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# Is There a Human Right Not to Be a Trade Union Member? Labour Rights under the European Convention on Human Rights

Virginia Mantouvalou \*

**Abstract:** This paper examines the protection of labour rights in the context of civil and political rights documents and explores the compatibility of closed shop arrangements with human rights law. It contributes to the relevant debates in two ways. First, it seeks to examine how the ‘integrated approach’ to interpretation, a method increasingly preferred by the European Court of Human Rights when examining work-related complaints, affects the regulation of closed shops. Second, it attempts to resolve the apparent tension between individual rights and collective interests of labour that is commonly articulated in both the case law and the academic literature. The paper suggests that, contrary to a widely held understanding, civil and labour rights share common values. Through the example of closed shops it is argued that the rights of workers and their unions can be enhanced rather than harmed by an effective and principled human rights regime.

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\* School of Law, University of Leicester. This paper is forthcoming in the book *Human Rights at Work: Perspectives on Law and Regulation*, T. Novitz and C. Fenwick (eds), Onati International Series on Law and Society (Oxford: Hart, 2010). An earlier draft was presented at a workshop on ‘Human Rights at Work’ in Onati, 2006. I am grateful to all Workshop participants and particularly to the organisers and editors of the book, Colin Fenwick and Tonia Novitz. I also wish to thank Hugh Collins, Ruth Dukes, George Letsas, Bob Simpson, Charlie Webb and two anonymous reviewers for comments on a draft. I have benefited from discussions with Conor Gearty, Margot Salomon, and participants of the London School of Economics Human Rights Centre PhD Affiliation Programme, and the Law Department PhD seminar.

## INTRODUCTION

Courts dealing with labour rights in human rights treaties have had to address complex questions, for reasons that involve the perceived nature of this group of entitlements, either as social entitlements or as collective claims. A labour right that illustrates the issue, included in both civil and political and socio-economic rights documents, is freedom of association. This is often specifically worded as a right to form and join trade unions.<sup>1</sup> ‘Freedom of organisation’, Kahn-Freund wrote,

has two social and therefore two legal functions. It is a civil liberty, a human right, an aspect of freedom of association [...] its existence and adequate guarantees for its exercise, are, however, also indispensable conditions for the operation of collective labour relations.<sup>2</sup>

A problem that often appears to obstruct the effective protection of freedom of association in human rights documents is the apparent tension between these two aspects of the right. This can be otherwise described as a conflict between the individual character of human rights and the collective interests of labour. Could this tension be resolved?

The example of closed shop agreements provides an excellent illustration of the interplay between the individual and the collective aspects of the right to associate. Closed shops are agreements between one or more employers and one or more workers’ organisations, according to which an individual can only be employed or retain her job upon condition of membership to a specific union.<sup>3</sup> Trade unions favour closed shop arrangements, for they lead to increased union membership. Powerful unions can negotiate the terms and conditions of employment with the employer more effectively. In addition, compulsory union membership is seen as a solution to the problem of ‘free riding’, namely the enjoyment of benefits earned through union struggles by those who did not contribute to the relevant burdens.

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<sup>1</sup> See Art 11 of the European Convention on Human Rights (ECHR), Art 16 of the American Convention on Human Rights, Art 22 of the International Covenant on Civil and Political Rights, Art 10 of the African Charter of Human and Peoples’ Rights.

<sup>2</sup> Cited in Wedderburn, Lord, ‘Freedom of Association or Right to Organise? The Common Law and International Sources’ in Wedderburn, Lord (ed), *Employment Rights in Britain and Europe* (London: Lawrence and Wishart, 1991) 142.

<sup>3</sup> The first type of agreement is a pre-entry closed shop agreement, while the second is a post-entry closed shop. For an analysis of closed shops in the UK and the US, see S. Leader, *Freedom of Association* (New Haven and London: Yale University Press, 1992) ch 9. In the US the question is put in terms of a right to work against the trade union. On this see B. Hepple, ‘A Right to Work?’ (1981) 10 *Industrial Law Journal* 65, 78. For further discussion of relevant US legislation, see J.T. Delaney, ‘Redefining the Right-to-Work Debate: Unions and the Dilemma of Free Choice’ (1998) XIX *Journal of Labor Research* 425 and, for a brief comparison between the US, the UK and Canada, see K. Miller, ‘Union Exclusivity Arrangements: A Comparative Overview’ (2000) 16 *International Journal of Comparative Labour Law and Industrial Relations* 387, 403 ff.

Compulsory membership, though, might not always be compatible with individual rights, because trade unions have the ability to exercise power on the individual, similar to the coercive power of the state.<sup>4</sup> Human rights treaties generally protect voluntary association. Associations are usually formed by individuals who share some ideas or beliefs and who come together in order to promote these ideas and beliefs. People are free to choose if they will join an association or not. Compelling an individual to relate with others with whom she deeply disagrees, in order to achieve some other purpose — however valuable that purpose may be — appears unacceptable at first glance. People should be free from such a compulsion, and this is an important principle in modern liberal societies. Is compelled union membership as a condition in order to get a job or remain employed compatible with human rights law?

In order to explore closed shops and their compatibility with human rights law, the present chapter looks at the European system for the protection of human rights.<sup>5</sup> It contributes to the debates on closed shops and human rights in two ways. First, it presents a new interpretive method of the European Convention on Human Rights (ECHR or Convention) that the European Court of Human Rights (ECtHR or Court) increasingly follows when it examines work-related complaints, and assesses how it affects the regulation of compulsory union membership. It suggests that this interpretive method, at least the way it has evolved to date, cannot provide a definite answer to the complex questions of closed shops and human rights. For this reason, the chapter takes a different route. It attempts to resolve the tension between the individual character of human rights and the collective interests of labour, reflected in closed shop arrangements, looking at the underlying values of the ECHR that shed light on its object and purpose. In this part of the analysis, the chapter relies heavily on an insightful essay by Stuart White on the compatibility of trade unionism with liberal values.<sup>6</sup> I argue that there are indeed important challenges that the employment relation in general and closed shops in particular pose to human rights law; concerns about the tension between the individual and the collective are not necessarily misplaced. Yet, they are overstated. Analysis of the underlying values of the ECHR reveals that if certain conditions are satisfied, closed shop arrangements will have to be regarded as compatible with human rights law.

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<sup>4</sup> For analysis, see C. Summers, 'Trade Unions and their Members' in L. Gostin (ed), *Civil Liberties in Conflict* (London and New York: Routledge, 1988) 65.

<sup>5</sup> For a presentation of the European system, see Novitz in *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart 2010).

<sup>6</sup> S. White, 'Trade Unionism in a Liberal State' in A. Gutmann (ed), *Freedom of Association* (Princeton: Princeton University Press, 1998) 330.

## THE ECHR AND LABOUR RIGHTS

The ECtHR and the European Commission of Human Rights (EComHR or Commission)<sup>7</sup> were traditionally reluctant when looking at the impact of the ECHR on labour rights. Influenced by Cold War prejudice and a belief that social and labour rights are by definition non-justiciable, the Court and the Commission usually decided to protect them only minimally. They found, for instance, that the right to associate does not necessarily encompass a right to consultation<sup>8</sup> or a right to strike.<sup>9</sup> In doing so, they allowed wide discretion to national governments and placed special weight on the fact that these rights were set down in the counterpart of the ECHR in the area of social and labour rights, the European Social Charter (ESC). When an alleged component of a Convention right was protected in the ESC, it was ruled to fall outside the material scope of the Convention.<sup>10</sup>

Human rights and labour law scholars were critical of this approach. Craig Scott, for instance, suggested that the ECtHR opted for what he called ‘negative textual inferentialism’ or a ‘ceiling effect’, which:

is created when an institution [...] refers to human rights commitments found in a legal instrument other than its own as a reason to *limit* the meaning, and thus the scope of protection, given to a right in that institution’s own instrument.<sup>11</sup>

Labour lawyers expressed concern that human rights and labour law are competitive areas by definition. The goals served by the two bodies of rules are incompatible, as the case law of the Court clearly indicated by denying any actual advantage to trade unions and their members.<sup>12</sup> Article 11 case law, which examined the components of the right to associate, was also criticised for not treating the relevant provisions of the ESC ‘as a more detailed map of the rights sketched out by the Convention’.<sup>13</sup> The stance of the Court and the Commission led to characterisations of the case law as disappointing,<sup>14</sup> ‘individual and formalistic’,<sup>15</sup> and Novitz argued that ‘the Court has limited enthusiasm for the

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<sup>7</sup> The European Commission of Human Rights (EComHR) was abolished in 1998 with the entry into force of Protocol 11 to the ECHR ETS 155.

<sup>8</sup> *National Union of Belgian Police v Belgium* (App no 4464/70) Judgment of 27 October 1975.

<sup>9</sup> *Schmidt and Dahlstrom v Sweden* (App no 5589/72) Judgment of 6 February 1976.

<sup>10</sup> See, among others, *National Union of Belgian Police* (App no 4464/70) Judgment of 27 October 1975 [38].

<sup>11</sup> C. Scott, ‘Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”’ (1999) 21 *Human Rights Quarterly* 633, 638–639.

<sup>12</sup> K.D. Ewing, ‘The Charter and Labour: The Limits of Constitutional Rights’ in G Anderson (ed), *Rights and Democracy, Comparative Essays in UK/Canadian Constitutionalism* (London: Blackstone Press, 1999) 79–80.

<sup>13</sup> J. Hendy, ‘The Human Rights Act, Article 11 and the Right to Strike’ (1998) *European Human Rights Law Review* 582, 588.

<sup>14</sup> K.D. Ewing, ‘The Human Rights Act and Labour Law’ (1998) 27 *Industrial Law Journal* 275. See also Novitz, n 5 above.

<sup>15</sup> Wedderburn, ‘Freedom of Association or Right to Organise?’ (1991) 144.

protection of trade union rights’, while it has shown ‘a greater interest on the defence of individual autonomy than collective solidarity’.<sup>16</sup>

#### AN INTEGRATED APPROACH TO INTERPRETATION

Yet, a recent development gave reasons for optimism to labour law scholars. A new method of interpretation emerged in post-2002 case law. Following the so-called ‘integrated approach’<sup>17</sup> to interpretation, the Court referred to social rights materials of the International Labour Organisation (ILO) and the European Committee of Social Rights (ECSR), the monitoring body of the ESC,<sup>18</sup> so as to widen the scope of the rights protected in the Convention. A number of cases can usefully illustrate this interpretive method. In 2002, for instance, in *Zebnalova and Zebnal v the Czech Republic*,<sup>19</sup> when the disabled applicants alleged that they had suffered a violation of certain ECHR rights, but also articles 12 and 13 of the ESC (right to social security and social and medical assistance), the Court, declaring the ESC part of their complaint inadmissible *rationa materiae*, stated:

[...] it is not [the Court’s] task to review governments’ compliance with instruments other than the European Convention on Human Rights and its Protocols, even if, like other international treaties, the European Social Charter (which, like the Convention itself, was drawn up within the Council of Europe) *may provide it with a source of inspiration*.<sup>20</sup>

Three landmark labour-related cases where the Court adopted the integrated approach to interpretation were *Wilson, National Union of Journalists and Others v UK*,<sup>21</sup> *Sidabras and Dziantas v Lithuania*<sup>22</sup> and *Siliadin v France*.<sup>23</sup> In *Wilson*, the ECtHR referred to ILO materials as relevant to the interpretation of the right to form and join a trade union, and added that the Committee of Independent Experts (renamed to ECSR) and the ILO’s Committee on Freedom of Association had criticised the UK legislation under scrutiny. In this way, contrary to its past stance, the Court took cognisance of these materials in order to maximise rather than limit the coverage of the Convention.<sup>24</sup> *Wilson* was,

<sup>16</sup> T. Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003) 238.

<sup>17</sup> For analysis see V. Mantouvalou, ‘Work and Private Life: *Sidabras and Dziantas v Lithuania*’ (2005) 30 *European Law Review* 573. The term was used by M. Scheinin, ‘Economic and Social Rights as Legal Rights’ in A. Eide, C. Krause, and A. Rosas (eds), *Economic, Social and Cultural Rights* (Dordrecht: Kluwer, 2nd ed 2002) 32. See also I.E. Koch, ‘The Justiciability of Indivisible Rights’ (2003) 72 *Nordic Journal of International Law* 3.

<sup>18</sup> See Novitz, n 5 above.

<sup>19</sup> *Zebnalova and Zebnal v the Czech Republic* (App no 38621/97) Admissibility decision of 14 May 2002.

<sup>20</sup> Emphasis added. See also *Mihailov v Bulgaria* (App no 52367/99) Judgment of 21 July 2005 [33].

<sup>21</sup> *Wilson, National Union of Journalists and Others v UK* (App nos 30668/96, 30671/96 and 30678/96) Judgment of 2 July 2002.

<sup>22</sup> *Sidabras and Dziantas v Lithuania* (App nos 55480/00 and 59330/00) Judgment of 27 July 2004.

<sup>23</sup> *Siliadin v France* (App no 73316/01) Judgment of 26 July 2005.

<sup>24</sup> K.D. Ewing, ‘The Implications of *Wilson and Palmer*’ (2003) 32 *Industrial Law Journal* 1, 16.

therefore, the first decision to show ‘how social rights can have indirect legal effect by influencing the interpretation of legally enforceable rights’, as Collins argued.<sup>25</sup>

In *Sidabras*, the Court examined the alleged violation of article 8 of the ECHR that guarantees the right to private life, in conjunction with article 14 that prohibits discrimination. Following a similar approach to that adopted in *Wilson*, the ECtHR stated:

[...] having regard in particular to the notions currently prevailing in democratic states, the Court considers that a far-reaching ban on taking up private-sector employment does affect ‘private life’. It attaches particular weight in this respect to the text of Article 1 § 2 of the European Social Charter and the interpretation given by the European Committee of Social Rights [...] and to the texts adopted by the ILO.<sup>26</sup>

In *Siliadin*, finally, the Court looked at the prohibition of slavery, servitude and forced or compulsory labour under article 4 of the ECHR.<sup>27</sup> Here, in examining a complaint of a former domestic worker who had been living and working in conditions of ‘modern slavery’, the Court made reference to ILO instruments, in order to determine the content of states’ positive obligations and to analyse the material scope of article 4, one of the most underexplored provisions of the ECHR.<sup>28</sup> Relying on these social and labour rights materials, the Court classified the applicant’s situation as ‘servitude’, and ruled that France violated the Convention, for it did not have in place effective criminal legislation to prosecute her employers.

In the post-2002 case law presented above, in other words, and contrary to its usual practice before *Wilson*, the Court did not approach the alleged social components of the Convention with its usual past hostility. To the contrary, it referred to the views and materials of monitoring bodies of the ILO and the ESC, so as to broaden, rather than minimise, the material coverage of the Convention.

#### THE ECHR: A SYSTEM ‘IN CONSTANT DIALOGUE’

Interestingly, the adoption of the integrated approach in the examination of socio-economic claims under the ECHR can be better understood if it is put in the broader picture of materials that are not part of the Convention, but which are used in the exploration of its values and evolving material scope. This ‘dialogue’ between the ECtHR and other bodies has become a technique commonly

<sup>25</sup> H. Collins, *Employment Law* (Oxford: Oxford University Press, 2003) 235.

<sup>26</sup> *Sidabras* (App nos 55480/00 and 59330/00) Judgment of 27 July 2004 [47]. On this, see V. Mantouvalou, ‘Work and Private Life: *Sidabras and Dzijauntas v Lithuania*’ (2005).

<sup>27</sup> See V. Mantouvalou, ‘Servitude and Forced Labour in the 21<sup>st</sup> Century: The Human Rights of Domestic Workers’ (2006) 35 *Industrial Law Journal* 395.

<sup>28</sup> *Siliadin* (App no 73316/01) Judgment of 26 July 2005 [51], [85]–[86].

employed in recent years. The Court repeatedly and increasingly takes note of non-Convention materials in cases that involve controversial social and political issues, or when it seeks support to reverse its past case law. The Convention system, Judge Rozakis suggested in this context, is ‘in constant dialogue with other legal systems’,<sup>29</sup> namely the European legal order, the international legal order and other national legal orders.<sup>30</sup> The ECtHR and its judges ‘do not operate in the splendid isolation of an ivory tower built with materials originating solely from the ECHR’s interpretative inventions or those of the States party to the Convention’. Other bodies’ materials have gained weight in the case law and ‘[t]his is a good sign for the founders of a court of law protecting values which by their nature are inherently indivisible and global’.<sup>31</sup>

There are several decisions that exemplify the interaction between the case law of the Court and relevant materials of other national and supranational legal orders. The cases *Goodwin v UK*<sup>32</sup> and *Mamatkulov and Askarov v Turkey*<sup>33</sup> can usefully illustrate this point. In *Goodwin*, the Court examined the right to private life and the right to marry, invoked by a claimant who had changed sex. In this context and before departing from its previous case law, the ECtHR considered European developments on the matter, noting particularly the stance of the European Union Charter of Fundamental Rights and the European Court of Justice. Similarly in *Mamatkulov* the Court assessed whether the respondent state should comply with a request for interim measures adopted by the ECtHR, although the provision on interim measures is only found in the internal rules of the Court and not in the text of the Convention. The Court examined whether interim measures are generally binding in international law and took note of various international legal materials, such as decisions of the United Nations (UN) Human Rights Committee, the UN Committee against Torture, the International Court of Justice and the Inter-American Commission and Court.

The general trend to have recourse to non-Convention materials is not hard to explain, for looking at these documents enhances the legitimacy of judicial decisions. The Court sometimes needs support when reaching judgments on controversial issues, and reliance on materials adopted by democratically elected and accountable bodies is useful for this purpose. By establishing some kind of general consensus, the Court avoids criticisms that its views are arbitrary. In addition, this interpretive technique addresses the standard concern that courts lack expertise and are, therefore, not competent to adjudicate on technical matters. Finally, looking at materials of other international bodies has the additional positive effect that it promotes coherence in supranational adjudication.

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<sup>29</sup> C.L. Rozakis, ‘The European Judge as Comparatist’ (2005) 80 *Tulane Law Review* 257, 268.

<sup>30</sup> *ibid.*, 269–70.

<sup>31</sup> *ibid.*, 278–79.

<sup>32</sup> *Goodwin v UK* (App no 28957/95) Judgment of 11 July 2002.

<sup>33</sup> *Mamatkulov and Askarov v Turkey* (App nos 46827/99 and 46951/99) Judgment of 4 February 2005. The cases of *Goodwin* and *Mamatkulov* are discussed by Rozakis, ‘The European Judge as Comparatist’ (2005) 265–267.

In the area of labour rights in particular, the cross-fertilisation between the Court and other expert bodies enhances the legitimacy of the decisions, and leads to outcomes friendlier to the interests of labour. The adoption of the integrated approach also enriches the material scope of the Convention, for the case law becomes more open to the inherent socio-economic components of labour rights.

## CLOSED SHOPS UNDER THE ECHR

The integrated approach to interpretation was generally welcomed with optimism by labour lawyers. It was regarded as a positive first step, with potential to address the complex questions that labour law poses to human rights law. *Wilson*, for instance, was described by Ewing as a decision that would ‘restore confidence in Article 11 of the Convention’,<sup>34</sup> while Collins suggested that ‘it is important to appreciate that recent years have revealed a profound reorientation in the ECHR’s interpretation of Convention rights in the context of the workplace and employment relations’.<sup>35</sup> But the expressed optimism about the potential of this interpretive method was not bound to be long-lasting. The issue of closed shops showed that the integrated approach, at least the way it has evolved to date, cannot address the most difficult problems that arise in the interplay between human rights and labour law. The present section first briefly presents how the ECtHR dealt with closed shops in the past, before turning to a recent decision that addressed the matter.

### PAST CASE LAW

The first judgment that explored closed shop arrangements was *Young, James and Webster v UK*.<sup>36</sup> The applicants were dismissed because they refused to join the trade unions with which their employer, British Rail, signed a closed shop agreement when they were already employed. They alleged, among other things, that article 11 of the ECHR was violated, arguing that the negative aspect of the right to associate is an inherent aspect of the provision. Article 11 provides as follows:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

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<sup>34</sup> Ewing, ‘The Implications of *Wilson and Palmer*’ (2003) 5.

<sup>35</sup> H. Collins, ‘The Protection of Civil Liberties in the Workplace’ (2006) 69 *Modern Law Review* 619, 627.

<sup>36</sup> *Young, James and Webster v UK* (App nos 7601/76, 7806/77) Judgment of 13 August 1981.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The ECtHR ruled that setting no limitations to compelled association, would strike at the very substance of Article 11, because ‘a threat of dismissal involving loss of livelihood is a most serious form of compulsion’.<sup>37</sup> The majority of the Grand Chamber found that the limitation imposed upon negative freedom of association here was disproportionate to the aims pursued and, therefore, in breach of the ECHR.

Closed shops were later examined in *Sibson v UK*<sup>38</sup> and *Sigurjonsson v Iceland*.<sup>39</sup> The applicant in *Sibson* would have had to move to another depot should he decide not to join a particular trade union. The facts differed from *Young, James and Webster* in a number of respects. First, the fact that Sibson used to be a member of the specific union (TGWU) before it signed a closed shop agreement with his employer, but resigned from it following a personal dispute, and that he was willing to rejoin the union if he received a public apology, indicated that he was not opposed to rejoining TGWU ‘on account of any specific convictions’.<sup>40</sup> Secondly, the closed shop agreement was not in force when the applicant resigned. Thirdly, and ‘[a]bove all’, according to the Court, ‘the applicants in the earlier case were faced with a threat of dismissal involving loss of livelihood [...] whereas Mr Sibson was in a rather different position’. Mr Sibson had the option to move to a nearby depot, where he would have no obligation to join TGWU, and where his working conditions would not be much different than before. The majority of the ECtHR decided that there had been no violation of article 11 of the ECHR.

Sigurjonsson, finally, had to become a member of a specific association, Frami, in order to retain a taxi driver’s licence, which would be revoked if he left the association. The obligation to join a union was imposed on the applicant by national legislation. The majority of the Court held that Iceland could promote Frami’s aims in some other way; imposing a duty of membership contrary to the applicant’s convictions was a disproportionate interference with article 11 of the Convention.

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<sup>37</sup> *Young, James and Webster* (App nos 7601/76, 7806/77) Judgment of 13 August 1981[55]. Of particular importance, here, was the fact that British Rail was a nationalised industry.

<sup>38</sup> *Sibson v UK* (App No 14327/88) Judgment of 20 April 1993.

<sup>39</sup> *Sigurdur Sigurjonsson v Iceland* (App No 16130/90) Judgment of 30 June 1993.

<sup>40</sup> *Sibson* (App No 14327/88) Judgment of 20 April 1993 [29].

*SORENSEN AND RASMUSSEN V DENMARK*

The 2006 judgment of the Grand Chamber in *Sorensen and Rasmussen v Denmark*<sup>41</sup> is of great importance for a number of reasons. Not only is it the most recent decision that examined the complex question of closed shop agreements, but it also illustrated the integrated approach as an interpretive method, opening up new questions and avenues for research.

The first applicant, Mr Sorensen, was born in 1975. Before commencing his studies at university, he applied for the post of holiday-relief worker. The company had a closed shop agreement with a trade union called SID. Having been informed that he would not have full SID membership, because he was a holiday-relief worker, the applicant told his employer that he no longer wanted to be a member of the union. He was immediately dismissed with no notice or compensation. The second applicant, Mr Rasmussen, was born in 1959. He was a gardener and a member of SID for some years before he ceased his membership, because he disagreed with the union's political affiliations. He became a member of the Christian Trade Union. Having been unemployed for a few years, he then got a job at a nursery. Membership of SID was a condition of his new job. Mr Rasmussen, as a result, rejoined SID and took up his new post. Both applicants claimed before the ECtHR that Danish legislation, which permitted the existence of closed shop agreements, breached the negative aspect of the right to associate under article 11 of the ECHR. They further argued that they disagreed with the political views of SID and that they wished to join a different union.

The Court stated that article 11 of the ECHR encompasses a negative right not to associate next to its positive right to form and join an association. While compulsion to join a union does not always breach article 11, it went on to say, it may do so when it strikes at the very substance of the provision. The fact that this case involved a pre-entry closed shop agreement, while past case law had only examined post-entry agreements, did not alter the decision. There are important similarities between the two types of arrangements — had [the applicants] refused they would not have been recruited. 'In this connection', it went on to say, 'the Court can accept that individuals applying for employment often find themselves in a vulnerable situation and are only too eager to comply with the terms of employment offered'.<sup>42</sup>

The Court accepted the Government's argument that the applicants could seek employment with an employer that was not covered by a union shop arrangement. It stated, though, that it would still have to look at the impact of the arrangement on each individual applicant. Looking at Mr Sorensen first, the Court said that the fact that he was dismissed without notice, in spite of his young age and of the fact that he would only take up the job 10 weeks before going to

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<sup>41</sup> *Sorensen and Rasmussen v Denmark* (App nos 52562/99 and 52620/99) Judgment of 11 January 2006.

<sup>42</sup> *ibid*, [59].

university, constituted a significant restriction on his freedom of choice. Mr Rasmussen, on the other hand, had been unemployed for some time before taking up his job at the nursery. Should he resign SID membership, he would be dismissed with no right to reinstatement or compensation. Additionally, the sector of horticulture was covered by closed shop agreements to a large extent. Equally to Mr Sorensen, in this sense, his freedom of choice was extremely limited. In response to the argument that both applicants objected to union membership for political reasons, the Danish Government claimed that they had an option of 'non-political membership' of SID. Yet the ECtHR stated that this possibility was in reality non-existent, because first, the membership fee would not be reduced, and secondly, the union might support political parties indirectly, through funds raised from other activities. The duty to become a member of SID was therefore considered to strike at the very substance of article 11 in the circumstances of the case.

Did the Government strike the right balance between the individuals' interests and the need of trade unions to operate effectively? To answer this question the Court first considered recent developments in Denmark and other Council of Europe States, which pointed towards a tendency to limit closed shop agreements, as they are no longer seen as indispensable for the effective protection of workers' rights. Here, the Court turned to the relevant case law of the ECSR to adopt an integrated approach to the interpretation of the ECHR. It referred to the Conclusions of the Committee, which had repeatedly found that the Danish legislation on closed shops was contrary to article 5 of the ESC on the right to organise.<sup>43</sup> It also mentioned the 1989 EC Charter of the Fundamental Rights of Workers, which guarantees a right to join or not to join a trade union, and then made reference to the 2000 EU Charter of Fundamental Rights, which protects freedom of association and further states that nothing in it can be interpreted as restricting rights that are already protected in existing treaties and agreements. All these materials, the Court stated, suggested that there is increasing consensus that closed shop arrangements are not necessary for the effective protection of the interests of labour. Article 11 of the ECHR, the majority therefore concluded, had been breached in respect of both applicants.

Five judges dissented from the decision of the majority, demonstrating in their opinions the tensions and the complexity of the issue. Of special interest is the partly dissenting opinion of Judges Rozakis, Bratza and Vajic, who drew a distinction between the two applicants based on the degree of compulsion that each of them faced. If Mr Rasmussen resigned from SID, he would be dismissed without compensation and with no real prospect of finding a job as a gardener, an area covered to a large extent by closed shop agreements. On the judges' view, '[t]he threat of dismissal and the potential loss of livelihood which would result, amounted [...] to a serious form of compulsion which struck at the very substance

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<sup>43</sup> *ibid*, [72].

of the right guaranteed by Article 11'.<sup>44</sup> For Mr Sorensen, on the other hand, it would be relatively uncomplicated to find a similar job with an employer that was not covered by a closed shop. For this reason, the degree of compulsion that he faced did not amount to a violation of his right to associate.

The other two Judges who dissented focused on different aspects of the compatibility of closed shops with human rights law. Judge Zupancic put his emphasis on the problem of free riders. Judge Lorenzen, on the other hand, stressed the sensitive socio-political character of closed shops, which should lead to the recognition of a wide margin of appreciation to Member States of the Convention. Moreover, he argued that individuals looking for a job are often compelled to accept terms that they disagree with and which may interfere with their personal life. He concluded that, on his view, neither of the applicants was significantly affected by closed shops, as they both had the possibility to find a job with another employer.

## IN SEARCH OF A SOLUTION

The decision in *Sorensen and Rasmussen* was disappointing to proponents of closed shop arrangements, for it appeared that there is little scope for union security clauses that are compatible with the ECHR. Indeed, following this latest judgment of the Grand Chamber, it is difficult to envisage a situation where a closed shop agreement will not violate human rights law. Yet, this section will argue that this is not necessarily correct. In order to examine the compatibility of closed shop arrangements with the ECHR, I will look at three alternative solutions that emerge from the case law. I will first consider whether the integrated approach to interpretation can provide a satisfactory answer. I will then discuss the proposition of Judges Rozakis, Bratza and Vajic that the crucial factor to focus on is the degree of compulsion that an employee faces when there is a closed shop in place. Finally, I will explore the character, the object and purpose of the Convention, to determine whether negative freedom of association should always and by definition be regarded as more weighty when it conflicts with the positive aspect of the right.

### THE INTEGRATED APPROACH

Closed shops revealed the shortcomings of the integrated approach as it has evolved to date. In most past case law, as explained earlier in this chapter, the ECtHR was unwilling to take into account ESC materials, when it had to decide whether the right to strike is an aspect of freedom of association, for instance. In

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<sup>44</sup> *ibid*, (Dissenting Opinion), [5].

refusing to do so, it stated that these issues are covered in the ESC and are, therefore, for its own machinery to regulate. Contrary to this negative textual inferentialism, the Court's stance on closed shops was different. From early on in its jurisprudence, in *Sigurjonsson*, the Court was keen to refer to the case law of the Committee of Independent Experts (current ECSR), which examined negative freedom of association and found that it is protected under article 5 of the ESC that protects the right to organise.<sup>45</sup> In a similar fashion it made mention of the ILO's findings, according to which closed shops imposed by law are in breach of Convention No 87 on Freedom of Association and Protection of the Right to Organise and Convention No 98 on the Right to Organise and Collective Bargaining. In the same way, Judges Sorensen, Vilhjalmsson and Lagergren, dissenting in *Young, James and Webster*, pointed at the stance of the ILO and the ESC,<sup>46</sup> which had expressed the view that union security arrangements should be regulated at national level.<sup>47</sup> In other words, although in the examination of other labour-related matters the Court showed deference to bodies, which were said to be more competent to decide the issues, when it looked at union security clauses, it relied on these bodies' findings from early on in its jurisprudence, in order to reach a decision itself.

In addition, some further complications make the analysis of the compatibility of closed shops with human rights law less straightforward than other labour-related matters. In recent case law where the Court adopted the integrated approach to interpretation, the ILO and the ESC had taken a similar view on the matters under consideration. The ECtHR, then, based its own findings on this common stance, this consensus of the expert bodies. Yet things were different with closed shops. This is because while both the ILO and the ECSR have looked into them, they have adopted a different position towards their regulation. The ILO has refrained from interference with the matter.<sup>48</sup> Article 2 of Convention No 87 provides that:

[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

The ILO Committee on Freedom of Association has said that:

it leaves it to the practice and regulations of each State to decide whether it is appropriate to guarantee the right of workers not to join an occupational

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<sup>45</sup> *Sigurjonsson* (App No 16130/90) Judgment of 30 June 1993 [35].

<sup>46</sup> The Committee's findings on the European Social Charter (ESC) changed later on.

<sup>47</sup> A similar stance is to be found in *Gustafsson v Sweden* (1996) 22 EHRR 409, where Judges Martens and Matscher discuss both ESC and International Labour Organisation (ILO) provisions and jurisprudence.

<sup>48</sup> *Sorensen and Rasmussen* (App nos 52562/99 and 52620/99) Judgment of 11 January 2006 [38].

organisation, or on the other hand, to authorise and, where necessary to regulate the use of union security clauses in practice.<sup>49</sup>

Only union security clauses that were imposed by law would result in union monopoly and would, as a result, be found contrary to Convention Nos 87 and 98.<sup>50</sup>

The ESC, on the other hand, has been much less deferential to national authorities than the ILO. It is interesting to note here that while most research to date has focused on the impact of materials of other expert bodies on the case law of the ECtHR, closed shops illustrate another aspect of the integrated approach — an integration which took place initially in the opposite direction.<sup>51</sup> Article 5 of the ESC, which guarantees the right to organise, says that:

[w]ith a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom.

In the past, the Committee had stated that it would not rule on the compatibility of union security clauses with the ESC.<sup>52</sup> Following *Young, James and Webster*, though, the Committee reassessed its stance.<sup>53</sup> It found that only state-imposed closed shops were contrary to the ESC, and also took a step further to hold that the state has a duty under the ESC to protect individuals positively from such arrangements.<sup>54</sup> For this reason, Novitz therefore rightly drew attention to the fact that:

the ECSR has become a more staunch opponent of the closed shop than the European Court of Human Rights ever dared to be, but it seems that the

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<sup>49</sup> International Labour Conference (43<sup>rd</sup> Session) (1959) RCE Report III (Part IV) para 36. See also the 1994 General Survey on Freedom of Association and Collective Bargaining: Right of Workers and Employers to Establish and Join Organisations, para 100.

<sup>50</sup> See Complaint against the Government of New Zealand presented by the New Zealand Employers' Federation, *Case No 1385*, 259<sup>th</sup> Report, para 551. See also Committee on Freedom of Association, 'Digest of Decisions' (1996), para 321.

<sup>51</sup> For an overview of the evolution of the Committee's stance towards closed shops, see *The Right to Organise and Bargain Collectively*, Social Charter Monographs – No. 5 (Council of Europe Publishing, 2<sup>nd</sup> ed, 2001) 23–29. See also L. Samuel, *Fundamental Social Rights – Case Law of the European Social Charter* (Strasbourg: Council of Europe Publishing, 2002) 112–118.

<sup>52</sup> European Committee of Social Rights, Conclusions I, 31.

<sup>53</sup> European Committee of Social Rights, Conclusions VII, 3233.

<sup>54</sup> See, for instance, European Committee of Social Rights Conclusions IX-1, 47. Danish legislation has been repeatedly found in breach of this obligation. See, for instance, Conclusions XI-1, 77, Conclusions XII-1, 110, Conclusions XIII-1, 130.

origin of its enthusiasm lies with the sentiments of the Court rather than its own initiative.<sup>55</sup>

While the ILO, to sum up, has repeatedly held that closed shop arrangements should be left to the national authorities to regulate, the ECSR has taken a more robust view, ruling that these arrangements violate the right to associate under the ESC. Which of the two expert bodies should the ECtHR follow, adopting an integrated approach to interpretation? Should it opt for the ILO's deferential stance or should it follow the ESC's more intrusive case law? This is a question that the integrated approach, the way it has evolved to date, leaves unanswered.

#### DEGREE OF COMPULSION

In *Sorensen and Rasmussen*, Judges Rozakis, Bratza and Vajic argued that the degree of compulsion that each individual employee faces should carry most weight in determining the compatibility of closed shops with article 11 of the Convention. The crucial question, on this view, is whether the employee has an option to work for another employer, before she alleges that her human rights have been violated, or whether she is really deprived of almost all alternatives. Individuals are not free to either accept a job and union membership or to turn to another employer.<sup>56</sup> To put it in the Court's words from *Young, James and Webster*,

[a]n individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value.<sup>57</sup>

The dissenting Judges' argument appears attractive at first. It is understandable, for instance, that the burden placed upon the applicants in *Young, James and Webster*, who would be dismissed if they did not join the trade union, with which their employer signed an agreement while they were already employed, constitutes real compulsion and strikes at the very substance of their right to associate. Turning to *Sorensen and Rasmussen*, it is probably uncontroversial that the latter of the applicants, who had already been unemployed and had very few alternative options open to him, faced real and strong compulsion because of the closed shop agreement. The situation of Sorensen, though, is not as straightforward. Did he really have freedom of choice or was the restriction of his choices such, as to say that his Convention rights were infringed?

While Judges Rozakis, Bratza and Vajic illuminate an important aspect of the problem, it will be hard to measure the actual compulsion that each individual faces when seeking employment or if dismissed. There is a danger of arbitrariness in the assessment of whether someone really needs a particular job or not, as even

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<sup>55</sup> Novitz, *International and European Protection of the Right to Strike* (2003) 242.

<sup>56</sup> This was Iceland's argument in *Sigurjonsson* (App No 16130/90) Judgment of 30 June 1993 [33].

<sup>57</sup> *Young, James and Webster* (App nos 7601/76, 7806/77) Judgment of 13 August 1981 [56].

a temporary job that a student takes up during her summer vacation, for instance, may be extremely valuable to her: the income may contribute to the continuation of her studies and the working experience may be crucial for her future work prospects. It is hard to extract clear principles focusing solely on the element of compulsion, when examining the regulation of closed shop agreements under the ECHR.

#### THE OBJECT AND PURPOSE OF THE CONVENTION: A LIBERTARIAN BILL OF RIGHTS?

Judge Martens joined by Judge Matscher, dissenting in *Gustafsson v Sweden*, claimed that when the negative and positive aspect of the right to associate are in conflict, the former should in principle prevail. This is due to the character of the ECHR. ‘The Convention’, they argued, ‘purports to lay down fundamental rights of the individual and to furnish the individual an effective protection against interferences with these rights’.<sup>58</sup> The right to dissociate, being a right of the individual, should therefore carry more weight when it conflicts with the right to associate, which is, on this reading of the ECHR, a positive right.

The correctness of the above suggestion is questionable. Its first problem lies in that it views positive freedom of association as a collective right, unlike its negative aspect. This is a false assumption. The right to associate is an individual right, like all other human rights, which can nonetheless only be exercised collectively, in association with others. There is nothing in the nature of the entitlement, therefore, that makes it less weighty than negative freedom of association, when the two aspects of article 11 are in conflict. Secondly, and more generally, the above suggestion of the dissenting Judges implies that the ECHR is a libertarian bill of rights and that its interpretation should be guided by libertarian principles that really reflect its object and purpose.<sup>59</sup> Libertarians oppose union security clauses because they limit employees’ and employers’ freedom of choice, and may also have an impact on economic efficiency.<sup>60</sup> If the ECHR is regarded as a libertarian document, it will be hard to reconcile its underlying values with closed shops arrangements.

However, the ECHR should not be viewed as a libertarian bill of rights. Nothing in its character, in its object and purpose, suggests that negative freedom of association is to be given priority over the positive aspect of the right. The Convention should more accurately be described as an egalitarian document, a point that can be supported with several arguments. First of all, the ECHR

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<sup>58</sup> *Gustafsson* (1996) 22 EHRR 409 [8] (Dissenting opinion of Judges Martens and Matscher).

<sup>59</sup> Article 31 of the Vienna Convention on the Law of Treaties provides in its first paragraph: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

<sup>60</sup> On libertarian approaches to compelled association, see J. Cohen and J. Rogers, ‘Associations and Democracy’ in E.O. Wright (ed), *Associations and Democracy* (London: Verso, 1995) 15 and for a liberal egalitarian response, see 18–21.

contains an anti-discrimination provision. Article 14 is not a free-standing equality clause, but only prohibits discrimination in the enjoyment of other ECHR rights.<sup>61</sup> The construction of the clause is narrow, at first glance, and leaves little scope for the protection against unequal treatment in the enjoyment of all human rights. The evolving egalitarian character of the Convention, however, has led to decisions, where the Court looked at other substantive provisions of the ECHR in conjunction with article 14 and opted for a wide interpretation. It found that a complaint may ‘fall within the ambit’ of the relevant right, without holding that there has been a breach of the substantive provision alone.<sup>62</sup> In this way, the ECtHR gave the anti-discrimination provision a somewhat autonomous meaning of a free-standing equality clause.

Moreover, importantly for present purposes and increasingly over the last few years, the Court reads social components in the material scope of the Convention when a substantive provision is examined together with the anti-discrimination clause — components that it would have otherwise been reluctant to protect.<sup>63</sup> Through article 14, and in particular when it was read in conjunction with the right to property, the ECtHR often adopted an integrated approach to the interpretation on a variety of matters, reading socio-economic rights in the Convention.<sup>64</sup> A particularly interesting example here is *Koua Poirrez v France*.<sup>65</sup> The decision involved discrimination in the enjoyment of social benefits on the basis of nationality. The Court found that a non-contributory right could give rise to a pecuniary right which falls within the ambit of article 1 of the 1<sup>st</sup> Additional Protocol of the Convention on private property. In the examination of the complaint, it adopted an integrated approach to the interpretation of the ECHR, taking note of a relevant decision of the ECSR on the issue.<sup>66</sup> The construction of the non-discrimination provision, in other words, has led the Court to opt for a wide reading of other Convention rights, showing how the instrument has taken on an egalitarian meaning containing social elements, which were probably not envisaged by its drafters.

A further development, finally, which serves as evidence that equality is a central value of the Convention system, is the entry into force of Additional Protocol 12, in April 2005. This Protocol sets out a free-standing equality clause,<sup>67</sup>

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<sup>61</sup> Article 14 of the ECHR provides that ‘[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.

<sup>62</sup> See, among others, *Abdulaziz, Cabales and Balkandali v the UK* (App nos 9214/80, 9473/81 and 9474/81) Judgment of 28 May 1985 [71] and *Inze v Austria* (App no 8695/79) Judgment of 28 October 1987 [36].

<sup>63</sup> Examples include the *Sidabras* (App nos 55480/00 and 59330/00) Judgment of 27 July 2004.

<sup>64</sup> See eg, *Gaygusuz v Austria* (App no 17371/90) Judgment of 16 September 1996.

<sup>65</sup> *Koua-Poirrez v France* (App no 40892/98) Judgment of 30 September 2003.

<sup>66</sup> *ibid* [29].

<sup>67</sup> Additional Protocol 12 Article 1 – General prohibition of discrimination. ‘1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority,

while its Explanatory Report stresses the central role of equality and non-discrimination for international human rights law in general. The 12<sup>th</sup> Protocol will unavoidably open up the Strasbourg machinery to more individual applications involving social rights, and this may explain why some governments have not ratified it yet.<sup>68</sup>

The ECHR should not be viewed as a libertarian document, contrary to what Judges Martens and Matscher suggested, for its object and purpose reflect egalitarian values. The notion of equality that the Convention promotes, moreover, is not a narrow notion. The ECHR and the Court endorse a rich understanding of equality, which is open to elements of social equality. The very existence of labour rights in articles 4 and 11 of the Convention, for instance, suggests that there is no firm distinction between the Convention and socio-economic rights, as the Court put it in *Airey v Ireland*.<sup>69</sup> At the same time, the case *Koua Poirrez*, which was presented above, shows that the understanding of the prohibition of discrimination in the enjoyment of other Convention rights is not narrow.

The best evidence perhaps of a rich approach to socio-economic aspects of the Convention are decisions such as *Sidabras*, *Wilson* and *Siliadin*, presented earlier in this chapter, where the Court adopted an integrated approach to interpretation. These judgments, particularly if considered in juxtaposition to past case law, demonstrate an increased interest in the social aspects of civil and political rights. In this spirit, it was observed in an analysis of the Council of Europe on social cohesion that

[t]he European Convention on Human Rights, the most famous normative instrument of the Council of Europe, does not contain social rights properly speaking, but concentrates on civil and political rights [...] On this basis the European Court of Human Rights has developed interpretations to all the rights contained in the convention, a jurisprudence that can be compared to the jurisprudence of national constitutional courts.

The analysis continued and then recognised that ‘[t]he jurisprudence of the Court has also repercussions on the interpretation of the social rights (emphasis added), eg when certain social security benefits are understood as property’.<sup>70</sup>

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property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.’

<sup>68</sup> On this see N. Grief, ‘Non-Discrimination under the European Convention on Human Rights: A Critique of the United Kingdom Government’s Refusal to Sign and Ratify Protocol 12’ (2002) 27 *European Law Review - Human Rights Survey* 3, 11–12.

<sup>69</sup> *Airey v Ireland* (App no 6289/73) Judgment of 9 October 1979 [26].

<sup>70</sup> See G. Battaini-Dragoni and S. Dominioni, ‘The Council of Europe’s Strategy for Social Cohesion’ (Conference on Social Cohesion, November 2003) 11, fn 9, at [www.hku.hk/socsc/cosc/Full%20paper/BATTAINI-DRAGONI%20Gabriella%202025.11.pdf](http://www.hku.hk/socsc/cosc/Full%20paper/BATTAINI-DRAGONI%20Gabriella%202025.11.pdf).

In a similar fashion, the Court has protected the right to healthcare and the right to housing in the context of art 8 of the Convention.<sup>71</sup> In all these instances, the ECtHR examined complaints that the drafters of the document never envisaged, and underlined that the Convention is a living instrument with a constantly evolving object and purpose. Certain social elements have already been read in the document, in a line of cases that reflect a more holistic understanding of the rights guaranteed therein and reveals its changing nature. A treaty that was once adopted as a bulwark to totalitarianism has come to reflect egalitarian ideas and to constitute a forum that safeguards to a certain extent social and labour rights.

The ECHR, to conclude, does not reflect libertarian values, contrary to the view expressed by Judges Martens and Matscher. It can better be described as a liberal egalitarian bill of rights that encompasses social elements. Can this analysis of the object and purpose of the Convention illuminate us on the question of the compatibility of closed shops with human rights law?

### **IS THERE A HUMAN RIGHT NOT TO BE A TRADE UNION MEMBER?**

The solution to the conflict between individual and collective interests, which is reflected in the closed shops debate in human rights law, cannot be found in the integrated approach to interpretation, which has taken the form of mere reliance on experts' views. This is partly because expert bodies do not always agree on the regulation of social and labour matters. The degree of compulsion that each individual employee faces, moreover, does not provide adequate guidance to the Court, which may reach arbitrary decisions when measuring the importance of a job to an individual's wellbeing. The nature, the object and purpose of the Convention and its underlying values, on the other hand, could lead to some clear guiding principles, which can enlighten our understanding of the problem. Unionisation is protected under the Convention, and the Court has frequently held that some kind of participation in the workplace is essential, so as to advance workers' claims against their employers. It offers to them the possibility to play a role in the decisions that affect their lives and promotes their feelings of dignity and self-respect. Union shops, at the same time, are not by definition contrary to liberal/egalitarian values reflected in the document. They should not necessarily be banned, but could be protected by the Court, subject to certain conditions that will be explored later on.

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<sup>71</sup> On the right to health, see, among others, *Lopez Ostra v Spain* (App No 16798/90) Judgment of 9 December 1994. On the right to housing see *Selcuk and Asker v Turkey* (App nos 23184/94 and 23185/94) Judgment of 24 April 1998. For a more detailed list of the relevant case law, see I.E. Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 *Human Rights Law Review* 81, fn 39.

Yet, there are two objections to the compatibility of closed shops with the ECHR that need to be dealt with at this point. First, it could be suggested that trade unions are associations that promote a specific ideal of the good life and are, therefore, incompatible with a liberal bill of rights. Secondly, it could be said that empowering a group of individuals — employees in this context — would be contrary to equality, which is also a central value of the Convention. Both objections can be rebutted.

#### NEUTRALITY

Stuart White, in an insightful essay on trade unionism in a liberal state, answered the question of whether an effective right to trade union membership is compatible with liberalism in the affirmative. Having drawn a useful distinction between *expressive* associations and *instrumental* associations, White showed that state protection and promotion of trade unionism can be compatible with liberal values, similar to the ones that the ECHR enshrines. He suggested that '[a]n expressive association is a community whose members are united by sharing a distinctive set of religious or ideological beliefs'.<sup>72</sup> There are, however, other associations, which are purely instrumental, and which the state may have a duty to promote. An instrumental association is

an association whose primary purpose is to secure for its members improved access to strategic goods, such as income and wealth, the possession of which is important from the standpoint of more or less any conception of the good life. The goals of such an association are independent of any particular conception of the good life or controversial ideology, and participation in such an association cannot be said, therefore, necessarily to express commitment to any particular conception of the good life or controversial ideology ...<sup>73</sup>

While in practice it will not always be easy to distinguish which association is of the one and which is of the other kind, in principle 'the primary purposes of a trade union, qua trade union, are essentially instrumental in kind: to increase members' access to certain all-purpose goods such as employment and income'.

Of course, trade unions will always be related to the political process. Yet this does not imply that they will support a specific view of a good life. Neutrality is here understood as ethical neutrality and not as political neutrality. As White put it,

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<sup>72</sup> White, 'Trade Unionism in a Liberal State' (1998) 334–335. For another interesting discussion of the issue, see Davies in chapter 6.

<sup>73</sup> *ibid*, 334–335.

a trade union may often articulate its instrumental ambitions by reference to an overarching set of ideas about distributive justice and democratic citizenship. Indeed, from a liberal standpoint, it is highly desirable that it should. But this does not necessarily make the union an expressive association, in the above sense, if the values to which it is appealing are, as they may well be, part of the shared public moral vocabulary of a liberal society.<sup>74</sup>

A trade union, according to this analysis, may be regarded as neutral, for it does not necessarily promote a specific ideal of the good life. This happens when it has as its primary function the promotion of workers' rights and their participation in decisions that affect their lives.

#### EQUALITY

Looking at the second possible objection, namely the position that promoting unionism and employees' rights would be contrary to equality, White's analysis is again useful. White argued that it is not adequate for a state to be neutral towards trade unions. A liberal state should adopt a 'power-adjusted conception of neutrality',<sup>75</sup> which will balance the inequality of bargaining powers that commonly characterises the employment relation. An approach that takes into account this power-adjusted conception of neutrality would be in line with the character of the ECHR as an egalitarian document. This approach implies that the Court should not be reluctant, when having to interfere with the regulation of labour matters. However, in doing so, it should keep in mind the inequality of power that characterises the employment relation, on the one hand, and the importance of employee workplace participation, on the other.

#### CLOSED SHOPS AND HUMAN RIGHTS

Closed shops are compatible with neutrality and equality — both ideals that the ECHR reflects. While these values leave scope for union security clauses, it is important to appreciate the potential conflict of compelled association with other rights. Closed shop arrangements may have an impact on individual liberties, such as negative freedom of association and freedom of expression, more generally. Of course workers, both individually and in association with others, have the power to act to promote their interests, and human rights law provides some minimum guarantees that their voice be heard through their unions. At the same time, though, the effective protection of human rights should not permit trade unions to set arbitrary restrictions on individual freedom.

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<sup>74</sup> *ibid*, 335.

<sup>75</sup> *ibid*, 337.

The imposition of membership to an association with which someone fundamentally disagrees infringes individual autonomy, running contrary to central values of the Convention. The general principle is that an individual should not be compelled to join an association, if its purposes are incompatible with the person's beliefs. This principle is instantiated in a case where the ECtHR examined compulsion to join a hunters' association. Analysing disagreement with the aims of an association on ethical grounds, the Court held that compulsion to join such an association was in breach of article 11.<sup>76</sup>

Certain conditions ought to be met, so as to avoid illiberal outcomes in the regulation of closed shops. In order to identify the more concrete principles that are applicable here, I will take White's analysis as a starting point. Looking at the Court's decisions and dissenting opinions in the relevant case law, it emerges that we can envisage such arrangements that do not breach the ECHR and that are compatible with its values.

Closed shop agreements are compatible with the Convention when either of the following two conditions is met. First, that a trade union is of a neutral, instrumental character, and does not support specific political parties; secondly, when a trade union does have political affiliations, that an option for non-political membership be offered. The first possibility would perhaps be rare in Europe, where trade unions are usually connected to left-wing politics. Yet, examples of unions that are non-political are not an unknown phenomenon globally.<sup>77</sup> In the second and more common alternative, namely that of unions with political affiliations, an option of non-political membership would meet the requirements of the Convention. This option should not be merely theoretical, as was the case with Danish legislation in *Sorensen and Rasmussen*. It should be effectively guaranteed in practice. This would imply that, unlike the Danish case, the membership fee should be reduced for employees who do not support the political activities of the union. The US example, where closed shops are allowed but the contributions are whittled down to the financial core, can serve to illustrate this position. Additionally, there should be a clear policy to ensure that fees paid by employees, who have opted for non-political membership, are spent to promote members' workplace interests, and not in support of a political party.

The idea that an individual should not be compelled to associate with others, who hold political views that clash with her own, was confirmed by the Court in another labour-related case, *Associated Society of Locomotive Engineers and Firemen (ASLEF) v UK*.<sup>78</sup> *ASLEF* involved negative freedom of association, but not from

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<sup>76</sup> *Chassagnou v France* (App nos 25088/94, 28331/95 and 28443/95) Judgment of 29 April 1999 [117]. See also, *Sorensen and Rasmussen* (App nos 52562/99 and 52620/99) Judgment of 11 January 2006 [63].

<sup>77</sup> A country where there are non-political, instrumental, trade unions is India. See Gopalakrishnan in chapter 7.

<sup>78</sup> *Associated Society of Locomotive Engineers and Firemen (ASLEF) v UK* (App no 11002/05) Judgment of 27 February 2007. For analysis, see K.D. Ewing, 'The Implications of the ASLEF Case' (2007) 36 *Industrial Law Journal* 425. For a discussion before the decision of the European Court of Human Rights (ECtHR),

the viewpoint of the individual employee who was unwilling to associate, but from the viewpoint of the trade union that wished to exclude an employee from membership.<sup>79</sup> ASLEF, the applicant union, is a socialist labour association. Mr Lee, a train driver and member of a political party of the far-right, the British National Party (BNP), was a member of ASLEF. He was expelled from the union when its officers were informed of his membership of the BNP and some of his activities, such as handing out anti-Islamic leaflets and engaging in serious harassment of anti-Nazi demonstrators. In its letter to Mr Lee, the union stated that his membership of the BNP was contrary to its aims, and potentially harmful to its reputation. Mr Lee brought proceedings before UK employment tribunals on the basis of section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992, which bans expulsion from a union on the grounds of membership to a political party. UK tribunals found in favour of Mr Lee and imposed on ASLEF an obligation to readmit him as a member. Before the ECtHR, ASLEF complained that it had not been allowed to exclude from membership an individual who holds views contrary to its own, a situation that was in breach of article 11 of the Convention. The Court stated that a union should have a right to choose with whom it will associate in a way similar to individual employees. This is because '[w]here associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership'.<sup>80</sup>

Yet, the Court implied that in the case of trade unions, the balancing test between the right to associate and freedom of expression may be more complex than when looking at other types of associations. This is because of the special role that unions may be afforded in representing the interests of employees before the employer. In such circumstances, when an association promotes what can be described as a public purpose, compulsion to associate may be justified, even if there is a clash of political views.<sup>81</sup> Here, nonetheless, the Court found that UK employment tribunals did not strike the right balance between Mr Lee's right to belong to a political party and the right of ASLEF to disassociate with him. The right of the union to choose its members was not given adequate attention. Mr Lee's exclusion from membership had not been abusive, and the tribunals had erred in imposing upon the union an obligation to accept him as a member.<sup>82</sup> Expulsion would not be detrimental to him, for there was no closed shop agreement in place, while the union represented all employees in the collective bargaining process, irrespective of membership.

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see J. Hendy and K.D. Ewing, 'Trade Unions, Human Rights and the BNP' (2005) 34 *Industrial Law Journal* 197.

<sup>79</sup> This can otherwise be seen as a right of individual members of a union with political affiliations not to associate with individuals who hold political views diametrically contrary to their own.

<sup>80</sup> *ASLEF* (App no 11002/05) Judgment of 27 February 2007 [39].

<sup>81</sup> *ibid*, [40].

<sup>82</sup> For the conditions in which exclusion from union membership may be abusive, see *ibid*, [43].

The Court held in *ASLEF* that placing restrictions on the right of the union to choose with whom it will associate, notwithstanding the fact that the individual had political views that conflicted with its own, constituted an illegitimate interference with the Convention. Trade unions are often affiliated to political parties, and imposition of a duty to associate with someone who holds views contrary to their own, was ruled to be in breach of negative freedom of association.

## CONCLUSION

The ECHR, a civil and political rights instrument, includes a right to form and join a trade union and can provide broad protection for the labour right to organise, one of the most fundamental entitlements that the ILO and the ESC also promote. The Convention can usefully serve the collective interests of labour. Even the imposition of compulsory union membership may be compatible with its provisions, if its underlying objectives are properly understood and the obligation to associate is accordingly construed.

The example of closed shops that the present chapter discussed shows that human rights and labour law share important values. The collective interests of labour are not irreconcilable with human rights law. The protection of freedom of association and closed shop agreements shed light on two different aspects of the issue. On the one hand, workers, both individually and in association with others, have the power to act to promote their interests; human rights law provides some minimum guarantees that their voice be heard through the protection of the right to form and join trade unions. At the same time, though, the protection of human rights does not permit unions to impose excessive restrictions on other individual freedoms in an arbitrary manner. The ECtHR, as it emerged from the above discussion, has not explored thoroughly the conditions under which union security clauses are compatible with the ECHR. Careful exploration of the evolving object and purpose of the document, however, can shed light on the interplay between the individual and the collective, and offer guiding principles, on which the Court can rely. To conclude, a close analysis of the compatibility of closed shops with human rights law suggests that the rights of workers and their unions cannot be harmed; they can only be enhanced through an effective and principled human rights regime.