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Global Perspectives on Freedom of Association: Italy

Matteo Monti

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Freedom of Association in Italy: Genesis, Evolution and Limits of Protection of Associations in the Italian Legal System

Matteo Monti[*]

I. Introduction

This paper aims to provide an overview of freedom of association in Italy and to also cover the issues of 'social groups' (organisations or communities standing between the individual and the State, including family, religious communities, associations and political parties)[1] and of the rights *of* associations in the Italian legal system. It will develop the issue from a constitutional law perspective, although there are other equally interesting perspectives: the civil law analysis of associations; the commercial-tributary analysis of the economic-fiscal activities of associations; the labour law analysis of work relations in associations; the criminal law analysis of crimes related to associations and their enforcement. The focus of the paper will instead be mainly on the fundamental right to freedom of association in the Italian legal system, albeit issues relating to other areas of law will also be touched upon. From a methodological point of view, the contribution offers an analysis conducted within the categories of Italian constitutional law. In order to address the typical problems of comparative law, which first and foremost are the translation[2] and conceptualisation of national legal categories,[3] categories deriving from Western legal systems that share similar legal notions will also be used to explain Italian legal categories, and a lexicon consistent with that of the European Convention on Human Rights (ECHR) will be employed.

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[1] It is 'an open category, marked by characters of historicity and relativity' (E Rossi, *Le formazioni sociali nella Costituzione italiana* (Padova: Cedam, 1989) 124 [my own translation]; P Rescigno, *Persona e Comunità* (Bologna: Il Mulino, 1966) 42-43. On the more recent developments, see A Ciancio (ed), *Ripensare o rinnovare le formazioni sociali?* (Torino: Giappichelli, 2020).

[2] If I have translated passages of judgments or legal literature myself, the wording 'my own translation' appears.

[3] For a recent analysis in English of the Italian constitutional system and its categories, see M Cartabia and N Lupo, *The Constitution of Italy. A Contextual Analysis* (Oxford: Hart Publishing, 2022).

The paper is structured into three additional sections and some brief conclusions. Section 2 contains a description of the historical evolution of freedom of association in the Italian legal system, its formalisation in the 1948 Italian Constitution (IC) and the rationales behind its protection. In section 3, the limits on freedom of association in the Italian legal system are analysed, looking at the subjects that enjoy this right, prohibited associations and compulsory associations. Section 4, on the other hand, will address the issue of the rights *in* associations and the rights *of* associations, focusing on compulsory associations and so-called tendency organisations (a legal category comparable to the German legal category of *Tendenzbetrieb*). In the conclusions, some recent trends in the area of freedom of association will be summarised, along with an overview of some recent legislative activities.

II. Freedom of Association in the 1948 Italian Constitution: The Centrality of the Human Being (*Personalism*) and the Reaction to the Fascist Regime

In post-unification Italy, the Statute of the Kingdom did not include a provision protecting freedom of association. In fact, the so-called Albertine Statute only mentioned the right of assembly (Article 32). However, the Italian Civil Code of 1865, unlike the French one, provided for the regulation of 'intermediate bodies' (*corpi morali*).[4] In this context, legal scholars and courts - also due to the abolition of the system of prior authorisation originally established in the Sardinian Penal Code of 1839 - recognised the existence of a right to association in Article 32 of the Statute.[5]

The *Statuto Albertino* was a flexible constitution without any form of protections or guarantees against its violations. The advent of fascism did not, therefore, entail a modification of the Constitution *octroyée*, but profoundly changed the scope of freedom of association and assembly. In particular, Law No 2029/1925 introduced a generic publicity mechanism for associations that introduced the first state control over the purpose of associations. The Unified Texts of the Laws of Public Security (*Testi Unici delle leggi di pubblica sicurezza*) of 1926 and 1931 then developed the power of the prefects (*prefetti*) to dissolve associations involved in

[4] C Ghisalberti, *La codificazione del diritto in Italia, 1865-1942* (Roma-Bari: Laterza, 2006) 92.
[5] It was, however, a 'system of precarious tolerance': U De Siervo, 'Associazione (libertà di)', in *Digesto delle Discipline pubblicistiche* (Torino: Utet, 1987) 484-500, 485 [my own translation]. See, also, E Cheli, 'Libertà di associazione e poteri di polizia: profili storici' in P Barile (ed), *La pubblica sicurezza* (Vicenza: Neri Pozza, 1967) 273-305.

activities contrary to the political order of the State and instituted forms of prior authorisation for the organisation of associations. The 1930 Criminal Code further established a series of criminal measures aimed at "eliminating" all forms of collective dissent. The only associations that partly survived the Fascist persecution were those linked to the Catholic Church, such as the *Azione Cattolica* (but only until 1931). Alongside these repression measures, a series of "proactive" measures[6] took place with the construction of the corporativism system and the creation of various associations directly connected to the Fascist Party.

It is against this backdrop[7] that the provisions of the 1948 Constitution with respect to freedom of association need to be read. The Constituent Assembly itself was driven by the desire to react to the suppression of the freedoms by the fascist regime and by the necessity to overturn the premises of distrust and 'hostility towards the free manifestations of social pluralism'.[8] In particular, the Constituent Assembly intended to put human beings back at the centre of social life, whereas the fascist regime had attempted to subordinate all aspects of individual existence to the authority and interests of the (quasi) totalitarian fascist state.

In the Constitution, there are two main provisions connected to associations (Article 18 and Article 2 IC), although there are also 'special' provisions[9] regarding particular categories of associations (Articles 8, 19, 20, 39, 43 and 49 IC) as well as a provision protecting freedom of assembly (Article 17 IC).

Article 18 IC states: 'Citizens have the right to form associations freely and without authorisation for those ends that are not forbidden by criminal law. Secret associations and associations that, even indirectly, pursue political aims by means of organisations having a military character shall be forbidden.' The constitutional definition of association goes beyond that of the so-called "recognised" associations in the Civil Code of 1942 (Article 12 of the Civil Code) by protecting "unrecognised" associations as well (Article 36 of the Civil Code).[10] Virtually every form of association that does not have a goal prohibited by criminal law is

[6] A Pace, *Problematica delle libertà costituzionali* (Padova: Cedam, 1992), 346 and ff.
[7] M Luciani, 'Antifascismo e nascita della Costituzione', (1991) 2 Politica del diritto 183-200.
[8] U De Siervo(n 5) 487 [my own translation].
[9] L Paladin, *Diritto Costituzionale* (3rd edn, Padova: Cedam, 1998) 641. Cf S Bartole *Problemi costituzionali della libertà di Associazione* (Milano: Giuffrè, 1970) 9 and ff.
[10] The difference between the recognition and non-recognition of an association (i.e. registration) primarily concerns fiscal and economic elements. While in fact legal subjectivity belongs to all organisations, legal personality belongs only to associations that obtain the registration in the register of legal persons.

protected as a result of the freedom and self-realisation of the individual (with some exceptions, see section 2). Apart from "compulsory" associations (see section 2), individuals are generally granted the freedom to associate and not to associate.[11] The recognition of an association under the Civil Code increases its scope for action in the legal system but is not otherwise compulsory. It permits the acquisition of legal personality, whereas legal subjectivity pertains to all associations.

Article 2 IC declares in its first part: 'The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed.'

This provision recognises the value of 'social groups', which according to many academic reconstructions are entitled to fundamental rights,[12] not as an ensemble of single individuals but as a collective subject.[13] Contrary to what occurs in the United States, where the presence of associations' collective rights seems to be more highly defined (at least when concerning freedom of expression/religious freedom),[14] the constitutional debate and case law are not yet that developed in Italy[15]. Article 2 IC also provides for the need to protect the 'inviolable rights'[16] of the individuals, a particular category of super-protected fundamental rights, in social groups.

In addition to these two general norms (Article 18 and Article 2 IC), there are a series of special provisions regulating a number of aspects of some associations. Articles 8, 19 and 20 IC protect

[11] '[T]he "freedom to associate", in its aspects ("positive" and "negative") indicated above, has to be protected as an "inviolable right" with regard not only to association, but also to those "social formations" to which Article 2 of the Constitution refers' (CC, Judgment No 239/1984). A Pace, 'Commento all'art. 18' in G Branca (ed), *Commentario della Costituzione* (Bologna: Zanichelli, 1977) 205 and ff.; U De Siervo (n 5) 490 and ff.

[12] Against this interpretation, see R Bin, 'Nuovi diritti e vecchie questioni' in *Studi in onore di Luigi Costato* (3rd edn, Napoli: Jovene, 2014) 75-84, 79.

[13] Considering 'the enhancement of intermediate communities as a means of promoting diffuse interests', see A Barbera, 'Commento dell'art. 2 della Costituzione' in G Branca (ed), *Commentario della Costituzione italiana* (Bologna: Zanichelli, 1975) 110 [my own translation].

[14] See the cases *Citizens United v Federal Election Commission*, 558 US 310 (2010) and *Burwell v Hobby Lobby Stores, Inc*, 573 US 682 (2014).

[15] The Constitutional Court held that '[t]here is no doubt that the collective form of freedom of expression is guaranteed by Article 21 of the Constitution …. This is because the collective form ... is necessary in order to provide a body and voice to opinions involving super-individual interests': CC, Judgments Nos 126/1985 [my own translation]. However, this passage did not launch a scholarly debate or further judgements regarding the collective rights of associations.

[16] See CC, Judgments Nos 109/1971 and 1146/1988.

religious groups. Article 39 IC protects trade union organisations. Article 43 IC concerns workers' or users' communities. Article 49 IC deals with political parties.

In this context, it can be observed that the constitutional provisions on trade unions and political parties have remained fundamentally unimplemented in the Italian legal system. Article 39 IC provides for the possibility of recognition of trade unions under the condition of their democratic structure.[17] Recognised trade unions would acquire the power to make 'collective labour agreements' legally binding 'for all persons belonging to the categories referred to in the agreement' (Article 39 IC). However, the registration requirement caused a certain suspicion among trade unions that never applied for registration.

A somewhat similar fate befell political parties, which were required by Article 49 IC 'to contribute to determining national policies through democratic processes.' This constitutional provision has remained without an implementing law, leaving political parties without any form of regulation of their internal life.[18]

Looking at the grounds for the protection of freedom of association, it is possible to detect the intertwining of three different rationales: the self-realisation of the individual (personalism principle), the development of pluralism (pluralism principle) and the strengthening of democratic debate. All of these rationales can be found in the case law of the Constitutional Court, but legal scholars have placed particular emphasis on the first.[19] The development of the 'personalism' principle,[20] which is the basis of the Constitution,[21] is also realised in the social groups within which the life of the individual takes place.[22] Intimately connected with

[17] A Celotto, 'Articolo 39' in F Clementi and others (eds), *La Costituzione italiana* (Vol I, Bologna: Il Mulino, 2021); GM Salerno, 'Art. 39' in V Crisafulli and L Paladin (eds), *Commentario breve alla Costituzione* (Padua: Cedam, 1990).
[18] F Biondi and G Rivosecchi, 'Le forme della rappresentanza e il sistema dei partiti', in S Sicardi, M Cavino and L Imarisio (eds), *Vent'anni di Costituzione (1993-2013). Dibattiti e riforme nell'Italia tra due secoli* (Bologna: Il Mulino, 2015) 161-252; E Rossi, 'La democrazia interna nei partiti politici' (2011) 1 *Rivista AIC* 1-20.
[19] *Ex pluribuus*: P Barile, 'Associazione (diritto di)' in *Enciclopedia del diritto* (Vol III, Milano: Giuffrè 1958) 841; U De Siervo (n 5) 488 and ff.; A Barbera (n 13) 103.
[20] A Barbera (n 13) 103.
[21] The Constitutional Court has clearly stressed the centrality of 'the personalist principle that inspires the Constitutional Charter and sets the development of each individual human person as the ultimate goal of social organisation': CC, Judgment No 167/1999 [my own translation].
[22] F Modugno, *I nuovi diritti nella giurisprudenza costituzionale* (Giappichelli: Turin, 1995) 34. The CC in an *obiter dictum* recognised 'the full development of the personality in social groups (Article 2 of the Constitution)': CC, Judgment No 81/1993 [my own translations]. It is indeed essential to understand the importance of the 'the personalism principle that inspires the Constitutional Charter and that sets the development of each individual human being as the ultimate goal of social organisation': CC, Judgment No 167/1999 [my own translations].

this principle is the principle of the development of pluralism.[23] Finally, it is impossible to forget the relevance of freedom of association to liberal democracy. This last principle has been developed by the Constitutional Court (CC) to the point of recognising that 'In a system of civil liberties, such as the one founded by our Constitution, the activity of associations that also aim to change the existing political order is permitted, as long as this aim is pursued democratically, through free debate and without direct or indirect recourse to violence.'[24] These three rationales are intrinsically interlinked, quoting the words of Costantino Mortati, constituent father and professor of constitutional law:

> *'*[O]nly in a society with his fellow human beings does human being acquire, with full self-awareness, … the tools that from one step to another, from the natural community of the family to the religious, scholastic, cultural, professional and political ones, make it possible active participation in the life of the state.'[25]

III. The Limits to the Freedom of Association, Prohibited Associations and Compulsory Associations

This section will analyse the limits to the freedom of association for certain categories of people, which associations are prohibited by the Constitution, and how compulsory associations are regulated.

To begin with the limits to the freedom to associate for certain categories of people, it is worth emphasising that all human beings, regardless of the formal wording of Article 18 IC that speaks of citizens, have the right to freely associate.[26] However, in the Italian legal system,

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[23] F Rigano, 'Commento all'art. 18' in R Bifulco, A Celotto and M Olivetti (eds), *Commentario alla Costituzione*, (Torino: Utet, 2006). Associations are guaranteed *'a sphere of action potentially equal to that guaranteed to individuals',* with the result that 'the constitutional recognition of the freedom of association represents the projection at the level of collective action of individual freedom, as recognised and protected by the Constitution itself': CC, Judgment No 417/1993 [my own translation].

[24] CC, Judgment No 114/1967 [my own translation]. GE Vigevani, 'Associazione (libertà di)' in S Cassese (ed), *Dizionario di diritto pubblico* (Milano: Giuffrè, 2006) 481. More recently, Article 270-bis of the Criminal Code (Associations for the purpose of terrorism, including international terrorism or subversion of the democratic order) was introduced into the legal system. The criminal provision of Article 604bis (Organisations with racist ideology) partially runs counter to the idea of open democracy. Cf M Ruotolo, 'La libertà di riunione e di associazione' in R Nania and P Ridola (eds), *I diritti costituzionali* (Turin: Giappichelli, 2006) 700-701.

[25] C Mortati, *Istituzioni di diritto pubblico I* (Padua: Cedam, 1991) 160 [my own translation].

[26] A Morelli, 'Associazione', in C Panzera and A Rauti (eds), *Dizionario dei diritti degli stranieri* (Naples: Editoriale Scientifica, 2020). In relation to the entitlement to fundamental rights, the Constitutional Court has affirmed 'the equality between the foreigner and the citizen' (CC, Judgment No 144/1970; my own translation).

there are some limits on the freedom to associate in political parties or trade unions for certain categories of civil servants.

Concerning membership in political parties, Article 98 IC provides in section 3 that: '[t]he law may set limitations on the right to become members of political parties in the case of magistrates, career military staff in active service, law enforcement officers, and overseas diplomatic and consular representatives.' In this sense, the restriction of Article 49 IC (freedom of association in political parties), which is intrinsically intertwined with Article 18 IC[27], with respect to certain public officials is made explicit in the Constitution. This provision eventually results in a derogation to Article 3 IC, the principle of equality, thereby generating a special regime for certain categories of citizens.

Regarding the category of 'magistrates', the law implementing Article 98 IC has been challenged before the Constitutional Court. Back in 2009, the Court ruled with respect to the law formally and absolutely banning judges from membership in political parties (Article 1, of Law No 269/2006) that: 'The Constitution, therefore, if it does not impose, nevertheless allows the ordinary lawmaker to introduce, in order to protect and safeguard the impartiality and independence of the judiciary, a prohibition on magistrates' membership of political parties.'[28] This stance was more recently reconfirmed after the Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*) raised the question of the constitutionality of Legislative Decree No 109/2006:

> 'The Constitution, in this way, demonstrates its disapproval of activities or behaviour likely to create stable bonds between magistrates and political actors, which are visible to the public eye, and which, therefore, compromise not only independence and impartiality, but even the appearance of the same.'[29]

[27] GE Vigevani, 'Art. 49' in S Bartole and R Bin (eds), *Commentario breve alla Costituzione* (Padua: Cedam, 2008) 498.
[28] CC, Judgment No 224/2009 [my own translation].
[29] CC, Judgment No 170/2018. As a result of this last ruling, the Court of Cassation (Court of Cassation, Judgment of 14 May 2020, No 8906.) confirmed the disciplinary sanction of a warning for Michele Emiliano, President of the Apulia Region and member of the *Partito Democratico*.

As the Constitutional Court pointed out, this limitation only applies to membership in political parties and not to participation in political life and to hold elected office.[30]

As to membership in trade unions, limits were placed on the membership of military personnel in trade unions, whereas other individuals, such as judges and policemen, enjoyed this freedom. Another illustrative case of limitations on the freedom of association for public servants is indeed the case of career military personnel. While not denying certain collective expressive freedoms to the military,[31] the Constitutional Court upheld the provision prohibiting trade unions in the armed forces (Article 8, Law No 382/1978), not detecting a violation of Article 39 IC (freedom of association in trade unions) within it.[32] However, this judicial orientation was recently overtaken by the Court.[33] The Constitutional Court was called upon to rule with reference to the new Article 117 of the Constitution (reformed in 2001) that provides for the introduction of the ECHR as an interposed parameter of constitutionality. The Constitutional Court used Article 11 of the ECHR to declare Article 1475(2) of Legislative Decree No 66 of 15 March 2010 (Code of Military Order) unconstitutional. The Court stressed how, according to the ECtHR:

> '[S]tates may at most introduce "lawful restrictions", although without calling into question the right of freedom of association of their members, and cannot impose restrictions that touch upon the essence of freedom of association ("l'essence même du droit"), without which the content of that freedom, namely the right to establish and join a trade union.'[34]

This is a clear example of how the interposed parameter of the ECHR is increasingly penetrating the Italian legal system (also) on the subject of freedom of association. In this specific case, the jurisprudence of the European Court of Human Rights (ECtHR) has led the Constitutional Court to overrule its precedent, changing the connotation of the scope of application of freedom of association for military personnel.

[30] '[F]or magistrates, enrolment or systematic and ongoing participation in the activities of a political party, which is forbidden by the disciplinary offense, is one thing; having access to elected positions and public political office is another, and the law in force allows for this under certain conditions'. CC, Judgment no. 170/2018.
[31] CC, Judgment No 126/1985.
[32] CC, Judgment No 449/1999.
[33] CC, Judgment No 120/2018.
[34] CC, Judgment No 120/2018.

Concerning prohibited associations that cannot be "created", it is possible to start from the same provision of Article 18 IC. In addition to associations whose goals are prohibited by criminal law (e.g., criminal organisations, terrorist or racist groups), secret associations and paramilitary associations are expressly prohibited by Article 18 IC.

According to Article 1 of Law No 17/1982,[35] secret associations are those associations that carry out 'activities aimed at interfering with the functions of constitutional bodies, public administrations, public bodies, as well as essential public services of national interest'.[36] The dissolution of a secret association is decided by the President of the Council of Ministers (in accordance with the Council of Ministers) after an irrevocable ruling by the judiciary ensuring the existence of the secret association. [37] In this sense, alongside the "governmental" resolution, there is always a judicial control that guarantees respect for fundamental rights.

As far as paramilitary associations are concerned,[38] under Article 1 of Legislative Decree No 43/1948, associations of a military nature are defined as those with an internal hierarchical organisation similar to the military that are capable of collective violent or militia actions. Additionally, these organisations have to be connected to political parties,[39] as stated by the Constitutional Court: 'Art. 2 of Legislative Decree No 43 of 1948 has a limited scope of application to "associations dependent on or connected with political parties or also indirectly having political aims." '[40] The decree containing those criminal provisions had been abrogated by the government in 2010 in a process of legislative simplification, but the Constitutional Court declared this abrogation illegitimate for lack of legislative delegation (Article 76 IC). In this decision, the Court pointed out the importance of this law highlighting that 'Legislative Decree No 43 of 1948 was enacted in parallel with the Constitution and represents the direct implementation of Article 18(2) of the Constitution.'[41]

[35] The law is set in a particular historical moment, that of the discovery of the P2 Masonic Lodge. For a comprehensive analysis, see L Barbiera, G Contento and P Giocoli Nacci, *Le associazioni segrete. Libertà associativa e diritti dell'associato tra legge Rocco (1925) e Legge sulla P2 (1982)* (Napoli: Jovene, 1984).
[36] Article 1 of Law No. 17/1982 [My own translation].
[37] Article 3, Law No 17/1982.
[38] C Mortati, 'Legittimità e opportunità della legge sulle paramilitari' in *Raccolta di scritti* (Vol III, Milano: Giuffrè, 1972).
[39] Article 2, 1.d No 43/1948.
[40] CC, judgment No 26/1976 [my own translation]. The provision did not apply to the *Schutzen*, for example. On the contrary, there were charges in 1996 for members of the so-called 'Guardia Nazionale Padana', linked to the then-secessionist Lega Nord party, which sought the independence of northern Italy.
[41] CC, Judgment No 5/2014.

Alongside Article 18 IC, the 12th final provision of the Constitution prohibits the reconstitution of the dissolved fascist party.[42] Law No 645/1952 implements this final provision. Article 1 of this law provides for the possibility of dissolving a party that advocates the fascist ideology or the suppression of the freedoms guaranteed by the Constitution or that denigrates democracy, its institutions and the values of the Resistance, and that employs or threatens to employ a violent method. If there is a judicial decision establishing that there is a 'reorganisation of the dissolved fascist party', then the Minister for the Interior, after consultation with the Council of Ministers, orders the dissolution of the movement.[43] The decision by the Council of Ministers has to be preceded by a judicial ruling establishing the existence of the conditions provided for in Article 1 of Law No 645/1952. This law has not precluded extreme right-wing and nationalist parties with former fascist proponents and an ideology close to fascism from participating in the democratic elections (e.g., the Italian Social Movement).[44]

As far as mandatory associations are concerned, the Italian legal system offers a partially different legal scenario from that of the ECHR. The ECtHR has excluded compulsory associations from the scope of application of the freedom of association (Article 11 ECHR) because of the lack of voluntariness.[45] On the contrary, in the Italian legal system, compulsory associations have to be recognised as holding those rights that derive from the constitutional protection of 'social pluralism',[46] if not directly from Article 18 IC itself.[47] It is also clear that the rights of members of associations have to be protected even within the compulsory associations (see section 4). As eminent Italian constitutional law scholar Paolo Barile observed, 'here two very different aspects of this "freedom" are being confused: the freedom

[42] B Pezzini, "Attualità e attuazione della XII disposizione finale: la matrice antifascista della Costituzione repubblicana", in M D'Amico and B Randazzo (eds.), *Alle frontiere del diritto costituzionale* (Milano: Giuffrè, 2011).
[43] Article 3, Law No 645/1952.
[44] The successors of this party, first Alleanza Nazionale and now Fratelli d'Italia, have partly moved away from this tradition. For a recent reading in English, see VA Bruno, ''Centre right? What centre right?' Italy's right-wing coalition: Forza Italia's political 'heritage' and the mainstreaming of the far right' in VA Bruno (ed), *Populism and Far-Right. Trends in Europe* (Milano: EDUCatt, 2022).
[45] Professional associations fall outside the scope of Article 11 for the ECtHR (*Popov and Others v Bulgaria*, 6 November 2003); P Ridola, 'Art. 11 Libertà di riunione e di associazione' in S Bartole, B Conforti and G Raimondi (eds), *Commentario alla Convenzione europea per la tutela dei diritti dell'Uomo e delle Libertà fondamentali* (Padova: Cedam, 2001) 359.
[46] U De Siervo (n 5) 491.
[47] Furthermore, Judgment No 173/2019 was issued by the same Constitutional Court that appears to legitimise the use of Article 18 IC in a constitutional appeal by the Bar Association, which had (wrongly) sustained that a law limiting the number of mandates in the Bar Council was incompatible 'with Articles 2, 3, 18, and 118 of the Constitution, on the grounds that the prohibition amounts to an illegal and unreasonable restriction of the sphere of autonomy reserved to the district bars as non-financial public entities of an associational character': CC, Judgment No 173/2019.

to associate, which is lacking in compulsory associations, and the freedom of associations, which conversely subsists even if they are compulsory. '[48]

As a preliminary point, it is necessary to distinguish between compulsory associations and natural or voluntary associations:[49] compulsory associations are those that the law requires a person to join in order to perform a certain activity/job. Compulsory associations are 'public bodies with compulsory membership'.[50] The Constitutional Court has recognised that their establishment and regulation 'responds to the need to protect an important public interest', entrusting them with 'the task of looking after the registers and checking that those who are already registered or who aspire to become registered possess and maintain the requirements', with the aim of 'guaranteeing the correct exercise of the profession and protecting the trust of the community'.[51] Compulsory membership has, in fact, been limited to those associations in which there is a public interest of constitutional value to preserve.[52] Ultimately, the State has entrusted certain powers, functions and prerogatives to those associations with compulsory membership. They are instituted by special laws that also regulate aspects of their internal organisation; however, such associations maintain an important degree of autonomy. The existence of compulsory associations obviously conflicts with the freedom to not associate. The Constitutional Court in a very clear manner has 'dispelled the doubt that the freedom to not associate is undermined every time it is provided for a compulsory enrolment of a certain category of individuals in a public/professional body'.[53] It is the Constitutional Court itself that reviews if there is a constitutional need for a compulsory association. For example, in 1984 the Court declared that the automatic membership in the Jewish Community of members of the Jewish religion living in the territory was unconstitutional.[54] In other words, the Court is well aware that 'where the freedom to associate cannot find other limits other than those explicitly described by the same Article 18 of the Constitution, the freedom not to associate encounters broader limits that are not punctually written by the Constitutional Charter'.[55]

[48] P Barile (n 19) 839 [my own translation].
[49] A Pizzorusso, 'Art. 1-4' in A Scialoja, G Branca and F Galgano (eds), *Commentario del codice civile* (Bologna-Roma: Zanichelli-Soc. ed. del Foro italiano, 1988) 1-224, 181 ss. G Lombardi, *Potere privato e diritti fondamentali* (Turin: Giappichelli, 1970) 127.
[50] CC, Judgment No 405/2005 [my own translation].
[51] CC, Judgment No 405/2005 [my own translation].
[52] See CC, Judgments Nos 69/1962 and 173/2019.
[53] CC, Judgment No 40/1982 [my own translation].
[54] CC, Judgment No 239/1984.
[55] CC, Judgment No 69/1962 [my own translation].

IV. Rights *in* Associations and Rights *of* Associations

The dimension of the freedoms *of* associations has not been fully explored within the Italian legal system, whereas legal literature and case law are more robust with regard to rights *in* associations. While focusing on rights of members of associations, this analysis also directly and indirectly covers the freedoms *of* associations.

In the Italian legal system, freedom of association is deeply connected to the guarantee of the individual's rights and freedoms in their associations[56] and to the inviolable rights recognised to individuals within 'social groups'. In the internal life of associations, civil law regulations may allow for the development of particular institutions of participation or conflict resolution, which belong to the organisational autonomy of an association. In certain cases, the internal rules of associations may provide for a derogation from fundamental rights. An example of such a dynamic is the competence of sporting justice in the area of technical sports disputes arising within sporting federations, which leads to the consequent impossibility of direct appeal to the ordinary courts as provided for in Article 24 IC (access to courts).[57] A similar departure from the application of Article 24 IC can occur with respect to religious organisations, in some circumstances, arguably going beyond the principle non-interference in spiritual matters.[58] From this perspective, the conflict between the rights of individuals *in* associations and the collective rights *of* associations clearly emerges from two interesting case studies, the members' rights in compulsory associations and in tendency organisations.

As far as the rights of members in compulsory associations are concerned, their protection appears to be cardinal given the limitation of the right to not associate that exists in this field (see section 3). From this point of view, it can be noted that professional associations are functionalised to achieve public interests, but they are also 'independent and autonomous social group*s*'[59] from the State and they pursue their own interests and demands. The presence of elected councils[60] and their independence from the State, which is well expressed in the

[56] G Guzzetta, *Il Diritto Costituzionale di Associarsi* (Milano: Giuffrè, 2003) 167 and ff.
[57]Most recently, see CC Judgment No 160/ 2019. CM Salazar, 'Giustizia sportiva e principi costituzionali' in (1994) 1 *Iure praesentia* 245.
[58] See Court of Cassation, Judgment of 27 May 1994, No 5213. A Guazzarotti, 'Libertà religiosa individuale e appartenenza confessionale di fronte alla giurisdizione dello Stato' in *Giurisprudenza Costituzionale*, 1995, p. 4560.
[59] F Bertolini, *Gli ordini professionali come corpi intermedi nell'esperienza dello Stato unitario*, in *Italian Paper on Fedelarism*, 1 (2021) 55.
[60] G Rossi, *Enti pubblici associativi. Aspetti del rapporto tra gruppi sociali e pubblico potere* (Napoli: Jovene, 1979); F Bertolini (n 55).

"political" positions taken in various public debates,[61] outline the freedom *of* these associations. In fact, the professional associations act both 'on the private side of the exercise of the associative freedom and, at the same time, on the public side of the exercise of the authoritative powers conferred on them.'[62] Therefore, in some ways, the existence of these bodies - with respect to what happens in the ECHR system - seems to be doubly linked to the concept of freedom of association, both with respect to the freedom of members in the associations and to the role of these association in a pluralist society. In this context, the courts are the actors deputised to balance the "interests" of the association and the rights of individuals. Bearing this in mind, two examples that well-express the tension between individual rights and the rights of the compulsory association can be described.

A first example regards the supposed conflict between certain "protecting the professional dignity" provisions of the Code of Ethics of Journalists (Law No 69/1963) as applied by the Inter-Regional Council of Journalists of Lazio and Molise and the editing of pornographic magazines by a member of the Journalist Association. In this case, the Court of Cassation held that the expulsion from the journalist's association of a journalist editor of several pornographic magazines (confirmed by the National Council of the Association of Journalists) was incompatible with Article 21 IC (freedom of expression). According to the Court of Cassation, the prerogatives of the Council of the Association of Journalists cannot extend so far as to discriminate 'between periodical publications that are "worthy" of being published, and for which it is consistent with the professional dignity of the journalist to be editor, and others that are deemed by the Council to lack 'anything creative in terms of information and criticism ….'.[63]

Another equally explanatory case was the sanction imposed by the Medical Disciplinary Committee of the Provincial Association of Physicians and Dentists of Bologna against the Regional Executive Councillor for Health Policy of Emilia-Romagna Region, a member of the Bologna Medical Association. As the supporter of a Regional Executive Resolution on ambulance services in the Region that had been strongly opposed by the regional medical association, the Councillor had eventually been expelled from the Provincial Association of Physicians and Dentists. The case reached the Constitutional Court via the "conflict of

[61] N Posteraro, *La rappresentanza degli interessi e gli ordini professionali*, in *Federalismi.it*, 1 (2019).
[62] F Bertolini (n 55) 56 [my own translation].
[63] Court of Cassation, Judgment of 5 June 2007, No 13067 [my own translation].

attributions" appeal. The Court censured the expulsion, stating that 'Such acts, ascribable to a public munus [office], are not among those subject to the Association's authority to impose penalties.'[64]

The two cases explain two different dynamics, the contrast of the behaviour of a journalist with the rules of the association as interpreted by the Council of the Journalist Association in its organisational autonomy and the contrast between the political position of an Association in the public debate, in particular, that of Physicians and Dentists, and the political behaviour of one of its members. In both cases, it could be seen that beyond internal remedies, it is the court system that has the final word on the correct balance between freedom *in* the association and freedom *of* the association.

Equally interesting appears to be the balancing of fundamental rights in the so-called tendency organisations. The absence of a precise legislative definition in this field[65] has not prevented the establishment of this category at scholarly and jurisprudential levels. These associations are particularly relevant because they advocate an ideological, political, religious or social vision. If freedom of association is usually seen as ancillary to the full realisation of the person, the importance of associations for public debate fully emerges in the field of tendency associations.[66] Consequently, in such associations, there could be a "sacrifice" of individual rights to preserve the ideological purpose of the tendency association. For example, it is possible to expel from a political party a member who is no longer in line with the party's ideology or to exclude from a religious organisation a member who is not in line with the group's official doctrine.[67] Of course, a distinction has to be made between 'neutral' and 'tendency' functions;[68] whereas the former do not require ideological adherence to the *Weltanschauung* of the tendency organisation, the latter do.

[64] CC, Judgment No 259/2019.
[65] There is Article 4 of Law No 108/90, but the boundaries of the category are uncertain.
[66]E Rossi and S Panizza, 'Libertà di manifestazione del pensiero e organizzazioni di tendenza' in A Pizzorusso and others (eds), *Libertà di manifestazione del pensiero e giurisprudenza costituzionale* (Milano: Giuffrè, 2005); Cf P Ridola, *Democrazia pluralista e libertà associative* (Milano: Giuffrè, 1987).
[67] This possibility shall only be allowed 'to guarantee other constitutionally guaranteed rights, such as the freedom of political parties and trade unions, religious freedom and the freedom of schools'. Court of Cassation, Judgment of 16 June 1994, No 5832 [my own translation].
[68] C Salazar, 'Alcune riflessioni su un tema. 'démodé': il diritto al lavoro' (1995) 1 Politica del diritto 3; R Romboli, 'Libertà d'insegnamento e organizzazioni di tendenza' in *Foro it*., IV (1978).

Two examples can illustrate both the scope of this category and the interactions between the rights of individuals and the rights of the association and, at the same time, give an insight into recent trends in the Italian legal system.

One of the most blatant cases regarding the conflicts between rights of members and rights of tendency organisations is the so-called *Cordero* case. The case concerned the dismissal by the Catholic University of the Sacred Heart in Milan of a professor due to the non-renewal of his *nulla osta* to teach by the Sacred Congregation because of the non-conformity of Professor Cordero's opinions with the doctrine of the Catholic Church. In this case, the contrast between the ideological freedom of a private university and the academic freedom of a professor is crystalline. When the Constitutional Court was called upon to resolve the controversy, it upheld the legitimacy of the dismissal:

> 'The legitimate existence of free universities, characterised by the goal of spreading a religious belief, is undoubtedly an instrument of freedom: … it is worth repeating that if the legal system required such a university to employ and to continue to employ professors not inspired by the same belief, such rule would fatally lead to a violation of the fundamental freedom of religion of those who have contributed or contribute to the life of the religious school.'[69]

Consistent with this approach, the Council of State had recently deemed legitimate the nonrenewal of a teaching contract to Professor Lombardi-Vallauri on the basis of the absence of the *nulla osta* by the Sacred Congregation. This case was then brought before the ECtHR. The ECtHR detected a violation of Article 10 (and Article 6) ECHR[70] due to the lack of procedural guarantees both in the internal phase before the faculty council of the university and in the subsequent phase of judicial scrutiny of the procedure before the administrative tribunals. The judgment of the ECtHR imposes new procedures and guarantees in this field. It is clear that although not using the textual parameter of Article 11 ECHR, with this decision the ECtHR has influenced the interpretation and limits of action of so-called tendency organisations in the Italian legal system, reinforcing the rights *in* associations as opposed to the rights *of* associations.

[69] CC, Judgment No 195/1972 [my own translation].
[70] ECtHR, *Lombardi Vallauri v Italy*, 20 October 2009.

But the dynamism of the contours and boundaries of the freedom of association also derives from the activism of ordinary judges. A second striking example of the conflict between rights *in* tendency organisations and rights *of* tendency organisations concerns political parties. As mentioned in section 1, political parties in Italy are unrecognised associations, and there is no state regulation of their internal activities. Traditionally, the courts have applied a self-restraint approach allowing political parties to expel and censure their members without any particular procedural guarantees. However, this trend recently changed when several first-instance courts started to review expulsions from the 5 Star Movement not only formally but also substantively, investigating the actual existence of the underlying cause of the sanctioning measure and its compliance with the 'statute' of the political party. This jurisprudential orientation was then followed by other courts,[71] introducing for the first time a judicial scrutiny of expulsions from political parties and reshaping the contours of the rights of associations.

These two examples highlight how even in the context of tendency associations, the final balancing between rights in associations and rights of associations is left to the courts. It is also evident how this balancing can change due to the emergence of new judicial trends or because of the influence of the ECHR.

[71] For a recap of the most recent trends and an analysis of the latest judgments, see E Caterina, *La riduzione civilistica del partito politico: appunti su due recenti sentenze dei Tribunali di Palermo e di Massa*, in *Forum di Quaderni Costituzionali* (2022), 27-34.