

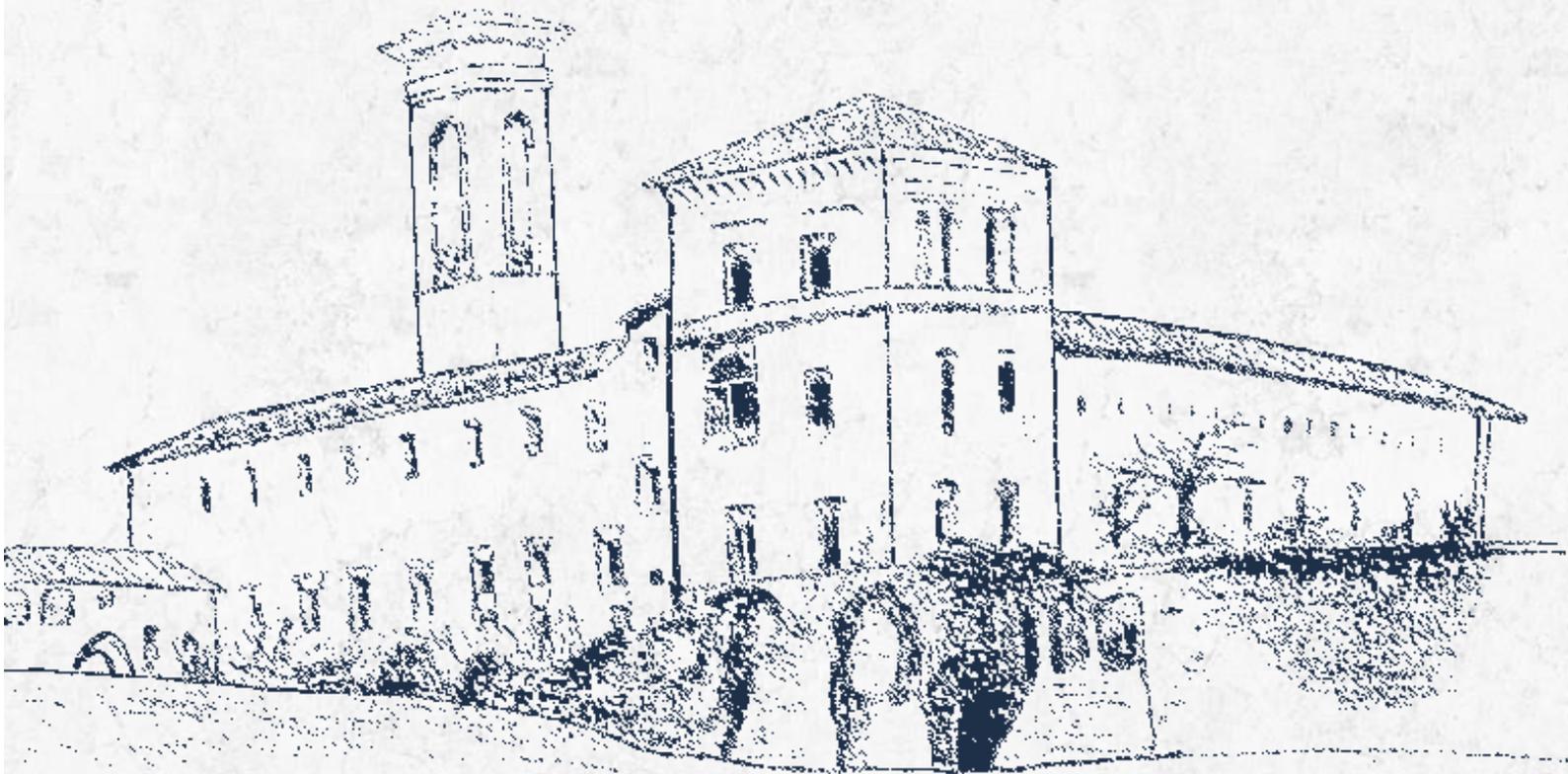
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The Right not to Join a Trade Union in the Case Law of the ECtHR

Stefan Stanev ¹

Abstract

Purpose – The purpose of this paper is to show the link between trade union activity and the ECtHR practice.

Design/methodology/approach – An analysis has been carried out of some decisions of the ECtHR

Findings – The relationship between trade union activity and the functions of the ECtHR has been examined.

Research limitations/implications – The research proposes an analytical framework and invites future empirical investigation.

Originality/value – The paper explores the link between labour law and the European Convention on Human Rights

Paper type – Conceptual Paper

Keywords – *Labour Law, The European Convention on Human Right, Trade Unions*

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Article 11 of the European Convention on Human Rights (“ECHR”) protects the human right to freedom to form trade unions, as a type or as a special aspect of the right to freedom of assembly and association.

The expression “for the protection of his interests”, included in Article 11, shows that “the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible”.

The State has a positive obligation to safeguard the rights of individuals and the trade unions against employers and to protect individuals from abuse of power by the trade unions.

The negative obligation of States not to interfere with the individual freedom of association of trade unions is enshrined in paragraph 2 of Article 11, the first sentence of which permits restrictions on certain grounds, whereas the second sentence permits restrictions on the exercise of Article 11 rights by members of the armed forces, of the police or of the administration of the State.

It is important to note that the right to freedom of association under Article 11 is supplemented by similar provisions in the respective Conventions of the International Labour Organization and the European Social Charter. The Court in Strasbourg takes into consideration the safeguards laid down in these instruments in accordance with their interpretation by the respective law enforcement bodies, and generally interprets the Convention in accordance with them.

Therefore, it should be observed that according to Article 11 everyone has the right to form and to join a trade union, regardless of whether they are employed under a contract of employment or self-employed. Moreover, individuals must be free to form and to join a trade union of their choice. The State is prohibited from forming and favouring only one trade union, membership of which is compulsory for the respective individuals.

The concept of freedom of association also includes the freedom NOT to join a trade union (a negative aspect of the freedom of association). Precisely this issue will be discussed in this article.

Compulsory membership of (or being compelled to join) a trade union is not explicitly governed by the Convention on Human Rights. But this should not imply that this negative aspect of the freedom of an individual to refuse to join a trade union remains completely outside the scope of Article 11 and that any coercion would be compatible with the purposes of this provision. Such an interpretation would undoubtedly be contrary to the very substance of the right to freedom of association, safeguarded by the Convention on Human Rights.

Thus, for instance, according to the practice of the Committee on Freedom of Association in the Governing Body of the International Labour Organization, compulsory membership of trade unions is incompatible with Conventions C087 and C098 (the former concerning freedom of association and protection of the right to organise, and the latter concerning the application of the principles of the right to organise and to bargain collectively).

Furthermore, compulsory membership of a trade union also does not exist according to the laws of most States-parties to the Convention. On the contrary, a large number of domestic legal systems set out safeguards that secure the negative aspect of the right to freedom of association in one way or another, *i.e.* the freedom of every individual not to join a trade union, or to leave a trade union.

Moreover, on 24 September 1991 the Parliamentary Assembly of the Council of Europe unanimously adopted a recommendation to include one sentence with the same meaning in Article 5 of the European Social Charter on 1961. Even in the absence of an explicit provision, the Committee of independent experts, formed to control the application of the Charter, considers the negative right to be included in this act.

Regardless, the Court in Strasbourg has had the opportunity to consider several cases regarding the right not to join a trade union. These cases concerned “closed shop” agreements, applicable to several European states. In the United Kingdom, the institution of the “closed shop” is of very long standing. In essence, this is an undertaking or workplace in which, as a result of an agreement between one or more trade unions and one or more employers or employers’ associations, employees of a certain class are in practice required to be or become members of a specified union. The employer is not under any legal obligation to consult or obtain the consent of individual employees directly before such an agreement is put into effect.

These agreements vary considerably in their form and content. One distinction that is often drawn is that between the pre-employment contract, under which the worker must join the trade union in order to be employed (“pre-entry” shop), and the contract after employment commences, under which he must join within a reasonable time after being engaged (“post-entry” shop).

The “closed shop” hypothesis was first considered in the case of *Young, James and Webster v UK*. The three applicants applied to the Commission on Human Rights with identical complaints, relying on Articles 9, 10 and 11 of the Convention. They submitted that the enforcement of the Trade Union and Labour Relations Act 1974 and the Trade Union and Labour Relations (Amendment) Act 1976, allowed their dismissal from employment despite the reasonable grounds of their objections to joining a trade union, which constituted an interference with their freedom of conscience, expression and

association with others against which they had no effective safeguard (Article 13 of the ECHR).

The Court emphasised that, in proceedings originating in an individual application, it had, without losing sight of the general context, to confine its attention as far as possible to the issues raised by the concrete case before it. Accordingly, the Court limited its review to the consequences which the “closed shop” agreement had had for the applicants, without examining its substance, including the alleged by the government positive effects for the workers.

As a consequence of the agreement concluded in 1975, the applicants had been faced with the dilemma either of joining one of the specified trade unions, or of losing jobs for which union membership had not been a requirement when they were first engaged and which two of them had held for several years. The applicants regarded the membership condition as an interference with the exercise of their right to freedom of association, and they did not approve of the policies of the respective trade unions.

In the Court’s opinion, such a form of compulsion, in the circumstances of the case, struck at the very substance of the freedom guaranteed by Article 11. For this reason alone, there had been an interference with that freedom as regards each of the three applicants.

An individual does not enjoy the right to freedom of association if in reality the freedom of action or choice, which remains available to him, is either non-existent or so reduced as to be of no practical value.

Having regard to all the circumstances of the case, the ECtHR held that the detriment suffered by the applicants went further than was required to achieve a proper balance between the conflicting interests and could not be regarded as proportionate to the aims being pursued.

The Court attached great significance to the fact that the consequences for the applicants had been so grave as to strike at the very substance of the negative right to freedom to join a trade union.

In the *Sorensen and Rasmussen v Denmark* case the two applicants accepted employment in the knowledge that their employers, who had entered into “closed shop” agreements, required them to have the compulsory membership in a specific trade union. The applicants objected to the membership in it because they did not support the political views of the union.

The first applicant was dismissed when he stated that he did not wish to pay the membership fees of the trade union, whereas the second applicant joined the trade union in order to get the job, but disputed the compulsion to become a member.

The Court reiterated its conclusion from the *Young, James and Webster* case that even though the right not to join a trade union is not absolute, the

compulsion to join a trade union, which “struck at the very substance” of the right, was an interference with the right to freedom of association under Article 11 of the Convention. “The very substance” of the right could be infringed both in cases of pre-employment “closed shop” agreements, and in cases of agreements concluded after commencement of employment.

It can be concluded from the judgments of the ECtHR that the Court would find there to be a violation of Article 11 if there exists an overpowering duty on the employees. This would be the case when a specific interested party’s significant interests are affected, for example, by dismissal or another disciplinary action.

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at www.adapt.it.

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