

rights protected by the ECHR, but also because it has a number of other features that enhance its relevance to a study of the state of the legal and normative aspects of civil society in Europe.

The first feature is that becoming a party to the ECHR is a precondition for becoming a member of the Council of Europe and to membership of the European Union. There is therefore significant political commitment to achieving effective protection of the fundamental rights provided by the ECHR. This aspect is enhanced by a second distinguishing feature of the ECHR that sets it apart from most other human rights treaties. The ECHR provides for the European Court of Human Rights (European Court or ECtHR), which issues judgments that are binding on all member states. Cases against a member state can also be brought to the European Court by individuals and non-governmental organisations. This is relevant to the issue of civil society in several ways. First of all, because it guarantees effective human rights protection in the member states, covering almost the entire European continent, and this protection is accessible directly by individual citizens and civic organisations. Secondly, the constant flow of judgments from the European Court means that the ECHR is a living document. As a consequence of this, the fundamental rights that it guarantees are not static but develop and evolve over time as societies change.

Moreover, two or more fundamental rights may be taken together to evaluate whether a specific provision is permissible. This is relevant because restrictions on, for example, freedom of expression are less easily accepted than, for example, restrictions on the right to property. If a particular restriction seems to address the latter but by implication also affects freedom of expression, testing the restriction against both rights taken together may lead to the judgment that the restriction at hand is not admissible, whereas tested only against the right to property in our example, it might be found to be admissible.

A third feature that underlines the relevance of the ECHR for a study of the legal and normative aspects of civil society in Europe is that it provides for fundamental rights for natural persons as well their organisations and legal persons. Here it should be noted that, as discussed later in this chapter, fundamental rights only apply to legal persons to the extent that they are relevant to them. This feature in particular bestows relevance on the ECHR in regard to the law on voluntary organisations in the member states.

In addition to its distinguishing features and position in regard to the substance and protection of human rights and fundamental freedoms

Civil Society in Europe and the European Convention on Human Rights

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1 Introduction

The existence of a civil society implies that citizens and their organisations voluntarily engage in social initiatives, contributing to shaping society at large. Civil society and its shape are therefore closely linked to the freedom of citizens and their organisations to engage in civic initiatives. This freedom has several aspects. First of all, it includes the right to express thoughts and opinions and to establish, join or support voluntary organisations. Supporting an organisation may take various forms, such as becoming a member and contributing one's time and resources. Another aspect of the freedom to engage in civic initiatives is the extent to which citizens and voluntary organisations are free to determine the purposes of their own initiatives without undue state interference or restrictions imposed by law or administrative practice in a member state. Consequently, civil society can only function to the extent that the legal environment safeguards fundamental rights and freedoms. The modalities of human rights and the effective protection thereof within a specific jurisdiction therefore determine the shape and potential of civil society to a large extent.

This observation reveals the clear relevance of the European Convention on Human Rights¹ (ECHR) to any study of the legal and normative aspects of civil society in Europe. The ECHR is, without doubt, the dominant source of human rights on the European continent. Therefore, to achieve any insight into the normative and legal aspects of civil society in Europe, the implications and scope of the ECHR are an essential element. This is true not only because of the number and nature of the fundamental

¹ Treaty for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

in Europe, there is also a consideration of a more practical nature for taking the ECHR as a starting point when mapping the state of the legal and normative aspects of civil society in Europe. Studies of laws that relate to voluntary non-profit organisations in the various European jurisdictions invariably demonstrate that there are many fundamental differences on major issues of the law in this area. These differences can be explained on the basis of political and legal history and the culture of the different states and possibly, if applicable, to jurisdictions within one state.² However, the mere fact that these differences exist makes it a more complex task to assess the state of the legal and normative aspects of civil society in Europe. Such an exercise would clearly benefit from a common point of reference that is accepted by all jurisdictions, which cannot easily be distilled from the various laws in the different jurisdictions.

This is where the practical quality of the ECHR lies for this study. The ECHR provides not only for a number of fundamental freedoms that are relevant to civil society, but it also provides for a legal framework to test whether the laws or administrative practices of a member state are acceptable in the light of the protection afforded by the ECHR. Because of the specific features of the ECHR, as mentioned earlier, this legal framework would seem suitable to serve for this study as the common point of reference that applies equally to all states involved.

The essential feature of the legal framework created by the ECHR is that fundamental rights and freedoms are granted to individuals and organisations but that such rights and freedoms are not absolute. States may impose restrictions on these fundamental rights and freedoms, but any restrictions are admissible only if they meet certain specific requirements. For the purpose of this study, the restrictions imposed are obviously of particular relevance. The nature of this research is not to determine whether a restriction is justified or unjustified. Our purpose is merely to try to identify the nature of the restrictions that apply in the various member states. Here it should also be noted that the member states have a certain margin of appreciation with regard to imposing restrictions, the limits of which may be determined by the specific circumstances

² See inter alia, A. Richter, 'German and American Law of Charity in the Early 19th Century', in: R. Helmholz and R. Zimmerman (eds), *Itinera Fiducia, Trust and Truthland in Historical Perspective*, Berlin, Duncker & Humbolt, 1998; T.J. van der Ploeg, 'A Comparative Legal Analysis of Foundations', in: H.K. Anheier and S. Toepler (eds), *Private Funds, Public Purpose*, New York, Kluwer Academic/Plenum Publishers, 1999; W.J.M. van Veen, 'Public Benefit Law from a Comparative Perspective', in F.W. Hondius and P. Bater (eds), *The Tax Treatment of NGOs*, The Hague/London/New York, Kluwer Law International, 2004.

applicable within its jurisdiction. In theory, it is therefore possible that specific restrictions may be justified in one particular member state but would not be admissible in another. The mere fact that certain restrictions apply within one member state but do not apply in another member state also contributes to our understanding of the state of the legal aspects of civil society, regardless of whether the restrictions are justified in that particular state.

The purpose of this chapter is first to further analyse the notion of a civil society from the perspective of the ECHR. One of the issues is that of terminology. The ECHR is, after all, not based on the notion of a 'civil society' but on that of a 'democratic society'. Another and directly related question is to identify and briefly describe the rights and freedoms that appear to be involved most directly with regard to civil society issues (Section 2). The following section includes a brief discussion of the framework and the testing criteria through which it is determined whether a restriction can be justified or not (Section 3). As mentioned earlier, these aspects are an important element in the whole legal framework provided by the ECHR. In particular, it is relevant which testing criteria are applied because these criteria, often by implication, determine what type of provisions or practices imply a restriction on a specific fundamental freedom. In the fourth section, on the basis of some examples, the potential relevance of the ECHR with regard to several aspects of laws and practices relating to voluntary non-profit organisations are set out.

2 The ECHR and Human Rights and Fundamental Freedoms in a Democratic Society: Democratic Society versus Civil Society?

The ECHR is based on the ideal of a democratic society in which the rights and freedoms of the individual are respected by the state. The concept of a democratic society is intrinsically a legal concept in this sense that it reflects the constitutional form of a state. The concept of a civil society, by contrast, is not a legal concept because it reflects an actual (or possibly ideal) situation in which citizens and their organisations participate actively in social and economic life in pursuit of goals of their choice. The concepts of a civil society and a democratic society, then, are not necessarily equivalent. One of the characteristics of a democratic society is that the legitimacy of the administration of the state through free elections is rooted in a mandate from its citizens. This is, however, as history has repeatedly demonstrated, no guarantee that the state will accept the free participation of citizens and their organisations in society, let alone respect

fundamental rights. If such rights are curtailed or stifled, this will hamper the development of civil society or in any case influence its presence and shape.

Consequently, there is potential incongruence between the concept of a democratic society and the protection of human rights and fundamental freedoms. Addressing this incongruence is at the heart of the ECHR. The two concepts share the same starting point – that a democratic society is the best available constitutional form, while the protection of human rights and fundamental freedoms is essential to preserving a healthy democratic society. Studying the cases of the European Court, one finds that there are not many cases in which the characteristics of a democratic society are set out. Usually the admissibility of specific restrictions is tested against the criterion of whether the restriction is *necessary* in a democratic society. This test implies an evaluation of the proportionality of the restriction. In general, as discuss in more detail subsequently, any restriction must be as narrow as possible to achieve its objectives. Interestingly, most cases where the European Court actually mentions the characteristics of a democratic society deal with freedom of expression and freedom of association. The European Court has stated in several judgments that freedom of expression and freedom of association are essential elements of political and social life and therefore constitute two of the foundations of a democratic society. In fact, in its case law, the European Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and freedom of association.³ By implication, it follows from these judgments that one of the characteristics of a democratic society in Europe is that citizens and their organisations enjoy the freedom to take part in political and social life. Freedom of expression and freedom of association are identified as the key vehicles by which to make this happen.

Thus the concept of a democratic society, as interpreted by the European Court, can be transposed onto the notion of a civil society in that it presupposes the freedom of citizens and their organisations to engage in political and social life. Freedom of expression (Article 10, ECHR) and freedom of association (Article 11, ECHR) are essential fundamental rights that determine the shape of civil society. Moreover, these two freedoms are related in this context. The right to effectively enjoy freedom of expression implies that citizens and their organisations can assemble

³ See inter alia ECHR 17 February 2004, *Gorzélik and others v. Poland*, para. 88 with further references to other judgments.

and form associations to express their views collectively and undertake to achieve their shared goals through legitimate activities.⁴

In this context, it is relevant to note that Article 10 of the ECHR does not cover freedom of expression in a narrow sense. It covers the freedom to provide and receive information that is essential for the existence and functioning of a healthy democratic society. In the context of the functioning of civil society, it is relevant to note that freedom of expression includes the freedom to make donations for a specific purpose.⁵ This would logically seem to imply that there is a fundamental freedom to accept a donation and apply it in the pursuit of the purpose for which it was donated.

Just as freedom of expression is not applied restrictively, freedom of association covers not only the right to establish or join an association without undue state interference, but it also protects against forced membership of an association.⁶ Moreover, the concept of association in Article 11 of the ECHR is autonomous. What does or does not constitute an association is not determined by the laws of the member states. If it were, it would be relatively easy to influence the scope of Article 11 of the ECHR. It is therefore for the European Court to determine whether a specific type of organisation qualifies as an association. This qualification does not depend on the qualifications of that organisation under the national law of the member state involved.⁷ For example, political parties and trade unions fall under the scope of Article 11 of the ECHR, whereas under the laws of many member states they are regarded as a special type of legal

⁴ See inter alia ECHR 7 December 1976, *Handyside v. The United Kingdom*, Series A no. 24, para. 49, wherein the Court stated that the freedom of expression is one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Also see ECHR 13 August 1981, *Young, James and Webster v. The United Kingdom*, Series A, No. 44, 4 EHRR (1982), para. 57: The protection of personal opinion afforded by Articles 9 and 10, in the shape of the freedom of thought, conscience and religion and of freedom of expression, is also one of the purposes of freedom of association as guaranteed by Article 11. See also ECHR 8 December 1999, *Freedom and Democracy Party v. Turkey*, para. 37: The Court reiterates that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. Furthermore, in ECHR 24 May 1988, *Müller and others v. Switzerland*, para. 27 the Court stated that Article 10 affords the opportunity to take part in the public exchange of cultural, political information and ideas of all kinds.

⁵ ECHR 19 February 1998, *Bowman v. UK*.

⁶ ECHR 13 August 1981, *Young, James and Webster v. The United Kingdom*, ECHR 30 June 1993, *Sigurdurjonsson v. Iceland*.

⁷ See inter alia ECHR 29 April 1999, *Chassagnou and Others v. France*, para. 100; ECHR 12 December 2002, nr. 56400/00 (*Cēsniēks v. Latvia*).

entity, separate to an 'association'. Also, organisations that have certain tasks and prerogatives bestowed upon them by public law can count as associations under the meaning of Article 11 of the ECHR.⁸

2.1 *Other Human Rights and Fundamental Freedoms Pertaining to a Civil Society*

Apart from freedom of expression and freedom of assembly and association, other fundamental rights are important in a civil society. To enjoy freedom from undue state interference, judicial review of state interference is essential and this right is guaranteed by Article 6 of the ECHR. In addition, adequate measures to prevent any abuses of power by the governmental authorities that impose a restriction of a specific freedom are required for any restrictions to be admissible. Such measures may include court review prior to the action involved (see also Section 3).

The right to privacy (Article 8 ECHR) is also relevant in the context of civil society. The notion of a civil society would seem to presuppose that the state does not have unfettered access to the offices of an organisation, for example, or the records that show which individual supports or is a member of which civil society organisation (CSO). In general there would seem to be no justification for the state to be in possession of such information. Moreover, if the state were to have access to these types of files, this might stifle the willingness to join or support such an organisation and thus possibly constitute a restriction on freedom of expression or freedom of association, respectively.

Finally, the right to enjoy one's property is evidently relevant to the notion of a civil society. Without property and the right to use it in the pursuit of a chosen purpose, the effective enjoyment of fundamental freedoms such as that of expression would be seriously hampered.

2.2 *Fundamental Rights for CSOs*

Despite the fact that the provisions of the ECHR apply in principle to both (groups of) individuals and CSOs with legal personality, not all the rights in the ECHR can be invoked by CSOs. Whether a CSO may invoke a particular right or freedom depends on the type of right or freedom and on the character of the CSO. Some rights and freedoms clearly cannot

⁸ See inter alia ECHR 30 June 1993, *Sigurðurjónsson v. Iceland*, para. 30–32. ECHR 29 April 1999, *Chassagnou and Others v. France*, para. 100 ff.

apply to CSOs, such as the right to life (Article 2), personal freedom and safety (Article 5), the right to family life (Article 8) and marriage (Article 12). Likewise, the right to education and the right not to be subjected to degrading treatment or punishment cannot be exercised by CSOs.

In some cases the CSO's legal structure and statutory purposes are decisive with respect to which rights can be invoked.⁹ Some rights are applicable without exception. For instance, CSOs can without doubt invoke the right to a fair trial, freedom of expression and assembly and the right to protection of its correspondence. The right to property is explicitly granted to legal persons by Article 1, First Protocol, ECHR. Ample case law demonstrates that applications can be successfully submitted by a wide variety of organisations, such as trade unions, churches, foundations, private associations and companies. Neither commercial activities, nor the status of a limited liability company, can deprive a legal person of its freedom of expression. Undertaking commercial activities generally has no bearing on the eligibility to fundamental rights and freedoms.¹⁰

As a general rule, CSOs can only invoke rights that are directly relevant to them.¹¹ This doctrine can be influential when it comes to specific rights such as the right to privacy provided for under Article 8 of the ECHR. The question of whether a legal entity is capable of enjoying the right to privacy has been the subject of dispute for many years. The European Court had taken the position that an extensive interpretation of the words 'private life' and 'home', as mentioned in Article 8 of the ECHR – meaning that these terms would include professional or business activities and the premises where these activities are conducted – is consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities.¹² This

⁹ H. Golsong, 'La Convention Européenne des Droits de l'Homme et les Personnes Morales', in: *Les Droits de l'Homme et les Personnes Morales*, Premier Colloque du Département des Droits de l'Homme, Université Catholique de Louvain, Bruxelles 1970, p. 15 at 26.

¹⁰ ECHR 22 May 1990, *Auromic AG v. Switzerland*, Series A, No. 178, 12 EHRR (1990), para. 5 ff.

¹¹ Olivier de Schutter, 'Sur l'émergence de la société civile en droit international: le rôle des associations devant la Cour européenne des droits de l'homme', *7 European Journal of International Law*, (1996) no. 3, pp. 372 et seq. De Schutter discusses ways to bypass this restriction for CSOs. In particular cases, a distinction between the rights of the association and the rights of the members that make up the association is considered an artificial one. See ECommHR 5 May 1979, *Pastor X and the Church of Scientology v. Sweden* (App. 7805/77), *Yearbook of the European Convention on Human Rights* (1979), p. 244.

¹² ECHR 16 December 1992, *Niemetz v. Germany*, Series A, no. 251-B, 16 EHRR (1993), para. 31.

judgment left room for the position that the right to privacy applies only to individuals directly. However, in a judgment almost 10 years later, the European Court stated in regard to the scope of Article 8 of the ECHR that¹³

la Cour considère qu'il est temps de reconnaître, dans certaines circonstances, que les droit garantis sous l'angle de l'article 8 de la Convention peuvent être interprétés comme incluant pour une société, le droit au respect de son siège social, son agence ou ses locaux professionnels. (voir *mutatis mutandis* arrêt Niemetz c. Allemagne précité, p. 34 § 30. » nr. 41)

Although this judgment refers to *sociétés* and CSOs, and foundations in particular may not necessarily be included among these types of entities, it is unlikely that the European Court will find that CSOs including foundations are not eligible for (this aspect of) the right to privacy.

The fact that CSOs enjoy, for example, the right to a fair trial, the right to privacy, freedom of expression, freedom of association and the right to property must be taken into consideration when looking at restrictions on the legal competence of CSOs with legal personality and regulation for state supervision. Where such rights are involved, any restriction is only allowed within the normative framework provided by the relevant provisions of the ECHR.

3 The Normative Framework for Safeguarding the Fundamental Rights Provided by the ECHR

Testing a specific restriction imposed on a fundamental right or freedom under the ECHR generally follows the same format. However, for specific applications the criteria for the admissibility of restrictions may differ according to the right or freedom involved. A detailed outline of those criteria is beyond the scope of this chapter, however, and a selection had to be made. Because freedom of expression and freedom of association are viewed by the European Court as the essential freedoms in a healthy democratic society, the basic principles that apply to restrictions on those freedoms are the most relevant in the context of this project. Furthermore, when protection of other fundamental rights and freedoms is sought alongside protection of the right to freedom of expression and freedom of association, the testing criteria pertaining to the latter would apply as well.

¹³ ECtHR 16 April 2002, *Affaire Siés Colas Est et Autres v. France*.

3.1 Testing Criteria 1: Prescribed by Law

Any restriction must be prescribed by law. This condition relates to the ECHR's objective of strengthening the character of the democratic state under the rule of law.¹⁴ The notion of law is applied in a substantive rather than a formal sense, meaning that it pertains not only to laws enacted by formal legislators¹⁵ but also regulations of a lower legal status,¹⁶ unwritten law and conventions.¹⁷

A rule only qualifies as a law under the ECHR¹⁸ if it meets certain quality requirements. The rule must be of a *general nature*. Restrictions are therefore allowed only if they constitute a general rule that applies to an unlimited number of cases. To be prescribed by law, a restriction must also have a basis in the national law of the member state. It is not sufficient that it does not conflict with the national law.¹⁹

Furthermore, to enable individuals to determine their behaviour, the restrictions must be *sufficiently clear*²⁰ and be made *publicly known*.²¹ A citizen must be able – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences that

¹⁴ See J. Velaers, *De Beprekingen van de Vrijheid van Meningsuiting*, Antwerpen-Apeldoorn: Maklu-publishers, 1991, pp. 262 et seq.

¹⁵ This is necessary to allow the United Kingdom, having a common law tradition, to impose restrictions. ECtHR 26 April 1979, *Sunday Times v. The United Kingdom*, Series A, No. 30, 2 EHRR (1979–80), para. 47.

¹⁶ See e.g. ECtHR 21 February 1975, *Golder v. United Kingdom*, Series A, No. 18, 1 EHRR (1979–80), para. 45.

¹⁷ ECtHR 28 March 1990, *Groppera Radio AG and others v. Switzerland*, Series A, No. 173, 12 EHRR (1990), para. 68; ECtHR 22 May 1990, *Autronic AG v. Switzerland*, para. 57.

¹⁸ J. Velaers, *op. cit.* n. 14, p. 265 et seq.

¹⁹ See e.g. ECtHR 26 April 1979, *Sunday Times v. The United Kingdom*, para. 47; ECtHR 25 March 1983, *Silver and others v. The United Kingdom*, Series A, no. 61, 5 EHRR, para. 86; ECtHR 24 April 1990, *Krusin v. France*, para. 27.

²⁰ This is necessary not only from the point of view of legal certainty but also to ensure that fundamental rights are not restricted any more than absolutely necessary. Velaers *op. cit.* n. 14, p. 268. The expertise of the party involved plays an important role in this respect e.g. ECtHR 28 March 1990, *Groppera Radio AG and others v. Switzerland*, para. 68; ECtHR 22 May 1990, *Autronic AG v. Switzerland*, para. 57; ECtHR 26 April 1979, *Sunday Times v. The United Kingdom*, para. 49; ECtHR 25 March 1983, *Silver and others v. The United Kingdom*, para. 88; ECtHR 2 August 1984, *Malone v. The United Kingdom*, para. 67.

²¹ This does not necessarily imply that the rule must be published through the official journal. Depending on the contents of the text, the area involved and expertise of the concerned, availability on order can be sufficient: ECtHR 28 March 1990, *Groppera Radio AG and others v. Switzerland*, para. 68 and ECtHR 22 May 1990, *Autronic AG v. Switzerland*, para. 57.

national (ethnic) minorities of their human rights on the grounds of the territorial integrity.²⁸

Restrictions in the interest of public safety are understood to entail that the member states can impose restrictions to assure the internal safety and internal sovereignty of the state and its organs. This may include measures to ensure the functioning of democratic institutions, such as parliament, by forbidding a demonstration within a certain distance from the building where parliament is convening, for example. The system of maintaining public order should also be able to function properly.²⁹ Under certain circumstances, it is admissible to punish the public incitement of violence or advocating illegal activities.³⁰

Public order means order in a physical sense from the perspective of the ECHR. It is admissible to restrict the distribution of pamphlets on public roads, the free installation of slogans along public roads, activities that may incite riots, and so on. It does not imply, however, that every public breach of a legal order, or incitement to do so, should be prevented. Restrictions on international communication networks to maintain public order are also admissible under Article 10, section 2, ECHR.³¹ Compulsory authorisation for public demonstrations is admissible but only to enable the authorities to guarantee the peaceful nature of a meeting.³²

Freedom of expression may also be restricted in the interest of the good name or the rights of others. The right to correct information may also justify restrictions on freedom of expression.³³ A restriction on these grounds is acceptable in cases where exercising freedom of expression or the reaction of others to this expression, presents a *clear and present danger* to the goods, rights or freedom of others that the government seeks to protect.³⁴ The 'clear and present danger' criterion can therefore help

²⁸ *Travaux Préparatoires*, IV, p. 262-3.

²⁹ ECommHR 16 March 1970, *X v. Federal Republic of Germany* (App. 4121/69), Rec. Déc.

1970, No. 33, pp. 23, 26.

³⁰ ECommHR 14 December 1972, *X v. Austria* (App. 5321/71), 42 Rec. Déc. (1973), p. 105; ECommHR 1 October 1975, *X v. The United Kingdom* (App. 6084/73), 1 October 1975, 3 DR (1976), p. 62.

³¹ ECHR 28 March 1990, *Groppera Radio AG and others v. Switzerland*, para. 70 and ECHR 22 May 1990, *Autronic AG v. Switzerland*, para. 59.

³² ECommHR, 10 October 1979, *Rassemblement Jurassien et Union Jurassienne v. Switzerland*, Appl. 8191/78, p. 119.

³³ ECommHR 5 May 1979, *Pastor X and the Church of Scientology v. Sweden* (App. 7805/77), 16 DR (1979), p. 68.

³⁴ See J. Velaers, op. cit. n. 14, p. 275, who found his inspiration on the case law regarding the first amendment.

a given action may entail.²² This also implies that restrictions *cannot be imposed retroactively*.²³

Prescribed by law implies that *safeguards against misuse* are incorporated into the rule or system of rules that includes the restriction.²⁴ Clearly the quality of the law is involved here. Interference with the freedom of citizens should, in a state governed by the rule of law, be subject to an effective form of control.²⁵

3.2 Testing Criteria 2: Limited Grounds for Restrictions

Restrictions are only admissible in the interest of *national security, territorial integrity or public safety, to prevent disorder and criminal acts, the protection of public health or good morals*,²⁶ the *good name or rights of others*, to prevent the *disclosure of information received in confidence* or to guarantee the *authority and impartiality of the courts*.

The list of grounds mentioned in the ECHR is limitative. Moreover, the interpretation of these grounds, in the spirit of the ECHR, is restrictive. For instance, restrictions on the grounds of national security and territorial integrity are meant to prevent and/or punish high treason, collaboration,²⁷ the incitement of insubordination and desertion by soldiers, and terrorist activities. It is explicitly not admissible to deprive

²² The fact that the restriction leaves room for interpretation does not imply that the restriction is not provided by law or is not sufficiently clear. The impartiality, independence and expertise of courts, and ultimately the European Court of Human Rights, provide guarantees against misuse of the freedom in interpretation. ECHR 24 March 1988, *Olsson v. Sweden*, Series A, No. 130, 11 EHRR (1989), para. 62. J. Velaers, op. cit. n. 14, p. 263; ECHR 2 August 1984, *Malone v. The United Kingdom*, para. 68; ECHR 25 March 1983, *Silver and others v. The United Kingdom*, para. 88. Not allowed is a restriction of which a person of normal intelligence can only guess at its meaning and differ at its application.

²³ ECHR 26 April 1979, *Sunday Times v. The United Kingdom*, para. 49. Also see Art. 7 ECHR with regard to penal law.

²⁴ ECHR 25 March 1983, *Silver and others v. The United Kingdom*, para. 90; ECHR 2 August 1984, *Malone v. The United Kingdom*, para. 67.

²⁵ It is not necessary to incorporate this mechanism of control in the same law that provides for the restriction.

²⁶ With regard to artistic expression, the court should be extremely reserved and not impede artistic freedom unduly: ECHR 24 May 1988, *Müller and others v. Switzerland*, Series A, No. 133, 13 EHRR (1991), para. 33.

²⁷ ECommHR 9 June 1958, *De Becker v. Belgium*, (App. 214/56), Report of 8 January 1960, Series B, No. 2, p. 212; ECommHR 1 October 1975, *X v. UK* (App. 6084/73), 3 DR (1976), p. 62; ECommHR 13 December 1984, *M. v. France* (App. 10078/82), 41 DR (1985), p. 103.

provided through radio and television programmes³⁹ and also protects commercial interests.⁴⁰

The condition that a restriction is only acceptable when it is necessary in a democratic society does not mean that the restriction must be indispensable. At the same time, however, it is not sufficient that the restriction is reasonable or useful.⁴¹ The decisive factor is the nature of the restriction in relation to its purpose. As the ECtHR has stated, the principle of *proportionality* 'is one of the factors to be taken into account when assessing whether a measure of interference is 'necessary'.⁴² The ECtHR has on occasion applied this test to the criterion that a restriction imposed was 'the only conceivable way' of achieving the aims that the restriction was intended to achieve.⁴³ When a restriction is not proportional in relation to the purpose that it serves, for instance if it is too general in its nature, it is considered unnecessary in a democratic society.

3.4 Testing Criteria 4: Non-Discrimination (Article 14)

Restrictions on the rights and freedoms provided for in the ECHR that are in violation of Article 14 of the ECHR are not admissible. Article 14 of the ECHR proscribes discrimination.⁴⁴ The discrimination criteria mentioned in Article 14 are *indicative* and not *limitative*.⁴⁵ In itself, this restriction may be allowed under the rules of the ECHR, insofar as it is provided for by the law and necessary in a democratic society, but if the restriction results in unequal rights, it is in violation of Article 14 of the ECHR. The member state may then choose either to drop the restriction completely or

³⁹ ECommHR 6 July 1976, *Geïllustreerde Pers NV v. The Netherlands*, Decisions & Reports 1976, 5.

⁴⁰ ECtHR 22 May 1990, *Autronic AG v. Switzerland*, para. 57.

⁴¹ See e.g. ECtHR 7 December 1976, *Handyside v. The United Kingdom*, para. 48. Also ECtHR 26 April 1979, *Sunday Times v. The United Kingdom*, para. 59; ECtHR 25 March 1983, *Silver and others v. The United Kingdom*, para. 97; ECtHR 25 March 1985, *Barthold v. Federal Republic of Germany*, para. 55.

⁴² ECommHR, 10 October 10, 1979, *Rassemblement Jurassien & Union Jurassienne v. Switzerland*, Appl. 8191/78, p. 121.

⁴³ ECtHR 30 June 1993, *Sigurdurjónsson v. Iceland*, para. 41.

⁴⁴ Art. 14 ECHR does not encompass a restraint on discrimination by the government in general, such as Art. 26 ICCPR does. The meaning of Art. 14 ECHR is limited in this respect. Discrimination on basis of race, could however be considered to be demeaning in the sense of Art. 3 ECHR. See ECommHR 10 October 1970, *East African Asians v. The United Kingdom* (App. 4403/70), 36 Rec. Déc. (1971), pp. 92-3.

⁴⁵ J. Velleaers, op. cit. n. 12, p. 339; M. Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme*, Brussel, 1976, pp. 56-7.

to define whether or not a restriction is necessary. The domestic courts should, in concrete cases, investigate whether unrestricted freedom could bring about circumstances in which a clear and present danger threatens one of the issues mentioned in the ECHR.

3.3 Testing Criteria 3: Necessary in a Democratic Society

Apart from the fact that restrictions must be 'provided by law', there is a second condition that determines whether a restriction is admissible: a restriction is only admissible if it can be said to be *necessary in a democratic society*. This is the key notion in the second section of the articles mentioned.³⁵ A restriction is not admissible simply because it promotes public order or good morals etc., but only if it serves the public order, good morals and the like that *belong to a democratic society*.³⁶

The European Court of Human Rights and the European Commission of Human Rights have decided in several cases that a democratic society is defined by pluralism, tolerance and open-mindedness.³⁷ This means that even opinions with the potential to hurt, shock or discomfort a nation or a section of its population are protected by the freedom of expression.³⁸ The press in particular should enjoy significant freedom, particularly when a government or governmental officials are involved. Politicians know that, given their public role, they are subject to greater scrutiny. This implies that they should exercise tolerance. On matters of public debate, it is preferable to overprotect freedom expression than not to protect it adequately. There is a 'preferred position of the freedom of speech' in this respect. Freedom of expression also covers information

³⁵ D. Dritsoll, *Freedom of Expression under Article 10 of the European Convention on Human Rights*, Strasbourg, Conseil de l'Europe, 1985; K. Rimanque, 'Noodzakelijkheid in een Democratische Samenleving - een Begrenzing van Bepertkingen aan Grondrechten', *Liber amicorum F. Duiron*, Antwerpen, Kluwer Rechtswetenschappen, 1983, p. 1221.

³⁶ Compare Supreme Court of The Netherlands, 15 April 1975, *Nederlandse Jurisprudentie* 1976/23.

³⁷ See ECtHR 7 December 1976, *Handyside v. The United Kingdom*, para. 49; *Müller and others v. Switzerland*, para. 33; ECtHR 13 August 1981, *Young, James and Webster v. The United Kingdom*, para. 63; ECtHR 7 December 1976, *Kjeldsen, Busk, Madsen, Pedersen v. Denmark*, Series A, No. 23, para. 50, in which the Court states that pluralism in education is essential for the preservation of a democratic society.

³⁸ See e.g. ECtHR 7 December 1976, *Handyside v. The United Kingdom*, para. 49; ECtHR 26 April 1979, *Sunday Times v. The United Kingdom*, para. 65; ECtHR 25 March 1985, *Barthold v. Federal Republic of Germany*, Series A, No. 90, 7 EHRR (1985), para. 58; *Müller and others v. Switzerland*, para. 33. See M. Hanotiau, 'Vers le droit à l'information ou les idées qui heurtent, choquent ou inquiètent', *Journal des Procès*, 31 Octobre 1986, pp. 21 et seq.

to widen its scope to cover every (legal) person, regardless of race, gender or other status.⁴⁶

3.5 Positive Action versus Direct Infringement

The importance of the ECHR is not limited to the constraints that it imposes on states to restrict the human rights protected by the ECHR. The member states must also ensure that human rights can be effectively enjoyed. This may require a state to take positive action. An example of this is that the state may have to take adequate measures to prevent one group of individuals hindering others from enjoying their fundamental rights.⁴⁷ Of course, CSOs also benefit from this feature of the ECHR. Another example of this doctrine is that the right to freedom of association under Article 11 of the ECHR includes the right to set up a legal entity.⁴⁸

4 CSO Law and the ECHR

4.1 Introduction

Research demonstrates that the relationship between the state and CSOs and the degree and nature of state involvement with CSOs during the different stages of their existence, starting with their incorporation, varies substantially within Europe and among the member states of the Council of Europe.⁴⁹ As explained in Section 1, contemporary regulations pertaining to associations and foundations in the jurisdictions in Europe is highly 'national' in character and determined by political and legal history and culture. Foundation law in particular has deep historical roots in many countries. With regard to companies and associations, these regimes have developed gradually due to social and economic circumstances (industrial revolution) and the general acceptance of freedom of association.

⁴⁶ Discrimination may be allowed if it serves a justified purpose and if this purpose is in proportion to the means (unequal treatment). For details and literature see J. Velaeers, op. cit. n. 1.4, pp. 338 et seq.

⁴⁷ ECtHR 21 June 1988, *Plattform Ärzte für das Leben v. Austria*, Series A, no. 139, 13 EHRR (1991), para. 34.

⁴⁸ See inter alia ECtHR 20 December 2001, *Gorzelik v. Poland*, para. 55.

⁴⁹ See the contributions by several authors in A. Schlüter, V. Then and P. Walkenhorst (eds), *Foundations in Europe*, Section IV, *Legal and Fiscal Framework and State Supervision*, London, Charity Aid Foundation, Directory of Social Change, 2000.

Traces of these historical roots are still discernible in the law of a number of jurisdictions. Some form of concession system still exists in a number of jurisdictions, for example. The extent to which CSOs – including associations – enjoy legal competence may depend on whether they are recognised as public benefit organisations. Furthermore, as we will see in Chapter 4, Section 1.3, under many jurisdictions in Europe foundations can still only be formed if this is for a public benefit purpose. In some jurisdictions, foundation law is predominantly of a public nature. Contemporary law on CSOs thus reflects, inter alia, the position of the state versus private initiatives with regard to serving public purposes.⁵⁰ The various historical, cultural and theoretical aspects of contemporary CSO law in Europe⁵¹ have caused that CSO law has such a distinct *couleur locale*.

The theme of this section is the influence of the ECHR on some key aspects of CSO law and identifying areas of CSO law where restrictions on the rights and freedoms protected by the ECHR are involved. In this context both the judgments by the European Court as well as the spirit of protection that the ECHR seeks to provide are taken into account. The aspects of CSO law that are discussed here include the incorporation of CSOs, restrictions on the legal competences of CSOs, restrictions on their activities, the supervision of CSOs and their internal organisation. For the sake of clarity I note that where restrictions are identified, they may not be in conflict with the ECHR. Restrictions may be admissible, but only to the extent that they comply with the normative framework provided for in Article 10, subsection 2 of the ECHR. In Chapter 5 our analysis is set out with respect to the admissibility of the restrictions identified in this chapter and in Chapter 4.

4.2 The ECHR and the Right to Form a CSO

4.2.1 Freedom to Form an Association

Article 11 of the ECHR guarantees freedom of association. It guarantees the right of individuals and CSOs to organise themselves on a voluntary

⁵⁰ See for a more comprehensive treatise on this subject, W.J.M. van Veen, op. cit. n. 2, also published in German: 'Gemeinnützigkeitsrecht aus vergleichender Sicht', in H.K. Anheier and V. Then *Zwischen Eigennutz und Gemeinwohl, neue Formen und Wege der Gemeinnützigkeit*, Güttersloh, Verlag Bertelsmann Stiftung, 2004.

⁵¹ See for literature E.W. Hondius and T.J. van der Ploeg, *Foundations, International Encyclopedia of Comparative Law*, Volume XIII, chapter 9, 2000, nr. 12 (p. 8); and W.J.M. van Veen, 'Stiftungsaufsichtsrecht in Europa', in A. Richter/Th. Wächter, *Handbuch des internationalen Stiftungsrechts*, Angelbachtal, 2007, pp. 296–9.

basis with a view to collectively pursuing a specific purpose or objective of their choice. It is generally accepted that this right includes the right to establish an association or become a member of an association without undue state influence. Freedom of association also includes the right *not* to become a member and the right to terminate one's membership.⁵² The latter aspect of freedom of association is known as negative freedom of association.

Whether Article 11 of the ECHR included the right to set up a legal entity was the subject of long debate. The *travaux préparatoires* suggested that this was not the case. However, the European Court has found in a number of judgments that such a right does indeed follow from Article 11 of the ECHR. Moreover, the European Court has stated that 'citizens should be able to form a legal entity in order to act collectively in a field of mutual interest'. The Court qualified this as one of the most important aspects of freedom of association.⁵³ The line of reasoning behind this is that freedom of association and, in relation to that, freedom of expression can only be enjoyed fully if an entity that exists separately from its membership can be established. Thus, if a member state allows for the formation of an association with legal personality through the registration of that association, a refusal to register that association is a restriction of freedom of association.⁵⁴ Such a refusal must therefore satisfy all requirements set out in Subsection 2 of Article 11, ECHR. Similarly, a requirement that a certain minimum number of persons is required to establish an association with legal personality is restricting of the right to freedom of association.

The right to form a legal entity is a separate matter from any provision in national law that associations may only be created in the form of a legal person or may only take part in social and economic life only after they have been registered. A prohibition to operate as an association before registration clearly appears to be a restriction on freedom of association. Similarly, any provision that an association by operation of law – even against the will of the members – is a legal entity that can hold property in its own name, sue and be sued and has certain internal structures prescribed by

⁵² See *inter alia* ECHR 30 June 1993, *Sigurdurjónsson v. Iceland*.

⁵³ See *inter alia* ECHR 10 July 1998, *Sidiropoulos v. Greece*, para. 40; ECHR 20 December 2001, *Gorzélik v. Poland*, para. 55.

⁵⁴ Compare ECHR 13 December 2001, no. 45701/99 (*Metropolitan Church of Bessarabia and Others v. Moldova*) concerning a refusal to register a religious organisation, thus depriving it from obtaining legal personality.

law may be viewed as a restriction on freedom of association. Such provisions restrict freedom of association because they prevent groups from forming, operating and being dissolved informally.

4.2.2 Freedom to Establish, Endow and Join a Foundation

Not many constitutions explicitly recognise the right to establish a foundation.⁵⁵ Likewise, the ECHR only recognises the fundamental right to the freedom of association. This right, guaranteed by Article 11 of the ECHR, encompasses the right to establish, join and operate an association without undue state influence. It has been established by the European Court of Human Rights that freedom of association and the state's obligation to ensure that its citizens can enjoy that right effectively, includes the right to establish a separate legal entity, which exists separately from its members, as is set out in Section 4.2.1.

The fact that the ECHR does not provide for any explicit fundamental right to establish a foundation does not imply that the ECHR is not relevant to this process and the subsequent functioning of the foundation in social and economic life. The fundamental rights that are relevant in relation to the right to set up a foundation are the freedom of association, freedom of property and freedom of expression. The argumentation supporting this view is that the ECHR operates an autonomous association concept, which is not necessarily consistent with the definitions used in national legislation. Because foundations can be set up by one or more people and others may join the foundation after its establishment, it can be argued that foundations are not excluded from the freedom of association as guaranteed by Article 11 of the ECHR. The freedom to enjoy property, which is guaranteed by Article 1 of the first Protocol, is also relevant because it includes the right to determine the destination of one's property without undue state interference.

Both lines of argument demonstrate the commonly held view that foundations are important vehicles for private initiatives and actions, and should therefore fall under the protection offered by the ECHR. In my opinion, the argument that the right to set up a foundation falls under the protection offered by the ECHR benefits significantly in a technical sense when it is related to the freedom of expression guaranteed by Article 10

⁵⁵ See J. García-Andrade, 'Establishment, Amendment and Liquidation of Foundations', in A. Schlüter, V. Then and P. Walkenhorst, *op. cit.* n. 49, p. 629–31, although such a constitutional right may be restricted to public-benefit purposes, such as in Spain.

of the ECHR. The European Court of Human Rights has established that a restriction on the freedom to dedicate money to a specific purpose is a restriction on freedom of expression.

ECtHR 19 February 1998, *Bowman v. the United Kingdom*.

Mrs Bowman was charged with an offence under subsections 75(1) and (5) of the Representation of the People Act 1983, which prohibits expenditure of more than five pounds sterling by an unauthorized person during the period before an election on conveying information to electors with a view to promoting or procuring the election of a candidate. Mrs Bowman alleged a violation of her right to freedom of expression under Article 10 of the Convention. The ECHR judged that:

'33. The Court notes that section 75 of the 1983 Act does not directly restrain freedom of expression, but instead limits to GBP 5 the amount of money which unauthorized persons are permitted to spend on publications and other means of communication during the election period. Moreover, it does not restrict expenditure on the transmission of information of opinions in general, but only that incurred during the relevant period "with a view of promoting or procuring the election of a candidate". Nonetheless, there can be no doubt that the prohibitions contained in section 75 amounted to a restriction on the freedom of expression, which directly affected Mrs Bowman....'

34. It remains to be considered whether this restriction was "prescribed by law", pursued a legitimate aim and was "necessary in a democratic society".

The judgment in the *Bowman* case concerned the right to dispose of money for the purpose of imparting information and ideas, which is a component of Article 10 of the ECHR. Here it is submitted that foundations are important vehicles for gathering, generating and conveying information and ideas. In my opinion, therefore, there can be no doubt that any restriction on establishing, endowing and joining a foundation with a social or political purpose is a restriction on freedom of expression. Such a provision would constitute a restriction under Article 10 of the ECHR in conjunction with the right to own, enjoy and dispose of one's property, with regard to setting up a foundation and freedom of association with regard to the joining of a foundation or indeed to participating in its establishment.

An interesting aspect is whether freedom of expression implies the right to set up a legal entity such as a foundation. This issue was also raised in relation to freedom of association and the question of whether that freedom encompasses the right to set up a legal entity. The European Court has resolved this issue by stating that freedom of association does in fact

encompass the right to set up a legal entity.⁵⁶ This is a corollary of the duty of member states to ensure that the rights guaranteed by the ECHR can be enjoyed effectively. It is of interest that the European Court in the context of the right to establish a legal entity with legal personality, links the right to freedom of association with the right to freedom of expression (see Section 4.2.1). This is interesting because it lends support to the view that because foundations are important vehicles for the effective enjoyment of the right to freedom of expression, especially taken with other fundamental rights including the right to property and/or freedom of association, the right to set up a foundation without undue state involvement can be seen as an implication of Article 10 of the ECHR.

It is important to note in this context that all member state jurisdictions provide for the 'foundation' as a legal entity or an equivalent thereof. Although there are differences in conceptualisation,⁵⁷ foundations are generally available as vehicles for private initiatives. The question of whether member states should in fact provide for a foundation-type legal entity as a consequence of Article 10 of the ECHR, is therefore not an issue. The focus then shifts to the question of whether restrictions on access to this legal form constitute restrictions on freedom of expression, or freedom of expression taken with the right to property and/or freedom of association. In my opinion, partly in the light of the *Bowman* judgment cited above, this is the case. This is because the foundation has different characteristics to the association, which implies that it can serve as a vehicle to enjoying the freedom of expression that differs from the association.⁵⁸ Consequently, a restriction on the availability of the foundation as a legal form must be assessed against the criterion of whether it is in fact necessary in a democratic society.

In summary, given the fact that (i) the foundation is recognised as a vehicle that enables citizens and their organisations to enjoy their freedom of expression and possibly other fundamental rights and (ii) the laws

⁵⁶ See *inter alia* ECtHR 10 July 1998, *Sidiropoulos v. Greece*, para. 40; ECtHR 20 December 2001, *Gorzélik v. Poland*, para. 55.

⁵⁷ Not all jurisdictions recognise legal personality. Moreover, in some jurisdictions the foundation is viewed as a property-based legal entity, whereas in others foundations are primarily seen as organisations not necessarily endowed available for private action. See W.J.M. van Veen, 'Supervision of Foundations in Europe: Post-incorporation restrictions and requirements', in A. Schlüter, V. Then and P. Walkenhorst, op. cit. n. 49, p. 731 ff.

⁵⁸ For example in the manner in which the will of the founder(s) is protected. I submit that if, in a particular jurisdiction, the same results could be achieved by means of an association, one could argue that there is no restriction of the right to freedom of expression.

of all member states also provide for a non-membership type of voluntary organisation (foundation), the right to establish a foundation falls within the normative framework of the ECHR. A restriction on the right to establish, endow and join a foundation is a restriction, according to the ECHR. An example of such a restriction is that the foundation must have a public benefit purpose. Another example of a restriction would be that a certain minimum endowment is prescribed to gain access to the foundation form. State approval or consent as a requirement before setting up a foundation would also constitute a restriction. Such a restriction is particularly suspect within the framework of safeguards provided by the ECHR if that approval or consent were to be discretionary rather than normative in nature.

4.3 *Restrictions on the Legal Competence of CSOs*

Given that CSOs enjoy fundamental rights and freedoms themselves, restrictions on their freedom to participate in social and economic life might constitute restrictions on fundamental rights or freedoms, such as the right to property or the right to freedom of expression. The rationale for such restrictions may be diverse, ranging from the *main morte* doctrine to preserving the assets of the CSO for the purpose of the CSO. One type of restriction that can be mentioned here is a restriction on the possession of certain type of assets. Such restrictions may regard the right to own real estate or certain (risk-bearing) investments, for example. Such restrictions could, moreover, be sanctioned by an obligation to dispose of the 'forbidden' assets were they to be acquired.

Other restrictions in the field of the legal competence of CSOs relate to the right to receive donations, legacies and inheritances. Such transactions may, for example, be excluded or subject to approval by a state body. It was demonstrated above that the freedom of expression includes the right to make a donation for a specific purpose. Such a freedom would seem to infer that freedom of expression taken with freedom of association and the right to property also apply in the context of the right to acquire property by receiving donations, legacies and inheritances.

4.4 *Restrictions on Activities*

Because CSOs are key vehicles for the effective enjoyment of the two fundamental freedoms of citizens to expression and association, the ECHR also grants protection of fundamental rights and freedoms to CSOs. This

presumes that CSOs can engage in political, social and economic life without undue state interference. In general, certain restrictions would seem to be justified; for example, the activities of a CSO must be consistent with the objectives contained in its constitutive document. A prohibition on engaging in activities that are against the law, social order and good morals are also commonly found. These restrictions may be justified if they accord with the testing criteria set out in Section 3.

In addition to these generic restrictions, CSOs should be free to engage in all aspects of society. One of the preconditions that enables them to do this is that the state should have no influence on the internal affairs of a CSO. This may be relevant if the annual budget of a CSO were subject to approval by a state authority and was a binding document for the management of the CSO. This would constitute state influence over the activities of the CSO through its approval (or rejection) of the budget. The right of a state authority to appoint one or more directors or supervisors that may sit in on meetings of the board of directors would directly affect the internal order of an organisation (see Section 4.6).

Another type of restriction is when CSOs are not allowed to engage freely in political activities of a certain kind or contribute to the public debate on social or political issues. For example, the extent to which CSOs are free to advocate a certain issue by means of lobbying for a change in the law or administrative practices could be restricted under a specific jurisdiction.

Finally, CSOs may face restrictions on joining certain type of organisations. For example, restrictions may apply on becoming a member or board member of a foreign associations. Such a restriction would directly affect the freedom of association of such a CSO.

4.5 *Supervision of CSOs and Enforcement of Legal Provisions from the Perspective of the ECHR*

4.5.1 State Supervision

Supervision of CSOs under many jurisdictions is granted to a particular public authority. This may be an authority at the national level and/or a decentralised level, depending on the purpose of the CSO and the scope of its activities.⁵⁹ For reasons of convenience, I use the term 'state'

⁵⁹ See W.J.M. van Veen, op. cit. n. 57, p. 699-701, and Chapter 4, Section IV, State supervision instruments and sanction.

supervision to indicate supervision by any public authority. The use of this term does not therefore imply supervision at the national level.

Usually, when state supervision is provided for, more than one authority is charged with some specific aspect of the applicable legal provisions. For example, compliance with tax laws and regulations will be handled by the fiscal authorities, while general supervision of the performance of the foundation and its officials will be handled by a separate authority. Moreover, supervision of CSOs is not necessarily restricted to state supervision. A possible alternative to state supervision is internal supervision or external supervision by non-state actors. Internal supervision means supervision by an organ of the CSO itself.⁶⁰ External non-state supervision may be exercised by 'watchdog' organisations or by members of the general public.⁶¹

This form of external supervision may be voluntary in nature, but it may also be endorsed by legal provisions granting a role and thereby certain rights to (certain) non-state actors. This type of supervision falls outside the scope of this study, however, except where adherence to such a non-governmental watchdog organisation is (effectively) compulsory. In that case, the negative freedom of association might be invoked to assess the admissibility of such compulsory adherence.

4.5.2 Enforcement

Enforcement is defined here as those actions that are directed at achieving compliance with the legal restrictions and requirements applicable to CSOs. Supervision precedes enforcement and, to some extent, serves to enable enforcement. The relationship, however, is reciprocal: enforcement also relates to compliance with the legal provisions that are designed to enable supervision. As a result, enforcement and supervision are closely related and should be treated jointly. The instruments and sanctions available to monitor, investigate and subsequently correct any behaviour or action that is in violation with the law are therefore included in this research.

4.5.3 Motives and Legitimacy of State Supervision

Over time, various motives or justifications for the state supervision of CSOs have been elaborated. The motives – the factors that determine the

⁶⁰ In some member states, internal state supervision exists, see W.J.M. van Veen, op. cit. n. 57, p. 701-2.

⁶¹ For social supervision in the different member states, see W.J.M. van Veen, op. cit. n. 57, p. 703-7.

direction of state action in relation to CSOs – can traditionally be placed into three main categories. The first two of these are to promote the efficient use of assets in a broader sense, and to prevent the use of assets for purposes that are politically undesirable. Not infrequently, both of these motives overlap. For example when supervision is aimed at preventing assets being used for purposes for which there is no real need, that are not worth serving, or for which an institution has already been established to which the assets could be transferred.⁶² A third motive is to observe that the CSO and more particularly its officials are obeying the law in general, including the duty to observe the statutes and pursue the best interests of the CSO. The aim here is to prevent irresponsible behaviour and abuses by the officials of the CSO.

The motives for state supervision are related to, but must be differentiated from the legitimacy of state supervision. The legitimacy of state supervision is defined by the criteria mentioned earlier. When it is recognised that the founding of an association or foundation is protected by the ECHR and that CSOs enjoy the rights provided by the ECHR to the extent that these rights are relevant to them, state involvement with CSOs may restrict those rights. State supervision is legitimate only when provided by law, surrounded by sufficient guarantees against abuse, and when it is necessary in a democratic society to protect the interests mentioned in Section 3.1.

The requirement that a restriction must be provided for by law, as well as the issue of the legitimate interests to be protected by supervision, can raise serious difficulties. As has been seen, the concept of 'law' is rather broad and may include European Union regulations (or directives). The interests that can legitimise state supervision of CSOs may include the interests of founder(s), officials, donors and creditors of the CSO. The key issue in relation to the justification of the restriction is therefore the requirement that the restriction must be needed in a democratic society to protect those interests. For the relevant criteria in this respect, see Section 3.3.

4.5.4 Achieving Accountability: Transparency and Inspections

Any requirements regarding the obligations of CSOs to disclose matters regarding their organisation and internal conduct of affairs could be seen

⁶² With regard to for example of poverty relief, in the Netherlands state supervision under the 'Regeling van het Armenbestuur' from 1854 was used to prevent individuals benefiting from support from both CSOs and from the government. See explanatory memorandum, *Kamerstukken* 1853-4, nr. XXVIII, 5, pp. 195-7.

as touching on the right to privacy of an organisation. This is particularly so if the information must be submitted to a public authority or filed or made available to the public in another way. In general, however, the obligation to prepare annual accounts and reports and to make them publicly available is not viewed as a violation of the right to privacy of a legal person.⁶³ Providing such information is necessary for the protection of the rights of others, such as (potential) creditors or donors to an organisation. Moreover, preparing annual accounts is a precondition relating to the state's prerogative to levy taxes within its jurisdiction. Evidently, if preparing and providing annual accounts is viewed as an appropriate measure to achieve an acceptable level of transparency, accountability and fiscal compliance, proper bookkeeping is a requirement that is justifiable for the same reasons.

Another issue would be that an organisation should maintain detailed records of its members, donors or other parties with which it has concluded a transaction of any other sort. This is particularly suspicious if such records must be disclosed to the public authorities. This type of obligation does seem to have a direct effect on the right to privacy of both the CSO and the persons involved. Depending on the social and political situation at a given point in time, the fact that information of this kind is available to the public authorities could easily be detrimental to specific organisations with purposes that might be unpopular with the authorities. In the end, provisions of this kind also affect the effective enjoyment of the freedoms of expression and association.

4.5.5 Inspections and Inquiry Procedures

The freedom of association and the right to privacy are obviously involved when it comes to issues of supervision by state authorities or the public. An example of supervision by the public would be that the law states that meetings held by (certain types of) CSOs are open to the public, including the media. The law may also require CSOs to provide annual accounts to members of the public that ask for this information.

Supervision by a state authority is more common, in particular with regard to foundations. Aspects of supervision include the obligation to submit specific information on a regular basis, as is the case for annual reports. But it may also include the competence of the state authority to

⁶³ Compare ECJ 9 November 2010, joined cases C-92/09 and C-93/09 (*Schecke und Eijfert v. Land Hessen*), para. 87; Supreme Administrative Court of The Netherlands, 17 October 1994, ECLI:NL:RVS:1994:AN4063 and 12 March 2014, ECLI:NL:RVS:2014:836.

request or demand information from an organisation and the right to access its offices, premises, books and accounts. Evidently, such powers would, when not sufficiently narrowly tailored, enable state authorities to make life difficult for CSOs with a purpose that they find unpleasant or undesirable.

4.5.6 The Supervisory Authority: Sanctioning

The final issue with regard to supervision is what type of public authority is charged with supervising CSOs and which powers are attributed to it. If this authority is part of the public administration such as a local authority or a ministry, then the issue of sufficient safeguards against possible abuse of power becomes relevant (see Section 3.1). In the context of this study, three main issues are raised. The first is which authority, if any, is charged or empowered with supervising CSOs. The second is what type of sanctions are available to this authority. The sanctions could possibly include imposing an administrative fine, initiating criminal proceedings, dismissing directors, invoking the liability of directors, providing for the temporary replacement of directors, revoking favourable tax status, dissolving the CSO and possibly other sanctions. The third issue is what safeguards, if any, are in place to prevent abuses of powers. Such safeguards could involve the review of any supervisory action by an independent court.

A relevant point in this respect is whether court approval is required before the relevant authority can exercise its powers, or that court review is provided for ex post. In the latter case, the CSO or its officers must be obliged to take legal action, which involves time, money and energy. In respect of the quality of the guarantees provided, the first form of court review seems to be preferred.

4.6 Interference with the Organisation of a CSO

The European Court has stated that the freedom of association safeguards associative life against unjust state interference. This directly concerns not only the organisation of a certain (religious) community as such but also the effective enjoyment of the right to freedom of association of the members.⁶⁴ This implies that authorities interfering with the choice by a

⁶⁴ E.g. ECtHR 26 October 2000, no. 30985/96 (*Hasan and Chaush v. Bulgaria*), in which case it concerned the organisation of a religious community pertaining to which the ECtHR stated that Article 9 must be interpreted in the light of the protection afforded by Article 11 of the ECHR.

CSO of its board members or representatives, is a violation of the freedom of association. State action favouring one leader over another for example constitutes a violation of the freedom of association.

Here we note that in some countries one or more civil servants must be part of the management board or supervisory board or that a civil servant can be appointed to that position by government (see Chapter 4, Section IV.2.2). In our view such provisions also affect the free choice of leaders by the CSO and therefore constitute a violation of the freedom of association. Moreover, they are suspect because they can easily lead to stifling the right to freedom of expression of a CSO and infringe on their right to privacy in particular when membership of the (management or supervisory) board involves providing access to the premises, offices and records of the CSO, which it generally does.

Civil Society and Civil Society Organisations in the Institutional and Legal Framework of the European Union

CORNELIA R.M. VERSTEEGH

1 Introduction

In the early 1990s, with the introduction of the Maastricht Treaty, social dialogue was radically institutionalised in the European Union because this Treaty introduced a special 'social paragraph'. Since that time, social issues have become more prominent on the agenda of the European Union (EU), demonstrating the need for a social policy in EU member states. When the 2009 European Lisbon Treaty was introduced, consisting of two parts, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU),¹ it was meant to embody European values. And indeed, the Treaty promotes human rights for individuals and stresses the importance of citizen's participation and civil society in the EU.²

The approach to European citizens as 'market citizens' reflects their political function as citizens of the EU and participants in civil society organisations (CSOs), with EU citizens and their CSOs ultimately making up the constituency of the EU. This approach is elaborated in Article 10 of the TEU, which states: 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' This approach towards European citizens as the participants of CSOs had been initiated with the European Commission's Governance

¹ The TEU includes common provisions on the Union's aims, provisions on democratic principles, provisions on institutions, the EU's external actions and its common foreign and security policy. The TFEU deals with categories and areas of Union competences, non-discrimination and citizenship of the Union, the internal market action, the EU's overseas actions, institutional and financial provisions. Both treaties have equal value and are applicable to individuals and organisations where EU law is at stake.

² Article 10, para. 3 TEU.