
WORKERS' RIGHT TO FREEDOM OF ASSOCIATION AND TRADE UNIONISM IN SOUTH AFRICA: AN HISTORICAL PERSPECTIVE

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1 Introduction

Workers' right to freedom of association is the fundamental labour right. In the workplace, the right to freedom of association is essentially an "enabling" right which entitles workers to form and join workers' organisations of their own choice in order to promote common organisational interests. For workers, freedom of association is a means of facilitating the realisation of further rights, rather than just a right in itself. It is considered *the* single essential right for workers from which other rights flow and without which other rights are illusory.¹ It is therefore referred to as a "shorthand expression for a bundle of rights and freedoms relating to membership of associations of workers and employers".² Without the right to freedom of association, workers are at risk of being isolated and powerless.

The South African history of labour relations and workers' rights is long and complicated. Accordingly, South African labour relations need to be considered within the context of the industrial revolution, economic history and traditional attitudes to work.³ The laws which have developed as a result of South Africa's chequered political history have determined the nature and scope of our present industrial relations system.⁴ This article examines workers' right to freedom of association and trade unionism in South Africa not only from a legal, but, importantly, also from a historical perspective. This history from colonisation to *apartheid* helps us understand South African workers' long march to freedom of association.

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1 For instance, the right to organise, the right to bargain collectively and the right to strike unfold seamlessly from the basic right to freedom of association. They all have in common the balancing of the rights of employers and employees in the workplace.

2 Creighton "Freedom of association" in Blanpain *et al* (eds) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (1987) 173.

3 Elias *Government and Politics in African Context* (1963) 1.

4 Grobbelaar "An overview of industrial relations in South Africa" in Coetzee (ed) *Industrial Relations in South Africa* (1976) 178.

2 Workers' right to freedom of association under the colonial and *apartheid* South African legal order

2 1 Introduction

The history of freedom of association and trade unionism in South Africa before the new constitutional legal order will be divided into three periods, namely the period from the Dutch settlement in 1652 to the formation of the Union of South Africa in 1910, the period from 1910 to the official implementation of a policy of *apartheid* in 1948, and the period of *apartheid* from 1948 to 1993.

2 1 1 Workers' right to freedom of association from the Dutch settlement in 1652 to the formation of the Union of South Africa in 1910

The Dutch East India Company formed the first European settlement in southern Africa in 1652. The settlers brought with them a few domestic slaves.⁵ In 1658, in order to alleviate their labour shortage problems, the Dutch East India Company landed shipments of slaves from Guinea Coast and Angola for private ownership.⁶ Later the majority of the slaves came from Madagascar, Indonesia, South India and Ceylon.⁷

Slavery in Southern Africa was abolished in 1834.⁸ In 1856, white farmers in the Cape pushed for legislation aimed at addressing their complaints of labour shortages.⁹ The legislation set out the respective rights and duties of master and servant in a non-racial way. During this period, the issue of trade unionism was of little interest.¹⁰

Arguably, the South African labour-relations system had its origin in the discovery of diamonds¹¹ and gold and the subsequent development of the mining industry.¹² The discovery of diamonds and gold led to an influx of labour and to the establishment of other industries to support the mining community. As South Africa did not have a sufficiently skilled labour force, European immigrants, mostly from Britain, were employed to do skilled work. These workers brought with them the European and especially the British brand of

5 Webster *et al Work and Industrialisation in South Africa* (1994) 28.

6 Allen *The History of Black Mine Workers in South Africa* (1992) 98.

7 *Idem* 99.

8 *Idem* 103.

9 Cape Master and Servant Act 15 of 1856.

10 Finnemore & Van der Merwe *Introduction to Labour Relations in South Africa* (1996) 22.

11 Diamonds were discovered in 1870 in Kimberley. See Damarupurshad *Historical Diamond Production: South Africa*, Report to the Department of Minerals and Energy Report R61 of 2007 1-2.

12 See Neal *Fundamental Social Rights at Work in the European Community* (1999) 32-33; Bendix *Industrial Relations in South Africa* (1989) 286.

trade unionism.¹³ There is no absolute certainty about the formation of the first workers' movement in South Africa. According to Finnemore and Van der Merwe¹⁴ one of the first documented trade unions in South Africa was the Carpenters and Joiners Union that was founded in 1881. This trade union represented skilled white workers mainly recruited from Australia and Europe.¹⁵ However, Van Jaarsveld and Van Eck argue that the first trade union in South Africa was founded in Johannesburg in 1892.¹⁶

In 1894, attempts were made to establish a trade council in Johannesburg to coordinate some of the trade unions.¹⁷ These attempts failed because some of the workers refused to participate. A trade council came into existence in the latter part of 1895, but soon became defunct. The skilled mineworkers and artisans who poured into South Africa from overseas, mainly from Britain, during the latter half of the nineteenth century, brought with them their own peculiar style of unionism.¹⁸ Their unions excluded black workers, whom they generally regarded as cheap unskilled labour that could be used by employers to undermine their job security and high standard of living.¹⁹ Black workers thus came to be excluded from trade unions by custom and tradition.

Attempts to secure cheap labour after the South African War were relatively unsuccessful because many black workers did not return to the mines after the War.²⁰ Consequently, a large number of Chinese workers were imported in 1904. Many problems arose and the Chinese workers were repatriated in 1907 because of pressure from the British government.²¹

In 1909 the Transvaal legislature enacted the Industrial Disputes Prevention Act.²² This was the first statute in South Africa designed to regulate labour relations in general. Under this Act, employers were obliged to give one month's notice of any changes they proposed to make to the terms and conditions of employment applicable in the enterprise.²³ If an employee

13 See Ringrose *The Law and Practice of Employment* (1983) 5; Bendix (n 12) 287.

14 Finnemore & Van der Merwe (n 10) 22.

15 *Ibid.*

16 Van Jaarsveld & Van Eck *Principles of Labour Law* (2002) 254.

17 Walker & Weinbren *The History of Trade Unions and the Labour Movement in the Union of South Africa* (1961) 2; Scheepers "The challenge facing trade unions" in Coetzee (n 4) 150; Finnemore *Introduction to Labour Relations in South Africa* (2002) 22.

18 Jones *Collective Bargaining in South Africa* (1982) 26.

19 *Ibid.*

20 The War took place between 1899 and 1902. See Brassey *Employment and Labour Law* Vol 1 (1998) A1:20.

21 See Finnemore (n 17) 27; Stahl "Migrant labour supplies, past, present and future with special reference to the gold-mining industry" in Bohning (ed) *Black Migration to South Africa* (1981) 13.

22 Transvaal Act 20 of 1909.

23 *Idem* s 5(1).

objected to the change, a conciliation and investigation board²⁴ could be appointed to investigate the matter and report back within a month.²⁵ Unless the parties to a dispute agreed otherwise, the board's findings were not binding but merely advisory.²⁶

No industrial action was permissible unless the conciliation and investigation board had reported on the dispute and until the moratorium on unilateral action had expired.²⁷ The Act excluded from its application employers who employed less than ten employees as well as public servants.²⁸

2 1 2 *Workers' right to freedom of association from the establishment of the Union of South Africa to the institutionalisation of apartheid (1910-1948)*

2 1 2 1 Workers' rights to freedom of association under the Union of South Africa

The Union of South Africa was established in May 1910 by the joining of the British colonies of the Cape and Natal, together with the former Boer Republics of the Transvaal and Orange Free State.²⁹ A constitution was adopted,³⁰ but the rights and liberties of black South Africans were ignored; instead it dealt principally with white interests.³¹

In 1911 the Mines and Works Act³² was promulgated. This Act came into being at the demand of skilled white miners who were at the time immigrants from overseas countries and insisted that they should not face any competition from the large number of non-whites employed mainly in unskilled and menial work.³³ Requiring certificates of competency, it excluded black workers from all skilled jobs and also from certain semi-skilled jobs in the mines. Also the Native Labour Regulations Act³⁴ was passed in 1911. This Act prohibited strikes by black workers. It won the support of employers and mine owners by placing tight control on employees and reinforcing the criminal sanction for breach of employment contracts by black workers.³⁵ As a result of the exclusion of black workers by legislation, the South African Native National Congress was formed

24 This board could only be appointed if the dispute affected ten or more employees.

25 S 5(2).

26 S 25.

27 S 6(1).

28 Ss 1 and 2.

29 Doxey *The Industrial Colour Bar in South Africa* (1961) 1.

30 It came into effect on 31 May 1910.

31 Togni *The Struggle for Human Rights: An International and South African Perspective* (1994) 131.

32 Act 12 of 1911.

33 Grobbelaar (n 4) 179.

34 Act 15 of 1911.

35 Brassey (n 20) A1:23; Finnemore & Van der Merwe (n 10) 23.

in 1912. It was the forerunner of the African National Congress. The South African Native National Congress embarked on a violent campaign against the 1910 Constitution that denied black people political rights.³⁶ They further protested against the reservation of jobs for whites and coloureds only. Despite the South African Native National Congress' efforts to eliminate restrictions based on colour, the government continued to pass laws limiting the rights and freedoms of black workers.

2 1 2 2 Labour unrest by black workers

In the later part of 1918 and early 1919 black mineworkers embarked on a strike for higher pay and the abolition of the colour bar. To restore order, the government passed the Natives Urban Areas Act³⁷ which tightened the control on black labour. Provisions were made for the proclamation of urban areas as zones in which the movement of black workers was restricted. Black males entering proclaimed areas had to report their presence to the authorities. When they managed to find employment, the employer had to register the employment contract with the police. When the contract was terminated, black employees had to leave the area unless they found another job within a prescribed period.³⁸ During these early days of segregation, there were no legal measures to control the activities of trade unions. Trade unions mostly tried to enforce better conditions of employment and other workers' demands by means of strikes. Some of these strikes were successful while others were not. The Industrial and Commercial Workers' Union was established in 1919. It became the first black workers' union. Although this union was not registered, it did take many issues to court and fought for the rights of black workers. However, due to factors such as external pressure, internal inefficiencies, division in the leadership and lack of democratic structure, the union collapsed and did not survive the depression of the early thirties.³⁹

Meanwhile, notwithstanding the exploitation of black workers, the position of white workers was also not entirely secure as the mine owners were pushing them to accept ruthless working conditions and lower wages. This led to industrial unrest by white workers in reaction to what they saw as attempts by employers to introduce cheap black labour.⁴⁰ And in 1922, when some white workers were to be retrenched, large-scale labour unrest and violent strikes took place on the Witwatersrand. The primary cause of the conflict was the

36 Finne more & Van der Merwe (n 10) 24.

37 Act 21 of 1923.

38 Brassey (n 20) A1:25.

39 Van Jaarsveld & Van Eck (n 16) 254.

competition between blacks and whites for jobs as well as the differential scales of pay.⁴¹ This labour unrest became known as the Rand Rebellion.⁴² During the unrest, a large number of workers were killed or seriously wounded. The Rand Rebellion made the government realise that urgent attention had to be given to labour relations. The strikes first resulted in the institution of conciliation machinery for the orderly negotiation of conditions of employment. The Rand Rebellion also precipitated a change of labour legislation. The Industrial Conciliation Act was consequently passed in 1924, shortly before the defeat of the Smuts government.⁴³ The promulgation of this Act was a result of more than a decade of spiraling labour unrest within an inadequate statutory framework.

2 1 2 3 The first consolidated labour legislation in South Africa: the Industrial Conciliation Act of 1924

The Industrial Conciliation Act was South Africa's first comprehensive labour legislation. This Act finally accorded legal recognition to the trade union movement in South Africa. Not only was statutory recognition given to trade unions, but trade unions and their members were also protected against employers and they were allowed to function in an organised manner.⁴⁴ This Act remained loyal to the basic principles underlying the 1909 Industrial Dispute Prevention Act and favoured a process of voluntary collective bargaining backed by curbs on industrial action.⁴⁵ It introduced a framework for collective bargaining and a system for the settlement of disputes and regulated strikes and lock-outs. Again, under the Industrial Conciliation Act it was compulsory to register trade unions and employers' organizations.⁴⁶ However, the Act expressly excluded black employees from the definition of an employee and they could therefore not benefit from its provisions.⁴⁷

40 Jones (n 18) 26.

41 Grobbelaar (n 4) 179.

42 Van Jaarsveld & Van Eck (n 16) 254.

43 Act 11 of 1924.

44 See Van Jaarsveld & Van Eck (n 16) 254; Jones (n 18) 24; Grobbelaar (n 4) 179.

45 See Lever "Capital and labour in South Africa: The passage of the *Industrial Conciliation Act of 1924*" in Webster (ed) *Essays in South African Labour History* (1978) 82; Brassey (n 20) A1:26-27.

46 S 12 of the Industrial Conciliation Act of 1924.

47 See Lever (n 45) 82; Finnemore & Van der Merwe (n 10) 27; Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2000) 4-5; Olivier, Smit, Kalula & Leslie "Collective agreements and individual contracts of employment in labour law: South African report" in Sewerynski (ed) *Collective Agreements and Individual Contracts of Employment* (2003) 207; Brassey (n 20) A1:28-29; Jones (n 18) 26; Coetzee (n 4) 179; Maree *The Independent Trade Unions 1974-1984* (1987) 117-118; Bendix *Industrial Relations in South Africa* (1992) 286-28; Ringrose (n 13) 3-4; Kittner *et al Labour Law Under the Apartheid Regime* (1989) 3-4.

Only white and coloured workers were permitted to form and join registered trade unions. Some unions were bi-racial, with membership open to white and coloured workers, while others were uni-racial, consisting of only white or only coloured workers.⁴⁸ White leadership and workers who perceived a community of interest with coloureds and considered them fellow workers supported the bi-racial unions. The exclusively white trade unions tended to have a “conservative” leadership that shunned an affinity with coloured workers, thus forcing them to form their own separate racial unions.⁴⁹

In furthering its control over industrial relations the government passed the Wage Act⁵⁰ in 1925. This Act provided for the unilateral determination of wages and working conditions where there was no agreement under the Industrial Conciliation Act and in industries falling outside the industrial council system.⁵¹ Unlike the Industrial Conciliation Act, the Wage Act applied to black workers and as a result a few trade unions were able to gain some benefits for black members by using the provisions of this Act to their advantage. Since the Act provided no warrant for racial discrimination, wage determinations had to be equal amongst races, but, by manipulating the jurisdiction of the wage boards, the authorities made sure that the system operated for the benefit of white workers only.⁵²

2 1 2 4 The development of non-racial trade unions

A high point in the history of freedom of association and trade unionism in South Africa was reached in 1926 when the South African Trade and Labour Council was formed.

This Council pursued a policy of open membership for all trade unions in its efforts to achieve national unity. It promoted the establishment of parallel black workers’ unions.⁵³ However, its hold on its members was tenuous, for they were randomly distributed and not very well organised. Despite its non-racial policy, many unions remained divided on racial grounds. The Council, however,

48 Jones (n 18) 27.

49 *Ibid.*

50 Act 27 of 1925.

51 S 1.

52 As one judge In *Ex parte Minister of Justice: In re R v Gerstner* 1930 AD 420 remarked, “the whole idea of this wage legislation was to secure to an employee a proper minimum wage, commensurate with his qualification and services” (at 423). The employees who were to receive this benefit were mainly whites and if blacks received any benefit as well, it was only for fear that they would otherwise undercut their white counterparts.

53 Brassey (n 20) A1:31.

ceased to be significant when, under the influence of white liberals, it expelled its communist office bearers.⁵⁴

On the face of the problems emerging from the dual system, the Industrial Conciliation Act of 1924 was amended in 1930.⁵⁵ The Amendment Act authorised the Minister of Labour to specify, on the recommendation of an industrial council or conciliation board, the minimum wage rates and maximum working hours for "persons excluded from the definition of 'employee'".⁵⁶

In 1937, the Industrial Conciliation Act of 1924 was replaced by the Industrial Conciliation Act 36 of 1937 that made provision for an inspector of the Department of Labour to represent pass-bearing African workers at industrial council meetings. However, neither the 1930 amendment nor the 1937 Act solved the problems of the dual industrial relations system.⁵⁷

By 1946, almost a quarter of the African population was resident in the urban areas. Trade union membership increased considerably.⁵⁸ Towards the end of 1946, a strike broke out and many people were injured. The government's response to the strike was to table amendments to the Industrial Conciliation Act to prohibit strikes by black workers.⁵⁹ The strike was crushed and the black trade union movement was shattered on the eve of the establishment of *apartheid*.

2.2 Workers' right to freedom of association under the *apartheid* regime (1948-1993)

2.2.1 Introduction

In 1948 the National Party government came to power and it institutionalised *apartheid*. Accordingly, white workers continued to prosper under the National Party government to the exclusion of black workers.⁶⁰ The *apartheid* period was divided into two eras, namely first the era of consolidating the exclusion policy and second the era of integrated labour law. This will be discussed in the following sections.

54 Lewis "The new unionism: Industrialization and industrial unions in South Africa 1925-1930" 1977 (3) *South African Labour Bulletin* 27; Finnemore (n 17) 22.

55 Industrial Conciliation Amendment Act 24 of 1930.

56 Du Toit *et al* (n 47) 6.

57 *Idem* 6-7.

58 Meara "The 1946 African mine workers' strike and the political economy of South Africa" 1975 *J of Commercial and Comparative Politics* 150. See also Brassey (n 20) A1:34.

2 2 1 1 The era of consolidating the exclusion policy

The National Party government soon established the Botha Commission of Inquiry⁶¹ to investigate the whole spectrum of labour relations matters in South Africa.

The Commission was appointed with the hope that it would provide a blueprint for the introduction of *apartheid* in the workplace and the suppression of black trade unionism.⁶²

When the United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948, South Africa persisted in its policy of racial segregation. Although South Africa was a United Nations Member State, attempts by the international community to have South Africa adhere to the Universal Declaration of Human Rights failed.⁶³ The South African government had no interest in the pursuit of human rights such as equality amongst the races in particular, since it was in contradiction with its policy of *apartheid*. Accordingly, the post-1948 period was a time during which the National Party government enacted much of its repressive legislation aimed at giving legal force to its ideology of racial segregation.

2 2 1 1 1 Suppression of communism and black workers' trade unionism

The findings of the Botha Commission were released in 1950. Following the Commission's recommendations, the government passed the Suppression of Communism Act.⁶⁴ This Act was intended to suppress any collective organisation or movement by black workers. The government policy in passing this Act was to divide black trade unionism. Many black trade union leaders were arrested and banned. Political parties such as the African National Congress and the South African Communist Party, which supported the vision of black trade unionism, were also targeted by this legislation.⁶⁵ The Commission further recommended that black trade unions should be able to negotiate with the statutory bodies but only if the State approved the establishment of a conciliation board to be chaired by a state official.⁶⁶ It further recommended that strikes by black workers be permissible, but only if they

59 Brassey (n 20) A1:36

60 Finnemore & Van der Merwe (n 10) 29; Brassey (n 20) A1:36.

61 The Commission was established on 1 Oct 1948. It was called the Industrial Relations Commission of Enquiry. It was headed by Botha and is hereinafter referred to as the "Botha Commission".

62 Brassey (n 20) at A1:36.

63 Togni (n 31) 132.

64 Act 44 of 1950.

65 Finnemore & Van der Merwe (n 10) 29.

were primary in nature and only in most exceptional circumstances.⁶⁷ It also proposed that registered trade unions should be prohibited from engaging in political activities.⁶⁸ The government feared the use of black trade unions as a political platform for change. Therefore, the government was determined to keep them out of the institutional collective bargaining structures.

The real divisions among the various elements of the registered trade unions and the lack of any effective organisation amongst black workers were some of the factors which were undoubtedly responsible for the government's decision to introduce the Native Labour Settlement of Disputes Act in 1953.⁶⁹ This Act made provision for the election of internal committees in industrial establishments that employed twenty or more black workers.⁷⁰ Their powers were minimal, consisting of little more than the right to be consulted if a dispute arose within the plant.⁷¹

The South African Trade Union Council, which later became the Trade Union Council of South Africa, was formed in 1954. Black trade unions were again initially excluded from this federation, but their members were encouraged to form parallel unions with which they could liaise and maintain a close working relationship.⁷²

Accordingly, in 1955, some erstwhile affiliates of the Trade Union Council of South Africa met with some members of the Council of Non-European Trade Unions and formed a new body called the South African Congress of Trade Unions (SACTU).⁷³ SACTU rejected the system of parallel unionism and was determined to mobilise the black working class in order to secure political liberation.⁷⁴ SACTU also maintained a close political link with the African National Congress and was active in promoting a political role for trade unions.⁷⁵

66 Pars 1794-1796 of the Botha Commission Report.

67 Pars 1820 and 1823 of the Botha Commission Report.

68 Par 1742 of the Botha Commission Report.

69 Act 48 of 1953.

70 S 7.

71 Brassey (n 20) A1:38.

72 Finnemore & Van der Merwe (n 10) 24.

73 Brassey (n 20) A1:39; Finnemore & Van der Merwe (n 10) 30.

74 De Clercq "The organised labour movement and state registration: Unity or fragmentation?" 1980 (5) *SA Labour Bulletin* 30-31.

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

2.2.1.1.2 Reinforcement of a racially exclusive system: The Industrial Conciliation Act of 1956

To give effect to the recommendations of the Botha Commission, the Industrial Conciliation Act of 1924 was repealed in 1956 and a new Act passed.⁷⁶ The Industrial Conciliation Act of 1956 was passed by the National Party Parliament in furtherance of its policy of *apartheid*. The Industrial Conciliation Act completed the construction of the racially exclusive industrial system in South Africa by entrenching the racial division of workers, prohibiting the registration of new unions having both white and “coloured” members and reserving certain work exclusively for “persons of specified race”.⁷⁷

The Industrial Conciliation Act of 1956 was the first statutory enactment which extensively dealt with freedom of association and trade union rights for workers. It provided that no employer could require an employee, whether by a term or condition of employment or otherwise that he should not be or become a member of a trade union or other similar association of employees.⁷⁸ Any such term or condition in any contract of employment was void.

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

any person (other than a bantu) employed by or working for, any employer, and receiving or being entitled to receive, any remuneration and any other person whatsoever (other than a bantu) who in any manner assists in the carrying on, or conducting of the business of the employer.⁷⁹

This Act further prohibited the registration of multi-racial unions and obliged those who were already formed to subdivide into segregated unions. In many areas job reservations were made to protect white workers from competition by their black counterparts.⁸⁰ As a result, only white and coloured workers could establish and join registered trade unions existing in both bi-racial and uni-racial form.

The exclusion of black workers from the definition of “employee” did not prevent them from forming and joining unregistered trade unions of their own. In fact, such black trade unions were formed on a fairly large scale, enjoying

76 Act 28 of 1956.

77 S 77 of the Act. See also Du Toit *et al* (n 47) 8.

78 S 78(1) of Act 28 of 1956.

79 S 1 of Act 28 of 1956. See also Brassey (n 20) A1:38; Finnemore & Van der Merwe (n 10) 29.

80 S 77 of Act 28 of 1956. See also Brassey (n 20) A1:38; Finnemore & Van der Merwe (n 10) 29.

substantial membership among urban black workers, migrants, frontier commuters and foreign black workers. However, because these unions could not be registered, they were not recognised by law. They operated outside the provisions of the Act.⁸¹ They could negotiate and conclude collective agreements with individual companies but those collective agreements could not be enforced under the provisions of the Industrial Conciliation Act.⁸²

In 1957, the South African Confederation of Labour (SACL) was formed and it comprised mainly white conservative unions representing mining, railway and steel workers. SACL was allied with the National Party government.⁸³ After the Sharpsville massacre in March 1960, banning orders were served on some political parties⁸⁴ and all SACTU leaders were consequently forced (to go) into exile. As a result, black trade union activities virtually disappeared during the 1960s.⁸⁵

In 1961, the Union of South Africa became the Republic of South Africa under the National Party government and a new Constitution was adopted.⁸⁶ Read with the Electoral Laws Consolidation Act,⁸⁷ the Constitution of 1961 made provision for social and political participation in the highest affairs of the state by "whites" only.⁸⁸ The black population was set on a path of separate development through a complex system that extended through a number of pieces of legislation.⁸⁹

In 1962, the United Nations General Assembly passed a resolution condemning South Africa's *apartheid* policies and requesting all the United Nations member states to cease military and economic relations with South Africa.⁹⁰ In response, South Africa withdrew from the International Labour

81 Jones (n 18) 28.

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

83 Finnemore & Van der Merwe (n 10) 24.

84 Particularly the ANC (African National Congress) and PAC (Pan African Congress) which were the most popular black political organisations at that time.

85 Finnemore & Van der Merwe (n 10) 30. See also Finnemore (n 17) 28.

86 Act 32 of 1961.

87 Act 46 of 1946.

88 Burdick & Van Wyk "Apartheid legislation 1976-1986" 1987 *Acta Juridica* 123.

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

90 Resolution 1761 of 1962.

Organisation in 1966 and, as a result, became increasingly isolated internationally.

In 1973, black workers embarked on a strike over wages. Industry was brought to a near standstill.⁹¹ For the first time, black workers demonstrated their real power. It became clear that even without the backing of any formal workers' organisation, black workers could press the government on labour issues.⁹² After the strike, black workers started to organise themselves into trade unions. These unions were referred to as "independent trade unions" since they were seen as separate from existing unions dominated by white workers.⁹³

Towards the end of 1973 the Bantu Labour Regulations Act⁹⁴ was passed to regulate the conditions of employment of black employees, the prevention and settlements of disputes between black employees and their employers as well as the procedure for setting up labour committees. This Act undermined the development of black trade unionism in that black workers were confined to mainly employer-initiated committees with little if any bargaining power. In addition, not all black workers were covered by the provisions of this Act. Those in agriculture, gold and coal mining as well as government services were excluded from its provisions.⁹⁵

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

2 2 1 2 The era of integrated labour law

2 2 1 2 1 The Wiehahn Commission of Inquiry

The period from 1976 is arguably the most interesting period in the development of South African labour relations and trade unionism. During 1976, calls for disinvestments in South Africa increased as did the shortage of skilled workers. As a result of pressure from the international community, the government appointed the Wiehahn Commission of Inquiry into Labour Legislation in 1977. The Commission issued its first report in 1979 and

91 Du Toit *et al* (n 47) 9.

92 Finnemore & Van der Merwe (n 10) 30.

93 Maree (n 47) 1-2.

94 Act 70 of 1973 which amended the Black Labour Settlement of Disputes Act 48 of 1953.

95 S 1 of Act 70 of 1973.

proposed fundamental changes to the industrial relations system.⁹⁶ The year 1979 proved to be a turning point as it witnessed the genesis of an integrated system of labour law. In its report in 1979, the Wiehahn Commission recommended that freedom of association be granted to all employees regardless of sex, race or creed and that trade unions be allowed to register irrespective of their composition in terms of colour, race or sex.⁹⁷

The Commission also recommended that trade unions be free to determine their own rules and that the contractual exclusion of an employee's right to union membership or participation in union activities by an employer should be defined as an unfair labour practice. Finally, the Commission called for the establishment of an Industrial Court and the abolition of job reservation.⁹⁸

Most of the recommendations and findings of the Wiehahn Commission were accepted. The Industrial Conciliation Act 28 of 1956 was amended in 1979 and in 1980.⁹⁹ The 1981 amendment¹⁰⁰ changed its name to the Labour Relations Act 28 of 1956 which was further amended in 1982, 1983, 1984, 1988 and 1991.¹⁰¹ These amendments were aimed at providing more substantial protection of freedom of association to all employees regardless of origin or race. Trade unions were granted full autonomy in respect of their membership and all racial restrictions were removed.¹⁰² Hence, to facilitate the admission of black workers into registered trade unions, the definition of "employee" was changed to avoid any reference to race or any other ground of discrimination. As a result, there was a rapid growth in the number of trade unions representing black workers.

Part 5¹⁰³ of the Wiehahn Report was published in 1981.¹⁰⁴ It contained a number of recommendations concerning freedom of association and trade unionism. It furthermore recommended that labour law and practices should correspond with international conventions and codes and that the statutory

96 See Roos "Labour law in South Africa 1976-1986: The birth of the legal discipline" 1997 *Acta Juridica* 96-98; Du Toit *et al* (n 47) 9.

97 Report of the Wiehahn Commission of Enquiry into Labour Legislation ("Wiehahn Report") Part I RP 47/1979.

98 Wiehahn Report (Parts 1-6). See also Finnemore (n 17) 31; Van Jaarsveld & Van Eck (n 16) 255; Jones (n 18) 30; Rycroft "Labour" in Ronald *et al South African Human Rights and Labour Law Yearbook* Vol 7 (1996) 139-140; Olivier *et al* "Collective agreements and individual contracts of employment in labour law – South African report" in Sewerynski (n 47) 207-208; Friedman *Building Tomorrow Today: African Workers in Trade Unions 1970-1984* (1987) 14-15.

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

100 Labour Relations Amendment Act 57 of 1981.

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

102 Finnemore & Van der Merwe (n 10) 31.

103 Parts 2, 3, 4 and 6 which were not crucial for the development of freedom of association and trade unionism in South Africa during the era of integrated labour law, were published in 1980.

104 It was published as Report 27/1981. See also Van Jaarsveld & Van Eck (n 16) 255.

requirements and procedures for registration of trade unions be revised.¹⁰⁵ This created a general fear amongst whites that as trade unions became larger and powerful they would bring about social and political changes in the country.

2.2.1.2.2 The period of rapid growth of trade unionism in South Africa

During this period the Industrial Court played a vital role in the development of South African labour law as demonstrated by its case law.¹⁰⁶ The Industrial Court introduced notions of fairness and international labour standards into the melting pot of South African labour law, which grew into a formidable body of jurisprudence, supporting the protection of workers and the bargaining power of unions.¹⁰⁷

During the early 1980s, all outdoor trade union meetings were prohibited in South Africa.¹⁰⁸ Outdoor union meetings were only allowed with the permission of the Minister of Law and Order or a magistrate having jurisdiction in that particular area.¹⁰⁹ Permission for these gatherings was granted subject to the assurance being given to the authorities that only certain named and specified people would address the meeting.

A detailed agenda and the topics which were to be addressed during the meeting were to be submitted to the authorities for approval. Indoor gatherings were permitted without official authorisation but with some legislative limitations.¹¹⁰ All these prohibitions were intended to discourage black trade unionism.

In 1983, South Africa adopted a new constitution.¹¹¹ Like its predecessors, the 1983 Constitution entrenched and enforced racial discrimination and classification which was at the heart of *apartheid*. It maintained the exclusion of

105 Van Jaarsveld & Van Eck (n 16) 255.

106 See, eg, some of the jurisprudence of the Industrial Court in the following cases decided since its establishment: *Mazibuko v Mooi River Textile Ltd* 1989 (10) ILJ 875 (IC); *Black Allied Workers Union v Initial Laundries (Pty) Ltd* 1988 (9) ILJ 272 (IC); *National Automobile & Allied Workers Union (NAAWU) v Atlantis Electric Diesel Engines (Pty) Ltd* 1989 (10) ILJ 948 (IC); *Keshwar v SANCA* 1991 (12) ILJ 816 (IC); *Gana v Building Materials Manufacturers Ltd t/a Doorcor* 1990 (11) ILJ 565 (IC); *NUM v Amcoal Colliery & Industrial Operations Ltd* 1990 (11) ILJ 1295 (IC); *Radio Television Electronics & Allied Workers Union v Tedalex (Pty) Ltd* 1990 (11) ILJ 1272 (IC); *Ppwawu v SA Printing and Allied Industries Federation* 1990 (11) ILJ 345 (IC); *Bawu v Umgeni Iron Works* 1990 (11) ILJ 589 (IC); *National Union of Steel & Allied Workers v Basaans Du Plessis* 1990 (11) ILJ 359 (IC); *NUMSA v Metkor Industries (Pty) Ltd* 1990 (11) ILJ 1116 (IC); *FAWU v Willoton Oil & Cake Mills* 1990 (11) ILJ 131 (IC).

107 Olivier (n 98) 207-208.

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

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

110 In terms of s 25 of the Criminal Procedure Act 51 of 1977 the police may be present in any meeting on authorisation from a magistrate who has reasonable grounds to believe that the internal security of the Republic or the maintenance of public order may be endangered; or if he considers there to be a likelihood that an offence may be committed at the meeting.

111 Act 110 of 1983. Hereinafter "the 1983 Constitution".

the black majority outside of state politics as they were denied political rights.¹¹² In 1984, the government created a tri-cameral parliament extending political rights in central government to coloureds and Indians but excluding blacks. The black labour movements used various strategies to fight the entrenched *apartheid* government.¹¹³ As a result, in 1985, the Congress of South African Trade Unions (COSATU) was formed. COSATU strongly supported the African National Congress which was banned at that time since it was furthering the struggle against *apartheid*. COSATU supported the political struggle and calls for international sanctions and boycotts against the *apartheid* government.

The United Workers Union of South Africa was also formed in 1986 under the umbrella of the Inkatha Freedom Party. Its members were mainly Zulu workers.¹¹⁴ Its formation led to immediate rivalry and confrontation with the Congress of South African Trade Unions affiliates. It appeared later that in order for the government to counter the growing power of the Congress of South African Trade Unions and its supporters, it had secretly sponsored the United Workers Union of South Africa.¹¹⁵

Another significant new federation of workers was formed when the Azanian Council of Trade Unions (AZACTU)¹¹⁶ and the Council of Unions of South Africa (CUSA)¹¹⁷ joined forces to establish the National Council of Trade Unions, which later developed strong links with the Pan African Congress.¹¹⁸

The 1988 Labour Relations Amendment Act¹¹⁹ extended the protection of black workers by categorising any direct or indirect interference with the right of employees to associate or not to associate as an unfair labour practice. The Labour Relations Amendment Act protected individual employees against any anti-union discrimination but its protection was limited to employees as defined in the Act. Employees outside the scope of the Act were unprotected. Job applicants were discriminated against on the grounds of their known or previous union involvement.¹²⁰ Employees in the public sector,¹²¹ domestic

112 Burdzik & Van Wyk (n 88) 126.

113 Finnemore (n 17) 31.

114 *Idem* 27.

115 Finnemore & Van der Merwe (n 10) 34.

116 In 1984, AZACTU was formed from an alliance of trade unions strongly supporting the philosophy of black consciousness. It had a strong link with AZAPO (Azanian People's Organisation).

117 CUSA, which was formed in 1980, insisted that the leadership be in the hands of black members, even though it accepted the principle of non-racial unionism.

118 See Bendix (n 47) 211, 227-229; Finnemore & Van der Merwe (n 10) 34.

119 Act 83 of 1988.

120 See Rycroft (n 98) 105.

121 Public service employees were covered by the Public Services Act 111 of 1984. S 351 of this Act provided for staff associations whose membership was restricted to employees in the public sector only. These associations have limited rights to negotiate with the state on terms and conditions of employment in the public sector.

servants and farm labourers were excluded from the scope of the Act.

The Industrial Court could grant an urgent interdict prohibiting unfair labour practices. The Act also introduced a presumption of liability on the part of trade union members, office bearers and officials for damages caused by unlawful industrial action.¹²² The 1988 Amendment Act further established the Labour Appeal Court.

Between 1988 and 1990, trade unions, like all other organisations in South Africa, were faced with the challenge of maintaining membership.¹²³

2 2 1 2 3 The 1990s: The process of transition to a democratic order

The 1990s were characterised by the consolidation and incorporation of a new labour dispensation. During this period South Africa was faced with unprecedented socio-economic and political problems. Many of these problems overflowed into the area of labour relations resulting in consumer boycotts and a sharp rise in the number of strikes.¹²⁴

In 1990, President FW De Klerk announced the release of Nelson Mandela and other political prisoners. The government lifted the ban on various political organisations including the African National Congress, Pan African Congress and the United Democratic Front. In September 1990, the government entered into a broad-ranging agreement with the South African Consultative Committee on Labour Affairs, Congress of South African Trade Unions and National Council of Trade Unions and committed itself to modifying those provisions of employment law statutes¹²⁵ which Labour found most offensive. Talks took place between the State and Labour that produced an agreement to repeal the challenged provisions. The minutes of those negotiations of 14 September 1990 came to be known as the "Laboria Minutes".¹²⁶ The Labour Relations Amendment Act¹²⁷ translated them into law. Labour relations and trade unionism were entering a new democratic era in South Africa.

122 Du Toit *et al* (n 47) 15.

123 Employers at that time believed that they competed with the unions and they were determined to divide workers with a view to undermine them. They could advance some strategies to win workers against the unions. Those strategies included the focus on free riders by giving them special considerations. Eg, if a deadlock in wage negotiations led to a strike, workers who were not on strike were granted the last offer wage increase, while the strikers were told that they could only receive the increase from the date of the settlement. The leadership of the union was forced to respond to the challenge caused by overt and covert attempts by management to separate them from their members. The maintenance of *apartheid* in South Africa led to further subjection and harassment of trade unions and labour leaders.

124 Van Jaarsveld & Van Eck (n 16) 257.

125 More particularly the provisions of the Labour Relations Amendment Act of 1988.

3 Conclusion

The industrial relations system that prevailed in South Africa before the establishment of the current constitutional and democratic order was fragmented in character. White, coloured and Indian workers were granted trade union rights under legislation. They could form registered trade unions and had access to principal industrial relations machinery such as industrial councils and conciliation boards. In contrast, black workers were denied these rights. The National Party government devised a series of statutes that seriously impacted on the right to freedom of association and enforced discrimination at the workplace.¹²⁶ Black workers were thus deprived of the most elementary labour rights and were unable to assert their interests freely and legally. The history of trade unionism in South Africa has shown, however, that even when fundamental rights such as freedom of association, the right to assembly and trade union rights were denied to black workers, they were nevertheless, despite opposition, able to establish institutional forums to achieve these rights.

126 Brasseley (n 20) A1:52; Innes "Labour relations in the De Klerk era" 1992 (6) *South African Review* 339-340.

127 Act 9 of 1991.

128 These included the Group Areas Act 41 of 1950, the Reservation of Separate Amenities Act 49 of 1953, the Prohibition of Mixed Marriages Act 55 of 1949, the Immorality Act 5 of 1927, the Suppression of Communism Act 44 of 1950 and the Affected Organization Act 31 of 1974. All these Acts were intended to further racial discrimination in South Africa.