THE FREEDOM OF ASSOCIATION IN IRELAND AND GERMANY

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The United States Supreme Court once held that the right of free association, like free speech, lay "at the foundation of a free society"[1]. The freedom of association, on any understanding of the concept, has become one of the undisputed components of any serious charter of human rights in this century. That does not mean, however, that our understanding of this freedom has remained static over this period. In fact, what might at first sight appear to be a reasonably straightforward concept has been the subject of many doubts, controversies and disputes. And while there are very few countries which do not at least claim to recognise and protect the freedom of association, it is not difficult to pick out States in which this protection has been somewhat hollow or even absent altogether.

In the field of labour law the freedom of association is, of course, of fundamental importance, since it is the means of creating the balance between employers and employees which is the underlying purpose of any legal framework in this area. The way in which this freedom is regulated in any given society will tell us more about that society's attitude towards industrial relations than any other single factor. More than anything else, the freedom of association is at the heart of labour law as we know it today.

The freedom to join unions is protected in one way or another in most States of the Western world today. But the methods of protection vary greatly, not only between those legal systems which have constitutional protection of fundamental rights (including the freedom of association) and those which do not, but indeed between those which ostensibly use the same method. It is therefore not easy to discover which kind of protection is the most effective, particularly since much depends on factors such as the nature of the political system or the historical development of the trade union movement, factors which do not readily translate from one country to another. That is not to say that making comparisons is useless. On the contrary, we can learn a great deal from the experiences of other systems. But it is essential to bear in mind the limitations contained in such an approach, and to understand

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that we cannot expect to find ready-made solutions to our own problems.

For the present purposes, it is proposed to examine briefly the protection of the freedom of association in Ireland and in the Federal Republic of Germany and to consider the merits of the constitutional protection common to both jurisidctions. A comparison between the two countries is of particular interest since both have a system of constitutional guarantees of fundamental rights; however, these have been super-imposed on completely different legal traditions. Despite this there has developed a remarkable similarity of judicial interpretation in the two jurisdictions, which permits us to draw some basic conclusions on the role of Constitutions in this area.

Before going into the substance of the matter, it is necessary to touch upon one problem which bedevils any attempt to embark on a serious examination of the freedom of association: that is, when reference is made to the "freedom of association" is this a reference to a "freedom" or "liberty" *strict sensu*[2], or to a "right" or "claim"? Most of the literature[3] and virtually all the judicial pronouncements[4] on the matter use the terms "right" and "freedom" as if they were inter-changeable, and even the two Constitutions considered below are ambiguous in this respect[5]. In the absence, therefore, of any clear concept and possibly of any coherent thinking it is pointless to speculate what the constitutional draftsmen or the judiciary had in mind. But that does not mean that we must adopt the present conceptual uncertainty. Instead, it is useful to state categorically at the outset what our own preference is, even if the conclusion cannot always be reconciled with the legal developments which have occurred. It is therefore proposed to treat the freedom of association as a *freedom*. The reason for this will become more apparent later; suffice it to say here that the whole concept would be very different indeed from the way in which it is understood and interpreted today if it were to be seen as a right or claim[6].

The question is more than just academic, for the protection given to workers and unions can depend significantly on the view adopted by the judiciary on the question of concept[7]. In this way the academic can make a valuable contribution to the clarification and development of the law.

THE CONSTITUTIONAL PROVISIONS

(i) *Germany*. In 1945, after the collapse of the Hitler regime, most of the German *Länder* (federal States) of the Western Zones re-enacted the spirit, and sometimes the exact wording, of Article 159 of the Weimar *Reichsverfassung*[8] in their State Constitutions. With the establishment of the Federal Republic of Germany came the enactment of the Basic

Law by the Parliamentary Council in 1949[9]. The first part of the Constitution is devoted entirely to fundamental rights, even before any mention is made of the nature and character of the new State and its organs of government. Article 1(1), which provides that "the dignity of man is inviolable", is the foundation on which the subsequent guarantees are built.

The provision relevant to the present considerations is contained in Article 9, paragraph 3 of which reads: "The right to form associations for the preservation and improvement of working and economic conditions is guaranteed to everyone and for all professions. Agreements which seek to restrict or hinder this right are void and measures to that effect are illegal. . ."

(ii) *Ireland*. The Constitution of Ireland (Bunreacht na hEireann) was enacted by the People in a referendum on 1 July 1937[10]. It was the successor of the Constitution of the Irish Free State of 1922. Similar to the German Basic Law, the 1937 Constitution contains a section devoted exclusively to the protection of fundamental rights[11]. In Article 40(3) "the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." Some of these "personal rights" are spelled out in Section 6(1) of the Article:

> "The State guarantees liberty for the exercise of the following rights, subject to public order and morality:- . . .iii. The right of citizens to form associations and unions.
> Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right."

The wording of the constitutional provisions in both jurisdictions raises many interesting points, some of which cannot be considered here. For example, one could ask whether the constitutional protection relates solely to the right or freedom to join unions – the only aspect which is expressly mentioned – or whether it encompasses additional rights or freedoms such as the freedom to bargain collectively or the freedom to strike. In this context it is interesting to observe the statement recently made by Lord Denning in the Court of Appeal in Britain concerning the scope of Article II of the European Convention for the Protection of Human Rights and Fundamental Freedoms[12]. Noting that the Article was designed to help the worker to secure "the protection of his interests", his Lordship found that this must mean that a right to be represented by the union of the worker's choice was also protected. Similar statements have been made by academics and some judges in both Germany and Ireland. But it would go beyond the scope of this paper to consider these questions here. It is therefore proposed to examine the nature of the protection of the freedom of association

rather than the extent of the freedom. This will be attempted by seeking the answers to three specific questions:

(a) What protection do the constitutional provisions give against legislative interference by the State?
(b) What protection do they give against hostile employers?
(c) What protection do they give against trade unions themselves?

A. THE CONSTITUTION AND THE STATE

On the face of it Article 9 of the German Basic Law is much more uncompromising than Article 40.6.1° iii of the Irish Constitution. It applies to *"everyone"* ("jedermann") and to *"all* professions" and appears to allow no derogation. In Ireland the constitutional provision is addressed directly to the State: it must "protect", "defend" and "vindicate" the personal rights, and it guarantees "liberty for the exercise" of the freedom of association. But on the other hand, the freedom to form associations and unions is protected subject to "public order and morality"[13] and it may be "regulated" and "controlled" in the public interest, though not in a discriminatory way[14]. The power of the State to derogate from the basic provision therefore seems to be much greater. In fact, in both cases the position is not quite as it appears to be, and judicial interpretation has brought the provisions very close together by moving, as it were, in opposite directions.

It is of course a general principle that no right or freedom can be absolute. In the same sense it is usually accepted that the State can regulate the scope and extent of those rights which are protected by the law, and a constitutional guarantee has the object of defining the limits of that regulation rather than prohibiting it altogether. Under the Irish Constitution, the question as to what amounts to permissible "regulation and control in the public interest" became the subject-matter of litigation very quickly. In 1941 the Government introduced the Trade Union Bill which passed into law later in the same year[15]. Part III of the Act set up a Trade Union Tribunal[16], the main function of which was to be the granting of sole bargaining rights to one or more unions claiming to have organised a majority of workers "of any particular class"[17]. Excluded from this were unions with their headquarters outside the State[18]. Various additional provisions were also included to safeguard existing rights and interests[19]. Where a union was granted a determination only it could engage in collective bargaining for the benefit of the class of workers in question. But beyond that, all other unions were prevented from accepting into membership any such workers from the date of the determination[20].

In fact, Part III of the Act had a very short life. Shortly after it came into force the Irish Transport and General Workers' Union sought sole bargaining rights in respect of workers employed in the road passenger

service of Córas Iompair Éireann. The National Union of Railwaymen, who also had members employed there, objected and brought proceedings claiming Part III of the 1941 Act was unconstitutional[21].

In the High Court Gavan Duffy J. accepted, as he was bound to, that Part III amounted to a restriction of the freedom of association, but he held that it did come within the "regulation and control" permitted by Article 40.6.1°.iii. He did so by arguing that the promotion of a small number of strong unions would make the individual's freedom to join a union – such as would remain – more effective. In other words, he saying that the worker's interest in the freedom of association was better protected by the strength of the unions he could join than by a variety of choice[22].

The Supreme Court refused to follow this line of reasoning. Murnaghan J., who read the judgment of the Court, put the case thus:

> "Both logically and practically, to deprive a person of the choice of persons with whom he will associate, is not a control of the exercise of the right of association, but a denial of the right altogether."[23]

Consequently, the Supreme Court held that Part III of the 1941 Act was unconstitutional.

The decision in *N.U.R.* v. *Sullivan* has been the subject-matter of some debate, and the Supreme Court has been accused of going much further than what was envisaged by the Constitution[24]. If "regulation and control" cannot legally be employed by Parliament to combat multi-unionism, which was a particularly serious problem prior to the passing of the 1941 Act[25], then how can it be used? On any view Part III of the 1941 Act must have been suspect, since it set out not merely to streamline the trade union movement, but to do this by seeking to eliminate a particular section of that movement[26]. In that sense the "regulation" was undoubtedly discriminatory[27]. But perhaps the most serious defect of the decision is not the conclusion it reached but the failure of the Court to take up some of the questions the case would inevitably raise. One might ask, for example, whether Part III would have stood if it had provided for the granting of sole bargaining rights but allowed other unions to continue to take new members. Murnaghan J. was anxious to point out that the Constitution did not give an "unqualified right"[28]:

> "There is no doubt that a law may be made dealing with the exercise of the right of forming associations and unions if that law can properly be called a law regulating the exercise of such right."

From the decision it is clear that Part III of the 1941 Act was not

found to be such a law. But the Court issued such a blanket condemnation of the legislation that it is difficult to see how, if at all, the Act might have been saved. The decision is therefore an uncertain guide as to how to approach regulatory laws in the future.

In Germany the question has perhaps been tackled in a more satisfactory manner. For a long time it was not raised at all, partly, perhaps, because of the very straightforward wording of the constitutional provision referred to earlier. The matter was however eventually tested in the *"Mitbestimmungs"* Case[29]. This case concerned the Co-determination Act 1976 which, broadly speaking, introduced equal representation for shareholders and workers on the supervisory boards of large undertakings (companies with more than 2,000 employees). A group of companies and employers' associations brought an action claiming, *inter alia*, that the Act was in breach of Article 9(3) of the Basic Law in that it allowed a potential interference of unions in employers' associations. It should be noted in this context that German constitutional law requires that an association, in order to qualify for constitutional protection under Article 9(3), must be independent of the bargaining opponent[30].

The Constitutional Court used this opportunity to embark on a major analysis of the freedom of association. In the course of the judgment it identified a "core" in Article 9(3) which cannot be tampered with, consisting, it appears, of the freedom to join unions as well as the freedom to engage in collective bargaining in an independent manner without interference by the State or others. This core, the Constitutional Court held, had not been violated by the 1976 Act. Beyond the core it was up to the legislator to determine the scope of the freedom of association; but even here Parliament could impose restrictions only so as to protect the rights of others, not merely as a policy decision.[31]

This form of interpretation could also be used quite sensibly in respect of the Irish Constitution, which allows regulation of the "exercise" of the freedom of association but not of the freedom itself, i.e. the "core" in the German terminology. This was perhaps the effect intended by the Supreme Court in the *NUR* case: The State does have a right to regulate the freedom of association, but it cannot thereby change the substance of the Constitutional protection. Parliament may control the right but not deny it altogether.

B. PROTECTION AS AGAINST EMPLOYERS

The German and Irish Constitutions therefore give protection to citizens against legislative interference with the freedom of association. But both Constitutions go beyond that – they protect the freedom against attacks by others as well. This is known as *"Drittwirkung"*

(third party effect) in German constitutional law. In Germany this arises directly out of the wording of Article 9(3): "Agreements" and "measures" which restrict the freedom of association are illegal under its terms. In Ireland the matter could have been doubtful, for the addressee of Article 40 is the State, but the *Drittwirkung* has become clear at the latest since the cases of *Educational Company of Ireland* v. *Fitzpatrick (No. 2)*[32] and *Meskell* v. *Coras Iompair Eireann*[33].

Apart from the State, and perhaps even more obviously than the State, it is against employers that the freedom of association needs the greatest protection. Clearly "yellow-dog"contracts, or dismissals discriminatory of union members, or any other anti-union discrimination in employment in areas like discipline, promotion or training can jeopardise the effectiveness of the freedom of association as much as restrictive legislation, particularly if carried out on a large scale. In both jurisdictions the Constitution has been successfully invoked against employers seeking to prevent workers from exercising their rights. By coincidence, two of the main cases in the two jurisdictions concern attempts by the State-owned transport companies to violate the freedom of association[34]. In both cases the facts and decisions are not strictly relevant to this discussion, but the effect was to give the aggrieved plaintiffs a right of action as against their employers based on their constitutional rights. The extent of this protection was illustrated in particular by the Supreme Court in Ireland in the case of *Meskell* v. *Coras Iompair Éireann.* In that case the plaintiff's contract of employment had been terminated with the required notice, and indeed apparently lawfully in every other respect. He had then been offered employment on new terms which would have involved a curtailment of his rights under Article 40 of the Constitution. He refused and brought a constitutional case. In considering the effect of the freedom of association, Walsh J. stated in the Supreme Court:

> "If the employer dismisses the worker because of the latter's insistence upon exercising his constitutional right, the fact that the form or notice of dismissal is good at common law does not in any way lesssen the infringement of the right involved or mitigate the damage which the worker may suffer by reason of his insistence upon exercising his constitutional right. If the Oireachtas cannot validly seek to compel a person to forgo a constitutional right, can such a power be effectively exercised by some lesser body or by an individual employer? To exercise what may be loosely called a common-law right of dismissal as a method of compelling a person to abandon a constitutional right, or as a penalty for his not doing so, must necessarily be regarded as an abuse of the common-law right because it is an infringement, and an abuse of the Constitution which is superior to the common law and which must prevail if there is a conflict between the two."[35]

The case itself did not concern a claim for reinstatement, but it would seem reasonable to assume that such a claim, if made in a proper case, could be successful[36].

It is perhaps also worth noting that there is in both jurisdictions some degree of "extra-constitutional" protection of the freedom of association. However, the nature of this protection is somewhat different in Germany and Ireland. In Germany the Basic Law is now on the whole the only source of the freedom of association. It is not just *a* guarantor of the freedom, but for all intents and purposes the *only* one. This is particularly apparent when we consider the *Kündigungschutzgesetz* (Protection against Dissmissals Act 1969). The main purpose of the Act is to declare void any dismissal considered to be "socially unjustified." The interesting feature of the Act is that nowhere do we find an enumeration of dismissals that might be described as "socially unjustified." The Act is concerned exclusively with procedural questions, leaving it to the discretion of the courts to decide whether any particular dismissal is socially justified. It is however universally agreed that a dismissal for trade union membership or activity is socially unjustified and therefore void. But this is based not on the text of the Act but on the constitutional protection of the freedom of association. The violation of a fundamental right can never be socially justified.

In Ireland, on the other hand, the freedom of association is additionally and quite separately protected by the Unfair Dismissals Act 1977, section 6(2)(a) of which declares a dismissal for union membership or activity to be an unfair dismissal[37]. We have therefore in Ireland, to an extent at least, two parallel systems of protection of the freedom of association. The extra-constitutional system owes much to the legal development in Britian which is now contained in section 58(I) of the Employment Protection (Consolidation) Act 1978[38]. In fact the British legislation, as it still stands at the time of writing, is guided by a wholly different philosophy from that to be found in the Irish Constitution, for it is cast in a collectivist frame which leaves little room for individual rights. Interestingly, the 1977 Act has not taken over the majority of the British provisions which spell this out most clearly, such as the distinction between independent and non-independent unions[39] and the absence of protection against dismissal for *non-membership* of independent unions[40]. If this is to be interpreted as meaning that the 1977 Act has not adopted the British philosophy, then we are left with two systems of protection with much the same purpose and outlook, the difference between them being their scope and procedure respectively.

In principle the protection given by section 6(2)(a) of the Unfair Dismissals Act was already guaranteed by the Constitution in Article 40.61°.iii, and it could perhaps be argued that such additional protec-

tion, which contains no reference to the pre-existing constitutional guarantee, is not always useful. This would become a problem, for example, in the case of a person excluded from the statutory protection[41] who might as a result think that he has no rights at all. It would perhaps have been preferable for the Oireachtas to have enacted a procedural reform only: instead of the present section 6(2)(a), Parliament could have provided that a remedy under the Act was available for a dismissal which violated Article 40.6.1°.iii of the Constitution[42].

On the whole the argument may not have much practical significance. It is beyond dispute that the Irish Constitution, like its German counterpart, has in the past been – and could be in the future – an effective instrument for protecting the freedom of association against hostile employers. But it is arguable that the existence of this "dual" protection may encourage a certain imbalance in the judicial interpretation of Article 40, since the majority of plaintiffs seeking to rely on its protection are likely to be aggrieved by the actions of trade unions rather than employers (in respect of the latter they would turn to the 1977 Act), thus forcing the courts to concentrate on aspects of the freedom of association which are certainly important but should scarcely be its sole thrust.

C. PROTECTION AS AGAINST TRADE UNIONS

It is generally accepted that the freedom of association has both individual and collective aspects: It protects not only the freedom of individuals to form or be members of a trade union but also the freedom of the unions themselves to exist and, perhaps, act without interference by the State or others. This distinction has been made repeatedly by the German courts and *both* aspects have received explicit constitutional protection[43]. In Ireland the question was raised only once, and then in relation to the provisions of the 1922 Constitution of the Irish Free State; in *Irish Union of Distributive Workers and Clerks* v. *Rathmines Urban District Council*[44] Murnaghan J. expressed himself in favour of a freedom to join unions which was exclusively an individual freedom[45]. However, although there is no express authority for the proposition, there is good reason to believe that the courts would take a different line today[46].

In most cases the purpose and substance of collective and individual aspects of the freedom of association are much the same and so the distinction will normally be of little relevance. But sometimes the two aspects can and do come into conflict, as when a worker wishes to join a union which does not want him as a member. And it is in such cases that the question arises whether the freedom of association, which is designed at first instance to protect unions, can also be used to protect

workers *against* trade unions. Here the courts are called upon to balance the respective merits of collective and individual freedoms.

This conflict is at its most serious in the case of the worker who is unwilling to become or remain a trade unionist[47]. If, in the general sense, he is to have a right at all, then this is in itself a victory of individual over collective freedoms; the freedom not to join a union, also known as "dissociation" or "negative freedom of association", has itself no collective element. In fact, both the Irish and German courts have recognised the existence of such a freedom. It has been held in the two jurisdictions that a compulsion to associate is a denial of the constitutional guarantee[48]:

> "The expressly guaranteed freedom to form an association (or to join it) pre-supposes by definition the freedom to stay away from any association."[49]

And similarly:

> "If it is a 'liberty' that is guaranteed . . ., that obviously does not mean that he *must* form or join associations and unions, but that he may if he so wills."[50]

It can thus be seen that the courts in both jurisdictions were relying heavily on the nature of the freedom of association as a freedom. The logic behind the argument would suffer enormously or fail altogether if the Constitution were to be seen as protecting a *right* of association. It is all the more disturbing then that the courts in question persisted in using both terms interchangeably throughout,[51] making it difficult to discover the basis for the respective decisions. Subsequent judgments have continued the confusion and even added to it.[52] Furthermore, the Federal Labour Court in Germany also relied on some previous decisions in which the Constitutional Court had held that Article 9 of the Basic Law protected a "pluralism of associations"[53] and on an interpretation of Article 9 (1),[54] which has nothing to do with labour law at all.

There is also another important point which has not been clarified sufficiently in either jurisdiction, namely, whether the freedom of dissociation, or negative freedom of association, will always be able to assert itself where a violation is established. It has already been observed that in such cases there is always a degree of conflict. In the litigation to date the individual aspect prevailed throughout. But must this always be so?

A recent German case provides a good illustration. It concerned the demand made by a union in the course of negotiating a collective agree-

ment that certain extra holiday money, the payment of which had been agreed in principle, should go to its members only; non-members would receive merely the minimum statutory payment. The employer refused to accede to this demand, whereupon the union called a strike. In an action brought against the union by the employer it was claimed that the strike was illegal.[55] The union in its defence stated *inter alia* that it was in fact exercising its constitutional right to organise in the employer's business. The Federal Labour Court agreed that the case involved two aspects:[56] (1) an attempt by the union to strengthen its position and to ensure its independence and right to exist (we can call this the pursuance of the collective freedom); and (2) pressure applied to make non-members join the union (this is the suppression of the individual freedom). On the facts the Labour Court held that the latter aspect was foremost in the minds of the union leaders and that the strike was therefore unconstitutional.

The decision of the Federal Labour Court is now widely quoted as an authority for the proposition that the negative freedom of association will always prevail over the positive freedom, or at least over the collective freedom of association. In the submission of the present writer that cannot be correct. What the Court stated was that the union was here chiefly concerned with applying pressure on non-unionists. But if the union's primary motive had been to strengthen its position – i.e. the pursuance of the collective freedom – of which the pressure on non-members was merely a consequence, inevitable but not specifically pursued, then the decision could have been different. That would be a question of fact to be determined in each individual case. It is submitted that this ought also to be applied in Irish law.[57] It makes little sense to set up the freedom of dissociation on a higher plane than the freedom of association and to allow it to predominate in all circumstances.[58]

Although the freedom of dissociation (a term which, it is submitted, is preferable to "negative freedom of association") is the most dramatic illustration of the constitutional protection of workers against trade unions, it is not the only one. In some recent Irish cases[59] the courts have considered the constitutional implications of a "right to work", which may apparently be invoked against a union which refuses to admit a worker into membership where such membership is the passport to a particular job.[60] Whether the concept goes beyond that is unclear,[61] but as hitherto explained it has a definite effect on the scope of the collective aspect of the freedom of association.

Apart from the uncertainty created by the "right" to work (which, in any case, does not derive its existence from the freedom of association), there does not appear to be any way of using the Constitution to compel a union to admit someone the union does not desire as a

member. In Ireland this has been expressly stated by the judiciary,[62] whereas the matter simply does not seem to have arisen in Germany.[63] One might be tempted to conclude that this is an example of the collective freedom of association being given priority, but of course the individual members of the union could just as easily be the holders of the predominant freedom.[64]

CONCLUSION

The above analysis can by no means claim to be comprehensive. It has merely attempted to identify some of the issues arising out of the constitutional protection of the freedom of association. In relation to these issues there is still much which needs clarification, and some of the developments need to be further explained by the judiciary. Even so, a very similar trend is emerging in both jurisdictions, which is characterised by the determination to contain restrictions on the freedom of association as well as the concern to safeguard individual interests in what is essentially a collective freedom. It has become clear that where the freedom is endangered the protection afforded by the Constitution operates regardless of the source of that danger; and while unions can, when accused of violating the guarantee, throw their own legal interests into the balance, they cannot do so to justify a gratuitous interference with individual rights.

We should ask, in conclusion, to what extent our constitutional protection gives us an advantage over jurisdictions such as Britain where it is absent. Three points in particular deserve attention:

(i) The law in Britain protects the freedom of association only as against the employer, but not as against the State (which it could not do anyway), other unions or indeed anyone else. In other words, only the employer is seen as the antagonist, and as a result the scope of the protection is very limited.

(ii) More notable still is the fact that the present legislation in Britain only prohibits anti-union discrimination (in so far as it does that) in employment. It does not affect selection for employment. In fact there is no reported case in either Ireland or Germany in which pre-employment discrimination was an issue, but it stands to reason that the Constitution in either jurisdiction could be used here. Ordinary legislation, even if it existed, would probably prove to be less than fully effective.[65] But the absence of any protection is very serious since there is nothing to prevent arbitrary rejection of union members in a situation where the union may, on account of that very discrimination, not have enough industrial muscle to do anything about it.

(iii) The British approach is, by its nature, far less flexible and much more piece-meal than that in Ireland and Germany. It cannot anticipate or adapt to new situations as can a Constitution providing for judicial review.

On the other hand, one frequently hears about the apprehension felt by trade unionists in respect of the power which the Constitution gives to the judiciary. That may or may not be justified, but either way there is no indication that the British experience has shown a less intensive involvement of the judiciary in the development of the freedom of association. It is at least strongly arguable that reservations about judicial impartiality would be out-weighed by the danger of State-sponsored restrictions on the freedom of association for reasons of administrative or economic convenience.

One of the main characteristics of a constitutionally guaranteed right or freedom is that it is not subject to shifts of legislative policy or of popular attitudes except where these are reflected in judicial interpretation. In that sense it is fairly rigid and is unaffected by factors such as the temporary unpopularity of trade unions or changes in Government. It is therefore to be hoped that the constitutional protection of the freedom of association will if anything be intensified and that it will lead to an increasingly effective implementation of the rights of workers and trade unions. Without a secure freedom of association there can be no socially acceptable system of labour law.

REFERENCES

1. *Shelton* v. *Tucker* (1960) 364 US 479.

2. W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* Yale University Press, 1923, Chapter 1.

3. See e.g. Sir O. Kahn-Freund, *Labour and the Law,* 2nd ed., Stevens & Sons, 1977, p. 161 *et seq.,* and J. M. Kelly, *Fundamental Rights in the Irish Law and Constitution,* Allen Figgis & Co. Ltd., Dublin, 1967, Chapter VI.

4. For an unusually enlightened analysis of this problem, albeit in a slightly different context, see Megarry V.-C. in *McInnes* v. *Onslow Fane* [1978] 3 All E.R. 211 at p. 217.

5. The German Constitution speaks only of a "right", but the Constitutional Court has always assumed that what has been guaranteed is the *"Freedom"* of association (Koalitions-*freiheit*). The Irish Constitution uses terminology which hints strongly that it is protecting a freedom, but it does so under the heading of "Personal *Rights*", which, we are told, the State must "respect", "defend" and "vindicate".

6. It should be pointed out that the term "freedom" is itself capable of different meanings, see F. A. Hayek in *The Constitution of Liberty,* Routledge & Kegan Paul, London, 1960, pp. 11-21. Furthermore, see also the relationship between "freedoms" and "duties" advocated by Sir Alfred Denning (as he then was) in *Freedom under the Law,* Stevens & Sons, London, 1949, at p. 4: "The freedom of the individual, which is so dear to us, has to be balanced with his duty."

7. The main difference lies in the effect which my freedom of association has on others. If we see it as a *freedom,* then this results in what Hohfeld calls a correlative "no-right" in others to prevent my exercising this freedom. A *right* or *claim,* on the other hand, leads to a duty on the part of others, and in particular the State, to protect and strengthen it. But there are other effects as well, particularly when we come to consider the freedom not to associate, the existence of which would be difficult to reconcile with a *right* of association. But quite apart from such factors, freedoms and rights in this sense evolved out of completely different traditions. The great "freedoms" (such as association, assembly, religion and free speech) were the products of 19th century liberalism, whereas the more modern "rights", concerned mainly with social security and the fair distribution of wealth, are creatures of the Welfare State. See also Sir Leslie Scarman, *English Law – the New Dimension,* Stevens & Sons, London, 1974, p. 28 *et seq.*

8. Which protected the freedom of association.

9. In a series of judgments the Constitutional Court has held that the Basic Law is not just a formal legal document, but the expression of a pre-existing code of standards and values arising out of the traditions of a liberal parliamentary democracy, see K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland,* C. F. Müller, Heidelberg, 1978, p. 4.

10. By a majority of 158,160. The method of using a referendum was designed to prevent a repetition of the arguments involving the root of title of the 1922 Constitution.

11. Articles 40 to 44.

12. *Advisory, Conciliation and Arbitration Service* v. *United Kingdom Association of Professional Engineers,* [1979] IRLR 68 at p. 72. Note that the Master of the Rolls thought that Article 11 of the Convention "only states a basic principle of English law".

13. The effect of this limitation with regard to the freedom of association has not been tested before the courts and is uncertain. In *N.U.R.* v. *Sullivan, infra,* Murnaghan J. did however point out that it had not been suggested that "associations or unions in the form of trade unions are contrary to public order or morality" – at p. 101. There is then a possibility that this qualification does not directly affect labour law matters.

14. Article 40.6.2°.

15. The Act followed the reports of the Irish Trade Union Congress Commission of Inquiry, which was set up in 1936 to consider the re-organisation of the trade union movement and trade union law in general, and of the Commission on Vocational Organisation.

16. And an Appeal Board with somewhat limited powers, see section 30.

17. Section 26 (1).

18. Section 26 (2).

19. Such as the re-employment of subsequently redundant trade union officials, section 26 (4): the observance of natural justice, section 26 (5); and the holding of ballots among the affected workers, section 27.

20. Section 34.

21. *National Union of Railwaymen* v. *Sullivan* [1947] I.R. 77.

22. *Ibid.,* at p. 88.

23. *Ibid.,* at p. 102.

24. J. M. Kelly, *op. cit.,* criticised the "colourless judgment" of Murnaghan J. for ignoring "Mr. Justice Gavan Duffy's painstaking analysis of the notion of 'regulation' of the right of association", at pp. 165-6.

25. At that time, for example, a Dublin dockyard had to be closed because of the inability of the 27 unions representing employees to agree on virtually anything.

26. One of the purposes of the Act was to reduce the influence of the British-based or "amalgamated" unions.

27. Gavan Duffy J. was not prepared to accept that the 1941 Act contained "political" discrimintion as prohibited by Article 40.6.2°, but one would have thought that this conclusion was questionable.

28. *N.U.R.* Case, at p. 101.

29. (1979) unreported. The matter had however been referred to in previous cases, see BVerfGE 4, 96 at pp. 105-8; BVerfGe 17, 319 at p. 333 *et seq.*; BVerfGE 18, 18 at p. 26; and BVerfGE 20, 312 at p. 318 *et seq.*

30. This is known as the "purity" ("Reinheit") of an association, see Hueck/Nipperdey, *Lehrbuch des Arbeitsrechts;* Verlag Franz Vahlen GmbH, Berlin, 1970, at p. 63 *et seq.*; and W. Zöllner, *Arbeitsrecht,* C. H. Beck, Munich, 1977, at p. 75.

31. An example of permissible regulation is Article 107 of the Civil Code ("Bürgerliches Gesetzbuch") which places certain restrictions on the freedom of infants to join unions. See also BVerfGE 4, 96 at pp. 105-8.

32. [1961] I.R. 345.

33. [1973] I.R. 121.

34. BVerfGE 19, 303 (Constitutional Court); *Meskell* v. *CIE* [1973] I.R. 121

35. *Meskell,* at p. 135.

36. Walsh J. left the matter open, but there is nothing in his judgment to suggest that reinstatement could not be granted. This must be so if a dismissal in breach of a constitutional right is to be considered void.

37. The provision is similar to section 58 (1) of the British Employment Protection (Consolidation) Act, 1978 – see *infra* – but with some important differences. For example, the 1977 Act protects union activities only outside working hours or, if within working hours, where they are permitted by the contract of employment; in Britain the permission of the employer is sufficient – see section 58 (2) (b) EP(C)Act.

38. Unfair dismissals were originally introduced by the Industrial Relations Act, 1971 – see section 24 (4) – and were adopted in the present form in the Trade Union and Labour Relations Act, 1974 – section 1 (2) and Schedule 1. In addition to section 58 of the EP(C)Act, section 23 of the Act protects workers against actions short of dismissal and section 27 provides for time-off for trade union officials to be trained in or to carry out their duties.

39. "Independent" trade unions were defined in section 30 of the Trade Union and Labour Relations Act, 1974.

40. Section 58 (1) (c) EP(C)Act. This does not necessarily mean that such a dismissal is unfair under the Irish statute, although it would undoubtedly be unconstitutional, see *infra*; the 1977 Act simply avoids the issue. Most aggrieved persons would perhaps follow Mr. Meskell into the High Court.

41. See sections 2-5 of the 1977 Act.

42. A similar formula could have been used for the other headings in section 6 where appropriate.

43. BVerfGE 4, 96. The decision of the Constitutional Court came at the end of an intense

academic debate. Most writers had at this stage favoured the existence of a collective aspect of the constitutional guarantee, see e.g. Hueck/Nipperdey, *op. cit.*, at p. 105: "The positive freedom of association of the individual would have little significance if associations as such did not receive special legal protection."

44 [1927] I.R. 260.

45. *Ibid.*, at p. 306. His statement was however strictly *obiter.*

46. See e.g. the case of *N.U.R.* v. *Sullivan, supra,* in which the union was able to bring a constitutional action *eo nomine,* and *Murphy* v. *Stewart* [1973] I.R. 97.

47. See on this Earnán P. de Blaghd, "How Closed Can My Shop Be?" (1972) I.L.T. & S.J. 67; E. P. de Blaghd, "The Problem of the Reluctant Non-Union Worker" (1973) I.L.T & S.J. 11.

48. In Germany it had previously been argued that the negative freedom of association could be derived from the freedom of contract protected under Article 2 (1) of the Basic Law.

49. BAG GS AP Nr. 13 zu Art. 9 GG, at p. 351.

50. Per Budd J. in *Educational Company of Ireland Ltd.* v. *Fitzpatrick (No. 2)* [1961] I.R. 345 at p. 365.

51. See e.g. Budd J. in *Educational Company*; Kingsmill Moore J. in the Supreme Court expressed himself only in terms of "rights", but the "right he envisaged was very much in the nature of a freedom – see p. 395. See also the Federal Labour Court (Nr. 13) at p. 351. In fact the Court used the term "right" everywhere except in the passage quoted above.

52. See e.g. *Meskell* v. *CIE* [1973] I.R. 121, in which the freedom of dissociation was referred to by the Supreme Court as a "correlative right" *[sic]* of the freedom of association.

53. See e.g. BVerfGE 18, 18 at p. 28. However, one would have thought that this would protect a worker who wants to leave his union to join another, but not one who wishes to be a member of no union at all.

54. BVerfGE 20, 312.

55. The strike was in breach of an existing collective agreement and therefore, under German law, *prima facie* unlawful.

56. BAG GS AP Nr. 13, *supra.*

57. This point is discussed by J. P. Casey in "Some Implications of Freedom of Association in Labour Law", *International and Comparative Legal Quarterly,* 1972, Vol. 21, p. 699 at pp. 709-710. Compare also with the statement by Lord Denning MR in the *U.K.A.P.E.* Case, *supra,* at p. 72: The freedom of association is protected provided that the association "is motivated – not by a desire to injure others – but by a desire to protect the interests of its members". The same would logically apply to dissociation.

58. This argument would to some extent depend on whether the freedom of association under Irish constitutional law has a collective aspect. But even if it does not, that would still leave room for conflicts between *individual* association and dissociation.

59. *Murphy* v. *Stewart* [1973] I.R. 97 per Walsh J.; *Rodgers* v. *Irish Transport and General Workers' Union,* unreported, 15 March 1978, per Finlay P.

60. *Murphy*'s case, at p. 117. It is perhaps odd that the "right" to work ever arose in this context in view of the theoretical illegality of the closed shop.

61. Either way, the term "right to work" is almost certainly a misnomer. From what we have been told it is no more than a "freedom" to work, if that. See on this the very useful comments by Megarry V. C. in *McInnes* v. *Onslow Fane,* footnote (4) *supra.*

62. Per Henchy J. in *Becton, Dickinson Ltd.* v. *Lee* [1973] I.R. 1 at p. 48; and per Walsh J. in *Murphy*'s case at pp. 116-120.

63. This can be explained at least partly by the lesser role played by unions and the very infrequent occurrence of closed shops.

64. Indeed, the sheer weight of numbers might determine the outcome in many cases.

65. As evidenced by the lack of success in this respect of the British Industrial Relations Act, 1971.