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Citation:

Rehana Cassim, The Legal Status of Political Protest  
Action under the Labour Relations Act 66 of 1995, 29  
Indus. L.J. (Juta) 2349 (2008)

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Wed Mar 7 06:46:09 2018

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# INDUSTRIAL LAW JOURNAL

VOLUME 29    OCTOBER

2008

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## *The Legal Status of Political Protest Action under the Labour Relations Act 66 of 1995*

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'The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.'

Per O'Regan J in *SA National Defence Union v Minister of Defence*.<sup>1</sup>

### 1 INTRODUCTION

The right to protest on political issues has always been a controversial labour law issue. During the 1980s and early 1990s protest actions (or 'stay-aways' as they were called) by the working population were rife in South Africa.<sup>2</sup> The protests revolved primarily around labour legislation, tax legislation and local political issues.<sup>3</sup> The Industrial Court was reluctant to accord legal protection to stay-aways with the result that they were regarded as unlawful under the Labour Relations Act 28 of 1956 on the basis that they were not related to

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<sup>1</sup> 1999 (4) SA 469 (CC); (1999) 20 ILJ 2265 (CC) at para 8.

<sup>2</sup> P A K le Roux & A van Niekerk 'Protest Action in Support of Socio-economic Demands — The First Encounter' (1997) 6(10) *Contemporary Labour Law* 81 at 81; D du Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper, G S Giles, C Bosch & J Rossouw *Labour Relations Law: A Comprehensive Guide* (5 ed 2006) at 334.

<sup>3</sup> Le Roux & Van Niekerk at 81.

industrial demands.<sup>4</sup> They constituted a species of absenteeism and an act of misconduct which justified taking disciplinary action against those who had participated in them.<sup>5</sup>

But now under the Labour Relations Act 1995<sup>6</sup> (LRA) protest action to promote or defend the socio-economic interests of workers is legally protected, meaning that an employee who participates in such action enjoys the same protections conferred by s 67 of the LRA on employees who engage in a protected strike action.<sup>7</sup> In terms of s 77 of the LRA every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action called by a registered trade union or federation of trade unions<sup>8</sup> provided certain procedural requirements set out in s 77(1) of the LRA are met.<sup>9</sup> 'Protest action' is defined in s 213 of the LRA as 'the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike'.

The only restriction which is expressly placed on the purpose of protest actions is that they may not be embarked upon for a purpose referred to in the definition of a 'strike', that is, for 'the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee'.<sup>10</sup> The LRA does not explicitly permit or prohibit political protest action. In the absence of any case authority clarifying whether political protest action is permitted by s 77 of LRA, it is necessary to interpret the meaning of the phrase 'socio-economic interests of workers' in order to determine whether political protest actions would fall within the scope of this phrase.

<sup>4</sup> See for example *Amalgamated Clothing & Textile Workers Union of SA v African Hide Trading Corporation (Pty) Ltd* (1989) 10 ILJ 475 (IC) and *Mbiyane v Cembad (Pty) Ltd t/a T A Art Centre* (1989) 10 ILJ 468 (IC).

<sup>5</sup> See *National Union of Mineworkers v Free State Consolidated Gold Mines Operations Ltd* 1996 (1) SA 422 (A) at 447E-F; (1995) 16 ILJ 1371 (A); Du Toit et al at 334. In *Amcoal Colliery & Industrial Operations Ltd v NUM* (1992) 13 ILJ 359 (LAC) (at 364J-365A) the Labour Appeal Court (LAC) held that stay-aways for political purposes were illegal and that political realities could not be taken into account in determining whether a dismissal for participation in a stay-away was fair. But cf *Gana v Building Materials Manufacturers Ltd t/a Doorcor* (1990) 11 ILJ 565 (IC) where Bulbulia M expressed the view that political influences and implications could not be ignored in the context of mass action (at 571J-572A).

<sup>6</sup> Act 66 of 1995 (hereafter referred to as the LRA).

<sup>7</sup> See s 77(3) of the LRA. These protections are that a person does not commit a delict or a breach of contract by taking part in the protest action; an employer may not dismiss an employee for participating in protest action; civil legal proceedings may not be instituted against any person for participating in the protest action, and any act in contemplation or in furtherance of the protest action that is a contravention of the Basic Conditions of Employment Act 75 of 1997 does not constitute an offence.

<sup>8</sup> See s 77(1)(a) of the LRA.

<sup>9</sup> These requirements are discussed below.

<sup>10</sup> See s 213 of the LRA, definition of 'strike'.

This article will examine whether political protest action is permitted by the LRA. It will become evident that it is difficult to define a 'political' protest action with certainty and that it frequently occurs that strike action over a matter of mutual interest between employer and employee or protest action over a socio-economic interest of workers intertwines with a political issue. This article will examine whether strike action which intertwines with political issues is protected by the LRA, whether socio-economic protest action which intertwines with political issues is protected by the LRA and whether *pure* political protest action is protected by the LRA. It will be concluded that while strike action and protest action involving a political issue do arguably fall within the scope of protected action under the LRA, pure political protest action does not. This article will argue that the prohibition of pure political protest action infringes certain constitutional rights of trade unions. Finally, it will be examined whether such infringement is justified in terms of the limitation clause contained in s 36(1) of the Constitution of the Republic of South Africa 1996.<sup>11</sup>

Section 1(b) of the LRA states that one of the primary objects of the LRA is to give effect to obligations incurred by South Africa as a member state of the International Labour Organization.<sup>12</sup> The ILO Committee on Freedom of Association<sup>13</sup> prohibits strikes of a purely political nature.<sup>14</sup> The decisions of the Freedom of Association Committee are very influential and 'comprise the cornerstone of the international law on trade union freedom and collective bargaining' but are *not* binding.<sup>15</sup> Even though the standpoint of the Freedom of Association Committee is that pure political protests should not be permitted, the application of this principle must be considered in the unique South African context.<sup>16</sup> It must be taken into account that trade unions in South Africa have played a central political role in South Africa's struggle for democracy and have often served as substitutes for banned political parties during the apartheid years.<sup>17</sup> Since their inception trade unions have used the power of their membership not only to place pressure on employers through collective bargaining but also

<sup>11</sup> Act 108 of 1996 (hereafter referred to as the Constitution).

<sup>12</sup> Hereafter referred to as the ILO.

<sup>13</sup> Hereafter referred to as the Freedom of Association Committee.

<sup>14</sup> ILO *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5 ed revised 2006) (hereafter referred to as the *CFA Digest*) at para 528.

<sup>15</sup> *Re Public Service Employee Relations Act Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* 1987 38 DLR (4th) 161 at 189, quoted with approval in *Volkswagen SA (Pty) Ltd v Brand NO* (2001) 22 ILJ 993 (LC) at para 67.

<sup>16</sup> See Shamima Saley & Paul Benjamin 'The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa' (1992) 13 ILJ 731 at 751.

<sup>17</sup> John Grogan 'Legitimate Protest — The Limits of Protest Action' (1999) 15(1) *Employment Law Journal* 11 at 11.

to influence the political process.<sup>18</sup> There is thus a strong link between the political and labour dispensations in South Africa which must be considered in determining whether the prohibition of pure political protest action is indeed justified in South Africa.

## 2 THE DISTINCTION BETWEEN PROTEST ACTION AND STRIKE ACTION

It is important at the outset to distinguish between strike action and protest action as the LRA stipulates different requirements that must be complied with before each action would be protected.<sup>19</sup> The difference between the two types of action relates to its purpose — protest action is embarked upon in order to promote or defend the socio-economic interests of workers while strike action is embarked upon in order to remedy a grievance or resolve a dispute in respect of a matter of mutual interest between the employer and employee. In *Rand Tyres & Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister for Labour & Minister for Justice*<sup>20</sup> Millin J adopted a wide interpretation of the concept ‘matter of mutual interest’ and stated that ‘[w]hatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned must be of mutual interest to them’.<sup>21</sup> A matter of mutual interest between employer and employee comprises matters concerning the terms and conditions of employment,<sup>22</sup> matters which are of direct relevance to the workplace and the job security of employees and to the negotiation of disciplinary, grievance and retrenchment procedures.<sup>23</sup> The dividing line between a socio-economic interest and a matter of mutual interest is a fine one as these issues are not mutually exclusive and may well intertwine.<sup>24</sup> In *Greater Johannesburg Transitional Metro Council v IMATU* the Labour Court (LC) stressed that it is ‘not alien to the collective bargaining process that unions emphasize socio-economic issues along with their concerns about matters of mutual interest’.<sup>25</sup>

An important distinguishing criterion of strike action and protest action relates to the target of the proposed action, that is, strikes are

<sup>18</sup> Halton Cheadle ‘Labour Relations’ in M H Cheadle, D M Davis & N R L Haysom *SA Constitutional Law: The Bill of Rights* (2 ed 2007 issue 5) at 18–34.

<sup>19</sup> See s 64(1) of the LRA in regard to the requirements which must be complied with before strike action will be protected and s 77(1) of the LRA in respect of those relating to protected protest action.

<sup>20</sup> 1941 TPD 108.

<sup>21</sup> at 115.

<sup>22</sup> *Greater Johannesburg Transitional Metro Council v IMATU* [2001] 9 BLLR 1063 (LC) at para 32.

<sup>23</sup> A C Basson, M A Christianson, C Garbers, P A K le roux, C Mischke & E M L Strydom *Essential Labour Law* (4 ed 2005) at 287.

<sup>24</sup> *Greater Johannesburg Transitional Metro Council v IMATU* at para 26.

<sup>25</sup> *ibid.*

directed against the employer or employers' organization while protest actions are directed against the state or institutions that formulate socio-economic policy.<sup>26</sup> Furthermore, unlike strike action on a matter of mutual interest between employer and employee, the employer is not in a position to concede to the demands of those taking part in protest action on socio-economic policies.

### 3 THE MEANING OF 'SOCIO-ECONOMIC INTERESTS OF WORKERS'

The purpose of socio-economic protest action is to attain from persons and institutions other than employers an advantage for workers of a social or economic nature.<sup>27</sup> But the phrase 'socio-economic interests of workers' has been left undefined in the LRA. In *Government of the Western Cape Province v COSATU*<sup>28</sup> Mlambo J noted that in failing to define the phrase 'socio-economic interests of workers' the legislature had left the determination of its meaning to the courts.<sup>29</sup> The judge remarked that it is not possible to provide an all-embracing definition of the phrase 'socio-economic interests of workers' and cited with approval Le Roux & Van Niekerk's view that the 'definition is capable of a range of interpretations, ranging from a restrictive one to a liberal one'.<sup>30</sup> Mlambo J chose to adopt a liberal approach to the interpretation of this phrase, and in support of this approach he relied on s 1 of the LRA, discussed below.<sup>31</sup>

Section 1 of the LRA states that the purpose of the LRA is 'to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects' of the LRA. Two purposes stand out in this context: the advancement of economic development and social justice. The main objective of economic development is to raise the living standards and the general well-being of the people in the economy, and its inclusion as a purpose of the LRA seeks to ensure that the LRA is interpreted in a manner that will promote not only the interests of capital and labour but also of the general public.<sup>32</sup> Social justice relates to the way in which benefits and burdens are distributed among members of society.<sup>33</sup>

<sup>26</sup> Du Toit et al at 296; *Business South Africa v Congress of South African Trade Unions* (1997) 18 ILJ 474 (LAC) at 481A-C; [1997] 5 BLLR 511 (LAC) at 518B-C.

<sup>27</sup> National Economic, Development & Labour Council 'When does NEDLAC get involved in Dispute Resolution?' available at [http://www.nedlac.org.za/top.asp?inc=docs/pr/1999/when\\_does\\_nedlac\\_get\\_involved\\_in.htm](http://www.nedlac.org.za/top.asp?inc=docs/pr/1999/when_does_nedlac_get_involved_in.htm)<sup>20</sup> (last consulted on 1 August 2008).

<sup>28</sup> (1999) 20 ILJ 151 (LC); [1998] 12 BLLR 1286 (LC).

<sup>29</sup> at paras 15-16.

<sup>30</sup> at para 17. See Le Roux & Van Niekerk at 85.

<sup>31</sup> at para 20.

<sup>32</sup> Martin Brassey, Garth Abraham, Peter Buirski, Tanya Cohen, Nadine Drutman & Shawn Kopel *Employment and Labour Law vol 3 Commentary on the Labour Relations Act* (1999) at A1:3.

<sup>33</sup> at A1:4.

Notably, the advancement of economic development and social justice are listed foremost amongst the purposes of the LRA. It is submitted that a liberal approach to the interpretation of the phrase 'socio-economic interests of workers' is the preferable approach, as opposed to a restrictive approach, as the former approach would give due cognizance to the importance placed by s 1 of the LRA on economic development and social justice. Similarly, in *Iscor Refractories / NACBAWU*<sup>34</sup> it was stated that the LRA had correctly left the ambit of the scope of 'socio-economic interests' wide open and that to impose a strict and 'boxed' type definition of 'socio-economic interests' would be 'to go against the very grain of the Act'.<sup>35</sup>

Regarding the meaning of the phrase 'socio-economic interests of workers' Mlambo J held that each matter depends on its particular circumstances, and that it should generally be sufficient for a party to place the demand or matter giving rise to the protest action 'squarely within the ambit of the social status and economic position of workers in general'.<sup>36</sup>

It is useful to refer to the socio-economic rights in the Constitution to obtain guidance on the types of matters that may constitute a 'socio-economic interest'. Socio-economic rights in the Constitution place positive obligations on the state to devise a workable plan to meet its obligations in terms of the rights as well as negative obligations on the state and other entities to desist from infringing the rights.<sup>37</sup> In *Government of the Republic of SA v Grootboom* the Constitutional Court (CC) declared that the socio-economic rights in the Constitution had to be understood not only in their textual setting, which required a consideration of the Bill of Rights and the Constitution as a whole, but also in their social and historical context.<sup>38</sup> The court recognized the interconnectedness of civil and political rights (known as first generation rights) and socio-economic rights (known as second generation rights) and stated that the provision of socio-economic rights in the Constitution attempts to ensure that all members of society have the capacity to participate in civil and political rights viz the rights of association, equality, political participation and expression.<sup>39</sup> The court stated as follows:

<sup>34</sup> [1993] 3 BALR 276 (IMSSA).

<sup>35</sup> at 283 and 286.

<sup>36</sup> *Government of the Western Cape Province v COSATU* at para 17.

<sup>37</sup> *Government of the Republic of SA v Grootboom* 2001 (1) SA 46 (CC) at paras 34 and 38.

<sup>38</sup> at para 22.

<sup>39</sup> at para 23. The first generation rights are the traditional liberal rights to equality, personal liberty, property, free speech, assembly and association. They are based on the idea that individuals should be free of state interference in their private lives and in their personal and political associations with others (see Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5 ed 2005) at 567).

'Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chap 2.'<sup>40</sup>

The most visible socio-economic rights in the Constitution are contained in s 26, which entrenches the right of access to adequate housing, and s 27, which entrenches the right to health care services, sufficient food and water and social security. Sections 26 and 27 require the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the rights.<sup>41</sup> Regarding specific socio-economic rights of children, s 28(1)(c) of the Constitution entrenches the right of every child to basic nutrition, shelter, basic health care services and social services. Section 29(1)(a) entrenches the right to basic education, including adult basic education, while s 25(5) mandates the state to foster conditions which enable citizens to gain land on an equitable basis. Regarding detained persons, s 35(2)(e) makes provision for the rights of detainees to adequate accommodation, nutrition, reading material and medical treatment.

Notably, in order for a matter to fall within the ambit of protest action under the LRA it must relate to the socio-economic interests of workers, that is, there must be a link between the socio-economic interest which is the subject of the protest action and workers. This is illustrated in *Government of the Western Cape Province v COSATU* where the Labour Court (LC) had to decide whether educational reform is a socio-economic matter relating to workers. Mlambo J held that it was notorious that imbalances in the educational system of the Western Cape Province were the direct result of past government policy and that accordingly the connection between educational issues and workers' interests is that workers in general have an interest in ensuring that their children do not suffer the same ills that afflicted them as a result of the policies of apartheid.<sup>42</sup> He thus concluded that the protest action on educational reform in the Western Cape Province was indeed designed to serve the socio-economic interests of workers.

#### 4 THE MEANING OF 'POLITICAL PROTEST ACTION'

There is no legal definition of a 'political strike'.<sup>43</sup> Kahn-Freund

<sup>40</sup> at para 23.

<sup>41</sup> In *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (at para 11) the CC emphasized that the obligations imposed on the state in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes.

<sup>42</sup> *Government of the Western Cape Province v COSATU* at para 19.

<sup>43</sup> *Sherard v Amalgamated Union of Engineering Workers* [1973] ICR 421 at 429.



expresses the view that the term 'political' cannot be defined with precision as it is not a legal term of art whose definition is prescribed by law.<sup>44</sup> In *Sherard v Amalgamated Union of Engineering Workers* Roskill J cautioned against formulating a definition:

'Although the phrase "political strike" has from time to time been used in reported cases, it is to my mind a phrase which should be used, at any rate in a court of law, with considerable caution, for it does not readily lend itself to precise or accurate definition. It is too easy for someone to talk of a strike as being a "political strike" when what that person really means is that the object of the strike is something of which he as an individual subjectively disapproves.'<sup>45</sup>

In *Sherard v Amalgamated Union of Engineering Workers* Phillips J regarded a political strike as being one to pursue a policy in opposition to that of the government in power.<sup>46</sup> Political protest action in this article is understood to mean action directed against the policies or actions of the state or any other public authority. The exertion of pressure in a political protest is not directed at employers to induce them to accept the demands of the employees but rather it is against or in favour of representatives of the power vested in the state and its authorities.<sup>47</sup> As with socio-economic protest action, in a political protest the employer is not in a position to accede to the demands of those taking part in the protest action. In a political protest the protester acts not only in his capacity as a worker but also equally in his role as a citizen.<sup>48</sup> Political protest action may also be undertaken for reasons of conscience and may be used to politically promote the human rights of others and to oppose exploitation and oppression.<sup>49</sup>

In order to determine whether political protest action is permitted by the LRA a distinction must be drawn between *pure* political protest and political protest which overlaps with matters of mutual interest between employers and employees or with the socio-economic interests of workers. *Pure* political protest action is protest action directed against the policies or actions of the state or any public authority, but

<sup>44</sup> Paul Davies & Mark Freedland *Kahn-Freund's Labour and the Law* (3 ed 1983) at 316.

<sup>45</sup> at 435.

<sup>46</sup> at 428.

<sup>47</sup> Wolfgang Fikentscher 'Political Strikes under German Law' (1953) 2(1) *The American Journal of Comparative Law* 72 at 72.

<sup>48</sup> S Nadasen "'Strike for the Purpose of Collective Bargaining . . .'" — The Place of the Political Strike in a Democracy' 1997 *TSAR* 117 at 122.

<sup>49</sup> Chris White 'The Right to Politically Strike' 2005 *AIRAANZ* at 263, available at <http://airaanz.econ.usyd.edu.au/papers/white.pdf> (last consulted on 1 August 2008). For instance, in *International Longshoremen's Association v Allied International Inc* 456 US 212 (1982) the trade union which represented longshore workers (known as the International Longshoremen's Association) ordered its members to refuse to handle cargo arriving from or bound for Russia as a protest against the invasion of Afghanistan by the Soviet Union. But the US Supreme Court found that the protest action was not lawful and rejected the trade union's contention that a political work stoppage 'to free ILA members from [a] morally repugnant duty' deserved more lenient treatment than an action to strengthen a union's position in collective bargaining (at 224).

it is not related to a socio-economic interest of workers or a matter of mutual interest between employer and employee.

Just as the dividing line between a socio-economic interest and a matter of mutual interest is a fine one since these issues may intertwine,<sup>50</sup> so too political issues may intertwine with matters of mutual interest between employers and employees and the socio-economic interests of workers. The Freedom of Association Committee has conceded that it is difficult to draw a clear distinction between what is political and what is trade union in character, and has accepted that these two notions overlap.<sup>51</sup> In fact it has stated that it is 'inevitable, and sometimes usual, for trade union publications to take a stand on questions having political aspects, as well as on strictly economic and social questions'.<sup>52</sup> Kahn-Freund ardently questions whether industrial issues and political issues could ever be separated. He states as follows:

'Whatever the political colour of the Government, it is involved in industry, and the organisations of both sides of industry are involved in government. Is not every major industrial problem a problem of governmental economic policy? Is it not true that, not only in publicly owned industries, governmental decisions on wages policies, on the distribution of industry and on housing and town planning, and on a thousand other things, affect the terms and conditions of employment at least as much as decisions of individual firms? Where is the line between a strike to induce an employer to raise, or not to reduce, wages, and a strike to press the government for measures which would enable the employer to do so?'<sup>53</sup>

The facts of *British Broadcasting Corporation v Hearn*<sup>54</sup> are an illustration of a pure political protest action. The British Broadcasting Corporation (BBC) proposed to televise the Football Association Cup Final on 21 May 1977 to a number of countries including South Africa by means of a space satellite. The technicians employed by the BBC were members of a trade union which had condemned racial and political discrimination. In order to demonstrate their disapproval of the apartheid policies pursued by South Africa the technicians threatened to withhold the transmission of the programme unless the BBC gave a satisfactory undertaking that the broadcast would not be transmitted to South Africa. The Court of Appeal ruled that the actions of the technicians were not connected with a trade dispute and that they were politically motivated. It granted an interdict against interference with the broadcast.

Another example of a pure political protest was a resolution by the Union of Post Office Workers (in the United Kingdom) to call on its members to delay the delivery of mail to South Africa for one week in

<sup>50</sup> See *Greater Johannesburg Transitional Metro Council v IMATU* at para 26, discussed earlier.

<sup>51</sup> *CFA Digest* at para 505.

<sup>52</sup> *ibid.*

<sup>53</sup> Davies & Freedland at 317.

<sup>54</sup> [1977] 1 WLR 1004.

protest against the apartheid policies of the South African government.<sup>55</sup> Protest action to prevent a government from declaring war,<sup>56</sup> or a strike of railway men against conveying an unpopular minister of a foreign country by railway (which was threatened in the case of Mussolini),<sup>57</sup> or in support of a presidential candidate would constitute pure political protest action.<sup>58</sup>

But if workers engaged in protest action over the state's policies on housing or health care services, this could be regarded as both a socio-economic and a political matter. If workers engaged in strike action against the arrest of persons this would be purely political but if they engaged in strike action against the arrest of persons on a picket line striking for higher wages this would arguably no longer be purely political.<sup>59</sup> In *National Union of Metalworkers of SA v The Benicon Group*<sup>60</sup> Cameron J stated that it is open to question whether a rigid distinction could fairly be drawn between mass action pertaining to labour relations and to workers' socio-economic interests on the one hand, and action whose purpose is purely political, on the other.<sup>61</sup> The judge opined that in 'both democratic and undemocratic societies, "purely political protest" is frequently directed at broadly socio-economic goals'.<sup>62</sup>

In determining whether the LRA permits political protest action it must be determined whether it permits: (i) *pure* political protest action; (ii) strike action involving a political issue; and (iii) political protest action which overlaps with a socio-economic interest of workers.

## 5 DOES THE LRA PERMIT POLITICAL PROTEST ACTION?

### (a) *Pure political protest action*

In order to determine whether political protest action is permitted

<sup>55</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435. In this case the plaintiff, a public spirited private individual, sought an injunction to stop the postal workers' delay of mail to South Africa on the ground that the delay would contravene s 58 of the Post Office Act 1953. The House of Lords refused to grant the injunction on the ground that the plaintiff lacked locus standi. It held that civil remedies could not be granted in order to uphold penal statutes unless the claim was brought by the Attorney-General or the plaintiff would suffer personal hardship as a result of the criminal action. Since the plaintiff was not able to persuade the Attorney-General to seek an injunction in this matter and he himself would not suffer any personal hardship the injunction was refused.

<sup>56</sup> A L Goodhart 'The Legality of the General Strike in England' (1927) 36 *Yale Law Journal* 464 at 473.

<sup>57</sup> at 473-4.

<sup>58</sup> Seth Kupferberg 'Political Strikes, Labor Law, and Democratic Rights' (1985) 71(5) *Virginia Law Review* 685 at 694; Michael Beaumont 'Handling Industrial Action: Protest Strikes — Are all Stay-aways now Permitted?' (1995) 19(2) *Beaumonts Service, Beaumont Express* 440 at 441.

<sup>59</sup> Davies & Freedland at 315-6; Beaumont at 441.

<sup>60</sup> (1997) 18 *ILJ* 123 (LAC).

<sup>61</sup> at 142F-G.

<sup>62</sup> *ibid.*

by the LRA, it is necessary to examine the purpose of the protest action and if the purpose is to promote or defend a socio-economic interest of workers it will be protected by s 77 of the LRA.<sup>63</sup> Even if the phrase 'socio-economic interests of workers' is given a liberal interpretation, it is arguable that *pure* political protest action would not fall within the scope of this phrase. Thus it seems by implication, although it is not expressly stated, that *pure* political protest action is not protected by the LRA.<sup>64</sup> Both Grogan and Basson et al express the view that pure political protest action is not included in the scope of 'socio-economic interests of workers' in s 213 of the LRA.<sup>65</sup> This means that employees who engage in pure political protest action would not enjoy the protection conferred by s77 of the LRA.

The Freedom of Association Committee recognizes that the objectives of a strike action do not only concern better working conditions but also the seeking of solutions to economic and social policy questions and the problems facing the undertaking which are of direct concern to the workers.<sup>66</sup> It holds the view that trade unions must be free publicly to express their views on a government's economic and social policies and hence that strike action for the purposes of defending workers' social and economic interests is permissible, including those that are aimed at criticizing a government's social and economic policies.<sup>67</sup> But, as discussed, the Freedom of Association Committee prohibits pure political strikes and considers that 'strikes of a purely political nature ... do not fall within the scope of the principles of freedom of association'.<sup>68</sup>

The Freedom of Association Committee is not alone in regarding pure political protest action as unlawful. Some countries that regard pure political protest action as unlawful are the United States of America,<sup>69</sup> New Zealand,<sup>70</sup> France,<sup>71</sup> Belgium,<sup>72</sup> Germany,<sup>73</sup> Israel<sup>74</sup> and Spain.<sup>75</sup>

<sup>63</sup> Currie & De Waal at 513.

<sup>64</sup> *ibid.*

<sup>65</sup> John Grogan *Workplace Law* (9 ed 2007) at 383; Basson et al at 322.

<sup>66</sup> *CFA Digest* at para 526.

<sup>67</sup> at paras 503, 527 and 529.

<sup>68</sup> at para 528.

<sup>69</sup> Alvin L Goldman 'The USA' in R Blanpain & R Ben-Israel (eds) *Strikes and Lock-outs in Industrialized Market Economies* (1994) at 206–7.

<sup>70</sup> Gordon Anderson 'New Zealand' in R Blanpain & R Ben-Israel (eds) *Strikes and Lock-outs in Industrialized Market Economies* (1994) at 131.

<sup>71</sup> Jacques Rojot 'France' in R Blanpain & R Ben-Israel (eds) *Strikes and Lock-outs in Industrialized Market Economies* (1994) at 57; Wiebke Warneck 'Strike Rules in the EU27 and Beyond: A Comparative Overview' (2007) *European Trade Union Institute for Research, Education and Health and Safety* at 30 available at <http://www.etui-rehs.org/research/media/files/reports/2007/r103> (last consulted on 1 August 2008).

<sup>72</sup> Roger Blanpain 'Belgium' in R Blanpain & R Ben-Israel (eds) *Strikes and Lock-outs in Industrialized Market Economies* (1994) at 34; Warneck at 16.

In order for workers in the United Kingdom to enjoy statutory immunity from criminal liability for conspiracy and civil liability for torts (which immunity is granted by ss 219 and 220 of the Trade Union and Labour Relations (Consolidation) Act 1992),<sup>76</sup> the strike action must be committed 'wholly or mainly' in contemplation or furtherance of a trade dispute.<sup>77</sup> This concept is known as the 'golden formula'.<sup>78</sup> The implication of the definition of a 'trade dispute' in s 244(1) of TULRA<sup>79</sup> is that the only parties to a protected dispute are the workers and their own employer.<sup>80</sup> The consequence of the golden formula is thus that action in protest against government action is impermissible, except where the government itself is the employer or has a statutory power to control the matters in issue or is represented on the bargaining committee which is considering the issue.<sup>81</sup> Strike action in the United Kingdom against the economic policies of government have been held to be prompted by political objectives and to fall outside the golden formula.<sup>82</sup>

While many foreign jurisdictions prohibit pure political protests there are some countries that do permit them, such as Italy, Denmark (subject to the protest being of short duration and for a reasonable cause),<sup>83</sup> Finland,<sup>84</sup> Ireland<sup>85</sup> and Norway (provided they are of short duration).<sup>86</sup> In Italy the pure political strike gained recognition in the Constitutional Court decision of *The Public Prosecutor v Antenaci*.<sup>87</sup>

<sup>73</sup> Manfred Weiss 'Germany' in R. Blanpain & R. Ben-Israel (eds) *Strikes and Lock-outs in Industrialized Market Economies* (1994) at 71–2.

<sup>74</sup> Menachem Goldberg 'Israel' in R. Blanpain & R. Ben-Israel (eds) *Strikes and Lock-outs in Industrialized Market Economies* (1994) at 85.

<sup>75</sup> European Foundation for the Improvement of Living and Working Conditions 'Industrial Relations: Political Strike' (5 October 2007) available at <http://www.eurofound.europa.eu/emire/SPAIN/POLITICALSTRIKE-ES.htm> (last consulted on 1 August 2008).

<sup>76</sup> Hereafter referred to as TULRA.

<sup>77</sup> See s 244(1) of TULRA.

<sup>78</sup> This expression is believed to have been coined by Professor Lord Wedderburn (Nick Humphreys *Blackstone's Employment Law Library: Trade Union Law* (1999) at 204).

<sup>79</sup> Section 244(1) of TULRA provides that a trade dispute relates to (a) terms and conditions of employment; (b) engagement or non-engagement, or termination or suspension of employment; (c) allocation of work; (d) matters of discipline; (e) a worker's membership or non-membership of a trade union; (f) facilities for officials of trade unions; and (g) machinery for negotiation or consultation and other procedures in respect of the above matters.

<sup>80</sup> Bob Hepple 'United Kingdom' in R. Blanpain & R. Ben-Israel (eds) *Strikes and Lock-outs in Industrialized Market Economies* (1994) at 185.

<sup>81</sup> *ibid.*

<sup>82</sup> See for example *Express Newspapers v Keys* [1980] IRLR 247 where trade unions engaged in a one-day national strike against the government's economic policies. The strike was held to fall outside the golden formula and was hence unlawful.

<sup>83</sup> Warneck at 24.

<sup>84</sup> at 28–9.

<sup>85</sup> at 40.

<sup>86</sup> at 54.

<sup>87</sup> vol 1 *ILLR* 51.

The Italian Constitutional Court held that strike pressure for securing political action does not of itself affect the system of representative democracy or the competence of the constitutional organs, and asserted that a strike constitutes a specific instrument of self-protection for workers in order to remove 'obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, prevents the full development of the individual and the participation of all workers in the political, economic and social organization of the country'.<sup>88</sup> The court further held that article 503 of the Penal Code of 1930 is unconstitutional<sup>89</sup> insofar as it penalizes political strikes which are not 'aimed at subverting [the] constitutional order . . . or at hindering or obstructing the free exercise of the legal powers in which popular sovereignty is expressed'<sup>90</sup> (for example, elections and meetings of constitutional bodies).<sup>91</sup> In brief, pure political strikes are lawful in Italy subject to these restrictions.

While it may be the case that pure political protest action is not generally permitted in several foreign jurisdictions and seemingly also not by the LRA, it is not clear whether political protest action which overlaps with a matter of mutual interest between employer and employee or which involves a socio-economic interest of workers, is permitted by the LRA. This is discussed below.

(b) *Strike action involving a political issue*

Some foreign jurisdictions adopt a stringent approach to strike action involving working conditions which has a political element to it and regard such strike action as unlawful. For instance in the United Kingdom, as discussed, in order for strike action to be protected it must be committed wholly or mainly in contemplation or furtherance of a trade dispute.<sup>92</sup> Thus, if the strike action has an ulterior political motive the immunity given to workers would fall away.<sup>93</sup>

In *Mercury Communications Ltd v Scott-Garner*<sup>94</sup> the Post Office Engineering Union opposed the idea advocated by the government to privatize the telephone system in the United Kingdom and instructed

<sup>88</sup> at 53–4.

<sup>89</sup> Article 503 of the Penal Code of 1930 penalizes strikes and lock-outs for non-contractual or political ends. The Constitutional Court held that article 503 infringed article 3 of the Italian Constitution, which section guarantees the removal of all social and economic obstacles which limit freedom and equality and hinder the full participation of workers in the political, economic and social organisation of the country.

<sup>90</sup> at 54.

<sup>91</sup> European Foundation for the Improvement of Living and Working Conditions 'Industrial Relations: Political Strike' (5 October 2007) available at <http://www.eurofound.europa.eu/emire/ITALY/POLITICALSTRIKE-IT.htm> (last consulted on 1 August 2008).

<sup>92</sup> See s 244(1) of TULRA.

<sup>93</sup> Hepple at 185.

<sup>94</sup> [1984] Ch 37 (CA).

its members not to assist the plaintiff by connecting it to the telephone network. The Court of Appeal held that the predominant objection of the union related not to imminent job losses, as argued by the union, but to the principle of privatization, and the strike was consequently held to fall outside the golden formula. Thus even though the strike action did involve a trade dispute it was not protected as it was found not to relate wholly or mainly to a trade dispute. But in contrast, in *Hadmor Productions Ltd v Hamilton*<sup>95</sup> a trade union was found to have a genuine concern over possible job losses for its members if independent television companies were used to produce television programmes. The strike was held to be non-political. Kahn-Freund argues that the fact that there is no clearcut line of demarcation between political and industrial disputes in the United Kingdom, and given the inevitable political context of many modern disputes, coupled with the fact that the courts have been made the arbiters of the extent of the political content of disputes, has made the golden formula theory untenable and uncertain.<sup>96</sup>

Germany, like the United Kingdom, adopts a stringent approach to strike action that involves both working conditions and political issues. In Germany a political strike is understood to be one which is intended to put pressure on the state administrator or on the state legislator, *regardless* of whether working conditions are concerned.<sup>97</sup> Such strikes are not only unlawful in Germany (save where the state is a party to a collective agreement as the employer of employees in the public service) but are also unconstitutional insofar as they attempt to pressurize the legislative body, on the ground that they infringe the constitutional guarantee of the freedom of members of parliament.<sup>98</sup> Even if the political strike is not directed against parliament it would nevertheless infringe the constitution for the reason that the power given to citizens to elect the representatives of parliament limits their engagement in the state's legislative and administrative functions.<sup>99</sup> There is however a growing group of legal scholars in Germany who have been questioning the correctness of this approach.<sup>100</sup>

Most countries do not follow the stringent approach of the United Kingdom and Germany. In most countries, provided the object of a strike concerns the occupational interests of workers and worker organizations, all manner of claims may be included in the strike action

<sup>95</sup> [1983] 1 AC 191.

<sup>96</sup> Davies & Freedland at 317-8. See also Bob Simpson 'A Not so Golden Formula: In Contemplation or Furtherance of a Trade Dispute after 1982' (1983) 46(4) *The Modern Law Review* 463 at 469 and 476.

<sup>97</sup> Weiss at 71.

<sup>98</sup> *ibid.*

<sup>99</sup> at 71-2.

<sup>100</sup> at 72.

and they need not be restricted to industrial disputes.<sup>101</sup> For instance, in Israel, in direct contrast to the decision in *Mercury Communications Ltd v Scott-Garner*, a strike against the removal of the monopoly of the state-owned telecommunications company was held to be lawful as it was aimed at safeguarding employee's rights.<sup>102</sup> In France, strikes held in the private sector to protest against specific social and economic policies of the state which directly influence wages and working conditions were previously unlawful but are now regarded as lawful.<sup>103</sup> In the Netherlands, like the position in South Africa, strikes that are not directed against the employer but are aimed at achieving a political goal or protesting against a general policy decision by the government are not explicitly unlawful, but are merely not covered by the 1961 Council of Europe Social Charter.<sup>104</sup> The Supreme Court of Netherlands in *Nederlandse Spoorwegen* has ruled that as long as conditions of employment are the reason for a strike it is not to be considered as a political strike even if it is directed against government policy.<sup>105</sup>

The standpoint of the Freedom of Association Committee in cases where the demands pursued through strike action include some of an occupational or trade union nature and others of a political nature has been to recognize the legitimacy of the strike when the occupational or trade union demands were not simply a pretext to disguise pure political objectives unconnected with the promotion and defence of workers' interests.<sup>106</sup>

In accordance with s 39(1) of the Constitution, which requires the courts to take into account the principles of international law and foreign law when interpreting the Bill of Rights and s 1(b) of the LRA, which states that one of the primary objects of the LRA is to give effect to the obligations incurred by South Africa as a member state of the ILO, it is submitted that we should follow the position adopted by the Freedom of Association Committee and most foreign jurisdictions and protect strike action where there is an overlap between a matter of mutual interest between employer and employee

<sup>101</sup> A T J M Jacobs 'The Law of Strikes and Lock-outs' in R Blainpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (8 ed 2004) at 559.

<sup>102</sup> *Histadrut v Bezek* case no 1993/4–4; see Jacobs at 560.

<sup>103</sup> Rojot at 57; European Foundation for the Improvement of Living and Working Conditions 'Industrial Relations: Political Strike' (5 October 2007) available at <http://www.eurofound.europa.eu/emire/France/POLITICALSTRIKE-FR.htm> (last consulted on 1 August 2008).

<sup>104</sup> European Foundation for the Improvement of Living and Working Conditions 'Industrial Relations: Political Strike' (5 October 2007) available at <http://www.eurofound.europa.eu/emire/Netherlands/POLITICALSTRIKE-NL.htm> (last consulted on 1 August 2008); Warneck at 52. The charter was revised in 1996 and the revised European Social Charter, which came into force in 1999, is gradually replacing the initial 1961 charter.

<sup>105</sup> *NV Nederlandse Spoorwegen tegen Vervoersbond FNV ea* (Hoge Raad 30 mei 1986) at 688.

<sup>106</sup> CFA Digest at para 505; see Bernard Gernigon, Alberto Otero & Horacio Guido 'ILO Principles concerning the Right to Strike' (1998) 137(4) *International Labour Review* 441 at 446.



and a political issue. In other words, as long as the strike action involves a matter of mutual interest between employer and employee, even if it has a political element to it, it should be protected and should be treated like any other strike action in terms of s 64 of the LRA. In *Greater Johannesburg Transitional Metro Council v IMATU* the LC held that the fact that a trade union's demands in its strike action (as opposed to protest action) related in part to socio-economic issues did not deprive the employees of the right to strike, provided that their demands related also to matters of mutual interest between employer and employee.<sup>107</sup> In the same way, it is submitted that if a trade union's contention in its strike action relates in part to a political issue this should not deprive the employees of the right to strike, provided their contention also relates to matters of mutual interest between employers and employees.

This argument is reinforced when compared to the applicable legislation in the United Kingdom, where, as discussed, in order to be protected, strike action must be committed *wholly or mainly* in furtherance of a trade objective listed in s 244(1) of TULRA. No such proviso has been imposed in the definition of a 'strike' in s 213, which simply provides that a strike is one 'in respect of any matter of mutual interest between employer and employee'. The position in Netherlands would be particularly influential in South Africa since the legislation there, like the LRA, is silent on the permissibility of political protest action, and yet it has been held that as long as conditions of employment are the reason for a strike such action is lawful and is not to be regarded as a political strike even if it is directed against government policy.

(c) *Political protest action which overlaps with a socio-economic interest of workers*

In accordance with the approach adopted to strike action involving an overlap between a matter of mutual interest between employer and employee and a political matter, it is submitted that where protest action over socio-economic issues involves a political issue, such protest action should not be unprotected, provided it does involve a socio-economic interest of workers, and should be treated like any other protest action in terms of s 77 of the LRA. Currie & De Waal submit that the more politically overt the action, the less the chance of the action being protected.<sup>108</sup> But this does not mean that if the action is highly politically overt but nevertheless involves a socio-economic interest of workers, that the action should not be protected by the LRA. The LRA does not require the protest action to relate wholly or mainly to the socio-economic interests of workers, as is the position

<sup>107</sup> See paras 24–32.

<sup>108</sup> Currie & De Waal at 513.

in the United Kingdom in respect of trade disputes. Accordingly, it is thus submitted that if a socio-economic interest of workers is in issue in the protest action, no matter how politically overt the action, the protest action ought to be protected under the LRA.

The question arises whether the prohibition of *pure* political protest action infringes the constitutional rights of trade unions, and if so, whether such infringement is justified in South Africa. As discussed above, although the recommendations of the Freedom of Association Committee are very influential or persuasive in South Africa, they are not binding. Thus even though the Freedom of Association Committee regards pure political protest action as unlawful, it must be considered whether this action is unlawful in the unique South African context.

## 6 THE LIMITATION ANALYSIS

The limitation analysis under s 36(1) of the Constitution is a two-stage process. The first stage is to determine whether a right in the Bill of Rights has been infringed by the law or conduct in question, and if so, the second stage is to determine whether the infringement is justifiable as a permissible limitation of the right.<sup>109</sup> Each of these stages is examined in turn below.

### (a) *Does the prohibition of pure political protest action infringe the constitutional rights of trade unions?*

It is submitted that the prohibition of pure political protest action infringes a number of the constitutional rights of trade unions. Most notably, trade unions are prohibited from communicating their support or opposition to a particular course of action by the state, from engaging in protest action as a method of political expression, or from expressing their political views.<sup>110</sup> These prohibitions infringe trade unions' rights of freedom of expression, enshrined in s 16 of the Constitution,<sup>111</sup> and their political rights, provided for in s 19 of the

<sup>109</sup> at 166.

<sup>110</sup> See Keith Ewing 'Laws Against Strikes Revisted' in Catherine Barnard, Simon Deakin & Gillian S Morris (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) at 51.

<sup>111</sup> Section 16 of the Constitution provides as follows:

'(1) Everyone has the right to freedom of expression, which includes —

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to —

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

Constitution.<sup>112</sup> In *Business SA v Congress of SA Trade Unions* Nicholson JA<sup>113</sup> confirmed that the right to freedom of expression is at stake in protest action.<sup>114</sup> The judge also stated that a further constitutional right involved in protest action is the right to assemble, demonstrate, picket and present petitions, all of which are guaranteed in s 17 of the Constitution.<sup>115</sup> It is clear that by not permitting trade unions the right to engage in political protest action their right to assemble, demonstrate, picket and petition is thereby infringed. A further constitutional right which is infringed by the prohibition of pure political protest action is that of freedom of association, protected by s 18 of the Constitution, as the ability of workers to establish associations and groups of like-minded people to foster and propagate opinions on political issues is curtailed.<sup>116</sup>

In *National Union of Metalworkers v Bader Bop (Pty) Ltd*<sup>117</sup> the CC asserted that the right to strike is important for the dignity of workers who in our constitutional order may not be treated as coerced employees. It is submitted that in the same vein, the right to protest, including for political aims, is important for the dignity of members of trade unions, and by denying trade unions the right to engage in political protest action they are denied the right to express and air their opinions on political matters of public interest and concern. Accordingly, their right to dignity enshrined in s 10 of the Constitution is neither respected nor protected.<sup>118</sup>

Regarding the right to strike enshrined in s 23(2)(c) of the Constitution, the majority of the Labour Appeal Court (LAC) in *BSA v COSATU* (per Myburgh JP and Froneman DJP) held that the right to protest contained in s 77 of the LRA does not form part of the constitutional right to strike. While this may be the legal position in South Africa, as discussed below, the correctness of this finding is debatable. It follows that the prohibition of pure political protest action would accordingly not infringe the constitutional right to strike.

The principal reason why the majority in *BSA v COSATU* rejected COSATU's argument that s 77 of the LRA should be liberally inter-

<sup>112</sup> Section 19(1) of the Constitution provides as follows:

'(1) Every citizen is free to make political choices, which includes the right —

- (a) to form a political party;
- (b) to participate in the activities of, or recruit members for, a political party; and
- (c) to campaign for a political party or cause.'

<sup>113</sup> Nicholson JA handed down a separate detailed minority judgment shortly after the majority judgment was handed down.

<sup>114</sup> *Business South Africa v COSATU* at 489J–499A.

<sup>115</sup> *ibid.* Section 17 of the Constitution provides: 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'

<sup>116</sup> See *SA National Defence Union v Minister of Defence* at para 8. Section 18 of the Constitution provides: 'Everyone has the right to freedom of association.'

<sup>117</sup> (2003) 24 ILJ 305 (CC) at para 13.

<sup>118</sup> Section 10 of the Constitution provides: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

puted given that the right to take part in protest action is an exercise of the constitutional right to strike, is that it contended that the labour rights in the interim Constitution of the Republic of South Africa 1993<sup>119</sup> and the final Constitution are predicated on the importance of collective bargaining, while protest action falls outside this context.<sup>120</sup> The majority argued that this distinction finds support both in the LRA itself which defines strike action and protest action as being mutually exclusive, as well as in international law, where a differentiation is made between strikes underpinning collective bargaining and a work stoppage for the socio-economic interests of workers.<sup>121</sup>

In direct contrast, the minority judgment supported a liberal interpretation of s 77 of the LRA and held that the right to strike in s 23 of the Constitution included protest action for socio-economic purposes. Nicholson JA reasoned that 'the fact that s 23 of the final Constitution does not restrict a strike to the purpose of collective bargaining must mean that the word "strike" is used in its widest sense'.<sup>122</sup>

The minority judgment has been said to be preferable for the reason that it is consonant with the approach of the CC that constitutional rights should not be restrictively interpreted.<sup>123</sup> A more forceful criticism of the majority's reasoning is that it did not take into account the fact that while the constitutional right to strike in the interim Constitution could have been predicated on collective bargaining, this is not the case in the final Constitution, where the words 'for the purpose of

<sup>119</sup> Act 200 of 1993 (hereafter referred to as the interim Constitution). Section 27(4) of the interim Constitution provided: 'Workers shall have the right to strike for the purpose of collective bargaining.'

<sup>120</sup> *BSA v COSATU* at 480A–C.

<sup>121</sup> at 480C–D. The majority also relied on the fact that the findings and recommendations of the Freedom of Association Committee and the Committee of Experts are to the effect that the right to withhold labour in order to promote economic and social interests falls within the scope of the right to freedom of association. It argued that the existence of both a right to freedom of association and an independent right to strike in the Constitution does not necessarily mean that the right to protest in s 77 of the LRA forms part of the constitutional right to strike (at 517E–F). But this reasoning is open to question because the fact that the Constitution contains both a right to freedom of association and a right to strike does not necessarily mean that the right to protest should be dissociated from the constitutional right to strike and should fall under the freedom of association right (see Carole Cooper 'Labour Relations' in Stuart Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of SA* 2 ed vol 3 (2006 Original Service 07–06) at 53–48 and Cheadle at 18–34 and 18–35). Cheadle points out that on a proper construction of the ILO jurisprudence the whole of the right to strike is a subsidiary right flowing from the right to freedom of association (at 18–34). The Freedom of Association Committee has held that the right to strike extends to strikes promoting or defending the social and economic interests of workers (see *CFA Digest* at para 531). Accordingly, under ILO jurisprudence, a strike over socio-economic matters attracts the same protection as strikes over collective bargaining matters. It therefore follows that the distinction between collective bargaining strikes and strikes over socio-economic matters is not one that should attract different protections but one that gives right to different procedures and limitations (Cheadle at 18–34).

<sup>122</sup> *Business South Africa v Congress of SA Trade Unions* at 493E–F.

<sup>123</sup> Cooper *Constitutional Law of South Africa* at 53–49.

collective bargaining' have been omitted from the right to strike contained in s 23(2)(c) of the Constitution.<sup>124</sup> Arguably the deletion of the collective bargaining qualification in the final Constitution leaves room for the implication that the right to strike in the Constitution includes a socio-economic strike. A further criticism of the majority judgment relates to its reasoning that since the LRA regards protest action and strike action as mutually exclusive the right to strike in the Constitution excludes the right to protest. As Cooper and Cheadle both argue, an Act giving effect to the Constitution cannot be used as an aid to the interpretation of the Constitution as it is the Constitution that sets the boundaries of rights and not legislation.<sup>125</sup>

The majority decision appears to have regarded protest action as less worthy of protection than strike action and seemed to consider protest action to be disruptive and prejudicial to economic development, while the minority, in contrast, regarded protest action as the expression of a constitutionally entrenched moral imperative.<sup>126</sup> Cooper submits that the majority judgment emphasized only the economic development purpose of the LRA without considering its commitment to the advancement of social justice.<sup>127</sup> At the same time, it is arguable that the minority judgment focused exclusively on the LRA's object of advancing social justice without considering its economic development purpose. Both objectives have to be taken into consideration.

The majority judgment nevertheless represents our legal position that the right to protest over socio-economic interests of workers is not protected by the constitutional right to strike, and therefore, as discussed, it follows that the prohibition of pure political protest action would not infringe the constitutional right to strike. But strangely in *Government of the Western Cape Province v COSATU* which was decided by the LC a year after the LAC's decision in *BSA v COSATU*, Mlambo J seemed to equate the right to strike and the right to engage in protest action by stating as follows:

'By asking for this type of order, the applicant seeks to limit COSATU's exercise of a fundamental, constitutionally protected right to strike. The protest action called by COSATU falls squarely within the LRA definition of protest action in s 213. It is a strike, but not for the purpose referred to in the definition of a strike.'<sup>128</sup>

<sup>124</sup> at 53–48 — 53–49.

<sup>125</sup> *ibid*; Cheadle at 18–34.

<sup>126</sup> Le Roux & Van Niekerk at 89; Grogan 'Legitimate Protest — The Limits of Protest Action' at 12.

<sup>127</sup> Cooper *Constitutional Law of SA* at 53–48.

<sup>128</sup> at para 32. See Grogan 'Legitimate Protest — The Limits of Protest Action' at 13.

(b) *Is the infringement of the constitutional rights of trade unions justified?*

To pass constitutional muster the limitation of constitutional rights must be justifiable in terms of s 36(1) of the Constitution, which provides as follows:

'The rights in the Bill of Rights may be limited only in terms of law of general application<sup>129</sup> to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.'

The approach to the limitation analysis is to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right on the one hand, and the purpose, importance and effect of the infringing provision on the other hand, taking into account the availability of less restrictive means available to achieve that purpose.<sup>130</sup> In analysing whether the infringement of the constitutional rights of trade unions to freedom of expression, political rights, freedom of assembly, freedom of association and human dignity of its members by the prohibition of pure political protest action is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, each of the factors listed in s 36(1) of the Constitution will be examined in turn.

(i) *The nature of the right*

This factor relates to the importance of the right in an open and democratic society based on human dignity, equality and freedom.<sup>131</sup> Generally, the more important the right is to an open and democratic society based on human dignity, equality and freedom the more compelling the justification for the limitation of the right needs to be.<sup>132</sup>

Regarding the right to freedom of expression, the CC has made it clear that this right is of the utmost importance to an open and democratic society. In *S v Mamabolo (ETV & others intervening)*<sup>133</sup> the CC

<sup>129</sup> This means that the law must apply impersonally, it must apply equally to all and it must not be arbitrary in its application (Currie & De Waal at 169). Section 213 of the LRA is a law of general application and accordingly may be subjected to the limitation analysis contained in s 36(1) of the Constitution.

<sup>130</sup> *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) at para 66.

<sup>131</sup> I M Rautenbach 'Introduction to the Bill of Rights' in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (2008 Service Issue 22) at para 1A–48 at 1A–88.

<sup>132</sup> Stuart Woolman & Henk Botha 'Limitations' in Stuart Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed vol 2 (2006 Original Service: 07–06) at 34–71.

<sup>133</sup> 2001 (3) SA 409 (CC).

emphasized that, having regard to South Africa's 'recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas ... is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought control, however respectably dressed'.<sup>134</sup> Similarly, in *Business South Africa v Congress of SA Trade Unions* Nicholson JA stated that '[w]herever the spirit of democracy breathes freely the primacy and pre-eminence of freedom of speech is acknowledged'.<sup>135</sup> Devenish argues that the voicing of political ideas and opinions is seminal to the right to freedom of expression.<sup>136</sup>

In *SA National Defence Union v Minister of Defence* the CC proclaimed that s 126B(2) and 126B(4) of the Defence Act 44 of 1957, which prohibited a member of the South African Defence Force from participating in an act of public protest, unjustifiably infringed the freedom of expression of those members of the Defence Force who were bound by these provisions.<sup>137</sup> As to the relevance of freedom of expression to a democratic state the CC asserted that:

'Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters ... freedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17).'<sup>138</sup>

Regarding the nature of political rights in an open and democratic society, s 19(1) is essentially a political species of the rights to freedom of expression, assembly and association.<sup>139</sup> Its purpose is to ensure that citizens are able to align themselves freely with a political cause or party of their choice without fear of adverse consequence.<sup>140</sup> It is

<sup>134</sup> at para 37.

<sup>135</sup> at 689E.

<sup>136</sup> G E Devenish 'Constitutional Law' in W A Joubert & J A Faris (eds) *The Law of South Africa* vol 5 part 3 (2004) para 77 at 94. Currie & De Waal argue too that the expression of political opinion lies at the core of the right to freedom of expression (Currie & De Waal at 362).

<sup>137</sup> at para 9.

<sup>138</sup> at paras 7 and 8.

<sup>139</sup> Jason Brickhill & Ryan Babiuch 'Political Rights' in Stuart Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed vol 2 (2006 Original Service: 03–07) at 45–30.

<sup>140</sup> Currie & De Waal at 448. Section 19(1) is capable of horizontal application since both state and private conduct may have the effect of preventing a person from exercising his or her political rights (Currie & De Waal at 447).

imperative for political rights to be interpreted in the context of South Africa's history of denial of political rights to certain racial groups.<sup>141</sup> Currie & De Waal submit that the freedom to make political choices is most often violated in the employment relationship.<sup>142</sup> Indeed, by not permitting political protest action the right of employees to make political choices in a democratic society is infringed.

In *Business South Africa v Congress of SA Trade Unions* Nicholson JA regarded the right to freely assemble, demonstrate, picket and petition as being of substantial importance to an open and democratic society. He stated as follows:

'The Constitution provides a fair and democratic environment within which to protest. Workers, who are essentially putting their jobs on the line for the rights of the unorganized and other weak and vulnerable members of society, are involved in a much wider activity than striking simpliciter. They are championing the rights of the economic victims of apartheid and relying on other rights in the Constitution to gather and protest freely and take part in other actions which were anathema in bygone times.'<sup>143</sup>

The Freedom of Association Committee has stated that protest action is protected by the principle of freedom of association when such activities are organized by trade union organizations.<sup>144</sup> It has said that any provision which gives the authorities the right to restrict the activities and objects pursued by trade unions for the furtherance and defence of the interests of their members is incompatible with the principles of freedom of association.<sup>145</sup> Freedom of association is fundamental to a democratic society and is of particular importance to a divided heterogeneous country like South Africa.<sup>146</sup>

Notably, human dignity is regarded as one of the most sacrosanct constitutional values that not only informs the interpretation of most other constitutional rights but is also central in the limitation analysis and goes to the core of our constitutional democracy.<sup>147</sup> In *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs*<sup>148</sup> the CC stated that the 'Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform

<sup>141</sup> *New National Party of SA v Government of the Republic of SA* 1999 (3) SA 191 (CC) at para 10; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) at para 47.

<sup>142</sup> Currie & De Waal at 448.

<sup>143</sup> *Business South Africa v Congress of SA Trade Unions* at 499D–E.

<sup>144</sup> *CFA Digest* at para 135.

<sup>145</sup> at para 496.

<sup>146</sup> Devenish para 92 at 108. See *SA National Defence Union v Minister of Defence* at para 20 which emphasized the importance of the right to freedom of association in our democracy.

<sup>147</sup> *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) at para 50; *National Coalition for Gay & Lesbian Equality v Minister of Justice* 2000 (1) BCLR 39 (CC) at para 58; *Makinana v Minister of Home Affairs*; *Keely v Minister of Home Affairs* 2001 (6) BCLR 581 (C) at 606F–G.

<sup>148</sup> 2000 (3) SA 936 (CC) at para 35.



the future, to invest in our democracy respect for the intrinsic worth of all human beings'. The court has laid down that the right to human dignity must be given a generous construction and regards the right as constituting a recognition of the intrinsic worth of human beings and an acknowledgment that human beings are entitled to be treated as worthy of respect and concern.<sup>149</sup>

It is patently clear from the above discussion that the rights to freedom of expression, political rights, freedom of assembly, freedom of association and human dignity are fundamentally important rights in an open and democratic society based on human dignity, equality and freedom. It follows that any justification for the limitation of these rights must be compelling.

(ii) *The importance of the purpose of the limitation*

This factor requires an assessment of the identification of the purpose of the limitation and an appraisal of its importance.<sup>150</sup>

One reason for prohibiting pure political protest action is that such action is viewed as disruptive of a democratically elected government.<sup>151</sup> Prohibiting pure political protest action is thus thought to protect democracy — it corresponds to a basic concept of democracy that the authority delegated by the people to determine the will of the state must be responsible to all the people, and not to a single, albeit powerful, pressure group.<sup>152</sup>

While this is undoubtedly an important purpose of the limitation of pure political protest action, a counter-argument is that pure political protest action may be capable not only of undermining, but also of facilitating democratic participation.<sup>153</sup> As emphasized by the Italian Constitutional Court, strike pressure for securing political action does not of itself affect the system of representative democracy or the competence of the constitutional organs.<sup>154</sup> A distinction must be drawn between coercive political protest action and non-coercive political protest action.<sup>155</sup> Coercive political protest action is designed to depose the government, reduce its credibility and dictate the policies which it should follow, while non-coercive political protest action is designed to influence the policy formation process or merely to draw attention to the extent or depth of feeling against a particular law or policy of

<sup>149</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) at para 328.

<sup>150</sup> Woolman & Botha at 34–73.

<sup>151</sup> White at 260.

<sup>152</sup> Fikentscher at 75.

<sup>153</sup> T Novitz *International and European Protection of the Right to Strike, A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (2003) quoted in White at 260.

<sup>154</sup> *The Public Prosecutor v Antenaci* at 53–4.

<sup>155</sup> White at 261.

the state.<sup>156</sup> Coercive political protest action occurs, for instance, when political opponents indefinitely strike until the state changes its policies.<sup>157</sup> While it is conceded that in a democracy coercive political protest action by trade unions may undermine principles of democracy could the same truly be said of non-coercive political protest action? Surely the strength of a democratic state lies in its ability to accommodate non-coercive political protest action, and doing so would reinforce its democratic nature and the constitutional values underpinning it.<sup>158</sup>

Another reason for prohibiting pure political protest action is that it results in a financial burden being imposed on employers and on the economy as a whole. In *Amalgamated Clothing & Textile Workers Union of SA v African Hide Trading Corporation (Pty) Ltd* the Industrial Court expressed the view that it could not 'condone stay-aways for political reasons, as they really serve no achieved purpose, apart from disrupting the country's economy and causing employers irreparable financial loss'.<sup>159</sup> The majority in *BSA v COSATU* regarded the fact that one of the stated purposes of the LRA was to advance economic development as the reason why s 77(2)(b) of the LRA empowers the LC to issue a declaratory order after having considered the steps taken by the trade union to minimize the harm caused by the protest action.<sup>160</sup>

On the one hand the financial harm to the economy is indeed a valid reason for prohibiting pure political protest action, but on the other hand the financial harm to the economy cannot in itself be decisive. Nicholson JA in *Business South Africa v Congress of SA Trade Unions* remarked, in relation to protest action on the socio-economic interests of workers, that while the harm to the economy is 'indeed a very important consideration ... it is ... only half the picture. If the protest strike is successful the lot of all employees in South Africa ... will be improved'.<sup>161</sup> In the same way, a political protest would also improve the plight of employees in South Africa by permitting them the freedom to express their political views, by according respect for their dignity and by giving them the scope to exercise their rights to associate, assemble, demonstrate, picket and petition. In *Gana v Building Materials Manufacturers Ltd t/a Doorcor* the court placed a different perspective on the financial harm caused by political protest action by pointing out that while 'it is true that stay-aways are disruptive of business and, of course, cause employers irreparable financial losses

<sup>156</sup> *ibid.*

<sup>157</sup> *ibid.*

<sup>158</sup> See Nadasen at 130.

<sup>159</sup> (1989) 10 ILJ 475 (IC) at 478J–479A.

<sup>160</sup> at 481E–F. This is discussed further below.

<sup>161</sup> *Business South Africa v Congress of SA Trade Unions* at 496A.

<sup>162</sup> at 574D.

... the same may be said of legal strikes, public holidays and natural disasters such as floods or earthquakes'.<sup>162</sup>

A third reason for the prohibition of pure political protest action is that protest action is disruptive of public order. It moreover causes resentment among employers who do not understand why the workplace should be used as a forum for expressing political sentiment, and thus the political protest action may frustrate employers and exacerbate relations between the employer and participating employees.<sup>163</sup> It is submitted that maintaining public order and good relations between employers and employees are important reasons for the prohibition of pure political protest action.

But on the other hand it must not be overlooked that political protest action does have a social justice purpose which cannot simply be overlooked or overshadowed by focusing primarily on the harm caused to the public order or employers. Societies generally move forward (or backward) by the expression of mass opinion and given that we have adopted a liberal constitution that values freedom of expression, political rights, freedom of assembly, freedom of association and human dignity it is arguable that we ought to accept the short-term inconvenience and economic risk that might accompany the various forms in which mass opinion is given expression.<sup>164</sup> As the US Supreme Court has stressed, re-thinking is often accompanied by 'public inconvenience, annoyance, or unrest'.<sup>165</sup>

It is evident from the above discussion that the reasons for prohibiting pure political protest action, while of importance, are not quite incontrovertible. It is submitted that the reasons for prohibiting pure political protest action leave unanswered the question whether the importance of these purposes is such as to require a complete prohibition of pure political protest action, as discussed below.

### (iii) *The nature and extent of the limitation*

This factor requires that an assessment be made of the impact of the limitation on those who have been negatively affected by it.<sup>166</sup> It must be determined whether the limitation constitutes a serious or a minor infringement of the right in question.<sup>167</sup>

It is submitted that the prohibition of pure political protest action does constitute a severe limitation on the constitutional rights of trade unions to freedom of expression, political rights, freedom of assembly,

<sup>163</sup> B Grant 'Political Stay-aways: The Dismissal of Participants' (1990) 11 *ILJ* 944 at 944; John Brand, Martin Brassey & Halton Cheadle (eds) 'Stay-aways Won't Go Away' (1989) 6(1) *Employment Law Journal* 2 at 3.

<sup>164</sup> Grogan 'Legitimate Protest — The Limits of Protest Action' at 13.

<sup>165</sup> *Terminiello v Chicago* 337 US 1 (1949) at 4.

<sup>166</sup> Woolman & Botha at 34–81.

<sup>167</sup> Currie & De Waal at 181.

freedom of association and the human dignity of trade union members by denying trade unions and their members the ability to express their views on matters of political importance in the form of a protest action. The CC has emphasized the importance of contextualizing the balancing exercise required by s 36 of the Constitution and has pointed out that the 'balancing has always to be done in the context of a lived and experienced historical, sociological and imaginative reality'.<sup>168</sup> Bearing this consideration in mind, in assessing the limitation of the constitutional rights of trade unions by the prohibition of pure political protest action, account must be taken of the central political role which trade unions have played in South Africa's struggle for democracy.<sup>169</sup> Since their inception trade unions have influenced the political process in order to promote and defend the interests of their members.<sup>170</sup> There is undoubtedly a strong link between the political and labour dispensations in South Africa.<sup>171</sup> Seen in this context the limitation of the constitutional rights of trade unions by not granting them the right to engage in pure political protest action, is indeed severe.

It is conceded that sometimes the limitation of the constitutional rights of trade unions by the prohibition of political protest action does not constitute a complete denial of these rights. The denial is sometimes partial because, as pointed out by Cameron J in *National Union of Metalworkers of SA v The Benicon Group*, in a democratic state, citizens have civic avenues and methods available to pursue political objectives, unlike pre-democratic South Africa when these avenues were in general closed to the bulk of the country's workers.<sup>172</sup>

But account must be taken of the fact that trade unions do not always or necessarily have such avenues open to them. The Constitution recognizes three forms of democracy. The first is representative democracy, which is the idea that individuals should participate in politics through their duly elected representatives.<sup>173</sup> The second is participatory democracy, which means that individuals or institutions must be given the opportunity to take part in the making of decisions that affect them.<sup>174</sup> For example trade unions may raise objections to a bill if it is published for public comment, before it becomes an Act of parliament. Section 57(1)(b) of the Constitution explicitly recognizes the importance of participation in the lawmaking process by providing that the National Assembly may make 'rules and orders

<sup>168</sup> *Prince v President, Cape Law Society* at para 151; see also *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at paras 30–31.

<sup>169</sup> Grogan 'Legitimate Protest — The Limits of Protest Action' at 11.

<sup>170</sup> Cheadle at 18–34.

<sup>171</sup> See Robert Venter (ed) *Labour Relations in South Africa* (revised edition 2003) at 23.

<sup>172</sup> at 143H–I.

<sup>173</sup> Currie & De Waal at 15.

<sup>174</sup> *ibid.*

concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement'.<sup>175</sup> Section 59 of the Constitution further provides that the National Assembly must facilitate public involvement in the legislative and other processes of the assembly and its committees.<sup>176</sup> The third form of democracy recognized by the Constitution is direct democracy which is where citizens participate in the decision making personally, as opposed to relying on intermediaries or representatives.<sup>177</sup>

As Currie & De Waal point out, the opportunities for participation in the executive decision-making process are less clearly developed.<sup>178</sup> Direct democracy becomes of importance and significance for those individuals and groups whose interests are neglected by the political parties, or who lack adequate representation in parliament to influence the course of events or who may find it difficult to make use of the avenues for participation in participatory forms of democracy.<sup>179</sup> Democracy is enhanced where the role of the representative and participatory structures is supplemented by encouraging direct forms of democracy.<sup>180</sup> The closest the Constitution comes to recognizing direct democracy is by means of the right to assemble, demonstrate, picket and petition which allow citizens to communicate directly with the authorities and the public in a meaningful manner.<sup>181</sup> Assemblies also ensure that there is meaningful and continuous communication between voters and representatives, and informs the state of the unpopularity of its policies, which would enable it to identify and address problems between elections.<sup>182</sup> Freedom of assembly is arguably essential to a society's commitment to universal political participation in the democratic process and discourse.<sup>183</sup> While it may be easier to justify the use of political protest action in a repressive autocratic regime this does not mean that pure political protest action is not important in a democratic South Africa as a tool of political advancement, particularly in the light of the fact that, as pointed out by the CC in *S v Mamabolo (ETV & others intervening)*<sup>184</sup> our democracy is

<sup>175</sup> Sections 70(1)(b) and 116(1)(b) of the Constitution provide similar provisions in respect of the National Council of Provinces and the provincial legislatures.

<sup>176</sup> Similar provisions are provided in ss 72(1)(a) and 118(1)(a) of the Constitution in respect of the National Council of Provinces and the provincial legislatures.

<sup>177</sup> Devenish at para 9 at 23.

<sup>178</sup> Currie & De Waal at 15.

<sup>179</sup> at 16; Devenish para 86 at 103.

<sup>180</sup> Currie & De Waal at 15.

<sup>181</sup> Devenish para 9 at 23; Currie & De Waal at 16. Section 84(2)(g) of the Constitution also recognizes the importance of direct democracy by making provision for the president to call a national referendum, while s 127(2)(f) of the Constitution makes provision for the calling of a provincial referendum by the Premier of the province.

<sup>182</sup> Devenish para 86 at 103.

<sup>183</sup> *ibid.*

<sup>184</sup> para 37.

not yet firmly established and must still feel its way. Pure political protest action by trade unions in a democracy constitutes an effective instrument for workers who wish to give meaningful expression to politically compelling ideas and to voice their political qualms. As O'Regan J stated in *New National Party of SA v Government of the Republic of SA*:<sup>185</sup>

'[T]o build the resilient democracy envisaged by the Constitution, we need to establish a culture of participation in the political process, as well as tolerance of different political views and a recognition that democracy can be a unifying force even when political goals may be diverse. The responsibility for building such a democracy is placed, in part, on the Legislature, Executive and the [Electoral] Commission . . . the responsibility, however, is shared too by other organs of states, as well as political parties and, of course, citizens.'

In accord with this dictum, Novitz maintains that political protest action 'may be viewed as an aspect of acting as a responsible citizen, a role which cannot simply be suspended during working hours'.<sup>186</sup>

It is submitted that the extent of the infringement of the constitutional rights of trade unions by the prohibition of pure political protest action is severe, particularly in the light of the fact that trade unions have played a critical role in South Africa's struggle for democracy. While the infringement of the constitutional rights of trade unions may in certain instances only be partial and not complete, as discussed, even in a democracy trade unions do not always have other avenues, apart from political protest action, to influence the political debate or express their political views, and in these instances the infringement of their rights by the complete prohibition of pure political protest actions is acute.

(iv) *The relation between the limitation and its purpose*

This factor requires an evaluation of whether there is a proportionality between the harm done by the infringement of the right and the beneficial purpose that the law is meant to achieve — in other words, are the means employed to achieve the objective rationally related to, or reasonably capable of, achieving that objective?<sup>187</sup>

It is submitted that while the prohibition of pure political protest action is rationally related to the purpose of protecting and upholding democracy, the prohibition is much too broad as it prohibits not only coercive political protest action but also non-coercive political protest action, which would not necessarily undermine or threaten democracy. Regarding the other reasons for prohibiting political protest

<sup>185</sup> para 121.

<sup>186</sup> T Novitz *International and European Protection of the Right to Strike, A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (2003) quoted in White at 263.

<sup>187</sup> Currie & De Waal at 183; Woolman & Botha at 34–84.

action, viz protecting the public order and minimizing harm to employers and the economy, there is a rational connection between the means employed and the objectives in question, but again the prohibition is overbroad because, as discussed below, non-coercive political protest action of a short duration would not disrupt the public order or harm employers or the economy to such an extent that merits its complete prohibition.

(v) *Less restrictive means to achieve the purpose*

A limitation of a fundamental right will not be proportionate if other means could be employed to achieve the same ends that will either not restrict the rights at all or will not restrict them to the same extent.<sup>188</sup> If a less restrictive, but equally effective, alternative method exists to achieve the purpose of the limitation then that less restrictive method must be preferred.<sup>189</sup> While the proportionality analysis must be conducted with reference to all the factors listed in s 36(1) of the Constitution it is the fifth factor on which most limitation arguments stand or fall.<sup>190</sup>

But in assessing whether less restrictive means exist it must be taken into account that the legislative choice concerning the best means of limiting a right is influenced by considerations of 'cost, practical implementation, the prioritisation of certain social demands and needs and the need to reconcile conflicting interests'.<sup>191</sup> In *S v Mamabolo (ETV & others intervening)* the CC pointed out that even though less restrictive means may be envisaged, on balance, a limitation of a right may nevertheless be justifiable.<sup>192</sup>

Regarding the prohibition of pure political protest action it is submitted that less restrictive means to achieve the legislative purpose do indeed exist, and these are as follows:

(i) *Non-coercive political protest action*

One less restrictive means would be to permit non-coercive political protest action and to prohibit coercive political protest action only. In other words, pure political protest action that is designed to influence the policy formation process or to draw attention to the extent or depth of feeling against state law or policy may be permitted but that which is designed to depose the state, reduce its credibility or dictate the policies it should follow would be prohibited. The example of the Italian Constitutional Court decision of *The Public Prosecutor v*

<sup>188</sup> Currie & De Waal at 184.

<sup>189</sup> *ibid.*

<sup>190</sup> *ibid.*

<sup>191</sup> *S v Manamela* at para 95.

<sup>192</sup> at para 49.

*Antenaci*, discussed earlier, may be followed, where only those pure political strikes that aim to subvert the constitutional order or which hinder or obstruct the free exercise of those rights and powers whereby the people's sovereignty is expressed (for examples, elections and meetings of constitutional bodies) are unlawful, while all other pure political strike action is permissible.

(ii) *Short duration*

A further less restrictive means would be to follow the example of Norway and Denmark and to permit pure political protest action of a short duration. This would have the effect of minimizing any possible harm done to the public order, employers and to the economy.

Imposing such limitations on pure political protest action would be considerably less invasive of the constitutional rights of trade unions to freedom of speech, political rights, freedom of assembly, freedom of association, and human dignity of its members. But, as discussed, the fact that less restrictive means exist does not necessarily mean that the prohibition of pure political protest action is not justified. It must be acknowledged that even if non-coercive political protest action of a short duration were protected a certain degree of harm to the economy and employers may still occur, as would disruption to the public order. Other concerns would arise too if non-coercive political protest action were protected in South Africa. One concern is that the independence of trade unions may be compromised if the government attempts to transform the trade union movement into an instrument for the pursuance of its own political aims.<sup>193</sup> The Freedom of Association Committee has strongly condemned this practice by governments.<sup>194</sup>

A further concern which may arise if non-coercive political protest action were to be protected in South Africa relates to the fact that the various trade unions in South Africa are not united in terms of their political affiliation. As pointed out in *Iscor Refractories v NACBA-WU*<sup>195</sup> trade unions in South Africa are perceived to be divided along ideological lines. This raises the apprehension that trade unions may attempt to dictate that their entire membership make a political statement, even in those instances where all the members are not agreed on the political statement in question. It is submitted that workers should be free to join or to abstain from a political protest and that the coercion and the intimidation of unwilling workers must be discouraged and prevented. While this is a well-founded apprehension it is not unique to political protest action as it arises in relation to strike action

<sup>193</sup> *CFA Digest* at para 499.

<sup>194</sup> *ibid.*

<sup>195</sup> at 281.



too, where all the members of a trade union or industry are unwilling to partake in certain strike action.<sup>196</sup>

Another concern of protecting non-coercive political protest action in South Africa, even for a short duration, is that it would result in frequent disruptions of work. As discussed, s 77(3) of the LRA provides that a person who takes part in protected protest action enjoys the protections conferred by s 67 of the LRA relating to strike action. But s 77(3) of the LRA does not clarify whether an employee who takes part in a protected protest action is entitled to remuneration for services that are not rendered during the protest action, as is the case with employees who engage in a protected strike action, who are not entitled to remuneration for services which are not rendered during the duration of the strike (in terms of s 67(3) of the LRA). It is submitted that in all likelihood employees who engage in a protected protest action would not be entitled to remuneration for services that are not rendered during the protest action. If this is the case, it is unlikely that protest action for political reasons would be an everyday occurrence.

While there are disadvantages to permitting pure political protest action in South Africa, on balance, when the relevant factors contained in s 36(1) of the Constitution are weighed together, it is submitted that the limitation of the fundamental constitutional rights of trade unions is disproportionate. To sum up the findings of the limitation analysis: (i) the rights to freedom of expression, political rights, freedom of assembly, freedom of association and human dignity are undoubtedly important in an open and democratic society based on human dignity, equality and freedom; (ii) regarding the importance of the limitation of pure political protest action, while the reasons prohibiting such action are important, they are not incontestable; (iii) the extent of the infringement of the constitutional rights of trade unions is not severe in those instances where trade unions have other avenues to influence the political debate or express their political views, but is severe when the infringement is contextualized and the role which trade unions have played in South Africa's political history is considered; it is certainly severe in those instances where trade unions do not have any other avenues, apart from a political protest, to influence the political debate or express their political views; (iv) while there may be a rational connection between the means employed to achieve the objective of prohibiting pure political protest action, the prohibition

<sup>196</sup> An example of such intimidation occurred in the strike which was called by the SA Transport & Allied Workers Union (which lasted from 23 March 2006 until 21 June 2006) in the security guard industry for the purposes of demanding an 11% wage increase and better working conditions, where intimidation of non-striking security guards was rife (see *Mail and Guardian* online 'At long last, security strike is over' 22 June 2006 at [http://www.mg.co.za/articlePage.aspx?articleid=275174&area=/breaking\\_news/breaking\\_news\\_business/](http://www.mg.co.za/articlePage.aspx?articleid=275174&area=/breaking_news/breaking_news_business/) last accessed on 1 August 2008).

is much too broad as it prohibits not only coercive political protest action but also non-coercive political protest action of a short duration, which would not undermine the objectives of the prohibition to such an extent that merits its complete prohibition; and (v) less restrictive means to achieve the legislative purpose do exist, in the form of non-coercive political protest action of a short duration. As discussed below, it is possible to contain the degree of public disorder and harm caused to employers and the economy by pure political protest action using the procedures provided for in s 77(1) and (2) of the LRA.

## 7 PROCEDURAL REQUIREMENTS OF PROTEST ACTION

In order to achieve a balance between the right to protest in order to promote or defend the socio-economic interests of workers and the needs of the economy, the Ministerial Legal Task Team proposed that protest action should be protected only if certain stringent procedural requirements were first satisfied.<sup>197</sup> In terms of s 77(1) of the LRA, these requirements are that the protest action must be called by a registered trade union or federation of trade unions; the trade union or the federation must have served a notice on NEDLAC<sup>198</sup> stating the reasons and the nature of the intended protest action; the matter giving rise to the intended protest action must have been considered by NEDLAC or another appropriate forum;<sup>199</sup> and the trade union or federation must have notified NEDLAC at least 14 days prior to the commencement of the protest action of its intention to proceed with the protest action. The LAC in *BSA v COSATU*<sup>200</sup> laid down that the

<sup>197</sup> Explanatory Memorandum to the Draft Labour Relations Bill B 85B-95, published in (1995) 16 *ILJ* 278 at 307. See also *BSA v COSATU* (at 481E-F) where the LAC stated that the extent of the right to protest involves the weighing up of this right, taking into consideration the rights of employees and employers, the interests of the public at large and the effect on the national economy.

<sup>198</sup> NEDLAC was constituted in terms of the National Economic, Development and Labour Council Act 35 of 1994 (the NEDLAC Act) and comprises four chambers consisting of members who represent organized business, organized labour, organizations of community and development interests and the state (see s 3(1) of the NEDLAC Act). All proposed legislation relating to labour market policy and all significant changes to social and economic policies are required to be considered by NEDLAC before they are introduced in parliament (see s 5 of the NEDLAC Act).

<sup>199</sup> The purpose of this notice is to give NEDLAC an opportunity to consider the dispute with a view to resolving it and in so doing, to avoid the proposed protest action (see *BSA v COSATU* at 488G-H). The majority in *BSA v COSATU* adopted a strict interpretation of the meaning of 'consider' in s 77(1)(c) of the LRA and held that a matter must be considered by NEDLAC after receipt of the first notice in terms of s 77(1)(b) of the LRA and before the second notice in terms of s 77(1)(d) of the LRA is given. It held that a matter could only be said to have been considered when one or more of the parties was no longer committed to resolving the dispute. In contrast, the minority adopted a liberal interpretation and held that 'consider' means that the parties must apply their minds honestly to trying to resolve the issues, and that previous debates of an issue by NEDLAC could not be disregarded in evaluating whether there has been adequate consideration (see *BSA v COSATU* at 505D-F).

<sup>200</sup> at 485I.

steps must follow the sequence in which they are set out in the legislation. Section 77(2)(a) of the LRA gives the LC the (exclusive) jurisdiction to grant an order to restrain a person from taking part in protest action which does not comply with these procedural requirements.

The Ministerial Legal Task Team further proposed that provision should be made for parties to approach the LC for a declaratory order for the lifting of the protection of the protest action.<sup>201</sup> Accordingly s 77(2)(b) of the LRA provides that the LC may grant a declaratory order which has the effect of forfeiting the protection against dismissal<sup>202</sup> granted to employees who take part in protected protest action, after having considered the nature and duration of the protest action, the steps taken by the registered trade union or federation of unions to minimize the harm caused by the protest action and the conduct of the participants in the protest action. The object of s 77(2)(b) of the LRA is to make provision for the fundamental right to engage in protest action without leaving it open ended.<sup>203</sup> In *Government of the Western Cape Province v COSATU Mlambo J* held that the court must exercise its discretion in terms of s 77(2)(b) of the LRA on the basis of proportionality, that is, by weighing the importance to the workers of the matter giving rise to the protest action against the nature and duration of the protest, 'in much the same way as the court must assess the constitutional validity of a limitation of a right in legislation in terms of s 36(1) of the Constitution'.<sup>204</sup>

It is submitted that in a similar vein, the procedural requirements laid down in s 77(1)(a) of the LRA and the declaratory order which may be granted by the LC in terms of s 77(2) of the LRA, may be used to ensure that the right to engage in pure political protest action is not open ended and that the restrictions necessary to uphold democracy, minimize harm done to employers, the economy and public order are enforced. For instance, an indefinite pure political protest over a trivial aspect of state policy would probably be disproportionate.<sup>205</sup> The LC would have to enquire whether the employees had a viable alternative and if not, whether they proposed to use means commensurate with the nature of their concerns.<sup>206</sup>

<sup>201</sup> Explanatory Memorandum to the Draft Labour Relations Bill at 307.

<sup>202</sup> On a literal interpretation of s 77(2)(b) read with s 77(4)(b) of the LRA it seems that the protections for civil liability which are granted to employees who engage in protected protest action would not be forfeited by the declaratory order of the Labour Court and only the protection against dismissal would be forfeited (see *Le Roux & Van Niekerk* at 84).

<sup>203</sup> Explanatory Memorandum to the Draft Labour Relations Bill at 307.

<sup>204</sup> at para 32.

<sup>205</sup> See Brand, Brassey & Cheadle 'Stay-aways Won't Go Away' at 5.

<sup>206</sup> *ibid.*

## 8 TRADE UNION DUES

Sections 25(3)(d) and 26(3)(d) of the LRA respectively provide that an agency shop and closed shop agreement is binding only if the membership subscription or levy which is deducted is not paid to a political party or to the campaigning costs of a person standing for political office, and is not used for any expenditure that does not advance the socio-economic interests of employees. If trade unions were to be permitted to protest on political matters it is submitted that it may be necessary to amend these sections to make provision for trade union dues to be used for purposes of a political protest action. At present, the use of union dues for political purposes is not entirely excluded because, as Du Toit points out, donations to campaigns supported by political parties, for instance, would be permissible provided they could be shown to advance or protect the socio-economic interests of employees.<sup>207</sup> In *Iscor Refractories v NACBA-WU*<sup>208</sup> it was held that the term 'socio-economic interests of employees' in s 25(3)(d) of the LRA, being extremely broad, is not limited to workplace issues and may very well include scope for the use of union dues in the political arena.

International jurisprudence is divided on whether union dues may be used for pure political purposes. In *Abood v Detroit Board of Education*<sup>209</sup> the US Supreme Court held that the union must be in a position to prove that its expenditures are related to collective bargaining. But in *Lavigne v Ontario Public Service Employees' Union*<sup>210</sup> the Canadian Supreme Court upheld an agency shop provision in a public sector collective agreement despite the fact that the agency fees were used for political purposes. The court held that the payment of union dues for causes unrelated to collective bargaining enables unions to participate in the broader political, economic and social debates in society and to contribute to democracy in the workplace.<sup>211</sup>

Unlike the finding in *Abood's* case, ss 25(3)(d) and 26(3)(d) of the LRA do not restrict the use of union dues to collective bargaining purposes as union dues may be used to advance or protect the socio-economic interests of employees.<sup>212</sup> In *Abood's* case a concern was raised that if union dues were used for political purposes this would have the effect of requiring an employee to support a cause which he or she may oppose, as a condition to retaining his or her employment.

<sup>207</sup> Du Toit et al at 195.

<sup>208</sup> at 281.

<sup>209</sup> 431 US 209 (1977)

<sup>210</sup> (1991) 81 DLR (4th) 545 (SCC).

<sup>211</sup> at 636-7.

<sup>212</sup> Du Toit et al (at 195) argue that because the US Constitution does not include a right to collective bargaining, unlike our Constitution, the approach of the US courts may be stricter and possibly inappropriate in interpreting equivalent provisions of the LRA.

Notably, s 25(4)(b) of the LRA makes provision for a conscientious objector to request the employer to pay the agency fee into a fund administered by the Department of Labour. A conscientious objector is a person whose objection to the payment is in accordance with the dictates of his conscience.<sup>213</sup> An employee who objects on political grounds to the policies of a trade union would be a conscientious objector if his objection were in accordance with the dictates of his conscience.<sup>214</sup> No equivalent provision has been made in the LRA in respect of closed shop agreements, but employees who refuse to join a trade union in terms of a closed shop agreement on the grounds of a conscientious objection may be required by the closed shop agreement to pay agency fees instead, in which case s 25(4)(b) of the LRA would apply.<sup>215</sup> In any event in *Lavigne v Ontario Public Service Employees' Union* the Canadian Supreme Court held that an employee's freedom of expression would not be infringed if union dues were used for political purposes to which he or she does not agree as the compelled payment of dues does not publicly identify him with the trade union's activities since he is only one of many anonymous contributors to a fund which is spent in the name of the trade union as representative of employees.<sup>216</sup>

## 9 CONCLUSION

The right to protest on political issues is certainly an intensely contested labour law issue. The LRA does not explicitly permit or prohibit political protest action, but because pure political protest action would arguably not fall within the scope of the socio-economic interests of workers, impliedly the LRA does not protect pure political protest action. Where however strike action over a matter of mutual interest between employer and employee overlaps with a political issue, or where protest action for the purpose of promoting or defending the socio-economic interests of workers overlaps with a political issue, as discussed, such action would arguably be protected by the LRA. It thus seems that employers may have to resign themselves to tolerating their employees' political protests, albeit as part of a strike action or socio-economic protest action.

It is debatable whether the prohibition of pure political protest action, which it is submitted, infringes the constitutional rights of trade unions to freedom of expression, political rights, freedom of assembly, freedom of association and the human dignity of its members, is justified in South Africa. As submitted, a limitation analysis in terms of

<sup>213</sup> *Brassey et al* at A3: 48.

<sup>214</sup> *Basson et al* at 266.

<sup>215</sup> See s 26(7)(b) and 26(8) of the LRA.

<sup>216</sup> at 640-1.

s 36(1) of the Constitution reveals that the prohibition of pure political protest action is overbroad as there are less restrictive means, in the form of non-coercive political protest action of a short duration, to achieve the legislative objects. While there are some disadvantages to permitting non-coercive political protest action of a short duration in South Africa, it is submitted that, on balance, the disadvantages do not outweigh the importance of the constitutional rights of trade unions. Significantly, the procedural requirements contained in s 77(1)(a) of the LRA and the declaratory order which may be granted by the LC in terms of s 77(2) of the LRA may be used to ensure that the limitations of pure political protest action which are necessary to uphold democracy, minimize the harm done to employers, the economy and the public order, are enforced.

As discussed, not all pure political protest action is inconsistent with a democratic state, and it is accordingly submitted that trade unions ought to be permitted to take a stand on key political issues, within the confines of the restrictions to such action. In fact, the strength of a democratic state may lie in its ability to accommodate certain political protest action, and doing so would surely fortify its democratic nature and the constitutional values reinforcing it.