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Global Perspectives on Freedom of Association: Spain

Guillermo A Morales Sancho

Societās Exploring the Value of Freedom of Association

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Freedom of Association in Spain

Guillermo A Morales Sancho[*]

I. Introduction

The Spanish mainstream constitutional scholarship defines association as a voluntary, stable, and organised union of two or more people for the pursuit of common ends.[1] Freedom of association is protected as a fundamental right under Article 22 of the Spanish Constitution and enjoys a multilevel recognition: universal (Articles 20 UDHR, 22 ICCPR and ICESCR), regional (Articles 11 ECHR, 12 EUCFR), and legal (mainly in the Organic Law 1/2002 – hereinafter 'LODA'). The cited international agreement dispositions were incorporated into national law after their ratification and publication in the Spanish official bulletin (BOE). Most importantly, both the ECHR and the ECJ case-law bind the interpretation of the Spanish Constitutional Court[2] regarding the fundamental right of association. There is a specific clause (Article 10.2 of the Spanish Constitution) ordering such a conform interpretation that the Constitutional Court has extended to the European Courts' (Strasbourg and Luxembourg) case-law, but not to the observations of treaty bodies in charge of the supervision of international human rights agreements (soft-law), which are only seldom (and selectively)[3] cited by the Constitutional Court. In the scope of application of EU-Law, the Spanish authorities are directly bound by Article 12 of the Charter of Fundamental Rights of the European Union (EUCFR) and the uniform interpretation provided by the ECJ.[4]

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[1] ÁJ Gómez Montoro, 'Artículo 22 CE' in M Rodríguez-Piñero and Bravo Ferrer and ME Casas Baamonde (eds), *Comentarios a La Constitución Española: XL Aniversario* (2nd edn, Madrid: Fundación Wolters Kluwer, Boletín Oficial del Estado, Tribunal Constitucional y Ministerio de Justicia, 2018) I, 656; JJ Anzures Gurría, *La Protección Constitucional de Las Asociaciones. Sobre La Dimensión Colectiva Del Derecho de Asociación* (Madrid: Centro de Estudios Políticos y Constitucionales, 2014) 71–85.

[2] Hereinafter, the STC.

[3] Dissenting vote part 4 of Arnaldo Alcubilla and Tolosa Tribiño to the STC 44/2023.

[4] STC 26/2014; C-399/11, *Melloni* ECLI:EU:C:2013:107; M Ruffert, 'Art. 12 Versammlungs- und Vereinigungsfreiheit' in C Callies and M Ruffert (eds), *Das Verfassungsrecht Der Europäischen Union Mit Europäischer Grundrechtscharta* (6th edn, München: CH Beck, 2022) 2741–5; J Shaw and L Khadar, 'Article 12 (2) Political parties' in S Peers and others (eds), *The EU Charter of Fundamental Rights* (2nd edn, Oxford, New York, Dublin: Hart, Beck, Nomos, 2021) 395–404, doi: 10.1057/ap.2013.23; F Dorssemont, 'Article 12 (1) Freedom of Assembly and of Association' in S Peers and others (eds), *The EU Charter of Fundamental Rights* (2nd edn, Oxford: Hart, Beck, Nomos, 2021) 371–94.

Legally, apart from the national statute (LODA), 5 out the 17 Spanish Regions (*Comunidades Autónomas*) have passed their own specific association acts, even though only two of them have the competence to do so.[5] Additionally, there are countless types of associations (sports, religious, cultural, parents and students' associations) regulated through specific statutes.[6] The result is an electronic code of around 1,000 pages.[7] As of the 31st of December 2021, there were 62,438 registered associations in Spain.[8] Not included in that figure (they feature in a different Register) is the Spanish agelong tradition of religious brotherhoods, fraternities and communities, so vast that it rivals the exuberant English association culture.

Unionisation, strike and collective bargaining are protected as separate fundamental rights (Articles 28, 37 of the Spanish Constitution). Political parties are a subspecies of associations (Article 22 of the Spanish Constitution). Unions and parties are required to have an internal democratic organisation and thus are subject to higher judicial scrutiny than regular associations (Article 6 of the Spanish Constitution).[9] For-profit corporations are protected as well under the fundamental rights of free enterprise (Article 38 of the Spanish Constitution) and property (Article 33 of the Spanish Constitution), both enjoy a lower constitutional protection than associations (Article 53.2 of the Spanish Constitution).

II. Historical Background

Before the 1978 Constitution, the recognition of the right was either merely formal - because subject to previous administrative authorization - or directly banned. The XIXth Century Spanish Liberalism, deeply influenced by the French *Chapelier Law*[10] and Rousseau's political thought, did not formally recognize the right to associate until 1869. Before that date, the Penal Code established the regulation and limits of tolerated associations regarded as suspicious political rivals. The above mentioned 1869 constitutional recognition of freedom of association

[5] ÁJ Gómez Montoro, *Asociación, Constitución, Ley. Sobre El Contenido Constitucional Del Derecho de Asociación* (Madrid: Centro de Estudios Políticos y Constitucionales, 2004) 223–30.
[6] Anzures Gurría (n 1) 85–92.
[7] JR Rojas Juáres (ed), *Código de Asociaciones* (Madrid: BOE, 2023).
[8] Ministerio del Interior, Anuario Estadístico del Ministerio del Interior 2021 (2022) <https://www.interior.gob.es/opencms/es/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-anteriores/anuario-estadistico-de-2021/> (accessed 6 January 2024).
[9] STC 226/2016.
[10] In 1793 the Spanish Government banned every professional association (guilds), a decision later confirmed by the Parliament.

was subject to such governmental constraints that no private association could survive without the State's approval and constant supervision.[11]

The same can be said about the 1876 Spanish Constitution, in force until 1923. During the brief and turbulent period of the II Republic (1931-1936) leading up to the Spanish Civil War, the unstable governments selectively protected those associations ideologically aligned with them. Religious institutions and instruction were banned. During the Franco authoritarian Regime, the right was formally recognised under Article 16 of the Fundamental Law and a 1964 statute. Nevertheless, the administrative oversight was so intense that no real pluralism was permitted.[12]

Hence, only the democratic transition and the 1978 Spanish Constitution did - properly speaking - protect freedom of association in its "Tocquevillean" terms.[13] The following constitutional interpretation of the Constitutional Court assumed the American liberal tradition as their own by heavily relying on the German Federal Constitutional Court opinions.[14] The German influence in Spanish public, and specifically, constitutional law has a long history. The Spanish 1978 fundamental rights catalogue and constitutional adjudication system were modelled on the Federal Republic of Germany 1949 Fundamental Law.[15] In the last two decades, however, that influence has shifted to the Strasbourg case-law.[16]

[11] Gómez Montoro (n 5) 43–53.
[12] Cf B Olías de Lima Gete, *La Libertad de Asociación En España (1868-1974)* (Madrid: Instituto de Estudios Administrativos, 1977).
[13] Gómez Montoro (n 5) 59–69.
[14] Anzures Gurría (n 1) 56; N Schacks, '§ 116 Allgemeine Vereinigungsfreiheit', in K Stern, H Sodan, and M Möstl (eds), *Das Staatsrecht Der Bundesrepublik Deutschland Im Europäischen Staatenverbund* (2nd edn, München: CH Beck, 2022) IV, 513–36.
[15] Cf A Gallego Anabitarte, 'La influencia extranjera en el Derecho administrativo español desde 1950 a hoy' (1999) 150(4) Revista de Administración Públic*a* 75–114; ÁJ Gómez Montoro and F Simón Yarza, 'La influencia del Derecho extranjero en el Derecho público español' (2016) 106(1) Revista Española de Derecho Constitucional 73–118, doi: 10.18042/cepc/redc.106.02; HJ Blanke and others, *Verfassungsentwicklungen Im Vergleich. Italien 1947 – Deutschland 1949 – Spanien 1978* (Berlin: Duncker & Humblot, 2021), doi: 10.3790/978-3-428-55929-9; A Truyol and Serra, 'Das Bonner Grundgesetz und die spanische Verfassung von 1978', in K Stern (ed), *40 Jahre Grundgesetz. Entstehung, Bewährung Und Internationale Ausstrahlung* (München: CH Beck, 1990) 235–41; P Cruz Villalón, 'La Ley Fundamental en la evolución constitucional española (1978-2008)' in C Hohmann-Dennhardt, R Scholz, and P Cruz Villalón (eds), *Las Constituciones Alemana y Española En Su Aniversario* (Madrid: Centro de Estudios Políticos y Constitucionales, 2011) 43–59.
[16] Gómez Montoro (n 1) 661.

III. The Spanish Legal Framework

We now synthetically describe the current regulation on freedom of association and its boundaries in the Spanish jurisdiction.

(i) Freedom of Association's Nature and Content

Freedom of association is a 'constitutionalised human right'.[17] As is common among fundamental freedoms,[18] Article 22 of the Spanish Constitution encompasses both a positive (right to associate) and a negative (right not to associate and to disassociate) aspect. Unlike individual freedoms, its social character implies both rights of individual and collective exercise.[19] Because of its institutional dimension (the creation of a new entity), the legal person resulting from human coordinated efforts is a holder of the freedom of association as well.[20] Freedom of association is neither a social right[21] nor a right to in-kind or cash transfer benefits; it does not imply state positive obligations to subsidise associations (ATC 162/1995). Nonetheless, public funding (direct or indirect through tax-credits) cannot be granted based on discriminatory criteria including suspect classifications such as ideology, sex, race, or religion (Article 14 Spanish Constitution).

Positive Aspect

Freedom of association's positive aspect comprises the following rights of individual exercise: the right to associate, to demand the compliance with the association's constitution (internal rules), to participate in the association's activities and the right to be heard in disciplinary procedures (Article 21 LODA). It does not include, however, a right to the unmodifiability of the association's purposes.[22]

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[17] ÁJ Gómez Montoro, 'La obsolescencia de los derechos' (2019) 115(1) Revista Española de Derecho Constitucional 47–79, 55; K Stern, '§ 62 Die Universalität der Menschen- und Grundrechtsidee', in K Stern (ed), *Das Staatsrecht Der Bundesrepublik Deutschland. Allgemeine Lehren Der Grundrechte* (München: CH Beck, 1988) III/1, 209–312.

[18] Cf J Hellermann, *Die Sogenannte Negative Seite Der Freiheitsrechte* (Berlin: Ducker & Humblot, 1993).

[19] Anzures Gurría (n 5) 58–70.

[20] ibid 99–133.

[21] As understood in human rights law, cf M Scheinin, 'Economic and Social Rights as Legal Rights' in A Eide, C Krause, and A Rosas (eds), *Economic, Social and Cultural Rights* (2nd edn, Leiden: Martinus Nijhoff, 2001) 29–54; D Murswiek, '§ 192 Grundrechte als Teilhaberechte, soziale Grundrechte', in J Isensee and P Kirchhof (eds), *Handbuch Des Staatsrechts Der Bundesrepublik Deutschland* (3rd edn, Heidelberg: CF Müller, 2011), IX, 569–619, 43-70.

[22] Anzures Gurría (n 1) 54–70.

As the association is the holder of the freedom, it can collectively exercise the right to join federations and most importantly the right to self-organise, which includes the authority to determine its: headquarters, activities, name, purposes, rules, and discipline (i.e., the admission and expulsion of members). This crucial aspect of freedom of association is the so-called institutional or collective dimension.[23]

Negative Aspect

The negative aspect (explicit in Article 20.2 UDHR) has also been recognised by the Constitutional Court as an inherent part of freedom of association. It comprises both the right not to create associations or join them and the right to disassociate. This right is held by the association itself. In other words, no association can be compelled to create or join federations and it holds the right to step out of them.

Interestingly enough, the Constitutional Court[24] and afterwards the legislation (Article 2.9 LODA) have recognised a further protection of this negative aspect of freedom of association, namely, the prohibition of discrimination based on membership or affiliation. It is referred to as the indemnity guarantee (exclusion of backlash and retaliation resulting from the legitimate exercise of fundamental rights).

(ii) Freedom of Association Protection

General

As with every other fundamental right in the Spanish Constitution, freedom of association's essential content cannot be abrogated (Article 53.1 of the Spanish Constitution), its legal development requires an organic statute (passed by the absolute majority of the Spanish Congress, Article 81.1 of the Spanish Constitution),[25] and every restriction must respect the principle of proportionality - the observance of which is guaranteed by judicial control, particularly that of the Constitutional Court.

[23] ibid 128–35.
[24] SSTC 40/1993, 191/1998.
[25] Its detailed regulation, however, can be addressed by an ordinary statute (Article 53.1 of the Spanish Constitution) which requires relative majority (Article 79.2 of the Spanish Constitution).

Judicial Review of Internal Affairs

The scope of judicial review[26] of an association's decisions is limited to an external control - i.e., that these decisions have been adopted in accordance with the association's internal rules (constitution) and procedures. The standard of scrutiny for such a review - according to SSTC 218/1988, 42/2011 FJ 3 - is mere reasonableness (non-arbitrariness).[27]

If the association holds a dominant (either monopolistic or preponderant) position in the concerned social or economic field, the scrutiny is heightened in decisions regarding admission, discipline, and expulsion of members. The same is true when the association's decisions have a significant economic impact on its members.[28]

Even if an associative entity has a dominant position, the judicial control neither applies to so-called 'expressive associations' nor to 'ideological/tendency enterprises'.[29] Therefore, decisions on their internal organisation are in principle immune from judicial review, with the exception of public order violations.[30]

This doctrine has been elaborated by the Spanish Constitutional and Supreme Courts' caselaw in dialogue with the ECHR and ECJ jurisprudence. Some scholars have defended the need of a law regulating the limits of associations' right to internal self-organization given the scarce attention devoted by the Constitutional Court to the topic.[31]

(iii) Illegal and banned associations

Associations with criminal purposes or means are constitutionally and legally banned (Articles 22.2 of the Spanish Constitution, 515-521 of the Penal Code) as well as secret and paramilitary

[26] J González Pérez and G Fernández Farreres, *Derecho de Asociación. Comentarios a La Ley Orgánica 1/2002, de 22 de Marzo* (Madrid: Civitas, 2002) 301–4, 415–20.
[27] Anzures Gurría (n 1) 441–67.
[28] ibid 334–439.
[29] The concept - adopted by the Constitutional Court, see SSTC 38/2007, 128/2007 and 51/2011 - is imported from the German legislation (§118 *Betriebsverfassungsgesetz*) that recognises a special status of the so-called *Tendenzbetrieb/-unternehmen*. Its influence has grown due to the ECJ case-law regarding ethos-based institutions and the application of article 4 of Directive 2000/78. Cf JP Schouppe, 'Hacia un régimen jurídico de las empresas de tendencia a la luz de la jurisprudencia europea' (2019) 59(1) Ius Canonicum 121–58.
[30] ibid 134–5.
[31] D Giménez Gluck, 'Asociación, discriminación y Constitución: los límites entre la autonomía asociativa y el derecho de los socios - y aspirantes a serlo - a no ser discriminados' (2010) 79(3) Revista de Derecho Político 143–71, 164–8, doi: 10.5944/rdp.79.2010.9132; JM Bilbao Ubillos, *Libertad de Asociación y Derechos de Los Socios* (Valladolid: Universidad de Valladolid, 1997).

ones (Articles 22.5 of the Spanish Constitution, 2.8 LODA). Consequently, the social phenomenon does not enjoy the constitutional protection of associations. The criminality of the means or purposes is a negative element of the fundamental right.[32] Hence, those associations are not protected under the constitutional provision of Article 22 of the Spanish Constitution. Until its dissolution, its lawful appearance enjoys the benefits of a putative association. Unlike other jurisdictions, there are no suspect associations in Spain.

They can be dissolved only by the judicial authority, not by the administration (Article 22.4 of the Spanish Constitution and Article 38 LODA).[33] As for political parties, there is a particular dissolution procedure (party illegalisation) before a specialised Supreme Court's Chamber (Article 61 LOPJ). Only the Government and the Attorney General have standing to initiate such illegalisation (Article 11.1 LOPP). The Political Parties Act 6/2002 was introduced to combat the Basque terrorist group ETA's infiltration in the democratic institutions. Several parties related to ETA and their succeeding associations have been outlawed through this mechanism. The statute was challenged before the Constitutional Court and its application before the ECHR. Both Courts declared the law compatible with the Constitution and the European Convention.[34]

(iv) Registration

Registration is only needed for publicity purposes (Article 22.3 of the Spanish Constitution, 10.1 LODA); that is, for the creation of a separate association's capital and to guarantee the entity's liability towards third parties. Without registration, associations exist but their members are directly and personally liable before third parties (Article 10.3 LODA).[35] Registration is considered a right of the association[36] and a duty of the competent administrative office,[37] who must grant the inscription and can only refuse it based on legally enumerated grounds (Article 24 LODA). In other words, the administration does not enjoy any

[32] For a deeper explanation about the typus negative elements theory (originally taken from criminal law), cf M Sachs, *Verfassungsrecht II - Grundrechte*, 3rd edn (Berlin: Springer, 2017) 119, n 11.
[33] González Pérez and Fernández Farreres (n 26) 421–31.
[34] STC 48/2003; ECHR cases *Herri Batasuna and Batasuna v Spain* App nos 25803/04 and 25817/04 (ECHR, 30 June 2009); *Etxeberria and others v Spain* App no 35579/03 (ECHR, 30 June 2009); *Herritarren Zerrenda v Spain* App no 43518/04 (ECHR 30 June 2009).
[35] Gómez Montoro (n 5) 183–5.
[36] González Pérez and Fernández Farreres (n 26) 321–4, 349–75.
[37] Gómez Montoro (n 5) 188.

discretion as the act of inscription/incorporation is a 'ministerial function' ('*actuación/verificación reglada*').[38] Only registered associations can apply for the 'public utility association' status in order to enjoy certain tax benefits and state financial support (Articles 31-36 LODA).

IV. Caselaw Overview

There is a relatively developed body of case-law from the superior courts on freedom of association: 192 opinions from the Constitutional Court and 1,241 cases decided by the Supreme Court.[39]

In comparison to other rights, this corpus is similar to the one developed on freedom of religion (Constitutional Court: 179, Supreme Court: 1,665), smaller compared to privacy (Constitutional Court: 269, Supreme Court: 4,292) and significantly less developed than free-speech case-law (Constitutional Court: 292, Supreme Court: 12,418). Most judicial opinions are unanimous. Only in sensitive topics related to religion, discrimination or contested social issues, are split decisions to be found.

The most frequent kinds of disputes are: 1) expulsion of members and the limits of organisational autonomy.[40] As already stated, these cases are usually resolved in favour of the association.[41] 2) Admission of members based on suspect classification criteria and the limits of organisational autonomy.[42] 3) Compulsory membership to professional colleges in order to practice a certain profession (eg, medicine, law, auditing) and the right not join an association. The Constitutional Court has developed a test to check the need of such a mandatory requirement.[43] 4) Illegalisation of political parties related to the Basque terrorist nationalist group ETA.[44] Lately, however, the focus has shifted towards cannabis associations.[45] 5) Registration denial and the legal benefits derived from it.[46]

[38] STC 67/1985; ibid 186–8.
[39] As of 29 March 2023.
[40] Anzures Gurría (n 1) 381.
[41] ibid 404–6.
[42] SSTS Civil Chamber 13.9.2002 (rec. 2239/1998), 15.1.2007 (rec. 6997/2002).
[43] Gómez Montoro (n 1) 662.
[44] SSTC 48/2003, 31/2009, 62/2011, 138/2012.
[45] SSTC 144/2017, 100/2018.
[46] STC 46/2001; Gómez Montoro (n 5) 174–88.

V. Freedom of Association and Neighbouring Rights

Freedom of association frequently overlaps with other fundamental rights. These conflicts of norms with equal constitutional nature and hierarchy are resolved with two basic principles:[47] *lex specialis* (the right more directly involved is the one applied[48]) and conjunction of rights (the simultaneous application of two fundamental rights that reinforces the protection of a specific conduct[49]). The absorption[50] rule (that a generic fundamental right is to be applied instead of a more specific constitutional provision) is only applied when the generic right enjoys a more robust constitutional protection than the specific one.

In the case of free speech, so-called expressive (tendency) associations - those created for the advocacy and promotion of a specific doctrine or ideal - are more robustly protected than regular ones. They can openly discriminate on the basis of ideology for membership, permanence and expulsion. Otherwise, society's internal pluralism would simply vanish. Political parties are a paradigmatic example of that type of association.

Freedom of assembly protects the non-permanent union of persons for a common purpose (Article 21 of the Spanish Constitution). The stability of the organisation and people's commitment is the differentiating element when compared to association (Article 22 of the Spanish Constitution).[51]

As almost every denomination is a social phenomenon, both the collective and institutional dimensions of religious freedom - namely, worship and denominations' legal status - are protected under freedom of religion in Article 16 of the Spanish Constitution. Religious communities have a specific official register - dependent on the Ministry of Justice - different from regular associations. This is an example of the *lex specialis* criteria.

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[47] ibid; Sachs (n 33) 205–11.
[48] The Constitutional Court has used it in several cases of equality (Articles 14 and 39 of the Spanish Constitution, regarding the investigation of paternity) and judicial protection.
[49] Notable examples of this reinforced protection are: i) free speech and right to judicial protection when lawyers represent their clients (STC 142/2020), ii) free speech and assembly in case of public demonstrations (STC 24/2015).
[50] Cf Sachs (n 33) 208–9, n. 8. It is known as the consumption principle in criminal law (article 8.3 of the Penal Code).
[51] SSTC 88/1985, 184/2021 FJ 12.

The right to personal and familial intimacy under Article 18.1 of the Spanish Constitution (remarkably smaller in scope than the Article 8 ECHR right to respect for private and family life) protects both family relationships and, in conjunction with freedom of assembly, private gatherings (family, friends, acquaintances).[52] Intimate associations, however, are not a specific category in Spain.

VI. The Third-Party/Horizontal Effect of Fundamental Rights

As a general principle (cf Article 53.1 of the Spanish Constitution), fundamental rights are public subjective rights before public powers (legislature, executive and judiciary). Only certain fundamental rights are conceived primarily as rights between private parties: namely, collective bargaining, strike and lock-out (Articles 37, 28.2 Spanish Constitution) between workers and the employer. Other fundamental rights (privacy, equality) designed primarily against state authorities are said to unleash an indirect or mediate third-party/horizontal effect through legislation, state positive obligations (due protection of private parties from dominant social forces) and judicial interpretation of legislation's open clauses and indetermined juridical concepts (so-called fundamental rights 'irradiation effect').[53]

If we consider Freedom of Association, that fundamental right is held both by physical and legal persons against the State, but does not rule the associate-association relationship which is regulated by civil law (infra-constitutional norms). The relationship between private right-holders (either physical or a legal person) and the state, however, is regulated by the constitutional right to freedom of association. Consequently, only a public authority can breach a private person's *fundamental right* to freedom of association. Such difference is procedurally very significant as regular disputes between members and the association (both private parties) are merely legal (infra-constitutional) and, hence, cannot reach the Constitutional Court (just

[52] STC 148/2021 FJ 5 a) *in fine.*

[53] J Alfaro Águila-Real, 'Autonomía privada y derechos fundamentales', *Anuario de Derecho Civil*, (XLVI) (1993) 57–122; JM Bilbao Ubillos, *La Eficacia de Los Derechos Fundamentales Frente a Particulares: Análisis de La Jurisprudencia Del Tribunal Constitucional* (Madrid: Centro de Estudios Políticos y Constitucionales, 1997); JM Bilbao Ubillos, 'La consolidación dogmática y jurisprudencial de la drittwirkung: una visión de conjunto' (2017) 21 Anuario de La Facultad de Derecho de La Universidad Autónoma de Madrid 43–74; J García Torres, A Jiménez-Blanco and Carrillo de Albornoz, *Derechos Fundamentales y Relaciones Entre Particulares. La Drittwirkung En La Jurisprudencia Del Tribunal Constitucional* (Madrid: Civitas, 1986); HJ Papier, '§ 55 Drittwirkung der Grundrechte', in HJ Papier and D Merten (eds), *Handbuch Der Grundrechte in Deutschland Und Europa* (1st edn, Heidelberg: CF Müller, 2006), II, 1331–61.

the Supreme Court). *Inter-privatos* disputes are - as a general rule - excluded from the 'constitutional complaint' ('*recurso de amparo'*).[54] Again, only those cases in which a public authority is involved have access to the constitutional complaint.

This general doctrine has an exception which is the fundamental rights' mediate or indirect horizontal effect between the association and the associate:

> '…the right of association also has ... a fourth dimension, this time *inter privatos*, which guarantees a range of powers to members considered individually with respect to the associations to which they belong - or, as the case may be, to individuals with respect to the associations they intend to join.'[55]

This *inter privatos* dimension protects the right of each associate to demand the associations' compliance with their internal rules and to react against disciplinary procedures in which the basic association articles have not been respected. It neither awards a right to be admitted as associate, nor a right to be treated equally in relation to other candidates for membership.[56]

(i) Equality and Anti-Discrimination Law

Equality and non-discrimination (Article 14 of the Spanish Constitution) cannot be imposed on associations against their internal *ethos*. Again, unlike public authorities, associations are not immediately obliged by private parties' fundamental rights. Only non-expressive dominant associations can be required to comply with Article 14 of the Spanish Constitution (equality and anti-discrimination law).[57] For instance, becoming a member of Real Madrid Sports Club cannot depend on suspect classifications (except the ideological support of the team).[58]

[54] See article 41.2 Organic Law of the Spanish Constitutional Court.
[55] STC 173/1998.
[56] Anzures Gurría (n 1) 343–55; J Alfaro Águila-Real, 'La asociación: parte especial', *Almacén de Derecho*, 2020. Contending the opposite opinion, Giménez Gluck (n 32) 150–151.
[57] Anzures Gurría (n 1) 362.
[58] Cf Article 11, *Estatutos Sociales*, Real Madrid <https://www.realmadrid.com/socios/carnet-de-socio/estatutos-sociales> accessed 6 January 2024.

The two landmark cases on the "Alarde"[59] - a traditional celebration in Fuenterrabía (Spain) - are the litmus test of equality's third-party effect. In the first one (2002), the association organising the event was held by the local council. Hence, women could not be excluded from the participation in certain roles of the official parade (marching dressed up as soldiers in the different platoons). Years later, however, the event was organized by a private association which competed with an alternative entity that allowed women to assume the soldier's role. In this second case, the Supreme Court ruled in favor of the association declaring that equality could not be imposed on it since it was a private entity without a monopolistic position (there was an available alternative).

A notable recent example (STS Civil Chamber 925/2021, 23/12/2021) concerned the case of a religious confraternity (only for males) devoted to the Adoration of an Image of Christ in La Laguna (Canary Islands). Women challenged the exclusion from admission - even though they could join different confraternities or found their own religious association integrated only by female members. After long discussion, the Spanish Supreme Court ruled in favor of the Confraternity allowing them to restrict the admission for males as stated in their constitution dating back to the 18th century.

(ii) Internal Pluralism and Democratic Organisation Requirement

Article 2.5 LODA requires every association to have democratic organisation and internal pluralism.[60] Unlike political parties and unions - which are constitutionally required (Article 6 Spanish Constitution) to have such type of government - Article 22 of the Spanish Constitution guarantees the association's right to self-organise.[61] Dominant scholarship[62] has challenged the

[59] Cf SSTS Civil Chamber 13.9.2002 (rec. 2239/1998), 15.1.2007 (rec. 6997/2002).
[60] This discussion reissues a similar debate over internal verses external pluralism in the schooling system held during the drafting of the Spanish Constitution (1977-1978) and the earliest Constitutional Court opinions on art. 27 Spanish Constitution (SSTC 5/1981, 77/1985, 86/1985). These two rival models fueled an enriching exchange. The "internal pluralism model" defended a complete public school system where each teacher could contend his own doctrine that students could freely and critically choose. The mutual cancellation of opposing teachings guaranteed the schools' neutrality. As for the "external pluralism", public schools should abstain from indoctrination since exclusively common constitutional values could drive the school's underlying worldview. Simultaneously, parents should be allowed to choose - without any financial discrimination - alternative chartered schools which held their own value statement ("*idearío*"), that every teacher had to respect. Therefore, schools held a fundamental right in order to project a consistent *ethos*. Hence, pluralism was external, as parents could opt for different schools, each with its own personality'. The latter was chosen (STC 5/1981).
[61] STC 218/1988.
[62] Gómez Montoro (n 5) 195–198; Anzures Gurría (n 1) 214–218; J Alfaro Águila-Real, 'La asociación: parte general', *Almacén de Derecho*, 23 September 2020; González Pérez and Fernández Farreres (n 26) 127–132.

constitutionality of the above mentioned legal requirement as an undue interference in associations' internal affairs (right to self-organise). The Constitutional Court, however, saved Article 2.5 LODA's constitutionality by limiting its scope of application with a restrictive interpretation, namely, that the disposition applies not to every association but to the specific type regulated by LODA[63]. Such an answer remains unsatisfying as the LODA regulates the *generic* association type and has caused - quite predictably - judicial confusion[64].

VII. Freedom of association's rationale

The 1869 and 1876 Constitutions recognised the right to associate 'for all goals of human life',[65] That provision, which remained very limited in its application, was later fully adopted, developed and enforced by the Constitutional Court:

> 'Freedom of association - recognised in modern constitutions - implies the overcoming of the liberal state wariness against the associative phenomenon (STC 67/1985, 24 May). Therefore, in its positive side, it guarantees the individual capacity to unite for the accomplishment of "every human endeavour" and, correspondingly, organise and function as a group free from every "undue state interference.'[66]

Following the German doctrine on the double nature of fundamental rights as subjective entitlements and objective law defining the basic architectural elements of the State's constitution[67], the Constitutional Court has stated that:

> 'The fundamental right involved is therefore the generic right of association recognised and partially regulated in Article 22 Spanish Constitution. This right, which in its objective aspect is one of the basic structural elements of the social and

[63] STC 133/2006.
[64] Alfaro Águila-Real (n 63); Anzures Gurría (n 1) 216–8.
[65] Gómez Montoro (n 5) 53–6.
[66] STC 115/1987.
[67] M. Sachs, '§ 65 Die Grundrechte als objektives Recht und als subjetive Rechte', in K Stern (ed), *Das Staatsrecht Der Bundesrepublik Deutschland. Allgemeine Lehren Der Grundrechte* (München: CH Beck, 1988) III/1, 473–618; D Merten and HJ Papier, *Grundsatzfragen Der Grundrechtsdogmatik* (Heidelberg: CF Müller, 2007).

democratic state based on the rule of law, as a subjective right is, in essence, a right to freedom from possible "interference by public authorities"'.[68]

It has further explained that pluralism is the main reason for protecting the negative side of that freedom:

'From the principle of pluralism that inspires our constitutional system, and which supposes the most complete mobility, self-determination and competition of social subjects, derives the existence of important constitutional limits to the forms of compulsory associationism, which must be considered as exceptional, and only possible "provided that its origin is justified in each case for reasons demonstrating that it constitutes a necessary measure to achieve public ends, and with the necessary limits so that this does not imply an assumption (or incidence contrary to the Constitution) of the fundamental rights of citizens" (STC 67/1985, FJ 2.º b).'[69]

Academic scholarship unanimously supports the Constitutional Court's understanding of freedom of association as an indispensable element of society's pluralism.[70]

VIII. New challenges and frontiers

Current threats to freedom of association, however, have emerged: the expansion of the immediate third-party effect doctrine[71] and the legislative imposition of blanket equality and

[68] STC 56/1995.
[69] STC 244/1991.
[70] Anzures Gurría (n 1); A Elvira Perales, 'Asociaciones y democracia interna', in *La Democracia Constitucional. Estudios En Homenaje Al Profesor Francisco Rubio Llorente* (Madrid: Centro de Estudios Políticos y Constitucionales, 2002), I; González Pérez and Fernández Farreres (n 26); Giménez Gluck (n 32); Gómez Montoro (n 5); Bilbao Ubillos (n 32); E Lucas Murillo de la Cueva, *El Derecho de Asociación* (Madrid: Tecnos, 1996); P Salvador Coderch and others, *Asociaciones, Derechos Fundamentales y Autonomía Privada* (Madrid: Civitas, 1997); M Salvador Martínez, 'La libertad de expresión de los afiliados a un partido político y sus límites (a propósito de la STC 226/2016)' (2019) 115 Revista Española de Derecho Constitucional 391–422; JJ Solozábal Echavarría, 'Asociación y Constitución' in E García de Enterría y Martínez-Carande (ed), *Constitución y Constitucionalismo Hoy. Cincuentenario Del Derecho Constitucional Comparado de Manuel García-Pelayo* (Caracas: Fundación Manuel García-Pelayo, 2000) 473–506.
[71] G Minero Alejandre, 'Género y asociaciones. La ponderación del derecho a la igualdad y el principio de autonomía autoorganizativa de las asociaciones religiosas al hilo de la STS (Sala 1ª) 925/2021, de 23 de diciembre' (2022) 41(2) Derecho Privado y Constitución 389–421.

anti-discrimination requirements, which gradually (and selectively[72]) reduce freedom of association's internal autonomy. The recent Equality and non-discrimination Act 15/2022 - surprisingly unnoticed by scholarship which mainly focused on its labour aspects - contains several of the aforementioned blanket requirements, whose broad scope of application (*inter alia* Articles 2.4, 3.1) collide with freedom of association.[73] All sports and cultural activities, for instance, must comply with equality and anti-discrimination requirements (Article 24.1).[74]

As explained in this study, a vibrant society needs pluralism to be safeguarded. Along with parental rights (coined as pluralism's legal root[75]), associations channel a wide range of coordinated human initiative. If cooperation with others is so vital for almost every human endeavor, its juridical protection should be considered one of the architectural elements of a true free society. The State's intervention in associations' internal affairs and public authorities' suppression of un-like-minded entities are genuine symptoms of decay. On the contrary, a robust protection of associations signals a strong confidence from the authorities in its own citizens. Such underlying trustful constitutional expectation is this 'more precious' [76] liberty's foundation.

[72] Women's associations are not regarded as suspicious, contrary to exclusive-male ones. The same can be said about expressive associations and sexual orientation/gender identity. It is very unlikely that the US Supreme Court ruling in *Boy Scouts of America v Dale*, would be upheld in Spain.

[73] For a similar discussion on the German Law on General Equality (*Allgemeines Gleichbehandlungsgesetz*). Cf J Isensee, '§ 150 Privatautonomie', in J Isensee and P Kirchhof (eds), *Handbuch Des Staatsrechts Der Bundesrepublik Deutschland* (3rd edn, Heidelberg: CF Müller, 2009), VII, 207–80.

[74] If thoroughly implemented: women's sports associations and competitions could be forced to admit trans-women, cultural associations for like-minded members could only survive if considered expressive, the examples could go on. The article poses a real threat to the association's right to internal organisation. Unfortunately, no bill is expected - nor has it been proposed in the electoral programs of the main parties for general election 23/7/2023 - to correct such developments. Only the right-wing party VOX defends the proposal to expand the ban of associations that intend the independency of part of the country and to cut the public funding of those promoting illegal immigration: VOX, *Agenda España,* 8, 26 <https://www.voxespana.es/agenda-espana> accessed 6 January 2024.

[75] J Isensee, 'Elternrecht', in Görres Gesellschaft (ed), *Staatslexikon* (8th edn, Freiburg: Herder, 2018) II, pt. I.

[76] A Tocqueville, *Democracy in America*, Historical-Critical edn (Indianapolis: Liberty Fund, 1890), III, chapter 5.