

1995

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Recommended Citation

W. Kearns Davis Jr., *Sigurjonsson v. Iceland: The European Court of Human Rights Expands the Negative Right of Association*, 27 Case W. Res. J. Int'l L. 301 (1995)

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SIGURJÓNSSON V. ICELAND: THE EUROPEAN COURT OF HUMAN RIGHTS EXPANDS THE NEGATIVE RIGHT OF ASSOCIATION

W. Kearns Davis, Jr.*

I. INTRODUCTION

In the late 1940s, with the horrible echoes of the Second World War still ringing in their ears, the leaders of Western Europe decided that the road to lasting peace lay in unity among nations.¹ In May 1949 they created the Council of Europe (Council), the first international political institution in Europe.² Although the United Nations already had passed its Universal Declaration of Human Rights (Universal Declaration),³ the Council feared that the U.N. would take too long to implement an effective system of enforcement.⁴ The Council began immediately, therefore, to formulate its own agreement, modeled after the Universal Declaration, but supported by authoritative machinery.⁵

On November 4, 1950, in Rome, representatives of fifteen nations signed the European Convention on Human Rights (Convention).⁶ In

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¹ THE COUNCIL OF EUROPE, THE COUNCIL OF EUROPE AND THE PROTECTION OF HUMAN RIGHTS 5 (1992) [hereinafter THE COUNCIL OF EUROPE, PROTECTION OF HUMAN RIGHTS]; see also INGRID DETTER, THE INTERNATIONAL LEGAL ORDER 116-17 (1994); Brian Walsh, *Protecting Citizens from Their Own Countries: How the European Court of Human Rights Affects Domestic Laws and Personal Liberties*, 15 HUM. RTS. 20, 20 (1988) (stating that the Convention "originated from the experiences of World War II").

² THE COUNCIL OF EUROPE, PROTECTION OF HUMAN RIGHTS, *supra* note 1, at 5.

³ The Declaration was adopted in 1948. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

⁴ Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 15 (1988).

⁵ THE COUNCIL OF EUROPE, PROTECTION OF HUMAN RIGHTS, *supra* note 1, at 5.

⁶ *Id.* at 7. The official title of the treaty is the Convention for the Protection of Human Rights and Fundamental Freedoms. THE COUNCIL OF EUROPE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 2 (1993). For a thorough discussion of the history and development of the Convention and its institutions, see J.A. Andrews, *The Euro-*

1959, the Council established the European Court of Human Rights in Strasbourg, France,⁷ making the Convention the first international human rights agreement with a means of enforcing the rights it guarantees.⁸ The hopes of the Convention's framers for effective enforcement have been realized, for the nations of Europe faithfully obey the verdicts of the Court in cases in which they are parties.⁹ Moreover, in the forty-four years since the Convention was enacted, the number of countries accepting the compulsory jurisdiction of the Court has doubled to a total of thirty nations, including several former members of the Communist Bloc.¹⁰ As a result, the power of the Court to affect the lives of individuals is now immense.

Despite its roots in the aftermath of the Second World War, the scope of the Convention is not limited to protection from violent atrocities. Article 11 of the Convention expressly guarantees the right of individuals to associate freely, and specifically includes trade unions

pean Jurisprudence of Human Rights, 43 MD. L. REV. 463 (1984).

⁷ Daniel S. Sullivan, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369, 2374 (1993).

⁸ Andrews, *supra* note 6, at 468.

⁹ Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT'L L. 217 (1993); Buergenthal, *supra* note 4, at 15; cf. Christopher J. Whelan, *Labor Law and Comparative Law*, 63 TEX. L. REV. 1425, 1431 (1985) (referring to the United Kingdom's obligation to change its union security system following the Court's decision in *Young v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) (1981)). The limiting phrase "in cases in which they are parties" is an important one, for the precedential effect of Court decisions on nonparties has been less pervasive. Some countries, such as Austria, attribute constitutional authority to the Convention in their domestic systems. Andrews, *supra* note 6, at 480. In others, however, including the United Kingdom, domestic courts are not bound by the Convention or the decisions of the Court, so an individual seeking relief under the Convention must do so directly through the Commission and the Court. *Id.* at 480-81. English courts may consider the Convention when there is no clear answer under English law. *Id.* at 481.

For a comprehensive study of the history, protections, and institutions of the Convention, see THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS (R. St. J. Macdonald et al., 1993) [hereinafter EUROPEAN SYSTEM].

¹⁰ COUNCIL OF EUROPE, CHART OF SIGNATURES AND RATIFICATIONS, DECLARATIONS PURSUANT TO ARTICLES 25 AND 46 OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, October 17, 1994. The countries now governed by the Convention are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, San Marino, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. *Id.*

among the types of associations that it contemplates.¹¹ The Convention does not, however, expressly guarantee the freedom to *refrain* from associating.¹² The Court recently addressed the issue of whether such a “negative” freedom of association¹³ is to be inferred from the express language of Article 11.¹⁴ *Sigurjónsson v. Iceland* arose when Sigurdur A. Sigurjónsson, a Reykjavic taxi driver, was stripped by the government of his taxi license for failure to pay union dues.¹⁵ After an unsuccessful constitutional challenge of Iceland’s licensing statute, Sigurjónsson sought international relief under the Convention.¹⁶ A divided court held that Article 11 implicitly guarantees the freedom of an individual not to be compelled to associate with others against his will.¹⁷

This Article first discusses the facts of *Sigurjónsson* and the competing analyses of the majority and dissent.¹⁸ It then discusses the law and practice of compulsory association under the domestic law of Europe, and tracks the development of the Article 11 negative right of association from its adoption in 1951 through the jurisprudence that immediately preceded *Sigurjónsson*.¹⁹ Next, the Article critiques the Court’s reasoning and interpretation of Article 11 in light of that prior jurisprudence, and predicts the effect of its holding on European employment practices.²⁰ Finally, this Article concludes that while the judgment of the Court was justified on the facts of the case, its expansive legal conclusions overstepped the bounds of both the Article itself and the Court’s precedent.²¹

II. SIGURJÓNSSON V. ICELAND

The facts of *Sigurjónsson* are straightforward. On October 24, 1984, Sigurjónsson obtained a license to operate a taxi.²² The license was issued on the condition that Sigurjónsson join the Frami Automobile Association (Frami).²³ He did so, and paid membership fees until Au-

¹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 11, 213 U.N.T.S. 221 [hereinafter Convention for the Protection of Human Rights]. For the full text of Article 11, see *infra* note 92 and accompanying text.

¹² See Convention for the Protection of Human Rights, *supra* note 11.

¹³ *Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 25 (1993).

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 8-9.

¹⁶ *Id.* at 9, 12.

¹⁷ *Id.* at 15.

¹⁸ See *infra* notes 22-74 and accompanying text.

¹⁹ See *infra* notes 75-136 and accompanying text.

²⁰ See *infra* notes 137-53 and accompanying text.

²¹ See *infra* notes 154-58 and accompanying text.

²² *Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 8 (1993).

²³ *Id.* Iceland Regulation no. 320/1983 was issued by the Iceland Minister of

gust, 1985.²⁴ After Sigurjónsson stopped paying his Frami dues, Frami requested that the licensing agency revoke his license.²⁵ The agency revoked the license on June 30, 1986,²⁶ and Sigurjónsson sent a letter of protest to the Ministry of Transport.²⁷ The Ministry of Transport confirmed the revocation, and sent a copy of the confirmation to the Reykjavik Chief of Police.²⁸ Sigurjónsson's attorney informed the police that Sigurjónsson intended to contest the revocation in court, and asked them not to interfere with his taxi business.²⁹ Despite his request, on August 1, 1986, the police stopped Sigurjónsson and removed his taxi license plates.³⁰

Sigurjónsson filed suit against the licensing agency and the Ministry of Transport in the Civil Court of Reykjavik, seeking a declaration that Article 73 of the Iceland Constitution prevents the government from compelling an individual to belong to a particular association.³¹ The Supreme Court of Iceland, in a decision issued on December 15, 1988, agreed with the lower court that the Iceland Constitution does not guarantee a negative right of association.³² However, it reversed the judgment of the lower court on the ground that there was no statutory basis for the regulatory provision requiring membership in Frami.³³

Althing, the Icelandic Parliament, responded quickly to the Supreme Court's ruling. Law No. 77/1989, which went into effect on July 1, 1989, made taxi licenses conditional on union membership.³⁴ In response to the

Transport pursuant to Iceland Law no. 36/1970, art. 10. *Id.*

Frami was formed by professional drivers in 1936. *Id.* at 11. The government does not control its policies. *Id.* Its expressed purpose is:

- (1) to protect the professional interests of its members and promote solidarity among professional taxicab drivers;
- (2) to determine, negotiate and present demands relating to working hours, wages and rates of its members;
- (3) to seek to maintain limitations on the number of taxicabs and
- (4) to represent its members before the public authorities.

Id. (citing Frami Articles cl. 2).

²⁴ *Id.* at 9.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

new statute, Sigurjónsson wrote to Frami on July 4, 1989.³⁵ He acknowledged that he had no choice but to join the union, but emphasized "that membership was contrary to his own wishes and interests. Not only did Frami's Articles contain provisions contrary to his political opinions, but the association also used the revenue from membership fees to work against his interests."³⁶ Furthermore, he stated that the statutory membership requirement violated the Convention, and that he planned to contest the statute accordingly.³⁷

Sigurjónsson filed an application with the European Commission of Human Rights (Commission),³⁸ claiming that the obligation to join Frami violated Article 11 of the Convention.³⁹ Iceland's government argued in

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ All claims under the Convention must be filed with the Commission, which has sole authority to determine whether a case is admissible for review under the Convention. Nanette Dumas, *Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals*, 13 HASTINGS INT'L & COMP. L. REV. 585, 604 (1990). If the Commission admits a case and issues a decision thereon, within three months thereafter the case may be appealed to the Court by one of the states involved or by the Commission itself. Convention for the Protection of Human Rights, *supra* note 11, art. 32, § 1, art. 47; *see also* Leslie R. Strauss, Note, *Press Licensing Violates Freedom of Expression—Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 5 *Inter-Am. Ct. H.R. (Ser. A) (1986)*, 55 U. CIN. L. REV. 891, 899-900 (1987).

³⁹ *Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 19 (1993). Sigurjónsson also claimed, in the alternative, violations of Articles 9, 10, and 13. *Id.* The Commission found it unnecessary to reach the claims under Articles 9 and 10. *Id.* at 30.

Article 13 of the Convention for the Protection of Human Rights provides: "[e]veryone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." *Id.* Unlike the U.S. Constitution, the Convention does not contain a "case and controversy" requirement. *See* Convention for the Protection of Human Rights, *supra* note 11. Because Sigurjónsson complied with Althing's new statute while he was pursuing his claim under the Convention he was never prosecuted under the statute he was contesting. *See supra* notes 34-37 and accompanying text. Although it allowed him to pursue his claim under Article 11, the Commission held that Article 13 does not guarantee a remedy when the statute in question has not been enforced against the complainant. *Sigurjónsson*, 264 Eur. Ct. H.R. (ser. A) at 30. The Commission explained that "in such circumstances a remedy would in effect amount to some sort of judicial review of legislation." *Id.* In effect, it limited the relief available to Sigurjónsson to a declaration that Iceland's statute violated Article 11. Because the Article 13 decision is peripheral to the substantive Article 11 claim, this Article does not analyze it further.

defense that the failure of the Convention's signatories to adopt an express guarantee of a negative freedom of association indicates that they intended to leave that question to domestic lawmakers.⁴⁰ The Commission agreed with Sigurjónsson, concluding that Iceland's statute violated Article 11.⁴¹

To reach its conclusion, the Commission addressed separately the two paragraphs of Article 11. It held first that paragraph 1, despite Iceland's argument, does imply a negative freedom of association.⁴² The Commission declined to decide, however, whether that negative freedom is equal in strength to the expressed positive right.⁴³ Instead, it limited its holding to the particular circumstances of the case, stressing its reliance on the degree of compulsion to join the union.⁴⁴ A negative right of association must be inferred from Article 11 where the degree of compulsion to join a particular group is so severe that it undermines the freedom of choice that Article 11 was intended to protect.⁴⁵

Turning to paragraph 2 of Article 11, the Commission focused on whether compulsory membership in Frami was "necessary in a democratic society."⁴⁶ Citing the judgment of the Court in *Young v. United Kingdom*,⁴⁷ it used three principles to conduct that inquiry:

Firstly, "necessary" in this context does not have the flexibility of such expressions as "useful" or "desirable." Secondly, in a "democratic society" tolerance and broadmindedness require that a balance must be struck which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Thirdly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued.⁴⁸

Sigurjónsson argued that the statute in question did not specify the purposes of Frami, and that Frami therefore was free to decide its own

⁴⁰ *Sigurjónsson*, 264 Eur. Ct. H.R. (ser. A) at 25.

⁴¹ *Id.* at 29.

⁴² *Id.* at 26-27.

⁴³ *Id.* at 26.

⁴⁴ *Id.* ("A threat of losing the taxicab licence, involving the loss of livelihood, is a very serious form of compulsion to join a particular trade union.")

⁴⁵ *Id.* at 26-27.

⁴⁶ *Id.* at 27 (quoting Convention for the Protection of Human Rights, *supra* note 11, art. 11, ¶ 2).

⁴⁷ *Young v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) (1981).

⁴⁸ *Sigurjónsson*, 264 Eur. Ct. H.R. (ser. A) at 27 (citing *Young v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) at 25 (1981)).

purposes and to act against his political interests.⁴⁹ An association cannot be considered necessary to fulfill a government purpose, he contended, when the government has no control over the purposes of the association.⁵⁰ Iceland responded that, despite the lack of a purpose expressed in the statute, Frami fulfilled the dual governmental aims of protecting its members' interests and supervising their provision of services to the public.⁵¹

The Commission held that compulsory membership in Frami was not necessary, and, therefore, that the infringement of Sigurjónsson's rights under Article 11, paragraph 1 was not justified under paragraph 2.⁵² It rejected the claim that Frami served a necessary supervisory purpose, pointing out that the legislature had created a separate, public-law institution—the Committee for Taxicab Supervision—for the same purpose.⁵³ Finally, it denied that compulsory membership was necessary to enable Frami to protect the interests of its members.⁵⁴ After issuing its decision, the Commission referred the case to the Court.⁵⁵

The Court affirmed the judgment of the Commission by a vote of eight to one.⁵⁶ In doing so, it took a subtle but significant legal step that the Commission had been unwilling to take. Like the Commission, the Court reserved judgment on the issue of whether the negative freedom of association that it recognized in Article 11 "is to be considered on equal footing with the positive right."⁵⁷ However, the Court based its finding on footing more solid than that of the Commission. Whereas the Commission ultimately had based its decision on infringement of the freedom protected by the positive right,⁵⁸ the Court found that the negative freedom, albeit implied, existed apart from any infringement of the expressed positive right.⁵⁹ The Court found, in other international treaties and in the domestic law of the majority of the Convention's signatories, common agreement that workers should be entitled to a negative freedom of

⁴⁹ *Id.* at 25, 27.

⁵⁰ *See id.* at 27.

⁵¹ *Id.* at 28.

⁵² *Id.* at 28-29.

⁵³ *Id.* (citing Iceland Law no. 77/1989, § 10). Public-law institutions, the Commission noted, are not subject to the limitations of Article 11. *Id.* at 28 (citing *Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) at 26-27 (1981)).

⁵⁴ *Id.* at 28-29.

⁵⁵ *Id.* at 6.

⁵⁶ *See id.* at 15-16.

⁵⁷ *Id.*

⁵⁸ *Id.* at 25.

⁵⁹ *See id.* at 15-16.

association.⁶⁰ In light of that international "common ground,"⁶¹ and because "the Convention is a living instrument which must be interpreted in light of present-day conditions,"⁶² "Article 11 must be viewed as encompassing a negative right of association."⁶³

Judge Thór Vilhjálmsson dissented, refusing to infer a negative right: "the text of this Article cannot be construed as guaranteeing the so-called negative freedom of association. Its text makes no express reference to such a guarantee."⁶⁴ To support his textual argument, he cited evidence that the omission of an express negative right of association was intentional.⁶⁵

First, he contended, the Court was misguided in relying on the U.N. Universal Declaration,⁶⁶ because the preamble to the Convention made clear that its framers intended only selective incorporation of the rights included in the Universal Declaration.⁶⁷ More importantly, he noted, the *travaux préparatoires*⁶⁸ make clear that the Convention's framers considered and rejected the inclusion in Article 11 of a provision guaranteeing a negative freedom of association.⁶⁹

Turning from his initial emphasis on the text of Article 11, Judge Vilhjálmsson next addressed the Court's determination that, "in light of present-day conditions,"⁷⁰ the Article can be read to imply a negative right.⁷¹ He argued that positive and negative rights of association are too distinct in their meanings and effects for the granting of one to imply the granting of the other.⁷² Positive freedom of association, he stated, "was originally one of the foundations of political freedom and activity."⁷³ He asserted that trade unions, and thus the issues of negative freedom of association that are at issue in *Sigurjónsson*, developed later, and that

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* (citing *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 40 (1989)).

⁶³ *Id.*

⁶⁴ *Id.* at 21-22 (Vilhjálmsson, J., dissenting).

⁶⁵ *Id.*

⁶⁶ Compare *id. with Sigurjónsson*, 264 Eur. Ct. H.R. (ser. A) at 15-16 (citing Universal Declaration, *supra* note 3, art. 20, § 2 (1948) (expressly establishing a negative freedom of association).

⁶⁷ *Id.* at 21-22 (Vilhjálmsson, J., dissenting).

⁶⁸ The *travaux préparatoires* is the Convention's equivalent to legislative history.

⁶⁹ *Id.*

⁷⁰ See *id.* at 16 (citing *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 40 (1989)); see also *supra* note 62 and accompanying text.

⁷¹ *Id.* at 21-22 (Vilhjálmsson, J., dissenting).

⁷² See *id.* (Vilhjálmsson, J., dissenting).

⁷³ *Id.* (Vilhjálmsson, J., dissenting).

cases like *Sigurjónsson* demonstrate that the negative freedom may not further citizens' interests as substantially as the positive right. "[T]he negative freedom is so special and so clearly distinguishable from the positive freedom of association, that a legal interpretation of the Article cannot result in the inclusion of the negative freedom within its sphere of application."⁷⁴

III. COMPULSORY UNIONISM IN EUROPE

Labor unions historically have been plagued by "free riders"—workers who accept the benefits of unions' negotiations for better working conditions, but who refuse to join unions to avoid paying union dues.⁷⁵ To alleviate the problem, some countries have permitted employers and unions to enter into "closed shop" agreements, under which employers may hire only union members.⁷⁶ Similar "union-shop" agreements, under which employees must join the union within a certain period after beginning work, are adopted frequently in the United States, where Congress has expressly authorized them.⁷⁷

Unions in Europe are much different in character from unions in the United States. The predominant factors that induce European workers to join together in unions generally are not employment interests, but common political or religious ideologies.⁷⁸ In most of Europe, therefore, it is rare that a single union is granted the right to be the exclusive bargaining representative for the workers of a particular employer,⁷⁹

⁷⁴ *Id.* (Vilhjálmsón, J., dissenting).

⁷⁵ See LAMMY BETTEN, *INTERNATIONAL LABOUR LAW* 76 (1993); cf. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 763-64 n.14 (1961) (discussing the free-rider problem in the United States).

⁷⁶ BETTEN, *supra* note 75, at 76.

⁷⁷ See, e.g., Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-87 (1988 & Supps. I-V 1989-93); Railway Labor Act, 45 U.S.C. § 152 (1988).

⁷⁸ Maya R. Crone, *Remaking Procrustes's Bed: A Model for Non-Exclusive Labor Law*, 25 COLUM. J.L. & SOC. PROBS. 243, 262, n. 94 (1992). See Telephone Interview with Edward Yemin, Chief of Labor Relations Branch, International Labour Organization (November 1, 1994).

⁷⁹ In the U.S., by contrast, "[e]xclusivity"—the idea that the union has the sole power to negotiate for workers in a bargaining unit—"is a fundamental premise of . . . labor policy." WALTER E. OBERER ET AL., *LABOR LAW* 213 (3d ed. 1986); see also *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 65 (1975) (acknowledging "long and consistent adherence to the principle of exclusive representation"); DONALD P. ROTHSCHILD ET AL., *COLLECTIVE BARGAINING AND LABOR ARBITRATION: MATERIALS ON COLLECTIVE BARGAINING, LABOR ARBITRATION AND DISCRIMINATION IN EMPLOYMENT* 27 (2d ed. 1979). For a general discussion of exclusive representation in the United States, see Benjamin Aaron, *Rights of Individual Employees*

because to designate a single union would have the effect of designating a single ideology.⁸⁰ Use of the closed shop is not pervasive in Europe,⁸¹ therefore, and in some countries is outlawed altogether,⁸² but it is common in certain countries such as the U.K.,⁸³ where it has been a source of infinite controversy.⁸⁴

A practice similar to the closed shop, and one that is more common in Europe, is compulsory membership in an organization by all members of a particular profession.⁸⁵ In the United States, the Supreme Court has determined that the First Amendment places limits on compulsory professional associations.⁸⁶ It held in *Keller v. State Bar of California* that, although a state may compel attorneys to join a state bar, mandatory dues may be used only to further "the State's interest in regulating the legal profession and improving the quality of legal services."⁸⁷ Compulsory membership dues may not be used to "fund activities of an ideological nature which fall outside of those areas of activity."⁸⁸ The European Court of Human Rights has addressed the issue of compulsory professional associations on multiple occasions, including *Sigurjónsson*.⁸⁹

Under the Act, in AMERICAN LABOR POLICY: A CRITICAL APPRAISAL OF THE NATIONAL LABOR RELATIONS ACT 119, 122-38 (Charles J. Morris ed., 1987).

⁸⁰ Telephone Interview with Edward Yemin, *supra* note 78. *See generally* Crone, *supra* note 78 (summarizing the effects of a single union in the majority of the European nations).

⁸¹ *See generally*, Crone, *supra* note 78 (discussing a model for non-exclusive labor law); Telephone Interview with Edward Yemin, *supra* note 78.

⁸² BETTEN, *supra* note 75, at 76.

⁸³ *Id.*

⁸⁴ Illustrative are the early 1970s. Closed shops were banned by the Industrial Relations Act of 1971, but the Act was repealed three years later when the Labour Party assumed power. LAMMY BETTEN, *THE RIGHT TO STRIKE IN COMMUNITY LAW* 141 (1985).

⁸⁵ *See, e.g.*, *Sigurjónsson*, 264 Eur. Ct. H.R. (ser. A) at 8 (1993); *Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) at 26 (1981). *But cf.* Telephone Interview with Mr. Giuseppe Casale, European Regional Office, International Labour Organization (November 2, 1994) (explaining that even such professional organizations generally are voluntary).

⁸⁶ *Keller v. State Bar of California*, 496 U.S. 1 (1990).

⁸⁷ *Id.* at 13-14.

⁸⁸ *Id.* at 14.

⁸⁹ *Sigurjónsson*, 264 Eur. Ct. H.R. (ser. A) at 8.

IV. LEGAL BACKGROUND TO *SIGURJÓNSSON*

Article 11 provides in full:

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.⁹⁰

During the last two decades the Court has refined significantly its Article 11 labor jurisprudence.⁹¹ Of the cases decided in that period, three are particularly important to a thorough analysis of *Sigurjónsson*. In *Le Compte v. Belgium*,⁹² three physicians claimed that their rights under Article 11 were violated by a legal requirement that they join the Belgian medical association.⁹³ The Court disagreed. It held that a public-law association that a state creates to regulate a profession for the protection of the general interest is not governed by Article 11.⁹⁴ The Court did

⁹⁰ Convention for the Protection of Human Rights, *supra* note 11, art. 11, *quoted in Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 13 (1993).

⁹¹ *E.g.*, *Swedish Engine Drivers' Union v. Sweden*, 20 Eur. Ct. H.R. (ser. A) §§ 31-37 (1976) (holding that Article 11 does apply to the state in its capacity as an employer, but that it does not require the state to negotiate and contract with any union with which it agrees on the substantive issues of employment); *Schmidt v. Sweden*, 21 Eur. Ct. H.R. (ser. A) at 16-17 (1976) (holding, *inter alia*, that (1) Article 11 is binding on the state in its capacity as an employer whether the employee relations in question are governed by public law or private law, (2) Article 11 does not compel that a post-strike collective bargaining agreement include retroactivity of benefits, (3) union members have a right to strike for the protection of their employment interests, and (4) the right to strike may be regulated in some circumstances); *Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) (1981); *Young v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) (1981); *Sibson v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993). For discussion of *Le Compte*, *Young* and *Sibson*, see *infra* notes 94-136 and accompanying text.

⁹² *Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) (1981).

⁹³ *Id.* at 26.

⁹⁴ *Id.* at 26-27.

add a caveat, however. Article 11 would be violated if a compulsion to join a public-law organization were accompanied by a prohibition against simultaneous membership in a private association.⁹⁵ Having rejected the application of Article 11 to the association in question, the Court stated expressly that "there is no reason . . . to determine whether the Convention recognises the freedom not to associate."⁹⁶

Three days after deciding *Le Compte*, a divided Court rendered its judgment in *Young v. United Kingdom*.⁹⁷ *Young* resulted from the firing of three employees of British Rail who refused to become union members.⁹⁸ All of them had worked for British Rail for several years, but they were dismissed when their employer agreed to a closed-shop system that required each employee to join one of three unions.⁹⁹ Opening its discussion of Article 11, the Court noted that the parties had devoted substantial attention to whether Article 11 guarantees a negative right of association.¹⁰⁰ As it had done in *Le Compte*, however, the Court found it unnecessary to decide that issue.¹⁰¹ Nevertheless, it did not dispose of the issue without comment. In dictum that would prove significant in *Sigurjónsson*, it elaborated on the issue at length. Even if it is assumed that Article 11 does not directly protect the negative right of association, the Court stated,

it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 To construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee.¹⁰²

Also important are the issues that the Court did decide. While state compulsion to join a particular union may not be sufficient by itself to constitute an Article 11 violation, the Court held, there is interference with workers' rights when the workers were employed before the implementation of the closed shop and are unable to practice their particular trade elsewhere.¹⁰³ Moreover, the Court stated, because one purpose of freedom of association is to protect personal opinion, the guarantees of

⁹⁵ *Id.* at 27.

⁹⁶ *Id.*

⁹⁷ *Young v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) (1981).

⁹⁸ *Id.* at 8.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 21.

¹⁰¹ *Id.* at 21-22.

¹⁰² *Id.*

¹⁰³ *Id.* at 22-23.

Article 11 are infringed upon when an individual is pressured to join a union that stands for principles contrary to his own.¹⁰⁴ Finding no government aim sufficient to justify the interference under section two of the Article,¹⁰⁵ the Court concluded that the United Kingdom had violated Article 11.¹⁰⁶

Three opinions were filed in *Young* in addition to the opinion of the Court. Although only one judge dissented,¹⁰⁷ six judges signed a concurring opinion in which they argued that Article 11 directly protects the negative freedom of association.¹⁰⁸

[A]s we understand Article 11, the negative aspect of freedom of association is necessarily complementary to, a correlative of and inseparable from its positive aspect. Protection of freedom of association would be incomplete if it extended to no more than the positive aspect. It is one and the same right that is involved.¹⁰⁹

¹⁰⁴ *Id.* at 23-24.

¹⁰⁵ *Id.* at 24-26. The Court focused on the advantages of the closed shop that were claimed by the U.K., including:

the fostering of orderly collective bargaining, leading to greater stability in industrial relations; the avoidance of the proliferation of unions and the resultant trade union anarchy; the counteracting of inequality of bargaining power, meeting the need of some employers to negotiate with a body fully representative of the workforce; satisfying the wish of some trade unionists not to work alongside non-union employees; ensuring that trade union activities do not enure to the benefit of those who make no financial contribution thereto.

Id. at 24-25. Interestingly, the last of those rejected reasons adopted language used by the Supreme Court of the United States. The Supreme Court consistently has held that compulsory union membership does infringe upon workers' freedom of association under the First Amendment, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977), and that workers therefore can withhold union dues in the proportion that such dues are used for political and ideological purposes. *Id.* at 235-36. Nevertheless, unlike the *Young* Court, the Supreme Court has found that the need to prevent abuse by workers who do not contribute financially to their unions—workers whom it calls "free riders," *International Ass'n of Machinists v. Street*, 367 U.S. 740, 763-64 n.14 (1961)—justifies compulsory payment of dues for purposes that "may ultimately inure to the benefit" of the workers in question. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991) (emphasis added). For a general discussion of the Supreme Court's jurisprudence in this area, see W. Kearns Davis, Jr., Note, *Crawford v. Air Line Pilots Ass'n: The Fourth Circuit Determines What Expenses a Union May Charge to Nonunion Workers*, 72 N.C. L. REV. 1732, 1738-44 (1994).

¹⁰⁶ *Young v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) at 26 (1981).

¹⁰⁷ *Id.* at 30-32 (Sørensen, J., dissenting).

¹⁰⁸ *Id.* at 28-29 (Ganshof van der Meersch, Bindschedler-Robert, Liesch, Matscher, Pinheiro Farinha, and Pettiti, JJ., concurring).

¹⁰⁹ *Id.* A number of commentators agree with the concurrence. See e.g., Christian

Even using the majority's test, the concurrence argued, the trade union freedom guaranteed by Article 11 is a freedom of choice, and there is no choice in a closed-shop system.¹¹⁰

In his dissent, Judge Sørensen contended that Article 11 does not imply a negative freedom of association, even to the small degree recognized by the majority.¹¹¹ He based his opinion on the drafting history of the Article,¹¹² which stated:

On account of the difficulties raised by the "closed shop system" in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which "no-one may be compelled to belong to an association," which features in the United Nations Universal Declaration.¹¹³

In addition, he rejected the contention of the concurrence that the positive and negative freedoms of association are "simply two sides of the same coin."¹¹⁴ The positive right, he argued, is a collective right that can be exercised only by a group of individuals.¹¹⁵ The claimed negative right, in contrast, albeit important, is an individual freedom that protects *against* groups, not in favor of them, and thus is not implied by the existence of the positive right.¹¹⁶ Judge Sørensen acknowledged the value of a negative right of association, but concluded that "union security arrangements and the practice of the 'closed shop' are neither prohibited, nor authorized by Article 11 of the Convention. . . . At present, it is therefore a matter for regulation by the national law of each state."¹¹⁷

The next major case in this area was not decided until 1993. The Court's decision in *Sibson v. United Kingdom*¹¹⁸ was rendered just ten

Tomuschat, *Freedom of Association, in EUROPEAN SYSTEM*, *supra* note 9, at 493, 502; BETTEN, *supra* note 75, 75-76.

¹¹⁰ See *Young*, 44 Eur. Ct. H.R. (ser. A) at 28-29 (Ganshof van der Meersch, Bindschedler-Robert, Liesch, Matscher, Pinheiro Farinha, and Pettiti, JJ., concurring).

¹¹¹ *Id.* at 30-32 (Sørensen, J., dissenting).

¹¹² *Id.*

¹¹³ REPORT OF 19 JUNE 1950 OF THE CONFERENCE OF SENIOR OFFICIALS, *reprinted in* 4 COLLECTED EDITION OF THE TRAVEAUX PRÉPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 262 (1975) [hereinafter REPORT OF 19 JUNE 1950], *quoted in* *Young v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) at 21 (1981).

¹¹⁴ *Young*, 44 Eur. Ct. H.R. (ser. A) at 30-32 (Sørensen, J., dissenting).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Sibson v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993).

weeks prior to *Sigurjónsson*. Sibson was a truck driver for a private company (CNS) and the branch secretary of the Transport and General Workers Union (TGWU).¹¹⁹ CNS was not a closed shop.¹²⁰ After being accused of misconduct in the performance of his union duties, Sibson resigned from TGWU and joined a competing union, the United Road Transport Union (URTU).¹²¹ TGWU members retaliated by ostracizing him, obstructing his work, and threatening to strike if he continued to work at the particular CNS depot.¹²² CNS tried to settle the disagreement, but TGWU agreed only that it would not strike if Sibson either rejoined TGWU or left the depot, and Sibson refused to rejoin TGWU unless he received an apology from his accuser.¹²³ CNS offered to move Sibson to another depot less than two miles away, and told him that he would be sent home without pay if he reported for work at the original depot.¹²⁴ Rather than switch depots or rejoin his old union, Sibson resigned.¹²⁵

Sibson failed to obtain relief in England's courts.¹²⁶ He claimed before the Court that, where an individual is injured due to his failure to join a particular union, the failure of domestic law to provide a remedy constitutes a violation of Article 11.¹²⁷ The Court devoted its treatment of the issue to distinguishing *Young*, which it did by stressing three factors.¹²⁸ First, it noted, that Sibson offered to rejoin TGWU if he received an apology made clear that his objections to the union were not rooted in specific convictions about its ideology.¹²⁹ Second, CNS was not a closed shop.¹³⁰ Third, Sibson was not threatened with the loss of his livelihood, but in fact was offered a similar position with the same employer and in the same community.¹³¹ As it had done in *Young*, the Court avoided deciding whether Article 11 directly protects an individual's negative right of association.¹³² Instead it invoked the *Young* test—whether the alleged compulsion to associate “strik[es] at the very

¹¹⁹ *Id.* at 7.

¹²⁰ *Id.*

¹²¹ *Id.* at 7-8.

¹²² *Id.* at 8.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 9-10.

¹²⁷ *Id.* at 13.

¹²⁸ *See id.* at 14.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.*

substance of the freedom" expressly protected by Article 11¹³³—and found that there was no violation.¹³⁴

V. SIGNIFICANCE OF *SIGURJÓNSSON*

The *Sigurjónsson* majority purported to follow closely the Court's earlier decisions in *Young* and *Sibson*.¹³⁵ Its claim is true if comparison is limited to the facts of the cases, because those facts are very similar to one another.¹³⁶ However, the *Sigurjónsson* holding represents a major change in the Court's conceptual treatment of the negative right of association.

In *Young*, although the Court found that the employees' Article 11 rights had been violated by the compulsion to join the unions, it expressly declined to recognize an independently existing negative right of association.¹³⁷ Instead, it found only that certain types of compulsion effectively inhibit the positive freedom that Article 11 guarantees explicitly.¹³⁸ Although the Court arguably could have rested its *Sigurjónsson* judgment on such infringement of the positive right, as the Commission had done,¹³⁹ it chose not to do so. By relying instead on international "common ground," and on its own interpretation of the Convention as a "living instrument which must be interpreted in light of present-day conditions,"¹⁴⁰ the Court abandoned any pretext of faithfulness to the language of the Article and the original intent of its drafters. Therefore, though unwilling to decide whether the implied negative right is equal in weight to the express positive right, the *Sigurjónsson* Court changed the slope of the Article 11 playing field by obviating the need for complainants to connect injuries from compulsion to associate to an infringement of the positive right.

The statement above is not intended to deemphasize the decision of the Court to withhold judgment on the weight to be attributed to the negative right. In *Young*, the Court attached great importance to the fact that the penalty for failure to join a railroad union was not only the loss of the opportunity to work for a particular employer, but effectively the

¹³³ *Id.*; *Young v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) at 21-22 (1981).

¹³⁴ *Sibson v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) at 14 (1993).

¹³⁵ *Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 16 (1993).

¹³⁶ Compare *id.* at 8-10 with *Young*, 44 Eur. Ct. H.R. (ser. A) at 8-18 (1981) and *Sibson*, 258 Eur. Ct. H.R. (ser. A) at 7-10.

¹³⁷ *Young*, 44 Eur. Ct. H.R. (ser. A) at 21-22.

¹³⁸ *Id.* at 23-24.

¹³⁹ *Sigurjónsson*, 264 Eur. Ct. H.R. (ser. A) at 26-27; see *supra* notes 35-38 and accompanying text.

¹⁴⁰ *Id.* at 15-16.

loss of the freedom to practice the trade at all.¹⁴¹ The complainants in *Le Compte* also were threatened with the loss of their livelihood.¹⁴² Furthermore, in *Sibson*, the fact that another opportunity was available to Sibson was a significant factor in the Court's decision that his Article 11 rights had *not* been violated.¹⁴³ The decision of the *Sigurjónsson* Court to recognize an independent negative right indicates that it now may be willing to broaden the effect of that right beyond instances in which compulsion would render the complainant unable to practice her trade. Nevertheless, because Sigurjónsson, like the employees in *Young* and *Le Compte*, would have been unable to practice his profession at all if he had refused to join Frami,¹⁴⁴ the Court certainly left itself the option of limiting the new negative freedom to cases in which the penalty for failure to associate is the loss of one's livelihood.

Another way in which the impact of *Sigurjónsson* may be restricted is by applying it only when the association in question engages in political or ideological discourse. In both *Le Compte* and *Sigurjónsson*, the professional organization took positions on issues not directly related to the public purpose of regulating the profession. The *Le Compte* Court held specifically that an association created by the state for the protection of the general interest is not governed by Article 11.¹⁴⁵ Frami, the association at issue in *Sigurjónsson*, was not a public-law institution,¹⁴⁶ but the Court nevertheless considered it significant that Frami's purposes were not limited to the public interest.¹⁴⁷ The *Sigurjónsson* decision therefore leaves the Court room to limit the ban on compulsion as the U.S. Supreme Court did in *Keller*, to cases in which the association exceeds its authority to regulate and improve services.¹⁴⁸

The effect of *Sigurjónsson* on domestic practices will depend on the Court's resolution of the issues raised above. An expansive application of *Sigurjónsson* might outlaw all forms of compulsory membership, including closed shops and regulatory professional associations. A narrow application, however, might result in no change at all.

If compulsion is prohibited only when failure to associate leaves

¹⁴¹ *Young*, 44 Eur. Ct. H.R. (ser. A) at 22-23.

¹⁴² *See Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) at 8-9 (1981).

¹⁴³ *Sibson v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) at 14 (1993).

¹⁴⁴ *See Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 9 (1993).

¹⁴⁵ *Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) at 26-27 (1981); *see also supra* note 96 and accompanying text.

¹⁴⁶ *Sigurjónsson*, 264 Eur. Ct. H.R. (ser. A) at 13.

¹⁴⁷ *See id.* ("Frami was established under private law and enjoyed full autonomy in determining its own aims, organisation and procedure").

¹⁴⁸ *See also supra* notes 86-88 and accompanying text.

employees unable to practice their trades,¹⁴⁹ closed shops will suffer only minimal effects, because few closed shops are industry-wide. If compulsion to join professional associations, which often *are* industry wide,¹⁵⁰ is unlawful only when the organizations take ideological positions, then the organizations will be able to survive with only minor adjustments in their activities. Which tack the Court will choose remains to be seen. However, the fact that it could have reached its decision in *Sigurjónsson* using the precedents set in *Le Compte*, *Young*, and *Sibson*,¹⁵¹ but chose instead to make the conceptual leap of recognizing for the first time an independent negative right under Article 11, indicates that the Court anticipates a broader protection against compulsory membership than it previously has recognized.

VI. CONCLUSION

By inferring an independent negative right of association from Article 11, the Court in *Sigurjónsson* made a clean break from the clear intent of the Convention's drafters. Not only is language to support the Court's interpretation absent from the Article, but the framers consciously chose not to provide for a negative right of association.¹⁵² Even if we recognize the prerogative of the Court to interpret the Convention in light of evolving international standards,¹⁵³ it remains difficult to justify the Court's decision to do so in *Sigurjónsson*, when it could have reached the same result under the rules it had established in previous cases.¹⁵⁴

By forcing complainants to connect injuries from compulsion to associate to an infringement of the positive right to associate,¹⁵⁵ the *Young* rule effectively limited the scope of the negative right of association. If the Court truly is uncertain about the effect it will give the negative right, as its decision to reserve judgment on the issue implies,¹⁵⁶ in *Sigurjónsson* it inadvertently opened the door to enlargement of that right by removing the natural constraint of linkage to the positive right. It is more likely that the opening of the door was not

¹⁴⁹ See *supra* note 146 and accompanying text.

¹⁵⁰ See, e.g., *Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 12 (1993); *Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) at 8-9 (1981).

¹⁵¹ See *supra* note 141 and accompanying text.

¹⁵² REPORT OF 19 JUNE 1950, *supra* note 115, quoted in *Young*, 44 Eur. Ct. H.R. (ser. A) at 21; see also *supra* note 115 and accompanying text.

¹⁵³ See *Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 15-16 (1993).

¹⁵⁴ See *supra* note 141 and accompanying text.

¹⁵⁵ See *supra* note 142 and accompanying text.

¹⁵⁶ See *Sigurjónsson*, 264 Eur. Ct. H.R. (ser. A) at 15-16; see also *supra* note 57 and accompanying text.

inadvertent at all, but that *Sigurjónsson* signals a positive intent by the Court to expand the scope of the negative right of association. If the latter is true, the result may be a drastic change in the organization of trades and professions in Europe.

