

Title	The right to be we: the case of associations
Authors	Schmitz, Michael
Publication date	2025-01-01
Original Citation	Schmitz, M. (2025) 'The right to be we: the case of associations', Societās Working Paper 33/2025 (20pp). Cork: School of Law, University College Cork.
Type of publication	Working paper
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Download date	2026-08-30 21:03:12
Item downloaded from	https://hdl.handle.net/10468/17845

Societās Working Paper 33/2025

August 2025

Global Perspectives on Freedom of Association: The Right to be We

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IRISH RESEARCH COUNCIL
An Chomhairle um Thaighde in Éirinn

Global Perspectives on Freedom of Association Collection

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

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Final versions of these papers appear in (2025) 12 1&2 *European Journal of Comparative Law and Governance* and in Maria Cahill & Giulia Lasagni (eds.), *Associational Life and Freedom: Insights from Philosophy and Law* (Hart Publishing, 2025).

The Right to Be We: The Case of Associations

*Michael Schmitz*¹

Introduction

Why freedom of association? Why a right to be a We, and why a right to be the particular kind of We, the particular kind of group, that is an association? For surely the right to freely associate is not the only kind of right to form and be a We that we commonly recognise. For example, we also recognise rights to marry or partner and to form a family, and even though these are in some sense rights to associate with others, this is not what is usually meant when we talk about the right to freedom of association. We would rather think of these as fundamental human rights. On the other end of the spectrum, we also recognise a right for people or peoples to form states – though how this is to be understood is a matter of some controversy. This right is also generally thought to be a fundamental human right or political right and in some sense it concerns the association of people. But again, this is not what people ordinarily think of when thinking of freedom of association

In this chapter, I want to contribute to clarifying what associations in the relevant sense are, what role they do and should play in a state, particularly a democracy, and how the freedom to associate should be justified. I will argue that freedom of association should not only be justified with the positive role associations play for the well-functioning of a state – top-down as it were. It can and should also be justified bottom-up: as an expression of a fundamental human need to form groups and co-operate with others. I will also argue that to play the positive role that they can play for the well-functioning of the state, associations must not be too close to the state and its government, but must keep a certain distance from it. They must neither

¹ This publication is a contribution to the *Societās: Exploring the Value of Freedom of Association* project, led by Professor Maria Cahill at the School of Law, University College Cork, and funded by the Irish Research Council (now Research Ireland) under grant IRCLA/2022/3860. The chapter builds on ideas discussed during the workshop *Exploring Associational Life: From Social Ontology to Law and Back Again*, held at University College Cork on 25–26 April 2024. This research was funded in part by the Austrian Science Fund (FWF), Grant DOI 10.55776/PAT7660524. For open access purposes, the author has applied a CC BY public copyright licence to any author-accepted manuscript version arising from this submission.

compete with the government or try to overthrow it, nor must they dependent on it, so that they are in danger of becoming a mere tool of it.

I will address these issues from a point of view inspired by recent debates about what philosophers call “social ontology” and “collective intentionality”² and the recently emerging field of a theory of law that addresses some of the traditional questions of philosophy of law – as well as some new ones – with the help of tools from social ontology and the theory of collective intentionality.³ Social ontology undertakes to make a fresh start on the nature of social entities such as groups, social norms and institutions like money and the law. By “collective intentionality” I mean the capacity of human (and possibly non-human) subjects to perceive, act, feel and think jointly with others – to represent the world together.

I favour an approach that addresses questions about the nature of groups, the law and other social and collective entities in the context of a theory of mental and linguistic intentionality or representation. So groups are to be understood in terms of subjects representing the world in modes of identification with others – such as the we-mode or role-mode as discussed below – and different kinds of groups can be distinguished in terms of the kinds of representational acts, states and artifacts essentially involved in jointly representing the world. For example, jointly attending to an object only requires sensory-motor-emotional experiences, while forming a state essentially involves written language and other forms of documentation.

To understand associations, what kind of groups they are, what roles they can and should play in society and the state, and why there should be a right to be them, I think we need to have some understanding what groups are in general and what ties them together. In the following, I will first briefly sketch my own version of such an account – a layered account of groups and social and institutional reality.⁴ I will then show how associations can be characterised in terms of such an account and this will eventually lead to answers to the questions which role associations should play in the state and why there should be a right to be them.

² For an overview of recent philosophical debates about collective intentionality, cf David P. Schweikard and Hans Bernhard Schmid, “Collective Intentionality” in Edward N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2021 Edition) <<https://plato.stanford.edu/archives/fall2021/entries/collective-intentionality/>> accessed 26 July 2025.

³ For a recent collection of such work, cf Miguel Garcia-Godinez, Rachael Mellin and Raimo Tuomela (eds), *Social Ontology, Normativity and Law* (Berlin, De Gruyter, 2020).

⁴ For fuller statements, cf Michael Schmitz, “Co-Subjective Consciousness Constitutes Collectives” (2018) 49 *Journal of Social Philosophy* 137 and Michael Schmitz, “From We-Mode to Role-Mode” in Miguel Garcia-Godinez and Rachael Mellin (eds), *Tuomela on Sociality* (Cham, Springer, 2023).

A Layered View of Groups and the Social World

The view I am about to present is based on three basic ideas. First, that there is a difference between experiencing and representing others as mere objects of one's attitudes towards the world – as when, for example, one simply perceives what they are doing – and experiencing and representing others as co-subjects of such attitudes – as when one, for example, watches a movie with them, or shares a belief or intention with them in a mode of identification with one another. Second, that to understand such co-subjectivity we always have to take into account both theoretical attitudes like perceptual or sensory states and beliefs and practical attitudes like actional or motor states and intentions. When, for example, we are truly jointly watching a movie, we must also at least be disposed to joint action – eg to protect our enterprise against disruption or to share our thoughts on what we are experiencing. It is not enough for us to be just mutually aware that the other is watching the same movie. Mutuality is not the same as jointness.⁵ The third idea is that the social world is layered, that collectivity and co-subjectivity happen on different layers or levels and that higher levels depend on lower levels in ways which we will explore.

For purposes of a first orientation, it is helpful to roughly distinguish three levels of the social world and of collective intentionality. Think of the first level in terms of small groups – eg a couple taking a walk together or dancing – attending to things and acting jointly, evolving patterns of (acceptable) behaviour through what I like to call “sensory-motor-emotional” interactions. “Acceptable behaviour” because these interactions always have a normative, or proto-normative dimension, which is centrally manifest in the emotional valence of the interaction. For example, we may evolve patterns of dancing together, which start to feel familiar and appropriate, so that deviations from these patterns may be experienced as jarring or erroneous, or even shocking and upsetting – but in some cases also as great fun or even genius. This level is characterised through sensory-motor-emotional experience whose content is non-conceptual and non-propositional and through corresponding dispositions.

The second level involves the adoption and negotiation of shared plans, beliefs, values and narratives. For example, the couple may start making plans for the future and construct a narrative of their shared life. This level essentially involves concepts. It may include concepts of what is right or wrong, good or bad, cruel or nice, and so on, as well as concepts of roles such as being a friend, a girlfriend or boyfriend, that bring their own standards and normative

⁵ cf Michael Schmitz, “Joint Attention: The PAIR Account” (2024) 43 *Topoi* 271 for an elaboration of this argument.

expectations with them. Shared concepts and a shared language make it possible for larger groups to adopt shared attitudes than the pure sensory-motor-emotional intentionality we find on the first level. And even if the group remains small like our couple, they typically use concepts drawn from the larger community. This level essentially involves propositionally structured and conceptually articulated thought and (spoken) language.

The third level essentially involves written language and various forms of documentation. For example, if our couple gets married, this will be documented and registered. Some of the rights and obligations that derive from marriage are codified in a legal system, and specialists in institutional roles such as judges enforce them. To develop such complex systems of institutions with a high degree of role differentiation, requires even larger groups, whole societies.

All levels are characterised through different forms of co-subjectivity: subjects experience and represent the world in modes of identification with others, who are not represented and experienced as mere objects, but as co-subjects. This means that there is at least a certain degree of agreement with them, including agreement or identification with their goals. That is, subjects become co-subjects and thus form groups or collectives of various kinds through sharing relations towards the world such as perceptual, actional and emotional relations as well as attitudes such as believing or intending.

On the first level of the mode of joint attending, acting and feeling that others are co-subjects is manifest in how they shape our experience of the world: how we are attuned to them, align with them, affirm them and imitate them; in how we experience the world in identifying with their interests and needs. For example, when running with my wife, I'm much more sensitive to the presence of dogs, experience them differently and respond to them differently, because she is afraid of them. This level is very deeply seated: infants start sharing pleasure and other emotions in joint attention from around 9-12 months or even earlier.⁶

At the we-mode level of jointly believing and intending we form beliefs, intentions and other attitudes from the point of view of the relevant group. And as members and functionaries of organisations and institutions individuals or groups adopt positions in role-mode, that is, in a mode of identification with their role, with the purposes and assumptions connected to it and to the larger collective in which it is embedded. For example, an individual may take a position

⁶ For a recent overview and discussion cf. Henrike Moll, "What we do and don't know about joint attention" (2023) 43 *Topoi* 247.

as a judge, or a group may take positions as a committee. Those positions may deviate from the positions they take as private individuals or in other roles, because the roles are connected to certain purposes as well as to certain standards of evidence. For example, a judge may sentence somebody to a punishment, even though as a citizen or private individual they think that the relevant kind of conduct should not be illegal. Or they may let somebody go even though they are privately convinced that they are guilty, because they can't prove it according to the evidential standards required by law, because, for example, certain pieces of evidence were obtained in inadmissible ways and therefore can't be used in court.

As I mentioned, the distinction in terms of the three levels is for purposes of first orientation. It roughly aligns with different forms of mental and linguistic representation: 1) sensory-motor-emotional experience; 2) spoken language and corresponding thoughts; 3) written language and other forms of documentation. More fine-grained distinctions can be drawn in terms of criteria such as the following:⁷

- a) richness of content from concrete to abstract: compare, for example, the richness of the sensory-motor-experience of dancing together to the abstraction of legal concepts such as citizenship;
- b) degree of context dependence: sensory-motor-experience is dependent on the immediate context of face-to-face interaction, whereas other forms of representation are not;
- c) density/differentiation of representational role: linguistic representation is more differentiated in terms of representational role, there are, for example, verbs, nouns and adjective in language, but not in sensory-motor-emotional experience; written language is yet more grammatically complex than spoken language, and cultural traditions also develop elaborate distinctions between different sorts of texts, eg between different kinds of legal texts such as briefs, letters to the court, depositions, opinions, law review articles, and so on;
- d) degree of durability/stability: sensory-motor-emotional experience is more volatile, while concepts, institutionalisation and documentation are all about making things more stable, durable and reliable, for example about keeping durable and reliable records of marriages, births, and possessions;
- e) this in turn is connected to the degree of externalisation/standardisation of representations: compare sensory-motor-emotional experiences to speech and

⁷ For more, cf Michael Schmitz "Of Layers and Lawyers" in Miguel Garcia-Godinez, Rachael Mellin and Raimo Tuomela (eds), *Social Ontology, Normativity and Philosophy of Law* (Berlin, De Gruyter, 2020).

writing. Again, the degree of externalisation and standardisation provided by writing and documentation is required for a legal order and for large groups, because only externalisation and standardisation make it possible that

representations are accessible to large groups and across extended periods of time.

There is an important explanatory hypothesis that I cannot really substantiate or discuss adequately here⁸, but which I want to at least introduce because it is important for things to be discussed later. It is that these criteria cluster, that they are connected to one another and to certain broader developments. The broadest development I have in mind here is that of institutional differentiation, for example, in the sense of the differentiation into a religious and a secular sphere and the differentiation of law from morals. The idea is that this development is connected to and at least partially realised in the differentiation of institutional roles, which in turn is connected to the representational parameters we have discussed. That is, the emergence of certain spheres, institutions and organisations in society is grounded in the emergence of institutional roles, in which specialists create new ways of thinking and new representational devices, which are ever more elaborate in terms of the parameters we have described, and which could only be created by such specialists, because specialisation is necessary to devise such abstract, context-independent, role-differentiated, enduring and standardised forms of representation.

On the layered view then, different kinds of groups can be described and explained in terms of the content, structure and format of the relevant representations. Higher-level groups and the higher-level, more abstract, role-differentiated and externalised representations that constitute them, are based on and can only function, or at least only function well, against the background of lower-level groups and the lower-level representations that constitute them. For example, it is well-known that historically basic institutions have been kin-based. The idea of the layered view is that the family is primarily constituted as a sensory-motor-emotional unit of creatures moving together, feeding together, and so on. Then concepts of being a mother, father, child etc. are introduced, which also bring with them rules and expectations concerning behaviour. Then ever more elaborate institutional structures are built on this foundation, which only gradually move away from being outright family or clan structures. But even modern states still remain dependent for functioning, or functioning well, on the functioning of families and other lower-level, informal groups.

⁸ But cf Schmitz, "Of Layers and Lawyers".

What is an Association?

Having introduced this basic layered framework for understanding groups, let us now move to the question of how to characterise associations. I will try to show that associations and their position in society can be fruitfully described and explained in the terms of this framework. Among other things I will do so by showing that the framework allows us to give satisfactory and illuminating answers to certain questions that have historically been asked about what is and what is not an association and about the relation between the concept of association and related concepts such as the concept of an assembly. I will not, however, try to give an outright definition of an association.⁹ One reason is that different cultures may draw the boundaries of the concept of an association somewhat differently and that it is not important to the main themes of this article how these boundaries should be drawn precisely. Another is that the law may often not really be concerned with defining the concept in the abstract, but will, so to speak, offer the status of an association to any group interested in registering as such and leave any further clarification, if it becomes necessary, to the courts.¹⁰ And this makes perfect sense from a legal point of view, particularly if, as in French law, an association is defined as a contract and the content of a contract is considered to be a ‘thing of the parties’.¹¹

My point of departure will be the following characterisation of associations: ‘the term “association” presupposes a voluntary grouping for a common goal’.¹² My working hypothesis will be that in addition to the concepts of kinds of groups and representations we have introduced already, associations can be characterised through the following parameters:

- a) Membership: who can be a member and how can they become a member?
- b) Shared goals or purposes, beliefs or convictions of the group
- c) Institutional sphere (as mentioned above), that is, public/private/economic
- d) Position in an institutional network

I now want to look at some cases where it may be instructive that they are not/only in some contexts associations. First, let us consider organisations that are governmental or government-instituted: “a university founded by an act of government” and “professional regulatory bodies

⁹ For a reflection on the concept of association, see Valeria Martino, “Recognising Associations: A Social Ontology Perspective” in Maria Cahill & Giulia Lasagni (eds.), *Associational Life and Freedom: Insights from Philosophy and Law* (Hart Publishing, 2025, forthcoming).

¹⁰ See, Maria Cahill, “Exploring Associational Life and Freedom: Comparative and Interdisciplinary Perspectives” in Maria Cahill & Giulia Lasagni (eds.), *Associational Life and Freedom: Insights from Philosophy and Law* (Hart Publishing, 2025, forthcoming).

¹¹ Vanessa Barbé, “Freedom of Association in France” (2025) 12 *European Journal of Comparative Law and Governance* 322, 324.

¹² cf Young, *James and Webster v United Kingdom*; cited after Maria Cahill, “Freedom of Association at the ECHR: A Right in Service of Democracy” (2025) 12 *European Journal of Comparative Law and Governance* 124, 127.

founded by legislation”.¹³ Such organisations are not usually considered to be associations. Why not? In the latter kind of cases one answer is that if there is a statutory obligation to be a member of an organisation then this defeats voluntariness. Another, more general and deeper answer is that freedom of association legislation is meant to strengthen and regulate a non-governmental sphere of civic activity. Assuming that in the terms outlined earlier, government represents the highest level of institutionalisation, associations do not and should not belong to that level.

It is instructive in this context to consider recent political disputes about a well-known kind of associations, namely so-called NGOs – that is, “non-governmental organisations” – in Germany and other countries. In Germany, these were triggered by the fact that several NGOs organised demonstrations against parties of the opposition, while at the same time receiving financial support from the government, and, critics argue, being financially dependent on the government.¹⁴ Of course the worry here is that if these associations are dependent on the government, they really cease to be non-governmental associations and instead become an extended arm of the government. They then cannot perform one of the essential functions anymore that associations can have in a well-functioning state: namely to organise, bundle and articulate opinions as part of a vibrant civil society. Such associations can be a check on the government and a laboratory where new ideas, new goals and plans for a society of the future are created. Vanessa Barbé emphasises this essential function of associations in her description of the situation in France:

“Freedom of association is also a factor in political innovation because the administration seems to be slow to adapt to social demand. On the contrary, the spontaneity with which associations are created means that they are directly in line with the concerns of today’s citizens. That’s the reason why, very often, the action of an association precedes that of the public authorities: it drives innovation, expresses a new need and gradually makes the State take it into account.”¹⁵

Associations cannot perform this function well anymore if they become too dependent on the government. Of course, since associations can be so vital for a well-functioning society and state, there are good reasons for the state to support them. In this spirit, some defenders of the

¹³ Cahill, “Freedom of Association at the ECHR”, 127.

¹⁴ For a brief journalistic account cf <https://www.dw.com/en/german-conservative-party-questions-political-neutrality-of-non-governmental-organizations/a-71794579>. See also Leannán Martan O’Grady, “Freedom of Association in Germany” in Maria Cahill & Giulia Lasagni (eds.), *Associational Life and Freedom: Insights from Philosophy and Law* (Hart Publishing, 2025, forthcoming).

¹⁵ Barbé, “Freedom of Association in France”, 325.

NGOs have framed the criticisms, which mainly came from conservatives, as an attack on civil society.¹⁶ But whether associations are still part of civil society when they are too dependent on the government and do its bidding is precisely what is at issue here. To what extent associations can be supported by the state without becoming too dependent on it, will of course be a matter of debate, a debate that we can't engage in here. The crucial point for present purposes is that there is such a thing as too much support here, that associations like NGOs can only perform their proper function in a society when they retain a certain degree of independence from the government.

Assemblies, Associations and Degrees of Institutionalisation

I now want to consider a feature of the constitution of the United States of America and its historical background: the US constitution only recognises a right of assembly, even though freedom of assembly and freedom of association and expression are often grouped together. What's the difference between freedom of assembly and freedom of association? The answer is stability: a right to assembly is not yet a right for long-term association with a high degree of institutionalisation. Assemblies, we might say, are short-term, highly context-dependent kinds of associations with a low degree of institutionalisation, and so the right to assemble does not necessarily entail a right to more long-term forms of association.

The first President of the US, George Washington, held that 'permanent, politically active associations of citizens were inconsistent with a republican form of government'.¹⁷ The idea is that citizens should only assemble to elect representatives, that between elections the right to speak on behalf of the people should only belong to elected representatives. This can make sense in a fledgling republic: any standing association of citizens may be or become a rival to parliament, so that as long as the power of parliament is not fully established, it may be legitimate or even necessary to suppress such standing associations. (Of course, the legitimacy of this will depend on whether the government itself is legitimate.)¹⁸ However, once parliament

¹⁶ cf <https://www.reuters.com/world/europe/german-conservatives-prompt-anger-with-questions-about-ngo-funding-2025-02-26/>.

¹⁷ Ashutosh Bhagwat, "Why Association?" (2025) 12 *European Journal of Comparative Law and Governance* 209, 212.

¹⁸ Two more historical examples for the pattern of curtailing or suppressing freedom of association to protect the government's power: 1) Nigeria: "The advent of British colonial rule saw a severe erosion of freedom of association with the colonial administration implementing laws that restricted public gatherings and associations aimed at suppressing anti-colonial movements and nationalist activities." Femi Amao, "Freedom of Association in Nigeria" (2025) 12 *European Journal of Comparative Law and Governance* 304, 305; 2) France: "The statute [regulating freedom of association of 1901] established a very liberal regime, in complete contrast to the secular tradition of suspicion of any coalition outside the control of the public authorities." Barbé, "Freedom of Association in France", 324 (emphasis added).

and the government of which it is a part are firmly established, it will become apparent that they function even better against the background of a lively civic society, where many individuals and standing associations articulate a diverse set of viewpoints, which can be input to and otherwise shape the deliberations of representatives. I take it that this is our contemporary sensibility, based on historical experience. President Washington's attitude has become quite foreign to us.

Associations then are more institutionalised than assemblies. They are more durable and stable, and this also at least typically means that they will have more of the other characteristics discussed above. That is, associations will often employ writing and documentation and often have complex organisational structures with a high degree of role differentiation. But different associations of course differ widely with regard to all these parameters and accordingly display different degrees of institutionalisation. The law in fact often distinguishes different kinds of groups with different degrees of institutionalisation (though not in these terms). For example, in France the very liberal statute of 1901 states that 'Associations of persons may be formed freely without prior authorisation or declaration'.¹⁹ Such undeclared associations are also called "de facto groupings". Declared associations must submit their declaration in writing. Only then do they obtain the status of legal persons. The next category are associations that are recognised as being of public utility. They have yet broader legal capacities and can receive donations and legacies. Finally, accredited associations have even more rights, particularly with regard to legal proceedings.

The higher the status, the more paperwork and documentation an association has to submit to obtain and maintain its status, and I would hypothesise, though I don't have data to support this hypothesis, that higher status organisations are likely to also have more complex organisational structures and higher degrees of role differentiation. A higher status also means a higher degree of integration with governmental institutions and therefore more legal rights – and obligations – while at the same time as we have emphasised, the association remains itself non-governmental and thus below the highest degrees of institutionalisation found in government. Is a higher status and a higher degree of institutionalisation better? It is insofar as it brings more legal rights with it! But it also brings more obligations with it and has other drawbacks as well, as we will explore in the next part.

¹⁹ For this and the following, see Barbé, "Freedom of Association in France", 324-5.

Friends for Friends vs. Bureaucratlandia or the Limits of Institutionalisation

So far the argument has been: lower levels should be able to flourish and provide input to higher-level institutions, at least once their power is firmly established. In our earlier discussion of recent debates about the role of NGOs, we have also already made the point that lower levels need a certain degree of independence from higher levels. In this part, I want to extend this argument.

The moot scenario #1 about *Cairde ar son Caidre* (“Friends for friends”) soup kitchen, which is presented in the introduction to this volume, raises the issues of limits to institutionalisation and of the dangers of overregulating and overstandardising lower levels through higher ones. Gráinne has been running the outdoor soup kitchen with some friends 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’.²⁰ *Cairde ar son Cairde* is not a registered charity, and has neither a bank account, a bookkeeper, a formal organisational structure, nor a constitution. And they want to keep it that way, even though the Charities regulator is pressuring them to register and has told the butcher that what he does is illegal:

“Gráinne has always wanted 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.”²¹

Gráinne therefore challenges the actions of the Regulator as a violation of her freedom of association, but the Supreme Court of Bureaucratlandia finds in favour of the regulator.

For Gráinne and her friends, the spirit of charity is dependent on the context of face-to-face interactions and friendly exchanges and – even if they may not think about it in this way – on the involved sensory-motor-emotional mental states. They want to keep things at that level and therefore resist the institutionalisation and the attendant forms of documentation that the Charities Regulator wants to force on them.

How could this problem be avoided in a land friendlier to charitable friends than Bureaucratlandia? A possible solution: groups could be exempt from registration and documentation up to a certain size of members and amount of donations. In this way the

²⁰ See Appendix 1 below.

²¹ See Appendix 1 below.

government would recognise limits to institutionalisation. It would recognise that forcing certain forms of representation and documentation on lower-level groups is in grave danger of destroying the spirit of charity that the government should foster.

Businesses vs. Associations: the Economic sphere, Discrimination and the State

Another interesting case are businesses. Can businesses be associations? No! Why not? Here's an answer from Ashutosh Bhagwat:

“...commercial entities must be excluded from the association right. Associational rights are largely meaningless without the right to voluntarily choose one's associations. But to grant such a right to commercial entities would be the end of all modern antidiscrimination law...”²²

As noted earlier, the government represents the highest institutional level at least within a given state. It represents the universal We of all of its citizens and must protect their equal rights against discrimination. This includes protection against discrimination in the economic sphere, which is essential to the well-being and flourishing of the citizenry. This is why it could not be tolerated if businesses had policies of only employing people of a certain sexual orientation or race, or of only offering their services to these groups.

Why then should we accept freedom of association, which essentially includes the right to voluntarily choose who one associates with and thus also the freedom to exclude individuals and even groups from one's association? The most fundamental answer is that the self-determination and freedom of groups is essential to human flourishing, and that people have a desire to associate with people who are like them in various ways. The state must have the interest of all its citizens at heart and therefore has a duty to ensure that they have equal rights in certain respects and spheres including the economic sphere. But this does not mean that it has a right to forbid a group just because it has a more particular membership and a more particularist agenda than the state. This would amount to a totalitarian interpretation of the state and its ethos. As long as all individuals and all groups have the same right to freely associate, this is not in conflict with the state's universalist ethos. In fact, it can be argued that this freedom has a positive effect on the state's functioning: as we noted earlier, a well-functioning state needs a vibrant civil society that provides particularist input from groups representing certain

²² Bhagwat, “Why Association?”, 223.

segments of the population to universalist deliberation. It is therefore desirable that we have groups that articulate and represent the interests of, say, footballers, homeowners, or the unemployed, so that they can be properly taken into account in the deliberations and actions of the state. In contrast, a legitimate reason for restricting the freedom of association is when people associate to actively work against a state's universalist ethos, particularly of course when it is enshrined in the state's constitution.

An interesting problem case for this argument is provided by the moot scenario #2 described in the introduction to this volume:²³ Róisín owns a local restaurant and is an amateur golfer, who golfs four mornings a week in the Kilgallen golf club, which has an open membership policy. But she would like to join another local golf club, the Kilmartin club, to build her connections and contribute more to the local community. But while the Kilmartin club has no formal policy excluding women, it traditionally only admits members who have been nominated by an existing member, and no woman has ever been nominated. Is it a violation of Róisín's freedom of association that she is not able to participate in the Kilmartin Golf Club? Is her claim to the freedom to join the club stronger than the claim of the club members to the freedom to exclude her? It seems to me the strongest argument on behalf of Róisín's claim is that the club membership is necessary for her to have full access to the economic sphere because the economic sphere must be free of discrimination. There is a long tradition of sex segregation in sports and of sex segregated sports clubs, and it seems hard to argue that there is something legally wrong with this per se.

But what kind of access to the economic sphere is relevant here? Róisín has full legal access to the economic sphere, there is no legal obstacle to her participation. What she is looking for are networking opportunities. But we do not ordinarily suppose there is a legal right to access to networking opportunities. In response, it can of course be asked what a legal right for access is worth if she is blocked from participation by non-legal, informal means? Even on the terms of the example, though, she is not really blocked, she already owns a restaurant after all. It may still be true that the men exclude her from further opportunities in a way that is at least morally wrong. Even then the best – in the sense of the most effective – way to respond may be in kind in the sense that one should first respond to an actual or perceived injustice at the level that it is committed at. Since the club does not even have a formal policy against the inclusion of women, the best course of action may be to first talk to one or several of the members. Perhaps one will nominate her after all. Or, failing that, Róisín may found a new club

²³ See Appendix 1 below.

and put out word that the Kilmartin club is rather fuddy-duddy. Legal action may only be appropriate as a last resort and if there is evidence that there is a concerted and systematic effort to limit women's participation in the economic sphere. From the point of view of the state, there's also a danger of legal action being perceived to be too heavy-handed and meddlesome, similarly to how forcing Cairdre ar son Cairdre to register as a charity, or treating it like a registered one, is too heavy-handed and meddlesome in the moot scenario #1. Educational campaigns may be a more appropriate form of government action here.

Conclusion

What has been accomplished concerning the nature of groups in general and associations in particular and what does this mean for how freedom of association should be justified?

I have argued that collectives in general should be understood in terms of people mutually representing themselves as co-subjects of perceptual, actional and affective relations and of positions such as believing and intending that they take towards the world in modes of identifying with their co-subjects and of occupying certain roles within an organisation. Such representing connects different kinds of groups from joint attention dyads over we-subjects of intentions to take walks and cook meals to associations and nation states. Different groups can also be found on different layers or levels of society or collectivity, and the difference between these layers can be described and explained in terms of the kinds and formats of representations – both mental and linguistic – that are involved. These can be distinguished in terms of such properties as their degree of context-dependence, representational role differentiation and concreteness or abstractness. For example, the representational states shared in a joint attention situation are dependent on that context, have a low degree of representational role differentiation, and are comparatively concrete, while the shared representations of a state as, for example, written down in its constitution are highly context-independent and abstract and have a high degree of representational role differentiation. Another central claim of the layered view is that higher layers can only work or at least work well against the background of lower layers. For example, the state, which represents the highest institutional level, can only work well on the basis of a vibrant civil society and a well-functioning public sphere.

What is the place of associations in this picture? To begin answering this question and to try to demonstrate the descriptive and explanatory power of the picture, I addressed certain traditional issues about associations and related entities. What is the relation between assemblies and associations? Assemblies are more momentary entities and the positions taken

in them therefore more-context-dependent. Allowing freedom of assembly only and forbidding long-term associations with a high degree of institutionalisation, as advocated by President Georg Washington, may be understandable and even appropriate if these organisations threaten the functioning of the government. This is a possibly legitimate reason to restrict freedom of association. However, once the government is firmly established, restricting freedom of association in this way becomes counterproductive. Articulating and justifying the attitudes and interests of groups within the population is vital for a well-functioning democracy, because these more particular viewpoints are crucial input for the universalist deliberations of the government.

To be able flourish and fulfil their functions in society, some low-level forms of associations should also be exempted from mandatory institutionalisation and the corresponding oversight. I used the moot scenario #1 of the *Cairdre ar son Caidre* Soup Kitchen to make this point. For Gráinne and her friends, the charitable spirit is dependent on the context of their friendship and face-to-face interactions with the people they help. To force them to formally register as a charity and document their funds and how they use them through a bookkeeper would be to extinguish that spirit. I suggested a solution to this may be to exempt groups from a duty to register and the corresponding regulations and forms of oversight up to a certain number of members and amount of donations.

In contrast, businesses cannot be associations because they cannot be exempted from certain regulations, particularly antidiscrimination law, while the right to freely associate entails the right, for example, to exclude non-Muslims from a Muslim association. The moot scenario #2 raises a problem about this freedom: Róisín argues that her exclusion from the Kilmartin golf club because she is a woman unjustly restricts her freedom of association. I tried to show that her strongest argument for this is that her exclusion impedes her access to the economic sphere, because many business owners frequent the club, but that this argument is still not compelling: we don't normally suppose that people have a legal right to networking opportunities, and informal or educational responses should be preferred over legal means, which will often be too heavy-handed similarly to the behaviour of the charities regulator in the moot scenario #1.

What does this all mean then for the justification of the right to be the certain kind of We that is an association? First, we have found support for the view that associations may be crucial for the proper, healthy or good functioning of democracy, because they can articulate and justify particularist group viewpoints which may be essential input to the more universalist deliberations of parliament and other government institutions. But, second, we have also

emphasised that the co-operative, we-seeking and we-forming nature of humans goes much deeper than this, is present on the many layers of collective intentionality, starting very early from about 9-12 months, if not earlier. In light of this, it seems to me that freedom of association should not only be justified instrumentally through the beneficial effects it has on democracy. It should also be justified through the inherent desire of humans to perceive, act, feel and think with others and it may therefore also be justified to think of it as a human right. Third, we have also noted two justifications for restricting freedom of association. The state may sometimes be justified in defending its own institutions against associations that try to undermine or overthrow them, and the freedom of association of one group or individual may be restricted through that of another one, as in the moot scenario #2, where Róisín's freedom to join an association was in conflict with that of the association to exclude her.

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?

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