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**Global Perspectives on Freedom of
Association: Judicial Review of
Associative Agreements**

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Judicial Review of Associative Agreements: Insights from a Civil Law Perspective

*José Juan Anzures Gurriá**

I. Introduction

One of the protected areas under freedom of association concerns the ability of associations to organize themselves and make their own decisions without interference from third parties, mainly the State. This does not mean, however, that the associations' decisions are outside the law or that they cannot be appealed to the courts. But how far should the intervention or control of the courts over the actions of associations go? Freedom of association includes the autonomy of associations to self-organize, meaning state authorities must be kept away from any intervention in their internal activities. However, this does not mean that their actions are free from any intervention by state courts.¹ There is no private dispute that can escape the control of the judiciary. Internal association agreements are no exception. Any decision taken by the association according to its organizational autonomy may be reviewable by ordinary courts.² This does not mean that, once the association's internal instances have been exhausted without reaching the desired result, a member must go to court and request the rectification of the association's agreement. If a member contests a decision made by the association, it is because he does not agree with it. However, this does not mean it should be corrected by the courts.

Therefore, the problem is not whether the agreements of associations should be under judicial control, nor if members of associations have the right to an effective judicial protection and can appeal to the courts, or even if the courts can and should hear disputes arising within

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¹ In Germany, legal precedents are cited by abbreviating the name of the Court and the case law journal, followed by the year and page number of the resolution. The precedent cited corresponds to *RG JW 1925, 224*, (*Reichsgericht, Juristischen Wochenschrift*, year 1925, page 224). Also, is mentioned the book and page number where the resolution is found. See, in this regard, resolution *RGZ 153, 267; 165, 140*, which means *Entscheidungen des Reichsgerichts in Zivilsachen* (book 153, page 267 and book 165 page 140). From 1879 to 1945, the *Reichsgericht* was the supreme court of the German Reich responsible for ordinary jurisdiction.

² Ruling of the Spanish Constitutional Court 218/1988, 22nd of November 1988. From now on, the rulings of the Spanish Constitutional Court will be abbreviated with the initials *STC*.

associations. Rather, the problem lays in determining how far this control by state courts can go. As Vidal Marín says, “in determining the limits to this judicial control”.³

This dilemma has been resolved in various ways in different jurisdictions. In common law countries, there may be greater respect for associative autonomy, limiting judicial interference.⁴ In contrast, in Roman-Germanic countries such as Spain and Germany, respect for the autonomy of the association is maintained, but members are also protected against possible abuses or violations by the association. There are three perspectives: one suggesting that the court's intervention should be merely formal, another advocating for a substantive intervention, and the third is based on a *reasonable basis* criterion. Based on the study and systematization of decisions from the constitutional courts of Spain and Germany, this paper offers some insights in respect of judicial review of associative agreements, intended to guide judges across different jurisdictions. The first consideration is the type of association; if it is an association with public relevance, such as political parties or trade unions, the judge's intervention should be greater. Another criterion is the type of associative agreement, whether it refers to a strict application of the statutes or an interpretive agreement of them. In the latter case, it must also be considered whether it is an agreement on the organizational structure of the association or whether it affects the members' rights. The chapter proceeds as follows: Part II analyses the normative framework relevant to judges resolving associative conflicts. Part III considers the case of formal judicial review while Part IV considers material or substantive judicial control. Part V explores the reasonable ground criterion. Part VI presents guidelines to orient judicial judgment in the case of judicial review of associative agreements.

II. Applicable Law

To respect the freedom of associations to self-organise, when hearing an associative dispute, the judge must first ensure that the statutes of the association are being respected.⁵ The judge's task is to verify that the association's agreements comply with its statutes. This can be very clear in the case of regulated agreements, where the statutes assign a specific, detailed, and clearly defined authority to the association's bodies, which they are obliged to comply with.

³ Tomás Vidal Marín, “El Derecho fundamental de asociación y el control judicial de la actividad interna de las asociaciones”, in Javier Díaz Revorio & Eduardo Espín Templado (Eds.), *La justicia constitucional en el estado democrático* (2000), at 270.

⁴ Also in common law countries, *Foss v Harbottle* (1843) 67 ER 189; *Wedderburn*, “Shareholders' Rights and the Rule in *Foss v Harbottle*” [1957] CLJ 194; pp. 196-198; *Hopkins v. Marquis of Exeter* (1867) L.R. 5 Equity 63; *Fisher v. Keane*, (1878) 11 Ch. D. 353, *Dawkins v. Antrobus*, (1881) 17 Ch. D. 615, *Labouchere v Earl of Wharncliffe* (1879) 13 Ch D 346; *Young v.s. Ladies Imperial Club* (1920) 2 KB 523.

⁵ STC 218/1988.

Therefore, if an agreement adopted by the association's bodies contravenes the provisions of the statutes, it is clear evident the agreement will be null and void.

Furthermore, the judge must also check that the association's agreements are in conformity with both the law and the Constitution. In this regard, the Spanish Constitutional Court pointed out in its decision ATC 213/1991 that the judge can nullify an association agreement not only when the association does not comply with its own statutes, but also when its agreements are contrary to the national system of law.

At the outset of this book, an interesting case is presented that bears relevance to the situation under consideration. The 'Soup Kitchen' scenario concerns *Cairde ar son Cairde*, a soup kitchen founded by Gráinne and friends, which operates using leftover food from local groceries and receives assistance from neighbors. *Cairde ar son Cairde* is not formally constituted, lacks a formal structure, and is not registered as a charity.⁶ It also has no bank account or bookkeeper. However, if *Cairde ar son Cairde* is a charity, and there is a law (such as the Charity Act) governing the operation of such associations, then it should be constituted and organized accordingly.

The Spanish Constitutional Court on March 5th 1995 in its decision 56/1995 pointed out that the courts may not only annul the agreements of association bodies for contravening their statutes, but also for infringement of the legal system, as well as for violating constitutional rights.⁷ The Spanish Supreme Court has also stated that judicial review of association agreements must take place when the management of the legal entity deviates from its own statutes or when it contravenes mandatory rules of the legal system or violates constitutional principles.⁸

Thus, the associative freedom of self-organization is firstly limited by the association's own statutes, but also by the legal system, the laws, the Constitution and its principles and values. Judicial control is therefore nothing more than verifying the association's conducts are carried out within the framework of legality and constitutionality. According to R. Ernst, if the association conducts are not bound by these restrictions, it could be considered an abuse of power by the association.⁹

⁶ Maria Cahill, "Comparative and Interdisciplinary Interfaces of Associational Life and Freedom" in Maria Cahill & Giulia Lasagni (eds.) *Associational Life and Freedom* (Hart Publishing, 2025); see also Appendix 1 below.

⁷ On trade union matters, this position is defended by Antonio Ojeda Avilés in Antonio Ojeda Avilés, *Derecho Sindical* (3rd ed., Tecnos, Madrid, 1986), at 122. See also STS May 7th, 1988.

⁸ STS 5th of July, 2004, (FD 2°); also STS 1153/2007, 6 of November (FD 2°). From now on, the rulings of the Spanish Supreme Court will be abbreviated with the initials STS.

⁹ Rolf Ernst, *Die Ausübung der Vereinsgewalt*, Diss., Köln, 1969, p. 48.

While freedom of association includes the establishment and functioning of any association, such associations must be constituted and registered in accordance with the associative models stipulated by law. The laws governing the different types of associations do not infringe on the autonomy of associations; on the contrary, these regulations are designed to protect the diverse types of associations and their members.

If Gráinne and her partners have a conflict that goes to court, they will have the legal certainty that the conflict will be resolved based on established law. The legislation the judge must apply is known—for example, the Charity Act. Then, there is no reason to argue that a judge should not apply the laws of the state when resolving an associative conflict.

III. Formal Judicial Control

Once it has been clarified that courts must ensure that the association's conduct complies with its own statutes, the problem is to determine the scope of judicial control within associations. Insofar as the freedom of self-organization of an association is the manifestation of a *negativus* status right, its exercise consists of a non-intervention of the state in the internal functioning of the association. In this sense, one of the first positions of scholars and case law in Germany was that the interference of the courts in conflicts over association agreements should be kept to a minimum.¹⁰

In this sense, a decision rendered by the *Reichsgericht* in 1922 held that a judicial review of the facts that led to an expulsion agreement constituted an undue interference in the autonomy of the association.¹¹ Similarly, another decision held by the German Supreme Court stated that the courts only have to check whether the decision of the association body was based on a provision of the statutes. This is because the assumption of facts in accordance with the statutes falls within the scope of the association's autonomous powers.¹²

From this perspective, the courts' task focuses on examining the facts that have occurred within the association and determining whether they are based on the statutes of the association. It is a matter of proving that the factual circumstances contained in the statutes have occurred. According to this position, it must be the association bodies, no one else, which must assess

¹⁰ Jesús Alfaro Águila-Real, "La expulsión de asociados y la confianza en el derecho privado", *Anuario de Derecho Civil*, 1997, at 167.

¹¹ RGZ 49, 150, 155. RGZ means "Entscheidungen des Reichsgerichts in Zivilsachen", (Decisions of the Supreme Court of Justice in civil matters, (book, page).

¹² NJW 66, 1951. NJW refers to "Neue Juristische Wochenschrift" (New Legal Weekly Newspaper), where the first number corresponds to the year and the second to the page.

the facts that have occurred and adopt the decision they deem appropriate.¹³ The courts cannot assess the correctness of the decision adopted by the association's bodies, nor can they substitute their assessments or reasoning, because this would imply a violation of the association's autonomy.¹⁴

In this respect, Stöber points out that the assessment and evaluation of the facts is not the task of the courts. Such an intervention would be an interference of the essential domain protected by the association's autonomy.¹⁵ The will of the association would be replaced by that of the state, thus encroaching on the spontaneous vitality of associations and paralyzing their internal functioning.

IV. Material Judicial Control

After the First World War, several court decisions became more influential in deciding certain association disputes. In 1922, the *Reichsgericht* heard a case on the expulsion of a doctor from the social security doctor's association (*kassenarzt Entscheidung*) and ruled not only on the procedure followed by the association, but also on its decision. The Court stated that the expulsion constituted a "manifest injustice". Since expulsion from the association also prevented the doctor from practicing his profession, membership of the association was a matter of vital importance for him.¹⁶ The Court understood that when questions of survival or the livelihood of a partner are at stake, judicial control must be substantive. From this court decision rendered on the 20th of April 1976, the German Supreme Court radically changed its judicial criterion.¹⁷ Instead of recognizing a minimal judicial intervention, it recognized a more intensive intervention. Moreover, with this decision, the tension between the individual interests of the members and the autonomy of the association became more evident.¹⁸ As a result of this judgment, the autonomy of the association and the principle of state non-intervention have ceased to be treated as dogma.¹⁹ The German Supreme Court gradually

¹³ Tomás Vidal Marín, *El Derecho Fundamental de Asociación y el control judicial de la actividad interna de las asociaciones*, cit., p. 274. Please adjust

¹⁴ The Spanish Supreme Court also holds that in no case can the court substitute the will of the associative body. STS, 5th of July 2004 FD 2^o. Also STS 1153/2007, 6th of November, Legal Ground (FD) 2^o.

¹⁵ Cfr. Kurt Stöber, *Handbuch zum Vereinsrecht*. 9. Auflage. Köln, 2004. p. 390.

¹⁶ RGZ 106, 120; 107, 386.

¹⁷ BGHZ 47, 381. BGHZ means "Entscheidungen des Bundesgerichtshofes in Zivilsachen", (Decisions of the Federal Court of Justice in civil matters, book, number page).

¹⁸ Ulrich Meyer-Cording, *Die Vereinsstrafe*, J. C. B. Mohr, Tübingen, 1957.p. 112.

¹⁹ Josef Schmitz, *Innere Vereinsfreiheit*, Inaugural-Disertation zur Erlangung der Doktorwürde einer Hohen Rechtswissenschaftlichen Fakultät der Universität zu Köln, 1976, p.71.

extended its interpretation to various aspects of members' lives, such as their economic, social and cultural development.²⁰

Although it is true that the state is, and remains, a potential threat to the organizational and operational freedom of associations, it is also true that the social and democratic state governed by the rule of law is the guarantor of individual freedoms. This results in the constitutional obligation of the courts to observe and enforce these rights both in public relations, of the citizen vis-à-vis the state, and in private relations, which include endo-associative ones, and this perspective justifies a more intensive judicial intervention. In this sense, a more intensive judicial review consists not only of assessing whether the facts fit the statutes' requirements, but also in assessing the validity of the association agreement. In other words, it concerns the assessment made by the association's organ of the facts that led to the decision.

From this perspective, judicial review consists of making a value judgement on the facts or reasons that gave rise to the association agreement, irrespective of its decisions. The courts must review not only the facts that gave rise to the association agreement, but also the association organ's subsumption of those facts under the relevant statutes.²¹ This is undoubtedly a substantial interference with the association's autonomy and is therefore only justified when it is intended to protect a member from possible abuses by the association or when the decision was notoriously arbitrary.

To defend the autonomy of associations, it is often argued that the fact that the courts decide on the substance of the dispute does not automatically mean excessive and arbitrary intervention. It is argued that this is not an infringement of the associations' autonomy, since the judicial decision will be taken in a well-founded and reasoned manner, based on the legislation that regulates each type of association, and on the principles and values of the legal system, including fundamental rights.

There should be no doubt that the courts must resolve the associative conflict in accordance with the law. The doubts of this position derive from the fact that when the courts hear an associative conflict and interpret the association's statutes, they overlook the interpretation made by the association's body of its own rules and regulations. An association's interpretation of its statutes is also part of the association's autonomy, so replacing its interpretation could indeed constitute an infringement of the association's freedom of self-organization.

²⁰ RGZ 140, 24; 147, 15.

²¹ STS of the 24th of March 1992, 13th of June 1996 and 26th of October 1995.

V. The Reasonable Ground Criterion

In Spain, the dilemma of judicial control over associations' internal decision was solved to some degree by decision number 218/1988, rendered by the Constitutional Court on the 22nd of November 1988, which adopted the concept of “reasonable ground”. An association appealed an ordinary court decision which assessed the consistency of the association's decision with its own statutes, as well as the reasoning of the association's body, and ultimately substituted the court’s own judgment for that of the association. The Constitutional Court found that the ordinary court's decision had infringed the association's freedom of self-organization. The Court ruled that the judge's role is not to assess the member's conduct, independently of the judgement already made by the association's organs, rather he must confine himself to checking whether there was a reasonable ground for the association's organs to adopt the expulsion decision.

This concept of reasonable ground has been well accepted and regularly used by the Constitutional Court, the Supreme Court, and other ordinary courts as a sufficient reason to resolve intra-association conflicts concerning the freedom of self-organization of associations.²²

Thus, in decision ATC 2/1993, the Constitutional Court reiterated the precedent it had maintained in decision STC 218/1988 and set it out in a more refined and complete manner. The Court stated that once the legality of the statutes has been verified by the judge, his task is strictly formal and must focus on two specific aspects: the competence of the associative body and the legality of the procedure. In addition to this review, the judge can verify the circumstances and reasonable grounds of the decision taken by the associative body, but must leave the discretion of the decisions to the association's body on how it will function.

In its decision STC 42/2011 from the 11th of April, the Constitutional Court stated that according to precedent, judicial review is less intense in substantive aspects than in procedural ones, and that judicial review should be limited to determining whether the decision lacks all reasonableness in accordance with the applicable legal and regulatory provisions.

The Spanish Supreme Court has also held in its decision STS, dated 6th of July 2000, that the right to self-organization of a trade union prevents the judge from reviewing the reasoning of the association's body when it is sanctioning a member. But it does allow the judge to “verify the fulfilment of the procedural guarantees established in the statutes to impose a

²² In its decision STS 846/2007 of the 13th of July 2007, the Supreme Court used the concept of reasonable grounds not to justify the expulsion of a member, but to deny membership to an applicant.

sanction, and also to verify whether the adopted decision lacks a reasonable ground and is, therefore, arbitrary”.²³

Although the concept of reasonable ground has been very useful, it is an indeterminate legal concept, and therefore does not solve all problems. According to Marín López, we must ask what should be understood as reasonable, what the criterion of reasonableness is, what does it consist of and how the judge should assess this reasonableness.²⁴ According to this author, a judge cannot decide whether the decision of an associative body is reasonable or not without assessing the facts; and if this is so, it must be accepted that this assessment must be made independently from the one made by the associative body, in which case it is possible to reach different conclusions. If this approach is not accepted, judicial review would have no practical operational effect. In short, according to this author, the reasonable ground is a justification for the judge to carry out a thorough judicial review of the association agreements.

On the other hand, this concept has been overused, including to justify the validity of all association agreements when perhaps it was not necessary. In this regard, the decision STS 654/2006 from the 23rd of June 2006 (Civil Chamber, 1st Section) of the Spanish Supreme Court is very illustrative. In this sentence, the Supreme Court ruled that the agreement adopted by the association to expel one of its members was based on reasonable grounds. The conducts carried out by the member were evident acts constituting reason for expulsion: the member engaged in self-contracting, which was prohibited by Article 48.3 of the association's statutes; he spoke out against the association in the media; he did not approve the 1995-1996 budgets; he made reverse charge calls; as well as other sanctionable conducts. Therefore, what happened in this case was not that there was a reasonable cause to expel the member from the association, but rather that there was a clear and flagrant violation of the association's statutes, and the member's conduct was in accordance with those acts.

The concept of reasonable ground is not to be understood as the conformity of the association agreement with the statutes of the association. It is not a question of whether the facts were correctly subsumed under the factual conditions set out in the statutes. In that case we would be dealing with a purely formal review and this concept would be meaningless. Rather, the concept of reasonable ground is to be applied when an association agreement is in accordance with the statutes, but the interpretation of the statutes by the decision-making body is apparently erroneous. This was precisely the case in the decision STC 218/1988 rendered by

²³ STS of 23 December 1997, April 7th of 1989 and May 7th of 1988.

²⁴ Juan José Marín López, *La intervención judicial en los conflictos endoasociativos: el caso de la expulsión de asociados*, en Poder Judicial, n. 14, 1989, p. 156.

the Supreme Court, in which the expelled members claimed that the sanctioning body's interpretation of the statutes was incorrect.

Rather, the concept of reasonable grounds should be understood as a way for the judge to hear the association agreements without replacing the value judgement made by the association, i.e. without infringing the discretionary capacity and the faculty of appreciation that every association has in the exercise of its organizational autonomy. Then, the reasonable ground concept is applicable when the association agreement is discretionary or appreciative, to determine that it has not been arbitrary, irrational or out of proportion.

The golf case scenario presented at the commencement of this book pertains to the Kilmartin Golf Club, which was established forty years ago.²⁵ Although there is no explicit rule prohibiting female membership, women are not admitted. This is attributed to an internal nomination procedure wherein a current member must nominate a prospective member, and to date, no woman has been nominated. A local businesswoman and amateur golfer seeks membership at the Kilmartin Golf Club. Should the case go to court, the judge would need to assess whether the club's decision to deny the woman's entry was based on reasonable grounds.

In short, according to constitutional case law precedents, it can be affirmed that judicial control over associative conducts should be minimal, and should focus on merely formal or procedural aspects, but not on the substance of the matter. In any case, the judge will determine whether this decision has been taken on a reasonable ground, whether it appears logical and not manifestly unfair or arbitrary. However, the judge's decision should not replace the reasoning made by the associative bodies.

VI. Guidelines To Determine the Scope of Judicial Control

Trying to determine whether judicial intervention in association agreements should be of a formal or substantive nature, or on reasonable grounds, is a question that cannot be solved in *abstracto*. The scope of judicial intervention in associative agreements will depend on the circumstances of each case. These circumstances can be grouped mainly into two categories: the type of association and the type of agreement adopted by the association.

A. The type of association

²⁵ Maria Cahill, "Comparative and Interdisciplinary Interfaces of Associational Life and Freedom" in Maria Cahill & Giulia Lasagni (eds.) *Associational Life and Freedom* (Hart Publishing, 2025); see also Appendix 1 below.

One of the most important issues to take into consideration to determine the scope of judicial control over association agreements is the type of the association. As Bilbao Ubillos points out, “if the associative reality is heterogeneous, the legal treatment cannot be uniform”.²⁶ Indeed, the type of each association or its special condition affects its freedom of self-organization and, consequently, the scope of the judicial control.

Salvador Coderch and Ferrer Riba have distinguished between associations with “ideological aims” and those of an “economic nature”.²⁷ Regarding the first, judicial control must remain separate from any debates or controversies surrounding ideological aspects. In this type of association, judicial control should be limited to verifying the conformity of the association agreement with the statutes, without being able to make an ideological judgement.

The agreements of religious associations or associations with a certain ideology or world view are basically not subject to judicial control. Any conflict or debate between different beliefs or ideologies within the association must remain outside the scope of judicial control. The courts are not the forum for deciding ideological questions, and ideological associations could not survive if judges and courts imposed their ideology.

As outlined in the Soup Kitchen scenario at the beginning of this book, the Charity Act pertains to the financial aspects of charity associations, not their ideological goals. Thus, if a judge encounters a conflict related to *Cairde ar son Cairde*, the judge's inquiry should focus on their financial stability, not their ideological principles.

For example, according to the facts of the decision rendered by the Supreme Court on the 26th of July 1993, Mr. Antonio M^a Peña Esturo, a member of the Popular Political Party of Spain, appealed against a resolution made by the party's National Executive Committee which proposed setting up a Management Committee on the grounds that there were serious circumstances which justified it. The action was dismissed at all levels. When hearing the case, the Supreme Court underlined the discretion of the party's governing bodies in assessing the causes justifying such an agreement, as well as the fact that, in these disputes, “political and opportune (circumstances) tend to predominate in relation to the management and activity of the party”.

On the other hand, the Court underlined that voluntary adhesion to a political party implies the acceptance and fulfilment of the statutes, especially in matters with a strong political dimension. The Supreme Court also determined that ordinary courts can only review the associative decisions that contradict the statutes of the association. Thus, with respect to

²⁶ Juan María Bilbao Ubillos, *Libertad de asociación y derechos de los socios*, Universidad de Valladolid, p. 12.

²⁷ STC 56/1995, the 6th of March 1995.

political parties, associations with a specific ideology, and any other association, judicial control will be kept minimal when the internal agreement concerns matters related to their own ideology. We understand that, although not all associations have ideological aims, they are all governed by certain principles and values. In such cases, judicial control cannot reach the correctness or incorrectness of a particular agreement. As far as political parties are concerned, it must be said that they are associations which play an important role in the social and democratic state under the rule of law.²⁸ Consequently, judicial control of their internal decisions must be far more extensive when it comes to examining their democratic structure and organization.

The same applies to trade unions. Trade unions have a privileged place in the social and democratic state under the rule of law. Trade unions are associations of constitutional relevance, and their internal decisions are therefore submitted to thorough judicial control. However, it is true that there must always be room for their organizational autonomy.²⁹ In this sense, the decision of the Supreme Court from the 6th of July 2000 amends the precedent of the Constitutional Court in its decision 218/1988 from the 22nd of November. The Supreme Court stated that “maintaining trade union freedom in its auto-organizational scope could violate the constitutional right of every worker to remain in the trade union of his choice”.³⁰

If judicial control is far more extensive for associations with constitutional relevance (political parties and trade unions), a more thorough judicial review can also be justified for associations with public relevance, not in the political sense, but in the social, economic or cultural field. This perspective can be supported by the Soup Kitchen scenario described at the beginning of this book. Due to the social importance of charities, judicial oversight of their internal agreements could be more extensive.

In the case of associations with economic relevance, judicial control should be greater because of the “financial damage that may result” for the association's members.³¹ In Germany, for example, given the financial implications of membership in a co-operative association, judicial control of its internal decisions is not only formal but also substantive.³² The aim is to

²⁸ STC 185/1993.

²⁹ José. TÁRRAGA POVEDA, “Sobre el control judicial de la actividad sindical, Comentario a la sentencia del Tribunal Supremo de 6 de julio de 2000”, in *Revista de Derecho social*, n. 12, 2000, p. 162.

³⁰ *Ibid.*, at 169.

³¹ Bernard Reichert, Franz J. Dannecker and Christian Kühr proposed a substantive judicial review of the association's decisions if the amount of the matter was equal to or greater than 5,000. Handbuch Vereins- und Verbandsrecht, Luchterhand, Köln, 2010. Pablo Salvador Coderch and Josep Ferrer I. Riba point out that this proposal is based on the idea that judicial intervention is only justified if there is substantial and quantifiable damage to the member. Pablo Salvador Coderch, Josep Ferrer I Riba, “Asociaciones, democracia y Drittwirkung”, in Pablo Salvador Coderch, (coord.), *Asociaciones, derechos fundamentales y autonomía privada*, Madrid, 1997, p. 157 y ss

³² RGZ 57, 154; 88, 193 y ss., 196; 129, 48; JW 08, 250; 27, 691; 30 2697; 32, 1010.

protect the economic interests of the members.³³ This also seems to be the understanding of the Spanish Constitutional Court in its decision 96/1994 from the 21st of March 1994. The Court understood that in the case of significant economic damage to a member—as in the case of the expulsion of a co-operative member—“the courts have full awareness” of the internal activity of the association.³⁴

On the other hand, the extent of judicial control will also depend on the internal regime of the association, i.e. whether it has a democratic structure and organization. In associations with a non-democratic structure and functioning, there is an increased risk of inadequate protection for members. In such associations, the infringement of members' constitutional rights seems more likely than in the case of associations with an internal democratic regime. However, case law seems to show the opposite, that violations of members' rights occur mainly in democratic associations, sometimes due to a simple violation of the statutes, and sometimes due to arbitrary decisions of the associative bodies.³⁵

It could therefore be argued that judicial control will be far more extensive for associations with a democratic regime than for those without. When an association has a democratic internal regime, stipulated by law, the State must ensure that this structure is followed and that members' rights are respected. If, on the other hand, an association is not obliged to have a democratic regime and follows another type of organizational model, such as a hierarchical one where members have freely accepted the restriction of some of their rights, the intervention of the courts should be limited.

In conclusion, if the association has constitutional relevance, i.e. it guarantees a constitutional and democratic State under the rule of law, like political parties and trade unions, it is evident that its internal autonomy will be limited. Therefore, judicial control over its internal decisions must be greater, not regarding its ideology, but its structure and functioning.

If the association has no constitutional relevance but holds a dominant or monopolistic position in a certain economic, cultural or social sphere, so that denial of membership implies a significant detriment for the member, the scope of judicial control can also be thorough. This could be exemplified by the Kilmartin Golf Club case, as described in scenario number 2 at the

³³ It has been pointed out that in common law countries also judicial intervention will be more intense to defend the rights of the partner when property rights are at stake. *Rigby v. Connol* (1880), 14 Ch. D. 482; *Osborne v. Amalgamated Society of Railway Servants*, 1911, 1 Ch. 540; in Canada *Abbott v. Sullivan*, [1952] 1 KB 189; in the United States *Otto v. Journeyman Tailors P. & B. TJ.*, (1888) 75 Cal. 308.

³⁴ In similar terms, the Supreme Court ruled in its decision STS 846/2007 of the 13th of July 2007 that the ordinary court may substitute the association body decision for its own if the expulsion causes relevant harm to the expellee, yet the court must reason why the expulsion causes relevant harm to the expellee.

³⁵ Ascención Elvira Perales, “Asociaciones y democracia interna”; en AA VV, *La democracia constitucional: estudios en homenaje al Profesor Francisco Rubio Llorente*, v. I, Madrid, 2002, cit., p. 628.

beginning of this book. This suggests that even for a private association, its social and economic relevance in a specific town, and the value of membership for building social networks and businesses, could be significant factors for a judge to consider when intervening in the association's internal organization. Indeed, the value of Kilmartin Golf Club membership extends beyond the membership itself to the associated rights and benefits.

On the contrary, if an association is strictly private, receives no public funding, is supported by its own income, carries out purely private activities and pursues private needs, and it doesn't have any social or economic relevance, it will enjoy a very wide autonomy in adopting its own association agreements, and consequently, the judicial control would be minimal.³⁶

B. The type of the associative agreement

The scope of judicial review in an associative conflict depends on the type of agreement. The validity of an association agreement primarily depends on its concordance with the association's statutes. Based on this link between an association's agreements and its statutes, a significant portion of German legal scholarship has identified a similarity between association agreements and acts of public administration. Thus, association agreements can be classified into regulated agreements, discretionary agreements, and value-based agreements. This classification is merely a proposal that may be useful for understanding the operation of any association and for determining the scope of judicial intervention.

To define these, we can say that: 1) Regulated agreements are the acts of the association's bodies that execute the powers conferred upon them by the statutes, according to their design and structure.³⁷ The adoption of these agreements consists solely of applying the statutes to the specific case by the competent body. 2) Discretionary agreements are those that require an association body to interpret gaps or silences in the statutes. Discretionary associative agreements may concern, for example, the time or occasion of member elections, the election of members to associative bodies, the economic amount of a pecuniary sanction, or the number of days a member will remain suspended from the association.³⁸ 3) Value-based agreements refer to the power that the association's bodies have to interpret or apply an indeterminate legal concept contained in the association's statutes, such as the social interest, the common good,

³⁶ Juan José Marín López, "El derecho de ingreso en las asociaciones" in *Los Alardes: Una Perspectiva Jurídica: Libertad e Igualdad en Las Relaciones entre Particulares* (Casino de Irún, Irún, 2000), at 13, 22.

³⁷ Cfr. Rolf Ernst, *Die Ausübung der Vereinsgewalt*, cit., p. 24.

³⁸ *Id.*

the associative order, a serious fault, or a just cause for the expulsion of members, among many others.³⁹

Value-based agreements differ from discretionary agreements in that value-based agreements interpret and give meaning to a vague concept, whereas discretionary agreements consist of a subjective appraisal by the association body of several options. For clarity, let us consider Moot Scenario 2 described at the beginning of this book. The statutes of Kilmartin Golf Club are silent on the admission of women to the Club, but traditionally the members, who nominate new members, have never nominated a woman. Given the silence of the statutes, an association's interpretation of its own statutes is a discretionary agreement. On the other hand, if an association decides to expel a member for committing serious misconduct, which is an indeterminate concept, the interpretation of that concept is a value-based agreement.

1. Judicial review of the association's agreements in relation to its statutes

If judges are clear about the type of association agreement, they will also be clear about the scope of their decision. Referring to regulated agreements, the judicial control is not a major problem: it is sufficient to check that the body's decision is in conformity with the statutes of the association; if the agreement adopted by the body contravenes the statutes, the agreement is manifestly null and void. Consequently, the judicial control should be minimal, as it is limited to verifying that the agreement complies with the statutes.

If an association's organs adopt discretionary or value-based decisions, the courts must restrict their review to verifying whether the interpretation made by the association body has been adopted on reasonable grounds and remained within the limits of its discretion, and whether it has not acted maliciously, or in a notoriously arbitrary or disproportionate manner. However, under no circumstances can the courts replace the will of the association.

We have already said that an association has the faculty to interpret their own status, but this does not mean that association bodies have the right to take arbitrary or disproportionate decisions, agreements contrary to the aims of the association, its own values, or even contrary to the legal system.

2. Judicial review of the association's agreements based on their content

³⁹ Peter Schlosser, *Vereins- und Verbandsgerichtsbarkeit*, Goldmann, München, 1972, p. 106.

The scope of judicial control will also depend on the content of the association agreement. They can be organic, i.e. relating to the organization of the association, or dogmatic, i.e. relating to its ideological content.

In Germany, the Supreme Court pointed out in the *Traberzucht* case that the correction by the ordinary court regarding the adopted agreement of the association should only occur in the case of punitive agreements.⁴⁰ Therefore, if the association agreement is merely organic, i.e. it concerns itself with structure and functioning, there is no room for substantive judicial intervention, nor for the substitution of the association agreement.

In the case of agreements with dogmatic content, the constitutional rights of the members come into play as against the organizational autonomy of the association. It is precisely in relation to these agreements that the choice between formal or substantive judicial control has significant implications for both the association and its members.

Formal judicial intervention would benefit the autonomy of the association, but could violate constitutional rights of the members and, consequently, the State would fail in its duty to protect these rights.⁴¹ If, on the other hand, a substantive judicial intervention is sought to protect members vis-à-vis the association, there is a risk of infringing the association's autonomy.⁴² Among the dogmatic association agreements, case law has mainly dealt with association agreements for the admission of new members and association agreements for expulsion.

As narrated in Golf Club scenario at the beginning of this book, the central issue is a dogmatic agreement of an association. The Kilmartin Golf Club has the power to determine membership, including the exclusion of women, but this directly opposes Rósin's freedom to associate and her right to equality.

In the case of association agreements to admit or not admit new members, a judicial review consists of verifying the reasons for the refusal, but not the facts that gave rise to the agreement.⁴³ The control cannot be very intensive because, in principle, the refusal of membership by the association does not violate any rights of the applicant, as there is no

⁴⁰ BGH LM Nr. 2 zu § 35 BGB = DB 56, 473.

⁴¹ Jesús Alfaro Águila-Real, "Autonomía privada y derechos fundamentales", *Anuario de Derecho Civil*, 1993, p. 93

⁴² Juan José Marín López, *La intervención judicial en los conflictos endoasociativos: el caso de la expulsión de asociados*, in Poder Judicial, n. 14, 1989, p. 155. Also Juan María Bilbao Ubillos, *Libertad de asociación y derechos de los socios*, cit., p. 71. See also SSTC 218/1988, 96/1994 and ATC 213/1991.

⁴³ Eugene Sauter, Gerhard Schwyer, Wolfram Waldner, *Der eingetragene Verein*, C.H. Beck, 19^a., ed, 2010. p. 54. In Italy, Aldo Bardusco rejects substantive judicial review of association agreements on admission or rejection of new members. According to this author, judicial control should be limited to procedural aspects. The judge cannot replace the will of the parties and directly recognise the applicant's right to admission. Aldo Bardusco, *La ammissiones del cittadino ai parti*, Istituto Edit. Cisalpino, Varese-Milano, 1967. pp. 97-101.

subjective right to join a certain association. From this point of view, Róisín has no right to join Kilmartin Golf Club, and Kilmartin Golf Club is not obliged to accept Róisín as a member.

If significant damage is caused or the applicant is prevented from carrying out a certain activity due to the specific status of the association, judicial control must be material because of the damage that may be caused to the member. Perhaps in this case, Róisín could argue that Kilmartin Golf Club's denial of admission is causing her harm, as it prevents her from conducting business or engaging in social networking in her own town.

Judicial control has been more intense in relation to associative agreements for the removal of members. The Spanish Constitutional Court has recognized that in the exercise of its autonomy, the association may expel its members, but on the other hand this may imply the violation of the member's constitutional right to remain in the association. In this sense, Lahera Forteza points out that the scope of judicial control is greater because it can gauge the tension between self-organization and the member's right.

When a member is expelled from the association, judicial review will consist of verifying: 1) whether the punishable conduct is determined in its statutes (statutory agreement); 2) whether the punishable conduct contained in the statutes has been correctly interpreted by the association's decision-making body; 3) whether the association's body has correctly applied the sanction using its discretion,⁴⁴ and finally 4) whether the sanction does not appear unjust or arbitrary, in other words, whether the association's decision is not manifestly unreasonable.⁴⁵

German scholars and case law have established that the expulsion decision must not be manifestly unjust. Therefore, the courts must consider not only the loss of membership, but also the possible harm that the member may suffer because of the expulsion.⁴⁶

Conclusion

When disagreements between an association and a member come before the courts, the court must consider different aspects and circumstances to rule for or against one or the other. The arguments presented in this paper can guide judges from different countries, regardless of their legal tradition, when they must resolve internal disputes of associations.

In the first instance, the judge is required to verify that the association agreement adheres to its statutes, the law, the Constitution, and the legal system. In the second instance, the judge must take into consideration the nature of the association. A private association enjoys

⁴⁴ Cf. RGZ 72, 191; Cf. Ulrich Meyer-Cording, *Die Vereinsstrafe*, cit., pp. 114.

⁴⁵ Cf. Kurt Stöber, *Handbuch zum Vereinsrecht*, cit., p. 390.

⁴⁶ A.A. OLG Celle NJW-RR 1989, 313; JR 1990, 317, 323.

greater freedom of self-organization and less interference from public authorities, whereas a public association with greater relevance experiences less freedom of self-organization and more interference from public authorities. In the third instance, the judge must examine the type of associative agreement. In the case of a regulated agreement, judicial interference is limited to formal review; in the case of a discretionary or value-based agreement, the judge may assess the reasonableness of the agreement but must not alter the value judgment rendered by the associative body. Finally, the content of the agreement is also a relevant consideration: if the agreement pertains to organic matters, the judicial review is limited to formal aspects; if the agreement pertains to dogmatic matters, the judicial review may be substantive if it infringes upon a constitutional right of the member or causes them significant harm.

Appendix 1: Moot Scenario 1 “Cairde ar son Cairde” Soup Kitchen

Together with a few friends, Gráinne has been running an outdoor soup kitchen called Cairde ar son Cairde (*phonetically: car-ja air son car-ja*) in her local area for more than ten years. She receives leftover food from local grocery shops and a local butcher’s shop has an account that allows people to donate money indirectly. Whenever possible, they also provide sleeping bags, underwear, socks, toiletries and period products.

Gráinne founded the group and has always been involved at the helm of the initiative. Three of her neighbours and friends, Aisling, Bláithín, and Clodagh initially volunteered alongside her, but Aisling of these has since moved to another city and Bláithín has stepped back from Cairde to care for her three small children. Clodagh still helps out every week and is the head chef of the group. Deirdre and Eithne have joined the organisation in the last five years and are very dedicated to its work. Deirdre takes the lead on getting in food supplies and helps Gráinne with serving and hosting, while Eithne sources the personal provisions and discreetly makes them available to clients when needed.

Cairde ar son Cairde is not a registered charity. It does not have a bank account or a bookkeeper. It does not have a formal organisational structure or a constitution. None of the volunteers has formal training in finance, and they don’t want to have to use their small funds to pay for a bookkeeper. In any case, Gráinne has always to keep a more informal feel to the organisation. The volunteers are all good friends, and she wants her guests to feel like they are being invited to a dinner with people they know, rather than receiving an impersonal hand-out from people who don’t care. When provoked to say something, all of the group are very critical of the failures of local and national government to address problems of homelessness and cycles of deprivation, but most of the time they just focus on what they can do to help.

Cairde ar son Cairde is in violation of the Charities Acts, for not having proper accounts and for not registering as a charity. The Charities Regulator has made several attempts to encourage Gráinne to register, but she is determined not to. The Charities Regulator then approached the butcher and told him that what he is doing is illegal. Eventually, Gráinne may be prosecuted for failure to comply with the Charities Acts.

The Charities Regulator defends its actions on the grounds that all charities must be subject to the same legal standards, so that members of the public can be assured that charities are operating with financial integrity as they pursue their charitable purposes.

Gráinne challenges the actions of the Charities Regulator for being a disproportionate violation of her right to freedom of association. The Supreme Court of Bureaucratlandia finds in favour of the Regulator.

Moot Scenario 2: Róisín's Golfing Ambitions

The Kilmartin Golf Club was created more than forty years ago by a group of local businessmen as a way of building connections and networking informally. Over the decades, many good things have happened on the course: ideas have been brainstormed, friendships have been made and strengthened, disputes have been avoided or resolved, all of which also coincides with the fact that the local economy has continued to thrive and remain vibrant despite various pressures of economic crises, rising costs of living and globalisation.

Women are not welcome as members of the club. Even though this is not a formal rule, it is club convention that somebody could only become a member having been nominated by an existing member, and no women have been nominated.

Róisín is a very accomplished amateur golfer as well as the owner of a local restaurant. She golfs four mornings a week in the Kilgallen Golf Club, which is based in the same town, half a mile from the Kilmartin Club, and which has an open membership policy.

Róisín would be very keen to build her connections in and contribute more to the local community. She believes that she could do this more effectively if she were allowed to become a member of the Kilmartin Golf Club.

Is it a violation of her right to freedom of association not to be able to participate in the Kilmartin Golf Club?

Does the Kilmartin Golf Club have a right to determine its own membership policy, even if that membership policy effectively discriminates against women?

If a new golf club, the Kilbrigid Golf Club were established by and for local businesswomen, which operated a nomination-based membership policy that effectively excluded men, would that violate the right to freedom of association of men in the local area?

If the Kilbrigid Golf Club adopted a formal women-only membership policy, would that violate the right to freedom of association of men in the local area?

If the Kilgallen Golf Club were to change its membership policy so as to exclude businessowners, on the grounds that they want the club to be a social space that is open to everyone rather than a spillover chamber of commerce, would that violate Róisín's right to freedom of association?

Maria Cahill