

Title	Freedom of association in Ireland
Authors	Ó Conaill, Seán
Publication date	2024-03-01
Original Citation	Ó Conaill, S. (2024) 'Freedom of association in Ireland', Societās Working Paper 13/2024 (9pp). Cork: School of Law, University College Cork.
Type of publication	Working paper
Link to publisher's version	https://brill.com/view/journals/ejcl/12/1-2/ejcl.12.issue-1-2.xml
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Download date	2026-09-23 00:04:26
Item downloaded from	https://hdl.handle.net/10468/15723

Societās Working Paper 13/2024

March 2024

Global Perspectives on Freedom of Association: Ireland

Seán Ó Conaill



Global Perspectives on Freedom of Association Collection

The Global Perspectives on Freedom of Association collection is presented under the auspices of [“Societās: Exploring the Value of Freedom of Association”](#). The project is generously funded as a Laureate project of the Irish Research Council and hosted at the School of Law in University College Cork.

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Freedom of Association in Ireland

*Seán Ó Conaill**

I. Introduction

This article examines the nature, scope and the rationale that underpin the right to freedom of association as seen in Article 40.6.1(iii) of the Irish Constitution, which provides that:

‘The State guarantees liberty for the exercise of the following rights, subject to public order and morality: ... the right of the citizens to form associations and unions. Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.’

Prior to the independence, which came about albeit in limited form, in 1922 as a result of ratification of the Anglo-Irish Treaty of 1921 by the Irish people, Ireland was administered as a distinct region of the United Kingdom with the common law and British constitutional conventions shaping the law in Ireland. Given such a system lacked any written constitution or clear rights-based discourse, there is little to no lasting impact of this period on the modern Irish legal situation pertaining to the Right to Freedom of Association although the trade union movement in Ireland does trace its existence to the period prior to independence. Instead, the true start of the story of Freedom of Association in Ireland can be found with the coming into force of the 1922 Constitution of the Irish Free State. The wording of the right in Article 40.6.1(iii) of Ireland’s current Constitution repeats almost precisely the wording of Ireland’s first post-independence Constitution in 1922 in Article 9 albeit that it presented slightly differently. Ruling of Irish Courts and legislative enactments from 1922 onwards are thus most relevant when assessing the right of freedom of association.

Ireland, as a modern democratic state in the common law tradition with a written constitution, can be seen as a good comparator with similar states; however in the Irish context it is important to note some elements of the specific context. Constitutional rights are expressly written in the text, predominantly in the ‘Fundamental Rights’ section from Articles 40 to 44, although,

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beginning in the 1960s, the superior courts have also identified other unenumerated or derived rights which are protected by the Constitution.¹ Ireland has also incorporated the ECHR into its domestic law at a sub-constitutional level and, accordingly, whilst the right of freedom of association recognised therein² applies to Ireland it does so only insofar as it does not conflict with the Irish courts' understanding of the constitutional right.³ Furthermore, Ireland has specific provisions of its Constitution which relate to religious organisations which are dealt with in that context rather than being interpreted through the lens of freedom of association. Article 44 of the Constitution recognises the right to freedom of conscience and free profession and practice of religion and further provides that '[e]very religious denomination shall have the right to manage its own affairs ... and maintain institutions for religious and charitable purposes'.⁴ Similarly, equality considerations and equality legislation have been interpreted narrowly so as not to infringe on the right to association by the Irish Courts in *Equality Authority v Portmarnock Golf Club*.⁵

Part II of this paper considers how the constitutional right to freedom of association has developed within the Irish legal system. It explores the types of disputes that have appeared before the Irish Courts and the way in which the Courts have articulated that right, with the majority of cases concerning trade unions and their membership. Part III briefly reflects on the rationales as to why the right is an important but broadly speaking underdeveloped one in the Irish context.

II. Development, Nature and Scope of Freedom of Association

The constitutional development of the right of Freedom of Association in Ireland can be traced noting firstly the provision itself and secondly the type of cases that arise when interpreting the right.

The constitutional provision concerned with the right is relatively straightforward in its construction with the right being grouped together with rights regarding the freedom of

¹ For an overview, see G Hogan and others, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) chapter 7.1.

² See, of this series, M Cahill, 'Global Perspectives on Freedom of Association: European Convention of Human Rights' Societas Working Paper 08/2024.

³ M Cahill, 'The Rule of Law or the Rule of Rights? Five ECHR Misconceptions that the Courts Convincingly Refute' in Eoin Carolan (ed), *Judicial Power in Ireland* (Institute of Public Administration, 2018) 183.

⁴ See Hogan (n 1) chapter 7.9.

⁵ [2009] IESC 73.

expression and the freedom of assembly as rights which the State guarantees the exercise of subject to public order and morality.⁶ In the specific context of the right of freedom of association the right is framed as that ‘of citizens to form associations and unions’ although the provision does reserve the right of the legislature to enact legislation for the regulation and control in the public interest of the exercise of the right. Such legislation, however, is subject to specific control under Article 40.6.2, which provides that:

‘Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.’

The Irish Constitution, as a bilingual document, has two language versions being English and Irish. The Irish version of the text, which is the authoritative text in the case of any conflict between the language versions, does differ in a minor sense whereby instead of the word ‘union’ which appears in the English language text the word ‘cumann’ appears which approximates more to the word ‘society’ rather than ‘union’ when translated, however this difference has not been litigated and is ultimately minor.

The framing of the right and the majority of the subsequent interpreting of the right has been focused on its individual rather than collective dimension, although some more recent judicial comments in *Mohan v Ireland*,⁷ a case which concerned the impositions of gender quotas on political parties, suggested that some rights related to associations would only vest in the associations themselves rather than individuals. The Courts did hold in *PMPS v Attorney General*⁸ that the right does not extend to the right to form corporate bodies established under companies’ legislation but rather that it was ‘a right of citizens (in the plural) to form an association or associations with each other’.⁹

Although there have been legislative enactments relating to the formation of various types of associations these enactments have tended to be technical in nature focusing on trade unions,

⁶ See similar grouping of the right of Freedom of Association with other rights in jurisdictions such as Nigeria etc: see, of this series, F Amao, ‘Global Perspectives on Freedom of Association: Nigeria’ Societas Working Paper 09/2024

⁷ [2019] IESC 18 [32].

⁸ [1983] IR 339.

⁹ *ibid* 355.

corporate entities, political parties, and clubs who wish to sell alcohol. There is no general requirement under Irish law to engage in any formal process to establish an association.¹⁰

Trade Unions

A significant amount of the Court's time in assessing the right of freedom of association has been spent examining the extent to which the right applies in cases concerning trade unions.¹¹ Although some of the trade union cases can be limited to specific facts and circumstances relating solely to trade unions themselves, most of the cases are useful in setting out the parameters of the right. In *National Union of Railwaymen v Sullivan*,¹² the Court struck down a legislative provision which effectively granted a monopoly on new union membership to specific pre-approved trade unions who were in the majority in a workplace on the grounds that the monopoly prohibited citizens from freely associating with other unions and forming their own unions.¹³ Whilst workers cannot be forced to join a particular trade union, the Courts have also established that trade unions themselves are not compelled to accept members. In *Tierney v Amalgamated Society of Woodworkers*,¹⁴ the Court held that there was no compulsion upon a trade union to accept all applications and that it should be for members of an association alone to decide as to who they admit to their own association.

In *Aughey v Ireland*¹⁵ the Court relied upon the public order qualification of the right to uphold a prohibition on police officers joining a trade union on the basis that, due to their connection with the security of the State, police officers 'may have to accept limitations on their right to form associations and unions which other citizens would not have to accept'¹⁶ – the rationale for this decision of the Irish Courts echoes strongly with the qualifications found in Article 11.2 of the ECHR although the Irish decision has effect at a constitutional level.

¹⁰ See however *CMC Medical Operations Ltd v VHI* [2015] IECA 68, where Hogan J suggests that the right as contemplated by the Constitution requires some form of legal personality or incorporation.

¹¹ See generally B Wilkinson, 'Workers, Constitutions and the Irish Judiciary: a Jurisprudence of Labour Liberty?' (1989) 24(2) *Irish Jurist* 198.

¹² [1947] IR 77.

¹³ D Coffey, "'The Union Makes us Strong': *National Union of Railwaymen v Sullivan* and the Demise of Vocationalism in Ireland' in L Cahillane, J Gallen and T Hickey (eds) *Judges, Politics and the Irish Constitution* (Manchester: Manchester University Press, 2017) 182-198.

¹⁴ [1959] IR 254.

¹⁵ [1986] ILRM 206.

¹⁶ *ibid* 217.

An equally important element of the right to associate is of course the converse right to not associate or to be forced to associate. The leading case in this regard, *Educational Co of Ireland v Fitzpatrick (No 2)*,¹⁷ concerned the picketing of a premises by members of a trade union who wished to force other workers who were not members of the union to join it. The Plaintiffs sought and were granted an injunction to restrain the picketing on the basis that citizens were ‘free to join or not join an association or union’ as they pleased. In *Meskeil v CIÉ*,¹⁸ in applying the principle established in *Education Co of Ireland*, the Court held that an attempt by an employer to effectively force all of the employees under contract to join a particular trade union to continue on in their employment going forward with the company was an unjust interference with the right to dis-associate. Employees who were dismissed for not joining the favoured trade union were held to have had their constitutional rights breached and were accordingly entitled to damages. A contemporaneous decision to *Meskeil* handed down by the Court does however establish the limits of the principles upon which the decision was made. In *Murphy v Stewart*¹⁹ a worker wished to move from one union to another. The new union was willing to accept him as a member provided his existing union were consented to release him however the existing union gave no such consent. The Supreme Court held that such an arrangement between the unions did not amount to a breach of the worker’s right to associate as effectively his new union were ultimately deciding whether to accept him as member or not.

Non-Trade Union Development of the right

A limited amount of the development of the right of freedom of association in Ireland can be further seen in cases which do not relate to the question of trade unions. Political parties are regulated as associations within certain confines. There are no restrictions *per se* on the formation of political parties however to fully take part in the electoral process as political parties or avail of state funding, certain condition and requirements must be met. In *Lofthus v Attorney General*²⁰ it was held that a broad interpretation had to be given to legislative provisions which laid down preconditions for political parties so as not to offend against the right to freedom of association under the Irish Constitution. Accordingly, phrases from the relevant legislation such as ‘genuine political party’ and ‘organised to contest [elections]’ were not held by the Court to be high bars of entry and were given a less than strict interpretation.

¹⁷ [1961] IR 345.

¹⁸ [1973] IR 121.

¹⁹ [1973] IR 97.

²⁰ [1979] IR 221.

In the more recent case of *Mohan v Ireland*²¹ the Supreme Court considered whether a member of a political party who was denied the chance to stand for election due to his party wishing to comply with gender quotas²² had standing to challenge the relevant legislation given that the gender quotas were aimed at his party and not at him individually.

The Court noted that ‘it does not appear that membership of an association precludes an individual asserting that legislation directed towards the internal workings of that association is an impermissible interference with his freedom of association’,²³ although it should be noted that the Court recognised that while the concept of freedom of association was ‘constitutionally sensitive’ the gender quota legislation did pursue ‘an evidently important social goal’.²⁴ The final broad area where the right of freedom of association tends to come into focus in the Irish context is in the area of ‘unlawful organisations’ as defined by the Offences Against the State Acts, 1939-1998. These Acts and related legislation focus on prescribed terrorist organisations which were seen as a threat to the security of the State. Membership of such organisations is criminalised and sweeping powers are conferred upon the policing authorities and the non-jury Courts who deal with the related criminal offences.

III. Rationales for Protecting and Promoting Freedom of Association

The rationales offered for protecting and promoting freedom of association as a right are varied although a common theme emerges around communitarian and collective values. Hardiman J writing in *Equality Authority v Portmarnock Golf Club*²⁵ notes that the constitutional provision does not create the right of freedom of association but rather guarantees the liberty for its exercise noting that;

‘[t]he right to freedom of association is a pre-existing natural right, inhering in human kind by virtue of its rational and social being and is essential to the exercise of various other rights such as the right to engage effectively in political speech,

²¹ [2019] IESC 18.

²² The relevant legislative provision being section 17(4B) of the Electoral Act 1997 (‘the 1997 Act’), as inserted by section 42(c) of the Electoral (Amendment) (Political Funding) Act 2012 does not impose absolute gender quotas but rather limits funding to political parties who fail to comply with the quotas for the number of candidates running for election.

²³ [2019] IESC 18 [33].

²⁴ *ibid* [41].

²⁵ [2009] IESC 73.

to organise for industrial purposes or otherwise, to take part in elections, to participate in sporting or cultural event, and many more.’²⁶

Whyte notes for example that the protection of freedom of association in the context of trade unions was very much aligned with the values of Catholic social teaching and that the strong Catholic influence on the Irish Constitution could account to some degree for the protection of the right whereby he notes ‘Catholic Social Teaching provided a basis for the protection of communitarian values through the Constitution’.²⁷ Daly and Hickey argue that freedom of association in the Irish Constitution can be interpreted as ‘enabling citizens to exercise their “powers of moral personality”...and develop their comprehensive doctrines or “conceptions of the good” through collective activity in various social contexts’.²⁸ They further argue that the protection of associational framework facilitates the exercise of democratic contestation in which various civic activities typically occur and accordingly this might account for the constitutional focus on activities such as political and trade union activities.²⁹

Although most scholarship has tended to focus on the trade union dimensions there exists little appetite within the literature for any wide-ranging changes nor are many of the critiques withering of the current arrangements. When reviewing the entire Constitution in 1996, the Constitutional Review Group advocated for little change to the general right of freedom of association describing it as ‘generally satisfactory’,³⁰ although some preference was expressed for limitations of the sort seen in the ECHR particularly at Article 11.2 of the Convention to be incorporated into the Constitution.

²⁶ [2009] IESC 73, 11 of the judgment of Hardiman J.

²⁷ G Whyte, ‘Catholic Social Teaching and Freedom of Association in Ireland’ (2019) 108 *Studies: An Irish Quarterly Review* 421, 429.

²⁸ E Daly and T Hickey, ‘The Political Theory of the Irish Constitution: Republicanism and the Basic Law’ (Manchester: Manchester University Press, 2015) 70.

²⁹ *Ibid.*

³⁰ Constitution Review Group, *Report of the Constitution Review Group*, Pn 2632 (Dublin: Stationery Office, 1996) 290.