FREEDOM OF OCCUPATIONAL ASSOCIATION AND HUMAN RIGHTS

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The question of defining and safeguarding "human rights and fundamental freedoms" has been forced inevitably on public attention in recent years by the rise of the totalitarian regimes and the danger to civil liberties, even from freely-elected governments, in a world so unstable. To the totalitarians, of course, human rights and fundamental freedoms have no meaning; the individual is not an end in himself; he has no rights against the state but only obligations to it. Under liberal, freely-elected governments, such as those in British countries, it has come to be assumed that the individual has certain well-defined and well-safeguarded rights against the state, but recent events suggest philosophic doubts whether the assumption is well-founded. It has been with something of a shock that the average Canadian, for example, has had brought home to him recently that such famous declarations of liberty as Magna Carta and the Bill of Rights have no binding effect on the British or Canadian Parliament and that the Canadian Parliament has power, having declared an emergency to exist, to strip of his property and send into exile any Canadian citizen whom it elects so to treat. Little wonder therefore that Canadians, who inherited their rights from the Mother Country and have never had to achieve them as against their own governments, have become acutely aware how precious they are and how easily they can be lost. And it is the same with other democratic countries; under the exigencies of wartime the "reasons of state" justification for deprivation of civil liberties, which is as old as tyranny, has shown clear signs of rearing its ugly head.

It is therefore not for academic reasons that Article 55 of the United Nations Charter states that the member nations "shall promote", along with various other objects, "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"; and that Article 56 states that "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". The Charter gives no further indication of what is and what is not to be included in the definition of "human rights and fundamental freedoms", except that in the Preamble, in the list of things in which the "peoples of the United Nations" desire to

re-affirm their faith, the words "in fundamental human rights" are followed by the words "in the dignity and worth of the human person" and "in the equal rights of men and women".

With a view to implementing these provisions of the Charter, the United Nations proceeded to set up, under the Economic and Social Council, a Commission on Human Rights, and a large number of recommendations have already been referred to this body, dealing with the whole range of questions involved.

Among these recommendations was one on trade union rights, submitted by the World Federation of Trade Unions on February 28th, 1947, laying it down that effective respect for trade union rights, apart from guarantees proper to every country, demands a safeguard of an international character, a real common international law, for which respect in all states should be assured by the Economic and Social Council.

A second memorandum on the same subject was submitted by the American Federation of Labour on March 13th, 1947, recommending that the International Labour Organization should draft, on the basis of a survey of existing conditions throughout the world, proposals for (a) incorporating the rights universally recognized; (b) protecting the workers and their organizations against the violation of basic labour or trade union rights; and (c) providing proper measures for the enforcement of such rights.

The view taken of these recommendations was that freedom of occupational association is but one aspect of freedom of association in general, which in turn forms part of the whole range of fundamental liberties of man, all interdependent and complementary one to another, including freedom of assembly and meeting, freedom of speech and opinion and freedom of worship. With these various aspects of the question of freedom of association in mind, the Economic and Social Council referred the question of freedom of occupational association to the International Labour Organization, and that of freedom of association in general to the Commission on Human Rights, to which had been entrusted the work of drafting an International Charter on Human Rights.

The memorandum submitted by the World Federation of Trade Unions, after alleging that "certain interventions tend, in various countries, to destroy the very foundations of trade union rights" and laying it down that the recognition of trade union rights may lead eventually to the acquisition by the trade unions of a new right, "that of determining the economic and social

policies in each country", submitted to the Economic and Social Council the following resolutions:

> I. Trade union rights are recognized as an inviolable prerogative enjoyed by salaried workers for the protection of their professional and social interests.
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> II. Trade union organizations should be able to administer their own affairs, to deliberate and freely decide on all questions falling within their competence, in conformity with the law and with their constitution, without interference in their duties from governmental or administrative bodies.
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> III. There should be no obstacle to the federation of trade union organizations on the occupational or inter-occupational level, whether locally, regionally or internationally.
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> IV. All legislation which places restrictions on the above-mentioned principles is contrary to the economic and social collaboration laid down by the Charter of the United Nations.
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> V. The Economic and Social Council decides to set up a Committee for Trade Union Rights which will safeguard, in a permanent fashion, respect for trade union rights. On every occasion on which the aforementioned principles are violated, the Committee will make the necessary enquiries and will submit recommendations to the Economic and Social Council as to the measures to be adopted.

The memoranda of the W.F.T.A. and the A.F of L. were transmitted to the I.L.O. in April 1947 with a request that the question of trade union rights should be put on the agenda of its next session, called for the following June at Geneva, and a report be sent to the Economic and Social Council for consideration at its next meeting in July. There was not sufficient time, under the I.L.O. constitution, for this addition to the agenda of the Conference to be communicated to Members, for purposes of adopting any Convention or Recommendation at the 1947 Session. A draft Resolution was submitted accordingly to the 1947 Conference, laying down a number of fundamental principles with regard to the question and, as it were, outlining the programme that the Conference might follow at future sessions, together with a list of points bearing on questions the regulation of which might appear particularly urgent and immediately possible by international action.

The proposed Resolution covered the various aspects of the problem of occupational association, namely:

(1) freedom of association;

(2) protection of the right to organize and to bargain collectively;

(3) collective agreements;

(4) voluntary conciliation and arbitration;

(5) co-operation between the public authorities and employers' and workers' organizations.

Since time did not permit more than the first two questions to be discussed at the 1947 Conference of the International Labour Organization, the last three questions will be disregarded for purposes of this paper.

In submitting the proposed Resolution, the International Labour Office, *i.e.*, the permanent secretariat of the International Labour Organization, observed that, with regard to freedom of association and the protection of the right to organize and to bargain collectively, there exist, "in spite of certain differences in the modalities of national regulations, a number of principles which are sufficiently defined and important and generally accepted and applied, to provide the Conference with the material for one or several Conventions, which would probably receive a large number of ratifications within a short time".

The sections of the proposed Resolution dealing with these two questions were as follows:

I. Freedom of Association

1. Employers and workers, public or private, without distinction as to occupation, sex, colour, race, creed or nationality, should have the inviolable right to establish organisations of their own choosing without previous authorisation.

2. Employers' and workers' organisations should have the right to draw up their constitutions and rules, to organize their administration and activities and to formulate their programmes without interference on the part of the public authorities.

3. Employers' and workers' organisations should not be liable to be dissolved by administrative authority.

4. Employers' and workers' organisations should have the right to establish federations and confederations as well as the right of affiliation with international organisations of employers and workers.

5. The guarantees defined in paragraphs 1, 2 and 3 herein with regard to the establishment, functioning and dissolution of employers' and workers' organisations should apply to federations and confedera tions of such organisations.

6. The acquisition of special privileges by employers' and wage-earners' organisations (as, for example, the acquisition of legal personality) should not be made subject to conditions of such a character as to restrict freedom of association as hereinbefore defined.

II. Protection of the Right to Organise and to Bargain Collectively

7. The central organisations of employers and workers should agree to recognise each other as the authorised representatives of the

interests of employers and workers, and should undertake mutually to respect the exercise of the right of association.

8. (1) In the absence of agreement between the central organisations of employers and workers, appropriate regulations should be prescribed to guarantee:

(a) the exercise of the right of association by the workers by measures designed to prevent any acts on the part of the employer or of his agents with the object of:

(i) making the employment of the worker conditional on his not joining a trade union or on his withdrawing from a trade union of which he is a member;

(ii) prejudicing a worker because he is a member or agent or official of a trade union;

(iii) dismissing a worker because he is a member or agent or official of a trade union.

(b) the exercise of the right of association by workers' organisations should be guaranteed by measures designed to prevent any acts on the part of the employer or employers' organisations or their agents with the object of:

(i) furthering the establishment of trade unions under the domination of the employer;

(ii) interfering with the formation or administration of a trade union or contributing financial or other support to it;

(iii) refusing to recognise trade unions or to bargain collectively with them for the purpose of concluding collective agreements.

(2) It should be understood, however, that a provision in a freely concluded collective agreement making compulsory membership of a certain trade union a condition precedent to employment or a condition of continued employment does not fall within the terms of this Resolution.

9. Appropriate agencies should be established for the purpose of ensuring the protection of the right of association as defined in paragraph 8 herein.

Section I. Freedom of Association

It will be seen that Section 1 has to do with freedom of association considered as a guarantee accorded to employers and workers in relation to the state. It is obvious that it would be meaningless to speak of freedom to associate and organize, and to bargain collectively, if the organizations participating in such bargaining did not enjoy complete autonomy in relation to the state and were not accorded full freedom of expression and action.

The intention of Paragraph 1 of Section 1 is to guarantee to employers and workers, public and private, without distinction as to occupation, sex, colour, race, creed or nationality, the right to establish organizations of their own choosing without previous authorization.

This formula involves the following three distinct elements:

1. The right to establish organizations *without previous authorization* means that the right is no longer to be considered as a concession accorded by authority, but rather as a fundamental right belonging to employers and workers, which, accordingly, commands the respect even of the public authority. It does not mean that the state is precluded from laying down detailed legal provisions governing the establishment of associations. For example, the requirement that associations become registered cannot be deemed to be incompatible with freedom of association, because the state naturally has the right to require organizations (in the same way as individuals) to make known their existence.

2. As regards the application of the guarantee of freedom of association, three points are to be noted:

   (a) it is to be to both employers and workers, who are placed on a footing of complete equality;

   (b) it is to be to *all* employers and workers, public or private, and, therefore, to public servants and officials and to workers in nationalized industries.

   (c) it is to be entirely without discrimination on the grounds of sex, colour, race, creed or nationality.

3. The significance of the provision that the persons enjoying freedom of association should have the right to establish *organizations of their own choosing* is simply that it is to be left entirely to employers and workers to decide between the single unified trade organization and the system of a plurality of organizations.

As a result of the discussion in the Freedom of Association Commission of the Conference, Paragraph 1 was amended to read as follows:

> Employers and workers, without distinction whatsoever, should have the inviolable right to establish or join organisations of their own choosing without previous authorisation.

The changes require little comment; the list of things in respect of which no distinction was to be made was deleted as unnecessary and even dangerous, on the *inclusio unius exclusio alterius* principle. For the rest, the employers suggested but did not press the inclusion of the words "for lawful purposes" after "establish", the majority view being that it was unnecessary.

While Paragraph 1 was concerned with the rights of employers and workers as individuals, Paragraph 2 purports to define the

freedom of association of employers' and workers' organizations. These, it provides, should have the right to draw up their constitutions and rules, to organize their administration and activities and to formulate their programmes without interference on the part of the public authorities.

This provision is intended to prevent any of those acts of interference on the part of the public authorities which, under totalitarian systems, were designed to impose on trade associations such conditions of substance and of form with regard to their constitutions, their activities and their objects as might please the authorities. Such intervention manifested itself, among other ways, in the direct appointment of officials of associations, the control of the internal and external life of organizations, the surveillance of general meetings of associations, the annulment of decisions freely taken by a majority of the members and, in short, in a series of measures taken for the purpose of bringing the whole functioning of all such organizations under the permanent control of the administrative authorities.

Admittedly, in this connection, national legislation which, purely as a matter of guidance, includes provisions regarding the questions to which statutory regulation might usefully be made applicable (for instance, the organization of trade associations, their financial management, the allocation of their funds, relations between the administrative officials of associations and their members, the conditions of admission and withdrawal of members) might be of considerable instructive value to inexperienced associations, provided always that it does not bring into question the administrative autonomy of the organizations.

Following the discussion in the Freedom of Association Commission, Paragraph 2 was amended to read:

> 2. Employers' and workers' organisations should have the right to draw up their constitutions and rules, to organise their administration and activities and to formulate their programmes; there should be no interference on the part of the public authorities which would restrict this right or impede the organisations in the lawful exercise of this right.

The change made in the concluding part of the paragraph, as will be seen, is merely a change of wording without any change in meaning.

Paragraph 3 completes the guarantees relating to the formation and working of organizations of employers and workers with a guarantee against arbitrary dissolution by administrative authority. Without such a guarantee, it is obvious that the right of freedom of association would be meaningless. But this

guarantee does not mean that such associations are not bound, like other organizations and individuals, to obey the ordinary laws for maintaining public order.

No change was made in this Paragraph as a result of the discussion at the Geneva Conference in 1947.

Paragraph 4 speaks for itself. Employers' and workers' organizations are to have the right to establish federations and confederations and to affiliate with international organizations. The international status of employers' and workers' organizations is, of course, formally recognized at the present time by their participation in the United Nations and the I.L.O.

The paragraph was amended to read as follows:

> 4. Employers' and workers' organisations should have the right to establish federations and confederations as well as the right of affiliation with international organisations of employers and workers.

The changes made, it will be seen, were purely verbal.

Paragraph 5 merely extends the guarantees provided in Paragraphs 1, 2, 3 and 4 to federations and confederations of trade associations.

The purpose of Paragraph 6 was to prevent the granting of special privileges (such as the granting of legal personality) from serving as the pretext for weakening or qualifying any of the guarantees provided in the preceding paragraphs. This paragraph was re-worded as follows:

> 6. The acquisition of legal personality by employers' and workers' organisations should not be made subject to conditions of such a character as to restrict freedom of association as hereinbefore defined.

An additional Paragraph 7, which speaks for itself, was inserted at the instance of the Government and Employer Groups, reading as follows:

> 7. The acquisition and exercise of the rights as outlined in this part should not exempt the employers' and workers' organisations from their full share of responsibilities and obligations.

The insertion of this paragraph was strongly opposed by the Workers' Group and notice was served that a determined attempt will be made to have it deleted when the draft Convention is under consideration at the next session of the Conference.

Section II. Protection of the Right to Organize and to Bargain Collectively

This Section is intended to supplement the guarantee of freedom of association, in relation to the state, by the guarantee

of the exercise of the right to organize in relation to the other party to the labour contract. It is obvious that, even though freedom of association were guaranteed by the state, the right would have little meaning if the other party to the labour contract were in a position to hinder, or even to paralyze, its exercise. The recognition of freedom of association by the other party to the labour contract is therefore a necessary corollary to the recognition of freedom of association by the State.

Paragraph 7 provides that the central organizations of employers and workers should agree to recognize each other as the authorized representatives of the interests of employers and workers, and should undertake mutually to respect the exercise of the right of association. This provision was drawn in the light of the fact that in some countries (for example, the United Kingdom) the recognition in question is accorded by a tacit agreement between the central organizations of employers and workers, while in other countries (for example, Denmark, Sweden, Norway, France and Belgium) the recognition is the subject of express agreements of national application. In both these cases, the mutual guarantee of freedom of association and, in a more general way, the establishment of collective relations is achieved effectively without the direct intervention of the legislature.

In the discussion of this paragraph, objection was taken by the employers to the reference to "the central organisations of employers and workers". It was pointed out that in certain countries there are no central organizations of employers and workers. It was also pointed out that the reference to "central organisations" carries the implication that collective agreements should be on an industry-wide and nation-wide basis which, it was submitted, it was not proper for the Resolution to do; the question whether collective agreements should be on an industry-wide and nation-wide basis or not was one entirely for the various countries to decide for themselves. In the result, the paragraph was amended to read:

> There should be agreement between organized employers and workers mutually to respect the exercise of the right of association.

Paragraph 8 is intended to deal with the situation in countries in which there is no express or tacit agreement between organized employers and workers. It provides that, in such circumstances, appropriate regulations should be prescribed to guarantee the observance of the right of association of the workers and of workers' organizations. In order to bring this paragraph into conformity with the amended preceding paragraph, all reference

to "the central organisations of employers and workers" was deleted and the opening words of the paragraph were amended to read as follows:

> Where full and effective protection is not already afforded, appropriate measures should be taken to enable guarantees to be provided for:

The rest of the paragraph was adopted without change. It will be seen that Sub-paragraph (a) is intended to guarantee the exercise of the right of association by the workers against any acts committed with the object of attacking the workers' trade-union rights. In the first place, there should be a guarantee against any attempt on the part of the employer to make the employment of the worker conditional on his not joining a particular trade union, or on his withdrawing from a trade union of which he is a member. Secondly, there is to be a guarantee that during the period of employment the employer will not discriminate against workers who are members, agents, or officials of a trade union, by such methods as change of occupation, downward grading or reduction of wages. Finally, there should be a guarantee against the employer dismissing a worker because he is a member or agent or official of a trade union.

Sun-paragraph (b) supplements the guarantee of the free exercise of the right of association by individual workers by a guarantee of the free exercise of the right of association by workers' organizations. Thus, it provides for a guarantee against any acts on the part of the employer or employers' organizations with the object of establishing "company unions", which would be entirely under their domination and with which they might undertake to settle conditions of employment to the exclusion of the free trade unions. Similarly, guarantees are to be provided against employers' interfering with the formation or administration of trade unions, or seeking to influence them by contributing financial or other support to them. Finally, a guarantee is to be provided against the refusal by employers or employers' associations to recognize trade unions as the authorized representatives of the wage-earners or to negotiate with them in good faith for the purpose of concluding a collective agreement.

The paragraph concludes with a provision that if the parties to a collective agreement agree to make membership of a certain trade union a condition precedent to employment, or a condition of continued employment, such a clause in an agreement should not be regarded as coming within the terms of the resolution. In other words, such a union security clause, provided it is freely agreed upon between the parties, should not be regarded as

derogating from the free exercise of the right of freedom of association.

To this provision, the Employer Group took strong objection. As a matter of fact, they proposed that Paragraph 8(1)(a) should be amended by making it clear that the individual worker should be protected against attempts to compel him to join a union, or to discriminate against him, or dismiss him, because he is not a member of a trade union. In other words, the employers argued that the principle of freedom of association should, so to speak, work both ways, *i.e.*, it should guarantee the right not to associate, as well as the right to associate. This view was not accepted by the workers or the majority of the Governments, and the employers, recognizing how desirable it was that the report to the Economic and Social Council of the United Nations should be unanimous, dropped their proposal designed to protect the worker's right not to join a trade union, on the clear understanding that they did not accept the principle of the "closed shop" and compulsory unionism, and that they reserved their right to oppose the inclusion of any such principle in the draft Convention which the Conference is to consider at the 1948 Session. In taking this position, the employers emphasized that, while they accepted the principle of freedom of association, they were not prepared to turn their backs on the principle of individual liberty. To the trade union argument that it is unfair that individual workers should enjoy the benefit of labour agreements negotiated by the unions without subscribing to the support of the unions, the employers replied that it is infinitely more objectionable that individual workers who are giving complete satisfaction to their employers should be dismissed from their employment, and debarred from securing other employment, simply and solely because they do not choose to join a trade union.

Paragraph 9 recommends the establishment of appropriate agencies for the purpose of ensuring the protection of the exercise of the right of association as defined. The intention is, of course, that disputes as to "union recognition", which are the most serious of all labour disputes, should be settled, in the interests of all parties, as promptly as possible. To this end special tribunals, such as the labour relations boards of the United States and Canada, have been set up in many countries, instead of leaving such disputes to be dealt with by the ordinary courts. With the exception of the addition of the words "if necessary", no change was made in the text submitted by the International Labour Office.

The Resolution as finally adopted without any dissenting vote read as follows:

I. FREEDOM OF ASSOCIATION

1. Employers and workers, without distinction whatsoever, should have the inviolable right to establish or join organisations of their own choosing without previous authorisation.

2. Employers' and workers' organisations should have the right to draw up their constitutions and rules, to organise their administration and activities and to formulate their programmes; there should be no interference on the part of the public authorities which would restrict this right or impede the organisations in the lawful exercise of this right.

3. Employers' and workers' organisations should not be liable to be dissolved or have their activities suspended by administrative authority.

4. Employers' and workers' organisations should have the right to establish federations and confederations as well as the right of affiliation with international organisations of employers and workers.

5. The guarantees defined in paragraphs 1, 2 and 3 herein with regard to the establishment, functioning, dissolution and suspension of employers' and workers' organisations should apply to federations and confederations of such organisations.

6. The acquisition of legal personality by employers' and workers' organisations should not be made subject to conditions of such a character as to restrict freedom of association as hereinbefore defined.

7. The acquisition and exercise of the rights as outlined in this part should not exempt the employers' and workers' organisations from their full share of responsibilities and obligations.

II. PROTECTION OF THE RIGHT TO ORGANISE AND TO BARGAIN COLLECTIVELY

8. There should be agreement between organised employers and workers mutually to respect the exercise of the right of association.

9. (1) Where full and effective protection is not already afforded, appropriate measures should be taken to enable guarantees to be provided for:

(a) the exercise of the right of freedom of association without fear of intimidation, coercion or restraint from any source with the object of:

(i) making the employment of the worker conditional on his not joining a trade union or on his withdrawing from a trade union of which he is a member;

(ii) prejudicing a worker because he is a member or agent or official of a trade union;

(iii) dismissing a worker because he is a member or agent or official of a trade union.

(b) the exercise of the right of association by workers' organisations in such a way as to prevent any acts on the part of the employer or employers' organisations or their agents with the object of:

(i) furthering the establishment of trade unions under the domination of employers;

(ii) interfering with the formation or administration of a trade union or contributing financial or other support to it;

(iii) refusing to give practical effect to the principles of trade union recognition and collective bargaining.

(2) It should be understood, however, that a provision in a freely concluded collective agreement making membership of a certain trade union a condition precedent to employment or a condition of continued employment does not fall within the terms of this Resolution.

10. Appropriate agencies should be established, if necessary, for the purpose of ensuring the protection of the right of association as defined in paragraph 9 herein.

The Conference adopted unanimously a second Resolution relating to the question of international machinery for safeguarding freedom of association on the lines of the proposals made by the World Federation of Trade Unions and the American Federation of Labour. It affirmed "belief in and attachment to the principle of freedom of association in all countries as an essential element in those wider personal freedoms which are the foundation of peace, prosperity and happiness"; and proceeded to recognize that the proposals put forward by the W.F.T.U. and the A.F. of L. for the establishment of international machinery for safeguarding freedom of association "raise issues of great complexity and difficulty including, for example":

(i) questions involving the sovereignty of States;

(ii) the relationship of any such machinery to the proposals under examination by the United Nations for giving effect to a Bill of Rights and establishing machinery for supervising the exercise of other fundamental freedoms, including freedom of speech, of information and of lawful assembly;

(iii) the composition, scope, powers (including powers of enquiry and investigation) and procedure of the proposed machinery;

(iv) the authority under which the proposed machinery would act.

The Resolution recognized, finally, that the establishment of permanent international machinery "may be an indispensable condition for the full observance of freedom of association throughout the world and that any such machinery should, if established, operate under the guarantees provided by the tripartite Constitution of the I.L.O." It concluded by requesting the Governing Body of the Organization to examine the question in all its aspects and report back to the 1948 Session of the Conference.

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These two Resolutions, together with a list of points to serve as a basis for the adoption of one or several International Labour Conventions in 1948, were reported to the Economic and Social Council of the United Nations in August 1947.

That body approved of the action taken and proposed by the I.L.O., the U.S.S.R. and Byelo-Russia alone dissenting, considered that the question of enforcement of rights, whether of individuals or of associations, raised common problems which should be considered jointly by the United Nations and the I.L.O., and requested the Secretary-General to arrange for co-operation between the I.L.O. and the Commission on Human Rights in the study of these problems.

A report along these lines has been made by the Economic and Social Council to the General Assembly of the United Nations and is practically certain to be approved.

The Commission on Human Rights, composed of representatives of eighteen different states, met in Geneva for several weeks last December and agreed on a draft Declaration and a draft Covenant on Human Rights.

So far as freedom of occupational association is concerned, the relevant articles are Articles 19, 24, 32 and 33 of the Declaration and Articles 19 and 22 of the Covenant, which read as follows:

DECLARATION

Article 19

Everyone has the right to freedom of peaceful assembly and to participate in local, national, and international associations for purposes of a political, economic, religious, social, cultural, trade union, or any other character, not inconsistent with this Declaration.

Article 24

1. Everyone has the right to receive pay commensurate with his ability and skill, to work under just and favorable conditions, and to join trade unions for the protection of his interests in securing a decent standard of living for himself and his family.

2. Women shall work with the same advantages as men and receive equal pay for equal work.

Article 32

All laws in any State shall be in conformity with the purposes and principles of the United Nations as embodied in the Charter, insofar as they deal with human rights.

Article 33

Nothing in this Declaration shall be considered to recognize the right of any State or person to engage in any activity aimed at the destruction of any of the rights and freedoms prescribed herein.

COVENANT

Article 19

All persons shall be free to constitute associations, in whatever form may be appropriate under the law of the state, for the promotion and the protection of their legitimate interests and of any other lawful object. . . .

Article 22

Nothing in this Covenant shall be considered to give any person or state the right to engage in any activity aimed at the destruction of any of the rights and freedoms prescribed herein.

It will be seen that Article 19 of the Declaration, in laying it down that everyone has the right to participate in local, national, and international associations for purposes, *inter alia*, of a trade union character, is in full accord with the first of the principles enunciated in Section 1 of the I.L.O. Resolution, namely, the inviolable right of employers and workers to establish or join organizations of their own choosing. The same may be said of Article 19 of the Covenant when it provides that all persons shall be free to constitute associations for the promotion and protection of their legitimate interests. The Declaration and Covenant are concerned, however, almost exclusively with the individual and do not attempt, as does the I.L.O. Resolution, to define the rights of the associations, such as trade unions, which result from the exercise by the individual of his right of free association. The only provisions of the Declaration and Covenant that in any way correspond to Paragraphs 2, 3, 4 and 5 of Section 1 of the I.L.O. Resolution, defining the rights of associations as against the state, are Article 22 of the Covenant and Articles 32 and 33 of the Declaration.

These however seem unconvincing substitutes for the clear and forthright provisions of the I.L.O. Resolution. The importance of this question is obvious in days when in so many parts of the world the state tends to frown on any forms of association that are not directly under its control. Not without reason, on the other hand, has democracy been defined as the form of government which establishes the best balance between individual and collective freedoms. While the primary concern of the Commission on Human Rights is individual freedom, it is clear that this cannot be dealt with *in vacuo;* unless the freedom of the association is also guaranteed, the right of the individual to establish or join it will be illusory.

It is understood that the Declaration and Draft Covenant have been forwarded to the fifty-seven member States of the United Nations for their comments, on the basis of which the

Commission on Human Rights will draw up its final report for the Economic and Social Council, which, in turn, will presumably report to the General Assembly at its Third Session next September. It is to be hoped that, in drafting its final report, the Commission will find time to give more consideration to those provisions of the I.L.O. Resolution that are designed to ensure that the freedom of the individual to form or join associations is supplemented, and so to speak fulfilled, by the freedom of the associations, once formed, to perform their proper functions without interference by the State.

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The prospect of an international convention on freedom of association being passed in the near future raises the question of the constitutional problems that would be created thereby for Canada. Before considering these, it will be well to recall the existing Canada law.

The general right to establish or join organizations of their own choosing, without previous authorization, may be said to be enjoyed alike by employers and employees throughout the country. Dominion Order in Council P.C. 1003 of 1943, which applied to the great majority of employers and employees during the War, provided that

> 4. (1) Every employee shall have the right to be a member of a trade union or employees' organisation and to participate in the lawful activities thereof.
>
> (2) Every employer shall have the right to be a member of an employers' organisation and to participate in the lawful activities thereof.

An identical provision (with the exception of the deletion of the word "lawful") is included in the Bill which has just been introduced in Parliament to replace P.C. 1003. This Bill, if it passes, will apply of course only to railways, air transportation, undertakings operated in connection with navigation and shipping, undertakings declared by Parliament to be for the general advantage of Canada, and undertakings outside the exclusive legislative authority of any provincial legislature. Similar provisions are found, however, in the statutes that have been passed by the various provincial legislatures since jurisdiction was restored to them after the War.

Again it may be said that in none of the provinces is there any attempt on the part of the public authorities to question the right of employers' and workers' organizations to draw up their constitutions and rules, to organize their administration and

activities and to formulate their programmes. Nor is there under any Canadian statute power by administrative action to dissolve employers' or workers' organizations or to suspend their activities. Finally, employers' and workers' organizations clearly enjoy under Canadian law the right to establish federations and confederations as well as the right of affiliation with international organizations of employers and workers.

As regards the acquisition of legal personality by employers' and workers' organizations not being made subject to conditions restricting freedom of association, there seems no prospect of workers' organizations, in whose interest this provision was presumably included, acquiring legal personality. This provision was described by its framers as "a saving clause with the object of preventing the attribution of special privileges [sic], such as the attribution of legal personality, from serving as a pretext for re-introducing any prohibitive regime concerning associations". Canadian trade unions, however, so far from regarding the acquisition of legal personality as a "privilege", have hitherto avoided it like the plague and the repeated arguments of organized employers that trade unions should be required to become incorporated have fallen on deaf ears so far as the Dominion and the various provincial governments are concerned.

The final provision of Section 1 of the Resolution that the acquisition and exercise of the right of freedom of association should not exempt employers' and workers' organizations from their full share of responsibility and obligations is so vague that little need be said as to the relevant existing Canadian law. Penalties are provided under both the Dominion and Provincial labour relations legislation for specified unfair labour practices, such as intimidation, discrimination or interference with the formation or administration of a trade union on the part of an employer, and for coercion or intimidation of any kind on the part of a labour organization. In practice, it has not been found practicable to enforce the penalties provided, in one of the most common cases of violation of the law, namely that of a strike called without complying with the procedure laid down for negotiation and conciliation.

Similarly it has not been found practicable to hold trade unions responsible for picketing which cannot be regarded as "peaceful" and permissible under section 501 of the Criminal Code, because it is not confined to "attending" for the purpose of obtaining or conveying information.

As regards protection of the right to organize and bargain collectively, the existing Canadian law may be said to be fully in line with the provisions of Section II of the Resolution. The Dominion and provincial labour relations legislation, as well as the Criminal Code (section 502A), provides adequate guarantees for the individual worker against the various kinds of intimidation, coercion and restraint referred to; and attempts to interfere with the formation or administration of workers' organizations and to further the establishment of so-called "company unions" under the domination of employers are similarly guarded against.

As regards the provision that freely-negotiated "closed shop" or "union shop" clauses (*i.e.*, clauses making membership of a certain trade union a condition precedent to employment or a condition of continued employment, respectively) shall not come within the terms of the Resolution, that is, shall not be regarded as derogating from the right of freedom of association, the existing Canadian law may be said to be to the same effect. In other words there is nothing in any of the existing statutes to prevent employers and employees from agreeing to the inclusion of a "closed shop" or "union shop" clause in a collective agreement. Indeed the Saskatchewan Trade Union Act of 1944 contains a provision to the effect that, upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, a clause shall be included in any agreement entered into to the effect that every employee who is or becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences thereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment.

The new Dominion Industrial Relations and Disputes Investigation Bill, which is likely to be passed at the present session of Parliament, contains a specific provision permitting employers and employees to agree that membership in a specified trade union may be made a condition of employment or that a preference of employment may be granted to members of a specified trade union.

Finally, the recommendation that appropriate agencies should be established for the purpose of ensuring the protection of the right of association has already been acted on in Canada. Labour relations boards, usually representative of both parties with a judicial chairman, have been set up to administer the Dominion Order in Council P.C. 1003 and the various provincial

labour relations statutes. Their prime function is the all-important one of settling promptly all questions arising in connection with the certifying of the bargaining representatives, questions as to whether an agreement is a collective agreement and as to whether the parties are negotiating in good faith. The Saskatchewan Trade Union Act of 1944 is alone in empowering the Labour Relations Board to require an employer to reinstate any employee discharged contrary to the provisions of the Act and to pay such employee "the monetary loss suffered by reason of such discharge". It is to be noted that the constitutionality of this provision has been attacked and, the Saskatchewan Court of Appeal having held that the Board was not properly constituted to discharge the functions delegated to it, the case (involving the John East Iron Works) is to be appealed to the Privy Council.

With respect to the constitutional problem that would be created for Canada by the adoption of an international convention of the kind proposed, when a draft convention is passed by the International Labour Organization each member state is, of course, obligated within eighteen months to bring it "before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action". It may be taken as well settled that the competent Canadian authorities, so far as a draft convention on freedom of occupational association is concerned, are the provincial legislatures, under their powers as to "property and civil rights". The only exception would be the limited number of categories of employment which are under Dominion jurisdiction, such as railways, canals, telegraphs, air transportation, and works carried on in connection with navigation and shipping.

It will be recalled that in a reference to the Judicial Committee of the Privy Council, *Re the Weekly Rest in Industrial Undertakings Act, the Miminum Wage Act, and the Limitation of Hours of Work Act*, it was argued that the legislation in question there, designed as it was to implement conventions adopted by the I.L.O., could be enacted by Parliament, as being legislation "necessary or proper for performing obligations arising under treaties between the Empire and foreign countries", within the powers of the Dominion under section 132 of the British North America Act, or within the powers given to the Dominion under section 91 of the British North America Act "to make laws for the peace, order and good government of Canada". The decision of the Privy Council, was, however, that such legislation was exclusively within the competence of the provinces under their

powers as to "property and civil rights", and therefore ultra vires the Dominion.

In these circumstances it will be for the various provinces to pass legislation implementing an international convention on freedom of occupational association. If certain provinces passed such legislation, and others did not, the situation would be anything but satisfactory, in view of the fact that so many industries are nation-wide in their scope and it is desirable that there should be a maximum of uniformity in working conditions throughout the country. This is of special importance in a question such as freedom of association, going as it does to the root of the relationship between employers and employees. If minimum wage laws differ from one province to another, no serious trouble results; but if the principle of the union or closed shop, for example, were recognized and enforced in certain provinces and not recognized in others, the situation could hardly be regarded as conducive to harmony and stability. It would be as though the writ of the Taft-Hartley Act ran in some States but not in others. So long however as jurisdiction over "property and civil rights" continues to be vested exclusively in the Provinces, the only way in which an I.L.O. draft convention on freedom of association can be brought into effect throughout Canada is for all the Provinces to pass implementing legislation.

TO THE INTERNATIONAL COURT OF JUSTICE — No. II

Your power is great: let your influence extend far. Your statute surrounds you with guarantees for your independence and impartiality. You will not falter before political expediency nor be dismayed by military might. Your decisions are taken, not politically, but in accordance with settled principles of justice, in the light of which all parties are equal before you, and none, however powerful, enjoys a special privilege. We hope and believe that it may be your destiny to play a great and significant part in the reconstruction of our world society, so that when the effects of this most frightful war have spent their unsettling force, the ever increasing jurisdiction of the court will bear eloquent testimony to the fact that the relations of states are proceeding in the channels of legality and justice, with respect for the law and, out of it, respect for the rights of each other. This court is in a most substantial sense a pivotal point in the organization of peace. In a world still full of tumult, anxiety and misunderstanding, it must stand like a rock of confidence and impartiality. (From a statement made by Sir Hartley Shawcross, K.C., on February 26th, 1948, at The Hague, prior to the opening of proceedings in the Corfu Channel case)