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Associating or Disrupting: The Dutch Supreme Court's Struggle in Prohibiting a Controversial Association

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Abstract

Association Martijn was a Dutch association that provided a platform for discussing a liberal attitude regarding sexual contacts between adults and children. One of the issues to consider regarding its dissolution is whether its activities amounted to a disruption of society. The European Convention on Human Rights (ECHR) is instrumental in understanding this case, inter alia since it was an integral part of the Dutch Supreme Court's ruling. This ruling is examined critically. In considering whether an association should be dissolved, inter alia the significance of a majority morality, the materialisation of a disruption of society and the prevention of harm to children must be considered.

Keywords

freedom of association – freedom of expression – human rights – harm – criminal law

1 Introduction

The importance of the freedoms of association and expression is uncontested, but there may be legitimate reasons to restrict these freedoms. Opinions commonly vary with respect to court decisions, depending, *inter alia*, on one's evaluation of the importance of the rights concerned and how they have been balanced.

The rulings discussed in this article are not exceptional in this regard. They center around a question that will also be the main question, namely, at what point promoting a view on sexuality that is generally considered unacceptable is tantamount to a disruption of society. This question will be answered by focusing on an actual case, which has the benefit that the relevance of raising it will become apparent. That case is the Association Martijn case. The subject matter is controversial, since Association Martijn provided a platform to discuss the acceptability of sexual contact between adults and children. That such contact is unacceptable is not a matter of debate here. What we want to address is rather to what extent should such an association be allowed to exist and express views that contravene the generally accepted view.

Section 2 discusses the Association Martijn case, presenting the rulings of the Dutch courts, culminating in the ruling of the Dutch Supreme Court. Section 3 adds pertinent aspects of the European Convention on Human Rights (ECHR), presenting case law of the European Court of Human Rights (ECtHR). Section 4 considers the main ideas, values and interests that are part of the courts' analyses, and attempts to form a consistent view, by means of which an answer to the main question is formulated.

2 The Association Martijn Case as a Case Study

2.1 *The Prosecution and the Ruling of the District Court Assen*

Article 2 of Book 2 of the Dutch Civil Code (henceforth Article 2:20 CC) makes a prohibition by the District Court, upon the request of the Public Prosecution Service, of a juridical person possible if its activities are contrary to public

order.¹ The legislative history attests that the then Minister of Justice observed: “It seems to me impossible that the judge will interpret this [public order] as ‘undesirable from a societal perspective’. That would, after all, have a wider scope than ‘contrary to the law’. There is no reason to fear such an abuse or arbitrariness [...]”.² Indeed, “Only actions that contravene the generally accepted foundations of our legal system may justify the prohibition of an association or another juridical person: the unjustified impairment of the freedom of others or of human dignity. [...]”.³

The Public Prosecution Service initiated a civil procedure against Association Martijn, arguing that its activities were contrary to public order. It provided information, maintained a weblog and published materials (including materials provided by others) on its website, divulging the sexual orientation of its members. Its board members were publicly active, portraying children as objects of lust, excusing and glorifying sexual contact between adults and children, and ridiculing criminal convictions. The Public Prosecution Service did not, however, argue that the association *itself* had committed criminal acts.

The District Court Assen declared Association Martijn prohibited, arguing that Association Martijn maintained that: (1) children are objects of lust, (2) there is nothing wrong with sexual contact between adults and children, (3) sexual contact between adults and children must be glorified, (4) criminal convictions of sex offenses with children are ridiculous, and (5) sexual contact between adults and children is very ‘natural’.⁴

The association argued that its website must be considered a news archive to present how the perspective of many people in the 1980s differs from the prevailing one with respect to the issue of sexual contact between adults and children. The goal of the publication of the materials was, accordingly, not sexual stimulation or condoning sexual contact with children, and ideas of the past should not be attributed to Association Martijn.⁵ However, after the Court – taking the legislative history into consideration – indicated that even views that are considered morally objectionable are constitutionally protected, it nevertheless maintained: “Association Martijn’s activities

1 The law has been amended significantly since the case under discussion, but the changes have come into force after the procedure had been concluded, and need not, accordingly, be discussed here.

2 Parliamentary Documents: House of Representatives, 1984/1985, 17476, no. 5, p. 2.

3 Parliamentary Documents: House of Representatives, 1984/1985, 17476, no. 5, p. 3.

4 District Court Assen June 27, 2012, section 2.11.

5 District Court Assen June 27, 2012, section 2.12.

contravene the generally accepted foundations of our legal system; these activities are, therefore, contrary to public order.”⁶ According to the Court,

[...] the activities of Association Martijn, considering the coherence and connection between the materials that are offered on its website and its views, as they have been expressed by its board members and its convictions, are indicative of the association’s goal to make it possible for its members to have sexual contact with children, in light of which the association glorifies that sexual contact and makes it seem something that is, or should be, normal and acceptable. It is that goal that constitutes a serious contravention of the prevailing fundamental values in our society and therefore conflicts with our legal order. Association Martijn creates or contributes to a subculture in which sexual acts between adults and children are considered normal and acceptable. The association thereby impairs the rights of children. The protection of the sexual integrity of children is unmistakably one of the most fundamental principles of our legal order. The Dutch constitutional state should, moreover, not offer any room for that impairment from an international legal perspective.⁷

First, however, it is unclear how creating or contributing to such a subculture would *in and of itself* impair the rights of children. Second, even supposing this were the case and presuming that protecting the sexual integrity of children is a government duty, it is still an open question whether that protection is one of the most fundamental principles of the legal order.

To be clear: these considerations notwithstanding, the Dutch Government should not leave any room to impair the sexual integrity of children, in accordance with the Dutch Criminal Code, which includes several punishable acts aim to protect the interests of children in that respect (notably Articles 239 to 254). What is at issue, however, is whether what the Court argued is sufficient a basis to conclude that Association Martijn was guilty of what it was accused of. It appears that the Court has construed – contrarily to the legislator’s intention – a contravention of the generally accepted foundations of the legal system because it considered the association’s existence something undesirable from a moral perspective, since a vast majority of the population considers pedophilia repulsive and disapproves of concomitant sexual acts.

⁶ District Court Assen June 27, 2012, section 2.16.

⁷ District Court Assen June 27, 2012, section 2.14.

2.2 *The Ruling of the Court of Appeal Arnhem-Leeuwarden*

Addressing the question of whether Association Martijn's activities are contrary to public order, the Court of Appeal emphasized – just as the District Court Assen – the importance of respecting freedom of association as a fundamental principle of the constitutional democratic state. Declaring an association prohibited is a serious limitation of this basic right, which may only be resorted to in the most extreme situation: “A declaration of prohibition cannot, accordingly, solely be based on behavior that is considered undesirable from a societal perspective.”⁸ The Court of Appeal subsequently presented its criterion for deciding whether a declaration of prohibition is legally warranted, which is that “[...] the measure is necessary to prevent actions that constitute an actual and serious impairment of principles of our legal system which are considered essential constituents and are or may be disruptive to society.”⁹ Only if *both conditions* are met – so if *both* an actual and serious impairment of those principles of the legal system *and* a (possible) disruption of society is at issue – is a prohibition warranted. The Court of Appeal ruled that in the case of Association Martijn only the first condition is met. How did it reach this conclusion?

The Court of Appeal stated that the sexual offenses for which the board members had been convicted cannot be identified as activities of the association in the sense specified in Article 2:20 CC. The association itself has not, insofar as may be determined, committed criminal offenses; the motivation behind the Public Prosecution Service's initiative seems to have been to terminate the situation in which the association was allowed to make it appear as if a perspective of sexual morals that is considered – by the majority – to be perverted and depraved is acceptable. That is not, however, according to the Court of Appeal, the purpose behind Article 2:20 CC:

Insofar as the Public Prosecution Service intended to argue that the association promotes a different morality than the morality with respect to sexual contacts with children that is entrenched in present society, its stance is unwarranted. Using an association as a means to plead more liberal sexual morals and decriminalizing sexual offenses legislation does not contravene public order, even if intimate contacts with minors are concerned.¹⁰

⁸ Court of Appeal Arnhem-Leeuwarden April 2, 2013, section 4.12.

⁹ Court of Appeal Arnhem-Leeuwarden April 2, 2013, section 4.12.

¹⁰ Court of Appeal Arnhem-Leeuwarden April 2, 2013, section 4.15.

The Court of Appeal maintained that the first condition was met, so that the association's activities constituted an actual and serious impairment of principles of the legal system that are considered essential constituents, and that protecting the sexual integrity of children is one of the generally accepted principles of the legal system. That 'protection principle' not only comprises the investigation and prosecution of criminal acts, but also "[...] any organization in which desires are nurtured among individuals with a pedophilic orientation in such a way and feelings of discontent of these individuals are mitigated in such a way that a sheltering environment develops in which such criminal acts may be considered justified and beneficial."¹¹

The association's website not only afforded the opportunity to pedophiles to discuss their feelings and desires without reserve, which would itself be allowed, but exceeded what is allowed because it trivialized, excused and even glorified the dangers of sexual contact with children. There was thus "[...] an actual and serious impairment of the principle, considered something essential, that the physical and sexual integrity of the child should be protected."¹² However, in order for a prohibition to be warranted, it must *also* be proved that the association's activities are or may be disruptive to society. The Court of Appeal observed that Article 2:20 CC does not aim to protect the interests of individual children, but rather the interests of society.¹³ It is not even warranted to conclude that there is a threat to society if the activities are widely considered perturbing. Accordingly, the District Court Assen's ruling was quashed.

The Court of Appeal thus presented itself as a guardian of the liberal democratic state: associations cannot be prohibited on account of their abhorrent ideas, and only if their activities may bring about a disruption of society is a prohibition warranted.

2.3 *The Ruling of the Supreme Court*

The Public Prosecution Service appealed in cassation to the Court of Appeal's ruling, contesting its conclusion that it is necessary for a declaration of prohibition for an association to be warranted that the association's activities bring about (the danger of) a societal disruption. So, the position the Public Prosecution Service contested was that the disruption criterion must be interpreted cumulatively; it maintained that an impairment of the principles

¹¹ Court of Appeal Arnhem-Leeuwarden April 2, 2013, section 4.17.

¹² Court of Appeal Arnhem-Leeuwarden April 2, 2013, section 4.19.

¹³ Court of Appeal Arnhem-Leeuwarden April 2, 2013, section 4.20. It was pointed out above that separate legislation exists to protect the interests of individual children.

of the legal system that are considered essential constituents was sufficient to warrant a prohibition.

In its discussion of the cassation appeal the Supreme Court referred to a criterion referred to in its case law:

[...] in answering the question whether the activities of the juridical person are contrary to public order, the point of departure is that freedom of association, guaranteed in (Article 8 of the Dutch Constitution and Article 11 ECHR), is a principle of the liberal democratic state, and that prohibiting a juridical person constitutes a serious impairment of this basic right, which may only be a measure of last resort. For a declaration of prohibition to be warranted more must, accordingly, be at issue than behavior that is undesirable from a societal perspective. The declaration of prohibition must be viewed as a necessary measure to prevent actions that constitute an actual and serious impairment of principles of our legal system which are considered essential constituents and are or may be disruptive to society.¹⁴

The Supreme Court thus appears to have acknowledged that the disruption criterion needs to be considered in answering the question whether a prohibition is warranted. Yet, oddly, the Supreme Court did not subsequently determine whether this criterion was met; it rather inquired whether a prohibition met the criteria of the limitation grounds of Article 11 (and Article 10, concerning freedom of expression);¹⁵ it answered this question affirmatively, meaning that a prohibition does not conflict with the ECHR.¹⁶ The Supreme Court considered, referring to the protection of the health and of the rights and freedoms of others, a large number of norms of international law concerning the protection of the sexual integrity of children to which the Netherlands has supposedly committed itself. Subsequently, the Supreme Court determined that the cassation appeal was accepted, without, however, clarifying why. The Supreme Court subsequently stated, rather opaquely, that the Court of Appeal was correct in observing that society has not been disrupted since Association Martijn's creation but has instead proved defensible, and acknowledged the Court of Appeal's judgment that:

¹⁴ Dutch Supreme Court April 18, 2014, section 3.5.

¹⁵ Dutch Supreme Court April 18, 2014, sections 3.5 and 3.6.

¹⁶ Article 11 ECHR will be discussed in section 2.

[...] the declaration of prohibition is only acceptable if it can be qualified as a necessary measure to prevent actions that constitute an actual and serious impairment of principles of our legal system which are considered essential constituents and are or may be disruptive to society. This viewpoint does not, however, entail that a serious disruption of society by the activities of the association is a necessary condition to determine that those are contrary to public order. The Court of Appeal should have examined, on the basis of the conditions and grounds referred to in section 3.6, taking into consideration the viewpoints presented in sections 3.7 to 3.9.5, whether the prohibition and dissociation of the association are necessary in a democratic society for the protection of health, public order or the protection of the rights and freedoms of others.¹⁷

The Supreme Court subsequently ruled on the issue, stating:

While in general great reticence is called for where prohibiting and dissociating an association is concerned, the exceptionally serious nature of the actions at issue, the nature of the activities of the association – which intends to remove possible limitations in having sexual contact with children for its members, thus promoting such contact – and the concomitant apparent intention of its members must result in the conclusion that, balancing all rights and interests concerned, it is necessary, in a democratic society, to prohibit and dissociate the association for the protection of the health and the protection of the rights and freedoms of children. [...] In this light, the Supreme Court will, quashing the Court of Appeal's ruling, confirm the District Court's verdict.¹⁸

The Supreme Court maintained, then, that the disruption criterion must not be interpreted cumulatively. However, this raises the question of how it must instead be interpreted. One may suggest an alternative of a hypothetical standard, but that would appear, in this case, to be an artifice, since there will always be only very few people who glorify sexual contact with minors. So, it is understandable, but not for a positive reason, that the Supreme Court did not specify how the disruption criterion should be interpreted by substituting the necessity test of the ECHR for the disruption criterion.

¹⁷ Dutch Supreme Court April 18, 2014, section 3.10.

¹⁸ Dutch Supreme Court April 18, 2014, sections 3.11 and 3.3.12.

3 The Dimension of the European Convention on Human Rights

As was indicated in the previous section, the Supreme Court referred to the ECHR. That it refers to the ECHR is understandable because of the Dutch Constitution stipulates (Articles 93 and 94) that provisions of treaties that may be binding on all persons take precedence over Dutch laws, but whether the appeal is also *justified* is another matter. This section aims to answer that question.

The freedoms listed in Articles 8–11 of the ECHR are subject to interference by state authorities as long as such they are prescribed by law and ‘necessary in a democratic society’ for the protection of certain aims, including the protection of public order, health, morals, or the rights of others.¹⁹ For the purpose of this article, Articles 10 and 11 ECHR in particular are relevant, which protect, respectively, the freedoms of expression and of assembly and association. Article 11 ECHR reads:

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.

As reasons to justify restrictions with respect to freedom of expression, Article 10, section 2, ECHR lists national security, territorial integrity, public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence and the maintenance of the authority and impartiality of the judiciary.

With respect to freedom of assembly and association, the ECtHR holds that “[...] the way in which national legislation enshrines this freedom and its

19 See, e.g., Janneke Gerards, ‘How to Improve the Necessity Test of the European Court of Human Rights’, (2013) 11(2) *International Journal of Constitutional Law* 466–490, 466.

practical application by the authorities reveal the state of democracy in the country concerned.”²⁰ According to the ECtHR, a direct relationship exists between democracy, pluralism and freedom of association and “[...] only convincing and compelling reasons can justify restrictions on freedom of association.”²¹ This right includes ‘The ability to establish a legal entity in order to act collectively in a field of mutual interest [...]’.²²

Judges applying Article 11 do so by evaluating the circumstances of the case in light of a ‘three-step test’. Applying this test, it is determined whether (1) the interference was prescribed by law (which means, briefly put, that the law on which the interference is based must be ‘adequately accessible’ and ‘formulated with sufficient precision to enable the citizen to regulate his conduct’);²³ whether (2) it pursued one of the aims stated in Article 11; and whether (3) the interference was ‘necessary in a democratic society’. In examining whether a ‘pressing social need’ exists on the basis of which it may be justified to curtail this right, the ECtHR grants national authorities a limited ‘margin of appreciation’, namely, the discretion national authorities are granted in applying ECHR rights,²⁴ stemming from the subsidiary nature of the Convention mechanism.²⁵ That the margin of appreciation is limited in this case follows

20 *Association of Victims of Romanian Judges v Romania* (Judgment) ECtHR App No 47732/06 (14 January 2014), para 25.

21 *Association of Victims of Romanian Judges v Romania* (Judgment) ECtHR App No 47732/06 (14 January 2014), para 25.

22 *Gorzelić and others v Poland* (Judgment) ECtHR App No 44158/98 (17 February 2004), para 88.

23 *Sunday Times v United Kingdom* (Judgment) ECtHR App No 6538/74 (26 April 1979), para 49.

24 Howard Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Court of Human Rights Jurisprudence* (Martinus Nijhoff Publishers, 1996) 15 defines it as follows: “The national margin of appreciation or discretion can be defined [...] as the freedom to act; maneuvering, breathing or “elbow room”; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention’s substantive guarantees. It has been defined as the line at which international supervision should give way to a State Party’s discretion in enacting or enforcing its laws.”

25 Cf. *Association of Victims of Romanian Judges v Romania* (Judgment) ECtHR App No 47732/06 (14 January 2014), para 26: “In its scrutiny, the Court’s task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion [...]”; *Sunday Times v United Kingdom* (Judgment) ECtHR App No 6538/74 (26 April 1979), para 59: “[...] the Court has underlined that the initial responsibility for securing the rights and freedoms enshrined in the Convention lies with the individual Contracting States.” See also Michael

from the fact that “[...] in determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision, embracing both the law and the decisions applying it, including those given by independent courts.”²⁶

In the case of *Association Martijn*, the Supreme Court began by noting that “[...] freedom of association is a fundamental principle of the democratic constitutional state, and that banning a legal entity represents a serious infringement of this fundamental right that should only be resorted to in extreme cases. A declaration of prohibition must therefore be based on more than behavior that is undesirable from a social point of view.”²⁷ A declaration of prohibition “[...] should be considered a necessary measure to prevent conduct that constitutes an actual and serious violation of the principles of our legal system that are perceived to be essential and that disrupts or may disrupt our society.”²⁸

In applying the three-step test, the Supreme Court found that the condition ‘prescribed by law’ was met, with Article 2:20 CC being “[...] a legal provision that has been formulated with sufficient precision, and thus provides a sufficient basis to prevent arbitrariness.”²⁹ The Supreme Court found that the protection of health and the rights and freedoms of others (namely, children) were the applicable aims.³⁰ Ultimately, the question of whether *Martijn* could be declared a prohibited entity amounted to the question of whether it was considered ‘necessary in a democratic society’.³¹

The Supreme Court examined whether the interference with freedom of assembly met a ‘pressing social need’ and was ‘proportionate to the legitimate aims pursued’, and whether the reasons to justify the interference were ‘relevant and sufficient.’³² Referring to *Vona v Hungary* – a case about the dissolution a political movement that held military-styled rallies in Hungary, particularly in villages with

Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’, (1999) 48(3) *International and Comparative Law Quarterly* 639–640.

26 *Association of Victims of Romanian Judges v Romania* (Judgment) ECtHR App No 47732/06 (14 January 2014), para 25.

27 Dutch Supreme Court 18 April 2014, section 3.5.

28 Dutch Supreme Court 18 April 2014, section 3.5.

29 Dutch Supreme Court 18 April 2014, section 3.7.

30 Dutch Supreme Court 18 April 2014, section 3.11.3.

31 There is no exact way to determine the meaning of the term ‘necessary’. However, the European Court’s perspective is helpful here, given that it has considered that ‘necessary’ is not synonymous with ‘indispensable’, ‘absolutely necessary’, ‘strictly necessary’, or ‘strictly required’, and that it is neither as flexible as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’. See *Handyside v United Kingdom* (Judgment) ECtHR App No 5493/72 (7 December 1976), para 48.

32 Dutch Supreme Court 18 April 2014, section 3.8.

large Roma populations³³ – the Supreme Court held that, when examining the activity of the association, as well as its apparent intention and consequences of the relevant expressions and behavior, it is not necessary that the association actually poses a danger to public order. In *Vona v Hungary*, the ECtHR held that

[...] the State is [...] entitled to take preventive measures to protect democracy *vis-à-vis* such non-party entities if a *sufficiently imminent* prejudice to the rights of others threatens to undermine the fundamental values on the basis of which a democratic society exists and functions. One such value is the coexistence of members of society free from racial segregation, without which a democratic society is inconceivable. The State cannot be required to wait, before intervening, until a political movement takes action to undermine democracy or has recourse to violence. Even if that movement has not made an attempt to seize power and the risk of its policy to democracy is not imminent, the State is entitled to act preventively if it is established that such a movement has started to take concrete steps in public life to implement a policy incompatible with the standards of the Convention and democracy [...].³⁴ (emphasis added)

Ultimately, the Supreme Court considered it to be necessary in a democratic society to prohibit and rescind the association in the interests of protecting the health and rights and freedoms of children, given the exceptionally serious nature of the conduct in question, the nature of the association's activity, and the corresponding apparent intention of its members.³⁵

It is – indeed – important that children be protected from being sexually exploited and abused, but that is not the issue here; a distinction must be made against a disruption of society and the protection of individuals. As was mentioned in section 1, the relevant actions are prohibited on the basis of the Dutch Criminal Code, which aims to protect children on that basis. Invoking the same protection to prohibit an association is unwarranted, since such a prohibition requires a different justification.

Importantly, of course, Article 11 ECHR not only includes 'the protection of health or morals' and 'the protection of the rights and freedoms of others' as justificatory grounds to curtail freedom of assembly and association, but also 'the prevention of disorder'. Strikingly, however, the Supreme Court did not

33 *Vona v Hungary* (Judgment) ECtHR App No 35943/10 (9 July 2013), para 59.

34 *Vona v Hungary* (Judgment) ECtHR App No 35943/10 (9 July 2013), para 57.

35 Dutch Supreme Court 18 April 2014, section 3.11.3.

focus its analysis on the latter element. After all, having observed that the mere fact that the association's activities pose a threat to the public order does not provide sufficient reason to prohibit it,³⁶ it based its judgment, resulting in the prohibition, on the necessity of protecting the sexual integrity of children, adding that the situation in which lowering the threshold of realizing sexual contact with children and facilitating such contact is realized is a consideration to reach that conclusion.³⁷

If the *current* protection sexual integrity of children is not the crucial consideration, that protection being, after all, legally provided, a *possible* – to be prevented – development toward the normalization of sexual contact with children is apparently the decisive consideration. One of the issues that must be addressed is whether an appeal to the “sufficiently imminent prejudice to the rights of others” is justified. This is the case if a disruption of society is a realistic danger. This consideration may be extended to the protection of the sexual integrity of children, so that, in other words, preventive measures may be called for if an association pleads a change in this respect, and thus seeks to weaken the protection of children's sexual integrity, and a significant number of other people are likely to support such an initiative. A number of additional questions may be raised regarding the justification of such measures, which will be addressed in the next section.

4 Justifying Restrictions

To answer the question raised at the end of the previous section, namely, at what stage, if any, it would be warranted to prohibit an association, it must become clear what a disruption of society is (and, of course, whether what Association Martijn promoted amounts to such a disruption).

First of all, since pedophilic acts are at present not generally accepted,³⁸ a situation that is not, it seems, likely to alter anytime soon, even if a disruption were – *arguendo* – the result of allowing Association Martijn's activities, it is to be expected that such a disruption would be (successfully) opposed.³⁹

³⁶ Dutch Supreme Court 18 April 2014, section 3.11.2.

³⁷ Dutch Supreme Court 18 April 2014, section 3.11.3.

³⁸ It is not unwarranted to say that this remark may be made with respect to several other societies as well, which is relevant in light of the fact that what is argued in this section's analysis is not limited to the Netherlands.

³⁹ This was, in fact, a consideration in the Court of Appeal's ruling (Court of Appeal Arnhem-Leeuwarden April 2, 2013, section 4.20), which, as was specified in section 1, quashed the declaration of prohibition of Association Martijn.

Notably, the Supreme Court observed, as was pointed out in section 1, that the idea of allowing sexual contact between adults and young children *conflicts* with broadly shared views,⁴⁰ but taking that seriously means that it is *not* justified to maintain that a danger exists of this idea readily becoming generally accepted, with the corollary that there is *no* need to curtail Association Martijn's freedoms.

The fact that a disruption of society is not imminent is important, but a principled matter must also be addressed: it seems peculiar, or even paradoxical, that an association should be *allowed* to express certain views or provide a platform to have others express such views just as long as the intended objectives have not been realized and will not be realized in the near future, and must be *disallowed* to do so (and even dissolved) before the time has come that those objectives have indeed been realized.

In *Vona v. Hungary*, the ECtHR referred to its ruling in *Refah Partisi and others v. Turkey*, where the 'timing' issue was a vital element in the analysis. To be sure, the Refah Partisi case differs from the Association Martijn case as it concerned a political party, but what the ECtHR observed with respect to the Refah Partisi is relevant to the case under discussion.

On the one hand, the ECtHR maintained that a political party may only promote a change in the law or the legal and constitutional structures of the State if the change proposed is compatible with "fundamental democratic principles"⁴¹ (the other condition, that the procedure to realize that goal is legal and democratic, does not have to be considered here, as it does not bear on the Association Martijn case). On the other hand, a political party may not divulge its agenda from the outset,⁴² so that it may not be clear whether the principles in question are at stake. The phrase 'sufficiently imminent', mentioned above, featured prominently in the ECtHR's consideration: it must be determined "[...] whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent [...]."⁴³

Association Martijn was no political party, but it did seek to realize the legal and societal acceptance of relationships between young and old people.

⁴⁰ Dutch Supreme Court 18 April 2014, section 3.11.3.

⁴¹ *Refah Partisi and others v Turkey* (Judgment) [GC] ECtHR App Nos 41340/98, 41342/98, 41343/98 and 41344/98 (13 February 2003), para 98.

⁴² *Refah Partisi and others v Turkey* (Judgment) [GC] ECtHR App Nos 41340/98, 41342/98, 41343/98 and 41344/98 (13 February 2003), para 101.

⁴³ *Refah Partisi and others v Turkey* (Judgment) [GC] ECtHR App Nos 41340/98, 41342/98, 41343/98 and 41344/98 (13 February 2003), para 104.

One might hold, on the basis of a certain interpretation of these “fundamental democratic principles”, that pursuing such a goal is acceptable, *provided it is never realized*; that is where the peculiarity or paradox manifests itself. In any event, it is strange, given the fact that the association was not a political party, that the ‘sufficiently imminency’ was a consideration at all for the Supreme Court; a binary decision (where the association’s activities were either acceptable or not, no need to await the outcome of political developments being necessary) would have been more understandable.

In addition, it must be made clear what qualifies as a disruption of society in the first place. Should pedophilic acts become generally accepted (just as homosexuality, which was once generally frowned upon, and even illegal⁴⁴), no disruption of society is at issue; it simply ceases to be a concern, having become as ‘normal’ as heterosexuality (or homosexuality). It has become, in that case, part of a *new* majority morality, which has supplanted the previous one, part of which was that pedophilic acts were not acceptable.

The *present* majority morality (with which the authors of this article concur, by the way) is that pedophilic acts are not acceptable. As was just observed, the indication of an *imminent* disruption of society is no reason to justify the prohibition, but would it not be correct to maintain that a disruption of society is *already* at issue if the association is allowed to exist and carry out its activities?

The Wolfenden Report is still a relevant reference point. It recommended that “[...] homosexual behavior between consenting adults in private should no longer be a criminal offense.”⁴⁵ but also, maintaining that it is part of the function of the law to preserve public order and decency, that homosexual behavior in public should “[...] continue to be dealt with by the criminal law.”⁴⁶ With respect to the issue under discussion, a new majority morality in this regard may be said to have replaced the previous one, followed by yet another one, once homosexual behavior *in public* became generally acceptable. As Hart argues, such a change is possible without concluding that society is destructed.⁴⁷

44 This comparison is not accidental, as will become apparent. For completeness, it should be noted that homosexuality is still illegal in some states.

45 Wolfenden Report (*Report of the Committee on Homosexual Offences and Prostitution*), September 4, 1957 (London: Her Majesty’s Stationary Office, 1957), section 62 (p. 53).

46 Wolfenden Report, section 49 (p. 45).

47 Herbert Hart, *Law, Liberty and Morality* (Stanford, CA: Stanford University Press, 1963) 51, 52. The question whether Hart justifiably observes that the idea “[...] that *some* shared morality is essential to the existence of any society [...]” is acceptable (Herbert Hart, *Law, Liberty and Morality*, 51) need not be explored here.

Pointing to the possibility of such a change does not address the real issue, though, for what must become clear is whether and, if so, to what extent, it should be allowed to act contrary to the majority morality; that is what is germane with respect to the position of Association Martijn. The Wolfenden Report points to the importance of individuals' private lives, observing that interventions should not extend beyond what is necessary.⁴⁸ The idea of a majority morality is, moreover, difficult to reconcile with the existence of a liberal democratic state, at least if it is imposed on individuals; its imposition on those who have not (already) accepted it as (part of) their worldview would amount to a dissolution of the 'liberal' part.

The irony of the fact that those who are critical of homosexual affectations being displayed in public (whether or not on the basis of a religious outlook with which they are considered not to be compatible) may not be lost on those who take the meaning of a majority morality seriously and would defend the right of those, who once constituted a *minority*, who hold that the rights should exist to display them in public, and if they are willing to take a consistent stance in the matter, they should allow those critical of such displays the right to express themselves, provided, of course, that they do not resort to violence. It is not amiss to refer to Hart in this respect as well: "If we conceive the successor to the 'common morality' to be not permissiveness but moral pluralism in some area of conduct once covered by a sexual morality which has decayed through the flouting of its restrictions, the thesis to be tested would presumably be that where moral pluralism develops in this way quarrels over the differences generated by divergent moralities must eventually destroy the minimal forms of restraint necessary for social cohesion."⁴⁹

What this means is that the importance of freedoms such as freedom of association and freedom of expression must be acknowledged, but it does not provide the basis to conclude that no restrictions of any kind should be accepted. Restrictions of the kind addressed in the Wolfenden Report are arguably problematic (from the present perspective), in particular in a liberal democratic state, but *other* restrictions may be warranted. The motive behind such restrictions is an important factor.

48 Wolfenden Report, section 14 (p. 21). Cf. Herbert Hart, *Law, Liberty and Morality*, 22: "[...] interference with individual liberty may be thought an evil requiring justification for simpler, utilitarian reasons; for it is itself the infliction of a special form of suffering – often very acute – on those whose desires are frustrated by the fear of punishment. This is of particular importance in the case of laws enforcing a sexual morality."

49 Herbert Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), Essay 11 ("Social Solidarity and the Enforcement of Morality") 262.

A proper motive would in this case be the prevention of harm. Mill famously presented the ‘harm principle’ in the following formulation: “[...] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”⁵⁰ ‘Harm’ is an abstract term, and one may debate whether it covers only *physical* harm,⁵¹ but an abstract or exegetical exercise may be forgone here, given the object of this article. It is easy to argue that pedophilic acts constitute harm, in the sense of physical harm and otherwise. This was, incidentally, an explicit consideration in the Wolfenden Report: “We have given anxious consideration to the third argument, that an adult male who has sought as his partner another adult male may turn from such a relationship and seek as his partner a boy or succession of boys. We should certainly not wish to countenance any proposal which might tend to increase offenses against minors. Indeed, if we thought that any recommendation for a change in the law would increase the danger to minors we should not make it.”⁵²

This is sufficient reason to make pedophilic acts illegal, even, as Hart observes, when minors consent to the sexual actions.⁵³ Such a stance is also in line with Mill’s perspective, who – rightly – maintains that the ‘harm principle’ does not apply to minors (and that they are, in other words, to be protected from harm they may inflict to themselves) on account of their limited judgment.⁵⁴ Importantly, however, that is not the kernel of the case. As was pointed out in section 1, a distinction must be made between, on the one hand, protecting individuals from harmful actions and, on the other hand, protecting society from a disruption.

A final issue to consider is the nature of morality. The perspective presented above presupposes moral relativism, since it accepts the premise that what is right is *decided* by the view of the majority of the people. The alternative, moral absolutism, is that some acts (whether or not they are associated with pedophilia) may be morally objectionable *irrespective* of what the majority thinks (or what anyone thinks, for that matter). Since this is no meta-ethical exposition, a general – and abstract – analysis will be forgone; we will limit ourselves to the main pertinent aspects.

50 John Stuart Mill, *On Liberty* (Collected Works of John Stuart Mill, vol. 18, Toronto/Buffalo, NY, University of Toronto Press, 1977 [1859]), Chapter 1, p. 223.

51 Mill himself appears not to limit his analysis to physical harm (see, e.g., John Stuart Mill), *On Liberty*, Chapter 1, p. 224 (where Mill speaks of “any evil” and “an act hurtful to others”) and Chapter 3, p. 260 (where the phrase “a nuisance to other people” is used).

52 Wolfenden Report, section 56 (p. 49).

53 Herbert Hart, *Law, Liberty and Morality*, 3.

54 John Stuart Mill, *On Liberty*, Chapter 1, 224.

An important question to raise in this respect is what the ECtHR means when it uses the phrase “fundamental democratic principles”. Apparently, democracy is not equated with the proper procedure, according to which the majority view – consonant with the majority morality – is the only relevant factor in reaching decisions, for otherwise the dissolution would make no sense. (This matter is, admittedly, somewhat more complicated if the issue of militant democracy – which is concerned with the question of whether a democracy may be dissolved by democratic means – is taken into consideration). In addition, the ECtHR apparently substitutes a ‘substantive’ conception of democracy for the procedural alternative, since it maintained: “One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention.”⁵⁵

The term ‘the rule of law’ is used here, and apparently in particular a ‘substantive’ or ‘thick’ conception of the rule is presumed, which has been defined as “[...] governance under a rule of law that includes all of the principles of the rule of law, including those related to substantive justice and enforcement of human rights protections.”⁵⁶ (After all, a ‘thin’ conception does not impose restrictions insofar as the *contents* of the law are concerned). The rule of law would accordingly, as it contains elements testifying of moral absolutism, form a counterbalance against a majority morality or, more precisely, certain specifications of the majority morality.

This perspective raises several questions, however. For example, for the rule of law to be relevant in any sense it needs to be specified, by some organization, and if the majority view is *not* to be decisive, it must be made clear *whose* view is – instead – to be decisive, and *why*. (Importantly, the principles are not self-evident and do not compellingly indicate what course of action is the ‘right’ one). Similarly, it must be made clear how (potential) conflicts between certain values are to be resolved. Such conflicts not only occur between the (prevailing) majority morality and one or more rule of law elements, which becomes apparent if one considers that it must be decided which right should prevail in the case of conflicting rights.

Applied to the topic under discussion, it is not possible to decide on the basis of the rule of law whether freedom of association could be invoked (contra the majority morality) or other rights or values could be appealed to in order to limit freedom of association. That a skeptical stance is called for in

55 *Klass and Others v Germany* (Judgment) ECtHR App No 5029/71 (6 September 1978), para 55.

56 Robert Stein, ‘What Exactly is the Rule of Law?’ (2019) 57(1) *Houston Law Review* 185–201, 196.

that respect does not mean, however, that an answer to the main question cannot be provided, since it concerns the disruption of society, and since there is no danger that this outcome will manifest itself, a dissolution of an association such as Association Martijn does not appear justified.

5 Conclusion

This article has addressed a sensitive issue; since what has been discussed may be considered controversial it may not be amiss to clarify our position once again here. Sexual contact between adults and children is unacceptable according to the majority morality (and according to the authors of this article), but this must be distinguished from the freedom of an association such as Association Martijn to serve as a platform to express views that may be contrary to the (present) majority morality, as long as no disruption of society exists or is imminent. There are good reasons to penalize adults who engage pedophilic acts (or take other measures in the case of mentally disturbed individuals), but those reasons may not serve to curtail an association's freedom; such curtailment requires a justification of its own.

An important factor in distinguishing between these two situations is the infliction of harm. Pedophilic acts constitute harm and are for that reason to be proscribed. That matter is relatively straightforward. Evaluating the meaning of a (potential) disruption of society, conversely, must be assessed with the necessary nuance and precision, taking the various relevant interests into consideration.

With respect to the Dutch case in particular, it may be observed that the Court of Appeal's analysis – and the concomitant ruling – is more consistent than the Supreme Court's: the latter, referring to Articles 10 and 11 ECHR, argued that, taking into consideration the interests of public order, the protection of the health and of the rights and freedoms of others, the necessity of protecting the sexual integrity of children outweighs freedom of association, while the former – rightly – observed, focusing on the pertinent issue, that no disruption of society may be said to exist or be imminent and, accordingly, that the association's dissolution was not justified.