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Global Perspectives on Freedom of Association: the United Kingdom

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Freedom of Association and the Law in the United Kingdom*

*Julian Rivers***

I. Introduction: A Negative and a Positive Right

If there is one feature of the British constitution which is generally well-known, apart, that is, from the existence of a monarchy, it is the fact that it is 'unwritten'. Having escaped major political turmoil since the revolution of 1688-9, it has evolved incrementally rather than experienced processes of wholesale codification. The highest form of law within the United Kingdom is an Act of Parliament, a piece of primary legislation, almost always promoted by the government of the day, and approved by both Houses. But 'Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law, and courts may approach legislation on this initial assumption.'[1] The common law provides a rich and complex legal context within which legislation takes its effect, somewhat as the conventions of language shape the possibilities of intelligible speech. The political context is further stabilised by constitutional conventions. These are normative practices which modify political powers in line with modern principles of governance. For example, by convention the monarch appoints as prime minister that person best able to command the support of a majority of the House of Commons, and by convention the monarch assents to any legislation which passes both houses. In this way traditional forms of rule are made responsive to democratic principle.

The sources of the British Constitution may thus be found in statute, the common law and political convention, a feature which gives it both resilience and flexibility. It also makes it distinctively open to competing interpretations, lacking as it does a single canonical text to

* The United Kingdom contains three main legal systems: England & Wales, Scotland and Northern Ireland. Scottish law differs in important respects from the law of the other two jurisdictions. However, laws relating specifically to freedom of association are substantially similar throughout the United Kingdom.

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[1] *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539, per Lord Steyn at 587.

act as a fixed point of constitutional debate. One of the most enduring accounts was provided by the constitutional theorist and Oxford professor, Albert Venn Dicey (1835 – 1922). He reduced the constitution to three main elements: a sovereign Parliament, the rule of law, and constitutional conventions, at the same time providing a gloss on those elements which reflected his hostility to the increasing role of the state. He was also sceptical of the value of codified fundamental rights, emphasising instead the practical effectiveness of historic legal processes such as the writ of habeas corpus against executive detention.

Dicey's account of the place of fundamental rights within the British constitution continues to influence the assumptions of many English lawyers.[2] In his main treatment, the closest he gets to discussing the topic of freedom of association addresses the 'Right of Public Meeting'. He states this:

> The right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B, and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E, and F, and so on *ad infinitum*, lead to the consequence that A, B, C, D, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner.[3]

Historically, the most frequent forms of legal intervention on the activities of groups have focused on constraining the potentially disruptive consequence of public gatherings, particularly those with express or covert intent to bring about political change. But by focusing on restrictions of the manifestation of group life – on what we would now call freedom of assembly, rather than the freedom of association as such – Dicey's account tended to render the constitutional place of social groups invisible. In themselves, crowds have no distinct legal form. These assumptions coloured even his account of associations. In an article published in 1904, he reflected further on the nature of the 'right of association' describing it as 'nothing more than the right of two or more citizens, X, Y, and Z, to combine together by agreement among themselves for the attainment of a common purpose.'[4] His subsequent discussion of

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[2] A.V. Dicey, *Introduction to the Study of the Constitution*, 8th edn. (London: Macmillan: 1915).
[3] *Ibid*., 170.
[4] A.V. Dicey, 'Combination Laws as Illustrating the Relation between Law and Opinion in England During the Nineteenth Century', (1903-1904) 17 *Harvard Law Review* 511-532, 512.

laws relating to early trade unions was framed as a tension between people exercising their normal individual liberties in concert and various attempts by the legislature to prevent these collective exercises of social power from having what were considered to be anti-social effects.

While Dicey was entirely correct to emphasise the importance of embedding abstract claims of fundamental right within the doctrine and practice of courts, not least in informing judicial approaches to the interpretation of statutory entrenchments upon basic rights, his conception of the content of such rights was *negative* in two important ways. It was negative, first, in its assumption that civil liberty is legally residual; it is part of the sphere of freedom left to people once one has subtracted all the legal limits, whether civil or criminal, on their actions. It was negative, secondly, in its assumption that liberty is most completely constituted by the absence of law; that law can only ever restrict the freedom of the individual rather than acting as a source of empowerment. This can perhaps best be explained as a reflection of the way Dicey emphasised Parliamentary legislative supremacy. Even today, this dual negativity can lead to programmatic claims, seen often enough in contemporary treatments, that there is no positive right of association in English law.[5] This then leads to the further claim that the Human Rights Act 1998 – which undoubtedly gives effect to a positive right – represents a major shift in constitutional thought.

Historically, the two main examples of restrictive intervention by Parliament were the attempts to suppress 'conventicles' and 'combinations'. The Clarendon Code of legislation passed in the first decade after the restoration of the monarchy in 1660 sought to impose a policy of religious uniformity within England.[6] In particular, the Conventicles Act 1670 made it an offence to be present at an assembly of five or more adults for religious worship apart from the established Church of England. Relief came – at least for Trinitarian Protestant dissenters – in the form of the Toleration Act 1689, which established a system of registration and licensing for places of worship, ministers and schoolmasters. Over the centuries that followed, toleration was expanded, and processes of registration rationalised, although the obligation to register groups of 20 or more meeting for religious worship, even on private premises, was not technically repealed until the 1970s. By then, registration had long become a means of obtaining benefits such as relief from local taxation and the capacity to conduct weddings, as it still is today.

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[5] Richard Clayton and Hugh Tomlinson, *The Law of Human Rights*, 2nd edn. (Oxford: Oxford University Press, 2009), para. 16.49.

[6] Julian Rivers, *The Law of Organized Religions* (Oxford: Oxford University Press, 2010), 13-20.

The other main historical example – and the one which Dicey considered in his article – was the attempt to suppress 'combinations' of workers seeking to improve the conditions of organised labour in the wake of the Industrial Revolution.[7] The highly restrictive, even draconian, Combination Act of 1800 criminalised strikes and the support of strikers, and the history of trade union law is one of gradual but uneven amelioration as the widening of the franchise generated political parties more sympathetic to the interests of labour. But there is an important difference between these two examples in respect of judicial attitudes. In the case of dissenting religious groups, the courts were broadly supportive of a policy of widening toleration. Once Parliament had removed the taint of illegality from non-Anglican religion they were willing enough to craft private law remedies which gave minority religious groups a secure and permanent legal existence. In the case of trade unions, the judiciary tended to use their creativity in more restrictive ways, as seen in the case-law on both the crime and, later, the tort of conspiracy. Even Dicey's choice of example is loaded.

Focusing on statutory restriction and administrative regulation can divert attention from the more fundamental ways in which the common law has long facilitated the legal expression of associational life. Although the common law contains no general means of acquiring legal personality, which was treated as a privilege to be granted by Royal Charter or Act of Parliament, lawyers managed to craft a series of rules and remedies which secured practical solutions to typical problems. As Maitland said commenting on continental European debates about the theoretical foundations of collective legal personality in the light of English common law:

> '…what for the civilians was a question of life and death was often in England a question of mere convenience and expense, so wide was that blessed back-stair. The trust deed might be long; the lawyer's bill might be longer; new trustees would be wanted from time to time; and now and again an awkward obstacle would require ingenious evasion; but the organized group could live and prosper, and be all the more autonomous because it fell under no solemn legal rubric.'[8]

Maitland was drawing attention here to a major point of difference between legal systems based upon the English common law and those influenced primarily by the continental European reception of Roman law. The device of the trust divides the ownership of property

[7] John V Orth, *Combination and Conspiracy: A Legal History of Trade Unionism 1721 – 1906* (Oxford: Oxford University Press, 1991).

[8] Frederic William Maitland, 'Translator's Introduction' to Otto v. Gierke, *Political Theories of the Middle Ages* (Cambridge: Cambridge University Press, 1900), 31.

into two parts: legal title and benefit or enjoyment. In this way, the legal owners come to have duties to deal with 'their' property for the benefit of others. Maitland's reference is most readily understandable in the case of charitable trusts. A trust of property for purposes which the law recognises as conferring a public benefit may exist in perpetuity for the fulfilment of those purposes. Trustees (legal owners) are subject to a regime of powers and duties to apply the property to those purposes, which is treated as a fund distinct from their own personal property. The fund becomes a quasi-person in itself. But even in the case of private (non-charitable) trusts – such as the ownership of the premises of a private members' club – the trust can be embedded in the group's constitution.[9] If the trust deed is well drafted, the property, which belongs beneficially to the members collectively, can only be applied in accordance with the terms of association.[10] Although the association is unincorporated, officers of the association may generally sue or be sued in a representative capacity.[11] In this way, English common law has for a long time offered techniques for the private legal ordering of collective action sustained over time. This was not a foregone conclusion; as Maitland's reference to 'ingenious evasion' hints, some of the older cases were clearly driven less by legal logic than the pragmatic need to craft a suitable remedy.[12] Yet by one route or another, English law protects and regulates the existence of unincorporated groups, as if they were for almost all practical purposes incorporated.[13] In this respect, the general statutory presumption that the use of the word 'person' in statute law includes 'a body of persons corporate or unincorporate' is entirely understandable.[14]

If we are to think about freedom of association within law, it is not sufficient to focus as Dicey did merely on the history and current state of legal restrictions on associational life. Instead, we must take as our starting-point the capacity within the law for individuals through private initiative and without public administrative authorisation to form themselves effectively into legally-recognised groups. A legitimate public policy concern for the anti-social potential of organised humanity still remains, but this is reflected less in outright restrictions on groups

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[9] See, generally, Nicholas Stewart et al. (op. cit. n. 3).

[10] Jean Warburton states that the common form is, 'upon trust for the members of the association according to the rules thereof': Jean Warburton, *Unincorporated Associations: Law and Practice*, 2nd edn. (London: Sweet & Maxwell, 1992), 45.

[11] There are also statutes empowering particular types of association to sue in their own name. See Stewart et al., op. cit. n. 3, ch. 9.

[12] See, e.g., Lord Eldon's reasoning in *Lloyd v Loaring* (1802) 6 Ves. J. 773 on the right of a majority of members to recover their society's property from a member who was holding it to ransom.

[13] See S.J. Stoljar, *Groups and Entities: An Enquiry into Corporate Theory* (Canberra: Australian National University Press, 1973), 59: '…the voluntary association emerges as a corporate body in virtually all but name.'

[14] Interpretation Act 1978, s.5 and Sched.1, para. 1.

formed for unlawful purposes, more in administrative regulation. The private capacity to create, operate and dissolve associations within the common law has been modified and supplemented by a range of statutory regimes for specific types of association. The hallmark of the modern law is increasing public differentiation and intervention, as different types of association come under public scrutiny. And the problems of associational liberty are problems of balancing a deep-rooted constitutional commitment to positive associational freedom with relevant public policy considerations such as legality of purpose, public benefit and financial transparency.

Against this background we can consider in more detail the problem of the relationship between private law and liberty, sketching in the ways in which the law now has specific legal regimes for different types of social group, prohibiting some which are anti-social. We then consider the impact of the Human Rights Act 1998 and Equality Act 2010 on this right.

II. Law and Liberty in Association

Considered more closely, the law of unincorporated associations reveals an important doctrinal disagreement about the basis for the court's jurisdiction to regulate the internal life of groups. The origins of this jurisdiction lie in a branch of law called 'equity', which in this context does not mean 'fairness', but is the name given to the body of legal rules and principles developed by the court of Chancery to protect property and provide redress for misappropriation. On this basis, the internal rules of a private association were of no inherent legal significance, being a purely private matter between the members who could continue to act by majority with complete freedom. 'Save for the due disposal and administration of property, there is no authority in the Courts either of England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs.'[15] New individuals could join according to the rules, which is to say, with the consent of existing members, and individual members could leave at any time without such consent, since their right to dissociate was inalienable.[16] The principle of majority rule flowed naturally from this individualistic foundation. However, the courts would intervene to protect proprietary interests, and at this point any formal rules adopted by the group would become relevant in working out what the nature of the member's interest was.[17] The effect of this approach, which we can call the proprietary model, was to deny a remedy to a member who had suffered under a breach of the

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[15] *Forbes v Eden* (1867) LR1 Sc 568.
[16] *Finch v Oake* [1896] 1 Ch. 409.
[17] See, e.g., *Hopkinson v Marquis of Exeter* (1867) LR 5 Eq 63; *Rigby v Connol* (1880) 14 ChD 482.

association's rules if their personal stake was not recognised by the courts as sufficiently akin to a property interest, such as an interest in a personal financial benefit or exclusive occupation of premises.

However, over time, courts throughout the United Kingdom became increasingly willing to remedy breaches of internal rules and other improper action by officers and members of associations, without paying much attention to the nature of the property interest at stake. The effect of this development is that associations are now considered primarily in terms of contract. A modern exposition would be likely to start with a definition offered by Lawton LJ. An unincorporated association consists of:

> two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will. The bond of union between the members of an unincorporated association has to be contractual.[18]

This shifts the legal focus of attention from the individual's stake in the material basis of the group towards the terms on which a group of people have agreed to collaborate. Of course, there is still a threshold question of whether the relationships within the group are sufficiently formal to constitute even a contract. On the facts of the case from which that quotation is drawn, the Court of Appeal held that the Central Office of the Conservative Party was simply an informal coordinating body, not contractually and directly linked to the large number of local party associations which select candidates to contest General Elections. Perhaps surprisingly, the central institution of the world's oldest political party does not, in law, exist.

The contractual model suffers from substantial doctrinal weaknesses,[19] leading the Australian High Court in an important case to reject it in favour of the older proprietary model.[20] However, as far as the laws applied in the United Kingdom are concerned, the contractual model seems now to be very firmly embedded. To take just one recent example, the English High Court issued a declaration that elections of an executive committee of an Islamic association were conducted unconstitutionally and gave orders curing that illegality.[21] No consideration was given to the question of the litigants' proprietary or other personal interests in the matter. The mere fact that the group had a constitution was a sufficient basis for the court

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[18] *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522 at 525.
[19] See S.J. Stoljar, *Groups and Entities: An Enquiry into Corporate Theory* (Canberra: Australian National University Press, 1973), 38-63.
[20] *Cameron v Hogan* [1934] HCA 24; (1934) 51 CLR 358.
[21] *Mohammed v Patel* [2024] EWHC 2581 (Ch).

to provide an authoritative ruling – as if that were an entirely legitimate judicial undertaking. This approach is reinforced by the social expectations of those involved in voluntary collective action that any group beyond the merely temporary needs, sooner or later, to be 'properly' constituted. And 'properly' for these purposes means according to some fairly standard rules which are legally intelligible and enforceable.[22] The enforceable legal requirement that the principles of natural justice will be observed in internal proceedings is also consistent with these expectations.[23]

To some extent, the older proprietary model was motivated not merely by concerns of doctrinal purity but also by a sense that judicial interference in the internal affairs of a private association is, generally speaking, inappropriate. A recent manifestation of the same concern can be found in a line of cases concerning the justiciability of internal disputes. This arises most naturally in the context of religious groups, in which it is plausible enough – as a general proposition – that judges are not competent to resolve disputed matters of religious belief, although the same point could be made about many other dimensions of social life. This argument from non-justiciability recently started to get some traction, leading the Court of Appeal in 2012 to strike out an action arising from litigation over the control of two Sikh gurdwaras.[24] The case turned on whether one of the parties had been validly dismissed, and another appointed, as trustee of the property. This depended on whether the individual purporting to make these decisions was, in line with the trust deed's conditions, the true successor of the Second Holy Saint. And that was a matter of hot dispute between the factions struggling to control the gurdwaras. Although the court insisted that it would not refuse to determine civil rights even if that raised in the process 'controversial and profound' religious questions, in this case the court was being asked to pronounce on matters of religious doctrine and practice, matters which it was incompetent to address.

Even on the older proprietary model the decision was puzzling. It seemed to establish an unsustainable dichotomy between two issues – control of the property and succession to the first Holy Saint – which were in fact intertwined. The Supreme Court reasserted legal orthodoxy by drawing a distinction between two types of justiciability.[25] Some matters are 'forbidden areas', such as political questions under the separation of powers; others however are only non-justiciable in the sense that courts will not entertain actions to resolve them *in the*

[22] See, e.g., Jean Warburton, op. cit. n. 12, who in a lengthy Appendix provides a familiar set of model rules, notices, deeds of appointment, etc.
[23] *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329; *John v Rees* [1970] Ch 345.
[24] *Khaira v Shergill* [2012] EWCA Civ 983.
[25] *Khaira v Shergill* [2014] UKSC 33.

abstract. But the court has to address religious questions if they arise in the course of resolving private rights and obligations, such as contractual rights of members of a community against others, or to ensure that trust property is applied according to its lawful purposes. The court could not avoid interpreting the trust dreed to determine who had the power to appoint trustees, and so, inevitably, the underlying religious dispute had to be resolved as best as possible, taking expert evidence if necessary.

The difference between the proprietary and the contractual models correlates to different understandings of the relationship between law and associative liberty. Under the older, proprietary model, the freedom of the individual remains paramount and is expressed in the unwillingness of the court to intervene in the internal life of groups, except to protect an individual's proprietary interest in the group. Freedom of association is here conceived as an individual right held and exercised in common. This also fits the Diceyan notion of freedom of association as an essentially negative right. The contractual view shifts the focus towards the constitution of the group itself as a living and purposive entity. Individual members have a stake in this entity – a stake in which participation in the social purpose of the group may well be more significant than any financial or proprietary benefit – but they are subject to its rules for the duration of their membership.[26] In this way, freedom of association becomes a collective right, rather than merely a right held in common.[27] It also implies a positive right: a legal power on the part of individuals to form social groups which can then take on a legal life of their own.

III. Prohibition and Regulation

As has already been indicated, the central constitutional principle for the protection of civil liberty within the constitutional framework of the United Kingdom remains the principle of legality.[28] According to this principle, the common law – understood as guarantor of an ordered liberty – provides the presumptive foundation onto which is grafted a series of statutory limitations and modifications for a wide range of public purposes. The legitimacy of these legislative interventions is provided by Parliament, which is taken to represent the consent of

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[26] See *Andrews v Mitchell* [1905] AC 78.

[27] For an extended version of this point in the context of religious groups, see Julian Rivers, 'Religious Liberty as a Collective Right' in *Richard O'Dair and Andrew Lewis* (eds.), Law and Religion (Oxford: Oxford University Press, 2001).

[28] *R v Secretary of State for the Home Department ex parte Leech (no. 2)* [1994] QB 198; *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539; *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115. Jason N.E. Varuhas, 'The principle of legality' (2020) 79(3) *Cambridge Law Journal* 578-614.

the people to the abridgment of their legal rights. Freedom of association has been substantially shaped by such interventions.

Even apart from the principle of legality, the common law sets limits to associative freedom. While it is true that a group of people may constitute themselves into an association for any lawful purpose, the meaning of 'lawful' has changed over time. Until the early 20th century, it excluded purposes considered hostile to law, state and society generally, as seen most clearly in the cases involving groups established for 'superstitious' or 'irreligious' purposes.[29] Even though the parties concerned were not guilty of any criminal offence, they would struggle to enforce their civil rights against others: 'An act may be illegal in the sense that it will not be recognised by the law as capable of being the foundation of any legal right, or that it may even deprive what it accompanies of that capacity, although it is followed by no penalty'.[30] This whole line of cases was formally overruled by a majority of the House of Lords in *Bowman v Secular Society*.[31] As Lord Dunedin put it, 'I cannot bring myself to believe that there is still a terra media of things illegal, which are not criminal, not directly prohibited, not *contra bonos mores*, and not against public policy.'[32] The latter terms, while still flexible, are fairly narrow in scope, covering agreements which are evidently immoral or which require the law to condone illegality.[33]

In practice, there are very few restrictions on the purposes for which a group may be established. Conspiracy to commit a crime is itself a crime, but since the objects of any formally constituted group are likely to be couched in positive and at least superficially lawful terms, the effect is that while the law may restrict some of the ways in which a group promotes its objects, the groups themselves are rarely unlawful. It was this basic assumption which led the English Court of Appeal to dismiss the claim of the Countryside Alliance that the prohibition on hunting foxes contained in the Hunting Act 2004 interfered with their right to assembly and association. The court approved the following statement of the Scottish Inner House:

> [T]here is a material distinction, in our opinion, between a restriction which compels an individual to join an association or prohibits him from joining it, or penalises him in either event… and a restriction that, without reference to any association, merely prohibits a particular activity with the indirect result that persons cannot associate for

[29] E.g. *Cary v Abbott* (1802) 7 Ves 490, 32 ER 198; *West v Shuttleworth* (1835) 2 My & K 684, 39 ER 1106 both involving Roman Catholic groups. *Cowan v Milbourn* (1867) LR 2 Ex 23 concerned a secular society.
[30] Bramwell B in *Cowan v Milbourn* (1867) LR 2 Ex 230, 233.
[31] *Bowman v Secular Society* [1917] AC 406.
[32] *Bowman*, 434.
[33] For a modern discussion, see *Patel v Mirza* [2016] UKSC 42.

> the purpose of carrying it out. A restriction of the former kind is capable of engaging article 11; but a restriction of the latter kind is not. If it were otherwise, the prohibition of any activity would infringe article 11.[34]

This draws the scope of Article 11 of the European Convention on Human Rights too narrowly,[35] but its distinction between the existence of an association and its ability to conduct certain activities expresses well the basic assumptions of English law.

We turn now to the statutory restrictions. The Public Order Act 1936 contains a statutory prohibition on quasi-military political organisations. It was passed to deal with fascist groups in the years preceding the Second World War, and the provisions have also been used against members of the Irish Republican Army.[36] Section 1 deals with the problem in typical fashion by making it a criminal offence to wear a uniform in public which signifies association with any political organisation or the promotion of any political object. Here, the target is the individual wrongdoer, not the group. However, section 2 targets the group itself by making it a criminal offence to be involved in controlling or managing a group which organises, trains or equips members to usurp the functions of the police or the armed forces, or enables them to use or display physical force in promoting any political object.[37] The law is designed to deal with the militarisation of political action. In the context of political parties more generally, it is worth noting that a system of registration was only introduced for the first time in 2000. Political parties who wish to field candidates at general or local elections must register with the Electoral Commission, and a party can only be removed from the register at its own request or for failure to comply with formalities.[38] Parties are subject to a regime of financial accountability, and there are restrictions and reporting obligations in respect of donations, but there is no mechanism for outright prohibition. For all its flaws, the British electoral system, which requires candidates as individuals to stand and win the largest share of the vote in one of 650 constituencies to gain a seat in the House of Commons, has so far proved remarkably effective at inhibiting the rise of populist leaders and extremist parties.

The most significant modern limit on associative freedom arises from the Terrorism Act 2000. This includes a process for proscribing organisations concerned with terrorism, empowering the Secretary of State to add to, and remove from, the list.[39] The list appears in a

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[34] *Adams v Scottish Ministers* 2004 SC 665 at [82] cited in *R (Countryside Alliance) v Attorney General* [2006] EWCA Civ 817, [2007] QB 305 at [106].
[35] The scope of European Convention on Human Rights 1950, art. 11, is outlined below.
[36] *R v Fell* [1974] Crim LR 673.
[37] See *R v Jordan and Tyndall* [1963] Crim LR 123.
[38] Political Parties, Elections and Referendums Act 2000, s. 33.
[39] Terrorism Act 2000, ss. 3-10.

statutory schedule which has been updated more or less annually.[40] There is a statutory process for applying for deproscription, and an appeal can be made on standard judicial review grounds to a public body, the Proscribed Organisations Appeal Commission, appointed by the Lord Chancellor. The chair is a judge (usually the chair of the Special Immigration Appeals Panel), and the other members are mix of legal and lay members. It is a criminal offence to belong, or profess to belong, to a proscribed organisation, to invite support (whether financial or otherwise), or to arrange or manage a meeting to support the organisation or further its activities.[41] There are also extensive provisions empowering the Government to freeze and confiscate terrorist property.[42]

Outright prohibition is a peripheral feature of the law. Far more common is a set of gradually increasing regulatory regimes in which certain benefits (such as public visibility and reputation, incorporation and tax advantages) are offered in return for public registration and financial accountability. This approach creates strong incentives, both negative and positive, towards social conformity and responsibility. Before the advent of general statutory regimes, organisations could seek to incorporate their trustees – although not typically the entire enterprise – by Royal Charter or, more commonly, private Act of Parliament. The latter might well include a basic constitution for the organisation. This was as true for joint stock companies established for profit as it was for local public enterprises and other large social or religious organisations. We can trace the advent of modern generic regimes of registration to the Friendly Societies Act 1793 which used local magistrates to review the rules and oversee the operations of the large numbers of mutual aid associations which developed in the later 18th century. Today, there are several such general statutory frameworks:

> Limited liability companies are primarily profit-making enterprises with a shareholding established for commercial purposes, although there is nothing to stop a company being limited by guarantee and being a non-profit-making enterprise for any lawful purpose, whether charitable or purely private. In the case of charities, this has the disadvantage of subjecting the organisation to two parallel regulatory systems, both Companies House and the Charity Commission. Once incorporated and registered under the Companies Acts, they are subject to a regime of transparency and financial accountability.

[40] Schedule 2 currently includes the names of about 100 organisations. 8 of them are Irish nationalist or loyalist groups; the rest operate principally overseas.
[41] Ss. 11-13.
[42] Ss. 14-23B.

Trade unions are subject to a complex and distinctive body of law which has varied over the years depending on the economic and industrial labour policy of the Government. The law regulating both trade unions and commercial enterprises is now highly developed and specific to each type of group, reflecting distinct policy imperatives.[43]

Friendly Societies are mutual associations, typically providing financial assurance or other social welfare provision for their members, who were typically poorer wage-earners. Legislative intervention started in the late 18th century, with a system of registration and regulation, which has expanded over the years. A wide range of societies may register, including benevolent societies, working men's clubs and old people's homes. Under the Friendly Societies Act 1992, friendly societies which offer insurance on a range of typical life events may incorporate. Industrial and provident societies, which are essentially incorporated co-operatives of workers in any trade or handicraft, were originally registered as Friendly Societies, but after 1852 they had their own statutory regime. The law here has recently been consolidated by the Cooperative and Community Benefit Societies Act 2023.

Charities are associations exclusively directed towards public benefit purposes, which include a wide range of activities such as relief of poverty, advancement of education or religion, health, the arts, culture, sport, environmental protection and animal welfare. With some exceptions they are required to register with the Charity Commission, and subject to transparency and financial accountability requirements. Although subject to lower levels of regulation than commercial companies, there is also a growing body of 'soft law' policy guidance on their operation. Charities may now incorporate without recourse to company law under a new vehicle, the Charitable Incorporated Organisation, which offers the advantages of separate legal personality under the single regulatory oversight of the Charity Commission.[44]

These are the main types of social group recognised by statute law and subject to public regulation. However, they are all grafted onto the set of legal background assumptions about the legal formation of associations sketched out in the previous sections. These background assumptions shape the interpretation of legislative material, fill gaps, and provide an independent means for the creation of wholly private associations.

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[43] Alan Bogg, 'Freedom of Association' in Guy Davidoff et al. (eds.), *The Oxford Handbook of the Law of Work* (Oxford: Oxford University Press, 2024).

[44] Introduced by the Charities Act 2006; see now Charities Act 2011, ss. 204-250.

IV. The Human Rights Act 1998

Until relatively recently, the scepticism voiced by Dicey as to the practical value of codified and legal enforceable fundamental rights was widely shared by the major British political parties. Caution about the language of rights and judicial enforcement can be based upon conservative, utilitarian or socialist foundations. However, what the United Kingdom was unwilling to countenance domestically, it was ready enough to approve at an international level and even in respect of the new constitutions of its former colonies. As in the case of other similar international instruments, the UK was an original signatory to the European Convention on Human Rights 1950, ratifying it in 1952, and in 1966 conferring on citizens the right of individual petition. Thereafter, the Convention had a small but gradually increasing indirect influence on English law. Long-standing political opposition to 'Bills of Rights' was finally overcome in the constitutional reform programme of Prime Minister Tony Blair's 'New Labour' government after 1997, and the domestic significance of the ECHR was formalised and strengthened from 2000 when the Human Rights Act 1998 came into force. This statute obligates courts to interpret law where possible in conformity with the Convention,[45] and creates a separate cause of action against public bodies which violate Convention rights.[46] It also authorises courts to issue declarations of incompatibility in the case of primary legislation,[47] which triggers a fast-track, albeit political, remedial process.[48] In this way, the strict primacy of Acts of Parliament is preserved. In developing case-law, courts are under obligation to take into account the relevant case-law of the European Court,[49] and as a result domestic law is now closely aligned to that of the European Court. However, British judges have on occasion consciously departed from European case-law in the name of 'judicial dialogue' with their European partners. [50]

Article 11 of the ECHR protects the right of each person to 'freedom of association with others, including the right to form and to join trade unions for the protection of his interests'. The European case-law under Article 11 tends to fall into three groups.[51] First there are cases

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[45] Human Rights Act 1998, s. 3.
[46] S. 6.
[47] S. 4.
[48] S. 10.
[49] S. 2.
[50] *R (Ullah) v Special Adjudicator* [2004] UKHL 26. Lewis Graham, 'The modern mirror principle' [2021] *Public Law* 523-541; Jeremy Letwin, 'Strasbourg's views on the modern mirror principle: shattering the mirror?' [2023] *Public Law* 628-649.
[51] See Bernadette Rainey, Pamela McCormick and Clare Ovey, *Jacobs White and Ovey: The European Convention on Human Rights*, 8th edn. (Oxford: Oxford University Press, 2021), ch. 19.

involving public assemblies, demonstrations and protests. These may also be considered as infringements of Article 10, freedom of expression. They are not the concern of this chapter, although it is worth noting in passing that the principal impact of Article 11 in domestic law under the Human Rights Act 1998 has also been in precisely this area of public protest. The second group concerns trade union activity, as suggested by the express wording of the article. Here, the European Court is in a subordinate position vis-à-vis other international bodies such as the International Labour Organisation. Nevertheless, it has upheld certain minimum protections for trade union registration, membership, collective bargaining and strike action. Most of the cases in which the United Kingdom has been found to have violated Article 11 fall into this group.[52] Finally, there is a group of cases involving denials of registration or access via public registration to differential regimes of legal privilege. Such systems of regulatory restriction are foreign to the laws of the United Kingdom, which, as we have seen, enables groups to function effectively in law without any such status, and even makes the corporate form relatively easily accessible.

In practice then, and apart from the notable exception of trade union activity, there has been very little British-origin litigation before the European Court on freedom of association. Perhaps the most notable exception is *Redfearn v United Kingdom* in which the United Kingdom was found to have violated its positive obligation to secure effective protection of the right to associate freely.[53] An otherwise exemplary employee who had been dismissed on account of his membership of the British National Party – a far-right, albeit lawful, political party – lacked a legal remedy against his employer. Unfair dismissal was not available to an employee who had only been employed for a short period of time, and although he would have qualified in principle to bring an action based on religion or belief discrimination, the courts have not extended this concept to party political membership as opposed to the holding of comprehensive political ideologies.[54] After the finding of a violation, the law was amended to introduce a specific protection against dismissal on grounds of political opinions or affiliation for all employees.[55]

In general, the domestic impact of Article 11, via the Human Rights Act 1998, has followed similar contours to the European case-law. The largest group of cases in which the

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[52] *Young, James and Webster v UK* (1981) Series A No 44 (1982) 4 EHRR 38; *Wilson and the National Union of Journalists v UK* (2002) 35 EHRR 523; *ASLEF v UK* (2007) 45 EHRR 34.
[53] *Redfearn v United Kingdom* (47335/06) (2013) 57 EHRR 2.
[54] *Olivier v Department of Work and Pensions* UKET 1701407/2013; *McEleny v Ministry of Defence* [2018] UKET S/4105347/2017.
[55] Employment Rights Act 1996, s. 108(4).

right has clearly affected judicial reasoning involve trade unions. In *Wandsworth LBC v Vining*, the Court of Appeal decided that a rule preventing two local authority parks police officers from joining a trade union was a breach of Article 11 and unlawful.[56] In 2021, the Court of Appeal again reversed the Employment Appeal Tribunal to find a breach of Article 11 in the refusal to register a trade union for foster carers – this had been refused on the grounds that as independent contractors with local authorities, foster carers are not in a qualifying employment relation to have a union.[57] On the other side of that problem lies the Supreme Court decision in *R (Independent Workers Union) v Central Arbitration Committee*.[58] Here the Committee was found to be right to refuse recognition of a trade union for delivery riders, as not falling within the scope of an employment relationship for Article 11 purposes. Finally, in *Kostal v Dunkley*, Article 11 played a central role in the Supreme Court's reasoning finding that offers made by an employer during a collective bargaining process were unlawful financial inducements undermining the process.[59] In these and other cases, Article 11 forms part of the legal background to the interpretation and application of domestic law.

Apart from the trade union cases there are very few involving claims based on freedom of association, and where it is even pleaded it seems to have little impact. Judicial review of the process for challenging listing as a proscribed organisation under the anti-terrorist legislation has – perhaps unsurprisingly – been unsuccessful.[60] Article 11 was hovering somewhere in the background to this case, but it was not clearly considered. Similarly, differential tax treatment of donations to political parties depending on whether they have an elected MP has survived judicial scrutiny.[61] In the context of a claim based on Article 14 in connection with Article 11, the court accepted a fairly low bar of rationality.

One exception in which Article 11 litigation has clearly raised problems of associative freedom is *Royal Society for the Prevention of Cruelty to Animals v Attorney General*.[62] The RSPCA sought guidance from court as to whether it could exclude from membership those who wished to change its long-standing policy of opposition to hunting with dogs. In relation to Article 11, Lightman J made several points: The RSPCA is not a public authority bound directly by Convention rights. Although the RSPCA is incorporated by private Act of

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[56] *Wandsworth LBC v Vining* [2017] EWCA Civ 1092. The illegality was remedied by a constructive interpretation of the Trade Union and Labour Relations (Consolidation) Act 1992, s. 280.
[57] *National Union of Professional Foster Carers v Certification Officer* [2021] EWCA Civ 548.
[58] [2023] UKSC 43.
[59] *Kostal UK Ltd v Dunkley* [2021] UKSC 47.
[60] *R (Kurdistan Workers Party) v Secretary of the Home Department* [2002] EWHC 644 (Admin).
[61] *Banks v Revenue and Customs Commissioners* [2012] EWCA Civ 1439.
[62] [2002] 1 WLR 448, ChD.

Parliament it would be hard to treat their rules as 'subordinate legislation'. In any case, Article 11 allows a society to exclude from membership, although this needs to be through a managed process of amending the application form to gather the data allowing for an objective consideration of whether a potential member had disqualified themselves by their active opposition to the society's policy.

The case illustrates nicely the difficulties of applying Article 11 within domestic law. Freedom of association as a Convention right attaches itself most readily to restrictions on the existence of certain types of group (e.g. undesirable political parties) or on differential access to legal privileges (e.g. historic religious denominations). As we have seen, English law has very few of either of these types of legal provision. Grounds for banning groups barely extend beyond those engaging in criminal activities, and there are few legal regimes of differential access, whether political, cultural or religious. The relevant categories, such as 'charity', are extremely broad. Tensions internal to groups may arise, but these raise the more limited positive obligation to secure effective protection of freedom of association against third parties. In any case, the right applies to both sides of the dispute, and the group takes priority over the individual. The European case-law on Article 11 provides little if any guidance on more subtle questions of the nature of associative freedom in its relation to state legal facilitation and regulation outlined in earlier sections of this chapter.

V. Group Recognition under the Equality Act 2010

More notable than the Human Rights Act 1998, in terms of recent development, has been the rise in constitutional status of 'equality law'. Bob Hepple argues that the Equality Act 2010 'mark[s] a decisive shift from the politics and law of single identities … towards the politics and law of fundamental human rights.'[63] The Act is the culmination of several decades of equality-related legislation, combining several statutes into a single coherent code. What started life in the 1960s as a series of discrete policy interventions to address race relations at points of particular social hostility and discrimination has become a wide-ranging and effective legal regime. Although the more recent impetus for reform has been provided by European Union initiatives, these have survived 'Brexit' and been fully assimilated into domestic law. The Equality Act both restricts the scope of associative freedom and provides legal protection for the activities of certain groups.

[63] Bob Hepple, *Equality: the legal framework*, 2nd edn. (Oxford: Hart Publishing, 2014), 1.

In brief, the Equality Act 2010 identifies nine 'protected characteristics': age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation, and pregnancy and maternity.[64] It prohibits four kinds of conduct in relation to those characteristics: direct discrimination,[65] indirect discrimination,[66] harassment,[67] and victimisation.[68] It makes such discriminatory conduct unlawful if it takes place in a wide range of public-facing contexts. Associations, whether incorporated or unincorporated, are thus bound to legal equality obligations in the same way as any other legal person, in their capacity as employers, providers of goods and services to the public, occupants of premises, and so on. In spite of the technical lack of legal personality of unincorporated associations, the courts have shown procedural flexibility in allowing discrimination claims to be brought directly against associations.[69]

The Act also applies to associations as such.[70] These have a specific meaning under the Act: associations to which this part of the Act applies must contain at least 25 members and operate admission according to a set of rules and a process of selection.[71] With the exception of marriage or civil partnership,[72] such associations may not discriminate against proposed members on the basis of a protected characteristic,[73] nor can they apply membership terms differently to members on the basis of a protected characteristic.[74] The Act also prohibits associations from harassing or victimising members,[75] and their obligations extend to associates and guests of an association.[76]

The basic equality obligations contained in the Equality Act 2010 are subject to a vast number of exceptions and adjustments specific to different characteristics and situations. For the most part, these adjust non-discrimination expectations to accommodate socially acceptable forms of collective identity and practice. However, some groups have found that their freedom to continue existing practices has been abridged. For example, the law protects the existence of many single-sex spaces. Single-sex services can be provided to people of a particular sex as

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[64] Equality Act 2010, s. 4 and Chapter 1.
[65] S. 13.
[66] S. 19.
[67] S. 26.
[68] S. 27.
[69] *Affleck v Newcastle Mind* [1999] ICR 852; *Nazir v Asim* [2010] ICR 1225.
[70] Part 7.
[71] S. 107(2)
[72] S. 100(1).
[73] S. 101(1). See, e.g., *Sivagurunathan v Tamils Forum UK Ltd* [2018] 12 WLUK 653.
[74] S. 101(2).
[75] Ss. 101(4) – (7).
[76] Ss. 107(6) and 102 respectively.

long as certain conditions are met, such as that ‘the service would be insufficiently effective if it were only to be provided jointly’, and that it ‘is a proportionate means of achieving a legitimate aim.’[77] This exception means that single-sex schools, hospital wards or a women-only crisis shelter are not be unlawful. Yet a male-only golf club would be.

There are protections generally for single-characteristic associations, meaning that a Muslim walking group that restricts membership to Muslims would not be unlawful.[78] However, ‘colour’ is an exception to this: no association may operate a colour-bar.[79] There is also protection for religious and philosophical groups who wish to restrict involvement in their activities to those who share their beliefs and lifestyle. Where an organisation has the purpose of practicing or advancing a religion or belief, or to teach the practices of a religion or belief, it is able to restrict membership on the basis of religion or belief, or sexual orientation.[80] There are also exceptions for employers with an ethos based on religion or belief who wish to impose an occupational requirement on employees to be of a particular religion or belief, if this is proportionate having regard to the ethos and nature or context of the work.[81] However, these substantial exemptions were not sufficient to protect Roman Catholic adoption agencies who did not wish to place children with same-sex couples.[82]

There is a general provision allowing for positive discrimination where that is a proportionate way of meeting specific needs. For example, this allows a housing association to confine the services it provides to orthodox Jewish residents.[83] Political parties are given a specific concession allowing them to operate positive discrimination policies in relation to selection criteria.[84] Associations may also offer age-related concessions, such as lower membership fees or discounts, as an exception to the rules concerning age discrimination.[85] They are allowed to limit the terms of a woman’s membership of an association if the existing terms would ‘create a risk to her health and safety.’[86] Charities are permitted to restrict the provision of benefits to persons who share a protected characteristic if they do so in pursuance of a charitable instrument and doing so is either generally proportionate or compensates for a

[77] Sched. 3, para. 27.
[78] Sched. 16, para. 1(1).
[79] Sched. 16, para. 1(4).
[80] Equality Act 2010, Sched. 23, para. 2. See *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin).
[81] Sched. 9, para. 3.
[82] *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2012] UKUT 395 (TCC).
[83] *R (Z) v Hackney LBC* [2020] UKSC 40.
[84] Ss. 104-106.
[85] Sched. 16, para. 1A.
[86] Sched. 16, para. 2.

disadvantage linked to the protected characteristic.[87] These are just some examples of the ways in which 'equality' is legally tailored to specific groups and activities.

The Equality Act 2000 takes the form of detailed primary legislation which directly regulates the relationships between private individuals and groups – as employers, providers of goods, services and facilities, and in other respects. Practically speaking it is therefore a far more important source of law in relation to associational life than the Human Rights Act 1998, which only protects abstract rights primarily against public authorities. Courts have sought to develop integrated interpretations of equality obligations in the light of human rights commitments, but it is still arguable that there is an emerging legal privileging of 'equality' over 'liberty'. The outworking of this prioritisation is, however, highly dependent on the particular context of litigation.

VI. Conclusion

In reflecting on the law of associations in the United Kingdom it would be easy to be complacent. In general terms, there is a high degree of liberty under law. Moreover, this liberty is understood not merely as freedom beyond the law, but as the legal empowerment of individuals to generate and contribute to a highly varied and legally secure plurality of social groups. International human rights obligations have contributed relatively little to this legal heritage. At the same time, the law is characterised by increasing public regulation as sporadic legislative intervention has tended to evolve into more comprehensive legal regimes. Regulation has brought in its wake diversification, as distinct types of social group are subjected to norms considered suitable for their specific social contribution. The Equality Act 2010 displays these features of the modern law of associations to an unprecedented degree, being both comprehensive in aspiration and reach, yet also containing highly detailed rules, distinctive to particular types of group and activity. The significance of this lies not so much in new (and, it must be said, fairly peripheral) restrictions on associational liberty, as in the fact that it has replaced flexible norms of social acceptability with more rigid legal obligations. This has been supplemented by growing 'soft law' expectations around the proper management and conduct of groups, which means that the impact of public regulation is perhaps felt most in terms of the increased burdens of regulatory compliance on the day-to-day life of groups. In

[87] S. 193.

these ways, associative freedom in the United Kingdom may be at risk not so much of legal limitation as of gradual suffocation.