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FREEDOM OF ASSOCIATION IN WEST INDIAN LABOUR LAW

CHUKS OKPALUBA*

INTRODUCTION

The right of the individual worker to join a trade union or to collaborate with other employees or other persons in forming a trade union has been existent, albeit *sub-silentio*, in the Commonwealth Caribbean labour law since the Caribbean trade unions were accorded legal recognition during the first half of this century. As it has been pointed out,¹ although the Trade Unions Acts brought about the legalisation of trade unions in the Caribbean, they left unanswered questions which arise from the practice of trade unionism and, for the present purpose, they did not state explicitly that the worker has the right to join a trade union. But by removing the legal disabilities² which abound in workers' organisations in the history of trade unionism in the Caribbean, the worker's right to freely associate existed merely by implication. Since the right was not expressed in the Acts, it is then understandable that no protection was afforded the worker in the exercise of the said freedom. One clear instance of the existence of such right however, is the fact that organisations of workers always obtained registration as trade unions on satisfaction of the statutory requirements.³ Freedom of association and, especially, to form or to belong to a trade union is now articulated — along with the other guaranteed freedoms⁴ — in both the independence⁵ and *quasi* independence⁶ Constitutions of the Commonwealth Caribbean countries. The meaning of this guarantee remains, to a great extent, hidden in the maze of decided cases discussed below. Quite recently, legislation has been passed in various Caribbean countries and elsewhere expounding the concept of freedom of association and clarifying it further. This article explores the implications of these recent provisions.

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CONSTITUTIONAL GUARANTEE

With the advent of written constitutions in the Commonwealth Caribbean countries guaranteeing the individual freedom of association, the question which is bound to arise in view of the brevity with which the constitutional provisions have been expressed is: what exactly does this freedom encompass? In effect, from the point of view of a trade unionist, what innovations has this entrenched freedom brought about? In other words, does it contemplate the freedom of every employee to be unionised and having been so unionised to be represented by that union? Assuming that the question is answered in the affirmative, does the freedom entail that the employer must recognise that particular union? Phrased in another way, as a result of this guarantee, does its enjoyment carry a corresponding obligation on the employer to recognise that union and then to bargain with it? Furthermore, is there anything left of the freedom of association if it does not imply the right to strike? All these points have arisen in recent times in Caribbean labour relations law.⁷ Accordingly, they are discussed below.

1. Representation by Union of One's Choice

In the first instance, a group of employees in a Jamaican Sugar Estate finding themselves receiving no wage increases over a number of years and having no established machinery to process their employment grievances decided to form a trade union. Consequently, after duly registering the association, they sought recognition by the employer. The association, Sugar Industry Clerical and Technical Association (SICTA), was intended to represent Clerical Workers, Bookkeepers, Stenographers, Typists, Accounting Machine Operators, Sugar Boilers, Rum Distillers, Overseers, Factory Foremen, Laboratory Workers, Garage Foremen and weekly paid chauffeurs.⁸ Among other reasons which the employers gave for refusing to recognise the Association was that the Company was "not prepared to agree that any clerical, administrative, or supervisory employees on the staff of this Company should be represented by any trade union".⁹ Before a Board of Enquiry headed by a former Chief Justice of Jamaica, Sir Colin MacGregor, the Company argued that these employees were not entitled to be represented by the Association for the following reasons:

- (a) They formed part of the staff of the Company, and as such occupied positions that were managerial or administrative or supervisory or confidential, and were regarded by the Company, as an integral part of management;

- (b) a member of a Trade Union owed loyalty to his Trade Union, and if and when management and the Trade Union were in conflict, a member of the staff would be faced with divided loyalties impossible to reconcile in many such cases;
- (c) it would be impossible for the Company to function properly if it allowed members of staff to be represented by a Trade Union;
- (d) traditionally there are two divisions of labour in the Sugar Industry, management and its extensions called staff, and, the rank and file worker, and it was accepted and provided by the agreement that staff should not be represented by the Unions.¹⁰

What the Board had to consider was whether the Company was justified in its refusal to recognise the Association. In doing that, the Board had to consider the implications of Sec. 23 of the Constitution of Jamaica which provides as follows:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons *and in particular to form or belong to trade unions or other associations for the protection of his interest.*¹¹

On behalf of the Association, it was argued that the refusal by the employer to recognise a particular Trade Union is tantamount to denying the employee the right of free association and to belong to a trade union of his choice. At common law the answer is that freedom does not carry such right and the Board opined that Sec. 23 of the Constitution does not affect the right of the employer to refuse to recognise and to bargain with a particular union. On the issue as to whether the employees are entitled to unionise, the Board answered in the affirmative, but added a proviso that those "members of staff who come within the terms managerial, administrative, supervisory and confidential, are all management and should not be unionised."¹² In coming to this conclusion, the Board was particularly impressed by the fact that — ¹³

It has long been recognised that the owner of a business, an employer, must have persons to assist him in the management of his business.¹⁴ If it were otherwise he couldn't do what was necessary for its management. It is agreed that the persons who

assist in the management, are not unionisable. It is recognised that in an organisation of any complexity there must be certain employees who are in the organisation to represent the interests of the employer.

However, the Board was cautious. It warned that it is difficult sometimes to draw a line between those who assist in management and those who do not.¹⁵ The Board further expressed the view that the right of the worker to join a trade union must be borne in mind in deciding whether a particular employee was part of management since if it is so decided he is not unionisable, and that this measure has been introduced as a practical necessity to have certain employees assist management. In this sense, therefore, the Board rejected the view that the concept of freedom of association conferred absolute right on every employee to unionise.

Similar issues were fought in *Banton v Alcoa Minerals*,¹⁶ where the Jamaica Court of Appeal had to decide whether in the circumstances of the case, the plaintiffs had been hindered in the enjoyment of their freedom of association. This question arose as a result of the contention of the plaintiffs to be effect that: (i) their right of freedom of association entails representation by a trade union of their choice; (ii) the content of that freedom must be determined not only by reference to the essential value of the right, but also by reference to the way in which its effective exercise contributes to its value; (iii) consequently, the employer is under a duty to recognise and, for the purposes of collective bargaining, to treat with the trade union of the employee's choice.¹⁷

The background to those arguments was based on some complicated facts which, in turn, arose out of a jurisdictional dispute between the two dominant trade unions in Jamaica, the National Workers' Union¹⁸ and the Bustamante Industrial Trade Union¹⁹ with regards to the representation of workers of the Alcoa Mineral Inc. Without going into the rather protracted events which took place in the dispute, the relevant aspects of the case could be put thus: the Company, after a poll conducted by the Ministry of Labour,²⁰ recognised the BITU as the sole bargaining agent of the workers. Certain workers in the bargaining unit who belonged to the N.W.U. argued that by so doing the Company created a situation in which they were hindered in the enjoyment of their freedom of association in violation of the provisions of the Constitution of Jamaica.²¹

Unfortunately, none of these arguments impressed the three judges of the Jamaica Court of Appeal.²² They held that the freedom of association guaranteed under the Constitution of Jamaica insofar as trade unions are

concerned involves no more than the right to join or to belong to a union of the worker's choice.²³ By so holding, the Court agreed with the judgment of Wooding, C. J. which was accepted by the Privy Council in *Collymore v Attorney General of Trinidad and Tobago*²⁴ to the effect that:

. . . freedom of association means no more than freedom to enter consensual arrangements to promote the common interest of the association group. The object may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable.²⁵

After rephrasing the sequence of the argument put forward by the plaintiffs, Graham-Perkins, J.A. expressed his astonishment in these words:

There are, of course, other equally far reaching implications but I do not pursue them. I am content to say . . . that there is little that would have been more surprising to the architects of our Constitution than to have been told that they were entrenching a right that would give rise to such dramatic consequences.²⁶

He therefore concluded:

. . . there is not a scintilla of evidence in this case that the plaintiffs, or any of them, have been hindered in the enjoyment of their freedom of association. There is not the vaguest suggestion that they, or any of them, were in any way hindered in the exercise of their right to join or to belong to the union of their choice. No one sought to deny them, or any of them, that right, nor indeed, to interfere with its exercises. They were at all material times, free to join any union they chose to join.²⁷

Having so held, it is, therefore, not surprising that the Court found the other argument untenable, holding that the right of a worker to join or belong to a trade union of his choice does not include a right as against the employer to be represented by that union in negotiations with him.

2. Duty of the Employer to Recognise the Union

Having decided that the constitutional provision does not entitle a worker to be represented by a union of his choice, it is now left to discover the Court's reaction to the contention that as a result of the constitutional guarantee there was a duty on the employer to recognize the union.²⁸ The argument is: the freedom of the worker to join a trade union of his choice entails that the worker is entitled to be represented

by that union but no other. If so, there is a corresponding obligation on the part of the employer to recognise the union of the employee's choice for the purposes of collective bargaining.

The neutrality of the common law in this area of labour relations is particularly conspicuous for it neither encourages nor discourages recognition. It imposes no duty on the employer to recognise a trade union nor does it confer on the union a right to be recognised by the employer, far less an obligation on the parties to treat and enter into collective bargaining with each other.²⁹ So, in the Commonwealth Caribbean as well as in the United Kingdom, recognition matters were often settled either by voluntary agreement between the parties or by resort to economic pressure by way of industrial action.

With this background, it was then left to the Court of Appeal of Jamaica to decide whether the constitutional guarantee has now supplied the omission of the common law. The Court held that no such duty was imposed by the relevant section of the Constitution. On his part, Graham Perkins, J. declared:

... in the absence of any enactment imposing on employer a clear duty to recognize and negotiate with the trade union of their employees' choice, the recognition by any employer of any particular trade union must ultimately depend on social and economic sanction.³⁰

When this case was decided in Jamaica, the "clear duty to recognise and negotiate" had already been imposed by express enactment in Trinidad and Tobago,³¹ Dominica³² and the Bahamas.³³ Now, the Jamaicans have proposed to introduce the compulsory recognition system into their labour relations.³⁴ Under the new Jamaica Labour Relations and Industrial Disputes Act, 1974,³⁵ the Minister may, at the request of the employer or a trade union claiming bargaining rights in relation to the workers or a category of workers in the employer's undertaking, conduct a secret ballot with a view to finding out whether the majority of the workers who were eligible to vote³⁶ indicated their wish to be represented by a particular trade union. The exercise of this power arises in any case of doubt or dispute:

- (a) As to whether the workers, or a particular category of the workers, in the employment of an employer wish any, and if so which, trade union to have bargaining rights in relation to them; or

- (b) as to which of two or more trade unions claiming bargaining rights in relation to such workers or category of workers should be recognised as having such bargaining rights.³⁷

Having thus ascertained, the Minister must accordingly inform the employer and every trade union concerned in the ballot about the result.³⁸ Then the duty is imposed on the employer to:

Recognise that trade union as having bargaining rights in relation to the workers who were eligible to vote and in relation to any bargaining unit in which they may, for the time being, be included, and shall inform the Minister and the trade union in writing of such recognition.³⁹

In a circumstance where two or more unions are claiming bargaining rights and after a ballot has been taken and none of the unions emerged as being favoured by a majority of the workers but where the ballot shows that two or three of those unions obtained not less than thirty percent of the number of the workers eligible to vote, joint bargaining rights may come into vogue if at least two of the unions concerned request the Minister in writing that they wish so to be treated. So, the Minister informs the employer that the unions wish to be recognised as having joint bargaining rights.⁴⁰ In this case too, the employer must recognise the unions as such.⁴¹

3. Free Collective Bargaining and Right to Strike

In order to convince the Court of Appeal of Jamaica that the constitutional guarantee of freedom of association goes beyond merely joining or belonging to a trade union, the plaintiffs in *Banton* had undoubtedly a formidable battle against the Privy Council decision to the contrary in *Collymore*.⁴² In that case, the appellants asked the Courts in Trinidad and Tobago and the Privy Council to declare *ultra vires* the Industrial Stabilisation Act, 1965,⁴³ on the ground that certain of its provisions infringed and abridged⁴⁴ and abrogated⁴⁵ the right of free collective bargaining⁴⁶ and the right to strike which are common law⁴⁷ rights, additionally guaranteed to trade unions by the Constitution of the People of Trinidad and Tobago,⁴⁸ and ILO Conventions 87⁴⁹ and 98⁵⁰ of which Trinidad and Tobago is a signatory.⁵¹

The Industrial Stabilisation Act was the regime of law which completely transformed the *corpus* of labour relations in Trinidad and Tobago by introducing the compulsory system of arbitration through the establish-

ment of an Industrial Court and especially by prohibiting strike actions in connection with trade disputes unless the Minister of Labour failed to refer the matter to the Industrial Court. The Court of Appeal of Trinidad and Tobago held, *inter alia*, that the right of free collective bargaining and the right to strike are not included in the fundamental freedom of association recognised and declared by the Constitution and are therefore not protected under the Constitution.⁵²

Although the Privy Council accepted that the Industrial Stabilisation Act abridged the freedom to bargain collectively and the freedom to strike, they also denied that either of these freedoms could be equated with the freedom of association and assembly which does not go as far as sanctioning all purposes for which they associate or all objects which they pursue in Association.⁵³

An Indian judge, on the other hand, has come to a contrary conclusion in *Uttar Pradeshiya Shramik Maka Singh v State of Uttar Pradesh*.⁵⁴ The judge was called upon to consider a statute of the State of Uttar Pradesh which tended to restrict the formation of trade unions and generally to restrict the association clause of the Constitution of India. Dhavan, J. found that the purpose of association is an integral part of the right and if the purpose is restricted, the right is then also restricted. Accordingly, if the state sought to restrict the purposes or objects or the normal functioning of an association, this would necessarily involve a restriction on the freedom of association. In addition, he found that the primary purpose of forming a trade union is to take collective action to safeguard the interest of the persons forming the association. What seems to have influenced him in coming to that conclusion is that "in the peculiar conditions in India, collective bargaining on behalf of workmen is almost the only function of the overwhelming majority of the trade unions, the subsidiary purpose of functions as friendly societies conferring material benefits on the members being almost unknown." On the basis of this statement therefore, the Jamaican Court of Appeal found the instrument to distinguish the circumstances of trade unionism in India from the Jamaican situation. Hence, the argument which the appellants in *Banton's* case frame around the Indian case was rejected. There is no doubt that had it been cited to the Courts in *Collymore* they would have rejected it also.

4. Right to Join a Trade Union

The courts in both *Collymore* and *Banton* were explicit in stating that the expression "freedom of association" in the Constitution extends

no more than that a worker is entitled to join a trade union of his choice. However, the pronouncements in those cases have left open the question whether the constitutional guarantee will aid a worker who applies for, but is refused admission in a trade union of his choice. Could such applicant invoke the constitutional provision in order to secure membership in the union?⁵⁵

There is no doubt that if the applicant does not satisfy the admission requirements in accordance with the union rules, the courts will not force them to admit him, since he may not have a cause of action at common law.⁵⁶ But can the courts act otherwise if the reason for refusal is based on some discriminatory ground? Is the common law, and now, the Constitution, of any assistance?

The traditional common law position on this matter could be described as one of hopelessness for the situation is simply this:

The body has a clear right to prescribe qualifications for membership. It may make it exclusive as it sees fit. It may make restriction on the line of citizenship, nationality, age, creed or profession as well as numbers. This power is incident to its character as a voluntary association.⁵⁷

It has been submitted that the absence of a contractual relationship between the applicant and the Union is the reason why the common law courts found themselves unable to intervene.⁵⁸ This brought about some artificial contractual implication by the courts in order to extend their review powers to these bodies.⁵⁹ But the current thought is that no such contractual nexus is necessary; an interference with the right to work is sufficient to bring about judicial intervention.⁶⁰

The English case of *Nagle v Fielden*⁶¹ is now cited as having substantially offset the previous common law stand on this matter.⁶² A woman trainer of many years standing was refused a license by a Jockey Club on the ground of her sex. The refusal to issue her a license was described as arbitrary by the Court of Appeal since it affected the pursuit of her profession. All the three judges⁶³ of the Court were of the opinion that the Jockey Club's action was contrary to the prevailing public policy of the English people.

In the case of a West Indian trade union refusing a person's application for membership on the ground of sex or race, will the rule in *Nagle's* case likely be applicable? It will probably apply if the refusal is

tantamount to a denial of the person's right to work. But one thing is clear; that is, *Nagle's* case concerns refusal to issue a license to practice a particular occupation. But a refusal to admit a person in a trade union may not necessarily deprive the applicant of a right to work. Trade Unions in the Caribbean are mostly general unions,⁶⁴ and even in those cases where there are industrial unions,⁶⁵ union membership is not often made a condition precedent to obtaining employment nor is there a requirement that shortly after taking up employment the worker shall join the union at the work place. The closed shop system and the union shop practices⁶⁶ are practically non-existent here. The basic difference between the English experience and our circumstances in the Caribbean is that whilst in closed shop undertakings as they used to exist in the U.K. (and as may be authorised under the Industrial Relations Act), a man cannot practice his profession if he does not belong to the union representing the employees in the place of work, in the Caribbean no such plight of workers exist.⁶⁷

It may be argued in general that an employee may not get adequate representation in the undertaking unless he is a member of a union. In Trinidad and Tobago this will pose little or no problem in a sense, for a worker need not be a member of a union in order to benefit from the terms of collective agreements struck by the union at the bargaining unit⁶⁸ or for the purposes of representation in the event of individual employment grievance,⁶⁹ although he may now be obliged to contribute towards the administration of that union irrespective of whether he is a member or not.⁷⁰

Whether the constitutional provisions will aid the applicant's case is also doubtful. A typical West Indian constitutional provision reads:⁷¹

It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, [political opinion]⁷² the following human rights and fundamental freedoms namely, (j) freedom of association.

The only circumstance in which the meaning of this clause has been considered in the Caribbean in connection with admission was the issue which arose in Trinidad in 1969 when a black American couple who was visiting the island alleged that the Trinidad Country Club — a social club — had refused to admit them to the Club because they were black. The sole commissioner, appointed by the Governor-General to investigate the issue, had to consider the implications of that clause to the question

of freedom of association.⁷³ Phillips, C.J. (Ag.) not only found that there was no racial discrimination involved in the matter, but he also emphasized that:

. . . in relation to the exercise of the constitutionally guaranteed freedom of association . . . there is no implied obligation imposed on any individual citizen desiring to associate with others to see to it that any association which he organises or of which he is a member should contain members of different 'race, origin, colour, religion, or sex'. The reality of the matter is that any such implication, if it existed, would be inconsistent with and in fact be the very negation of the freedom of association recognised and protected by the Constitution.⁷⁴

The learned Commissioner found as an analogy to this matter the right of an individual to choose his own friends, "a choice which is usually dictated by the accidental circumstances of one's birth, education etc."⁷⁵ He did not consider it worthwhile that legislation was necessary to regulate admission matters in voluntary associations and social clubs since "any attempt, by means of legislation or otherwise, to compel him to associate with particular persons or groups of persons would be running counter to a principle which is basic to democratic institutions as we know them."⁷⁶

Whether or not the constitutional protections will extend to cover discriminatory acts of trade unions is still a question the answer to which is lost in the jungle of undecided issues. The constitutional protections also talk about any law abridging the rights. Perhaps the only indication, and one rather unclear, is the case of *Tierney v Amalgamated Society of Wood Workers*⁷⁷ where an Irish Judge expressed the view that the union's action in the circumstances "can only be regarded as interfering with the plaintiff's right to work in a particular way as a member of a particular body, that is, as a carpenter who is a member of this union".⁷⁸ Again, this statement is unhelpful bearing in mind the circumstances of the case, i.e. membership in a craft union as opposed to membership in a general union, which is the common feature of most Caribbean trade unions.⁷⁹ Finally, the right to work is not expressly protected in any of the Commonwealth Caribbean Constitutions.⁸⁰

Neither the Bahamas⁸¹ nor the Trinidad and Tobago Industrial Relations Act⁸² nor indeed the new Jamaica Labour Relations and Industrial Disputes Act⁸³ provides for the situations under discussion. The United Kingdom Industrial Relations Act,⁸⁴ on the other hand, stipulates what it

terms "guiding principles" for organisations of workers. In relation to membership in industrial organisations the Act states:

Any person who applies for membership of the organisation, or of a branch or section of the organisation, and who—

- (a) is a worker of the description, or (as the case may be) of one of the descriptions, of which, in accordance with the rules of the organisation, the organisation or that branch or section, as the case may be, is intended wholly or mainly to consist, or of which it wholly or mainly consists, and
- (b) is appropriately qualified for employment as a worker of that description, shall not, by way of any arbitrary or unreasonable discrimination, be excluded from membership of the organisation or of that branch or section of it.⁸⁵

PROTECTION AGAINST VICTIMIZATION

In order to give meaning to the expression "freedom of association," a new trend has developed in recent labour legislation purporting to secure the enjoyment of this right to workers.⁸⁶ In the Caribbean, the first statute of this kind was the now repealed Industrial Stabilisation Act, 1965, of Trinidad and Tobago.⁸⁷ Among a number of innovations introduced into the labour relations law of that country by the Act, were provisions designed to prohibit the dismissal or the taking of any other kind of action which may have adverse effect on the employee in relation to his employment for reasons of his union membership, activities or position held in such organisation.⁸⁸ Mere threat in that direction was also forbidden by the Act. Since then, similar protections are given to workers in Dominica⁸⁹ and the Bahamas.⁹⁰ In Trinidad and Tobago, the present law is embodied in the Industrial Relations Act, 1972.⁹¹ These statutory protections notwithstanding, there are still instances of employers victimizing employees for trade union membership.⁹² More importantly, the 1965-67 law appeared hopeless as the victims obtained no remedy under the justice administered through the Industrial Court because of the clumsy definition of the term "worker" under that Act.⁹³

Granted that these new regimes of labour relations law now purport to protect the worker's freedom of association by prohibiting discriminatory treatment by the employer because of the worker's interest, membership or activities in a trade union. But, exactly what does this protection

cover? Here recent English decisions are illustrative.⁹⁴ In *Central Electricity Generating Board v Coleman & Others*,⁹⁵ the question was whether the employer had discriminated against certain employees in contravention of Sec. 5(2) (b) & (4) of the Industrial Relations Act, 1971, by publishing a notice inviting nominations only from members of any of the recognised unions to fill the vacancy in the works committee established in the bargaining unit. This committee was made up of representatives of management and workers drawn from the four recognised unions in the bargaining unit. The complainants were members of a non-recognised union. Their nomination papers were rejected by the employer. On complaining to the Industrial Tribunal, it was held that the employer had discriminated against the complainants. They had a right to be eligible for election to the committee, hence the employer had no right to refuse to accept their nomination papers on the ground that they were not members of one of the recognised unions.

On appeal to the National Industrial Relations Court, it was held that the employer had not "discriminated against" the complainants within the meaning of Sec. 5(2) (b) & (4) of the Act. The Court's reasoning was based on the construction of the subsections as contemplating a detriment suffered or benefit enjoyed by a worker as an individual in the context of his contract of employment and were not aimed at discrimination in the sense of differentiation between certain groups of workers. The Court took into account the fact that the Act had made provisions for recognition of trade unions for the purposes of collective bargaining. Hence Sir John Donaldson, P. expressed the view that "it is inherent in such recognition that for some purposes an employer will be obliged to discriminate between those of his employees who are members of the unions concerned and those who are not."⁹⁶

In *Post Office v Ravyts*,⁹⁷ the N.I.R.C. had reversed the decision of the Industrial Tribunal by holding that although Sec. 5(2) of the IRA (U.K.) forbade discrimination by an employer against an employee for the employee's membership or activities in a registered trade union, it did not proscribe the employers from discriminating against the registered trade union itself. Further, that the right embodied in Sec. 5(1)(c) did not confer any right on members of a trade union as against the will of their employers to take part in trade union activities on the premises of the employer.

The Court of Appeal reversed this decision and restored the tribunal's judgment in *Crouch v The Post Office*.⁹⁸ In *Post Office v Union of Post*

Office Workers,⁹⁹ the House of Lords affirming the Court of Appeal, unanimously dismissed the appeal by the Post Office. Their Lordships held that the right granted under the relevant sub-section was one which entitled the employee to conduct union activities on the employers' premises, but only outside the working hours. Since Sec. 5 (1) (c) gave members of trade unions the right to take part in the activities of the union, they had the right to conduct on their employers' premises all such activities which could be carried on without assistance from the employer, since the act does not oblige an employer to provide such assistance. The activities contemplated by Sec. 5(1)(c) in respect of a trade union official would include visits to those premises where the members work, provided, however, that "real inconvenience" is not caused to the employer.

On the question of the discriminatory practices of the Post Office in not allowing unrecognised associations "the various privileges designed to assist the recognised associations in the management of union affairs," their Lordships held that insofar as the Post Office had granted facilities to members of the U.P.W. they went beyond anything they were required to do by Sec. 5(1)(c). But they were bound by Sec. 5(2)(b), after making allowances for the respective sizes of the two unions, to provide comparable facilities to members of the T.S.A., other than facilities that were required by the U.P.W. by virtue of their status as sole bargaining agents. If the Post Office failed to provide comparable facilities to the T.S.A. within Sec. 5(2) by reason of their exercising rights conferred on them by Sec. 5(1) to join one union rather than another, to the extent that members of T.S.A. would as a result, be in a substantially worse position than members of the U.P.W., it was discriminatory against the T.S.A. in breach of Sec. 5(2)(b).

In *Howle v. G.E.C. Power Engineering*,¹⁰⁰ the N.I.R.C. held that an unrecognised union is not entitled to the facilities for exercising negotiating rights, since the Act authorises an employer to recognise a union or unions to the exclusion of others. In such a case, a member of the unrecognised union cannot complain of breach of Sec. 5(2)(b) as against him. But if an employee is deprived of a union representative's negotiation facility, then that clearly is a breach of the subsection.

RIGHT TO DISSOCIATE

Although there is no West Indian case in point, it is more than probable that the courts here will be prepared to hold, if and when the oppor-

tunity presents itself, that freedom of association of essence encompasses not only the right of the individual worker to associate, but also a negative implication that the worker is free not to associate or to terminate the association at any stage.

The Irish case of *Meskeil v C.I.E.*¹⁰¹ concerned the argument by an employee who had been dismissed and offered a new contract which contained a condition binding him at all times to be a member of a representative union. The employee contended, *inter alia*, that the condition in the proffered contract restricted his liberty by attempting to confine his choice to the said representative union thus infringing his constitutional right embodied in Art. 9 of the Irish Republican Constitution and that it also deprived him of his right to remain out of any union.

These arguments were rejected by the trial judge, Teevan, J. who held that the plaintiff was not in any way restricted in his choice of a union. Although the plaintiff had to belong to a representative union, this did not stop him and others forming one of their own. Teevan, J. held further, that the purpose of the arrangement between the employer and the unions was not intended to injure the plaintiff but to advance the legitimate interests of the unions and the defendants. The plaintiff's action was therefore struck out.

Mr. J. P. Casey has since criticised this judgment.¹⁰² He points out that the reasoning which suggests that the plaintiff and others were not restricted in case they wished to form a union of their own was "very questionable,"¹⁰³ because even if the plaintiff and others were successful in forming a union it would not necessarily have been "representative" within the contemplation of the contract. Another reason cited by the author was that the difficulties of forming a union in Ireland could hardly be underestimated in view of the fact that before a union could negotiate terms and conditions of employment on behalf of its members it had to deposit a sum of £1,000 in the High Court in accordance with the Trade Union Act, 1941. Mr. Casey further challenged the correctness of this decision on the ground that the effect of the revised terms of the contract between the employer and the union was certainly "to take away the plaintiff's right of free dissociation." Strongly in favour of Mr. Casey's argument is the judgment of Budd, J. and the Supreme Court of Ireland in *Educational Co. v. Fitzpatrick*.¹⁰⁴

Teevan, J.'s judgment has now been reversed by the Irish Supreme Court¹⁰⁵ and Mr. Casey has been proven right in his criticisms of that judgment. The Supreme Court has held that the dismissal of the appellant

because of his refusal to accept the conditions imposed by the terms of the new contract was an infringement of his personal liberty guaranteed by Art. 9 of the Constitution in that the freedom of association entails the right to join a trade union or to form associations or unions and, according to Walsh, J. carries with it "the implicit guarantee of the right of dissociation."¹⁰⁶

There is no doubt that the principle established in *Meskeil's case*¹⁰⁷ will have considerable policy implications for West Indian labour law especially in those countries where, although there is a constitutional guarantee of freedom of association, there is no provision either in the Constitution or in a statute purporting to specify that no employer shall dismiss an employee on grounds of the employee's union activities. If this interpretation is adopted in those countries, it will mean that the constitutional guarantee will override the common law right to dismiss an employee for any reason whatsoever as long as he gives the employee adequate or reasonable notice of termination or adequate compensation in lieu of notice.¹⁰⁸

Assuming that it is now established that there is a right to dissociate, can this right be subject to notice of the intention to dissociate on the part of the member wishing to do so? Suppose a trade union's constitution provides that a member who wishes to withdraw from the union should give notice of the intention to do so to the executive council of the union.¹⁰⁹ Suppose also that the rule provides further that the member's notice will be subject to approval by the said committee or any organ of the union, as the case may be. Here, again, we do not appear to have a West Indian case in point. But it is fairly clear that the constitutional guarantee would not necessarily be infringed just because the union rules stipulate that notice of intention to withdraw be given to a certain union organ. It will, however, be otherwise if the rule stipulates an unreasonable length of notice. One may base this assertion on two grounds.

Firstly, since the union rule is the contractual document upon which the relationship of the parties is based and can be enforced in case of breach, the parties in accordance with the general tenor of the law of contract recognise, subject to certain exceptions,¹¹⁰ the right of the other party to reasonable notice of termination, such requirement in this respect may not necessarily infringe the right of the individual member to dissociate. If, on the other hand, this right is regarded as an absolute one, then the above argument becomes purely academic, since a union rule cannot stipulate a condition which is contrary to law, written or unwritten.¹¹¹

It is submitted, however, that on a balance of probabilities, the former argument appears more convincing. For instance, the member wishing to withdraw may be an officer holding a strategic or key position in the union whose abrupt withdrawal may occasion chaos and confusion. In such a circumstance the union ought to be given reasonable notice of withdrawal¹¹² so as to enable it to find an alternative person to hold together the reins of the union in the interim.

Secondly, there is nothing like automatic expulsion from a trade union.¹¹³ Expulsion of a member must follow rigidly the relevant procedure laid down in the union rules and in the absence of stipulation to the contrary, an expulsion could only lawfully be done after due observance of the common law requirements of minimum procedural decencies.¹¹⁴ It may be argued by way of analogy that the requirement of notice of intention to withdraw, especially where the length of notice is not unreasonable, may well be within the constitutional protection and not in contravention of it.

The above argument finds support in the recent English case of *Ashford v ASTHS*,¹¹⁵ where the principles enunciated could be summarised thus: while the court will be prepared to uphold the requirement of reasonable notice of resignation from a trade union, it is abundantly clear that it will not uphold any condition as null and void. So, too, the court will be prepared to accept that it is reasonable to invite a member to state reasons why he wishes to resign from the union, but that such could not be made a condition precedent to resignation nor could the court countenance any union rule requiring a member to apply to any union organ for permission to resign from the union. Sir John Donandson espoused the NIRC's decision in the following language:

However benignly this discretionary power may in fact be exercised by the union, it is inherently unreasonable that a member's right to resign should be fettered in this way, since there can be no certainty that a differently constituted council would act reasonably.¹¹⁶

It must be pointed out that reliance on the United Kingdom experience on this matter must be read subject to two considerations. Firstly, the case in point was not decided on the basis of a constitutional guarantee since the British have no written Constitution. Secondly, the case was decided on the construction of Sec. 65(3) of the Industrial Relations Act which states:

Every member of the organisation shall have the right, on giving reasonable notice and complying with any reasonable conditions, to terminate his membership in the organisation at any time.¹¹⁷

CONCLUSION

We have seen that the newly written West Indian Constitutions have all embodied in barest terms the individual freedom of association and that individual workers have fought battles with a view to reading as a necessary implication of that provision what they regarded as the *raison d'être* of trade unionism, that is to say, the right to strike and free collective bargaining but that they have failed to convince the courts that there was justification for so construing. Again, a similar attempt was made to extend the ambit of the phrase to create certain legal rights and obligations, not only that the worker is free to join a union of his choice but that he has of essence to be at liberty to be represented by a union of his choice, irrespective of what labour relations practices are. Further, that the worker having chosen the union to represent him, the employer is obligated to recognise and enter into negotiations with that union on the worker's behalf. All of these have now been rejected as not being within the constitutional framework.

The next thing to consider is the possibility of amending legislation. Since the above decisions, the only area that has commended itself to the law-makers is the question of compelling the employer to legally deal with a union with a view to entering into collective bargaining. It does not seem that there is the faintest hope that legislation will be passed in contemporary Caribbean or in the nearest future to guarantee a worker his right to strike. On the contrary, the tendency has been to keep a grip on those who organise strikes — indeed the regulation of strikes by law has been given a whole-hearted reception by the various Caribbean Governments.¹¹⁸ Recent developments have shown that the right to strike is not likely to be included in the Constitutions as a fundamental right¹¹⁹ nor incorporated in contemporary labour relations legislation.¹²⁰ The position, however, is regrettable, as the meaning of freedom of association needs to be clarified by legislation. It has been observed that the only effort to concretize the freedom of association is to prevent victimization for trade union membership and activities as against the employer, but that there is no statutory protection against the activities of the unions themselves which might tend to inhibit the individual in the enjoyment of his freedom of association.

NOTES

¹Okpaluba, Chuks, *Statutory Regulation of Collective Bargaining in the Caribbean*, Chapter I.

2e.g., restraint of trade and criminal conspiracy.

³There is one recent instance of a refusal to register a trade union at the intervention of the Government alleging that there were too many trade unions in St. Lucia and subsequently amending substantially the Trade Union Ordinance of that island in order to impose stiff requirements for registration of trade unions.

⁴For an analysis of the various freedoms entrenched in the Caribbean Constitutions see "Fundamental Human Rights, the Courts and the West Indian Constitutions" by Chuks Okpaluba, in *Proceedings of the Conference on the Implications of Independence for Grenada*, Institute of International Relations, U.W.I., St. Augustine.

⁵The Independence Constitutions include those of Jamaica (1962); Trinidad and Tobago (1962); Barbados (1966); Guyana (1966-70); Bahamas (1973) and Grenada (1974).

⁶Here reference is made to the Constitutions of the Associated States of Antigua; Dominica; St. Lucia; St. Kitts-Nevis-Anguilla; and St. Vincent, all of which were written in 1967.

⁷There are at least three other instances in which the interference with the freedom of association might be or has been in question. It must be noted that these instances have not been presented in the Courts. Two of these illustrations come from the Bahamas and are contained in the Industrial Relations Act, 1970. First, that Act contains provisions to the effect that the Registrar of Trade Unions shall not register as a trade union any body, association, federation or congress which under its constitution offers membership to any other trade union, body or association (Schedule I, Part I, Clause 4). On the other hand, it is unlawful under the Act for a union to function without being registered (Sec. 6). Secondly, Sec. 38(1) declares it unlawful for a trade union to federate, associate, or align itself with any international organisation of trade unions without a licence obtained from the Minister of Labour for that purpose. The grant of such licence is at the absolute discretion of the Minister who may, in exercising the said discretion, grant the licence conditionally or without conditions, or may refuse to grant it (Sec. 38(2)). The question which one may ask is whether the constitutionally guaranteed individual freedom of association may cover the freedom of the unions themselves to associate with each other or to associate with unions outside of the Bahama Islands.

Our third illustration assumes an entirely different complexion. In 1965, an Act entitled The Canefarmers and Cess Act was passed in Trinidad and Tobago which incorporated the Trinidad Islandwide Cane Farmers Association and bestowed on its management committee the sole representational right over all matters concerning the business of canefarming and the welfare of canefarmers in the country. The issue which has come to the fore for the first time is that a trade union — the Islandwide Cane Farmers Trade Union — which was formed and registered sometime early 1973 has found that under the present statutory arrangements it cannot represent its members in any issues concerning them in the sugar belt. Although the Union has hitherto filed no suit purporting to challenge the *vires* of the 1965 Act, the gravamen of its argument, which it has sought to back up with protest marches, demonstrations, sit-ins and other forms of political agitation, is that the Act is unconstitutional, since it purports to deny a cane farmer his freedom to join and to be represented by a trade union of his choice but compels him to belong to the Trinidad Islandwide Cane Farmers Association against his will.

⁸See the Report of the Commission of Enquiry into the dispute between the Jamaica Sugar Estates and certain of its employees, dated October 12, 1965, hereinafter, McGregor Report.

⁹*Ibid*, at p. 3

¹⁰*Ibid*, at p. 30.

¹¹Italics supplied.

¹²McGregor Report, p. 38.

¹³*Ibid*, at p. 37.

¹⁴This practice was given legal validity in Trinidad and Tobago in 1965 under the definition section of the Industrial Stabilisation Act which excluded from the definition of a "worker" any person comprised in or responsible for the management of any undertaking. In 1967, that provision was clarified to mean any person responsible for policy-making in or the effective control or discretion of any undertaking. This aspect of the definition of worker has been retained in the Industrial Relations Act, 1972 (which repealed the 1965 Act and its amendments) with further modification to the effect that a person is not a worker if he is responsible for, or has an effective voice in, the formulation of policy in any undertaking or business, or the effective control of the whole or any department of any undertaking or business. Sometimes too, collective agreements signed in other countries by trade unions and employers recognise this practice. For example, the preamble to the Agreement between Dominica Construction Ltd. and the Dominica Waterfront and Allied Workers' Union states that Supervisory and Confidential staff are excluded from the agreement, and by Supervisory and Confidential staff the parties meant: Managers, Accounting Officers, Clerks having access to confidential material and Accounts, Foremen and any other who by mutual consent may reasonably be regarded as participating in management or who may be charged with duties involving the supervision of others.

¹⁵In *Electric Ice Co. v Federated Workers' Trade Union* (1967) 12 WIR 362, the Court of Appeal of Trinidad and Tobago was called upon to adjudicate a dispute between the union and the employer which involved union representation of an employee designated "Branch Manager." The employer's argument was that no dispute existed between the Company and the union within that definition of the ISA because it concerned a person who was part of management. Affirming the judgment of the Industrial Court, Wooding C.J. (Phillips and Fraser, JJ.A concurring) laid down the principle that what is important is the function performed by the person and not by what title he is designated. In deciding whether the "Branch Manager" performed managerial functions or not, the Chief Justice accepted the learned opinion of the President of the Industrial Court that the employee in question was "no more than a conduit pipe, performing duties of a routine or clerical nature which did not require the use of independent judgment . . . and that he was responsible to but no responsible for management." The power to control and direct is, therefore, the controlling test. See also in *Re Crown Employees (General) Conciliation Committee* (1934) A.R. 125 (New South Wales) based on Sec. 5 of the New South Wales Industrial Arbitration Act, 1940 (as amended); and Canadian cases based on the Ontario Labour Relations Act, 1950, Sec. 1(3)(b) (see now RSO, 1970), *Re Canadian General Electric Co. Ltd. and Ontario Labour Relations Board* (1956), 4 D.L.R. (2d.) 243 (Ontario High Court) reversed on other grounds [1957] OR 316 (Ontario Court of Appeal); *Falconbridge Nickel Mines Ltd. Case*, O.L.R.B. Monthly Report, September 1966, p. 379 where the Board stated —

If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from manage-

ment to the employees, the person cannot be said to exercise managerial functions within the meaning of Sec. 1(3)(b) of the Act.

See also *Barbara Jarvis and Associated Medical Services Inc.* (1961) reproduced in *Labour Relations Law: Cases, Materials & Commentary*, compiled by the Labour Relations Law Casebook Group, at p. 98; *the Canadian Union of Public Employees — CLC, Ont. Hydro Employees Union, Local 1000 and the Hydro-Electric Power Commission of Ontario* [1969] OLRB Monthly Report, August 669.

¹⁶(1971) 17 WIR 275.

¹⁷As summarised by Graham-Perkins and Parnell, J.J.A. pp. 283 and 290, respectively.

¹⁸Hereinafter N.W.U.

¹⁹Hereinafter B.I.T.U.

²⁰In accordance with the practice established in Jamaica and agreed to by the unions and the employers during the early fifties as a result of the emergence of the N.W.U. in the Jamaican labour scene. See *Guide to Industrial Relations in Jamaica*, Ministry of Labour, 1966.

²¹*Quaere* whether the fundamental guarantee could be contravened as against an individual by a non-governmental agency or public authority and if so whether the individual has a cause of action against such person under the Constitution. This problem was carefully sidestepped by the Court of Appeal of Jamaica in *Banton's* case.

²²Graham-Perkins, Parnell and Robotham, J.J.A.

²³Citing Grunfeld, *Modern Trade Union Law*, at p. 37.

²⁴[1969] 2 All E.R. 1207; [1970] AC 538; [1970] 2 WLR 233; (1969) 15 WIR 229.

²⁵(1967) 12 WIR 5 at p. 15 (Trinidad and Tobago C.A.).

²⁶(1971) 17 WIR at p. 283.

²⁷*Ibid*, at p. 289.

²⁸The opinion of the Board of Enquiry on this matter has already been discussed. A one-man Commissioner of Enquiry into the claim for recognition by Foremen of Kaiser Engineers is reported as finding that the Company was under no obligation to recognise the Union as the bargaining agent for the category of workers in question (quoted in "Unionisation of Foremen and Supervisors", Jamaican Employers' Federation, Members' Guide, July 1972, at p. 2).

²⁹See Wedderburn, *The Worker and the Law* (1st ed.) at p. 103; Khan-Freund in Flanders & Clegg, *Industrial Relations in Great Britain*, p. 55.

³⁰In *Banton v. Alcoa Minerals* (1971) 17 WIR 275.

³¹Industrial Stabilisation Act, 1965, Sec. 3. For the failure of this pioneering experiment and its replacement with new provisions see chapter 6 of *Statutory Regulation of Collective Bargaining*, *op. cit.*

³²Trade Disputes (Arbitration & Enquiry) (Amendment) Act, 1967 as subsequently amended.

³³Industrial Relations Act, 1970.

³⁴The Industrial Disputes Bill, 1970 proposed by the previous Government had nothing on recognition.

³⁵Jamaica Gazette Supplement.

³⁶Sec. 5(3) deals with eligibility

³⁷Sec. 5(1).

³⁸Sec. 5(4).

³⁹Sec. 5(5).

⁴⁰Sec. 5(6).

⁴¹*Supra.*

⁴²*Supra.*

⁴³This action was based on Art. 2 of the Constitution of Trinidad and Tobago to the effect that Parliament shall not enact laws that shall abridge, abrogate or infringe any of the entrenched fundamental freedoms and, on Art. 6 under which the individual is entitled to challenge such Act of Parliament. But for such plaintiff to succeed he must allege and prove that some legal right(s) of his has been violated in relation to himself. On the whole subject of judicial review of legislation in the West Indies see A.R. Carnegie, "Judicial Review of legislation in the West Indian Constitution" (1972) *Public Law*, p. 276. For the most recent cases on the matter see *Francis v. Chief of Police* [1970] 15 WIR 1 (W.I.A.S., C.A.); [1973] 2 WLR 505 (P.C.) where it was held that legislation purporting to curtail the mode of communication at public meetings was not *ultra vires* and not in breach of the individual's freedom of expression; and *Antigua Times Ltd. v. Attorney General of Antigua and Minister of Home Affairs of Antigua* (unreported) (1972) (Louisy, J), *Attorney General of Antigua and Minister of Home Affairs of Antigua v Antigua Times Ltd.* (1973) (unreported) (W.I.A.S., C.A.) where certain legislation were declared *ultra vires* for being an infringement of the freedom of the press in that island (Peterkin, J.A. (Ag.) dissenting).

⁴⁴Sec. 34 virtually proscribed strikes and made the taking of such action subject to ministerial approval and it was a manifest Government policy to cut down or completely halt strike actions.

⁴⁵Sec. 36 prohibited strikes in the essential services, while section 37 set out categories of employees who under no circumstance could go on strike, e.g. the Police, Defense Force, Prison Officers and the Public Service.

⁴⁶Secs. 18-26 dealt with industrial agreements and stated that they were subject to the examination of the Minister of Labour whose responsibility it was to transmit the agreement to the Industrial Court for registration, together with a notice containing the ground of any objection which he might have against the agreement.

⁴⁷There are *dicta* in both the English and the Canadian jurisdictions suggesting that the enactment of the Trade Union Act was a recognition of the worker's right to strike. See e.g. per Lord Bramwell in *Mogul S.S. v. McGregor, Gow & Co.* [1892] AC 25 at p. 47; Lord Wright in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Vietch* [1942] 1 All E.R. 142 at pp. 58-159; *Newall v Barker & Bruce* (1950) 2 DLR 289 at 299, per Rand, J.; *R. v Canadian Ry. Co.* 31 DLR (2d) 209 at p. 215, per McRuer, C. J. of the Ontario High Court, affirmed sub. nom. *Canadian Pacific Ry. Co. v Zambri* 34 DLR (2d) 654.

⁴⁸Art. I(j), Constitution of Trinidad and Tobago (1962).

⁴⁹Freedom of Association and Protection of the Right to Organise Convention, 1948.

⁵⁰Right to Organise and Collective Bargaining Convention, 1949.

⁵¹Apart from the fact that these Conventions, like other Conventions of the International Organisations are not usually binding on the individual members of the International Labour Organisation until the members have not only ratified the Convention but also gone further to incorporate the terms of the Convention in the country's municipal legislation. The late Director-General of the ILO had written in his book, *International Protection of Free Trade Unions* that a refusal by an employer to bargain with a particular union is not regarded as an infringement of freedom of association, appropriate for the consideration of the Governing Body's Committee on freedom of association. Dr. Jenks then referred to cases from British Guiana (now Guyana) and British Honduras (now Belize) to illustrate his point (at p. 350).

⁵²The Constitution Commission of Trinidad and Tobago was urged by the Trinidad and Tobago Labour Congress to include in its recommendations of a new Constitution for the People of Trinidad and Tobago a right to strike. Even the Public Service Association whose members are traditionally barred from striking called on the Commission to give back to public servants the right to strike. Their General Secretary told the Commission: "we feel that a thing as important as this (i.e. right to strike), as fundamental as this, ought to find its way into the Constitution and, therefore, again today we reaffirm the call for this right to become a fundamental right and find its way in our Constitution." (See *Public Service Review*, No. 5, May 15, 1973). On its part, the Commission did not share the views of the labour movement on this question. It was of opinion that emphasis in the country should be on the "generation of new wealth and the restructuring of the society so that the wealth produced will be more equitably distributed than it is at present. Creating a right to strike would be emphasising the negative." Because a "strike . . . produced no wealth and, where an essential service is involved, may expose the community to grave dangers or hold it up to ransom." While the Commission did not think that it was proper to totally disbar a worker from striking, they saw "no reason to elevate it to the status of a constitutionally enshrined right — on the same plane as the right to life or to personal liberty." (See Report of the Constitution Commission, January 22, 1974, paragraph 92).

⁵³Lord Donovan said ([1969] 2 All E.R. at 1211) that "the question is whether the abridgment of the rights of free collective bargaining . . . are abridgments of the freedom of association." He then referred to the judgment of the Courts below and citing per Wooding, C.J. (*supra*), concluded: "Their Lordships . . . agree with the Courts below in the rejection of the appellant's main argument." (at p. 1212).

⁵⁴AIR (1960) All 45.

⁵⁵For the common law cases on when an applicant for membership becomes a member of the union, see Rideout, *Right to Membership of a Trade Union*, Chapter IV. For the recent case on this point see per Megarry, J. in *Woodford v Smith* [1970] 1 All E. R. 1091.

⁵⁶See e.g. *Martin v Western District of Australian Coal & Shale Employee's Federation, Workers' Industrial Union of Australia (Mining Dept.)* (1934) S.R.N.S.W. 539. *Contra* the Canadian case: *Williams & Rees v Local Union No. 1562, United Mine Workers of America & Young* (1918) 41 DLR 709, (affirmed) 14 Alta. L.R. 251 where the refusal to admit resulted in loss of employment and it was held that the individuals involved were liable in damages.

⁵⁷*Per* Green, V.C. in *Mayer v Journeyman Stonecutters' Association* (1890) (N.J.) 20A 492. For a good account of the practices in American Unions before the intervention by the legislature see Summers, "The Right to Join a Union" (1947) 47 Col. L.R. 33. For the Canadian cases on this issue see *Graham v Bricklayers' and Masons' Union* (1908) 9 WLR (Court of Appeal of British Columbia); *Guelph v White et. al.* (1946) 4 DLR 114 (Supreme Court of British Columbia). The English cases on this include *Faramus v Film Artistes Association* [1964] AC 925; *Weinberger v Inglis* [1919] AC 606.

⁵⁸See Grodin, *Union Government and the Law: British and American Experiences*, at p. 64.

⁵⁹See *Davies v Carew-Pole* [1956] 1 WLR 833; *Bryne v Kinematograph Renters* [1958] 2 All E.R. 579.

⁶⁰*Per* Denning, M.R. in *Nagle v Fielden* [1966] 2 Q.B. 633.

⁶¹*Supra*.

⁶²Rideout, "Admission to Non-Statutory Association Controlling Employment" (1967) 30 MLR 389.

⁶³Lord Denning, M.R. Salmon and Danckwerts, L.JJ.

⁶⁴For an account of the organisational structure of Caribbean Trade Unions see Henry, *Labour Relations and Industrial Conflict in Commonwealth Caribbean Countries*.

⁶⁵E.g. in Sugar and Oil Industries and the Waterfront.

⁶⁶On the operation of these practices see McCarthy, *The Closed Shop in Britain*. See now the Industrial Relations Act, 1971 (U.K.) on "Approved Closed Shop Agreements", Secs. 7, 17 and Schedule I. The Federal Industrial Relations and Disputes Investigation Act legislation permits the inclusion of a closed shop or union shop clauses in collective agreements in Canada. On the other hand, the U.S. Labour Relations legislation appears to be against closed shops. See Sec. 8(a)(3) National Labour Relations Act, 1935 as amended by the Labour-Management Relations Act, 1947 and the Labour Management Reporting and Disclosure Act, 1959. In Trinidad and Tobago an employer cannot make union membership a condition of employment — Industrial Relations Act, 1972, Sec. 42(2)(a).

⁶⁷In this sense, the pronouncements in *Edwards v SOGAT* [1971] Ch. 354 are not, given our present circumstances, relevant to the Caribbean context.

⁶⁸Under the Industrial Relations Act, 1972, Sec. 35(a), upon certification as a recognised majority union in the bargaining unit, the union so certified is bound to bargain collectively on behalf of the workers in that bargaining unit. It is also obliged to process all employment grievances within the bargaining unit.

⁶⁹One of the effects of the certification system under the Industrial Relations Act of Trinidad and Tobago is that the certified majority union has "exclusive authority" to bargain on behalf of the workers in the bargaining unit and to bind them by a collective agreement (s. 35(a)).

⁷⁰See Trinidad and Tobago IRA, Secs. 72-76 in connection with agency shop orders. This aspect of the Act has been dealt with in Chapter 10 of *Statutory Regulation of Collective Bargaining in the Caribbean*, I.S.E.R. Law and Society Monograph.

⁷¹Trinidad and Tobago Constitution, 1962, Art. 1(j).

⁷²The words in square brackets are not included in the Trinidad and Tobago clause, but they appear in the Constitution of Jamaica — Art. 24(2). As to its implications see the baffling majority judgment of the Jamaica Court of Appeal in *Byfield v Allen* (1970) 16 WIR 1 where the Court held (Graham-Perkins, J.A. dissenting) that the reason for which the plaintiff was refused employment as a headmaster of a school situated in the defendant's (Minister of Education) Constituency was not the plaintiff's political opinion. *Cf.* the conclusion arrived at by the Court of Appeal of the West Indies Associated States in *Camacho & Sons Ltd. v Collector of Customs* (1971) 18 WIR 159 discussed in "Fundamental Human Rights, the Courts and the West Indian Constitutions," *supra*.

⁷³The meaning of this expression *vis-à-vis* collective bargaining and the right to strike was the subject for decision in *Collymore v Attorney General of Trinidad and Tobago* (1967) 12 WIR 5 (T&T C.A.); (1969) 15 WIR 229 (P.C.); *Banton v Alcoa Minerals, Inc.* (1971) 17 WIR 275, discussed *supra*.

⁷⁴"Report of the Commission . . . to investigate Allegations of Discriminatory Practices by the Management of the Trinidad Country Club", at p. 8.

⁷⁵*Ibid.*

⁷⁶*Ibid.*

⁷⁷[1959] I.R. 254.

⁷⁸*Ibid.*

⁷⁹Henry, *Op.cit.*, at p. 73. *Cf.* the somewhat ambivalent provision of Sec. 3(1) of Part II of the First Schedule to the Bahamas Industrial Relations Act which is to the effect that the qualifications for membership in a trade union shall include that no person shall be eligible for membership of the trade union unless he is, or has been, regularly and normally employed in the industry, or as a member of the craft or category of employees which the union represents. This is certainly an innovation which is peculiarly different from the closed shop or union shop practices for union membership is neither made a condition for obtaining employment nor is it a condition for remaining in a particular employment but the other way round. A worker must first obtain employment before he can think of joining a trade union. Furthermore, it would seem to follow that when he leaves one employment he has to relinquish his membership of the union for another union may be based in the industry where he now finds new employment. It would seem too that he is ineligible for membership for any period he remains unemployed. The best that can be said of this provision is that the Act encourages "Industrial Union" and "Craft Unions" see Sec. 2(1) of Part I of the First Schedule.

⁸⁰The proposed new Constitution of Trinidad and Tobago drafted by the high powered Constitution Commission now provides that "every person shall have the right to practice any profession or to carry on any occupation trade or business": (Art. 13(1)). *Quaere* whether this provision protects the individual's right to work in a situation where he has the necessary qualifications for a particular job. Can this article protect him if he is not offered the job on some discriminatory ground and the employer is not a public authority and the person refusing him employment is not "acting in the execution of public function." *Cf.* s.703(a) of the U.S. Civil Rights Act of 1964 where the right to work is protected as against "any individual."

⁸¹Industrial Relations Act, No. 14 of 1970. This Act protects the right of a worker to join or take part in trade union business as against the employer interfering with the exercise of that right, Sec. 42.

⁸²No. 23 of 1972. As under the Bahamas Act, the individual worker has a right as against his employer not to be dismissed for union membership under the Trinidad and Tobago Act, see Secs. 42 and 75.

⁸³This Act is not intended to regulate union affairs but to provide for the establishment of a permanent tribunal for purposes of settling labour disputes. Sec. 4 protects the rights of the workers in respect of trade union membership.

⁸⁴The British Industrial Relations Act has now been repealed, but owing to the long standing industrial action at Her Majesty's Printery, the repealing Act has not been published. However, the interpretation of the W.I. legislation will continue to be influenced by the judgments already pronounced in the United Kingdom on the basis of the Act as long as the West Indian legislation is in operation. Meanwhile, it is difficult to speculate as to what the new Act purports to cover.

⁸⁵Section 65(2).

⁸⁶This approach was adopted in the U.S. in 1947, see Secs. 7 and 8 of the National Labour Relations Act. See also the Ontario Labour Relations Act, 1960, Sec. 50 (as amended). Even in the U.K. where there is a traditional refusal to legislate on human rights, this aspect is now embodied in the Industrial Relations Act, 1971—see Sec. 5 on rights of workers in respect of trade union membership and activities.

⁸⁷Section 4.

⁸⁸These provisions were accordingly based on the ILO Convention of 1963 on Unfair Dismissal, Recommendation 119.

⁸⁹Trade Disputes (Arbitration & Inquiry) (Amendment) Act, 1967, Sec. 5.

⁹⁰Industrial Relations Act, 1970 (Bahamas) Sec. 42.

⁹¹Sec. 42, discussed in Chapter 7 of *Statutory Regulation, op.cit.*

⁹²See e.g. *Paramount Transport Ltd. v Amalgamated Workers Union*, Nos. 3 and 5 of 1967; *Motilal Moonan v Transport & Industrial Workers' Union*, No. 86 of 1966; *Bird of Paradise Inn (Egbert Lau Proprietor) v Union of Commercial and Industrial Workers*, No. 206A of 1967; *Gabriel & Son v Union of Commercial and Industrial Workers*, No. 35 of 1968. See further, Chuku Okpaluba, "Unfair Employment Practices in a Caribbean Industry", *Lawyer of the Americas*, Vol. 6 No. 1, February 1974, esp. at p. 75.

⁹³*Paramount Transport Case, supra.* This aspect of the problem has been covered in "Unfair Employment", *op.cit.*, at pp. 77-78 and amplified in "Dismissal and Reinstatement in a West Indian Jurisdiction" by Chuku Okpaluba & Dale Rubin, Vol. 3, *Anglo American Law Review*, April 1974, p. 251.

⁹⁴For the decision based on the construction of the corresponding provisions—Sec. 5, (U.K.) I.R.A. see *Cotter v Lynch Bros.* [1972] ICR 263; *Kenyon v Fred Miller Ltd.* [1972] ICR 260; *Axe v British Domestic Appliances* [1973] ICR 133 which are straight-forward illustrations. See G.H. Scott, "Unfair Dismissal and the Unregistered Union" (1972) 122 NLJ 897.

⁹⁵[1973] 2 All E.R. 709.

⁹⁶At p. 715.

⁹⁷[1973] 3 All E.R. 485.

⁹⁸[1973] 3 All E.R. 225, discussed in "Organisational Rights of Unions" by C.P. Gordon in (1973) 123 NLJ 1024; "Discrimination Against Non-Union Employees" by M. Dugdale (1973) 123 NLJ 869.

⁹⁹[1974] 1 All E.R. 229.

¹⁰⁰[1974] 1 All E.R. 275.

¹⁰¹*Irish Times*, December 20, 1972 at p. 13.

¹⁰²(1972) 21 ICLQ, 699 at 713.

¹⁰³*Ibid.*, ff. 62.

¹⁰⁴(1961) IR 345.

¹⁰⁵*Irish Times*, December 20, 1972 at p. 13.

¹⁰⁶*Ibid.* *Quaere* would this necessarily be the case in the U.K. where there is now a legally "authorised closed shop"? *Cf.* the common law decision in *Boulting Bros. v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606.

¹⁰⁷*Cf.* the same Supreme Court's decision that the refusal of the National Union of Vehicle Builders to grant one of its members a transfer to the Irish TGWU was not an infringement of his constitutional rights, because the action of the NUVB in deciding to exercise such rights as they had under an agreement entered into with the Irish TUC, which provided that one of its members could not be transferred to another affiliated trade union without its consent, could not be held in any way to have infringed the Constitutional right of a member. *Irish Times*, December 20, 1972 at p. 13.

¹⁰⁸See Okpaluba & Rubin, "Dismissal & Reinstatement", *op.cit.*

¹⁰⁹Where the union rule is silent on the issue of notice the member is entitled to exercise his common law right to withdraw without giving any notice. See *Finch v Oake* [1896] 1 Ch. 409. *Contra*, Trade unions have no common law right or power to expel a member — *Simpson v Tinning* (1941) AR (NSW) 41; *Clarke v Ferrie* (1926) NI 1.

¹¹⁰See generally, A.R. Carnegie, "Terminability of Contracts of Unspecified Duration" (1967) 85 LQR 392.

¹¹¹*Lee v Showmen's Guild of G.B.* [1952] 2 QB 329; *Baker v Jones* [1954] 2 All E.R. 553.

¹¹²There is no doubt that in the case of a paid official, his withdrawal without due notice will amount to a breach of the contract of employment.

¹¹³See e.g. *Kelly v Natsopa* (1951) 31 TLR 632; *Simpson v Tinning* (1941) AR (NSW) 41; *Clarke v Ferrie* (1926) NI 1.

¹¹⁴*Andrews v Mitchell* [1905] AC 75; *Wayman v Perseverance Lodge of Cambridge Order of United Brethren Friendly Society* [1917] KB 677.

¹¹⁵[1973] ICR 296.

¹¹⁶*Ibid.*, at p. 300.

¹¹⁷*Corry Lighthorage v Transport & General Workers Union & Others* [1973] 2 All E.R. 341; (Brightman, J.) [1973] 2 All E.R. 558 (CA); and *Langston v A.U.E.W.* [1973] 2 All E.R. 430. And see Bob Hepple's note in [1973] 36 MLR 545 where he urged "the abolition of the right to be a non-unionist, or at least its limitation to cases of genuine conscientious objection . . ." (at p. 550).

¹¹⁸Note 120 *infra*.

¹¹⁹The rejection of the concept by the Constitution Commission of Trinidad and Tobago has already been noted. In their draft Constitution they expressed the freedom of association thus:

No restrictions shall be imposed on any person against his will in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the protection of his interests (Art. II(1)).

It will be noted that this provision is neither an improvement nor a retrogression as compared with the provisions of the 1962 Constitution or of any other of the Caribbean Constitutions. Art. II(2) makes the freedom subject to certain exceptions which in turn is legislation for what Sir Hugh Wooding had said when he was Chief Justice of Trinidad and Tobago. In his celebrated judgment in *Collimore*, Sir Hugh had opined that freedom in an ordered society cannot be observed by an individual without due regard to the conflicting rights and freedom of others (see (1967) 12 WIR at p. 9).

¹²⁰See the Industrial Relations Act, 1970 (Bahamas); Industrial Relations Act, 1972 (Trinidad and Tobago); Labour (Collective Agreements & Emergency Procedures) Ordinance, 1973 (Montserrat); Labour Relations and Industrial Disputes Act, 1974 (Jamaica).