FREEDOM OF ASSOCIATION (TRADE UNION) AND ITS IMPLICATION ON THE CONSTITUTIONAL GUARANTEE

by

GHAZALI NIK TAIB

84158483

DIL 06

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SHAH ALAM

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TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

SOME REFLECTIONS ON LAW AND POWER

Anyone who surveys the history and structure of labour law must become aware of the inherent tension between the social demands of the employment relationship and the spirit and possibilities of the law. The evolution of an orderly and, compared with many other countries, even today, reasonably well-functioning system of labour relations, was one of the great achievements of our civilisation.

The system of collective bargaining rests on a balance of the collective forces of management and organised labour. To maintain it has on the whole been the policy of the legislature during the last twenty years or so. The welfare of the nation has depended on its continuity and growing strength. This is a sentiment shared, it is to be hoped, by all political parties represented in Parliament.

If it is important to an understanding of Labour Law to accept the limitations of the Common Law, it is equally important to realise the limitations of the law as a whole in this area, as elsewhere. The law governing labour relations is one of the centrally important branches of the law - the legal basis on which the very large majority of people earn their living. No one should be qualified as a lawyer - professionally or academically - who has not mastered its principles.

But the law can make only a modest contribution to the standard of living of the population.

Law is a secondary force in human affairs, and especially in labour relations. Law is a technique for the regulation of social power.

Power - the capacity effectively to direct the behaviour of others - is unevenly distributed in all societies. There can be no society without a subordination of some of its members to others,

without command and obedience, without rule makers and decision makers. The power to make policy, to make rules and to make decisions and to ensure that these are obeyed, is a social power.

It rests on many foundations, on wealth, on personal prestige, on tradition, sometimes on physical force, often on sheer inertia. It is sometimes supported and sometimes restrained, and sometimes even created by law, but the law is not the principal source of social power.

Labour Law is chiefly concerned with this elementary phenomena of social power. And - this is important - it is concerned with social power irrespective of the share which the law itself has had in establishing it.

This is a point the importance of which cannot be sufficiently stressed. As a social phenomenon the power to command and the subjection to that power are the same no matter whether the power is exercised by a person clothed with a "public" function, or by a private person, an employer or a trade union official.

The subordination to power and the nature of obedience do not differ as between purely social or private and legal or public relations. It is a profound error to establish a contrast between society and the state and to see one in terms of co-ordination, the other in terms of subordination. As regards labour relations that error is fatal.

The law does and to some extent must conceal the realities of subordination behind the conceptual screen of contracts considered as concluded between equals.

The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power.

In its inception it is an act of submission, in its operation it is a condition of subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment." [1]

The main object of Labour Law, has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of labour legislation must be seen as a protective legislation. It is an attempt to infuse law into a relation of command and subordination.

Everywhere the effectiveness of the law depends on the unions far more than the unions depend on the effectiveness of the law. The effectiveness of the unions, however, depends to some extent on forces which neither they nor the law can control. If one looks at unemployment statistics and at the statistics of union membership,[2] one can see a correlation. Very often, as employment falls, so does union membership.[3]

The characteristic feature of the employment relation is thus that the individual worker is subordinated to the power of management but that power of management is co-ordinated with that of organised labour. The worker has the legal right and moral duty to be a member of the relevant union. He may have the legal freedom not to be a member of a union, just as the citizen is free to vote. But he has no more a moral right to abstain from being a union member than a citizen has to abstain from voting. The equation of the freedom not to associate with the freedom to associate is a fallacy. Nothing is more misleading that the ambiguity of the word 'freedom' in labour relations. The danger begins if 'freedom' is taken for a social fact rather than a verbal symbol that is, which may in many spheres of life, not only in labour relations be not more than the freedom to restrict or to give up one's freedom. Conversely, to restrain a person's freedom may be necessary to protect his freedom, that is, to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will.