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THE CASE OF YOUNG, JAMES, AND WEBSTER:
BRITISH LABOR LAW AND THE EUROPEAN
CONVENTION ON HUMAN RIGHTS

Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees all individuals within the jurisdiction of the signatory states the right to freedom of association, including the right to form and join trade unions.¹ Article 13 of the Convention requires that any individual whose Convention rights have been violated shall have an effective remedy before a national authority.² The United Kingdom is one of the signatories to the Convention; British law allows "closed shop"³ agreements between trade unions and management.⁴ There has been considerable controversy as to whether Article 11 prohibits such closed shop agreements because of the restrictions that those agreements place on the freedom of an individual not to associate.⁵ In addition, there

1. Article 11 provides:

(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.

(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.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *reprinted in* COUNCIL OF EUROPE, EUR. CONV. ON HUMAN RIGHTS: COLLECTED TEXTS, 5 (1971) [hereinafter cited as CONV. ON HUMAN RIGHTS].

2. Article 13 provides:

Everyone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

CONV. ON HUMAN RIGHTS, *supra* note 1, at 5.

3. A closed shop is "the term customarily applied to an agreement or arrangement which requires employees to join a specified union as a condition of getting or holding a job." GREEN PAPER ON TRADE UNION IMMUNITIES, 66 on file at Cornell Int'l L.J. [hereinafter cited as GREEN PAPER]. For a more detailed description of the closed shop see O. KAHN-FREUND, *LABOUR AND THE LAW*, 193-209 (2d ed. 1977).

4. See *infra* notes 70-76 and accompanying text for a discussion of the Industrial Relations Act, 1971, ch. 72 § 5; see *infra* notes 78-84 and accompanying text for a discussion of the Trade Union and Labour Relations Act, 1974, ch. 52 § 6(5), sched. 1; and see *infra* notes 93-94 and accompanying text for a discussion of the Employment Act, 1980, ch. 42, § 7.

5. 4 COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PREPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 262 (1977) [hereinafter cited as TRAVAUX PREPARATOIRES].

is a potential for conflict between British law and Article 13, because Parliament never incorporated the Convention into domestic law.⁶ Consequently, British citizens may not have a national forum in which to vindicate effectively their convention rights.⁷

In the *Case of Young, James, and Webster*,⁸ three British laborers asked the European Court of Human Rights to consider the issues of freedom of association and the right to an effective remedy. Young, James, and Webster objected to union membership on personal and political grounds.⁹ British law on unfair dismissal, however, allowed an employee to refuse union membership only on the basis of religious beliefs.¹⁰ Therefore, the three were dismissed from their jobs with British Railways for refusing to join a union. Because British law sanctioned their dismissals, they sought relief from the European Court of Human Rights.

The determination of the European Court in *Young, James, and Webster* raises several questions regarding the effectiveness of the European Convention when it is implicated in a situation similar to the one presented by the British closed shop system. This Note examines those questions. Section I presents an overview of the procedures available for implementing Convention rights. This Note then uses the *Young, James, and Webster* case as the basis for an analysis of Articles 11 and 13. Section II examines the British law on unfair dismissals and closed shops in the context of the freedom of association provision of the European Convention. Section III sum-

6. In Britain, only the crown can conclude a treaty. E.C.S. WADE & A.W. BRADLEY, *CONSTITUTIONAL LAW* 276-77 (8th ed. 1970) [hereinafter cited as WADE AND PHILLIPS]. The crown, however, is not competent to enact or modify legislation. Thus, Parliament must enact any treaty that is to have the force of municipal law. *Id.* If the "execution and application in the United Kingdom" of a treaty involves a change in British law, Parliament must enact the appropriate legislation. *Id.* at 278. Britain never enacted the Convention. The government in power at the time of ratification assumed that existing domestic law was in accord with the provisions of the Convention. Drzemczewski, *The Implementation of the United Kingdom's Obligations Under the European Convention on Human Rights: Recent Developments*, 12 HUMAN RIGHTS J. 95, 98 (1979). Successive governments have taken the same position. *Id.*

7. WADE AND PHILLIPS, *supra* note 6, at 266-67. For a general discussion of the effects of the European Convention on Human Rights on the domestic law of the signatory states, and in particular that of the United Kingdom, see generally Drzemczewski, *The Authority of the Findings of the Organs of the European Human Rights Convention in Domestic Courts*, 1979 LEGAL ISSUES OF EUROPEAN INTEGRATION 1; Drzemczewski, *supra* note 6. See also *infra* note 133 and accompanying text.

8. Case of Young, James, and Webster (Eur. Ct. of Human Rights) (Judgment of 13 Aug. 1981) [hereinafter cited as *Young, James, and Webster*]. Young, James, and Webster applied initially to the European Commission on Human Rights. The Commission recommended the case to the Court. For a discussion of the procedures involved in appearing before the Court see *infra* notes 11-30 and accompanying text.

9. *Young, James, and Webster*, *supra* note 8, at 11-13.

10. Trade Union and Labour Relations (Amendment) Act, 1976, ch. 7, § 1(e). See *infra* note 85 and accompanying text.

marizes the applicability of the Convention to British domestic law, and discusses the conflict that exists between British law and Article 13. Finally, section IV proposes changes both in British law and the Convention which might give greater effect to the Convention in the United Kingdom as well as in other Convention signatories.

I. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CLOSED SHOP CASE

A. THE EUROPEAN CONVENTION ON HUMAN RIGHTS: AN OVERVIEW

A primary purpose of the Convention for the Protection of Human Rights and Fundamental Freedoms is to protect the human rights of all individuals in the signatory states. The promulgation of the Convention, to some extent, was a consequence of the European integration movement that followed the Second World War.¹¹ Seventeen members of the Council of Europe¹² signed the Convention in Rome on November 4, 1950.¹³ The Convention incorporates many of the principles and provisions of The Universal Declaration on Human Rights.¹⁴ The Convention prescribes civil and political rights which the "High Contracting Parties" must afford to individu-

11. Consequently, citizens may bring a petition against their own state to the European Commission. See F. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1-7 (1975). Professor Jacobs maintains that, in the wake of the Second World War, the formation of the Council of Europe and the drafting of the Convention were the most significant immediate results of the movement for European unity. Jacobs explains that the creation of the Council of Europe and the adoption of the Human Rights Convention are an acknowledgment that the civil liberties of individuals may require protection from the state of which he or she is a national. The establishment of the Convention and its organs of enforcement as an independent body of international law initiated a new approach to the protection of human rights. Traditionally, the protection of human rights had been relegated to the domestic jurisdiction of the individuals states. For further history of the Convention, see also A.H. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 1-21 (2d ed. 1977); G. WEIL, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 21-35 (1963); Robertson, *The Political Background and Historical Development of the European Convention on Human Rights* in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 24 (1965).

12. The Council of Europe is a product of the movement for European unity that emerged after the Second World War, and was formed to bring together the European nations in the post-war reconstruction effort. COUNCIL OF EUROPE SECRETARIAT, *MANUAL OF THE COUNCIL OF EUROPE* 3-5 (1970). The Council was created by the Statute of the Council of Europe in 1949, and had the stated objective of achieving "a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress." The Statute of the Council of Europe, May 5, 1949, art. 1(a) reprinted in *MANUAL OF COUNCIL OF EUROPE*, app. 1, at 299. Any European state may be invited to become a member. *Id.* art. 4, app. 1, at 300. The Council is composed of a Committee of Ministers and a Consultative Assembly. *Id.* art. 10, app. 1, at 301.

13. CONV. ON HUMAN RIGHTS, *supra* note 1 at 17.

14. The Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810, at 74 (1948) (3d Sess., 1st Part).

als within their jurisdictions, and establishes mechanisms to protect those rights.

The European Convention established two judicial bodies for protecting human rights: the European Commission on Human Rights (Commission) and the European Court of Human Rights (Court).¹⁵ Petitions alleging violations of Convention rights may be referred to the Commission by a High Contracting Party,¹⁶ or by "any person, non-governmental organisation, or group of individuals."¹⁷ The Commission, however, does not accept jurisdiction until the applicant exhausts all domestic remedies.¹⁸ Furthermore, the Commission does not accept anonymously submitted petitions, and it will not resolve matters "already [dealt with] by the Commission,"

15. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 19 at 7.

All members of the Council of Europe are guaranteed judicial representation on the Court. *Id.* art. 38 at 11. The number of members on the Commission, however, is controlled by the number of signatories to the Convention. *Id.* art. 20 at 7. Presently, there are 21 members of the Court and 20 members of the Commission. The judges on the Court are nominated by the Council of Europe and elected by its Consultative Assembly for a nine-year term. *Id.* arts. 39, 40 at 11-12. Commission members serve six-year terms. *Id.* art. 22 at 8.

In addition, the Statute of the Council of Europe provides for a Committee of Ministers, *see supra* note 12, at art. 14, which functions as the executive organ for the Convention. Under Article 32 of the Convention, CONV. ON HUMAN RIGHTS *supra* note 1, at 10, the Committee decides whether the Convention has been violated in those cases that the Commission does not refer to the Court. *Id.* at 13. For a general discussion of the principal mechanisms for enforcing the Convention, see F. CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14-20* (1974); Golsong, *The Control Machinery of the European Convention on Human Rights*, in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS supra* note 11, at 38.

16. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 24 at 8. This provision applies when there is a breach of a Convention right by another High Contracting Party. A High Contracting Party denotes a signatory State of the Convention.

17. *Id.* art. 25 at 8-9. Article 25 is concerned with the actions of a High Contracting Party which violate an individual's Convention rights. Article 25 includes a provision stating that the Commission will only receive individual petitions if the government against which the complaint was filed "has declared that it recognises the competence of the Commission to receive such petitions." *Id.* at 9. Declarations may be made for specific time periods, and are to be sent to the Secretary-General of the Council of Europe, who transmits copies to the signatory governments. In 1966 the United Kingdom issued a declaration, effective for three years, recognizing the right of individual petition. [1966] Y.B. EUR. CONV. ON HUMAN RIGHTS 8. The United Kingdom renewed this declaration in 1974 for two years, and in 1976 for five years. [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 6, 14. The United Kingdom most recently renewed its declaration in January of 1981. *See* 994 PARL. DEB., H.C. (5th ser.) 90 (1980). Professor Fawcett finds the right of individual petition remarkable because it allows the individual to "bring an application against any contracting state." Thus, the individual is not dependent upon the diplomatic intervention of a state "for the protection of Convention rights." J.E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 279 (1969).

18. CONV. ON HUMAN RIGHTS, *supra* note 1, arts. 26, 27(3) at 9. Article 26 provides that the standards for determining whether domestic remedies have been exhausted are the "generally recognized rules of international law." *Id.* art. 26 at 9. For a general discussion of the law of exhaustion of local remedies and Article 26, see F. CASTBERG, *supra* note 15, at 40; J.E.S. FAWCETT, *supra* note 17, at 288; A.H. ROBERTSON, *supra* note 11, at 160-65; and G. WEIL, *supra* note 11, at 104.

or matters which are incompatible with the provisions of the present Convention."¹⁹ Finally, the Commission will not consider a case that is manifestly illfounded, or that abuses the right of petition.²⁰

When a dispute arises under the Convention, the Commission initially attempts to bring the parties to a "friendly settlement."²¹ If a settlement is not forthcoming, the Commission forwards a report embodying its recommendations to the Committee of Ministers.²² Then the Commission may refer the case to the Court,²³ and the Court will issue a decision. If the case is not referred to the Court, the Committee of Ministers decides the case. In either case, the decision binds the High Contracting Party.²⁴

The jurisdiction of the European Court of Human Rights extends "to all cases concerning the interpretation and application"²⁵ of the Convention which either the High Contracting Parties or the

19. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 27 at 9.

20. *Id.* Upon receiving a petition, the Commission first must decide whether an application is admissible under Article 27. Professor Fawcett claims this screening process is the one part of the Commission's activities that can be labelled quasi-judicial. J.E.S. FAWCETT, *supra* note 17, at 310. Even after accepting a petition, the Commission may reject a petition if, during its examination, the Commission finds that one of the grounds for non-acceptance provided for in Article 27 exists. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 29 at 10.

From 1955 to 1980, out of a total of 8,693 decisions (9,216 applications registered), the Commission declared 234 admissible (approximately 2.6%). EUROPEAN COMMISSION OF HUMAN RIGHTS, ANNUAL REVIEW 1980, 40 (1981) [hereinafter cited as ANNUAL REVIEW 1980].

21. CONV. ON HUMAN RIGHTS, *supra* note 1, arts. 28(b), 30 at 9-10. Article 28(b) provides that the Commission should "place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention." The Commission accomplishes this goal through confidential negotiations with the parties. F. JACOBS, *supra* note 11, at 254. Usually the Commission will indicate to the government involved its "provisional opinion on the question of a violation." *Id.* at 255. Because a formal finding may necessitate compensating the victim and making any requisite changes in the law, it is in the interest of the government to achieve a mutually beneficial settlement with the applicant if the Commission believes a violation exists. *Id.* If the parties do not reach a settlement, the Commission decides the case by majority vote. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 34, at 11.

22. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 31 at 10.

23. *Id.* art. 48 at 13. Robertson cites several factors that influence the decision of the Commission regarding whether or not to bring a case before the Court. A.H. ROBERTSON, *supra* note 11, at 205-06. If the substance of the case poses difficult legal problems that the Court is better suited than the Committee of Ministers to decide, or if a case requires authoritative interpretation of a Convention provision, the Commission is apt to refer the issue to the Court. *Id.* at 205. A narrow division of the Commission members over a question also may prompt referral to the Court. *Id.* at 205-06. If the case involves serious political questions, the Commission probably will refer the case to the Committee of Ministers, because the Committee, as the executive organ of the Council of Europe, is more political in nature than the Court. *Id.* at 206.

24. A two-thirds vote is required. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 32 at 10. Article 32 provides a three-month period for further efforts towards a friendly settlement. *Id.* See also *id.* art. 47 at 13.

25. *Id.* art. 45 at 12.

Commission²⁶ refer to the Court.²⁷ A chamber of judges decides each case.²⁸ The judgements of the Court are final,²⁹ and the signatory states, when parties to a case, must abide by the decisions of the Court.³⁰

B. THE CASE OF YOUNG, JAMES, AND WEBSTER

The *Case of Young, James, and Webster*³¹ arose in 1975 when British Railways dismissed Ian Young, Noel James, and Ronald Webster from their jobs. The dismissals of the employees resulted from their refusal to join one of the three unions that had signed closed shop agreements with British Rail.³² Notices posted at the work sites informed the employees that closed shop agreements between certain unions and British Rail modified the employment contracts of all railroad employees. After the modification, membership in one of these unions became a condition of employment.³³ Young and Webster were told that the unfair dismissal provisions of the Trade Union and Labour Relations Act, 1974³⁴ exempted them

26. *Id.* arts. 44, 48 at 12-13. Under Article 48(a) the Commission brings cases before the Court for individuals whose rights have been violated.

27. *Id.* art. 45 at 12. The Court decides questions concerning its own jurisdiction. *Id.* art. 49 at 13. States may declare, however, that they recognize the Court's jurisdiction as compulsory. *Id.* art. 46 at 13.

28. *Id.* art. 43 at 12. For each case, seven judges are selected to make up the Chamber; a judge from the state or states concerned in the case sits as an *ex officio* member. Under Article 48 of the Court's rules, however, the Chamber may relinquish jurisdiction in favor of the plenary Court. Rules of Court of the European Court of Human Rights, reprinted in COUNCIL OF EUROPE, EUR. CONV. ON HUMAN RIGHTS 34 (1971): The Court resorted to this procedure in *Young, James, and Webster*.

29. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 52 at 14. See *id.* art. 51, which provides that the Court must give reasons for its judgments.

30. *Id.* art. 53 at 14.

31. *Young, James, and Webster*, *supra* note 8.

32. The unions involved were the National Union of Railwaymen (N.U.R.), the Transport and Salaried Staff Association (T.S.S.A.), and the Associated Society of Locomotive Engineers and Firemen (A.S.L.E.F.). The agreement was made in July, 1975. *Young, James, and Webster*, *supra* note 8, at 8.

33. *Young, James, and Webster*, *supra* note 8, at 8-9. Young was hired in 1972, James in 1974, and Webster in 1958. Webster had objected to joining a union in 1970 under similar circumstances, but because in 1971 Parliament enacted the Industrial Relations Act, which outlawed dismissals based on the refusal of an employee to join a union in a closed shop, his objection did not result in his dismissal.

34. Trade Union and Labour Relations Act, 1974, ch. 52, § 6(5), sched. 1. See *infra*, notes 78-84 and accompanying text. The Act provided:

(5) Dismissal of an employee by an employer shall be regarded as fair for the purposes of this Schedule if—

(a) it is the practice, in accordance with a union membership agreement, for all employees of that employer or all employees of the same class as the dismissed employee to belong to a specified independent trade union, or to one of a number of specified independent trade unions; and

(b) the reason for the dismissal was that the employee was not a member of the specified union or one of the specified unions, or had refused or pro-

from forced union membership if they genuinely objected to becoming members of any union because of religious beliefs, or due to any other reasonable grounds.³⁵ The fired employees asserted their exempt status, and an appeal body³⁶ convened, in accordance with the union membership agreement, to hear their claims. Before the hearing, however, Parliament passed the Trade Union and Labour Relations (Amendment) Act, 1976.³⁷ The 1976 Act repealed the provision of the 1974 Act which allowed exemptions from union membership on "any reasonable grounds."³⁸ Because the claims of Young and Webster were not based on the ground of religious belief, their claims were denied.³⁹ James refused to join the required union for a different reason; he was dissatisfied with the way in which the union responded to the salary clarification request of a fellow employee.⁴⁰ British Rail therefore dismissed him for failing to com-

posed to refuse to become or remain a member of that union or one of those unions;

unless the employee genuinely objects on the grounds of religious belief to being a member of any trade union whatsoever, or on any reasonable grounds to being a member of a particular trade union, in which case the dismissal shall be regarded as unfair.

35. Applications 7601/76 and 7806/77, *Young, James, and Webster v. United Kingdom*, Eur. Comm'n on Human Rights, 1979 [hereinafter cited as *Comm'n Report*].

36. The Appeal Body was established by the union membership agreement and consisted of representatives from British Rail, the T.S.S.A., and the N.U.R. *Comm'n Report*, *supra* note 35, at 9, 12.

37. Trade Union and Labour Relations (Amendment) Act, 1976, ch. 7.

38. *Id.* § 1(e).

39. Young and Webster's claims of exemption were based on a variety of political considerations. Young, for instance, protested in writing that he did not agree with the union's political bias towards the Labour Party. *Comm'n Report*, *supra* note 35, at 8-9. He also indicated that he did not want to provide financial support for the Labour Party, or have money from the union fund support a Labour party oriented newspaper. *Id.* In Young's opinion, the union was responsible for increased inflation. *Id.* In addition, he complained that the union, was "intolerant of the expression of individual freedom." *Id.* He also claimed that closed shops would permit the union to have more control over employees, and that union strikes would require that he leave work, even though he considered striking a form of collective blackmail. *Id.* Finally, Young noted that if he ever wished to become a full time union official, he would have to give the union records of his past activities with the Labour and Trade Union movements. *Id.* Webster's claims were similar. He opposed closed shops because of their purported effects on individual rights and the economy, and believed that trade unions failed to provide adequate representation for employees. *Id.* at 83-84. Finally, Webster also believed that the union's influence was not in the best interest of the country. *Id.*

40. James initially had no objection to joining the union he was required to join, the N.U.R. As a result of a wage dispute in which he and another worker were involved, however, James did not apply for N.U.R. membership. The other worker, already a N.U.R. member, had applied to the union for clarification of his salary calculation. James was not satisfied with the failure of the union to state the basis for concluding that his fellow employee's salary was computed correctly. Neither the union nor the management responded to James' inquiry concerning his own salary; he refused, therefore, to join the union.

ply with the union membership agreement.⁴¹

The three former railroad employees applied to the European Commission on Human Rights, which referred the case to the European Court of Human Rights.⁴² In the Court proceedings, the applicants alleged that the United Kingdom had violated several of their Convention rights, including their freedom of thought, conscience, and religion, guaranteed by Article 9;⁴³ their freedom of expression, protected by Article 10;⁴⁴ their freedom of association, including the right to form and join trade unions, articulated in Article 11;⁴⁵ and their right to an effective remedy before a national authority, granted

41. James brought a claim before an Industrial Tribunal. The Tribunal dismissed his claim on the grounds that James had not followed the exemption procedure outlined in the agreement. Furthermore, he had not claimed that his grounds for refusing to join the union were religious; therefore, under the Trade Union and Labour Relations (Amendment), Act 1976, ch. 7 § 1(e), the dismissal was fair. *Comm'n Report, supra* note 35, at 9-10.

42. Young and James joined in filing an application before the Commission. Webster filed separately. The Commission joined their actions on May 11, 1978, after holding hearings on both the admissibility and the merits of the individual applications. *Comm'n Report, supra* note 35, at 4. The Commission was unable to bring the parties to a friendly settlement under Article 31(2) of the Convention. *Id.* at 5. The Commission did not find it necessary to consider whether the freedom of association protected by Article 11 of the Convention included the right not to join any trade union. *Id.* at 32. It did find, however, that the applicants' Article 11 rights were violated. *Id.* at 37. It explained that the freedom to join trade unions includes the right to join a union of one's own choice, and if no such union is available, to form a labor association by "private initiative." *Id.* at 34. It observed that the applicants were dismissed for refusing to join a specific trade union against their "personal convictions." *Id.* at 35. Furthermore, Young, James, and Webster were already employed by British Rail when the closed shop agreement became effective; thus, the consequence of failing to join a union was loss of employment. The Commission distinguished this situation from the situation in which a closed shop arrangement existed before a worker was hired, because in the latter situation the Commission discerned elements of consent. *Id.*

The Commission found that, with respect to Article 13, there is no right to a remedy when legislation is in conflict with the Convention because "[s]uch a remedy would . . . amount to some sort of judicial review of legislation." *Id.* at 38. The Commission found that Article 13 is concerned with individuals acting in an official capacity, rather than with legislation.

43. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 9 at 5; see *Comm'n Report, supra* note 35, at 13-14.

44. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 10 at 5-6; see *Comm'n Report, supra* note 35, at 15.

45. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 11 at 6; *Comm'n Report, supra* note 35, at 15-30. For the text of article 11, see *supra* note 1. The applicants claimed that under the ordinary meaning of the language of Article 11(1), "the right to associate and the right not to associate were two sides of the same coin, the freedom to associate." *Comm'n Report, supra* note 35, at 15. They alleged that the right to join trade unions was useless if they could only join unions recognized by their employers, or risk dismissal. *Id.* at 16. The applicants stressed that it was "a power to exact . . . a choice [not to associate]," not the actual dismissal, which violated the Convention. *Id.* at 18. The applicants agreed with the government that there was no difference between refusing to hire someone who would not join a union and dismissing a non-union employee. Both actions, the applicants claimed, were equally unfair. The latter situation, however, involved an additional problem as the union agreement changed the terms of the employee's contract without the employee's participation or consent. *Id.*

by Article 13.⁴⁶

The Court held that the United Kingdom had violated Article 11 by compelling Young, James, and Webster either to join a union, or to risk dismissal and the concomitant loss of livelihood. The Court stated that "a threat of dismissal involving loss of livelihood is a most serious form of compulsion."⁴⁷ This type of coercion, the Court noted, struck at the essence of an individual's right to freedom of association.⁴⁸ The Court emphasized that the threat was directed against workers that were hired before British Rail entered the close shop agreement.⁴⁹ The fact that the agreement limited the employee's choice regarding which union to join, and thereby further impinged upon the individual's freedom to associate, was also a consideration.⁵⁰

Furthermore, the Court addressed the issue of whether Article

The government contended that it did not make union membership agreements compulsory; it simply left the matter up to the employers and the unions. Furthermore, the government did not alter the rights of employees when an employer, in breach of a contract, unfairly dismissed an employee. The government also asserted that there could be no right not to associate, for if an employee claimed such a right in a closed shop, he or she would deny other workers the right not to associate with those who refused to work under the same terms and conditions as themselves. "The right of 'non-association' could not exist for one employee and not for all the employees." *Id.* at 20. In addition, the government denied that any compulsion was involved in the dismissal of the employee. Employees simply were faced with the choice of joining a union or not working for one particular employer. *Id.* Because the Convention did not establish a right to work, there could be no violation of Article 11(1). Finally, the government distinguished the right to join trade unions from the freedom to associate, saying that the right was not absolute but could be qualified by certain terms. Therefore, even if the Convention established a right not to join a trade union, the right was qualified; an individual could "only refuse to join if he accepted that he could not enjoy the benefits." *Id.* at 22.

46. CONV. ON HUMAN RIGHTS, *supra* note 1, art. 13 at 6; *Comm'n Report, supra* note 35, at 31. For the text of Article 13 see *supra* note 2. The applicants claimed that the United Kingdom had an "obligation under international law to ensure that domestic law was in line with treaty obligations." *Comm'n Report, supra* note 35, at 31. The British government claimed that an Article 13 issue could arise only if the applicants first demonstrated that a Convention right had been violated. *Id.* Because the government had not violated any of the applicants' Convention rights, the government claimed the Article 13 issue was moot. *Id.*

47. *Young, James, and Webster, supra* note 8, at 18. The Article 9 and 10 issues were not considered in detail by either the Commission or the Court because they turned on the determination of the Article 11 claim. The Court said:

The protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11. Accordingly, it strikes at the very substance of this Article to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions.

Id. at 19.

48. *Id.* at 18.

49. *See id.* at 19.

50. *See id.* at 18.

11(2)⁵¹ justified the actions of the United Kingdom in interfering with human rights. It focused this part of its analysis on the following question: "[I]n order to achieve the aims of the unions party to the 1975 agreement with British Rail, was it 'necessary in a democratic society,' to make lawful the dismissal of the applicants?"⁵² The Court noted that the dismissal of the employees was not necessary in this case because the unions involved already had extensive membership listings.⁵³ In addition, the Court observed that unions that establish closed shop agreements with employers frequently permit employees hired prior to the existence of the agreement to abstain from joining any union.⁵⁴

Most importantly, while finding a violation of the employees' freedom to associate, the Court did not decide whether the Article 11 right to freedom of association included the right not to become a member of any union or association.⁵⁵ The Court also found it unnecessary to consider whether there had been a violation of Article 13,⁵⁶ which guarantees individuals the right to an effective remedy before a national authority.

The Court's decision is disappointing because it failed to address two critical issues raised by the case: first, whether the freedom to associate includes the right not to associate, at least with regard to union membership; and second, whether individuals, such as Young, James, and Webster, can avail themselves of an effective remedy before a national authority when the nation involved has not incorporated the Convention into its domestic law. This Note maintains that the Court could have resolved these issues more adequately by determining that Article 11 implies both a positive freedom to associate and an equivalent negative freedom not to asso-

51. The Court raised the issue of Article 11(2) even though the United Kingdom stated that if the Court found interference with a right guaranteed by paragraph one of Articles 9, 10, or 11, it would not seek to argue that such interference was justified. *Id.* at 19. For the text of Article 11(2) see *supra* note 1.

52. *Young, James, and Webster, supra* note 8, at 20.

53. *Id.* at 20.

54. *Id.* The Court considered three factors in determining whether the applicants' dismissal met the definition of "necessary in a democratic society." First, it established that "necessary" was not a flexible term, i.e., the necessity requirement of Article 11(2) is not satisfied by mere advantageousness. *Id.* at 20. Second, it noted that "pluralism, tolerance, and broadmindedness are the hallmarks of a 'democratic society.'" *Id.* at 21. Finally, the restrictions on Convention rights "must be proportionate to the legitimate aim pursued." *Id.* (citing *Handyside Case*, 1976 Y.B. EUR. CONV. ON HUMAN RIGHTS 506 (Eur. Ct. of Human Rights)).

55. The Court said that it was adhering to its policy of limiting its holding to the facts at issue. *Young, James, and Webster, supra* note 8, at 17-18.

56. CONV. ON HUMAN RIGHTS, *supra* note 1, at 22. The Court stated that, "[h]aving regard to its decision on Article 11 . . . , the Court does not consider it necessary to determine whether there has in addition been a violation of Article 13." For a discussion of Article 13 see *infra* notes 149-69 and accompanying text.

ciate, and by at least addressing the Article 13 issue. This Note recognizes, however, that a decision by the Court holding that no adequate national remedy existed would not by itself resolve the most pressing Article 13 problem, namely, whether signatory states should incorporate the Convention into their domestic law in order to ensure an effective national remedy, may require an amendment to Article 13. The following discussion of British unfair dismissal law provides a background to the *Case of Young, James, and Webster*. It also illustrates the type of controversial domestic human rights issues that may require Convention guidance.

II. FREEDOM OF ASSOCIATION AND BRITISH LAW ON UNFAIR DISMISSAL

A. UNFAIR DISMISSAL AND CLOSED SHOPS IN BRITISH LAW

Developments over the past decade in British law regarding unfair dismissal demonstrate the inability of the legislature to control collectively bargained union membership agreements.⁵⁷ Closed shop agreements have been a persistent problem for the British government, even though no law protects collectively bargained agreements, and such agreements are not enforceable as legal contracts.⁵⁸

Since the late 1960's, the number of workers covered by closed shop agreements has increased from 3.75 million to 5.2 million.⁵⁹ Closed shop agreements now govern the employment contracts of many white collar workers, and have become quite popular in many

57. The phrases "union membership agreement" and "closed shop" are used interchangeably in this Note. The Trade Union and Labour Relations Act, 1974, ch. 52, § 30 defines a union membership agreement as an arrangement that

has the effect of requiring the terms and conditions of employment of every employee of that class to include a condition that he must be or become a member of the union or one of the unions which is or are parties to the agreement or arrangement or of another appropriate independent trade union.

58. Professor Kahn-Freund asserts that collective bargaining agreements lack the status of enforceable contracts because the parties do not intend to conclude a binding contract. O. KAHN-FREUND, *supra* note 3, at 125-26. He attributes this lack of intent to the structure of British collective bargaining. *Id.* at 127. The Industrial Relations Act, 1971, c. 72, § 34, attempted to make collective bargaining agreements binding, but unions and employers avoided this provision by including disclaimers in their agreements. *Id.* at 130. The Trade Union and Labour Relations Act, 1974, c. 52, § 18, reversed the 1971 Act by creating a presumption similar to the one at common law, that collective bargaining agreements were not binding unless the parties agreed to the contrary in writing. *Id.* at 131.

Professor Kahn-Freund also advances the thesis that collective bargaining agreements in Britain, although not legally enforceable as contracts, operate as a sort of non-binding "code" which serves certain social functions within labor relations. Freedom of contract may be limited or restrained by collective agreements. *Id.* at 133. The terms of the collective agreement shape the terms of individual contracts.

59. The Times (London), Aug. 15, 1981 at 3, col. 3.

developing industries.⁶⁰ There are several possible explanations for the increasing popularity of closed shops. Some suggest that closed shops permit the union to further the political aims of this otherwise powerless membership.⁶¹ Other commentators emphasize that closed shop agreements assure adequate representation for all workers, and increase stability in the collective bargaining process.⁶² In any event, the increase in closed shops has occurred despite the efforts of several conservative governments to eliminate such arrangements.⁶³

Before the 1970's, common law contract principles governed unfair dismissal complaints, including those complaints that were brought because employees were fired for refusing to join a union when a closed shop was in effect.⁶⁴ Under the common law, unfairly dismissed employees were entitled only to reasonable notice of the termination of their contracts.⁶⁵ The failure of an employer to give notice entitled the employee to contract damages,⁶⁶ consisting of the

60. The most pronounced growth has been in the food, drink and tobacco; clothing and footwear; gas, water, and electricity; and transportation and communication sectors. *Id.*

61. O. KAHN-FREUND, *supra* note 3, at 199. Kahn-Freund asserts that "the case for the closed shop can only be made in terms of the need for an equilibrium of power." *Id.*

62. GREEN PAPER, *supra* note 3, at 66. Closed shop advocates also argue that non-union members who withhold their support should not receive the benefits won by the unions. Kahn-Freund rejects this argument. He concedes that it has emotional appeal, but argues that the problem is easily solved by having non-union members make monetary contributions to union funds, as is the practice in other countries. O. KAHN-FREUND, *supra* note 3, at 198.

63. *See generally* Industrial Relations Act, 1971, ch. 72; Employment Act, 1980, ch. 42. Both are attempts to eliminate the closed shop.

64. *See* D. JACKSON, UNFAIR DISMISSAL: HOW AND WHY THE LAW WORKS 4-6 (1975).

65. *Id.* at 4. A contract of service characterized employer-employee relationships. *Smith v. Geneva Motor Cab Co.*, 1911 A.C. 188. There were four "indicia of a contract of service:" the payment of wages, the employer's control of the work, the employer's ability to select the employee, and the employer's right to dismiss the employee. *Shor v. J. and W. Henderson. Ltd.*, 1946 Sess. Cas. (H.L.) 24, 33-34; *Gould v. Minister of National Insurance*, [1951] 1 K.B. 731, 734. Although these criteria could be affected by statute, *Short* at 34, they indicate that in general the employer's control was essential to the relationship. Reasonable notice was held to require from as little as one week, *Evans v. Ware*, [1892] 3 Ch. 502, 504, to as much as one year, *Grundy v. Sun Printing and Publishing Association*, [1916] 33 T.L.R. 77; *Savage v. British Indian Stream Navigation Co. Ltd.*, [1930] 46 T.L.R. 294. The Contracts of Employment Act, 1963, ch. 49, § 4(1) established the rights of employees to have, if there was no written contract, a written statement detailing such particulars as the rate and frequency of payment, and other terms and conditions of employment. The Act also required a minimum period of notice for dismissal, which varied with the length of service. *Id.* § 1. For a discussion of the contract of employment in employment law, see Forrest, *Political Values in Individual Employment Law*, 43 MOD. L. REV. 361, 363 (1980).

66. *General Billposting Co. Ltd. v. Atkinson*, 1909 A.C. 118. The employee could sue for repudiation of contract, or in quantum meruit for the value of the work performed, by treating the contract as rescinded on the basis of the employer's act. *Cutter v. Powell*, [1795] 6 Term Rep. 320; *Emmens v. Elderton*, [1853] 13 C.B. 495, (H.L.), 509 (per

losses incurred during a reasonable period of notice.⁶⁷ More importantly, the employer did not have to state a reason for the dismissal.⁶⁸ In addition, the common law on "restraint of trade" made any worker combination illegal if it was established to injure an individual in his or her trade rather than to defend the trade of the combining members. This principle applied to the enforcement of closed shop agreements against individuals who refused to join, resigned from, or were dismissed from a union.⁶⁹

In 1971, the British government passed the Industrial Relations Act, 1971 establishing statutory rights which attempted to protect employees from unfair dismissal.⁷⁰ The Industrial Relations Act restricted the ability of an employer to dismiss an employee without providing a reason.⁷¹ It also granted the individual employee the right not to belong to a trade union,⁷² a right enforceable by either reinstatement or compensatory damages.⁷³ Furthermore, the Act outlawed restrictive hiring practices based on union membership (hiring halls),⁷⁴ and established the right to form "agency shops" for

Crompton, J.); *Goodman v. Pocock*, [1850] 15 Q.B. 576, 580 (per Campbell, J.); *Pritchett v. Badger*, [1856] 1 C.B.N.S. 296, 305 (per Williams, J.).

67. *D. JACKSON*, *supra* note 64, at 4-5. See *French v. Brooks*, [1830] 6 Bing. 354; *Burton v. Pinkerton*, [1867] 2 L.R.-Ex. 340; *Hartley v. Harman*, [1840] 11 Ad. & E. 798 (damages for breach of notice precludes those for work and labor); *Goodman v. Pocock*, [1850] 15 Q.B. 576; *Hochster v. De la Tour*, [1853] 2 E. & B. 678 (intended breach of promise is grounds for suit); *Brace v. Calder*, [1895] 2 Q.B. 253, (C.A.).

68. *Ridgeway v. Hungerford Market Co.*, [1835] 3 Ad. & El. 171; *Cussons v. Skinner*, [1843] 11 M. & W. 161. Paradoxically, an employer did not have to have a reason at time of discharge, but at time of trial the tribunal had to be able to find a reason.

69. *Morgan v. Fry*, [1967] 2 All E.R. 386; *Rookes v. Barnard*, [1964] 1 All E.R. 367 (threat by union members to strike unless non-union member dismissed, when a closed shop is in force, constitutes the tort of intimidation); *Huntley v. Thornton*, [1957] 1 All E.R. 234 (union secretary's threat to call a strike unless non-union member was dismissed, failed to support a claim of conspiracy because it was not intended to injure plaintiff, but to protect union interests; however, the same conduct constitutes unlawful intimidation).

70. Industrial Relations Act, 1971 ch. 72, § 22-33. Under the statute, unfair dismissal constitutes an unfair industrial practice, and the victims of such practices may bring their claims before industrial tribunals. *Id.* § 106.

71. *Id.* § 24(1).

72. *Id.* § 5(1)(b). The purpose of this section was to undercut the closed shop. Parliament adopted the policy that was formulated by the Conservative Political Centre. See FAIR DEAL AT WORK, THE CONSERVATIVE APPROACH TO MODERN INDUSTRIAL RELATIONS (1968), cited in O. KAHN-FREUND, *supra* note 3, at 202. The Industrial Relations Act, 1971, ch. 72, § 5(1)(a) gave employees the right to membership in a trade union of his or her choice.

73. Industrial Relations Act, 1971, ch. 72, § 106(2)-(5).

74. *Id.* § 7. This section bans "pre-entry" closed shop agreements. A pre-entry closed shop agreement prohibits an individual from applying for a job unless he or she is a member of a particular union. O. KAHN-FREUND, *supra* note 3, at 196. A pre-entry closed shop agreement is to be distinguished from a post-entry closed shop agreement, in which every employee must join the union within a certain time after accepting a job. *Id.* at 196-97.

registered unions.⁷⁵ In practice, the Industrial Relations Act failed to restrict closed shop arrangements, primarily because such agreements are informal, and, therefore, the statute prohibiting them is difficult to enforce.⁷⁶ In addition, such agreements are popular among both workers and employers.⁷⁷

The Trade Union and Labour Relations Act, 1974, repealed the Industrial Relations Act, 1971.⁷⁸ The new legislation⁷⁹ re-enacted several sections of the earlier statute, however, including those provisions that protect employees from unfair dismissals, and required employers to show good cause before dismissing an employee.⁸⁰ The new Act, although it allowed closed shops, also provided a foundation from which an employee could object to forced membership in a particular union. As a general principle, the 1974 Act provided that the dismissal of an employee was unfair if based solely on that employee's membership, or proposed membership, in a union.⁸¹ Under the Act, however, a dismissal for failure to join a union would be fair if all the employees of a particular employer belonged to a "specified independent trade union,"⁸² and if the fired employee was not a member of, or had refused to join, that union.⁸³ But even in these legitimate circumstances, dismissal would be considered unfair if the employee objected "on grounds of religious belief to being a member of any trade union whatsoever" or "on any reasonable grounds to being a member of a particular trade union."⁸⁴ Two years later, however, the Trade Union and Labour Relations (Amendment) Act, 1976, repealed the provision of the 1974 Act that permitted an employee to refuse to participate in a closed shop agreement if the employee had "reasonable grounds" for such

75. Industrial Relations Act, 1971, ch. 72, § 11. An agency shop is an agreement allowing individual workers either to become union members, or to contribute to a union fund or a charity. *Id.* Section 12 provided for balloting by workers on the question of whether an agency shop should be instituted. The fact that only registered unions were eligible to form agency shops allowed employers and unions with more informal arrangements to avoid the strictures of the Act. O. KAHN-FREUND, *supra* note 3, at 202.

76. O. KAHN-FREUND, *supra* note 3, at 199. Kahn-Freund asserts that the inability of the law to "suppress practices based on informal and generally shared understandings of the workers" is one of the strongest arguments against legislating to restrict the closed shop. *Id.*

The lack of cooperation by the trade unions also may explain the failure of the statute: the Trade Union Congress and its affiliates actively opposed the legislation. *Id.* at 203-04. See also GREEN PAPER, *supra* note 6, at 67.

77. See *supra* notes 59-63 and accompanying text.

78. Trade Union and Labour Relations Act, 1974, ch. 52, § 1(1).

79. *Id.* secs. 4-15, sched. 1 §§ 22-23.

80. *Id.* secs. 4, 6, sched. 1, §§ 22, 24.

81. *Id.* sec. 6(4), sched. 1, § 24.

82. *Id.* § 6(5), sched. 1.

83. *Id.*

84. *Id.*

refusal.⁸⁵

Court interpretations of the 1974 and 1976 Acts have reinforced the restrictive effects of union membership agreements on the right of individual workers to refuse to join a specific union. In *Home County Dairies Ltd. v. Woods*,⁸⁶ the Employment Appeals Tribunal⁸⁷ reasoned that a union membership agreement between the employer and the union controlled all union membership issues, and thereby superseded the provision in an individual's employment contract, which provided a right not to join a union.⁸⁸ In *Himpfen v. Allied Records Ltd.*,⁸⁹ the Tribunal found that an employee was dismissed unfairly because the employer had dismissed the employee after he joined a union other than the one that was specified by the closed shop agreement. At the same time, however, the Tribunal construed the phrase "dismissal . . . shall be regarded as fair . . . [if] it is the practice . . . for all employees . . . to belong to the specified union," to require a showing that "almost all" employees belonged to the union.⁹⁰ Under the Tribunal's construction of the Act, a shop need not be "closed" completely, and still the dismissal of an employee who refused to join a union would be labeled "fair." In *Himpfen*, however, the Tribunal found that a significant number of employees were not union members. Hence, even the liberalized "almost all" condition was not satisfied, and the dismissals were found to be unfair.⁹¹ Employment Appeal Tribunals have also held that an employer's genuine belief that an employee was not a union member

85. Trade Union and Labour Relations Act, 1976, ch. 7 § 1(e). The Employment Protection (Consolidation) Act, 1978, ch. 44 § 58(3) consolidated the provisions of the Trade Union and Labour Relations Act, 1974, ch. 52 § 6(5), Sched. 1 as amended by the 1976 Act, along with other employment laws. The Government viewed the broad reasonable grounds exception in the 1974 Act as a threat to closed shop agreements. England & Rees, *The Trade Union and Labour Relations (Amendment) Act, 1976* 39 MOD. L. REV. 698, 699 (1976).

86. 1977 Indus. Cas. R. 463.

87. The Employment Protection Act, 1975, ch. 71, § 87 originally established the Employment Appeals Tribunal, and The Employment Protection (Consolidation) Act, 1978, ch. 44, § 135 perpetuated its existence. The Tribunal adjudicates appeals from industrial tribunals concerning various statutes.

88. 1977 Indus. Cas. R. at 467-68. This decision seems harsh even in light of the 1974 and 1976 legislative efforts to protect the closed shop. Although the legislation obviously favored the closed shop, the 1974 Act also relegated collectively bargained agreements to their status at common law; that is, such agreements were not enforceable as binding contracts. The explicit right not to join a trade union, as set forth in the employee's contract, therefore, ought to have controlled.

89. 1978 Indus. Cas. R. 684.

90. *Id.* at 689-91. Note that in *Taylor v. Co-operative Retail Services*, 1982 Indus. Cas. R. 600, Fox, L.J., in reference to the interpretation of "practice" in the 1976 Amendments, stated that *Himpfen* did not give "any authoritative guidance . . . since it appears to proceed upon the basis that the word 'all' remains in paragraph 6(5) as amended by the Act of 1976." *Id.* at 613.

91. *Id.* at 689.

is sufficient to render a dismissal fair; it is irrelevant that the employee was either a member or entitled to be a member of the union.⁹²

A conservative British government modified its posture on closed shop agreements by passing the Employment Act, 1980.⁹³ Section 7 of the Act makes it unfair to dismiss an employee for not joining a union if the employee "genuinely objects" to membership on the "grounds of conscience or other deeply-held personal convictions," if the union membership agreement became effective after the employee's term of employment began, or if the union membership agreement was signed but not approved on the effective date of the 1980 Act.⁹⁴

Under section 3(4) of the Employment Act, 1980, the Department of Employment promulgated a Code of Practice on Closed Shop Agreements and Arrangements.⁹⁵ The Code provides "that any agreement or practice on union membership should protect basic individual rights; should enjoy the overwhelming support of

92. *Gayle v. John Wilkinson and Sons (Saltley) Ltd.*, 1978 Indus. Cas. R. 154; *Lakhani v. Hoover*, 1978 Indus. Cas. R. 1063.

93. Employment Act, 1980, ch. 42.

94. *Id.* § 7. The Employment Act, 1980 retained the provisions of the Trade Union and Labour Relations Acts of 1974 and 1976, as consolidated in the Employment Protection (Consolidation) Act, 1978, ch. 44, § 58(3) which permitted an employer to dismiss an employee for not joining a union if a union membership agreement existed. *See supra* notes 34 & 85. It also expanded the grounds by which an employee could be exempted from a closed shop requirement. The statute provided:

(3A) The dismissal of an employee . . . shall be regarded as unfair if he genuinely objects on grounds of conscience or other deeply-held personal conviction to being a member of any trade union whatsoever or of a particular trade union.

(3B) The dismissal of an employee by an employer . . . shall be regarded as unfair if the employee—

(a) has been among those employees of the employer who belong to the class to which the union membership agreement relates since before the agreement had the effect of requiring them to be or become members of a trade union, and

(b) has not at any time while the agreement had that effect been a member of a trade union in accordance with the agreement.

(3C) Where a union membership agreement takes effect after the commencement of section 7 of the Employment Act 1980 in relation to the employees of any class of an employer, and an employee of that class is dismissed by the employer. . . , the dismissal shall be regarded as unfair if—

(a) the agreement has not been approved in relation to those employees. . . , or

(b) it has been so approved through a ballot in which the dismissed employee was entitled to vote, but he has not at any time since the day on which the ballot was held been a member of a trade union in accordance with the agreement.

Employment Act, 1980, ch. 42, § 7. Section 7(3) contains a requirement that 80% of the employees entitled to vote must approve a union membership agreement in a secret ballot.

95. DEP'T OF EML., CODE OF PRACTICE: CLOSED SHOP AGREEMENTS AND ARRANGEMENTS (1980).

those affected; and be flexibly and tolerantly applied.”⁹⁶ The Code requires that closed shop arrangements be the product of mutual agreements between employees and unions, and encourages employers to be attentive to employee sentiment concerning union membership.⁹⁷ The Code also includes provisions requiring review of closed shop arrangements.⁹⁸

The position of the Department of Employment regarding closed shop agreements, as expressed by James Prior, then British Secretary of Employment,⁹⁹ was that such arrangements were inimical to personal liberty.¹⁰⁰ Prior noted that closed shops not only infringe on the personal liberty of an employee by making union membership a condition of employment, but that certain practices associated with such agreements also impede economic efficiency. These provisions include denying business to firms whose workers are not unionized, refusing to handle non-union made goods, refusing to work with non-union labor, and insisting on “union labor only” clauses in subcontracts.¹⁰¹ Prior also maintained that the existence of closed shops had failed to reduce industrial conflict.¹⁰² He recommended the elimination of closed shops, the periodic review of institutions with closed shop arrangements, and the enactment of laws that prohibit the unreasonable operation of closed shops.¹⁰³

96. *Id.* at 1. Section 3(8) of the Employment Act, 1980, requires that the Code be admitted as evidence in judicial proceedings. Employment Act, 1980, ch. 42, § 3(8).

97. DEP'T OF EMPL., *supra* note 95, at 6.

98. *Id.* at 11-12. The parties are to conduct reviews every few years (or more frequently when employee support for the closed shop arrangement declines), when the law or the parties to the agreement change, or when the agreement fails to work satisfactorily. Upon review, the parties have several options: they can amend the agreement, hold a secret ballot to test employee opinion, or terminate the agreement. *Id.* at 12. In this context, the Code discourages pre-entry closed shops. *Id.*

The Code of Practice on closed shops has been criticized for its failure to define such phrases as “deeply held personal conviction,” that are critical to the Code’s protection of individual rights in closed shop agreements. 10 INDUS. L.J. 45 (1981).

99. Prior is currently secretary to Northern Ireland.

100. GREEN PAPER, *supra* note 3, at 66.

101. *Id.* at 66, 60-74. See also O. KAHN-FREUND *supra* note 3, at 196. Kahn-Freund acknowledged the argument that closed shops inhibit free access to jobs, thus negatively effecting economic development and optimal use of labor. He also maintained that “if there are to be restrictions of access they should be imposed by organs of government responsible through democratic processes, and not by private organisations who are not publicly responsible.” *Id.* Other possible effects include depriving individuals of opportunity, suppressing minority opinion, and giving trade unions too much power over the individual.

102. GREEN PAPER, *supra* note 3, at 66.

103. *Id.* at 68-70. One problem with prohibiting closed shop arrangements, as Prior observed, is that collective agreements are not “enforceable at law.” *Id.* at 68. He noted the argument that such a law would fail to eliminate so “established a feature of our industrial relations system.” *Id.* at 69.

Proposals that closed shop agreements be prohibited or curtailed overlook certain critical factors relevant to industrial life in modern England. Those factors become evident upon analyzing the history of British legislative efforts to control the closed shop. Trade unions have become a major political force in Britain, and as one author asserts, they serve the same function for employees as workers as the vote does for individuals as citizens.¹⁰⁴ Naturally, the political power of the unions engenders conflicts with other political entities, primarily the government and the business community. Consequently, any realistic evaluation of the issues raised by closed shops must place those issues within the proper political framework, and must recognize the necessity of accommodating both the interests of the individual in freedom of association and the collective interest of labor in preserving its political power. An international agreement, such as the Convention on Human Rights, may provide some guidelines for developing that political framework. Thus, the Court's analysis of the right of freedom of association as applied to the British closed shop system may prove to be quite significant.

B. FREEDOM OF ASSOCIATION UNDER THE EUROPEAN CONVENTION

Since the inception of the European Convention on Human Rights in 1950, it has been unclear whether Article 11 protects both the positive right to join and the negative right not to join a trade union or association.¹⁰⁵ That question arose in the *Young, James, and Webster*. The Convention does not directly address the closed shop question. The United Nations Universal Declaration on Human Rights, however, a primary source for the text of the European Convention, states that "no one may be compelled to belong to an association."¹⁰⁶ Because of the difficulties that this provision raised for the existing closed shop systems in member countries, the language was not included in the European Convention.¹⁰⁷ The European Commission and Court, however, have addressed the

104. O. KAHN-FREUND, *supra* note 3, at 201.

105. See *Travaux Préparatoires*, *supra* note 5, at 262; P. WALLINGTON AND J. MCBRIDE, *CIVIL LIBERTIES AND A BILL OF RIGHTS* 57 (1976). For remarks on this question in the context of a general discussion of Article 11, see F. CASTBERG, *supra* note 15, at 152; J.E.S. FAWCETT, *supra* note 17, at 222; F. JACOBS, *supra* note 11, at 157; and A.H. ROBERTSON, *supra* note 11, at 30.

106. The Universal Declaration of Human Rights, *supra* note 14.

107. TRAVAUX PRÉPARATOIRES, *supra* note 5, at 262. Under the Vienna Convention on the Law of Treaties, however, preparatory work does not control the interpretation of a treaty. Article 32 of the Vienna Convention on Supplementary Means of Interpretation (as opposed to the General Rules of Interpretation in Article 31) provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order

closed shop question in the context of Article 11 of the Convention. In *National Union of Belgian Police*,¹⁰⁸ the Court construed the phrase in Article 11 "for the protection of [one's] interests"¹⁰⁹ to mean that contracting states must allow for the protection of occupational interests through trade union activity.¹¹⁰ In *X v. Belgium*,¹¹¹ the Commission suggested that the right to join an association implies the right not to join.¹¹² Moreover, in the *Case of Young, James and Webster*, the Commission found that the language of Article 11 implicitly grants workers the right to choose the union that is best able to protect their interests, or to form a new union.¹¹³

Upon review, a majority of the European Court specifically refused to address this question.¹¹⁴ In a concurring opinion, how-

to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, May 23, 1969 (Article 32).

The United Kingdom argued before the Commission that the failure to include the sentence "No one may be compelled to belong to an association" protected the closed shop. *Comm'n Report, supra* note 35, at 35. The Commission dismissed this argument on the ground that the drafting history of the document was not "specifically related to the practice at issue, namely the dismissal for refusal to join specific unions." *Id.* at 36.

108. [1975] Y.B. EUR. CONV. ON HUMAN RIGHTS 294 (Eur. Ct. of Human Rights) (Judgment).

109. For a full citation, see *supra* note 1.

110. [1975] Y.B. EUR. CONV. ON HUMAN RIGHTS 294, 296 (Eur. Ct. of Human Rights) (Judgment). In *National Union*, the Court held "that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which states must both permit and make possible." *Id.*

111. [1970] Y.B. EUR. CONV. ON HUMAN RIGHTS 708 (Eur. Comm. on Human Rights) (decision).

112. *Id.* at 718. The case concerned a Belgian worker dismissed from his job, allegedly because he did not belong to a trade union. *Id.* at 712. The Commission dismissed the application because it could not find a violation of Article 11. The Commission stated that "the very concept of freedom of association with others also implies freedom not to associate with others or not to join trade unions." *Id.* at 718.

113. *Comm'n Report, supra* note 35, at 34. The Commission noted that the right to form a new union was particularly important because unions have political philosophies with which workers may disagree. *Id.* The Commission based its holding on the decision of the Court in *National Union of Belgian Police Case*, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 294 (Eur. Ct. of Human Rights) (Judgment).

The Commission has also distinguished the right to form or join a trade union from the right to administer or manage one. *X v. Belgium*, [1961] Y.B. EUR. CONV. ON HUMAN RIGHTS 324, 336-38 (Eur. Comm'n on Human Rights) (decision). In addition, the Commission found a violation of Article 11 where threats of dismissal were used to encourage a worker to give up his trade union activity. *X v. Ireland*, [1971] Y.B. EUR. CONV. ON HUMAN RIGHTS 198, 222 (Eur. Comm'n on Human Rights) (decision).

114. *Young, James, and Webster, supra* note 8, at 17. The Court's more limited holding was that workers who were hired before an employer entered a closed shop agreement could not be forced to join the union. The Court did note, however, "that the right to form and join trade unions is a special aspect of freedom of association . . . the notion of a freedom implies some measure of freedom of choice as to its exercise." *Id.* Moreover, the Court also noted that "it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 and that each and

ever, seven judges criticized the limited scope of the holding of the majority. The concurring judges reasoned that the freedom to associate includes, as a corollary, the freedom not to associate, and that a freedom of association necessarily includes freedom of choice.¹¹⁵ The judges explained that the existence of trade union freedom, a form of freedom of association, implies that an employee can choose not to join an association. Consequently, compulsory membership violated Article 11, and dismissal for failure to join merely aggravated the violation.¹¹⁶

The view of the concurring judges regarding the freedom of employees to choose not to join a union is sound. Article 11 permits individuals to "join or form trade unions."¹¹⁷ This language is significant because it implies that individuals are free to decide what is in their best interests when deciding whether or not to join a trade union. If individuals do not believe that a particular union advances their interests, they may join another union or form their own.¹¹⁸ Consequently, one can infer that individuals are free to decide that no union advances their interests, and to choose not to be represented.

In addition, the reasoning of the majority is less convincing than that of the concurrence because the majority never sets forth the elements that are essential to the proper implementation of the Convention's freedom of association provision. The majority argued that "a threat of dismissal involving loss of livelihood is a most serious form of compulsion."¹¹⁹ In so arguing, the Court assumed that the "negative" aspect of freedom of association was not necessarily protected

every compulsion to join a particular trade union is compatible with the intention of that provision." *Id.*

115. *Id.* at 24.

116. *Id.* The concurrence states:

Trade union freedom, a form of freedom of association, involves freedom of choice: it implies that a person has a choice as to whether he will belong to an association or not and that, in the former case, he is able to choose the association. However, the possibility of choice, an indispensable component of freedom of association, is in reality non-existent where there is a trade union monopoly of the kind encountered in the present case.

Here, the sanction—be it the giving of notice or dismissal—which was a consequence of the system instituted by the law, did not give rise to but simply aggravated the violation. The violation, already constituted by compulsion in the shape of obligatory membership, is irreconcilable with the freedom of choice that is inherent in freedom of association.

Id. at 24.

117. *Comm'n Report, supra* note 35, at 34. The Commission stated: "[I]t is significant that Art. 11 uses the plural 'unions.' This shows that a trade union monopoly is excluded. There must be room for more than one union." *Id.*

118. *Id.*

119. *Young, James, and Webster, supra* note 8, at 18.

to the same extent as the "positive" aspect.¹²⁰ The Court concluded that compelling an individual to join a union "may not always be contrary to the Convention."¹²¹ The Court also stated, however, that "some measure of freedom of choice" is involved in the basic concept of a freedom.¹²² The Court ultimately failed to articulate fully the parameters of an individual's right to freedom of association. Therefore it is difficult to discern what elements the Court views as integral to that right.¹²³ The Court's opinion does not explain why the degree, or seriousness of the compulsion, rather than the mere fact of compulsion, violates freedom of association,¹²⁴ but the majority appears to view the right of freedom of association as a more flexible concept than does the concurrence. The Court's failure to explain what is integral to the right provides signatory states with little indication of what forms of compulsion will be "serious" enough to constitute a violation of the right of freedom of association. While the facts of the *Case of Young, James, and Webster* may not have warranted a broad policy ruling, some explanation of the principles underlying the right of freedom of association would have provided more adequate guidance as to the requirements of Article 11.

120. *Id.*

121. *Id.*

122. *Id.* at 17.

123. Note that the Court's desire to limit its decision to the facts at issue, *see supra* note 55 and accompanying text, does not justify its failure to address the question as to what principles are integral to Article 11. The problem is not one of extending the decision, but of determining the basis for suggesting that some forms of compulsion violate Article 11 while others do not. The concurrence, however, by emphasizing that the element of choice is crucial to the interpretation of freedom of association, establishes a foundation for arguing that forcing a worker to join a union violates Article 11.

124. If one accepts the argument of the concurrence, i.e., the concept of choice is integral to freedom of association, then the fact that the closed shop in *Young, James, and Webster* took effect after the workers were hired is irrelevant, despite the Court's emphasis on that aspect of the case. The following example illustrates why even where an employee initially has consented to compelled union membership, the majority's position raises problems.

Suppose that, in a closed shop situation, the individual has joined the required union. If the particular union holding a closed shop agreement is less than wholly satisfactory, the choices of the workers are limited. At that point they cannot join or form a new union which might be more satisfactory. Nor, if the workers wish to continue to work, can they leave the union.

It may be said that in a situation such as this, the employees have consented. If the initial consent, however, was given under the threat of dismissal, or with the possibility, in a heavily unionized society, of never finding a job, the employee's acquiescence could not be labeled as consensual. This is especially true in times of high unemployment.

The *Young, James, and Webster* decision leaves an individual's Article 11 freedom of association unprotected in such a situation. As a matter of policy, the decision gives no incentive to trade unions to represent their members fairly once they have a closed shop agreement, nor does it encourage signatory states to police trade unions to ensure such representation.

The failure of the *Young, James, and Webster* majority to address the issue of whether or not Article 11 implies a freedom not to associate is disappointing. At the same time, however, the Court must be applauded for recognizing the plight of Young, James, and Webster. Perhaps this decision will at least provide the United Kingdom and the other signatories with some incentive to interpret their obligations liberally when legislating in the trade union area.

III. THE RIGHT TO AN EFFECTIVE REMEDY AND THE ROLE OF THE CONVENTION IN THE UNITED KINGDOM

A. THE APPLICABILITY OF THE CONVENTION IN BRITISH DOMESTIC LAW

The three railway workers raised a second issue in the *Case of Young, James, and Webster*; they contended that the United Kingdom had denied them their right to an effective remedy before a national authority, in direct contravention of Article 13 of the Convention.¹²⁵ Young, James, and Webster alleged that they had no effective remedy to vindicate their Article 11 right to freedom of association because the Trade Union and Labour Relations Act, 1976 authorized their dismissals. Because it has not been enacted by Parliament, the Convention does not have the force of domestic law in the United Kingdom;¹²⁶ Young, James, and Webster could not have

125. *Young, James, and Webster, supra* note 8, at 14.

126. WADE AND PHILLIPS, *supra* note 6, at 276-77. The authors define the term convention as relating to "multilateral law-making treaties" and explain: "[T]he provisions of a treaty duly ratified do not by virtue of the treaty alone have the force of municipal law. The assent of Parliament must be obtained and the necessary legislation passed before a court of law can enforce the treaty, should it conflict with the existing law." *Id.* at 277. In practice, however, treaties "are concluded on the advice of Ministers, who will normally be in a position to command a majority in Parliament." *Id.* Parliament cannot modify or reject a treaty the government has made without censuring the government which was responsible for the particular treaty. *See id.* Furthermore, if the United Kingdom is to ratify a treaty that it has signed, as it did with the Convention, the treaty will usually lie before Parliament for 21 days. *Id.* at 279. The Sovereign then ratifies the treaty. It should be noted that the consent of Parliament is not required for the making or the satisfaction of a treaty in the United Kingdom. *Id.*

In Britain, customary rules of international law are deemed to be part of the domestic law. Lord Alverstone in *West Rand Central Gold Mining Co. Ltd. v. R.*, [1905] 2 K.B. 391 (A.A.), at 406-407, stated, "whatever has received the common consent of civilized nations must have received the assent of our country." British courts have held, however, that the doctrine of Parliamentary sovereignty requires that British law control where there is a conflict between the provisions of a British statute and an international obligation. *Collico Dealings, Ltd. v. I.R.C.*, [1961] 1 All E.R. 762, 765. As Drzemczewski states:

The practice as to treaties is conditioned basically upon the constitutional principles which limit the Executive's power to negotiate, sign and ratify treaties (that is to say, the prerogative powers of the Crown) in that constitutionally the Executive is not competent to enact or modify legislation Constitutionally, therefore, any treaty which requires a change in domestic law—in order to

complained about the violation of their Article 11 rights before a British court, because the British courts would have been bound to enforce the 1976 Act.

A discussion of the applicability of the Convention in British domestic law will demonstrate how the Article 13 problem arose in the *Case of Young, James, and Webster*. This section of the Note will also explain how the British judiciary used the Convention both before and after the Court's decision in *Young, James, and Webster*. As the discussion will demonstrate, the response of the British judiciary to the decision of the European Court, does not provide an adequate solution to the Article 13 problem.

Before the European Court's decision in *Young, James, and Webster*, British judges referred to the provisions of the Convention when they supported or supplemented the existing British law.¹²⁷ They did this despite the fact that the provisions of the Convention could not be enforced directly in British courts. For instance, in *Waddington v. Miah*,¹²⁸ the House of Lords determined that because Article 2 of the European Convention forbade the imposition of criminal sanctions based on retrospective laws, it was "hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation."¹²⁹ In *Birdi v. Secretary of State for Home Affairs*,¹³⁰ Lord Denning suggested that parliamentary acts should be construed in a manner that is consis-

make law conform with the provisions of the treaty and be enforceable by domestic tribunals—requires that the necessary legislation be enacted.

Drzemczewski, *Implementation of the United Kingdom's Obligations*, *supra* note 6, at 98. For a general discussion of parliamentary sovereignty, see WADE AND PHILLIPS, *supra* note 6, at 38-61.

Some European countries do not require legislation to make their treaty obligations part of domestic law; their international agreements are self-executing. States in which the Convention has the force of law include Austria, Belgium, Cyprus, France, the Federal Republic of Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Switzerland, and Turkey. See Drzemczewski, *Authority of the Findings*, *supra* note 7, at 8.

Note that recently Parliament failed to pass a bill which would have given the Convention effect as domestic law. See H.L. Bill No. 100, 48/1 (1979).

127. For a general discussion of this development, see Drzemczewski, *Implementation of the United Kingdom's Obligations*, *supra* note 6, at 98-109; Duffy, *English Law and the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 585, 586-96 (1980); Comment, *The European Convention on Human Rights and the British Courts*, 12 TEXAS INT'L L.J. 61 (1977). In *R. v. Secretary of State for the Home Department*, ex parte Phansopkar and *R. v. Secretary of State for the Home Department*, ex parte Begum, [1975] 3 All E.R. 497, 510-11, the court noted that certain human rights relating to family life were protected by the Magna Carta and "reinforced" by the European Convention.

128. [1974] 2 All E.R. 377.

129. *Id.* at 379.

130. [1975] Sol. J. 322 (C.A.) The case involved an illegal immigrant who requested permission to remain in the United Kingdom following an announcement by the Home Secretary that he would not order the removal of illegal immigrants from certain countries provided they had arrived before January 1, 1973. The immigrant was jailed pending his removal when immigration officials determined that he had arrived after January

tent with the terms of the Convention.¹³¹ He reiterated this conclusion in *R. v. Secretary of State for Home Affairs, ex parte Bhajan Singh*,¹³² but also noted that an Act of Parliament must prevail over conflicting treaty obligations that had not been enacted by Parliament.¹³³ Furthermore, in *R. v. Chief Immigration Officer, ex parte Salamat Bibi*,¹³⁴ Lord Denning held that government immigration officers need not rely on the principles of the Convention when applying immigration rules.¹³⁵

Following the decision in *Young, James, and Webster*, the British Court of Appeal has continued to rely on the Convention when it is not directly in conflict with the domestic law. In *Cheall v. Association of Professional Executive Clerical and Computer Staff*,¹³⁶ the court invalidated a notice terminating Cheall's union membership. The Association of Professional Executive Clerical and Computer Staff (APEX) expelled Cheall pursuant to the association's membership rules. These rules permitted the expulsion of a member when that action was necessary in order to comply with a Trade Union Congress (TUC) disputes committee decision.¹³⁷ The court found

1, 1973. The Court found that the immigration officials had acted fairly, and that there had been no violation of any right protected by the Convention.

131. *Id.*

132. [1975] 2 All E.R. 1081. Lord Denning asserted that the Convention should be taken into account whenever a court interprets a statute affecting individual rights. He based his statement on the assumption that "the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties." *Id.* at 1083. In *Begum, supra* note 127, at 511, Scarman L.J. interpreted *Bhajan Singh* as requiring attention to the Convention in "interpreting and applying the law."

133. [1975] 2 All E.R. at 1083. In *Birdi*, Denning had indicated that he might invalidate legislation that conflicted with the Convention.

134. [1976] 3 All E.R. 843.

135. *Id.* at 847. The case concerned the actions of an immigration officer. The court explained:

They [immigration officers] cannot be expected to know or to apply the convention. They must go simply by the immigration rules laid down by the Secretary of State and not by the convention. . . . The convention is drafted in a style very different from the way which we are used to in legislation. It contains wide general statements of principle. . . . So it is much better for us to stick to our own statutes and principles, and only look to the convention for guidance in case of doubt.

Id. at 847-48. For other cases which continue the trend of using the Convention for purposes of guidance and not as part of English domestic law, see *Pan American World Airways, Inc. v. Department of Trade*, [1976] 1 Lloyd's Rep. 257; *Blaythwayt v. Lord Cawley*, [1975] 3 All E.R. 625; *Ahmad v. Inner London Education Authority*, THE TIMES, March 22, 1977, at 9, col. 3; *Ostreicher v. Secretary of State for Environment*, THE TIMES, May 5, 1977, at 7, col. 1; and *R. v. Secretary for the Home Department, ex parte Hosenball* [1977] 3 All E.R. 452.

136. 1982 Indus. Cas. R. 543.

137. *Id.* at 552. Cheall was expelled when he resigned from a rival union, and then joined APEX. APEX failed to inquire into whether the rival union objected to Cheall's transfer before allowing him to join. This contravened TUC rules. Note that a closed shop agreement was not involved in *Cheall*.

that APEX had resorted to the use of this expulsion rule because of its own deliberate failure to observe a TUC principle. Therefore, the court ruled that APEX could not take advantage of its own misconduct.¹³⁸ In reaching this conclusion, Lord Denning referred to the "fundamental principle"¹³⁹ of Article 11 of the Convention. He noted that despite the repeal of a section of the Industrial Relations Act, 1971, which might have protected Cheall, the plaintiff nevertheless retained his right to join a trade union of his choice under both the common law and the Convention.¹⁴⁰ With regard to the Convention, Denning stated:

Every man could, by going to the European Court of Human Rights at Strasbourg, vindicate his rights under the Convention. Just as the three railwaymen did when they were dismissed for refusing to join a trade union. The European Court of Human Rights directed that the United Kingdom Government should pay compensation to the three railwaymen. That was on August 13, 1981, in *Young v. United Kingdom* By being vindicated in this way, we reach the conclusion that article 11(1) of the Convention is part of the law of England or at any rate the same as the law of England. The courts of England should themselves give effect to it rather than put a citizen to all the trouble and expense of going to the European Court of Human Rights at Strasbourg. Our courts should themselves uphold the right of every man to join a trade union of his choice for the protection of his interests.¹⁴¹

The Court of Appeal also discussed Article 11 and *Young, James, and Webster* in *Taylor v. Co-operative Retail Services*.¹⁴² In *Taylor*, the complaint of the plaintiff was dismissed in an action brought before the Employment Appeals Tribunal; the Court of Appeal, in affirming the tribunal, rejected Taylor's claim that he had been unfairly dismissed for failing to join a union when a closed shop was in effect.¹⁴³ The court decided the case under the Labour Relations Act, 1976, which was in force at the time Taylor was dismissed.¹⁴⁴ The court found that, because the employer had satisfied all conditions of the Act, the dismissal was fair.¹⁴⁵ The court noted that, had Taylor's case gone to the European Court, it would have been governed by the decision in *Young, James, and Webster*.¹⁴⁶ The Court of Appeal observed, however, that Taylor could not recover damages from his employers.¹⁴⁷ The court stated that "[t]he United Kingdom government is responsible for passing those Acts

138. *Id.* at 557, 574.

139. *Id.* at 553.

140. *Id.* at 554.

141. *Id.* at 554-55.

142. 1982 Indus. Cas. R. 600.

143. *Id.* at 602.

144. *Id.* at 610.

145. *Id.* at 607-08, 611-13.

146. *Id.* at 610 (per Denning, L.J.)

147. *Id.*

and should pay him compensation. . . ." Taylor's employers, on the other hand, could not be required to pay damages as they had done nothing that the Act did not allow.¹⁴⁸

Despite the laudable attempts of the British judiciary to interpret the Convention so that it is consistent with domestic law, the fact that the British government has not enacted the Convention into its domestic law continues to present problems. The *Case of Young, James, and Webster* demonstrates that when the domestic law of a signatory state conflicts with Convention rights, individuals may be unable to secure a remedy without going before the European Commission and Court. It is questionable whether such a remedy can be termed either "national" or "effective."

B. THE RIGHT TO AN EFFECTIVE REMEDY AND THE INTERNAL LAW OF SIGNATORY GOVERNMENTS

Article 13 of the European Convention establishes an individual right to an effective remedy before a national authority.¹⁴⁹ An interpretational problem emerges as to exactly what domestic action the High Contracting Parties bound themselves to perform by agreeing to provide an effective remedy before a national authority.¹⁵⁰ British law requires that domestic legislation control when that legislation is in conflict with a provision of the Convention. *Young, James, and Webster* illustrates the types of issues that arise when such a conflict develops. Thus, the question naturally arises as to whether Britain currently provides individuals whose Convention rights have been violated with an effective remedy.¹⁵¹

148. *Id.*

149. For the text of the Article see *supra* note 2.

150. Two schools of international legal theory address the domestic consequences that follow the adoption of international treaties. The monist school believes that international and domestic law are actually part of the same system, and, therefore, international obligations are automatically binding in domestic law. The dualist school maintains that domestic and international agreements are separate systems of rules, and consequently, international obligations first must be enacted before they become part of a state's domestic law.

151. For a discussion of the issue, see HUMAN RIGHTS IN NATIONAL AND INTERNAL LAW, (A.H. Robertson ed. 1968), [especially Sorenson, *Obligations of a State Party to a Treaty as Regards its Municipal Law, Id.* at 11; Ganshof van der Meersch, *Does the Convention Have the Force of "Ordre Public" in Municipal Law?, Id.* at 97; and Verdross, *Status of the European Convention in the Hierarchy of Rules of Law, Id.* at 47]. See also Buergenthal, *The Effect of the European Convention on Human Rights on the International Law of Member States*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS *supra* note 11, at 79. CASTBERG, *supra* note 15, at 157; Drzemczewski, *The Domestic Status of the European on Human Rights: New Dimensions*, 1977 LEGAL ISSUES OF EUROPEAN INTEGRATION 1; JACOBS, *supra* note 11, at 215.

This Note focuses on duties that the European Convention, through its language, structure, and history, places on signatory states. The Note uses the United Kingdom to illustrate problems that have developed under the Convention; however, the Note does

Several arguments support the contention that in order to implement Article 13, the signatory states should incorporate the Convention rights into domestic law. First, Article 13 is an independent Convention right; it grants individuals a substantive right in the same sense that Article 11, the freedom of association provision, grants a substantive right. Article 13 appears among the civil and political rights, rather than with the procedural and remedial provisions which govern the operation of the Commission and the Court. Second, one interpretation of Article 13 suggests that the right to an effective remedy presupposes that the signatory states will incorporate the provisions of the Convention into their domestic law,¹⁵² because only then will the judiciaries and administrative tribunals of the signatory states fully recognize Convention rights. If these provisions, because they lack the status of municipal law, cannot be recognized by domestic tribunals, and if the signatory has established no other mechanism for ensuring an effective remedy, then individuals will not have a "national authority" that is competent to protect their Convention rights.¹⁵³ Moreover, an individual's

not attempt to address the issues that might arise under British law if the United Kingdom attempted to incorporate Convention rights into domestic law. This Note maintains, ultimately, that based on the analysis of Article 13 advanced herein, the British Parliament, like the legislatures of other signatory states where Convention rights still lack domestic effect, should enact the Convention as domestic law. For a discussion of some of the issues potentially associated with the incorporation of the Convention into British law, see Note, *Implementing the European Convention on Human Rights in the United Kingdom*, 18 STAN. J. INT'L L. 147 (1982).

152. Verdross, *supra* note 151, at 51. Verdross contends:

Although in principle, States are free to determine how an international treaty shall be implemented, such a treaty may itself prescribe the manner in which it is to be implemented. Attention is called, in this connection, to Article 13 of the European Convention on Human Rights, according to which States undertake to ensure that anyone alleging infringement of the rights guaranteed to him in the Convention shall have an effective remedy before a national authority. The right to such a remedy presupposes, however, that the individual provisions of the Convention have become an integral part of municipal law, for otherwise they cannot be applied by the authority competent to give a decision. Article 13 therefore indirectly enjoins Contracting States to incorporate the various provisions of the Convention into their municipal law in such a way that they can be applied directly by domestic courts and administrative authorities and, consequently, also by the supervisory authority provided for in Article 13.

Id. See also Drzemczewski, *Domestic Status*, *supra* note 151, at 15 (A discussion of Golson's thesis that "recourse can only be effective if the decision reached is binding on all the authorities of the State concerned.").

153. Verdross, *supra* note 151, at 51. Buergenthal believes that the parties to the Convention intended "to enable individuals to rely on and invoke [the Convention's] provisions in the courts of the member states." Buergenthal, *supra* note 151, at 81. He suggests that by ratifying the Convention, the parties agreed "to remove all domestic obstacles" preventing individuals from enforcing their Convention rights before domestic tribunals. See *id.* He asserts that Article 13, read in light of Article 1, "creates an obligation" to make the Convention "directly applicable domestic law," *id.* at 82, and that states which have not done so are in breach of their Convention obligations. *Id.* at 83.

remedy cannot be considered "effective" if a domestic tribunal will not recognize Convention rights because those rights conflict with domestic legislation. Finally, the language of Article 13 argues against relying solely on the mechanisms established by the Convention to provide the remedies required by that section. That language calls for an effective national remedy. The length of time required to use effectively the judicial machinery of the Convention tends to thwart the immediacy of the need for a remedy. In order to avoid delays that may discourage individuals from pursuing their claims, signatory states should provide remedies before domestic authorities. Because the provisions of the Convention often address extreme and transitory situations, the timeliness of a remedy becomes central to its effectiveness.

Several other Convention articles also support the interpretation that participating states should incorporate the rights of the Convention into their domestic law. Article 1, for example, states that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."¹⁵⁴ The European Court has noted that the intention of Article 1 to secure Convention rights "finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law."¹⁵⁵ Moreover, Article 26 requires that, before an applicant's allegation will be considered justifiable, an applicant to the Commission must first exhaust all domestic remedies.¹⁵⁶ Domestic incorporation is consistent with the approach of this provision, as it would encourage a signatory state to attempt to resolve alleged violations of Convention rights in the first instance. Finally, Article 57 provides that a signatory state must answer inquiries made by the Secretary General of the Council of Europe regarding how its domestic law secures a right protected by the Convention.¹⁵⁷ This

154. CONV. ON HUMAN RIGHTS, *supra* note 1, at 2.

155. Ireland against United Kingdom, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 512. (European Commission on Human Rights) (decision).

156. CONV. ON HUMAN RIGHTS, *supra* note 1, at 9.

157. CONV. ON HUMAN RIGHTS, *supra* note 1, at 14-15. This Article was invoked in 1964, when the Secretary-General invited all Contracting Parties to submit reports explaining how their domestic law gave effect to the Convention. FAWCETT, *supra* note 17, at 338. It also was used in 1961 when Turkish delegates to the 1960 Consultative Assembly were arrested and prevented from attending the meeting. WEIL, *supra* note 11, at 167.

In addition, there are two Articles relating to the enforcement of specific Court decisions. Convention Articles 50 and 53 ensure that the decisions of European Court are enforced in the signatory states. Article 50 allows the Court to give "just satisfaction" to an individual whose rights have been violated if the law or other authority of a High Contracting Party is in conflict with the Convention or does not allow for full reparation. *Id.* at 13. In Young, James, and Webster, *supra* note 8, at 28, the Court referred the question of the application of Article 50 back to the Commission with instructions to

provision indicates that the parties contemplated answering to the Council of Europe for the adequacy of their domestic law in protecting Convention rights, and expected to reconcile their domestic law with the provisions of the Convention.

Various arguments indicate the necessity of requiring the signatory states to incorporate the provisions of the Convention into domestic law. First, the specificity of the international rights enumerated in the Convention demonstrates that the rights are not abstract proposals that the Contracting Parties casually can tailor to their domestic law. Instead, they are concrete rights that the states must enforce as written.¹⁵⁸ Second, the Convention arguably has the status of *ordre public*.¹⁵⁹

Ordre public has been defined to include "the rules essential to the maintenance of general peace and order, the essential rules of universal morality and respect for fundamental human rights."¹⁶⁰ In this context, the notion of *ordre public* emphasizes the pre-eminence of the public interest, rather than the Convention obligations of each individual state to the other states, in securing the individual rights forwarded by the Convention.¹⁶¹ The member states, by becoming signatories to the Convention, established an independent European

report if a friendly settlement were reached. Articles 50 and 53 discuss domestic enforcement of Court decisions, a related issue that is not discussed in this Note. For a discussion of this issue see Buergenthal, *supra* note 151, at 94-105 (discussion of the domestic *res judicata* and precedential effect of Court judgments).

158. Buergenthal, *supra* note 151, at 82. Buergenthal refers to the drafting history underlying the Convention to support his theory, noting that a provision requiring signatory states to incorporate the terms of the Convention into their domestic law was not included in the Convention because the Contracting Parties thought this "an obligation which had already been clearly created in the Convention." *Id.* at 82-83. *But see supra* note 135, and *infra* note 173.

159. Ganshof van der Meersch, *supra* note 151, at 97, quotes the following definition of *ordre public*:

[T]hat body of institutions and rules designed to ensure, in a given country, the satisfactory functioning of the public services, security and morality of transactions between individuals, who may not exclude their application in private agreements.

160. *Id.* at 99.

161. Drzemczewski, *Domestic Status*, *supra* note 127, at 5. Drzemczewski comments:

[T]he remedies available to individuals in cases where their rights have been held to be violated must be considered in the context of an interest higher than that of the aggrieved or even that of the Contracting State Party. Stress should be laid on the preeminence of a certain form of general interest or *ordre public*.

He advances this notion in arguing that the Convention is "*sui generis*"; its relationship to domestic law is different from that of traditional international law. The judicial organs of the Convention "[examine and determine] whether domestic law as it stands complies with the provisions of the Convention." Drzemczewski, *The Sui Generis Nature of the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 54, 54-56 (1980). The Convention creates a "legal order" which domestic courts, as well as the European Court and Commission, can enforce. *Id.*; ROBERTSON, HUMAN RIGHTS IN EUROPE, *supra* note 11, at 231.

judicial body before which individuals can assert their fundamental human rights within the community. This system protects the rights of the individual both as a member of the European community and as a member of an individual state, and makes the state answerable to the community through the European Court. Although the option of resorting to the European Court allows individuals to protect their Convention rights regardless of what action their national government takes, the concept of *ordre public* is appealed to more easily when the Convention is incorporated into domestic law.¹⁶² Incorporation guarantees the individual a forum that is more attractive geographically, culturally, and most likely financially. In short, incorporation makes both the forum and the remedy more available, and thus more readily advances the public interest.

There are, however, several arguments supporting the view that a signatory state need not grant the Convention the status of domestic law in order to implement the language of the Convention. One interpretation of Article 13 reads it as applying only where the Commission or the Court finds an actual violation of the Convention. Requiring action at the Convention level before any domestic mechanism can be activated, however, effectively denies Article 13 the status of an independent right.¹⁶³ This argument implies that an individual has no independent recourse at the domestic level until he or she has obtained a final determination of relief by the Court or the Committee of Ministers.¹⁶⁴ Such an outcome robs the language

162. Drzemczewski discusses a related theory; he proposes that the Convention has become a part of the European Community law, and that at least where Community issues are involved, the Convention must be applied domestically in the member states which can bring cases before the European Court of Justice. Drzemczewski, *The Domestic Application of the European Human Rights Convention as European Community Law*, 30 INT'L & COMP. L.Q. 118, 119 (1981); Duffy, *supra* note 127, at 614-15.

163. CASTBERG, *supra* note 15, at 158; FAWCETT, *supra* note 17, at 229; JACOBS, *supra* note 11, at 215.

164. The Court rejected this interpretation of Article 13, however, in the *Klass* case. *Case of Klass and Others* [1978] Series A No. 28 (Eur. Ct. of Human Rights) (Judgment). *Klass* involved legislation that provided that persons under surveillance (by mail, electronics, etc.) need not receive notice of that surveillance. Applicants contended that this legislation violated their right to an effective remedy because it prevented them from determining whether their right to privacy under the Convention had been violated. Although the Court found no violation of Article 13, it construed Article 13 as requiring that if an individual claims that his or her Convention rights have been violated, that individual must have redress before a national authority. The Convention violation need not be predetermined for an Article 13 remedy to exist. *Id.* at 29.

Duffy argues that, in general, English law is in harmony with the *Klass* interpretation of Article 13. Duffy, *supra* note 127, at 617. He acknowledges some gaps in the United Kingdom's fulfillment of its human rights obligations, and suggests that a legislative body be set up to design legislation to harmonize problematic British laws with Convention provisions. *Id.* at 618.

Note, in this context, that no Convention provision requires that a state recognize the right of the individual to petition the Commission under Article 25 of the Convention.

of Article 13 of its plain meaning, and makes the Article mere surplusage; if the Convention is to have any effect, the articles of the Convention should not be so construed.

In addition, proponents of the non-incorporationist view maintain that states are ordinarily left to implement a treaty in any way they find appropriate, unless the parties to the treaty provide otherwise.¹⁶⁵ An implication of this position is that signatory states are not obligated to use any particular means to secure the Convention rights of individuals; states simply must abide by the substance of the Articles. This argument assumes, of course, that at the time the Convention was signed, the parties did not intend to give effect to the Convention as domestic law.¹⁶⁶

The *Case of Young, James, and Webster*, however, demonstrates the difficulties that arise when the Convention is not accorded the status of domestic law. The applicants in that case, confronted with a domestic statute that denied them their Article 11 rights, found no vindication of those rights in any British tribunal. Arguably, they could have attempted to bring their case before an appropriate court, but given the existence of the domestic statute, and the duty that it imposed on a British court, the outcome of such litigation was preordained. Further, in the *Case of Klass and Others*,¹⁶⁷ the European Court construed Article 13 as requiring that signatory states provide redress before a national authority to any individual who claimed his or her Convention rights had been violated. As noted above, forcing individuals to litigate for extensive periods of time in non-domestic forums offers a remedy that is neither effective nor national to those that allege violations of their Convention rights.

Once a country has enacted the Convention into its domestic law, each sector of that nation's government would have the ability to extend the protections of the Convention to individuals. Individuals seeking redress would be able to pursue domestic remedies in their own courts. This argument gains support from the fact that a major concern behind the Convention was the protection of individ-

Thus, if a state had not incorporated the Convention into its domestic law (thereby denying individuals the ability to challenge Convention violations before domestic tribunals), and had not declared that individuals had a right to petition the Commission, a state might effectively foreclose its citizens from enforcing their Convention rights against it.

165. Sorensen, *supra* note 151, at 18. Sorensen claims that none of the statements in Articles 1 or 13 are necessarily incompatible with a system which allows signatories to implement the Convention as they see fit. *But see supra* note 152.

166. Note that it is well established that the internal law of a state can not provide an excuse for ignoring international obligations. For instance, Article 27 of the *Vienna Convention on the Law of Treaties*, *supra* note 107, states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *Id.*

167. *See supra* note 164 and accompanying text for a discussion of *Klass*.

ual rights against infractions by state governments.¹⁶⁸ Incorporation would encourage complainants to exhaust their local remedies before resorting to the Commission and the Court, thereby promoting other Convention goals.¹⁶⁹ Finally, the language of Articles 1 and 13, the status of Article 13 as an independent right, and the community-oriented nature of Convention obligations also lend support to this solution.

The Court's decision not to answer the Article 13 question in *Young, James, and Webster* may have been the product of astute political judgment. Given the controversy that has surrounded the problem of the relationship of the Convention to domestic law, the Court may have assumed that the issue is better left to the signatory states. Nonetheless, *Young, James, and Webster* did present this issue, and, as demonstrated, little short of the implementation of the Convention in domestic law will guarantee new employees the right not to join a union. Thus, the failure of the Court to find a violation of Article 13 in the *Case of Young, James, and Webster* is particularly unsatisfactory.

IV. SUGGESTIONS FOR REFORM

The failure of the Court to resolve the issues of whether Article 11 includes a right not to associate, or whether the United Kingdom was in violation of Article 11, left numerous questions open to further debate. For the moment the Employment Act, 1980, has mitigated the problem of compulsory union membership in the United Kingdom, by providing that in some circumstances an employee need not join a union. Given the history of British legislation dealing with unfair dismissals and closed shop agreements, however, the Court's lack of guidance on the Article 11 question is disappointing.¹⁷⁰ More importantly, the failure of the Court to address the Article 13 question leaves a significant gap in the law; this failure is especially disappointing because *Young, James, and Webster* presented the most striking Article 13 problem—a direct conflict between domestic legislation and the Convention. This Note

168. JACOBS, *supra* note 11, at 3.

169. *See supra* note 18 and accompanying text.

170. The decision in *Young, James, and Webster*, however, may provide impetus for the abolition of the closed shop in Britain. The judgment provided "powerful new ammunition" to the Freedom Association, which had lent financial support to the applicants' cause, and was expected to mount a campaign for tougher legislation following the announcement of the judgment. *The Times* (London), Aug. 14, 1981 at 1, col. 2. Further, an editorial in the *London Times* called for "new safeguards" and "more accountability" in closed shop legislation following the Court's decision. *Id.* at 9, col. 1. The editorial noted, however, that the closed shop is an established part of the British industrial system and that the elimination of closed shops would create disorder. *Id.*

presents four suggestions for Convention reform which should be considered in view of the questions left unanswered by the Court.

One solution to the Article 13 problem is for the Court to determine that Article 13 requires signatory states to ensure that their domestic law is consistent with the Convention. Such a decision might be based on the language of the specific articles, the length of time an applicant must spend before the Commission and the Court in order to vindicate Convention rights, the specificity of the rights enumerated in the Convention, and the common intent of the contracting parties to obligate themselves as a community to protect human rights.¹⁷¹ One problem with this approach is that there would be no way to enforce such a decision in any states other than the ones that were involved in the proceeding before the Court, because, under Article 53, only the parties in the particular case are bound by the Court's decision;¹⁷² the Court's decision has little or no value as precedent. Hence, if the Court determined that Article 13 required the implementation of Convention rights into municipal law, the decision would not be binding on all the signatory states. A second problem with this approach is that if the Court begins to enforce provisions in a manner in which the signatories did not expect, such enforcement might deter further co-operative ventures concerning Convention rights. The parties will be reluctant to bind themselves if they believe that their future obligations might be contrary to their domestic law. In the final analysis, however, the Court is likely to remain hesitant about issuing a decision that requires signatory states to implement the provisions of the Convention into their domestic law.

Another solution to the Article 13 question is for domestic courts to continue to use the Convention to fill gaps in the existing law, and to interpret ambiguous provisions in domestic law as consistent with the articles of the Convention. This approach, however, does not protect an individual when the legislation of a country is in direct conflict with a provision of the Convention, as in *Young, James, and Webster*. In such a case, the courts may be bound to follow the domestic statute in question rather than the Convention.

The most popular solution among commentators is for the United Kingdom, as well as the other signatories, to incorporate the Convention into domestic law.¹⁷³ Such an enactment would estab-

171. See *supra* notes 151-62 and accompanying text.

172. CONV. ON HUMAN RIGHTS, *supra* note 1, at 14.

173. For a discussion by commentators who favor incorporation in the form of a British Bill of Rights see J. JACONELLI, ENACTING A BILL OF RIGHTS 246 (1980); WALLINGTON AND MCBRIDE, *supra* note 105, at 43. Wallington and McBride favor adopting the Convention as a British Bill of Rights, and set forth a draft bill which incorporates

lish a basis for the enforcement of Convention rights before national authorities, and would settle the confusion with regard to what Article 13 requires of signatory states. This solution would also, for the most part, remove the problem of conflicts between domestic law and the Convention. Adopting the Convention into domestic law might serve as a deterrent to the enactment of laws that were inconsistent with Convention rights. At the very least, courts in the signatory states would have the opportunity to decide whether the laws conflicted, and to mete out the appropriate remedy.

Ultimately, to ensure that the signatory states accept their Convention responsibilities, the signatories should amend Article 13. The amendment should specify that the language "an effective remedy before a national authority" means that Convention rights are to be enforceable as domestic law.¹⁷⁴ Amending Article 13 would avoid the potential difficulty of requiring states to comply with a judicial order that interprets Article 13 in a manner in which those states may never have intended to bind themselves. The amendment would apply to all the signatories, hence, treatment of the Convention in the domestic law of all the countries involved would be consistent. Furthermore, because the requirements of the Article then would be clear, the amendment would avoid the imposition of arguably unexpected Article 13 responsibilities.

CONCLUSION

The European Court's decision in the *Young, James, and Webster* leaves unanswered several questions involving the interpretation of Articles 11 and 13 of the Convention on Human Rights. With respect to the problem of freedom of association and the closed shop, the Court's decision indicates an unwillingness to construe Article 11

Convention rights, and establishes a Constitutional Court and remedies for Convention violations. *Id.* at 112. Jaconelli, however, concludes that the Convention would make a poor Bill of Rights. He believes that the Convention adds little to British law, is drafted more loosely than traditional British legislation, and might be construed as imposing a maximum, rather than a minimum standard of responsibility for human rights. Duffy notes that a 1976 House of Lords select Committee favored the adoption of the Convention as a Bill of Rights, but concludes that there is little support for incorporation of the Convention. Duffy, *supra* note 127, at 591 n.37.

174. Such an amendment might be worded as follows:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority competent to adjudicate claims of violations of Convention rights, consistent with the rights set forth in this Convention, notwithstanding that the violation has been committed by persons acting in an official capacity.

The Convention has been amended several times in the past. The amendments are found in the Protocols. See e.g., Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, reprinted in COUNCIL OF EUROPE, EUR. CONV. ON HUMAN RIGHTS: COLLECTED TEXTS (1971).

in such a way as to interfere with closed shop systems of the High Contracting Parties. It provided relief to Young, James, and Webster, and established that workers cannot be dismissed for failure to join a union where the closed shop became effective after they had begun work. The Court's analysis, however, leaves doubt about what is integral to freedom of association. In Britain, the Employment Act, 1980, provides remedies for individuals who are dismissed unfairly because of their failure to join a union. This legislation temporarily alleviates some of the problems that arise in balancing the validity of closed shop agreements with the individual's right to freedom of association.

As for the problem of ensuring a right to an effective remedy, Article 13 should be amended to reflect what the Parties' arguably agreed to do, that is, incorporate the Convention into their domestic laws. The European Convention is a unique agreement in that it emphasizes community law and establishes an independent judiciary to protect individual rights, traditionally a domestic matter. The language of Article 13 places responsibility on the Contracting Parties to ensure that Convention rights be available to individuals and that remedies exist for violations. This responsibility is not fulfilled unless the Convention has been incorporated into a country's domestic law. It is time for the debate over the nature of this initial agreement to end. Article 13 should be amended by the Parties so as to mandate the incorporation of the Convention into domestic law. Only then will individuals faced with a situation similar to that presented in *Young, James, and Webster* be assured of the human rights guaranteed by the Convention.

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