"Freedom of association" and New Zealand industrial law

Alex Frame*

The electoral events of 1984 have made it certain that New Zealanders will soon be discussing the contents and form of a Bill of Rights. The new government appears committed to the enactment of a catalogue of fundamental freedoms, the maintenance of which will be entrusted to the courts.[1] *In this speech Alex Frame considers constitutional development in the industrial field by examining the concept of freedom of association.*

I. INTRODUCTION

In discharge of my brief tonight I would like to consider the origin of the concept of "freedom of association" in what my distinguished predecessors in this series have called the "international dimension"; to discuss its recent and controversial connection with the historical arrangements by which New Zealand industrial relations have been conditioned; and to review the kinds of problems which the concept is likely to present for our courts. In defence of what might be considered to be the narrow scope of my inquiry, I must plead that the time has arrived when broad arguments on constitutional development must be supplemented by more mundane and detailed considerations of specific problems.

II. INTERNATIONAL SOURCES FOR "FREEDOM OF ASSOCIATION"

I propose to consider five such sources. Of these, only the first two are presently in force for New Zealand as a matter of international law. They are:

(1) the International Covenant on Civil and Political Rights;
(2) the International Covenant on Economic, Social and Cultural Rights;
(3) I.L.O. Convention No. 87: Convention concerning Freedom of Association and Protection of the Right to Organise;
(4) the Universal Declaration of Human Rights;
(5) the European Convention on Human Rights.

I have set out the full texts of these instruments, as they relate to "freedom of association", in the Appendix to this paper.

* Senior Lecturer in Law, Victoria University of Wellington.

1 See, for example, the views of the Deputy Prime Minister elect, Mr Palmer, presented to the 1984 New Zealand Law Conference and printed in [1984] N.Z.L.J. 178.

A. *The International Covenant on Civil and Political Rights*

We must study with some care the view of the former government as to the state of compliance of New Zealand law with article 22 of the International Covenant on Civil and Political Rights before the abolition of the "unqualified preference clause" by the Industrial Relations Amendment Act 1983 on 16 December 1983. The New Zealand Government, reporting to the Human Rights Committee, as it had bound itself to do under article 40 of the Covenant, declared as follows:[2]

> 274. Although there is no system of compulsory unionism in New Zealand there is, in its place, a system whereby the union or unions party to an award or collective agreement may elect to have inserted in the award or agreement what is known as an "unqualified preference provision". The effect of such a provision if inserted into an award or collective agreement is that if any adult (other than a person who is exempted from union membership), who is not a member of the union of workers bound by the award or collective agreement, is employed by an employer bound by the award or agreement, in any position or employment that is subject to the award or agreement, that adult must become a member of the union within 14 days after his engagement, and he or she must remain a member of the union so long as he or she continues in that position or employment. (Industrial Relations Act 1973, section 98). . . .
> 277. The above provisions allow the majority of workers who are party to an award or collective agreement to choose whether they wish all workers subject to that award or agreement to belong to a union and is consistent with giving the individual a right to freedom of association.

Furthermore, when Mr. Beeby of the Ministry of Foreign Affairs travelled to Geneva and addressed the Human Rights Committee on 10 November 1983, he observed:[3]

> New Zealand's view is that the restriction to which I have referred and others mentioned in this part of the report are permissible in terms of Article 22(2). In case, however, this view is wrong, New Zealand of course reserved the right not to apply Article 22 as it relates to trade unions to the extent that existing legislative measures enacted to ensure effective trade union representation and encourage orderly industrial relations may not be fully compatible with that Article.

I have asked you to follow me carefully through these passages of New Zealand's presentation to the Human Rights Committee because they establish, clearly in my view, that the government did not rely on the New Zealand reservation to article 22 to preserve the unqualified preference provisions but, on the contrary, asserted them to be "consistent with giving the individual a right to freedom of association", and, even at the height of the controversy over the 1983 Amendment Bill and whilst on full notice, claimed that the measures reported on were "necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others".

2 *New Zealand Report under the International Covenant on Civil and Political Rights,* U.N. Document CCPR/C/10 Add. 6, 29 January 1982. The text appears also in the Information Bulletin referred to in the following note.

3 *Human Rights in New Zealand,* Information Bulletin No. 6 (Ministry of Foreign Affairs, Wellington, 1984) 21.

The answer to the question why this formal declaration, several years in the composition, solemnly presented by the New Zealand Government to the Human Rights Committee, and amounting to something very like an estoppel (if I may use that expression in a general sense) played so little part in the debate on the 1983 Bill abolishing preference, and was never deemed worthy of any explanation by the then government, lies, I think, in an observation by Professor Quentin-Baxter in the opening lecture of this series where he pointed out that New Zealand's reporting under the covenant "created hardly a ripple of domestic interest, because the action takes place outside the range of New Zealand's news gathering".

B. *The I.L.O. Conventions*

Although New Zealand is a party to a considerable number of I.L.O. conventions[4] it is not a party to Conventions 87 or 98. In the run-up to the introduction of the Bill abolishing the preference provisions there was a suggestion that the Bill was inspired by a desire to ratify Convention 87.[5] In the House, however, the Minister preferred to straddle the possibilities:[6]

> It (the Bill) is a charter — if members like that term — to bring New Zealand more into tune with the international charters on freedom. Article 20 of the International (sic) Declaration of Human Rights states that no one may be compelled to belong to an association.

We may, however, learn more as to the meaning "freedom of association" in the I.L.O. conventions from the decisions of the Freedom of Association Committee of the governing body of the I.L.O.[7] That committee is composed of nine regular members and nine substitute members drawn from the government, employers' and workers' groups of the governing body. The members participate in a personal and not a representative capacity. By 1976 the committee had dealt with more than 800 cases. In particular it has considered "union security" arrangements in the context of freedom of association on a number of occasions. It takes as its starting point the statement of the Committee on Industrial Relations appointed by the International Labour Conference in 1949 according to which:[8]

> Convention No. 87 can in no way be interpreted as authorising or prohibiting union security arrangements, such questions being matters for regulation in accordance with national practice.

On one occasion the committee considered whether a provision that nobody should be compelled to join or not to join a trade union itself infringed Conventions 87 and 98 — it held that it did not so infringe.[9] Perhaps its fullest statement on the question should be set out at length:[10]

4 See *International Labour Conventions Ratified by New Zealand* (Department of Labour, Wellington, 1982).
5 See Suzanne Carty, *The Evening Post,* Wellington, 31 May 1983, 6: "Compulsion may go from Union membership".
6 Hon. J. B. Bolger, New Zealand Parliamentary Debates Vol. 453, 1983: 2471.
7 For a description of the Committee and its work, and a digest of its decisions, see *Freedom of Association* (2nd Ed., International Labour Office, Geneva, 1976).
8 Digest of decisions, op.cit. supra n.7, p. 19, para. 39.
9 Ibid. p. 19, para. 40.
10 Ibid. p. 19, para. 41.

> There are many examples of countries in which the law prohibits certain forms of union security arrangements and many others in which the law permits such arrangements, either formally or by reason of the fact that no legislation on the matter exists at all. The Committee has considered that the position is very different when the law imposes union security — either in the form of making union membership compulsory or by the making of union contributions payable in such circumstances as to amount to the same thing. The Committee has pointed out that when a worker can join a different union as a matter of law, but is still obliged to join a particular union — by law — if he wishes to retain his employment, such a requirement would seem to be incompatible with his right to join the organisation of his choosing.

The I.L.O. committee thus appears to make a distinction between statutory creation of compulsory unionism and legislation which simply permits the parties to collective agreements, and other instruments regulating industrial relations, to impose union security arrangements upon themselves. For those wearying of the language of the international bureaucrats, let me relate that distinction to the New Zealand context. In 1936 the First Labour Government secured passage of a measure providing that:[11]

> it shall not be lawful for any employer to employ . . . or to continue to employ . . . any adult person who is not . . . a member of an industrial union bound by (the) award. . . .

In contrast, the situation prevailing from 1961 until December 1983 was that it was left to the parties to industrial agreements and awards to agree, or not, that a provision reguiring workers to join the relevant union within fourteen days of engagement be inserted in the agreement or award.[12] It seems to me clear that the post-1961 arrangement was permissible under the committee's distinction.

As a post-script I should add that those concerned about the state of New Zealand jurisprudence in relation to "freedom of association" might with profit consider decisions of the committee in other areas:

> A situation in which an individual is denied any possibility of choice between different organisations, by reason of the fact that the legislation permits the existence of only one organisation in the sphere in which he carries on his occupation, is incompatible with the principles embodied in Convention N.87. . . .[13]
> The Committee has drawn attention to the importance which it attaches to the principle that workers' organisations should not be liable to be dissolved or suspended by administrative authority. . . .[14]
> The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association. . . .[15]

The current existence in our law of the Fishing Industry (Union Coverage) Act 1979, which permits only one, ministerially approved, union in the fishing industry; the deregistration powers of the Minister provided in section 130 of the Industrial Relations Act 1973; and the provisions of the Wage Freeze Regulations 1982 preventing the reaching of agreements between unions and employers would all appear to be in conflict with the committee's view of the scope of "freedom of association".

11 Section 18, Industrial Conciliation and Arbitration Amendment Act 1936.
12 See ss. 98 and 99 of the Industrial Relations Act 1973 as they were prior to repeal.
13 Digest of decisions, op.cit. supra n.1, p. 12, para. 19.
14 Ibid. p. 27, para. 68.
15 Ibid. p. 91, para. 241.

C. *A View from the Caribbean*

It may surprise some to hear the suggestion that the most fertile environment for the growth of a jurisprudence as to the meaning of the expression "freedom of association" when it is located in a constitution providing the courts with power of judicial review, may, for New Zealand purposes, be the West Indian states, especially Trinidad and Tobago, and Jamaica. Both have statutory codes for industrial relations which are in certain respects similar to our own. In the *Collymore* case[16] in 1968, Wooding C.J. and the other members of the Court of Appeal of Trinidad and Tobago delivered lengthy and, with respect, comprehensive judgments on the question whether the "freedom of association" provided in section 1(j) of the Constitution of Trinidad and Tobago entailed a "right to strike". The court decided that it did not and was supported in this view by the Privy Council on appeal, Lord Donovan making reference to I.L.O. Convention No. 87 in support of a narrower scope for "freedom of association" than contended for by the appellants. In *Banton's* case, the Jamaican court also took a narrower view of the "freedom of association" provided in the Jamaican Constitution: it did not include a right that an employer recognise or deal with a particular association.[17]

Nearer to the recent debate in New Zealand, in 1975 the Court of Appeal of Trinidad and Tobago faced the question whether an Act of Parliament which deemed sugar-cane growers to be members of the Cane Farmers' Association was contrary to the "freedom of association" guaranteed by the constitution. The court unanimously struck down the legislation.[18] It seems to me that the reasoning of Hyatali C.J., whilst not expressly alluding to it, preserves the distinction which I have drawn from the I.L.O. committee's decisions — namely that statutory compulsion, and a fortiori, a provision deeming membership, is proscribed whereas provisions empowering the parties to enforce membership are not.

A general conclusion from this very brief cruise into the Caribbean must be that unions have not succeeded in persuading Caribbean courts that "freedom of association" entails more than the "freedom to enter into consensual arrangements to promote the common interest objects of the association group. . . ."[19] The attempt to spin the concept out into a fabric giving efficacy to the association has not succeeded.

D. *The Universal Declaration of Human Rights*

Of the sources I have listed, and in which I have looked for clarification of the scope of "freedom of association", the Declaration is the only one specifically to address the "negative freedom" — the freedom not to join an association. The Declaration does not, of course, create obligations under international law whereas the 1966 Covenants do. It is to the Covenants therefore that we should

16 *Collymore* v. *the Attorney-General* (1968) 12 W.I.R. 5. The Privy Council's decision is reported in [1970] A.C. 538.
17 *Banton* v. *Alcoa Minerals of Jamaica Ltd* (1971) 17 W.I.R. 275.
18 *Trinidad Island-Wide Cane Farmers' Association* v. *Seereeram* (1975) 27 W.I.R. 329.
19 *Collymore,* supra n.16.

give primacy, and the absence in the covenants of any provision corresponding to article 20(2) seems more significant than its presence in the Declaration. Nevertheless, article 20(2) may be reconciled with the sorts of distinction drawn by the I.L.O. committee if we understand article 20(2) as aiming at statutory compulsion of the kind seen in New Zealand between 1936 and 1961 or, for example, in the *Seereeram* case[19a] in Trinidad and Tobago.

E. *The European Convention on Human Rights*

Reference to the Appendix will remind us of the terms of article 11 of the European Convention. In 1975, three employees of the British Railways Board applied to the European Commission on Human Rights with a complaint that their dismissal by the board following the reaching of a "union membership agreement" was in violation of their rights under article 11. The matter was referred to the European Court of Human Rights which gave its decision on 13 August 1981.[20] Features of the case which are important for our present purposes are: first, that the employees could not have claimed exemption under the then existing United Kingdom equivalent to our "conscientious objection" provision — it was, unlike the New Zealand provision, confined to religious grounds; secondly, the "union membership agreement" came into effect after the engagement of the workers. The European court was careful not to decide that "freedom of association" involved a negative right not to be compelled to join an association or union. The court observed:[21]

> Assuming that Article 11 does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention. However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and . . . it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular union. . . .

Accordingly, the court found, by eighteen votes to three, that there had been a violation of article 11. The decision has been criticised, particularly by reference to the *travaux préparatoires* for the convention which reveal that consideration had been given to including a specific protection against compulsion to join, but that:[22]

> On account of the difficulties raised by the "closed-shop system" in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which "no one may be compelled to belong to an association" which features in the United Nations Universal Declaration.

In the end, of course, we must return from our international travels to

19a Supra n.18.

20 *The Young, James and Webster* case (1982) 62 I.L.R. 359. See also A. Drzemczewski and F. Woolridge "The Closed Shop Case in Strasbourg" (1982) 31 I.C.L.Q. 396, and M. Forde "The Closed Shop Case" (1982) 11 Industrial L.J. 1.

21 (1982) 62 I.L.R. 359, 379.

22 Report of the Conference of Senior Officials submitted to the Committee of Ministers on June 19, 1950, *Collected Edition of the Travaux Préparatoires,* Volume IV, at p. 262, quoted in both articles cited at n.20.

consider the question which I proposed at the outset: what view might a New Zealand court, charged with interpreting a Bill of Rights containing a "freedom of association" clause, take of the "unqualified preference" provisions which had until very recently governed our industrial arrangements? In addition to the contractual basis of those arrangements, two further features are, I think, relevant. The first is the unusually wide scope of the "conscientious objection" procedure to secure exemption from union membership previously found in section 105 and subsequent sections of the Industrial Relations Act 1973: it provided that "conscientious belief" meant:

> any conscientious belief honestly, sincerely, and personally held, whether or not the grounds of the belief are of a religious character, and whether or not the belief is part of the doctrine of any religion. . . .

This procedure has frequently been used over the years and the rate of success in such applications has been high.[23]

Secondly, and contrary to assertions frequently made during the recent debate, the Political Disabilities Removal Act 1960 provides a straightforward mechanism by which any member of a "society" (which is defined to include unions) can avoid the payment of any levy to be applied in furtherance of political objects by giving appropriate notice. There lies the answer to the complaint that unwilling members are compelled to support political purposes of which they do not approve. Of course, general funds of a union may still be used for such purposes — but only where a resolution has been passed on a ballot of the members. In this respect union members seem to me to be in a worse position than shareholders in a company making political donations. But here we enter political country against which journey we are cautioned by that acute observer of industrial relations and law, the late Professor Kahn-Freund, who carefully considered the arguments for and against the closed shop in the United Kingdom in his Hamlyn Lectures in 1972. Having discounted the traditional ethical argument in favour of the closed shop — that all benefit from conditions secured by unions and so all should pay — Kahn-Freund concluded that:[24]

> The case for the closed shop can only be made in terms of the need for an equilibrium of power. It cannot be attacked or defended in terms of general ethical sentiments, but only in terms of social expediency . . . it was for reasons of expediency that, after weighing the arguments pro and contra, the Donovan Commission decided not to recommend legislation against it. In the view of at least some employers it was in the mutual interest: it reduces friction on the shop floor. . . . The scene of the struggle between groups among the workers, between militant and less militant wings is shifted away from the workplace. . . . It is for me very hard to understand how . . . the law can suppress practices based on informal and generally shared understandings of the workers, and for good reasons, tolerated, and sometimes even welcomed by employers.

23 The Annual Reports of the Department of Labour (App. J.H.R. G-1, 1981 and 1982) reveal that in 1981, 185 applications were heard and 167 certificates granted; of the applications heard, 153 were on religious and 32 on "other" grounds. In 1982, 213 applications were heard and 191 certificates granted; of the applications heard, 176 were on religious and 37 on "other" grounds.

24 Otto Kahn-Freund *Labour and the Law* (Stevens and Sons, London, 1972) 201-202.

III. CONCLUSION

I have tried in the course of this lecture to show two things. First, that the comparative jurisprudence which I have examined, at both national and international level, points towards the compatibility of the "unqualified preference clause" in the form in which it existed in New Zealand from 1961 to 1983, with the conception of "freedom of association". Secondly, and on a more general level, I have sought to suggest the kinds of enquiry which the enactment of a Bill of Rights may throw upon courts and those who appear before them. The paradox with which I must end is that the recent decision to abolish the preference provisions in New Zealand (a very marginal decision which has been further clouded by the recent election result) was a political decision — as it should have been according to those who are fearful of judicial intervention in such matters — but it was a political decision which sought to clothe itself in the language of constitutional argument, because in the final analysis it was justified as a measure to bring us "into tune", if you will recall the Minister's expression, with international charters.

APPENDIX

(1) *International Covenant on Civil and Political Rights*

ARTICLE 22

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

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedom of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

New Zealand made a reservation to Article 22 as follows:

> The Government of New Zealand reserves the right not to apply Article 22 as it relates to trade unions to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that Article.

(2) *Covenant on Economic, Social and Cultural Rights*

ARTICLE 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interest. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations

and the right of the latter to form or join international trade union organisations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

New Zealand made a reservation to Article 8:

> The Government of New Zealand reserves the right not to apply Article 8 to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that Article.

(3) *I.L.O. Convention No. 87: Convention concerning Freedom of Association and Protection of the Right to Organise*

ARTICLE 1

Each member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

ARTICLE 2

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

ARTICLE 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

ARTICLE 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

ARTICLE 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

(4) *Universal Declaration of Human Rights*

ARTICLE 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

(5) *European Convention on Human Rights*

ARTICLE 11

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.