

THE FREEDOM OF ASSOCIATION IN INTERNATIONAL LAW

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INTERNATIONAL STANDARDS REGARDING THE FREEDOM OF ASSOCIATION

Various international instruments protect the right to freedom of association. Particularly important is the International Covenant on Civil and Political Rights (ICCPR), whose norms are binding on state parties.¹ The right is also mentioned in conventions of the International Labour Organization (ILO), regional treaties, and reflected in statements and declarations of the relevant UN bodies.

1. SOURCES AND SCOPE OF THE FREEDOM OF ASSOCIATION IN INTERNATIONAL LAW

Article 20 (1) of the Universal Declaration of Human Rights is axiomatic. It states that “everyone has the right to freedom of peaceful assembly and association”.

Article 22 of the International Covenant on Civil and Political Rights (1966) defines the right in more detail and with modifications: “(1) everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right”.

Art. 2 of the ILO Convention concerning Freedom of Association and Protection of the Right to Organise² points out that “workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation”. Art. 4 emphasizes that “Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority”.

The core substance of the freedom of association is further carved out by the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.³ Article 5 states that “for the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: ... (b) to form, join and participate in non-governmental organizations, associations or groups”. Article 12 states that “(1) everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms ... (3) In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and

¹ States that breach their obligations under the Covenant commit an internationally wrongful act, see Art. 3 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Report of the International Law Commission (2001), UNGA Doc. A/56/10, Supp. No. 10), which states that “the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law”. The authoritative interpretation of the rights and freedoms under the Covenant falls to the ICCPR treaty body, the Human Rights Committee.

² Convention concerning Freedom of Association and Protection of the Right to Organise (Convention No. 87, 1948).

³ General Assembly Resolution 53/144 (9 December 1998), as a UNGA endorsed declaration it arguably summarizes the *opinio iuris* of the 193 UN member states.

acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms”.

Moreover, the UN Human Rights Council⁴ has addressed the freedom of association. In Resolution 21/16 (2012) it reminded states “of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law”.⁵ The Council furthermore stresses that “respect for the rights to freedom of peaceful assembly and of association, in relation to civil society, contributes to addressing and resolving challenges and issues that are important to society, such as the environment, sustainable development, crime prevention, human trafficking, empowering women, social justice, consumer protection and the realization of all human rights”.⁶

It should also be noted that the freedom of association is part and parcel of fundamental rights protection at the regional level in Europe⁷, Africa⁸ and the Americas⁹.

However, freedom of association is not guaranteed on the regional level in Southeast Asia. The ASEAN Human Rights Declaration (AHRD) omits the freedom of association and merely guarantees the freedom of assembly and the freedom of expression¹⁰. It has been stated that without the inclusion of a specific provision for the right to freedom of association, the AHRD maintains a critical gap in the human rights framework of the ASEAN regional system and falls short of international standards.¹¹ Anyway, the ASEAN Human Rights Declaration, as most ASEAN agreements, is non-binding soft law¹² and ASEAN states’ obligations under international law are not affected by the omission.

2. LIMITATIONS TO THE EXERCISE OF THE RIGHT

Art. 22 (2) ICCPR gives a list of permissible limitations to the exercise of the freedom of association. It states that the state may “limit the individual right or restrict the activities of any association by means of a public law and when it is necessary in a democratic society in order to ensure specific public interests, such as security,

⁴ The Human Rights Council is charter-based and not to be confused with the Human Rights Committee, which is the ICCPR treaty body.

⁵ A/HRC/21/2 (26 August 2013), p. 49.

⁶ A/HRC/21/2 (26 August 2013), p. 49.

⁷ Art. 11 European Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 005).

⁸ Art. 10 African Charter on Peoples’ and Human Rights.

⁹ Art. 16 American Convention on Human Rights.

¹⁰ Art. 23 ASEAN Declaration states “Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person’s choice”; Art. 24 ASEAN Declaration states “Every person has the right to freedom of peaceful assembly”.

¹¹ American Bar Association Rule of Law Initiative, *The ASEAN Human Rights Declaration: A Legal Analysis* (2014), p. 124.

¹² The ASEAN Declaration, as all regional instruments, is trumped by obligations of states under the UN Charter, see Art. 103 UN Charter: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

safety, public order, health and morals, and the protection of rights and freedoms of all members of the society”.

Referring to Art. 22 (2) ICCPR, state parties frequently argue that the limitations they have imposed by law are legitimate. However, oftentimes the restrictions imposed on associations tend to contradict the above outlined standard. The permissible limitations in Art. 22 ICCPR must be interpreted in context. First of all, any limitation to the freedom of association must be prescribed by law (principle of legality), and that law must be of general application and must have been in place prior to the act in question (principle of non-retroactivity).¹³ The law must be accessible and formulated in clear language of sufficient precision.¹⁴

While the ICCPR recognizes restrictions to the freedom of association, the broad language and vagueness of these categories does not mean that sweeping authorization is given under the ICCPR to limit the freedom of association. On the contrary, in each instance of potential limitation the state must clearly explain the precise and legitimate purpose served, as well as showing that the measure in question is necessary and proportionate.¹⁵ All aims enumerated in Art. 22 (2) ICCPR have a restricted scope.¹⁶

Any limitation on the freedom of association must be a necessary means of securing those ends within a democratic society. The words “in a democratic society” (Art. 22 (2) ICCPR) are important. Undemocratic societies violate the core essence (“Wesensgehalt”) of the right per definitionem, because the freedom of association necessarily recognizes pluralistic sources of power aside from the government. There can be no democracy when freedom of association is not guaranteed as a basic tenet. Limitations to the freedom of association are only permissible to protect democratic pluralism – and not to destroy it.

Furthermore, the expression “necessary in a democratic society” implies that state action to safeguard democracy is to be proportional to those interests it seeks to achieve.¹⁷ In that context, the term “necessary” expresses pressing social need which should be regarded in order to uphold pluralism and tolerance in democratic societies.¹⁸ According to the Human Rights Committee proportionality means that limitations to rights “must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be

¹³ Report of the African Commission on Human and Peoples' Rights Study Group on Freedom of Association (2014), para. 5.

¹⁴ Report of the African Commission on Human and Peoples' Rights Study Group on Freedom of Association (2014), para. 5. The African Commission of Peoples' and Human Rights rightfully pointed out that a right may be restricted by domestic law, but that this “does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed the whole essence of treaty making”, see *Constitutional Rights Project and Others v Nigeria*, African Commission on Peoples' and Human Rights, Communications 140/94, 141/94 and 145/95 (1999), para 40.

¹⁵ Report of the African Commission on Human and Peoples' Rights Study Group on Freedom of Association (2014), para. 6; see also the UN Special Rapporteur on Freedom of Association and Assembly, A/HRC/23/39 (24 April 2013), para 23, where the Special Rapporteur states in the context of terrorist financing that “laws drafted in general terms limiting, or even banning funding under the justification of counter-terrorism do not comply with the requisites of “proportionality” and “necessity”.

¹⁶ C Tomuschat 'Freedom of Association ' in RSJ Macdonald F Matscher and H Petzold (eds) *The European System for the Protection of Human Rights* (Nijhoff Dordrecht 1993) 493-513, at 508.

¹⁷ S Joseph J Schultz and M Castan (eds) *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn OUP Oxford 2005), at 575.

¹⁸ C Tomuschat 'Freedom of Association ' in RSJ Macdonald F Matscher and H Petzold (eds) *The European System for the Protection of Human Rights* (Nijhoff Dordrecht 1993) 493-513, at 510.

protected.”¹⁹ Importantly, the Human Rights Committee pointed out that “the principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”.²⁰

As a result, any restriction imposed by domestic law must be (1) prescribed by law, (2) proportional and for a legitimate purpose and (3) in coherence with international human rights obligations, i.e. necessary in a democratic society.

3. PRACTICAL IMPLICATIONS

The right to freedom of association applies to any group of individual or legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.²¹ The right covers a wide range of different entities, including civil society organizations, trade unions, political parties, foundations, professional associations (e.g. bar unions), religious associations and any other forms of not-for-profit activity.²²

The UN Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association in his 2012 report to the Human Rights Council explicitly pointed out that:

- unregistered associations are protected by the right - a state should not ban or sanction associations for failure to register;²³
- in addition to allowing unregistered associations, the law should allow for the formation of legally registered associations; the registration procedure should be easily accessible, prompt, and non-discriminatory, and should take the form of notification;²⁴
- there is no good reason for requiring more than two individuals to form an association;²⁵
- should the authorities refuse registration, it must be clearly motivated, duly communicated and based on legally justified reasons;²⁶
- a judicial appeal before an independent and impartial court must be available;²⁷

¹⁹ UN Human Rights Committee, General Comment No 27, para 14; General Comment No 34, para 34.

²⁰ UN Human Rights Committee, General Comment No 27, para 15; General Comment No 34, para 34, here the UN Human Rights Committee also emphasizes that “the value placed by the ICCPR upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain”.

²¹ Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 51, quoting Report of the SR of the S-G on human rights defenders, A/59/401, para 46.

²² Report of the African Commission on Human and Peoples' Rights Study Group on Freedom of Association (2014), para. 14.

²³ Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 56.

²⁴ Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 58.

²⁵ A higher number may be required to establish a union or a political party, but this number should not be set at a level that would discourage people from engaging in associations; see Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 54.

²⁶ Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 61.

²⁷ Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 61.

- newly adopted laws should not request previously registered associations to re-register so that existing associations are protected against arbitrary rejection or time gaps in the conduct of their activities.²⁸

Associations must be free to pursue a wide range of activities, including exercising their rights to freedom of expression and assembly.²⁹ The European Court of Human Rights has emphasized that associations must be able to express opinion, disseminate information, engage with the public and to advocate before the government for changes in law, including changes in the Constitution.³⁰ The internal organization of an association is a matter for the associations itself, accordingly the authorities must not interfere with it or violate the associations' right to privacy.³¹

The ability for associations to access funding and resources is an integral and vital part of the right to freedom of association. Therefore, associations must have free access to funding, both domestically and internationally.³² Membership in an association alone should never be taken as grounds for criminal charges. Finally, adequate remedies (including compensation) must be made available to rectify violations of the right to freedom of association.³³

Summed up, international law demands that limitations to the freedom of association are applied rarely - and arguably only in exceptional circumstances. Thus, non-approval, suspension or dissolution of an association must only be applied where there is a clear and imminent danger of a flagrant violation of basic principles of democracy. Limitations to the freedom of association must always be in compliance with international human rights obligations of the state. Ergo, any limitation must be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.³⁴ National laws that are drafted in general terms, and open the door for arbitrary dissolution of associations, are a violation of the abovementioned international law.

²⁸ Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 62.

²⁹ Report of the African Commission on Human and Peoples' Rights Study Group on Freedom of Association (2014), para.16.

³⁰ European Court of Human Rights, Zhechev v. Bulgaria, application No. 57045/00, 21 June 2007.

³¹ Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 65. The right to privacy is stipulated in Art. 17 of the ICCPR. In particular, the government should refrain from interfering with citizens' capacity to join associations, or stacking associations with government representatives and then providing such bodies wide discretionary powers in an effort to control civil society space, see African Commission on Peoples' and Human Rights, Civil Liberties Organisation (in respect of Bar Association) v Nigeria (No 101/93 (1995)), paras 14 to 16.

³² Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, paras 67 and 68. In this context, international associations should be subject to the same procedures as national associations, *ibid*, para. 59.

³³ Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 81.

³⁴ Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 75.