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Global Perspectives on Freedom of Association: Nature, Ground, Expression of Freedom of Association

Kirk Ludwig

Societās Exploring the Value of Freedom of Association

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The Nature, Ground, and Legal Expression of a Right to Freedom of Association

Kirk Ludwig[1]

> … from this liberty of each individual, follows the … freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.
>
> John Stuart Mill, *On Liberty*, Chapter 1.

Introduction

What is a right to freedom of association? In asking this, I am not asking what the various *legally* codified rights regarding freedom of association are in one or another jurisdiction or what they may have in common. My project is not descriptive. That is, it is not an investigation into extant legal practices. [2] I intend to be asking a more general, extra-legal question. I am interested, specifically, in connection with thinking about freedom of association as a fundamental human value, in the grounding and logical form of a *moral* right to freedom of association. I take the content of the moral right to freedom of association to have some bearing on how we should think about designing a legal right to freedom of association – though, as I will argue, it is not entirely straightforward

[1] My thinking on this topic has been aided by participation in the interdisciplinary workshop *Exploring Associational Life: From Social Ontology to Law and Back Again* at University College Cork, Ireland, 25-26 April 2024, and the online Symposium held on 30 January 2025, organised as part of the *Societās: Exploring the Value of Freedom of Association* project, directed 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.

[2] This contribution takes a step back from questions about how a legal right to freedom of association is implemented in various legal jurisdictions to consider the more abstract question of freedom of association as a fundamental human value, and then what guidance that may provide in thinking about how to construct a legal right to freedom of association.

how to work out its implications. My method will be analytical. What are the elements that go into the concept of freedom of association? How do they interact? What is the source of the moral value of freedom of association? In accordance with this, I structure the investigation around three more specific interconnected questions.

(1) What do we mean by *freedom* in this context? What is its structure and limits?
(2) What kinds of association do we have in mind?
(3) What can ground a moral right to freedom of association?

I will sketch a foundational theory of a moral right to freedom of association by way of preliminary answers to these three questions. I do so from the field specific standpoint of the theory of collective and institutional agency. By collective agency I mean any instance of our doing things together, especially our doing things together intentionally. By institutional agency, I mean any instance of our doing things together when we act in institutional or organisational roles. Each of these has a role to play in the following. The overarching goal is to provide a structural and normative account of a moral right to freedom of association and to explore some of the complexities in its application to the conditions of legality.[3]

The Logical Form of a Right to Freedom of Association

An association implies at least two individuals interacting with each other (see the introduction to this book for further discussion).[4] A right to freedom of association, then, constitutively involves reference to others. It has a negative and a positive component. It is a right not to associate with others if one so chooses (negative) and a right to associate with others (certain conditions being met) if one chooses to (positive). Each is necessary for the other. The negative component of the right can be exercised individually. However, the positive right to freedom of association can only be exercised in and by an ensemble of individual agents. By an ensemble I mean a collection or group of agents whether or not they share any purpose, or are engaged in any joint activities or interacting with one another, but who nonetheless have the potential to do so. An association, in contrast, implies a shared purpose among those involved. So "ensemble" picks out a group that may form an association without implying that it has. While the right to freedom of association is a right of an individual, rather than of a group, the other agents with whom one may wish to

[3] I borrow this phrase from Scott Shapiro, *Legality* (Cambridge MA, Harvard University Press, 2011).
[4] See Appendix 1 below.

associate have the same right, including the right not to associate with others if they so choose. A consequence is that for any member of an ensemble to exercise her positive right to associate with others, the others must correspondingly exercise their positive rights to associate with everyone else in the ensemble. Thus, the positive right to freedom of association is exercised *by* individuals but only if and when the others with whom they would associate likewise exercise their rights to associate with the others. More precisely, let G be an ensemble of agents and let G/x be the group consisting of all and only members of G except for x. Then:

> For any group G, for any member x of G, x can exercise a right to associate with the members of G/x
>
> if and only if
>
> for every y in G ≠ x, y exercises y's right to associate with the members of G/y.

This generates a network of the mutual exercise of individual rights binding each of the members to each of the others. This is illustrated in Figure 1 for an ensemble of six.

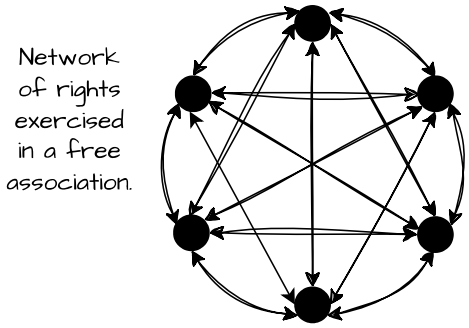


Figure 1: Each arrow represents an expression of willingness on the part of one to associate with the other conditional on their willingness to association with her. When the entire structure is in place, they jointly exercise their rights to associate with one another.

I will call a right with this structure an *ensemble right*. This is not the same as a group right because a group right is held by the group as such. While *we* have a right to associate with one another if we want to, the right distributes over members of the group. Since an individual's proper exercise of the positive component of an ensemble right requires the reciprocal exercise of the right by all

members of the ensemble, the positive right to freedom of association is a conditional right. It is a right to associate with others conditional on their (all each individually) freely choosing to do so. A corollary is that the exercise of an ensemble right requires transparency in the sense that the members of the ensemble must be in a position to be reasonably assured that the other members of the ensemble willingly enter into the association. In contrast, the negative right, absent other moral constraints (such as promissory duties), is an unconditional right. It does not depend on whether or not others wish or do not wish to associate with you.

Associating and Associations

The *content* of a moral right to freedom of association depends on what we understand by "association". The word "association" is used in several related senses. It can mean the *act* of associating or a *result* of associating, namely, *an* association. Associating as an act is conceptually basic. A right to associate with others for various purposes is prior to the right to form associations. Associating with one or more others implies a shared purpose. Associating with others for a shared purpose entails a commitment on the parts of each participant to their engaging in a shared intentional activity for promoting the purpose together. The purpose may be transitory (a pickup basketball game, a conversation while waiting for a train) or longer term (a friendship, a marriage, a club or political party).

While not every act of associating with others for a shared purpose (like a casual conversation) is an association, a right to associate implies a right to participate in associations. An association must have some stability and involve recurrent jointly intentional activities or the shared intention to engage in recurrent activities for some shared purpose. A shared intention is constituted by the participatory intentions of the members of a group directed toward their doing things together. I will call these participatory intentions, which are individual intentions, "we-intentions". On the account of we-intentions I favour, for each of us to we-intend that we move a bench (and so for us to share an intention) is for each of us to intend to make a contribution to there being a collective action plan in accordance with which we move the bench.[5] For example, I lift

[5] Kirk Ludwig, 'Collective Intentional Behavior from the Standpoint of Semantics' (2007) 41 *Nous* 355; Kirk Ludwig, *From Individual to Plural Agency: Collective Action 1* (Oxford, Oxford University Press, 2016). Other accounts include Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge, Cambridge University Press, 1999) C 8; Michael Bratman, *Shared Agency: A Planning Theory of Acting Together* (Oxford, Oxford University Press, 2014); Raimo Tuomela, 'We-Intentions Revisited' (2005) 125 *Philosophical Studies* 327; Raimo Tuomela, *Social Ontology: Collective Intentionality and Group Agents* (Oxford, Oxford University Press, 2013); Margaret Gilbert, 'Walking Together: A Paradigmatic Social Phenomenon' (1990) 15 *Midwest Studies in Philosophy*

the left side and you lift the right side at the same time and we each then move in the direction of the foyer, etc. I call this the shared plan account of we-intending. A shared intention may be generalised. We may intend to meet in the library every Friday evening to play chess. In this case, the members of the group have generalised we-intentions: each intends to contribute to there being a plan in accordance with which we meet in the library every Friday night. An association is underwritten by a generalised shared intention of its members to engage with other members on appropriate occasions in the kinds of activities that forward the association's purposes. These are implemented in more detailed plans on particular occasions.

Associations may be informal or formal. Informal associations are part of the fabric of everyday life. A group of friends who get together regularly are an informal association whose purpose is companionship, emotional support, a sense of belonging, the enjoyment of one another's company, and so on. The shared purpose need not be stated explicitly, and the goals and purposes of the informal association may change overtime. Formal associations are distinguished from informal association not just by having a division of labour, but by virtue of the assignment of status roles to members of the group. A status role is a function assigned to an agent in social interactions defined in terms of how the agent in the role interacts with others in virtue of their status roles.[6] Hence, status roles are defined in terms of their position in a network of status roles. Examples are being a president, treasurer, university professor, student, policeman, judge, citizen, employee, club member, and so on. A status role is a special type of status function, like being a ten-dollar bill, or the black queen in chess.[7] Something can function as a ten-dollar bill in an economic transaction only if those party to it collectively accept it for that role. In practice, this is expressed in our we-intentions being directed at the same things for the same roles. Thus, collective acceptance is constituted by the appropriate coordination of our we-intentions on items for the roles defined by the activity type we wish to engage in. On a train trip we may press bottle caps and a checkered tablecloth into service as chess pieces and a board. As long as our we-intentions

1; Margaret Gilbert, *A Theory of Political Obligation* (Oxford, Clarendon Press, 2006); Raimo Tuomela and Kaarlo Miller, 'We-Intentions' (1988) 53 *Philosophical Studies* 367. For an overview, *cf* Ludwig, *From Individual to Plural Agency*, C 16. Differences in detail won't be relevant to the points I wish to make, excepting Gilbert, for whom joint action constitutively involves sui generis directed obligations on the part of members of a group acting together to other members of the group to do their parts. *cf* Bratman, *Faces of Intention*, C 7; Ludwig, *From Individual to Plural Agency*, C 16.5 for responses.

[6] Kirk Ludwig, *From Plural to Institutional Agency: Collective Action 2* (Oxford, Oxford University Press, 2017) C 10.

[7] John Searle, *The Construction of Social Reality* (New York, Free Press, 1995); Ludwig, *From Plural to Institutional Agency*, C 8–9.

coordinate on the same things for the roles of the various pieces, they can play those roles; otherwise not.

A status role is a status function assigned to an agent in which the agent is expected to express her agency in fulfilling its function. These can include command roles, compliance roles, decision making roles, and so on. For example, a private in an army has a compliance role. His role is defined in part by the role-based duty to obey lawful orders issued by those of higher rank in his chain of command. A sergeant occupies a command role with respect to the private and a compliance role with respect to a First Lieutenant. The club treasurer is responsible for collecting and depositing dues, signing checks, managing the books, and so on. All institutions in the organisational sense are groups of agents realising a network of interdefined status roles designed for the purpose of carrying out collective action. All formal associations are institutions in this sense. Formal associations, as defined, need not have a legal status, but *any organisation that has a legal status will be a formal association*. Some features of formal associations are important to how they interface with a general moral right to freedom of association. In particular, three hallmarks of formal associations are:

(1) Their roles have entry and exit conditions. Meeting the entry conditions, someone has the role until the exit conditions are satisfied. Although it is presumed that the person occupying the role is party to the collective acceptance by which he has it, provisions are typically in place for what to do if he does not adhere to the requirements.

(2) In virtue of this, roles are time-indexed, that is, an agent can have the role at one time but not at another.

(3) Thus, they can be potentially occupied successively by different agents and the number of roles may both expand and contract over time. This is how organisations (understood as realised patterns of status roles) can persist through changes in membership and what gives rise to the possibility of perpetual existence. This together with the formal division of labour gives organisations their power.

Given that the positive right to associate with others cannot be exercised individually but only in concert with others, it is not per se a restriction of the right to freedom of association that a formal association has membership conditions that not everyone meets.

Formal associations raise a prima facie difficulty for the requirement of reciprocal exercise of positive rights of association. Someone voluntarily joins a large-scale formal association by meeting the entry conditions, for example paying dues for a club membership, or accepting an offer of employment at a university. But in large organisations this is typically done without most members of the organisation knowing it. How is the requirement that the other members exercise their right to associate with the new member satisfied? It is satisfied because when they joined the organisation, they also accepted the conditions for membership. Thus, they are committed to accepting as a member anyone now or in the future who meets the appropriate entry conditions. Thus, when a new member joins, they meet the condition the others have already accepted as appropriate for associating with them, and the new member accepts all those who have already satisfied the membership conditions.

The Moral Right to Freedom of Association

We can ground a moral right to freedom of association on two considerations.[8] The first lies in the fact that acting with others in pursuit of shared purposes is a fundamental value for social beings, for it is only in the context of joint intentional activities that we can express what most fundamentally defines the kinds of beings we are. This is not to say that just any form of joint intentional action answers to our most fundamental needs for social interaction but that only social interaction meets those needs. It is only in finding our place in a social world that we can reach full self-realisation. The second is a general duty to respect the autonomy of other agents, constrained only by the requirement that the exercise of that autonomy be consonant with the exercise by others of a comparable degree of autonomy and that it otherwise not be in conflict with the requirements of morality. Autonomy is a central value in the Kantian tradition.[9] It is also given a central role by Mill in his utilitarian liberalism, 'one of the elements of well-being'.[10] Autonomy as I understand it is the ability to govern oneself in accordance with one's own goals, values, and interests[11] rather

[8] One argument for a legal right to freedom of association goes through a moral right to freedom of association. There are other grounds as well, namely, that it is required as a precondition for the proper maintenance of a liberal democracy, which must presuppose certain civic virtues of its citizens which are cultivated through associational life. In additional, freedom of association is essential for the voices of multiple persons to be properly heard the public sphere, for it is typically only by collectivising their voices and speaking as a group that their views can effectively enter public debate. My concern, however, is to identify a fundamental moral grounds for a legal right to freedom of association.

[9] Immanuel Kant, *Groundwork for the metaphysics of morals* (New Haven, Yale University Press, 2018).

[10] John Stuart Mill, *On Liberty* (London, J. W. Parker and Son, 1859).

[11] A common view is that one's own values, desires, and interests are those that one would reflectively endorse. This traces back to Harry G. Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 *Journal of Philosophy* 5. For present purposes it is not necessary to take a position on what makes desires, interests, and values one's own.

than being manipulated, guided, or governed by forces or constraints external to the self or by psychological compulsions or addictions that are not reflective one's basic values and interests.[12] Autonomy is expressed in both thought and action. It is expressed in thought in thinking for oneself. It is expressed in action through choosing for oneself what to do, especially in connection with life-shaping projects. Autonomy is expressed both in choosing what to do and in what not to do. Autonomy is a fundamental value for self-conscious agents capable of thinking of themselves as the authors of their own lives. Part of what gives a human life the value it has for its protagonist is that from among the range of recognisably human goods and excellences, which cannot all be realised in any one individual, the ones realised in a life are chosen by the agent whose life it is, that is, the life is one authored by the one who lives it.[13]

Kant's Formula of Humanity enjoins us to 'So act that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means'.[14] Having identified engagement with social life and autonomy as two fundamental values for the kind of agents we are, it follows that treating others as ends in themselves requires minimally not restricting the expression of their autonomy in their decisions about what social arrangements they enter into, provided those decisions are compatible with the simultaneous exercise by others of their autonomy and not otherwise in conflict with the moral law. This grounds a duty of non-interference when there are no countervailing moral considerations and correspondingly a right to choose what social arrangements one enters into. The right is unrestricted except by the requirement of consistency with the moral law. This subsumes all forms of association, transitory, private, public, stable, informal and formal. As we observed above, when autonomy is expressed positively in the choice of who to associate with, given that it must be consistent with everyone else's right to make their own choices, it can only be expressed appropriately as a member of an ensemble of agents exercising their positive right to associate with the others.

The qualification about giving equal status to the autonomous choices of others and the moral law generally is important. Autonomy is not an absolute value. There can be considerations

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[12] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge, Cambridge University Press, 1988).

[13] Authoring a life is a matter of degree and depends to some extent of the range of opportunities open to one and the extent of harms and deprivations to which one is subject, but in most any life there are many decisions that shape the kind of life it is that are made by the agent who lives that life, minimally in shaping and expressing the character of its subject and her relations to others.

[14] Kant, *Groundwork for the metaphysics of morals*, AK 4:429. For a discussion of the Formula of Humanity and its relation to the other formulas of the moral law in Kant *cf* Allen Wood, *Formulas of the Moral Law* (Cambridge, Cambridge University Press, 2017).

in favour of an abridgment of autonomy. These can go beyond mere consistency with others exercising their autonomy freely. The proper exercise of autonomy presupposes competence in identifying one's own most important values, determining means to ends, and executing decisions effectively. We restrict the autonomy of children not because it is not a value for children but because they are still forming their values and outlook on life and their emotional, moral, and cognitive abilities are still under development. Similarly, we do not let someone suffering from dementia choose to cross the road when there is heavy traffic. And even when competence is not in question, in particular cases intervention may be appropriate because of knowledge we possess which others do not that puts us in a position to see that without intervention their autonomous actions would result in significant unanticipated harm to them (or others), or the frustration of their goals, which could be achieved in some alternative way. This would be an intervention that the agent herself would recognise as in her best interest and which she would have chosen herself with the additional knowledge we possess. Nonetheless, even in cases in which someone insists on doing something which we are well justified in thinking is not optimal for her, she has a (defeasible) right to choose the less optimal path. For there is value in it being her choice, and disvalue in restricting it. And the value it derives from it being her choice together with the disvalue attendant on not being given a free choice can weigh more heavily than the difference in overall well-being as measured independently of whether the path was chosen by the agent.

From a Moral to a Legal Right

I assume here that the law is socially constructed, and, hence, an invention.[15] On this assumption, the law is not constitutively moral: unjust laws are still laws. Consequently, legal rights and duties are not per se moral rights and duties. Even on this assumption, however, insofar as the law provides a framework for a society and for large scale social organisation, and insofar as we have an interest in the moral law, we have an interest in shaping positivist law so that it does not violate the moral rights of those it governs. While the moral law does not dictate every aspect of the design of a legal system, it may be thought of as scaffolding within which the details for the circumstances of a

[15] I argue for this assumption, from the standpoint of the field of social ontology and institutional agency, in Kirk Ludwig, 'The Social Construction of Legal Norms' in Miguel Garcia-Godinez, Rachael Mellin and Raimo Tuomela (eds), *Social Ontology, Normativity and Law* (Berlin, De Gruyter, 2020). See the related arguments of: Shapiro, *Legality*; Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford, Oxford University Press, 2001); Christopher Kutz, 'The Judicial Community' (2001) 11 *Philosophical Issues* 442. The interest in assuming it here lies in showing that even so there is room for the question how moral law should shape positive law without making it definitional of law as a human invention that it is in harmony with morality.

particular society are worked out. In light of this, the question arises how to implement a moral right to freedom of association in a legal system, that is, as a legal right.[16] I think we can identify two very general principles. The first is motivated by the fact that autonomy is a fundamental moral value and that social relations are a basic source of value for us. The second is motivated by the fact that autonomy is a fundamental value and by the potential for abuse of the enormous power of the state to suppress associations it disfavours.

(1) A right to freedom of association should be encoded at the level of constitutional law, that is, a part of the basic framework for a legal system.
(2) A right to freedom of association should be presumptively unrestricted in the sense that unless there are specific and weighty countervailing considerations grounded in the moral law or in the practicalities of maintaining a stable legal system, the right to freedom of association cannot be abridged.

It is in the "unless" clause of the second general principle that all the complexities of a legal right to freedom of association must be worked out. These complexities combine, on the one hand, the complexities of the application of general moral principles to particular circumstances and the balancing of competing moral values and, on the other, the complexities of crafting laws whose conditions of application are clear, which can be supported by a broad consensus among citizens, which are practically enforceable, and are not liable to abuse. A legal system must be stable to fulfil its function. It must be compatible with a plurality of views about the best forms of life. It must balance the freedom of individuals against the common good. It must take account of the actual contingent historical state of society and of the fact that the social conditions it governs are non-ideal.

Sources of Limitations on a Legal Right to Freedom of Association

While a moral right to freedom of association is grounded in a fundamental moral right to autonomy, like the moral right to autonomy from which is derives, it is a pro tanto right. It may be over-ridden by other moral considerations in particular circumstances. Thus, we can expect that a legal right to freedom of association may be restricted in light of other moral and social exigencies. I consider four important kinds of limitation in this section without suggesting that these are exhaustive.

[16] The practical issues are the same whether one adopts positivism or the natural law theory.

First, there may be restrictions on the formation of associations with certain purposes.

Second, there may be restrictions on the form that associations with certain purposes must take, for example formal versus informal, and if formal, then on how they are structured given the purposes.

Third, especially in the case of formal associations of certain sorts, there may be restrictions on who may be excluded, that is, on the form of the entry conditions.

Fourth, there may be prima facie restrictions on the negative component of the right to freedom of association, that is, citizens may be required to participate in certain kinds of formal associations.

The discussion here can only touch, in a fairly abstract way, on some of the issues that arise in each case.

(1) Limitations based on purpose. An association may be legally banned or restricted on the basis of *certain* purposes. Some cases are relatively straightforward. An association whose purpose is to overthrow the state may be legally prohibited as a formal condition on the coherence of a (presumptively just) system of laws, namely, that they should be allowed to defend their own sovereignty. In addition, an association whose purposes are themselves immoral may be legitimately declared illegal, for example, criminal gangs, the mafia, a company of assassins for hire, organisations involved in human trafficking, or organisations devoted to political violence.

A more difficult case is that of creedal and expressive associations, that is, those organised around an ideology or set of beliefs (creedal) or for the purpose of expressing shared views (expressive). Many of these will be relatively innocuous, such as the Flat Earth Society, the Boy Scouts of America, many, if not all, political parties, and so on. The difficulties arise when the association's ideology is not innocuous but harmful. Take the white supremacist ideology of the KKK as an example. Racism is a disease, not of the individual, but of the social order. If it becomes too widespread, it leads to widespread discrimination and the enactment of laws that underwrite racial bias. But there are dangers and costs to banning associations based on racist or other harmful ideologies, as opposed to criminal action. First, banning them drives them underground without treating the source of the disease. Second, it puts us on a slippery slope. Where do we draw the line and who decides what is pernicious enough to ban? For example, the Catholic Church's patriarchal structure is explicitly sexist. Why should it get special treatment? Third, a governmental power to

ban associations on the basis of their ideology is a recipe for abuse. Fourth, by allowing the public expression of pernicious views, as Mill noted, we keep ourselves alive to the reasons against them and deepen our appreciation and understanding of the principles of liberty. Finally, there are alternatives that arguably treat the disease more effectively: namely, (i) openly challenging the racist ideology through education, social media, entertainment, advertisements, the news, and so on, and (ii) promulgating policies that integrate racial minorities into the economic and civic life of a nation so that their socio-economic status matches that of the general population. Even so, there is no single answer to the question whether a creedal or expressive organisation organised around pernicious views can legitimately be banned. For it depends on the degree of risk in not doing so, which is sensitive to the actual conditions of a society and its history, and on whether there are alternatives which can effectively mitigate the risks.

(2) Restrictions on the form that associations take. There are at least two dimensions to this. The first concerns what forms associations must have given their purposes. Business laws, for example, govern how businesses are formed, operate, and are governed. The second concerns when an association is required to become formal by becoming legally registered. For the right to freedom of association extends not only to the association's purposes and members, but also to how it is organised, that is, *how* the members choose to associate with one another. I focus on the second case here.

For specificity, consider the following case.[17] A group of friends organise informally to run an outdoor soup kitchen. They receive leftover food from local grocery shops. A local butcher shop has an account that allows people to contribute money indirectly. They provide sleeping bags and clothing when possible. They are not a registered charity, have no bank account or bookkeeper, no formal organisation – they are an informal organisation in the sense of not realising a network of status roles. The members are friends. They want those who use the soup kitchen to feel like they have been invited to a dinner with people they know. It is important for their understanding of what they are doing that it be an informal association. Let us say that there is a law requiring charitable organisations to register. Though they have been maintaining the informal association for some years, they are now charged with violating the law. Let us say that the justification given is that all charities should be subject to the same legal standards so the public is assured they operate with

[17] This is closely modelled on a moot scenario discussed at the *Exploring Associational Life* Workshop at University College, 25-26 April 2024. See Appendix 1 below.

financial integrity. Can there be an adequate ground for requiring them to register as a legal charity, that is, become a legal entity, open a bank account and hire a bookkeeper? My concern is not with the correct legal judgment given the actual content of the law. It is with whether there can be an adequate normative justification for the law if it requires the informal charitable association to legally register. Our second basic principle above says that their right to freedom of association, which subsumes freedom to choose its form, should be abridged only if

> there are a specific and weighty countervailing considerations grounded in the moral law or in the practicalities of maintaining a stable legal system.

The question then is what harms result from allowing informal charitable organisations of this sort. In our case, the group of friends have been running the soup kitchen without causing any one harm for some years. If there is a ground for requiring them to register, it will have to lie in the risks of harms if associations of the same sort were generally allowed to remain unregistered. The risk of harms would have to outweigh both the good done by such associations and the costs in general of requiring every such organisation to register.

We can accept that large charitable associations which solicit donations from the public should be regulated, and, hence, required to become a legal entity, to ensure financial integrity and that the funds donated go toward the charitable purposes of the organisation. This is important for securing the public trust that all such charities rely upon. These requirements are in the interest of the associations themselves. However, the association in the present case does not solicit donations from the public and does not maintain a bank account. An *individual* who shares food with those who are hungry should not be required to register as a legal entity. There is no question about a need to assure *the public* of the individual's financial integrity. No more should a small group of friends who pool resources to do the same be required to register as a legal entity merely because they work together to promote a common interest. If a local grocery shop provides an individual with leftover food to be distributed, this introduces no significant new factor, and it would not do so when it is a group of friends who work together to distribute food. Perhaps a wrinkle in the present case is that the butcher has an account so that others can contribute indirectly. But is it only the friends in the group or those closely association with them who contribute? Are there any solicitations of the public generally for contributions? Plausibly, the key question is who contributes. If only friends and neighbours are involved, and there is no solicitation of money from the general public, then they are a private association. The public does not have an interest in

whether private individuals handle *their* money with integrity. The provision for an account they contribute to should not here be a significant factor. They could alternatively put cash in a canister and use it to buy meat for the soup kitchen. The principle that can be applied in this case then is that a private charitable association need not be regulated, but that a public one may. It suffices to be a public charitable association that it solicits support from the general public. In this case, the public has an interest in the financial integrity of the charitable association, as it touches their interest, and it is reasonable to require legal registration. The case then illustrates two things of interest. The first is that a dimension of the right to freedom of association is whether to engage in a formal as opposed to informal association. The second is that the distinction between a private and public association is relevant to whether it may be reasonable to require an association to become a legal entity.

(2) Restrictions on who may be excluded. Since the basic structure of the right to freedom of association requires for the proper exercise of the positive right that those with whom one associates agree to the association, the basic presumption is in favour of a group excluding anyone who they do not want to join. For informal associations in the private realm, there should be no abridgements of this right of exclusion. For formal associations which are in the public realm, there is a presumption in favour of a right of exclusion, especially when it is tied to the association's character and purposes. For example, a church may require members to be adherents to its creed. Creedal and expressive associations should in general be protected from having to accept anyone who does not accept their core doctrines. To abridge this right would be tantamount to banning such associations, for they cannot fulfil their purposes without the restriction.

What would count as a consideration weighty enough to overrule a formal association's conditions on membership when they are not integral to its character and purpose? A state formed for the good of its citizenry will treat each of them as having an equal stake in the goods of society. I will assume that this minimally requires affording them equal access to those goods. If the way public associations regulate their membership undermines access to the goods of society for some subset of citizens on the basis of a salient common property, such as on the basis of sex or race, then the state has an interest in regulating their membership. There are two subcases to consider.

The first is explicit discrimination. If a grocery co-op offers any member of the public the option to buy shares, except for Blacks, it has an explicitly discriminatory membership policy. Any rule that if universalised would undermine access to public goods to any portion of the public on

the basis of some non-morally relevant feature of them would violate the obligation of the state to provide citizens with equal access to the goods of society. This provides a ground for prohibiting restrictions on membership in public associations on the basis of sex, race, religion or any other common feature irrelevant to the character and purposes of the association.

The second case is one in which the membership condition itself is neutral with respect to, for example, race or sex, but the association still intentionally discriminates. Let's consider a particular, somewhat tricky, case.[18] A golf club of long standing is formed initially by a group of businessmen in part for informal networking. It has been highly successful. The club requires that new members be nominated by current members. There is no rule against nominating a woman. Thus, it is open formally to any businessperson, and it counts as a public association. But in fact the members of the club do not want women to join, and the formal conditions of membership provide an effective means of remaining a male only club. A local businesswoman who is an avid golfer wishes to build her business connections by joining the club. There are other places to golf close by and she is a member of another golf club, but it does not provide the same opportunities for business networking.

Is it a violation of *her moral right to freedom of association* not to be able to participate in the male only golfing club? The answer is a straightforward "no". Exercising the positive right to freedom of association presupposes that those with whom one associates exercise the positive rights reciprocally (Part 2). The right question to ask is whether the state has an interest in restricting the pro tanto right of the members of the male only golf club to exclude intentionally members on the basis of sex.[19] More specifically, the question is whether there are weighty considerations in favour of abridging that right in this case. First, does the exclusion of businesswomen from membership undermine their access to public goods on the basis of features

[18] This case is also modelled on a moot scenario discussed at the Exploring Associational Life Workshop at University College, 25-26 April 2024. See Appendix 1 below.

[19] Suppose that they accede to the requirement to admit women but only because of a legal order to do so. Does it follow that the conditions for the local businesswoman to exercise her right to join them are not met because they are not willing to associate with her? For example, when someone is coerced into a marriage, their right to freedom of association is violated and the conditions for the other party to the marriage to exercise a positive right to associate are not met. But it is not as clear in the case of a legal ruling about membership in a public association. We sometimes do things we are pressured to do without that entailing that we do not do it voluntarily. In particular if we accept the legitimacy of the authority of the law, even if we disagree with it or its application, then in acting in accordance with it, we do not act under coercion. In this case, following the legal order, the members of the club do accept women as members willingly in the sense that is relevant. In the same sense, if we participate in a decision procedure, we accept the outcome, whether or not the outcome is the one we thought was best or the one we hoped for.

irrelevant to the purpose of the club? Second, does it matter that the exclusion is not written into the entry conditions?

Suppose that the club explicitly required that members be male. Then it would formally discriminate on the basis of sex when that is not integral to the kind of club it is. If this is permitted, then we must permit it potentially by every professional organisation whose membership is de facto male. Suppose most businessmen are in fact male. Since networking is an important resource for businessmen and women, allowing professional organisations formally to exclude businesspeople on the basis of being female would permit a significant restriction on the access to a resource on the basis of sex. Thus, it would be disallowed. Keeping everything else fixed, is it relevant whether the formal conditions of membership allow women to join but club members conspire to exclude women? In the case in which the formal conditions exclude women, the conditions are in place as a result of the members sharing an intention to exclude women. In the second case, the members also share the intention to exclude women. The only difference is that it is not expressed as a formal condition on membership. There is no moral distinction between the cases. The intention and the effect are the same. Whether the means involves a formal membership condition that explicitly excludes women is not relevant to why it is wrong. Therefore, it is not just when the formal conditions exclude women that the state has an interest in restricting the exclusion of women from membership in organisations that afford professional benefits to them.

Consider now a case in which a group of women organise a golf club that is *formally* restricted to women. This would not violate the right of local businessmen to join because that right is conditional on the willingness of the others to associate with them. But can the women only club members' right to exclude men be restricted on the same grounds as I argued the right of the male only golf club to admit only men could be restricted? First, it may make a difference what the purpose of the association is. If it is to provide a space for networking for women in particular against the backdrop of a somewhat hostile male business community, then it is integral to its purpose that members be women. There is no such justification for the exclusion of women in the case above. Second, even putting this aside, a restriction on their right to exclude men would be justified only if it restricted access to a public good that would not otherwise be available to men. But if we assume as above that most businesspeople in the community are men, and that there is a club to which they can belong which affords them ample opportunities for networking, then there is no corresponding ground for restricting the right of the women only club to exclude male members.

As a final wrinkle, consider a golf club that decides to exclude businesspeople on the grounds that it doesn't want the club to become a spillover chamber of commerce. The question should be approached by focusing on whether allowing this in general may permit a circumstance in which a class of citizens is excluded from access to certain public goods. In this case, it is clear that it would, and so the restriction should not be permitted. But that does not entail that a club cannot have rules of conduct for their members that include no discussion of business on the club premises, and so there is plausibly another remedy for the need for a social space which is not an extension of the business sphere.

(4) Restrictions on the negative component of freedom of association. Common examples of restrictions on the negative component of freedom of association are being drafted into the armed forces and being called up for jury duty. But the case for these being restrictions on the negative right to freedom of association is not clear. Why? Let us suppose that we are thinking of a legitimate state, by which I understand one that has the consent of those it governs. This does not mean that all citizens believe that all of the state's institutions and laws are just, but that they accept that the state adequately, even if imperfectly, represents the interests of its citizens as a whole. In a representative democracy, this is expressed in citizens accepting the procedures by which representatives are chosen. In accepting the procedures, they accept the results as legitimate, even if the candidates that they voted for do not win. The legislature then acts as a proxy agent for them. In this way, ideally, the laws have internal authority over the citizens, that is, authority that is endorsed by those they govern.[20] Citizens who accept their roles as citizens, then, have authorised indirectly the legal requirements to participate in jury duty when called. Thus, it is not a violation of their negative right to freedom of association because they are already willing to serve if called to do so. That leaves citizens who are not willing to fulfil their duties as citizens under the law. But this is simply a case of the moral legitimacy of the law in general for citizens. If the laws are justifiable, then no all-in moral rights are violated, when someone otherwise not disposed to follow them does so only because there are enforcement mechanisms.

Conclusion

An assumption of this project is that moral rights and duties provide a scaffold for the design of a legal system. Given this, the focus has been on how the ground and logical form of a *moral* right

[20] Ludwig, 'The Social Construction of Legal Norms'.

to freedom of association may inform our thinking about how to design a legal right to freedom of association.

Since a right to freedom of association involves others in its exercise, the negative (not to associate with others) and positive (to associate with others) rights have different implications. The negative right can be exercised individually. The positive right, given the negative right of others, can only be exercised when those with whom one would association likewise exercise their positive rights with respect to the same group. The positive right then is a conditional right, and this gives rise to a right of exclusion for any group that has formed an association. It follows that the exercise of a right to exclusion is not a violation of anyone's moral right to freedom of association.

The moral right to freedom of association and its importance is grounded in a moral right to autonomy, a right to make one's own decisions about the shape or one's life, together with social interactions being a fundamental source of value for us. The moral right is distinct from the legal right. But even on a positivist view of law, to the extent that we have an interest in respecting moral rights in the design of positive law, we should seek to find an appropriate legal expression of a right to freedom of association. Given its importance, it should be encoded at the level of constitutional law and be treated as presumptively unrestricted, if not absolute. Restrictions should be based on countervailing moral considerations that are weightier or justified by the practical necessities of maintaining a stable legal system.

Significant issues that come up in implementing a moral right to freedom of association in a legal code are: (i) under what conditions the purpose or content of especially a formal association constitutes a ground for banning it, (ii) when an informal association may be required to become a legally recognised and hence formal association, (iii) when an association's right to exclusion may be abridged, and (iv) when the negative right not to associate may be overridden. There can't be a general algorithm because decisions depend on balancing considerations in light of empirical facts. The open texture of the law in this connection is not a flaw but a virtue: it ensures that the precise shape of a right to freedom of association will be worked out in part through case law when confronted with circumstances that could not have been anticipated ahead of time.

Figure 2 summarises some of the themes of the discussion.

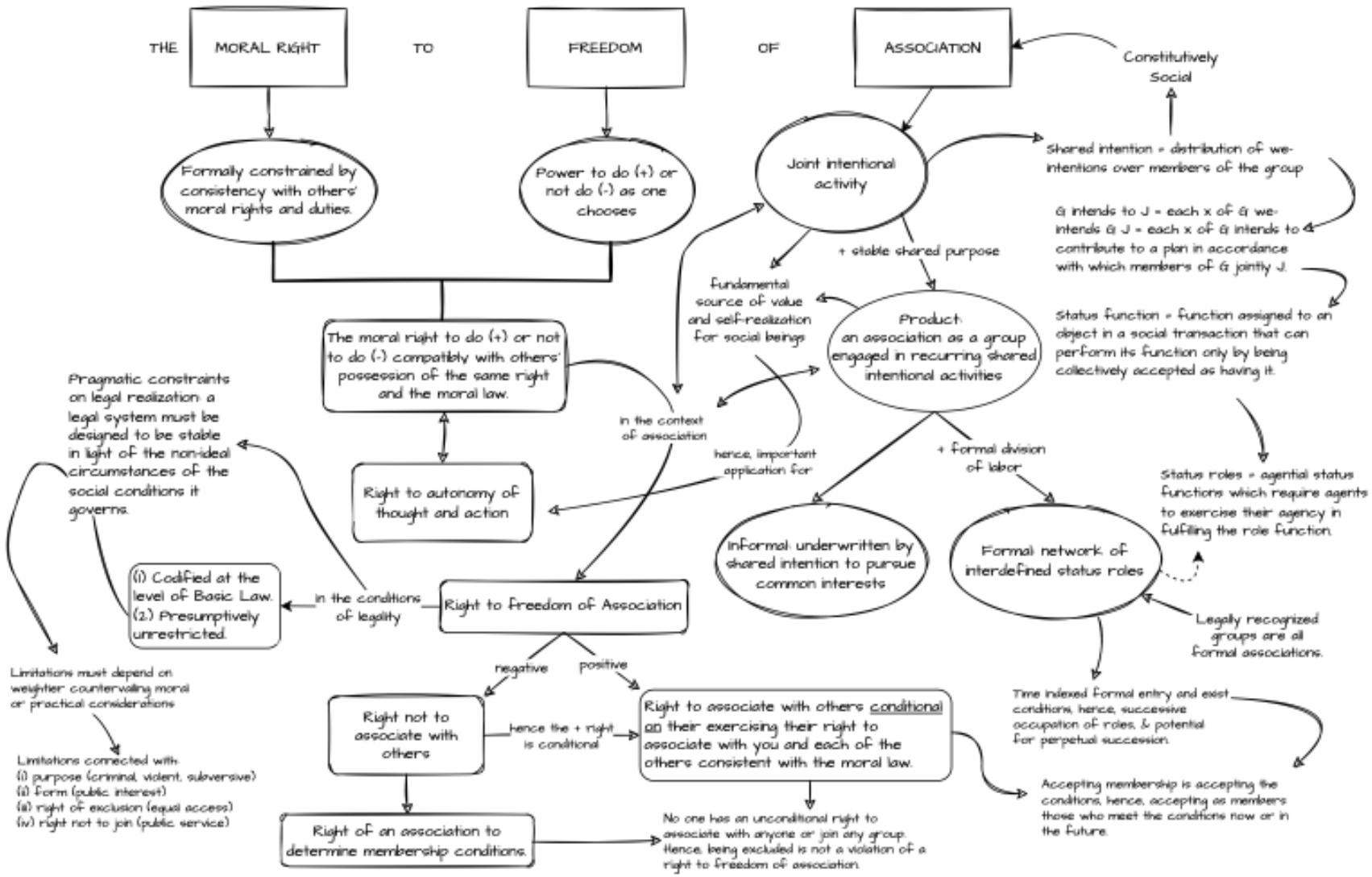


Figure 2: An analysis of the moral right to freedom of association and notes on its application to the conditions of legality

Appendix 1: Moot Scenario 1 "Cairde ar son Cairdre" Soup Kitchen

Together with a few friends, Gráinne has been running an outdoor soup kitchen called Cairde ar son Cairdre (*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