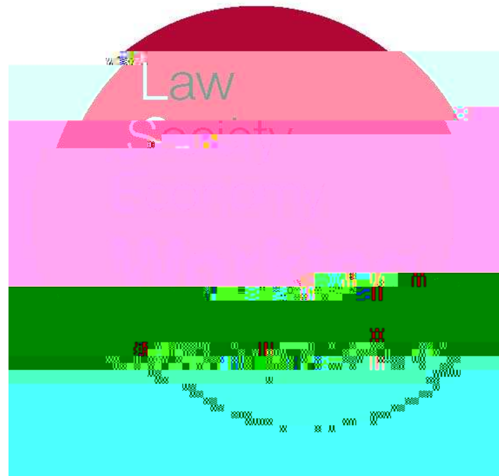

Is There a Human Right Not to Be a Trade Union Member? Labour Rights under the European Convention on Human Rights

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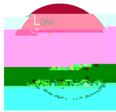
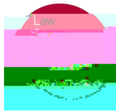


Courts dealing with labour rights in human rights treaties have had to address complex questions, for reasons that involve the perceived nature of this group of



protection of trade union rights', while it has shown 'a greater interest on the defence of individual autonomy than collective solidarity'.[16]

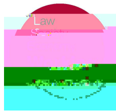
AN INTEGRATED APPROACH TO INTERPRETATION

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'[17] 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,[18] 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 *Zehnalova and Zehnal* v *the Czech Republic*,[19] 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*.[20]

Three landmark labour-related cases where the Court adopted the integrated approach to interpretation were *Wilson, National Union of Journalists and Others* v *UK*,[21] *Sidabras and Dziautas* v *Lithuania*[22] and *Siliadin* v *France*.[23] 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

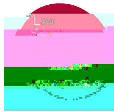
employed in recent years. The Court repeatedly and increasingly takes note of non-Convention materials in cases that involve controversial social and political issues, or when it seeks support to reverse its past case law. The Convention system, Judge Rozakis suggested in this context, is 'in constant dialogue with other legal systems',[29] namely the European legal order, the international legal order and other national legal orders.[30] The ECtHR and its judges 'do not operate in the splendid isolation of an ivory tower built with materials originating solely from the



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'.[37] 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*[38] and *Sigurjonsson* v *Iceland*.[39]



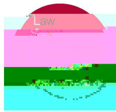
SORENSEN AND RASMUSSEN v *DENMARK*

The 2006 judgment of the Grand Chamber in *Sorensen and Rasmussen* v *Denmark*[41] 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

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.[43] It also mentioned id



of the right guaranteed by Article 11'.[44] For Mr Sorensen, on the other hand, it would be relatively uncomplicated to find a similar j

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 atth

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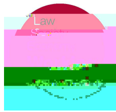
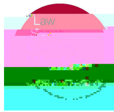


> organisation, or on the other hand, to authorise and, where necessary to regulate the use of union security clauses in practice.[49]

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.[50]

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.[51]

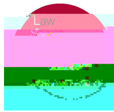
In a similar fashion, the Court has protected the right to healthcare and the right to housing in the context of art 8 of the Convention.[71] In all these instances, the ECtHR examined complaints that the drafters of t



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'.



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.[76]

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.[77] 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 io uoad ttcari

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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.[79] 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'.[80]

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