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“Article 11 and the negative Freedom of Association - the Right to be protected against Trade Unions and Employers’ Organisations?”

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Working paper

Introduction

For a long time the freedom of association was thought not to have a negative dimension. No international protection of the right not to associate existed¹. The negative freedom of association was not inserted in the ILO-conventions no. 87 and 98, the Universal Declaration on Human Rights, the European Declaration on Human Rights and the original European Social Charter of 1961. In article 20.2 the UDHR stipulates that “no one may be compelled to belong to an organisation”, but the more specific article 23.4 only recognises “the right to form and joint trade unions for the protection of his interests”. An amendment to introduce the right not to associate into the ILO-convention no. 87, was rejected by the preparatory International Labour Conference².

The silence of the conventions was interpreted differently by ILO- and European monitoring bodies. The monitoring bodies of the ILO concluded that the admissibility of union security clauses was left to the discretion of the states, as long as they were the result of free negotiations between workers’ and employers’ organisations and not imposed by law³. The ECourtHR recognised a negative freedom of association, despite the fact that the preparatory works explicitly mention that it was “undesirable” to introduce the negative freedom of association into the Convention “on account to the difficulties raised by the ‘closed shop system’ in certain countries”⁴. Ironically, it was the closed shop that provoked the Court’s jurisprudence about the negative freedom of association.

1. The birth of the right not to associate: the closed shop

In 1981 the Court had to decide on a closed shop agreement for the first time. In the judgment of 13 August 1981, *Young, James and Webster v. UK*, referred by three workers who were fired because they refused to become member of a trade union which signed a closed shop agreement with their employer after their engagement, the

¹ G. SPIROPOULOS regrets in 1956 that only a handful of countries protect the negative freedom of association in the same way as the positive freedom of association. See G. SPIROPOULOS, *La liberté syndicale*, Paris, Librairie générale de droit et de jurisprudence, 1956, 214.

² Bureau International du Travail, *Etude d'ensemble*, p.47-49, no. 100 and International Labour Office, *Freedom of Association Digest*, p. 77, no. 364.

³ Bureau International du Travail, *Etude d'ensemble*, p.47-49, no. 100 and 205, and International Labour Office, *Freedom of Association Digest*, p. 77, no. 365 en 366.

⁴ Report of 19 June 1950 of the Conference of Senior Officials, Collected Edition of the “Travaux Préparatoires”, vol. IV, p. 262.

ECourtHR accepted that article 11 of the Convention implied some measure of negative freedom of association. Although a general rule protecting the negative freedom was deliberately omitted from article 11 of the Convention, the Court considered that “it does not follow [from such an omission] that the negative aspect of a person’s freedom of association falls completely outside the ambit of Article 11”.

In the absence of any defence by the Thatcher government, the Court held that there had been a violation. The Court attached great value to the consequences of the closed shop – loss of employment and livelihood – and the political objections of the workers against trade union membership⁵. However, the judgment reveals the existence of major differences between the judges of the Court, as the three Scandinavian judges wrote a common dissenting opinion. Due to those differences, the Court didn’t reject the assumption that “Article 11 does not guarantee the negative aspect of that freedom on the same footing as the positive aspect”, leaving the option open that other forms of compulsion to join a particular trade union could be in line with the Convention.

As only a form of such compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association guaranteed by Article 11 constituted an interference, in the 20 April 1993 judgment, *Sibson v. UK*, the application of a dismissed worker was denied because he didn’t oppose to trade union membership on account of specific convictions and would have suffered no damage if he agreed with a transfer to a nearby depot⁶.

2. The extension of the negative freedom of association

A. Professional organisations

In a judgment of 30 June 1993, *Sigurdur A. Sigurjonsson v. Iceland*, the Court had to decide on the obligation to be member of a professional organisation to attain a taxicab licence. Unlike in the previous cases, in this case the organisation was no trade union, but a professional organisation of self-employed, and the mandatory membership was not the result of a collective agreement, but imposed by law.

⁵ See also P. J. DUFFY, “The closed shop case. A note on *Young James and Webster v. United Kingdom*”, *The Human Rights Review*, autumn 1980, Vol. V, no. 3, 205-207; P. LEMMENS, “Het “closed shop”-systeem en de vrijheid van vakvereniging (zaak *Young, James & Webster*)”, *R.W.* 1981-82, 1701-1703; P. O’HIGGINS, “The closed shop and the European Convention on Human Rights”, *The Human Rights Review*, spring 1981, Vol. VI, no. 1, 22-27.

⁶ See also C. PETTITI, « Le droit de ne pas s’affilier à un syndicat en droit européen », *Droit Social* 1993, no. 12, 999-1002.

Faced with the Icelandic defence that the negative freedom of association has to be interpreted restrictively on account of the preparatory works, the Court noted that “it did not attach decisive importance to them; rather it used them as a working hypothesis”. The Court also recalled that “the Convention is a living instrument which must be interpreted in the light of present-day conditions” and surpassed its previous *Young, James and Webster* jurisprudence. It now stated that “Article 11 must be viewed as encompassing a negative right of association”. Nevertheless, the Court refused to determine whether this negative right is to be considered on an equal footing with the positive right, arguing that it is not necessary to do so.

No significant weight was attached to the fact that, before being granted the licence, the applicant agreed to become a member. However, the Court did not yet disapproved pre-entry closed shops, i.e. the obligation to join a trade union at the time of taking up a contract of employment as opposed to the situation of a post-entry closed shop in which a similar obligation is imposed after recruitment. Because the rule that imposed the pre-entry closed shop lacked statutory basis, the applicant found himself in a post-entry closed shop situation. The Court relied again on the loss of livelihood of the applicant and his ideological objections⁷.

B. Collective agreements

In 1996 the ECourtHR had to decide on an alleged violation of an employer’s negative freedom of association, when the owner of a restaurant complained about a lack of State protection against the industrial action taken against his restaurant⁸. The collective action aimed at inducing the owner to meet the trade union’s demand that he be bound by a collective agreement: either by joining an employers’ organisation or by signing a substitute agreement, a common practice in Sweden where no system of universally binding collective agreements exists.

The Commission agreed with the applicant, but the Court did not. In the judgment of 25 April 1996, *Gustafsson v. Sweden*, the Court accepted that “to a degree” the enjoyment of the applicant’s freedom of association might be affected by the pressure to join an employers’ organisation or to sign a substitute agreement. However, only the first alternative involved membership of an association and the applicant was not compelled to opt for membership of an employers’ organization because of the economic disadvantages attached to the substitute agreement. In reality, the applicant’s principal

⁷ See also F. DORSSEMONT, “The Right to Form and to Join Trade Unions for the Protection of his Interests under Article 11 ECHR”, *European Labour Law Journal* 2010, no. 2, 191-194 and 198.

⁸ An application of two workers of *Gustafsson* was declared inadmissible by the Commission. The Commission stated that the collective actions had no influence on their right not to be a member of a trade union or their working conditions. See ECHR 8 April 1994, *Englund v. Sweden*.

objection to the signing of a collective agreement appeared to be his disagreement with the collective-bargaining system in Sweden.

While the Court considered that article 11 of the Convention did not guarantee a right not to enter into a collective agreement, it wouldn't go so far as to completely exclude collective agreements from the scope of article 11. It stated that article 11 may well extend to treatment connected with the operation of a collective-bargaining system, but only where such treatment impinges on freedom of association. Compulsion which does not significantly affect the enjoyment of that freedom, even if it causes economic damage, cannot give rise to any positive obligation under article 11. Having regard to the margin of appreciation to be accorded to the State in the area under consideration, the Court did not find that Sweden failed to secure the applicant's rights under article 11^{9 10}.

In the judgment C499/09 of 9 Mars 2006, *Hans Werhof v. Freeway Traffic Systems*, the negative freedom of association was used by the Court of Justice of the European Union to refuse a dynamic interpretation of article 3, § 1, of the Council Directive Transfers of Undertakings¹¹. The Court decided that, if the collective agreements concluded after the transfer of undertaking would be binding for the transferee, his fundamental right not to join an association could be affected. It referred to the *Gustafsson v. Sweden* judgment, but it is questionable whether that interpretation accords to the judgment.

C. Pre-entry closed shops

In the 11 January 2006 judgment, *Sorensen and Rasmussen v. Denmark*, the Court made an end to the distinction between post-entry and pre-entry closed shops, the latter still regarded as lawful in some national legal orders. In the case two workers complained about the obligation to become member of a particular trade union set as a condition for employment, because they did not share the political opinions of the trade union and wanted to join another trade union.

Even though this was already the fourth case about the negative freedom of association, the Court brought in a new argument. The Court stated that the notion of personal

⁹ See also J.-P. MARGUENAUD and J. MOULY, Comment on *Gustafsson v. Sweden*, *Recueil Dalloz* 1997, no. 29, 365-368; T. NOVITZ, "Negative Freedom of Association", *Industrial Law Journal*, Vol. 26, Mars 1997, 79-87.

¹⁰ Some years later the Swedish courts applied the jurisprudence of the ECHR in a similar conflict, but the applicant questioned their impartiality on the basis of article 6 of the ECHR. In a judgment of 1 July 2003, *A.B. Kurt Kellerman v. Sweden* the ECHR dismissed the claim.

¹¹ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, *PB L 61*, p. 26.

autonomy is an important principle underlying the interpretation of the Convention guarantees and must therefore be seen as an essential corollary of the individual's freedom of choice implicit in article 11. Without mentioning it, the Court moved forward in its recognition of the negative aspect of the freedom of association. It noted that, "although it has not taken any definite stand on the question whether the negative aspect of the freedom of association should be considered on an equal footing with the positive right, it does not in principle exclude that the negative and the positive aspects should be afforded the same level of protection in certain situations". Thirteen years earlier, in *Sigurdur A. Sigurjonsson*, the Court refused to examine this question.

According to the Court the wide margin of appreciation which states enjoy as how to secure the freedom of trade unions to protect the occupational interests of their members, must be considered to be reduced where the domestic law of a state permits the conclusion of closed-shop agreements between unions and employers which run counter to the freedom of choice of the individual inherent in article 11. The Court acknowledges that individual interests must on occasion be subordinated to those of a group, but chances that group interest may prevail seem small as the Court states that "a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position". Therefore, the worker who was aware that trade union membership was a condition for obtaining and retaining his employment, must also be protected by article 11, because individuals applying for employment often find themselves in a vulnerable situation and are only too eager to comply with the term of employment offered¹².

The Court appears to be influenced by the Committee on Social Rights, the monitoring body of the European Social Charter. Invited by a collective complaint of the *Confederation of Swedish Enterprise*, the Committee on Social Rights already disapproved pre-entry closed shops in 2002. The Committee stated on that occasion that clauses set out in the collective agreements which reserve employment for members of a certain union are clearly contrary to the freedom guaranteed by article 5, as they restrict workers' free choice as to whether or not to join one or other of the existing trade unions or to set up separate organisations¹³.

¹² See also J. CAVALLINI, « Les accords de monopole syndical (ou clauses de closed shop) sont contraires à la liberté d'association », *La semaine juridique – Edition sociale* 2006, no. 6, 24-26 ; N. KANG-RIOU, « Vers l'interdiction des accords de monopole syndical en vertu de l'article 11 CEDH », *L'Europe des Libertés* 2006, no. 20, 20-21 ; J.-P. MARGUENAUD and J. MOULY, « Le modèle syndical danois terrassé par le droit d'association négatif », *Droit Social* 2006, no. 11, 1022-1025.

¹³ European Committee of Social Rights, Report Decision on the merits, *The Confederation of Swedish Enterprise v. Sweden*, no. 12/2002. See also concerning Denmark, *Conclusions XVIII-1 Volume 1*, 2006 ; Sweden, *Conclusions 2006 Volume 2* and Finland, *Conclusions XIII-5*, 1997.

D. Monitoring fees

In the 13 February 2007 judgment, *Evaldsson and others v. Sweden*, the Court decided that the so called “monitoring fees”, i.e. deductions on the wages as a reimbursement of the costs made by the trade union for the monitoring of wages, a common practice in Sweden, were in violation with the Convention. However, the decision was not based on a negative freedom derived from article 11, but on article 1 of the First Additional Protocol to the Convention. The Court disapproved the monitoring fees, because in its view the union’s wage monitoring activities lacked the necessary transparency as the unions could not give the information to verify that the fees corresponded to the actual cost of the inspection work and that the amounts paid were also not used for other purposes¹⁴.

The choice for article 1 of the First Additional Protocol to the Convention instead of article 11 was not a complete surprise. In the same collective complaint the *Confederation of Swedish Enterprise* also had acted against the “monitoring fees”, on the basis of article 5 of the European Social Charter, but without success. The Committee on Social Rights considered that the payment of a fee to the trade union for financing its activity of wage monitoring cannot be regarded in itself as unjustified. There was no interference with the freedom of a worker to join a trade union, since the payment of the fee does not automatically lead to membership and in addition is not required from workers members of other trade unions. Yet, the Committee expressed doubts as to the use of the fees for activities other than wage monitoring, but left it to the national courts to decide the matter¹⁵.

By contrast, in the 2008 published *Digest* the view is expressed that “to secure the negative freedom of association, domestic law must clearly prohibit all pre-entry or post-entry closed shop clauses and all union security clauses (automatic deductions from the wages of all workers, whether union members or not, to finance the trade union acting within the company)”¹⁶.

E. Contributions to employers’ organisations

¹⁴ See also the comment by F. DORSSEMONT, *EHRC 2007*, vol. 8, no. 4, 474-477.

¹⁵ European Committee of Social Rights, Report Decision on the merits, *The Confederation of Swedish Enterprise v. Sweden*, no. 12/2002. See also concerning Romania, *Conclusions 2002 and 2004*.

¹⁶ Council of Europe, *Digest of the case law of the European Committee of Social Rights*, 1 September 2008, p. 50.

In the 27 April 2010 judgment, *Olafsson v. Iceland*, the Court considered the statutory obligation to pay an “industry charge” to an employers’ organisation as a violation of article 11, due to a lack of transparency and accountability towards non-members. Although the obligation to which the applicant was subject did not involve formal membership, it had an important feature in common with that of joining an association, namely that of contributing financially to the funds of the employers’ organisation. This common feature could be seen as being reinforced by the fact that members who paid the industry charge were entitled to a reduction of their membership fees by an amount equivalent to the charge. It made no difference to the Court that the charge was not paid directly to the employers’ organisation, but indirectly through the State Treasury.

The amounts were relatively modest and the degree of compulsion to which the applicant was subjected may be regarded as significantly less serious than in other cases, where an applicant’s refusal to join a union resulted in the loss of his employment or professional licence and as a consequence his means of livelihood. However, the Court stated that in *Sorensen and Rasmussen* much less serious consequences of a refusal to comply with the requirement to join a union have similarly been found to be capable of striking at the very substance of the freedom of choice and personal autonomy inherent in the right of freedom of association protected by article 11. In reality, this was a new reading of the *Sorensen and Rasmussen* case by the Court as in *Sorensen and Rasmussen* both workers would have lost their jobs if they refused to be a member of a specific trade union, although one of them was just a seasonal worker.

Like in the *Sigurdur A. Sigurjonsson* case, part of the severity of the Court may be explained by the fact that the obligation was imposed by law. Whereas the duty of payment in the *Evaldsson* case had been imposed under a collective labour agreement, the obligation in the present case was imposed by statute, which meant for the Court that the position adopted in the former case could be applied with even greater force. The Court follows the ILO where it objects against mandatory contributions imposed by law. However, when a law imposes a contribution on all workers, members and non-members, for the benefit of a majority trade union, this is in conformity with the ILO-Conventions¹⁷.

3. The importance of the negative freedom in the case law of the ECHR

Over the years the ECourthR became the major source of the individual freedom of association. It should be noticed that the concept of the negative freedom of association used by the Court gradually extended. In the beginning it only covered closed shop

¹⁷ Bureau International du Travail, *Etude d'ensemble*, p.47-49, no. 102 and 103 and International Labour Office, *Freedom of Association Digest*, p. 76, no. 363.

agreements, i.e. the mandatory membership of an organisation, in those cases in which the political opinions of workers were contrary to the organisation's views, and the refusal of membership led to severe damage, like loss of livelihood. Nowadays the Court also disapproves mandatory financial contributions to an organisation, even when they cause less severe damage and the only political opinion of the applicant is his denial to pay a membership fee. The 2010 judgment, *Olafsson v. Iceland*, serves as a model for this new approach. Although the case deals with a specific Icelandic problem, the imposition by law of public assignments on a private organisation, like the *Sigurdur A. Sigurjonsson* case, it may influence future judgments about trade union practices.

In the same period also the Court's vision on the relation between the positive and negative freedom of association changed. While in 1981, in *Young, James and Webster v. UK*, the Court only stated that "it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11", in 1993, in *Sigurdur A. Sigurjonsson v. Iceland*, it said that "Article 11 must be viewed as encompassing a negative right of association". In the same judgment the Court refused to determine whether this negative right is to be considered on an equal footing with the positive right, arguing that it is not necessary to do so, but 13 years later, in *Sorensen and Rasmussen v. Denmark*, it mentioned that "although it has not taken any definite stand on the question whether the negative aspect of the freedom of association should be considered on an equal footing with the positive right, it does not in principle exclude that the negative and the positive aspects should be afforded the same level of protection in certain situations". In practice, the Court does not balance the negative and positive freedom. Maybe the Court did balance in the 1996 case, *Gustafsson v. Sweden*, when it decided that compulsion which does not significantly affect the enjoyment of negative freedom, even if it causes economic damage, cannot give rise to any positive obligation under article 11, but if so, it was only implicit.

One cannot avoid the impression that the Court's protection of the negative freedom is of greater importance than its protection of the positive freedom of association. By far most of the Court's case law before 2002 concerns the negative freedom of association. Only recently the Court began to play a role in protecting the positive freedom of association with judgments like the 2 July 2002 judgment, *Wilson, National Union of Journalists and Others v. UK*, the 27 February 2007 judgment, *Associated Society of Locomotive Engineers & Fireman v. UK*^{18 19}, the 12 November 2008 judgment, *Demir*

¹⁸ In this case the Court states that "As an employee or worker should be free to join, or not to join a trade union without being sanctioned or subject to disincentives (with reference to *Young, James and Webster* and *Wilson*), so should the trade union be equally free to choose its members. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership."

and Baykara v. Turkey, the 9 December 2008 judgment, *Ciocan and others v. Romania* and the 30 July 2009 judgment, *Danilenkov and Others v. Russia*. The Court is dependent on the cases brought before it and thus cannot be blamed for the trade unions' past lack of interest. Individuals are more likely to send cases before the ECourtHR, while trade unions can use other procedures like collective complaints before more specialised bodies like the ILO Freedom of Association Committee or European Committee on Social Rights. However, the case law on the negative freedom of association demonstrates that the ECourtHR is more focussed on individual rights and therefore more advantageous for individuals than for trade unions, as the Court not always has a substantial knowledge and understanding of the particularities of collective bargaining systems, or refuses to bear those particularities in mind.

¹⁹ See also D. MEAD, "To BNP or Not to BNP: Union Expulsion on Ground of Political Activity – A commentary on ASLEF v. Lee", *Industrial Law Journal*, Vol. 33, September 2004, 267-277; J. HENDY en K. D. EWING, "Trade Unions, Human Rights and the BNP", *Industrial Law Journal*, Vol. 34, Mars 2005, 197-216; K. EWING, "The implications of the ASLEF-case", *Industrial Law Journal*, Vol. 36, nr. 4, December 2007, 425-445; F. DORSSEMONT, "Le droit des syndicats d'expulser des membres en raison de leurs convictions politiques", *Rev. tr. dr. h.* 2008, nr. 74, 562-564.