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Freedom of Association at the European Court of Human Rights: a Right in Service of Democracy

Maria Cahill[*]

I. Introduction

This article explores how freedom of association is protected by the European Court of Human Rights. The European Convention on Human Rights affirms, in Article 11.1, that everyone has the right 'to freedom of peaceful assembly and to freedom of association', and specifically recognises the right to form and to join trade unions. The right is expressly qualified in Article 11.2, which provides (using language that is broadly similar to that found in the neighbouring provisions) that the exercise of the right may be justifiably restricted if the restrictions are 'prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'. It concludes with the statement that '[t]his article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State'.[1]

The European Convention on Human Rights is a product of the Council of Europe: an international organisation that is independent of the European Union and now comprises forty-six member states. Its origins date back to the aftermath of the Second World War. The Congress of Europe, held at The Hague between 7th and 11th May 1948, and attended by prominent politicians, philosophers, lawyers, academics, historians, journalists, entrepreneurs, civil society leaders and religious leaders from the nations of Europe, concluded with a Political Resolution calling for a Charter of Human Rights.[2] The Council of Europe was thereafter established in 1949 and the draft Convention opened for signature in 1950. Having attracted

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms: European Convention on Human Rights (coe.int) (hereinafter 'the Convention').
[2] The Political Resolution of the Hague Congress: Political Resolution of the Hague Congress (7–10 May 1948) - CVCE Website.

the support of the then 12 Council of Europe Member States, the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (and hereinafter referred to as the Convention), was ratified and entered into force on 3rd September 1953.[3]

The Convention is interpreted by the European Court of Human Rights (hereinafter referred to as the Court), which hears cases brought by individual applicants against Member States claiming a violation of Convention provisions. The Court exercises a supervisory human rights jurisdiction, in line with the Preamble to the Convention, which affirms that Member States, 'in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.[4] Article 35 of the Convention provides that a case may only be brought 'after all domestic remedies have been exhausted, according to the generally recognised rules of international law'[5] and Article 46 provides that in the event of a finding by the Court that a Member State is in violation of the Convention, the Member States 'undertake to abide by [the decision] and the judgment is conveyed to the Committee of Ministers of the Council of Europe which works with the government of the Member State to try to secure the execution of the judgment'. In other words, Member States have the first responsibility and the ultimate responsibility for the vindication of human rights in their nation states, but between those two points the Court has the final authority on how the Convention is interpreted.

Part I considers how the Court defines "associations" and how it has developed three component aspects of the right: the right to form associations, the right not to be forced to join an association, and the right of the association to organisational autonomy. Part II explores the types of disputes that arise, and ways in which the Court articulates the relationship between freedom of association and freedom of expression. Part III reflects on the rationales that the European Court of Human Rights offers for why the right to freedom of association is

[3] The Council of Europe (with its 46 Member States) is distinct from the European Union (with its 27), the latter having its own human rights instrument, the Charter of Fundamental Rights, which entered into force on 1 December 2009 as part of the Treaty of Lisbon.
[4] The Convention (n 1).
[5] ibid, Article 35 of the Convention.

important, and its particular focus on the idea that freedom of association is essential to the proper functioning of democracy.

II. The Nature and Scope of the Right

National laws define associations at national level and provide a framework within which a group of people may be entitled to register in law as a formal association, with consequent obligations and entitlements. The corollary of this is that national law may preclude certain groups or certain types of groups from becoming registered and deny certain privileges to certain types of registered associations. The Grand Chamber of the European Court of Human Rights, in an early leading case of *Chassagnou and Others* v *France*, made clear that the Court will make its own independent determination as to whether or not an organisation is an association for the purposes of Article 11; the fact that an organisation has been denied the status of an association in national law will not dispose of the question of whether it is entitled to the protection of Article 11.[6] In a previous case, *Young, James and Webster* v *United Kingdom*, the Commission Report had stressed the voluntary character of associational life in proposing the following definition: 'the term "association" presupposes a voluntary grouping for a common goal'.[7] The absence of voluntariness, e.g. if the relationship was primarily contractual, could signal that an association could not be said to exist for the purposes of Article 11.[8] In *Chassagnou*, the Court then developed a set of factors that should be taken into account when assessing voluntariness: (1) whether the association owes its existence to the will of parliament; (2) whether it is set up in accordance with the law on private associations; (3) whether it remains integrated within the structures of the State; (4) whether it enjoys prerogatives outside the orbit of ordinary law, such as administrative, rule-making or disciplinary; and (5) whether it employs the processes of a public authority, like professional associations.[9] In subsequent decisions, the Court has held that, for example, a university founded by an act of parliament could not be an association under the terms of Article 11[10] and that various professional regulatory bodies founded by legislation to regulate the professions in the interests of the public similarly fall outside the scope of Article 11 because they 'remain

[6] *Chassagnou and Others* v *France* [GC] App nos 25088/94, 28331/95 and 28443/95 (ECHR, 29 April 1999) para 101.
[7] *Young, James and Webster* v *United Kingdom* App nos 7601/76 and 7896/77 (ECHR, 13 August 1981), Commission's report of 14 December 1979, Series B, no 39, 36, para 167.
[8] ibid.
[9] *Chassagnou* (n 6) para 101.
[10] *Slavic University in Bulgaria and Others* v *Bulgaria* (dec) App no 60781/00 (ECHR, 18 November 2004).

integrated within the structures of the State'.[11] Having stressed the centrality of voluntariness to the definition of association, the Court went on to develop a jurisprudence that articulates three component parts of the right to freedom of association: the right to form an association, the right not to be forced to join an association, and the right of organisational autonomy.

(i) The Right to Form an Association

The right to freedom of association is antecedent to the association itself, since the right to form an association is part of what is included under the umbrella of this right. Moreover, the right to freedom of association is not limited to those associations that are registered in law; unincorporated associations also enjoy the protection of this right.[12] Article 11.1 explicitly recognises the right to form trade unions. In the case of *Sidiropoulos and others* v *Greece*, the Court clarified that the right to form is not limited to trade unions but accrues to associations of all kinds:

> '[T]he right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning'.[13]

Member States can be found to be in violation of this aspect of freedom of association when national laws require an association to assume a legal status that it does not seek,[14] when they refuse to grant legal status to an association (unless the association is able to pursue its purposes without formal registration),[15] and when there are significant delays in the registration

[11] *Popov and Others* v *Bulgaria* (dec) App no 48047/99 (ECHR, 6 November 2003) para 2. The Court did note that individuals who are required to be members of such professional regulatory bodies should not be prevented from forming their own professional associations which would enjoy the protection of Article 11.
[12] *The United Macedonian Organisation Ilinden and Others* v *Bulgaria* (no 2) App no 34960/04 (ECHR, 18 October 2011) para 53.
[13] *Sidiropoulos and Others* v *Greece*, 10 July 1998, Reports of Judgments and Decisions 1998-IV, para. 40. This passage has been cited with approval recently in *Gorzelik and Others* v *Poland* [GC] App no 44158/98 (ECHR, 17 February 2004) para 91 and *Magyar Keresztény Mennonita Egyház and Others* v *Hungary* App nos 70945/11 and 8 others (ECHR, 8 April 2014) para. 78.
[14] *National Turkish Union Kungyun* v *Bulgaria* App no 4776/08 (ECHR, 8 June 2017) para. 41; *Republican Party of Russia* v *Russia* App no 12976/07 (ECHR, 12 April 2011) para. 105; *Zhechev* v *Bulgaria* App no 57045/00 (ECHR, 21 June 2007) para 41.
[15] *Sidiropoulos* (n 13) para 31; *Koretskyy and Others* v *Ukraine* App no 40269/02 (ECHR, 3 April 2008) para 39; *Özbek and Others* v *Turkey* App no 35570/02 (ECHR, 6 October 2009) para 35.

procedure.[16] In *Ouranio Toxo and Others* v *Greece*, the Court also held that 'genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere' and that there may be positive obligations which fall on national authorities 'to secure the effective enjoyment of the right to freedom of association'.[17]

(ii) The Right not to be Forced to Join

The right to form or to join an association is often termed the positive aspect of the right of freedom of association. This is to contrast it with the so-called negative aspect, sometimes known as the right to dissociate, which is the right to leave or to refuse to join an association. The negative aspect of freedom of association right is not explicitly protected in Article 11, but the Court has determined that it falls within the ambit of that provision. In *Sigurður A Sigurjónsson* v *Iceland*, the Court concluded that Article 11 'must be viewed as encompassing a negative right of association' on the grounds that: (1) several Member States guarantee the freedom not to join or to withdraw from an association; (2) that there is growing support at international level for recognition of this aspect of the right; and (3) that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions'.[18] In *Sørensen and Rasmussen* v *Denmark*, the Grand Chamber grounded the protection of this negative aspect of freedom of association in the notion of personal autonomy, which was declared to be 'an important principle underlying the interpretation of the Convention guarantees' in general, and freedom of association in particular.[19] The ideas was that if Article 11 implies the right to choose to be part of an association, then it includes the right to choose not to be part of an association. In the recent 2021 case of *Vörður Ólafsson* v *Iceland*, the negative aspect was again confirmed by the Court as being part of what is protected under Article 11, and this time the autonomy rationale is underscored by the Court's articulation of the negative aspect as the 'right not to be forced to join an association'.[20]

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[16] *Ramazanova and Others* v *Azerbaijan* App no 44363/02 (ECHR, 1 February 2007) para. 60; *Aliyev and Others* v *Azerbaijan* App no 28736/05 (ECHR, 18 December 2008) para 33.

[17] *Ouranio Toxo and Others* v *Greece* App no 74989/01 (ECHR, 20 October 2005) para 37. Cf *Wilson, National Union of Journalists and Others* v *the United Kingdom* App nos 30668/96 and 2 others (ECHR, 30 January 2002) para 41, in which the Court found that there could be a positive obligation on the Member State to intervene in the relationship between private parties in circumstances when such would be necessary to ensure the effective enjoyment of the right to freedom of association.

[18] *Sigurður A Sigurjónsson* v *Iceland*, 30 June 1993, Series A no 264, para 35. The Court added: 'It is not necessary for the Court to determine in this instance whether this right is to be considered on an equal footing with the positive right.'

[19] *Sørensen and Rasmussen* v *Denmark* [GC], App nos 52562/99 and 52620/99 (ECHR, 11 January 2006) para 54.

[20] *Vörður Ólafsson* v *Iceland* App no 20161/06 (ECHR, 27 April 2010) para 45.

(iii) The Right of Organisational Autonomy

In the case of *United Communist Party of Turkey and Others* v *Turkey*, the Court noted that the protection offered under Article 11 'would be largely theoretical and illusory if it were limited to the founding of an association', i.e., a strict interpretation of the right to form an association. Instead, the Court held, 'the protection afforded by Article 11 lasts for an association's entire life…'.[21] The third aspect of the right to freedom of association, the right to organisational autonomy, protects the association's authority to govern its own affairs, e.g., by establishing a purpose and ethos, drawing up internal regulations, agreeing decision-making rules, setting expectations regarding standards of behaviour, determining who is entitled to become a member or an officeholder within the association, formulating a disciplinary process, and so on. The right to organisational autonomy can come into tension with the state, when the state's regulations interference with the freedom of the association to govern its own affairs, and it can also come into tension with an individual who wants to become or remain a member or officeholder in the association, in violation of the internal regulations.

An early affirmation of the right to organisational autonomy came in the case of *Cheall* v *United Kingdom*, in which the Commission asserted the position that 'the right to form trade unions involves, for example, the right of trade unions to draw up their own rules, to administer their own affairs and to establish and join trade union federations'.[22] As a corollary, the Commission concluded that a person does not have an entitlement to join a specific association just because they would like to do so and in violation of the rules of the association.[23] A subsequent case held similarly that a person is not entitled to a specific post within an association in contravention of the internal rules.[24] In *Associated Society of Locomotive Engineers and Firemen* v *UK*,[25] the Court considered the scope of the right to organisational autonomy in some depth in a trade union case, beginning by noting that unions enjoy a '*prima facie* … freedom to set up their own rules concerning conditions of membership'.[26] Just as a person has freedom to join or not join an association, 'so should the trade union be equally free

[21] *United Communist Party of Turkey and Others* v *Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I, para 33.
[22] *Cheall* v. *the United Kingdom*, App no 10550/83, Commission decision of 13 May 1985, Decisions and Reports 42, para 178.
[23] ibid.
[24] *Fedotov* v *Russia* (dec) App no 5140/02 (ECHR, 23 November 2004).
[25] *Associated Society of Locomotive Engineers and Firemen (ASLEF)* v *the United Kingdom* App no 11002/05 (ECHR, 27 February 2007) para 38.
[26] ibid.

to choose its members'.[27] The Court continued this robust defence of the right of organisational autonomy in the following way:

> 'Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, *it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership*. By way of example, it is uncontroversial that religious bodies and political parties can generally regulate their membership to include only those who share their beliefs and ideals. Similarly, the right to join a union "for the protection of his interests" cannot be interpreted as conferring a general right to join the union of one's choice irrespective of the rules of the union: in the exercise of their rights under Article 11 § 1 *unions must remain free to decide*, in accordance with union rules, questions concerning admission to and expulsion from the union'.[28]

Having established that associations have a right to organisational autonomy, and that that right includes the substantive right to determine membership policy, the Court was faced, in the 2017 case of *Lovrić* v *Croatia*, with the question as to whether an association can *conclusively* determine membership and disciplinary disputes such that the disappointed individual can be precluded from having access to the courts. The Court affirmed that the right of organisational autonomy includes the procedural right to settle membership disputes and disciplinary issues authoritatively and conclusively, without recourse to the courts:

> '[T]he organisational autonomy of associations constitutes an important aspect of their freedom of association … and it can serve as a legitimate aim for restricting the right of access to court. In particular, associations must be able to wield some power of discipline, even to the point of expulsion, without fear of outside interference'.[29]

[27] ibid, para 39.
[28] ibid. Emphasis added. The Court went on to note that this robust understanding of organisational autonomy in respect of membership policy 'holds good where the association … is a private and independent body' and not in receipt of public funding or fulfilling public duties which, if it were the case, would mean that 'other considerations may well come into play'. ibid, para 40.
[29] *Lovrić* v *Croatia* App no 38458/15 (ECHR, 4 April 2017) para 71.

However, there was a caveat: since the right to freedom of association is not absolute and therefore the right to organisational autonomy is not absolute, the association must be 'held to some minimum standard in expelling a member', lest they stray to the point of violating the right to freedom of association of the particular member.[30] Whether this minimum standard refers only to procedural guarantees of due process or also substantive review of the decision of the association is not clear from the judgment in this case,[31] but the Court reiterates that 'the scope of judicial review may be restricted, even to a significant extent' in deference to the right of the association to govern its own affairs.[32]

(iv) Legitimate Restrictions

According to Article 11.2, state interference with the right to freedom of association may be justified if it is 'prescribed by law', and if it is 'necessary in a democratic society' for the pursuit of one of the listed legitimate aims: national security or public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others. For example, in the leading case of *Gorzelik and others v Poland*, the Grand Chamber held that:

> 'Freedom of association is not absolute, however, and it must be accepted that where an association, through its activities or the intentions it has expressly or implicitly declared in its programme, jeopardises the State's institutions or the rights and freedoms of others, Article 11 does not deprive the State of the power to protect those institutions and persons'.[33]

Again, the position of the European Court of Human Rights as a supervisory court must be borne in mind: attentive to the principle of subsidiarity and the margin of appreciation, it reviews the work of the national authorities, conscious of its position outside that system. The requirement that national restrictions must be 'prescribed by law' entails both that the impugned measure should have a basis in domestic law and that it should be accessible and

[30] ibid, para 72.
[31] The applicant in this case had raised a claim under Article 6.1 (the right to fair trial) and had *not* raised a claim under Article 11. The majority of the Court found a violation of Article 6, while the dissenting judge found no violation under Article 6, but noted that there may have been a claim under Article 11. ibid.
[32] ibid, para 73.
[33] *Gorzelik* (n 13) para 94.

foreseeable.[34] The requirement that national restrictions must be 'necessary' for the pursuit of a legitimate aim does not mean simply 'useful' or 'desirable' in achieving that end.[35] National authorities must assess whether there is a 'pressing social need' to impose a particular restriction.[36] The role of the European Court of Human Rights, as outlined by the Court itself, is not to substitute its own view for that of the national authorities, but to review the impugned measure in the light of the case as a whole and determine whether it was proportionate, and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.[37] Examples of unjustified state interference range from refusal of registration[38] to dissolution of an association,[39] from conducting unwarranted inspections and imposing sanctions[40] to requiring an existing association to submit to new registration procedures.[41]

III. Disputes before the Court

Freedom of association cases make up only 1% of the total number of cases before the ECHR.[42] There have been more than five times as many cases brought invoking the right to life in Article 2, the right to freedom of expression in Article 10, and the principle of non-discrimination in Article 14, more than twelve times as many cases invoking the prohibition on inhuman and degrading treatment (Article 3), liberty and security of the person (Article 5) and right to privacy (Article 8), and almost fifty times as many cases invoking the right to a fair trail (Article 6). The closest right in terms of volume of caselaw generated is the right to freedom of thought, conscience and religion in Article 9. The comparatively low rate of litigation might imply that the right of freedom of association is relatively well protected within the Council of Europe. However, it might also be the case that the low rate of litigation begets a situation where the

[34] *Maestri* v *Italy* [GC] App no 39748/98 (ECHR, 17 February 2004) para 30; *NF* v *Italy* App no 37119/97 (ECHR, 2 August 2001) para 26 and 29.
[35] *Young, James and Webster* v *the United Kingdom*, 13 August 1981, Series A no 44, para 63; *Chassagnou* (n 6) para 112.
[36] *Chassagnou* (n 6) para 113; *Gorzelik* (n 13) para 95.
[37] *Gorzelik* (n 13) para. 96.
[38] *Zhechev* (n 14); *The United Macedonian Organisation Ilinden and Others* v *Bulgaria* App no 59491/00 (ECHR, 19 January 2006); *Bozgan* v *Romania* App no 35097/02 (ECHR, 11 October 2007).
[39] *Les Authentiks and Supras Auteuil 91* v *France* App nos 4696/11 and 4703/11 9ECHR, 27 October 2016) para 84; *Vona* v *Hungary* App no 35943/10 (ECHR, 9 July 2013) para 58; *Association Rhino and Others* v *Switzerland* App no 48848/07 (ECHR, 11 October 2011) para 62.
[40] *Cumhuriyet Halk Partisi* v *Turkey* App no 19920/13 (ECHR, 26 April 2016).
[41] *Moscow Branch of the Salvation Army* v *Russia* App no 72881/01 (ECHR, 5 October 2006). For a general discussion of unjustified state interference with freedom of association, see *Ecodefence and Others* v *Russia* App nos 9988/13 and 60 others (ECHR, 14 June 2022) para 81.
[42] The data referenced here is based on searches conducted on the HUDOC website: HUDOC - European Court of Human Rights (coe.int) retrieved on 16th August 2023. Of the 81,193 judgments decided by the European Court of Human Rights (sitting in Committee, Chamber and Grand Chamber), 2,284 invoke Article 11. Of those, 828 concern freedom of association.

caselaw on freedom of association is underdeveloped relative to other rights, which in turn leads to litigants preferring to invoke other rights and/or judges preferring to examine the complaint by reference to other rights, thus reinforcing a low rate of litigation which does not correlate with a high degree of protection.

(i) Types of Disputes and Intensity of Review

A large majority of those freedom of association cases deal with trade unions, which is to be expected given their specific acknowledgement in Article 11, and which is commensurate with their role as 'an essential element of the social dialogue between workers and employers' and therefore vital in the achievement of 'social justice and harmony'.[43] After that, another large proportion of the cases deal with political parties, which the Court recognises as having an 'essential role in ensuring pluralism and the proper functioning of democracy'.[44] As noted by Rainey *et al*, the caselaw under Article 11 can 'very broadly, be divided into [these] two categories'.[45] Minority associations and religious associations also feature reasonably regularly in the caselaw, the former being important so that those belonging to minorities can maintain their identity, and the latter, supporting the right to freedom of religion protected in Article 9 by ensuring that believers are allowed to freely associate.[46] Significantly, the Court has proclaimed that the intensity of its review depends on the type of association: state interference with political parties is to be subject to 'the most rigorous scrutiny'[47] because political parties are so essential to the proper functioning of a democracy – and 'only convincing and compelling reasons can justify restrictions' on their exercise of the right to freedom of association.[48] This seems to imply that associations that are not political parties are second-class associations, and that interferences with their exercise of the right to freedom of association will be easier for the state to justify.

(ii) Relationship with other Rights

The relationship between freedom of association and other fundamental rights such as freedom of expression (protected in Article 10 of the Convention), freedom of thought, conscience and

[43] *Sindicatul "Păstorul cel Bun"* v *Romania* [GC], App no 2330/09 (ECHR, 9 July 2013).
[44] *United Communist Party of Turkey* (n 21) para 43.
[45] Bernadette Rainey, Pamela McCormick and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (8th edn., Oxford: Oxford University Press, 2020) 556. 19. Freedom of Assembly and Association | Law Trove (oclc.org).
[46] *Gorzelik* (n 13) para 94; *Ouranio Toxo* (n 17) para 40.
[47] *Vona* (n 39) para 58; *Les Authentiks* (n 39) paras 74 and 84.
[48] *Gorzelik* (n 13) 46.

religion (protected in Article 9),[49] and the prohibition on non-discrimination (protected in Article 14) has not yet been the subject of lengthy discussion in the Court's judgments. This is partly because, when an applicant relies on several Convention provisions, the Court will often determine the matter in respect of one of the rights and declare it unnecessary to examine the complaints separately under the other provisions. For example, in *Socialist Party and others v Turkey*, the applicant relied on Articles 6, 9, 10, 11, 14, 18 as well as Articles 1 and 3 of Protocol No 1, but the Court found a violation of Article 11 and declined to consider the matter under the other provisions.

So far, the relationship between freedom of expression and freedom of association is the one that has received some attention.[50] The Court has taken two positions on the relationship between these two rights: first, that freedom of association is a vehicle for the protection of freedom of expression, and second, that freedom of association can be interpreted in the light of freedom of expression. As regards the former, in *Sørensen and Rasmussen* and in *Vörður Ólafsson,* the Court found a violation of Article 11, affirming both times that '[t]he protection of personal opinions guaranteed by Articles 9 and 10 is one of the purposes of the guarantee of freedom of association',[51] thus articulating Article 11 is designed to help to vindicate the right to freedom of expression. As regards the latter, in *Redfearn v UK*, the Court used Article 10 as an interpretive guide to Article 11.[52] The two positions were brought together in the recent case of *Ecodefence and Others* v *Russia*, when the Court determined to examine the situation under Article 11 'interpreted in the light of Article 10', on the basis that 'the implementation of the principle of pluralism is impossible without an association being able to express freely its ideas and opinions' and went on to say that 'the protection of opinions and the freedom to express them within the meaning of Article 10 of the Convention are objectives of freedom of association'.[53] Both positions - that freedom of association is designed to promote protection of freedom of expression and that freedom of association can be interpreted in the light of freedom of expression - could conduce towards an impression that freedom of association is the less significant right.

[49] Cf Ioana Cismas, *The European Court of Human Rights and the Freedom of Religion or Belief* (Leiden: Brill | Nijhoff, 2019) 260-281. https://doi.org/10.1163/9789004346901_013.
[50] Cf Stefan Sottiaux and Stefan Rummens, 'Concentric democracy: Resolving the incoherence in the European Court of Human Rights' case law on freedom of expression and freedom of association (2012) 10(1) International Journal of Constitutional Law 106–126. https://doi.org/10.1093/icon/mor074.
[51] *Sørensen* (n 19) para 54; *Vörður Ólafsson* (n 20) para 46.
[52] *Redfearn* v *the United Kingdom* App no 47335/06 (ECHR, 6 November 2012) para 56.
[53] *Ecodefence* (n 41) para 72.

IV. Rationales for Protecting Freedom of Association

Reference has already been made to some of the rationales that the Court has mentioned as reasons to protect freedom of association. The right to freedom of association protects the individual against the arbitrary power of the state.[54] The right not to be forced to join an association secures personal autonomy.[55] Freedom of association supports the vindication of the right to freedom of expression.[56] Trade union law protects social justice and harmony.[57] Vindicating the freedom of association of minority associations can be important in preserving their identity of minority groups.[58] Vindicating the freedom of association of religious groups supports the vindication of freedom of religion.[59] None of these rationales have been developed at length in the caselaw. By far the most common rationale invoked by the Court as the rationale for defending freedom of association is that freedom of association promotes democracy.

The leading case on this point is the Grand Chamber decision in *Gorzelik*, which included the following passage, affirmed and cited several times in subsequent caselaw:

> 'While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, *are also important to the proper functioning of democracy*. … It is only natural that, where a civil society functions in a healthy manner, *the participation of citizens in the democratic process is to a large extent achieved through belonging to associations* in which they may integrate with each other and pursue common objectives collectively'.[60]

[54] *Redfearn* (n 52) para 42.
[55] *Sørensen* (n 19) para 54; *Vörður Ólafsson* (n 20) para 45.
[56] *Sørensen* (n 19) para 54; *Vörður Ólafsson* (n 20) para 46.
[57] *Sindicatul* (n 43).
[58] *Gorzelik* (n 13) para 93.
[59] ibid, para 94; *Ouranio Toxo* (n 17) para 40.
[60] *Gorzelik* (n 13) para 92. Emphasis added. Cf *Moscow Branch of the Salvation Army* (n 41) para 61; *Zhechev* (n 14) para 139; *Tebieti Mühafize Cemiyyeti and Israfilov* v *Azerbaijan* App no 37083/03 (ECHR, 8 October 2009) para 53; *Association Rhino* (n 39) para 61.

Essentially, the Court views freedom of association entirely through a democratic lens: not only political parties but all kinds of associations contribute to the flourishing of democracy and are valuable for that reason. Moreover, democratic participation by the citizenry is achieved 'to a large extent' by means of participation in associations. As people engage in their various associations, supported by a pluralism based on genuine respect for 'diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts', so this harmonious interaction of the persons and groups builds into social cohesion and a strong democracy.[61] To put it bluntly, associations must be protected in the service of democracy. Does the *Gorzelik* passage overstate the political purpose of non-political associations? In *Vona v Hungary*, the Court (without referencing *Gorzelik*) distinguished between political parties and 'social organisations', noting that although both enjoy protection under Article 11, 'these two types of entity differ from each other as regards, amongst other elements, the role which they play in the functioning of a democratic society, since many social organisations contribute to that functioning *only in an indirect manner*'.[62] Here, the Court continues to value non-political associations for their political contribution, but recognises that they are not focussed fully on that purpose.

It is worth reflecting a little on why the Court is so keen to emphasise democracy as the orienting value of associations and associations as crucial to the proper functioning of democracy, with the resultant focus on the political purpose of non-political associations. It could be that the Court's attention is trained towards democracy because the majority of the caselaw under Article 11 concerns the right to freedom of assembly, and the majority of freedom of association caselaw is generated by trade unions and political parties, rather than non-political associations like sporting associations, charitable associations, residents' associations, students' associations, and so on. Perhaps the Court focuses on the political value of associations simply because democracy is one of the values that is most often in play or at stake in the types of cases that come before the Court. Alternatively - or additionally - it could be the case that in spotlighting freedom of association's capacity to support strong democracies, the Court is seeking to remain true to its deepest purposes. The origins and founding values of the Council of Europe as well as the position of the European Court of Human Rights as an international court with supervisory jurisdiction mean that it cannot be surprising that the

[61] *Gorzelik* (n 13) para 92.
[62] *Vona* (n 39) para 56. Emphasis added.

quality of democracy in the nation state would be on the Court's radar. As the Court put it in 1998 and has affirmed several times since: '[t]he way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned'.[63] In other words, the Court understands that the right to freedom of association offers the Court a window into the health of the democracy of the nation.

There are good arguments for considering freedom of association as a right in service of democracy, and that is certainly neither a new argument nor a specifically European one,[64] and it can be further unpacked as the Court develops its jurisprudence.[65] At the same time, there is a tension in the Court's jurisprudence which must be acknowledged. This tension is palpable in the *Gorzelik* case itself. *Gorzelik* concerned a minority cultural association with the stated aims of restoring and promoting Silesians culture which sought registration under a regulatory framework which would have entitled it to certain electoral privileges. Registration was denied at national level, but the European Court of Human Rights found no violation on the grounds that the stated aims of the association could be fulfilled without registration.[66] The irony, then, is that the Court approved a regime which denied a cultural association from participating more robustly in the national political process, whilst simultaneously declaring both that the value of non-political associations is their important contributions to democracy and that citizens' democratic participation is mostly achieved through involvement in associations. It must be recalled here that only state interference with political parties is subject to the most intense review by the Court. Political parties are so crucial to the proper functioning of a democracy that 'only convincing and compelling reasons can justify restrictions' on their exercise of the right to freedom of association.[67] Contrariwise, state interference with non-political associations will be more easily justified. Beyond the circumstances of the *Gorzelik* decision - and the point here is not to contest the validity of that outcome - the tension or problem is that while non-political associations are valued for how much they contribute to democracy, they are not protected with the same strict standard of review with which the Court protects political parties. In fact, in the Court's eyes, non-political associations seem to be second-class political

[63] *Sidiropoulos* (n 13) para 40. Cf *Gorzelik* (n 13) para 88.
[64] Alexis de Tocqueville, *Democracy in America* (Harvey C Mansfield and Delba Winthrop eds, tr) (Chicago: University of Chicago Press, 2000).
[65] Dragan Golubovic, 'Freedom of Association in the Case Law of the European Court of Human Rights' (2013) 17(7-8) The International Journal of Human Rights 758-771, DOI: 10.1080/13642987.2013.835307.
[66] Gorzelik (n 13).
[67] ibid, para 46. Cf *Vona* (n 39) para 58; *Les Authentiks* (n 39) paras 74 and 84.

associations: valuable for indirectly contributing to democracy like political parties but not protected to the same degree.

In making these remarks, I do not wish to undermine the idea that freedom of association is a right in service of democracy. I do seek to highlight, however, that there is a danger in thinking about the value of non-political associations – if not all associations – *only* in terms of their service to democracy. The Court's commitment to pluralism, and its recognition of the multiplicity of types of associations which contribute greatly to the life of the nation and the flourishing of its citizens, means that the Court does implicitly recognise that there are other important values in play when associations are at work. There is room for the Court to be explicit about the myriad of other important purposes and values that are furthered by associations of all kinds. Freedom of association certainly is a right in service of democracy, but that is not the whole of its story.