

# Chapter 53

## Labour Relations

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### Labour Relations

23. (1) Everyone has the right to fair labour practices.

(2) Every worker has the right —

- (a) to form and join a trade union;
- (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; and
- (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; and
- (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).<sup>1</sup>

## 53.1 Introduction

FC s 23 regulates labour relations rights,<sup>2</sup> both of an individual and a collective nature. While the labour relations rights in the Final Constitution largely track those in the Interim Constitution,<sup>3</sup> there have, however, been some significant changes: The right to strike is unencumbered,<sup>4</sup> employers' recourse to the lock-out has been excluded; giving effect to the international practice that the right to strike and lockout are not equivalent; labour-related association rights reflect more closely the protections afforded by the ILO;<sup>5</sup> the right to collective

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bargaining has been reformulated, arguably to give effect to the statutory collective bargaining regime;<sup>6</sup> and union security arrangements contained in national legislation are permitted.<sup>7</sup>

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- 1 The Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution').
  - 2 The impact of the Final Constitution on labour relations is not confined to the labour relations rights. Other rights are also of relevance, among them the right to equality (FC s 9), privacy (FC s 14), assembly, demonstration, picket and petition (FC s 17), human dignity (FC s 10), freedom of expression (FC s 16), and freedom of association (FC s 18).
  - 3 See Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution'). Section 27 read: '(1) Every person shall have the right to fair labour practices. (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations. (3) Workers and employers shall have the right to organise and bargain collectively. (4) Workers shall have the right to strike for the purposes of collective bargaining. (5) Employers' recourse to the lockout shall not be impaired, subject to section 33 (1).'
  - 4 FC s 23(2)(c). Under the Interim Constitution, the right to strike was granted for the purposes of collective bargaining. This purpose has now been omitted.
  - 5 (1948) ILO No 87, 68 UNTS 17 (Ratified by South Africa on 19 February 1996). Articles 2, 3 and 5 of the Convention read as follows: Art 2 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.' Art 3 '1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.' Art 5 'Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.' See IC ss 23(2)(a) and (b); (3)(a) and (b); (4)(a), (b) and (c).

The Constitutional Court has, under the Final Constitution, had little occasion to develop jurisprudence on the labour rights — no doubt because of the extensive regulation of labour relations. Nevertheless, the case law that has emerged has been critical to a deeper understanding, in particular, of fair labour practices and the right to strike. The Constitutional Court has also had to consider its approach to the interpretation of labour legislation, where that legislation, such as the Labour Relations Act (LRA),<sup>8</sup> seeks to give effect to and to regulate FC s 23 rights. Finally, the Court has been obliged to determine the constitutional jurisdiction of other superior courts in relation to labour matters arising under FC s 23. Jurisprudence has also been developed by the High Court with respect to constitutional labour rights, but sometimes with a less than satisfactory result. For instance, the High Court has advanced contrasting interpretations of the constitutional right to engage in collective bargaining (see below).<sup>9</sup>

## (a) Application

### (i) Burdens

The Bill of Rights in the Final Constitution applies to all law and binds the legislature, executive, organs of state and the judiciary. FC s 8(2) provides that the Bill of Rights may be applied horizontally to private persons (including juristic persons), provided it is applicable, thus bringing the conduct of private citizens under constitutional scrutiny.<sup>10</sup> Labour rights are eminently suited to horizontal application. The reference in FC s 23 to workers and employers and their organizations indicates that the rights have primarily to do with the relationship between private citizens.<sup>11</sup> Labour practices, trade unions and employer organizations, organizational activities, collective bargaining, strikes, and union security

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arrangements — the subject matter of the FC s 23 rights — all relate to the mediation of private relationships on an individual or a collective basis. As we have seen above, however, little jurisprudence on disputes between employers and workers under the labour rights has emerged because labour legislation regulates, to

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6 FC s 23(5). The Interim Constitution granted the right to collective bargaining; the Final Constitution grants the right 'to engage' in collective bargaining. § 53.5 infra.

7 FC s 23(6).

8 Act 66 of 1995.

9 See *South African National Defence Union v Minister of Defence & Others* 2003 (3) SA 239 (T), (2003) 24 ILJ 1495 (T); *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 ILJ 2101 (T).

10 See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31. See also *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

11 That labour rights are eminently capable of horizontal application is indicated by international law. Articles 1 and 2 of the International Labour Organization's Right to Organize and Collective Bargaining Convention envisages that the protection accorded to workers and employers and their organizations regarding their activities relates to private conduct as well as to legislative enactments. (1949) ILO No 98, 96 UNTS 257 (ratified by South Africa on 19 February 1996).

a large degree, the private conduct between employers and employees, and leaves little space for constitutional contestation.<sup>12</sup>

## (ii) Benefits

The labour relations rights in FC s 23 are granted mainly to workers and employers, and their organisations. The use of the term 'worker' rather than 'employee' is significant. The terms are not synonymous. 'Worker' has a meaning that is broader than the term 'employee'.<sup>13</sup>

The constitutional scope of the term 'worker' was examined in *South African National Defence Union v Minister of Defence & Another*.<sup>14</sup> The *SANDU I* Court found that the term 'worker' in FC s 23 was used in the context of employers and employment. It referred to those persons who worked for an employer, which would, primarily, be those who had entered into a contract of employment to provide services to such employer. By comparison, members of the permanent defence force did not enter into contracts of employment. They enrolled in the force.<sup>15</sup> However, the *SANDU I* Court found that in many respects the relationship between members of the permanent defence force and the military was 'akin' to an employment relationship, which argued in favour of these members being considered 'workers' for the purposes of the right.<sup>16</sup> They could, therefore, claim the protection of the right and were entitled to form and join trade unions.<sup>17</sup>

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The above finding of the *SANDU I* Court suggests that the notion of 'worker' contained in FC s 23 should be generously interpreted. It thus could encompass persons who have not entered into a formal contract of employment but are in work

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- 12 The Final Constitution instructs a court when applying a right to natural or juristic persons to develop the common law to the extent that legislation does not give effect to the right. See FC s 8(3). The fairly comprehensive scope of labour legislation means that there will probably be little need to develop the common law, and thus the impact of the labour rights on such law will be slight.
- 13 Section 213 of the 1995 LRA defines an employee as '(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration, and (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee"'.
- 14 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC), (1999) 20 ILJ 2265 (CC) ('*SANDU I*'). The Court was called on to decide whether prohibiting members of the defence force from forming and joining trade unions was an infringement of the right to freedom of association which applies to 'workers' (and employers).
- 15 *Ibid* at para 22.
- 16 *Ibid* at para 24. The Court stated that members of the armed forces rendered a service for which they received a range of benefits, the latter including salaries and allowances, leave, medical and transport benefits and certain mess expenses. Termination of membership, in general, occurred on the basis of misconduct or retirement and at the request of a member. However, misconduct was punishable in terms of the Military Disciplinary Code. The Code provided that members were criminally liable for specific forms of misconduct and might be sentenced to prison. In that respect, at least, the relationship was different from the employment relationship.
- 17 *Ibid* at paras 35 and 36.

relationships 'akin' to the employment relationship governed by a contract of employment. Thus, workers in atypical work relationships could fall within the scope of the term 'worker' and be protected by the right.<sup>18</sup> Currently, many workers are treated as independent contractors, when, in truth, they are workers as they are dependent on the person for whom they undertake the work. In other words, the formal nature of the employment relationship does not conform to its reality. Labour legislation is alert to the problem of workers being falsely portrayed as independent contractors. Both the LRA<sup>19</sup> and the BCEA<sup>20</sup> provide for a process whereby the real nature of the relationship between an employer and a person providing a service may be determined so as to ensure that persons who work in a subordinate and dependent manner are captured as employees in terms of the definition of employee under the Acts.<sup>21</sup> A generous interpretation of the term 'worker' in terms of FC s 23 will protect not only these workers, but other dependent and subordinate workers who might currently lack protection under the existing statutory framework.

Distinct from the other sub-sections in FC s 23, FC s 23(1) grants the right to fair labour practices to 'everyone'. The Constitutional Court has written that FC s 23(1) engages 'broadly speaking, the relationship between the worker and employer'<sup>22</sup> This embedding of FC s 23(1) within the employment relationship inevitably curtails the reach of the term 'everyone'. The Court's characterisation of the right's ambit as 'broadly speaking' encompassing the employment relationship is an indication, nevertheless, that the parameters of the right should remain flexible. As with the expanded notion of the term 'worker', this 'broad' reading

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could encompass persons on the margins of the employment relationship, including those in the employee-like relationships mentioned above.<sup>23</sup>

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18 For a detailed exposition of this argument, see H Cheadle 'Labour Relations' in *South African Constitutional Law: The Bill of Rights* 18-4-18-7.

19 Section 200A of the 1995 LRA provides that a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

'(a) The manner in which the person works is subject to the control or direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organization, the person is part of that organization; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom that person works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person.'

20 See 1997 BCEA s 83A. The wording of the provision is the same as that found in 1995 LRA s 200A.

21 See Cheadle (supra) at 18-6. Cheadle argues that the criteria for determining whether a person is a worker is the personal nature of the service and whether the person works for another in a manner which is subordinate and dependent. He relies on the following: *ILO Meeting of Experts* (2000) 4; The UK's Employment Rights Act 1996 (section 202(3)); P Davies & M Freedland *Employees* (2000) 267; and Article 1 of the *Draft Convention on Contract Labour* (1998) ILO Report V (2B).

22 *NEHAWU v UCT* (2003) 24 ILJ 95 (CC), 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC), ('NEHAWU') at para 40.

The Final Constitution recognises that 'everyone' may include not only natural persons, but juristic persons as well.<sup>24</sup> Employers are typically either natural or juristic persons depending on the nature of the organisation and the way in which they conduct their business.<sup>25</sup> In *NEHAWU*, the applicant's argument that 'everyone' in FC s 23(c) referred only to workers, and excluded employers, was based on the mistaken view that all employers were juristic persons and thus not embraced by the term 'everyone'. The *NEHAWU* Court, finding that the right applied equally to workers and to employers, correctly held that not all employers were juristic persons and that the right should apply to all employers, juristic or otherwise.<sup>26</sup>

## **(b) Jurisdiction**

The Final Constitution makes the Constitutional Court the highest court in all constitutional matters. It may decide only constitutional matters and issues connected with constitutional matters, and makes the final decision whether a matter is a constitutional matter or an issue connected with a constitutional matter.<sup>27</sup> These general terms do not, however, speak to the somewhat unique character of constitutional jurisdiction in matters relating to labour relations.

The jurisdiction of the Constitutional Court in relation to labour matters was an issue under the Interim Constitution. Under the latter, provision was made to limit judicial intervention on the grounds that decision-making

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on such matters was best managed by specialist courts and tribunals provided for under the statutory labour regime. IC s 33(5)(a) read: '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 in full force and effect until repealed or amended by the

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23 The right might protect job applicants from discrimination. While such persons are now protected by the Employment Equity Act 75 of 1998 (section 6(1) read with section 9) and have recourse under the constitutional right to equality, nevertheless it could be argued that they may also rely on the right to fair labour practices.

24 FC s 8(4).

25 According to company law, a juristic person comprises incorporated companies, close corporations and foundations, while it excludes partnerships and trusts. See H Cilliers & M Benade *Corporate Law* (2000) 6.

26 *NEHAWU* (supra) at 113.

27 FC s 167 (3)(a), (b), (c). The Constitutional Court has interpreted the notion of constitutional matters broadly. See *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC) at para 13 ('If regard is had to the provisions of s 172(1)(a) and s 167(4)(a) of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), is the question whether in the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.')

legislature.' The effect of this provision was to immunize labour law provisions falling within the specified categories from constitutional attack.

This provision reappeared in the draft Final Constitution in a slightly modified form. It stated that the provisions of the LRA 1995 were to remain valid until they were amended or repealed.<sup>28</sup> The Constitutional Court refused to certify this provision. In the *First Certification Judgment*, the Court found it to be in conflict with Constitutional Principles (CPs) II, IV and VII. These principles, read together, made it plain that all statutory provisions had to be subject to the supremacy of the Final Constitution unless they were made part of the Final Constitution itself.<sup>29</sup> If that latter route were followed, the provisions had to comply with the special procedures as contemplated in CP XV. If not made part of the Final Constitution, then the provisions were subject to constitutional review as contemplated by principles II and VII. The Court found that it could not have been the intention of the drafters of the CPs to shield ordinary statutes from constitutional review and held that the section was not, as a result, in compliance with the CPs.

The LRA provides that the Act has been enacted to give effect to the Constitution.<sup>30</sup> One way of reading this provision is that the LRA is an extension of the Final Constitution and is thus fully constitutive of the constitutional labour rights. On such a reading, the provisions in the LRA would be placed beyond constitutional scrutiny. The Constitutional Court has rejected the view that the LRA is immunized from constitutional scrutiny simply because it purports to give effect to the constitutional labour rights. In *National Education Health and Allied Workers Union v University of Cape Town & Others*, the Court held that our constitutional democracy 'envisages the development of a coherent system of law that is shaped by the Constitution'<sup>31</sup> and to which all law is subordinate. Where an Act is passed to give effect to a constitutional right it will be subject to constitutional scrutiny to ensure that its provisions are not inconsistent with the Final Constitution.<sup>32</sup> It follows that where the constitutional validity of an Act is challenged, a court must first determine the extent of the constitutional right in order to assess whether the legislation gives effect to it. According to the NEHAWU Court, where the legislation falls within 'constitutional limits', a court, interpreting the legislation, must then give full

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effect to the legislative purpose.<sup>33</sup> The 'proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter.'<sup>34</sup> If the effect of this requirement, the *NEHAWU* Court held, was that it would have jurisdiction in all labour matters, then that would be an

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28 Draft FC s 241.

29 *First Certification Judgment* (supra) at 149.

30 Section 1(a) of the 1995 LRA.

31 *NEHAWU* (supra) at 106.

32 *Ibid* at para 14.

33 *NEHAWU* (supra) at para 14. The court has stated that the infringement of a fundamental right by a legislative provision is a constitutional matter.



inevitable 'consequence of our constitutional democracy.'<sup>35</sup> The Court thus unequivocally asserted its right to adjudicate constitutional issues in all labour matters. The Court in *National Union of Metalworkers of South Africa & Others v Bader Bop (Pty) Ltd* confirmed this assertion of jurisdiction by stating that it would be shirking its constitutional duty if it were to hold that it would never hear appeals from the Labour Appeal Court (LAC).<sup>36</sup>

While the Court has emphasised its judicial responsibility to scrutinize labour matters, it has indicated that it will not always intervene in such matters.<sup>37</sup> The overall test is whether the interests of justice require the Court to hear the dispute. The Court has adumbrated the following factors as relevant to determining whether it will assert jurisdiction:

- the prospects of success on appeal;<sup>38</sup>
- the nature of the constitutional issue and its importance;<sup>39</sup>
- whether the dispute should be left to the specialist courts to resolve.<sup>40</sup>

In addition to determining its own jurisdiction under FC s 23, the Constitutional Court has also considered the constitutional jurisdiction of the Supreme

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34 Ibid at para 14.

35 Ibid at para 16.

36 *NUMSA v Bader Bop* (2003) 24 ILJ 305 (CC), 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), ('*NUMSA v Bader Bop*') at para 20.

37 *NEHAWU* (supra) at para 18.

38 *NEHAWU* (supra) at paras 25 & 26, *NUMSA v Bader Bop* (supra) at para 17. See also *Xinwa & Others v Volkswagen of SA (Pty) Ltd* 2003 (4) SA 390 (CC), 2003 (6) BCLR 575 (CC), (2003) 24 ILJ 1077 (CC) at para 16 (in which the Constitutional Court declined to consider the matter of an allegedly procedurally unfair dismissal because there were no prospects that the Court would find that the dismissal had been procedurally fair.)

39 *NEHAWU* was the first occasion on which the Court was required to consider and define its approach to the interpretation of a provision which was part of legislation designed to give effect to a constitutional right. Moreover, the application would affect some 267 workers who had lost their employment. In *NUMSA v Bader Bop*, which concerned the alleged limitation of the constitutional right to strike, the Court stated that the restriction would affect all trade unions and their members and thus the issue deserved to be heard on appeal from the LAC.

40 In *NEHAWU*, the Court acknowledged the need for labour disputes to be resolved expeditiously in the interests of the economy and labour peace and that the legislature had provided specialist courts for that purpose. Because of this, said the court, it would be slow to hear appeals from the LAC unless they raised important issues of principle, which was the case in the matter under consideration. *NEHAWU* (supra) at paras 30, 31, & 32. In *NUMSA v Bader Bop* the Court reiterated this position by stating that the establishment of specialist courts to resolve matters expeditiously in the field of labour relations meant that the Court would be slow to intervene in such disputes. However, where it had been alleged that there had been an infringement of a constitutional right that would be a factor in favour of granting leave to appeal. *NUMSA v Bader Bop* (supra) at para 20.



Court of Appeal (SCA) over labour matters on appeal from the Labour Appeal Court (LAC). A central issue is whether there is an appeal to the SCA from the LAC on constitutional issues in labour matters, or whether the Constitutional Court should be the only court of appeal. The *NEHAWU* Court held that although the LRA constituted the LAC as a final court of appeal in matters from the Labour Court,<sup>41</sup> it was not the equivalent of the SCA in respect of appeals on constitutional matters.<sup>42</sup> The SCA could decide appeals in any matter and was the highest court of appeal except in constitutional matters.<sup>43</sup> While the legislature's intention that labour disputes should be resolved expeditiously and cheaply could be undermined by this finding, the *NEHAWU* Court showed that it was alive to the potential negative effect of its ruling by holding that there was nothing to prevent a litigant from appealing directly to the Constitutional Court.<sup>44</sup>

The issue of the jurisdiction of the superior courts and the specialist labour courts over constitutional issues is likely to be short-lived. The Superior Courts Bill proposes that the specialist labour courts be abolished and that a specialist labour panel be established within the main court system.<sup>45</sup>

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41 LRA s 167(2) and (3).

42 *NEHAWU* (supra) at para 23.

43 *Ibid* at para 21. See also FC s 168(3).

44 *NEHAWU* (supra) at para 22. See FC s 167(6)(b) read together with s 16(2) of the Constitutional Court Complementary Act 13 of 1995 and rule 18 of the Rules of the Constitutional Court. The Court has also had occasion to consider the constitutional jurisdiction of the High Court (HC) in labour matters, but under different constitutional rights. See *Fredericks & Others v MEC for Education & Training, Eastern Cape & Others* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC), (2002) 23 ILJ 81 (CC) ('*Fredericks*'). In *Fredericks*, the Court had to consider the HC's jurisdiction where it was alleged that the application of a collective agreement concluded in terms of s 24 of the 1995 LRA infringed the rights to just administrative action and equality in a context where the state was the employer. The LRA provides that disputes over such agreements are to be arbitrated under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) established under the LRA and are not justiciable in the Labour Court (LC). Arbitration awards are binding and there is no appeal to the LC against a ruling of the arbitrator, only a right of review. The Constitutional Court found firstly, that in terms of FC s 169, the HC's constitutional jurisdiction could only be ousted where the legislature had accorded that jurisdiction to a court of similar status. Section 24 of the LRA, the Court found, did not oust the HC's jurisdiction because the CCMA was not a court of similar status to the HC. Secondly, the court then considered whether elsewhere the Act had assigned jurisdiction over the matter to the LC, which the LRA had cast as a court of similar status to the HC [section 151(2)], as that would have had the effect of ousting the jurisdiction of the HC. It found that the Act conferred exclusive jurisdiction on the LC to hear all matters [section 157(1)] — which would include constitutional matters — where it was specifically assigned such jurisdiction in the Act. It found that there was no express provision of the Act affording the LC jurisdiction to determine disputes arising from an alleged infringement of constitutional rights by the state acting in its capacity as employer, other than s 157 (2). However, that provision accorded concurrent jurisdiction to the LC and the HC. Thus the provision did not oust the jurisdiction of the HC. Accordingly, the Court found, contrary to the decision of the court a quo, that the HC did have jurisdiction over the matter. This finding of the CC should not be read as granting the HC jurisdiction over disputes of a constitutional nature arising from collective agreements as a matter of course. The Act envisages that disputes over the interpretation and application of agreements should be settled only by binding arbitration. This is not the place to discuss the full ramifications of the decision. Suffice it to say that on policy grounds alone there are good reasons for the HC to demonstrate caution before intervening in such disputes.

45 B52-2003, s 3(1)(a)(ii) & s 12.

There is a strong case to be made for judicial deference in labour matters. In essence, the relationship between employers and workers is one of power mediated through a variety of mechanisms. Because of their complex and polycentric nature and the trade off in power which lies at their heart, labour disputes are ill-suited to constitutional adjudication.<sup>46</sup> Labour law needs to be responsive to the changing demands of the employment relationship and the context in which it operates. It needs to be negotiated and renegotiated to balance multiple competing interests within an ever-changing economic environment.<sup>47</sup>

Nevertheless, cognisance also needs to be taken of the imperatives of our new constitutional dispensation. Those negotiating the Final Constitution saw fit to include labour relations among its fundamental rights and freedoms. The Court's approach to date is one that strikes the correct balance between the poles of interventionism and abstentionism. It has demonstrated its awareness that principles governing the wage-work bargain should be left more fluid and amenable to change and thus has indicated that it will exercise its constitutional jurisdiction in a supervisory manner, intervening in labour matters only when necessary to do so to fulfil its role as the guarantor of constitutional labour rights.<sup>48</sup>

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46 JM Weiler sums up the case for deference as follows:

'I believe our current system of collective bargaining regulating the relations between workers and employers is too complicated and sophisticated a field to be put under the scrutiny of a judge in a contest between two litigants arguing vague notions such as 'reasonable' and 'justifiable' in a free and democratic society. I have no confidence that our adversary court system is capable of arriving at a proper balance between the competing political, democratic and economic interests that are the stuff of labour legislation. When we consider that collective bargaining law is polycentric in nature, adjustments to the delicate industrial relations balance in one part of the system might have unanticipated and unfortunate effects in another. The lessons of the evolution of our labour law regime in the past 50 years displays very clearly that the legislatures are far better equipped than the courts to strike the appropriate balance between the interests of the individual employee, the union, the employer and the public.'

JM Weiler 'The Regulation of Strikes and Picketing under the Charter' in Weiler & Elliot (eds) *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (YEAR) 226, quoted in M Brassey *Employment Law* note 1 at C3:16 Juta 1998.

47 For a sceptical view as to whether constitutional adjudication has any positive value at all in resolving labour conflict, see H Arthurs *The Constitutionalisation of Labour Rights* (2005). Arthur argues that constitutional adjudication purports to lay down the law 'for all time' — which is the antithesis of what is required to resolve labour conflict. Constitutional adjudication, he argues, is ill-suited to contend with the dynamic context of labour law. Thus he states:

'Trade offs in labour law involve power, not just logic or ethics. They are dynamic and not static. That is why labour laws have to be negotiated in the first place, then constantly renegotiated over time as power shifts, as the economy changes, as technology and demography changes, as social attitudes change, as we learn from experience, as new insights emerge.'

Ibid at 12. Arthurs's position that constitutional adjudication is unlikely to play any positive role is questionable. In the two cases in which the Constitutional Court has intervened to determine the nature of labour rights, *NEHAWU* and *NUMSA*, it has overturned decisions of the LAC which were inimical to the interests of workers, and which were at odds with the intention of the legislature. However, his view that constitutional adjudication is unlikely to play a systemic transformative role is probably true — the transformation of the underlying structures relevant to labour relations is a matter of political will and inclination.

48 *NUMSA v Bader Bop* (supra) at paras 13 and 20.

## 53.2 Right to fair labour practices

While other constitutions contain rights to freedom of association, collective bargaining and the right to strike, it is rare to find a constitution that includes the broad and vague right to fair labour practices. The motivation for its inclusion was a demand by public sector employees for access to the unfair labour practice law on dismissals developed under the 1956 LRA. They viewed such access as an essential means of protecting their jobs during the transition to a new political dispensation.<sup>49</sup> In the constitutional negotiations this concern led to the embedding of this right in Constitutional Principle XXVII and its subsequent appearance as a fundamental right in both the Interim and Final Constitutions.

International jurisprudence is of limited use in providing a definitive interpretation of the right. International law extensively regulates labour rights, in particular through the conventions and recommendations of the International Labour Organisation (ILO). Nowhere, however, do these conventions and recommendations provide specifically for a right to fair labour practices, although many of the practices so protected could be co-incident with the right.<sup>50</sup> A similar point can be made in relation to the rights protected under the European Social Charter.<sup>51</sup> Foreign law is similarly unenlightening. British law, for instance, is unsatisfactory as a guide because its unfair labour practice regime is narrowly linked to its law on unfair dismissal. In the US, the unfair labour practice jurisprudence is concerned primarily with prohibitions relating to collective labour practices.<sup>52</sup> In India, the

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49 See H Cheadle 'Labour Relations' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (1st Edition, 2002) 18-9. Cheadle has stated that the provision was inserted in the Interim Constitution as part of the package of provisions to secure the support of the public service for the new constitutional dispensation and in particular for the restructuring and the transformation of the public service into a single public service that would be broadly representative of the South African community.

50 They embrace such varied concerns as health, safety and social security; working time; minimum wages, equal pay, and other remuneration matters; job security; minimum age and forced labour protections; and discrimination.

51 The European Social Charter of 1961 guarantees, among other things, the right to just conditions of work (art 2); and the right to a fair remuneration (art 4). The Charter's right to just conditions of work includes reasonable daily and working hours and a progressive reduction in the working week; public holidays with pay; two weeks' annual holiday with pay; weekly rest periods and additional holidays or reduced working hours for those in dangerous or unhealthy occupations. While just working conditions conveys a similar meaning to 'fair labour practices' ('just' includes the notion of fairness, and 'conditions' are the product of practices), the rather arbitrary inclusion of some working conditions and the exclusion of others from the category limits its usefulness as an interpretive guide.

52 In summary, s 8 of the National Labour Relations Act (NLRA) provides that it is an unfair labour practice by an employer to:

1. interfere with employees' collective bargaining rights;
2. interfere with the formation or administration of any labour organization;
3. discriminate in hiring or regarding any term or conditions of employment as a way of influencing membership of a labour organization;
4. dismiss or discriminate against an employee for exercising rights under the unfair labour practice provision;
5. refuse to bargain collectively with representatives of his employees.

unfair labour practice jurisprudence is limited to victimization for trade union activities and unfair dismissal.<sup>53</sup> A more fruitful avenue for determining the content of the right lies in our own labour law. Specific regard should be had to the unfair labour practice jurisprudence grounded in the 1956 LRA,<sup>54</sup> the 1995 LRA<sup>55</sup> and the 1997 Basic Conditions of Employment Act.<sup>56</sup>

### **(a) Construction of 'everyone'**

As noted above, the Constitutional Court has found that FC s 23(1) refers 'broadly speaking' to the employment relationship. Thus the right may be interpreted as embracing persons on the margins of that relationship. The term 'everyone' should be interpreted within this context.

### **(b) Labour practices**

Labour relations are essentially concerned with the employer-worker relationship, and labour practices with matters of mutual interest which arise from that relationship. A wide range of matters may potentially fall within the ambit of labour practices covered by FC s 23(1). As we have seen above, international law provides little real guidance as to the ambit of FC s23(1), whereas domestic law constitutes a much richer source for determining the meaning of the right. Under the 1956 LRA, the Industrial Court fashioned an equity based jurisprudence arising from the unfair labour practice provision introduced into the law in 1979.<sup>57</sup> The very broad and

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Labour organizations commit an unfair labour practice by

1. coercing or restraining employees in the exercise of collective bargaining rights;
2. causing an employer to discriminate against non-union members;
3. refusing to bargain collectively with an employer;
4. engaging in or pressurizing workers to engage in certain strikes and boycotts;
5. charging discriminatory agency fees;
6. requiring employers to pay for services not performed;
7. picketing where the object is to force an employer to bargain with a labour organization as the representative of his employees.

R Blanpain (ed) *International Encyclopaedia of Industrial Relations and Labour Law: Vol 5, USA* (Supplement 86, February 1988) 124-7.

53 Blanpain (supra) *Vol 6, India* (Supplement 101, June 1989) at 103.

54 Act 28 of 1956.

55 Act 66 of 1995.

56 Act 75 of 1997.

57 See Commission of Enquiry into Labour Legislation (1979) Part 5 4.127.17 (The Wiehann Commission). The Commission was responsible for the recommendations that led to this change in the LRA.

vague nature of the initial provision,<sup>58</sup> which stated that an unfair labour practice was 'any labour practice which in the opinion of the industrial court is an unfair labour practice', gave the court wide scope in developing its jurisprudence. Later refinements to the provision gave it greater content, and over time the court developed a body of rights-based rules in terms of which

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fairness was seen broadly as encompassing a balancing of employees' and employers' interests in order to achieve the Act's object of labour peace.<sup>59</sup> The Industrial Court's labour practices were, in terms of this new provision, found to cover both individual and collective practices, but were confined to the employer-employee relationship.<sup>60</sup> The generous equity-based jurisprudence developed by the court led to the following findings of unfairness: (a) unfair dismissals because of the absence of a fair reason and procedure;<sup>61</sup> (b) the dismissal of strikers for participating in a lawful strike;<sup>62</sup> (c) failure to reemploy in terms of an agreement; (d) failure to renew a contract where there was a reasonable expectation of such renewal;<sup>63</sup> (e) selective dismissal;<sup>64</sup> (f) racial discrimination;<sup>65</sup> and (g) victimisation for trade union activities.<sup>66</sup> Among the unfair labour practices struck down by the court as conducive to labour unrest and the undermining of the employment relationship were: (a) a refusal to bargain;<sup>67</sup> (b) bad faith bargaining;<sup>68</sup> (c) a failure to accord rights relevant to the bargaining process;<sup>69</sup> (d) the use of unfair bargaining

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58 Industrial Conciliation Amendment Act 94 of 1979.

59 See *Consolidated Frame Cotton Corporation v The President, Industrial Court* (1986) 7 ILJ 489 (A).

60 In this body of jurisprudence, 'practice' was interpreted as including both habitual action and a single act or omission. See *Trident Steel (Pty) Ltd v John NO* (1987) 8 ILJ 27 (W); *SAAWU v Border Boxes (Pty) Ltd* (1987) 8 ILJ 467 (C). Labour included both mental and physical labour. See *Bleazard v Argus Printing & Publishing Co Ltd* (1983) 4 ILJ 60, 70 (IC).

61 See A Rycroft & B Jordaan *A Guide to South African Labour Law* (1992) Chapter 4.

62 See *NUM v Marievale Consolidated Mines Ltd* (1986) 7 ILJ 123 (IC).

63 See *Mtshamba v Boland Houtnywerhede* (1986) 7 ILJ 563 (IC).

64 See *Fihla v Pest Control Tvl (Pty) Ltd* (1984) 5 ILJ 165 (IC).

65 See *MWU v East Rand Gold & Uranium Co Ltd* (1990) 11 ILJ 1070 (IC).

66 See *Mbatha v Vleissentraal Co-operative Ltd* (1985) 6 ILJ 333 (IC).

67 See *FAWU v Spekenham Supreme (2)*(1988) 9 ILJ 628 (IC); *SACWU v Sasol Industries (Pty) Ltd* (1989) 10 ILJ 1031 (IC); *Buthlezi v Labour for Africa* (1991) 12 ILJ 588 (IC); *NUM v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A); (1991) 12 ILJ 1221 (A); *Macsteel (Pty) Ltd v NUMSA*(1990) 11 ILJ 995 (LAC).

68 See *Mawu v Natal Die Casting Co (Pty) Ltd* (1986) 7 ILJ 520 (IC).

tactics;<sup>70</sup> and (e) the resort to industrial action before deadlock had been reached in negotiations.<sup>71</sup> The court, however, declined to consider matters relating to bargaining topics, bargaining levels, and the wage-work bargain, on the grounds that this would have constituted an unwarranted descent into the collective bargaining arena.<sup>72</sup>

Drawing on the jurisprudence of the Industrial Court on unfair labour practices, the 1995 LRA has codified the following as unfair labour practices: unfair conduct in relation to workers' security (unfair dismissal, including dismissal during a transfer of a business, unfair suspension and the failure to re-employ or reinstate), unfair treatment in relation to work opportunities (promotion, demotion, probation, training and benefits<sup>73</sup>— more recently victimisation arising from whistle blowing has been added to the list<sup>74</sup>), and unfair disciplinary action.<sup>75</sup> However, in contrast to the 1956 Act, the 1995 LRA — while promoting collective bargaining through the creation of the mechanisms for such bargaining, the protection of trade unions and employer organisations, the recognition of organisational rights, the establishment of industrial councils and the right to strike — has not codified a right to collective bargaining and the correlative duty to bargain. Nor does it regulate issues relating to such bargaining, such as bargaining in good faith. The stance of the Act is that these

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69 See *NUM v Free State Consolidated Gold Mines (Operations) Ltd* (1988) 9 ILJ 804 (IC).

70 See *East Rand Gold & Uranium Co Ltd v NUM* (1989) 10 ILJ 683 (LAC).

71 See *NUM v Henry Gould (Pty) Ltd* (1988) 9 ILJ 1149 1154-1155 (IC); *Olivier v AECL Plofstowwe & Chemikaliee, Bethal* (1988) 9 ILJ 1052, 1058-1059 (IC).

72 The resolution of such disputes, considered to be 'interest' disputes, is left to collective (and individual) bargaining between the parties. While interest disputes generally encompass disputes over new terms and conditions of work, rights disputes, on the other hand, refer to disputes arising from the application or interpretation of an existing law, collective agreement or contract and are usually settled through adjudication. Not all disputes are easily classifiable, and some may migrate from one category to another. Thus under the LRA disputes over dismissals for operational requirements were initially regarded as disputes of right adjudicable in the Labour Court, but now certain of these disputes may be resolved through strike action. Unions may elect to follow one course or the other (sections 189 & 189A of the 1995 LRA). See, more generally, *Conciliation and Arbitration Procedures in Labour Disputes* ILO 5 and *Wiehahn Commission Report: Part 1* (1979) 89-90 para 4.5.

73 See the recent concept paper by Halton Cheadle, in which he proposes a re-evaluation of the unfair labour practice concept and its boundaries. In particular he suggests that the unfair labour practice over benefits would be better conceived as a wage-work issue subject to collective bargaining, rather than adjudication. H Cheadle 'Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA' (2006) ILJ 27.

74 In terms of an amendment (s 42 of Labour Relations Amendment Act 12 of 2002) to the LRA, victimization due to whistle-blowing was included as an unfair labour practice (s186(2)(c)). This followed the promulgation of the Protected Disclosures Act 26 of 2000, which protects an employee from victimization for having made a protected disclosure defined in that Act.

75 Unfair discrimination originally fell under the provision on unfair labour practices in the LRA (Schedule 7 item 2(1)(a)), but is now regulated in terms of the Employment Equity Act. It was always the intention that unfair labour practices would be incorporated into a separate Act. This has occurred in respect of unfair discrimination, while the remaining unfair labour practices have now been included in the main body of the 1995 LRA under s 186(2).

and other bargaining issues, such as bargaining agents and levels, are to be decided by power play. In accordance with the previous regime, the 1995 LRA also leaves to power play the resolution of disputes over the substantive economic demands of the parties. This schema does not ignore the situation of more vulnerable non-unionised workers: they are protected by minimum standards legislation in the form of the Basic Conditions of Employment Act (BCEA), which sets a floor of rights in respect of a wide range of terms and conditions of work, as well as by legislation on health and safety.<sup>76</sup>

The Constitutional Court has held that the right to fair labour practices is incapable of precise definition. Taking into account the development of the law outlined above, the scope of the notion of 'labour practices' may embrace at least the practices set out below. Firstly, the right should provide protection against unfair practices relating to work security and employment opportunities as codified in the 1995 LRA, both of a substantive and procedural nature.<sup>77</sup> Secondly, it

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should underwrite the minimum standards accorded in the BCEA since one of the BCEA's objects is to give effect to and regulate the right to fair labour practices in FC s 23(1).<sup>78</sup> Whether the right should encompass rights regulated in other labour legislation, such as health and safety rights at work, is debatable, but there is no apparent reason why such protection should be excluded. Thirdly, the right should not engage the wage-work bargain. In other words, it should be concerned with the adjudication of disputes of right as opposed to disputes of interest. A further issue for consideration is whether FC s 23(1) is an overarching right encompassing the other labour relations rights, or whether it should be viewed as distinct from them. The structure of FC s 23 suggests that the subsections are distinct, each traversing a different terrain, and militates against an interpretation which sees the right to fair labour practices as a catchall right, capable of embracing any person and any matter. This was not, however, the approach of the High Court in *South African National Defence Union & another v Minister of Defence & Others*. Without considering the scope of the right to fair labour practices, the court assumed that it included collective bargaining rights, finding that restrictions in the military regulations<sup>79</sup> on matters over which bargaining could take place infringed both this

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76 For instance, the Occupational, Health and Safety Act 83 of 1993.

77 See *SANDU & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 ILJ 2101 (T) ('*SANDU III*'). The High Court found that regulation 73 of the Military Regulations, which provides for the Minister of Defence to appoint 'independent persons' to the Military Arbitration Board, infringed the right to fair labour practices because it amounted to an unfair procedure. The function of the board to determine disputes (referred to it in terms of regulation 71(5)(b)) would include disputes involving the Minister in his capacity as employer. The independence and impartiality of the arbitration board would be compromised as it was appointed by the Minister who would also appear before it in his representative capacity as employer. The Court referred to *De Lange v Smuts NO & others* 1998 (3) SA 785 (CC); *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, Series A No 13 at para 95; *Campbell and Fell v United Kingdom* 28 June 1984 Series A no 80 para 78; *Sramek v Austria* 22 October 1984 Series A no 84. The Court found that regulation 41 of the military regulations which conferred on the Minister the power to appoint the registrar also violated the right to fair labour practices on the basis that the minister as employer had an interest in the decisions to be taken by the registrar. On an objective test, a reasonable person might believe that the registrar might favour the minister to whom he is beholden for his appointment and continuing office — at 2128E-G.

78 Section 2(a) of the BCEA.



right and the right to engage in collective bargaining.<sup>80</sup> Sachs J in his minority judgment in

*SANDU I*,<sup>81</sup> also viewed FC s 23(1) as an overarching right, capable of encompassing trade union rights. He proposed such a reading despite the fact that these rights are separately provided for under FC 23. He found that if the military personnel's claim to trade union rights had been considered under the right to fair labour practices — which is granted to 'everyone' — rather than under the provision on trade union rights, it would not have been necessary to have given an expansive meaning to the term 'worker' in order to embrace those personnel, a position adopted by the majority of the court.<sup>82</sup>

A related issue is whether matters specifically excluded from the ambit of one of the other rights as not worthy of constitutional protection could nevertheless be protected by FC s 23(1). There is good reason for holding that interests which have been rejected as not worthy of constitutional protection should not find a home under the section.<sup>83</sup>

### (c) Fairness

The Constitutional Court in *NEHAWU* stated that the focus of FC s 23(1) is, broadly speaking, the relationship between workers and employers and the continuation of that relationship on terms that are fair to both.<sup>84</sup> It held that the right was incapable of precise definition and that problems relating to its definition were compounded by the tension between the interests of workers and employers. Thus it was neither

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79 Amendment to the General Regulations for the South African National Defence Force and Reserve, Government Gazette Vol 411 No. 20425 1 September 1999 Regulation Gazette No 6620 No. R1043. Regulation 3(c) provides for collective bargaining on 'certain' issues of mutual interest, while regulation 36 provides that military trade unions 'may engage in collective bargaining, and may negotiate on behalf of their members, only in respect of: 'a) the pay, salaries and allowances of members, including the pay structure; b) general service benefits; c) general conditions of service; (d) labour practices; and e) procedures for engaging in union activities within units and bases of the Defence Forces.' The court found that these provisions derogated from the right of a military trade union to negotiate over all matters of mutual interest between the employer and the military trade union and its members. See *SANDU III* (supra) at 2123. The provision, it found, infringed the right to fair labour practices and the right to engage in collective bargaining. The Court further found that the minister had failed to justify the restriction. It ordered that the word 'certain' be severed from regulation 3(c) and declared regulation 36 inconsistent with the Constitution and invalid to the extent that it purported to limit the right of military trade unions to engage in collective bargaining in respect of the matters in paras (a)-(e).

80 Similarly, the court, again without considering the nature of the right, found that the prohibition on a military trade union representative representing a member in grievance and disciplinary proceedings in terms of regulation 27 of the Military Regulations infringed the right. This particular claim should have been considered instead under the freedom of association rights, in particular the right to form and join a trade union and the right of a trade union to organize as it falls squarely within the scope of those rights. See *National Union of Metalworkers of South Africa v Bader Bop* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 ILJ 305, 324 (CC) ('*NUMSA v Bader Bop*') (Constitutional Court, considering a similar issue relating to trade union representation, did so in terms of the constitutional rights to form and join a trade union and to organize.)

81 *SANDU I* (supra) at para 48.

82 The High Court in *SANDU III* also located a remedy for the prohibition on a military trade union representing its members at disciplinary or grievance proceedings within the right to fair labour practices rather than under the rights to organise or to determine its activities. See § 53.4 infra.

necessary nor desirable to define the right. What was fair would depend on the circumstances of each case and would 'essentially involve a value judgment'.<sup>85</sup> While the concept of fairness does indeed present difficulties of interpretation, nevertheless some understanding needs to be reached on the principles embodied by the right for scrutiny of law and the development of a consistent jurisprudence under the right.

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The interests of employers are underpinned by the right to the economic development of their enterprises through enhanced production and efficiency; informing the interests of workers are the principles of social justice and democracy in the workplace. These principles encompass workers' rights to job security and advancement, a democratic work environment, and the right to be treated with dignity and equality. The right indicates that both parties' interests should be considered<sup>86</sup>: however, it does not tell us where the balance between these interests should be struck in any situation. The Constitutional Court, while acknowledging the legitimacy of the commercial requirements of the employer, has pointed to the role the Final Constitution plays in protecting the vulnerable in society. 'Our Constitution,' the Court has said, 'protects the weak, the marginalized, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.'<sup>87</sup> Although this finding was made under FC s 9, it nevertheless has resonance for many of the rights in the Final Constitution, including labour rights.<sup>88</sup>

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In *NEHAWU*, the Constitutional Court was called on to establish whether the interpretation of s 197 of the LRA by the LAC infringed the right to fair labour practices.<sup>89</sup> The Court held that the purpose of s 197, which regulates the transfer of employees' contracts during the transfer of a business, was to protect workers' rights to job security as well as the interests of employers by facilitating the transfer of the business. The Court found this balance to be consistent with the right to fair

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83 An example would be the right to a lockout. The drafters of the Constitution deliberately chose not to protect the lockout. Given this, it would be anomalous to allow for its protection under the right to fair labour practices. A further example relates to the right to engage in collective bargaining. One interpretation of that right is that it does not impose a correlative duty to bargain, and that disputes over a refusal to bargain, including the related issues of bargaining in good faith, bargaining levels, bargaining topics and bargaining tactics, should be resolved through industrial action rather than adjudication and are excluded from the right to engage in collective bargaining. If this restrictive view of the structure of the right were to be adopted, it should not be possible to seek redress in relation to those matters under the right to fair labour practices instead.

84 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC), (2003) 24 ILJ 95, 110 (CC) ('*NEHAWU*') at para 40.

85 Ibid at para 33.

86 As seen above, the scope of the right includes the interests of both employers and workers.

87 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 34. The Hoffmann Court was asked to consider the refusal of SAA to appoint a flight attendant because of his HIV status. The High Court had upheld the employer's argument that employing an HIV positive person as an attendant would, among other things, have an adverse impact of the airline's commercial interests. The Constitution Court, while acknowledging the legitimacy of employers' commercial interests, nevertheless held that they could not always be paramount, particularly when weighed up against the discrimination and marginalisation of persons with HIV.

labour practices.<sup>90</sup> On this basis, the Court held that the judgment handed down by the majority of the LAC that the contract of employment could be transferred only if an agreement existed between the old and new owners of the business was not reflective of the legislative intent. Nor, however, was the minority's view that the provision was designed solely to protect the interests of workers.<sup>91</sup> In support of its approach, the *NEHAWU* Court had regard to the purpose of the LRA to promote economic development, social justice and labour peace;<sup>92</sup> the section of the Act protecting workers from unfair dismissal, of which s 197 forms part;<sup>93</sup> and international law on the transfer of a business, designed to protect workers from dismissal during such a transfer.<sup>94</sup>

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88 As far as international law is concerned, many ILO conventions offer a greater appreciation of where the balance between the interests of employers and workers should be struck so as to give effect to the notion of fairness. The conventions which are relevant to those practices which may fall under the rubric of fair labour practices have in common a focus of on the protection of workers. For instance, the ILO Convention on the Termination of Employment (1982) stipulates the parameters for a fair dismissal or retrenchment, which would be of relevance in testing the constitutionality of the provisions in the LRA on dismissal. An examination of the terms of the convention reveals that the provisions in the LRA closely reflect the requirements for a fair dismissal contained therein. Similarly, other conventions, such as the Holidays with Pay Convention of 1970, Protection of Wages Convention of 1949, and Hours of Work (Industry) of Convention 1919, would be relevant in testing the constitutionality of provisions in the BCEA. Although South Africa has not ratified the conventions mentioned here, they represent universally accepted norms and therefore constitute a touchstone against which the notion of fairness may be gauged. Again, this is not to suggest that the notion of fairness is exclusive of employers' legitimate commercial interests, but indicates that a central purpose of modern employment law is to guarantee the protection of workers. This has been succinctly put by Kahn Freund:

'The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation — legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether — must be seen in this context.'

P Davies & M Freedland *Kahn-Freund's Labour and the Law* (1983 3rd Edition) 18.

89 The University of Cape Town (UCT) had outsourced parts of its services to independent contractors, leading to the retrenchment of staff, some of whom were employed by the contractors but on less favourable conditions. *NEHAWU* sought an interdict and declaratory relief. The legal question was whether in terms of s 197 of the 1995 LRA, which deals with the transfer of a business as a going concern, the workers were automatically transferred without prior agreement. The LC held that s 197 did not provide for an automatic transfer of contracts in the case of the transfer of a business as a going concern. The court's view was that contracts of employment may only be transferred without the consent of the employees if the seller and purchaser of the business agree that the contracts will be transferred together with the business. *NEHAWU* appealed to the LAC. The majority of that court dismissed the appeal. The LAC held that in terms of s 197 a business is transferred as a going concern only if its assets, including the workforce, are transferred by prior agreement between the seller and the purchaser and the workers are part and parcel of the transaction. As there had been no prior agreement between UCT and the contractors that the workforce would be transferred as part of the transaction, there was no transfer of a business as per s 197(1)(a).

90 *NEHAWU* (supra) at paras 53 and 62. The focus of FC s 23, the Court said, was the relationship between the worker and the employer and the continuation of that relationship on terms that were fair to both: 'In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.' *Ibid* at para 121.

The Court's approach to the notion of fairness as articulated in the case has much in common with that of the Industrial Court under the 1956 Act. Under this Act, the definition of an unfair labour practice treated the interests of

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employees and employers as equivalent:<sup>95</sup> workers were to be protected in relation to work security and opportunities<sup>96</sup> and employers against conduct detrimental to their businesses.<sup>97</sup> Employees relied on the provision to build increased rights in the workplace.<sup>98</sup> In adjudicating the individual rights disputes before it, the industrial court developed over time a jurisprudential standard of fairness that required that both the employer's commercial interests and the legitimate workplace interests of employees be taken into account.

The *NEHAWU* Court, following the approach in the 1956 LRA, found that although S197 was concluded in similar language to the two international instruments mentioned above, its purpose was not solely to protect the interests of workers, as provided in the instruments. Rather, its purpose was to strike a balance between the interests of both workers and employees. Similarly, even though s 197 forms part of the section of the Act on dismissals, which is specifically designed to protect workers, the court chose not to emphasise this. That said, the Court's finding that FC

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91 *NEHAWU* (supra) at para 45.

92 *Ibid* at para 62.

93 *Ibid*.

94 *Ibid* at paras 47-51. The court referred to the Acquired Rights Directive 77/187 EEC (adopted by the European Commission 1977) and the British Transfer of Undertakings (Protection of Employment) Regulations 1981/1794 ('TUPE') (enacted pursuant to the directive.). See *Landsorganisasioen I Danmark for Tjenerforbundet I Danmark v Ny Molle Kro* [1987] ECR 5465 at para 12 (construed the directive as holding that its purpose was to protect workers against the loss of employment in the event of the transfer of a business. The title of the regulations promulgated by the United Kingdom pursuant to the British Directive, the court said, also demonstrated an intention to protect workers against unfair dismissals in the event of the sale of a business).

95 The notion of equivalence is given expression, for instance, in the holding of the court in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others* 1996 (4) SA 577 (A), 593G-H (Court wrote: 'The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs.)

96 The definition stated that an unfair labour practice was any practice which had the effect that '(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby'.

97 As far as employers were concerned, the definition of an unfair labour practice was a practice which had the effect that '(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby'.

98 It was employees, not surprisingly given the imbalance in power between them and employers, who relied overwhelmingly on the provision to build increased rights in the workplace.

s 23 required the LRA to be interpreted so as to include workers' interests was critical in rectifying the misconstrual of the section by the LAC.

One implication of the Court's approach to the notion of fairness is that the LRA's provisions on unfair labour practices and unfair dismissal become vulnerable to constitutional attack. This is because, in contrast to the 1956 LRA, protection against unfair labour practices and unfair dismissals in the 1995 LRA is granted to employees only and not vice versa. The 1995 LRA thus reflects the belief that a central object of labour law is to act as a corrective to the generally weaker position of workers.<sup>99</sup> The Labour Court, called on to consider the constitutionality of the provision on unfair labour practices has found, however, that the LRA need not specifically protect the right of employers against an unfair labour practice by employees. The Court held that the Act was not

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intended to 'regulate exhaustively the entire concept of a fair labour practice as contemplated in the Constitution'.<sup>100</sup>

A further question is where legislation fails to give effect to the constitutional right, whether the right may be relied upon directly for the fashioning of a remedy. The High Court in *NAPTOSA* warned against such an approach.<sup>101</sup> It argued that because of the complex social and policy issues which mark the employment relationship, the right to fair labour practices is not a right which may, without 'an intervening regulatory framework, be applied directly in the workplace.'<sup>102</sup> If this were to occur, the High Court reasoned, it would lead to the development of parallel streams of jurisprudence in the labour arena. This stance has much to recommend it, and if the LRA were found to be constitutionally wanting, the better approach would be for the Constitutional Court to direct that the LRA be amended to remedy this limitation.<sup>103</sup>

In general the development of the notion of fairness as it applies to the conduct between employers and workers will take place through the specialist labour courts and the arbitration mechanisms established under the LRA. The *NEHAWU* Court

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99 This is not to say that employers have no recourse to the law to defend their conduct in terms of the 1995 LRA: employers may escape a claim of unfairness by demonstrating that there was a substantively fair reason for their actions and that they acted in accordance with a fair procedure. However, they may not prosecute a claim for an unfair labour practice themselves. See 1995 LRA ss 185, 186 and 188, the Code of Good Practice: Dismissal (Schedule 8 of the 1995 LRA); and the Code of Good Practice on Dismissals based on Operational Requirements, promulgated by General Notice 1517, Government Gazette 20254 (16 July 1999).

100 *National Entitled Workers Union v CCMA* (2003) 24 ILJ 2335, 2340 (LC) ('*NEWU*'). The CCMA had refused to hear a case involving the resignation of an employee which the employer held to be an unfair labour practice. The CCMA commissioner's decision was referred to the Labour Court for review. The Labour Court upheld the decision, and found that the applicant had other common law remedies at his disposal.

101 (2001) 22 ILJ 889 (CC) at 895F-J, 895A-I, 896A-J, 897A-E.

102 *Ibid* at 896-7.

103 In *NEWU*, the Labour Court held differently, stating that should the employer wish to prohibit a labour practice which is unfair and which is not regulated by a conventional statute, it could approach a court relying on FC s 23 to grant the relief which it sought. *NEWU* (supra) at 2337.

acknowledged this in stating that the concept of a fair labour practice 'must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court', and, in the second instance, with regard to domestic and international law.<sup>104</sup> Nevertheless, the Constitutional Court retains a supervisory role in assessing whether legislation honours the rights guaranteed in FC s 23(1). Labour legislation, the *NEHAWU* Court held, will 'always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution.'<sup>105</sup> So too, it follows, will the interpretation of that legislation.

## 53.3 Freedom of association rights

### (a) Right to form and to join trade unions and employer organisations

The Final Constitution guarantees every worker the right to form and join a trade union and to participate in the activities and programmes of the union.<sup>106</sup> Similar

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provisions apply to employers as regards their own organizations.<sup>107</sup> It also guarantees that these organizations may determine their own administration, activities and programmes.<sup>108</sup> These freedom of association rights<sup>109</sup> constitute the bedrock of the related rights to organise, bargain collectively, and, in the case of workers, to strike.<sup>110</sup> The right to freedom of association has long been recognised

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104 *NEHAWU* (supra) at para 34.

105 *Ibid* at para 14. This stance was congruent with the Court's statement in *First Certification Judgment* that the development of labour law would 'in all probability' occur via the labour courts in terms of labour legislation. Nevertheless, the legislation would always be subject to constitutional oversight to ensure that the rights of workers and employers as entrenched in FC s 23 would be honoured.

106 FC s 23(1)(a) and (b).

107 FC s 23(3)(a) and (b).

108 FC s 23(3) and (4).

109 FC s 23(4).

110 In separating out the right to form and join representative organisations, the right of those organisations to carry out their activities and to organise, the right to bargain collectively and to strike, the Final Constitution avoids possible conflict over the interpretation of the scope of the right to freedom of association, as has occurred in other jurisdictions. In Canada, the right to freedom of association has been interpreted to exclude the associational activities of collective bargaining, strikes and picketing. The state is not constitutionally required to support or refrain from restricting these activities. *Reference re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161, [1987] 1 SCR 313 ('*Re PSERA*'); *PSAC v Canada* (1987) 38 DLR (4th) 249 (SCC); *Saskatchewan v RWDSU, Locals 544, 496, 635 and 955* (1987) 38 DLR (4th) 277 (SCC). In Germany the opposite is the case in terms of article 9, section 3 of the Basic Law. R Blanpain (ed) *International Encyclopaedia of Industrial Relations and Labour Law: Volume 5 Germany* (Supplement 162, September 1994) 122.

internationally both by the International Labour Organization<sup>111</sup> and other international instruments.<sup>112</sup> The individual<sup>113</sup> and collective right<sup>114</sup> to freedom of association protects workers and employers and their organisations from control and undue interference by the state (executive and legislature), and trade unions and their members from victimisation by employers.<sup>115</sup> The fundamental importance of the right to freedom of

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association in the context of labour relations is captured in this cogent and oft-quoted statement by Dickson CJ in *Reference re Public Service Employee Relations Act*:<sup>116</sup>

Freedom of association is most essential in those circumstances where the individual freedom is liable to be prejudiced by the action of some larger and more powerful entity, like the government or an employer. Association has always been the means by which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.

Freedom of association rights are also protected in the 1995 LRA. Individual rights to freedom of association are guaranteed by granting employees the right to

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111 Convention Concerning Freedom of Association and Protection of the Right to Organise (1948) ILO No 87, 68 UNTS 17 (ratified by South Africa on 19 February 1996) ('Convention 87') and International Labour Organization's Right to Organize and Collective Bargaining Convention (1949) ILO No 98, 96 UNTS 257 (ratified by South Africa on 19 February 1996) ('Convention 98').

112 The right to freedom of association as it pertains to labour relations is also found in the following international instruments: the International Covenant on Economic, Social and Cultural Rights (1966) (article 8); the International Covenant on Civil and Political Rights (1966)(article 22); the Covenant for the Protection of Human Rights and Fundamental Freedoms (1950)(article 11); the European Social Charter (1961)(part 1 article 5 and part 2 article 5); and the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights (1988)(article 8).

113 The right of workers to join organizations of their own choosing is guaranteed in ILO Conventions 87 and 98. Convention 87 article 2 reads: 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.' Convention 98 articles 1 and 2 read: '(1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. (2) Such protection shall apply more particularly in respect of acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a trade union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.'

114 Convention 87 article 3 protects the collective right by granting organizations the right to draw up their constitutions and rules, freely elect their representatives, and to organize their administration and activities and formulate their programmes and to join federations and international organizations. Convention 98 protects organizations from interference from each other and workers' organizations from employer domination.

115 On freedom of association generally, see S Woolman 'Freedom of Association' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

116 *Re PSERA* (supra).



participate in forming a trade union<sup>117</sup> (or federation),<sup>118</sup> to join a trade union, subject to its constitution,<sup>119</sup> and to participate in its lawful activities;<sup>120</sup> and by protecting employees and work seekers from victimization for exercising these and other rights under the Act.<sup>121</sup> Similar rights are conferred on employers in respect of their organisations.<sup>122</sup> The 1995 LRA also protects the associated rights of trade unions and employer organizations to determine their own constitutions, to plan and to organize their administration and lawful activities,<sup>123</sup> and to join federations<sup>124</sup> and international labour bodies.<sup>125</sup>

Members of the defence force are not protected by the LRA, and therefore do not benefit from the trade union rights under that Act. In *South African National Defence Union v Minister of Defence & Another*, the Constitutional Court was called on to decide whether s 126B(1) of the Defence Act,<sup>126</sup> which prohibited members of the permanent force from becoming members of a trade union, infringed the

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constitutional right to form and to join a trade union.<sup>127</sup> In order for the Court to find that members of the SANDF were protected by the right, the Court had to find that they were 'workers'. This the Court did. O'Regan J argued that although such members were not employees in the strict sense of the term, their relationship with the defence force was 'akin' to an employment relationship and they could therefore

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117 A trade union is defined in 1995 LRA s 213 as 'an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organizations'.

118 1995 LRA s 4(1)(a).

119 1995 LRA s 4(1)(b).

120 1995 LRA s 4(2)(a).

121 1995 LRA ss 5 and 187(1).

122 1995 LRA ss 6 and 7.

123 1995 LRA ss 8(a) and (b).

124 1995 LRA s 8(c).

125 1995 LRA s 8(e).

126 Act 44 of 1957. Section 126B(1) of the Act provided as follows:

(1). A member of the Permanent Force shall not become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act 28 of 1956): Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister.

As mentioned earlier, members of the South African National Defence Force, National Intelligence Agency, and the South African Secret Service are excluded from the ambit of the 1995 Labour Relations Act. See § 53.1(a)(i).

be considered 'workers' for the purposes of the right. Relying on FC s 200(1) — which states that the 'defence force must be structured and managed as a disciplined military force' — the respondents had claimed that allowing members to join and to form trade unions would entitle them to bargain and to strike, which would, in turn, undermine the discipline of the military force and have 'grave consequences' for the security of the South African state.<sup>128</sup> The *SANDU I* Court disagreed. It held, instead, that union membership would likely have the opposite effect. It would enable the establishment of proper channels for grievances and complaints and thus might enhance the discipline and the efficiency of the force.<sup>129</sup> It found therefore that the total ban on trade unions in the SANDF went beyond what was reasonable and justifiable under FC s 36 and declared s 126B(1) invalid.<sup>130</sup>

The Military Regulations<sup>131</sup> governing members of the defence force have also come under constitutional scrutiny in relation to freedom of association rights. In *SANDU III* the High Court found that regulation s 37(1) and (2) infringed FC s 23(2)(b). FC s 23(2)(b) provides that every worker has the right to participate in

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the activities and programmes of a trade union.<sup>132</sup> Regulation 37(1) stated that no member 'may participate in the activities of a military trade union while participating in a military operation,' while regulation 37(2) held that no military trade union 'may

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127 *SANDU I* (supra) at para 30. The matter came to the Constitutional Court by way of referral from the Transvaal Provincial Division, where Hartzenberg J had declared s126B(1) and (3) unconstitutional and invalid. *South African National Defence Union v Minister of Defence & Another* 1999 (2) SA 735 (T), 1999 (3) BCLR 321 (T), (1999) 20 ILJ 299 (T). In both courts the case also involved the constitutionality of s 126B(2) of the Defence Act, which prohibited a member of the SANDF from performing any act of public protest. Section 126B(2) also prohibited members of the SANDF from participating in any strike, but in this respect the constitutionality of the section was not disputed in either court.

128 *SANDU I* (supra) at para 32. A research memorandum of the respondents showed that in England, the USA, and France no trade unions were permitted in the armed forces. But in none of these countries was there an express constitutional right to form and to join trade unions. Trade unions in the armed forces were permitted in the Netherlands, Germany and Sweden, where they were often not afforded the rights to negotiate on behalf of their members but were only afforded rights of consultation and representation. The Court did not accept the argument that the research supported the view that members of the armed forces could not join trade unions without putting the discipline and efficiency of the armed forces under threat, but rather suggested that a range of different responses to trade unions in the armed forces existed. *Ibid* at para 34.

129 *Ibid* at para 35.

130 *Ibid* at para 36. Note, however, that the Court suspended its order of invalidity for a period of three months in order to allow the respondents time to decide how to regulate trade union rights in the SANDF. This period of suspension was three months shorter than the period suggested by the High Court. Justifying the shorter period, the Constitutional Court pointed out that the SANDF had already had five years in which to address the issue of procedures to regulate trade unions in the SANDF, but had failed to do so. It also noted that as the matter could be the subject of regulation by the Minister of Defence rather than parliamentary legislation, an appropriate regulatory framework could be established within three months.

131 Amendment to the General Regulations for the South African National Defence Force and Reserve Government Gazette vol 411 No. 20425 1 September 1999 Regulation Gazette No 6620 No. R1043.

132 *SANDU III* (supra) at 2123H-J and 2124A-E. The High Court also held that regulation 37 infringed the right to engage in collective bargaining.

liaise with its members whilst such members participate in a military operation or exercise.' The justification proffered by the Minister was that it would cause 'a threat to safety and a danger not only to the country concerned, but to the members themselves' if members were permitted to engage in trade union activities whilst engaged in military training'. The Court rejected the Minister's justification as too general, and ordered that the provision be severed from the regulations.

In the same case the High Court held that the prohibition in the regulations<sup>133</sup> on military trade unions' affiliating or associating with any labour organisation, labour association, trade union or labour federation that is not recognised and registered infringed FC s 23(4)(c). FC s 23(4)(c) provides that every trade union has a right to form and to join a federation. The High Court referred to the findings of the ILO Committee on Freedom of Association that international trade union solidarity constitutes one of the fundamental objectives of any trade union movement and underlies the principle in article 5 of Convention 87. The Court rejected the minister's reasoning that the limitation was justified because of the need to keep the defence force politically independent and to maintain high standards of discipline. It was, the Court pointed out, regulation 13(b), which prohibits a military trade union from associating with any political party, that spoke properly to the minister's concern. The fact that union federations COSATU<sup>134</sup> and NACTU<sup>135</sup> might be affiliated to political parties did not mean that all labour organisations would be so affiliated and thus the provision was overly broad. The Court ordered that the provision be severed from the regulations.<sup>136</sup>

### **(b) Union security arrangements**

A highly contested issue is whether or not the right to form and join trade unions includes the right not to do so. In other words, does the right to freedom of association as applied to the workplace imply the negative right not to associate? Other jurisdictions, such as Germany and Canada, have found that the

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positive right includes the negative right not to associate.<sup>137</sup> The European Court of Human Rights has reached a similar conclusion.<sup>138</sup> ILO Conventions 87 and 98 on the right to freedom of association and the right to organise and to collective bargaining do not explicitly include the right not to associate, although the exercise of the negative right has been found not to infringe the conventions.<sup>139</sup> Proponents of the approach that the right to freedom of association includes the negative right view

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133 Regulation 13(a) of the Amendment to the General Regulations for the South African National Defence Force and Reserve, Government Gazette Vol 411, No 20425 (1 September 1999).

134 Congress of South African Trade Unions

135 National Council of Trade Unions

136 *SANDU III* (supra) at 2119E-J and 2120A-E.

137 The German Federal Labour Court has found that the Freedom of Association provision (article 9) in the Basic Law protects the freedom not to associate and that the closed shop violates the right. See. R Blanpain (ed) *International Encyclopaedia of Labour Law and Industrial Relations: Vol 5 Germany* (Supplement 162, June 1994) 122. In *Lavigne v Ontario Public Service Employees Union* a majority of the Supreme Court of Canada accepted that the freedom to associate also entails the freedom not to associate. (1991) 81 DLR (4th) 545 (SCC).

the freedom to associate and the freedom from association as symmetrical in nature and as two sides to the same right to autonomy. The negative freedom is said to be part and parcel of the overall protection of human freedoms that mark a democratic state.<sup>140</sup>

The contrasting approach holds that the closed shop, and its lesser form, the agency shop, are justified in that they advance democracy in the workplace. The closed shop, in particular, operates to ensure an equilibrium of power on which the system of labour relations rests. It brings stability to the workplace and prevents friction on the shop floor through orderly and stable collective bargaining by preventing the proliferation of trade unions and by ensuring that the union represents the entire workforce.<sup>141</sup> It also avoids a situation where free-riders enjoy the benefits of collective bargaining without bearing any of the costs. The importance attached to the role of trade union membership in furthering the collective bargaining goals of workers is reflected in the Canadian Supreme Court's

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decision in *Lavigne*.<sup>142</sup> In *Lavigne*, several judges argued that compelled association is necessary to further the collective goals of workers and the more general aims of a social democratic state. The Canadian Supreme Court recognized that to the extent that union security arrangements limit individual freedom as little as possible, they should pass constitutional muster.

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- 138 See *Young, James and Webster v United Kingdom* (1981) 4 EHHR 38, (1981) 2 HRLJ 185. The court found that the right to freedom of association guaranteed under article 11(1) of the European Convention of Human Rights protects the freedom not to associate. Although the court invalidated the closed shop agreement on the facts, it did not challenge the legitimacy of the closed shop *per se*.
- 139 In its preparatory work for Convention 87 in 1947 the ILO rejected an amendment to grant workers the right not to join an organization. See *ILO Freedom of Association and Collective Bargaining* (1994) ('ILO Freedom of Association and Collective Bargaining 1994') 45. At the time of the adoption of Convention 98 the relevant ILO committee agreed that the Convention 'could in no way be interpreted as authorizing or prohibiting union security arrangements, such questions being matters for regulation in accordance with national practice.' The Committee of Experts has found that systems which prohibit union security practices in order to guarantee the right not to join an organization, as well as 'systems which authorize such practices, are compatible with the Convention.' *Ibid* at 46 para 100.
- 140 On this approach, just as the individual's right in the political sphere to join or not to join a political party is essential to the notion of democracy, so too is the worker's right to choose whether to join a trade union or not in the industrial sphere. Critics, however, point to a fundamental fallacy in an approach which equates democracy in the political sphere with the right to join or not to join political parties. In the workplace the right to form or join a trade union is foundational to the exercise of democracy, as it is essentially through the trade union and the process of collective bargaining that workers are able to play a role in determining their terms and conditions of work. The equivalent, in the political sphere, is not the citizen's right to belong to the party of his or her choice, but to exercise the franchise. The trade union is to the worker what parliament is to the citizen. See P Davies & M Freedland *Kahn Freund's Labour and the Law* (1983) 246.
- 141 Davies & Freedland (*supra*) at 244-5.
- 142 See *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545 (SCC) ('*Lavigne*'); *Bhindi v British Columbia Projectionists Loc 348* (1986) 4 BCLR (2d) 145, 29 DLR (4th) 47; *Remai Investment Co* (1987) 18 CLRBR (NS) 75 (Sask), quoted in G Adams *Canadian Labour Law* (2nd Edition, Release No 4, November 1995) 3-78 — 3-79. In *Lavigne*, he copurt required that to pass muster the statutory language must be permissive.

Section 23(6) of the Final Constitution recognises the role which union security arrangements may play in the workplace by permitting national legislation to recognise such arrangements as long as they are contained in collective agreements. The import of the provision is that legislative union security arrangements which comply with the requirement will not per se be unconstitutional. To pass constitutional muster, however, the legislation must comply with FC s 36 and limit constitutional rights as little as possible. The fundamental rights which closed shops are most likely to infringe are the general right to freedom of association, the right to freedom of religion, belief and opinion, political rights, as well as the labour freedom of association rights.

The 1995 LRA provides for collective agreements containing closed and agency shops. As the provisions in the Act fulfil the requirements of FC s 23(6), they should survive constitutional scrutiny.

We have seen above that the purpose of union security arrangements is the fostering of democracy in the workplace through collective bargaining and the creation of a stable industrial relations environment. Agency shops, representing a lesser form of compulsion — as they do not require workers to join a union but merely to pay an agency fee — are less susceptible to constitutional challenge than closed shop arrangements.<sup>143</sup> The provisions in the 1995 LRA permitting collective agreements that include agency shops should pass constitutional muster. Firstly, there is no compulsion to join a trade union,<sup>144</sup> but merely to pay the union an agency fee. If there is compulsion, then the agency agreement will not be binding on non-members.<sup>145</sup> Moreover, the agency shop is subject to democratic controls that limit the way in which it may operate. Thus, it may be introduced only by collective agreement, and only if the union or unions involved represent the majority of the affected workers. The fee may not be used for party political purposes<sup>146</sup> but only to serve the socio-economic interests

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of the workers.<sup>147</sup> It must be paid into a separate account which is subject to scrutiny by the auditor conducting the annual audit of the union's records of account and financial statements.<sup>148</sup> The 1995 LRA makes provision for a conscientious objector to request that the agency fee be paid into a fund administered by the Department

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143 See, eg, *Abood v Detroit Board of Education* 431 US 209 (1977) ('*Abood*').

144 1995 LRA s 25(1).

145 1995 LRA s 25(3)(a).

146 1995 LRA s 25(3)(d). Foreign jurisdictions have found differently on the political use of agency fees: In *Abood*, the US Supreme Court, while giving the nod generally to such arrangements, upheld the objection to the arrangement on the grounds that the dues were used for political causes unrelated to collective bargaining. In *Lavigne*, on the other hand, the Canadian Supreme Court upheld an agency shop agreement in a public sector collective agreement even though a portion of the dues were to go to political and social causes not immediately connected with collective bargaining.

147 1995 LRA s 25(3)(d)(iii).

148 1995 LRA s 98(1)(b)(ii).

of Labour rather than into the trade union's coffers.<sup>149</sup> This exemption should take care of instances where a worker's religion prohibits him or her from supporting secular bodies. Finally, to ensure that the fees are not misused, the 1995 LRA provides for an appeal to the Labour Court over the use of fees.<sup>150</sup>

The ultimate purpose of the closed shop is the same as that of the agency shop: the achievement of democracy in the workplace through orderly and stable collective bargaining. The difference is in the level of compulsion. Closed-shop arrangements compel workers to join a particular union if they wish to work in a particular workplace. The pre-entry closed shop requires workers to join the union before they apply for work with a particular employer. The post-entry closed shop requires membership only once workers have been employed, on pain of dismissal. Because of this compulsion, closed shops have had a more difficult constitutional ride internationally than agency shops. While they have survived constitutional scrutiny in the US and Canada, they have not done so in Ireland, West Germany and the West Indies. The European Court of Human Rights has also found against them.<sup>151</sup>

The closed shop in South Africa is post entry in nature. While this might attenuate the degree of compulsion involved, it does not remove the compulsion and thus the closed shop remains susceptible to constitutional attack. It is for this reason that the 1995 LRA subjects the operation of the closed shop to a series of controls designed to ensure that in achieving its democratic purpose, constitutional rights are limited as little as possible. As in the case of an agency shop, only a trade union or trade unions representing the majority of workers may enter into a closed shop agreement.<sup>152</sup> Moreover, a closed shop will be binding only if a ballot has been held of the employees to be covered by the agreement and two thirds of employees vote in favour.<sup>153</sup> In addition, agreements will be binding only if there is no provision for a pre-entry closed shop and the requirements for membership fees, which are the same as for agency shops, are followed.

One of the chief complaints against the closed shop is that it has drastic consequences for a worker who refuses to join the union. The employer is compelled to dismiss him or her. The 1995 LRA attempts to restrict the circumstances in which this might occur. First, existing employees may not be

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dismissed for refusing to join a union party to the closed shop.<sup>154</sup> Second, the 1995 LRA also prohibits a trade union from refusing a worker membership in or expelling a worker from the union unless the refusal or the expulsion is in accordance with the trade union's constitution and the reason for the refusal or the expulsion is fair.<sup>155</sup> Third, the Act protects from dismissal persons who refuse to join a union on

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149 1995 LRA s 25(4)(b).

150 1995 LRA ss 24(5), (6) and (7).

151 Adams (supra) at 3-82.

152 1995 LRA ss 24(1) and (3).

153 1995 LRA s 26(3).

conscientious grounds.<sup>156</sup> Both existing employees and conscientious objectors, however, may be required to pay an agreed agency fee.<sup>157</sup> The Act also provides for the termination of the closed shop by a majority of those who voted, after a ballot instigated by a third of those covered by the agreement.<sup>158</sup> These democratic controls should weigh in favour of the closed shop in any limitation enquiry.

The only challenge mounted against the closed shop under the Final Constitution so far has focused on the right to negotiate over the establishment of a closed shop rather than attacking the nature of the closed shop itself. Regulation 19 of the military regulations prohibited military trade unions from negotiating a closed or agency shop with their employer.<sup>159</sup> The South African National Defence Union (SANDU) argued that this prohibition infringed the union's right to engage in collective bargaining.<sup>160</sup> What was at issue, the High Court found, was not the legitimacy of a closed shop in the military but the refusal to give SANDU the opportunity, through negotiation, of persuading the Minister 'that there are circumstances rendering a closed shop agreement appropriate.'<sup>161</sup> The *SANDU III*

- 154 1995 LRA s 26(7)(a). It thus avoids the obstacle that stood in the way of the survival of the closed shop in *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38, (1981) 2 HRLJ 185. Although the European Court of Human Rights recognized that the closed-shop provision was advantageous for the union and employer, it found that the compulsion on existing employees to join the closed shop or face dismissal constituted a breach of Article 11 of the European Convention on Human Rights. The article includes in para 2 a limitation clause which accepts restrictions on freedom of association which are 'prescribed by law' and 'necessary in a democratic society' for the purpose, among other things, of 'the protection of the rights and freedoms of others.' The closed shop provision in the case breached article 11 on the ground that the infringement was not 'necessary' in a democratic society. The court held that pluralism, tolerance and broadmindedness were all hall marks of a 'democratic society' and that 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.' The court's view that majoritarianism in and of itself is not a sufficient justification for curtailing the rights of minorities in the context of a closed shop points to a requirement for additional mechanisms to protect minority rights. The democratic controls in the 1995 LRA should prove sufficient to ensure fair and proper treatment of minorities.
- 155 1995 LRA s 26(5). The expulsion will be fair if the conduct undermines the trade union's collective exercise of its rights. These democratic controls should weigh in favour of the survival of the closed shop in any limitations inquiry.
- 156 LRA 1995 s 26(7).
- 157 LRA 1995 s 26(8).
- 158 LRA 1995 s 26(15) and 26(16).
- 159 Regulation 19 of the Amendment to the General Regulations for the South African National Defence Force reads: 'Military trade unions shall not have the right to negotiate a closed shop or agency shop agreement with the employer.' Regulation Gazette 6620, R1043, Government Gazette 20425 (1 September 1999).
- 160 *South African National Defence Union & Another v the Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 ILJ 2101, 2120 (T) ('SANDU III').
- 161 *Ibid.*



court took issue with — and rejected — the proposition that closed shops and agency shops were undesirable in all contexts. Despite the relatively satisfactory outcome, the judgment contains one notable lacuna: in addressing the minister's arguments on the legitimacy of the closed shop, it fails to make any reference to FC s 23(6).

### 53.4 Right to organise

The main difference between the current right of every trade union and every employer's organization to organize and the comparable right in the Interim Constitution is that the right is now granted not to individuals but to organizations.<sup>162</sup> FC s 23(4)(b)'s right to organize refers to the right of an organization to build its structures to enable it to represent its members and engage effectively in collective bargaining. As far as trade unions are concerned, this right embraces the recruiting of members, the granting of stop-order facilities, the right of union representatives to fulfil their duties, and access to necessary information to ensure that bargaining is meaningful.

Rights to organization are guaranteed by ILO conventions and decisions. They protect workers from dismissal for union activities,<sup>163</sup> recognize the right of trade unions to hold trade union meetings, including public meetings,<sup>164</sup> to have access to places of work, especially where employees live on employers premises,<sup>165</sup> enable employees to communicate with management,<sup>166</sup> allow employees to be represented by union officials,<sup>167</sup> permit unions to collect union dues,<sup>168</sup> and enable

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162 FC s 23(4)(b).

163 Right to Organize and Collective Bargaining Convention (1949) ILO No 98, 96 UNTS 257 (ratified by South Africa on 19 February 1996) article 1 upholds the worker's right to protection against dismissal for participating in union activities outside working hours or, with the consent of the employer, within working hours.

164 See ILO Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 1996 ('ILO *Freedom of Association* 1996') 30.

165 See *Freedom of Association and Collective Bargaining* (1994) (supra) at 57; and ILO *Freedom of Association* (1996) (supra) at 198. See also ILO *Prelude to Change Industrial Relations Reform in South Africa, Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa* (1992) at para 717. This right is qualified in that there should be no interference with the conduct of work during working hours and appropriate precautions for the protection of the employer's property should be taken. The ILO states that in sectors where trade unions experience particular difficulties, such as agriculture, there is a duty on employers to provide unions with 'facilities for the conduct of their normal activities, including free office accommodation [and] freedom to hold meetings.' Instruments were also adopted requiring governments to 'take concrete steps to obviate these various difficulties in the rural sector by actively facilitating the establishment and functioning of such organizations.' ILO *Principles, Standards and Procedures concerning Freedom of Association* (1989) 11, with reference to the Rural Workers' Organization Convention 141 and the Associated Recommendation 149 of 1975, as quoted in Du Toit et al *The Labour Relations Act of 1995* (2003) at 89.

166 See ILO *Freedom of Association and Collective Bargaining* 1994 (supra) at 57.

167 Ibid. The ILO recognises the right of a trade union to engage in any activity involved in the defence of members' interests which would include the right to representation.

unions to gain access to information for collective bargaining purposes.<sup>169</sup> The right to organize constitutes fertile ground for constitutional contestation because of the potential for conflict between this right and other rights: namely, the constitutional rights to privacy and to freedom of expression and the common-law proprietary rights of employers.

The 1995 LRA gives positive effect to the right to organize by providing for a range of organizational rights for trade unions.<sup>170</sup> In framing the provisions, attempts have been made to balance the potential conflict between these rights, and rights to privacy, property and ownership. Thus a trade union's right of access to an employer's premises is subject to any 'conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.'<sup>171</sup> Similarly, a trade union's right to relevant information is balanced against the employer's right not to disclose information which could cause substantial harm to his or her business or employees; or private, personal information relating to an employee unless the employee agrees.<sup>172</sup> A concern not to infringe rights to privacy and property is clearly the intention behind the denial of

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168 See ILO 'The Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking' (1971) Recommendation No 143.

169 The Committee of Experts has referred with approval to practices communicating to workers information on the economic situation of the bargaining unit. See ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 111.

170 See Part A of Chapter 3 of the 1995 LRA. It grants unions which achieve a particular level of representation the rights of access to the workplace (section 12), to deduct union dues (section 13), to have elected union representatives in the workplace (section 14), to leave for union activities (section 15), and to disclosure of information (section 16). Unions may also gain organisational rights via a collective agreement (section 20), or by virtue of being a party to a bargaining or statutory council, but only in respect of rights of access and deduction of union dues (section 19). Where there is a dispute over organisational rights unions with the required level of representation may choose to have the dispute settled by arbitration or to strike (sections 22 and 65(2)(a)). Non-representative unions have no right to arbitration but they may strike to try to persuade an employer from granting them organisational rights. See *National Union of Metalworkers of South Africa v Bader Bop* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 ILJ 305, 324 (CC).

171 1995 LRA ss 12(1), (2) and (4). In Canada, in the context of freedom of association, the right to engage in union activities has generally been held not to include the right to do so in the employer's time. Canadian Charter s 26.

172 1995 LRA s 16(5)(c) and (d). The requirement to balance rights is specifically referred to in the Act: in a dispute about the disclosure of information the commissioner is obliged to 'balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining' (s 16(11)). The provision that the employer can request that the information be kept confidential is also a factor which might weigh in favour of disclosure. In Canada a Charter challenge in terms of s 8 (providing protection against search and seizure) was unsuccessful. The labour board's decision that the documents be produced was saved in that it did not require the taking of the documents, that there were built-in provisions for the maintenance of confidentiality, and that the employer's duty to bargain in good faith created an obligation of disclosure in the interests of a full discussion between the parties. See *Gainers Inc and UFCW (Re)* (1986) 14 CLRBR (NS) 191 (Alta), as quoted in Adams (supra) at 3-93.

organizational rights of access and disclosure to trade unions in the domestic sector.<sup>173</sup> Even though domestic employees are notoriously difficult

to organize because of the isolated nature of their work, the limitation may be justified because of the private character of the home.

A number of points of conflict have emerged in other jurisdictions and may arise here. They relate to whether the right to communicate with and serve members' interests includes the right to political activities,<sup>174</sup> whether the right of access to employers' premises includes lunch and rest periods (are these working or non-working hours?),<sup>175</sup> and whether freedom of expression means that employers can attempt to dissuade employees from joining unions.<sup>176</sup>

The 1995 LRA places limitations on organizational activities according to the level of representativeness of a union or unions acting jointly.<sup>177</sup> For some rights the requirement is that the union or unions acting jointly should represent the majority of members. For other rights the threshold is that of sufficient representativeness. The ILO has found that such provisions are not in themselves contrary to the principles of freedom of association. The ILO finding is subject to two provisos: (1) the determination of the most representative organization must be based on 'objective, pre-established and precise criteria so as to avoid the possibility of bias or abuse';<sup>178</sup> (2) the provisions must not have the effect of entrenching an exclusive union system. In the main, the requirements in the LRA 1995 relating to representation should survive constitutional scrutiny. The test for majoritarianism is clear and objective. While the test of sufficient representation is less clear, its guidelines offer adequate direction to a commissioner called upon to decide a dispute over representativeness.<sup>179</sup> The Act also guards against entrenching a unitary union system by providing that the majoritarian and sufficiently

173 1995 LRA s 7.

174 See, eg, *Adams Mine, Cliffs of Canada Ltd* (1982) Can LRBR (NS) 384 (Ont) ('Adams Mine') (Ontario Labour Relations Board refused to allow a trade union to use its exclusive bargaining status to capture an audience for its political activities unrelated to collective bargaining, but warned against a construction on its decision that would be seen as generally condoning a constraint on trade union communication with its members in the workplace).

175 See, eg, *Michelin Tires (Canada) Ltd* 80 CLLC 16 009 (NSLRB); *United Rubber Workers of America v Michelin Tires (Canada) Ltd* 80 CLLC 14 012 (NSSCTD); *Re Jarvis and Associated Medical Services Inc* 61 CLLC 16 218 (OLRB).

176 In Canada prohibition on such speech has been found to be justified where it takes the form of threats and coercion. See *Placer Development Ltd* (1985) 11 CLRBR (BS) 195 (BC); *Union Bank Employees and Bank of Montreal* (1985) 10 CLRBR (NS) 129 (Can).

177 1995 LRA Chapter III part A.

178 ILO *Freedom of Association and Collective Bargaining* (supra) at 44-45.

179 In a dispute as to whether a union is sufficiently representative to achieve certain organizational rights a commissioner, in exercising his/her discretion, must take into account the nature of the workplace, the nature of the organizational rights sought, the nature of the sector, and the organizational history at the employer's workplace. 1995 LRA s 21(8)(b).

representative requirements may be met by unions acting together.<sup>180</sup> Moreover, a commissioner may withdraw representation rights if another union is found to be more representative. However, whether the section that provides that a majority union and employer may set their own thresholds for the achievement of organizational rights<sup>181</sup> in a binding collective agreement will constitute a

justifiable limitation of FC s 23 is unclear. It might, as currently construed, operate to prevent weaker unions from exercising their own organizational rights.

In *NUMSA v Bader Bop*, the Constitutional Court pointed to the desirability of minority unions being able to represent their members, and therefore assert their organisational rights, in the workplace.<sup>182</sup> In this case, a dispute arose over the union's intention to strike because of the employer's unwillingness to recognise the union's shop stewards and to bargain collectively with the union on the grounds that the union was not representative of the majority of its workforce — a requirement for formal recognition under s 14 of the LRA 1995. The Constitutional Court found that the dispute engaged two fundamental principles. The first was the right to freedom of association in FC s 18. This right is given specific content by the right to form and join trade unions (FC s 23(2)(a)) and by the right of trade unions to organise (FC s 23(4)(b)).<sup>183</sup> Those rights would be impaired where workers were not permitted to have their union represent them in workplace disciplinary and grievance matters, but were required to be represented by a rival union which they had chosen not to join.<sup>184</sup> The second principle raised by the dispute related to the right to strike,<sup>185</sup> in particular, whether workers' right to strike in support of their right to be represented by shop stewards in grievance and disciplinary proceedings had been limited by the Act.<sup>186</sup> The Court found that prohibiting a 'right to strike in relation to a demand that itself relates to a fundamental right otherwise not protected as a matter of right in

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180 1995 LRA s 21(8)(c).

181 1995 LRA s 18.

182 (2003) (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), 2003 (24) ILJ 305 (CC) (*NUMSA v Bader Bop*).

183 *Ibid* at para 34. The Court relied on Art 2 of the ILO Convention of Freedom of Association and the Right to Organise which provides that workers have the right to join organisations of their own choosing. The Convention has been interpreted to mean that a majoritarian system of trade unionism would not be compatible with the Convention as long as minority unions were allowed to exist, to organise and to represent members in relation to individual grievances, and could also seek to challenge majority unions.

184 *Ibid* at para 34.

185 While ILO Conventions do not grant a right to strike, the ILO's committees have both asserted that such a right is essential to collective bargaining. The Court held that a reading of the Act which permitted minority unions the right to strike over the issue of shop steward recognition, particularly for the purpose of the representation of union members in grievance and disciplinary hearings, would be more in accordance with the principles of freedom of association in FC s 18 and the rights of workers to form and join trade unions, to organise and bargain collectively, and to strike.

186 *Ibid* at para 35.

the legislation would constitute a limitation on the right to strike' in FC s 23.<sup>187</sup> The Court held that s 21 of the 1995 LRA should not be used to deny a minority union the right to pursue organisational rights through the mechanism of collective bargaining and, if necessary, strike action.<sup>188</sup> The implication of the judgment is that a limitation on the right to organise by imposing thresholds on the exercise of legislative organisational rights may be justifiable provided that another means exists for a union to exert pressure to obtain those rights.

### 53.5 Right to engage in collective bargaining

Collective bargaining is inextricably linked to the right to join and form representative organisations, to organise and to strike. These rights — jointly and severally — promote democracy in the workplace and the achievement of worker dignity. While freedom of association rights, more narrowly construed, have a value in and of themselves, their full value may only be achieved through the right to collective bargaining. It is through such bargaining that workers can most effectively challenge the countervailing power of employers.<sup>189</sup>

Collective bargaining comprises a complex system of interlinking elements underpinned by a particular regulatory framework. Collective bargaining is, firstly, a process constituted by the recognition of the representative organisations of the parties, the actual bargaining process — which includes matters relating to thresholds for bargaining, the nature of the bargaining unit, topics for bargaining, and bargaining levels — and the outcome of bargaining. Secondly, collective bargaining comprises the institutions and the mechanisms through which such bargaining takes place.

The Final Constitution recognizes the importance of collective bargaining by granting trade unions, employer organizations and employers the right to engage in collective bargaining.<sup>190</sup> The wording in FC 23 is consonant with that in Constitutional Principle XXVIII. CP XXVIII states that ' . . . the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.' In the *First Certification Judgment*, the Constitutional Court upheld an objection to the wording of the draft Final Constitution which excluded individual employers from the right.<sup>191</sup> While accepting the exclusion of individual workers was rational on the basis that collective

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187 Ibid at para 35.

188 Ibid at paras 43 and 44. The Court found that there was nothing in chapter 4 of the LRA of 1995 which regulates strike action, which places a limitation on minority unions' striking to achieve organisational rights.

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

190 FC s 23(5).

191 *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), 1996 (10) BCLR 1253, 1405-6 (CC) ('*First Certification Judgment*') at para 69.

bargaining by workers in their individual capacity was not possible,<sup>192</sup> the Court held that the same could not be said for individual employers. The failure of the text to protect this right of individual employers represented a failure to comply with the language of CP XXVIII.<sup>193</sup>

The Final Constitution differs from most other constitutions in that it explicates the different aspects of the broader right to freedom of association<sup>194</sup>. That is, it expressly guarantees the right freely to form and join trade unions and employer organisations, the right of those organisations to conduct freely their activities and programmes, the right to organise, the right to collective bargaining and, in the case of workers, the right to strike. In so doing it has avoided problems that have marked other constitutional jurisdictions where a right to collective bargaining is reliant on the interpretation given to the right to freedom of association. In Canada, the scope of the entrenched right to freedom of association has been a source of considerable contestation. Until recently, the Canadian Supreme Court consistently interpreted the right narrowly to exclude the right to collective bargaining and the right to strike.<sup>195</sup>

192 Martin Brassey correctly takes issue with the reasoning of the court:

[t]he issue is where the right should reside and who should be entitled to exercise it. That it can be exercised only in a collective manner can shed light on this question, but cannot determine it. As we have seen, the right in the Interim Constitution was vested in individual workers, and freedom of association, another right whose expression must necessarily be collective, remains individuated in the Final Constitution.

Employment and Labour Law (1998) 1 C3:45.

193 See *First Certification Judgment* (supra) at para 69. The wording of FC s 23 differs from that in the Interim Constitution in two respects: the Interim Constitution granted the right to workers and employers (rather than their organisations) and it granted a right to bargain collectively rather than the right 'to engage' in collective bargaining. The import of these differences is discussed below.

194 Belgium, Spain and Poland are among the few countries whose constitutions also contain a right to collective bargaining. See M de Vos 'Belgium', J Wratny 'Poland' and J Garcia Blasco 'Spain' in R Blanpain (ed) *The Actors of Collective Bargaining* (2003) ('Blanpain *The Actors*'). In Canada, New Zealand and the Netherlands, constitutional freedom of association rights have been narrowly interpreted to exclude the right to collective bargaining. See T Archibald 'Canada', G Andrews 'New Zealand', and W Bouwens 'The Netherlands' in Blanpain *The Actors* (supra) at 93, 193 and 277 respectively.

195 See *Reference Re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161, [1987] 1 SCR 313 ('*Re PSERA*'); *Dunmore v Ontario (Attorney General)* (2001) 207 DLR (4th) 193 (SCC). In the latter case, the issue was whether the exclusion of agricultural workers from collective bargaining legislation violated the constitutional guarantee of freedom of association and equality. The court held that the failure to protect vulnerable farm workers in the legislative scheme amounted to under-inclusion, but this did not mean that freedom of association automatically required collective bargaining rights. If workers had an alternative means, such as a political avenue, to express an associational voice, or had non-union associations for the representation of their interests, there was no constitutional violation.

At the provincial level, Canadian labour legislation, influenced by the US Wagner Act, generally affords access to collective bargaining. In the main, recognition of the union comprises recognition for bargaining purposes. Employers may recognise a union voluntarily, but more commonly, the union files an application for certification with the Labour Relations Board. Once this is granted, after a determination of the relevant bargaining unit and the representativeness of the union, the union is recognised for the purposes of collective bargaining, with an attendant duty on both parties to bargain in good faith.



While the specific enumeration of labour rights avoids the above mentioned problems of interpretation, questions regarding the nature and extent of the right to engage in collective bargaining have still arisen. Rights are generally viewed as imposing a correlative duty or obligation on another party to ensure the protection of the right. With respect to the right to engage in collective bargaining, the exact nature of that obligation has been the subject of conflicting judgments.<sup>196</sup> At issue is whether the right places on the state and employers a positive duty to

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bargain.<sup>197</sup> If there is such a positive duty, the question arises as to the extent of that duty. Does it require a delineation of levels of membership for recognition of the parties, bargaining topics, bargaining levels, and the bargaining unit and a requirement to bargain in good faith? Or is it more like a negative right or freedom that requires merely that there should be no impediment to, constraint upon, or interference with, parties' voluntary and autonomous exercise of collective bargaining? In terms of the negative conception, the decision whether to negotiate or not rests with the parties and is underpinned by economic power play and not legal enforcement. The content of the constitutional right has implications for the constitutionality of the current labour law regime, in particular, the Labour Relations Act, as well as the regulations governing members of state sectors excluded from the ambit of the LRA, such as the South African National Defence Force (SANDF).<sup>198</sup>

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While the US Constitution does not provide for a right to collective bargaining, the constitutions of several states, such as Florida, Hawaii, Michigan, Missouri, New Jersey, New York and Oregon, recognise the right of employees to bargain collectively. Moreover, at the federal level, the National Labour Relations Act declares that it is an unfair labour practice for an employer to refuse to bargain collectively with the representatives of its employees. Section 8(a)(5). See E Render 'United States of America' in Blanpain *The Actors* (supra) at 303.

196 Compare *South African National Defence Union v Minister of Defence & Others* 2003 (3) SA 239 (T), (2003) 24 ILJ 1495 (T) ('SANDU II') with *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 ILJ 2101 (T) ('SANDU III').

197 It has been argued that the right to engage in collective bargaining is in the nature of a freedom rather than a right. The use of this terminology has spawned a somewhat confusing analysis on the differences between a freedom and a right in the Bill of Rights. Thus it has been held, incorrectly, that where the term 'freedom' is used in the Constitution, the relevant provision does not encapsulate a right. See *SANDU III* (supra) at 2113. What is at issue, no matter the terminology, is the nature of the obligation imposed by a provision. As far as the right to engage in collective bargaining is concerned the issue is whether an obligation is placed on someone to do something, that is on the parties to bargain, or whether this should be something left to the parties freely to decide. Those arguing that the right is in the nature of a freedom rely on the distinction between rights and freedoms characterized by Dickson CJ of the Canadian Supreme Court as follows: 'Rights are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question, whereas 'freedoms' are said to involve simply an absence of interference or constraint.' *Re PSERA* (supra) at 192-3. An illustration of such interference would be where legislation was passed which prohibited collective bargaining or which would have the effect of prohibiting it, such as the extension of a collective agreement beyond its expiry date by 'legislative fiat' as in the *PSERA* case. See H Cheadle 'Labour Relations' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (1st Edition, 2002) 18-25 and 27)

198 See the amendments to chapter XX of the military regulations set out in Amendment to the General Regulations for the South African National Defence Force and Reserve, Regulation Gazette 6620, R1043, Government Gazette 20425 (1 September 1999) ('Amendment to the General Regulations'), made in terms of section 87(1)(rB) read with section 126C of the Defence Act 44 of 1957. The other state sectors excluded from the 1995 Labour Relations Act are the National Intelligence Service and the South African Secret Service. 1995 LRA s 2.



The 1995 LRA studiously avoids imposing a duty to bargain on employers, employers' organisations and trade unions. This is not because it regards collective bargaining as unimportant. On the contrary, one of the objects of the Act is to provide a framework for collective bargaining within which employees, trade unions, employers and employers' organisations can bargain collectively on matters of mutual interest. A further object is to promote orderly collective bargaining and orderly bargaining at sectoral level.<sup>199</sup>

In support of these objects the Act facilitates the acquiring of the different rights relating to collective bargaining: it protects the right of workers to form and to join trade unions and employers', employers' organisations, and the right of

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those organisations to conduct their own activities and programmes, providing a judicial remedy for the infringement of these rights.<sup>200</sup> The Act also facilitates the acquisition of organisational rights by granting these rights to trade unions which can demonstrate a sufficient level of representativeness. Disputes over the granting of organisational rights may be resolved either by arbitration or strike action.<sup>201</sup> In further support of collective bargaining, the 1995 LRA provides for the voluntary establishment of bargaining councils and their weaker counterpart, statutory councils,<sup>202</sup> and for the products of collective bargaining to be made binding on parties and their members and, on application, non-parties. The Act also provides for the enforcement of parties' demands, if collective bargaining should fail, through industrial action in the form of the strike and the lockout. Finally, the 1995 LRA is not altogether silent on the issue of a refusal to bargain and provides for advisory arbitration where there is a dispute over such a refusal. However, the parties are not obliged to abide by the ensuing arbitration award since, as the 1995 LRA says, it is merely advisory in nature.

Having provided this support for collective bargaining, the 1995 LRA leaves its enforcement to industrial action. Thus, an employer's failure to agree to bargain would be a dispute over a matter of mutual interest to be resolved by recourse to strike action. The right to strike to enforce collective bargaining is a right available to both representative and non-representative unions.<sup>203</sup>

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199 1995 LRA s 1(c) and (d)(i) and (ii).

200 1995 LRA ss 4-10.

201 1995 LRA ss 12-16 and 65(2).

202 The establishment of statutory councils is triggered by one or other of the parties. Once triggered, however, such a council must be established provided the requirements for representation have been met. See 1995 LRA ss 39-41.

203 See *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 ILJ 305, 324 (CC) ('NUMSA v Bader Bop'). In *NUMSA v Bader Bop*, Constitutional Court underscored the importance of the right to strike for minority unions as a means of forcing employers to the bargaining table over organisational rights (in this instance the recognition of trade union representatives). Granting the right to strike, it said, would avoid a limitation of the right of trade unions to organise and bargain collectively. (at para 36). It thus highlighted the importance of the strike as a lever to enforce bargaining.

The defence force regulations are cast differently, to take account of the specific nature of the armed forces. While collective bargaining is one of the objects of the military regulations,<sup>204</sup> it is more carefully controlled. In their original form, the regulations prescribed a list of topics for bargaining<sup>205</sup> under the bargaining council established by the regulations.<sup>206</sup> Moreover, there was no compulsion on either party to bargain.<sup>207</sup> A major difference between the regulations and the

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1995 LRA is that under the regulations striking is prohibited.<sup>208</sup> Such a prohibition is not unusual in relation to the armed forces worldwide. The absence of both a strike weapon and a duty to bargain led to a constitutional challenge to the regulations on the grounds that the combined effect of these omissions was to deprive members of the opportunity to play any real role in the determination of their terms and conditions of work.

There are persuasive arguments both in favour of and against a legally enforceable duty to bargain at constitutional level.

One of the main arguments in support of such a duty is the consistent stance of the Constitutional Court that a constitutional right should be generously interpreted. Such an approach suggests that as far as the right to engage in collective bargaining is concerned, it should be construed broadly enough to provide protection for all workers, no matter what the applicable regulatory regime. Thus it should be able to protect both those workers who are covered by the LRA, as well as those falling under other employment regulatory regimes, such as that governing the defence force. Where appropriate, limitations on the right may be imposed, but the constitutional right should not be interpreted with unnecessary limitations in mind.

The Constitutional Court has not yet had occasion to consider directly the nature of the constitutional right to engage in collective bargaining. Nevertheless, it has underlined the importance of collective bargaining as a means for workers to defend their interests in the workplace<sup>209</sup> and has stated that the Final Constitution conditions a fair industrial relations environment on the existence of collective bargaining.<sup>210</sup> While recognising the centrality of collective bargaining, the Court has cautioned against 'setting in constitutional concrete, principles governing that

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204 Amendment to the General Regulations s 3(c).

205 Amendment to the General Regulations s 62.

206 Amendment to the General Regulations s 36.

207 Ibid. In *SANDU III*, however, the court read this provision as peremptory in nature and thus enforcing a legal duty to bargain.

208 Amendment to the General Regulations s 6.

209 *First Certification Judgment* (supra) at para 66.

210 *NUMSA v Bader Bop* (supra) at para 13.

bargain which may become obsolete or inappropriate as social and economic conditions change.<sup>211</sup>

The view that the constitutional right confers a positive duty to bargain was recognized in *SANDU III*. Regulations governing members of the military provided for collective bargaining<sup>212</sup> on certain issues only and established a military bargaining council for this purpose.<sup>213</sup> The military regulations, however, did not clearly confer a duty to bargain. They provided only that military trade unions 'may' engage in collective bargaining, and 'may' negotiate on behalf of their members on the specified issues.<sup>214</sup> The applicants sought a declarator from the High Court stating

- 211 Ibid at para 13. Moreover, as we have seen above, collective bargaining is critical to the achievement of democracy in the workplace and for the dignity of workers, both of which are consonant with the spirit and values underlying the Constitution. Thus narrowing the right would potentially undermine these goals. As already mentioned, the Constitutional Court itself has found that collective bargaining is key to a fair industrial relations system. See *NUMSA v Bader Bop* (supra) at para 13. The negative effect of a refusal to bargain or bargaining in bad faith on democratic values within the workplace has been succinctly put: 'There is nothing so subversive of collective bargaining, however, as to refuse to bargain entirely or to pretend to bargain without doing so, going through the motions with no intention of reaching agreement.' See M Brassey in Brassey et al *The New Labour Law* (supra) at 151. The Industrial Court was alive to the potential to subvert the process of collective bargaining in this manner, and no doubt this formed an essential factor in its decision to hold, under the unfair labour practice provisions in the 1956 LRA, that there was a duty to bargain. See, on the notion of a general duty to bargain, *FAWU v Spekenham Supreme* (2)(1988) 9 ILJ 628 (IC); *Nasionale Suiwelkoöperasie Bpk v FAWU* (1989) 10 ILJ 712 (IC); *SACWU v Sasol Industries (Pty) Ltd* (1989) 10 ILJ 1031 (IC); *Buthelezi v Labour for Africa* (1991) 12 ILJ 588; *SACTWU v Maroc Carpets and Textile Mills (Pty) Ltd* (1990) 11 ILJ 1101 (IC); *RTEAWU v Tedelex (Pty) Ltd* (1990) 11 ILJ 1272 (IC); *Sentraal-Wes (Ko-op) Bpk v FAWU* (1990) 11 ILJ 977 (LAC); *Macsteel (Pty) Ltd v NUMSA* (1990) 11 ILJ 995 (LAC)). In relation to bargaining in good faith, the following forms of bargaining conduct were among those deemed to be unfair: unfair or unreasonable preconditions to bargaining (*Sentraal-Wes (Ko-op) v FAWU* (1990) 11 ILJ 977 (LAC)); *FAWU v Sam's Foods* (Grabouw) (1991) 12 ILJ 1324 (IC)); premature unilateral action (*NUM v Goldfields of SA Ltd* (1989) 10 ILJ 86 (IC)); illegitimate pressure tactics; denial of union access (*Doornfontein Gold Mining Co Ltd v National Union of Mineworkers* (1994) 15 ILJ 527 (LAC)); sham bargaining; inadequate substantiation of proposals; the failure to disclose information; dilatory tactics (*MAWU v Natal Die Castings Co (Pty) Ltd* (1986) ILJ 520); bypassing a recognized union and negotiating directly with the employees when the union is not in bad faith (*NUM v East Rand Gold and Uranium Co Ltd* (1991) 12 ILJ 1221 (A)); and unilaterally implementing an unnegotiated proposal (*NUM v East Rand Gold and Uranium Co Ltd* (1991) 12 ILJ 1221 (A)). See A Rycroft & B Jordaan *A Guide to South African Labour Law* (1992) 132-40. The court, however, drew the line at determining the level at which the parties should bargain, but only in the absence of manifest unfairness. See, for instance, *Bleazard v Argus Printing & Publishing Co Ltd* (1983) 4 ILJ 60 (IC); *SA Union of Journalists v Times Media Ltd* (1993) 14 ILJ 387 (IC). In *Paper Printing Wood & Allied Workers Union v SA Printing & Allied Industries Federation* (1990) 11 ILJ 345 (IC). The court refused to compel an employers' organisation to remain a member of an industrial council. In general it also stopped short of deciding appropriate bargaining topics: the Court intervened only where the bargaining demand was 'unconscionable or so outrageous that one can infer that there was no intention to negotiate'. See *Buthelezi v Labour for Africa* (1991) 12 ILJ 588, 592G-I.
- 212 Collective bargaining is defined in section 1 as 'the process whereby the employer and military trade unions engage in negotiation on matters of mutual interest'. Only a registered military trade union has collective and organisational rights in respect of members (section 9).
- 213 Regulation 3(c) stated: 'Military trade unions may engage in collective bargaining, and may negotiate on behalf of their members, only in respect of a. the pay, salaries and allowances of members, including the pay structure; b. general service benefits, c. general conditions of service; d. labour practices; and e. procedures for engaging in union activities within units and bases of the Defence Force.'
- 214 Regulation 36.

that the Minister of Defence was under a duty to negotiate with SANDU on all matters of mutual interest that might arise between them in his official capacity as the employer and a mandamus directing the minister to negotiate accordingly.<sup>215</sup> The court granted the declarator and mandamus.<sup>216</sup> The High Court's conclusions were grounded in the need to interpret constitutional rights broadly, the essential role of collective bargaining in a fair industrial relations system,<sup>217</sup> the decisions of the Industrial Court under the 1956 LRA that there was a duty to bargain,<sup>218</sup> and the importance of collective bargaining where

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workers were prohibited from striking.<sup>219</sup> The *SANDU III* court held that the constitutional right to collective bargaining placed a duty on the state as employer to bargain collectively. It stated that if the minister was not 'burdened with an obligation to negotiate in good faith' the union would be deprived of any method of enforcing its right to engage in such bargaining. A right without a remedy, it contended, was meaningless.<sup>220</sup> The High Court also found that the regulations themselves could be read in such a way so as to give effect to the duty to bargain, thus obviating the need to amend them to ensure their consistency with its interpretation of FC s 23.<sup>221</sup> Co-incident with the enquiry over the duty to bargain itself, the court also considered the issue of bargaining topics. It found that restrictions on the matters over which collective bargaining could take place — to 'certain' issues (regulation 3(c)), which were specified in regulation 36 — violated the Final Constitution and ordered that the offending provisions be deleted.<sup>222</sup>

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215 *SANDU III* (supra) at 2111E-F.

216 *Ibid* at 2115H.

217 The *SANDU III* Court quoted the Constitutional Court's statement in *NUMSA v Bader Bop* (at para 13) that 'the Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment.'w

218 *SANDU III* (supra) at 2112G.

219 *SANDU III* (supra) at 2113H.

220 *Ibid* at 2113H. The regulations make provision for a Military Arbitration Board to settle disputes which remain unresolved at bargaining council level. The bargaining council is granted the power to hear disputes over any dispute in respect of a collective agreement, or any other matter which is or could be the subject of collective bargaining. This provision is based on the premise that collective bargaining will occur. A dispute about the fact of bargaining cannot itself be the subject matter of bargaining and therefore may not be referred to the arbitration board.

221 *SANDU III* (supra) at 2115I. The court did so by arguing that the word 'may' in regulation 36 which provides that military trade unions 'may engage in collective bargaining and may negotiate on behalf of their members', was the legislature's customary manner of conferring powers. See *Paper Printing Wood and Allied Workers Union v Pienaar & Others* 1993 (4) SA 621 (A), 640A-B, (1991) 12 ILJ 308 (A). Contrary to this view it has been held that the word 'may' reflects a certain amount of discretion and will be interpreted as directory rather than peremptory, unless the purpose of the provision indicates otherwise. See *Amalgamated Packaging Industries Ltd v Hutt* 1975 (4) SA 943 (A). With respect, within the context of the regulations, it is difficult to see how the provision could be anything other than directory in nature.

222 *SANDU III* (supra) at 2130J and 2131A.

A case can, however, be made that FC s 23 does not impose a legally enforceable duty to bargain. Central to this view is Article 4 of Convention 98 of the ILO which does not prescribe a positive duty to bargain. The Article states:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.<sup>223</sup>

The committees<sup>224</sup> of the ILO have highlighted the two central principles of this article: (1) the voluntary and autonomous nature of collective bargaining and (2) that positive action should be taken by public authorities to promote such bargaining.<sup>225</sup> In underscoring the voluntary nature of collective bargaining and the autonomy of the bargaining parties, the committees have rejected recourse to

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compulsion to ensure that bargaining occurs. The role of authorities is to provide the legal framework and administrative machinery for collective bargaining to which parties on a voluntary basis and by mutual agreement may have recourse.<sup>226</sup> Even when highlighting the importance of collective bargaining as an element of freedom of association, the ILO states that the bargaining should be 'free'.<sup>227</sup> It is not sufficient, however, that bargaining should be permitted. It must be actively encouraged and promoted.<sup>228</sup> The committees have held, in addition, that when bargaining occurs, it must take place in good faith.<sup>229</sup> Even here, it must be noted, the committees envisage that a lack of good faith bargaining is a matter for negotiation between the parties rather than a matter that requires compulsion.<sup>230</sup> Moreover, the committees have stated that the determination of bargaining levels<sup>231</sup> as well as bargaining topics should also be left to the parties and not be imposed by law or by the authorities.<sup>232</sup>

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Proponents of the voluntary position also base their arguments on the wording of FC s 23 itself.<sup>233</sup> They argue that because FC s 23(5) requires that national legislation may be enacted to regulate collective bargaining and may limit a fundamental right,

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223 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 107 para 235.

224 The Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee of the Governing Body of the ILO.

225 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 106 para 235.

226 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 110, para 247. See also ILO *Freedom of Association* (1996) (supra) at 170-171, paras 844, 845 and 846:

'The voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association' . . . 'Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining,' . . . 'Nothing in Article 4 of the Convention places a duty on the government to enforce collective bargaining by compulsory means with a given organisation; such an intervention would clearly alter the nature of bargaining.'

227 ILO *Freedom of Association* (1996) (supra) at 159 para 782.

it is envisaged that the regulation of collective bargaining should be left to the legislature. This position, so the argument goes, is reinforced by the wording of the right that parties may 'engage' in collective bargaining (as opposed to the right in the Interim Constitution which granted the right 'to' collective bargaining). However, several constitutional rights require national legislation to make good their promise and all such legislation must comply with constitutional dictates. Whether the word 'engage' connotes the negative right to bargain rather than a hard right with its correlative duty to bargain has been a matter of some contestation. It was previously argued that nothing material turns on this difference in wording.<sup>234</sup> It does not constitute conclusive proof that the right avoids imposing a duty to bargain.

A further argument against a legally enforceable duty to bargain is that the determination of an appropriate collective bargaining regime is an issue of policy which is best left to the legislature to determine. The regime which finds expression in the 1995 LRA is one which positively promotes collective bargaining at industry level, rather than at enterprise level, although, in compliance with the Final Constitution, bargaining at the latter level is not excluded.<sup>235</sup> The 1995 LRA supports

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- 228 The ILO's position is highlighted in its observations on New Zealand's previous regulatory regime (the Employment Contracts Act), to the effect that what was required was not merely that the Act permit collective bargaining, but that it should actively promote and encourage it. See *Interim Decision of the ILO's Committee on Freedom of Association* Case No 1698, Official Bulletin vol 77 series B no 3 at para 137(e). The committee stated: 'Considering that, taken as a whole, the Employment Contracts Act does not encourage and promote collective bargaining, the committee requests the Government to take appropriate steps to ensure that legislation encourages and promotes the development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements.' In its Final Decision, the committee wrote: 'In effect it seems that the Act allows collective bargaining by means of collective agreement, along with other alternatives, rather than promoting and encouraging it.' *Ibid* at para 255. See G Anderson 'Collective Bargaining and the Law: New Zealand's Employment Contracts Act Five Years On' (1996) 9(2) *Australian Journal of Labour Law* 107, 107-108.
- 229 ILO *Freedom of Association* (1996) (supra) at 165 para 814 'It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties.'
- 230 *Ibid* at 166, para 817 ('While the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other part is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach an agreement.')
- 231 *Ibid* at 172, para 851 ('According to the principle of free and voluntary bargaining embodied in art 4 of Convention No 98 the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.') See also ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 112 para 249.
- 232 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 112-3 para 250. The only time the ILO seems to regard an obligation to bargain as amounting to a legally enforceable duty is where a union is representative of workers in an industry. In these circumstances, the committee has held that employers should recognise the union for the purposes of collective bargaining
- 233 H Cheadle 'Labour Relations' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (1st Edition, 2002) 18-27.

industry-level bargaining because of the benefits attached to such a regime.<sup>236</sup> It eschews a general duty to bargain as it would undermine industry-level bargaining by encouraging bargaining at enterprise level. According to this view, interpreting the constitutional right to give effect to a duty to bargain would

conflict with the policy regime embodied in the 1995 LRA. Whether one agrees with the merits of industry-level bargaining or not, there is much to be said for the argument that it should be left to the legislature to determine the appropriate collective bargaining regime. Nevertheless, a policy of complete judicial deference within a constitutional democracy is not defensible.<sup>237</sup>

The case against a duty to bargain is also based on the view that conflicts over bargaining agents, levels of bargaining, bargaining tactics, and the bargaining agenda are best left to power play between the interested parties and not to the courts to resolve.<sup>238</sup> The counter argument is that a legal duty to bargain, rather than impeding bargaining, may clear the way for bargaining to take place.<sup>239</sup> Under the 1995 LRA, potential conflict over bargaining rights is minimised by the existence of organisational rights, in particular trade union representation rights, which drive the process leading up to collective bargaining.<sup>240</sup> Disputes over organisational rights are resolved either by industrial action or arbitration, thus minimising the role of the courts and the possible delays inherent in the judicial process. This legislative

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234 See M Brassey & C Cooper 'Labour Relations' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 30-32. See also *South African National Defence Union v Minister of Defence & Others* 2003 (3) SA 239 (T), (2003) 24 ILJ 1495 (T) ('SANDU II'). The High Court relied on the wording to decide that the right did not impose a correlative duty to bargain. However, it did hold that the absence of a duty to negotiate did not mean that participation in the process of negotiation and bargaining was so voluntary that the Defence Force could decide capriciously or at whim not to negotiate. Nor could it refuse because bargaining would be inconvenient or difficult. The reasoning in this judgment was held to be incorrect by the High Court in *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 ILJ 2101 (T) ('SANDU III').

235 The constitutional right to engage in collective bargaining is granted not only to trade unions and employer organisations but to individual employers as well. An attempt to restrict the ambit of the right to employer organisations and exclude individual employers was rejected by the Constitutional Court in *First Certification Judgment*.

236 See Cheadle (*supra*) at 18-28 and 29. Cheadle lists the benefits of industry-level bargaining as follows: it removes conflict from the workplace and lowers the transactional costs for employers and trade unions; it generally sets a floor of standards, allowing for further negotiations at the workplace — a combination which both protects workers and allows for flexibility; by setting industry standards, it ensures that competition does not take the form of a race to the bottom by lowering standards for workers; because it is voluntary it has greater legitimacy; and fewer strikes occur where there is such bargaining and they are less damaging for the individual employer.

237 See *National Educators Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC), (2003) 24 ILJ 95, 109-110 (CC); *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 ILJ 305, 317-319 (CC). The Constitutional Court has stated that it will be slow to intervene where a statute, such as the LRA, aims to give effect to a constitutional right. Nevertheless it would be shirking its constitutional duty if it did not ensure that the legislation gave proper effect to the right. It would intervene when it was in the interests of justice to do so.

238 In the US, the duty to bargain has spawned jurisprudence over issues relating to bargaining agents, the manner of bargaining, bargaining units and so on which has led to delays in the actual bargaining itself. See D Leslie *Labor Law in a Nutshell* (4th Edition, 2000) 181-228.



approach, however, is less helpful in those sectors where workers are hard to organise, such as the farming sector. A duty to bargain would give such vulnerable workers greater opportunity to determine their terms and conditions of work.

There is a valid concern that the imposition of a legally enforceable duty to bargain — and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics — could lead to rigidities in the labour market, with negative consequences for South Africa's ability to compete internationally.<sup>241</sup> A system that allows parties to determine

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the contours of bargaining and bargaining outcomes, and which includes the possibility of such arrangements being amended, is more suited to the imperatives of a globally competitive market to which the South African economy needs to be attuned. The Constitutional Court, as we have seen, has indicated that it is alert to the danger of judicially imposed rigidities that might become obsolete under new economic circumstances.<sup>242</sup>

An interpretation of the right to engage in collective bargaining which imposes a correlative duty to bargain would undoubtedly provide the greatest protection to both private and public sector workers and enhance their ability to determine their terms and conditions of work.<sup>243</sup> It would also give effect to the general approach of the Constitutional Court to interpret fundamental rights in a generous manner. At the same time, however, it would be dissonant with the requirements of international law as well as with the legislative regime in the LRA. The alternative reading — that the constitutional right is a negative right or freedom — accords with ILO Convention 98 and the LRA.

An interpretation of the constitutional right as imposing a correlative duty to bargain would mean that the LRA fails to give effect to that right. It would then have

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239 See *Brassey* (supra) at 151. Under both the 1956 and 1995 LRAs, the position was/and is more nuanced than the above analysis might suggest. While under the 1956 Act the duty to bargain was juridified, this did not extend to all aspects of the duty. Once a duty to bargain had been established by the Industrial Court, the majority of cases thereafter related to good faith bargaining. See *Rycroft & Jordaan* (supra) at 132-140.

240 As the granting of union representation rights is dependent on the union having majority support in the workplace and the extent of the representation is highly regulated, conflict over bargaining agents and the bargaining unit is reduced.

241 The 'Explanatory Memorandum on the Labour Relations Bill' Government Gazette 16259 (10 February 1995) addresses the problem as follows:

[T]he fundamental danger in the imposition of a legally enforced duty to bargain and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment. The ability of the South African economy to adapt to the changing requirements of a competitive international market is ensured only where the bargaining parties are able to determine the nature and the structure of bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both the structures within which agreements are reached and the terms of these agreements . . . While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing a series of organizational rights for unions and by fully protecting the right to strike.

242 *NUMSA v Bader Bop* (supra) at para 13.

to be shown that this limitation is justifiable under FC s 36. We have seen above that one of the main objects of the LRA is to promote collective bargaining and that that purpose is made manifest through the promotion of representative organisations and their activities, organisational rights, the right to industrial action and the provision of mechanisms and institutions for bargaining. Given

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that the 1995 LRA promotes collective bargaining and is reflective of international law, the limitation on the right to engage in collective bargaining arising from the absence of a duty to bargain could be justifiable.

A further issue for consideration is whether the right to collective bargaining may be interpreted as incorporating the right to a lockout. The Final Constitution explicitly protects the right to strike, but there is no equivalent right to lock out. In *First Certification Judgment*, the Constitutional Court found that implicit in a right to collective bargaining was the right to 'exercise some economic power against partners in collective bargaining'.<sup>244</sup> This statement should not be read as providing for an implicit right to a lockout, particularly as the court in the same judgment unequivocally rejected the separate inclusion of a right to a lockout on the grounds that the rights to strike and to lock out were not equivalent. Moreover, it would be anomalous to allow the inclusion of the lockout through 'the back door' via another right once it has been explicitly rejected by the Court as worthy of constitutional protection.

One of the provisions of the LRA most vulnerable to constitutional attack under the right to engage in collective bargaining is section 32 of the 1995 LRA. Section 32 provides that a collective agreement drawn up in a bargaining council can be extended to non-parties within the scope of the council, thereby binding them to the terms of the agreement. The effect of this section is not only to limit non-parties' rights to collective bargaining but also, because parties can agree to exclude industrial action as a means of resolving a dispute, to prohibit non-parties' right to strike where such agreement is reached. The imposition on non-parties of limitations which might infringe their fundamental rights could be open to constitutional

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243 Interpretative assistance in evaluating the competing claims over a duty to bargain may be provided by foreign law. However, the caveat against importing law out of context from other jurisdictions should be borne in mind. Few foreign constitutions contain a specific right to collective bargaining. Where such a right is included, it is not always the case that it translates into a positive legislative duty. Thus in Spain and in Poland, the constitutional right to collective bargaining is reflected in a legislative duty to bargain. See Juan Blasco 'Spain' in Blanpain *The Actors* (supra) at 241-242 and Jerzy Wrątny 'Poland' in Blanpain (supra) at 219-220. Not so in Belgium. See Marc de Vos 'Belgium' in Blanpain *The Actors* (supra) at 65-66. In Belgium, collective bargaining is voluntary, although that country's constitution guarantees the right to such bargaining. Conversely, it is often the case that even where a constitution does not contain a right to collective bargaining, a legislative duty to bargain nevertheless exists or the courts have interpreted the law to give effect to such a duty. Generally a distinction is made between a duty to bargain and a duty to bargain in good faith. Countries with a legislative duty to bargain include Canada, Poland, Sweden, Turkey and France. Countries with a specific duty to bargain in good faith include New Zealand, Poland, Spain, and Israel. Voluntary collective bargaining systems are found in Belgium, Germany, Norway, the Netherlands, Israel, Great Britain, New Zealand, and Turkey. Thus there is no uniform approach, the collective bargaining regime in any specific country being a result of a mix of policy, legal history and social and political norms unique to that country.

244 *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), 1996 (10) BCLR 1253, 1284 (CC). On the basis that Constitutional Principle XXVIII did not require that the constitutional text should recognize any particular economic mechanism, the Court declined to determine the nature and extent of that right.

challenge. It remains to be seen whether such agreements would, under such circumstances, be found to be justifiable on the grounds that they are based on notions of democratic majoritarianism, contain safeguards on the application of the majoritarian principle, and are designed to ensure the promotion of a stable, sectoral collective bargaining system.<sup>245</sup> While the extension will

generally be granted only where unions and employers can fulfil the required majoritarian requirement, the Act does make provision for the extension of agreements where the parties are merely sufficiently representative if the Minister deems this to be in the interests of sectoral collective bargaining.<sup>246</sup> This grants a wide discretion to the Minister, and is more susceptible to constitutional challenge than extension based on the majoritarian requirement.<sup>247</sup>

Collective agreements struck at the level of the enterprise may also be made binding on non-union employees in terms of s 23(1)(d) of the 1995 LRA provided the union represents the majority of employees. This has the effect of depriving non-union employees of the right to negotiate their own agreements. The more limited scope of such agreements, the majoritarian requirement and the objective of stable collective bargaining might ensure the constitutional survival of such agreements.

Collective bargaining is also limited by sectoral determinations in terms of s 51 (1) of the Basic Conditions of Employment Act. However, as the purpose of these determinations is to set minimum conditions of employment to protect more vulnerable employees and are arrived at through a process of public consultation, they are unlikely to be impugnable.

## 53.6 Right to strike

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245 Safeguards apply, firstly, to the operation of the bargaining councils: they may only be established voluntarily (1995 LRA s 27), the parties must be sufficiently representative of the interests they purport to represent (1995 LRA s 29(11)(iv)), objections may be raised in relation to their establishment (1995 LRA s 29(3)), the demarcation of the scope of councils must be approved by the National Economic Development and Labour Council (Nedlac) (1995 LRA s 29(8)) or the Minister (1995 LRA s 29(9)), adequate provision must be made in bargaining councils' constitutions for the representation of small and medium enterprises (1995 LRA s 29(11)(3)), and parties which are refused admission to councils may seek redress in the Labour Court (1995 LRA s 56(5)). In respect of collective agreements, the Act requires that for an agreement to be declared binding both parties should vote in favour, and they should represent (in the case of trade unions) and employ (in the case of employers' organisations) the majority of members/employees of the parties to the council (1995 LRA s 32(1)). Moreover, the Minister may not extend the agreement unless the majority of workers to be affected are members of the relevant trade unions, and employers employ a majority of the workers to be covered (1995 LRA s 32(3)(b) & (c)). The Act also provides for exemptions from the terms of an agreement by an independent body according to fair and objective criteria (1995 LRA s 32(3)(e) and (f)), and that levels of representativeness of bargaining councils in respect of which a collective agreement has been extended must be reviewed annually (1995 LRA s 49(2)). The Act does not limit collective bargaining at enterprise level altogether thus allowing for the exercise of bargaining rights of employees within their own enterprise over terms and conditions not bargained at council level, as well as over terms and conditions which improve on those set at council level.

246 S 32(5)(a) and (b) of the LRA 1995.

247 FC s 158(1)(g) read with FC s 3(b) and FC s 157 (1).

The right to strike is widely regarded as fundamental to the protection of workers' interests. Without a right to strike, workers' rights to freedom of association and to collective bargaining are compromised.<sup>248</sup>

Although ILO Conventions do not specifically recognise the right to strike, the ILO's Committee on Freedom of Association has held that 'the right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests'.<sup>249</sup> The committee has interpreted the right as integral to the right of trade unions to organise their activities and programmes in order to defend and further workers' interests under the Freedom of Association and Right to Organise Convention.<sup>250</sup> The ILO does permit limitations to be placed on the right to strike under certain

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circumstances, but requires compensatory guarantees in the form of impartial and rapid conciliation and arbitration processes, and binding and rapidly implemented awards.<sup>251</sup>

The ILO's Committee of Experts and its Committee on Freedom of Association have confirmed that the purpose of strike action is not confined to addressing demands relating to collective bargaining, but may have a broader focus. Their view is summed up in the following statement:

The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.<sup>252</sup>

The ILO distinguishes between strikes for broad socio-economic purposes and 'purely political strikes' which it views as falling outside the scope of freedom of association and thus the right to strike.<sup>253</sup> Recognising that it will not always be easy to draw a distinction between the categories, the ILO, nevertheless, has made it clear that it does not regard as 'purely political' those strikes aimed at criticising a government's

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248 The right is provided for in the International Covenant on Economic, Social and Cultural Rights of 1966; the European Social Charter of 1961; and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.

249 ILO *Freedom of Association* (1996) (supra) at 101, para 475.

250 Articles 3, 8, and 10 of Convention No 87 of 1948. The committee considers that the ordinary meaning of the word 'programmes' includes strike action. ILO *Freedom of Association and Collective Bargaining* (1994) at 65-66, paras 147, 148.

251 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 72, para 164.

252 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 65, para 147; ILO *Freedom of Association* (1996) (supra) at 102, para 482. ('[T]rade unions should be able to have recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies.' Ibid at para 484: 'The right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organisations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests.')

economic and social policies.<sup>254</sup> Political strikes, as opposed to socio-economic ones, are not recognised by most other countries whose constitutions contain a right to strike.

In *First Certification Judgment*, the Constitutional Court stated that strike action was the primary mechanism through which workers exercised collective power and that the capacity to strike enabled them to bargain effectively with employers.<sup>255</sup> The right, it said, was entrenched in many constitutions. More recently, the Court has asserted that the

right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.<sup>256</sup>

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The Interim Constitution granted workers the right to strike for the purpose of collective bargaining.<sup>257</sup> The right to strike under the Final Constitution is still cast as an individual right, but is no longer linked to any specific purpose.<sup>258</sup> The effect is to broaden the scope of the right. A purposive interpretation of the right will embrace strikes for social and economic purposes. A conception of the right to strike which narrows its scope to collective bargaining issues strictly defined would offend the requirement that the Final Constitution be interpreted to give effect to international law. The LAC has recognised that the constitutional right to strike should not, in the absence of express limitations, be restrictively interpreted.<sup>259</sup>

The scope of the constitutional right to strike has arisen in relation to strike provisions in the 1995 LRA. In conformity with the constitutional labour rights, an individual right to strike is guaranteed to workers in terms of the Act.<sup>260</sup> The Act also makes provision for protest action to promote or to defend the socio-economic interests of workers,<sup>261</sup> but imposes certain restrictions on such action. Protest action may be called only by a registered union or federation of trade unions, is subject to

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253 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 72,t para 165. It would seem that most countries place a limit on purely political strikes.

254 Ibid at 102 para 482.

255 *First Certification Judgment* (supra) at para 66.

256 *NUMSA v Bader Bop* (supra) at para 13.

257 IC s 27(4).

258 Every worker has the right to strike — FC s 23(1).

259 See *Chemical Workers Industrial Union* (1999) 20 *ILJ* 321 (LAC). On the interpretation of fundamental rights generally, see *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 15.

260 While the right to strike is granted as an individual right, the definition of strike in the Act casts it as a right which may only be exercised in concert with other workers. 1995 LRA s 213 states:

certain procedures, and may be curtailed by the Labour Court acting according to specified criteria.<sup>262</sup> Although these restrictions may constitute infringements on the right to strike, they would probably be justifiable given the potentially deleterious consequences of protest action on the general public.

Whether the legislative right to protest action over socio-economic issues is protected by the constitutional right to strike was considered in *Business South Africa v Congress of South African Trade Unions & Another*.<sup>263</sup> The case turned on whether, in calling for protest action over a deadlock in negotiating employment standards within the Labour Market Chamber of NEDLAC, the Congress of South African Trade Unions (COSATU) had followed the procedural requirements for such action under 1995 LRA s 77, specifically s 77(1)(c). Section 77 provides that an employee has the right to participate in protest action to promote or defend the socio economic interests of workers provided that such action is called by a registered trade union/federation,<sup>264</sup> a

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notice has been served on NEDLAC giving the reasons for and the nature of the protest action,<sup>265</sup> the matter giving rise to the action has been considered by NEDLAC or another appropriate forum,<sup>266</sup> and the union/federation has served a notice of the impending action on NEDLAC 14 days before commencing with the action.<sup>267</sup> *Business South Africa* held that COSATU had not complied with s 77(1)(c), as the matter giving rise to the intended protest action had not been properly considered by NEDLAC. At issue was whether, given the guarantee of a constitutional right to strike, a requirement of compliance with a procedural pre-condition for a strike should be liberally or restrictively interpreted.<sup>268</sup> The Labour Appeal Court (LAC), which heard the matter as a court of first instance, handed

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'strike' means the partial or complete concerted refusal to work or the retardation or obstruction of work, by persons who are or have been employed by the same or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.

261 1995 LRA s 77.

262 1995 LRA s 77(2).

263 (1997) 18 ILJ 474 (LAC), (*BSA*).

264 1995 LRA s 77(1)(a).

265 1995 LRA s 77(1)(b).

266 1995 LRA s 77(1)(c).

267 1995 LRA s 77(1)(d).

268 1995 LRA s 77(1)(c) reads: '(1) Every employee who is not engaged in an essential service or maintenance service has the right to take part in protest action if — . . . (c) the matter giving rise to the intended protest action has been considered by Nedlac or by any other appropriate forum in which the parties concerned are able to participate to resolve the matter . . .'

down a split decision. The majority was reluctant to find that the constitutional right to strike embraced strikes or protest action over socio-economic issues. The court sought to make a distinction between the right to strike and the right to protest action on a number of grounds. Firstly, it stated that the labour rights in the Interim Constitution and the Final Constitution underpinned collective bargaining, while protest action fell outside of that context.<sup>269</sup> Secondly, the court held that the LRA conceptualised the right to strike and the right to protest action over socio-economic issues as mutually exclusive. This approach, the court argued, was supported by international law which drew a distinction between strikes relating to collective bargaining and political strikes.<sup>270</sup> Thirdly, as the committees of the ILO had found that the right to strike over economic and social interests was integral to the right to freedom of association, the existence of both a right to freedom of association and an independent right to strike in the Final Constitution did not necessarily mean that the right to protest action in LRA s 77 formed part of the constitutional right to strike.<sup>271</sup> Finally, the court held that because of the different nature and character of the right to protest action, it needed to be assessed in a context broader than that of the fundamental labour rights. The latter in general related to collective bargaining, and thus were restricted to the relationship between employer and employee. However, the right to protest action had an impact not only on the interested parties, but also on the interests of the public. Consonant with the Act's purpose to advance economic development, the right to protest action should therefore be weighed up against these broader interests.<sup>272</sup>

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On the basis of the above arguments, the *BSA* court concluded that the purpose of the Act did not necessarily require an expansive or liberal interpretation of 1995 LRA s 77.<sup>273</sup>

The *BSA* court's arguments are flawed in a number of respects. Firstly, in holding that the scope of the right to strike was constrained by its collective bargaining context, the court ignored the fact that the constitutional right to strike is no longer predicated on the right to collective bargaining. Secondly, the court erred in its interpretation of the ILO's position on the ambit of the right to strike. The ILO sees socio-economic strikes as integral to the right to strike but excludes purely political strikes from its scope. The court argued, incorrectly, that the ILO's view was that

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269 *BSA* (supra) at 479B-480A-B.

270 *Ibid* at 480C-D.

271 *Ibid* at 480E-F.

272 *Ibid* at 481D-F.

273 The *BSA* court, with reference to *S v Makwanyane & Another*, rejected the view that interpreting a legislative provision in a purposive fashion was synonymous with a liberal or expansive interpretation. Depending on the proper purpose of the Act, a particular section might have to be interpreted 'restrictively rather than extensively'. In this case, the purpose of the Act (to advance economic development) did not 'necessarily require an expansive or liberal interpretation of s 77, in the sense that the exercise of the right to protest action must be restricted as little as possible'. The procedural requirement could be interpreted narrowly to mean that the next procedural step could be proceeded with only if one (or both) of the parties was no longer committed to resolving the matter. *BSA* (supra) at 479A-B.



socio-economic strikes were coincident with political strikes,<sup>274</sup> and thus fell outside the ambit of the right to strike. Problematic too is the court's view that the right to strike excludes the right to protest action because these rights are dealt with in a mutually exclusive manner in the 1995 LRA. The fact that these rights are dealt with separately in the LRA in contrast to the Constitution does not mean that the scope of the constitutional right to strike should be narrowly construed to include only strikes relating to collective bargaining. It is the Constitution which ultimately sets the boundaries of rights and not legislation. Also open to question is the court's view that protest action does not form part of the right to strike because the ILO views strikes over socio-economic issues as part of the right to freedom of association. The fact that the Final Constitution contains a more general right to freedom of association<sup>275</sup> does not mean that the right to protest action should be disassociated from the constitutional right to strike and be given a home under the general freedom of association right. Finally, in justifying a restrictive reading of 1995 LRA s 77, the BSA court emphasised the economic development purpose of the Act without considering its other purposes, in particular its commitment to the advancement of social justice.<sup>276</sup>

By contrast, the minority judgment found unequivocally that the right to strike did include strikes for socio-economic purposes: 'the fact that s 23 of the new Constitution does not restrict a strike to the purpose of collective bargaining must

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mean that the word "strike" is used in its widest sense.<sup>277</sup> This interpretation is preferable in that it reflects ILO findings and is consonant with the Constitutional Court's approach that constitutional rights should not be restrictively interpreted. The minority held, in addition, that the purpose of protest action to advance the cause of unorganised workers and economic victims of apartheid was an embodiment of the constitutional rights to freedom of expression and the freedom to demonstrate. This suggested that a liberal rather than a restrictive construction should be placed on 1995 LRA s 77(1)(c).<sup>278</sup> The minority court argued that although the provisions in LRA s 77 were peremptory, compliance with them would have been fulfilled if this had occurred in a real sense (ie substantively, and not in a strictly

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274 See *BSA* (supra) at 480C-D.

275 FC s 18

276 1995 LRA s 1. A consideration of social justice objectives need not necessarily mean that an extensive interpretation of the procedural requirements is called for, but it should have been given due consideration by the court in weighing up the relevant factors.

277 *BSA* (supra) at 493E.

278 *BSA* *ibid* citing *S v Zuma & Others* 1995 (2) SA 642 (CC), 651A-653B, 1995 (4) BCLR 401 (CC), in which the following reference was made to *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, 395-6, 18 CCC (3d) 385:

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 . . . The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection.

legal sense).<sup>279</sup> A broad interpretation of s 77(1)(c) did not mean that an impasse had to occur before the next procedure could be embarked on. The issue in dispute merely had to have been considered. An interpretation that allowed meetings to be prolonged indefinitely could undermine the right to protest action and the other freedoms guaranteed by the Final Constitution.<sup>280</sup> While the minority's view is to be preferred, it is also open to the criticism that it relies on the nature of other protest rights as the basis for its conclusion that s 77(1)(c) should be liberally construed. A better approach would have been for the minority court to locate its analysis solely within the nature of the right to strike and FC s 23's labour rights as a whole.

The LRA places other procedural and substantive limitations on the statutory right to strike that may infringe FC s 23.<sup>281</sup>

The Act requires that specific procedures must be followed before workers can

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embark on a protected strike.<sup>282</sup> The ILO has accepted legal procedures preceding a strike as long as they are not so complicated as to make it 'practically impossible to declare a legal strike'.<sup>283</sup> The procedural limitations in the LRA requiring prior conciliation and advance warning of 48 hours (or seven days where the employer is the state) should survive constitutional scrutiny. The requirement for conciliation is in line with the notion of strike action as a weapon of last resort. The notice period is short enough so as not to undermine the effectiveness of the action, while allowing the employer time to reconsider its position or to make provision for the action.<sup>284</sup>

At a substantive level, the Act limits the right to strike during the currency of a collective agreement if the issue in dispute is regulated<sup>285</sup> by the agreement.<sup>286</sup> This limitation is accepted by the ILO on the grounds that collective agreements may be

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279 *BSA* (supra) at 500E-F. In support of his argument Nicholson J quoted Van Dijkhorst J in *Ex parte Mothuloe* (Law Society Transvaal intervening) 1996 (4) SA 1131 (T) at 1137H-1138D who said the following:

In *Maharaj & Others v Rampersad* 1964 (4) SA 638 (A), 646C Van Winsen AJA, after having concluded that the legislative provision he was concerned with was peremptory, went on to enquire whether it was fatal that it had not been strictly complied with. The learned judge laid down the following test: 'The enquiry, I suggest, is not so much whether there has been "exact", "adequate" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction had nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object had been achieved are of importance.'

280 *BSA* (supra) at 501B-C.

281 The Committee of Experts recognizes that the right to strike cannot be considered an absolute right: not only may it be subject to a general prohibition in exceptional circumstances but it may also be governed by provisions laying down the conditions for, or restrictions on, its exercise. See *ILO Freedom of Association and Collective Bargaining* (1994) (supra) at 66-7, para 151.

282 1995 LRA s 64.

283 *ILO Freedom of Association* (1996) (supra) at 105 paras 498, 499 and 502.

viewed as social peace treaties of fixed duration,<sup>287</sup> as long as workers have recourse to 'impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreements.'<sup>288</sup> The rationale for this conclusion is that, having bargained and settled an issue, parties should abide by the agreement until it expires. Peace obligations are also common in other jurisdictions. The Act meets the ILO requirements in that it provides for disputes over the interpretation or application of issues in such agreements to be referred in the first instance to conciliation and, if the dispute is not resolved, to voluntary arbitration. The limitation should be deemed justifiable because it is narrowly tailored to meet the ILO's objective of social harmony and is a product of a voluntary and collective bargain between employer(s) and workers. The provision should also survive constitutional attack as collective agreements often provide for minimum wages only, leaving it to individual enterprises to negotiate actual wages.<sup>289</sup>

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The Act also provides for peace obligations in respect of binding arbitration awards. Parties are precluded from embarking on industrial action where the award regulates the issue in dispute.<sup>290</sup> This limitation should pass constitutional muster on the basis that where the arbitration process is available to parties, they should not be allowed a second bite of the cherry if dissatisfied with the outcome of that process.

More susceptible to constitutional challenge is the prohibition on strike action during the currency of a statutory council agreement where the parties are not

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284 The ILO permits prior conciliation and mediation provided that the process is not 'so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness'. It also permits a period of advance notice which is shorter than the conciliation period if the conciliation period is lengthy, provided that the period is not an additional obstacle to bargaining. ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 75 para 172.

285 Peace agreements have been found to include agreements about the implementation and application of the collective agreement, thus precluding a strike over such issues. In *Samancor Ltd v NUMSA* (2000) 21 ILJ 2305 2314 (LC), the Court stated: 'The issues in dispute, variously described in both the dispute declaration and the strike notice, are issues relating to the application and/or the implementation of those agreements and not to the substance thereof and are accordingly disputes of right, regarding which industrial action is expressly precluded by the collective bargaining agreement within the ambit of which they were concluded.' See also *Fidelity Guards Holdings (Pty) Ltd v PTWU* [1997] 11 BLLR 1425 (LC) in which the Court held that an issue is regulated by a collective agreement not only where it is substantive in nature but also where it relates to the process for the resolution of the issue.

286 1995 LRA s 65(3)(a)(i).

287 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 73 para 166.

288 Ibid at para 167.

289 For apposite decisions under the 1956 LRA, see *BAWU v Asoka Hotel* (1989) 10 ILJ 167 (IC); *SEAWU v BRC Weldmesh* (1991) 12 ILJ 1304 (IC); *SAWU v Rutherford Joinery (Pty) Ltd* (1990) 11 ILJ 695 (IC). For an apposite decision under the 1995 LRA, *PSA v Minister of Justice and Constitutional Development & Others* (2001) 22 ILJ 2303 (LC).

290 1995 LRA s 65(3)(a)(i).

representative within the council's scope.<sup>291</sup> Such agreements, if promulgated as determinations by the Minister of Labour, will bind non-parties and thus deprive certain workers of their right to strike without their consent. The provision, however, should survive constitutional scrutiny as the determination may only be made on a recommendation by the employment standards commission after an investigation by the director general of labour. Moreover, the investigation must take cognisance of a wide range of interests, including those of workers deprived of the right to strike.<sup>292</sup> The Act provides, furthermore, for applications for exemption from the terms of the agreement to an independent body appointed by the Minister.<sup>293</sup>

The 1995 LRA provides that parties may contract out of the right to strike by means of a collective agreement.<sup>294</sup> This limitation should be justifiable on the basis that the right to strike is being waived in terms of an agreement which is voluntary in nature, and the result of the collective power of the employees rather than the result of negotiation between the more vulnerable individual worker and employer. Moreover, the Act, in line with ILO requirements, provides for alternative dispute resolution for such disputes through conciliation and arbitration.<sup>295</sup> More problematic is the provision providing that the agreement may be extended to non-parties under certain conditions.<sup>296</sup> These parties will, without their consent, be denied the right to strike during the agreement's currency. Whether such an infringement will pass constitutional muster will depend on whether it can be justified in terms of the imperatives of orderly collective bargaining and the majority principle.

The 1995 LRA states that a person may not take part in a strike if he or she is bound by an agreement requiring the issue in dispute to be referred to

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arbitration.<sup>297</sup> The provision refers to both individual and collective agreements. A collective agreement waiving the right to strike in favour of arbitration may be constitutionally justifiable. Less certain is the case of individual agreements as individual employees remain vulnerable in ways union members are not.

According to the 1995 LRA, a person may not strike if the issue in dispute is one that a party has a right to refer to arbitration or to the Labour Court in terms of the

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291 1995 LRA s 65(3)(a)(ii) read with s 44.

292 1995 LRA s 44 read with sections 53 and 54 of the Basic Conditions of Employment Act 75 of 1997.

293 1995 LRA s 44(3). The Act also prohibits industrial action if the person is bound by a determination in terms of the Wage Act regulating the issue in dispute during the first year of that determination. Act 5 of 1957. The Wage Act has since been repealed, and wage determinations are now sectoral determinations under the Basic Conditions of Employment Act. To the extent that the provision limits the right to strike, similar arguments as above as to its justifiability would apply.

294 1995 LRA s 65(1)(a).

295 1995 LRA s 24.

296 1995 LRA ss 23(1)(d) and 32.

297 1995 LRA s 65(1)(b).

Act.<sup>298</sup> Where the Act requires arbitration or adjudication for disputes best left to industrial action for resolution, there may be grounds for challenging the constitutionality of such a restriction.<sup>299</sup> Dismissals over retrenchment, for instance, were originally justiciable in the Labour Court, even though there were strong arguments for their being treated as economic disputes. Subsequent amendments to the LRA have now opened the way for certain workers to have the choice of either striking or going to court where such disputes arise.<sup>300</sup>

Under the 1995 LRA, the choice of arbitration or strike action has always been available to representative unions concerning disputes over organisational rights that they are granted as of right under the Act.<sup>301</sup> Unrepresentative unions, however, are denied organisational rights as of right by the Act, and may not refer disputes over such rights to arbitration. Whether they may strike in order to persuade the employer to grant them such rights was considered in *NUMSA v Bader Bop*.<sup>302</sup> The Constitutional Court in *NUMSA* found that denying minority unions the right to strike over trade union representation rights constituted an infringement of the right to strike.<sup>303</sup> There was nothing in the relevant part of the Act that prevented non-representative unions from 'using the ordinary process of collective bargaining and industrial action to persuade employers to grant them

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organisational facilities.<sup>304</sup> The Constitutional Court stated that these were matters of 'mutual interest' to employers and unions and thus were capable of forming the subject matter of collective agreements, of being referred to conciliation, and of

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298 1995 LRA s 65(1)(a). See R Birk 'Industrial Conflict: The Law of Strikes and Lockouts' in R Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (4th Edition, 1990) 281.

299 While not explicit, the Act follows the schema whereby disputes of right are either adjudicated or arbitrated, while disputes of interest (economic disputes) are left for resolution through power play by the parties.

300 1995 LRA s 189A.

301 Where disputes are over organizational rights, the Act grants parties a choice either to resolve the dispute through adjudication or by industrial action. A similar choice is granted to certain workers in relation to disputes over operation requirements dismissals. See 1995 LRA s 189 and s 189A.

302 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 ILJ 305 (CC) ('*NUMSA v Bader Bop*').

303 But see *Bader Bop v NUMSA* (2002) 23 ILJ 104, 316 (LAC). The LAC had found that the requirements of representativeness for the exercise of organisational rights in s 21 precluded unrepresentative unions from striking in order to conclude a collective agreement with employers over the granting of such rights. The union, which was not sufficiently representative, had sought to obtain the organisational rights in ss12-15 of the LRA. While the employer was willing to grant the union access to its premises and stop order facilities, it was not prepared to recognise the union's shop stewards or to bargain collectively with the union. The union had then indicated its intention to strike over these matters. The employer had sought an interdict preventing the strike. The Labour Court had dismissed the application, but on appeal a divided Labour Appeal Court granted it. The majority argued that unless the union was representative of the majority in the workplace it could not be granted shop steward recognition nor could it strike over such a demand.

304 *NUMSA v Bader Bop* (supra) at 326.

being resolved through strike action.<sup>305</sup> Support for this view, the Court held, was also found in s 20 of the Act. Section 20 states that nothing in the part of the Act on organisational rights precluded the conclusion of a collective agreement that regulated such rights. The Constitutional Court rejected as narrow and inappropriate in an Act committed to freedom of association and collective bargaining the LAC's view that s 20 of the 1995 LRA merely clarified the position that employers and representative unions might regulate organisational rights.<sup>306</sup> Instead the Court viewed 1995 LRA s 20 as an express confirmation of the internationally recognised rights<sup>307</sup> of minority unions to seek to gain access to the workplace, and the recognition of their shop stewards and other organisational facilities through the techniques of collective bargaining.<sup>308</sup>

The 1995 LRA also limits the right to strike in essential services and minimum services. The ILO recognises that it might be necessary to prohibit strikes in essential services but that such services should be restrictively defined. Without a restrictive definition, the notion would lose all meaning. The ILO defines essential services as those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.<sup>309</sup> It was not prepared to draw up a definitive list of which services could be determined as essential.<sup>310</sup> The method of declaring services as essential differs from country to country. The two main methods are either to list the essential services or to provide a definition and declare services as essential according to that definition from time to time.<sup>311</sup> Both methods have their advantages and disadvantages. Although the list system benefits from its specificity, it may embrace whole services or parts of services which are not truly essential. The definition method allows for an assessment according to consistent criteria as to whether services are essential services or not. The disadvantage is that too many services may be captured by too broad a definition. The benefit of the ILO's definition is that it is restrictively cast and thus allows for the prohibition of strike action in very limited circumstances. Critically, the ILO requires that where a strike is

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prohibited, there should be access to quick and impartial mediation and arbitration procedures for workers hit by the prohibition.<sup>312</sup>

The 1995 LRA basically adopts the definitional approach to essential services. It defines as essential a service 'the interruption of which endangers the life, personal

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305 Ibid.

306 Ibid at 327.

307 The ILO has declared that a ban on strikes relating to recognition disputes is not in conformity with the principles of freedom of association.

308 *NUMSA v Bader Bop* (supra) at 327.

309 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 70 para 159.

310 Ibid.

311 See C Cooper 'Strikes in Essential Services' (1994) 15(5) *ILJ* 903-929.

safety or health of the whole or any part of the population'.<sup>313</sup> It also specifically declares as essential the parliamentary service and the South African Police Service. The prohibition of strikes in essential services (including minimum services) provided for in the LRA should pass the requirements of the limitations test in the Final Constitution, particularly as the prohibition is consonant with ILO requirements.<sup>314</sup> The Act's definition of an essential service replicates that of the ILO. Both provide for a prohibition on strikes only in very restricted circumstances. The specific inclusion of parliamentary and police services as essential services, thereby removing the right of employees in these services to strike, is also defensible in terms of the public importance of these functions, and is accepted by the ILO and is common elsewhere. The ILO states that the right to strike may be restricted or prohibited in the public service in so far as such a strike could cause 'serious hardship' to the 'national community and provided that the limitations are accompanied by certain compensatory guarantees'.<sup>315</sup>

The Act provides for an independent essential services committee to investigate the declaration of services as essential, whether in whole or part, for representations from any interested party, and the variation or the cancellation of the declaration after following the same process.<sup>316</sup> Moreover, it also provides for the committee to investigate disputes over the interpretation or application of the designation of services as essential. In making its decision the committee will be guided by the restrictive definition of an 'essential' service.<sup>317</sup>

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312 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 72 para 164. The ILO also recommends the establishment of an independent body to examine the difficulties raised by the definition of essential services and to issue enforceable decisions. The ILO recognises that under certain circumstances a service which may not amount to an essential service in the strict sense of the term may become essential if a strike in that service exceeds a certain duration or extent so that the life, personal safety or health of the population are endangered. Thus it provides that in such a case it should be possible to establish a minimum service provided that the service is 'genuinely and exclusively a minimum service', and, secondly, as this would limit the right to strike of workers in those services, that workers be allowed to participate in defining such a service, along with employers and the public authorities. ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 71, para 161.

313 1995 LRA s 213.

314 1995 LRA s 65(1)(d)(i).

315 ILO *Freedom of Association* (1996) (supra) 110, para 533.

316 1995 LRA s 70; 1995 LRA s 71.

317 The approach of the British Columbia Labour Board in defining essential services is instructive: See *School District No 54 and Bulkley Valley Teachers' Assn (Re)* 93 CLLC 16,070 (BCLRB) as cited in G Adams *Canadian Labour Law* (2nd Edition, Release No 4, November 1995) 10-36.3 ('In summary, the factors that the Board will consider in its investigation and recommendation and in its subsequent designation of essential services, include such matters as the length of the dispute, the timing of the dispute, the type of "facilities, production and services" which the employer seeks to have designated, and the actual impact of the dispute on both the parties and the public.' The Board went on to say: 'Finally this Board is not naive with regard to the impact of essential service designations on a dispute. The employer will often seek higher levels than necessary in order to lessen the impact and force a strike. The union will often seek lower designations in order to increase the effectiveness of its strike. The Board in all of this must keep the public interest firmly in its view.')



The LRA also provides for the resolution of disputes in essential services via simple, impartial and accessible conciliation and arbitration processes, including provision for parties to designate a specific commissioner to resolve their disputes<sup>318</sup> and for the speedy issuing of awards.<sup>319</sup> These conditions, in that they meet the demand for a restrictive limitation of the right to strike and the provision of appropriate compensatory arbitration processes, should render the limitation justifiable in terms of FC s 36.<sup>320</sup> The Act also requires the committee to ratify the designation by collective agreement of parts of an essential service as a minimum service. In such circumstances, only workers in the minimum service are prohibited from striking.<sup>321</sup> This arrangement has the effect of further limiting the restriction on the right to strike, thus conforming to ILO precepts<sup>322</sup> and immunizing the provision against constitutional attack.

In an innovative provision, the LRA limits strikes in what it terms maintenance services. These services are defined as those which, if interrupted, will have the effect of the 'material physical destruction to any working area, plant or machinery.'<sup>323</sup> The difference between the provisions on maintenance and minimum services is that the former are concerned with preventing the potential damage a strike may have on the wealth creating capacity of the business and the latter the effect of a strike on the safety of people. Maintenance services may be instituted in any plant either via collective agreement or, if there is no such agreement, on application by the employer to the essential services committee. The declaration of a service as a maintenance service has the effect of depriving the right of employees in that service to strike.<sup>324</sup> The Act provides that the committee may refer the dispute to arbitration but only if the number of employees employed in the maintenance service is greater than the number who would be entitled to strike.<sup>325</sup> The effect of this requirement is not to deprive the whole workforce of

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318 1995 LRA s 135(6)(i).

319 1995 LRA ss 135 and 136. There are special provisions in the Act relating to time limits for the coming into force of an arbitration award in essential services disputes where the employer is the state and the award has financial implications. As monies have to be voted by Parliament to fulfil awards which have financial implications, the longer period should be justifiable.

320 See *Mbelu & Others v MEC for Health and Welfare, Eastern Cape & Others* 1997 (2) SA 823 (Tk), 835E-836A (Upheld s 19 of the Public Service Labour Relations Act Proc 105 of 1994 as a justifiable limitation of IC s 27(4), the right to strike. The Public Service Labour Relations Act has been repealed by the 1995 LRA. Section 19 prohibited strikes in essential services and was not as closely tailored to ILO requirements in this regard as is the 1995 LRA.)

321 1995 LRA s 72.

322 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 69 and 70 para 159.

323 1995 LRA s 75(1).

324 1995 LRA s 65(1)(d)(ii).

325 1995 LRA s 65(1)(ii).

the right to strike if the majority are entitled to do so. Employers who have been granted their application for the declaration of a maintenance service may not use replacement labour in place of those on strike or where they have locked out employees, unless the lockout is defensive in nature. It is unlikely that many employers will make use of this provision, as it limits their ability to keep production in operation through the use of replacement labour. The restriction on the right to strike in a maintenance service should prove to be justifiable because such a service is narrowly defined and includes a ban on the use of replacement labour.

The ILO has stressed the importance of the protection of those who go on strike from dismissal and other retaliatory measures. Legislation, the ILO has held, should provide genuine protection for workers on strike. Without such protection, the right might be 'devoid of content'.<sup>326</sup> The LRA meets this requirement by guaranteeing protection against unfair dismissal and granting immunity from civil liability (delict and breach of contract<sup>327</sup>) to strikers who follow the required strike procedures.<sup>328</sup> The Act protects workers who have been unfairly dismissed by providing that they should be reinstated or re-employed. However, it does grant discretion to the adjudicator not to grant reemployment or reinstatement under certain circumstances.<sup>329</sup> This provision needs to be narrowly construed. If not, it could undermine the right to strike by failing to protect adequately those unfairly dismissed for going on strike.<sup>330</sup>

A generous interpretation of the constitutional right to strike would include secondary strikes. The LRA recognises the legitimacy of such strikes, but places limitations on them. It follows the universal practice of requiring a link between the primary strike and any secondary strike.<sup>331</sup> The requirements should pass

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326 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 62 para 139.

327 Although striking is not a breach of contract under the Act, and therefore strikers should be remunerated, the Act deals with this anomaly by providing that the employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike 1995 LRA s 67(3).

328 1995 LRA ss 187(1)(a) and 67. The Committee of Experts has found that striking workers should be protected against dismissal or discrimination: 'Since the maintaining of the employment relationship is a normal consequence of the recognition of the right to strike, its exercise should not result in workers being dismissed or discriminated against.' ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 77-8, para 179. However, conduct which amounts to a criminal offence is expressly excluded from protection. 1995 LRA s 67(8).

329 1995 LRA s 193(2).

330 Additional protection for striking workers is provided in s 5 of the Act which protects an employee from discrimination (1995 LRA s 5(1)) or prejudice (s 5(2)(a)(iv)) for exercising a right conferred by the Act, and from being prevented from exercising a right under the Act (s 5(2)(b)), or being advantaged for not exercising such a right (1995 LRS s 5(3)). Our courts have found that a financial reward to non-striking workers should be strictly prohibited. See *FAWU v Pet Products (Pty) (Ltd)* 2000 (7) BLLR 781 (LC).

331 Secondary strikes are prohibited unless 'the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect the secondary strike may have on the business of the primary employer'. 1995 LRA s 67(3). See C Cooper 'Sympathy Strikes' (1995) 16(4) *ILJ* 759-784.

constitutional muster on the grounds that the restrictions are based on notions of proportionality and are reflective of common and accepted practice in other jurisdictions.

Members of the South African National Defence Force have no right to strike: the military regulations<sup>332</sup> prohibit them from doing so and they are excluded from the protections afforded workers in terms of the 1995 LRA.<sup>333</sup> This infringement of their right to strike will most likely be found to be justifiable on two grounds. Firstly, they are public servants who exercise authority in the name of the state.<sup>334</sup> The ILO accepts that a limitation of the right to strike is acceptable where public servants are concerned. Secondly, as the Constitutional Court noted in *SANDU I*, the constitutional imperatives of maintaining a disciplined and effective force may justify the different treatment to which military trade unions (and therefore their members) are subject.<sup>335</sup>

### (a) Lockouts

One of the most significant changes to the constitutional labour rights in the Final Constitution is the absence of a lock-out right for employers. The Interim Constitution stated that 'recourse to the lock-out for the purposes of collective bargaining shall not be impaired, subject to section 33(1).'<sup>336</sup> The absence of a constitutional right or recourse to a lock-out reflects a worldwide trend.<sup>337</sup> Many countries protect a right to strike without offering employers a right to a lock-out.<sup>338</sup> Support for this view can also be found in the decisions of the ILO's Committee of Experts and the International Covenant on Economic, Social and Cultural Rights, which recognize the right to strike but accord no equivalent status to the lockout.

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332 See Amendment to the General Regulations for the South African National Defence Force and Reserve s 6.

333 1995 LRA s 2.

334 ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 69 para 158.

335 *SANDU v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC), (1999) 20 ILJ 2265, 2281 (CC).

336 IC s 27(5).

337 Lockouts are entrenched only in the constitutions of Guatemala, the Dominican Republic, Ecuador, El Salvador, Mexico and Sweden. See D Ziskind 'Labour Law in 143 Countries' *Comparative Labour Law* 223. The absence of a right to a lock-out in the constitutions of France, Italy and Portugal, despite a constitutional right to strike, illustrates the lack of equivalence granted these forms of industrial action in other jurisdictions. *The Regulation of Industrial Conflict in Europe, Strikes and Lockouts in 15 Countries* EIRR Report No 2 (December 1989).

338 The right to strike (with various qualifications) is enshrined in the constitutions of many countries, including: Argentina, Bolivia, Burkina Faso, Bolivia, Chile, Colombia, Cyprus, Ecuador, El Salvador, Dominican Republic, Dahomey, France, Greece, Guatemala, Honduras, Italy, Malagasy Republic, Mexico, Morocco, Panama, Paraguay, Portugal, Romania, Rwanda, Senegal, Sweden, Venezuela. ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 64 n12; Ziskind (supra) at 222.

Opponents of the right to lock-out argue that the employee's 'right or freedom to strike is already balanced by the employer's right of property and his prerogatives to hire and fire at will.'<sup>339</sup> It is the employer's power to act unilaterally that

is the true equivalent of the strike. Granting the employer an additional economic weapon in the form of the lockout would upset 'the delicate balance created by the recognition of the right or freedom to strike.'<sup>340</sup>

This argument was accepted by the *First Certification Judgment* Court. Rejecting the employers' case for the inclusion of a right to lock out in the Bill of Rights, the Constitutional Court stated that the ability of workers to act collectively (through collective bargaining and the right to strike) was necessary to enable them to counteract the greater social and economic power of employers. In contrast, the court said, employers have a range of other weapons at their disposal by means of which they may exercise their economic power against workers such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace.<sup>341</sup> Given that the Constitutional Court has explicitly rejected the inclusion of a right or recourse to the lockout in the Final Constitution, no part of FC s 23 should be interpreted to include such a right.<sup>342</sup>

The 1995 LRA contains an attenuated 'recourse' to a lockout.<sup>343</sup> The absence of a constitutional provision for a lock-out does not render unconstitutional the recourse to the lockout in the 1995 LRA. What it does mean, however, is that employers have no constitutional protection against the curtailing of their recourse to the lock-out in the LRA.<sup>344</sup>

## (b) Picketing

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339 R Ben Israel 'Introduction to Strikes and Lockouts: A Comparative Perspective' in 'Strikes and Lockouts in Industrialized Market Economies' (1994) 29 *Bulletin of Comparative Labour Relations* 14.

340 A Rycroft & B Jordaan *A Guide to South African Labour Law* (1992) 141.

341 *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), 1996 (10) BCLR (CC) 1253, 1284 ('*First Certification Judgment*'). On the basis that a lockout was not a universally accepted right, the Constitutional Court also rejected the argument that the exclusion of the lock-out meant that the text failed to comply with CP II, which requires that 'all universally accepted fundamental rights, freedoms and civil liberties' shall be provided for and protected in the Final Constitution 'due consideration [having been given] to, *inter alia*, the fundamental rights' contained in the Interim Constitution. *Ibid*.

342 This is particularly relevant in relation to the scope of the right to engage in collective bargaining as it is possible for the lock out to be considered an adjunct to that right. See § 53.5 *supra*.

343 Significantly, many other countries accord less recognition to the lock-out than the LRA. Portugal prohibits lock-outs altogether, their use in Spain is strictly curtailed, while in France and Italy they have no statutory recognition. D du Toit et al *The Labour Relations Act of 1995* (*supra*) at 196-7.

344 *First Certification Judgment* (*supra*) at 1285.

Picketing is a common activity engaged in by workers to obtain the support of other workers and the general public for their cause.<sup>345</sup> The right to picket is recognised by the ILO which holds that pickets may be prohibited only if they cease to be peaceful. The right to picket is

provided for in terms of FC s 17 but not explicitly in the labour rights.<sup>346</sup> However, in SANDU III, the High Court read FC s 23(2)(b) as conferring a right to picket on workers. The section states that every worker has the right to 'participate in the activities and programmes of a trade union'. Section 8(b) of the military regulations provided that the right of members of the force to assemble, to demonstrate, to picket and to petition was subject to the limitation that such right should not be exercised 'in respect of any matter concerning either the employment relationship with the Department of Defence or any matter related to the Department of Defence.' In declaring the provision invalid, the Court referred to ILO Committee of Freedom of Association findings that workers should enjoy the right to peaceful demonstration to defend their occupational interests.<sup>347</sup>

Picketing in the 1995 LRA takes the form of a trade union right.<sup>348</sup> The limiting of the right to a trade union right where the constitutional formulation grants an individual right is one possible ground for a constitutional challenge. The limitation should survive constitutional scrutiny on the basis of the potentially disruptive effect of a picket on the public and the need to ensure that the parties who call the picket are sufficiently accountable.

The most probable constitutional challenge to the LRA's picketing provision will arise in the context of claims by employers that their common-law right to property has been infringed.<sup>349</sup> The Act provides for picketing on an employer's premises only with the permission of the employer, but states that this permission may not be withheld unreasonably.<sup>350</sup> The CCMA is empowered to assist parties (at their request) to reach agreement on picketing rules, including rules regarding picketing on an employer's premises if the CCMA is satisfied that the employer has withheld permission unreasonably.<sup>351</sup> Thus to it initially falls the difficult task of balancing the

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345 See ILO *Freedom of Association and Collective Bargaining* (1994) (supra) 76 at para 174.

346 See S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson, M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43 (Contains an extensive discussion of the right to picket and conditions for its appropriate limitation.)

347 SANDU III (supra) at 2118C-D. The High Court found that the Minister of Defence's justification for the provision that 'mass action against the SANDF is usually, if not always, in basic conflict with the type of discipline desired in a defence force', did not fulfil FC s 36's requirements for justification. Ibid at 2118H-J.

348 1995 LRA s 69(1). A registered trade union may authorize a picket by its members and supporters for the purposes of peacefully demonstrating in support of any protected strike or in opposition to any lock-out.

349 See Woolman 'Assembly' (supra) at § 43.7 (Analysis of picketing under the 1995 LRA.)

350 1995 LRA ss 69(2) and (3).

right to picket against the employer's property rights. Disputes over picketing which remain unresolved by the CCMA will be heard by the Labour Court.

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