Introduction

Freedom of association is one of the rights that a written constitution normally guarantees and in Malaysia the Federal Constitution in its art 10(1)(c) guarantees all citizens the right to form associations. Associations in this constitutional context may be referred to all general associations or groupings, which may include labour organisations or trade unions. It may be argued that although there is no specific reference to the right to form a trade union in the constitution, it may be submitted that art 10(1)(c) is equally applicable to the right of workers to form a trade union. However, some quarters may argue otherwise that freedom of association for trade union purposes is not a constitutional right. Although the issue may still be debatable, it is considered appropriate to discuss freedom of association in labour relations in Malaysia by grounding it on constitutional provisions. Indeed, there is a constitutional dimension to the issue of freedom of association which should serve as the foundation of any discussion of a country's system of labour relations. What is the scope and content of the freedom of association guaranteed under the constitution; are citizens guaranteed the fundamental right to establish join and maintain an association; are labour unions recognised as specie of the associations that citizens have the fundamental right to establish? Our focus in this article is on the constitutional right of freedom of association in Malaysia, and where appropriate reference to other jurisdictions such as India is also made. Freedom of association here refers to the right to associate and dissociate. The former refers to the right to join a trade union and the latter, the right not to join a union.

The Labour Relations Power

Subject to a minor exception in favour of Sabah and Sarawak, the Malaysian Constitution has assigned the entire
labour relations power to the central government to the exclusion of the constituent units. Thus all matters that concern trade unions, labour and industrial disputes, welfare of labour and social security, are contained in the Federal List. The same also applies to matters like trade, industry and commerce, external affairs, implementation of treaties and agreements, internal security and preventive detention, all of which affect labour and industrial relations laws and practices either directly or indirectly n1.

The constitutional distribution of labour relations power just described is a further testimony to the assertion that the federal system in Malaysia has created a very strong centre. In the context of labour relations, the apparent advantage is the uniformity of labour laws applicable throughout the country. Such uniformity may be especially appropriate for a country like Malaysia considering it not-so-big a size.

The Fundamental Right to form Associations

The fundamental right to form associations or unions means the liberty of citizens to form a legal entity in order to act collectively in a field of mutual interest. The concept of freedom of association and the purpose which it serves has been elucidated by the European Court of Human Rights in the case of James, Young and Webster v UK. The case involved the issue of the permissibility of closed shops and the question arose as to whether freedom of association also involved the freedom to dissociate. Defining what it referred to as the positive freedom of association in contradistinction with the negative freedom of association, the court declares thus:

The positive freedom of association safeguards the possibility of individuals, if they so wish, to associate with each other for the purpose of protecting common interests and pursuing common goals, whether of an economic, professional, political, cultural, recreational or other character, and the protection consists in preventing public authorities from intervening to frustrate such common action. It concerns the individual as an active participant in social activities, and it is in a sense a collective right in so far as it can only be exercised jointly by a plurality of individuals n2.

Why is freedom of association considered to be a fundamental right? The main reason has to do with the nature of man himself. The inclination to associate is inherent in human nature. According to Professor Alkema, association helps to develop the individual personalities of human beings. It also helps in the development of the society n3. For instance the formation of political parties and the coming into being of the freedom movements during the colonial days led to the emancipation of the colonised people in different parts of the world including Malaysia.

The right to join and form trade unions is an aspect of the general right to form associations. It is regarded as a fundamental right. All other collective rights of the workers become a reality only after they have formed a trade union. Most countries with written constitutions guarantee the right to form trade unions by workers as part of the right to form associations generally. In Japan as well as in some European countries, the constitution guarantees the workers not only the right to form and join trade unions but also the right to bargain collectively with the employers and to subsequently withdraw their labour (under certain circumstances) as a way of enhancing their bargaining power n4. The constitutional protection is thus extended beyond the individual right to form and join trade unions to the collective rights of the trade union itself to pursue its objectives. In common law countries, the position is different. The constitution only recognises the fundamental right to form and join a trade union and no more. The rights to collective bargaining and to strike are not regarded as fundamental rights which parliament cannot by law temper with.

The position in most common law countries is best illustrated by the decision of the Privy Council in Collymore & Anor v Attorney-General of Trinidad and Tobago n5. The issue in the case was the constitutionality of the Industrial Stabilisation Act 1965, a law which established a system of compulsory arbitration and in the process abridged the rights to collective bargaining and to strike. The appellants, who were employees of an oil company, were also members of a trade union. The attempt of their trade union to negotiate a new collective agreement with their employer after the
expiry of an existing one was not successful because of the refusal of the employer to accede to the new demands of the union. Ordinarily, the workers would have embarked on a strike or other forms of industrial action in order to force the employer to negotiate with their union. But they could not do so because of some legal constraints contained in the law, which made the arbitration of industrial disputes compulsory. In fact the law had virtually imposed a system of compulsory arbitration for the settlement of trade disputes instead of strikes and lockouts. The appellants challenged the constitutional validity of the law on the ground that it infringed their fundamental right to form a trade union in order to protect their economic interests. They argued that the right to form a trade union also included the right to bargain collectively and to withdraw labour whenever that was found to be necessary.

Giving the judgment of the Board, Lord Donovon rejected the arguments of the appellants. According to the learned judge:

It is, of course, true that the main purpose of most trade unions of employees is the improvement of wages and conditions. But these are not the only purposes which trade unionists as such pursue. They have in addition in many cases objects which are social, benevolent, charitable and political. The last named may be at times of paramount importance since the efforts of trade unions have more than once succeeded in securing alterations in the law to their advantage n6.

The Malaysian Constitution guarantees every Malaysian citizen the right to form associations. Article 10(1) of the Federal Constitution reads as follows:

Freedom of speech, assembly and association
10. (1) Subject to clauses (2), (3) and (4)
   (a) ...;
   (b) ...;
   (c) all citizens have the right to form associations
Clause (2) (a) to (c) however give power to parliament to impose some legal restrictions on all the rights and freedoms guaranteed under cl (1). For our purpose, paragraph (c) is relevant. It gives power to parliament to impose legal restrictions on the right to form associations if it deems such restrictions 'necessary or expedient in the interest of security of the Federation or any part thereof, public order or morality' n7.

In addition to the restrictions that parliament may impose due to any of the grounds just mentioned, cl (3) provides that 'restrictions on the right to form association ... may also be imposed by any law relating to labour or education' This provision was inserted into the constitution in 1963 at the time of the merger of Malaya, Singapore and the Borneo territories to form Malaysia n8. It may be recalled that during this period, Singapore was experiencing some labour troubles. Singapore trade unions were under the firm control of the Communists and they were giving Lee Kuan Yew, his government, and the PAP, a tough time. The same may be said with regard to the Chinese schools and their students n9. So the insertion of cl (3) of art 10 into the constitution, at the time of the merger, may be seen in this perspective. The intention might have been to arm parliament constitutionally to be able to face any eventuality that might arise from that angle after the merger.

Three obvious points may be stressed at this stage. First, the right to form associations is guaranteed only to Malaysian citizens. Secondly, as Sheridan and Groves indicate, even in case of citizens, the protection afforded by the constitution is quite narrow because of the combined effect of cl (2) of art 10 and art 4(2)(b) of the same constitution n10. The latter constitutional provision prohibits challenging of the validity of any law on the ground that it imposes restrictions pursuant to art 10(2) even though such restrictions were not deemed necessary or expedient by parliament as required by the said articles n11. Finally, there is no reference to 'union' in cl (1), sub-cl (c) of art 10 as one of the
associations that citizens have the right to form. This 'omission' might have been a deliberate one. Analogous provisions in older constitutions and international instruments on human rights specifically cite 'trade union' as a specie of the associations that may be formed by individuals for the protection of their interests.\footnote{12}

It would have been interesting to see how the Malaysian courts interpreted the power given to parliament under cl (3) of art 10 to make law imposing restrictions on the right to form associations as long as that law related to labour or education. Unfortunately (or fortunately), as far as one can tell, there is not a single case on the provision. Tan and Li-Ann wonder whether the court would be helpless if a law relating to labour or education totally prohibits the right to associate.\footnote{13} Assuming that parliament makes a law totally abrogating the right of all the employees of a particular industry or company to form a trade union, can the employees challenge the constitutional validity of that law based on the right of freedom of association guaranteed by the constitution? Will the court see such law as valid since it concerns labour, one of the subjects over which parliament can impose restrictions regarding freedom of association? Will the court interpret the word 'restriction' in this context to include total abrogation of the right to form join a trade union?

These questions cannot be answered with certainty. We can however learn some lessons from cases decided by the courts regarding the constitutional validity of legislation made by Parliament. How many times for instance have laws made by Parliament been struck down because the courts had interpreted them to be inconsistent with one provision of the constitution or the other? What has been the attitude of Malaysian courts with respect to the fundamental rights guaranteed under the constitution most especially the right to form associations generally?

As indicated above, there have been no cases dealt directly by Malaysian courts on freedom of association for trade union purposes. Reference therefore has to be made to cases on freedom of association generally and then will apply them to situation relating to trade unions. We discuss below two decided cases on the issue. The first case is about the right of a member of an association to participate in the management of the association. The case arose following the enactment of a law restricting junior lawyers from membership of the Bar Council, an important organ of the Bar Association. Was the restriction an abridgement of the right to form an association? The second case is about defection by a legislator who is a member of one political party, to another political party, after he had won a legislative assembly election under the platform of his former political party. If a law prohibits that defection on the pain of vacation of the seat won, is that law a derogation of the right to form or join an association? Both cases have an indirect relevance to freedom of association for trade union purposes. By the decision in the Malaysian Bar case, the right of trade union members to elect their leaders without any interference from outside is no longer guaranteed as part of the right to establish trade unions. The Dewan Undangan Negeri Kelantan case is on the other hand relevant to the issue of trade union security.

*The Fundamental Right to Participate in the Management of an Association: Malaysian Bar & Anor v Government of Malaysia* \footnote{14}

In 1978, the Government of Malaysia amended the Legal Profession Act 1976 vide the Legal Profession (Amendment) Act 1978. Section 46A was introduced. This section disqualified lawyers of less than seven years standing at the bar from being elected as members of the Bar Council or a Bar committee or any committee of the Bar Council. The same prohibition was also extended to lawyers who were legislators, trade union leaders, political party leaders or leaders of any other organisation, body or group 'which has the objectives or carries on activities which can be construed as being political in nature'. The law gave the Attorney-General the power to declare an organisation as falling within the prohibition and at the same time ousted the jurisdiction of any court from entertaining a case challenging that declaration.

The Malaysian Bar challenged the constitutionality of the said s 46A through a suit in which it sought a declaration that it (the section) was 'ultra vires' art 10(1)(c) of the Federal Constitution guaranteeing freedom of association and therefore void under art 4(1) of the Federal Constitution.
It seems from the decision of the case as contained in the law report, no indication was given of the reason behind the amendment at that particular time. Why did the government feel that such a drastic measure was needed at that point in time? Although this question was not addressed by the court, the learned judge however explained the rationale of the disqualification of junior members of the Malaysian Bar from the membership of the Bar Council as follows:

In my opinion the powers and functions of the Bar Council and State Bar Committees ... must clearly be exercised by seniors of the profession and the disqualification from membership of these bodies by juniors is not unreasonable n15.

Regarding the justification for disqualifying the other classes of people, the learned judge argued that: The emphasis is for an independent Bar which is not subject to external influences of a non-professional character.

Now was the impugned section a derogation of the fundamental right to form or join an association? According to the learned judge:

I find no merit in the argument that the amendment is in violation of art 10(1)(c) of the Federal Constitution in that it violates the rights of citizens to form associations ... Nowhere in s 46A is there a provision to prevent a lawyer from being a member of the Bar. The question of freedom of association therefore does not arise n16.

More importantly, the learned judge held that: ... Article 10(1)(c) does not give any right to any citizen to manage any association but merely the right to form associations. In support of the conclusion that the right to form associations does not include the right to manage them, the learned judge cited the case of Azeez Basha v Union of India n17. He observed that there was no merit in the contention that the right of association had been violated because: Article 10(1)(c) does not give any right to any citizen to manage any association but merely the right to form associations: Azeez Basha v Union of India. I accordingly find that s 46A(1)(c) is not ultra vires art 10(1)(c) and therefore not void under art 4(1) of the Federal Constitution n18.

On the argument that the impugned law was discriminatory and therefore contrary to art 8(1) of the Federal Constitution guaranteeing the right to equality before the law and the equal protection of the law, the learned judge held that it was not. 'These provisions' says the learned judge, '... apply to all lawyers and are therefore, not discriminatory'. Our main interest in this case is on that part of it which held that the right to form associations does not include the right to manage them. We may however note the views of Sheridan and Groves regarding its holding on the issue of the right to equality n19. The learned authors have questioned the premises on which the learned judge built his conclusion that the law was not discriminatory. They have observed that: (1) contrary to what the learned judge said, the provisions of the impugned law were applicable to only some listed members of the legal profession and not all members, therefore in that sense, they could be said to be discriminatory; (2) the learned judge should have based his decision regarding the validity of the impugned
law on whether the discrimination contained in it was reasonable or not, since it was clear that the provisions of the law were indeed discriminatory; (3) there was nothing self-evident about the rationality of excluding certain members of a professional organization from holding some leadership positions in the organisation, just because those members appear to the outside world to lack independence; and (4) anyway it was not self-evident that holding the memberships listed makes one appear to lack independence.

Having described the position of Sheridan and Groves on the aspect of the judgment dealing with the right to equality, let us now examine more closely that aspect of it dealing the right to form to associations and the opinion of the learned judge that such right does not include the right to manage associations.

We may recall that the learned judge based his decision on the case of *Azeez Basha v Union of India*. One would have found the decision of the learned judge more informative, if an insight had been given regarding the *ratio* of *Azeez Basha*’s case and its link with the present case. In his wisdom, the learned judge did not consider that to be necessary. So all that we were told about the case was its title, citation and the fact that it was an authority for the proposition that the right to form an association does not include the right to participate in its management. In order to fill this gap in information, a perusal of the *Azeez Basha*’s case from the report became necessary.

A closer reading of *Azeez Basha*’s case revealed a wide dissimilarity between its facts and the facts of the present case. *Azeez Basha* dealt with the right of the Muslim minority of India to continue to administer an educational institution, the Aligarh Muslim University, which their ancestors had established mainly as a solution to the problem of educational backwardness. Initially, the institution operated as a college. When a decision was taken in 1919 to convert the institution to a university with full government recognition, it became necessary for government to back the establishment of the university with an act of the central government. It seems under the act, the government gave to itself very pervasive power over the control and administration of the university to the detriment of the Muslim minority. A later Amendment to the Act removed whatever little exclusive privileges that the Muslims used to enjoy over what they thought to be their university. They therefore challenged the constitutionality of the Amendment principally based on the provision of art. 30(1) of the Indian Constitution. Article 30(1) reads as follows: All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

The major point raised in the case was whether the Muslims could claim that the Amendment was unconstitutional because it deprived them of the right to administer an educational institution, which they had established. It was held that since the university was established by an act of the central government, it was for the government that established it to administer it, and therefore Muslims had no right to
administer an institution which they did not establish. The allegation of infringement of the right to freedom of association was raised as a subsidiary issue and the court did not give it much attention. At p 675 of his judgment, the learned judge had this to say: The next attack on the constitutionality of the 1965 Act is based on art 19, and the argument seems to be that the statute deprives Muslims of their right to acquire, hold and dispose property and to form associations or unions. The argument has merely to be stated to deserve rejection. We cannot understand how the 1965-Act deprives Muslim citizens of their right to form associations or unions...it is said that the Muslim minority has been deprived of the right to manage the Aligarh University...There is no force in this contention... Article 19(1)(c) does not give any right to any citizen to manage any particular educational institution. It only gives right to a citizen to form associations. That right has not been touched by the 1965 Act n20.

Now contrast this case with the Malaysian Bar case that is being examined. In the latter case, the bone of contention was a law which had picked some sections of the membership of an association and deprived them of the right to be elected or appointed to the membership of an important organ of that association. So the right of each individual in that category to participate in the decisions of an important organ of the association was in jeopardy. On the other hand, in Azeez Basha's case, the issue was the right of a religious group to administer an educational institution, which in their eyes was established by them. So while the first had to do with the right of individuals, the second had to do with the right of a group recognized under a self contained and unequivocal article of the constitution different from and in addition to whatever the constitution had provided for with regard to the right of association. The facts of the two cases are therefore such that one cannot be an authority for the other. One cannot therefore resist the temptation to conclude that as far as that aspect of it dealing with right to manage an association is concerned, the Malaysian Bar case was decided based on a wrong authority.

The Right to Disassociate: Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor n21

The impugned legislation in this case was art XXXIA of Pt I of the Constitution of Kelantan dealing with defection from one political party to another. Article XXXIA reads as follows:
If any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative Assembly and his seat shall become vacant.

The claim of the plaintiffs/respondents was that this provision was inconsistent with art 10(1)(c) of the Federal Constitution which guarantees the right to form association. They had resigned from the membership of the political party under the platform of which they were elected as members of the Kelantan State Legislative Assembly and joined the opposition party. The Legislative Assembly declared their seats vacant pursuant to art XXXIA of the State
Constitution and called for by-elections. They contested in the by-elections conducted to fill in the vacant seats. Candidates of their former party defeated them at the by-elections.

The High Court accepted their argument, struck down art XXXIA as unconstitutional, voided the by-elections and returned them to their seats as members of the Legislative Assembly. The winners of the by-elections and the Election Commission were not joined in the suit. The Legislative Assembly appealed to the Federal Court arguing that:

The learned High Court judge failed to appreciate that there was a distinction between the plaintiffs/respondents' right to be or continue to be members of the Legislative Assembly on the one hand and their right to form or join associations as guaranteed by art 10(1)(c) on the other.

The learned High Court judge failed to appreciate or consider the broader constitutional issues behind art XXXIA of the Constitution of the State of Kelantan.

There was the need for the plaintiffs/respondents to establish what their real complaint was in order to establish which of their rights had been violated.

Chapter 'D' of the General Orders had also imposed restrictions on civil servants right to form association in this context.

UMNO's Constitution also contained certain restrictions which going by the argument of the plaintiffs/respondents may also be said to be unconstitutional.

The learned High Court judge should not have made the declaratory order since the Election Commission and the winners of the by-elections were not before the court although any declaratory order made by the judge would adversely affect their interests and their right to be heard would thereby be jeopardized.

The Federal Court rejected all these arguments and unanimously affirmed the decision of the lower court. The court held that:

The right to freedom of association in art 10(1)(c) of the Federal Constitution guarantees to a citizen both right to join and not to join an association. Therefore any restriction on the right to dissociate like the type imposed by art XXXIA of the Kelantan Constitution was a derogation of the freedom and therefore unconstitutional. The court relied heavily on the minority decision in the case of Mian Bashir Ahmad & Ors v State of Jammu & Kashmir n22, a judgment of an Indian High Court, concerning defection by a legislator from the party under the platform of which he was elected, to another political party. The majority view in that case had rejected the argument that a law prohibiting defection on the pain of loss of a legislative seat was a derogation of the right to form and join associations. The majority view had called attention to the necessity of preventing political defections in India because of the threats such defections posed to the good functioning of parliamentary democracy in the country.

Abdul Hamid Omar LP, contrasted the position in India, concerning the threats that defections posed to democracy and the one in Malaysia. He concluded that in Malaysia, political defection was not a problem. He said:

The position in this country cannot, however, be said to be similar to the position in India then, for the background events to which we have
briefly referred have no parallel here. Certainly, no attempt
whatever was made either by the introduction of evidence or even by
way of argument to establish the contrary n23.

The learned Lord President then emphasized that in any case, the background events which led to the passing of the
law were irrelevant. According to him ‘... the highest of motives and the best of intentions are not enough to displace
constitutional obstacles’.

The learned Lord President went on to commend the minority judgment in Mian Bashir Bashir Ahmad’s case and
approvingly cited that portion of it which held that:

The legislation can be, of course, struck down if it directly infringes
the fundamental rights of a legislator but it can also be struck down
if the inevitable consequences of the legislation is to prevent the
exercise of the fundamental right guaranteed under art 19(1)(c) or make
the exercise of that right ineffective or illusory (Emphasis added.)
n24.

The learned Lord President then declared:
It is, in our view, inconceivable that a member of the legislature can
be penalized by any ordinary legislation for exercising a fundamental
right which the constitution expressly confers upon him subject to such
restrictions as only parliament may impose and that too on specified
grounds, and on no other grounds n25.

Concerning the argument that the winners of the by-election and the Election Commission had been denied the
right to be heard, since they were not joined in the suit although the declaratory order made would adversely affect their
interests, the court held that the grant of a declaratory order was discretionary; that nowadays the proposition that courts
should grant declaratory orders sparingly no longer holds; that since the declared winners of the by-election had made
no attempt to apply to be joined, it should not be claimed that their right to be heard had been denied to them. Edgar
Joseph Jr SCJ observed that ‘the State Legislative Assembly of Kelantan is, in reality ... fighting the suit on behalf of
them’ n26.

Ordinarily, the decision of the Supreme Court in this case should be commended for the protection it afforded to the
right of dissociation. There is no doubt that as far as the formation and the joining of political parties are concerned,
individuals should have an unfettered freedom of choice. No one should be forced to belong to a political party the
ideology, manifesto or programme of which he does not support or believe in. So politicians should be free to resign
from one political party and join another any time they so wish n27.

It is however very difficult to accept the argument that a law imposing an obligation on a political defector to
vacate his legislative seat won under the platform of his former party, is an abridgement of his right to resign from a
political party. This is because the law does not prevent him from resigning from one political party and joining another.
All the law requires is that after the resignation, such politician should vacate his seat for a by-election. The law does
not provide for an automatic vesting of the parliamentary seat in the defector’s former political party to be filled in by it
anyway it wants. All it does is to create a vacancy to be filled in through another election in which the defector’s new
party may contest, either by fielding him or by fielding another candidate. Under a parliamentary system of government
where the stability of an elected government rests heavily on the majority it has in the Legislature, this approach to the
problem of political defection is fair enough. It is fair to the political party from which the defector has resigned and the
support of which might have been very critical to the success of the defector in winning the election in the first place. It
is also fair to the electorate in the sense that if the motivation behind the election of the politician in question was the
programmed of his party and not his personality, a chance is now given to the electorate again to elect candidate of the same party. It is also reasonable.

It should be stressed here that the question of fairness comes to the fore in this particular case because of what happened after the Legislative Assembly had declared as vacant the seats of the two plaintiffs/respondents in this case. First, there were by-elections in which the two defectors contested for their lost seats under the platform of their new political party. One would have expected them to first legally contest the constitutional validity of the declaration of their seats as vacant, immediately that declaration was made. Apparently they did not do that. Instead, they acquiesced to it and agreed to participate in the by-elections under the platform of their new political party. Second, they lost the by-elections to the candidates of their former political party. This goes to show that their successes in the earlier elections were most likely due to the popularity of their former political party among the electorate and not due their popularity as candidates. It also raises question as to whether they would have claimed that their fundamental right of dissociation had been tempered with, if they had emerged successful in the by-elections. Third, there now arose some concern regarding the rights of the winners of the by-election and that of their political party. Finally, the credibility of the electoral system was also threatened. After the seats had been declared vacant, the Election Commission conducted by-elections and declared some people winners. If the returns of the Election Commission could be reversed by a stroke of a judicial pen, without hearing the declared winners or the Election Commission, won't public confidence in the electoral system be shaken thereby?

A prominent English judge once said that justice must not only be done, but must also be seen to have been done. The failure of the learned High Court judge to order for the joinder of the winners of the by-elections and the Election Commission despite the fact that he knew his declaratory orders would adversely affect their interests is, with due respect, a serious anomaly which should not have been affirmed or even condoned by the Supreme Court. The argument that the Legislative Assembly was fighting on their behalf did not adequately address the need for their right to fair hearing to be given to them.

The justification given in the minority view of Mian Bashir's case for the argument that the law in question was an abridgement of a legislator's right to dissociate is based on the Indian Supreme Court decision in the case of Smt Maneka Ghandhi v Union of India & Anor. In this case, the Supreme Court of India affirmed the view that in considering the effect of an impugned legislation on the fundamental rights protected by the constitution, the applicable test:

Is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right ... it is the effect of the law and the action upon the right which attracts the jurisdiction of the court to grant relief. The direct operation of the act upon the rights forms the real test.

In line with the doctrine of direct operation as stated above, the minority view in Mian Bashir's case held that: ... it is relevant to bear in mind that it is not the form but the effect of the legislation which is relevant and the court has to consider the direct and inevitable effect of the impugned legislation on the fundamental rights.

As noted earlier, the Kelantan law in question could not be said to have the direct and inevitable consequence of denying the defectors their right to dissociation. This is attested to by the fact that after they had resigned from their old political party, they were able to join another political party and even contest by-elections under its platform.

But more importantly, in the same case of Smt Maneka Ghandhi, the Supreme Court of India had emphasized the centrality of the right to fair hearing regarding the validity and fairness of any judicial or administrative decision. An important point raised before the court in that case was whether the principles of natural justice, one of which is the
right to be heard, should be regarded as inherent in any procedure to be prescribed by law. In that case, the passport of a
citizen had been impounded without affording her a reasonable opportunity of being heard in defence. Bhagwati J, speaking for the
majority, observed as follows:

A long course of decisions, beginning with Dr Bentley's case (1723)
1 Str 557 and ending with some very recent cases, establish that
although there are no positive words in the statute requiring that the
party shall be heard, yet the justice of the common law will supply the
omission of the legislature. The principle of audi alteram partem
which mandates that no one shall be condemned unheard, is part of the
rules of natural justice n32.

In short, even assuming that the impugned law was a derogation of the right of the defectors to resign from one
political party and join another, since the defectors had in fact not only resigned but also contested by-elections under
another political party and lost to the candidates of their former political party, justice required that no judicial relief
should have been granted to them, without giving the declared winners of the by-elections the right to make their case
before the court.

Now to conclude, if the principles established in Malaysian Bar and Dewan Undangan are to be applied to labour
organisations, the consequences on freedom of association could be emasculating. No member of a trade union would
for instance want to be excluded from participating in its management. In any case, it is contrary to trade union
democracy to do that. As for the fundamental right to dissociate, its application in case of labour unions would make the
use of closed shop in Malaysia unconstitutional.

Looking at the Indian judicial decisions regarding the scope of the fundamental right to form associations or unions
as guaranteed under art 19(1)(c) of the Indian Constitution, it seems the Indian courts have been confronted by two
broad questions. First, although there is no doubt that the right guaranteed is available to citizens of India only, whether
certain classes of Indian citizens can be excluded from the protection of the right despite the use of the term 'all citizens'
in the article. The courts have been called upon to decide whether for instance the right of government servants to
establish economic organizations or choose the particular organization to belong to could be abridged by the state.
Second, whether the right to form labour unions being part of the right guaranteed by the article, also includes the
fundamental right of the labour unions formed to pursue the objects for which they are established. In other words,
although the constitution of India has not, like that of Japan for instance, made any explicit reference to the fundamental
right to bargain collectively or the right to strike, whether such rights could be implied into the provisions of art
19(1)(c), in view of the fact that without these rights, labour unions cannot fully achieve their purposes.

It should be noted that the Malaysian courts have not, in the context of industrial relations, been faced with these
issues. The two Malaysian cases discussed above concerned a professional organization and a political party
respectively. One may therefore say that there is in Malaysia a somewhat de-constitutionalization of industrial relations.
By this we mean the exclusion of industrial relations issues from constitutional litigation n33. How this has been done
remains quite intriguing. One probable explanation for this is the presence of cl (3) of art 10 with the attendant
implication that in Malaysia, the right to form labour unions is not a fundamental right guaranteed by the constitution
n34.

Conclusion

Freedom of association in its ordinary constitutional sense means the freedom to work for the establishment of an
association, to belong to an association, to maintain it and to participate in its lawful activity without penalty or reprisal.
As we have already seen, freedom of association for trade union purposes goes beyond establishing, belonging to,
maintaining and participating in the activities of a labour union. Most labour lawyers and trade unionists would want it
to also include the fundamental right of the labour organizations to engage in collective bargaining with their employer
and where necessary the right to strike. The argument is that labour organization and collective bargaining are two sides
There are some constitutions notably that of Japan, which guarantee the fundamental right to bargain collectively and to strike in the same way as they guarantee the right of workers to organize. The Constitution of India guarantees to Indian citizens, including workers, the fundamental right to form associations or unions only. Judgments of Indian courts indicate that all categories of workers with the exception of those in the armed forces and the security forces have the right to freedom of association as defined above, subject only to reasonable legal restrictions in the interests of defence, public order or public morality. Attempts by government to restrict or abridge the freedom of association of government servants by for instance insisting that they have to get prior approval before establishing or belonging to a labour organisation have been nullified by the courts as unconstitutional. However the courts have refused to read into the constitutional text dealing with the right to form associations or unions the so-called concomitant rights of workers' unions to bargain collectively or to strike. This means that State may by law regulate collective bargaining and strikes.

In Malaysia, the constitution guarantees to Malaysian citizens the right to form associations. This right is however narrower in scope when compared with the scope of similar right under the Indian Constitution. The protection afforded to freedom of association under the Malaysian Constitution is liable to abridgement by parliament whenever it considers doing that to be necessary or expedient in the interests of public defence, public order or public morality. Such abridgement may or may not be reasonable. If a judgment of Malaysian High Court is anything to go by, the fundamental right to form association does not include the right to manage the association so formed. This means that some members of an association may be excluded by law from the right to participate in some of its activities. According to a judgment of the highest court in Malaysia, the fundamental right to dissociate is to be extended to workers, it means that compulsory unionism is unconstitutional in Malaysia.

Although the right to form associations for trade union purposes seems not to be argued as a constitutional right in the Malaysian courts, Malaysian workers however still enjoy such right under statutory provisions. For this, we may refer to relevant legislation such as the Industrial Relations Act 1967 where through ss 4 and 5, workers shall have the right to join a trade union and to participate in its lawful activities. Section 5 in particular renders any act of the employer unlawful for any act which is regarded as anti union discrimination. Cases heard by the Industrial Court under this section seemingly did not attract arguments of constitutional right instead they were just grounded on statutory right. However, to say that freedom of association for trade union purposes is not a constitutional right would not be completely correct as art 10(3) states that 'restrictions on the right to form associations may also be imposed by any law relating to labour'. The existence of such qualification or limitation means that such right is in fact recognised as one of the enshrined fundamental liberties under the federal constitution except that other laws are capable of restricting it.

FOOTNOTES:
n1 See paras 15, 8, 9 and 3, List I, Legislative Lists, Ninth Schedule of the Federal Constitution.


n3 Ibid, p 558.


n5 [1969] All ER 1207.

n6 Ibid, p 1211.

n7 According to Tan and Li-Ann, legislation made in Malaysia pursuant to this power include: The Societies Act 1966 which requires all societies to be registered, the Education Institutions (Discipline) Act 1966 (Act 174) which allows the executive to restrict students or student bodies from associating with certain organisations. The Internal Security Act 1960 (Act 18) which allows the relevant minister to order a person to refrain from associating with certain organisations (s 8(5)(d)) and upon suspending a detention order impose the above as a condition for release (s 10(1)). Labour organisation is governed by the Trade Unions Act (Act 262)). See Tan, Yeo & Lee's Constitutional Law of Malaysia and Singapore (2nd Ed), (Singapore: Butterworths, 1997), p 894.


n10 Sheridan and Groves, p 72.

n11 It reads as follows: 'The validity of any law shall not be questioned on the ground that ... (b) it imposes such restrictions as are mentioned in art 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that article'.

n12 For instance art 11(1) the European Convention on Human Rights provides as follows: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests'. (Emphasis added.)

n13 Tan and Li-ann, p 854, note 7.

n14 [1986] 2 MLJ 225.


n16 Ibid, p 228.
n17 AIR 1968 SC 662, p 675.

n18 [1986] 2 MLJ 225 at p 228.

n19 Sheridan and Groves, iii.

n20 Emphasis added.


n24 Ibid, p 712.

n25 Ibid, p 713.

n26 Ibid, p 724.

n27 Note however that just because there is a fundamental right to form associations, that should not mean, according to the Supreme Court of India, that the right to dissociate is also fundamental. See the Indian case of Tika Ramji v State of Uttar Pradesh AIR 1956 SC 812 at p 709 where Bhagwati J, observed thus, 'In the first place, assuming, that the right to form an association implies a right not to form an association it does follow that the negative right must be fundamental. The citizens of India have many rights which have not been given the sanctity of fundamental rights and there is nothing absurd or uncommon if the positive right alone is made a fundamental'.

n28 Since 1985, the constitutional position regarding political defections in India has been in line with the position in Jammu & Kashmir under the impugned law in the Mian Bashir's case. See art 102(2) and 191(2) and also para 2(a) of the 10th Schedule of the Indian Constitution. See also HK Saharay, The Constitution of India: An Analytical Approach (3rd Ed), (Calcutta: Eastern Law House, 2002), p 547.

n29 AIR 1978 SC 597.

n30 Ibid, p 634.

n31 AIR 1982 J&K 26 at p 59.

n32 AIR 1978 SC 597 at p 625.

n33 For instance, in the recent case of Menteri Sumber Manusia & 2 Ors v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar and Restaurant Semenanjung Malaysia [1997] 4 AMR 3841, the attempt of a trade union to impugn the constitutional validity of a regulation dealing with the procedure for electing a representative union was aborted by the Court of Appeal on the excuse that the issue was not raised at the court of first instance.

n34 The view that in Malaysia, the right to form labour unions is not fundamental may be doubted if one adverts his mind to an observation made (obiter) by Raja Azlan Shah FJ (as he then was) in the case of Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd [1976] 2 MLJ 67, p 69. According to the learned Federal Judge, 'Workers organisations cannot exist, if workers are not free to join them, to work for them and to remain in them. This is a fundamental right which is enshrined in our constitution and which expresses the aspirations of workmen. But then the learned judge made no specific
reference to any relevant constitutional provision probably because he was making the statement just by the way.

n35 Caire, 109.


n37 However the Federal Court had on one occasion indicated that workers have the right to associate: *South East Asia Fire Brick*’s case, see note 36 above.