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**COMPARATIVE STUDY
ON
NATIONAL LEGISLATION
ON FREEDOM OF PEACEFUL ASSEMBLY**

requested by the Venice Commission

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Introduction

In 2010, the European Commission for Democracy through Law of the Council of Europe (Venice Commission) in co-operation with the OSCE/ODIHR panel issued the 2nd edition of their joint guidelines on freedom of peaceful assembly, a comprehensive overview of the normative standards for freedom of peaceful assembly legislation among the Venice-Commission's member states and OSCE participating states. These guidelines were based on relevant international human rights instruments and principles, as well as the grown, established and prevalent principles and best practices of freedom of peaceful assembly regulations within the Venice Commission member states and OSCE/ODIHR participating states. The guidelines are currently being subject to revision by the Venice-Commission as well as the OSCE/ODIHR expert panel because new issues within the scope of the guidelines have emerged. These new questions concern, inter alia, the use of social media in the organization of protests (flashmobs) or the concept of the organizer of demonstrations. The comparative study on freedom of peaceful assembly regulation within the Commission's Member States is meant to inform and facilitate this revision of the guidelines which is due in 2014.

Selection of topics of comparison

The case studies aim at presenting a comprehensive overview with regard to the legislative situation in the investigated countries with a special regard on new questions (such as flashmobs, social networks, content-based restrictions, amongst others). The case studies therefore researches into

- the scope of guarantees in constitutional and in primary legislation and case-law,
- legally provided restrictions (legitimate grounds for restrictions; time, place, and manner restrictions; sight and sound),
- procedural issues (such as notification requirements, spontaneous assemblies, assemblies taking place on private property or privately rented land, counter-demonstrations, decision-making, review and appeal) as well as
- questions of implementation (pre-event planning, costs, use of force by the police, liability of enforcement personnel and organizers, monitoring and media access).

Selection of countries

For reasons of time and resources, the authors had to choose representative countries. The choice of jurisdictions aims at regional representivity (of Eastern European, Central European, Western European as well as non-European member states), the inclusion of legislative systems influential in the shaping of freedom of assembly (such as the Belgium one), integrating the earliest and therefore pivotal traditions (the US and the UK) and codifications (France as the earliest European codification). Since the study aspires to support the revision of the Venice Commission's guidelines, its selection of states also encompasses Member States which have in the past received opinions by the Venice Commission (the Russian Federation, Serbia) or which have been party to proceedings before the ECtHR with regard to freedom of assembly questions (Hungary, Poland, UK, Turkey, Germany). Another reason to include Tunisia and Turkey has been their part in the Arab Spring revolutions or, respectively, the Taksim square protests. The US and the Ukraine were included in order to find a good balance between "old" and "new", "small" and "big" countries. During drafting of the study, protests in Ukraine have erupted and gained a high level of seriousness, also with regard to the use of force by police personnel which we tried to include as comprehensively as possible. The countries are chronologically ordered, according to the entry into force of the constitutional guarantee of freedom of assembly.

After a first presentation of the study at the Venice Commission's 98th Plenary Session in March 2014, all member states of the Commission were invited to comment on the study. We received several valuable comments which were in part integrated into the study. The

Austrian and Dutch members offered case studies for their respective countries which we decided to attach to this study as annexes at the end (Annex I – Austria, p. 158; Annex II – Netherlands, p. 162).

Nature of the reports and comparison

The country reports as well as the final comparison focus on the legislative situation but also include interpretations by national courts and the European Court of Human Rights. Issues of implementation as well as instances of current administrative, mostly police practice are included in order to provide for a topical and comprehensive overview of the situation in a given country. The study was conducted with a view to the guidelines and is intended to provide orientation for legislators and other practitioners. Its nature therefore is a practical one; lengthy background information on the legal systems have been left out in favour of a very direct confrontation with the regulation of freedom of assembly in each country.

United Kingdom (particularly England and Wales)

by Jannika Jahn

The right to freedom of peaceful assembly is widely exercised in the UK,¹ between ten to fifteen demonstrations per day on average basis are spontaneous.²

1. Legal bases and scope of the guarantee

Traditionally, as every civil liberty, the freedom of peaceful assembly used to be a residual right.³ For the purpose of securing public order, the right was applied in a restrictive manner and broad powers and margins of error were given to the police and other public authorities in enforcing their powers. A positive right to assemble peacefully was introduced by the Human Rights Act 1998 (HRA 1998).⁴ Meanwhile, the fundamental parameters of the right are defined with reference to ECtHR case law. By placing the right at the beginning of a balancing exercise with other rights or interests and by emphasizing its significance, the courts show that they seem to have accepted the legal presumption in favour of the right, as was postulated by the ECtHR.⁵ Art. 11 ECHR encompasses a positive and a negative right,⁶ it comprises participation in private and public meetings,⁷ processions,⁸ mass actions, demonstrations, pickets, rallies,⁹ cyber protests and flashmobs, it only excludes the participation in violent protests.¹⁰ More recently, the protection of the right to a peaceful assembly on private grounds has become topical. Originally this was not comprised by the protected right.¹¹ Many public spaces are being contracted out to private entities, however, which leaves the right to demonstrate largely unprotected if the positive dimension of the right is not properly enforced by the legislator and the courts.¹² In the case of *Appleby v.*

¹ This report does not delve into specificities of Scottish or Irish laws. In areas where regulatory powers concerning policing and the preservation of public order have been devolved to the Scottish or Irish parliaments, the report will only refer to England and Wales.

² In London, there are ca. 4000 protests per year, see the Report of the UN Special Rapporteur on freedom of peaceful assembly in the UK, A/HRC/23/39/Add.1, 29 May 2013, para. 18.

³ This meant that everyone was held to be free in his/her actions as long as they did not cause a breach of the law. Restrictions were not imposed with requirements of legality or fairness, see e.g. Lord Denning in *Hubbard v. Pitt* [1976] QB 142; *Hirst and Agu v. Chief Constable of West Yorkshire* (1986) 85 Cr App R 143; *Jones and Lloyd v. DPP* [1999] 2 All ER 257.

⁴ The HRA was adopted to comply with the obligations under the ECHR. S. 6 HRA 1998 obliges all public authorities to abide by the ECHR obligations (act in compliance with the ECHR), which means that also courts will have to take into account the ECHR and the ECtHR's interpretation of it, when making decisions with ECHR references.

⁵ Also underlined as important by the OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly, Study no. 581/2010, CDL-AD(2010)020, 2nd ed, 2010, para. 30. For ECtHR case law, see e.g. *Christians Against Racism and Facism v. United Kingdom*, Application no. 8440/78, Judgment of 2010, 21 DR 138, at p.148; for UK case law, see *R (Tabernacle) v Secretary of State for Defence* [2009] EWCA Civ 23.

⁶ See the Report of the Human Rights Joint Committee (HRJC) of 2008/2009, Demonstrating respect for rights? A human rights approach to policing protest, 7th Report, available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4702.htm> (last accessed: 09 March 2014), para. 17, with reference to pertinent ECtHR case law. The following Articles are those of the ECHR unless cited otherwise.

⁷ *Rassemblement Jurassien and Unité Jurassienne v Switzerland*, App. No. 8191/78, 17 DR 93.

⁸ *Christians Against Racism and Facism*, *supra* fn. 4.

⁹ *Rai Almond and 'Negotiate Now v. the United Kingdom*, Application no. 25522/94, 6 April 1995.

¹⁰ *Ciraklar v Turkey*, Application no. 19601/92, 80 DR 46. To determine whether a demonstration is peaceful, the courts look at the organizer's intention, see *Rai Almond and 'Negotiate Now*, *supra* fn. 9. Apparently, demonstrations of a merely social character are not excluded by statute or case law.

¹¹ *Anderson et al v. UK*, Appl. no. 33689/96, 27 October 1997.

¹² See *D. Mead*, A chill through the back door? The privatised regulation of peaceful protest, P.L. 2013, Jan, 100-118; the HRJC recommended in its report, *supra* fn. 6, para. 68, that if people were effectively deprived of their right to peaceful protest, "the Government should consider the position of quasi-public spaces"; along the same lines, OSCE guidelines, *supra* fn. 5, paras. 22-23. The restriction of public protest is exacerbated by injunctions and costly eviction costs, imposed on protesters, see *Netpol*, Civil law poses threat to protest freedom, 28 March 2013, available at <http://netpol.org/2013/03/28/civil-law-poses-threat-to-protest-freedom/> (last accessed 09 March 2014); hence the call to stop their enforcement, in the Report of the UN Special Rapporteur on freedom of

United Kingdom the applicants were prevented from leafleting in a private shopping centre. Whilst the English courts as well as the ECtHR held that there was no violation of Art. 11, the ECtHR held obiter dicta that “a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating [private] property rights.”¹³

2. Restrictions

UK law holds targeted and untargeted, statutory and common law powers of restraining demonstrations. When confronting them with human rights standards, concerns of legality, necessity and proportionality surface here and there concerning the laws’ substance, the scope of discretion left to the enforcing authorities and their implementation.

Targeted statutory powers

The Public Order Act 1986 (POA 1986) holds powers to regulate public processions and assemblies. The strictest controls apply to processions, i.e. moving demonstrations.¹⁴ Only public processions in a public space are covered.¹⁵ If the procession is held to demonstrate support for or opposition to the views of any person or body of persons, to publicize a cause or campaign or to mark or commemorate an event, notice requirements apply to the organizer.¹⁶ An advance notice of six clear days before the proposed date of the event must be given to the police, specifying the date, the starting time, the route and the name and the address of the organizer. If timely notice was not reasonably practicable, it must be delivered as soon as is reasonably practicable.¹⁷ Failure to conform to the notice requirements is a summary offence for the organizer.¹⁸ No offence can be committed if there is no organizer and if the procession is spontaneous and lacks a specific route.¹⁹ The notification requirements are generally deemed to be in compliance with Art. 10 as enshrined in the HRA 1998,²⁰ although the minimum notification period has been found to be too long.²¹

Conditions may be imposed by a senior police officer before or during the public procession,²² but only if he reasonably believes either that the procession may result in serious public disorder, serious damage to property or a serious disruption to the life of the community, or that it was organized for intimidating others.²³ He may impose such conditions as “appear to him necessary” to prevent the apprehended disorder, damage, disruption, or intimidation, including the power to change the procession’s route or to prohibit the entering of a specific public place.²⁴

peaceful assembly in the UK, A/HRC/23/39/Add.1, 29 May 2013, para. 93, also directing this recommendation against private organizations, in para. 94.

¹³ *Appleby v UK*, App. No. 44306/98, 6 May 2003, para. 47.

¹⁴ No exact definition is given in the POA 1986; the number of persons necessary has never been concretized; in *Flockhart v. Robinson* [1950] 2 KB 498, p. 502 it was defined by Lord Goddard as “a body of persons moving along a route”; in *DPP v. Jones* [2002] EWHC 110 (Admin).

¹⁵ Section 16 POA 1986. A public place is “any highway... and (b) any place which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission.” This covers a wide range of places, see, e.g. *Cawley v. Frost* [1976] 3 All ER 743, where a speedway track surrounding a football pitch was held to be a public place under an almost identical definition.

¹⁶ Section 11(1) POA 1986. If a procession is a funeral procession or is commonly or customarily held in the police area, s. 11(2) exempts those processions from the notice requirement.

¹⁷ Section 11(6) POA 1986.

¹⁸ Section 11(7) POA 1986.

¹⁹ Held in the obiter dicta of *R (Kay) v. Commissioner for the Metropolitan Police Force* [2008] UKHL 69.

²⁰ *R. Stone*, *Civil Liberties and Human Rights*, 9th ed. 2012, p. 382.

²¹ Report of the UN Special Rapporteur on freedom of peaceful assembly in the UK, A/HRC/23/39/Add.1, 29 May 2013, para. 11.

²² The meaning of Senior Police Officer differs according to the point of time, when the conditions are imposed. Before the event, the conditions have to be given in writing and be reasoned, as implied by *R (Brehony) v. Chief Constable of Greater Manchester Police* [2005] EWHC 640 (Admin).

²³ Intimidation must have been done with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do; hence there must be a fear of coercion as well as intimidation.

²⁴ Section 12(1) POA 1986.

Conditions may also be imposed on public assemblies²⁵ according to section (s.) 14. The procedure is almost identical to that for public processions.²⁶

Organizing or participating in processions or assemblies without complying with the conditions as well as the incitement to such participation is a summary offence.²⁷ In case of failure, the police are empowered to arrest those acting in violation of the direction.²⁸ S. 24 of the Police and Criminal Evidence Act 1984 conveys a general power of arrest without a warrant on the police if a police officer reasonably suspects that a person does not follow the police's directions.²⁹

Generally, the statutory power to impose conditions by ss. 12, 14 POA 1986 has been deemed reasonable as to its scope and the discretion that is left to the police.³⁰ But the HRA 1998 will require proportionate conditions that do not strip the procession of its purpose.³¹ The organizers liability for others' breaking of conditions³² has caused disapproval, as this may have a chilling effect on the exercise of the right.³³ In practice, the police have been criticized for using the conditions too extensively as well as for enforcing them with the intimidating 'Scene Management Barrier System' and by using force where no violence or disorder was involved.³⁴ The police have alleged that conditions were used sparingly and only when necessary.³⁵ Whether, having imposed restrictive conditions, the police try to make a suitable alternative time or place available in practice, as prescribed by *Rai, Almond and "Negotiate Now" v. United Kingdom*,³⁶ is thus difficult to assess.

The power to ban processions is conveyed exclusively on the chief officer of police.³⁷ He must reasonably believe that because of particular circumstances existing in (part of) the police area, the powers to impose conditions under s. 12 will not suffice to prevent "serious public disorder."³⁸ The consent/approval of the Home Secretary is required, adding an element of external political control on and highlighting the exceptional character of the

²⁵ They are defined in s. 16 POA 1986 as an assembly of two or more persons in a public place which is wholly or partly open to the air. The definition of public is the same as for processions. Until it was amended by the Anti-Social Behaviour Act 2003, s. 57, s. 16 POA read "20 or more persons". Hence, the power now applies to a very small amount of people that cannot establish a real risk to public order, rendering the criminal offences, arising in case of a violation of the Act, seem disproportionate, see Liberty's response to the HRJC report "Policing and Protest", June 2008, available at <http://www.liberty-human-rights.org.uk/pdfs/policy08/response-to-jchr-re-protest-2.pdf>, at 10-11 (last accessed: 09 March 2014). Whether gatherings inside of premises that have a closed circuit television coverage fall within the ambit of this definition is difficult to ascertain, *D. Bonner/R. Stone*, *The Public Order Act 1986: Steps in the Wrong Direction* [1987] PL 202, p. 223

²⁶ The power to impose conditions applies irrespective of a certain purpose which is pursued by the assembly.

²⁷ Sections 12 (4) and 14(4), 12(5) and 14(5), 12 (6) and 14 (6) POA 1986.

²⁸ Sections 12(7) and 14(7) POA 1986.

²⁹ In *Broadwith v. Chief Constable of Thames Valley Police* [2000] Crim LR 924 the police ordered the alteration of the proposed route in order to avoid the confrontation with a rival demonstration, any person who did not follow the altered route was arrested.

³⁰ In contrast, the UN Special Rapporteur found the threshold too low, suggesting that the powers would not satisfy the tests of necessity and proportionality under Art. 21 of the ICCPR, Report of the UN Special Rapporteur on freedom of peaceful assembly in the UK, A/HRC/23/39/Add.1, 29 May 2013, para. 12, 93.

³¹ "Serious disruption to the life of the community" (section 12(1)(3) POA 1986) is formulated in wide terms which may cause legal uncertainty and the discretion may be misused; see also *R. Stone*, *supra* fn. 19, p. 384; *S. S. Foster*, *Human Rights and Civil Liberties*, 3rd 2011, p. 515; for pertinent case law, see *R (Brehony) v. Chief Constable of Greater Manchester*, *supra* fn. 21; in *Austin v. Commissioner of Police of the Metropolis* [2007] EWCA Civ 989, it was held that the power to impose conditions could include a power to end a protest and that an instruction under s. 14 could include a dispersal direction.

³² If they want to evade this consequence they will have to show that the violation arose from circumstances beyond their control, ss. 12(4), 14(4).

³³ This was also criticized by the UN Special Rapporteur, *supra* fn.29, para. 15.

³⁴ See the case study in the report of the Network for Police Monitoring (Netpol) into the policing of protest 2010/2011, available at <http://netpol.files.wordpress.com/2012/07/wainwright-report-final1.pdf>, p. 21-24 (last accessed: 09 March 2014).

³⁵ See the HRJC report that was conducted, after heavy policing of mass protests had been widely criticized. The police took the opposite view, HRJC Report, *supra* fn. 6, paras. 1-10, 47-51.

³⁶ Application no. 25522/94, Judgment of 6 April 1995.

³⁷ Section 13(1), (4) POA 1986.

³⁸ The procedure to be followed is different for London and the rest of the country.

ordering of bans.³⁹ A ban only applies to a class of public processions in the relevant district for a period not exceeding three months.⁴⁰ The order should be in written form.⁴¹ It need not be made public. The organization of or the participation in a banned procession, or the incitement of such a participation are summary offences.⁴² It has been pointed out that, although formally, supervisory mechanisms exist, in practice, the chief constables and the Commissioners have a wide discretionary power that is unlikely to be seriously challenged under English law.⁴³ Hence, the ECHR standards are deemed important for holding the police to the principle of proportionality,⁴⁴ especially, since recently the section has been used as legal basis for several blanket bans.⁴⁵

While banning public assemblies in advance is not allowed,⁴⁶ s. 70 and 71 CJPOA 1994 have expanded s. 14 POA 1986, giving the police the power to stop trespassory assemblies in advance.⁴⁷ Trespassory assemblies are such, where the right to access is not given or limited⁴⁸ and the police officer reasonably believes that an assembly might result in serious disruption to the life of the community, or [...] in significant damage to the land, building or monument.⁴⁹ They are banned in a certain district for a specified period not exceeding 4 days. This does not prevent other peaceful non-trespassory assemblies from taking place in the district at that time.⁵⁰ Importantly, s. 14C gives the police the power to stop persons from going to a trespassory assembly, if a police officer reasonably suspects a person to be committing an offence under this section, and to arrest the person without a warrant. It has been emphasized, that the police should use this forceful power restrictively.⁵¹ A burdensome use of the pre-emption power of s. 14C has been criticized, however.⁵² Raves, i.e. large-scale outdoor musical events, held with the permission of the landowner, are also subject to certain rules under ss. 63-67 CJPOA 1994, allowing for an order to prevent such events from taking place.⁵³

In the vicinity of Parliament special powers of controlling noise or the camping on the Square apply under s. 143 Police Reform and Social Responsibility Act 2011.⁵⁴ Concerns of proportionality have been raised.⁵⁵

³⁹ See *S. Foster*, *supra* fn. 31, p. 516. Outside of London, the chief constable must apply to the district council that will issue the ban, on approval of the Home Secretary. Already at this stage, political control is involved.

⁴⁰ This is in order to avoid an overly burdensome and politically motivated restraint of the right to assemble peacefully, *R. Stone*, *supra* fn. 20, p. 385.

⁴¹ Section 13(6) POA 1986.

⁴² Section 13(7), (8), (9) POA 1986.

⁴³ *S. R. Stone*, *supra* fn. 20, p. 386; *S. S. Foster*, *supra* fn. 31, 516, with reference to the case of *Kent v. Metropolitan Police Commissioner*, *The Times*, 15 May 1981, where a ban was ordered for 28 days and the definition of a "class" of processions was achieved by excluding certain types of processions. The unreasonableness standard was handled generously by the Court of Appeal.

⁴⁴ *S. S. Foster*, *supra* fn. 31, p. 516.

⁴⁵ Criticized by the UN Special Rapporteur in his report, *supra* fn. 30, para. 13.

⁴⁶ The power to ban public assemblies was held to be too infringing on freedom of speech in the White Paper of the POA 1986, para. 5.3.

⁴⁷ Under s. 14A POA.

⁴⁸ I.e. in "any district at a place on land to which the public has no right of access or only a limited right of access, and when the assembly is likely to be held without the permission of the landowner or to conduct itself in a way which would exceed that permission or the limit of the public's right of access."

⁴⁹ The latter must be of historical, architectural, archaeological or scientific importance.

⁵⁰ *DPP v Jones and Lyod* [1999] 2 All ER 257, s. 14A does not automatically prohibit the holding of an assembly where only a limited right of access to the highway exists; s. 14 A (1), (5).

⁵¹ *S. Foster*, *supra* fn. 31, p. 520; *R. Stone*, *supra* fn. 20, p. 392.

⁵² Netpol Report, *supra* fn.34.

⁵³ See section 63(6) CJPOA 1994. The Anti-Social Behaviour Act 2003 (ASBA 2003) extended the powers to trespassory assemblies not in the open air and reduced the required number of people from 100 to 20. The failure to comply with banning or altering orders gives rise to summary offences.

⁵⁴ Ss. 141-149 Police Reform and Social Responsibility Act 2011 have repealed the Powers of ss. 132.138 of the Serious Organised Crime and Police Act 2005 to ban on unauthorized assembly in the vicinity of Parliament which was widely held as being incompatible with the Convention.

⁵⁵ The Special Rapporteur is concerned that this may prevent long-term public protest in front of Parliament, *supra* fn. 12, para. 14.

While the authorization of assemblies in the vicinity of Parliament has been repealed, the authorization requirement still applies to other designated areas.⁵⁶ Owing to concerns of proportionality, the HRJC recommended to amend s. 128(3)(c) SOCPA 2005 so as to permit the Home Secretary to designate sites on the grounds of national security only where it is *necessary* to do so.⁵⁷ This has, however, not been implemented yet.

Undercover policing of activist groups is provided for by an intricate legal framework.⁵⁸ This has led to serious scandals in the last year, especially the infiltration of non-violent groups with the purpose of controlling their right to freedom of peaceful assembly has sparked criticism⁵⁹ and calls for reform.⁶⁰ Additionally, the wide definition and application of the term “extremist groups” has allowed the police to use extensive powers against e.g. Occupy London.⁶¹

Surveillance by Forward Intelligence Teams (FITs) and the management of several databases on protesters, including peaceful ones,⁶² purportedly containing personal information, caused public disconcertment.⁶³ The courts have also rejected this practice of intransparent and illegitimate blanket acquisitions and retention of data, highlighting the chilling effect such surveillance methods and intelligence data bases may have.⁶⁴ Moreover, they raise concerns of legality.⁶⁵ Apparently, Government is working on changes, particularly the clarification of the role of FITs.⁶⁶

⁵⁶ Cf. section 128 Serious Organized Crime and Police Act 2005 (SOCPA 2005).

⁵⁷ Report, *supra* fn. 12, para. 108.

⁵⁸ See the report of Her Majesty’s Inspectorate Constabulary (HMIC), Policing Public Order, February 2011, available at <http://www.hmic.gov.uk/media/policing-public-order-20110208.pdf>, Annex C of the HMIC report, A review of national police units which provide intelligence on criminality associated with protest, p. 44-48 (last accessed: 09 March 2014).

⁵⁹ See the UN Special Rapporteur report, *supra* fn. 30, paras. 24-28.

⁶⁰ The UN Special Rapporteur recommended that the undercover policing legislation should be reviewed, specifying that peaceful protestors should not be infiltrated and that a law should be adopted on intelligence gathering, *supra* fn. 30, para. 93.

⁶¹ See the Report of the UN Special Rapporteur, *supra* fn. 30, paras. 34-35 and the HMIC report, A review of national police units which provide intelligence on criminality associated with protest, 2012, available at <http://www.statewatch.org/news/2012/feb/uk-hmic-police-undercover-report.pdf> (last visited: 09 March 2014), recommended that an adequate definition should be found for “extremism” so that undercover policing will not apply to peaceful activist groups, rec. 2, at 12, see also the OSCE guidelines, *supra* fn. 5, para. 91. The definition, given by the Association of Police Officers (ACPO) 2006, originally directed against violent animal rights activists, now covering especially the “professional protester”, reads: “[d]omestic extremism and extremists are the terms used for activity, individuals or campaign groups that carry out criminal acts of direct action in furtherance of what is typically a single issue campaign. They usually seek to prevent something from happening or to change legislation or domestic policy, but attempt to do so outside of the normal democratic process.”

⁶² The becoming a target of a Forward Intelligence Team does not require criminal activity, but merely a prominent or frequent involvement in political protest, *Netpol* Report, *supra* fn. 34, p. 43.

⁶³ *Netpol* report, *supra* fn. 34, p. 42; the Special Rapporteur even reported on private security companies reportedly collecting data on and taking pictures of peaceful protestors, *supra* fn. 12, para. 33. In their report following the policing of the G20 demonstrations, “Adapting to Protest” (2009), the HMIC recognized these concerns and recommended to clarify the role of FITs, and the remit of evidence gatherers, available at <http://www.hmic.gov.uk/media/adapting-to-protest-20090705.pdf> (last accessed: 09 March 2014), see also *V. Swain*, Disruption policing: surveillance and the right to protest, 8 August 2013, available at, <http://www.opendemocracy.net/opensecurity/val-swain/disruption-policing-surveillance-and-right-to-protest> (last accessed: 09 March 2014).

⁶⁴ With respect to Art. 8 and not Arts. 11 or 10. For the latest decision on this issue with further pertinent references, see *Catt v. ACPO & the Commissioner of the Police of the Metropolis* [2012] EWHC 1471 (Admin), paras. 17-18 for the statutory power and paras. 21-35 for the rival cases and authorities. The Court of Appeal found that the retention of information which did not contain any suggestion of unlawful activity was disproportionate, given that the police had failed to show how the information would assist in the investigation or suppression of crime, also in *Wood v. MPC* [2009] EWCA Civ 414 it was held that the retention of data would have to be justified.

⁶⁵ In *Wood* the Court held that the common law power in combination with the unpublished “Standard Operating Procedures for ‘Use of Overt Filming/Photography’” constituted sufficient legal footing for the surveillance and photography powers and would not contradict the principle of legality, *supra* fn. 64, para. 55. In *Mengesh*, even though slightly different on the facts, the court took a more restrictive approach on the scope of the common law powers.

⁶⁶ See the HMIC Report 2010/2011, *supra* fn. 58, Annex B, Rec. 10.

Public order (criminal) offences

Part I POA 1986 contains public order offences which impose criminal liability on demonstrators, including riot, violent disorder, affray and the fear or provocation of violence.⁶⁷ The concept of “unlawful violence” is at the core of each offence, defined in s. 8 POA 1986 as meaning “any violent conduct” whether or not intended to cause injury or damage.⁶⁸

There are two offences in the POA 1986 which forbid the causing of harassment, alarm or distress, ss. 4A⁶⁹ and 5. It has been difficult for English courts to find a balance between peaceful protest and the prevention of public disorder.⁷⁰ What is considered to be “reasonable” has been assessed differently, leaving the suspect in uncertainty.⁷¹ This is exacerbated in cases of “borderline extremist protest.”⁷² Moreover, s. 5 incurs criminal liability which may raise concerns of proportionality, since “harassment, alarm or distress must [only] be *likely* to result from the person’s behaviour and the *mens rea* is already fulfilled if the perpetrator was aware of the facts that were likely to cause harassment etc.”⁷³ In order to alleviate the problem of disproportionate criminalization of only minor offences,⁷⁴ s. 5 was amended by s. 57 of the Crime and Courts Act 2013 after a vigilant campaign against the preservation of the word “insulting” in s. 5 of the POA. Apart from that, the offences under Part I POA 1986 have been called a “reasonable set of controls at appropriate levels of disorder.”⁷⁵ However, doubts have been voiced concerning the coverage of behaviour, solely exercised on private grounds, saying that here ordinary criminal law offences would suffice.⁷⁶

Aggravated trespass criminalizes types of protest, particularly where direct action is used against the activities of others or actions, employing indirect force to determine the behaviour of others.⁷⁷ S. 69 CJPOA 1994 allows the police to direct purported trespassers to leave the land.⁷⁸ These powers have been considered critical, especially with a view to the privatization of public space.⁷⁹

⁶⁷ Sections 1-4 POA 1986. They concretize in black letter law former common law concepts, the principle of “breach of the peace” having been central to them, but considered too vague by the Law Commission, see The Law Commission: Criminal Law: Offences Relating to Public Order (Law Com. No. 123), The Modern Law Review, Vol. 47, Issue 3, 1984, pp. 324–333.

⁶⁸ Concerning riot, it is problematic, that besides the requirement of violence, the common intention can be inferred from conduct, hence a person might face the severe penalties of the offence for relatively innocuous behaviour. The offences of violent disorder and affray criminalize minor acts of actual or threatened violence. This may hinder the exercise of peaceful protest. Yet, as the use or the threat of violence is required, it is unlikely that this will be called incompatible with the ECHR, S. *Foster*, *supra* fn. 31, pp. 523-524.

⁶⁹ Added by the CJPOA 1994.

⁷⁰ I.e. the balance between Arts. 10 and 11 and section 5 of the POA 1986.

⁷¹ C. Newman, Section 5 of the Public Order Act 1986: the threshold of extreme protest, J. Crim.L. 2012, 76(2), 105-109, p. 108, with further references to case law.

⁷² In the latest case on the issue, the judicial stance was rather restrictive, in *Abdul v DPP* [2011] EWHC 247 (Admin) it was held that protestors chanting “British soldiers go to hell”, “cowards”, “terrorists” towards bypassing soldiers fell out of the ambit of exercising legitimate protest, since their words were “*potentially defamatory and undoubtedly inflammatory*,” giving rise to a clear threat to public order.

⁷³ C. Newman, Section 5 of the Public Order Act 1986: the threshold of extreme protest, J. Crim.L. 2012, 76(2), 105-109, p. 108, with further references to recent case law.

⁷⁴ See the Standard Note of Parliament (Home Office Section), “Insulting words or behaviour”: Section 5 of the Public Order Act 1986, 15 January 2012, SN/HA/5760, where the reasons and the history of the process of repeal are described, available at www.parliament.uk/briefing-papers/SN05760.pdf.

⁷⁵ R. Stone, *supra* fn. 20, p. 403.

⁷⁶ This is because behaviour on private grounds does not raise concerns for the public order. It is submitted that even the narrowing of scope in ss. 4 and 5 to exclude dwellings would not go far enough, see R. Stone, *supra* fn. 20, p. 403-404.

⁷⁷ It is enshrined in s. 68 of CJPOA 1994. *Mens rea* requires the intention to intimidate, obstruct or disrupt. The offence under s. 68 is summary and punishable with up to three months’ imprisonment, or a fine not exceeding level 4, section 68 (3) CJPOA 1994.

⁷⁸ Failing to comply with such order constitutes an offence, section 69 CJPOA 1994.

⁷⁹ Report of the UN Special Rapporteur, *supra* fn. 30, para. 49.

Incitement to racial hatred has been criminalized by the “racial hatred” offences enacted in Part III POA 1986.⁸⁰ They are meant to control racist speech at public assemblies.⁸¹ Racially aggravated offences are explicitly criminalized under ss. 28-32 Crime and Disorder Act 1998.⁸² The Racial and Religious Hatred Act 2006⁸³ added a Part 3A to the POA 1986.⁸⁴ Offences cover speech, publications plays, recordings and broadcasts, possession of inflammatory material⁸⁵ and the police are given powers of entry, search, and seizure and powers of forfeiture.⁸⁶ While these powers considerably constrain free speech and thus also the right to freedom of peaceful assembly, the underlying balance between the restriction imposed and the severity of the nature of the prohibited acts appears to be proportionate *in abstracto*.

Non-targeted statutory powers and offences

Other statutory powers have been used by the police to restrict public protest which were originally meant for other areas of law. Under the Protection from Harassment Act 1997 (PHA) it is an offence for a person to pursue a “course of conduct which harasses, and which the person knows or ought to know amounts to harassment.”⁸⁷ The Serious Organised Crime and Prevention Act 2005 (SOCPA) introduced Section 1A PHA which extends the definition of harassment to include conduct on one occasion only.⁸⁸ While the PHA 1997 was primarily enacted for dealing with “stalking”, the powers have been used with respect to demonstrations.⁸⁹ Penalties can be incurred⁹⁰ and injunctions applied.⁹¹ Concerning injunctions, proceedings are held in private, which is not adequate for public protest issues.⁹²

Companies have used injunctions broadly to prevent protests against them.⁹³ Generally, these powers have been held to bear the potential for overbroad and disproportionate application.⁹⁴

⁸⁰ Racial hatred is defined as “hatred against any group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.”

⁸¹ Section 17 POA 1986. The offences encompass a publication offence, s. 18, which criminalizes the use of “words or behaviour or the display of written material that are threatening abusive or insulting and has either been intended to stir up racial hatred or is likely to do so.

⁸² Proceedings for these offences may only be instigated with the consent of the Attorney-General, due to the politically sensitive nature of these issues. An offence is racially aggravated when at the time of committing the offence, the offender demonstrates towards the victim of the offence hostility based on the victim’s (presumed) membership of a racial group or where the offence is motivated by hostility towards members of a racial group based on their membership of that group.

⁸³ Sections 29A-29N.

⁸⁴ Religious hatred is defined as “hatred against a group of persons defined by reference to religious belief or lack of religious belief.” Religious belief is not defined. The enactment was triggered by the increasing religious hatred spurred by the often perceived link between Islam and terrorism and due to some Muslim clerics who were thought to be stirring up hatred against non-Muslims.

⁸⁵ Sections 29 B-29G of the Racial and Religious Hatred Act 2006.

⁸⁶ Section 29H-I of the Racial and Religious Hatred Act 2006; the prerequisite requirements are stricter, as opposed to Part III POA 1986, postulating that the behaviour must be threatening and the intention to stir up religious hatred needs to be shown.

⁸⁷ Sections 1 and 2. Harassment is not defined, but includes conduct which causes ‘alarm and distress’.

⁸⁸ Provided that it involves the harassment of two or more persons and is done with the intention of persuading them to do something that they are entitled not to do or not to do something which they are entitled to do.

⁸⁹ *Huntington Life Sciences v. Curtin*, The Times, 11 December 1997 (research on animals); *DPP v. Mosley*, The Times, 23 June 1999 (Farming mink).

⁹⁰ See ss. 2 and 4 PHA 1997,

⁹¹ Notably, an injunction is a civil remedy, but the breach of the injunction is a criminal offence.

⁹² This is especially so, since protestors may not make representations on the proposed injunction, but when seeking to have an injunction revoked, protestors may face substantial costs; the HRJC thus also recommended that this state of law should be reviewed, so that injunctions cannot be made without notice being given to those potentially affected, requiring an amendment of the Practice Directions 39 and 25 to the Civil Procedure Rules, see *supra* fn. 6, para. 99.

⁹³ Cf “A glut of barristers at Westminster has led to a crackdown on dissent: The harassment law now being used against anti-dumping protesters in Oxfordshire is turning into the riot act of our day”, *Guardian*, March 6th 2007.

⁹⁴ See the HRJC Report, *supra* fn. 6, para. 99, see the report of the Special Rapporteur, *supra* fn. 12, para. 47-48, 93, 94.

In areas where the impact on public order appears less heavy, recourse has been had to civil procedures as a means of control, including anti-social behaviour orders (ASOBs), dispersal orders⁹⁵ and football banning orders.⁹⁶ Introduced by s. 1 of the Crime and Disorder Act 1998 ASOBs require the acting in an anti-social behaviour. On occasion peaceful protest has been considered to fall within the very broad statutory definition.⁹⁷ The breach of an ASOB is a criminal offence which carries a higher maximum penalty than other substantive public order offences.⁹⁸ While the ASOBs have not been used as extensively as anticipated,⁹⁹ they still constitute an incohesive fragment in the law that may restrict the right to freedom of peaceful assembly.

The existing dispersal powers in case of anti-social behaviour will be replaced and extended by s. 33 of the Anti-social Behaviour, Crime and Policing Bill,¹⁰⁰ the only requirement being that the dispersal is 'necessary to reduce the *likelihood* of anti-social behaviour'.¹⁰¹ This has led to criticism, as anti-social behaviour powers have often been used for constraining protests.¹⁰²

While police have no general powers to oblige protesters to provide personal details s. 50 of the Police Reform Act 2002 gives the police the power to demand the name and address of anyone they have reason to believe has acted antisocially, the refusal to abide is an offence. These data acquisition and retention powers must be exercised narrowly as this may also impair the free exercise of the right of assembly,¹⁰³ but their increased use as a blanket power has been of major concern recently.¹⁰⁴

⁹⁵ Part 4, ss 30-36 of the Anti-social behaviour Act 2003.

⁹⁶ See ss. 14-21 of the Football Spectators Act 1989, as amended by the Football (Disorder) Act 2000, twice the set of powers were considered in relation to a demonstration, dealing particularly with the power under s. 30 ASBA 2003, *R (Singh) v. Chief Constable of West Midlands Police* [2006] EXCA Civ 118, [2007] 2 All ER 297; *R (W) v. Metropolitan Police Commissioner* [2006] EWCA Civ 458, [2006] 3 All ER 458, both times, the powers were held to be compatible with Arts 10 and 11, yet only as the use of the powers had been interpreted strictly.

⁹⁷ Anti-social behaviour is given if (a) any person over the age of nine has acted in an anti-social manner, that is so as to cause or be likely to cause "harassment, alarm or distress" to someone in another household and (b) that the order is necessary to protect other people from further anti-social behaviour." The discretion of the magistrate's court concerning the type of order is wide, concerning the "if" of the order, however, the court must establish the ASOBs necessity.

⁹⁸ The maximum penalty on indictment of five years' imprisonment causes concern as to the compatibility with the lower maximum penalty incurred by a violation of ss. 4, 5 POA 1986. Yet, in the latest decision on the issue, the court held that the ASOB maximum penalty should be considered, see *R v. Lamb* [2005] EWCA Crim 3000. Being of a hybrid nature, i.e. not merely civil nor criminal, the orders are not subject to the fair trial requirements of Art. 6. Thus, hearsay evidence is sufficient.

⁹⁹ *R. Stone*, *supra* fn. 20, p. 411. But they have been used in a wide range of cases for which they had not been envisaged, hence, for the purpose of legal certainty, the Home Office contemplated to replace ASOBs by criminal behaviour orders, crime prevention injunctions and community protection orders in 2011, Home Office, *More Effective Responses to Anti-Social Behaviour*, 2011.

¹⁰⁰ In connection with ss. 32, 34. It replaces Sections 30-36 ASBA 2003 that give the police and community support officers the power, within designated areas, to disperse any group of two or more people whose behaviour they think is likely to cause harassment, alarm or distress to the members to the public. The new Bill allows the police to disperse without prior notice, and on their discretion alone, it is available at, <http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0066/14066.pdf> (last accessed: 10 March 2014).

¹⁰¹ Emphasis added by the author. Notably, protections are included in the statute, but these apply only to trade union pickets or to notified political protest, see s. 34 (4) of the Bill.

¹⁰² See Netpol, *Police set to get new dispersal powers*, 23 July 2013, available at <http://netpol.org/2013/07/23/police-set-to-get-new-dispersal-powers/> (last accessed: 10 March 2014).

¹⁰³ The retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences must be strictly limited by law, see *S. and Marper v. United Kingdom* (2008) in which the blanket and indiscriminate nature of powers concerning the retention of such data led the ECtHR to find a violation of Art. 8. The recording of such data and the systematic processing or permanent nature of the record kept may give rise to violations of privacy, *Perry v. the United Kingdom* (2003) at para. 38. Transferring this to freedom of assembly, it can amount to a chilling effect, seriously infringing the free exercise of this right, see *also* para. 161 of the OSCE guidelines for this issue, *supra* fn. 5.

¹⁰⁴ See the Report of Netpol, *supra* fn. 34, pp. 6 and 44; this was recognized by the HMIC in their 2010/2011 report, *supra* fn. 58, Annex D, recommendations from Nurturing the British Model, 8 (a), available at <http://www.hmic.gov.uk/media/policing-public-order-20110208.pdf> (last accessed: 10 March 2014), who recommended that the Home Office should clarify the scope and application of this power.

A number of stop and search powers are used in relation to protests, including the Police and Criminal Evidence Act 1984,¹⁰⁵ the CJPOA 1994¹⁰⁶ and the Terrorism Act 2000.¹⁰⁷ After the ECtHR judgment of *Gillan and Quinton v United Kingdom*, where the ECtHR held that these powers were neither sufficiently prescribed by law nor proportionate,¹⁰⁸ sections 44-47 Terrorism Act were repealed under a s. 10 HRA 1998 remedial order and replaced with a more targeted and proportionate power under s. 47A Terrorism Act by the Protection of Freedoms Act in 2012.¹⁰⁹ Still, the extensive use of stop and search powers has been called to be stopped with respect to peaceful protesters.¹¹⁰

Lastly, powers to prohibit uniforms may be used against specific political factions, but also, under terrorism legislation, to proscribe the wearing of certain emblems.¹¹¹ Wearing a black uniform or looking like an anarchist was found by the police to indicate the intent to carry out criminal activities and sparked pre-emptive arrests.¹¹²

It has been a recurring problem that the non-targeted powers have not received parliamentary attention regarding their effect in curtailing protest, and that they largely operate without judicial supervision, thus suffering from procedural deficiencies and proportionality defects.¹¹³

By-laws

Public authorities may enact byelaws which restrict the freedom of peaceful assembly on their grounds. Belonging to the public sphere, they are subject to judicial scrutiny and may

¹⁰⁵ Section 1 provides that the police may stop and search people or vehicles where they have a reasonable suspicion that they are carrying certain stolen or prohibited items.

¹⁰⁶ Section 60 allows police to designate an area, in which officers are able to stop and search individuals without requiring an officer's "reasonable suspicion of wrongdoing" as is necessary for the PACE powers. This is used to curtail protests pre-emptively, see *S. Laville*, Royal wedding: police consider pre-emptive arrests, *The Guardian*, 19 April 2011, available at <http://www.theguardian.com/uk/2011/apr/19/royal-wedding-police-arrests-crusades> (last accessed: 10 March 2014); see also the *Netpol* report, at 13-15; see point 5, especially 5.2.-5.5 of the Home Affairs Committee, Report on Stop and Search Powers, SN/HA/3878, 21 May 2012, available at www.parliament.uk/briefing-papers/sn03878.pdf, on the recent practice.

¹⁰⁷ Provides the police with the power to search people and vehicles in an area designated by a Chief Police Officer for articles that could be used in connection with terrorism. Currently, the whole of Greater London is designated as such an area.

¹⁰⁸ ECtHR, *Gillan v. UK*, Judgment of 12 January 2010, Appl. no. 4158/05, the Court held that the police powers were not sufficiently circumscribed nor subject to adequate legal safeguards against abuse and were not in accordance with the law. This was in part due to the breadth of the powers (the exercise of which did not require reasonable suspicion on the part of the police officer) and also the lack of adequate safeguards against arbitrariness: "such a widely framed power could be misused against demonstrators and protestors. The case was decided under Art. 8 ECHR, however, the Court held that there was a risk that such a widely framed power could be misused against demonstrators. The listed deficiencies were also criticized by the OSCE in their guidelines, *supra* fn. 5, paras. 35, 89-91 (with fn. 149 with further references), 223.

¹⁰⁹ Sections 59-61 of the Protection of Freedoms Act now introduced s. 47A and 47AA (code of practice). An authorization for the use of the new stop and search powers can only be given under section 47A, where the person giving it, reasonably suspects an act of terrorism will take place and considers the powers are necessary to prevent such an act. An authorization can last for no longer and cover no greater an area than is necessary to prevent such an act. This represents a significantly higher threshold for giving an authorization than the "expediency" test under section 44 of the 2000 Act. As a result, the numbers of section 47A searches were expected to be greatly reduced from the number of section 44 searches prior to the remedial order. The use of counter-terrorism powers to curb protest unrelated to terrorism was extensively documented in the 2009 JCHR Report. Especially the newly adopted code of conduct addresses the OSCE guidelines' concern about the discretionary powers afforded to law enforcement officials by the anti-terrorism legislation, *supra* fn. 5, paras. 90-91. Despite this positive development, the Special Rapporteur still underlines that these remaining wide powers should not be used against peaceful protesters, *supra* fn. 12, para. 44.

¹¹⁰ UN Special Rapporteur, *supra* fn. 30, paras. 43-44, para. 93.

¹¹¹ A prohibition of uniforms, signifying association with any political organization or with the promotion of any political object is enshrined in the Public Order Act 1936, s. 1 and s. 13 Terrorism Act 2000 forbids the wearing of any items of dress, or wearing, carrying or displaying any article in such a way or in such circumstances as to arouse reasonable apprehension that the person is a member or supporter of a proscribed organization is set.

¹¹² *Netpol* report, *supra* fn. 34, p. 12.

¹¹³ *H. Fenwick*, Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest, P. L. 2009, Oct, 737-765, p. 759.

not disproportionately interfere with the right under Art. 11. The Parliament Square Garden Byelaws 2012 have been criticized for requiring a prior written permission for the organization of and participation in an assembly within Parliament Square Garden.¹¹⁴

Common law powers

Acting *contra bonos mores* is a common law power which was held to contradict the criterion of “prescribed by law” by the ECtHR and has not been used ever since.¹¹⁵

Breach of the peace is a doctrine which conveys several powers on the police for the purpose of preserving public order. The leading precedent in this relation is *R (Laporte) v. Chief Constable of Gloucestershire*.¹¹⁶ This case has put stricter limits on what was becoming a very broad discretionary power.¹¹⁷ Still, the breach of peace power is wide and can be used to complement or even circumvent the powers of the POA 1986.¹¹⁸ Human rights concerns were already raised in *Austin v. Commissioner of Police for the Metropolis*.¹¹⁹ The case dealt with a more recent contentious police tactic, i.e. “kettling”/constrainment. Concerning the legality of the power, the European Court of Human Rights (ECtHR) found, that the breach of the peace doctrine had been sufficiently clarified by the English courts over the decades¹²⁰ and it was never found to be materially violating ECHR rights.¹²¹ The Home Affairs Committee’s (HAC) Report on the policing of the G20 protests found, however, that the powers of kettling should be codified.¹²² Due to the power’s imprecision also other voices have chimed in and urged for codification which would outline a clear regulatory procedure with appropriate safeguards.¹²³ Moreover, the power has been criticized for the wide

¹¹⁴ See section 5(1)(j); the Special Rapporteur rejects any authorization regimes in relation to demonstrations, *supra* fn. 12, para. 14. In *R (Tabernacle) v Secretary of State for Defence*, *supra* fn. 5, para. 43, the Court of Appeal ruled in favour of attendees of a protest camp, upholding their argument that the Ministry’s of Defence recent byelaws, banning the camp, violated their freedom of assembly rights, as they were not sufficiently justified; reference to inadequate byelaws was also made by the National Union of Journalists, in the HRJC Report, *supra* fn. 6, para. 49.

¹¹⁵ ECtHR, *Hashman and Harrup v. UK* (1999), appl. no. 25594/94, where a condition was imposed on protesters not to behave *contra bonos mores*, i.e. in a way which is wrong rather than right in the judgment of the majority of fellow citizens. This was held to violate Art. 10. This issue was also raised as problematic under the head of legality by the OSCE guidelines, *supra* fn. 5.

¹¹⁶ [2007] UKHL 55, [2007] a AC 105, the House of Lords considered the decision of the police to prevent a coach load of peace protestors from travelling to a protest at RAF Fairford and forcibly return them to London. The House of Lords concluded that the police’s action in preventing the protestors from travelling to the demonstration and forcing them to leave the area was an interference by a public authority with the exercise of the protestors’ rights under Arts. 10 and 11 which was not prescribed by law, as the police did not believe that a breach of the peace was imminent.

¹¹⁷ Several elements of the power were established in this decision, the most important being that the breach of peace has to be imminent; *R. Stone*, *supra* fn. 209, pp. 415-419. In *R (Moos and Anor) v The Commissioner of the Police of the Metropolis*, the High Court decided that the actions of police in “kettling” climate change protestors during the G20 summit were unlawful due to the lacking imminence of a threat to the peace, otherwise a blanket ban would be facilitated, [2011] EWHC 957 (Admin).

¹¹⁸ A case of misuse was that of *N. P. and C in Steel and others v United Kingdom*, 1998 28 EHRR 603.

¹¹⁹ *Supra* fn. 31. The English courts held that the containment of a crowd of demonstrators for several hours was covered by the common law power of preventing an imminent risk of breach of the peace and did not contradict Convention law.

¹²⁰ It was thus held to meet the “prescribed by law” test in the context of Arts. 5, 8 and 10 in *Austin v. the United Kingdom* [GC], App. nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, but also before in *McLeod v United Kingdom* (1998) 27 E.H.R.R. 493 ECtHR, (did however not arise in the matter of protest), *Steel and Morris v. UK*, Application No. 2438/94, 26 June 1996.

¹²¹ Breach of the peace is committed “only when an individual causes harm, or appears likely to cause harm to persons or property, or acts in a manner the natural consequence of which would be to provoke violence in others”, *Laporte*, *supra* fn. 5, p. [42].

¹²² Home Affairs Committee, *Policing of the G20 Protests, Conclusions and Recommendations*, Eighth Report, session 2008-2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/418/41802.htm>, paras. 16-22 (last accessed: 10 March 2014).

¹²³ Already stated in the OSCE, *Guidelines on Freedom of Peaceful Assembly* (2007), available at <http://www.osce.org/odihr/24523>, para. 44 (last accessed: 10 March 2014); HRJC Report, *supra* fn. 6, para76; *H. Fenwick*, *supra* fn. 113, at 757, 758 argues that it would be preferable to rely on the scheme under the POA ss.11-14A; *R. Stone*, *supra*fn. 19, p. 422; *R. Stone*, Breach of the Peace: the Case for Abolition, [2001] 2 Web JCLI.

discretion it leaves to the police and its disproportionate application¹²⁴ which has also sparked the call for its abolition.¹²⁵

In *Mengesha v Commissioner of Police of the Metropolis* the power to impose conditions for the release of persons who were lawfully detained, such as requiring the handing over of personal details or the submission to being filmed for identification purposes, was held to be unavailable. Statutory powers did not apply, and although the common law sanctions containment, the legal requirements are very narrow for the purpose of preserving legal certainty and avoiding a chilling effect on the exercise of the right of Art. 11.¹²⁶

3. Implementing the constitutional guarantee and freedom of assembly legislation

Several new challenges result from new forms of communication in the new and social media age. New forms of protest, i.e. flashmobs or cyberprotest constitute a challenge for the police, especially due to their spontaneity, the missing organizer and the unforeseeable number of participants¹²⁷ and partially, due to the missing legal framework. Concerning cyberprotest, it has been submitted that police forces shall use the existing powers in a proactive way.¹²⁸ Concerning spontaneous incidents, the 2010 Manual of Guidance on Keeping the Peace, adopted by the Association of Chief Police Officers of the UK (ACPO), contains specific sections that give guidance on how to behave in such events.¹²⁹ Considering the media coverage, flashmobs constitute a regular form of protest in the UK.¹³⁰

The use of force and tasers were heatedly discussed after the death of Ian Tomlinson and the violent arrest of Nicola Fisher during the G20 protests in 2009.¹³¹ Yet, the reproach of heavy-handed protest policing is still voiced.¹³² Public confidence may be reduced

¹²⁴ It has been argued that this power is unsuitable for deciding sensitive human rights issues, since it hands the police an extraordinarily wide discretion, *H. Fenwick*, *supra* fn. 113, p. 738; seen particularly critical is the lacking differentiation between peaceful and violent protestors, OSCE guidelines 2007, *supra* fn. 123, para 125; also in the obiter dicta of *Laporte*, *supra* fn. 116, the power was denounced by some judges as exceptional, if it is directed against people acting lawfully. In the Netpol report, *supra* fn. 34, it is contended, that, in practice, the power is used widely and not as a method of last resort, p. 25, including a case study on pp. 25-33. Here, perceptions differ, however, between the police, the courts and the public and interest groups, see *R (Castle and others) v Commissioner of Police for the Metropolis* [2011] EWHC 2317, p. 29, where the court held that the police behaved lawfully when using kettling.

¹²⁵ The UN Special Rapporteur relies on the method's indiscriminate, disproportionate nature and the chilling effect for the right to peaceful freedom of assembly, *supra* fn. 30, paras. 37-38 and para. 93.

¹²⁶ [2013] EWHC 1695 (Admin) (Lord Justice Moses); the Court did not accept that the information was handed over voluntarily and that the request for identification was "part and parcel of the containment", hence no common law power was available. Neither did a statutory power apply (s. 64A of the Police and Criminal Evidence Act 1984 and s. 60 of PACE 1984 were considered). The case has left open whether it will be lawful if a police officer were to ask a member of the public for their personal details in circumstances which might suggest an obligation to comply.

¹²⁷ *L. Kiltz*, Flash Mobs: The Newest Threat to Local Governments, ICMA Publications, Cover Story, Vol. 93, Number 11, 2011, available at <http://webapps.icma.org/pm/9311/public/cover.cfm?author=Linda%20Kiltz&title=Flash%20Mobs%3A%20The%20Newest%20Threat%20to%20Local%20Governments&subtitle> (last accessed: 10 March 2014); Rail police criticise flashmobs, 26 February 2009, available at http://news.bbc.co.uk/2/hi/uk_news/england/london/7913034.stm (last accessed: 10 March 2014).

¹²⁸ The HRJC suggested that existing powers be used proactively by the police, HRJC report, *supra* fn. 5, para. 109; this may only be valid until precise powers have been enacted to deal with the new phenomenon.

¹²⁹ See ACPO Manual, available at <http://www.acpo.police.uk/documents/uniformed/2010/201010UNKTP01.pdf>, e.g. pp. 62-63 (last accessed: 10 March 2014).

¹³⁰ See e.g. the website where flashmobs are frequently announced, available at <http://flashmob.co.uk/index.php/site/regional/category/britain/> (last accessed: 10 March 2014).

¹³¹ Both the HRJC and the HAC came up with several recommendations in their reports, including the guidance that weapons shall not be used against peaceful protesters, and the enhancement of accountability by quarterly reports to Parliament on the deployment and use of tasers, see the HAC report, *supra* fn. 122, paras. 54-65; 66-75; recommendations paras. 23-29 and the HRJC report, *supra* fn. 6, paras. 182-192.

¹³² See e.g. for a recent incident, *M. Taylor/K. Rawlinson/J. Harris*, Police accused of using excessive force at student protests, the Guardian, 5 December 2013, <http://www.theguardian.com/uk-news/2013/dec/05/police-clash-student-london> (last accessed: 10 March 2014). This impression is also often enhanced by the disproportionate number of police officers present and their uniforms, see also HRJC report *supra* fn. 5, para. 187; see also the UN Special Rapporteur, *supra* fn. 30, paras. 39-40.

considerably as police forces are often filmed and the material is uploaded.¹³³ The improvement of communication with protesters will be crucial for improving this state of affairs.¹³⁴

The use of pre-emptive action was criticized as being excessive, including pre-emptive arrests,¹³⁵ squat raids and an extensive use of warning letters,¹³⁶ and has been called to stop with respect to peaceful protesters.¹³⁷

The use of mass arrests under breach of peace or aggravated trespass powers is criticized.¹³⁸

Another way of restraining protest has been the use of excessive bail conditions.¹³⁹

On a positive note, the police have started to develop general standards of implementation, general policing strategies and new forms of communication to educate the people about their rights, including flashmobs.¹⁴⁰

4. Securing governmental accountability

Judicial review and the responsiveness of the democratic process

In recent cases the courts have taken a strong rights-based approach,¹⁴¹ interpreting powers narrowly and asking for interferences to be adequately justified.¹⁴² On the other hand, there have also been cases where the courts have been quite deferential to the risk assessment of the police, leaving considerable discretion to the police.¹⁴³ But these cases have become fewer and the courts as well as the democratic process have reacted to ECtHR judgments¹⁴⁴ and have been responsive to human rights concerns.

The Independent Police Complaints Commission and other types of review

The Independent Police Complaints Commission is in charge of investigating the most serious complaints and allegations of misconduct by police officers in England and Wales where an individual can file a complaint after having unsuccessfully rendered it to the police.¹⁴⁵ Civil society unfortunately appears not to see the Commission as being

¹³³ This was also underlined by the HAC report, *supra* fn. 121, para. 19; see also *Netpol*, Force not facilitation, 21 August 2013, available at <http://netpol.org/2013/08/21/force-not-facilitation-at-fracking-protests/> (last accessed: 10 March 2014).

¹³⁴ It has been underlined that police officers should be trained in forms of dialogic and peaceful communication, HAC report, *supra* fn. 122, recommendations para. 12; HRC report, *supra* fn. 6, para.181.

¹³⁵ This concerned in particular preventive arrests in relation to the Royal Wedding 29 April 2011. The views differ on this point, however, as in the following court decision, preventive arrests in order to prevent a breach of the peace were held to be lawful, *Hicks and others v Commissioner of Police for the Metropolis* [2012] EWHC 1947.

¹³⁶ *Netpol* Report, *supra* fn. 34, pp. 7-12.

¹³⁷ The UN Special Rapporteur considers them to be neither necessary nor proportionate, *supra* fn. 30, paras. 41-42 and para. 93.

¹³⁸ *Netpol* report, *supra* fn. 34, pp. 34-41.

¹³⁹ This has been urged to be stopped and to establish a protest ombudsman before whom protestors can challenge bail conditions, Special rapporteur, *supra* fn. 12, para. 93; see also *Netpol*, Bail conditions used to restrict protest, 6 June 2013, available at <http://netpol.org/2013/06/06/bail-conditions-used-to-restrict-protest/>, paras. 45-46, 93 (last accessed: 10 March 2014).

¹⁴⁰ See the ACPO Manual of 2010, *supra* fn. 129; HMIC Report, *supra* fn. 58, Annex A, rec. 1, 2, 5-7, 11; for the police flashmob, see the campaign "Keep calm and know your rights," <http://www.hampshire.police.uk/internet/news-and-appeals/campaigns/keep-calm-and-know-your-rights>.

¹⁴¹ This is notable, as they operate in a public order oriented legal framework.

¹⁴² See *Mengesha v. MPC*, *supra* fn. 126; *R (Moos and Anor) v. The Commissioner of the Police of the Metropolis*, *supra* fn. 117; *Catt v. ACPO & MPC*, *supra* fn. 64; *Wood v. MPC*, *supra* fn. 64.

¹⁴³ See *Abdul v. DPP*, *supra* fn. 72 (construing "legitimate protest" narrowly); *R (Castle and others) v. MPC*, *supra* fn. 124; *Austin v. MPC*, *supra* fn. 31 (confirmed by the ECtHR); and *Gillan v. MPC* [2006] UKHL 12 (reversed by the ECtHR).

¹⁴⁴ See e.g. *Gillan v. UK* and the amendment of s. 44 Terrorism Act, *supra* fn. 108 and 109 and it remains to be seen whether parliament or the courts will take a stricter approach on "kittling" in the near future which might enforce a higher threshold than that prescribed by the ECtHR in *Austin v. UK*.

¹⁴⁵ From April to September 2012, the IPCC upheld 44% of appeals made before it at the national level. IPCC, Police complaints statistics for police forces and the PCC, available at http://www.ipcc.gov.uk/en/Pages/police_complaints_stats.aspx (last accessed: 10 March 2014). The Commission

independent, however, particularly due to the fact that it does not report to the Parliament, but to the Home Secretary.¹⁴⁶

In reaction to reproaches of unaccountable police who use onerous and overbroad powers in an often disproportionate way, ACPO has started a White Paper Process, Policing in the 21st century.¹⁴⁷ This led to the enactment of the Police and Social Responsibility Act 2011, one of the farthest reaching police reforms, instituting a mechanism of democratic accountability by replacing public authorities with an elected 'Police and Crime Commissioner'.¹⁴⁸ Going even further, the HRJC recommended that the Government develop a quick and cost free system for resolving complaints and disputes in advance of protests taking place which has not yet been effected.¹⁴⁹

Finally, judicial review is the most important legal mechanism of police accountability.¹⁵⁰ Since March 2008, police authorities in England and Wales have been required to monitor police compliance with the HRA 1998, however. Additionally, the police have developed the laudable practice to invite non-governmental organizations, to monitor protests, and the policing around them.¹⁵¹

Moreover, the importance of personal accountability of police personnel has been pointed out.¹⁵² Crucial for holding police officers to account is the possibility to identify them by their identification numbers,¹⁵³ officers' non-identification at the G20 protests consequently spurred intensive criticism.¹⁵⁴ But the police appear to have made progress in this respect.¹⁵⁵ Regarding accountability, the improvement of the police's communication strategies with the media¹⁵⁶ is an important topic.¹⁵⁷ According to the HMIC report, the police have made progress in entering into a dialogic relationship with the media.¹⁵⁸

also issues recommendations to the police about the policing of protest and public order incidents as a result of its investigations. However, the police are not required to respond to the IPCCs recommendations.

¹⁴⁶ The UN Special Rapporteur regrets this, *supra* fn. 30, para.55. He recommends to allow the Commission to report before the Parliament, and increasing its resources; protestors should be able to bring complaints directly to the Commission; and a greater mixed nature of investigators should be achieved, para. 93.

¹⁴⁷ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/175441/policing-21st-full-pdf.pdf (last accessed: 10 March 2014).

¹⁴⁸ This is meant to serve the people's needs more directly, particularly by way of enhanced democratic as opposed to bureaucratic accountability; see the HMIC report, *supra* fn. 58, Annex B, recommendations 2, 11. For the background of the Act, see the report of Liberty, points 10-11, available at <http://www.liberty-human-rights.org.uk/pdfs/policy10/policing-in-the-21stc-reconnecting-the-people-and-the-police-sept-2010.pdf>. (last accessed: 10 March 2014) Especially ss. 11-14 enhance information transparency and thus allow for more accountability

¹⁴⁹ See HRJC report, *supra* fn. 6, para. 157.

¹⁵⁰ In administrative proceedings the claimant may only apply for judicial review after having followed the pre-action protocol which prescribes the sending of a letter to the defendant, giving the latter the opportunity to reply to the allegations which may lead to an agreement of the parties before the court proceedings take place, see s. 2 of the Administrative Court Guidance, available at <http://www.justice.gov.uk/downloads/courts/administrative-court/applying-for-judicial-review.pdf> (last accessed: 10 March 2014) and the pre-action protocol, available at http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv (last accessed: 10 March 2014), given effect by the Practice Direction Protocols annexed to the Civil Procedure Rules 1998. For a claim to be admissible, leave must be given by the High Court.

¹⁵¹ Report of the UN Special Rapporteur on freedom of peaceful assembly in the UK, A/HRC/23/39/Add.1, 29 May 2013, para. 52, although evidence has also been provided that this is not always effected as such, para. 53.

¹⁵² UN Special Rapporteur, *supra* fn. 151, para. 93. He believes in the courts and a democratic oversight body.

¹⁵³ This has also been emphasized by the Special Rapporteur, *supra* fn. 12, para. 93.

¹⁵⁴ See HAC report, *supra* fn. 122, paras. 17-23.

¹⁵⁵ The HMIC report highlights that numerals are worn by police officers, otherwise they would incur liability, *supra* fn. 58, Annex A, recommendation 12.

¹⁵⁶ The NUJ raised the problem that journalists were often prevented by the police to cover protests, see HRC report, *supra* fn. 6, para. 193.

¹⁵⁷ It has been highlighted that police forces should ensure that their officers follow the media guidelines which have been agreed between the ACPO and NUJ and hold those, not following these guidelines, to account, see HRJC report, *supra* fn. 6, para. 200, or have a designated media contact point, HAC report, *supra* fn. 122, recommendations para. 2.

¹⁵⁸ See Annex A, recommendations 2, 3, 7, 9 with reference to the ACPO Manual, *supra* fn. 129.

5. Conclusions and outlook

The overall conclusion on the law of public protest is multifaceted. Partially, the law has been developed in a human rights friendly fashion. In many respects, the legal system has shown to be responsive to the close scrutiny of the democratic process, the public, international and non-governmental organizations.¹⁵⁹ However, serious problems remain. Particularly problematic are the legality of certain powers, their proportionality as well as a legal framework, the focus of which is more on ensuring public order, thus providing many broad and discretionary powers, rather than on protecting freedom of assembly.¹⁶⁰ This approach also seems to determine the police's practice, which has led to disproportionate responses to protest¹⁶¹ and the courts have been willing to be deferential to the police's risk assessment. Thus, a changing attitude towards policing public protest in a facilitating way is important. Moreover, having regard to the powers being very scattered, it could be sensible to codify a law on freedom of peaceful assembly which would go through the democratic process, rendering the law more comprehensive and cohesive and enabling all stakeholders to participate.¹⁶² Last but not least, procedural safeguards and forms of legal redress need review, especially with regard to the non-targeted powers, accountability mechanisms should continue to be strengthened and the potential threat of the privatization of public space needs to be contained.

¹⁵⁹ See the parliamentary report, the HRJC report *supra* fn. 6 and the HAC report *supra* fn. 122 as well as the changed structure and ductus of court decisions.

¹⁶⁰ See also UN Special Rapporteur, *supra* fn. 151, para. 17.

¹⁶¹ This is also underlined by K. Bullock/P. Johnson, The Impact of the Human Rights Act 1998 on Policing in England and Wales, Br J Criminol (2011) 52(3); but in the report of HMIC, Adapting to protest, *supra* fn. 63, p. 7, it is submitted that the police as a service has adopted the presumption in favour of facilitating peaceful protest as a starting point for policing protest.

¹⁶² This was also recommended by the UN Special Rapporteur, *supra* fn.151, para. 93.

France

by Melina Garcin

In 2012, 3.382 protest demonstrations took place in Paris, and 883 in the first quarter of 2013. In 2012, 12 demonstrations were prohibited, either because of the planned itinerary, or because of threats to public order. 4 were prohibited in the first quarter of 2013.¹⁶³

1. Legal bases

In Europe, the guarantee of freedom of assembly is a result of the French Revolution. This fundamental right later on spread to other constitutions, especially on the basis of the Belgian Constitution from 1831. In France, freedom of assembly first appeared in a draft that Mirabeau presented to the National Assembly on 17 August 1789, but the Constituent Assembly did not endorse it in the Declaration of the Rights of Man and of the Citizen of 26 August 1789 (DRMC). A right to assemble nonetheless was granted in the Decree of 14 December 1789 on the constitution of the municipalities.¹⁶⁴ The Constituent Assembly proclaimed freedom of assembly and association in a 1790 law, before enshrining it in the 1791 Constitution, and again in the 1848 Constitution. Freedom of assembly then disappeared from the constitutional provisions, probably resulting from an amalgam between assembly and association.¹⁶⁵

The 1958 Constitution does not include any provision on freedom of assembly. The Preamble quotes the Preamble of the 1946 Constitution, which has constitutional value. It recognizes “the rights and freedoms of Man and the citizen enshrined in the DRMC and the fundamental principles acknowledged in the laws of the Republic”.¹⁶⁶ Freedom of assembly is not guaranteed as such in the Declaration, but the “free communication of ideas and opinions is recognized as being one of the most precious of the rights of Man; every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law”.¹⁶⁷

According to the wording, freedom of expression is recognized to “citizens”. However, the French legal doctrine (which is not a direct source of law but which influences the legislator and the courts) assumes that Art. 11’s freedom of expression is a human right applicable to all, and therefore freedom of assembly (as *lex specialis* to freedom of expression) is as well¹⁶⁸.

French law differentiates between public meetings, provided by an 1881 Act on freedom of assembly¹⁶⁹ (“liberté de réunion”) and a 1907 Act on public meetings¹⁷⁰ (“réunions publiques”); and demonstrations (“manifestations”), enshrined in different texts. While freedom of assembly and freedom to demonstrate are similarly recognized by French law, their legal regime differs, due to the fact that the use of public roads is more likely to disturb public order and to infringe freedoms (freedom of movement, freedom of work, etc.) than the use of public or private facilities. The 1881 Act provides that public meetings are free¹⁷¹ and the 1907 Act states that public meetings, regardless of the object, can be held without prior notification.¹⁷² Electoral meetings are included in the protection.¹⁷³ All marches, rallies, and,

¹⁶³ Communication Service of the Prefecture of police (2013) *Le 1er mai et ses traditionnelles manifestations!* Paris: Le Panorama hebdomadaire de la préfecture de police n° 265, 24 April.

¹⁶⁴ Stefan Ripke (2012) *Europäische Versammlungsfreiheit*. Tübingen: Mohr Siebeck, p. 14.

¹⁶⁵ COLLIARD, C.A. (2005) *Libertés publiques*. 8th ed. Paris: Dalloz, p. 495.

¹⁶⁶ Constitution of 1946, Preamble, para. 1.

¹⁶⁷ DRMC, Art. 11.

¹⁶⁸ WÖLKER, U. (1987) *Zu Freiheit und Grenzen der politischen Betätigung von Ausländern*. Berlin: Springer, p. 58.

¹⁶⁹ Act of 30 June 1881 on freedom of assembly.

¹⁷⁰ Act of 28 March 1907 on public meetings, in its consolidated version of 16 May 2009.

¹⁷¹ Act of 30 June 1881 on freedom of assembly, Art. 1, *supra* fn. 169.

¹⁷² Act of 28 March 1907 on public meetings, Art. 1, *supra* fn. 170.

¹⁷³ Act of 30 June 1881 on freedom of assembly, Art. 5, *supra* fn. 169.

generally speaking, all demonstrations on public roads are subject to prior notification.¹⁷⁴ Static meetings could take place on public squares but not on public roads.

2. Scope of the guarantee

Case-law

Freedom of assembly refers to “public meetings” in France. The French highest judicial Court (Cour de Cassation) stated that a public meeting, within the meaning of the 1881 Act, implied the intentional gathering of people in a public or private place accessible to the public.¹⁷⁵ The delimitation with a private meeting does not result from the location – which can be public or private, but depends on the access to the meeting. To be considered a private meeting, the participants should have been invited personally,¹⁷⁶ as opposed to public meetings or demonstrations without any participatory restrictions.¹⁷⁷ The distinction is sometimes difficult to make and in some cases, the highest administrative jurisdiction (Conseil d’Etat) extended the definition to private meetings which could actually constitute or degenerate in public ones.¹⁷⁸ A public meeting is organized or concerted; it is not a chance encounter between individuals. This criterion distinguishes a meeting from a crowd.¹⁷⁹ A meeting is a temporary gathering, as opposed to an association or a company, which have a long-term or a continuous nature.¹⁸⁰ Its purpose can lie in the exchange of views and ideas, as well as in the defence of an interest.¹⁸¹ The subject of the debate can be political, religious, moral, artistic, or economical.¹⁸² To be encompassed in the definition, public entertainment events should have the aim of disseminating an intellectual message to be discussed or to be defended.¹⁸³ The distinction between a public meeting and a demonstration lies in the fact that a demonstration takes place on public roads, whereas public meetings cannot be held on public roads¹⁸⁴ and take place in private or public facilities accessible to the public. Freedom of demonstration is enshrined in French legislation together with freedom of assembly; the Penal Code penalizes any “breach [...] of the enjoyment of freedom of [...] assembly or of demonstration”.¹⁸⁵ This distinction in France between public meetings (as the equivalent to the English word “assembly”) and demonstrations differs from the European Court of Human Rights’ interpretation (ECtHR). According to the ECtHR, the freedom to demonstrate is included within the right to freedom of peaceful assembly,¹⁸⁶ which encompasses indoor meetings and those taking place on public roads, and can be exercised by individuals and organizers.¹⁸⁷ Any demonstration on public roads can cause some disruption and the ECtHR considers that a certain tolerance is required from the authorities in such circumstances.¹⁸⁸

Flash mobs

There is no legal provision on flash mobs in France, nor any case-law on the matter. It is therefore not clear whether flash mobs on public roads would follow the same procedure

¹⁷⁴ Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 1 – *Demonstrations on public roads*, Art. L.211-1.

¹⁷⁵ Cass. crim., 14 March 1903, *Du Halgouët*, Rec. Dalloz 1903 I, p. 168.

¹⁷⁶ Cass. Crim., 9 January 1869, *Larcy*, S. 1869.281.

¹⁷⁷ COLLIARD, *supra* fn. 165, p. 498.

¹⁷⁸ CE, 23 December 1936, *Bucard*, Rec. p. 1151.

¹⁷⁹ Cass. crim., 13 December 1923, *Castex*, DP 1924.I.121.

¹⁸⁰ CE, 6 August 1915, *Delmotte et Senmartin*, Rec. 275.

¹⁸¹ Conclusions of the Government Commissioner MICHEL in CE, 19 May 1933, *Benjamin*, Rec. Lebon, p. 541; Cass. crim., 14 March 1903, *Du Halgouët*, Rec. Dalloz 1903 I, p. 168.

¹⁸² Cf. COLLIARD, *supra* fn. 165, p. 493; DUFFAR, J. (1996) *Les libertés collectives*. Paris: Montchrestien, p. 20.

¹⁸³ MENANTEAU, M. (1937) *Les nouveaux aspects de la liberté de réunion*. Paris: Librairie technique et économique, p. 119.

¹⁸⁴ Act of 30 June 1881 on freedom of assembly, Art. 6, *supra* fn.169 .

¹⁸⁵ Penal Code in its Consolidated version of 13 October 2013, Vol. IV – *Offences against the Nation, the State and public peace*, Title III – *Offences against the authority of the State*, Chap. I – *Breaches of public peace*, Sect. 1 – *Impediments to freedoms of expression, of labour, of association, of assembly or of demonstration*, Art. 431-1.

¹⁸⁶ ECtHR, *Barraco v France* (2009) App. No. 31684/05, para. 39.

¹⁸⁷ *supra* fn. 186, para. 41.

¹⁸⁸ *supra* fn. 186, para. 43.

requirements as indoor flash mobs (a lot of them take place in malls, airports, etc.). While most of the flash mobs taking place in France are staged as entertainment (and might therefore neither be included in the definition of a public meeting, nor of a demonstration), they are sometimes used to raise awareness about important issues.¹⁸⁹ Flash mobs are generally formed through the Internet¹⁹⁰ and social media web sites, such as Facebook¹⁹¹ and Twitter.¹⁹²

3. Restrictions

Freedom of assembly and freedom of demonstration are linked to freedom of expression,¹⁹³ as their purpose is to express a common claim, belief, thought, or protest.¹⁹⁴ According to Article 11 of the DRMC, legal restrictions are admissible.

Place and time restrictions

Restrictions to freedom of assembly are enshrined in Article 6 of the 1881 Act, pursuant to which meetings cannot be held on public roads and cannot be extended beyond 11 pm. However, in the localities where public premises close later, meetings can be extended until that closing time. Although it is not provided by law, demonstrations have been prohibited because of their planned itinerary.¹⁹⁵

Manner restrictions

Only electors of the district, members of the chambers, candidates, and their agents are allowed to attend electoral meetings.¹⁹⁶ The Constitutional Council affirmed that a “neighbourhood-visit” by a candidate for election constituted an electoral meeting held on public roads and therefore was prohibited by the 1881 Act.¹⁹⁷ Preventive measures, and even prohibitions, are admissible in cases of serious threats to public order.¹⁹⁸ Holding a demonstration that was prohibited previously is punishable.¹⁹⁹ In its *Benjamin* decision, the Conseil d’Etat (CE) paved the way to the approach used to apply freedom of assembly by exercising a strict scrutiny of the restrictions resulting from police measures, notably to maintain public order.²⁰⁰ Freedom is the rule, restriction the exception.²⁰¹ The CE takes into consideration the circumstances of the case, the balance of powers, and the political environment at the time of the decision when conducting the proportionality check.²⁰² Referring to Art. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the CE recalled that lawful restrictions could be imposed by members of the armed forces, police, or the State administration. The CE found that a measure re-establishing border control between France and Spain to avoid renewed violence during a demonstration was necessary and proportionate, considering the threats to public

¹⁸⁹ AllOut, Inter-LGBT, Act-Up Paris (2012) *Mardi 28 février – Flashmobs contre les lois homophobes à Saint-Pétersbourg*. 27 février, Act-Up Paris. Available at: <http://www.actupparis.org/spip.php?article4773>.

¹⁹⁰ Website on flash mobs in France: <http://flashmob.info/fr/> (last accessed: 10 March 2014).

¹⁹¹ Facebook group on flash mobs in France: <https://www.facebook.com/flashmobs> (last accessed: 10 March 2014).

¹⁹² Twitter page on flash mobs in: https://twitter.com/flashmob_fr.

¹⁹³ COLLIARD, *supra* fn. 165, p. 499.

¹⁹⁴ RIPKE, S. (2012) *Europäische Versammlungsfreiheit*. Tübingen: Mohr Siebeck, pp. 344-345.

¹⁹⁵ Communication Service of the Prefecture of police (2013) *Le 1er mai et ses traditionnelles manifestations!* Paris: Le Panorama hebdomadaire de la préfecture de police n° 265, 24 April.

¹⁹⁶ Act of 30 June 1881 on freedom of assembly, Art. 5, *supra* fn. 169.

¹⁹⁷ Cons. Const., 58-22 AN, 12 December 1958, OJ 16 December 1958, p. 11329; Cons. Const., 78-845 AN, 12 July 1978, OJ 17 July 1978, p. 2840.

¹⁹⁸ Cf. CE, 19 May 1933, *Benjamin*, Rec. Lebon, p. 541; CE, 5 February 1937, *Bujadoux*; CE, Sect. 23 January 1953, *Naud*; CE, 19 June 1953, *Houphouët-Boigny*; CE, 29 December 1997, *Maugendre*; Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 1 – *Demonstrations on public roads*, Art. L.211-4.

¹⁹⁹ Penal Code, Vol. IV – *Offences against the Nation, the State and public peace*, Title III – *Offences against the authority of the State*, Chap. I – *Breaches of public peace*, Sect. 3 – *Unlawful demonstrations and criminal involvement in a demonstration or a public assembly*, Art. 431-9.

²⁰⁰ CE, 19 May 1933, *Benjamin*, Rec. Lebon, p. 541.

²⁰¹ CE, 5 February 1937, *Bujadoux*; CE, Sect. 23 January 1953, *Naud*; CE, 29 July 1953, *Damzière et autres*.

²⁰² CE, 19 June 1953, *Houphouët-Boigny*; CE, 23 July 1993, *M. Saldou*, n° 107126; CE, 3 July 2009, n° 329315.

order.²⁰³ Carrying a weapon during a demonstration or a public assembly is prohibited.²⁰⁴ In circumstances where there are reasons to fear serious public order disturbances, carrying objects that could be used as weapons is prohibited in the area where the demonstration is taking place.²⁰⁵ The participation in a “crowd” (“atroupement”), which is a gathering of persons on public roads or in a public place likely to disrupt public order, constitutes a misdemeanour and the crowd can therefore be dispersed by law enforcement authorities.²⁰⁶ Once legal warnings have been made to the demonstrators, it is an offense to continue participating in that crowd.²⁰⁷ The penalties increase if the perpetrators continue engaging deliberately in the crowd after the authorities’ warning, if they conceal their face, or if they are armed.²⁰⁸

Sight and sound restrictions

On the prohibition of a public meeting held by the Front National, the CE stated that this meeting was not likely to threaten public order in a manner that could not be controlled by appropriate police measures.²⁰⁹ It applied the same argument to sectarian groups.²¹⁰ While detainees are not deprived of the right to exercise their fundamental freedoms on the sole basis that they are detained, the exercise of those freedoms is subordinated to the constraints inherent to their detention; therefore, they cannot invoke freedom of assembly provisions.²¹¹ The CE confirmed, in two 2013 decisions, the legality of a presidential Decree ordering the dissolution of associations that spread an ideology inciting hatred and discrimination through gatherings, demonstrations, meetings, and forums, among others.²¹² On 9 January 2014, the CE confirmed a prefectural order which prohibited the holding of a performance of the French comedian Dieudonné M’Bala M’Bala, containing anti-Semitic remarks. Freedom of expression and freedom of assembly were invoked in that case, and were put into balance with the reality and the seriousness of the risks of public order disturbances and the serious risk of offense to the dignity of the human person, enshrined in the DRMC.²¹³ From a legal point of view, it seems doubtful to quote freedom of assembly next to freedom of expression in this case, as only public meetings are regulated by French legislation, whereas a performance by a comedian, only opened to persons in possession of a ticket, should be seen as a private meeting.²¹⁴ As the CE does not refer expressively to the 1881 Act though, it probably intended to refer to the guarantee of freedom of assembly derived from the freedom of expression, as encompassed in Art. 11 of the DRMC, without taking into consideration the exact definition of the freedom of assembly in France. In any event, it will be interesting to find out what the ECtHR will decide on that case if seized. For the ECtHR, the term “restrictions” within the meaning of Art. 11-2 ECHR must be interpreted

²⁰³ Cf. CE, 30 July 2003, n° 237649; ECtHR, *Gurekin a.o. v France* (2006) App. No 9266/04.

²⁰⁴ Penal Code, Vol. IV – *Offences against the Nation, the State and public peace*, Title III – *Offences against the authority of the State*, Chap. I – *Breaches of public peace*, Sect. 3 – *Unlawful demonstrations and criminal involvement in a demonstration or a public assembly*, Art. 431-10.

²⁰⁵ Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 1 – *Demonstrations on public roads*, Art. L.211-3.

²⁰⁶ Penal Code, Vol. IV – *Offences against the Nation, the State and public peace*, Title III – *Offences against the authority of the State*, Chap. I – *Breaches of public peace*, Sect. 2 – *Criminal involvement in a crowd*, Art. 431-3.

²⁰⁷ Penal Code, Regulatory Part, Vol. IV – *Offences against the Nation, the State and public peace*, Title III – *Offences against the authority of the State*, Chap. I – *Breaches of public peace*, Sect. 2 – *Criminal involvement in a crowd*, Art. R.431-1.

²⁰⁸ Penal Code, Vol. IV – *Offences against the Nation, the State and public peace*, Title III – *Offences against the authority of the State*, Chap. I – *Breaches of public peace*, Sect. 2 – *Criminal involvement in a crowd*, Art. 431-4 and 431-5.

²⁰⁹ CE, 29 December 1997, *Maugendre*, Rec. p. 826; CE, 29 December 1995, n° 129759.

²¹⁰ CE, 30 March 2007, n° 304053.

²¹¹ CE, 27 May 2005, *Section française de l’Observatoire international des prisons*, n° 280866.

²¹² CE, 25 October 2013, n° 372319 and n° 372321.

²¹³ CE, Order of 9 January 2014, n° 374508.

²¹⁴ LETTERON, R. (2013) *Dieudonné: la censure, dernière tentation de Manuel Valls*. 29 December, Liberté, Libertés chéries, Veille juridique sur les droits de l’homme et les libertés publiques. Available at: <http://libertescheries.blogspot.fr/2013/12/dieudonne-la-censure-derniere-tentation.html> (last accessed: 10 March 2014).

as including the measures - such as punitive measures - taken following a meeting.²¹⁵ A restriction within the meaning of Art. 11-2 ECHR cannot find its legitimate aim in the peaceful demonstration against a legislation which has been contravened by the protestor.²¹⁶

4. Procedural issues

Notification/authorization

The 1881 Act provides that public meetings can take place without prior authorization under the conditions provided by law.²¹⁷ As for the 1907 Act, public meetings, regardless of the subject, can be held without prior notification.²¹⁸ However, all marches, rallies, and gatherings of persons, and, generally speaking, all demonstrations on public roads, are subject to prior notification.²¹⁹ The organizer of a demonstration must notify the prefect (or the Préfet de Police in Paris) of the reason, date, time, location, and itinerary of the demonstration 15 to 3 days beforehand.²²⁰ Demonstrations following local customs are exempted from the requirement.²²¹ Organizing a demonstration on public roads without prior notification, or introducing an incomplete or erroneous notification, both constitute punishable acts.²²² However, the ECtHR stated that a demonstration could take place without prior notification if the authorities were aware of the demonstration and did not stop it.²²³ ECtHR judgments can lead to the re-examination of the case by the French judge. They also often influence the evolution of national law.

Decision-making

If the authority vested with police powers considers that the projected demonstration is likely to disturb public order, it can prohibit it, notifying that to the signatories of the notification. The mayor transfers the notification to the prefect and, if applicable, attaches the copy of the prohibition order. If the mayor abstained from taking a prohibition order, the prefect has the power to do so.²²⁴ The prefect (or the Préfet de Police in Paris) is responsible for the prohibition of carrying objects which could be used as weapons during demonstrations.²²⁵ The prefect, the mayor, or police officers are responsible for the legal warnings prior to the dispersal of a crowd.²²⁶

5. Specific forms of assemblies

Spontaneous assemblies

French legislation does not envisage spontaneous assemblies. Precautionary measures for the maintenance of public order are put in place in case of large-scale gatherings that could

²¹⁵ ECtHR, *Ezelin v France* (1992) 14 EHRR 362, para 39.

²¹⁶ ECtHR, *Cisse v France* (2002) App. No 51346/99, para 50.

²¹⁷ Act of 30 June 1881 on freedom of assembly, Art. 1, *supra* fn.169.

²¹⁸ Act of 28 March 1907 on public meetings, in its consolidated version of 16 May 2009, Art. 1.

²¹⁹ Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 1 – *Demonstrations on public roads*, Art. L.211-1.

²²⁰ *Ibid*, Art. L.211-2.

²²¹ *Ibid*, Art. L.211-1.

²²² Penal Code, Vol. IV – *Offences against the Nation, the State and public peace*, Title III – *Offences against the authority of the State*, Chap. I – *Breaches of public peace*, Sect. 3 – *Unlawful demonstrations and criminal involvement in a demonstration or a public assembly*, Art. 431-9; Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 5 – *Penal provisions*, Art. L. 211-12.

²²³ ECtHR, *Barraco v France* (2009) App. No. 31684/05, para. 45.

²²⁴ Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 1 – *Demonstrations on public roads*, Art. L.211-4.

²²⁵ Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 1 – *Demonstrations on public roads*, Art. L.211-3.

²²⁶ Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 3 – *Crowds*, Art. L.211-9.

possibly deteriorate. In 2012, 719 out of the 3382 demonstrations (21.26%) and 179 out of the 883 in the first quarter of 2013 (20.27%) were spontaneous demonstrations. In February 2013, opponents to same-sex marriage decided not to give prior notification and to assemble spontaneously in Paris before the police arrived to disperse them.²²⁷ A spontaneous demonstration took place against a neo-Nazi gathering. The police remained on alert to avoid any misconduct, although the location was unknown.²²⁸ Even police officers have demonstrated spontaneously without prior notification.²²⁹ They are allowed, but are disbanded if they cause disturbances to public order.

Assemblies gathered by means of new technologies

Information on the previously-quoted spontaneous demonstrations spread rapidly on social media²³⁰ or through text messages or emails.²³¹ Many public meetings, demonstrations, or other types of events are now organized or advertised through social networks.²³² The “Dieudonné” case shows that public order disturbances are nowadays strongly influenced by the mobilization of different actors through social media. Information on the actual content of Dieudonné’s words was indeed spread on social media, before being used by the Conseil d’Etat to decide on the case.

Assemblies taking place on public property

Public meetings can be held in public facilities. Demonstrations on public roads can generally take place if they are notified in advance.

Counter-demonstrations

Counter-demonstrations are not regulated by French law. Public authorities sometimes use the possible occurrence of counter-demonstrations as a justification to the prohibition of meetings. The Conseil d’Etat held that by refusing to make a room available for meetings of the “collectif Palestine ENS”, the director of the “Ecole Normale Supérieure” did not impair students’ freedom of assembly, as it had been balanced with the prevention of disturbances of public order and took especially into account possible counter-demonstrations.²³³

6. Implementing freedom of assembly legislation

Pre-event planning

Every meeting shall have a board (“un bureau”) of at least three people responsible for maintaining order, preventing any breach of the law, prohibiting any speech that is contrary to public order or morals or containing any incitement to commit an act constituting a serious crime or other major offence.²³⁴ In Paris, the direction of public order and traffic regulation (“direction de l’ordre public et de la circulation”), which is part of the Prefecture of Police, can contact the organizer of a demonstration to discuss certain points, as the itinerary, the evaluation of potential risks, etc.

²²⁷ QUEGUINER, C. (2013) *Manifestation spontanée anti-mariage pour tous dimanche: “Maintenant, nous n’allons plus demander l’autorisation”*. 10 February, France Info. Available at: <http://www.franceinfo.fr/politique/manifestation-spontanee-anti-mariage-pour-tous-dimanche-maintenant-nous-n-a-888265-2013-02-10> (last accessed: 10 March 2014).

²²⁸ BADINIER, E. (2013) *Manifestation spontanée contre le rassemblement néo-nazi*. 17 May, France Bleu Roussillon. Available at: <http://www.francebleu.fr/societe/neo-nazis/manifestation-spontanee-contre-le-rassemblement-neo-nazi-571206> (last accessed: 10 March 2014).

²²⁹ MOREAU, V. (2012) *Malaise dans la police française: entre manifestations encadrées et actions “spontanées”*. 17 May, RFI. Available at: <http://www.rfi.fr/france/20120511-malaise-police-entre-manifestations-encadre-es-actions-spontanees> (last accessed: 10 March 2014).

²³⁰ BADINIER, E. (2013), *supra* fn. 228

²³¹ MOREAU, V. (2012) *Malaise dans la police française: entre manifestations encadrées et actions “spontanées”*. 17 May, RFI. Available at: <http://www.rfi.fr/france/20120511-malaise-police-entre-manifestations-encadre-es-actions-spontanees> (last accessed: 10 March 2014).

²³² I.e. a demonstration organized by Belgians supporting same-sex marriage and the LGBT community in France: <https://www.facebook.com/events/338081072957774/> (last accessed: 10 March 2014).

²³³ CE, 7 March 2011, n° 347171.

²³⁴ Act of 30 June 1881 on freedom of assembly, Art. 8, *supra* fn. 169.

Costs

The State pays for the costs falling under the obligations of public authorities to maintain public order.

Use of force

The use of force is appropriate only if absolutely necessary to the maintenance of public order. The deployed force shall be proportionate to the disturbance.²³⁵ Weapons can be used by authorities only under strict conditions.²³⁶ Law enforcement authorities responsible for the dispersal of a crowd can directly make use of force if they are victims of violence or if they cannot secure the location they are occupying in another manner.²³⁷ Military means can be used in case of threats or serious public order disturbances.²³⁸ The Parliamentary Assembly of the Council of Europe (PACE) has deplored “recent cases of excessive use of force to disperse demonstrators”²³⁹, referring to demonstrations against same-sex marriage staged in Paris in 2013, which resulted in the intervention of law enforcement forces who used tear gas on demonstrators. Four persons were injured and several hundred were arrested. But violence also rose from the demonstrators’ side (throwing of glass bottles at policemen, insults towards journalists and policemen, direct attacks against policemen).²⁴⁰

Liability of organizers

Members of the board of a public meeting are accountable for infringements to the prescriptions set in Articles 6 and 8 of the 1881 Act.²⁴¹

7. Securing governmental accountability

Review and appeal

Administrative orders can be challenged before the administrative tribunals. Appeals are made before the administrative courts of appeal, and the Conseil d’Etat, as the highest administrative jurisdiction, is the final judge on acts taken by local authorities. If a demonstration is prohibited, the administrative judge has to make sure that there is a risk of disturbance to public order and that no other measure to maintain order is sufficient or adapted to guarantee the security of persons and goods. Civil cases are brought before the judicial courts of first instance, which may be appealed before a court of appeal and finally go before the Cour de Cassation, which decides whether the rules of law have been correctly applied by the lower courts. The Constitutional Council is seized when there is a doubt on whether a legislative provision violates the rights and freedoms guaranteed under the Constitution, including the freedoms enshrined in the Preamble of the 1946 Constitution and in the DRMC.

Liability and accountability of law enforcement personnel

The State bears civil liability for damages and harm caused by armed or non-armed crowds or gatherings to people or goods. The State can file a recourse action against the municipality when the latter bears responsibility.²⁴²

²³⁵ Penal Code, Regulatory Part, Vol. IV – *Offences against the Nation, the State and public peace*, Title III – *Offences against the authority of the State*, Chap. I – *Breaches of public peace*, Sect. 2 – *Criminal involvement in a crowd*, Art. R.431-3.

²³⁶ *Ibid.*

²³⁷ Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 3 – *Crowds*, Art. L.211-9.

²³⁸ *Ibid.*, Art. R.431-5.

²³⁹ PACE Resolution 1947 (2013) *Popular protest and challenges to freedom of assembly, media and speech*. 27 June (25th Sitting). Available at: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20002> (last accessed: 10 March 2014).

²⁴⁰ Editorial Board (2013) *Manifestation anti-mariage gay: violents heurts après la dispersion des cortèges*. 27 May, France 24. Available at: <http://www.france24.com/fr/20130526-heurts-eclatent-apres-dispersion-manifestation-anti-mariage-gay-police-crs-frigide-bardot-homo/> (last accessed: 10 March 2014).

²⁴¹ Act of 30 June 1881 on freedom of assembly, Art. 8, *supra* fn. 169.

Monitoring

In France, the Office for Democratic Institutions and Human Rights' observation teams could not be deployed to monitor the particular assemblies that had been selected for observation. This was the result of decisions by the respective authorities not to facilitate and to assist the deployment of ODIHR monitoring teams during such events.²⁴³

Media access

Independent coverage of public meetings and demonstrations is not regulated by the law, even though they are largely covered by the media in France but also by international media, as it was the case during the demonstrations against same-sex marriage in 2013 for example. The current news on the comedian Dieudonné M'Bala M'Bala is also widely covered by the media, which has some influence on the public's reactions.

8. Conclusions and Outlook

Freedom of assembly is not quoted as such in the Constitution, but is derived from another constitutionally recognized freedom, which is freedom of expression. The distinction between public meetings and demonstrations in French legislation is not the most explicit one, as public meetings are guaranteed by two acts, whereas the right to demonstrate is not regulated by a specific act, but in different ones, its guarantee being affirmed within the Penal Code. French rules on freedom of assembly are liberal. Public meetings can be held freely; the board only has to find a location and to ensure the smooth process of the event. Demonstrations on public roads are subject to prior notification. A demonstration is lawful, if it has not been prohibited due to the risk of public order disturbances. The implementation of freedom of assembly in France is generally speaking liberal, as protests have played an important part in France's history. But depending on the political context and on the issues at stake, the right to demonstrate, as well as its restrictions, can take different proportions (as shown by the protests against same-sex marriage or the "Dieudonné" case for example). Also, although the law only requires a notification from organizers of most demonstrations, public authorities tend to interpret it as a request for authorization²⁴⁴, leading to a decision on whether to permit or prohibit the event.²⁴⁵

²⁴² Code of Homeland Security, Vol. II – *Public order and security*, Title I – *Public order*, Chap. I – *Prevention of disturbances of public order during demonstrations and gatherings*, Sect. 3 – *Crowds*, Art. L.211-10.

²⁴³ OSCE/ODIHR (2012) *Report Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States (May 2011 – June 2012)* Warsaw, 9 November, para. 228. Available at: <http://www.osce.org/odihr/97055>.

²⁴⁴ Cf. <http://vosdroits.service-public.fr/associations/F21899.xhtml#N10083>;
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&ved=0CIABEYwCA&url=http%3A%2F%2Fmedia.strasbourg.eu%2Falfresco%2Fd%2Fa%2Fworkspace%2FSpacesStore%2F57c63e97-61e1-4373-91c4-026433563deb%2Fformulaire-demande-organisation-grand-evenement.pdf&ei=sRSzUuK7BoSihqf6sIC4Bg&usq=AFQjCNGGGEr8BRL_pbljBIDrZv0qdwHFrw&sig2=Nakauqf7RxSYs5kbBi5ARg (last accessed: 10 March 2014).

²⁴⁵ <http://vosdroits.service-public.fr/associations/F21899.xhtml#N101F7> (last accessed: 10 March 2014).

United States of America

by Dr. Steven Less, Esq.

1. Legal bases and scope of the guarantee

Constitutional right to assemble

The First Amendment to the US Constitution expressly mentions the right of “the people” to “assemble,” while simultaneously listing other fundamental areas of expressive activity that are protected from governmental interference: “Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”²⁴⁶

No ranking prioritizes the freedoms protected. Rather, the guarantees of petition, assembly, speech and press are seen as applying to coequal or “cognate” freedoms,²⁴⁷ the protection of which additionally implies a right of association. Whether gatherings across time and place are more appropriately secured under a non-derivative right to freedom of association²⁴⁸ as opposed to a temporally broader concept of assembly has been debated.²⁴⁹ For brevity’s sake, this report focuses on the First Amendment’s protection of physical gatherings for expressive purposes.

The Amendment’s wording suggests that “peaceable assembly” plays only a facilitating role in allowing individuals on a collective level to ask for responsive and accountable government. Nevertheless, this portion of the provision has generally been designated as the “Assembly and Petition Clause,”²⁵⁰ indicating a broader view of the expression guaranteed. Despite scholarly characterization of the Clause as “the very essence of the Bill of Rights,”²⁵¹ little case law²⁵² or academic literature focuses specifically on either petition or assembly rights.²⁵³

Scope of the guarantee

Traditionally, guarantees of assembly and petition were understood as referring to activities aimed at influencing the government.²⁵⁴ A wider conception now prevails under which controversies involving speech, press, assembly or petition are all analysed in terms of free speech or expression.²⁵⁵ As a result, judicial application of the First Amendment adheres to the speech-framework also in cases of assembly taking such forms as political meetings, marches, rallies, gatherings in public parks, labour pickets, leafleting, door-to-door solicitation, etc.²⁵⁶

The Assembly and Petition Clause suggests that, while government may not interfere with an inherent right of people “peaceably” to assemble, no general right exists to assemble per se.

²⁴⁶ U.S. Const., amend. I (ratified 1791). Under the ‘incorporation doctrine,’ the protections secured by the Bill of Rights against Congress (and other organs of the federal government) have generally been interpreted to apply to the states and their political subdivisions by virtue of the Due Process Clause of the Fourteenth Amendment.

²⁴⁷ *De Jonge v. Oregon*, 299 U.S.353, 364 (1937); M. M. Russell (ed.), *Freedom of Assembly and Petition (The First Amendment): Its Constitutional History and the Contemporary Debate* (2010) (hereinafter *Freedom of Assembly and Petition*).

²⁴⁸ See D. Cole, ‘Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association,’ in *Freedom of Assembly and Petition*, id., 207, at 208-209.

²⁴⁹ See J. D. Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly* (2012).

²⁵⁰ See M. M. Russell, ‘Editor’s Introduction,’ in *Freedom of Assembly and Petition*, supra fn.247, 21, at 22, 43.

²⁵¹ See id., at 23.

²⁵² Cf. M. M. Russell, ‘Editor’s Note, Part III,’ in *Freedom of Assembly and Petition*, supra fn. 247, 185, at 185.

²⁵³ See M.M. Russell, ‘Editor’s Introduction,’ in *Freedom of Assembly and Petition*, supra fn. 247, at 21.

²⁵⁴ *United States v. Cruikshank*, 92 U.S.542 (1875).

²⁵⁵ *De Jonge v. Oregon*, supra fn. 247.

²⁵⁶ See J. Mazzone, ‘Freedom’s Associations,’ in *Freedom of Assembly and Petition*, supra fn. 247, 26, at 29.

Because of this qualification, ensuring public safety and preventing disturbances to the public order remain appropriate objects of governmental regulation.²⁵⁷

Even where regulation does not amount to a prohibition, however, the constitutional guarantee of assembly may be invalidly compromised. By narrowing the definition of “peaceable” and imposing cumbersome conditions, governmental authorities can subvert public assemblies, transforming them into irrelevant “symbolic performance[s].”²⁵⁸ The Supreme Court has determined that peaceable assemblies need not have peace as their purpose: “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger....”²⁵⁹

Forms of assemblies

Assemblies on public property

Where an assembly occurs on government or public property, the courts will consider whether the setting constitutes a public or a non-public forum. Public forums either have a longstanding tradition of being used by the public for purposes of expression guaranteed by the First Amendment (e.g. streets, sidewalks and parks)²⁶⁰ or they have been specially designated by the government for such uses (e.g., municipal auditoriums or public meeting halls). Non-public forums are properties used for other public purposes (e.g., court-buildings, government offices, municipal hospitals, municipal airports, police stations, military installations, school buildings, jails, etc.).

For non-public forums, the courts will examine whether restrictions on expression are reasonable with respect to the people served by the forum and neutral with respect to viewpoint.²⁶¹ Restrictions on assembly are generally upheld under this test.

Public forums enjoy favoured status in First Amendment law. Where restraints are imposed on their use, the restraints’ constitutionality is determined using the above-mentioned standards for content-neutral restrictions. Applying the time, place and manner test, the Court has, for example, upheld a proscription of loud demonstrations on a sidewalk in front of a school during school-hours.²⁶²

Assemblies on private property

Nothing in the First Amendment prevents private parties free to forbidding assembly on their property. In *Lloyd Corp. v. Tanner*, a split Supreme Court upheld a ban on distribution of anti-Vietnam-war handbills in a privately-owned shopping centre.²⁶³ The dissenters, however, saw access to the mall as necessary for effective communication in this situation, where they considered the location as the “functional equivalent” of a town’s business district. Grounding themselves on state constitutional provisions and the theory that owners have voluntarily opened their property to the public, a few state courts have upheld state statutory limits on private-property owners’ power of exclusion.²⁶⁴

²⁵⁷ See *id.*, at 27-28.

²⁵⁸ T. A. El-Haj, ‘The Neglected Right of Assembly,’ in *Freedom of Assembly and Petition*, *supra*fn. 247, 255, at 256-257.

²⁵⁹ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

²⁶⁰ See, e.g., *Hague v. CIO*, 307 U.S. 496 (1939).

²⁶¹ *International Society for Krishna Consciousness [ISKCON] v. Lee*, 505 U.S. 672 (1992) and *Lee v. ISKCON*, 505 U.S. 830.

²⁶² *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

²⁶³ 407 U.S. 551 (1972). See also, *Hudgens v. NLRB*, 424 U.S. 507 (1976).

²⁶⁴ See, e.g., *Golden Gateway Center v. Golden Gateway Tenants Association*, 29 P.3d 797 (Cal. 2001); *Green Party v. Hartz Mountain Industries, Inc.*, 752 A.2d 315 (N.J. 2000); cf. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

2. Restrictions

Content-based restrictions

A core-principle of First Amendment law **forbids any regulation of expression directed at the message** being communicated.²⁶⁵ While the prohibition appears to be absolute, it has been subject to qualifying interpretation. According to the Supreme Court, some categories of expression are excluded from protection under the First Amendment. Where assembly-participants communicate fighting words, threats of violence, or an incitement to riot, police suppression presumptively conforms with the First Amendment. Restrictions affecting protected categories of expression, on the other hand, require the balancing of the legitimate governmental interest to regulate conduct and the individual interest in unfettered expression. Over time, the Court has established particular balancing standards which apply depending on the category at issue in the relevant case. Essentially, restrictions on unprotected categories of expression are subject to low-level (rational basis) judicial review. Where protected categories are subject to content-based restrictions, the highest level of judicial review (strict scrutiny) applies.

The “fighting words” doctrine,²⁶⁶ for example, precludes the police from arresting people who have merely insulted them.²⁶⁷ Rather, the insults must be made in an individualized, face-to-face encounter inherently likely to provoke listeners into responding with immediate violence. The “true threats” excluded from First Amendment’s protection are serious expressions of intent to commit an act of unlawful violence to a particular individual or group of individuals, where the speaker means to intimidate.²⁶⁸ The “clear and present danger” standard²⁶⁹ originally provided courts with a guideline to analyse the validity of restrictions on communication seen as constituting an “incitement to riot.” Under *Brandenburg v. Ohio*, the standard was more precisely and narrowly formulated as expression meant and likely to incite immediate unlawful action.²⁷⁰ General fears of possible lawless action are considered premature under the contemporary approach and do not justify governmental interference.²⁷¹

When the threat of lawlessness arises from the reaction of a hostile audience, the police are obliged to maintain order so that the assembly can take place. They cannot constitutionally disperse or arrest demonstrators for the disorderly conduct of spectators.²⁷² Rather, their peacekeeping efforts must focus on the hecklers. As long as the police have the means to maintain order, suspending an assembly should be a last resort.²⁷³

Assemblies whose participants propagate hate speech – i.e., words or expressive conduct intended to communicate denigration, belittlement, contempt or loathing for others because of their race, religion, ethnic origin, gender, sexual orientation or other characteristics – generally fall within the protection of the First Amendment. Notwithstanding substantial criticism of the Court’s “market-place-of-ideas”²⁷⁴ approach to such expression, the Supreme Court has struck down legislation criminalizing the display of symbols likely to provoke anger, resentment or alarm based on race, colour, ethnicity or religion;²⁷⁵ it has upheld the right of National Socialist Party members to march in uniform through areas with a large Jewish population, including many Holocaust survivors,²⁷⁶ and it has upheld the right to hold cross-

²⁶⁵ See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

²⁶⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

²⁶⁷ See, e.g., *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), *Gooding v. Wilson*, 405 U.S. 518 (1972), *City of Houston v. Hill*, 482 U.S. 451, cert. denied, 483 U.S. 1001 (1987).

²⁶⁸ *Virginia v. Black*, 538 U.S. 343 (2003).

²⁶⁹ *Schenck v. United States*, 249 U.S. 47 (1919).

²⁷⁰ 395 U.S. 444 (1969).

²⁷¹ *Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1996).

²⁷² *Wright v. Georgia*, 373 U.S. 284 (1963).

²⁷³ *Gregory v. Chicago*, 394 U.S. 111 (1969).

²⁷⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, dissenting).

²⁷⁵ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

²⁷⁶ *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977).

burning ceremonies at Ku Klux Klan rallies.²⁷⁷ Hate speech during assemblies can be abridged, however, where it goes beyond the communication of beliefs and falls into a category of unprotected speech. A split Court, nevertheless, invalidated a law which sanctioned only hate-speech within the category of fighting words, finding this to be an unconstitutional viewpoint-selective regulation of words or symbols.²⁷⁸

Content-neutral restrictions

In establishing the scope of the constitutional guarantee of assembly, the courts have distinguished between speech and conduct. *United States v. O'Brien*²⁷⁹ provided a test for determining when government can validly interfere with expression in cases involving content-neutral regulation directed at conduct which has an expressive dimension and where the basic dispute concerned the regulation's application. O'Brien was convicted for having knowingly destroyed his selective service registration certificate (draft card). He did this before a crowd on the steps of a court building in Boston, thereby engaging in nonverbal conduct intended to communicate a message, i.e. symbolic speech. Upholding O'Brien's conviction, the Supreme Court found that the regulation, which prohibited wilful damaging of draft cards, was content-neutral, served a substantial governmental purpose unrelated to suppressing speech, and was narrowly tailored to achieve this purpose. This standard essentially parallels a second standard which has been used for cases where expression is also incidentally abridged by time, place and manner restrictions on conduct and the restrictions are challenged on their face.²⁸⁰

Regulations that entirely foreclose a medium of expression, although content-neutral, would generally not meet either of these standards.²⁸¹ Such restrictions potentially discriminate against financially weaker groups unable to employ more expensive means of communications. The complete prohibition of public marches, for example, has been found unconstitutional under this rationale.²⁸² However, where there is no indication of discrimination, some total medium bans have been sustained.²⁸³

Time, place and manner restrictions are typically imposed on assemblies to maintain public order and protect against nuisances. Such restrictions, which have generally survived constitutional challenge, may be found in the form of anti-noise ordinances²⁸⁴ - ordinances protecting residential privacy,²⁸⁵ anti-littering laws,²⁸⁶ laws protecting against interference with traffic as well as ingress to and egress from buildings,²⁸⁷ anti-solicitation regulations,²⁸⁸ regulation of signs and billboards,²⁸⁹ ordinances making permits a prerequisite for assembling,²⁹⁰ etc.²⁹¹ In addition to the above-mentioned *O'Brien* standard, the Court has employed a "time, place and manner test" in such cases. The latter allows for reasonable restraints on expression where such restraints are content-neutral, "narrowly tailored to serve

²⁷⁷ *Virginia v. Black*, *supra* fn. 268

²⁷⁸ *R.A.V. v. City of St. Paul*, *supra* fn.275. *But see Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (upholding enhanced criminal sentencing for racially motivated assault under state law).

²⁷⁹ 391 U.S. 367 (1968).

²⁸⁰ See *infra*, text accompanying fn. 287.

²⁸¹ See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Loper v. New York City Police Dept.*, 999 F.2d 699 (2d Cir. 1993).

²⁸² *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

²⁸³ See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding prohibition on camping in a park).

²⁸⁴ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

²⁸⁵ *Frisby v. Schultz*, 487 U.S. 474 (1988).

²⁸⁶ See *Schneider v. State of New Jersey*, 308 U.S. 147 (1939); *cf. City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

²⁸⁷ *Hill v. Colorado*, 530 U.S. 730 (2000).

²⁸⁸ *Martin v. City of Struthers*, 319 U.S. 141 (1943).

²⁸⁹ *Ladue v. Gilleo*, *supra* fn. 281.

²⁹⁰ See *infra* Sect. 2 (prior restraints).

²⁹¹ See NY Penal Law §240.35(4) (generally forbidding people from publically assembling while wearing masks); see also, upholding the provision, *Schuman v. State of N. Y.*, 270 F.Supp. 730 (S.D.N.Y. 1967) and *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004).

a significant government interest” and “leave open ample alternative channels for communication.”²⁹² The intermediate-level review applied to content-neutral restrictions under either approach is generally deferential to the government.

Criminal laws enacted to maintain public safety may, likewise, interfere with the right of assembly. Enforcement of statutory provisions on trespass, breach of the peace, disorderly conduct, and blocking public passage will generally be upheld when they are clear and not intended to suppress expression.

Place restrictions: restricted zones

Spatial bans on assembly have been upheld in US law. Some of these ‘frozen zones,’ ‘buffers,’ etc., appear in connection with time, place and manner restrictions on expression near schools,²⁹³ health clinics²⁹⁴ and private residences.²⁹⁵ Similar restrictions on assembly have been deemed constitutional also in regard to polling places.²⁹⁶

Nevertheless, the Supreme Court has often found spatial regulations unsustainable as content-based,²⁹⁷ failing to promote a significant governmental interest,²⁹⁸ or overbroad.²⁹⁹ They have also drawn criticism for rendering protest ineffective and being arbitrary.

Although *Snyder v. Phelps* pertained to a civil suit rather than a municipal ordinance,³⁰⁰ this decision throws doubt on the constitutionality of recent attempts to restrict the exercise of First Amendment rights near funerals. It also suggests that the Court may be disinclined to uphold broad zonal approaches to ensuring access to abortion clinics in the future.³⁰¹

Vagueness and overbreadth

Restrictions on assembly must be precise. Arrests based on criminal law, for example, require narrow, clear language which provides sufficient notice of what is prohibited. The vagueness doctrine implicates a fair notice requirement derived from the Due Process Clause.³⁰² It also facilitates consideration of the chilling effect on expression³⁰³ that results from arbitrary and discriminatory enforcement of restrictions by officials who have been improperly delegated authority to make basic policy decisions in the absence of objective guidelines.³⁰⁴

Statutes that authorize police to arrest persons for “loitering,”³⁰⁵ “annoying,”³⁰⁶ being “offensive,”³⁰⁷ or causing “anger” or “a condition of unrest,”³⁰⁸ are invalid and may be challenged even when the conduct of the person claiming a First Amendment violation falls outside the Amendment’s protections. The overbreadth of such laws stems from their

²⁹² *Clark v. Community for Creative Non-Violence*, *supra* fn. 283.

²⁹³ *Grayned v. City of Rockford*, *supra* fn. 262 .

²⁹⁴ See *Hill v. Colorado*, *supra* fn. 37; *Schenck v. Pro-Choice Network of Western New York*, *supra* note 62; *Madsen v. Women’s Health Center, Inc.*, *infra* fn. 314.

²⁹⁵ See *Frisby v. Schultz*, *supra* fn. 285.

²⁹⁶ See *Burson v. Freeman*, 504 U.S. 191 (1992).

²⁹⁷ See *Boos v. Barry*, 485 U.S. 312 (1988) (invalidating ordinance that prohibited display within 500 feet of a foreign embassy of signs that bring „the foreign government into public disrepute“).

²⁹⁸ See *United States v. Grace*, 461 U.S. 171 (1983) (striking down ban on carrying signs, flags and banners on sidewalk outside the Supreme Court).

²⁹⁹ See *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (invalidating a Los Angeles International Airport resolution prohibiting all assembly and speech activities in the airport’s central terminal).

³⁰⁰ 131 S.Ct. 1207 (2011) (holding that communication about a public issue on public property near a cemetery was protected from tort liability by the 1st Amend.).

³⁰¹ See *McCullen v. Coakley*, S.Ct. Docket No. 12-1168, October Term 2013) (decision pending).

³⁰² *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Grayned v. City of Rockford*, *supra* fn 262.

³⁰³ *Id.*, at 109.

³⁰⁴ *Id.*, at 108-109.

³⁰⁵ *Chicago v. Morales*, 527 U.S. 41 (1999).

³⁰⁶ *Coates v. Cincinnati*, 402 U.S. 611 (1971).

³⁰⁷ *Texas v. Johnson*, 491 U.S. 397 (1989).

³⁰⁸ *Terminiello v. City of Chicago*, *supra* fn. 259.

potential application to both protected and unprotected expression. By causing those whose expression is constitutionally protected to fear that their lawful activity will expose them to criminal prosecution, overbroad laws chill expression the First Amendment was designed to secure.³⁰⁹

Likewise, statutes permitting arrest for failure to obey a police officer's order to disperse are invalid in the absence of an objective, clear and precise standard for when such an order can be issued.³¹⁰

Prior restraints

A central feature of the First Amendment's protection of expression is its rejection of the use of governmental authority to prevent public dissemination of disfavoured ideas. Seen against this backdrop, prior restraints on expression are a form of censorship and, therefore, presumptively invalid. Mandatory permits or licensing requirements for assemblies, and injunctions imposed on assemblies by courts, are potentially censorial and invalid under the prior restraints doctrine when based on the content of the message that the participants intend to convey. Permits also imply an additional hurdle for organizers beyond having to meet a notice requirement, since they must assume the need to await official authorization before proceeding.

Nevertheless, permits offer a practical way to prevent scheduling conflicts, plan for traffic diversion and ensure the deployment of sufficient resources to maintain order. Requiring larger assemblies to obtain advance approval through permit applications has become commonplace. The courts have generally upheld content-neutral permit prerequisites which serve the above-mentioned governmental interests, considering these to be reasonable time, place and manner restrictions.³¹¹

Even content-neutral permit schemes may, of course, be abused to discriminate against disfavoured assemblies, thereby becoming unconstitutional prior restraints. In reviewing time, place and manner restrictions, the courts will, thus, examine the amount of discretion they vest in an administrator to consider the applicant's identity, the content of the assembly's message and the potential hostility which the message may provoke,³¹² as well as the degree to which a permit's cost and notice requirements³¹³ and fulfilment of its substantive conditions³¹⁴ impede free expression.

As with permits, court injunctions directing parties to act or refrain from certain acts can suppress disfavoured expression. First Amendment challenges in the context of anti-abortion protests have given rise to a special rule that seems to demand slightly more rigorous examination of content-neutral injunctions than other content-neutral restrictions on expression: Valid injunctions may not "burden ... more speech than necessary to serve a significant government interest."³¹⁵ On this basis, the Supreme Court has provided detailed guidelines for injunctions which restrict assembly near health clinics, accepting as constitutional restrictions aimed at preventing physical obstruction or severe harassment which would prevent physical access.³¹⁶

³⁰⁹ *Gooding v. Wilson*, *supra* fn.267 .

³¹⁰ *Shuttlesworth v. City of Birmingham*, *supra* fn. 281.

³¹¹ *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Thomas v. Chicago Park District*, 534 U.S. 316 (2002).

³¹² *Thomas v. Chicago Park District*, *id.*

³¹³ See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

³¹⁴ See, e.g., *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

³¹⁵ *Id.*; cf. *Clark v. Community for Creative Non-Violence*, *supra* note 33 (requiring that restrictions be "narrowly tailored to serve a significant government interest," etc.).

³¹⁶ See *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997).

3. Procedural issues

Notification and spontaneous assemblies

Courts have rejected permit/notice requirements of more than a couple of days.³¹⁷ A “spontaneous assembly,” which ignores such requirements, invites arrest for trespass, disturbing the peace or blocking traffic, etc. Nevertheless, persons charged with these offenses may challenge the constitutionality of the underlying law, in contrast to those who violate an injunction on assembly.³¹⁸

Unrest resulting from hecklers and counter-demonstrations cannot “veto” or nullify a permit or justify dispersing those who otherwise have a right to be where they are for purposes of assembly.³¹⁹

Decision-making

Permit systems dependent on an administrator’s discretion constitute prior restraints.³²⁰ Thus, permits based on considerations other than resource allocation and scheduling conflicts may be constitutionally defective. The Supreme Court has invalidated ordinance vesting administrators with authority to consider applicants’ identity, their message, or the hostility which the assembly might arouse in the public, and to withhold permits in order to secure “public welfare, peace, safety, health, decency, good order, morals or convenience”³²¹ or to prevent “riots, disturbances or disorderly assemblage.”³²²

Review of denial of permits

In a different permit context (licensing of movies), the Supreme Court recognized that where content is likely to play a role in deciding on the abridgment of First Amendment rights, a full hearing and prompt review are required.³²³ Similar procedural requirements pertain to injunctions.³²⁴

Implementation costs

Beyond incorporating the basic procedural requirements mentioned above, a permit scheme must also be specific and objective when imposing charges in order to avoid being invalidated as a prior restraint. Fees can validly cover the costs of processing an application as well as traffic regulation and police protection.³²⁵ Where the amount varies according to the estimated expense of controlling a hostile audience, however, the First Amendment is invalidly compromised.³²⁶ Flat fees intended to recoup administrative costs and insurance requirements with amounts based on the size of the event and the type of facilities involved have been upheld.³²⁷

4. Implementing the constitutional guarantee and freedom of assembly legislation

Use of force by the police

Given the circumstances of a particular assembly, police may constitutionally resort to force. According to the US Department of Justice (DOJ), “Police officers should use only the

³¹⁷ See, e.g., *Church of the Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676 (7th Cir. 2003); *Local 32B-32J v. Port Authority of N.Y. & N.J.*, 3 F. Supp. 2d 413 (S.D.N.Y. 1998); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F. 3d 1022 (9th Cir. 2006).

³¹⁸ See *supra* Sect. 2.

³¹⁹ See *Wright v Georgia*, *supra* fn. 22; see also *supra* Sect. 2.

³²⁰ See *supra* Sect. 2.

³²¹ See *Shuttlesworth v. Birmingham*, *supra* fn. 282.

³²² See *Hague v CIO*, *supra* fn.260 .

³²³ See *Freedman v. Maryland*, 380 U.S. 51 (1965). Cf. *Thomas v. Chicago Park District*, *supra* fn. 311.

³²⁴ See, e.g., *Carroll v Princess Anne*, 393 U.S. 175 (1968); *National Socialist Party v. Village of Skokie*, *supra* fn. 276.

³²⁵ See *Cox v. New Hampshire*, *supra* fn. 311.

³²⁶ See *Forsyth County v. Nationalist Movement*, *supra* fn. 313.

³²⁷ See T. A. El-Haj, ‘The Neglected Right of Assembly,’ 56 *UCLA Law Review* 543 (2009), at 549 n. 18.

amount of force that is reasonably necessary to bring an incident under control while protecting the lives of the officers and others.³²⁸ The standard of reasonableness in this context is governed by the Fourth Amendment.³²⁹ It entails an objective test which requires a court to envision a reasonable officer and, based on the totality of the facts and circumstances, ask whether such an officer could believe that the use of force was reasonable.³³⁰

Liability of assemblers

In addition to imposing administrative fees for permits, local governments may require a bond or insurance and demand reimbursement of costs to clean or repair a venue after an assembly.³³¹ Liability for such charges has generally been accepted by the courts in the absence of discrimination among groups and events of a similar type and size, and as long as they do not for practical purposes bar meaningful access to public forums.³³²

Civil liability cannot be imposed on participants in an assembly merely because they all belong to the same group, when some members have committed illegal acts. Rather, liability requires that the group had illegal goals and the individual member specifically intended to help them occur.³³³

5. Securing government accountability

Liability of law enforcement authorities

Police who use excessive force to disperse, arrest or take people demonstrators into custody without cause, expose themselves to criminal³³⁴ as well as civil liability.³³⁵ Even where there is no false arrest or application of excessive force, interference with First Amendment rights by state and local officials acting under colour of state law may establish grounds for a lawsuit for civil (monetary) damages under federal law.³³⁶ While 42 U.S.C. §1983 does not cover federal law enforcement agents, the Supreme Court has held that they may be sued directly under the Constitution.³³⁷ Police officers have qualified immunity and may thereby avoid liability when the constitutional right they are accused of violating was not clearly established³³⁸ or when the officers' conduct was objectively reasonable in light of the relevant constitutional standard.

Monitoring

Monitoring or surveillance of assemblies by law enforcement agencies is often advocated for purposes of ensuring public or national safety and defending against charges of abuse.³³⁹ The courts have generally approved routine videotaping of public assemblies, reasoning that those involved have intentionally exposed themselves to being filmed on the basis of their open participation.³⁴⁰ However, unwarranted monitoring constitutes harassment and chills the expression of persons innocently exercising their First Amendment rights. While rejecting a

³²⁸ DOJ, *Principles for Promoting Police Integrity: Examples of Promising Practices and Policies*, (Jan. 2001). See also, Tony Narr et al., *Police Management of Mass Demonstrations: Identifying Issues and Successful Approaches*, Police Executive Research Forum (2006) 56-57.

³²⁹ US Const, amend IV ('The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated').

³³⁰ *Graham v. Connor*, 490 U.S.386 (1989).

³³¹ See, e.g., NYC Rules §2-08, p and t.(7), Ch. 2, Title 56.

³³² See *Women's Day Planning Committee v. San Antonio*, 691 F3d 346 (5th Cir. 2010).

³³³ *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982).

³³⁴ 18 U.S.C. §242 (making it a crime to wilfully violate federal constitutional rights while acting under colour of law).

³³⁵ 42 U.S.C. §1983 (allowing civil lawsuits for violations of constitutional rights).

³³⁶ *Id.*

³³⁷ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

³³⁸ See *Pierson v. Ray*, 386 U.S. 547 (1967) (recognizing immunity where the police enforce laws later declared unconstitutional).

³³⁹ See, e.g., DOJ, *The Attorney General's Guidelines for Domestic FBI Operations* (2008); M. Masterson, 'Crowd Management,' in *FBI Law Enforcement Bulletin*, Aug. 2012.

³⁴⁰ See, e.g., *Donohue v. Duling*, 465 F.2d 196 (4th Cir. 1972); see also *infra* Sec. 6 (unmanned aerial systems) for additional 4th Amendment considerations.

claim challenging the military's domestic monitoring of civilians on procedural grounds, the Court in *Laird v. Tatum*³⁴¹ left open a remedial possibility where surveillance results in objective harm or threatens specific future harm. Governmental surveillance of anti-war and civil rights demonstrations, protesters and organizations became the subject of intense congressional scrutiny in 1975-1976, culminating in the Church Committee's revelation of the extreme lengths to which the federal government went at the time to discredit and undermine activities protected by the First Amendment.³⁴²

Videotaping or photographically documenting assemblies by the news media, on the other hand, may effectively promote governmental accountability. Nevertheless, journalists usually do not have a constitutional right of access to government property or governmental operations, except in the case of traditional public forums³⁴³ which are generally accessible to the public. Exclusion of the media from places otherwise open to others is probably unconstitutional.³⁴⁴

6. Conclusions and outlook

Social media

Allegedly fearing a recurrence of violence by protesters trying to impede train traffic, officials of Bay Area Rapid Transit (BART) in San Francisco shut down cell phone service in several subway stations for a few hours in August 2011 to disrupt protests against police brutality.³⁴⁵ This appears to be the first time American authorities blocked cell phone and Internet activity in the context of a public demonstration. The incident provoked extensive legal debate over the proper governmental reaction to "flashmobs," in view of concerns that BART's actions violated both the First Amendment and the Communications Act of 1934.³⁴⁶

In the absence of case law and guidelines from the Federal Communications Commission, the issue remains open to further debate. Forum analysis would be key to assessing whether BART's actions violated assembly rights, whereby the Supreme Court's precedents provide some authority for characterizing subway stations as non-public forums. The incident, in any event, poses the question whether the *Brandenburg* approach to incitement requires modification in light of individuals' capacity via mobile and Internet-based communications technology and social media to reach large numbers of people quickly and anonymously, irrespective of logistical constraints. Such a modification would represent a dramatic departure from the normative framework described above in Section I.

Unmanned aerial systems (UAS)

Recent legislation requires the Federal Aviation Administration (FAA) to regulate the operation of civil and public UAS or 'drones'³⁴⁷ in the national airspace by 2016.³⁴⁸ This legislation also makes it fairly easy for police departments to receive authorization to operate drones.³⁴⁹

³⁴¹ 408 U.S. 1 (1972).

³⁴² See C. A. Benoit, Picketers, Protesters, and Police, in *FBI Law Enforcement Bulletin*, Aug. 2012, referring to: *Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong. 257 (1976).

³⁴³ See *supra* Sect. 1 (assemblies on public property).

³⁴⁴ See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). Cf. *Dinler v. City of New York*, 2012 WL 4513352 (S.D.N.Y., 2012).

³⁴⁵ See T. Collins, BART Cell Phone Shutdown: Safety Issue or Free Speech Violation, Aug. 15, 2011, www.huffingtonpost.com/2011/08/12/bart-cell-phone-shutdown-free-speech_n_927294.html (last accessed: 18 November 2013).

³⁴⁶ 47 U.S.C. § 151 (2006).

³⁴⁷ 'Aerostats,' i.e. moored balloons, used for surveillance raise related legal questions. See C. Timberg, 'Floating eyes in the sky heighten privacy worries,' *The Washington Post*, Jan. 23, 2014, p. A1.

³⁴⁸ FAA Modernization and Reform Act of 2012, Pub. L. 112-95.

³⁴⁹ See *id.*, Sects. 333-334.

The prevailing privacy approach under the Fourth Amendment has until now accorded the police wide flexibility with respect to aerial surveillance. Over the last decade, helicopters and blimps have, in fact, been used to support live monitoring of assemblies.³⁵⁰ Problems arise, however, where police collect literature, take photos, make videos or audio recordings, or otherwise collect personally identifiable information about individuals or groups exercising their First Amendment rights, where there is no reasonable law enforcement purpose (i.e., reasonable suspicion that criminal activity is occurring or will take place) or this is not done in a manner narrowly tailored to achieve the government's legitimate objectives (e.g. maintaining public order, enforcing traffic control, preventing criminal activity, protecting persons or property, and ensuring compliance with permits and reasonable restrictions on the time, place and manner for conducting an event).³⁵¹

Under modern surveillance jurisprudence, privacy rights under the Fourth Amendment are implicated when a person has a subjective expectation of privacy and that expectation would generally be recognized as reasonable.³⁵² Following *Katz v. United States*, it was widely accepted that individuals located in public spaces can have no objective expectation of privacy. Aerial surveillance of private property was also consistently upheld as constitutional under the 'plain view' doctrine.³⁵³ Recently, however, has the Court accepted some limitations on searches involving more sophisticated technology.³⁵⁴ This suggests that it may be willing to adopt a more restrictive approach to governmental intrusion in light of drones' capacity to employ powerful sensory-enhancing equipment and the technically limitless storage, retrieval and dissemination possibilities which exist for any data they generate.

³⁵⁰ Police Executive Research Forum, *Managing Major Events: Best Practices from the Field*, June 2011, at 35, 38.

³⁵¹ See Global Justice Information Sharing Initiative, *Recommendations for First Amendment-Protected Events for State and Local Law Enforcement Agencies* (Dec. 2011), at 16-19; cf. *Handschu v. Special Servs. Div.*, 2007 U.S. Dist. LEXIS 43176 (S.D.N.Y. 2007)(involving continued litigation with respect to guidelines included in the Handschu 1985 consent decree, which was modified after 9/11 and re-modified subsequently); 28 CFR Part 23, § 23.20 (operating principles).

³⁵² *Katz v. United States*, 389 U.S. 347 (1967) (finding unconstitutional warrantless eavesdropping on conversations occurring in a public telephone booth).

³⁵³ See *California v. Ciraolo*, 476 U.S. 207 (1986); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); and *Florida v. Riley*, 488 U.S. 445 (1989).

³⁵⁴ *Kyllo v. United States*, 533 U.S. 27 (2001) (finding a violation of the 4th Amend. in the warrantless use of a not commonly available thermal imaging device to detect the growth of marijuana in a home); *United States v. Jones*, 132 S. Ct. 945 (2012)(finding attachment of a GPS device to a car to track its movements on a public road for 4 weeks, exceeding the time-limit set by a warrant, constituted a search within the protection of the 4th Amend.).

Belgium

by Melina Garcin

1. Legal bases

After the 1830 Belgian Revolution broke out, a temporary government was established and convened a national congress in charge of drafting a constitution. For the first time in the genesis of freedom of assembly, the criterion of an open air gathering entered into force.³⁵⁵ This provision was absorbed by a number of constitutions ratified in the 19th century, and has been part of the Constitution which has been in force ever since its adoption by the National Congress in 1831. A consolidation took place in 1994, and a last amendment in 2012.

Art. 26 of the Constitution gives Belgians “the right to assemble peaceably and without arms, in accordance with the laws that can regulate the exercise of this right, without submitting it to prior authorization”.³⁵⁶ However, the provision “does not apply to open air gatherings, which are entirely subject to police regulations”.³⁵⁷

While the Constitution guarantees the respect of its fundamental freedoms to every human being, only Belgian citizens are entitled to the freedom of assembly³⁵⁸. Art. 191 of the Constitution stipulates that “all foreigners on Belgian soil benefit from the protection provided to persons and property, except for those exceptions provided for by the law”. Art. 26 of the Constitution does not apply to non-Belgians, but pursuant to Art. 191 of the Constitution, they have the right to exercise freedom of assembly, unless it is limited by the law.³⁵⁹

The constitutional provision defines “assembly” as the temporary gathering of several persons in a public place, accessible to everyone.³⁶⁰ The provision therefore applies to public meetings, as opposed to private meetings taking place in private places and accessible to people who have been personally invited by the organizer of the meeting. The provision applies to indoor meetings, as opposed to open air gatherings which are also guaranteed, but which are submitted to police regulations. The police authority can therefore regulate open air gatherings, submit them to prior authorization, and prohibit them if needed; to maintain public order.

There is no specific assembly law in Belgian legislation; freedom of assembly is recognized and regulated in different legal texts not pertaining to assemblies in particular. Art. 141ter of the Penal Code³⁶¹ prohibits an interpretation of the other provisions under Title Iter on terrorist offences that would lead to a breach of freedom of assembly without any justification. This provision refers to Art. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).³⁶² The Alien Act states that the lawful

³⁵⁵ RIPKE, S. (2012) *Europäische Versammlungsfreiheit*, Tübingen: Mohr Siebeck, p. 20.

³⁵⁶ Constitution, Art. 26, para. 1.

³⁵⁷ *Ibid.*, para. 2.

³⁵⁸ *Ibid.* 26, para. 1.,.

³⁵⁹ Cf. DE MEYER, J. (1963) *Staatsrecht*, Leuven: Wouters, 4th ed., p. 459; LAVALLEYE, P., in: PELLOUX, R. (1959) *Essais sur les droits de l'homme en Europe*, Paris: Bibliothèque Européenne, p. 19; WIGNY, P. (1973) *Cours de droit constitutionnel*, Brussels: Bruylant, p. 179; ORBAN, O. (1911) *Le droit constitutionnel de la Belgique*, Liège: Dessain, Vol. III, p. 161; PIETERS, D., in: GRABITZ, E. (1986) *Grundrechte in Europa und USA*, Kehl: Engel, p. 34.

³⁶⁰ DELPEREE, F. (2000) *Le droit constitutionnel de la Belgique*, Brussels: Bruylant, p. 254.

³⁶¹ Penal Code of 8 June 1867, Vol. II – *Offences and their Repression in Particular*, Title Iter – *Terrorist Offences*, Art. 141ter.

³⁶² Of 4 November 1950. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed: 10 March 2014).

exercise of freedom of peaceful assembly cannot be held against a foreign national to justify his/her return or removal.³⁶³

2. Scope of the guarantee

The Belgian supreme administrative jurisdiction (Conseil d'Etat) recalls that freedom of assembly is a fundamental right guaranteed by the Constitution, which cannot be undermined as long as the assembly is peaceful and unarmed. A general prohibition of a political congress would present an infringement to freedom of assembly.³⁶⁴ For the Conseil d'Etat, public entertainment events are included in the protection of Art. 26 of the Constitution³⁶⁵, although the highest judicial court (Cour de cassation) showed some reluctance admitting it.³⁶⁶ In two different decisions³⁶⁷, the Belgian Constitutional Court referred to an explanatory statement on Art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),³⁶⁸ in which Belgium confirmed the recognition of this Article, as long as it was in compliance with the right to freedom of peaceful assembly, pursuant to Art. 20 of the Universal Declaration of Human Rights,³⁶⁹ to Art. 21 of the International Covenant on Civil and Political Rights³⁷⁰ and to Art. 5 (d) (ix) of the ICERD. The Belgian Anti-Racism Act³⁷¹ aims at fighting efficiently against organizations defending racist theories. The Court stated that the contested provision of this Act did not prevent an association from existing, nor from meeting, even if one or several of its members had been sentenced on the basis of the provision.³⁷² It noted that the contested provision was considered necessary in a democratic society for the protection of the rights of others. The provision was proportionate to the objective, which consisted in fighting against organizations encouraging racial discrimination.³⁷³

No specific laws on flash mobs

There is **no legal provision** on flash mobs in Belgium, **nor any case-law** on the matter. It is therefore not clear whether open air flash mobs would follow the same requirements as indoor flash mobs (a lot of them take place in malls, airports, etc.). While most of the flash mobs taking place in Belgium are staged as entertainment, they are sometimes used to raise awareness about important issues.³⁷⁴ Flash mobs are generally formed through social media web sites, such as Facebook³⁷⁵ and Twitter.³⁷⁶

3. Restrictions

Place and time restrictions

The general rule is that open air gatherings are permitted in Belgium, although submitted to police regulations.³⁷⁷ Open air gatherings and individual demonstrations are generally

³⁶³ Act of 15 December 1980 on the entry, stay, permanent residence and removal of aliens, Titel I – *General Provisions*, Chap. VI – *Returns and Removals*, Art. 20.

³⁶⁴ CE, 7 November 1998, n° 76815.

³⁶⁵ Cf. CE, 24 March 1953, Pas. Belge 1954, IV, 103 (105); DELPEREE, F., *supra* fn.360, p. 254; WIGNY, *supra* fn. 359, p. 181; DUPRIEZ, L. (1887) *La liberté de réunion*, Brussels: Lesigne, p. 3.

³⁶⁶ Cass., 16 November 1920, Pas., 1921, I, p. 126.

³⁶⁷ Const. 12 February 2009, n° 17/2009 and Const., 11 March 2009, n° 40/2009.

³⁶⁸ Of 7 March 1966. Available at: <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf> (last accessed: 10 March 2014).

³⁶⁹ Of 10 December 1948. Available at: <http://www.un.org/en/documents/udhr/> (last accessed: 10 March 2014).

³⁷⁰ Of 16 December 1966. Available at: <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> last accessed: 10 March 2014.

³⁷¹ Act of 30 July 1981 on the punishment of acts of racism and xenophobia.

³⁷² Const., 12 February 2009, n° 17/2009, para. B.83.5.

³⁷³ *Ibid*, para. B.83.6.

³⁷⁴ i.e. on the protection of animals: <http://www.gaia.be/fr/gaia-tv/flashmob-no-cruel-cosmetics> (last accessed: 10 March 2014).

³⁷⁵ Facebook group on flash mobs in Belgium: <https://www.facebook.com/groups/318226533597/> (last accessed: 10 March 2014).

³⁷⁶ Twitter page on flash mobs in Belgium: <https://twitter.com/Flashmobbeldgium> (last accessed: 10 March 2014).

³⁷⁷ Constitution, *supra* fn. 356, Art. 26, para. 2.

prohibited on Saturdays and on certain public venues of Brussels.³⁷⁸ But gatherings caused by the fulfilment of a public service, military parades, ceremonies, celebrations and entertainments organized by the public authority, funeral ceremonies, and gatherings specifically authorized by a mayor's decree are excluded from that general prohibition.³⁷⁹

Manner restrictions

The Belgian Cour de Cassation admitted at an early stage that the Constitution allowed a restriction to freedom of worship in the form of an open air religious procession to ensure the maintenance of public order.³⁸⁰ Likewise, laws can regulate the exercise of the right to assemble peaceably with the purpose of maintaining public safety, policy, and health.³⁸¹ The Conseil d'Etat (CE) confirms public authorities' decisions to restrict freedom of assembly when it is justified by public security imperatives and maintenance of public order. The CE does not substitute its own assessment to the one made by the competent authority, as long as the restriction to the freedom is duly justified.³⁸² When the competent authority fails to carry out the balance of interests between freedom of assembly and the guarantee of public order, the CE decides on the proportionality of the measure taken³⁸³ using the European Court of Human Rights' standards – whether the measure is necessary, in a democratic society, to maintain public order. It recalls that freedom of assembly is not an absolute right and that authorities can exercise their competence to regulate it. In that case, it is for the claimant to prove the violation of Art. 26 of the Constitution and Art. 11 of the ECHR by the authorities' regulations.³⁸⁴ When the safety and the well-being of inhabitants, as well as prevention from disturbance of public order do not excessively affect freedom of assembly, the CE will not find a violation of the proportionality principle.³⁸⁵ In case of a serious threat to public order, police officers are allowed to conduct security searches on individuals participating in public gatherings.³⁸⁶ Police services are present at large-scale gatherings and take necessary measures for their peaceful proceedings. They are in charge of disbanding all armed crowds (“atroupements”); those which result in crimes and offences against persons or goods, or to breaches to the Act prohibiting private militias,³⁸⁷ and those which are set up with the purpose of devastation, killing, looting, or attempts against the physical integrity or the life of individuals. Police services are in charge of disbanding crowds interfering with the law, a police order, a police measure, a Court decision, or a constraint.³⁸⁸ In cases of extreme urgency, the Circular on surveillance cameras allows police officers to use surveillance cameras in closed but public places to determine if a large-scale gathering requires immediate intervention of police services (e.g., police services did not know in advance about the meeting of an extremist group or about the meeting of bikers in a zoning).³⁸⁹ Such measures can only be used for large-scale gatherings within the meaning of Art. 22 of the Act on the police function and for a limited time (demonstrations, concerts, and football games).³⁹⁰ General Police Regulations regulate public safety in each Belgian municipality. Municipal powers are indeed very broad in Belgium and encompass everything which is of municipal interest. A municipality can do everything which is not prohibited; under

³⁷⁸ Cf. Act of 2 March 1954 to prevent and respond to breaches of the unimpeded exercise of sovereign powers set out in the Constitution, Art. 3; General Police Regulation of the City of Brussels, Chap. III – *Public safety and convenience of passage*, Sect. 1 – *Assemblies, demonstrations, processions*, Art. 31.

³⁷⁹ Act of 2 March 1954 to prevent and respond to breaches of the unimpeded exercise of sovereign powers set out in the Constitution, Art. 3.

³⁸⁰ Cass. 23 January 1879, Pas., I, 1879, p. 75.

³⁸¹ Cf. Constitution, *supra* fn. 356, Art. 26, para.1; Cass. 18 May 1988, Pas., I, 1988, p. 1139.

³⁸² CE, 15 June 2000, n° 97.974.

³⁸³ CE, 14 December 2001, n° 101887.

³⁸⁴ CE, 10 November 2010, n° 208.910.

³⁸⁵ CE, 30 September 2009, n° 196.527.

³⁸⁶ Act of 5 August 1992 on the police function, Art. 28.

³⁸⁷ Act of 29 July 1934 prohibiting private militias.

³⁸⁸ See *supra* fn. 386, Art. 22.

³⁸⁹ Circular of 10 December 2009 on the Law of 21 March 2007 governing the installation and use of surveillance cameras, para. 3.2.

³⁹⁰ *Ibid*, para. 3.3.

the control of the federal State, the communities, the regions and provinces.³⁹¹ Some rules can therefore differ from one municipality to the other. Thus, in Brussels, it is prohibited to provoke or to participate in crowds in public space that hamper traffic or inconvenience pedestrians without prior authorization.³⁹² Additionally, unless authorization has been granted, concealment of the face in public space is prohibited.³⁹³

4. Procedural issues

Authorization

Every gathering, demonstration, or procession on public space is subject to prior authorization by the mayor. The authorization request has to be addressed to the mayor at least 10 days before the intended date and has to include the following elements: the name, address and phone number of the organizers, the topic of the event, the date and time of the planned gathering, the planned itinerary, the planned location and time of the event's end, the evaluation of the number of participants, the intended means of transport, and the planned organizational measures. If a meeting is taking place at the end of the event, it also has to be notified in the authorization request.³⁹⁴ Any concert, show, entertainment, assembly taking place on public roads, but which have received an authorization by the municipality, cannot be disrupted.³⁹⁵

Decision-making

The mayor of each Belgian municipality issues the authorization to hold gatherings, demonstrations, or processions on public space on request. Authorization is usually not granted for gatherings and processions taking place on Saturdays in some parts of Brussels; but the mayors can make exemptions in exceptional cases. If the conditions settled in the delivered authorization are not met, the mayor can withdraw this authorization.³⁹⁶ Most of the decisions are taken at municipality level. However, the municipalities have to be careful not to establish discriminatory measures which would only apply to certain groups (e.g., young people)³⁹⁷ and which would be contrary to the law. In the event of riots, hostile crowds, or public order disturbances, the 1988 New Municipal Act stipulates that the mayor can issue police orders, which are communicated to the municipal council.³⁹⁸ Municipalities must prevent breaches to public peace resulting in brawls or street fights, chaos, and disproportionate noise and nocturnal crowds disturbing inhabitants' rest.³⁹⁹ When the police disband crowds or are present at large-scale gatherings, they inform the mayor and the chief of local police forces beforehand or, if not possible, at the earliest opportunity, and stay in permanent contact with them during the intervention⁴⁰⁰. The police are responsible for taking decisions based on an assessment between the protection of fundamental rights⁴⁰¹ and the maintenance of public order.

³⁹¹ http://www.belgium.be/fr/la_belgique/pouvoirs_publics/communes/competences/ (last accessed: 10 March 2014).

³⁹² General Police Regulation of the City of Brussels, Chap. III – *Public safety and convenience of passage*, Sect. 1 – *Assemblies, demonstrations, processions*, Art. 30.

³⁹³ *Ibid.*, Art. 32.

³⁹⁴ Cf. Cass., 23 January 1879, Pas., I, 1879, p. 75; General Police Regulation of the City of Brussels, Chap. III – *Public safety and convenience of passage*, Sect. 1 – *Crowds, demonstrations, processions*, *supra* fn. 392, Art. 31.

³⁹⁵ General Police Regulation of the City of Brussels, Chap. III – *Public safety and convenience of passage*, Sect. 2 – *Inconvenient and dangerous activities on public space*, Art. 40.

³⁹⁶ General Police Regulation of the City of Brussels, Chap. III – *Public safety and convenience of passage*, Sect. 1 – *Crowds, demonstrations, processions*, *supra* fn. 392, Art. 31.

³⁹⁷ http://www.belgium.be/fr/justice/securite/evenements_publics/manifestations/ (last accessed: 10 March 2014).

³⁹⁸ New Municipal Act of 24 June 1988, Art. 134, para. 1.

³⁹⁹ *Ibid.*, Art. 135, para. 2, n° 2.

⁴⁰⁰ Act of 5 August 1992 on the police function, *supra* fn. 386, Art. 22.

⁴⁰¹ Cf. Act of 5 August 1992 on the police function, *supra* fn. 386, Art. 1; Act of 7 December 1998 organising a two-level structured integrated police service, Art. 123.

Review and appeal

Verifying that the action (or inaction) by the administrative authorities is legal and in the public interest is carried out first by the authorities themselves, exercising their official or supervisory powers over municipal administration. The supervisory powers are based on legislation and local authorities (provinces and municipalities) are submitted to it.⁴⁰² Municipalities' regulations and acts are therefore subject to the supervisory authority.⁴⁰³ A decision by a subordinate authority that violates the law or undermines the public interest can be suspended or annulled.⁴⁰⁴ The courts, whether or not under the purview of the judiciary, have jurisdiction to conduct a judicial review of the legality of administrative acts and regulations. The basis for this supervision is provided by Art. 159 of the Constitution.⁴⁰⁵ The jurisdiction of judicial courts is based primarily on Arts. 144 and 145 of the Constitution.⁴⁰⁶ The application of these provisions has led the judicial courts and tribunals to hear a sizeable portion of administrative disputes. This is because many cases involving citizens and the administrative authorities pertain to subjective rights and many of these were considered to be civil rights.⁴⁰⁷ The jurisdictional competence of the Conseil d'Etat (CE) is based on Art. 160 of the Constitution.⁴⁰⁸ The CE has the power to annul acts and regulations, on appeal by any stakeholder. The CE may also hear appeals against decisions handed down in the final instance by the administrative courts.⁴⁰⁹ Judicial supervision may finally be carried out by the Constitutional Court, whose primary task is to make sure that the different legislators of federal Belgium comply particularly with Title II of the Constitution - public liberties.⁴¹⁰ It has jurisdiction to verify the legality of administrative acts and regulations.⁴¹¹

5. Specific forms of assemblies

There are more than 650 protest demonstrations in Brussels-Capital which take place peacefully every year.⁴¹²

Assemblies gathered by means of new technologies (social networks etc.)

A lot of public assemblies, open air demonstrations, or other kind of events are now organized or advertised through social networks, even among different countries.⁴¹³

Spontaneous assemblies

While spontaneous assemblies are generally allowed,⁴¹⁴ they can be prohibited if they take place in an area where gatherings are generally banned.⁴¹⁵ Taxi drivers in Brussels

⁴⁰² LEWALLE, P. (2009) *La Justice Administrative en Europe – Le Droit Belge*. 25 Août, p. 5.

⁴⁰³ Order of 14 May 1998 organising the administrative supervision of the municipalities in the Brussels-Capital Region.

⁴⁰⁴ LEWALLE, *supra* fn. 402, p. 5.

⁴⁰⁵ Constitution, *supra* fn.356, Art. 159: "Courts only apply general, provincial or local decisions and regulations provided that they are in accordance with the law."

⁴⁰⁶ *Ibid.* Art. 144: "Disputes about civil rights belong exclusively to the competence of the courts."; Art. 145: "Disputes about political rights belong to the competence of the courts, except for the exceptions established by the law."

⁴⁰⁷ LEWALLE, *supra* fn. 402, p. 9.

⁴⁰⁸ Constitution, *supra* fn. 356, Art. 60: "[...]The Conseil d'Etat makes decisions by means of judgments as an administrative court and provides an opinion in the cases determined by the law."

⁴⁰⁹ Cf. http://www.raadvst-consetat.be/?page=proc_admin&lang=fr (last accessed: 10 March 2014); LEWALLE, *supra* fn. 402, p. 6.

⁴¹⁰ <http://www.const-court.be/> (last accessed: 10 March 2014).

⁴¹¹ C.A., 4 April 1995, no. 31/95, roll no. 738, Belgian Official Gazette, 16 May 1995.

⁴¹² Cf. Editorial Board (2012) *Thielemans demande une enquête concernant les violences policières*. 18 June, LaLibre.be. Available at: <http://www.lalibre.be/regions/bruxelles/thielemans-demande-une-enquete-concernant-les-violences-policieres-51b8ecaee4b0de6db9c6f888>; <http://www.bruxelles.be/artdet.cfm/4389> (last accessed: 10 March 2014).

⁴¹³ i.e. a demonstration organized by Belgians supporting same-sex marriage and the LGBT community in France: <https://www.facebook.com/events/338081072957774/> (last accessed: 10 March 2014).

⁴¹⁴ Editorial board (2008) *Gaza: manifestation spontanée à Heusden-Zolder*. 7 sur 7, 29 December. Available at: <http://www.7sur7.be/7s7/fr/1502/Belgique/article/detail/579483/2008/12/29/Gaza-manifestation-spontanee-a-Heusden-Zolder.dhtml> (last accessed: 10 March 2014).

scheduled a spontaneous assembly through text messages and radio exchanges to protest against police violence. The assembly escalated when a taxi driver was stabbed by a storekeeper, and the police used force against the protesters.⁴¹⁶

Assemblies taking place on public property

As already mentioned, open air gatherings and individual demonstrations are banned on some public venues of the capital.⁴¹⁷ Municipalities are responsible for the maintenance of order in places where large-scale gatherings take place, such as fairs, markets, public celebrations, shows, games, coffee shops, and churches.⁴¹⁸

Counter-demonstrations

Counter-demonstrations are not regulated by Belgian law. Public authorities sometimes use them as a justification for prohibiting assemblies, based on the risk of public order disturbance. The Conseil d'Etat indeed confirmed the refusal to hold a demonstration because of prior incidents and the risk of disorder caused by counter-demonstrators to the march.⁴¹⁹ The decision to prohibit a demonstration against the construction of a mosque had been based, among other elements, on the risks of counter-demonstrations from the Muslim community and far left groups.⁴²⁰

6. Implementing the constitutional guarantee and freedom of assembly legislation

Pre-event planning

The police management of events in the area of public order is described within a Circular by the Ministry of Home Affairs, pursuant to which organizers, authorities, and police services, among others, ensure a safe and easy conduct of the event, with total respect for freedom of assembly and expression, in compliance with the ECHR and the Belgian Constitution. Demonstrations or public entertainment events have to be managed and protected, implying a balance between the demands, the expectations and the interests of the different actors participating or involved in the event.⁴²¹ The police have to maintain public order through dialogue, consultation and transparency, and remain discreet and tolerant towards peaceful gatherings and demonstrations. The police maintain the communication with the organizer throughout the organization process and the organizer agrees to deploy all possible efforts for the safe and easy conduct of the event.⁴²² The organization of a gathering has to follow a non-discrimination policy. It is punishable to promote any discourse instigating hatred, segregation, or violence; discrimination on the access to goods and services; or the belonging to groups or associations that engage in or defend racial discrimination or segregation.⁴²³

⁴¹⁵ Cf. Editorial board (2009) *Le bourgmestre de Renaix interdit une manifestation spontanée*. 7 sur 7, 16 January. Available at: <http://www.7sur7.be/7s7/fr/1502/Belgique/article/detail/620234/2009/01/16/Le-bourgmestre-de-Renaix-interdit-une-manifestation-spontanee.dhtml> (last accessed: 10 March 2014); General Police Regulation of the City of Brussels, Chap. III – *Public safety and convenience of passage*, Sect. 1 – *Crowds, demonstrations, processions*, *supra* fn. 389, Art. 31.

⁴¹⁶ *Manifestation spontanée des chauffeurs de taxi cette nuit à Bruxelles* (2010) Video RTL.be. 28 May.

⁴¹⁷ Cf. Act of 2 March 1954 to prevent and respond to breaches of the unimpeded exercise of sovereign powers set out in the Constitution, Art. 3; General Police Regulation of the City of Brussels, Chap. III – *Public safety and convenience of passage*, Sect. 1 – *Assemblies, demonstrations, processions*, *supra* fn. 392, Art. 31.

⁴¹⁸ New Municipal Act of 24 June 1988, *supra* fn. 398, Art. 135, para. 2, n° 3.

⁴¹⁹ CE, 28 September 2012, n° 220.792.

⁴²⁰ Editorial board (2013) *Une manifestation « anti mosquée » interdite à Glain*. 7 sur 7, 26 March. Available at: <http://www.7sur7.be/7s7/fr/1502/Belgique/article/detail/1603827/2013/03/26/Une-manifestation-anti-mosquee-interdite-a-Glain.dhtml> (last accessed: 10 March 2014).

⁴²¹ Circular of 11 May 2011 concerning the negotiated management of public space for the two-level structures integrated police service, para. 3.

⁴²² *Ibid.*, para. 4.

⁴²³ http://www.belgium.be/fr/justice/securite/evenements_publics/manifestations/ (last accessed: 10 March 2014).

Costs

Organizers of public assemblies are not required to purchase liability insurance,⁴²⁴ but are responsible for the good organization of the event and deploy all physical measures to this end.⁴²⁵

Use of force by the police

Art. 37 of the Act on the police function foresees that the police can make use of force only when the protection of a legitimate aim would render it necessary. This use of force has to be exercised reasonably and proportionally to the legitimate aim. It has to be preceded by a warning.⁴²⁶ Art. 31 of the same Act states that the police can undertake arrests of people disturbing public peace and keep them away from the gathering.⁴²⁷ In 2010, several “No Border” demonstrations (about the European migration policy) took place in Brussels and hundreds of individuals were arrested. These arrests were called “preventive arrests” and, despite Art. 31 of the mentioned Act, they were conducted before any misbehaviour or damage had occurred.⁴²⁸ The police used tear gas, violence, and intimidation measures; causing security misconduct⁴²⁹. Following those events, the United Nations Human Rights Committee published its recommendations to Belgium; the Committee was “particularly concerned by reports of excessive use of force and preventive arrests during the demonstrations that took place from 29 September to 1 October 2010”.⁴³⁰ Recently, peaceful protests of Afghan asylum-seekers deteriorated when the police reacted violently during the dispersal of demonstrators (use of tear gas and baton-charging). Around 60 persons were arrested.⁴³¹

Liability of organizers

The organizer of an open air gathering has to contact the municipality where the gathering is supposed to take place, as the regulations vary from one municipality to another. The organizer of indoor public assemblies must take necessary measures to prevent disturbances of residents in the area; otherwise, it is considered a “lack of precaution”. However, the organizer is not liable for the actions of individual participants. The organizer can inform guests that disturbance of public tranquillity is subject to penalization. The organizer must comply with the noise standards prescribed for the location.⁴³²

7. Securing government accountability

Liability and accountability of law enforcement personnel

The State is liable for the damage caused by law enforcement officials in the performance of their duties.⁴³³ Law enforcement officials are personally liable for the damage caused to the State, the municipalities, or to third parties when they commit an intentional or a serious misconduct.⁴³⁴ According to Arts. 46 and 49 of the Police Service Code of Ethics,⁴³⁵ the use

⁴²⁴ *Ibid.*

⁴²⁵ Circular of 11 May 2011 concerning the negotiated management of public space for the two-level structures integrated police service, *supra* fn. 421, para. 4.

⁴²⁶ Act of 5 August 1992 on the police function, Art. 37.

⁴²⁷ *Ibid.*, Art. 31.

⁴²⁸ *Entrave au droit de manifester ?* (2012) Video. Télébruxelles. 28 November.

⁴²⁹ La Ligue des Droits de l'Homme (2012) *Le droit de manifestation mis à mal : Citation contre l'Etat Belge et la zone de police Bruxelles Capitale-Ixelles*, 28 November. Available at: <http://www.liquedh.be/2012/1603-le-droit-de-manifestation-mis-a-mal-citation-contre-letat-belge-et-la-zone-de-police-bruxelles-capitale-ixelles> (last accessed: 10 March 2014).

⁴³⁰ HRC, 100th Session, Geneva, 11 – 29 October 2010, *Consideration of reports submitted by State parties under article 40 of the Covenant, Draft concluding observations of the Human Rights Committee, Belgium*. 16 November 2010. CCPR/C/BEL/CO/5, para. 14. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/467/12/PDF/G1046712.pdf?OpenElement> (last accessed: 10 March 2014).

⁴³¹ *La manifestation des demandeurs d'asile afghans dégénère* (2013) Video. RTL Info. 25 September, 1825 hrs.

⁴³² http://www.belgium.be/fr/justice/securite/evenements_publics/manifestations/ (last accessed: 10 March 2014).

⁴³³ Act of 5 August 1992 on the police function, *supra* fn. 386, Art. 47.

⁴³⁴ *Ibid.*, Art. 48.

of force can never be automatic, since it always requires the judgment of the official or police officer and must always meet the conditions of legality, proportionality and necessity. Any violation of these rules may lead to legal and/or disciplinary proceedings in accordance with the law. In order to ensure that policing is conducted properly, and in particular that the rules on the use of force and the protection of human rights are respected, the State also has mechanisms and bodies that are independent of the police, known as external monitoring mechanisms.⁴³⁶ One of them, the Standing Committee on the Supervision of the Police Services, received various complaints relating to the 2010 “No Borders” demonstrations. Its investigation focused on the overall handling of the demonstrations, including the measures taken by the police to prepare for the event, the measures taken by the administrative authorities, the number of officers assigned to the events and the policing measures used.⁴³⁷ The investigation was completed in June 2011 and sent along with general and specific recommendations to the Minister of Home Affairs and the different police services concerned.⁴³⁸ A Circular was then issued by the Ministry of Home Affairs⁴³⁹ providing a frame of reference for the handling of complaints to satisfy the recommendations⁴⁴⁰ put forward by the Committee⁴⁴¹.

Independent **monitoring** of public assemblies is not provided for by law, but there are no restrictions either.

Media access

Independent coverage of public assemblies is not regulated by the law, but public assemblies and open air gatherings are largely covered by the media in Belgium, especially in Brussels, at both national and European level.

8. Conclusions and outlook

While all types of peaceful assemblies deserve protection,⁴⁴² the Belgian constitutional provision on freedom of assembly distinguishes between public meetings – which can be held freely – and open air gatherings, which are subject to police regulations and which can be submitted to different rules, depending on the police regulation of the municipality in which they are taking place. Moreover, the laws entailing provisions on freedom of assembly do not always make clear whether “public space” always corresponds to “open air” or also to indoor locations, and therefore which assemblies exactly are subject to prior authorization. This might lead to legal uncertainty for the citizens. In addition, all open-air gatherings are subject to prior authorization from the mayor, and not only to prior notification, as foreseen by the

⁴³⁵ Royal Decree of 10 May 2006 establishing the Police Service Code of Ethics, Art. 46: “In all situations, and especially those requiring an infringement of the rights and freedoms guaranteed under the Constitution, the members of the operational unit shall ensure in advance that the orders they give and the actions they perform are based on a legal or regulatory framework and that the methods used in the operation are proportionate to the aim. They shall neither order nor commit arbitrary acts that may infringe such rights and freedoms, such as illegal arrests and detentions or violations of the privacy of the home.”; Art. 49: “Service staff who are authorized to use force or coercion in accordance with the law shall ensure that: the objective of the operation is legal; this objective cannot be achieved in a less violent way, such as through persuasion or dialogue; and the means used are reasonable and proportionate to the aim and circumstances of the particular case. They must thus seek the appropriate methods of intervention involving the least possible violence, and must apply various distinctions and degrees of force in the methods used.”

⁴³⁶ HRC, *Consideration of reports submitted by State parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee, Belgium, Addendum, Information received from Belgium on the implementation of the concluding observations of the HRC (CCPR/C/BEL/CO/5)*, 13 November 2012. CCPR/C/BEL/CO/5/Add.1, para. 11. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/475/93/PDF/G1247593.pdf?OpenElement> (last accessed: 10 March 2014).

⁴³⁷ *Ibid.*, para. 19.

⁴³⁸ *Ibid.*, para. 20.

⁴³⁹ Circular of 29 March 2011 relating to the internal monitoring system in the integrated, two-tier police force. *Moniteur Belge*, 21 April 2011.

⁴⁴⁰ Standing Committee on the Supervision of the Police Services, Annual Report 2010. Available at: <http://www.comitep.be/2010/fr/rapport/2010fr.pdf> (last accessed: 10 March 2014).

⁴⁴¹ HRC, *supra* fn. 436, para. 8.

⁴⁴² Venice Commission Guidelines on Freedom of Peaceful Assembly, para. 1.2.

2010 Guidelines on Freedom of Peaceful Assembly.⁴⁴³ Generally speaking and in practice though, the implementation of freedom of assembly is liberal in Belgium. In Brussels, demonstrations are massively covered by the media, considering the important impact they have on the European scene.

⁴⁴³ *Ibid.*, para. 118.

Germany

by Prof. Dr. Rainer Grote, LL.M.

1. Legal bases

The freedom of assembly is guaranteed in Art. 8 of the Basic Law of the Federal Republic of Germany. The first paragraph of the provision recognizes in general terms the right of Germans to assemble peacefully while the second paragraph allows for restrictions to this right in the case of outdoor assemblies: “(1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission. (2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.” The constitutional guarantee is implemented by the Federal Act on Assemblies and Processions (“Gesetz über Versammlungen und Aufzüge”)⁴⁴⁴ of July 24, 1953. The constitutional reform of August 28, 2006, has transferred the power to regulate the exercise of the right of assembly from the federal government to the *Länder*. At the time of writing, four of the sixteen federal states had made use of this new competence.⁴⁴⁵

Measures taken by the competent administrative and police authorities on the basis of the applicable federal and Land legislation concerning assemblies are subject to review by the courts on the application of individuals who allege that their right of assembly has been violated in a specific case. Since the relevant statutes form part of public law it is primarily up to the administrative law courts to decide in contentious cases whether the applicable statutory provisions have been observed. However, when doing so they must stay within the normative framework established by constitutional guarantee of freedom of assembly in the BL, as interpreted by the Federal Constitutional Court (FCC).⁴⁴⁶ If the applicant believes that the courts have failed to properly assess the scope and the effect of the constitutional freedom of assembly on the application of the statutory law in the case at hand, he or she may appeal to the FCC by way of the constitutional complaints procedure once the ordinary remedies have been exhausted. The FCC will quash the decision by the specialized court if it arrives that the conclusion that it is indeed based on a flawed understanding of the scope of the constitutional guarantee.⁴⁴⁷ In special circumstances individuals may challenge new statutory provisions restricting freedom of assembly directly before the FCC, without having to wait for their application by the administrative authorities in an individual case.⁴⁴⁸

2. Scope of the constitutional guarantee

Ratione personae

Art. 8 of the Basic Law grants the freedom of assembly only to Germans. This is at odds with Art. 11 of the Convention which provides that “everyone” within the jurisdiction of a member state shall have the right of peaceful assembly. However, the Convention does not require that the rights and freedoms guaranteed in the Convention are given constitutional status in the domestic legal systems of member states. In Germany the European Convention for the Protection of Human Rights and Fundamental Freedoms has been incorporated in the rank

⁴⁴⁴ All translations of individual provisions of the Assembly Act in the text are provided by the author.

⁴⁴⁵ State assembly acts have been enacted by Bavaria (Bayerisches Versammlungsgesetz of July 22, 2008, as amended on April 22, 2010), Lower Saxony (Niedersächsisches Versammlungsgesetz of October 7, 2010), Saxony (Gesetz über Versammlungen und Aufzüge im Freistaat Sachsen of January 25, 2012) and Saxony-Anhalt (Gesetz des Landes Sachsen-Anhalt über Versammlungen und Aufzüge of December 3, 2009).

⁴⁴⁶ Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume 2/Part 1: Freedom of Speech, 284 (295) – *Brokdorf Demonstration Case*.

⁴⁴⁷ *Ibid.*, 284 (296) – *Brokdorf Demonstration Case*.

⁴⁴⁸ An example is provided by the decision of the Federal Constitutional Court of February 17, 2009, suspending provisions of the newly adopted Bavarian Assemblies Act in the interim relief procedure. The Bavarian Parliament did not wait for the decision of the Constitutional Court on the merits but amended the act on the basis of the remarks provided by the Constitutional Court in its decision on interim relief.

of an ordinary federal statute.⁴⁴⁹ In addition, the relevant federal and *Land* legislation on assemblies grants the right to organize public assemblies and to take part in such manifestations to everybody.⁴⁵⁰ The right of non-nationals to assemble peacefully is thus legally protected in Germany. That it does not enjoy explicit⁴⁵¹ constitutional protection does not raise problems under the Convention.⁴⁵²

The protection of freedom of assembly is not limited to natural persons. Corporations, companies, associations with and without legal personality may also organize an assembly and call upon their members to take part in the manifestation.⁴⁵³ However, public law entities like administrative authorities, municipalities etc. may not validly invoke this right which is primarily directed against interferences by state organs and all other persons and bodies exercising public authority.⁴⁵⁴

Rationae materiae

To enjoy the constitutional protection of freedom of assembly at least two people must come together for a common purpose.⁴⁵⁵ “Coming together” in this context requires the physical presence of several persons in a specific place at a specific time. By contrast, the coming together of several people in the virtual world, for example in a chat room in the Internet, lacks the element of physical presence of a potentially huge number of people in the same place at the same time that gives collective manifestations a particular weight, but also creates specific risks which justify a separate constitutional guarantee.⁴⁵⁶

The FCC has defined the necessary purpose of the assembly by reference to the fundamental significance of the right for the shaping of public opinion and the formation of the political will in a democratic society.⁴⁵⁷ It thus understands the freedom of assembly as the right to the collective exercise of the freedom of opinion. This protection is not limited to events at which there will be arguments and disputes; it includes diverse forms of communal behaviour extending to non-verbal forms of expression (silent marches, sit-ins etc.). It also applies where the freedom to meet is claimed for the purpose of expressing opinions in a striking or sensational way.⁴⁵⁸

By contrast the constitutional freedom of assembly does not protect public gatherings whose primary purpose is mere crowd entertainment or mass partying. The FCC has qualified events like the “Love Parade” as music festivals designed to attract huge crowds who wanted

⁴⁴⁹ BVerfG, Order of 14 October 2004, 2 BvR 1481/04 – *Görgülü Case*, available at: www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html (last accessed: 10 March 2014).

⁴⁵⁰ § 1 (1) Versammlungsgesetz; Art. 1 (1) Bayerisches Versammlungsgesetz; § 1 (1) Niedersächsisches Versammlungsgesetz; § 1 (1) Gesetz über Versammlungen und Aufzüge im Freistaat Sachsen; § 1 (1) Gesetz des Landes Sachsen-Anhalt über Versammlungen und Aufzüge.

⁴⁵¹ According to the majority opinion in German constitutional law doctrine, the right of assembly of non-nationals is protected as forming part of their general right to free development of their personality under Art. 2 para. 1 of the Basic Law; however, this view is contested. In any case the legislator enjoys wider discretion in limiting freedom of assembly under Art. 2 para. 1 than it would under Art. 8, see J. Bröhmer, in: Dörr/Grote/Marauhn (eds.), EMRK/GG, 2nd edition, 2013, chap. 19 para. 17.

⁴⁵² However, such limited protection in the case of EU nationals is hardly consistent with European Union law which prohibits any discrimination on grounds of nationality within the scope of application of the EU treaties (Art. 18 Treaty on the Functioning of the European Union), see H. Schulze-Fielitz, in: H. Dreier (ed.), Grundgesetz-Kommentar, vol. I, 3rd edition 2013, Art. 8 para. 52; Bröhmer, *supra* fn. 451), chap. 19 para. 16.

⁴⁵³ Schulze-Fielitz, *supra* fn. 452, Art. 8 para. 57.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Art. 2 (1) Bayerisches Versammlungsgesetz now contains an express definition of an assembly which is to be understood as a “gathering of at least two persons for a joint discussion or manifestation that is primarily intended to contribute to the formation of public opinion.” See also § 2 Niedersächsisches Versammlungsgesetz; § 1 (3) Sächsisches Versammlungsgesetz. On previous case law and literature which sometimes required a greater number of people see S. Ott&H. Wächtler&H. Heinold, Gesetz über Versammlungen und Aufzüge, 7th edition 2010, § 1 para. 3.

⁴⁵⁶ Amtsgericht Frankfurt, Multimedia und Recht 2005, 863 (866); Bröhmer, *supra* fn. 451, chap. 9 para. 25.

⁴⁵⁷ BVerfGE (=Entscheidungen des Bundesverfassungsgerichts) vol. 104, 92 (194) – *Sit-down Demonstrations III*.

⁴⁵⁸ Decisions of the Bundesverfassungsgericht, *supra* fn. 446, 284 (292) – *Brokdorf*.

nothing else than to dance and to party to the sounds of electronic (“techno”) music. The fact that on the occasion of the music festivals the organizers also lobbied for the support of participants for further events of this kind could not change the character of the event from a party to a collective exercise of freedom of opinion.⁴⁵⁹ The courts have been more favourable towards private concerts organized by skinhead bans as assemblies, arguing that in this case the music is used to convey political messages and serves as an important instrument for their dissemination.⁴⁶⁰

The qualification of flashmobs and smartmobs depends on the purpose of the spontaneous gathering. *Smartmobs* are designed to replace traditional forms of protest by modern forms of social interaction. They have an explicit political purpose and thus fall within the scope of application of Art. 8 BL.⁴⁶¹ The German labour courts have therefore recognized that a smart mob organized by trade union representatives may constitute a legitimate form of industrial action.⁴⁶² By contrast, the *flashmob* is defined as a spontaneous gathering arranged via the social media for the purpose of celebrating and partying together. It will thus not normally fall within the narrow concept of assembly adopted by the Federal Constitutional Court.⁴⁶³

Peaceful character of assembly

The assembly must take place “peacefully and unarmed”. The prohibition to carry arms is the direct and perhaps the most important consequence of the requirement of peaceful assembly. However, the prohibition is not absolute. The Federal Act on Assemblies and the corresponding *Land* laws allows the participants of demonstrations to carry arms following prior authorization of the competent authorities.⁴⁶⁴

The explicit reference to the prohibition on arms which exemplifies the requirement of a peaceful assembly suggests that the threats resulting for public peace and order resulting from an assembly must be substantial in order to justify its dispersal.⁴⁶⁵ In view of the wide formulation of the legal proviso in Sect. 2 of Art. 8 of the Basic Law there is no room to interpret the term “peaceful” extensively, thereby limiting from the start the scope of application of the basic right guarantee to such an extent that the legal proviso becomes largely meaningless.⁴⁶⁶ Demonstrations involving a limited measure of physical force therefore do not automatically lose the protection of Art. 8 Basic Law. The protection of Art. 8 ends (only) at the point where the conduct of the participants is intended not to promote but to stifle public discourse and to impose their collective views on bystanders and non-participants by physical force.⁴⁶⁷

⁴⁵⁹ Decision of the Bundesverfassungsgericht, 1 BvQ 28/01, paras. 19, 22 available at: www.bverfg.de/entscheidungen/qk20010712_1bvq002801.html (last accessed: 10 March 2014). The Federal Administrative Court arrived at a different conclusion with regard to the “Fuck Parade” whose organizers had prepared banners and leaflets arguing for the need for a less commercialized version of the Love Parade, see Bundesverwaltungsgericht, Urteil vom 22.8.2007 – 6 C 22/06, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2007, 1434 (1435). The Court held that in ambiguous cases in which the event did not exclusively pursue entertainment purposes but also included elements designed to influence public opinion it should benefit from the protection as assembly.

⁴⁶⁰ Verwaltungsgerichtshof Baden-Württemberg 1 S 349/10 of 12 July 2010, available at www.juris.de (last accessed: 10 March 2014).

⁴⁶¹ C. Neumann, Die rechtliche Beurteilung moderner Kommunikations- und Interaktionsformen, NVwZ 2011, 1171 (1173).

⁴⁶² BAGE (=Decisions of the Federal Labour Court) vol. 132, 140.

⁴⁶³ Neumann, *supra* fn. 461, 1173.

⁴⁶⁴ § 2 (3) Versammlungsgesetz; Art. 6 Bayerisches Versammlungsgesetz; § 3 (1) Niedersächsisches Versammlungsgesetz; § 2 (3) Gesetz über Versammlungen und Aufzüge im Freistaat Sachsen; § 2 (3) Gesetz des Landes Sachsen-Anhalt über Versammlungen und Aufzüge.

⁴⁶⁵ Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Volume 2/Part 2: Freedom of Speech 1958-1995, 357 (376/77) – *Mutlangen Demonstration Case*.

⁴⁶⁶ Decisions of the Bundesverfassungsgericht, *supra* fn. 465, 357 (377) – *Mutlangen Demonstration Case*.

⁴⁶⁷ BVerfGE 104, 92 (103) – *Sit-down Demonstrations III*.

Protected activities

The freedom of assembly protects the right of individual persons to take part in an assembly and thus to have access to the place where the demonstration takes place.⁴⁶⁸ In addition, it covers all activities related to the preparation of a demonstration, including the public announcement of the event, and the right to freely determine the object, the place, the time and the manner of the assembly.⁴⁶⁹ Finally the freedom of assembly protects the various assembly-specific activities taking place at the assembly itself, like the pronouncement of speeches, the distribution of leaflets, the chanting of slogans or songs, the display of posters etc.⁴⁷⁰ On the other hand, the freedom to stay away from a demonstration is also protected.⁴⁷¹

While the freedom of assembly guarantees the holders of the fundamental right *inter alia* the right to freely determine the location of the assembly, it does not thereby provide them with the right of access to any location, including private property. But it is not restricted to public street space, either. Communication activities take increasingly place in a wide array of different venues, including shopping centres or other meeting places. The Federal Constitutional Court has therefore ruled that assemblies may also be held in places in which a public enterprise has opened a general public traffic. By contrast, places the access to which is controlled individually and is only permitted for individual purposes are excluded from such use.⁴⁷²

3. Restrictions

All measures which effectively prevent or deter people from participating in an assembly or make access to such demonstrations exceedingly difficult by setting up road controls or comprehensive registrations systems for participants constitute interferences with the freedom of assembly which have to be measured against Art. 8 BL.⁴⁷³ Similarly, sanctions which the public authorities impose on participants of an assembly in respect of their role in the preparation, organization or realization of the manifestation or procession, whether they take the form of criminal sanctions or of disciplinary action in the workplace, also interfere with the unfettered exercise of the freedom of assembly.⁴⁷⁴

With regard to restrictions of the freedom of assembly, Art. 8 BL distinguishes between outdoor assemblies which may be restricted by or pursuant to a law, and indoor assemblies which are not subject to such restrictions. This does not mean however, that indoor assemblies may never be prohibited or dispersed. But such assemblies are subject only to such restrictions as can be derived directly from the Basic Law, especially those derived from the need to preserve the life, liberty and property of outsiders and of the peaceful demonstrators themselves.⁴⁷⁵ By contrast Art. 8 BL expressly provides for restrictions on outdoor assemblies by or pursuant to law because of their manifold contacts with the outside world which creates specific risks which need to be regulated.⁴⁷⁶ However, measures restricting the freedom of assembly must always take into account its paramount importance in the democratic order.

⁴⁶⁸ By contrast the protection afforded by Art. 8 BL ends where at issue is not participation, even critical participation, but prevention of the assembly see Decisions of the Bundesverfassungsgericht (fn. 462), 535 (539) – *Assembly Dispersal Case*.

⁴⁶⁹ Decisions of the Bundesverfassungsgericht, *supra* fn. 446 , 284 (292); Schulze-Fielitz, *supra* fn. 452, Art. 8 para. 33.

⁴⁷⁰ Schulze-Fielitz, *supra* fn. 452, Art. 8 paras. 31, 34.

⁴⁷¹ Bröhmer, *supra* fn. 451, chap. 19 para. 35.

⁴⁷² BVerfGE, Judgment of 22 February 2011, 1 BvR 699/06 – *Frankfurt Airport Decision*, Press release no. 18/2011 of 22 February 2011, sect. III. 2. a), available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-018en.html (last accessed: 10 March 2014).

⁴⁷³ Decisions of the Bundesverfassungsgericht, *supra* fn. 446, 284 (296) – *Brokdorf Demonstration Case*.

⁴⁷⁴ Bröhmer, *supra* fn. 451, chap. 19 para. 34.

⁴⁷⁵ Schulze-Fielitz, *supra* fn. 452 , Art. 8 para. 72.

⁴⁷⁶ Decisions of the Bundesverfassungsgericht, *supra* fn. 446, 284 (297) – *Brokdorf Demonstration Case*.

The legislature may only authorize limitations of the freedom of assembly for the protection of other legal interests of equal value and in strict observance of the principle of proportionality. The establishment of such statutory limits as well as their implementation is subject to strict judicial scrutiny.⁴⁷⁷

4. Implementing the constitutional guarantee: The Federal Assembly Act

In accordance with the constitutional regulation the Federal Act on Assemblies distinguishes between indoor assemblies (title II) and outdoor assemblies (title III).

Indoor assemblies

With regard to *indoor assemblies*, the Act specifies that somebody must be in charge of the assembly (*Versammlungsleiter*). Normally this will be the individual or the chairman of the association organizing the event, although the organizer may delegate the supervisory functions to another person (§ 7 Act on Assemblies). The most important function of the person in charge of the assembly is the maintenance of order during the demonstration (§ 8). To this end he/she may direct orders to the participants (§ 10) and even exclude persons who are responsible for grave disturbances from further participation in the assembly (§ 11). He/she is also the person to which the competent authorities have to address their communications concerning the assembly (see § 12).

Indoor assemblies may only be prohibited for the reasons specified in § 5 of the Act: if the organizer of the assembly is a political party or association which has been banned in the procedure provided for this purpose by the Constitution (Art. 9, 21 BL), a person who has forfeited his or her right to freedom of assembly under Art. 18 BL, or tries to promote the objectives of a political party which has been banned under Art. 21 BL; if the organizer allows persons carrying weapons without the required permission to participate in the event; if there is reason to believe that the organizer or his followers envisage a violent or riotous development of the demonstration; or if there is reason to believe that the organizer will express or tolerate views which have a criminal offense as their object. For the same reasons, the police may order the dispersal of an indoor assembly which is already under way. However, in the latter case the dispersal is only admissible if other, less far-reaching measures have proved unsuccessful or are likely to be insufficient.

In addition, the police may record videotapes and audiotapes of participants of an assembly if specific facts suggest that they constitute a substantial threat to public safety or order. The records have to be destroyed immediately after the end of the demonstration unless they are needed to prosecute criminal offenses committed by participants of the demonstration or to prevent future offenses by the person concerned (§ 12a).

Outdoor assemblies

Similar provisions apply to *outdoor assemblies* (§ 18). Unlike indoor assemblies, however, outdoor assemblies have to be notified to the competent authority at least 48 hours prior to the event. The notification must indicate the object of the assembly (§ 14). The notification shall enable the authorities to make up their mind which precautions have to be taken for the event to run as free from disturbance as possible while preserving the interests of non-participants.⁴⁷⁸ According to § 15 (3) of the Act, a demonstration or procession may be dispersed by the competent authority if it has not been duly notified. However, the courts have ruled that the duty to notify does not apply to spontaneous demonstrations (*Spontanversammlung*) which form without any prior planning or preparation.⁴⁷⁹ In relation to

⁴⁷⁷ Decisions of the Bundesverfassungsgericht, *supra* fn. 446, 284 (296) – *Brokdorf Demonstration Case*. Outdoor assemblies within the meaning of Article 8 (2) BL must not necessarily take place in open air but may also be held in closed buildings. What is decisive is that such assemblies take place in a public space, i.e. surrounded by the general public and not spatially separated from it, see BVerfGE – *Frankfurt Airport Decision*, *supra* fn. 472, sect. III. 2. A).

⁴⁷⁸ Decisions of the Bundesverfassungsgericht, *supra* fn. 446, 284 (297) – *Brokdorf Demonstration Case*.

⁴⁷⁹ Decisions of the Bundesverfassungsgericht, *supra* fn. 446, 284 (297) – *Brokdorf Demonstration Case*.

urgent assemblies (*Eilversammlungen*) which are organized at short notice to respond to current events only a reading of the Assembly Act which requires that notification occurs as soon as an opportunity arises, without fixed deadline, is compatible with Art. 8 BL.⁴⁸⁰

Most importantly an assembly may be prohibited or dispersed only if it constitutes a direct threat to public safety or order (§ 15 (1), (3) Assembly Act). The concept of “public safety” includes the protection of central legal interests like life, health, freedom, honour, property and wealth of the individual as well as maintaining the legal order and the state institutions intact. “Public order” is to be understood as including the totality of unwritten rules, obedience to which is regarded, according to social and ethical opinions prevailing at the time, as an indispensable prerequisite for an orderly communal human existence within a defined area.⁴⁸¹ These measures are subject to strict scrutiny in terms of their proportionality. In particular, bans and dispersals presuppose that the less severe method of imposing conditions on the organizers designed to remove the threat to public safety emanating from the assembly has been exhausted. The freedom of assembly must only take second place when a balancing of interests which takes into consideration the importance of the freedoms shows that this is necessary for the protection of other legal interests of equal value. It would therefore be inadmissible to ban demonstrations for considerations of traffic regulations, since the use of public streets and places by demonstrators can normally be harmonized with the needs of the participants of the normal traffic by way of conditions (*Auflagen*) within the meaning of § 15 (1) Assemblies Act.⁴⁸² Similarly, the fear that the demonstration may be disturbed by a violent counterdemonstration does not normally justify its prohibition or dispersal; the police measures must be directed against the counterdemonstration in the first place.⁴⁸³

The power of the authorities to intervene is further limited by the fact that bans and dispersals are only permitted when there is a “direct threat” to public safety or order. A prognosis of the dangers based on “recognizable circumstances”, i.e. on facts and other particulars instead of mere suspicions or assumptions, is necessary in each case. What standards are required in the individual case has to be determined primarily by the specialist courts. However, the Constitutional Court has indicated that especially with regard to large demonstrations a positive assessment by the police may depend on the willingness of the organizers to co-operate with the police in taking the necessary precautions to ensure a peaceful demonstration. The police, for its part, should keep a low profile and avoid excessive reactions (de-escalation strategy). In particular, contact should be made at an early stage, at which both sides get to know one another, exchange information and possibly find their way to a co-operation based on mutual trust. The more the organizers are ready on the occasion of the notification of a large demonstration to take unilateral confidence-building measures or even ready for “demonstration-friendly” co-operation, the higher is the threshold for intervention by an authority because of danger to public safety and order.⁴⁸⁴

Outdoor assemblies and processions in the proximity of the national and state parliaments are prohibited (§ 16). They may be prohibited in places dedicated to the memory of the victims of the National Socialist rule of violence and arbitrariness, if the place is of paramount historical importance and if there is reason to believe that the dignity of the victims will be negatively affected by the assembly (§ 15 (2)).

⁴⁸⁰ BVerfGE vol. 85, 69 (75/76) – *Urgent Assemblies Case*; see English summary available at <http://legislationline.org/documents/action/popup/id/16276> (last accessed: 10 March 2014).

⁴⁸¹ Decisions of the Bundesverfassungsgericht, *supra* fn. 446, 284 (298/99) – *Brokdorf Demonstration Case*.

⁴⁸² Decisions of the Bundesverfassungsgericht, *supra* fn. 446, 284 (299) – *Brokdorf Demonstration Case*.

⁴⁸³ Only as a means of a last resort, if violence and major damage to the life, liberty and property of peaceful demonstrators and bystanders cannot be avoided by other means, e.g. the modification of the proposed meeting place, may the authorities ban a peaceful assembly for fear of a violent counterdemonstration which they cannot police effectively with the disposable manpower and resources, see Decisions of the Bundesverfassungsgericht, 446, 284 (304) – *Brokdorf Demonstration Case*.

⁴⁸⁴ Decisions of the Bundesverfassungsgericht, 446, 284 (302) – *Brokdorf Demonstration Case*

The recording of persons taking part in an outdoor assembly by the police on video or audiotape is admissible in the same conditions as in indoor assemblies (§ 19a).

5. Impact of other laws

General provisions concerning liability, costs etc.

The Act on Assemblies does **not contain special provisions on costs and liabilities** (of both the organizers and of the law enforcement personnel). The ordinary provisions of police law, civil law and criminal law thus apply to liability issues arising in the context of demonstrations. However, it is generally recognized that the application of these provisions may not result in a disproportionate burden on the exercise of the freedom of the assembly: they have to be interpreted in the light of the paramount importance of the constitutional freedom of assembly for a functioning democracy and may not be used to deter people from organizing an assembly or participating in it. The liability for damages caused to private or public property by a demonstration may thus not be extended to participants who were not involved in the acts causing the damage.⁴⁸⁵ On the other hand, Art. 8 does not *per se* exclude the liability of the organizer for the costs resulting from the cleaning up of public streets or places following a lawful outdoor assembly.⁴⁸⁶

The recent Assembly Acts of the states (Länder)

Since 2008, several *Länder* have enacted their own statutes on the exercise of the freedom of assembly (see above). Among the most salient features of these new laws are the formal definition of the concept of assembly in the light of the recent case law of the Federal Constitutional Court,⁴⁸⁷ the incorporation of specific provisions dealing with spontaneous and instant assemblies⁴⁸⁸, and the creation of legal bases for the adoption of restrictive measures for the protection of the dignity of the victims of National Socialist rule.⁴⁸⁹

While most of these laws remain within the framework established by the FCC and the federal Assembly Act, the Bavarian Assembly Act contains some novel features, including a detailed list of the duties of the persons in charge of the Assembly (Art. 4), an express prohibition to disturb lawful assemblies from within or without (Art. 8), extended powers of the police to monitor and record public meetings (Art. 9), and the codification of the duty of the organizer to co-operate with the competent public authorities in the preparation of the assembly (Art. 14). The extended duties of the organizers and the wide powers of the police could conceivably deter people from exercising freedom of assembly. In an important ruling of February 2009, the FCC suspended by way of interim relief the provisions which allowed the authorities to impose fines on the organizers in case of violation of their far-reaching notification and cooperation duties and to film the entire assembly, including indoor assemblies, even in the absence of a clear and present danger to public safety or order (“*anlasslose Übersichtsaufnahmen*”).⁴⁹⁰ The Bavarian legislature swiftly amended the Assembly Act. The revised provisions allow the police only to film outdoor assemblies where this is necessary in view of the size of the assembly and the unclear situation on the ground. The identification of individual persons on the film or picture is only admissible if they constitute a real danger to public safety or order. The powers to impose fines have been limited to cases of failure to comply with substantial duties of the organizer.

⁴⁸⁵ BGHZ (=Decisions of the Federal Supreme Court in civil matters) vol. 89, 383 (395); BGH, Neue Juristische Wochenschrift 1998, 377 (381).

⁴⁸⁶ Bundesverwaltungsgericht, Urteile vom 06.9.1988 – 1 C 71/86 und vom 06.9.1988 – 1 C 15/86, Neue Juristische Wochenschrift 1989, 52 (52); 53 (54).

⁴⁸⁷ Art. 1 (2) Bayerisches Versammlungsgesetz; § 2 Niedersächsisches Versammlungsgesetz; § 1 (3) Sächsisches Versammlungsgesetz.

⁴⁸⁸ Art. 13 (3), (4) Bayerisches Versammlungsgesetz; § 5 (4), (5) Niedersächsisches Versammlungsgesetz; § 14 (3), (4) Sächsisches Versammlungsgesetz; § 12 Abs. 1 Landesversammlungsgesetz Sachsen Anhalt.

⁴⁸⁹ Art. 15 (2) Bayerisches Versammlungsgesetz; § 8 Abs. 4 Niedersächsisches Versammlungsgesetz.

⁴⁹⁰ BVerfG, Order of 17 February 2009, 1 BvR 2492/08 – *Bavarian Assembly Act*, Press release no. 17/2009 of 27 February 2009, sects. 1, 3, available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvq09-017en.html (last accessed: 10 March 2014).

While the Bavarian case confirms that the FCC will ensure the respect of freedom of assembly also by the new State laws on assemblies, it also demonstrates the risk of growing legal uncertainty inherent in the fragmentation of the hitherto unified statutory framework. The *Länder* as well as constitutional law experts have therefore established working groups in order to prepare a model code on assemblies which may serve as point of reference to the *Länder* in the exercise of their new legislative powers.⁴⁹¹

6. Conclusions and outlook

The most important development in Germany concerning the freedom of assembly has been the transfer of the implementing powers from the federal government to the *Länder*. While most *Länder* have limited to codify the organizational and procedural aspects of the freedom of assembly in line with the established case law of the Federal Constitutional Court, others have tried to modify the concept of freedom of assembly itself, in particular by imposing additional burdens on the organizers in the preparation and management of the assembly while at the same time granting the police extended powers in the monitoring and recording of the event (Bavaria).⁴⁹² While the Constitutional Court has indicated clear constitutional limits to such reforms at the state level, this has not entirely banned the risk of growing uncertainty through competing legal frameworks for the exercise of this fundamental freedom in each of the 16 states.

With regard to the substance of freedom of assembly, the development has been characterized by a high degree of continuity. The reading of the freedom of assembly as a collective exercise of the freedom of opinion, as opposed to crowd gatherings for party and entertainment purposes, has become firmly entrenched in the case law as well as in the legislation. The courts have continued to emphasize the procedural and organizational aspects of the right in order to strike a balance between the effective exercise of freedom of assembly on the one hand and the need to manage the risks emanating particularly from outdoor assemblies on the other. The cooperation between the organizers and the police is seen as a vital tool to educate both the organizers and the authorities and to give maximum protection to peaceful assemblies. However, as the Bavarian example shows, it can also be used as a tool to put an excessive burden on the organizers, thus putting at risk the concept of assembly as a contribution to the formation of public opinion which must stay free of state regimentation.

⁴⁹¹ Schulze-Fielitz, *supra* fn. 452, Art. 8 para. 23.

⁴⁹² Ott&Wächtler&Heinhold, *supra* fn. 455 speak with regard to the Bavarian case of a „thorough failure“ (at 291).

Turkey

by Elif Askin

1. Introduction

In Turkey, the right to freedom of peaceful assembly continues to be severely restricted.⁴⁹³ For instance, in 2012, 424 peaceful assemblies were dispersed by police forces.⁴⁹⁴ In the same year, a total of 252 people were sentenced to 1'163 years of imprisonment in 46 cases for exercising this right.⁴⁹⁵

With 61 violations of Art. 11 of the European Convention on Human Rights found by the European Court of Human Rights (ECtHR) between 1959 and 2013, Turkey has the highest number of violations of freedom of peaceful assembly in Europe.⁴⁹⁶ 130 applications against Turkey concerning the right to freedom of peaceful assembly are still pending before the ECtHR.⁴⁹⁷ This chapter provides an overview of the national legislation governing the right to freedom of peaceful assembly in Turkey with special focus on the recent developments in the summer of 2013.

Current events: Gezi Park protests

On 30 May 2013 the police broke up a demonstration by a group of environmentalists' sit-in at Gezi Park, in Istanbul's Taksim Square. The protests began as part of a longstanding campaign against the destruction of the Gezi Park, one of the last green spaces in central Istanbul, as part of the redevelopment of the Taksim Square.⁴⁹⁸ The subjects of the demonstrations then broadened beyond the development of Gezi Park into wider anti-government protests. By the middle of June 2013, 3.5 million people had taken part in almost 5000 "Gezi Park protests" that spanned almost every one of Turkey's 81 provinces.⁴⁹⁹ The nationwide demonstrations were fanned by the authorities' aggressive dismissal of the integrity of those protesting peacefully in these demonstrations and the crude attempts to deny them the right to freedom of peaceful assembly.⁵⁰⁰

⁴⁹³ The Observatory for the Protection of Human Rights Defenders (obs), Turkey Human Rights Defenders, Guilty until Proven Innocent, International Fact-Finding Mission Report, May 2012, p. 14.

⁴⁹⁴ İnsan Hakları Derneği (IHD), 2012 İnsan Hakları İhlalleri Bilançosu (Human Rights Association in Turkey, Account of the Human Rights Violations in Turkey in 2012, available at: <http://www.ihd.org.tr/images/pdf/2012/2012bilanco.pdf> (last accessed: 5 March 2014); see also The Observatory for the Protection of Human Rights Defenders (obs), Turkey Human Rights Defenders, Guilty until Proven Innocent, International Fact-Finding Mission Report, May 2012, p. 14.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ ECtHR, Violations by Article and by State, Statistical Information on Turkey, available at: http://echr.coe.int/Documents/Stats_violation_1959_2013_ENG.pdf (last accessed: 5 February 2014).

⁴⁹⁷ Euro-Mediterranean Human Rights Network, Mission Report on the Protest Movement in Turkey and its Repression, May-July 2013, II. 6.

⁴⁹⁸ The plans include the building of a replica 19th century Ottoman barracks and said by the Prime Minister Recep Tayyip Erdogan to include the construction of a shopping centre and mosque. Anger was caused not just by the destruction of the park but also the opaque way in which the decision for the redevelopment project was taken, which critics described as characteristic not just of urban regeneration projects but, more generally, of a government unwilling to respect or listen to opposing opinion; Amnesty International, Gezi Park Protests. Brutal Denial of the Right to Peaceful Assembly in Turkey, October 2013, with a timeline at p. 54 *et seq.*; Ayata Gökceciçek et. al., Gezi Park Olayları: İnsan Hakları Hukuku ve Siyasi Söylem Işığında bir İnceleme, İstanbul Bilgi Üniversitesi Yayınları, 2013, p. 55.

⁴⁹⁹ De Bellaguie Christopher, Turkey: Surreal, Menacing...Pompous, The New York Review of Books, 19 December 2013, available at: <http://www.nybooks.com/articles/archives/2013/dec/19/turkey-surreal-menacing-pompous/?pagination=false> (last accessed: 5 February 2014).

⁵⁰⁰ Amnesty International, Gezi Park Protests. Brutal Denial of the Right to Peaceful Assembly in Turkey, October 2013, p. 6.

Taksim Square in Istanbul constitutes a traditional gathering point for demonstrations, and bears an important value for protestors and political organizations. For long periods, the current Turkish AKP-government banned all politically-motivated assemblies in Taksim.⁵⁰¹ On 31 May 2013, people were prevented from accessing the Taksim area and joined the Gezi Park protests.⁵⁰² After 15 June 2013, access to the Gezi Park was totally blocked, and any gathering in Taksim square was prevented or immediately dispersed.⁵⁰³ Since that time, the authorities have frequently **denied permission** for assemblies to go ahead, and police have **cleared** them using force, force, especially water cannons and tear gas.⁵⁰⁴

Flash mobs

During the Gezi Park protests in June 2013, people gathered spontaneously in the Taksim Square and stood still and motionless for hours.⁵⁰⁵ The “Standing Man” protest began when a Turkish actor performed the “Standing Man” facing the Atatürk Cultural Centre in Taksim. Shortly thereafter, more than hundred people participated in this flash mob informed through the social media⁵⁰⁶ as well as by word of mouth. There were also other flash mobs such as the “Piano Concert” in Taksim and the “Dance the Tango” in the Gezi Park. In all these cases, the police dispersed the spontaneous assemblies with gas bombs and detained the persons. The pianist reported that his piano was being held in custody and a letter of permission from the security forces was necessary as well as the payment of a 160 Turkish Lira to get it back.⁵⁰⁷

2. Legal bases and scope of the guarantee

The constitutional guarantee

The freedom of peaceful assembly is regulated in Art. 34 (1) of the Constitution of the Republic of Turkey of 7 November 1982 (hereafter “the Constitution”), which lays down that “[e]veryone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.”⁵⁰⁸ According to Art. 34 (3) of the Constitution “[t]he

⁵⁰¹ In the case of *DISK and KESK v. Turkey*, which concerns the trade unions’ complaint about the police intervention in the Labour Day celebrations on 1 May 2008 in Istanbul, the police took extensive measures to deter the demonstration and made declarations that they would use force against the demonstrators if they insisted on holding the demonstrations in the Taksim Square. To this end, on 1 May 2008, upon the order of the Istanbul Governor, operations of ferries and subways were stopped, the roads leading to Taksim Square were blocked and extra police were deployed to the area to block the entrance to Taksim. The ECtHR takes note that in 1977, during Labour Day Celebrations in the Taksim Square 37 people had died when a clash had broken out. As a result, the Taksim Square became a symbol of that tragic event, and it is for this reason that the applicants insisted in organising the Labour Day celebrations in Taksim in commemoration; ECtHR, *DISK v. KESK v. TR*, judgment of 29 April 2013, App. No 38676/08.

⁵⁰² All public transportation such as metro, ferries as well as the Galata motorway bridge were interrupted. People and vehicles were stopped around Taksim by checkpoints of the police.

⁵⁰³ Amnesty International, *supra* fn. 500, p. 13 *et seq.*; EMHRN, *supra* fn. 497, III. 1.

⁵⁰⁴ Amnesty International, *supra* fn. 500, p. 14. See also for the recent protests in Istanbul New York Times, Protesters Clash With Police in Turkey, 27 December 2013, available at: <http://www.nytimes.com/2013/12/28/world/europe/protesters-clash-with-police-in-turkey.html> (last accessed: 5 February 2014); „Thousands of protesters calling for the resignation of Prime Minister Recep Tayyip Erdogan of Turkey over a corruption scandal *clashed with the police on Friday night as they tried to reach Taksim Square* in central Istanbul, suggesting that the growing political crisis could converge with street unrest“ (emphasis added).

⁵⁰⁵ Human Rights Watch, The Turkish Protests – Still Standing, 21 June 2013, available at: <http://www.hrw.org/news/2013/06/21/turkish-protests-still-standing> (last accessed: 5 February 2014).

⁵⁰⁶ For example on Twitter, #duranadam.

⁵⁰⁷ Hürriyet Daily News, Police release ‘detained’ Gezi Park piano, 18 June 2013, available at: <http://www.hurriyettailynews.com/police-release-detained-gezi-park-piano-.aspx?pageID=238&nID=49055&NewsCatID=341> (last accessed 5 February 2014).

⁵⁰⁸ Art. 34 of the Constitution of the Republic of Turkey (Türkiye Cumhuriyeti Anayasası), 7 November 1982 (as amended to 12 September 2010), Law No. 2709, the official English translation is available at: http://global.tbmm.gov.tr/docs/constitution_en.pdf (last accessed: 5 March 2014); Art. 26 of the Constitution guarantees the right to issue “public statements”: “Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing”.

formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.”⁵⁰⁹

Art. 90 of the Constitution provides for the supremacy of international law standards above domestic law on the subject of rights and freedoms, thus requiring the direct application of international law standards on the right to assemble peacefully in Turkey.⁵¹⁰

The Law on Meetings and Demonstrations

Issues related to the right to freedom of peaceful assembly are regulated by the Law on Meetings and Demonstrations of 6 October 1983 (hereafter “the Law”).⁵¹¹ Art. 3 of the Law provides for the right of all persons to hold peaceful assemblies without obtaining prior permission.⁵¹² The Law defines under its Art. 2 a) meetings: “means that (...) meetings that are organised in open and closed places in the framework of this law by real and juridical persons on specific issues to enlighten people and to create public opinion” and under Art. 2 b) demonstrations: “demonstrations (marches) that are organised in the framework of this law by real and juridical persons on specific issues to enlighten people and create public opinion.”⁵¹³ Art. 10 of the Law requires the organizers of the assemblies to notify the authorities in detailed terms of the nature of the demonstration and its time and location.⁵¹⁴ According to the Law each assembly requires an organising committee consisting of at least seven persons (organizers).⁵¹⁵ The right to organize assemblies is granted to persons, who have full capacity to legal acts and who are at least 18 years of age.⁵¹⁶ An assembly is a gathering at which at least seven persons participate, excluding the organising committee.⁵¹⁷ The right to organize assemblies is granted to persons, who have full capacity to legal acts and who are at least 18 years of age.⁵¹⁸

Case-law

According to the case-law of the Supreme Court of Turkey, peaceful meetings and demonstrations as well as spontaneous assemblies are protected under Art. 34 (1) of the Constitution. This was confirmed in a landmark decision in 2002, in which the Supreme Court emphasized that assemblies should be protected and facilitated by the authorities as long as they are peaceful.⁵¹⁹ However the Turkish courts changed this ruling of the Supreme Court, as the constitutional protection of freedom of assembly was restricted to cover only assemblies with a prior notification.⁵²⁰

3. Restrictions

Legitimate grounds for restrictions

The second paragraph of Art. 34 of the Constitution states that “[t]he right to hold meetings and demonstrations shall be restricted only by law on the grounds of national security, public order, prevention of committing of crime, protection of public health and public morals or the rights and freedoms of others.”⁵²¹ However, there is no mention of the condition of necessity

⁵⁰⁹ Art. 34 (3) of the Constitution, *supra* fn. 508.

⁵¹⁰ *Ibid.*, Article 90.

⁵¹¹ Law on Meetings and Demonstrations (Toplantı ve Gösteri Yürüyüşleri Kanunu), 6 October 1983, Law No. 2911, for the official text in Turkish see: <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.2911.pdf> (last accessed : 5 March 2014).

⁵¹² Art. 3 of the Law on Meetings and Demonstrations, *supra* fn. 511.

⁵¹³ *Ibid.*, Art. 2; Euro-Mediterranean Human Rights Network, Regional Study, The Right to Freedom of Assembly in the Euro-Mediterranean Region, Part I Legislation Review, 2013, p. 139.

⁵¹⁴ *Supra* fn. 511, Art. 10.

⁵¹⁵ *Ibid.*, Art. 9. Pursuant to Art. 3 (2) of the Law on Meetings and Demonstrations foreigners are restricted from organising and participating in assemblies and have to be authorized by the Ministry of Interior Affairs.

⁵¹⁶ *Ibid.*, Art. 9.

⁵¹⁷ Art. 11 of the Law on Meetings and Demonstrations, *supra* fn. 511.

⁵¹⁸ *Ibid.*, Art. 9.

⁵¹⁹ Türkiye Barolar Birliği, İnsan Hakları Merkezi, İnsan Hakları Raporu (Turkey Bar Association, Human Rights Centre, Human Rights Report), 2013, p. 468 (with further references to the Turkish case-law).

⁵²⁰ See for example Council of State of Turkey, E. 2000/5980, 27 January 2003; E. 2006/946, 15 September 2008; E. 2006/8821, 21 February 2007.

⁵²¹ Art. 34 of the Constitution, *supra* fn. 508.

and proportionality of such restrictions, leaving the door open to arbitrary interferences.⁵²² The Constitution also fails to mention the positive obligation of the State to protect peaceful assemblies established by the ECtHR.⁵²³

In fact, the Law introduces extensive restrictions. The regional governor or district commissioner has the right to ban a specific meeting or postpone it for up to a maximum of one month for reasons of national security, public order, prevention of crime, public health and public morals or protection of rights and freedoms of others.⁵²⁴ Art. 17 of the Law limits the restrictive measures to legitimate aims, but the provision does also not foresee proportionality and leaves therefore a wide margin of discretion to the administrative authorities.⁵²⁵

Time restrictions

The timeframe of an assembly set out in Art. 7 of the Law states that meetings should start at sunrise and should be concluded an hour before sunset in open spaces, and by 11 p.m. in closed spaces.⁵²⁶

Place restrictions

Local authorities have large discretionary powers to unilaterally determine the location of an assembly and the organizers have not the right to take part in this determination.⁵²⁷ The authorities can also decide on general bans of assemblies in certain places.⁵²⁸

Specific restrictions for assemblies in public space

Art. 22 of the Law prohibits meetings and demonstrations on public streets, in parks, places of worship, buildings in which public services are based and in the area surrounding one kilometre of the Grand National Assembly of Turkey. Demonstrations organized in public squares have to comply with security instructions and not disrupt individuals' movements or public transport.⁵²⁹

Place restrictions concerning Cyprus and the "Green Line"

Regarding the situation in Cyprus, the ECtHR stated in *Djavit An v. Turkey*⁵³⁰ that the refusals by the Turkish Cypriot authorities to allow Djavit An to cross the "green line" into southern Cyprus and participate in bi-communal medical meetings organized by the UNHCR violated the right to freedom of peaceful assembly. The ECtHR noted that "all the meetings the applicant wished to attend were designed to promote dialogue and an exchange of ideas and opinions between Turkish Cypriots living in the north and Greek Cypriots living in the south, with the hope of securing peace on the island. The refusals to grant these permits to the applicant in effect barred his participation in bi-communal meetings, preventing him from peacefully assembling with people from both communities. (...) As there seemed to be no

⁵²² EMHRN, *supra* fn. 497, II. 1; but see Art. 13 of the Constitution: „Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality“ (*emphasis added*).

⁵²³ EMHRN *supra* fn. 497, II. 1; ECtHR, *Case of Plattform Ärzte für das Leben v. Austria*, judgment of 21 June 1988, App. No. 10126/82, para. 34.

⁵²⁴ Art. 17 of the Law on Meetings and Demonstrations; see also Art. 19 which states that the regional governor may postpone all meetings in one or more districts of a province in the region, for a maximum of one month for reasons of national security, public order, prevention of crime, public health and public morals or for the protection of rights and freedom of others.

⁵²⁵ Euro-Mediterranean Human Rights Network, Turkey, November 2013, p. 5.

⁵²⁶ Art. 7 of the Law on Meetings and Demonstrations, *supra* fn. 511.

⁵²⁷ *Ibid.*, see i.e. Art. 6 (2).

⁵²⁸ EMHRN, *supra* fn. 525, p. 5; Akbulut Olgun, Toplantı ve Örgütlenme Özgürlükleri, in: Inceoglu Sibel, İnsan Hakları Avrupa Sözleşmesi ve Anayasa, İstanbul 2013, p. 389; see also *infra* public space.

⁵²⁹ Art. 22 of the Law on Meetings and Demonstrations, *supra* fn. 511.

⁵³⁰ ECtHR, *Djavit An v. TR*, judgment of 9 July 2003, App. No. 20652/92.

law regulating the issuing of permits to Turkish Cypriots living in northern Cyprus to cross the “green line” into southern Cyprus to assemble peacefully with Greek Cypriots, the manner in which restrictions were imposed on the applicant’s exercise of his freedom of assembly was not “prescribed by law (...)”.⁵³¹

Manner

Art. 23 of the Law lists the circumstances under which a meeting or demonstration will be regarded as illegal, and includes the absence of notification as well as holding a meeting or a demonstration outside the times declared in the notification, possession of weapons or explosives, sharp objects, stones, sticks, iron or plastic bars, metal ropes or chains that can cause injuries or be used to strangle, toxic substances that can burn, corrode or injure, or any other poisonous substances or smoke, gas and other similar substances.⁵³² Anyone shall be punished with prison if bearing symbols of illegal organizations, uniforms with these symbols, chanting illegal slogans with amplifiers, carrying illegal posters, signs and pictures.⁵³³ Relating to this provision the ECtHR emphasized in *Incal v. Turkey* that “[t]he limits of permissible criticism are wider with regard to the government (...). In a democratic system the actions or omissions of the government must be subject to the close scrutiny (...) also of public opinion.”⁵³⁴

Participants of demonstrations are not allowed to cover their faces completely or partially specially intended to conceal their identity.⁵³⁵

Illegal meetings and demonstrations are to be cleared following a warning to disperse, using force if necessary.⁵³⁶

Some stop and search powers of the police are also used in relation to demonstrations and against peaceful protestors. The revised Law on the Duties and Powers of the Police of 14 June 2007⁵³⁷ gave the police powers to carry out identity checks, to establish a bank of fingerprints and photographic identification of individuals, and to carry out preventive searches of public places.⁵³⁸ In cases where a delay might prove an obstacle, this power was granted to the police without the need for judicial authorization.⁵³⁹ Although in practice some of the stop and search powers were already extensively used by the police in demonstrations, this was the first time such provisions had been codified in the law.⁵⁴⁰

Restrictions intended to counter terrorism

Pursuant to Art. 220 of the Turkish Penal Code of 26 September 2004⁵⁴¹, a person who commits an offence on behalf of an organized criminal group without being a member of that

⁵³¹ *Ibid.*, para. 1, 61; see also ECtHR, *Djavit An v. TR*, Press Release, 20 February 2003; see for other Cyprus cases for example ECtHR, *Adali v. TR*, judgment of 12 October 2005, App. No. 38187/97.

⁵³² Art. 23 of the Law on Meetings and Demonstrations, *supra* fn. 511.

⁵³³ *Ibid.*; EMHRN, *supra* fn. 525, p. 5.

⁵³⁴ ECtHR, *Incal v. TR*, judgment of 9 June 1998, App. No. 41/1997/825/1031, para. 54.

⁵³⁵ Art. 23 of the Law on Meetings and Demonstrations, *supra* fn. 511.

⁵³⁶ *Ibid.*, Art. 24.

⁵³⁷ The Law on the Duties and Powers of the Police (Polis Vazife ve Salahiyet Kanunu), 4 July 1934, Law No. 2559, for the official text in Turkish see http://www.nvi.gov.tr/Files/File/Mevzuat/Nufus_Mevzuati/Kanun/pdf/polis_vazife_selahiyet_kanunu.pdf (last accessed: 5 February 2014). The revisions entered into law as the Law amending the Law on the Duties and Powers of the Police (Polis Vazife ve Salahiyet Kanununda Değişiklik Yapılmasına Dair Kanun), Law No. 5681, approved by the Turkish Parliament on 2 June 2007, and published in the Official Gazette on 14 June 2007, for the official text in Turkish see <http://www.resmigazete.gov.tr/eskiler/2007/06/20070614-1.htm> (last accessed: 5 February 2014).

⁵³⁸ Human Rights Watch, Closing Ranks against Accountability, Barriers to Tackling Police Violence in Turkey, p. 24.

⁵³⁹ The provision was included in Art. 1 of the Law amending the Law on Duties and Powers of the Police and inserted as Article 4 (a) in the Law on the Duties and Powers of the Police; *ibid.*, p. 24.

⁵⁴⁰ See Human Rights Watch, *supra* fn. 538, p. 24.

⁵⁴¹ Turkish Penal Code (Türk Ceza Kanunu), 26 September 2004, Law No. 5237, for the official text in Turkish see <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf> (last accessed: 5 February 2014).

organization shall be punished as a member of that organization.⁵⁴² The extensive use of Art. 220 of the Turkish Penal Code by courts against participants of demonstrations of Kurdish-related organizations as well as leftist organizations follows a precedent ruling of the Court of Cassation (Supreme Court of Appeals) in March 2008, which indicated that individuals participating in demonstrations should be also brought into the ambit of the Turkish Penal Code.⁵⁴³ In practice, Turkish courts also apply Art. 220 of the Turkish Penal Code to cover non-violent statements during demonstrations, when they are seen to overlap with any one of the aims of a terrorist organization. Acts such as requesting mother-tongue education in Kurdish, or displaying a banner requesting free education have been subject to criminal proceedings against the protestors.⁵⁴⁴

Demonstrators convicted under anti-terrorism laws⁵⁴⁵ have typically been sentenced to between 7 and 15 years in prison.⁵⁴⁶ Since the Gezi Park protests, a number of criminal investigations against the participants of the Gezi Park protests have been brought under anti-terrorism laws and related provisions.⁵⁴⁷

4. Procedural issues

Notification

Art. 10 of the Law requires the organizers of meetings and demonstrations to notify the authorities in detailed terms about the nature of the demonstration, its time and location. The organizers must provide the notification to the governor's office or authorities within at least 48 hours and during working hours, stating the aim of the meeting, date, start and end times

⁵⁴² Art. 220 (6) of the Turkish Penal Code; Art. 220 (7) of the Turkish Penal Code which states: "A person who aids and abets the organization knowingly and willingly, although he or she does not belong to the hierarchical structure of the organisation, shall be punished as though a member of the organisation"; article 220 (8) of the Turkish Penal Code: "A person who makes *propoganda* for the organization or its objectives shall be punished to imprisonment of one to three years. If the crime is committed through media and press, the sentence will be increased by half" (emphasis added); see also Article 1 of the Anti-Terror Law (Terörle Mücadele Kanunu), 12 April 1991, Law No. 3713, the official text in Turkish is available at: <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.3713.pdf> (last accessed: 2 February 2014).

⁵⁴³ See CoE, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Following his visit to Turkey from 10 to 14 October 2011, 10 January 2012, CommDH(2012)2, para. 64 (with further references).

⁵⁴⁴ *Ibid.*

⁵⁴⁵ Art. 314 of the Turkish Penal Code: "(1) Any person(s) who forms an armed organisation to commit the offenses listed in the fourth and fifth sections of this chapter [section four: crimes against state security; section five: crimes against the constitutional order and its functioning], and commands this group, is punished with imprisonment of 10 to 15 years. (2) Members of the organisation defined in the first paragraph are sentenced to imprisonment of five to 10 years. (3) Other provisions relating to the offense of forming an organisation for the purpose of committing crimes are treated [punished] in the same way as this offense".

⁵⁴⁶ In addition to the charge of „membership in an armed organisation“ for „committing a crime on behalf of an organisation“, the defendant can also faces other charges for being in violation of the Law on Meetings and Demonstrations. The combination of charges means that a defendant could face 28 years of imprisonment or more, Human Rights Watch, *Protesting as a Terrorist Offense. The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey*, November 2010, p. 22; in the context of the *prosecution of children* Amnesty International stated that „since 2006, thousands of children in Turkey, some as young as 12, have been prosecuted under anti-terrorism legislation solely for their alleged participation in demonstrations“ (emphasis added), Amnesty International, *All Children Have Rights: End Unfair Prosecutions of Children under Anti-terrorism Legislation in Turkey*, June 2010, EUR 44/011/2010, p. 15. In 2010, after civil society groups campaigned against the prosecution of children under terrorism laws, the Turkish Parliament adopted several amendments to limit the applicability of such laws to child demonstrators, Human Rights Watch, *Protesting as a Terrorist Offense. The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey*, 2010, p. 3.

⁵⁴⁷ Amnesty International, *supra* fn. 500, p. 42; European Commission, *Turkey 2013 Progress Report*, 16 October 2013, SWD(2013)417final, p. 5; see also the statement of Egemen Bağış, former Minister for EU Negotiations on 15 June 2013, *Hürriyet Egemen Bağış'tan Taksim protestolarıyla ilgili açıklama*, 16 June 2013, available at: <http://www.hurriyet.com.tr/gundem/23517868.asp> (last accessed: 5 February 2014): „I am specifically calling on all our citizens who have been giving support to these protests. They should return to their homes. Unfortunately, at this stage the state will have to consider *every individual* there [Taksim] as *members of terrorist organisations*“ (emphasis added).

as well as the names, home and if available work addresses of the organizers.⁵⁴⁸ Art. 23 lists the circumstances under which a meeting or demonstration will be regarded as unlawful, and includes the absence of prior notification.⁵⁴⁹ The ECtHR has repeatedly held in cases involving the breaking up of demonstrations in Turkey that the absence of prior notification is not sufficient to impose restrictions on a peaceful assembly.⁵⁵⁰ The Court decided in *Oya Ataman*

v. Turkey that “where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Art. 11 of the Convention is not to be deprived of all substance”.⁵⁵¹ The legal provisions concerning the advance notification in Turkey empower the authorities to refuse to accept a notification and to ban an assembly. In practice, the notification procedure constitutes a request for permission resulting in an overly onerous and bureaucratic de facto authorization process of the authorities.⁵⁵²

Decision-making

According to Art. 18 of the Law, restrictions or ban decisions should be handed to the organising committee at least 24 hours before the meeting or demonstration.⁵⁵³

Review and appeal

Restrictions or ban decisions can be appealed against before a court.⁵⁵⁴ Penal courts of first instance examine the cases of individuals who have allegedly violated the Law, while administrative courts examine the practices of authorities when implementing the Law.⁵⁵⁵

The Constitution of 1982 did not recognize the right to put forward a complaint of human rights violations for individuals. However in 2010 a new mechanism was created into the Turkish legal system by constitutional amendments of 13 May 2010, whereby individual applications regarding human rights violations may be presented to the Constitutional Court.⁵⁵⁶ This Court can be referred to once all other domestic remedies have been exhausted. Although the introduction of constitutional complaint could be a positive step in

⁵⁴⁸ Art. 10 of the Law on Meetings and Demonstrations, *supra* fn. 511; Art. 4 describes the exceptions: Indoor meetings of political parties, trade unions, foundations, scientific, sportive, trading and economic activities, national or religious days and wedding ceremonies do not require a notification; see in this context the judgment of the Council of State of Turkey, E. 2002/1966, 7 October 2005, in which the court explicitly emphasized that indoor meetings of political parties do not require a notification.

⁵⁴⁹ Art. 23 (a) of the Law on Meetings and Demonstrations, *supra* fn. 511; Akbulut Olgun, *supra* fn. 528, p. 387.

⁵⁵⁰ For example ECtHR, *Oya Ataman v. TR*, judgment of 5 December 2006, App. No. 74552/01, para. 42; *Izci v. TR*, judgment of 23 July 2013, App. No. 42606/05, para. 39: “The Court considers, in the absence of notification, the demonstration was unlawful, a fact that the applicant does not contest. However, it points out that an unlawful situation does not justify an infringement of freedom of assembly (...)”; see also Amnesty International, *Gezi Park Protests. Brutal Denial of the Right to Peaceful Assembly in Turkey*, October 2013, EUR 44/022/2013, *supra* fn. 500, p. 11.

⁵⁵¹ The case of *Oya Ataman v. Turkey* concerned the dispersal of a demonstration for which prior notice had not been provided. ECtHR, *Oya Ataman v. TR*, *supra* fn. 550, para. 42 (emphasis added); *Izci v. TR*, *supra* fn. 550, para. 89; *Samüt Karabulut v. TR*, judgment of 27 April 2009, App No 16999/04, para. 35.

⁵⁵² Türkiye Barolar Birliği, İnsan Hakları Merkezi, İnsan Hakları Raporu (Turkey Bar Association, Human Rights Centre, Human Rights Report), 2013, p. 468; Amnesty International, *supra* fn. 500, p. 11.

⁵⁵³ Art. 18 of the Law on Meetings and Demonstrations.

⁵⁵⁴ EMHRN, *supra* fn. 525, p. 6.

⁵⁵⁵ *Ibid.*, p. 9.

⁵⁵⁶ Art. 148 of the Constitution reads: “Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted. In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies. Procedures and principles concerning the individual application shall be regulated by law”; the details related to constitutional complaints have been regulated by Law on the Establishment and Rules of Procedure of the Constitutional Law (Anayasa Mahkemesinin Kuruluşu ve Yargılama Usulleri Hakkında Karar), 30 March 2011, Law. No. 6216, available at: <http://www.resmigazete.gov.tr/eskiler/2011/04/20110403-1.htm> (last accessed: 5 March 2014); see also Özbudun Ergun/ Türkmen Füsün, *Impact of the ECtHR Rulings on Turkey’s Democratization: An Evaluation*, in: *Human Rights Quarterly*, 35 (2013), p. 1004 *et. seq.*

the access to effective remedy, it is worrying that a further domestic step has been added, delaying possible recourse to the ECtHR. The relatives of Gezi Park victims have already initiated an appeal to the ECtHR, arguing that the domestic remedies are not effective.⁵⁵⁷ The ECtHR however has already declared an application inadmissible for non-exhaustion of domestic remedies of this new constitutional mechanism.⁵⁵⁸

5. Specific forms of assemblies

Spontaneous assemblies

The current Law does not allow for spontaneous assemblies to take place.⁵⁵⁹ On the contrary, by virtue of Art. 23 (a) of the Law, spontaneous assemblies are illegal and give rise to sanctions.⁵⁶⁰

Assemblies gathered by means of new technologies

Officially established in 2007, the Law on Regulating Broadcasting in the Internet and Fighting Against Crimes Committed through Internet Broadcasting focuses on banning key words and blocking access to certain websites.⁵⁶¹ Websites can be blocked by court orders and administrative decisions made by Turkey's Internet regulator, the High Council for Telecommunications (TIB).

Social media networks have played a major role in the Gezi Park protests. The protestors made a call through social media for a major gathering at the Gezi Park.⁵⁶² The Government attacked social media companies and during the first weekend of the demonstrations websites are blocked and Facebook and Twitter⁵⁶³ were nearly impossible to access in Istanbul, particularly in Taksim Square.⁵⁶⁴ A number of citizens were placed in custody for posting Twitter messages about the Gezi Park protests.⁵⁶⁵

⁵⁵⁷ Hürriyet Daily News, Relatives of Gezi Park victims appeal to ECHR, 11 October 2013, available at: <http://www.hurriyetdailynews.com/relatives-of-gezi-park-victims-appeal-to-echr.aspx?pageID=238&nID=56118&NewsCatID=339> (last accessed: 5 March 2014).

⁵⁵⁸ ECtHR, *Uzun v. TR*, judgment of 30 April 2013, App. no. 10755/13; ECtHR, Annual Report 2013 (Provisional Version), p. 81, available at: http://www.echr.coe.int/Documents/Annual_report_2013_prov_ENG.pdf (last accessed: 5 March 2014).

⁵⁵⁹ Art. 10 of the Law on Meetings and Demonstrations, *supra* fn. 511; Türkiye Barolar Birliği, İnsan Hakları Merkezi, İnsan Hakları Raporu (Turkey Bar Association, Human Rights Centre, Human Rights Report), 2013, p. 468.

⁵⁶⁰ Arts. 23, 32 of the Law on Meetings and Demonstrations, *supra* fn. 511..

⁵⁶¹ Law on Regulating Broadcasting in the Internet and Fighting Against Crimes Committed through Internet Broadcasting (İnternet Ortamında Yapılan Yayınların Düzenlenmesi ve Bu Yayınlar Yoluyla İşlenen Suçlarla Mücadele Edilmesi Hakkında Kanun), 4 May 2007, Law No. 5651, for the official text in Turkish see <http://www.resmigazete.gov.tr/eskiler/2007/05/20070523-1.htm> (last accessed: 5 February 2014).

⁵⁶² On the evening of 30 May 2013, more than 10'000 people were at the Gezi Park, Hürriyet Daily News, Timeline of Gezi Park protests, available at: <http://www.hurriyetdailynews.com/timeline-of-gezi-park-protests-.aspx?pageID=238&nID=48321&NewsCatID=341> (last accessed: 5 February 2014).

⁵⁶³ See for example #OccupyGezi .

⁵⁶⁴ BBC, Social media plays major role in Turkey protests, 4 June 2013, available at: <http://www.bbc.co.uk/news/world-europe-22772352> (last accessed: 5 February 2014); Prime Minister Recep Tayyip Erdogan called Twitter a „menace“, BBC, Social media plays major role in Turkey protests, 4 June 2013, available at: <http://www.bbc.co.uk/news/world-europe-22772352> (last accessed: 5 February 2014); see also CoE, Parliamentary Assembly, Popular protest and challenges to freedom of assembly, media and speech, Resolution 1947 (2013), 27 June 2013, para. 9.5.

⁵⁶⁵ European Commission, *supra* fn. 547, p. 52; Amnesty International, *supra* fn. 500, p. 50: „The majority of those under investigation are being investigated under Penal Code Article 214 (encouraging the commission of a crime) and Article 217 (encouraging breaking of the law). The investigations relate to tweets expressing support for the protests and providing information on where police were intervening against protestors, injuries and medical needs, and which areas were safe to protest in”.

In reaction to the Gezi Park protests and the corruption scandal in December 2013 the Turkish Parliament passed a new law, which allows the government to block websites without a court order.⁵⁶⁶

Assemblies taking place on private property

The Law contains in Art. 22 general restrictions on places⁵⁶⁷ and does not regulate assemblies that take place on private property.⁵⁶⁸

Counter-demonstrations

According to Arts. 29 and 30 of the Law, it is permitted that third parties intervene in assemblies. As such, the current law does not allow counter-demonstrations.⁵⁶⁹

6. Implementing the guarantee

Use of force by the police

The use of force is regulated by the Law on the Duties and Powers of the Police of 14 June 2007.⁵⁷⁰ According to Art. 17 the police can resort to forceful measures if a person or a group attacks police officers.⁵⁷¹ This provision foresees a gradually increasing level of bodily force, material force (e.g. tear gas) and, where the legal conditions are in place, arms may be utilized against illegal demonstrators.⁵⁷² The police can use firearms in self-defence, and concerning the capture of people the police may shoot for warning purposes. If the person ignores the warning and attempts to escape, firearms may be used in a proportional extent to ensure that he/she is caught.⁵⁷³ This provision fails to incorporate the international standards that use of lethal force must be a last resort and only permissible in order to protect life.⁵⁷⁴ The order on rapid intervention forces of 30 December 1982⁵⁷⁵ establishes procedures for the dispersal of demonstrators, such as two or three warnings (except in cases of effective attack and resistance against police officers).⁵⁷⁶

Use of tear gas

On 15 February 2008, the Ministry of the Interior issued a directive to law enforcement personnel on the use of tear gases.⁵⁷⁷ It is noted in the directive that, according to Art. 16 (3) of the Law on the Duties and Powers of the Police, tear gases are listed among the weapons which law enforcement officials are permitted to use in the execution of their duties.⁵⁷⁸

⁵⁶⁶ Freedom House, Turkish Parliament Restricts Free Expression Online, 5 February 2014, available at: <http://www.freedomhouse.org/article/turkish-parliament-restricts-free-expression-online#.UVTQus1bmZI> (last accessed: 5 February 2014).

⁵⁶⁷ It could be presumed that the wording in Art. 2 (a) of the Law on Meetings and Demonstrations “meetings (...) in open and closed places (...)” covers meetings that take place on public and on private property, for example in private buildings. However the Law on Meetings and Demonstrations provides for a general and vague definition of an assembly and does not include definitions of individual types of meetings or demonstrations. See also *supra*, part public space.

⁵⁶⁸ Art. 22 of the Law on Meetings and Demonstrations, *supra* fn. 511; Akbulut Olgun, *supra* fn. 528, p. 389.

⁵⁶⁹ Akbulut Olgun, *supra* fn. 528, p. 394.

⁵⁷⁰ The Law on the Duties and Powers of the Police (Polis Vazife ve Salahiyet Kanunu), 4 July 1934, *supra* fn. 537.

⁵⁷¹ Art. 16 (1) of the Law on the Duties and Powers of the Police, *supra* fn. 537.

⁵⁷² *Ibid.*, Art. 16 (1).

⁵⁷³ *Ibid.*, Art. 16 (1) (c).

⁵⁷⁴ Human Rights Watch, *supra* fn. 538, p. 25. The UN Special Rapporteur on extrajudicial summary or arbitrary executions has stated that „[t]hese relatively recently adopted provisions grant the police and security forces vague and therefore potentially wide powers to use force, beyond those permitted under international law. Specifically, article 16 (c) of the Law on the Duties and Powers of the Police appears to legitimize the use of lethal force against, inter alia, a suspected thief escaping. Although proportionality is mentioned, the omission of the required objective of protecting life and the ambiguity of the “stop warning” result in a *dangerously large power grant*.” (emphasis added), UN Office of the High Commissioner for Human Rights, Preliminary Observations on official visit to Turkey by Mr. Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, 26-30 November 2012, para. 2.

⁵⁷⁵ Order on rapid intervention forces (Polis Cevik Kuvvet Yönetmeliği), 30 December 1982.

⁵⁷⁶ *Ibid.*, para. 25.

⁵⁷⁷ Circular No. 19 (E.G.M. Genelger:No. 19), 15 February 2008.

⁵⁷⁸ ECtHR, *Izci v. TR*, *supra* fn. 548, para. 32.

However, the Law on the Duties and Powers of the Police does not set out any specific circumstances regulating its use.⁵⁷⁹ The directive of 2008 sets out the circumstances in which tear gases may be used in open and confined spaces and stipulates that tear gases may not be used against persons who have stopped putting up resistance.⁵⁸⁰ The ECtHR emphasized in the case of *Abdullah Yasa v. Turkey* that the use of tear gas must be exceptional and cannot be fired from close distance. According to the Court's case-law the law enforcement officers have to respect the 45° angle by using tear gases and not aim the spray directly at people's face.⁵⁸¹ However, this was not the case in the Gezi Park protests.

The authorities' response to the Gezi Park protests has been characterized by the extreme level of abusive use of force by law enforcement officials during the protests.⁵⁸² From the starts of the protests the police used without adequate prior warnings water cannons⁵⁸³, pepper spray, tear gas as well as plastic bullets and live ammunition in a clearly unnecessary and disproportionate manner, as they were for the most part used to disperse peaceful protesters.⁵⁸⁴ Police trade union representatives admitted intervening without prior warnings.⁵⁸⁵ Police officers and civilians acting in cooperation with the police were also seen beating suspected protestors⁵⁸⁶ – these protestors also included professionals carrying out their duties such as doctors, journalists and lawyers.⁵⁸⁷ Force was used not just to disperse crowds and in response to individual acts of violence, but also often in a targeted manner against those clearly fleeing the scene of protest and against small groups of individuals

⁵⁷⁹ *Ibid.* para. 65: „It thus appears that the only framework regulating the use of tear gas by police officers at the time of the events was the Law on the Duties and Powers of the Police which allow police officers to use tear gas. Nevertheless, *beyond listing tear gas as one of the weapons which can be used by police officers, that Law does not set out any specific circumstances in which tear gas may be used in accordance with Turkey's international obligations.*“ (emphasis added); EMHRN, *supra* fn. 497, II. 3.

⁵⁸⁰ ECtHR, *Izci v. TR*, *supra* fn. 548, para. 32.

⁵⁸¹ ECtHR, *Abdullah Yasa and Others v. TR*, judgment of 16 July 2013, App No 44827/08, paras. 22; 48-50.

⁵⁸² The Turkish Medical Association stated that as of 10 July 2013 in the Gezi Park protests more than 8'000 people had been injured, more than 61 were severe injuries such as having lost an eye and having received serious head injuries. Five people have died, including one police officer. Three of them have died as a result of the use of force by police. One person was shot in the head by a police officer with live ammunition and another was beaten to death. The Ministry of the Interior also reported that more than 600 police officers had been injured; for further information with references to the facts Amnesty International, *Gezi Park Protests. Brutal Denial of the Right to Peaceful Assembly in Turkey*, October 2013, EUR 44/022/2013, *supra* fn. 500, p. 15; UN News Centre, UN rights office calls on Turkish government to ensure freedom of assembly, 4 June 2013; see also the statement of Prime Minister Recep Tayyip Erdogan, 15 June 2013, available at: <http://www.akparti.org.tr/site/haberler/basbakan-eroganin-milli-iradeye-saygi-erzurum-mitingi-konusmasinin-tam-metn/46327> (last accessed: 5 February 2014): „They were still all there. The limits of tolerance have been exceeded. I told my Minister of the Interior: within 24 hours, you will *clean up* the Atatürk Cultural Centre. You will clean up the square. You will clean up the statue. After that, you will clean up Gezi Park. They ask: *who gave the order to the police? I did.* I did. Yes. Were we supposed to sit and watch the forces of occupation? Were we supposed to wait until the whole world would join in and celebrate?“ (emphasis added).

⁵⁸³ Pressurized water was used repeatedly and unnecessarily against peaceful demonstrators over a number of hours, including against demonstrators fleeing from the police and bystanders who were close to the demonstrations. Water cannons have also been recorded targeting people *inside buildings* such as the German Hospital (close to Taksim Square) and the Divan Hotel (where doctors were treating injured demonstrators). The injuries caused by water cannons have been resulted in falls and burns to the skin (first degree). There is strong evidence, that *chemical irritants have been added to water* used against demonstrators during the Gezi Park protests; Amnesty International, *supra* fn. 500, p. 18 *et seqq.*; Hürriyet Daily News, *Substance in water cannons in Gezi Park protests harmful and criminal*, experts say, 18 June 2013, available at: <http://www.hurriyetcailynews.com/Default.aspx?pageID=238&nid=49009> (accessed on 5 February 2014).

⁵⁸⁴ See UN News Centre, *Senior UN officials urge restraint, dialogue to defuse tensions fuelling protests in Turkey*, 18 June 2013, available at: <https://www.un.org/apps/news//story.asp?NewsID=45200&Cr=Turkey&Cr1=#.UsCHys1bmZl> (last accessed: 5 February 2014).

⁵⁸⁵ They also explained that the intervention was justified by the presence of known leftist and pro-Kurds organizations (“marginals” and “terrorists”) and a perception that the protests were unlawful.

⁵⁸⁶ Police officers were also observed intervening in demonstrations wearing *civilian clothes*. During the Gezi Park protests, serious allegations were also received of police officers hiding their identification.

⁵⁸⁷ Amnesty International, *supra* fn. 500, p. 16.

caught in the vicinity of protests but not taking part of them.⁵⁸⁸ Women detained by the police explained that they had been sexually harassed by the police.⁵⁸⁹

In particular, since the beginning of the Gezi Park protests, tear gas had been used against peaceful protestors. Children were also affected by the tear gas.⁵⁹⁰ Police officers were seen firing tear gas canisters horizontally and directly at people, fired at close range.⁵⁹¹

During and after the Gezi Park protests the Ministry of the Interior issued two directives of 26 June 2013 and 22 July 2013 for use of force by law enforcement authorities against unauthorized demonstrations.⁵⁹² The directives include instructions for the police to warn demonstrators before firing tear gas, to use water cannons before using tear gas, and to avoid targeting enclosed spaces, as well as people not participating in the demonstrations.⁵⁹³ However the circulars do not mention close-range shooting, which was a major cause for injuries during the Gezi Park protests.⁵⁹⁴

Finally, law enforcement officers enjoy an extraordinary large decision margin for the forceful dispersal of assemblies in Turkey.⁵⁹⁵ The ECtHR reiterated in *Izci v. Turkey* that a great number of applications against Turkey concerning the excessive use of force by law enforcement officials during demonstrations were currently pending. Considering the systemic aspect of the problem, the Court therefore requested the Turkish Government to adopt general measures, in order to prevent further similar violations in the future.⁵⁹⁶

Liability of organizers

Article 23 of the Law regulates the grounds for sanctions (in general⁵⁹⁷) and Article 28 of the Law provides several sanctions for the organizers.⁵⁹⁸ The failure to disperse upon request is a criminal offence punishable by imprisonment for a period of between six months to three years, increased by half for the organizers of the protest.⁵⁹⁹ Individuals are held responsible

⁵⁸⁸ *Ibid.*, p. 16. See also <http://www.youtube.com/watch?v=dEtBM7wCr3E> (last accessed: 5 February 2014).

⁵⁸⁹ Amnesty International, *supra* fn. 500, p. 25 *et seq.*

⁵⁹⁰ CNN iReport, Children affected by tear gas tonight in Taksim Square, 15 June 2013, available at: <http://ireport.cnn.com/docs/DOC-989235> (last accessed: 5 February 2014); CNNiReport, Police attack divan hotel where children are, 15 June 2013, available at: <http://ireport.cnn.com/docs/DOC-989050> (last accessed: 5 February 2014).

⁵⁹¹ Human Rights Watch, Turkey: End Incorrect, Unlawful Use of Teargas, Dozens Injured as Police Fired Teargas Canisters Directly at Protesters, 17 July 2013, available at: <http://www.hrw.org/news/2013/07/16/turkey-end-incorrect-unlawful-use-teargas> (last accessed: 5 February 2014).

⁵⁹² Circulars of the Ministry of the Interior of Turkey, 26 June 2013 and 22 July 2013.

⁵⁹³ Human Rights Watch, *supra* fn. 591.

⁵⁹⁴ *Ibid.*; EMHRN, *supra* fn. 497, III. 2.

⁵⁹⁵ EMHRN, *supra* fn. 525, p. 7.

⁵⁹⁶ ECtHR, *Izci v. TR*, *supra* fn. 548, para. 97 *et seq.*; Press Release, *Izci v. Turkey*, 23. July 2013, ECHR 233 (2013). See also ECtHR, *Abdullah Yasa and Others v. TR*, *supra* fn. 581; *DISK and KESK v. TR*, *supra* fn. 501; *Ali Günes v. TR*, judgment of 10 April 2012, App No 9829/07; *Oya Ataman v. TR*, *supra* fn. 550.

⁵⁹⁷ Art. 23 of the Law on Meetings and Demonstrations, *supra* fn. 511: „a) Holding an assembly without notification, or holding it before or after the notified date and time; b) Bearing any kind of firearms, explosives, cutting and perforating tools, stones, sticks, poisons, gas or fog materials, as well as symbols of illegal organisations, uniforms with these symbols, covering faces to prevent identification, chanting illegal slogans, carrying illegal posters, pictures etc.; c) Holding an assembly outside of the timing restrictions foreseen in article 7 or d) Outside the places mentioned in articles 6 and 10; e) Noncompliance to the methods and conditions mentioned in Article 20 and to the prohibitions and measures mentioned in article 22; f) Transgressing its own aims, rules and limits defining meetings that are not required authorisation according to Article 4; g) Gatherings aiming at committing a crime defined by law; h) Transgressing the aim mentioned in the notification; i) Holding an assembly before the end of the postponing or banning period; j) Maintaining the Assembly after the government's commissariat finalized it; k) The meetings that do not comply with the paragraph 2 of article 3 (about foreigners) will be considered as illegal“.

⁵⁹⁸ Such as 18 months to 3 years of imprisonment for those organize and lead illegal meetings, up to 12 months of imprisonment for who do not conform to specific requirements yet organize meetings and for the members of the organising committee who do not have the necessary conditions such as the juridical capacity, 6 months to 2 years of imprisonment for the members of the *organising committee who were not present during the meeting* and who fail to perform their duties and 2 to 5 years of imprisonment who uses violence against law-enforcement officials.

⁵⁹⁹ Art. 32 of the Law on Meetings and Demonstrations, *supra* fn. 511.

individually, but organizers (as a committee) have a collective responsibility pursuant to Art. 28 of the Law. Organizers face a special liability, for example to pay for cleaning and security, and criminal responsibility for violence or material damage.⁶⁰⁰

Many of those accused of organising the Gezi Park protests are being investigated under anti-terrorism legislation.⁶⁰¹ According to Amnesty International, it is still unclear how many of those detained and questioned will ultimately stand trial.⁶⁰²

7. Securing government accountability

Accountability of law enforcement personnel

Law enforcement personnel are theoretically accountable for excessive use of force and human rights violations according to the Art. 94 (1) of the Turkish Penal Code.⁶⁰³ However, pursuant to Art. 129 (6) of the Constitution, prior authorization of the administrative authority is required to initiate investigations of public officials.⁶⁰⁴ In practice, police officers enjoy a de facto immunity from prosecution, particularly in the context of demonstrations.⁶⁰⁵ Although recent reforms in the Turkish Code of Criminal Procedure were introduced, the findings of the ECtHR confirm the structural nature of the problem of impunity in Turkey against members of security forces.⁶⁰⁶ By the end of August 2013, prosecutors had only responded to two complaints in the context of the Gezi Park protests and a number of investigations had been closed without examination of the cases.⁶⁰⁷

Monitoring

In Turkey civil society organizations reported that they faced fines, closure proceedings and administrative obstacles on the basis of a Ministry of Interior circular of November 2012, which provides a legal basis for visual and voice recording of activities by the police where there is a threat to public order or evidence of a crime.⁶⁰⁸ As illustrated during the Gezi Park protests NGOs were fined for disobeying orders under the Law on Misdemeanours and reported that they were prevented by the authorities from holding demonstrations and issuing press statements. Many court cases were launched against human rights defenders and civil society representatives in cases relating to freedom of peaceful assembly. In June 2013, anti-terror police raided multiple addresses, detaining dozens as part of an investigation into the Gezi Park protests. A high number of human rights defenders also faced prosecution and

⁶⁰⁰ Euro-Mediterranean Human Rights Network, Turkey, p. 8.

⁶⁰¹ See the statement of the Ruling and Development Party (AKP) deputy chair and former Minister of Justice Mehmet Ali Şahin, 31 July 2013, available at: http://www.radikal.com.tr/turkiye/mehmet_ali_sahin_gezi_eylemleri_muebbetlik_suc_kapsaminda-1144298 (last accessed: 5 February 2014): "I believe those who have started these protests and are giving them direction/leading them are aiming to *overthrow the government and remove it from office*. But the security services and the cautious approach by the government have prevented those harbouring this aim from achieving it. I don't believe *they will attempt to engage in such action anymore*" (emphasis added).

⁶⁰² Amnesty International, *supra* fn. 500, p. 42.

⁶⁰³ Art. 94 (1) of the Turkish Penal Code: "Any public officer who causes severe bodily or mental pain, or loss of conscious or ability to act, or dishonors a person, is sentenced to imprisonment from three years to twelve years".

⁶⁰⁴ Art. 129 of the Constitution: "Prosecution of public servants and other public officials for alleged offences shall be subject, except in cases prescribed by law, to the permission of the administrative authority designated by law." The Law on the Trial of Officers and Other Public Officials reiterates this authorization system, *Memurlar ve diger kanun görevlilerinin yargilanmasi hakkinda kanun* (Law on the Trial of Officers and Other Public Officials), 2 December 1999, Law no. 4483, for the official text in Turkish see: <http://mevzuat.meb.gov.tr/html/38.html> (last accessed: 5 February 2014).

⁶⁰⁵ Amnesty International, *supra* fn. 500, p. 35; Human Rights Committee, Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session, 13 November 2013, CCPR/C/TUR/CO/1, para. 14: "The Committee is concerned that despite progress made, the number of allegations of torture and other inhuman and degrading treatment at the hands of law enforcement officers is still high. The Committee is also concerned that a genuinely independent complaints mechanism to deal with cases of alleged torture or ill-treatment by public officials is absent, that the number of prosecutions of such cases remains low".

⁶⁰⁶ Özbudun Ergun/ Türkmen Füsün, Impact of the ECtHR Rulings on Turkey's Democratization: An Evaluation, in: Human Rights Quarterly, 35 (2013), p. 1006.

⁶⁰⁷ Amnesty International, *supra* fn. 500, p. 35.

⁶⁰⁸ European Commission, *supra* fn. 547, p. 11.

legal proceedings on charges of making propaganda for terrorism during demonstrations and meetings and following their attendance at press conferences.⁶⁰⁹

The newly created Ombudsman in November 2012 received 23 complaints relating to the Gezi Park protests, which were found eligible, without requiring prior exhaustion of administrative remedies.⁶¹⁰

Media access

The mainstream national media conveyed little of the Gezi Park protests.⁶¹¹ Journalists reported serious difficulties in disseminating information on the events. Journalists' unions and associations announced that they were exposed to police violence, detained and thus prevented from doing their job. There were also some censorship policies followed by some media agencies.⁶¹² As a result of the reporting of the Gezi Park protests, journalists were fired or had to resign.⁶¹³

8. Conclusions and outlook

As stated by the Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, the peaceful Gezi Park protests in 2013 were met with fierce repression by police forces and numerous judicial and administrative investigations against peaceful protestors.⁶¹⁴ These events have shed light on the authoritarian ways of Turkish authorities, their disproportionate use of excessive force against peaceful demonstrators and their use of the judiciary as a means of retaliation against criticism, which may have a profound chilling effect on those who want to legitimately exercise their right to freedom of peaceful assembly in Turkey.⁶¹⁵ Moreover, it must be noted that there is a tendency to authorize use of force by police when a protest is deemed illegal even when the protest is peaceful. The alleged violations of human rights in the context of the Gezi Park protests as well as in meetings and demonstrations organized by Kurdish activists, students, unionists, human rights and left-wings groups underline the need for far-reaching reforms in order to ensure respect for freedom of peaceful assembly in line with European standards. Several important aspects of the right are lacking, such as the positive obligation of the State to protect peaceful assemblies and the proportionality principle established by the ECtHR. The reforms should therefore cover primarily a substantial review of the Law on Meetings and Demonstrations and its implementation and ensuring that anti-terrorism laws are not used to prosecute people participating in demonstrations. In a more general manner, the ECtHR stated in *Izci v. Turkey* that "in order to ensure full respect for the rights guaranteed in Arts. 3 and 11 of the Convention, the Court considers it crucial that a clearer set of rules be adopted concerning the implementation of the directive regulating the use of tear gas, and a system be in place that guarantees adequate training of law enforcement personnel and control and supervision of that personnel during demonstrations, as well as an effective ex post facto review of the necessity, proportionality and reasonableness of any use of force, especially against people who do not put up violent resistance."⁶¹⁶

⁶⁰⁹ *Ibid.*

⁶¹⁰ See for further information on the Ombudsman <http://www.ombudsman.gen.tr/> (last accessed: 5 February 2014); European Commission, *supra* fn. 547, p. 10.

⁶¹¹ CNN Türk's decision to air a pre-scheduled two-hour documentary on penguins during the first weekend of mass protest across Turkey became a symbol in the eyes of many protestors and the wider public for self-censorship in the national media in general, Al-Monitor, Shameful Examples of Press Censorship Emerge in Turkey, 3 July 2013, available at: <http://www.al-monitor.com/pulse/originals/2013/07/turkish-press-censored.html#> (last accessed: 5 February 2014).

⁶¹² EMHRN, *supra* fn. 497, III. 2.

⁶¹³ The Independent, Turkish journalists fired over coverage of Gezi Park protests, 23 July 2013, available at: <http://www.independent.co.uk/news/world/europe/turkish-journalists-fired-over-coverage-of-gezi-park-protests-8727133.html> (last accessed: 5 February 2014).

⁶¹⁴ See Council of Europe, Press release, CommDH018(2013), 8 July 2013.

⁶¹⁵ EMHRN, *supra* fn. 525, p.2.

⁶¹⁶ ECtHR, *Izci v. TR*, *supra* fn. 548, para. 99.

The Russian Federation

by Evgeniya Yushkova

1. Legal bases

Constitutional guarantee

In the Russian Federation, freedom of assembly is guaranteed by Art. 31 of the Constitution of 12 December 1993. It stipulates that “citizens of the Russian Federation shall have the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets”.⁶¹⁷

Primary legislation

On 19 June 2004 the Federal Law No.54-FZ “On Assemblies, Meetings, Demonstrations, Marches and Picketing” (in the following Assembly Law) was adopted. This is currently the central primary legislation on the procedure of preparation and conduct of assemblies and the status of the involved parties. On 8 June 2012, the Assembly Law and the corresponding provisions of the Code of Administrative Offences were amended by Federal Law No.65-FZ. This amendment excludes several groups of persons from the lawful option to be an organizer of an assembly; it introduces specially designated sites for assemblies; it creates a civil liability of the organizer; it makes a mass simultaneous presence/movement an administrative offence; and the amendment finally raises the fines for administrative offences. The June 2012 amendments prompted wide criticism.⁶¹⁸

The Assembly Law applies to “public events” defined in Art. 2 No.1 as “open, peaceful action accessible to everyone that is implemented as an assembly, meeting, demonstration, march or picketing or by using various combinations of those forms that is undertaken at the initiative of citizens of the Russian Federation, political parties, other public or religious associations”.⁶¹⁹ The definition moreover indicates that the event has as its objective “to exercise the free expression and shaping of opinions and to put forward demands concerning various issues of political, economic, social and cultural life of the country and also issues of foreign policy”. The specification of the objective must be made in the notification submitted to the authorities, and also appears to constitute a definitional element of “assembly” in the sense of Art. 2 No. 1 of the Assembly Law.

In Art. 2 the Assembly Law determines three static (assembly, meeting, picket) and two moving (demonstration, march) forms of public events.

An assembly is a gathering of citizens in a place allocated or adjusted for the purpose of collectively discussing socially important questions (Art. 2 No. 2) whereas a meeting is a mass gathering of citizens at a certain place to publicly express a common view regarding

⁶¹⁷ English version of the Russian Constitution, <http://www.constitution.ru/en/10003000-01.htm> (last accessed: 10 March 2014).

⁶¹⁸ See e.g. European Commission for Democracy through Law (Venice Commission), Opinion on Federal Law No.65-FZ of 8 June 2012 of the Russian Federation, CDL-AD(2013)003 (11 March 2013); Amnesty International, Freedom under Threat – Clampdown on Freedoms of Expression, Assembly and Association in Russia (April 2013), AI Index: EUR 46/011/2013, p. 8-12; <http://www.amnesty.org/en/library/asset/EUR46/011/2013/en/d9fb0335-c588-4ff9-b719-5ee1e75e8ff5/eur460112013en.pdf> (last accessed: 10 March 2014); Human Rights Watch, Laws of Attrition – Crackdown on Russia’s Civil Society after Putin’s Return to the Presidency (April 2013), p.46-53, [http://www.hrw.org/by-issue/publications/209?date_filter\[value\]\[year\]=2013](http://www.hrw.org/by-issue/publications/209?date_filter[value][year]=2013) (last accessed: 10 March 2014).

⁶¹⁹ The study refers to the translation provided by the Venice Commission: Venice Commission, Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing No.54-FZ of 19 June 2004 of the Russian Federation as amended by Federal Law No.65-FZ of 8 June 2012, CDL-REF(2012)029 (7 August 2012). For the Russian original see <http://letters.kremlin.ru/acts/23> (last accessed: 10 March 2014). Another English translation of the 2004 Law No.54-FZ can be found at <http://www.legislationline.org/topics/country/7/topic/15> (last accessed: 26 May 2014).

current problems mostly of social or political character (Art. 2 No. 3). A picket is a form of public expression of opinion without using sound-amplifying devices by stationing one or more citizens carrying placards, streamers and other aids of visual campaigning outside an object being picketed (Art. 2 No. 6).

A demonstration is an organized public manifestation of a common sentiment of a group of citizens using placards, streamers and other aids of visual campaigning while they move (Art. 2 No. 4). A march is a mass passage of citizens along a route specified beforehand with the aim of attracting attention to certain problems (Art. 2 No. 5).

Any public event which does not pursue the required objective falls outside the scope of the Assembly Law and may be qualified as a mass simultaneous presence and/or movement. Holding such a presence or movement may constitute an administrative offence under Art. 20.2.2 (1) of the Code of Administrative Offences introduced by the June 2012 amendment.⁶²⁰

Secondary legislation

In accordance with Art. 1 (1) of the Assembly Law, the President, the Government and the State power bodies of the Subjects of the Russian Federation⁶²¹ have the authority to pass regulatory legal acts concerning the conditions for holding a public event in cases where the Assembly Law envisages it. This mostly concerns restrictions regarding the place (Art. 8 of the Assembly Law). The Subjects shall determine “specially designated sites” for public events and regulate the procedure for their use, the norms for their maximum capacity and the maximum number of people participating in a public event without a notification (para.1.1). They can prohibit assemblies at certain sites in order to safeguard human rights and freedoms, preserve lawfulness and public safety (para.2.2), regulate the procedure for holding a public event at a site of public transport infrastructure (para.3.1). The executive power bodies of a Subject can regulate the procedure for holding a public event at a cultural site (para.3). The President determines the procedure of the holding of a public event at the Moscow Kremlin, the Red Square and the Alexander Garden (para.4). The Subjects define the minimal distance between picketers (Art. 7 (1.1)) and the procedure for submitting a notice of holding the public event (Art. 7 (2)). The Government of the Russian Federation or the Subjects can pass legislation concerning the material and technical support of an assembly (Art. 11 (1)).

2. Scope of the guarantee

Case-law

The Russian Constitutional Court considers freedom of peaceful assembly as „one of the basic and inalienable elements of the legal status of a person in the Russian Federation as a democratic law-governed State“.⁶²² It is of fundamental value to the ideological and political diversity and multi-party system ensuring a real possibility for the citizens to influence the activity of bodies of public authority.⁶²³ In the view of the Constitutional Court, freedom of assembly should create a peaceful dialogue between the civil society and the State allowing for protest and criticism of singular actions and decisions or of the policies as a whole.⁶²⁴

⁶²⁰ Venice Commission, Opinion on Federal Law No.65-FZ, CDL-AD(2013)003 (11 March 2013), para. 56.

⁶²¹ According to Art. 5 (1) of the Russian Constitution, Russia consists of republics, territories, regions, cities of federal importance, autonomous regions and autonomous areas. All of those entities are commonly referred to as “Subjects” of the Russian Federation.

⁶²² Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, p. 13 (*Постановление Конституционного Суда от 14 февраля 2013 года № 4-П*), the English translation provided by the Court, <http://www.ksrf.ru/en/Decision/Judgments/Pages/2013.aspx> (last accessed: 10 March 2014); Judgment of 18 May 2012 No.12-П, p. 5.

⁶²³ Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, *supra* fn. 622, p. 13.

⁶²⁴ *Ibid.*

However, the right to assemble peacefully is „not absolute and may be restricted by federal law with the aim to protect constitutionally significant values with obligatory observance of the principles of necessity, proportionality and commensurateness, so that the restrictions introduced by it do not encroach upon the very essence of this constitutional right“.⁶²⁵ In the light of the preamble of the Russian Constitution, which proclaims the goal of securing civil peace and accord, and the very nature of public events, which can breach rights and lawful interests of a broad circle of persons, restrictions respecting the requirements of Arts. 17 (3)⁶²⁶, 19 (1)⁶²⁷, (2)⁶²⁸ and 55 (3)⁶²⁹ of the Constitution may be established.⁶³⁰ The Court evaluates this approach to be in conformity with Art. 20 (1) of the Universal Declaration of Human Rights, Art. 21 of the International Covenant on Civil and Political Rights and Art. 11 of the European Convention on Human Rights. It refers to the case-law of the European Court of Human Rights, and also substantiates the state's obligation to protect freedom of peaceful assembly, to ensure effective realization and to refrain from excessive control.⁶³¹

The Constitutional Court affirms that in accordance with the Constitution, the federal legislator enjoys broad discretion for the regulation of the realization of freedom of assembly and of the corresponding responsibility.⁶³² In the view of the Court, the executive authorities are not allowed to prohibit/allow a public event.⁶³³ They have the power to suggest changes to the place and time if the changes are necessary to uphold the functioning of vital objects of the municipal or transport infrastructure, of law and order, of the security of citizens or for other similar reasons.⁶³⁴ The Court holds that including a catalogue of such grounds in the Assembly Law would unduly restrict the discretion of the authorities.⁶³⁵

Experiences with flashmobs

Many flashmobs (dancing, pillow/snowball fights etc.) have been staged in the Russian Federation so far. After the June 2012 amendments, arrests and detentions of participants were reported during actions which had already been taking place for several years without police interference.⁶³⁶ During a pillow fight in St. Petersburg staged by students, several people were detained and three of them were sentenced to administrative fines of 10.000-15.000 roubles (approximately 222-333 Euro) by a St. Petersburg Justice of the Peace. The fines were legally based on Article 20.2.2 (1) of the Code of Administrative Offences, as the judge found that the students participated in a mass simultaneous presence resulting in a breach of health standards due to the rising of dust and loose feathers.⁶³⁷

3. Restrictions

⁶²⁵ Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, *supra* fn. 622, p. 16; Judgment of 18 May 2012 No.12-П, *supra* fn. 622, p. 7.

⁶²⁶ Stating „the exercise of the rights and freedoms of man and citizen shall not violate the rights and freedoms of other people“.

⁶²⁷ Stating „all people shall be equal before the law and court“.

⁶²⁸ Stating „the State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned“.

⁶²⁹ Stating „the rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.“

⁶³⁰ Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, *supra* fn. 622, p.14; Judgment of 18 May 2012 No.12-П, *supra* fn. 622, p.5; Decision of 2 April 2009 No.484-O-П, pp.2-3.

⁶³¹ Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, *supra* fn. 622, pp.15-16.

⁶³² Constitutional Court of the Russian Federation, Decision of 24 October 2013 No.1618-O, pp.2-3, Decision of 4 April 2013 No.485-O, p.3.

⁶³³ Constitutional Court of the Russian Federation, Decision of 2 April 2009 No.484-O-П, *supra* fn 630, p.5.

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*

⁶³⁶ Cf. Amnesty International, *supra* fn. 618, p.25.

⁶³⁷ Газета.ру, *Пух и перья на тысячи рублей* (Fuzz and Feathers for thousands roubles), http://www.gazeta.ru/politics/2012/09/07_a_4758821.shtml (last accessed: 10 March 2014).

Legitimate grounds for restrictions

Art. 55 (3) of the Russian Constitution provides that “rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State”. The Constitutional Court laid down that if the organizers or participants behave destructively, the State is discharged of the duty of protection and must use all lawful means for non-admission or interruption of such manifestations.⁶³⁸

The Assembly Law provides for three far reaching restrictions: refusal to agree on the holding of the public event, suspension, and termination of the public event.

Refusal to agree

Under Art. 12 (3) of the Assembly Law, the executive authorities of a subject or the local authorities may refuse to agree on the holding of a public event only in the following cases: The first case is that the notification is submitted by an individual who is not entitled to be an organizer. The second case is that the notification states that the public event is to be held at a site on which the holding is prohibited by federal law or by the law of the Subject.

On the personal aspect: Persons which are not entitled to be an organizer of a public event are persons who have been declared to lack legal capacity (in full or in part) by a court, persons kept in detention under a court verdict, and political parties, public and religious organizations which have been banned (Art. 5 (2.1) and (2.2)).

The newly inserted Art. 5 (2.1.1) adds that persons “with an unsquashed or outstanding conviction for the committing of a premeditated crime against the fundamentals of the constitutional order and security of the State or a crime against public safety and public order or having been prosecuted under administrative law twice or more for administrative offences (...) during a period when that person is subject to administrative punishment” are not entitled to be an organizer of a public event.

Art. 12 (3) in conjunction with Art. 5 (2.1.1) excludes entire categories of people from the right to organize assemblies for breaches of not only criminal norms but also administrative norms without any differentiation in respect of the gravity of the breach.⁶³⁹

The Constitutional Court upheld the amendment arguing that the norm does not encroach the very essence of the right to peaceful assembly.⁶⁴⁰ In the view of the Court, the legislator rightly dealt with the issue that the persons envisaged by Art. 5 (2.1.1) doubtedly have the ability to organize a peaceful assembly.⁶⁴¹ The legislator also observed the principle of proportionality by requiring two or more instances of administrative offences during one year from the day of the termination of execution whereas only one criminal charge is sufficient to prevent a person to become a lawful organizer.⁶⁴²

As for the second legal option for refusing to agree to the holding of a public event, the spatial aspect: This legal ground constitutes an absolute ban on assemblies on certain sites without regard to potential legitimate reasons in the concrete case. This ground for refusing to agree thus limits the autonomy of the organizer.

Suspension and termination

An **authorized representative of the executive authority** has the right to suspend a public event if a violation of law and order not entailing a threat to life and health has occurred through the fault of the participants and has not been made good by the organizer or jointly

⁶³⁸ Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, *supra* fn. 622, p. 16.

⁶³⁹ Venice Commission, Opinion on Federal Law No.65-FZ, CDL-AD(2013)003, *supra* fn. 620, paras. 17-18.

⁶⁴⁰ Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, *supra* fn. 622, p. 20.

⁶⁴¹ *Ibid.*, p. 18.

⁶⁴² *Ibid.*, pp. 21-22.

with the authorized representative of the internal affairs body upon his demand. The suspension may last until the detected violation is made good (Art. 15 (2) in conjunction with Art. 15 (1)). If the violation is not rectified in the fixed time limit, the authorized representative of the executive authority terminates the public event.

Further grounds for the termination of a public event is the creation of a real threat to life and health of citizens and to property of individuals and legal persons (Art. 16 No. 1); perpetration of illegal actions by participants and deliberate violation by the organizer of the provisions of the Assembly Law concerning the procedure for holding the public event (Art. 16 No. 2); and the failure of the organizer to fulfil his obligations provided for in Art. 5 (4) of the Assembly Law (Art.16 No. 3).

Art. 5 (4) of the Assembly Law contains a catalogue of obligations including the submission of a notification, compliance with the conditions of the holding of the event as specified in the notice or in the rules of procedure as agreed with the authorities and compliance with the norm of maximum holding capacity of the premises at the place of holding of the public event. The organizer further has a broad variety of obligations pertaining to participants' conduct which he will normally neither have the capacity nor the competence to enforce alone (only in collaboration with the authorized representative of the law enforcement body). Although the list of grounds for terminating the public event is not open-ended but complete, the specified grounds are in themselves open (notably the "perpetration of illegal actions", Art. 16 No. 2, and the violation of any obligation under Art. 5 (4), Art. 16 No. 3), the result is that any violation of the law, no matter how grave it might be can serve as a ground for termination (Art. 16 No. 3).

The public event can also be terminated in case of commission of extremist acts during the conduct (Art. 16 of the Federal Law No.114-FZ "On Countering Extremism" of 25 July 2002).

Time, Place and Manner Restrictions

Place

In principle, a public event can be held at any venue suitable for holding the event if the conduct does not create a threat of collapse of buildings or structures or other threats to safety of the participants (Art. 8 (1) of the Assembly Law).

The June 2012 amendments brought a major novelty of "specially designated sites" which shall be determined by the executive authorities of the Subjects (Art. 8 (1.1) of the Assembly Law). These shall be common sites specially designated or adapted for collective discussion of "publicly significant questions and the expression of public sentiment and also for mass gatherings", thus places for the holding of assemblies and meetings. After the specially designated sites have been determined, public events shall be held, as a rule, at those sites (Art. 8 (2.1) of the Assembly Law). Public events at other sites are permitted only after agreement with the executive authorities of the Subject or the local authorities.

The Russian Constitutional Court approved the legal option to determine and regulate such sites created by the amended Article 8 of the Law as such, with the argument that this new rule facilitates the conduct of a public event for all involved parties.⁶⁴³ Nonetheless, the Court proclaimed the Article 8 (1.1) unconstitutional, because it did not provide clear criteria for the executive authorities which would guarantee equal legal conditions in all Subjects.⁶⁴⁴ The norm shall remain in force until it is revised by the federal legislator in so far as the Subjects are required to provide special sites as a minimum in every city circuit and municipal

⁶⁴³ Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, *supra* fn. 622, pp. 44-47.

⁶⁴⁴ *Ibid.*, pp. 47-48.

district.⁶⁴⁵ The changes brought to the State Duma so far foresee that such places shall be provided in every settlement, city circuit, and municipal region.⁶⁴⁶

Art. 8 (2) of the Assembly Law prohibits public events on territories directly adjacent to hazardous production facilities and to other projects the operation of which requires compliance with special labour safety rules; at territories directly adjacent to residences of the President, territories directly adjacent to buildings accommodating courts, on territories directly adjacent to the territories and buildings of prisons; and in the border zone.⁶⁴⁷

Time

Public events may not commence earlier than 7 a.m. and end later than 22 p.m., with the exception of public events devoted to commemorative dates of Russia or public events with cultural content (Art. 9 of the Assembly Law). Although these time limits do not on their face prohibit multi-day events, they have as an effect that a multi-day event with overnight camps is prohibited. Thus, the provision constitutes a problematic blanket restriction excluding any possibility of a multi-day event.⁶⁴⁸

Manner

The organizer has the right to use sound-amplifying technical devices during assemblies, demonstrations and marches (Art. 5 (3) No. 5 of the Assembly Law).

Art. 29 of the Constitution prohibits propaganda or agitation instigating social, racial, national or religious hatred. This provision is specified by the **Federal Law No.114-FZ “On Countering Extremism”**. Art. 16 of the Law No.114-FZ prohibits extremist action during an assembly and imposes the responsibility to ensure that on the organizer. Art. 16 of the Law No.114-FZ prohibits carrying weapons or any other instruments designed like a weapon.

On 30 June 2013, the **Federal Law No.135-FZ** entered into force, adding Art. 6.21 to the **Code of Administrative Offences**.⁶⁴⁹ The article allows for the imposition of fines on citizens, officials and legal entities of 4.000–1.000.000 roubles (approximately 89–22.416 Euro) for the propaganda of untraditional sexual relations between minors by the means of dissemination of material about untraditional sexual relations. This amendment seems to culminate years of political strife between the gay rights movement and the executive as shown by the case *Alekseyev v. Russia*.⁶⁵⁰ However, according to information provided by the Institute of Legislation and Comparative Law under the Government of the Russian Federation, there has not yet been a case to which the provision has been applied to organizing and holding of public events. The Institute of Legislation and Comparative Law also points out that the Presidium of the Kostroma Regional Court declared the ban of a gay parade based on Federal Law No. 135-FZ to be illegal.

⁶⁴⁵ *Ibid.*, p.48. New amendments incorporating the judgment of the Constitutional Court have been introduced in the State Duma on 13 December 2013 but were not yet adopted. See on the progress of the legislative process <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=329301-6&02> (last accessed: 10 March 2014).

⁶⁴⁶ Draft of the new amendment, <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=329301-6&02> (last accessed: 10 March 2014).

⁶⁴⁷ The norm has been criticized by the Venice Commission as too broad and not adapt to accommodate every special case, see Venice Commission, Opinion on the Federal Law No. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing of the Russian Federation, CDL-AD(2012)007 (20 March 2012), para. 34.

⁶⁴⁸ Venice Commission, Opinion on Federal Law No. 65-FZ, CDL-AD(2013)003, *supra* fn. 620, para. 33.

⁶⁴⁹ The Russian text, <http://www.zakonrf.info/koap/> (last accessed: 10 March 2014).

⁶⁵⁰ ECtHR, *Alekseyev v. Russia*, Judgment of 21 October 2010, Application Nos 4916/07, 25924/08 and 14599/09. The ECtHR found a violation of Article 11 of the European Convention of Human Rights by Russian authorities as they banned any gay rights movement event during 2006-2008. Another application concerning the refusal of authorities to agree on the holding of events organized by gay rights activists throughout 2010/2011 is currently pending before the Court, *Lashmankin and others v. Russia and 14 other applications*, lodged on various dates, Application No. 19700/11.

The participants are not allowed to conceal their faces and wear masks or other items intended to impede identification (Art. 6 (4) No. 1 of the Assembly Law). It is not allowed to carry or drink alcoholic beverages or to be in a state of inebriation at the site of a public event (Art.6 (4) No. 2 and 3 of the Assembly Law).

“Sight and Sound”

With regard to the determination of the specially designated sites and establishment of rules for their use, Art. 8 (1.2) of the Assembly Law stipulates that the executive authorities have to provide for the possibility that the public event attains its aims, the authorities must also see that transport vehicles have access to the sites. The authorities must also provide for the possibility for the organizers or participants to use infrastructure facilities. They must ensure the compliance with health norms and rules. The authorities must also provide for the safety of public event.

Otherwise, the Assembly Law does not specifically endorse the the principles of proportionality, and does not establish a presumption in favour of the assembly. It does not contain any other provisions which aim to facilitate the assembly within “sight and sound” of its object or target audience.

In contrast, the practice of the authorities often hinders assemblies within the sight and sound of its targets. In some cases, the reasons given by the authorities to alter the place⁶⁵¹ and time⁶⁵² of the events⁶⁵³ appear arbitrary. In other cases, the authorities have abstained from further communication with the organizers until the planned date of the event passed.⁶⁵⁴

4. Procedural issues

Notification

The organizer has to submit a notification on holding the public event to the executive authority of the Subject or to the local self-government body not earlier than fifteen and not later than ten days prior to the planned event (Art. 5 (4) No. 1 of the Assembly Law in conjunction with Art. 7 (1)). An exception is made for an assembly or picket held only by one person. (Art. 7 (1) of the Assembly Law). If a picket by a group is planned, the notice has to be submitted no later than three days prior to the event (Art. 7 (1) of the Assembly Law). The notification shall be submitted in written signed form and must provide extensive information (Art. 7 (1), (3), (4) of the Assembly Law).

Decision-making

Upon receiving the notification the executive authority of the Subject or the municipal body has to confirm receipt indicating the date (Art. 12 (1) of the Assembly Law). The authorities have the right to make a reasoned proposal to the organizer to alter the venue and/or time of the public event or any other proposal to bring the aims, form or other conditions for holding the event in line with the requirements of the Assembly Law. The proposals must be issued by the authority within three days of the receipt of the notice by the organizer on holding the public event (Art. 12 (2) of the Assembly Law). In the case of an organizer’s notice on holding a picket by a group of persons (which the organizer must only submit within less than five

⁶⁵¹ Cf. ECtHR, *Kasparov and others v. Russia*, Judgment of 3 October 2013, Application No. 21613/07, para. 9 (the authorities disregarded four alternative routes in central Moscow proposed by the organizer and suggested to hold the event in the suburbs).

⁶⁵² Cf. ECtHR, *Yevdokimova v. Russia*, application of 23 April 2012, No.31946/12, A.

⁶⁵³ Cf. ECtHR, *Lashmankin and others v. Russia and 14 other applications*, Application No.57818/09. Here the authorities refused to approve a seven person picket in a park by giving the reason that on the date of the picket, a public holiday, many families were expected in the park and the picket could have posed a danger to their health and life.

⁶⁵⁴ Cf. ECtHR, *Malofeyeva v. Russia*, Judgment of 30 May 2013, Application No. 36673/04, para. 32 (the authorities provided a notification of receipt but no documentation of their agreement); *Lashmankin and others v. Russia and 14 other applications*, Application No. 51169/10.

days prior to the planned day of the picket's holding), the authority must submit its proposal to the organizer on the day of the receipt of the organizer's notice (Art. 12 (2) of the Assembly Law).

If the authority's proposal disregards the "sight and sound" features which the organizer had desired for the assembly to reach its objectives, the proposal with the alteration might constitute a de facto ban of the assembly, because Art. 5 (5) of the Assembly Law prohibits the holding of an assembly if an agreement was not reached.

Concerns have been raised with regard to the legal term "motivated proposal" in Art. 5 (5). It is uncertain how the agreement process with the authorities can be realized in a way that does not transform the notification procedure into a de facto permission procedure under Art. 5 (5) of the Assembly Law. These concerns have been the object of proceedings before the Russian Constitutional Court. The Court stated that the authorities cannot permit or not permit the holding of a public event; they can only change the time and venue if there are compelling reasons to do so.⁶⁵⁵ The alteration may only be proposed by the authority if the holding the event at the place initially desired by the organizers would not only be less preferable but really impossible.⁶⁵⁶ To reach an agreement, the authority has to propose alternatives which enable the organizer to reach his aims.⁶⁵⁷ Also, the organizer has a duty to communicate with the authority and to employ all available means to reach an agreement.⁶⁵⁸

The executive authority or the municipal body are obliged to submit information concerning the maximum holding capacity of the territory at the place of the planned event to the organizer (Art. 12 (1) No. 4 of the Assembly Law).

The executive authority or the municipal body may issue a warning to the organizer regarding his possible responsibility/liability if the information in the notification or obtained otherwise suggests that the assembly will violate either the Constitution, the Code of Administrative Offences or the Criminal Code (Art. 12 (2) of the Assembly Law).

Review and appeal

According to Article 19 of the Assembly Law, decisions, actions or inactions of state authorities, local self-government bodies, public associations and officials may be appealed against in court. The effectiveness of remedies can be reduced by the fact that the authorities are not bound to observe a time-frame during the agreement proceedings.⁶⁵⁹ Relief via court injunctions is not available.⁶⁶⁰ The Institute of Legislation and Comparative Law under the Government of the Russian Federation indicated that this is a specific feature of the Russian legal system. Currently, the introduction by law of short terms for court procedures is being discussed. It is suggested to apply Article 78 (4) of the Federal Law No.67-FZ of 12 June 2002 "On basic guarantees of electoral rights and the right to participate in the referendum of the citizens of the Russian Federation" by analogy to assembly issues. This provision states that decisions on complaints filed before the voting day during the election campaign or the referendum campaign shall be accepted by courts within five days, but no later than the day preceding the elections day. Decisions on complaints which have been submitted exactly on the voting day or the day following the voting day must be issued immediately. These time-lines for judicial decisions might be applied per analogiam to complaints regarding public events as well.

⁶⁵⁵ Constitutional Court of the Russian Federation, Decision of 2 April 2009 No.484-O-П, *supra* fn. 630, p.5.

⁶⁵⁶ *Ibid.*, p.6.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ *Ibid.*, p.7; Comments of the Institute of Legislation and Comparative Law under the Russian Federation Government on the Federal Law of the Russian Federation on Assemblies, Meetings, Demonstrations, Marches and Picketing, CDL(2012)023 (5 March 2012), question 5.

⁶⁵⁹ Cf. ECtHR, *Alekseyev v. Russia*, *supra* fn. 650, para. 99.

⁶⁶⁰ Venice Commission, Opinion on Federal Law No. 65-FZ, CDL-AD(2013)003, *supra* fn. 620, para. 37; Opinion on the Federal Law No. 54-FZ of 19 June 2004, CDL-AD(2012)007, *supra* fn. 647, para. 27.

5. Specific forms of assemblies

Spontaneous assemblies

The organizer of a public event has the right to hold the event as specified in his notice or as it has been altered by the agreement with the executive authority of the Subject or the body of local self-government (Art. 5 (3) No.1 Assembly Law). He has no right to hold the event if the notification was not filed in due time or when an agreement was not reached (Art. 5 (5) of the Assembly Law). Strict application of the Assembly Law renders spontaneous assemblies impossible.

Assemblies gathered by means of new technologies

The organizer has the right to conduct prior campaigning through mass information media upon the agreement on holding the event with the authorities (Art. 5 (3) No. 2, 10 (1), (2) of the Assembly Law).

Counter-demonstrations

The provision of Art. 8 (1.2) of the Assembly Law stipulates that if notifications are sent by organizers of several events seeking to hold an event at a specially designated place, it will be the time of receipt which determines the use of the venue. This rule interferes and may potentially violate the right to hold a counter-demonstration within the “sight and sound” of the demonstration.

In fact, authorities have at least in one case refused to agree on the holding of a public event by pointing to the risk that a counter-demonstration will take place.⁶⁶¹

6. Implementing Freedom of Assembly Legislation

Pre-event planning

Art. 14 (1) of the Assembly Law provides: “at the suggestion of the executive power body of the Subject of the Russian Federation or the local self-government body, the chief of the body of the Ministry of Interior that is servicing the territory (premises) in which it is **planned** to hold the public event, is obliged to appoint **an authorized representative of the Interior** for purposes of rendering assistance to the organizer of the public event in maintaining public order and security of citizens.” (emphasis added). . From the wording of Art. 14 (3) No. 1 of the Assembly Law, it is not entirely clear whether the appointed official (the “authorized representative of the Interior”) supports the organizer in the planning of the event or only in conduct of the event. The insight that the planning and preparation is a part of the entire event, and the appointment procedure suggest that the authorized representative participates both in the planning and in its course.

A representative of the executive authority is also obliged to facilitate the conduct of the event (Art. 13 (2) No.2 of the Assembly Law).

Costs

The maintenance of public order, regulation of road traffic, sanitary and medical service with the objective of ensuring the holding of the public event are provided free of charge according to Art. 18 (3) of the Assembly Law.

Use of force by the police

The use of force is regulated by the **Federal Law No. 3-FZ** of 7 February 2011 „On Police“. In relation to assemblies, the following situations are probable in which the following special methods can be used according to Art. 21 (1): to repel an attack on a person or a police member, to prevent a crime or an administrative offence, to overcome force directed at a police member, to avert a mass disorder and other unlawful acts interfering with transportation or methods of communication, and to reveal persons committing crime or

⁶⁶¹ Cf. ECtHR, *Alekseyev v. Russia*, *supra* fn. 650, paras. 9, 12, 30, 41, 72-77.

administrative offences. The special methods include clubs, special agents, tasers, lightshockers, trained animals, methods constraining movements, et cetera. Because any violation of the Assembly Law can constitute an administrative offence, it is possible that special methods are applied.

The aforementioned special methods cannot be used during the dispersal of unlawful assemblies of a peaceful character which does not interfere with public order and /or with the functioning of transportation and infrastructure (Art. 22 (1) No. 2). A water cannon may not be used if the temperature is below zero Celsius (Art. 22 (2) No. 2). The use of water cannons and armoured vehicles has to be authorized by the chief of the law enforcement body of the territory in question with a notification of the public prosecutor within 24 hours.

Liability of organizers

Art. 5 (6) of the Assembly Law establishes the civil liability of the organizer for failure to fulfil his obligations under Art. 5 (4). This provision has been found unconstitutional.⁶⁶²

Any violation of the established procedure of the Assembly Law for organizing or holding a public event generally entails the imposition of an administrative fine or community service. The Federal Law No. 65-FZ of 8 June 2012 amending Art. 20.2 of the Code of Administrative Offences increased the fines excessively (222-6.652 Euro for a citizen)⁶⁶³ and introduced community service as a new administrative penalty.

The Constitutional Court of the Russian Federation ruled that only the minimum monetary value of the fines was unconstitutional because it did not allow the courts to individualize the fine in a manner compatible with the Constitution.⁶⁶⁴ As long as an amendment is not passed by the State Duma, the courts may reduce the fines below the lowest bound established by the current law.⁶⁶⁵ The imposition of community work as an administrative punishment for administrative offences not resulting in damage to health or property but only in violation of formalities of the process for organizing or conducting a public event was held to be unconstitutional by the Russian Constitutional Court.⁶⁶⁶

7. Securing government accountability

Liability and accountability of law enforcement personnel

Under Art. 18 (8), (9) of the Federal Law No.3-FZ, the police official is not liable for the use of physical force, special methods or firearms if these measures are based on the law, and if he does not overstep his powers.

Monitoring

International NGOs such as „Amnesty International“ and „Human Rights Watch“ have compiled reports on the recent developments concerning the freedom of assembly.⁶⁶⁷ Also Russian NGOs such as the „Levada-Center“ or the „Centre of the Development of Democracy and Human Rights“ have gained popularity.⁶⁶⁸ Their work has recently faced excessive control and restrictions on the basis of the **Federal Laws No.121-FZ** of 20 July 2012 („The Foreign Agents Law“), **No.190-FZ** of 12 November 2012 („Treason Law“), and

⁶⁶² Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, *supra* fn. 622, p. 37-38; 39-41 (citing case-law of the ECtHR and the Venice Commission Guidelines on the Freedom of Peaceful Assemblies).

⁶⁶³ The average monthly income in Russia is approximately 629 Euro, <http://www.rg.ru/2013/04/28/zarplata-site.html>.

⁶⁶⁴ Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, *supra* fn. 622, p.51-59.

⁶⁶⁵ *Ibid.*, p.59.

⁶⁶⁶ *Ibid.*, p.90.

⁶⁶⁷ See for example Amnesty International, Freedom under Threat, AI Index: EUR 46/011/2013, *supra* fn. 618; Human Rights Watch, Laws of Attrition.

⁶⁶⁸ Homepage of the Levada-Center: <http://www.levada.ru/eng/> (last accessed: 10 March 2014); homepage of the Center of the Development of Democracy and Human Rights: <http://www.demokratia.ru/> (Центр Развития Демократии и Прав Человека) (last accessed: 10 March 2014).

No.272-FZ of 28 December 2012 (a law banning Russian NGOs that either engage in „political“ activities and receive funding emanating from the US or which engage in activities that threaten Russia’s interests).⁶⁶⁹

The implementation of the freedom of assembly is monitored by the Ombudsman for Human Rights in the Russian Federation.⁶⁷⁰

Media access

In the context of the 2011-2012 oppositional protests, „PEN International“ reports detentions and arrests of journalists.⁶⁷¹ „Amnesty International“ reports that several journalists were injured by the police during an unauthorized meeting in Moscow on 5 March 2012.⁶⁷²

8. Conclusions and outlook

The protest movement in the Russian Federation has grown considerably throughout 2011-2013 and shown the strife for more voice and participation on Russia’s political and social arena. The citizens discover the power they can have in this relatively young democracy. The June 2012 amendments and the practice of authorities and courts, however, quash any willingness and readiness to take to the streets. It seems that the European Court of Human Rights is currently preparing a pilot judgment on freedom of assembly in the case of *Lashmankin and others v. Russia*. This case comprises 15 different applications,⁶⁷³ all showing the deplorable state of Russian Assembly Law and its implementation. Hopefully, the ECtHR-judgment will be a wakeup call for the Russian authorities.

⁶⁶⁹ Summary of the laws and its impacts, see Human Rights Watch, *Laws of Attrition*, p.12-45.

⁶⁷⁰ *Уполномоченный по правам человека в Российской Федерации*, <http://ombudsmanrf.org/> (last accessed: 10 March 2014).

⁶⁷¹ PEN International, *Вклад Международного ПЕН-клуба и Русского ПЕН-центра в 16-ю сессию рабочей группы Универсального периодического обзора, Российская Федерация* (Report of the International PEN-Club and the Russian PEN-Center to the 16th session of the working group of Universal Periodic Review, Russian Federation), paras. 6-7, <http://www.pen-international.org/newsitems/pen-international-advocacy-at-united-nations-16th-upr-session/> (in Russian) (last accessed: 10 March 2014).

⁶⁷² Amnesty International, *supra* fn. 618, p.16.

⁶⁷³ See <http://hro.rightsinrussia.info/archive/european-court/assembly/pilot> (last accessed: 10 March 2014).

Ukraine

by Dr. Halyna Perepelyuk, LL.M. (Int.)

1. Legal bases and scope of the guarantee

In Ukraine, the right to freedom of assembly is a fundamental right guaranteed by the Constitution of Ukraine,⁶⁷⁴ the main law of the state with the highest legal status in the normative hierarchy.⁶⁷⁵ According to Art. 39 of the Constitution "citizens shall have the right to assemble peacefully without arms and to hold rallies, meetings, processions, and demonstrations after having notified executive or local self-government bodies in advance". The second part of Art. 39 provides for restrictions on the exercise of this right which "may be established by a court in accordance with law and only in the interests of national security and public order, for the purpose of prevention of disturbances or crimes, protection of the health of the population, or protection of the rights and freedoms of other persons".⁶⁷⁶

Although some types of assemblies have been listed in Art. 39 of the Constitution ("rallies, meetings, processions, and demonstrations"), this list cannot be regarded as complete, and according to Art. 22 of the Constitution, human and citizens' rights and freedoms affirmed by the Constitution shall not be exhaustive. In other words, adoption of new laws or introduction of amendments to the ones in effect can broaden the scope of this right. Besides, the Constitution prescribes in its Art. 92 that "human and citizens' rights and freedoms and the guarantees of these rights shall be determined exclusively by Ukrainian laws", not by secondary legislation or any other type of legal acts.

It is important to mention that international agreements ratified by Ukrainian parliament are an integral part of the national legislation of Ukraine⁶⁷⁷ and are applied in the same manner as the norms of national laws.⁶⁷⁸ For example, the European Convention on Human Rights and Fundamental Freedoms of 1950 (henceforth the ECHR) was ratified by the parliament in 1997 and therefore became part of Ukrainian legislation.⁶⁷⁹ Besides, case law of the European Court of Human Rights (henceforth the ECtHR) is a source of Ukrainian law and should be applied by the national courts.⁶⁸⁰ It means that Art. 11 of the ECHR and case law of the ECtHR on freedom of assembly should be applied together with the national legislation while deciding cases on the right to freedom of assembly.

One of the main tasks of the Constitutional Court of Ukraine is to provide an official interpretation of the Constitution and Ukrainian laws. In its decision on timely notification of peaceful assemblies,⁶⁸¹ the **Constitutional Court defined** the right to assemble peacefully as "an inalienable and inviolable right".⁶⁸² Furthermore, the court said that this right "relates

⁶⁷⁴ The Constitution of Ukraine of 28 June 1996 (last amendment by the law no. 586-18 of 6/10/2013), available at: <http://zakon4.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> (last accessed: November 17 2013).

⁶⁷⁵ Art. 8 of the Constitution of Ukraine of 28 June 1996.

⁶⁷⁶ The Constitution of Ukraine is available in English on the official website of the President of Ukraine: <http://www.president.gov.ua/en/content/constitution.html> (last accessed: November 15 2013).

⁶⁷⁷ Art. 9 of the Constitution of Ukraine of 28 June 1996.

⁶⁷⁸ Art. 19 (1) of the Law of Ukraine "On International Treaties" of 29 June 2004, available at: <http://zakon2.rada.gov.ua/laws/show/1906-15> (last accessed: 17 January 2014).

⁶⁷⁹ The Law "On Ratification of the European Convention on Human Rights and Fundamental Freedoms 1950 and Additional Protocols 1,2,4,7 and 11" of 17 June 1997, available at: <http://zakon1.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80> (last accessed: 15 January 2014).

⁶⁸⁰ Article 17, the Law "On Execution of the Decisions of the European Court of Human Rights" of 23 February 2006, available at: <http://zakon1.rada.gov.ua/laws/show/3477-15> (last accessed: 15 January 2014).

⁶⁸¹ The Decision of the Constitutional Court of Ukraine no. 4-pn/2001 of 19 April 2001 in a case regarding timely notification of peaceful assembly, available at: <http://zakon2.rada.gov.ua/laws/show/v004p710-01> (last accessed: 15 November 2013).

⁶⁸² §2, the Decision of the Constitutional Court of Ukraine no. 4-pn/2001 of 19 April 2001 in a case regarding timely notification of peaceful assembly. English translation of the Decision is available at: <http://legislationline.org/documents/action/popup/id/6861> (last accessed: 17 November 2013).

to the constitutional safeguards of the civil rights to freedom of opinion, religious belief, thought, and speech, and the freedom to use and impart information through speech or in written form or by any other means of choice".⁶⁸³

Despite the clear requirement contained in Arts. 39 and 92 of the Constitution that a procedure for organizing and holding peaceful assemblies must be regulated by law, unfortunately there is **no legal act** which would regulate such a procedure. The existing provisions in Ukrainian legislation are not sufficient to fully regulate the procedure for organizing and holding peaceful assemblies. Besides, they are either archaic or do not comply with European standards. Below it will be shown that, for example, persons wishing to hold an assembly have to notify local authorities ten days before it is planned to be held, that existing secondary legislation does not allow spontaneous and simultaneous demonstrations, assemblies during the night, etc.

Ukraine became an independent and sovereign state in 1991 and it started to build up its statehood by creating new legislation, based on international principles and standards.⁶⁸⁴ Certainly, this process is difficult and long, but even the ECtHR noted that delay of more than two decades is not justifiable, especially when such a fundamental right as freedom of peaceful assembly is at stake. In its *Vyerentsov* judgment the ECtHR held that the Constitution of Ukraine provides for some general rules as to the possible restrictions on the freedom of assembly, but those rules require further elaboration in the domestic law.⁶⁸⁵ After this judgment, which was actually the first judgment of the ECtHR against Ukraine that found violation of Art. 11 of the ECHR (freedom of assembly), the Committee of Ministers obliged Ukraine to implement urgently specific reforms in legislation and administrative practice in order to fill in the legislative lacuna concerning the freedom of assembly in the Ukrainian legal system.⁶⁸⁶

The **issue of adopting a special law on peaceful assemblies** is not a new topic for Ukraine. The draft law on peaceful assemblies was already developed in 2006, after having been assessed by the Venice Commission and the OSCE/ODIHR,⁶⁸⁷ in May 2009 it was submitted to the Ukrainian parliament, and on 3 June 2009 it passed the first reading.⁶⁸⁸ After the draft was amended following the conclusions of the Main Scientific and Expert Department of the parliament, it was sent to the Venice Commission for an assessment⁶⁸⁹ and afterwards submitted again to the Ukrainian parliament for the second reading on 3 June 2010. The second reading was to take place on 15 March 2012, but the national deputies

⁶⁸³ *Ibid.*

⁶⁸⁴ For example, the Constitution of Ukraine and especially the second chapter of the Constitution "Human and Citizen Rights, Freedoms and Duties", was very much appreciated by the Venice Commission: "the catalogue of rights protected is very complete and it shows a willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights". Source: Opinion on the Constitution of Ukraine adopted by the Venice Commission on its 30 Plenary Meeting in Venice, on 7-8 March 1997, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF%281997%29002-e> (last accessed: 20 November 2013).

⁶⁸⁵ §54-55 of the *Vyerentsov* judgment. *Vyerentsov v. Ukraine*, application no. 20372/11, 11 April 2013. HUDOC: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-118393#%22itemid%22:%22001-118393%22>] (last accessed: 15 November 2013).

⁶⁸⁶ Committee of Ministers, *Case no. 23 1179th meeting - 26 September 2013*, available at: <https://wcd.coe.int/ViewDoc.jsp?id=2103807&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> (last accessed: 15 November 2013).

⁶⁸⁷ Joint Opinion on the Draft Law on Peaceful Assemblies in Ukraine by the Venice Commission and the ODIHR of 13-14 October 2006, Opinion 385/2006, available at: <http://www.venice.coe.int/webforms/documents/?opinion=385&year=all> (last accessed: 15 November 2013).

⁶⁸⁸ The Resolution (*postanova*) of the parliament of Ukraine on adopting as a basis for future law the draft Law of Ukraine on the organization and conduct of peaceful activities, available at: <http://zakon4.rada.gov.ua/laws/show/1434-17> (last accessed: 15 November 2013).

⁶⁸⁹ Joint Opinion on the Law on the Order of Organizing and Conducting Peaceful Events of Ukraine by the Venice Commission and the ODIHR of 14 December 2009, Opinion no. 556/2009, ODIHR Nr.: FOA-UKR/144/2009, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282009%29052-e> (last accessed: 15 November 2013).

voted to postpone the reading. As of January 2013, the law on peaceful assemblies has still not been adopted by the parliament.

Since there is no special law, some procedures for holding assemblies in Ukraine are **regulated by the Decree (*ukaz*) of the Presidium of the Supreme Soviet** of the USSR of 28 July 1988 concerning the procedure for organizing and holding meetings, rallies, street marches and demonstrations in the USSR⁶⁹⁰ (henceforth the Decree of 1988) and by local regulations. The legal bases for validity of Soviet Union normative legal acts in Ukraine are Chapter XV. "Transitional Provisions" of the Constitution of Ukraine⁶⁹¹ and the Resolution⁶⁹² (*postanova*) of the parliament of Ukraine "On temporary application of certain legislative acts adopted by the USSR".⁶⁹³ However, there is no common position among higher Ukrainian courts and authorities as to the applicability of the Decree of 1988.⁶⁹⁴ Neither do courts of general jurisdiction have a common position, thus, some regard the act as valid,⁶⁹⁵ while the others do not,⁶⁹⁶ The most acceptable official position as to the validity of the Decree is that of the Ministry of Justice, which proposes to use only those provisions of the Decree that do not contradict the Constitution,⁶⁹⁷ as it has the highest legal force in Ukraine. The main problem created by the Decree of 1988 is that according to it, persons wishing to hold a peaceful assembly have to get a permit of intention from local executive authorities, while Art. 39 of the Constitution requires only advance notification. The other problem is that according to the Decree of 1988, local authorities can ban a peaceful assembly, while Art. 39 of the Constitution says that only a court can do so.

Some city councils of *oblast*⁶⁹⁸ centres in Ukraine⁶⁹⁹ adopted their own regulations on holding assemblies, despite Constitutional provisions that human and citizens' rights and freedoms, and the guarantees of these rights, are determined exclusively by Ukrainian laws (Art. 92 of the Constitution). Besides, the restrictions as to place and time for holding assemblies contained in these rules clearly contradict the Guidelines on Freedom of

⁶⁹⁰ The Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 on the procedure for organizing and holding meetings, rallies, street marches and demonstrations in the USSR, available at: <http://zakon4.rada.gov.ua/laws/show/v9306400-88> (last accessed: 15 November 2013).

⁶⁹¹ "Laws and other normative legal acts enacted prior to the entry into force of this Constitution shall apply insofar as they do not conflict with the Constitution".

⁶⁹² The Resolution of the *Verhovna Rada* of Ukraine of 12 September 1991 "On temporary application of certain legislative acts adopted by the USSR", available at: <http://zakon4.rada.gov.ua/laws/show/1545-12> (last accessed: 17 November 2013).

⁶⁹³ The legislation of the USSR shall be applicable in Ukraine with respect to issues that have not been regulated by the legislation of Ukraine and insofar as they do not contradict the Ukrainian Constitution and laws; the legislation of the USSR is applicable until relevant legislation is adopted by Ukraine.

⁶⁹⁴ The Supreme Court held in "The Review of the practice of the Supreme Court in cases concerning administrative offences (Articles 185-185² of the Code on Administrative Offences)" of 1 March 2006 that the Decree is in force, available at: http://www.scourt.gov.ua/clients/vsen.nsf/0/88DE37EDF92C0BE2C32572C900333D8F?OpenDocument&Collaps_eView&RestrictToCategory=88DE37EDF92C0BE2C32572C900333D8F&Count=500& (last accessed: 15 November 2013), while the Higher Administrative Court of Ukraine, however, holds the Decree of 1988 to contradict the Constitution of Ukraine and therefore opines that it should not be applied by the courts (Information note of April 2012 by the Higher Administrative Court of Ukraine on a study and summary of the jurisprudence of administrative courts applying the relevant legislation deciding cases concerning the exercise of the right to peaceful assembly (meetings, rallies, marches, demonstrations, etc.) in 2010 and 2011, available at: <http://zakon1.rada.gov.ua/laws/show/n0002760-12> (last accessed: 15 November 2013).

⁶⁹⁵ The District Administrative Court of the Autonomous Republic of Crimea in its Decision no. 801/9176/13-a of 19 September 2013 referred to the Decree of 1988 in deciding the case, available at: <http://www.reyestr.court.gov.ua/Review/33574171> (last accessed: 15 November 2013).

⁶⁹⁶ The District Administrative Court of Khmelnytsky in its Decision no. 822/3199/13-a of 2 August 2013 denied the validity of the Decree of 1988, available at: <http://www.reyestr.court.gov.ua/Review/32883506> (last accessed: 15 November 2013).

⁶⁹⁷ Letter no.1823-0-1-09-18 of Ministry of Justice of Ukraine of 26 November 2009, available at: <http://zakon4.rada.gov.ua/laws/show/v823-323-09> (last accessed: 15 December 2013).

⁶⁹⁸ "*Oblast*" is an administrative unit in Ukraine. Ukraine is subdivided into 24 *oblast*'s, Autonomous Republic of Crimea and two cities with special status (Kiev and Sevastopol).

⁶⁹⁹ As to October 2013 in the following *oblast*' city centers were valid own regulations on regulation of holding assemblies: Kiev, Kharkiv, Rivne, Sumy, Zaporizhzhya.

Peaceful Assembly. These regulations are valid and are used by public authorities and referred to by district courts.

2. Restrictions

Time

In Kiev⁷⁰⁰, Sumy⁷⁰¹, Rivne⁷⁰², Kharkiv⁷⁰³ it is allowed to hold assemblies from 8-9 a.m. till 10-11 p.m. In other words, it is not allowed to hold an assembly in these cities during the night.

Place

In Kiev a special permission is needed from the city council for holding assemblies near the buildings of the following bodies: the parliament, the Administration of the President, the Cabinet of Ministers, the Supreme Court and the Kiev City Council. Moreover, from 14 June 2013 until the end of 2013 it was prohibited to hold any kind of assemblies on the streets close to the building of the presidential administration by a decision of the Kiev district administrative court,⁷⁰⁴ In Kharkiv it is prohibited to hold assemblies near buildings of local administrations, if such assemblies disturb their normal functioning.

Massive pro-EU rallies have gripped Ukraine following the delay of an association agreement with the EU announced by Prime Minister Mykola Azarov on 21 November 2013. The same day the Kiev City Council appealed to the Kiev Administrative Court to restrict the holding of assemblies in Independence Square and the court ruled in favour of the plaintiff. The next day the Mayor of Kharkiv issued an order that prohibits holding mass events on the pretext of an increase in incidence of flu and acute respiratory infections. In other Ukrainian cities – Odessa, Lviv, Mykolayiv – local administrative courts prohibited any kinds of demonstrations near administrative buildings.⁷⁰⁵ Usually such bans on demonstrations were intended to prevent any rallies organized by opposition parties that were not satisfied with the decision of the Prime Minister.

Sight and Sound

According to Art. 24 of the Law "On Sanitary and Epidemiological Welfare of the Population"⁷⁰⁶, any restrictions as to sound should not be applied to meetings, rallies, demonstrations and other mass events, of which local executive authorities were notified in advance.

Despite the above-mentioned law, the City of Sumy set its own limits to sound, which must not be higher than 40 dB. In Rivne, the use of loudspeakers or sound-amplifying devices is prohibited if they were not foreseen in the program submitted to authorities. Moreover, in

⁷⁰⁰ The Decision of the Kiev City Council no. 317/418 "On determining the order of organization and holding non-state mass public events of political, cultural, educational, sports, entertainment, and other character in Kiev" of 24 June 1999, available at: http://kmr.gov.ua/decree_gol.asp?Id=2998 (last accessed: 15 November 2013).

⁷⁰¹ The Decision of the City Council of Sumy no. 214 "On the procedure for organizing and holding mass events in Sumy" of 7 April 2009, available at: www.sumy.ua/engine/download.php?id=3537 (last accessed: 15 November 2013).

⁷⁰² The Decision of the City Council of Rivne no. 53 "On organization and holding of mass events in Rivne" of 14 April 2009, available at: http://www.city-adm.rv.ua/RivnePortal/ukr/documents_view.aspx?id=27546 (last accessed: 15 November 2013).

⁷⁰³ The Decision of the City Council of Kharkiv no. 541 "On temporary regulations of the procedure for organizing and holding meetings, rallies, marches and demonstrations" of 6/6/2007, available at: http://www.gov.lica.com.ua/b_text.php?type=3&id=32028&base=27 (last accessed: 15 November 2013).

⁷⁰⁴ Decision of the Kiev district administrative court no. 826/9127/13-a of 13 June 2013, available at: <http://www.reyestr.court.gov.ua/Review/31870298> (last accessed: 15 November 2013).

⁷⁰⁵ Ukrainian Helsinki Human Rights Union (2013), *Monitoring of violation of the right to peaceful assembly during European maidans (renewed)*, 27/11/2013, available at: <http://helsinki.org.ua/index.php?id=1385707213> (last accessed: 29 December 2013).

⁷⁰⁶ Law "On Sanitary and Epidemiological Welfare of the Population" of 24 February 1994 (last amendment by the law no. 5395-17 of 06/12/2012), available at: <http://zakon2.rada.gov.ua/laws/show/4004-12> (last accessed: 15 November 2013).

Rivne organizers have to notify in advance whether they intend to use tents, canopies and objects of external advertisement (screens, stands, shields etc.).

3. Procedural issues

Notification

Art. 39 (1) of the Constitution of Ukraine states that executive or local self-government bodies should be notified of an assembly in advance. The Ministry of the Interior referred to the Constitutional Court of Ukraine for an official interpretation of this constitutional provision and the court ruled that “organizers of an event should inform executive authorities or bodies of local self-government in advance, that is, within reasonable time prior to the date of the planned event”.⁷⁰⁷ Furthermore, the court held that such time limits should serve not as limits to the right but as a guarantee of the right to assemble peacefully, in order to provide relevant authorities with an opportunity to take measures to ensure that citizens may freely hold assemblies and to protect order and the rights and freedoms of others. The court stressed that only laws can set up exact deadlines for timely notification with regard to the specifics of peaceful assemblies. Unfortunately, since 2001 no law on this matter has been adopted yet.

Usually local authorities require to be notified of an assembly ten days before it. This time limit is set in the Decree of 1988. The local executive authorities shall examine the application and notify the representatives (organizers) of its decision no later than five days prior to the date of the event.

Decision-making

Local executive authorities have delegated power to resolve, in accordance with the law, issues of holding meetings, manifestations and demonstrations,⁷⁰⁸ Therefore, if a local authority decides that an assembly for some reason should not be held, it can place a claim before an administrative court to ban such an assembly. Such claims have to be resolved within three days or immediately, and an organizer is to be informed immediately of a proceeding. If the claim was submitted the same day of the assembly, or after it, the court will not consider it,⁷⁰⁹

According to the Ukrainian Helsinki Human Rights Union, in 2012 Ukrainian authorities sought successfully to restrict peaceful assembly in 88 % of cases, in 2011 in 89 % and in 2010 in 83 %, ⁷¹⁰ Grounds on which local executive authorities claim to ban an assembly may be, for example, a simultaneous assembly, a counter-assembly, an assembly which would disturb normal functioning of a company or public authority, or a number of participants which is higher than a relevant territory could host, potential traffic jams etc.⁷¹¹

⁷⁰⁷ Decision of the Constitutional Court of Ukraine no. 4-pn/2001 of 19 April 2001 in a case regarding timely notification of peaceful assembly, available at: <http://zakon2.rada.gov.ua/laws/show/v004p710-01> (last accessed: 15 November 2013).

⁷⁰⁸ Art. 38 (b (3)) of the Law of Ukraine "On local self government" of 21 May 1997 (last amendment by the law no. 563-18 of 23/10/2013), available at: <http://zakon4.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80> (last accessed: 15 November 2013).

⁷⁰⁹ Art. 182 of the Code on Administrative Legal Proceedings of Ukraine of 6 July 2005 (last amendment by the law no. 406-18 of 11/08/2013), available at: <http://zakon0.rada.gov.ua/laws/show/2747-15> (last accessed: 15 November 2013).

⁷¹⁰ Statistical data is taken from §11. Peaceful Assemblies of the "Annual Report on Human Rights. Human Rights in Ukraine 2012. Reports of Human Rights NGOs", available at: <http://helsinki.org.ua/index.php?id=1362646268> (last accessed: 15 November 2013).

⁷¹¹ Ukrainian Helsinki Group (2012), 11. *Freedom of Peaceful Gatherings, Annual Report on Human Rights. Human Rights in Ukraine 2012*, available at: <http://helsinki.org.ua/en/index.php?r=3.3.1.9> (last accessed: 29 December 2013).

Review and appeal

The organizer of an assembly can appeal to an administrative court for the removal of restrictions on the right to peaceful assembly by the executive authorities. Such claims have to be resolved within three days or immediately.⁷¹²

4. Specific types of assemblies

Spontaneous assemblies

The Statute of patrol service of police in Ukraine⁷¹³ permits the police to stop an assembly if a local executive authority has not been notified in advance: "The reasons for which a meeting, rally, street march or demonstration will be stopped are holding it without actual permission from the local executive authorities..." [*transl. by author*].

A similar provision can be found in the regulations of the City of Zaporizhzhya, which allow stopping an assembly if the local executive authorities were not notified in advance.

Assemblies organized by means of new technologies

In Ukraine organizers often use social networks to hold an assembly or to organize a flash mob; however, none of these types of assemblies are regulated by existing legislation, or foreseen in the draft law on peaceful assemblies. The most recent example of a spontaneous assembly organized by means of social networks such as Twitter and Facebook is the protests throughout Ukraine following the delay of an association agreement with the EU announced by Prime Minister Mykola Azarov on 21 November 2013. The announcement was made at about 3 p.m., and almost immediately afterwards there was created a tweet such as, for example, the "@euromaidan" and several pages of facebook dedicated to the *Euromaydan* rallies (one of the facebook pages: "ЄвроМайдан – EuroMaydan"). In Kiev the same day at about 10 p.m., more than 500 protesters were gathered by means of social networks in Independence Square (the main square of Kiev). On Sunday 24 November 2013 the number of demonstrators had reached 50,000.⁷¹⁴ Furthermore, following violence from government forces in the early morning of 30 November, the level of protests in Kiev on the weekends of 1 December and 8 December rose respectively to 100,000⁷¹⁵ and 300,000⁷¹⁶ protesters, despite the Kiev Administrative Court decision to ban any kinds of rallies in Independence Square until 7 January 2014.⁷¹⁷ Later, the *Euromaydan* would be called the most significant rally in Ukraine since the Orange revolution in 2004 and "the largest ever pro-European demonstration".⁷¹⁸

A new type of assembly – the **flash mob** – is quite popular in Ukraine. One of the latest examples of a flash mob was the singing of the national anthem in one of the subway stations in Kiev. The flash mob was organized to support *Euromaydan* rallies.⁷¹⁹

⁷¹² Art. 183 of the Code on Administrative Legal Proceedings of Ukraine of 6 July 2005.

⁷¹³ The Statute of the police patrol service in Ukraine approved by the decree no. 404 of the Ministry of Interior of 28 July 1994, available at: <http://zakon2.rada.gov.ua/laws/show/z0213-94/page> (last accessed: 15 November 2013).

⁷¹⁴ Deutsche Welle. *Ukrainian march for closer EU ties*, 24 November 2013, available at: <http://www.dw.de/ukrainians-march-for-closer-eu-ties/a-17248871> (last accessed: 28 December 2013).

⁷¹⁵ Deutsche Welle. *Tens of thousands rally in Kyiv in pro-Europe protest*, 1 December 2013, available at: <http://www.dw.de/tens-of-thousands-rally-in-kyiv-in-pro-europe-protest/a-17264317> (last accessed: 28 December 2013).

⁷¹⁶ Deutsche Welle. *Ukraine protesters keep up the pressure on President Yanukovich*, 8 December 2013. Available at: <http://www.dw.de/ukraine-protesters-keep-up-the-pressure-on-president-yanukovich/a-17279277> (last accessed: 28 December 2013).

⁷¹⁷ Ukrainian Helsinki Human Rights Union (2013), *Monitoring of violation of the right to peaceful assembly during European maidans (renewed)*, 27/11/2013, available at: <http://helsinki.org.ua/index.php?id=1385707213> (last accessed: 29 December 2013), *supra* fn. 705.

⁷¹⁸ Bildt, Carl (2013) *Ukraine deserves better*, KyivPost, 28 Dec, available at: <http://www.kyivpost.com/opinion/op-ed/carl-bildt-ukraine-deserves-better-334360.html> (last accessed: 29 December 2013).

⁷¹⁹ Summeronlinestream. (2013) *Flash mob in Kiev: thousands of subway passengers sing the national anthem of Ukraine* [online video], available at: <http://www.youtube.com/watch?v=rbRjgFnXIXc> (last accessed: 17 December 2013).

Assemblies taking place on public properties

Ukrainian legislation does not contain provisions to regulate peaceful assemblies on public properties. In this case a principle of general permission is applied: "everything is permitted if it is not prohibited by a law".⁷²⁰

Counter-demonstrations

Neither laws nor local regulations contain any provisions as to counter-demonstrations; in practice they would be treated like simultaneous ones. For example, in Zaporizhzhya, Rivne and Kharkiv simultaneous assemblies are not allowed and local executive authorities would propose another place to the organizers of one of the assemblies.

5. Implementing freedom of assembly legislation

Pre-event planning

Chapter XV of the Ukrainian Statute of police patrol service⁷²¹ prescribes the organization of public order security during mass events. § 309-318 of the Statute regulate pre-event planning, in which according to § 310 (1) the police first check the permission of the organizer to hold an assembly. Afterwards "police together with the organizer of the event inspect the buildings, structures or other objects where the event is to be held; study the best options for securing public order during the event; take measures to eliminate the deficiencies observed" (§310 (2)) [*transl. by author*].

Costs

According to Art. 38 (b) 3 of the Law "On local self-government"⁷²², "local authorities exercise control over public order during meetings, rallies, manifestations, demonstrations and other mass events",⁷²³ Therefore, the costs for keeping public order rest with the state and no additional financial charges for providing adequate policing should be paid by the organizers of assemblies.

Use of force by the police

Use of force by law enforcement officials is regulated by the Law of Ukraine "On police"⁷²⁴, and by the Statute of police patrol service in Ukraine,⁷²⁵

According to Art. 10 of the Law "On Police" the main duty of the police, among others, is to ensure public order and the security of citizens. The third section of the law "Use of force, special means and weapons" contains provisions according to which the police have the right to use physical force to stop an offence (Art. 13) and special means for stopping mass disorders and disruption of public order (Art. 14(2)). Such special means according to Art. 14 include: "handcuffs, rubber batons, methods of restraint, tear gas, light and distraction devices, devices to open doors and force vehicles to stop, water cannons, armoured vehicles and other special vehicles as well as sniffer dogs"[*transl. by author*]. Before starting the use of force or special methods a policeman is obliged to notify the intention to use force in a loud voice or through loudspeakers at least twice, in order to give enough time for an offence or disorder to be stopped by itself (§ 200 and 201 of the Statute of police patrol service in Ukraine of 28 July 1994).

⁷²⁰ Theory of state and law. Academic Course: Ed. O. Zaichuk, N. Onishchenko. (Kiev: Inter Yurinkom, 2006), 528.

⁷²¹ The Statute of police patrol service in Ukraine approved by the decree no. 404 of the Ministry of Interior of 28 July 1994, available at: <http://zakon2.rada.gov.ua/laws/show/z0213-94/page> (last accessed: 15 November 2013).

⁷²² The Law of Ukraine "On local self-government" of 21 May 1997 (last amendment by the law no. 563-18 of 23/10/2013), available at: <http://zakon4.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80> (last accessed: 15 November 2013).

⁷²³ English translation of the law on local self-government of Ukraine is available at: http://www.urban.org/PDF/ukr_locgov.pdf (last accessed: 17 December 2013).

⁷²⁴ The Law "On police" of 20 December 1990 (last amendment by the law no. 5178-17 of 11/10/2013), available at: <http://zakon0.rada.gov.ua/laws/show/565-12> (last accessed: 15 November 2013).

⁷²⁵ The Statute of police patrol service in Ukraine approved by the decree no. 404 of the Ministry of Interior of 28 July 1994, available at: <http://zakon2.rada.gov.ua/laws/show/z0213-94/page> (last accessed: 15 November 2013).

The use of drones during demonstrations

The use of drones in Ukraine is regulated by the Air Code of Ukraine,⁷²⁶ Art. 1(23) of the Code defines “unmanned aerial vehicle” as an aircraft without a human pilot on board, which is controlled by the special control station situated outside the aircraft. Drones less than 20 kg used for an entertainment or for sports do not need to be registered in the State Register of the Aircraft of Ukraine (Art. 39). A special permit of the Ministry of Defence is needed for use of foreign drones in Ukraine (Art. 46).

Drones are often used by media during demonstrations in Ukraine. One of the latest images taken by a drone is a panoramic view of the *Euromaydan* rally in Kiev,⁷²⁷ which gave an idea about the number of participants in the rally that day.

Liability of organizers

Art. 185¹ "Violation of the procedure for organizing and holding meetings, rallies, street marches and demonstrations" of the Code on Administrative Offences of Ukraine⁷²⁸: "Violation of the established procedure for organising and holding assemblies, meetings, rallies and demonstrations is punishable by a warning or by a fine of no less than 10 and no more than 25 tax-free minimal wages.

In case of this offence being committed repeatedly within one year after an administrative sentence has been passed, or it being committed by the organizer of the assembly, meeting, rally or demonstration, it is punishable by a fine of no less than 20 and no more than 100 tax-free minimal wages or by correctional labour for a term of no less than one and no more than two months with twenty percent of the salary deducted in favour of the state, or by an administrative arrest for up to fifteen days".⁷²⁹

6. Securing government accountability

Liability and accountability of law enforcement personnel

According to Art. 340 "Illegal interference with the organization or holding of meetings, rallies, marches and demonstrations" of the Criminal Code of Ukraine,⁷³⁰ "illegal interference with the organization or holding of meetings, rallies, street marches and demonstrations, where this act was committed by an official or with the use of physical violence, shall be punishable by correctional labour for a term of up to two years, or arrest for a term of up to six months, or restraint of liberty for a term of up to five years, or imprisonment for the same term".⁷³¹

Monitoring

Human Rights NGOs actively monitor assemblies in Ukraine. A lot of useful information can be found on their websites, as, for example, how many applications to hold an assembly were made, and how many of them were banned, the reasons for restricting a certain assembly, the use of force during assembly, etc. Here are some of the NGOs which monitor assemblies in Ukraine:

⁷²⁶ The Air Code of Ukraine of 19 May 2011, available at: <http://zakon4.rada.gov.ua/laws/show/3167-12> (last accessed: 29 December 2013).

⁷²⁷ Yura Yakymets. (2013) *Euromaidan from the bird's-eye view. Day 15/12/2013* [online video], available at: <http://www.youtube.com/watch?v=rGNjV1TCYXc> (last accessed: 29 December 2013).

⁷²⁸ The Code on Administrative Offences in Ukraine of 7 December 1984 (last amendment by the law no. 656-18 of 16/11/2013), available at: <http://zakon4.rada.gov.ua/laws/show/80731-10/page13> (last accessed: 15 November 2013).

⁷²⁹ English translation of the Code on Administrative Offences is available at: <http://legislationline.org/topics/country/52/topic/15> (last accessed: 15 November 2013).

⁷³⁰ The Criminal Code of Ukraine of 1 September 2001 (last amendment by the law no. 228-18 of 04/07/2013), available at: <http://zakon4.rada.gov.ua/laws/show/2341-14> (last accessed: 15 November 2013).

⁷³¹ English translation of the Criminal Code of Ukraine is available at: <http://www.legislationline.org/en/documents/action/popup/id/16257/preview> (last accessed: 18 December 2013).

- Ukrainian Helsinki Human Rights Union;⁷³²
- Maidan,⁷³³
- Association of Ukrainian Monitors on Human Rights Conduct in Law Enforcement (Association UMDPL).⁷³⁴

Media access

Art. 26 of the Law of Ukraine "On printed mass media in Ukraine" of 16 November 1992⁷³⁵ prescribes the rights and duties of editorial journalists. According to Art. 26(7) a journalist has the right, *inter alia*, "upon presentation of editorial credentials or other document confirming his affiliation with printed media, to be present in the places of disaster, catastrophes, accidents, mass riots, rallies and demonstrations, and in territories in state of emergency" [*transl. by author*].

7. Conclusions and outlook

After analysis of the available primary and secondary legislation regulating the procedure of organizing and holding peaceful assemblies in Ukraine, the conclusion can be drawn that it is not "clear and foreseeable"⁷³⁶ and Ukraine urgently needs a special law on peaceful assemblies. Human rights activists already called the draft law⁷³⁷ which awaits its reading in parliament the most liberal law on peaceful assemblies in Europe.⁷³⁸ The draft law on peaceful assemblies will finally define spontaneous and counter-assemblies, assemblies on public property. Besides, it will regulate the figure of organizers of an assembly and their rights and duties. The notification period for an assembly will be two days. The draft provides for the restrictions on holding an assembly, the procedure for applying to the court against such restrictions, and the responsibility for violation of the right to freedom of peaceful assembly. In general terms the draft law is developed according to European and international standards on freedom of peaceful assembly, and its last version considered most of the comments expressed by the Venice Commission in its joint opinions.⁷³⁹ The only question remaining open is whether and when the parliament will adopt the law.

⁷³² <http://helsinki.org.ua/en/> (last accessed: 24 December 2013).

⁷³³ <http://maidanua.org/category/monitor/> (last accessed: 24 December 2013).

⁷³⁴ <http://umdpl.info/eng/index.php?r=3.1> (last accessed: 24 December 2013); http://en.wikipedia.org/wiki/Association_of_Ukrainian_Monitors_on_Human_Rights_Conduct_in_Law_Enforcement (last accessed: 10 March 2014).

⁷³⁵ The Law of Ukraine "On printed mass media in Ukraine" of 16 November 1992 (last amendment by the law no. 409-18 of 28/07/2013), available at: <http://zakon2.rada.gov.ua/laws/show/2782-12> (last accessed: 17 November 2013).

⁷³⁶ § 28, *Shmushkovych v. Ukraine*, application no. 3276/10, 14/11/2013, available at HUDOC: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128050#%7B%22itemid%22%3A%5B%22001-128050%22%5D%7D> (last accessed: 30 December 2013).

⁷³⁷ Draft law on peaceful assemblies in Ukraine is available in English from: http://legislationline.org/download/action/download/id/3358/file/Ukraine_Draft%20Law%20on%20Peaceful%20Assemblies_2010_en.pdf (last accessed: 30 December 2013).

⁷³⁸ Ukrainian Helsinki Human Rights Union (2013), *Human rights: The law "On freedom of peaceful assembly" may be the most liberal in Europe*, 22/10/2013. Available at: <http://helsinki.org.ua/index.php?id=1382426506> (last accessed: 29 December 2013).

⁷³⁹ §6 of the Joint Opinion on the Law on Peaceful Assemblies of Ukraine by the Venice Commission and the ODIHR of 19 October 2010, Opinion no. 592/2010, ODIHR Opinion Nr.: FOA –UKR/168/2010 (MA), available at: <http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD%282010%29033-e> (last accessed: 15 November 2013).

Poland

by Maria Stożek

1. Legal bases

In Poland freedom of assembly is regulated in Art. 57 of the Constitution: “The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute.”⁷⁴⁰

According to the Law on Assemblies,⁷⁴¹ an assembly is a gathering in which at least 15 persons participate, in order to confer over something or with an aim to express their position. The right to organize assemblies is granted only to persons who have full capacity to legal acts, to legal persons, other organizations, as well as groups of persons. Everybody, except persons carrying a gun, explosive materials, pyrotechnic materials, hazardous fire materials or other dangerous tools, can participate in an assembly.

2. Scope of the guarantee

Polish **administrative courts** generally assert that the freedom of assembly is of such fundamental constitutional value that the authorities dispose of very limited discretion in prohibiting an assembly.⁷⁴² Similarly, the Polish **Supreme Court** found that a decision of prohibiting an assembly should be based on provisions that guarantee freedom of assembly, and not merely on the rights and freedoms of other persons.⁷⁴³

The Polish **Constitutional Court** found that “[f]reedom to organize assemblies means in particular to ensure the freedom to choose the time and place of the assembly, the form of expressing views and freedom in setting the agenda of an assembly. Freedom to participate in assemblies includes also the freedom to refuse to participate in an assembly”.⁷⁴⁴

In Poland there was an incident of prohibiting, for ideological reasons, a gay pride parade (“Equality Parade”) in Warsaw in June 2005, which was brought before the ECtHR in *Bączkowski and Others v. Poland*.⁷⁴⁵ A group planned to hold a march and several assemblies to draw society’s attention to the situation of various groups of persons who were discriminated against, especially gays and lesbians. The assemblies were initially banned by the mayor of Warsaw who required submitting “a traffic organization plan”. The assemblies were held despite the ban and were protected by the police. Applicants filed an appeal arguing that the requirement to submit “a traffic organization plan” lacked a legal basis and the mayor’s decision was ideologically motivated. The Governor overturned the mayor’s decision. The ECtHR found that: “[T]he assemblies were held without a presumption of legality, such a presumption constituting a vital aspect of effective and unhindered exercise

⁷⁴⁰ The Constitution of the Republic of Poland as adopted by the National Assembly on 2nd April 1997 – Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. 1997, Nr 78 poz. 483 ze zm.), hereinafter: Constitution.

⁷⁴¹ Law on Assemblies of 1 August 1990 – Ustawa z dnia 5 lipca 1990 r. Prawo o zgromadzeniach (Dz.U. 1990, Nr 51, poz. 297 ze zm.), hereinafter: Law on Assemblies.

⁷⁴² See judgments of the Polish Supreme Administrative Court (I OSK 329/06, I OSK 1907/10, I OSK 448/11) and Polish Regional Administrative Courts (IV SA/Po 983/05, IV SA/Wr 216/08, IV SA/Po 888/09, VII SA/Wa 1856/10, VIII SA/Wa 78/09, III SA/Gd 68/11).

⁷⁴³ See judgments of the Polish Supreme Administrative Court (I OSK 329/06, I OSK 1907/10, I OSK 448/11) and Polish Regional Administrative Courts (IV SA/Po 983/05, IV SA/Wr 216/08, IV SA/Po 888/09, VII SA/Wa 1856/10, VIII SA/Wa 78/09, III SA/Gd 68/11), *supra* fn. 742. See also Polish Supreme Court Judgment of 5 January 2011 (III RN 38/00) where the President of the city T. prohibited an assembly based on the fact that it would constitute a nuisance for a group of residents of the house next to the place, where the assembly was planned to take place (residents protested against the place of the assembly). The President’s decision was supported *inter alia* by Art. 31 para. 2 of the Polish Constitution (“No one shall be compelled to do that which is not required by law.”).

⁷⁴⁴ See Judgment of the Constitutional Court of 28 June 2000, K 34/99, (OTK 2000, Nr 5, poz. 142).

⁷⁴⁵ *Bączkowski and Others v. Poland*, Application No. 1543/06, Judgment of 3 May 2007, violation of Arts. 11, 13 and 14.

of freedom of assembly and freedom of expression. The Court observes that the refusals to give authorization could have had a chilling effect on the applicants and other participants in the assemblies” (at 67).

In 2006, the Polish Constitutional Court also discussed the incident of banning the “Equality Parade”.⁷⁴⁶ The case was initiated by the Commissioner for Citizens’ Rights who challenged the requirement to obtain permission for an assembly that hinders road traffic or requires the use of a road⁷⁴⁷. The Commissioner argued that local authorities refused to grant permission for assemblies due to the failure to fulfill the requirements (e.g. in the case of the “Equality Parade”). At the same time, events of a religious nature do not require such permissions. The Court found that the reviewed provision placed different types of events on the same level, even though they are not of the same constitutional nature. Freedom of assembly is a fundamental political freedom, and therefore may not be subject to the same regulations as politically neutral events, such as the organization of athletic competitions, rallies, races. The legislator rightly noticed the difference between the latter and events of religious nature (such as processions, pilgrimages, funeral processions).⁷⁴⁸ However, the legislator had failed to account for the constitutional nature of the freedom of assembly. There are no grounds to differentiate between the statutory regulation of enjoyment of the constitutional freedom of conscience and religion (Art. 53 para. 1 and para. 2 of the Constitution) and the enjoyment of the constitutional freedom to organize peaceful assemblies (Art. 57 of the Constitution). The restrictions on freedom of assembly imposed by the Road Traffic Law were in breach of the requirement of proportionality and incompatible with the Constitution in so far as it applied to assemblies.

The Constitutional Court specified, “moral convictions of the public officials are not a synonym for „public morality” as a limitation to the freedom to assemble”.⁷⁴⁹ Similarly, the Supreme Administrative Court adjudicating the case of „Equality Parade” found that: “In the context of freedom of organizing peaceful assemblies, it is not the role of public administration or administrative courts to analyze slogans, ideas and concepts expressed at an assembly, that are in accordance to laws, by the prism of own moral convictions of public officials or judges adjudicating the case, or by the prism of convictions of the majority of the society. Such analysis would violate the constitutional freedom of assembly, and the Law on Assemblies”.⁷⁵⁰

⁷⁴⁶ See Judgment of the Constitutional Court of 18 January 2006, K 21/05 (OTK-A 2006, Nr 1, poz. 4).

⁷⁴⁷ According to Art. 65 of the Road Traffic Law of 20 June 1997 – Ustawa z dnia 20 czerwca 1997 r. Prawo o ruchu drogowym (Dz.U. z 2003 r. Nr 58 poz. 515 ze zm.) an assembly that creates difficulties in the road traffic or requires specific use of the road, may be held upon prior permission issued by authority, which manages traffic on the given road, and on condition of providing security and order during the whole time of the assembly (See Art. 65 of the Road Traffic Law: “Sports competitions, rallies, races, assemblies and other events that cause traffic problems or require a special use of the road may only be held if safety and order during the event have been secured and permission has been obtained for holding that event”).

⁷⁴⁸ Cf. CDL-AD(2009)035 Opinion on the Draft Law on Meetings, Rallies and Manifestations of Bulgaria, para. 14: “The (...) Law shall not apply to cultural and sport events, weddings, family and friendly celebrations, funeral rites, religious ceremonies (...). These exceptions are consistent with the idea of assemblies under Article 11 ECHR that does not include assemblies for social purposes.”

⁷⁴⁹ Cf. Judgment of the Constitutional Court of 28 June 2000, *supra* Fn. 744. The case was initiated by a group of Members of the Polish Parliament who claimed the Art.65 paras. 1-5 of the Road Traffic Act 1997 was inconsistent with the constitutional provisions of the freedom to organize peaceful assemblies. The applicants called to distinguish between organizing sporting and recreative events, on one hand, and events that involve exercising political and cultural rights, on the other. They alleged that the obligations as stipulated in the Art. 65 paras. 1-5 of the Road Traffic Act 1997 restrict the right of the less affluent members of society to organize such assemblies. The Tribunal found that regardless of the character of an event the road has to be prepared for the purpose of an assembly, and for the participants of the road traffic a substitute route should be ensured.

⁷⁵⁰ See Judgment of the Supreme Administrative Court of 25 May 2006, I OSK 329/06.

Because of the violent character of assemblies, there is a tendency to restricting the freedom to assemble. These restrictions include examples of prohibiting assemblies for fear of violence, suggestions of restricting anonymous assembly participation,⁷⁵¹ and suggestions to collect monetary deposits from organizers to secure the peaceful character assemblies.⁷⁵²

The Constitutional Court in 2004 disapproved restricting the anonymous participation in assemblies.⁷⁵³ The case was initiated by the President of the Republic of Poland, who requested primary review of an act prohibiting the organization of assemblies in which persons participate, whose appearance renders their identification impossible.⁷⁵⁴ The President alleged that these provisions failed to conform to the freedom of assembly as guaranteed by Art. 57 of the Constitution, read in conjunction with the principle of proportionality (Art. 31 para 3), and the principle of the rule of law (Art. 2). The Court found that the right of a demonstrator to remain anonymous presents an essential element of the content of the constitutional freedom of assembly. The Court observed that the prohibition also concerned persons who do not disturb the peaceful character of the assembly, but may not want to be identified for other reasons. Additionally, the Police Law provides the possibility for the police to determine the identity of persons participating in the assembly if a threat to its peaceful nature occurs.

Experiences with flashmobs

In Poland flashmob participants do not exercise the same rights as participants of an assembly, as they do not share an intention to participate at a public debate (e.g. flashmob in Krakow on 30 January 2011 when people “froze” after the sound of the trumpet signal from St. Mary’s towers⁷⁵⁵).

3. Restrictions

The municipality prohibits a public assembly if its goal or holding is incompatible with the Law on Assemblies or violates provisions of penal laws; or if the holding of an assembly may pose a substantial threat to the life or health of people or property of considerable value.

Art. 233 of the Constitution allows for limitation of the freedom of assembly in times of martial law and states of emergency, and during states of natural disaster. The limitations as a part of the extraordinary measures may be introduced only by a regulation, issued upon the basis of a statute, which regulates the principles of activity by organs of public authority as well as the degree to which freedoms and rights of persons and citizens may be subject to limitation for the duration of a period requiring any extraordinary measures, and which shall

⁷⁵¹ On wearing masks during the assembly see BODNAR A., (2008) *Shaping the Freedom of Assembly: Counter-Productive Effects of the Polish Road towards Illiberal Democracy*. In: SAJO, A. (ed) *Free to Protest: Constituent Power and Street Demonstration*. Utrecht: Eleven International Publishing, pp. 165-187.

⁷⁵² Regarding contemporary discussions on restrictions of assemblies in Poland see generally e.g. HFHR (2012) *Public hearing on the Assemblies Act*, [WWW]. Available at: <http://humanrightshouse.org/Articles/17770.html> (last accessed: 03 December 2013); HFHR (2012) *Poland: Appealing against a ban on an assembly* [WWW]. Available at: <http://humanrightshouse.org/Articles/18364.html> (last accessed: 03 December 2013); HFHR (2012) *32 non-governmental organisations has issued an open letter on the Assemblies Act* [WWW]. Available at: <http://humanrightshouse.org/Articles/18357.html> (last accessed: 03 December 2013).

⁷⁵³ See Judgment of the Polish Constitutional Court of 10 November 2004, Kp 1/04 (OTK-A 2004, Nr 10, poz. 105). Proposal of prohibiting demonstration of participants covering up their faces and the establishment of joint and several civil liability of the assembly organizer and perpetrator of any damage, gained parliamentary approval and took the form of the Assemblies and Road Traffic Amendment Act of 2004 that was challenged before the Court.

⁷⁵⁴ Cf. CDL-AD (2012)006 OSCE/ODIHR - Venice Commission Joint Opinion on Law on Mass Events in the Republic of Belarus, para. 108: “Article 11 further provides that people may not protect their identity by wearing masks. Such prohibition is in violation of the right to freedom of expression and also the right to personal identity, a person’s manner of appearance under Article 17 of the ICCPR and Article 8 of the ECHR respectively. As stated by the OSCE/ODIHR- Venice Commission Guidelines, “The wearing of a mask for expressive purposes at a peaceful assembly should not be prohibited, so long as the mask or costume is not worn for the purpose of preventing the identification of a person whose conduct creates probable cause for arrest and so long as the mask does not create a clear and present danger of imminent unlawful conduct”.

⁷⁵⁵ MAJ, W. (2011) *Flash Mob: Freeze - Kraków (Poland), 30.01.2011* [YOUTUBE] 30th January. Available at: <https://www.youtube.com/watch?v=izOGgrAmc4g> (last accessed: 03 December 2013).

additionally require to be publicized (Art. 228 of the Constitution). Propagating nazi, fascist or communist views is forbidden by the Constitution (Art. 13 of the Constitution).⁷⁵⁶

There are no limitations (other than procedural ones) concerning types of gatherings or places where the freedom of assembly can be exercised. Freedom of assembly may be subject to limitations only if those limitations are provided by law and are necessary for the protection of state security or public order or public health or public morality or rights and freedoms of other people. Moreover, according to the Law on the protection of the areas of the former Nazi Extermination Camps⁷⁵⁷, assemblies near the Monument of Extermination, require prior consent – through administrative decision – of a responsible Governor. The Governor refuses the consent if the assembly violates the Law on the protection of the areas of the former Nazi Extermination Camps, Law on Assemblies or the provisions of penal law; the holding of that assembly may pose a threat to the life or health of individuals or to property of considerable value, or if the purpose or fact of the holding of that assembly may disturb the dignity or nature of the Monument of Extermination. If the assembly is to be held in the neighborhood of an embassy, consular offices, or international organizations which enjoy diplomatic immunity, the municipality is obliged to notify the responsible Police commander and Ministry of Foreign Affairs. If the assembly is organized near the buildings which are under the protection of the Bureau for the Protection of the Government, the municipality informs the Chief of the Bureau for the Protection of the Government about the place, date, and the estimated number of participants.

4. Procedural issues

Notification

The organizer of an assembly is obliged to notify the relevant municipal council (*Rada Gminy*) about the planned gathering not earlier than 30 days and not later than 3 days before the date of the planned assembly. The notification should include: name, birth date, address of the organizer; name, birth date, address and photograph of the leader⁷⁵⁸; and name and address of a legal persona or other organization, if he is organizing assembly on its behalf; goal and agenda and language in which the participant of the assembly will communicate; place and date, exact hour of the beginning of an assembly, planned duration of an assembly, planned number of participants, planned route of march, description of measures, which ensure peaceful run of an assembly, and measures, which the organizer requests from the municipal authorities.

According to the Law on Higher Education,⁷⁵⁹ assemblies held in the buildings of universities require prior consent of the rector of the university. Organizers need to notify the rector no later than 24 hours before the planned start of that assembly.

Decision-making

The municipal council may decide that in certain areas, organization of an assembly does not require notification.

⁷⁵⁶ Cf. CDL-AD(2010)049 Interim Joint Opinion on the Draft Law on Assemblies of the Republic of Armenia, by the Venice Commission and OSCE/ODIHR, paras. 29-30: "(...) it is important to mention that events aimed to make public calls to war, to incite hatred towards racial, ethnic, religious or other groups, or for other manifestly bellicose purposes would be deemed unlawful and their prohibition would be justified in the light of the requirement to balance the freedom of assembly against other human rights, including the prohibition on discrimination. There is, however, a fine line between the degree of restriction necessary to safeguard other human rights, and an encroachment on the freedom of assembly and expression. The test is the presence of the element of violence. (...) In order for the Draft Law to be consistent with the Guidelines, the text should include the reference to the "element of violence" requirement".

⁷⁵⁷ Law on the protection of the areas of the former Nazi Extermination Camps of 7 May 1999 – Ustawa z dnia 7 maja 1999 r. o ochronie terenów byłych hitlerowskich obozów zagłady (Dz.U. 1999, Nr 41, poz. 412 ze zm.)

⁷⁵⁸ Each assembly has a leader who is responsible for the lawful conduct of the assembly. A leader may be the organizer of the assembly.

⁷⁵⁹ Law on Higher Education of 27 September 1990 – Ustawa z dnia 12 września 1990 r. o szkolnictwie wyższym (Dz. U. 1990, Nr 65, poz. 385 ze zm.)

Review and appeal

The decision on prohibition of an assembly issued by a municipality may be appealed to the Governor (*wojewoda*) and complaints about decisions on assemblies are filed directly to the administrative court.

5. Specific forms of assemblies

Spontaneous assemblies

The Law on Higher Education is the only Polish statutory law that mentions an “urgent” assembly: in urgent cases, the rector may accept a shorter notice. In Poland, holding an assembly without prior notification is penalized (Art. 52 para 1(2) of the Code of Contraventions⁷⁶⁰). This penalization was challenged before the Constitutional Court.⁷⁶¹ The Court found that penalization was in accordance with the constitutional freedom of assembly. At the same time, the Court observed that “the assembly that was not registered (without notification) cannot be identified as illegal”⁷⁶², and therefore spontaneous assemblies have the same constitutional protection as those that were planned and organized after notification. It is the court's responsibility to determine whether in concrete circumstances there was a possibility of notification. Similarly, the ECtHR found in *Skiba v. Poland*⁷⁶³ that “(...) the obligation [of notification] on the applicant under domestic law could not be considered an excessive or unreasonable requirement capable of surreptitiously restricting his right to freedom of peaceful assembly” and “applicant's criminal conviction did not appear disproportionate to the legitimate aims pursued”.⁷⁶⁴

Assemblies gathered by means of new technologies

Recently gatherings called up by means of new technologies have been discussed in Poland, after a case of a gathering of an entertaining character organized on 27 April 2013 through social media – “Facebook” – in Zakrzówek. Around 22,000 people gathered at one spot, and as a result several participants were injured. Organizer Anna K. is currently facing charges for organizing a mass gathering without permit⁷⁶⁵).

Counter-demonstrations

The municipality might summon the organizer of the assembly to amend the time and place of the assembly or the walking route of the participants if notifications for assemblies coincide.⁷⁶⁶ If the organizer fails to conform, the municipality prohibits an assembly. The Polish Constitutional Court in 2006 pointed out that the risk of a counter-demonstration

⁷⁶⁰ Code of Contraventions of 20 May 1971 – Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń (Dz. U. z 2007 r. Nr 109, poz. 756 ze zm.), hereinafter: Code of Contraventions.

⁷⁶¹ Judgement of the Polish Constitutional Court of 10 July 2008, P 15/08 (OTK 2008, Nr 6, poz. 105). For the background of this case see BODNAR A., *supra* fn. 751, pp. 165-187.

⁷⁶² Cf. *Bukta and Others v. Hungary* (Application No. 25691/04).

⁷⁶³ See ECtHR, *Skiba v. Poland*, Application no. 10659/05, decision of 7 July 2009 (*inadmissible*), where the Court examined imposition of a fine for presiding over a peaceful meeting without giving prior notice to the authorities. The applicant organized a spontaneous peaceful assembly before an art gallery against defamation of religion at an exhibition. Applicant was fined for organizing a public meeting without notifying the authorities.

⁷⁶⁴ Cf. CDL-AD(2009)034 Joint Opinion on the Draft Law on Assemblies of the Kyrgyz Republic by the Venice Commission and OSCE/ODIHR, para. 36: “Spontaneous assemblies by definition are not notified in advance since they generally arise in response to some occurrence which could not have been reasonably anticipated”.

⁷⁶⁵ INSIDE POLAND (2013) *Woman faces eight years in jail for organizing ‘illegal’ party via Facebook*, [WWW]. 7th November. Available at: <http://inside-poland.com/t/woman-faces-eight-years-in-jail-for-organising-illegal-party-via-facebook/> (last accessed: 03 December 2013).

⁷⁶⁶ Cf. CDL-AD(2005)007 Opinion on the Draft Law making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia, para. 20: “The right to counter-demonstrate should only be limited in connection with genuine security or public order consideration.”, CDL-AD(2010)049 Interim Joint Opinion on the Draft Law on Assemblies of the Republic of Armenia by the Venice Commission and OSCE/ODIHR, para. 25: “Whilst the right to counter-demonstrate does not extend to inhibiting the right of others to demonstrate, an “imminent danger of a clash” should not necessarily be a reason for prohibiting one of the assemblies from taking place at the same time and in the same vicinity. Emphasis should be placed on the state's duty to protect and facilitate each event and the state should make available adequate policing resources to facilitate both to the extent possible within sight and sound of one another”.

should not lead to the prohibition of a peaceful assembly, even if there is a serious threat to public order.⁷⁶⁷

6. Implementing freedom of assembly legislation

Pre-event planning

The notification of an assembly includes information about measures, which the organizer requests from the municipal authorities.

Costs

There are no fees for organizing an assembly in Poland.

No strict liability of the organizers

In 2004, the Constitutional Court disapproved strict liability of assembly organizer.⁷⁶⁸ The Court found that the provision stating, “the assembly organizer and perpetrator of damage shall be held jointly and severally liable for any damage committed by a participant in the course of an assembly or directly following its dissolution” lacks specificity and legal certainty. The Court noted that even the utmost diligence of the assembly organizers would not preclude their liability. Such a provision might discourage potential assembly organizers.

Use of force by the police

Poland is currently challenged with the problem of extremists joining assemblies or counter-demonstrations, and ensuing violence.⁷⁶⁹ Even though the main responsibility for the safety stays with the organizer of the event, the police may ensure peace in public places during the assembly, according to the Police Law. The police can restore public order when the assembly is illegal, the assembly was disbanded by its leader or a municipality, in the situation, when its continuation constitutes a threat for the life or health of people⁷⁷⁰ or to property, or when the assembly disturbs the regulations laid down in the Law on Assembly or the regulations of the penal provisions, when the gathering refuses to disperse.

7. Securing government accountability

Liability and accountability of law enforcement personnel

In case of exceeding its prescribed competences, the police officer bears a disciplinary and a criminal responsibility.⁷⁷¹ (For example in May 2013, the police officer Andrzej C. was found guilty and sentenced for attacking Daniel K., participant of an assembly during the Polish Independence Day of 11 February 2011⁷⁷²).

⁷⁶⁷ See Judgment of the Constitutional Court of 18 January 2006, *supra* fn. 746.

⁷⁶⁸ See Judgment of the Polish Constitutional Court of 10 November 2004, *supra* fn. 753.

⁷⁶⁹ See e.g. recent assemblies on Polish Independence Day turned violent: RADIO FREE EUROPE (2013) *Moscow Demands Apology From Poland Over Embassy Violence* [WWW]. Available at: <http://www.rferl.org/content/russia-poland-tension-diplomacy-nationalism/25165359.html> (last accessed: 03 December 2013); BBC (2012) *Poland Independence Day march turns violent* [WWW]. Available from: <http://www.bbc.co.uk/news/world-europe-20286409> (last accessed: 03 December 2013).

⁷⁷⁰ Police Law of 6 April 1990 – Ustawa z dnia 6 kwietnia 1990 r. o Policji (Dz.U. 1990, Nr 30, poz. 179 ze zm.).

⁷⁷¹ Cf. CDL-AD(2009)052 Joint Opinion on the Order of Organising and Conducting Peaceful Events of Ukraine by the Venice Commission and OSCE/ODIHR, para. 71: “International standards require that law enforcement officials should use force only as a last resort, in proportion to the aim pursued, and in a way that minimizes damage and injury. While it is not indispensable for the provision, a reference to liability for unlawful or excessive use of force by law enforcement bodies might be beneficial, though such liability is necessarily already contained in laws governing conduct of officials”.

⁷⁷² GAZETA WYBORCZA (2013) *Policjant skazany za pobicie uczestnika Marszu Niepodległości. "Bił z furją i agresją"* [WWW]. Available at: http://wyborcza.pl/1,75478,13956681,Policjant_skazany_za_pobicie_uczestnika_Marszu_Niepodleglosci_.html (last accessed: 03 December 2013).

Monitoring

The **NGO that monitors freedom of assembly** in Poland is Helsinki Foundation of Human Rights with a program: "Observation of Public Assemblies in Poland" ([WWW] <http://programy.hfhr.pl/zgromadzenia/about-project/>).

Media access

In Poland public assemblies are largely covered by the representatives of the media, and there is no independent provision on media coverage of public assemblies.

8. Conclusions and outlook

Poland currently faces several challenges regarding the freedom of assembly. The first pertains to how to properly balance the constitutional freedom to assemble with the need to appropriately respond to assemblies that might lose their peaceful character. There is the **tendency to limit the application of the guarantee** to assemblies that are unlikely to turn violent.⁷⁷³

Another problem is the **reaction of Polish local authorities** to assemblies that do not comply with their **ideological beliefs** (e.g. in the case of "Equality Parade"⁷⁷⁴), even though Polish laws fall within the "notification" scheme, rather than requiring an authorization. It is established case law that the banning of assemblies cannot be based on the moral convictions of public officials or judges.⁷⁷⁵

In Poland, spontaneous assemblies are not specifically regulated.⁷⁷⁶ They are protected by the constitutional guarantee of the freedom of assembly as long as they are truly spontaneous and the purported spontaneity is not a circumvention of the notification requirement. In that case, organizers of unnotified, not spontaneous assemblies face a penalty up to 14 days of imprisonment.⁷⁷⁷ However, if an assembly truly formed spontaneously in relation because spontaneous protest to a current event arose so that the character of the assembly would have been changed or the assembly would not have taken place altogether if postponed, courts accept these events and desist from penalization. A shorter period of notification for spontaneous assemblies (currently it is three days before the assembly), including the possibility of using non-formal means of communication (phone/fax/email), would improve this somewhat unclear situation.

⁷⁷³ Cf. CDL-AD (2010)050 OSCE/ODIHR - Venice Commission Joint Opinion of Draft Law on Peaceful Assemblies of the Kyrgyz Republic, para. 19: "The OSCE/ODIHR and the Venice Commission, would like to note, that since that time, in their assessment of legislation on freedom of assembly, they have recommended, in relation to laws relating to assembly that they have examined, that the title be "law on freedom of assembly". By removing the term "peaceful", legislation acknowledges and covers not only peaceful assemblies, but also addresses the cases where assemblies are not peaceful, or degenerate into non-peaceful assemblies. Ideally therefore, the title of the law should be amended to "Law on Freedom of Assembly", CDL-AD(2012)007 Opinion on the Federal Law on assemblies, meetings, demonstrations, marches and pickets of the Russian Federation, para. 37: "The Venice Commission agrees, in general, that provision for a timeframe for the notification of public events may be helpful as it enables the authorities to take reasonable and appropriate measures in order to guarantee their smooth conduct. It recalls however that there may be cases in which a public event is organized as an urgent or spontaneous response to an unpredicted event, in which case it may not be possible to respect the ordinary timeframe for notification. Spontaneous and urgent assemblies are protected by Article 11 ECHR".

⁷⁷⁴ On this topic see mostly BODNAR A., *supra* Fn. 751, pp. 165-187. See also GRAFF, A. (2006) We Are (Not All) Homophobes: A Report from Poland. *Feminist Studies*, 32 (2), p. 436 (who argues that decisions of Warsaw mayor Lech Kaczynski, who banned gay rights marches in 2004 and 2005, were not arbitrary, but were well-planned moves in his political career), and for an overview see GRUSZCZYNSKA, A. (2006) Living La Vida Internet. Some Notes on the Cyberization of Polish LGBT Community. In: KUHAR, R., TAKACS, J. (eds.) *Beyond the Pink Curtain: Everyday Life of LGBT People in Eastern Europe*. Peace Institute, pp. 95-115. Available format: http://www.policy.hu/takacs/books/isbn9616455459/pdf/peace-mirror/07_Gruszczyńska.pdf (lastAccessed 03 December 2013).

⁷⁷⁵ See Judgment of the Constitutional Court of 18 January 2006, *supra* Fn. 746 and Judgment of the Supreme Administrative Court of 25 May 2006, *supra* fn. 751.

⁷⁷⁶ The only exceptions are urgent assemblies held in the buildings of universities.

⁷⁷⁷ See e.g. *Skiba v. Poland*, *supra* fn. 763.

Serbia

by Friederike Ziemer

1. Introduction

Freedom of Assembly in Serbia presents an interesting case in so far as the constitutional right is **not defined as a human, but as a citizen's right**. This distinction is criticised by international organizations;⁷⁷⁸ however, it is undisputed in Serbia. The focus of public debate on human rights in Serbia does not lie on Freedom of Assembly, which can be seen by the merely marginal mentioning of this topic in human rights reports. Nevertheless, Freedom of Assembly has been an issue during the last years because of the various bans of Belgrade [Gay] Pride Parades which have been criticized by the public in Serbia as well as by numerous international organizations. Violent counter-demonstrations remain a problematic issue for many assemblies held by minority groups.

Furthermore, the **Public Assembly Act** which governs Freedom of Assembly is in itself controversial for reasons discussed below.⁷⁷⁹ Its **constitutionality has been disputed** and it might have to be altered in the near future which could lead to important improvements in the handling of the Freedom of Assembly.

2. Legal bases and scope of the guarantee

Freedom of Assembly is guaranteed in Art. 54 of the Serbian Constitution which reads as follows: "Citizens may assemble freely. Assembly held indoors shall not be subjected to permission or registering.

Gathering, demonstrations and other forms of assembly held outdoors shall be reported to the state body, in accordance with the law. Freedom of assembly may be restricted by the law only if necessary to protect public health, morals, rights of others or the security of the Republic of Serbia.

The interpretation of Freedom of Assembly is further laid out in the Public Assembly Act⁷⁸⁰ (henceforth PAA).

The Constitutional Court interprets Freedom of Assembly under Art. 54 of the Serbian Constitution as protecting the freedom of citizens to assemble peacefully.⁷⁸¹ It clarifies that an assembly is peaceful when its participants plan a peaceful gathering, notwithstanding the fact that violent reactions by others are likely to occur.⁷⁸² Where restrictions to this freedom are concerned, it is, however, mostly reluctant to declare them as a violation of the Freedom of Assembly. For example, the Constitutional Court decided that restrictions on time and location of an assembly do not violate the Freedom of Assembly.⁷⁸³ Furthermore, it gives the local authorities a lot of leeway in determining whether or not an assembly should be banned. The ban of an assembly for reasons under Art. 11 (1) PAA is not examined with a high level of scrutiny; the Constitutional Court usually determines only whether the local authorities decided arbitrarily.⁷⁸⁴ Therefore, the ban of an assembly by the organization "women in black" has been held to violate the Freedom of Assembly because the decision to ban the assembly lacked a sufficient statement of reasons.⁷⁸⁵ A violation of the Freedom of

⁷⁷⁸ Venice Commission, Opinion on the Constitution of Serbia, Opinion No. 405/2006, pp. 9-10.

⁷⁷⁹ Cf. Venice Commission and OSCE/ODIHR, Joint Opinion on the Public Assembly Act of the Republic of Serbia, Opinion No. 597/2010.

⁷⁸⁰ Official Gazette RS Nos. 51/92, 53/93, 67/93, 17/99, 33/99, 48/94, Official Gazette FRY No. 21/2001, Official Gazette RS Nos. 29/2001, 101/2005.

⁷⁸¹ Decision Уж-5284/2011 of 18 April 2013; Decision ИЗ-204/2013 of 30 May 2013, *supra* fn. 790.

⁷⁸² Decision Уж-4078/2010 of 29 February 2012.

⁷⁸³ Decision ИY-201/2004 of 7 October 2004, *supra* fn. 783.

⁷⁸⁴ Cf. Decision Уж-5284/2011 of 18 April 2013, *supra* fn. 781.

⁷⁸⁵ Decision Уж-4078/2010 of 29 February 2012, *supra* fn. 782.

Assembly has also been seen in the insufficient possibility of organizers to contest the local authorities' decision on a ban. The Constitutional Court stated that this violated the organizers' right to judicial protection under Art. 22 (1) and their right to a legal remedy under Art. 36 (2) of the Serbian Constitution amounting also to a violation of their Freedom of Assembly.⁷⁸⁶

When interpreting the Freedom of Assembly, the Constitutional Court is reluctant to make many references to ECtHR case-law which might be because the ECtHR has yet to rule on Serbian cases concerning Freedom of Assembly. Nevertheless, both parties arguing that their Freedom of Assembly has been violated and the Constitutional Court frequently cite not only the guarantee as found in Art. 54 of the Serbian Constitution, but also Art. 10 ECHR.⁷⁸⁷ Furthermore, the Constitutional Court has cited ECtHR case-law when deciding on the ban of radical organizations.⁷⁸⁸ In these decisions, the radical organizations' violent reactions to peaceful assemblies are cited as a further ground for establishing the unconstitutionality of said organizations.⁷⁸⁹

A recent important development can be seen in the Constitutional Court's decision of 30 May 2013: With this decision, the Constitutional Court initiated a procedure under Art. 168 (1) of the Serbian Constitution in order to assess whether the PAA is compatible with Art. 54 of the Serbian Constitution.⁷⁹⁰ It expressed concerns that the grounds for a temporary ban as expressed in Art. 9 (1) PAA which depend on the purpose of an assembly are not expressly provided for in Art. 54 of the Serbian Constitution. It also stated that the type of legal restrictions may have to depend on the reasons for restrictions; this particular concern might be interpreted as an attempt to include the criterion of proportionality for restrictions. Further concerns expressed in the Constitutional Court's decision are related to the legal remedies organizers have in order to contest a ban of an assembly, namely in relation to the time in which a court decision can be obtained since under the current law, the decision might only be delivered after the scheduled beginning of the assembly. Finally, the current praxis of allowing local authorities to designate locations adequate for public assemblies is contested, since it might be necessary to allow assemblies in all locations except when constitutionally defined reasons for a restriction of the Freedom of Assembly are apparent.

3. Restrictions

Freedom of Assembly is firstly restricted by the Serbian Constitution in so far as only peaceful assemblies of citizens are protected.⁷⁹¹ Further restrictions are set out by the definitions set out in Arts. 2 and 3 PAA and assemblies that have been registered can be restricted due to the reasons listed in Arts. 9 and 11 PAA.

Art. 2 (1) PAA defines public assemblies under the PAA as the organization and holding of a meeting or other type of gathering in a location adequate for the purpose. Therefore, Freedom of Assembly is guaranteed merely in locations adequate for public assemblies under Art. 2 (2), (3) PAA. These locations are designated by municipality or city regulations under Art. 2 (8) PAA (see e.g. for Belgrade: Decision on Determining the Area for Assemblies of Citizens in Belgrade⁷⁹²).

Furthermore, Freedom of Assembly can be restricted in regard of the time assemblies can be held: According to Art. 2 (6) PAA, assemblies in a location in which public transport takes place may only be held between 8 a.m. and 2 p.m. and between 6 p.m. and 11 p.m. with a maximum duration of three hours. Also, under Art. 2 (4) PAA, assemblies may not be held in

⁷⁸⁶ Decision Уж-5284/2011 of 18 April 2013.

⁷⁸⁷ Cf. Decision IY-201/2004 of 7 October 2004, *supra* fn. 783; Decision VIIY-249/2009 of 12 June 2012.

⁷⁸⁸ Decision VIIY-279/2009 of 17 March 2011; Decision VIIY-249/2009 of 12 June 2012, *supra* fn. 787.

⁷⁸⁹ *Ibid.*

⁷⁹⁰ Decision IY3-204/2013 of 30 May 2013.

⁷⁹¹ Cf. Constitutional Court, Decision Уж-5284/2011 of 18 April 2013, *supra* fn. 781; Decision IY3-204/2013 of 30 May 2013, *supra* fn. 790.

⁷⁹² Official List of the City of Belgrade No. 13/97.

the vicinity of the Federal Assembly and the National Assembly of the Republic of Serbia immediately before and during sessions. This particular provision has been contested before the Constitutional Court which upheld it, stating that the provision ensures the conditions or undisturbed activities of the National and Federal Assemblies and does not prevent Freedom of Assembly since assemblies can be held either at another place or at another time.⁷⁹³

Moreover, under Art. 3 (2) PAA, assemblies that move from one location to another (public processions) may only be held in an uninterrupted motion, i.e. the assembly may only halt at the start and finishing points of the procession.

While Arts. 2 and 3 PAA define the term of public assembly protected under the PAA, Arts. 9 (1) and 11 (1) PAA list grounds for the temporary and final ban of assemblies.

A temporary ban under Art. 9 (1) PAA shall be issued if the assembly in question is directed toward violent changes of the constitutional order, violation of territorial integrity and the autonomy of the Republic of Serbia, a breach of human or civil rights and freedoms guaranteed by the Constitution or the provoking or inciting of national, racial or religious animosity or hatred.

Assemblies may be banned under Art. 11 (1) PAA in order to prevent an obstruction of public transport or threats to health, public moral or the safety of persons and property. These reasons are seen to correspond with the grounds for restriction as defined in Art. 54 of the Serbian Constitution.⁷⁹⁴

A further restriction has been introduced by a 2009 law prohibiting assemblies by neo-Nazi and fascist organizations and associations.⁷⁹⁵

4. Procedural issues

Notification

Public Assemblies have to be notified by the organizers under Arts. 4, 6 PAA. According to Art. 6 (1) PAA, the notification has to be submitted to local organizational units adjacent to the Ministry of Interior at least 48 hours before the scheduled beginning of the assembly. If the assembly is scheduled to take place in a location where public transport takes place, the notification has to be submitted at least five days prior to the assembly.

Art. 6 (4) PAA lays down the required content of the notification which covers program and purpose of the assembly, location, time and duration, estimated number of participants and information on the measures taken by the organizer for the purpose of maintaining order. If the organizer fails to include relevant information, he is warned by the authorized body to complete the application; according to Art. 7 (2) PAA, the assembly is only regarded as notified after the submission of a complete form.

Reported assemblies do not have to be authorized; however, they can be banned or temporarily banned, of which the organizer has to be informed at least 12 hours before the scheduled beginning of the assembly under Art. 9 (2) or Art. 11 (2) PAA.

Decision-making

The decision whether a complete application has been filed and whether an assembly should be banned or temporarily banned lies with organizational units of the Ministry of Interior. These units are dispersed throughout Serbia and organizers have to address the organizational units responsible for the territory in which the assembly is to be held. If the organizational unit deems an application to be incomplete, it will set a time period for the

⁷⁹³ Decision IY-201/2004 of 7 October 2004, *supra* fn. 783.

⁷⁹⁴ Constitutional Court, Decision IY3-204/2013 of 30 May 2013, *supra* fn. 790.

⁷⁹⁵ Law Prohibiting the Holding of the Manifestations of Neo-Nazi and Fascist Organisations and Associations and Using the Neo-Nazi or Fascist Emblems and Designations, Official Gazette of RS No. 41/09.

completion of the application under Art. 7 (1) PAA. If a change of the contents of the application is submitted, it will be considered as the submission of a new application according to Art. 7 (3) PAA. This new application also has to be filed within the time period discussed above.⁷⁹⁶

A temporary ban of an assembly for reasons listed in Art. 9 (1) PAA has to be announced to the organizer by the organizational unit not later than 12 hours before the scheduled beginning of the assembly. Also within this time period, the organizational unit has to submit a substantiated claim to the competent district court which will decide on the banning of the assembly.

If the organizational unit decides to ban an assembly under Art. 11 PAA, it also has to inform the organizer at least 12 hours before the scheduled beginning of the assembly. Possible complaints against the ban do not delay its execution.

Review and appeal

All temporary bans on assemblies have to be decided on by a County Court. The procedure for such hearings is set out in Art. 10 PAA: The hearing has to be held within the 24 hours upon receiving the claim by the organizational unit. It can be held even in absence of the summoned parties. The County Court will decide to either annul the decision on the temporary ban or to ban the assembly.

The same procedure applies if an assembly is terminated because grounds for the temporary ban of an assembly arise in the course of the assembly. In this case, under Art. 12 (4) PAA, the competent district court has to decide on the ban of the terminated assembly within 12 hours after its termination.

Complaints against the decision to ban an assembly can be lodged within 24 hours after receiving the decision. According to Art. 10 (6) PAA, a panel of three judges of the Supreme Court decides on the complaint within 24 hours upon its receipt.

5. Specific forms of assemblies

Spontaneous assemblies

Spontaneous Assemblies are not permitted under the PAA which does not provide for any exceptions to the application period of at least 48 hours. Moreover, under Art. 14 PAA, assemblies which are not properly applied for shall be prevented by the authorized body and measures shall be taken to re-establish public order and peace. According to Art. 15 No. 1 PAA, the organizer of an assembly without previous application may also have to pay a monetary fine or be imprisoned for up to 60 days.

Nevertheless, spontaneous assemblies and even processions have taken place. For example, after the recent ban of the 2013 Belgrade Pride Parade, LGBTI organizations spontaneously held a midnight march with about 250 participants from the government building to the parliament building. The participants were protected by police officers rushing to the scene who did not dissolve the assembly.⁷⁹⁷

Counter-demonstrations

Counter-demonstrations constitute an issue mainly where the safety of an assembly is concerned. They often form without prior registration and have on occasion led to violence against the original assembly. This has been problematic in the prominent case of the 2010 Belgrade Pride Parade when several thousand counter-demonstrators attacked the

⁷⁹⁶ See above, 5. Procedural Issues – Notification.

⁷⁹⁷ The European Parliament's Intergroup on LGBT Rights, 30 September 2013, <http://www.lgbt-ep.eu/press-releases/belgrade-pride-banned-for-third-year-sends-wrong-signal-for-accession-meps-say/> (last accessed: 10 March 2014).

assembly,⁷⁹⁸ but also other organizations suffer from violent counter-demonstrators. Therefore, assemblies are sometimes banned with reference to a threat to personal safety after violent organizations announce counter-demonstrations.⁷⁹⁹

LGBTI rights/prohibition of Gay Pride Parades

LGBTI rights are the most controversial topic related to Freedom of Assembly in Serbia. Belgrade Pride Parades have been scheduled to take place over the last years; however, only the 2010 Pride Parade was held whereas the parades in 2009, 2011, 2012 and 2013 were either banned or, as in the case of the 2009 parade, their location was changed shortly before the scheduled beginning of the assembly which amounted to a de facto ban of the event.⁸⁰⁰ In the course of the 2010 parade, participants were kept safe due to heavy police protection, but the event nevertheless escalated due to violent reactions by spectators, resulting in physical injuries of 150 police officers and members of the public, damage to the public infrastructure amounting to over 1 Million € and 250 arrests.⁸⁰¹ In 2013, although the parade was once again banned, a Belgrade Pride Festival could be held.⁸⁰² Before the parades could take place, there have always been threats by right-wing associations and therefore, the Ministry of Interior argues that the parades constitute a high security risk and even a heavy police escort of 6,500 to 7,000 officers in full protective gear would be unable to prevent an escalation of violence.⁸⁰³

6. Implementing Freedom of Assembly Legislation

Pre-Event Planning with Law Enforcement Officials (Freedom of the Organizer to Arrange Freely (with Respect to Location, Form...)), Dynamic Concept of Organizer

The freedom of the organizer to arrange freely with respect to location and form of the assembly is not guaranteed under Serbian law. As stated above, arrangements of the organizer can be severely restricted under the PAA.⁸⁰⁴ Furthermore, the Constitutional Court decided that restrictions on time and location of an assembly do not violate Freedom of Assembly.⁸⁰⁵

Costs

The costs for ensuring the safety of the participants and other citizens are covered by the Ministry of Interior. However, according to Art. 4 (2) PAA, if the organizer of an assembly wishes to hold the assembly in a location in which public transport takes place, he has to bear the costs incurred by temporary alteration of traffic and other costs incurred by an additional performance of public services. He is also responsible for maintaining order within the assembly.

Use of force by the police

Use of force is allowed within the limits of the Police Law⁸⁰⁶ in order to ensure the protection of the safety of persons and property of the participants of the assembly and of other citizens, in order to maintain public order and peace, the safety of traffic or other activities

⁷⁹⁸ Freedom House, 2011 Report on Serbia, <http://www.freedomhouse.org/report/freedom-world/2011/serbia> (last accessed: 10 March 2014).

⁷⁹⁹ Cf. the several Belgrade Pride Parades, e.g. Constitutional Court, Decision Уж-5284/2011 of 18 April 2013, *supra* fn. 781; see also Decision Уж-4078/2010 of 29 February 2012, *supra* fn. 782.

⁸⁰⁰ On this last case see Constitutional Court, Decision Уж-1918/2009 of 22 December 2011.

⁸⁰¹ The European Parliament's Intergroup on LGBT Rights, 11 October 2010, <http://www.lgbt-ep.eu/news-stories/belgrade-pride-serbia-first-safe-pride-event/> (last accessed: 10 March 2014); 30 September 2011, <http://www.lgbt-ep.eu/press-releases/belgrade-pride-banned-meps-express-deep-regret/> (last accessed: 10 March 2014).

⁸⁰² European Commission, Serbia 2013 Progress Report, COM(2013) 700 final, p. 44.

⁸⁰³ See Ministry of Interior, Information on the Circumstances and Reasons that lead to the banning of Gay Parade "Pride 2012" from the Point of View and Field of Jurisdiction of the Ministry of Interior, available at <https://wcd.coe.int/ViewDoc.jsp?id=2065499> (last accessed: 10 March 2014).

⁸⁰⁴ See above, 4. Restrictions; cf. also Venice Commission and OSCE/ODIHR, Joint Opinion on the Public Assembly Act of the Republic of Serbia, Opinion No. 597/2010, *supra* fn. 779, p. 8.

⁸⁰⁵ Decision IY-201/2004 of 7 October 2004, *supra* fn. 783.

⁸⁰⁶ Official Gazette RS No. 101/2005.

related to secure the assembly. Furthermore, use of force can be applied under Arts. 12 (2) and 14 PAA in order to terminate assemblies that are either banned or not registered and to re-establish order and peace.

Liability of organizers

According to Art. 15 PAA, organizers are liable for failing to maintain order in the assembly, i.e. not organising a monitoring service, for gathering citizens without an application, for holding an assembly regardless of a ban issued under Arts. 9 (1) or 11 (1) PAA or for not terminating an assembly when so instructed under Art. 12 (1) PAA. In these cases, a monetary fine of a maximum of 10,000 – 500,000 Dinars (depending on whether or not the organizer is a legal entity) or imprisonment of up to 60 days are the penalty

7. Securing governmental accountability

Liability and accountability of law enforcement personnel

Law Enforcement Personnel can be held accountable for a violation of participants' rights. Under Art. 180 Police Law, everyone can file a complaint to the Ministry of Interior, whereupon Internal Affairs will initiate a complaint resolution procedure.⁸⁰⁷ After receiving a notice of the outcome of said procedure, the complainant may pursue the usual legal remedies to preserve his rights.

Monitoring

As follows from Art. 15 No. 1 PAA, monitoring the assembly falls within the maintaining of order in the assembly and is therefore a duty of the organizer. If the organizer fails to organize a monitoring service, he has to pay a monetary fine or can even be imprisoned for up to 60 days.

8. Conclusions and outlook

All in all, Freedom of Assembly is protected in Serbia. There are, however, numerous restrictions of the freedom which are not all compatible with its scope under Art. 10 ECHR. Nevertheless, important steps for the improvement of the legal protection of the Freedom of Assembly have been taken. The Constitutional Court's decision to initiate a procedure assessing the constitutionality of the Public Assembly Act in its entirety could well lead to the establishing of new rules concerning Freedom of Assembly.

The problems regarding LGBTI rights have been addressed. The government has established a new anti-discrimination agenda focusing also on police training in this matter.⁸⁰⁸ Furthermore, the ban of violent organizations by decisions of the Constitutional Court as well as the law banning neo-Nazi and fascist organizations will hopefully ensure that future events are less often cancelled due to security concerns.

⁸⁰⁷ The Complaint Resolution Procedure is then governed by the Complaints Procedure Regulation, Official Gazette RS No. 54/2006.

⁸⁰⁸ European Commission, Serbia 2013 Progress Report, COM(2013) 700 final, *supra* fn. 802, p. 45.

Hungary

by Orsolya Salát

1. *Legal bases*

Changing constitutional context: problematic constitutional text, uncertain continuity with previous constitutional jurisprudence

After the 2010 election, a new government backed by 2/3 of the Parliament, a constitution-amending majority, adopted a new constitution and hundreds of laws in many respects fundamentally rewriting the Hungarian legal order. The new 2012 constitution, entitled Fundamental Law, protects freedom of assembly in its para. (1) Art. VIII,⁸⁰⁹ when it spells out that “everyone has the right to peaceful assembly.” Paras. (2)-(5) of the same article regulate the right to freedom of association, including the right to form and join organizations, parties, and trade unions.

Some specificities of the constitutional text and recent constitutional developments will be mentioned at the outset, as some of them might question the assumption that fundamental rights and rule of law are guaranteed in Hungary nowadays.

Two general developments have to be noted regarding the relation of the old and the new constitution, including their interpretation. In 2012, the Constitutional Court of Hungary (HCC) ruled on the relation between its jurisprudence under the old constitution and the FL, that it will take into account its earlier reasoning unless the applicable FL provision contradicts or departs from the provision in the former constitution.⁸¹⁰ In case of substantively equivalent provisions, the HCC “shall provide justification not for following the principles laid down in previous jurisprudence but for departing from those principles.”⁸¹¹

However, since then the *Fourth Amendment to the FL* was adopted which “repealed” constitutional rulings handed down prior to the entry into force of the FL, though “without prejudice” to their legal effect.⁸¹² This questioned the status of the whole body of previous constitutional jurisprudence. The HCC reacted by reversing the previously cited approach, and claiming that the reference to previous case law in case of substantively equivalent provisions is still *possible*, but needs to be justified in detail. Earlier arguments, legal principles and established constitutional logic might be – though need not necessarily be – relied upon, if (i) the two constitutional texts are substantively overlapping, and this overlap is spoiled by (ii) neither different context in the FL, (iii) nor by that of the specific interpretative rules contained in the FL, (iv) nor by the particular circumstances of the case.⁸¹³ In the future, the influence of previous jurisprudence on the present one might loosen even further, as

⁸⁰⁹ The FL applies a mixed system of numbering. Paragraphs of the preamble – entitled National Avowal – are not listed, while the second part, entitled Foundations is divided into articles of the alphabet (Art. A, Art. B etc.). The third part, entitled Freedom and Responsibility (including a bill of rights, and, weirdly, of obligations), has its articles listed by Roman numbers (Art. I, Art II. Etc.), and the articles of the fourth part, entitled The State, come in Arabic numerals (Art. 1, Art. 2, etc.). The last part, i.e. the Closing provisions are simply numerically listed (1., 2., etc.), without having “articles”. To minimize the chances of confusion, this study will adhere to the original numbering, without an attempt of transforming it into some more commonly recognized system.

⁸¹⁰ Decision Nr. 22/2012 (V. 11.) AB, ABH 2012/2, 94, 97, as translated in Miklós Bánkuti, Tamás Dombos, Gábor Halmi, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, László András Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppele, Péter Sólyom, Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary, April 2013, available at: http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment4.pdf, p. 80, fn. 144 (last accessed: 10 March 2014).

⁸¹¹ *Ibid.*

⁸¹² Art. 19 of the Fourth Amendment to the FL, point 5 of the Closing and Miscellaneous Provisions, effective from 1 April 2013. In English translation available at : [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2013\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)014-e) (last accessed: 10 March 2014).

⁸¹³ Decision Nr. 12/2013. (V. 24.) AB.

judges elected solely with the votes of the current government parties⁸¹⁴ are now in the majority. This study cannot but take as starting point that previous case law will be understood to be still “valid”, “citable”, and having an at least persuasive authority.

As to the Fourth Amendment, it also has to be noted that it is threatening the rule of law and the basic rights protection in many other regards as well which might affect freedom of assembly. Just to refer to the Venice Commission’s observations, the measures included in the 4th Amendment “amount to a threat for constitutional justice”, it “endangers the constitutional system of checks and balances”, and, “is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics.”⁸¹⁵

A further general remark about the FL which affects the legal bases of freedom of assembly is the *general limitation clause* in Art. I para. (3)⁸¹⁶ which applies to all fundamental rights: The rules for fundamental rights and obligations shall be determined by special Acts. A fundamental right may be restricted to allow the exercise of another fundamental right or to defend [protect -- OS] any constitutional value to the extent absolutely necessary, in proportion to the desired [pursued -- OS] goal and in respect of the essential content of such fundamental right.

Finally, the FL also contains *interpretative rules*: the preamble, entitled ‘National Avowal’ and so-called ‘achievements of the historical constitution’ are mandatory guidelines in the interpretation of the FL as stipulated in para. (3) Art. R.⁸¹⁷ This might be rather problematic as the preamble reaffirms conservative value choices of the majority ethnic nation, and of Christianity, which in interpretation might endanger individual rights and rights of minorities. Achievements of the historical constitution might turn out to mean a restrictive understanding of rights as the concept is unclear and includes anti-constitutionalist traditions as well.

Specifically about the assembly guarantee, it has to be noted that the right to freedom of assembly precedes the right to freedom of expression, guaranteed in Art. IX. This order is quite unusual, if not unheard of in international comparison. Furthermore, it goes counter to the logic of constitutional interpretation which in Hungary – similarly to Germany, and in line with the ECtHR’s view that Art. 11 is *lex specialis* to Art. 10 – considers freedom of expression a mother right of communicative freedoms, among them freedom of assembly.⁸¹⁸

The Act on the Right to Assembly

On the statutory level, freedom of assembly in Hungary is guaranteed in Act III/1989 on the right of assembly (ARA in the following). It is a law which played a fundamental and symbolic role in the transition to democracy in 1989, but which also bears on itself signs of hastiness in its adoption and is considered partly too liberal, partly too restrictive by many in academia and the civil sphere, and gave rise to anomalies in application, most vividly during the 2006 riots and protests. This made the ombudsman conduct a large scale project examining the

⁸¹⁴ In one case with the support of the extreme right wing: <http://www.politics.hu/20130326/mps-in-secret-vote-approve-new-top-court-judge-endorsed-by-fidesz-jobbik/> (last accessed: 10 March 2014). But that will not affect the point here on the generally deferential approach of the new judges (except maybe one judge regularly) towards the current government.

⁸¹⁵ Conclusions 145-147 of OPINION ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) CDL-AD(2013)012 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e).

⁸¹⁶ In English translation available at: <http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf> (last accessed: 10 March 2014).

⁸¹⁷ “(3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution.” English translation available at: <http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>. (last accessed: 10 March 2014)

⁸¹⁸ E.g. Constitutional Court’s (HCC) Decision Nr. 55/2001. (XI. 29.) AB, ABH 2001, 442, 449.

right of assembly in practice.⁸¹⁹ Despite criticisms of the 1989 act, no new law on assemblies was adopted in the legislative rush of the last three years after the coming into power of Viktor Orbán as Prime Minister (which resulted in an unprecedented rewriting of basically every important piece of legislation in the range of several hundreds).

The previous constitution required the ARA to be adopted by the two-third majority of members of parliament present, but this requirement was abolished in the FL. Overall the number of issues requiring such entrenchment (renamed “cardinal laws”) increased in the new constitution (to the point that the Venice Commission found it might endanger democracy⁸²⁰), freedom of assembly belonging to the few issues where the earlier requirement of an enhanced majority was abandoned.

2. Scope of the guarantee

The scope of freedom of assembly has only changed in the text of the guarantee in the Fundamental Law in that Art. VIII does not contain a reference to the guarantee of free exercise of the right as it used to be from 1989 till 2012. However, the general rights provision in Art. I (1) stipulates that the protection of fundamental rights is the primary obligation of the state, i.e. as if the specific obligation to guarantee freedom of assembly would be now covered by the general duty to protect fundamental rights. Thus, freedom of assembly is logically interpreted the same way as before. Accordingly, the HCC stated in 2012 that statements in its previous jurisprudence on freedom of assembly are considered guidelines in the interpretation of the FL’s assembly provision.⁸²¹ However, there is no decision on freedom of assembly from after the Fourth Amendment “repealed” constitutional rulings handed down prior to the entry into force of the FL (see above), thus some uncertainties remain.

Peacefulness

Hungarian law only protects peaceful assemblies. The constitution itself does not explicitly ban wearing arms or similar devices at an assembly, but the ARA prohibits participants from wearing arms (shotgun or explosives) or other device capable of taking the life or assaulting of others if worn with the intent of threat or violence.⁸²² In such cases, police are entitled to disperse the assembly, just as when the assembly realizes a criminal offense or incitement to it, or it violates rights and freedoms of others.⁸²³

Narrow (or enlarged) notion of assembly

The jurisprudence, strongly under German influence, interpreted freedom of assembly as “part of freedom of expression of opinions in the broad sense, which guarantees the peaceful, common expression of opinion with regard to public issues. Constitutional protection is thus accorded to events aimed at participating at the public debate on matters political, which help gathering and distributing information on issues of public interest and their common expression.”⁸²⁴ Thus, an event qualifies as assembly when it affects a public matter, which depends on the expressed opinion’s “content, form and context.” The HCC embraces the so-called narrow (or maybe enlarged) concept of assembly in that it does not grant constitutional protection to events unrelated to public discussion, such as sport events.⁸²⁵

⁸¹⁹ HAJAS B. ed., Gyülekezési jogi projekt. (Országgyűlési Biztos Hivatala, Budapest 2009) [Project on the right to assembly. Office of the Parliamentary Commissioner, Budapest, 2009].

⁸²⁰ CDL-AD(2011)016 Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

⁸²¹ Decision 3/2013. (II. 14.) AB, [38], *supra* fn. 821.

⁸²² Art. 12 (2) in conjunction with Art. 15 b) ARA.

⁸²³ Art 14. ARA.

⁸²⁴ *Ibid.* at [39] referring to 55/2001. (XI. 29.) AB határozat, ABH 2001, 442, 449. *supra* fn. 818; 75/2008. (V. 29.) AB határozat, ABH 2008, 651, 662–663.

⁸²⁵ The latter would be the wide notion of assembly, advocated by Judge András Bragyova in his dissent to Decision 75/2008. (V. 29.) AB.

Choice of place, time, and circumstances

It belongs to the freedom of assembly of the individual to organize and participate in assemblies, including the choice of purpose, place, time, and of the circumstances of the assembly. Referring to ECtHR case law,⁸²⁶ the HCC emphasizes that the place of the assembly is also covered by the scope of the right, as the purpose of the assembly might be closely related to the place. For instance, the assembly might aim to recall events happened at that very place, or the place might have symbolic meaning.

Specifically, the ARA protects assemblies on any (i) “public area” (“közterület”), which includes roads, streets, squares and any area open to all without restrictions⁸²⁷ and also (ii) on private property if it is freely accessible for the public. This view is supported – according to the HCC – by Art. 21 ICCPR and Art. 11 ECHR, including their interpretation, and by the Venice Commission.⁸²⁸

The HCC indicated that the time frame during which an assembly might take place has its limits, however, this is not included in the law. In fact, demonstrators can circumvent the HCC decision by “rotating”.⁸²⁹

Types of assemblies protected

Constitutional practice and the ARA protect assemblies in any form, what is “peaceful gathering, procession, and protest”, i.e. both moving and stationary assemblies are covered, and regulated the same way. Even though constitutionally protected by either freedom of assembly, religion or at least by general freedom of action, some assemblies are exempted from the scope of the ARA. These are (i) assemblies regulated by the law on election procedure; (ii) religious rituals, events, and processions organized in a church or other place of worship; (iii) cultural and sport events; and (iv) family events are exempted from the scope of the ARA (Art. 3. ARA). Assemblies falling under (i) and (ii) are regulated less by other laws, those falling under (iii) more than assemblies under the ARA, and family events are as such not regulated at all.

2. Restrictions

Legitimate grounds for restrictions

At the constitutional level, the FL’s general limitation clause⁸³⁰ allows for restriction of fundamental rights in the interest of another fundamental right or constitutional value. A constitutional value corresponds to such usual legitimate aims like public order, public health, prevention of crime etc. The necessity-proportionality test in Hungarian constitutional law traditionally accorded more weight to competing fundamental rights than to such abstract values as public order. In the latter case, a stronger justification was required.⁸³¹ In case of communicative rights, including the right to assembly, the principle of content-neutrality allowed only “external limits” on the exercise of the right,⁸³² and by and large disallowed limits based on such vague and abstract notions like public order, or public morals, but this might change completely after the 4th Amendment.⁸³³

⁸²⁶ *Sáska against Hungary*, § 21, Appl. No. 58050/08, 27 November 2012 as referred to by Decision 3/2013. (II. 14.) AB at [40].

⁸²⁷ Art. 15 ARA.

⁸²⁸ The HCC refers to *Rassemblement Jurassien Unité v. Switzerland*, Appl. No. 8191/78, 10 October 1979, and to the Compilation of Venice Commission Opinions concerning Freedom of Assembly, Strasbourg, 04 October 2012, CDL(2012)014rev2, 2. at [42] Decision 3/2013. (II. 14.) AB, *supra* fn. 821.

⁸²⁹ This happened to the perpetuated few members demonstration in front of the headquarters of top managing organ of all Hungarian public media. See <http://mediamonitor.ceu.hu/2012/12/demonstration-outside-mtva-building-marks-a-year/> and <http://www.bbc.co.uk/news/world-europe-16354192> (last accessed: 10 March 2014).

⁸³⁰ See *supra* fn. 816.

⁸³¹ See, e.g., Decision Nr. 30/1992. (V. 26.) AB.

⁸³² 75/2008. (V. 29.) AB határozat, ABH 2008, 651, 667, *supra* fn 824.

⁸³³ See Miklós Bánkúti, Tamás Dombos, Gábor Halmi, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, László András Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppele, Péter Sólyom, Renáta Uitz, *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary*, (eds. Gábor

At the statutory level, the ARA regulates in more detail the possible restrictions. Among the “General provisions”, Art. 2. para. 3. of the ARA states that the exercise of freedom of assembly shall not realize a criminal act, or shall not incite others to commit a criminal act, and it shall not cause the violation of the rights and freedoms of others. Consequently, danger of criminal acts or threat of violation of rights and freedoms of others are legitimate grounds for police intervention, at least if the assembly is already ongoing. This latter ground (rights of others) is however considered to give too much discretion to police, and results in questionable application.⁸³⁴

Art. 12 states that the organizer is obliged to dissolve the assembly if the conduct of participants endangers the legality of the event, and order cannot be re-established otherwise. Although the text does not include imminence of the endangerment, the second condition ensures that the obligation imposed on the organizer is proportionate. If the organizer fails to dissolve the assembly under these circumstances, police are entitled to intervene.

Specific place and time restrictions

More specific restrictions are also regulated in the ARA which ought to be largely understood as content-neutral place restrictions. According to Art. 8, if the planned assembly (i) seriously endangers the undisturbed functioning of representative organs (parliament and local and municipal self-governing bodies) or courts; or (ii) traffic cannot be rerouted, police might ban the assembly at the time or place signalled in the notification.

There is thus no general ban on demonstrating at specific sites, for instance around parliament. The ombudsman is of the view that whether an assembly seriously endangers the functioning of parliament or courts needs to be assessed individually and in detail, taking into account the effect of the assembly on the functioning, and, if possible, having requested the opinion of a representative of the affected organ.⁸³⁵

Police practice diverges from this recommendation. For instance, a planned laser projection of a political slogan to the façade of parliament by a political movement was considered a “serious endangerment” without police having had assessed the circumstances in detail or asked the opinion of parliamentarians.⁸³⁶ In contrast, when members of the Hungarian Guard notified police that several persons will be “waiting in a non-demonstrative manner” in front of the Metropolitan Court (while the hearing on the dissolution of the Guard is ongoing), police remained passive, not reacting in any way to the notice. Later, police argued that the “waiting in a non-demonstrative manner” does not fall under the ARA, thus they were not competent to react to the notice, neither to examine if the event disturbed the functioning of the court.⁸³⁷

Halmai & Kim Lane Scheppele), *supra* fn. 810, available http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment4.pdf (last accessed: 10 March 2014).

⁸³⁴ Such as the ban of a one-hour event for it would endanger others’ “right to rest” HAJAS, B. *A gyülekezési jog egyes aktuális elméleti és gyakorlati kérdései, doktori értekezés*, PTE ÁJK (2012), 189.

⁸³⁵ Report of the Ombudsman OBH 5593/2008, <http://www.ajbh.hu/documents/10180/103448/200805593.rtf/6e63e634-9c5f-42b3-8b09-7953948b8b7a;jsessionid=DDEA9F48593DC8BAD7521441CFAAEA23?version=1.0> (last accessed: 15 November 2013).

⁸³⁶ *Ibid.*

⁸³⁷ The Ombudsman interprets rights and freedoms of others as including the undisturbed functioning of parliament and courts, thus an assembly can not only be banned in advance, but also dispersed if such a disturbance occurs. Police were of the view they lack the power to disperse an assembly for the reasons they are entitled to ban in advance. HAJAS, ed., *Project of the Ombudsman*, at 51-52.

The impossibility of rerouting traffic also often serves as ground for prior ban. Sometimes, however, this ground is used to cover up for other, content-based concerns. Recurring advance bans on the Budapest Pride,⁸³⁸ and a 2005 ban on demonstrating in front of the prime minister's residence⁸³⁹ are examples of that reasoning.

A series of openly content-based bans were issued in 2009 against 10 planned Rudolf Hess memorial marches,⁸⁴⁰ based on the general provisions of the ARA conceptualizing rights and freedoms of others and crime prevention as limits of freedom of assembly.

A further way to circumvent the narrow scope of the ARA is to recurrently disallow demonstration in "operational zones" imposed by police⁸⁴¹ or the Counter-Terrorism Centre,⁸⁴² despite almost consistent court reversals in such cases.⁸⁴³

A further technique preventing demonstrations at certain places came from the mayor of Budapest. *The local self-government of Budapest* issued a so called „public area use

⁸³⁸ The Budapest Pride was banned for alleged impossibility of diverting traffic in 2011, and, despite quick court reversal, the police banned the event again the following year, again reversed in court. See 39-41 in http://tasz.hu/files/tasz/imce/full_report_-_english.pdf (last accessed: 10 March 2014). Other marches, e.g., pro-government rallies on basically the same route were not banned, thus the ban was clearly viewpoint-discriminatory, too. (Cf. e.g. the so-called Peace March for Hungary, <http://www.bbc.co.uk/news/world-europe-16669498> (last accessed: 10 March 2014).) The Metropolitan Court found that this way police not only discriminated against, but even harassed Pride marchers because of their sexual identity. Decision of 16 January 2013 (not available), see <http://helsinki.hu/zaklato-modon-diszkriminalt-a-rendorseg-2012-pride> (last accessed: 10 March 2014).

⁸³⁹ Impossibility of rerouting traffic was the alleged reason to ban a few person demonstrating on the wide pavement in front of the residence of the prime minister on the afternoon of 24 December when there is no public transport. ECtHR found an evident violation of Art. 11. *Patyi v. Hungary*, Application no. 5529/05, Judgment of 7 October 2008.

⁸⁴⁰ See Hungary police ban neo-Nazi marches Aug. 12, 2009 at 2:39 PM http://www.upi.com/Top_News/2009/08/12/Hungary-police-ban-neo-Nazi-marches/UPI-51191250102356/ (last accessed: 10 March 2014). The court of review also accepted the prior ban, although with different reasoning, namely that the Paris peace treaty obliges Hungary to dissolve fascist organizations - despite the fact that in the present case the organization notifying the march had never been dissolved. *That's why Hajas, B.* (2012) 215 thinks the decision is wrong. The Helsinki Committee finds the prior ban unlawful, but thinks the march, once ongoing, would have likely been possible to be dispersed for incitement to crime and violation of rights of others. *Álláspontra 2009. augusztus 15-re tervezett felvonulással kapcsolatban* <http://helsinki.hu/allaspontra-2009-augusztus-15-re-tervezett-felvonulással-kapcsolatban>.

⁸⁴¹ E.g. A place restriction independent of the ARA regime was applied in 2006, when Kossuth square around parliament was blocked for demonstrations because the police declared it a „security operational zone” with regard to the Fall 2006 riots. According to the police, declaring a site a „security operational zone” changes the quality of the public area which is normally accessible by all, and excludes the possibility of holding assemblies in the zone. Years later domestic courts found the declaration unlawful. In English see §§ 8-18, *Szerdahelyi v. Hungary*, Application no. 30385/07, Judgment of 17 January 2012. Subsequently, the ECtHR for this reason considered it a measure not prescribed by law, and thus found a violation of Art. 11 without examining legitimate aim or proportionality. *Szerdahelyi v. Hungary*, Application no. 30385/07, Judgment of 17 January 2012, *Patyi v. Hungary* (No. 2.), Application no. 35127/08, Judgment of 17 January 2012.

⁸⁴² Despite domestic and ECtHR condemnations of the 2006 “security operational zone”, in March 2013, the Counter-terrorism Centre declared the area in front of the home of the president an “operational zone.” On this basis police disallowed ten activists of the Hungarian Helsinki Committee from demonstrating in front of the presidential residence urging the president not to sign the 4th Amendment to the FL. The court reversed (Decision Nr. 20.KpK.45.258/2013 of the Metropolitan Court, available at <http://helsinki.hu/wp-content/uploads/szent-gyorgy-ter-lezaras-hatalyon-kivul-helyezes-anonim.pdf> (last accessed: 10 March 2014)) referring also to the Venice Commission's opinions (Venice Commission's Opinions concerning Freedom of assembly, Strasbourg, 04 October 2012, CDL(2012)014rev2, *supra* fn. 828, 5.2. at p. 6 of the decision.).

⁸⁴³ The Counter-terrorism Centre and the police repeated this same cooperation two more times with regard to the residence of the *prime minister* later, leading courts to basically scold law enforcement for observing neither ECHR case law, nor even domestic decisions http://ataszjelenti.blog.hu/2013/09/04/a_mihez_tartas_vegett_rendorsegi_visszaeles_es_a_biroi_jogorvoslat (last accessed: 10 March 2014). In December 2013, however, when a max. 50 person demonstration was banned in front of the residence by police relying on the Counter-terrorism Centre's security measure, the court upheld the ban for it is applicable in a residential area, and protects the “quiet of the neighbours” who would be a “captive audience” of the assembly. The HCLU turns to HCC in this case arguing *inter alia* that it is a disproportionate restriction on political speech. <http://tasz.hu/gyulekezesi-jog/alkotmanybirosag-elott-tamadtuk-meg-gyulekezesi-jogot-serto-biroi-dontest> (last accessed: 10 March 2014).

license” for some central public places, *to the mayor’s office* for March 15, 2012, a national holiday celebrating the revolution 1848.⁸⁴⁴ The HCC ruled that the ARA regime cannot be circumvented this way.⁸⁴⁵

Hungarian law does not know general place or time restrictions around Holocaust Memorials or Memorial Days either.⁸⁴⁶ Still, at the request of the prime minister, and in disregard of deadlines and grounds for prior ban, an anti-Semitic rally parallel to the March of the Living⁸⁴⁷ and another next to the World Jewish Congress⁸⁴⁸ were banned.

Manner restrictions

Recently, legislation aims at countering the activities of the banned Hungarian Guard⁸⁴⁹ and its successor organizations. The Act on Administrative Offences punishes participation both at the activities of banned organizations, and at public events in *uniform* belonging to banned organizations, or of which the banned organization’s uniform can be recognised.⁸⁵⁰ Initiation ceremonies of different versions of the Hungarian guard (New Hungarian Guard, Hungarian National Guard) still regularly take place.⁸⁵¹ Although the police sometimes tried to ban in advance, courts reversed.⁸⁵² Interpretational questions loom large around what counts as uniform, and how to determine if one uniform reminds of another, what is “formation”⁸⁵³ or “taking an oath”⁸⁵⁴.

⁸⁴⁴ When an opposition party, LMP, wanted to demonstrate on that day on Heroes’ Square, police refused to receive the advance notice for lack of competence. They reasoned that the square does not – after it had been quasi-reserved by the public area license -- any more qualify as public area, thus the ARA does not apply. Ordinary courts affirmed, the HCC reversed.

⁸⁴⁵ Decision 3/2013. (II. 14.) AB, *supra* fn. 821.

⁸⁴⁶ There was though a case which ended at the ECtHR, concerning removal, detention and an administrative fine as a result of display of an Arpad-striped flag (which is an old Hungarian flag, but which was used by the arrow cross movement in WW2) at a site where a memorial of empty shoes symbolizes the massacre of Hungarian Jews during WW2. The ECtHR found a violation of Art. 10, but the case did not turn on the proximity to the memorial either in domestic courts, or in Strasbourg. *Fáber v. Hungary*, judgment of 24 July 2012, *Application no. 40721/08*.

⁸⁴⁷ In 2013, an extreme right wing group, the “Motorists of National Emotion” wanted to rally under the name “Give gas!” in time and place close to the yearly March of the Living commemorating the genocide of Hungarian Jews. The police only banned it at the request of the prime minister after having been inactive at first. The ban was upheld in court arguing that the FL’s new (4th Amendment) limit on freedom of expression, i.e. the dignity of communities, required the ban. It has to be noted that in Hungarian law, if an ordinary judge assumes the unconstitutionality of a law she is supposed to apply, she is supposed to suspend and refer the case to the HCC instead of directly applying the constitution. (The two days delay was not claimed in the appeal.) http://index.hu/belfold/2013/04/15/adj_gazt_ugy_birosagi_nem_a_motorosok_beadvanyara/ (last accessed: 10 March 2014).

⁸⁴⁸ The same group (Motorists of National Emotion) wanted to rally against “the crimes of Bolshevism and Zionism” during the World Jewish Congress in Budapest. Again, the police banned the rally only belatedly after the prime minister had intervened. This time, court reversed the ban as it was issued after the deadline was over. http://hvg.hu/itthon/20130424_A_birosag_szerint_jogszerutlenul_tiltotta (last accessed: 10 March 2014).

⁸⁴⁹ The Hungarian Guard was banned in civil law procedure at the request of the prosecutor in 2008. The ECtHR found the ban did not violate Art. 11. *Vona v. Hungary*, Judgment of 9 July 2013, Application no. 35943/10, Request for referral to the Grand Chamber pending. An analysis with background is provided by representatives of the European Roma Rights Centre, intervenor at the ECtHR: Judit Geller and Gergely Dezideriu, *Vona v Hungary: Freedom of association and assembly can be restricted to protect Minority Rights* 7 August, 2013, <http://strasbourgobservers.com/2013/08/07/vona-v-hungary-freedom-of-association-and-assembly-can-be-restricted-to-protect-minority-rights/> (last accessed: 10 March 2014).

⁸⁵⁰ § 174 of the Act on Administrative Offences, act Nr. II/2012.

⁸⁵¹ Tibor Bognár, Budapest 2012.03.17. *Gárdisták a Hősök terén – letették az esküt* [Guardists on Heroes’s Sqaure— they took the oath] http://indavideo.hu/video/Budapest_20120317_Gardistak_a_Hosok_teren_-_letettek_az_eskut (last accessed: 17 November 2013). For a general impression see google’s image results for search term “Guard initiation” in Hungarian at https://www.google.hu/search?q=g%C3%A1rdaavat%C3%A1s+2012&rlz=1C1TSND_enHU403HU403&es_sm=93&tbo=u&source=univ&sa=X&ei=8-LKUqvJNce6vgPj7ID4CA&ved=0CHgQsAQ&biw=1517&bih=713&dpr=0.9 (last accessed: 10 March 2014).

⁸⁵² In English see, e.g., Counter-demonstrators detained at Hungarian Guard rally on Heroes’ Square, August 27th, 2012, by MTI <http://www.politics.hu/20120827/counter-demonstrators-detained-at-hungarian-guard-event-on-heroes-square/> (last accessed: 10 March 2014).

⁸⁵³ That’s why on one occasion guard members were sitting on the pavement.

Concealing the face on assemblies and sport events is prohibited, if it is capable of frustrating the identification of the person by the authorities.⁸⁵⁵

The Supreme Court issued an opinion qualifying egg throwing (and other thrown *objects incapable of causing bodily harm*) as truculence or defamation.⁸⁵⁶

Sight and sound restrictions

Public area events are explicitly exempted from sound level restrictions.⁸⁵⁷ In 2007, when a metropolitan ordinance required authorization (public area use license) for erecting build-ups, installations or stationing vehicles on political events, the HCC found violation of the right to assemble, as such tools might be necessary for the exercise of the right.⁸⁵⁸ The ombudsman in a similar vein criticized police for requiring organizers to notify as a separate item of agenda a planned laser projection of a political slogan on the façade of parliament.⁸⁵⁹ Police practice diverges,⁸⁶⁰ sometimes being inactive despite authorization to intervene, at other times restricting core political speech disproportionately.⁸⁶¹

3. Procedural issues

a) Notification

Police have to be notified three days in advance about assembly events held on “public area”. No notice is required for assemblies held elsewhere.⁸⁶²

The notice contains expected start and end time, place, and route of the planned event, its purpose and agenda, expected number of participants, and number of stewards securing the undisturbed course of the event, name and address of the organizer or their representative. (Art. 7 ARA). As police cannot examine the content of an opinion, in theory no sanctions are

⁸⁵⁴ Thus guard members silently sat during the speaker told the oath out loud in first person, the audience reciting the oath “muted”, to themselves.

⁸⁵⁵ § 169 c) of the Administrative Offences Act. The text itself does not require intent to evade law-enforcement, and thus burdens, e.g., demonstrators who face violent counter-protestors as well -- which is constitutionally questionable.

⁸⁵⁶ BKv. 71, 2008.EI.II.E.3/10., available at <http://www.lb.hu/hu/kollvel/71-bkv-0> (last accessed: 10 March 2014) the occasion was that participants of the Pride march, and unpopular politicians during their speeches on national holidays, including the mayor of Budapest sometimes became victims of *egg throwing*. A general, blanket ban is questionable. Hajas argues for distinguishing between different uses (e.g. as traditional form of political critique it should be protected while throwing eggs filled with feces at Pride marchers is outside protection.) at 236.

⁸⁵⁷ Regulation of the Government, Nr. 284/2007. (X. 29.) Korm. Rendelet. The vice-ombudsman for the rights of future generations criticized the lack of a clear regulatory context which would guarantee the right to a healthy environment, but acknowledges (confirming the opinion of the minister) that events protected by freedom of assembly are to be separately assessed in this regard than other events. <http://www.ajbh.hu/documents/10180/111959/Jelent%C3%A9s+a+k%C3%B6zter%C3%BCleti+rendezv%C3%A9nyek+okozta+zajterhel%C3%A9sr%C5%91/581dd32a-715e-4d39-9760-319ec2636a33?version=1.0> at 30 (last accessed: 10 March 2014).

⁸⁵⁸ 4/2007. (II. 13.) AB határozat.

⁸⁵⁹ OBH 5593/2008, *supra* fn. 835.

⁸⁶⁰ E.g., when in 2006 Kossuth square was occupied day and night for weeks by protestors, police did not try to enforce public health and similar regulations at all, basically tolerating a public health hazard. Finally, the camping was dissolved for protestors did not cooperate and police found dangerous devices all around the site. Then, however, the ban remained – clearly disproportionately – in place for months. See, e.g. the Report of the Helsinki Committee: Az őrzők őrzése. A Magyar Helsinki Bizottság értékelése a 2006-2007-es zavargásokról, Fundamentum 2007/1, <http://www.fundamentum.hu/sites/default/files/07-1-09.pdf> (last accessed: 10 March 2014).

⁸⁶¹ In 2013, the police’s claim that hanging a poster reading “The constitution is not a toy” on a bridge during a lawful protest march qualifies as truculence, was dismissed in court, as the performance had a political message and as such was not capable to outrage or intimidate, and was not “ostentatiously against community” norms. See http://tasz.hu/files/tasz/imce/megszunteto_vegzes_anonim.pdf (last accessed: 10 March 2014).

⁸⁶² Decision Nr. 55/2001. (XI. 29.) AB, *supra* fn. 818, and 3/2013. (II. 14.) AB határozat, *supra* fn. 821. Therefore, the peaceful occupation of party headquarters on premises owned by the party does not fall under the ARA regime. The misdemeanour “abuse of freedom of assembly” cannot be committed there either, and organizers are not obliged to notify police. See Andrea Pelle, Székházfoglalás: egy „bűnügy” krónikája [Occupation of headquarters: the chronicle of a „crime”] <http://szuveren.hu/tarsadalom/szekhazfoglalas-egy-bunugy-kronikaja> (last accessed: 10 March 2014), 27 December 2013.

foreseen for the ongoing assembly if it turns out to have different agenda or route than notified.⁸⁶³

Notice can be submitted in person or in writing – practice diverges on whether emailed notice is acceptable,⁸⁶⁴

There is no deadline *starting from which* it is possible to notify police about an assembly. That is why police had to take cognizance of demonstrations notified for the coming hundred years in advance.⁸⁶⁵

b) Spontaneous assemblies

A literary reading of the ARA obliged police to dissolve any unnotified assembly. After Hungary was found violating the ECHR in *Bukta v. Hungary*,⁸⁶⁶ the HCC reversed its previous jurisprudence,⁸⁶⁷ and stated⁸⁶⁸ that flashmobs, spontaneous and urgent assemblies are protected by freedom of assembly as they contribute to the discussion of public matters.⁸⁶⁹

c) Assemblies gathered by means of new technologies (social networks etc.)

Assemblies are recently organized via the internet, especially Facebook. Milla, an opposition movement part of which later became a political party, started on Facebook, by aiming to collect 1 million followers for Hungarian press freedom.⁸⁷⁰ It organized or co-organized all the bigger anti-government demonstrations in the last four years. Other opposition and civil society movements are also present, and heavily mobilize on Facebook.⁸⁷¹ The student movement which held protests in Winter 2012/2013, often occupying important avenues and bridges of Budapest, was also organized on Facebook.⁸⁷² Jobbik, the far right party (which founded the Hungarian Guard) has been very successful in mobilizing through Facebook, “online social media following on Facebook of Jobbik is greater than its official membership list.”⁸⁷³

⁸⁶³ Clearly since Decision Nr. 75/2008. (V. 29.) AB, *supra* fn 824 (similarly Hajas, 195-196).

⁸⁶⁴ The relevant ordinance from 1990 mentions telegram, telex and fax, but not email §. 2 (5) of Ordinance Nr. 15/1990. (V. 14.) BM rendelet a rendezvények rendjének biztosításával kapcsolatos rendőri feladatokról. The ombudsman suggests that the general rules of administrative procedure apply, and thus the ordinance ought to be interpreted in harmony with the act on administrative procedure, which welcomes electronic administration. Hajas B. ed., Report of the Ombudsman, 46-47, <http://www.ajbh.hu/documents/10180/124842/gyulekezesijogi.pdf/9e675513-ca81-4b6b-b258-8aad57c604ca;jsessionid=80CC85714B5F197C96ADAC132039E16E?version=1.0> (last accessed: 10 March 2014).

⁸⁶⁵ The copy of the notice is available at http://nemetszikarendszer.blog.hu/2012/01/19/szaz_evre (last accessed: 10 March 2014).

⁸⁶⁶ *Bukta and Others v. Hungary*, Application no. 25691/04, Judgment of 17 July 2007, *supra* fn. 762.

⁸⁶⁷ Decision 55/2001. (XI. 29.) AB, *supra* fn. 818.

⁸⁶⁸ Decision 75/2008. (V. 29.) AB, *supra* fn 824.

⁸⁶⁹ During the 2012-2013 Winter student protests, students used to march in the streets after ending their indoor meetings. Police tolerated much of the unnotified marches which were in truth organized, sometimes constructing events to which an immediate response is mandated quite artificially, only in order to justify the lack of notice. It does not follow, though, that police could have dispersed any of them without violating proportionality. www.minimumplusz.hu/2012/12/17/m-toth-balazs-fazekas-tamas-hiba-lett-volna-oszlatni/ (last accessed: 10 March 2014).

⁸⁷⁰ <https://hu-hu.facebook.com/sajtoszabadsagert> (last accessed: 10 March 2014) (which even has a parallel website operated in English just to inform about the Hungarian website those who do not speak Hungarian: <https://www.facebook.com/freepresshun> (last accessed: 10 March 2014)).

⁸⁷¹ [http://www.demos.co.uk/files/DEMOS - New Political Actors - Hungary.pdf?1384281102](http://www.demos.co.uk/files/DEMOS_-_New_Political_Actors_-_Hungary.pdf?1384281102) (last accessed: 10 March 2014).

⁸⁷² <https://www.facebook.com/hallgatoi.halozat> (last accessed: 10 March 2014).

⁸⁷³ See Jamie Bartlett, Jonathan Birdwell, Péter Krekó, Jack Benfield, Gabor Gyori: “The rise of populism in Europe can be traced through online behaviour...” Populism in Europe: Hungary http://politicalcapital.hu/wp-content/uploads/Demos_Hungary_Book_web.pdf (last accessed: 10 March 2014).

c) Decision-making

After prior notice has been given, police have to issue a receipt. Within 48 hours, police either (i) take cognizance, (ii) ban the event at the notified time or place in case it would seriously endanger the undisturbed functioning of representative organs or courts or traffic cannot be rerouted, (iii) or refuse the notice for lack of competence if the event does not fall under the ARA. If no steps are taken, the assembly is understood to be accepted. The ban is issued in a formal and reasoned decision which is to be communicated to the organizer in writing within 24 hours.

Before issuance of the formal decision, the police may negotiate with the organizers,⁸⁷⁴ who are however not obliged to engage in dialogue.⁸⁷⁵

d) Review and appeal

The decision banning the assembly cannot be appealed,⁸⁷⁶ but can be directly brought to court for review within three days from the communication of the ban. The court decides within three days, holding a hearing if necessary. If the ban is reversed later than the planned date of the assembly, the organizer informs police 24 hours before the new date.⁸⁷⁷ No appeal is available, but a constitutional complaint can be lodged if the applicant thinks the court did not observe her fundamental rights.⁸⁷⁸

The HCC ruled that judicial review extends in every case to the merits. Not only in case of ban, but also in case police refuses to decide about the notice for reason of lack of competence, the court has to review the merits, justification and reasoning of the police fully.⁸⁷⁹ Limited review violates due process rights including the right to effective judicial protection,⁸⁸⁰ and freedom of assembly.

4. Specific forms of assemblies

Counter-demonstrations are not regulated. Constitutionally, police should accommodate and secure both events, respecting content-neutrality and non-discrimination. Organizers of both events might need to negotiate and give up some space or agree on a different schedule. If it is not possible, however, there is no possibility to ban the secondly notified event.⁸⁸¹

Putting obstacles to the exercise of freedom of assembly by force or threat is punished with up to three years of imprisonment⁸⁸² - a rule which might apply to violent or threatening counter-demonstrators.

In practice, police lately cordons the route of Pride March within strict confines in order to protect the marchers from potential violent counter-protestors.⁸⁸³

Another event from 2012 widely reported in media was the Guard commemoration, where counterdemonstrators were not allowed on the square.⁸⁸⁴

⁸⁷⁴ The negotiation is mentioned, but not regulated in detail in the ordinance on police's activity securing public events, 15/1990. (V. 14.) BM rendelet.

⁸⁷⁵ The HCC mentions that organizers and police necessarily need to cooperate, but it is mentioned in relation to maintaining order on the spot. 75/2008. (V. 29.) AB határozat, 6.3, *supra* fn 824.

⁸⁷⁶ Art. 9 ARA.

⁸⁷⁷ Art. 8 ARA.

⁸⁷⁸ This is what the HCLU initiated with regard to demonstration in front of the prime ministerial residence where a court upheld police's ban, see *supra* fn. 843 or <http://tasz.hu/gyulekezesi-jog/alkotmanybirosag-elott-tamadtuk-meg-gyulekezesi-jogot-serto-biroi-dontest> (last accessed: 10 March 2014).

⁸⁷⁹ 3/2013. (II. 14.) AB határozat.

⁸⁸⁰ *Id.* at [76]-[77], citing *Golder v UK*, *Zborovsky v Slovakia* from the ECtHR and three decisions of the ECJ.

⁸⁸¹ Similarly <http://www.arsboni.hu/tothb.html> (last accessed: 10 March 2014) and Hajas 74-82.

⁸⁸² § 217 Criminal Code.

⁸⁸³ <http://www.politics.hu/20120708/gay-pride-parade-held-in-budapest-under-heavy-security/> (last accessed: 10 March 2014).

⁸⁸⁴ <http://www.politics.hu/20120827/counter-demonstrators-detained-at-hungarian-guard-event-on-heroes-square/> (last accessed: 10 March 2014).

3. *Implementing freedom of assembly legislation*

Pre-event planning

Even though the choice of purpose, place, time, and of the circumstances of the assembly falls within the freedom of assembly of the organizer,⁸⁸⁵ route, place, and time are often discussed with police. This negotiating process is not regulated by the ARA, mentioned only in the ordinance regulating police activity in securing events.⁸⁸⁶ Refusing negotiations with police in principle shall not result in more burdens for the exercise of the right, to engage in negotiations is voluntary.⁸⁸⁷ Change of route, place, or time does arise sometimes from such negotiation, this only can happen if on the planned route, place, or time the assembly could be banned in advance.

Costs

Constitutionally, the state cannot bind the exercise of fundamental rights to payment. Still, according to the current regulatory frame, in one interpretation, the notice would need to be accompanied by paying a fee as in regular administrative procedure. In practice – in conformity with the constitution - police never requested the payment.⁸⁸⁸

In a similar vein, assembly organizers can request the state health care providers to assist on the spot free of charge (stationing ambulance cars and personnel).⁸⁸⁹

Liability of organizers

The organizer is jointly liable for the damage caused by a participant at the assembly to any third party. The organizer is exempted from the liability if she proves that during the organization and the course of the assembly she “did as it could be expected in the particular situation”⁸⁹⁰, which corresponds to the regular Hungarian private law culpability standard.

Use of force by the police

An assembly can be dispersed (i) if the organizer fails to dissolve the assembly which became unlawful and order cannot be re-established otherwise; (ii) if crimes are committed or called for; (iii) if it violates the rights and freedoms of others, or if participants are armed or wear arm-like devices. Constitutionally, dissolution is the last resort, and the specific measure taken must be strictly necessary and proportionate to the aim pursued, i.e. dispersal is only an option if less restrictive means are not available. The ARA, however, only regulates dispersal as the means police can make use of in case of unlawful assemblies.⁸⁹¹

In practice, police sometimes notoriously fail to uphold order while observing rule of law. Hungarian police were infamously unprepared during the riots and waves of demonstrations in the fall of 2006, and used excessive force against peaceful protesters or even non-participants in many cases. Domestic human rights organizations (Hungarian Helsinki Committee, Hungarian Civil Liberties Union, etc.) and the Committee against Torture expressed concerns over police brutality which often remained unpunished, not even investigated.⁸⁹²

⁸⁸⁵ Decision 3/2013. (II. 14.) AB, *supra* fn. 821.

⁸⁸⁶ 15/1990. (V. 14.) BM rendelet a rendezvények rendjének biztosításával kapcsolatos rendőri feladatokról.

⁸⁸⁷ Hajas 76.

⁸⁸⁸ Hajas, 181-182.

⁸⁸⁹ In two instances, however, the National Ambulance Service wished to charge for providing assistance on antigovernment demonstrations. In the first case, the (previous) ombudsman declared this irreconcilable with the state's obligation to institutional protection of fundamental rights to life and assembly. In the second case, the opinion of the new ombudsman is either not prepared yet or cannot be found. Case nr. AJB-3449/2012, report of the ombudsman of 11 June 2012, available <https://www.ajbh.hu/documents/10180/143994/201203449.rtf/3edbf7b1-9ede-4219-a6d2-dd405e91c7a2> (last accessed: 10 March 2014).

⁸⁹⁰ Art. 13 ARA.

⁸⁹¹ Similarly, Balázs M. Tóth, <http://www.arsboni.hu/tothb.html>.

⁸⁹² See [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.HUN.CO.4.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.HUN.CO.4.En?Opendocument) (last accessed: 10 March 2014).

More recently, to the contrary, police were criticized for not using force to disperse an anti-Roma demonstration.⁸⁹³ After listening to virulently racist speeches about genetically coded criminality and that “we will trample down the phenomenon which needs to be exterminated from our Lebensraum [this latter one in Hungarian is the exact translation of the German original]”, participants threw stones, pieces of concrete and bottles into the yard of Roma inhabitants in Devecser.⁸⁹⁴ Police stood by passively. Since then, one person was prosecuted for hate crime (violence against member of a community), but as to the speeches, police closed the investigation for not having found any crimes committed, not even incitement to hatred.⁸⁹⁵

In 2012, police did not intervene when extreme right wing counter-protestors attacked journalists in the immediate vicinity of an anti-government demonstration.⁸⁹⁶ Police neither dispersed the evidently unpeaceful (and unnotified) assembly, nor were the attackers (clearly identifiable) arrested.⁸⁹⁷

6. Securing government accountability

Liability and accountability of law enforcement personnel

Hungarian law contains a lot of rules which in theory would guarantee liability and accountability of all state officials, especially including law enforcement, for violating human rights and abuse of power in executing their duties. These rules include the Criminal Code’s provisions on criminal assault, unlawful detention, etc., the state’s liability to pay compensation for violations of personality and other human rights, in particular for unlawful detention, etc.

In fact, several alleged police abuses in 2006 remained unaccounted for. Partly because police officers did not wear identification badges, a large part of police abuses could not be prosecuted. Domestic and international human rights organizations, including the Committee Against Torture condemned the government for this practice.⁸⁹⁸ Police now are obliged to wear clearly visible identification numbers during crowd control as well.

The contemporary government convened a committee of experts to assess the events, including omissions and defects of the protest policing.⁸⁹⁹ Though the committee found many problems with the policing, a human rights group headed by Jobbik MP Krisztina Morvai (associate professor of law) prepared another report even more condemning of government.⁹⁰⁰

On January 1, 2008, the Independent Police Complaints Board was established directly in order to prevent re-occurrence in the future of police abuses similar to those of 2006, and human rights violations by police in general.⁹⁰¹

⁸⁹³ <http://tasz.hu/node/2812> (last accessed: 10 March 2014).

⁸⁹⁴ In English see Amnesty International’s report at <http://www.amnesty.org/en/news/hungary-must-protect-roma-communities-attack-2012-08-15> (last accessed: 10 March 2014).

⁸⁹⁵ The Hungarian Helsinki Committee lodged a complaint against this: <http://helsinki.hu/ha-ez-nem-uszitas-akkor-semmi-sem-az> (last accessed: 10 March 2014).

⁸⁹⁶ See the video (“Death onto you, Jews!”) http://index.indavideo.hu/video/Ferenciek_tere?utm_source=flash&utm_medium=watchoninda&utm_campaign=videoplayer (last accessed: 10 March 2014).

⁸⁹⁷ http://index.hu/belfold/2013/12/19/barna_orfk/ (last accessed: 10 March 2014) or <http://helsinki.hu/mulasztott-a-rendorseg-az-osszevert-videos-ugyeben> (last accessed: 10 March 2014).

⁸⁹⁸ [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/bb9cec39af4f478dc125728000562b4d/\\$FILE/G0740345.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/bb9cec39af4f478dc125728000562b4d/$FILE/G0740345.pdf) (last accessed: 10 March 2014).

⁸⁹⁹ English summary of the report http://www.gonczolbizottsag.gov.hu/jelentes/gonczolbizottsag_jelentes_eng.pdf (last accessed: 10 March 2014).

⁹⁰⁰ English summary of the report http://www.americanhungarianfederation.org/docs/CJB_Summary.pdf (last accessed: 10 March 2014).

⁹⁰¹ http://www.panasztestulet.hu/index.php?link=en_main.htm (last accessed: 10 March 2014).

Monitoring

In 2007, the **general ombudsman launched a large-scale monitoring project**, where colleagues of the ombudsman's office observed on the scene and if needed, behind the scene, the policing of altogether fifty demonstrations, processions, flashmobs etc. for more than a year, and organized workshops and conferences with scholars, officials and civil society actors. The resulting report was many times cited in this study as well.⁹⁰²

Apart from the ombudsman, as the references in this study again testify, human rights NGOs, especially the Hungarian Civil Liberties Union within its freedom of assembly program and the Hungarian Helsinki Committee also follow closely much of the assembly activity taking place in the country, initiate appeals and judicial proceedings, if necessary, turning to the HCC or to the ECtHR as well. Freedom of assembly issues also find their way into shadow reports prepared by these organizations for supervisory bodies of various human rights treaties.

Media access

Representatives of the media are in principle to be especially protected on assemblies in Hungary as well, though media freedom in Hungary has been notoriously in decline in the last years.⁹⁰³ In general, police do not prevent journalists from following the events closely.

Lately, there was one reported case where police did not protect a journalist from being assaulted by extreme right wing counter-protestors next to an anti-government demonstration, albeit the assault was clearly visible for police officers standing by. The police have closed the investigation, but this was considered an unlawful omission in court.⁹⁰⁴

7. Conclusions and outlook

The deteriorating general constitutional context puts a question mark to every fundamental right in Hungary, including freedom of assembly. So far, however, **problems arising are largely old ones**, from which the most important ones will be summarized here. These include **technicalities** which could easily be resolved by legislation, such as e.g. that it not be possible to notify an assembly for hundred years in advance, in fact booking a public square for eternity and blocking everyone else from exercising the right. Similarly old is the urge to cordon out anti-government protestors, though new techniques emerge, such as the public area use license reserving central Budapest for the government or the Counter-terror Centre's shielding president and prime minister within "operational zones". These practices are so far largely countered by courts in the end, though not very efficiently, as there is a worrying trend to impose such exclusionary zones. Police and administration in fact often resist clear judicial guidance when it comes to anti-government protest, reinforcing the appearance of a politically biased or influenced public service. In a similar way, an anti-gay bias of police (or those instructing police) has been apparent with regard to the Budapest Pride bans.

Problems with far right demonstrations also continue to loom large, partly around inevitable interpretational questions common to many jurisdictions restricting uniforms and banning organizations in the fight against hate. In relation to counter-demonstrations, police seem ill-prepared to concretize abstract human rights reasoning and properly balance clashing interests, thus there also might exist a need for legislation. In some cases, however, such as with the violent anti-Roma assembly, police clearly misapplied established constitutional doctrine and common sense about what is violent. In others, such as with the anti-Semitic rallies, the ban comes at the price of serious violation of rule of law standards, or relying directly on the Fourth Amendment's very problematic communitarian dignity rationale

⁹⁰² <http://www.ajbh.hu/documents/10180/124842/gyulekezesijogi.pdf/9e675513-ca81-4b6b-b258-8aad57c604ca.jsessionid=80CC85714B5F197C96ADAC132039E16E?version=1.0> (last accessed: 10 March 2014).

⁹⁰³ In the Press Freedom Index, Hungary fell from 23rd to 56th between 2010 and 2013. See <http://en.rsf.org/press-freedom-index-2013,1054.html> (last accessed: 10 March 2014).

⁹⁰⁴ <http://helsinki.hu/mulasztott-a-rendorseg-az-osszevert-videos-ugyeben> (last accessed: 10 March 2014).

which limits not only hate speech against ethnic minorities, but is meant to protect dignity of the “Hungarian nation” as well, thereby chilling political criticism. This all when the existing legal tools would enable police to disperse (though not ban in advance) these assemblies in case incitement to hatred or another crime is committed.

Courts, the ombudsman, human rights NGOs and some segments of the media have so far been able to counter some of the excesses of the executive branch, though their efforts remain necessarily insular and of limited reach. It has to be seen and closely monitored also in the future how the new ombudsman and the constitutional court in its new composition will fare under the changing constitutional circumstances.

Tunisia

by Melina Garcin

1. Legal bases

Freedom of Assembly cannot be depicted without sketching the current political situation after the overthrow of the Ben Ali government following the “Arab Spring” insurgence of the Tunisian people. On 17 December 2010, thousands of Tunisians participated in anti-government protests. The protests continued until President Ben Ali left office and fled Tunisia on 14 January 2011.⁹⁰⁵

A state of emergency has been in place in Tunisia since and has been extended until June 2014.⁹⁰⁶ During this time, freedom of peaceful assembly can be restricted⁹⁰⁷, contradicting the repeated affirmations of the right to freedom of peaceful assembly by Tunisian authorities of the new government.⁹⁰⁸

In 2011, the 1959 Tunisian Constitution⁹⁰⁹ was first suspended⁹¹⁰ and then completely repealed,⁹¹¹ and a National Constituent Assembly (NCA) was elected in October to draft a new constitutional text. One year later, the NCA started to discuss the Preliminary Draft of the Constitution,⁹¹² which was issued in August 2012. A second draft Constitution of the Tunisian Republic⁹¹³ was issued in December 2012. From 23 December 2012 to 13 January 2013 and with the help of the United Nations Development Programme (UNDP), a two-month outreach campaign was organized to gather input and recommendations from the Tunisian people.⁹¹⁴ The plenary debates of the NCA began in late January 2013, adding feedback to the proposed constitution. The assassination of the opposition leader, Chokri Belaid, in February 2013, interrupted the drafting process for a moment. As the second draft was subject to disagreements and critics among academics, lawyers, NCA members and NGOs, the NCA issued a third draft in April 2013.⁹¹⁵ The NCA began voting on the Final Draft Constitution⁹¹⁶ (released on 1 June 2013), article by article, on 3 January 2014.⁹¹⁷ Most of the articles on freedoms and liberties were adopted unanimously, including Art. 37 on freedom of assembly and demonstration. The final version adopted thus reads: “The right to peaceful assembly and demonstration shall be guaranteed.”⁹¹⁸ The new Constitution was adopted on 26 January 2014 and entered into force on 10 February 2014.

⁹⁰⁵ The International Center for Not-for-Profit Law (2011) *Arab Spring: an opportunity for greater freedom of association and assembly in Tunisia and Egypt?* Global Trends in NGO Law, Vol. III, Issue 1, June, p. 1.

⁹⁰⁶ CNN Staff (2013) *Tunisia extends state of emergency*. CNN, 3 November. Available at: <http://edition.cnn.com/2013/11/03/world/africa/tunisia-unrest/> (last accessed: 10 March 2014).

⁹⁰⁷ Fédération Internationale des Ligues des Droits de l'Homme (2011) *La Tunisie post Ben Ali face aux démons du passé: Transition démocratique et persistance de violations graves des droits de l'Homme*. July, N° 567f, pp.6-7.

⁹⁰⁸ *Ibid.*, p.17.

⁹⁰⁹ United Nations Public Administration Network, The 1959 Constitution of Tunisia.

⁹¹⁰ By Decree Law n°14 of 23 March 2011 relating to the provisional organisation of the public authorities, J.O.R.T. n°20 of 25 March 2011.

⁹¹¹ By Constituent Law n°6 of 16 December 2011 relating to the provisional organisation of the public authorities, J.O.R.T. n°97 of 20-23 December 2011.

⁹¹² European Commission for Democracy through Law (Venice Commission), Preliminary Draft Constitution of the Tunisian Republic, CDL-REF(2012)035-e, Or.Fr., Strasbourg, 25.09.2012.

⁹¹³ United Nations Development Programme project in Tunisia, Draft Constitution of the Republic of Tunisia of 14 December 2012, unofficial translation.

⁹¹⁴ Libertas Constitutional Consulting, The Arab World in Transition: Constitutional Timelines for Tunisia, Egypt and Libya, Last update: 18.01.2014, <http://www.libertascc.com/#!timelines/c13mv> (last accessed: 10 March 2014).

⁹¹⁵ International IDEA, Draft Constitution of the Tunisian Republic of 22 April 2013, unofficial translation.

⁹¹⁶ Venice Commission, Draft Constitution of the Tunisian Republic of 1 June 2013, unofficial translation, CDL-REF(2013)032-e, Or.Arabic., Strasbourg, 20.06.2013.

⁹¹⁷ M. TEYEB, *Tunisia: A constitution by the majority for the minority?* 8 January 2014. Al-Jazeera. Available at: <http://www.aljazeera.com/indepth/opinion/2014/01/tunisia-constitution-majority-minority-20141711464706380.html> (last accessed: 10 March 2014).

⁹¹⁸ Base de données: La législation du secteur de la sécurité en Tunisie. Available at: <http://www.legislation-securite.tn/fr/node/33504> (last accessed: 10 March 2014).

Pursuant to Art. 49, “the law shall specify the restrictions related to the rights and freedoms guaranteed in this Constitution [...]. Such restrictions shall only be imposed where necessary in a civil, democratic society and with the purpose of protecting the rights of others or where required by public order, national defence, public health or public morals, while ensuring any restrictions are proportionate to the intended objective. [...]”⁹¹⁹

A 1969 Assembly Act regulates public meetings, marches, rallies, demonstrations, and assemblies,⁹²⁰ and as the legal norms do not mention any differential treatment, foreigners enjoy the same rights and obligations regarding the law on assemblies as Tunisian citizens.⁹²¹ For the time being, freedom of assembly in Tunisia is still governed by the laws which were in force under the previous regime. Pursuant to Art. 1 of the 1969 Assembly Act, public meetings are free and may be held without prior authorization, subject to the conditions provided by the law.

2. Scope of the guarantee

Comments on the final draft

AI Bawsala, Amnesty International (AI), Human Rights Watch (HRW), and The Carter Centre have independently followed the constitution drafting process from the outset.⁹²² The NCA requested the opinion of the Venice Commission of the Council of Europe on the Final Draft Constitution of Tunisia. The rapporteurs stated that the provision on freedom of assembly failed to require that any interference for a legitimate aim had to comply with the principle of proportionality and necessity in a democratic society⁹²³ in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.⁹²⁴ This was taken into account and encompassed in Art. 49 of the newly adopted constitutional provision on the restriction to constitutionally guaranteed rights and freedoms.

Experiences with flash mobs

There is no legal provision on flash mobs in Tunisia, although if considered a rally and pursuant to Art. 9 of the 1969 Assembly Act, they should be subject to notification.⁹²⁵ When they are not staged as entertainment, flash mobs are used as means to protest in Tunisia⁹²⁶ and to raise awareness about important issues.⁹²⁷ But even if they are organized moderately, they can be thwarted,⁹²⁸ if considered as unarmed crowds likely to disturb the public peace, pursuant to Art.13 of the 1969 Assembly Act.⁹²⁹

⁹¹⁹ *Ibid.*

⁹²⁰ Act No. 69-4 of 24 January 1969, on the Regulation of Public Meetings, Marches, Rallies, Demonstrations and Assemblies, Official Bulletin of 28-31 January 1969, p. 117.

⁹²¹ Euro-Mediterranean Human Rights Network (2013) *Regional Study: The right to freedom of assembly in the Euro-Mediterranean Region, Part I: Legislation Review*. EMHRN, November, p. 130.

⁹²² AI reviewed the latest version of the Draft Constitution and found that the text still undermined tenets of international human rights law, such as the universality of human rights, Amnesty International Media Centre, Tunisia: New draft Constitution still falls short on human rights, PRE01/270/2013, available at: <http://www.amnesty.org/en/for-media/press-releases/tunisia-new-draft-constitution-still-falls-short-human-rights-2013-06-05> (05.06.2013) (last accessed: 10 March 2014).

⁹²³ Venice Commission, Observations on the Final Draft Constitution of the Republic of Tunisia, CDL(2013)034, Or. Fr., Strasbourg, 17.07.2013, paras. 42, 71.

⁹²⁴ Amnesty International, Last opportunity for Tunisian lawmakers to enshrine human rights for all in Tunisia's new Constitution, MDE 30/005/2013, 05.06.2013.

⁹²⁵ Act of 24 January 1969, Art. 9: Marches, rallies and all other forms of demonstrations on public roads necessarily have to be notified.

⁹²⁶ Cf. R. LECOMTE *Révolution tunisienne et Internet: le rôle des médias sociaux*. VII 2011 : Dossier : Sahara en mouvement, pp. 389-418, § 28; Available at: [Révolution tunisienne et Internet : le rôle des médias sociaux](#) (last accessed: 10 March 2014); Over the unemployment crisis: <http://www.youtube.com/watch?v=NBkOosu6WSs> (last accessed: 10 March 2014).

⁹²⁷ I.e. on the right to abortion: <http://www.youtube.com/watch?v=1DtHHwg7xTc> (last accessed: 10 March 2014).

⁹²⁸ Cf. LECOMTE, R., *supra* fn 926, pp. 389-418, fn. 50; <http://atunisiangirl.blogspot.de/2010/08/comme-tous-les-combats-qui-ont-fait.html> (last accessed: 10 March 2014).

⁹²⁹ Act of 24 January 1969, Art. 13: Are prohibited on public roads and places: 1. All armed crowds; and 2. All unarmed crowd likely to disturb public peace.

3. Restrictions

The state of emergency is based on a 1978 Decree.⁹³⁰ The governor can forbid the movement of persons and vehicles in designated areas and for as long as security and public order requires.⁹³¹ The Minister of Home Affairs has the right to put any person who engages in activities that threaten national and public security under house arrest.⁹³² The Minister of Home Affairs and local governors can also close temporarily meeting places of any kind and ban meetings likely to disturb public order,⁹³³ as well as censor the press, radio broadcasts, and other activities.⁹³⁴ The 1969 Assembly Act states that public meetings cannot be held on public roads.⁹³⁵ Additionally, they cannot continue beyond midnight, except in localities where the closure of public establishments occurs later.⁹³⁶ The 1969 Act also gives authorities the possibility to forbid any meeting or demonstration that is likely to disturb security and public order by decree.⁹³⁷

3. Procedural issues

Notification/authorization

The 1969 Assembly Act states that public meetings do not require prior authorization,⁹³⁸ but shall be preceded by a notification to authorities that specifies the place, date and time of the meeting; that is signed by a minimum of two persons, and that includes their personal identification, profession, and place of residence.⁹³⁹ Notifications must be submitted between 15 and 3 days prior to the holding of the meeting and specify the theme and purpose of the meeting.⁹⁴⁰ Furthermore, Art. 9 of the 1969 Act states that all marches, rallies, and, generally speaking, all demonstrations on public roads, irrespective of their nature, must submit prior notification. It has to indicate the place of the gathering and the itinerary, together with the banners or flags that will be carried. An incomplete or inaccurate notification, as well as participating in a demonstration that has not been the subject of a notification or that has been banned, is punishable by up to one-year imprisonment.⁹⁴¹

Decision-making

Art. 2 of the 1969 Act vests different authorities with the capacity for decision-making pertaining to assemblies. In most regions, notifications should be submitted to municipalities. In the capital city Tunis however, it is the Department of Homeland Security that shall be notified. Legislation foresees that a civil servant shall be appointed by the security services to attend public meetings. He/she has the right to pronounce the dissolution of the meeting, if requested by the meeting's supervisory committee, or if clashes or assaults occur.⁹⁴² The organizer of a demonstration has a right to be informed of the reasons why the demonstration has been prohibited.⁹⁴³ However, under the state of emergency, the authorities do not need to give reasons to restrict or ban meetings, and they can issue general bans prohibiting any kind of meetings or demonstrations, far from what international standards require with regard to necessity and proportionality.⁹⁴⁴

⁹³⁰ Decree n° 78-50 of 26 January 1978.

⁹³¹ *Ibid.*, Art. 4.

⁹³² *Ibid.*, Art. 5.

⁹³³ *Ibid.*, Art. 7.

⁹³⁴ *Ibid.*, Art. 8.

⁹³⁵ Act of 24 January 1969, Art. 8.

⁹³⁶ *Ibid.*, Art. 4.

⁹³⁷ Cf. Act of 24 January 1969, Art. 7 and 12; Adm.Court, 14 November 2012, n° 121187.

⁹³⁸ Act of 24 January 1969, Art. 1.

⁹³⁹ *Ibid.*, Art. 2.

⁹⁴⁰ *Ibid.*, Art. 3.

⁹⁴¹ *Ibid.*, Art. 26.

⁹⁴² *Ibid.*, Art. 6.

⁹⁴³ Adm.Court, 14 November 2012, n° 121187.

⁹⁴⁴ EMHRN, *supra* fn. 921, p. 133.

Review and appeal

Organizers of prohibited meetings can appeal to the Secretary General of the Ministry of Home Affairs, whose decision is deemed final.⁹⁴⁵ Although there is the right of recourse before the administrative courts, frequently this recourse is not fast enough to enable the upholding of the demonstration or public meeting.⁹⁴⁶ Moreover, cases relating to the revolution that were brought before the courts did not move forward because officials, and occasionally judges, refused to cooperate in the investigations.⁹⁴⁷ While the law provides for an independent judiciary, the executive branch strongly influences judicial procedures, particularly in cases involving political dissidents and oppositionists. Cases involving freedom of expression resulted in lengthy trials and harsh verdicts.⁹⁴⁸ The military courts handled redress of alleged abuses by security forces during civil disturbances during the revolution.⁹⁴⁹

4. Specific forms of assemblies

Spontaneous assemblies

The law does not cover certain forms of assemblies such as spontaneous or simultaneous assemblies. By virtue of Art. 25, it envisages imprisonment for a period of up to six months for “any direct call for holding a meeting on public roads”,⁹⁵⁰ while Art. 31 foresees an imprisonment penalty for a minimum term of one month and a maximum term of one year on individuals who incite unarmed crowds, whether through public speeches, leaflets or posters.⁹⁵¹ Art. 13 of the 1969 Act forbids all unarmed crowds that are likely to disturb public peace.⁹⁵² The Euro-Mediterranean Human Rights Network (EMHRN) drew the conclusion that spontaneous assemblies were prohibited in Tunisia, as virtually any gathering in a public place would convey some kind of disturbance to undefined public peace.⁹⁵³ Since the revolution though, there have been spontaneous demonstrations, protests, and strikes across the country.⁹⁵⁴ Some of them degenerated into violent clashes and contaminated other cities and areas.⁹⁵⁵

Assemblies gathered by means of new technologies

Widespread use of and access to the Internet and social media sites was a major facilitating factor in starting the 2010 protests, as well as the subsequent ones. Almost 20 percent of youth had a Facebook account, and since the fall of the former government, Internet sites were no longer blocked. The government took several steps during 2011 to end official Internet censorship.⁹⁵⁶

Assemblies taking place on public property

Public meetings cannot be held on public roads⁹⁵⁷ and all marches, rallies and demonstrations taking place on public roads are subject to prior notification.⁹⁵⁸

⁹⁴⁵ Act of 24 January 1969, Art. 7.

⁹⁴⁶ For example, the Ministry of Home Affairs banned demonstrations on 9 April 2012 on the main avenue of Tunis, Habib Bourguiba. The administrative tribunal could only render its judgment on 12 June 2012, after the Minister withdrew the ban.

⁹⁴⁷ U.S. Department of State, Bureau of Democracy, Human Rights and Labor (2012) *Tunisia 2012 Human Rights Report*, p. 8. Available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dldid=204385> (last accessed: 10 March 2014).

⁹⁴⁸ *Ibid.*, p. 7.

⁹⁴⁹ *Ibid.*, p. 8.

⁹⁵⁰ Act of 24 January 1969, Art. 25.

⁹⁵¹ *Ibid.*, Art. 31.

⁹⁵² *Ibid.*, Art. 13.

⁹⁵³ EMHRN, *supra* fn. 921, p. 132.

⁹⁵⁴ U.S. Department of State, Bureau of Democracy, Human Rights and Labor (2011) *Tunisia 2011 Human Rights Report*, p. 10. Available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dldid=186451> (last accessed: 10 March 2014).

⁹⁵⁵ F. DAHMANI, (2011) Tunisie: un été en état d'urgence. 3 August. Jeune Afrique. Available at: <http://www.jeuneafrique.com/Article/ARTJAJA2637p040-041.xml0/> (last accessed: 10 March 2014).

⁹⁵⁶ U.S. Department of State, *supra* fn. 954 p. 9.

⁹⁵⁷ Act of 24 January 1969, Art. 8.

Counter-demonstrations

The law does not envisage counter-demonstrations. The organization of counter-demonstrations has become a common way to impede the meetings and gatherings of opposition parties and NGOs.⁹⁵⁹

5. Implementing freedom of assembly legislation

Pre-event planning

Each meeting must have a supervisory committee of at least three persons which is responsible for maintaining order, preventing any infringement of laws, conserving the nature of the meeting to that included in the notification, forbidding any speeches contrary to public order and good morals, and limiting provocation for acts qualified as crimes or offences.⁹⁶⁰

Costs

No information found.

Use of force by the police

After having issued warnings, the police may resort to the use of firearms against demonstrators who refuse to disperse,⁹⁶¹ even if the demonstrators have not used any violence. In the event that the demonstrators attempt to achieve their aims by force, police can shoot directly at them.⁹⁶² According to an OHCHR report,⁹⁶³ figures obtained from the Ministry of Justice indicate that at the beginning of the revolution, 147 persons had died during, or in circumstances surrounding, the demonstrations, while another 510 had been injured. Several human rights organizations have reported a much higher number of killings since the beginning of the protests.⁹⁶⁴ There were reports of security officials using excessive force in arresting protesters, including those involved in peaceful demonstrations,⁹⁶⁵ and not following legally established arrest procedures. Both the OHCHR and AI stated that security forces used excessive force when confronting demonstrators during five days of protests in Siliana at the end of November 2012. An estimated 300 demonstrators were injured, including dozens shot in the face with birdshot, blinding several people.⁹⁶⁶ Following news of Chokri Belaid's death - opposition leader with the left-secular Democratic Patriots' Movement, police used tear gas to disperse thousands of people demonstrating in front of the Ministry of Home Affairs in Tunis.⁹⁶⁷ The same happened in cities throughout the country.⁹⁶⁸ Following Mohamed Brahmi's death - founder and leader of the second left-wing party People's Movement, hundreds of his supporters, including relatives and party

⁹⁵⁸ *Ibid.*, Art. 9.

⁹⁵⁹ EMHRN, *supra* fn. 921, p. 128.

⁹⁶⁰ Act of 24 January 1969, Art. 5.

⁹⁶¹ *Ibid.*, Art. 20.

⁹⁶² *Ibid.*, Art. 22.

⁹⁶³ OHCHR (2011) *Report of the OHCHR Assessment Mission to Tunisia, 26 January–2 February 2011*. Para. 39.

⁹⁶⁴ Cf. HRC, 19th Session (2012) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez - Addendum - Mission to Tunisia*. 2 February. A/HRC/19/61/Add. 1. Para. 37. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/103/22/PDF/G1210322.pdf?OpenElement> (last accessed: 10 March 2014); Editorial board (2011) *Tunisie: un adolescent tué par balles à Sidi Bouzid*. L'EXPRESS.fr, 18 July. Available at: http://www.lexpress.fr/actualite/monde/tunisie-un-adolescent-tue-par-balles-a-sidi-bouzid_1012809.html (last accessed: 10 March 2014).

⁹⁶⁵ U.S. Department of State, *supra* fn. 947, p. 5.

⁹⁶⁶ Cf. R. COLVILLE (2012) *Press briefing notes on Tunisia and Egypt*. Geneva, 30 November. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12848&LangID=E> (last accessed: 10 March 2014); AI (2012) *Excessive force against protesters in Tunisia*. 1 December. Available at: <http://www.amnesty.org.au/news/comments/30623/> (last accessed: 10 March 2014); HRC, *supra* fn. 964, para. 36.

⁹⁶⁷ Editorial board (2013) *Tunisia: Chokri Belaid assassination prompts protests*. BBC News Africa, 6 February. Available at: <http://www.bbc.co.uk/news/world-21349719> (last accessed: 10 March 2014).

⁹⁶⁸ M. MARKS and K. FAHIM (2013) *Tunisia Moves to Contain Fallout After Opposition Figure Is Assassinated*. The New York Times, 6 February. Available at: <http://www.nytimes.com/2013/02/07/world/africa/chokri-belaid-tunisian-opposition-figure-is-killed.html? r=0> (last accessed: 10 March 2014).

members, demonstrated in front of the Ministry of Home Affairs' building and in Brahmi's hometown.⁹⁶⁹ Many witnesses HRW interviewed described excessive use of tear gas by the police to break up a peaceful sit-in in front of the NCA. Several witnesses said the police insulted and beat protesters and journalists in an effort to disperse them.⁹⁷⁰ During his funeral, protesters called for the government to be toppled, and although the gathering was peaceful, police fired tear gas on them⁹⁷¹. Additionally, security officials often repeatedly harassed and threatened journalists during street demonstrations or protests.⁹⁷² There were several instances of demonstrators and bystanders being arbitrarily arrested and at times, detained.⁹⁷³ There also were reports of mistreatment during pre-trial detention. Multiple activists reported harsh physical treatment of individuals who participated in demonstrations. Minors and adults were arbitrarily detained and taken to a detention centre without any access to lawyers or notification to their families. Detention officers forced them to kneel and remain in uncomfortable positions. Some were beaten by several policemen.⁹⁷⁴ Private actors are jeopardizing freedom of peaceful assembly. Individuals who do not belong to the law-enforcement personnel have violently attacked demonstrators on several occasions.⁹⁷⁵

Liability and accountability of organizers

Art. 5 of the 1969 Act places the responsibility on organizers to control order during public meetings. The police endured repeated attacks by protesters who destroyed police stations, vehicles and equipment.⁹⁷⁶

6. Securing government accountability

Liability and accountability of law enforcement personnel

Although the Ministry of Home Affairs holds legal authority and responsibility over law enforcement, the Ministry of Defence began playing a larger role in internal security matters after the 2011 revolution.⁹⁷⁷ Authorities have the obligation to facilitate the exercise of peaceful assembly and to distinguish between violent and non-violent protesters. However, authorities have often failed to comply with this obligation⁹⁷⁸. Under article 101 of Tunisia's Penal Code, any public agent who, while on duty, uses or causes to be used violence against persons without a legitimate purpose can be sentenced to up to five years in prison. Art. 101bis imposes a term of up to eight years for acts that rise to the level of torture. Human Rights Watch (HRW) has investigated past incidents involving the apparent use of excessive force by Tunisian police forces against protesters. No police officer has been accused for such violence⁹⁷⁹. The government also failed to properly investigate the incident on 9 April 2012, when police violently dispersed a peaceful protest after the Minister of Home Affairs banned demonstrations on the main avenue in Tunis. The NCA formed a commission of inquiry to investigate, but it did not make any progress and 10 of its members resigned in protest in April 2013⁹⁸⁰. Pursuant to Art. 17 of the 1972 Act,⁹⁸¹ public authorities are to be held accountable for unusual damages caused by dangerous activities, which can result from

⁹⁶⁹ C. GALL (2013) *Second Opposition Leader Assassinated in Tunisia*. The New York Times, 25 July. Available at: <http://www.nytimes.com/2013/07/26/world/middleeast/second-opposition-leader-killed-in-tunisia.html> (last accessed: 10 March 2014).

⁹⁷⁰ Human Rights Watch (2013) *Tunisia: Protesters Describe Tear gas Attacks, Beatings*. 29 July. Available at: <http://www.hrw.org/news/2013/07/29/tunisia-protesters-describe-teargas-attacks-beatings> (last accessed: 10 March 2014).

⁹⁷¹ Editorial board (2013) *Tear gas fired at Tunisian protesters*. Al Jazeera, 28 July. Available at: <http://www.aljazeera.com/news/africa/2013/07/201372710011814239.html> (last accessed: 10 March 2014).

⁹⁷² Cf. U.S. Department of State, *supra* fn. 954, p. 10. HRC, *supra* fn. 964, para. 39.

⁹⁷³ Cf. U.S. Department of State, *supra* fn. 954, pp. 1, 4, 5; U.S. Department of State, *supra* fn. 945, p. 5; Fédération Internationale des Ligues des Droits de l'Homme, *supra* fn. 907, p. 26; HRC, *supra* fn. 964, para. 40.

⁹⁷⁴ Cf. U.S. Department of State, *supra* fn. 954, p. 5; HRC, *supra* fn. 962, para. 40.

⁹⁷⁵ EMHRN, *supra* fn. 921, p. 128.

⁹⁷⁶ U.S. Department of State, *supra* fn. 947, p. 5.

⁹⁷⁷ U.S. Department of State, *supra* fn. 945, p. 5.

⁹⁷⁸ EMHRN, *supra* fn. 921, p. 134.

⁹⁷⁹ Human Rights Watch, *supra* fn. 970.

⁹⁸⁰ *Ibid.*

⁹⁸¹ Organic Law n° 72-40 of 1 June 1972 relating to the Administrative Court, last amended on 13 February 2008.

demonstrators making use of force or from law enforcement personnel making use of force or shooting directly at demonstrators.⁹⁸²

Monitoring

Operating space for domestic and international human rights groups improved dramatically after the revolution; they operated without government restriction, investigating and publishing their findings on human rights cases. Acting government officials were increasingly cooperative and responsive to the protesters' views.⁹⁸³ On 9 September 2011, the NGO Ligue Tunisienne pour la défense des Droits de l'Homme (LTDH) held its first national congress in 11 years, after having been banned and repressed under the Ben Ali regime for decades. The government granted international NGOs, like Human Rights Watch and Reporters Without Borders, permission to open offices in Tunis. These organizations were permitted to conduct in-country research and investigations into human rights issues freely. Additionally, UN Agencies (OHCHR⁹⁸⁴) and UN Special Rapporteurs⁹⁸⁵ carried out assessment missions in Tunisia, and an OHCHR office opened in Tunis. The NGO Euro-Mediterranean Human Rights Network (EMHRN) issued a study which is based on a process of consultation and participation involving 80 human rights organizations and institutions based in 30 countries as well as individuals.⁹⁸⁶ There were, however, instances when the government did not cooperate with human rights organizations in their investigations into human rights violations.⁹⁸⁷

Media access

Reporters and photographers working for local and foreign media were subject to beatings and insults, and their equipment was confiscated. In response, the Ministry of Home Affairs issued a public apology and opened an inquiry into the incidents.⁹⁸⁸

8. Conclusions and outlook

The new Tunisian Constitution was adopted on 26 January 2014, shortly after the third anniversary of the Tunisian Revolution. The article on freedom of assembly has been adopted unanimously and guarantees the right to peaceful assembly and demonstration, without referring to any possible restriction in the wording of the article itself. Article 49 of the Constitution states that restrictions to constitutionally guaranteed rights and freedoms are provided by law; they shall be necessary in a democratic society and be proportionate to the legitimate aim pursued; matching therefore the criteria recognized internationally.⁹⁸⁹ The 1969 Assembly Act protects public meetings, which are free and do not need any authorization to be held, but shall be notified. They cannot be held on public roads. The same Act distinguishes public meetings from marches, rallies and demonstrations, which take place on public roads and necessarily have to be notified. Crowds, which are gatherings likely to disturb public order, are prohibited. Article 3 requires that notifications shall specify the theme and the purpose of planned public meetings.⁹⁹⁰ In this context, Art. 10 states that prior notifications to assemblies on public roads shall be submitted, in compliance with the provisions of Art. 2, specifying flags or banners which will be used during the assembly.⁹⁹¹ Those necessities can be considered as content regulation and consequently, pre-

⁹⁸² Adm. Court, 28 March 2008, n° 1/16754; confirmed by the Court of Appeal on 10 July 2009, n° 27001; confirmed by the Supreme Court on 28 May 2011, n° 3109938.

⁹⁸³ U.S. Department of State, *supra* fn. 954, p. 14.

⁹⁸⁴ OHCHR, *supra* fn. 963.

⁹⁸⁵ Cf. HRC, *supra* fn. 964; HRC, 20th Session (2012) *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin – Addendum – Mission to Tunisia*. 14 March. A/HRC/20/14/Add.1; HRC, 22nd Session (2013) *Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya – Addendum – Mission to Tunisia (27 September-5 October 2012)*. 25 January. A/HRC/22/47/Add. 2.

⁹⁸⁶ EMHRN, *supra* fn. 921, p. 1.

⁹⁸⁷ U.S. Department of State, *supra* fn. 947, pp. 15-16.

⁹⁸⁸ HRC, *supra* fn. 964, para.39.

⁹⁸⁹ I.e. Art. 12 of the International Covenant on Civil and Political Rights.

⁹⁹⁰ Act of 24 January 1969, Art. 3.

⁹⁹¹ Act of 24 January 1969, Art. 10.

ensorship if these elements are considered in advance to scrutinize any message to be displayed in the assembly. The obvious contradiction between the declarations of the transitional authorities and the recourse to the law on the state of emergency to limit the right to freedom of peaceful assembly leads to legal uncertainty for the Tunisian people.⁹⁹² The conditions for the state of emergency are no longer met and exceptions to laws should not be used to ban peaceful meetings and protests. OSCE and ODIHR issued a 2013 opinion on a new Draft Organic Law on the Right to Peaceful Assembly in Tunisia and recommended the inclusion of the presumption in favour of holding assemblies, the State's positive obligation to protect peaceful assembly, as well as the more general principles of legality, proportionality, non-discrimination and good administration.⁹⁹³

⁹⁹² Fédération Internationale des Ligues des Droits de l'Homme, *supra* fn. 907, p.18.

⁹⁹³ OSCE/ODIHR (2013) *Opinion on the Draft Organic Law on the Right to Peaceful Assembly of Tunisia*. Unofficial translation. Warsaw, 14 May, FOA-TUN/230/2013.

Freedom of Assembly in Europe - Comparison

Isabelle Ley and Anne Peters

1. Constitutional and statutory guarantees

All member states – with the exception of the United Kingdom which does not have a written constitution – guarantee freedom of assembly as a constitutional right. France is a slightly particular case insofar as the 1958 Constitution does not directly contain a provision on freedom of assembly. Instead, it refers to the Preamble of the 1946 constitution which, in turn, refers to the Declaration of the Rights of Man and of the Citizen of 1789 recognizing the “free communication of ideas and opinions” as one of the fundamental rights of man. In Tunisia, the new constitution was adopted on January 26, 2014 and entered into force on February 10, 2014. Until that date, a Constituent Law of 2011 temporarily guaranteed “freedoms and human rights” – and will probably continue to be a reference until a new constitutional interpretation and practice has evolved.

Within most constitutions, the freedom of assembly is connected to the rights of political expression – either as a direct part of an overarching right of free expression such as in the US constitution, or it is viewed as being linked or related to the freedom of speech and press and of association.⁹⁹⁴ In the European Convention of Human Rights, freedom of assembly is guaranteed in one article together with the freedom of association (Art. 11 ECHR), and these two rights are understood by the ECtHR as *lex specialis* to the basic communicative guarantee of Art. 10 ECHR (freedom of expression).⁹⁹⁵ The new Hungarian Constitution of 2010, having been adopted under Viktor Orbán, posits a startling exception to this rule as it precedes the freedom of expression in order.⁹⁹⁶ While in some cases, as in Art. 11 ECHR, the freedom of assembly is guaranteed in the same provision as the freedom of association, this is not always the case – in Germany, for instance, the two are clearly separated in different articles (Art. 8 and 9 of the Basic Law; the same is true for Art. 33 and 34 of the Turkish Constitution).

In most countries, specific infra-constitutional norms (laws and decrees) regulate the law of assemblies. Here again, the UK in which the freedom of assembly used to be a residual right and is now included in the Human Rights Act, forms an exception. France has a codification for public meetings only, while demonstrations (“manifestations”) are regulated in other statutes not specifically covering the law of assemblies. Furthermore, Belgium and Ukraine do not have codifications pertaining to specific issues regarding the conduct, protection and restrictions of assemblies. In Tunisia, a statute by the former regime, enacted in 1969, has been declared valid until the new regime will legislate on the matter.

⁹⁹⁴ U.K. Preuß, Associative Rights (the rights to the freedom of petition, assembly, and association), in: M. Rosenfeld, A. Sajó (eds.), Oxford Handbook of Comparative Constitutional Law 1st edition 2012, 948, at 951 et seq.

⁹⁹⁵ ECtHR, *Ezelin v. France*, Application no. 11800/85, judgment of 26 April 1991.

⁹⁹⁶ Cf. report on Hungary, *supra*, p. 115.

Wording

The wording of the constitutional guarantees is quite similar. The provisions usually guarantee the freedom of peaceful – and in some cases: unarmed – assembly.⁹⁹⁷ Some of the constitutions enumerate different forms of assemblies; the Ukrainian Constitution for instance explicitly mentions “rallies, meetings, processions, and demonstrations”, similarly to the Russian and Turkish provisions. In this regard, the constitutions of the last 30 years (the Turkish Constitution dates from 1982) are more explicit and differentiated than the more traditional legal systems such as the French one whose Declaration of Rights of Man and Citizen of 1789 only mentions the communication of ideas and opinions without explicitly referring to assemblies.

The wording of the Belgian guarantee is an exception worth mentioning. Already in 1831, Belgium was the first state to establish a specific and distinct regime for open air gatherings. These require not only prior notice, but prior authorization,⁹⁹⁸ as opposed to indoor meetings. This stipulation has proved widely influential as the differentiation between open air and indoor assemblies was later on incorporated in the constitutions of Luxemburg, Denmark, Germany, Greece, Italy, Spain and Romania (mostly without the authorization requirement, however).⁹⁹⁹ Finally, the legal provisions differ in technical terms: Sometimes the scope and conditions of restrictions of assemblies are defined in the constitutional guarantee itself, sometimes only in the implementing laws. In some legal orders, a general restriction regime applies to all fundamental freedoms; in other constitutions, each fundamental right has its own particular restriction regime.¹⁰⁰⁰

Scope of application

Ratione personae

Importantly, the constitutional guarantees differ with regard to their scope *ratione personae*. Art. 11 ECHR requires member states to guarantee the freedom of assembly to “everyone” within their jurisdiction. Art. 16 ECHR allows member states to restrict the political activities of foreigners, but these restrictions must be proportionate.¹⁰⁰¹

Many constitutions explicitly grant the freedom of assembly to citizens only. In part, this has to do with the intimate connection of the communication rights with citizenship, such as in France. The limited personal scope of the guarantee for citizens can be found in the Serbian, Russian, German, French, and Belgian constitutions. In some cases (Belgium and Germany), constitutions protect foreigners by guaranteeing their fundamental rights through residual provisions. Still others extend the freedom of assembly of foreigners through an

⁹⁹⁷ Cf. 1st Amendment to the US Constitution: “Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”; Art. 8 German Basic Law: “(1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.”; Art. 26 Belgian Constitution: “the right to assemble peaceably and without arms, in accordance with the laws that can regulate the exercise of this right, without submitting it to prior authorization”; French Declaration of the Rights of Man and the Citizen: „free communication of ideas and opinions is recognized as being one of the most precious of the rights of Man; every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.”; Art. 34 of the Turkish Constitution: „Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.”; temporary Tunisian Constituent Law: “the guarantee of freedoms and human rights”; (1) Art. VIII Hungarian Constitution: “everyone has the right to peaceful assembly”; Article 39 of the Constitution of Ukraine: “citizens shall have the right to assemble peacefully without arms and to hold rallies, meetings, processions, and demonstrations after having notified executive or local self-government bodies in advance”; Art. 54 Serbian Constitution: “Art. 54 of the Serbian Constitution Citizens may assemble freely.”

⁹⁹⁸ The provision “does not apply to open air gatherings, which are entirely subject to police regulations.” See *supra* p. 46.

⁹⁹⁹ S. Ripke, *Europäische Versammlungsfreiheit*, 22-43 (Mohr Siebeck Tübingen 2012).

¹⁰⁰⁰ For further information see below pp. 141-148.

¹⁰⁰¹ Venice Commission, *Opinion on the Compatibility with Human Rights Standards of the Legislation of Non-Governmental Organisations of the Republic of Azerbaijan*, Oct 2011, CDL-AD(2011)035e, paras 79-81.

extensive interpretation of the constitutional guarantee of freedom of assembly (France). Thus, in some form or other, almost all legal systems satisfy the standards of Art. 11 and 16 ECHR.

Important exceptions seem to be the Serbian and the Russian legal orders in which freedom of assembly appears to be granted to citizens only, with no wide interpretation or default guarantee which would satisfy the requirement of a broad personal scope as mandated by Art. 11 and 16 ECHR.

Ratione materiae

In the states under scrutiny, the material scope of the assembly guarantee differs in an important respect, namely with regard to the content of the message or the purpose conveyed by the meeting.¹⁰⁰²

A conspicuous feature of the First Amendment of the US Constitution is the facially broad scope of the guarantee. The guarantee may be seen to proceed from the premiss that all types of concerns are worth constitutional protection. While the notion of an “assembly” was in the USA initially interpreted narrowly, as referring only to activities aimed at influencing the government, it is now central to American constitutional doctrine that freedom of expression and assembly extends **beyond purely political speech**. This approach underscores the right of assembly-organizers to define for themselves the diverse (political, cultural, social, inter alia) dimensions of their publicly voiced concern.

In contrast, the German and Hungarian constitutions reserve the freedom of assembly guarantee – as interpreted by the constitutional courts – to meetings aiming at the **formation and articulation of a political will**. These constitutions thus exclude purely social, cultural or “fun” gatherings from the material scope of the freedom of assembly (see in detail also below).¹⁰⁰³ So the US and the German schemes sit on the two ends of a spectrum.

The ECtHR’s understanding of the freedom of assembly sits in the middle of that spectrum.. The Strasburg Court in its leading case *Plattform ‘Ärzte für das Leben’ v. Austria*, defined assemblies as “associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community.”¹⁰⁰⁴

Belgium,¹⁰⁰⁵ Serbia¹⁰⁰⁶, the UK¹⁰⁰⁷ and the Russian Federation do not distinguish events with regard to the purpose of the meeting, and in that regards resemble the current US-approach., the Russian federation however excludes election campaign meetings and religious rites and ceremonies from the protection.,¹⁰⁰⁸

France follows a middle course, and in that regard resembles the ECtHR’s approach: The law defines demonstrations as public meetings with any whatever intellectual message, not limited to political content. But stricter regulation is allowed for non-political meetings in comparison to political demonstrations.¹⁰⁰⁹

The German Federal Constitutional Court defines “assemblies“ with regard to their function for the shaping of the public opinion and the formation of the political will in a democratic society. In consequence, cultural gatherings such as large open-air music events (“love

¹⁰⁰² On this point see W. Hoffmann-Riem, Standards für die Verwirklichung der Versammlungsfreiheit in Europa, in: W. Durner/F.-J. Peine/F. Shirvani (eds.), Freiheit und Sicherheit in Deutschland und Europa, Duncker & Humblot, 2013, 267, at 272 et seqq.

¹⁰⁰³ Cf. report on Germany, *supra* p. 56; report on Hungary, *supra* pp. 118-119.

¹⁰⁰⁴ Plattform „Ärzte für das Leben“ v. AUT, Nr. 10126/82, para. 32.

¹⁰⁰⁵ *Supra* p. 46.

¹⁰⁰⁶ *Supra*, p.109.

¹⁰⁰⁷ *Supra*, p. 11.

¹⁰⁰⁸ *Supra*, pp. 79-80.

¹⁰⁰⁹ See *supra*, p. 27.

parade”) are not considered to be assemblies. However, the German Federal Constitutional Court has been more lax vis-à-vis the issue with regard to music events of the extreme right. It argues that here, the music is used to convey political messages and is therefore of importance to the political identity of skinhead and neo-nazi groups.¹⁰¹⁰ In general, the German Federal Constitutional Court has made an effort to take the specific sensibilities of extremist groups into consideration in order to avoid indirect discrimination and to remain content-neutral.

Strongly influenced by the German approach, Hungarian law also restricts freedom of assembly to events affecting public matters, depending on the expressed opinion’s “content, form and context” while other gatherings, such as sports events, are not comprised in the protection.

Flashmobs

Flashmobs are one of the novel challenges for the regulation of assemblies. Flashmobs are spontaneous gatherings arranged by social media, social networks such as facebook, for example, for different purposes, be it celebrating and partying together, or forming a spontaneous manifestation with a political purpose. Due to their spontaneity, the absence of an organizer, the unforeseeable number of participants, and due to the lack of a specific legal framework, they pose a challenge for the authorities. Still, the situation has not been tackled by legislators so far. In the meantime, the police and, in some cases, courts have tried to come to terms with these new forms of gatherings, by applying the traditional conception, legal distinctions and terms.

The British police association (Association of Chief Police Officers of the UK) has issued a manual on how to behave in such events, trying to apply a proactive and human rights-based approach. In the US, the issue has been put onto the agenda in 2011, when protestors tried to organize an impediment of train traffic in San Francisco via mobile phones. The Bay Area Rapid Transit reacted by shutting down cell phone service in several subway stations for a few hours. This reaction was alleged to have violated the First Amendment, which requires a more specific and immanent incitement of violence in order to allow for a restriction of the freedom of assembly.¹⁰¹¹

German courts employ the mentioned terminological distinction between meetings with a political message and purely cultural, musical or sportive events unprotected by freedom of assembly. As a consequence, a distinction between flashmobs and smartmobs emerged. Flashmobs have been defined as pure “fun” events while smartmobs designate those with a political purpose and are thus protected by Art. 8 of the German Basic Law (the constitution). Similarly, in Poland flashmobs are not specifically protected, since they usually do not contribute to public debate.

In contrast, Hungary reacted to a critical sentence of the ECtHR (*Bukta v. Hungary*¹⁰¹²) after the dispersal of spontaneous assemblies. The state now treats flashmobs equally as other assemblies contributing to public debate.

Today, assemblies and opposition movements often mobilize their supporters via facebook, be they of the left or right end of the political spectrum. In the Gezi park protests in Turkey, facebook also played an important role in organizing demonstrators. Furthermore, a new type of flashmob emerged with people standing still for several hours on Taksim Square (“Standing Man Protest”) in Turkey which was eventually dispersed by the police. Overall, social networks thus seem to facilitate the gathering of assemblies. Most countries have reacted and protect assemblies organized via social media in the same way as other assemblies.

¹⁰¹⁰ Cf. report on Germany, *supra* p. 57.

¹⁰¹¹ Cf. report on U.S., *supra* p. 43-44.

¹⁰¹² ECtHR, *Bukta and Others v. Hungary*, *supra* fn. 762.

Federal states

While some countries studied in this report (Belgium, the US, Germany, the Russian Federation) are federal states, this circumstance does not seem to play an important part for the regulation of freedom of assembly. In Germany, for instance, the competence to legislate on the freedom of assemblies has been transferred to the *Länder*, the lower federal level, in the course of a constitutional reform of 2006. Currently, four of 16 *Länder* have made use of this competence. In the remaining *Länder*, the old federal law on assemblies and processions is still in force. Despite this federalization and the ensuing legal diversity of assembly laws adopted by the *Länder*, German public law as a whole is strongly “constitutionalized”: There is a bulk of constitutional case-law which spells out constitutional principles that must be satisfied by ordinary law, including the laws of the *Länder*. In consequence, the German Federal Constitutional Court has given detailed instruction on what is in constitutional terms admissible with regard to regulating assemblies. The result is that minor divergences between different assembly laws of the *Länder* do not lead to meaningful substantive differences.

More important than the federal set-up seems to be the role of cities and other municipalities. This is especially true for countries which do not possess an assembly law and which do not acknowledge that restrictions of fundamental rights require a formal legal basis, such as the Ukraine. Here, a decree dating back to the former regime is being applied concurrently with municipal orders regulating important procedural aspects of the law of assemblies.¹⁰¹³

2. Restrictions

Restrictions “prescribed by law”?

In almost all studied countries, restrictions to the freedom of assembly are laid down in statutory laws. This issue is being debated in the UK where the lack of an assembly law leads to a somewhat confusing variety of restriction powers based on different statutes and rules, some of which were never intended to be used for restricting assemblies. Some powers of restriction are recognized as common law powers only. The most problematic (indeterminate and untargeted) common law power of acting *contra bonos mores* has been held to be a violation of the requirement “prescribed by law” by the ECtHR in 1999.¹⁰¹⁴ It has not been employed ever since. Another common law power which is still applied is derived from the breach of the peace doctrine which permits government officials to complement or even circumvent the powers granted to them by the Public Order Act, and allows them to use methods such as kettling of demonstrators. However, due to a long tradition and an increased awareness of police and courts of human rights standards since the entry into force of the Human Rights Act in 1998 (implementing the ECHR), restrictions are usually well predictable and applied in a non-discriminatory and justiciable manner.

In Ukraine, the adoption of an assembly law is required by the Constitution of 1996 (Articles 39 and 92). A new draft assembly law has been developed in 2006 and has been assessed by the Venice Commission and the OSCE/ODIHR several times. It underwent a first reading in parliament in 2009. However, a second reading scheduled for March 2012 was postponed and has not taken place since. Existing statutory provisions do not regulate the matter sufficiently, as the lack of a provision on notification illustrates. The result is an unclear situation in which some municipalities (*oblast*) apply a Decree by the Supreme Soviet Presidium of 1988 and others apply their own municipal regulations issued by executive bodies. Authorities and courts hold different views on the applicability of the Decree of 1988. The Ministry of Justice considers only those provisions valid which do not contradict the 1996 Constitution. Contrary to the Constitution, the decree requires the authorization of assemblies instead of a mere notification procedure. It also allows authorities to ban assemblies although this can – according to the Constitution – only be done by courts. One

¹⁰¹³ See *infra* p. 151.

¹⁰¹⁴ ECtHR, *Hashman and Harrup v. UK* (1999), appl. no. 25594/94. Cf. report on the United Kingdom, p. 21.

gets the impression that the issue is one over which the country is divided into a fraction favouring the new assembly law and trying to satisfy Western requirements, particularly by the Venice Commission, while other groups would like to leave the question unsettled in order not to diminish discretionary powers and not to empower courts. The violent overthrow of the government of February 2014 has put the issue aside for the moment.

Private space

An issue which is currently in flux is the scope of the guarantee *ratione loci*. To what extent does the freedom of assembly reach onto private property? Can demonstrators claim a right to demonstrate in private spaces which are accessible to the public? The classic understanding of freedom of assembly is that it is a constitutional guarantee to demonstrate on *public* streets and places (with the exception of specifically banned areas). In several countries, the question arose whether the right can also be claimed in private areas which have a public and therefore potentially communicative function, such as airports and shopping malls. The fundamental rights dimension of the topic is especially delicate in countries where many publicly accessible spaces are rented out to private entities, and where the public sphere is thus privatized to some extent, such as the UK.¹⁰¹⁵

The legal answers to this development vary. The legal regimes are highly diverse, and do not only depend on the concepts of publicly owned or privately owned real property, but also on the idea of a public dedication of a given territory, independently of possible private ownership of that territory. At the one side of the spectrum, there are generous fundamental rights regimes such as in Germany and Hungary. These states have extended the freedom of assembly to privately owned spaces (at least to those co-owned by private and public entities) that have been opened to public access. Countries like the US have a somewhat mixed regime. At the other end of the spectrum, the majority of countries retains the classical approach: no freedom of assembly on private ground. In Germany, the Federal Constitutional Court's FRAPORT decision of 2011 where protesters assembled in an airport to demonstrate against deportations of foreigners brought about a legal evolution. The Court conformed that the constitutional guarantee of freedom of assembly applies directly in a space dedicated to public use (an airport) under mixed private-public ownership, at least when the state holds more than 50 percent of the shares and is thus able to control the firm and the space..¹⁰¹⁶

In Hungary, the legislator provided for a similar extension in the ARA (assembly law).

In the U.S., the Supreme Court in *Lloyd Corp. v. Tanner* upheld a ban on distribution of anti-Vietnam-war handbills in a privately-owned shopping centre.¹⁰¹⁷ However, several states in the US adopted legislation allowing for leafleting and demonstrations in publicly opened private spaces such as shopping malls, and these were subsequently confirmed by the state judiciaries. In the UK, the question arose in the case *Appleby v. United Kingdom* where the applicants were prevented from leafleting in a private shopping centre. In the other countries under scrutiny, no information was available on the issue. This suggests that it has either not arisen yet or has been handled restrictively.

Prohibition, bans, and dispersals of assemblies

In some countries, the prohibition of an assembly is formally not allowed in advance (before the beginning of the event). This is the case in the UK, with the exception of trespassory assemblies which are not openly accessible and which give reason to believe that they "might result in serious disruption to the life of the community, or [...] in significant damage to the land, building or monument."¹⁰¹⁸

¹⁰¹⁵ Cf. report on the United Kingdom, p. 11-12.

¹⁰¹⁶ BVerfGE – *Frankfurt Airport Decision*, 22. Feb. 2011, 1 BvR 699/06, *supra* fn. 472, sect. III. 2. a); *supra* p. 58.

¹⁰¹⁷ 407 U.S. 551 (1972). See also, *Hudgens v. NLRB*, 424 U.S. 507 (1976).

¹⁰¹⁸ Report on the United Kingdom, *supra* p. 14.

The prohibition of assemblies in advance usually requires the existence of an elevated degree of threat to public safety or order.¹⁰¹⁹ Also, a proportionality test must be applied. In particular, less severe measures must first be exhausted. In France, prohibitions can be issued in the event of a risk to public order. In Poland, the prohibition of an assembly requires that penal laws have been violated or that substantial threats to the life or health of people, or to property of considerable value exist. Similarly, in the Russian Federation, the termination of an event is justified if the life and health of citizens or the property of individuals and legal persons is threatened, or when “extremist acts” are being performed (Article 16 of the Federal Law No.114-FZ “On Countering Extremism” of 25 July 2002). In Serbia, a far-reaching and content-related general ban of neo-nazi and fascist organizations and associations has been issued in 2009, next to other, more “regular” rules with regard to prohibitions or dispersals of demonstrations in cases of threats to private or public goods.¹⁰²⁰

The dispersal of an ongoing assembly usually requires that other measures have been exhausted or do not appear sufficient in order to “prevent serious public disorder”¹⁰²¹ (UK). In Hungary, the organizer is primarily called to disperse the event if order cannot be re-established otherwise and when the order to do so is proportionate. As a second step, the police can itself disperse the assembly (i) if the organizer fails to dissolve the assembly which became unlawful and order cannot be re-established otherwise; (ii) if crimes are committed or called for; (iii) if the assembly violates the rights and freedoms of others, or (iv) if participants are armed or wear arm-like devices. However, the Hungarian constitution requires a restrictive and proportionate application of these norms. In Turkey, unnotified events or those being held outside the notified time frame as well as possession or weapons and other dangerous tools make an assembly illegal. Illegality is the precondition for a dispersal following a warning.¹⁰²²

Some countries appear to acknowledge the serious and exceptional nature of a ban of a specific demonstration through specific legal requirements on competencies and form. For example, they require direction or approval of higher ranking officials, such as the Home Secretary in the UK, and prescribe to observe certain formal requirements (such as a court confirmation in Ukraine).

Time, place, and manner restrictions

Assembly and police laws provide for a wide range of restrictive measures short of a prohibition, and before the resort to police force before or during an assembly will be admissible. Such measures may, for instance, restrict the time, place or manner of an assembly.

Central to the US constitutional guarantee is the principle that any regulation of protected expression that is directed at the content of the message being communicated is generally forbidden. The presumptive unconstitutionality of content-based regulation of expression within the scope of the First Amendment is essential to the understanding of the right.¹⁰²³ Content-based police suppression may, however, be in conformity with the First Amendment in regard to assemblies where participants communicate fighting words, utter threats of violence, or incite to riot. When content-neutral, a wide range of measures are allowed in order to maintain public order and protect against nuisances. They can range from anti-noise ordinances¹⁰²⁴, over ordinances protecting residential privacy,¹⁰²⁵ anti-littering laws,¹⁰²⁶ laws

¹⁰¹⁹ See for instance § 15 (1), (3) German Assembly Act.

¹⁰²⁰ Cf. report on Serbia, p. 109.

¹⁰²¹ Section 13(1), (4) of the English POA 1986.

¹⁰²² Article 23, 24 of the Turkish Law on Meetings and Demonstrations.

¹⁰²³ See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

¹⁰²⁴ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

¹⁰²⁵ *Frisby v. Schultz*, 487 U.S. 474 (1988).

¹⁰²⁶ See *Schneider v. State of New Jersey*, 308 U.S. 147 (1939); cf. *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

protecting against interference with traffic as well as ingress to and egress from buildings,¹⁰²⁷ anti-solicitation regulations,¹⁰²⁸ to the regulation of signs and billboards. Beyond the requirement of meeting a reasonableness test, these measures – as in the case of any measures interfering with the categories of expression guaranteed by the First Amendment – need to be applied in a content-neutral fashion.

Other countries such as Poland or Germany operate with a general clause of police law, the applicability of which is conditioned merely on the existence of a threat for public security and order (Germany) or, in the case of Poland, on a threat for state security, public order, public health, public morality or rights and freedoms of other people. Similarly, Art. 55 (3) of the Russian Constitution provides that “rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State”. It is striking that these restrictions are in the Russian Federation regulated at the constitutional level while in most other states such detailed regulations can be found on the level of ordinary statutory law only. Similarly, in the UK, conditions may be imposed before or during a procession if the competent authority believes that the procession may result in **serious public disorder, serious damage to property** or a **serious disruption to the life of the community**, or that it was organized for intimidating others.¹⁰²⁹

Place restrictions: specifically designated areas in the Russian Federation and Serbia

The free choice of venue is understood to form an important part of the freedom of the organizer to autonomously decide on the character of the event, especially when the location itself is in some form object of the protest. This is true for the Taksim Square Protests which had the future design of the place as its object. However, some countries have seriously curtailed the free choice of the venue. Following the assembly law amendments of 2012, the Russian Federation aims at steering assemblies to “specially designated areas” which are determined by the executive authorities that are competent on the subject matter. The authorities also determine the way in which these places are to be used and the number of persons who are allowed to assemble there. A group up to that number is not obliged to notify the event. Hence, organizers respecting the confinement of space and size are privileged. Thereby, the Russian Federation aims at channelling assemblies into places which are confined and determined by the authorities, and which are limited in size, too.¹⁰³⁰ At all other, non-designated places, authorities possess far-reaching rights to alter the location, sight and sound and other features of the envisaged assembly: Upon the notification by the organizers, the authorities can issue a reasoned proposal with alternative suggestions. This proposal is supposed to be followed by an “agreement process” with the organizers which is however not defined very clearly in the law. If no agreement can be reached, the assembly may not be held. Furthermore, the authorities often use the “agreement process” with organizers to prevent assemblies from taking place within sight and sound of the targeted object or at the planned date.

Similarly, Serbia guarantees the freedom of assembly merely in locations deemed adequate for the purpose under Art. 2 (2), (3) of the Serbian law (PAA). The locations are designated by municipality or city regulations according to Art. 2 (8) PAA.

Turkey regulates the locality of an event relatively strictly. The authorities enjoy large discretion with regard to the location of assemblies, while the organizers do not play an important role in the process of deciding the venue.

¹⁰²⁷ *Hill v. Colorado*, 530 U.S. 730 (2000).

¹⁰²⁸ *Martin v. City of Struthers*, 319 U.S. 141 (1943).

¹⁰²⁹ Cf. fn. 24.

¹⁰³⁰ Cf. the report on Russia, *supra* pp. 83-84.

Tunisia's regulation approaches the issue of place restrictions from the other end: While assemblies are generally allowed in public spaces, officials (the governor) can forbid the movement of persons and vehicles in designated areas for a time span required for safeguarding by security and public order.¹⁰³¹ The 1969 Assembly Act states that public meetings cannot be held on public roads.¹⁰³² Additionally, they cannot continue beyond midnight, except in localities where the closure of public establishments occurs later.¹⁰³³

Similarly, Art. 8 of the Hungarian Act (ARA) provides for a ban of an assembly at a specific time and place if the authority's individual assessment of the situation shows that the planned assembly (i) seriously endangers the undisturbed functioning of representative organs (parliament and local and municipal self-governing bodies) or courts; or when (ii) traffic cannot be rerouted. Police might then ban the assembly from the time or place signalled in the organizer's notification. The law in France is also somewhat peculiar. Static public meetings are not allowed to take place on public roads (by default only on public squares and other places).

In the other countries, the freedom of the organizers to choose the venue of the assembly is better respected. Ban areas (for example around Parliament) form the only general exception to the free choice of the location of public events.¹⁰³⁴

Time restrictions

Ukraine, Serbia, the Russian Federation and Turkey place general time limits on the exercise of the freedom of assembly, amounting more or less to a night time ban of assemblies in certain areas. Such is the case in some Ukrainian cities (Kiev,¹⁰³⁵ Sumy,¹⁰³⁶ Rivne,¹⁰³⁷ and Kharkiv¹⁰³⁸) which prohibit assemblies at night time after 10 or 11 p.m. Similar time restrictions exist in Serbia, where assemblies may not take place between 2 and 6 p.m. and between 11 p.m. and 8 a.m. and are limited to a maximum duration of three hours. Moreover, under the Serbian Art. 3 (2) PAA, assemblies that move from one location to another (public processions) may only be held in an uninterrupted motion, i.e. the assembly may only halt at the start and finishing points of the procession. In the Russian Federation, public events need to take place between 7 a.m. and 22 p.m. with the exception of national commemorative events or events with a cultural content. In Turkey, assemblies have to take place during the day, starting earliest at sunrise and ending the latest an hour before sunset.

Sound restrictions

In Hungary¹⁰³⁹ and, as a rule, also in Ukraine,¹⁰⁴⁰ public area events are explicitly exempted from sound level restrictions. Despite this rule contained in a law, some Ukrainian cities (Sumy and Rivne) issued their proper rules with regard to sound limits and the prohibition of sound-amplifying devices. In the other countries, no fixed sound limits exist, which, naturally, does not exclude decisions on a case-by-case basis.

¹⁰³¹ Tunisian Decree n° 78-50 of 26 January 1978, Art. 4.

¹⁰³² Tunisian Act of 24 January 1969, Art. 8.

¹⁰³³ *Ibid.*, Art. 4.

¹⁰³⁴ See *infra*, p. 146.

¹⁰³⁵ The Decision of the Kiev City Council no. 317/418, *supra* fn. 700.

¹⁰³⁶ Decision of the City Council of Sumy no. 214, *supra* fn. 701.

¹⁰³⁷ Decision of the City Council of Rivne no. 53, *supra* fn. 702.

¹⁰³⁸ Decision of the City Council of Kharkiv no. 541, *supra* fn. 703.

¹⁰³⁹ Regulation of the Hungarian Government, Nr. 284/2007. (X. 29.) Korm. Rendelet. The vice-ombudsman for the rights of future generations criticized the lack of a clear regulatory context which would guarantee the right to a healthy environment, but acknowledges (confirming the opinion of the minister) that events protected by freedom of assembly are to be separately assessed in this regard than other events. <http://www.ajbh.hu/documents/10180/111959/Jelent%C3%A9s+a+k%C3%B6zter%C3%BCleti+rendezv%C3%A9nyek+okozta+zajterhel%C3%A9sr%C5%91/581dd32a-715e-4d39-9760-319ec2636a33?version=1.0> at 30 (last accessed: 10 March 2014).

¹⁰⁴⁰ Ukrainian Law "On Sanitary and Epidemiological Welfare of the Population", *supra* fn. 706.

Anonymity of participants

An important issue in the context of restrictions of the freedom of assembly is the right of demonstrators to stay anonymous. In England, databases are being kept that collect the names even of peaceful demonstrators and of those exhibiting lawful conduct. The concealment of faces of assembly participants is prohibited in Belgium,¹⁰⁴¹ the Russian Federation,¹⁰⁴² Turkey,¹⁰⁴³ and Hungary (if suited to frustrate the identification of persons by the authorities¹⁰⁴⁴). Identification rights in Turkey extend to the right to take fingerprints and photographs.

Fringe areas and other restricted zones

Most countries spatially restrict the exercise of the freedom of assembly in the form of designated areas surrounding central public buildings, especially parliament, where demonstrating is not allowed. However, the laws differ widely.

In the UK, an authorization requirement for demonstrations in the vicinity of Parliament has been repealed on the basis of proportionality considerations. In Ukraine, assemblies near parliament, the Administration of the President, the Cabinet of Ministers, the Supreme Court and the Kiev City Council need prior permission.

Other countries such as the U.S. designate “frozen” or “buffer zones” around polling places and certain buildings without an obvious political function such as schools, hospitals (in particular: abortion clinics) and private residences. However, the issue is constitutionally debated and the Supreme Court has rendered some decisions in which it has limited these zones, arguing that these constituted invalid content-based restrictions, failed to promote significant governmental interests, or were overbroad.¹⁰⁴⁵

In some countries, assemblies are restricted on specific sites of public historical significance. An example are the sites of former Nazi concentration camps in Poland where assemblies need to be permitted by the Governor, and permissions can be denied, inter alia, for reasons of concern for the dignity of the monument.

During the pro-European rallies in Ukraine following the delay of an association agreement with the EU in November 2013, several spatial bans have been issued. Courts have upheld bans around the Maidan (Independence Square) in Kiev, and near administrative buildings in other cities, apparently in order to prevent opposition parties to organize further rallies.

In Turkey, demonstrations on the Taksim square were banned for a long time by the AKP-government after protests had started there at the end of May 2013.¹⁰⁴⁶ Starting on June 15, 2013, all protests on the square were banned and any gatherings were dispersed immediately.¹⁰⁴⁷

¹⁰⁴¹ General Police Regulation of the City of Brussels, Chap. III – *Public safety and convenience of passage*, Sect. 1 – *Assemblies, demonstrations, processions*, Art. 32.

¹⁰⁴² Article 6 (4) No.1 of the Russian Assembly Law.

¹⁰⁴³ *Ibid.*, Article 23.

¹⁰⁴⁴ § 169 c) of the Hungarian Administrative Offences Act. The text itself does not require that the participants intend to evade law-enforcement, and thus also burdens participants who face violent counter-protestors. The constitutional admissibility of this provision is doubtful.

¹⁰⁴⁵ Cf. report on the United States of America, *supra* p. 39.

¹⁰⁴⁶ In the case of *DISK and KESK v. Turkey* which concerned the trade unions' complaint about the police intervention in the Labour Day celebrations on 1 May 2008 in Istanbul, the police took extensive measures to deter the demonstration and made declarations that they would use force against the demonstrators if they insisted on holding the demonstrations in the Taksim Square. To this end, on 1 May 2008, upon the order of the Istanbul Governor, operations of ferries and subways were stopped, the roads leading to Taksim Square were blocked and extra police were deployed to the area to block the entrance to Taksim. The ECtHR noted that in 1977, during Labour Day Celebrations in the Taksim Square, 37 people had died when a clash had broken out. As a result, the Taksim Square became a symbol of that tragic event, and it is for this reason that the applicants insisted in organising the Labour Day celebrations in Taksim in commemoration; ECtHR, *DISK v. KESK v. Turkey*, *supra* fn. 501.

¹⁰⁴⁷ Amnesty International, *supra* fn. p. 13 *et seq.*; EMRHN, *supra* fn. 497, III. 1.

Use of force by the police

The force to which police officers may resort to while supervising an assembly is, in most countries, subject to strict reasonableness- or proportionality-tests. In the US, officials and courts envisage a reasonable officer and, based on the totality of the facts and circumstances, ask whether such an officer could believe that the use of force was reasonable.¹⁰⁴⁸ In most states (e.g. in France), the use of force is primarily allowed when the police are themselves threatened by violence from the side of the protestors. Likewise, Turkish law conditions resort to police force on a prior resort to violence on the side of the demonstrators. In that case, officials may – in a proportionate fashion – use force. When a demonstrator who is to be captured risks to escape, firearms may be used in order to prevent such escape.

Less strictly, the Tunisian police may resort to firearms against demonstrators who refuse to scatter after the police issued several warnings. This is allowed even if protestors have not used violence beforehand.

In Serbia, use of force is allowed to protect persons and property of the participants themselves, to protect other citizens, in order to maintain public order and peace, the safety of traffic, or to maintain other activities related to secure the assembly. Furthermore, force can be applied under Arts. 12 (2) and 14 of the Serbian PAA in order to terminate assemblies that are either banned or not registered, and in order to re-establish order and peace. In the Russian Federation, too, the threshold to allow police force is quite low: Besides other triggers, it is sufficient that administrative offences are being committed.

The rules also differ with regard to the degree of detail by which the permissible use of police force is defined. The Ukrainian rule is an example of a detailed list of specific measures which can be employed in cases of public disorder such as “handcuffs, rubber batons, methods of restraint, tear gas, light and distraction devices, devices to open doors and force vehicles to stop, water cannons, armoured vehicles and other special vehicles as well as sniffer dogs”. These may only be employed after audible warnings have been issued.¹⁰⁴⁹

State of emergency

Most countries have legislation which restricts the freedom of assembly in the state of emergency. In Tunisia, the state of emergency has been in place since the beginning of the Arab Spring revolution in January 2011, with side-effects for the freedom of assembly. For instance, the movement of persons and vehicles can be prohibited in certain areas for as long as public order requires; the arrest powers of the Ministry of Home Affairs have been expanded, assemblies cannot take place on public roads, and any meeting or demonstration likely to disturb security and public order can be prohibited by decree.

Anti-terrorism legislation

Freedom of assembly is sensitive to restrictions in the name of anti-terrorist legislation which has been introduced, especially in the aftermath of 9/11, but also in reaction to other incidents and conflicts, in a number of countries. In Turkey, Art. 220 of the Penal Code in conjunction with Art. 1 of the Terrorism Act have in the past been used to prevent and punish the participation of Kurdish or leftist organizations in assemblies. Since a leading ruling of the Court of Cassation (Supreme Court of Appeals) of 2008, Kurdish and leftist demonstrators have been punished according to this provision with between seven and fifteen years in prison. As a result, activities such as requesting mother-tongue education in Kurdish or displaying a banner requesting free education have been subjected to criminal proceedings against the protestors. Also in relation to the Gezi Park demonstrations in the summer of 2013, a number of protesters have been subject to criminal investigations under the anti-terrorism laws.

¹⁰⁴⁸ *Graham v. Connor*, 490 U.S. 386 (1989).

¹⁰⁴⁹ *Cf. supra* p. 98.

In Hungary, “operational zones” imposed by the police or the counter-terrorism centre are used to forbid demonstrations in unwanted areas such as the vicinity of the president’s home, and, more largely, to circumvent the narrow scope for restrictions as foreseen by the Hungarian Assembly Law (ARA).

The UK has – following critical case-law of the ECtHR – recently abolished and circumscribed more narrowly some of its anti-terrorist police powers. For instance, after the ECtHR judgment *Gillan and Quinton v. United Kingdom*,¹⁰⁵⁰ stop and search powers included in the Terrorism Act were repealed and replaced by more targeted and proportionate powers.

3. Procedural issues

Notification or authorization requirement

Most countries require organizers of outdoor assemblies to notify the authorities before the planned assembly. **Notifications** usually need to include information about date, starting time, route, name and contact information of the organizer. Rules differ as to the minimum notification period: In the UK, the notification must be made six clear days before the proposed event (later notification is accepted if an earlier one is not reasonably practicable). Germany generally requires outdoor assemblies to be notified at least 48 hours before the event.

In France, assemblies taking place on public roads need to be notified fifteen to three days before the event, with the exception of demonstrations following local custom. Disregard of the notification requirement is punishable as an administrative offence. Here, it has been criticized that the notification requirement is being (ab)used as a disguised requirement to seek a prior authorization.

Tunisia, too, requires notification fifteen to three days before the event. Incomplete or inaccurate information as well as participation in a non-notified event carries the risk of earning up to one year of imprisonment. Poland has a notification period between 30 and three days before the event, requiring detailed information; universities require consent of the rector which needs to be requested no later than 24h before the event. In Hungary, notification has to be sent at the latest three days before an event in a public area, with no starting date – having the effect that the police already had to take notice of assemblies to be held regularly within the next hundred years – thereby blocking public space for other interested groups. In Serbia, notification for holding an assembly has to be filed 48 hours before the beginning, in places of public transport five days in advance. When the required information (program and purpose, location, time and duration, estimated number of participants and measures planned by the organizer in order to maintain order) is not included in the notification, assemblies are not regarded as notified.¹⁰⁵¹

The rules in Ukraine and in the Russian Federation result in a relatively long and therefore onerous notification period of ten days before the planned event: In Ukraine, courts have ruled that “organizers of an event should inform executive authorities or bodies of local self-government in advance, that is, within reasonable time prior to the date of the planned event”.¹⁰⁵² However, there is no law prescribing this rule or any fixed period. The only written rule is a Decree of 1988 (issued by the former regime) setting a deadline of ten days before the event. In the Russian Federation, notification needs to be given between fifteen and ten days prior to the event, encompassing a lot of information ranging from the number of participants of the event as well as the name, address, telephone number of the organizer, data on persons authorized by the organizer to perform managerial functions, forms and methods to be used by the organizer to ensure public order, the organization of medical aid,

¹⁰⁵⁰ ECtHR, *Gillan v. UK*, *supra* fn. 108.

¹⁰⁵¹ Cf. p. 108 et seq.

¹⁰⁵² Decision of the Constitutional Court of Ukraine no. 4-pn/2001 of 19 April 2001, *see supra* p. 93.

and on the intention to use sound-amplifying devices during the conduct of the event. Group pickets need to be notified three days prior to the event.

In a few countries, assemblies need not only be notified in advance, but depend on **authorization or permission** by the authorities. This is the case for open air assemblies in Belgium – these are explicitly excluded from the constitutional provision protecting (indoor) assemblies. Authorization has to be requested from the mayor at least ten days in advance by way of a comprehensive form including detailed information about the organizers, the planned number of participants, itinerary, planned meetings etc. This strict regulation seems to be connected with the fact that the Belgian legal order does not distinguish between political demonstrations and other public events of a cultural, festive or sportive nature. Despite this restrictive regulation, freedom of assembly is respected in a liberal fashion in Belgium. The right is frequently exercised, usually with broad media coverage.

Permits are required for larger assemblies in most US states, where courts have accepted permits as a viable instrument for coordination and pre-event planning as long as they remain content-neutral. The relevant decisions of the US Supreme Court would appear to support this approach.¹⁰⁵³

In Turkey, assemblies need to be notified 48 working hours before the event. However, legal provisions allow Turkish authorities wide discretion as to whether to accept this notification or to prohibit the assembly. The consequence is a de facto authorization requirement.

With regard to the human rights dimension, an important question is which consequences follow from holding an assembly which has not been notified in advance. While lack of notification for no plausible reason is treated as a summary offence in the UK, in some countries (Germany) unnotified events can be dispersed in case there is no good reason for the lack of notification. However, this power is subject to close proportionality scrutiny by the German Federal Constitutional Court.

Pre-event planning of law enforcement officials with the organizer

Usually, the determination of date, time and route of an event falls within the freedom of the organizer. If the authorities take issue with one of these features for justified reasons, many legal systems provide for a dialogical, and ideally, consensual search for alternatives. These schemes serve to keep with the proportionality principle, because they are a milder means than a simple unilateral determination of these features by the authorities. In order to ensure peaceful and dialogical cooperation, certain legal systems prescribe such cooperative behaviour for both sides. This is the case for example in Belgium where communication between police and organizers is foreseen throughout the organization process.¹⁰⁵⁴ Similarly, in France, the directorate of public order and traffic regulation (*direction de l'ordre public et de la circulation*) can contact the organizer to discuss the itinerary, potential risks and other relevant issues.

Chapter XV of the Ukrainian Statute of Police Patrol also envisages a pre-event planning process between organizer and police, especially concerning indoor events. Here, the police together with the organizer are obliged to inspect building and infrastructure of the location where the event is to be held in order to guarantee a safe meeting. Pre-event planning in Poland includes the possibility for the organizer to request police measures concerning, for instance, adequate protection.

Hungary does not regulate the negotiating process in the ARA, but only mentions it in the ordinance regulating police activity in securing events. In practice, route, place and time are often discussed with the police.

¹⁰⁵³ See report on the U.S., *supra* p. 38 *et seq.*

¹⁰⁵⁴ Belgian Circular of 11 May 2011 concerning the negotiated management of public space for the two-level structures integrated police service, para. 4.

In the Russian Federation, authorities usually appoint an official who renders assistance to the organizer in maintaining public order and security of citizens (Art. 14 (3) No. 1 of the Russian Assembly Law). This assistance seems to comprise pre-event planning and the event itself. The dialogical character of the process may be questioned.

As the right of the organizer to arrange an assembly according to his or her ideas is not guaranteed under Serbian law, arrangements of the organizer can be severely restricted and a negotiating process does not seem to take place in advance.

In France¹⁰⁵⁵ and Tunisia,¹⁰⁵⁶ meetings shall have a supervisory board of at least three people responsible for the maintenance of order and for preventing breaches of the law and speeches contrary to public order and good morals.

Ru the Russian Federation ssia somewhat restricts the capacity to be an organizer and excludes not only banned political parties, but also persons which have been convicted for criminal or even administrative offenses, without any differentiation with regard to the gravity of these offenses (Art. 12 in conjunction with Art. 5 of the Russian Assembly Law).

Spontaneous assemblies

The treatment of spontaneous events which emerge without any prior planning or preparation is a delicate issue. If only for practical reasons, officials understandably prefer to be notified in advance. Under normal circumstances, the notification requirement of a few days in advance does not pose an overly onerous limit on the guarantee of the freedom of assembly. But the balance between the right of the organizer to arrange the event freely and the public interest in security and order may have to be struck differently when the need to assemble and demonstrate arises spontaneously and cannot be postponed without changing the nature of the event. As a result, spontaneous assemblies are often not envisaged in the legislation, but tolerated by courts for reasons of constitutional law. This is the case in Germany.¹⁰⁵⁷ Here urgent assemblies that are organized at short notice to respond to a current event are tolerated as long as the notification occurs as soon as an opportunity to notify arises.¹⁰⁵⁸ Similarly, assemblies must be notified before the event in Poland (and lack of notification is penalized), but the Polish Constitutional Court held that spontaneous assemblies enjoy the same constitutional protection as planned ones. As a result, it is up to the courts to decide whether circumstances would have allowed for a notification or not.¹⁰⁵⁹

In France, Belgium and Tunisia, spontaneous assemblies are allowed as long as they do not cause public disturbances. In 2012, roughly 20% of the demonstrations taking place in France have been spontaneous. While Tunisia handled spontaneous demonstrations much more restrictively before the revolution of 2011, there have been multiple spontaneous events since the revolution all across the country.¹⁰⁶⁰

On the other hand, under Serbian law non-notified events are penalised. However, there are examples of spontaneous assemblies such as the 2013 Belgrade Pride Parade, which was not only left undisturbed by the police but was protected by quickly arriving police officers.¹⁰⁶¹ The statute of patrol service of police in Ukraine¹⁰⁶² permits the police to stop an assembly if a local executive authority has not been notified in advance. In the Russian Federation, spontaneous events are neither foreseen nor tolerated in practice. Strict application of the

¹⁰⁵⁵ French Act of 30 June 1881 on freedom of assembly, Art. 8, *supra* fn. 169.

¹⁰⁵⁶ Tunisian Act of 24 January 1969, Art. 5.

¹⁰⁵⁷ Decisions of the Bundesverfassungsgericht – *Brokdorf Demonstration Case*, *supra* fn. 446, 284 (295)

¹⁰⁵⁸ BVerfGE vol. 85, 69 (75/76), *Urgent Assemblies Case*, *supra* fn. 480.

¹⁰⁵⁹ *Cf. supra* p. 103.

¹⁰⁶⁰ U.S. Department of State, *supra* fn. 954, p. 10.

¹⁰⁶¹ *Cf. supra* p. 110.

¹⁰⁶² The Statute of police patrol service in Ukraine approved by the decree no. 404 of the Ministry of Interior of 28 July 1994, available at: <http://zakon2.rada.gov.ua/laws/show/z0213-94/page> (last accessed: 15 November 2013).

Assembly Law renders spontaneous assemblies – outside the designated areas – impossible. Similarly, spontaneous assemblies are illegal and sanctioned in Turkey.¹⁰⁶³

Counter-demonstrations

In none of the countries studied, counter-demonstrations are specifically regulated. A comparison of the different practices shows that the handling of counter-demonstrations generally corresponds to the regulation and practice of prohibitions: Where assemblies are prohibited relatively easily (the conditions simply being a “public disturbance”, for instance), counter-demonstrations may also be more easily prohibited or dispersed.

Authorities sometimes prohibit demonstrations on account of the risk that these may provoke dangerous counter-demonstrations. This has happened, for instance, in Belgium where a demonstration against the construction of a mosque has been banned due to the risk of counter-demonstrations by Muslim and extreme-left groups.¹⁰⁶⁴ The French Conseil d’Etat allowed similar practices of French authorities with regard to student demonstrations.¹⁰⁶⁵ In Serbia, the 2010 Belgrade Pride Parade has been subject to violent attacks by several thousand counter-protestors. Since then, assemblies are banned with reference to the endangerment of the personal safety of protestors when violent organizations announce counter-demonstrations.¹⁰⁶⁶

For lack of regulation, counter-demonstrations are treated like simultaneous ones in most of Ukraine and in the Russian Federation. The ones which were first notified are usually given priority over later ones. Sometimes here too, possible counter-demonstrations have been used as a reason to refuse permission.¹⁰⁶⁷ Several Ukrainian cities (Zaporizhzhya, Rivne, and Kharkiv) simply prohibit counter-demonstrations. This results in the city authorities trying to find alternatives to the places where the notified assemblies are taking place.

In Poland, the Constitutional Court has specifically pointed out that the risk of counter-demonstrations should not be used as a ground to prohibit an assembly.¹⁰⁶⁸ Also in Hungary, the police try to accommodate both events; in practice, the police tries to protect demonstrations that are threatened by violent counter-demonstrations such as the Pride March. During the guard commemoration in 2012, counter-demonstrators were not allowed on the square.¹⁰⁶⁹

In Tunisia, counter-demonstrations have become relatively common in order to impede meetings and gatherings of opposition parties and NGOs.¹⁰⁷⁰

Decision-making

Decision making powers before and during the assembly lie mostly with the assembly authorities or the police, sometimes needing confirmation by courts. In Poland, the municipal councils regulate assembly affairs. In Ukraine, the local executive authorities regulate assembly issues while the final decision about a prohibition needs to be taken by an administrative court. In the Russian Federation, too, the executive authorities of the Subject (the lower federal entity) decides on assembly affairs.

¹⁰⁶³ Art. 23 of the Law on Meetings and Demonstrations; Art. 32 of the Law on Meetings and Demonstrations.

¹⁰⁶⁴ Editorial board (2013) *Une manifestation « anti mosquée » interdite à Glain*. 7 sur 7, 26 March. Available at: <http://www.7sur7.be/7s7/fr/1502/Belgique/article/detail/1603827/2013/03/26/Une-manifestation-anti-mosquee-interdite-a-Glain.shtml> (last accessed: 10 March 2014).

¹⁰⁶⁵ CE, 7 March 2011, n° 347171.

¹⁰⁶⁶ Cf. the various Belgrade Pride Parades, e.g. Serbian Constitutional Court, Decision Уж-5284/2011 of 18 April 2013, *supra* fn. 781; see also Decision Уж-4078/2010 of 29 February 2012, *supra* fn. 782.

¹⁰⁶⁷ Cf. ECtHR, *Alekseyev v. Russia*, *supra* fn. 648, paras. 9, 12, 30, 41, 72-77.

¹⁰⁶⁸ Judgment of the Constitutional Court of 18 January 2006, K 21/05 (OTK-A 2006, Nr 1, poz. 4). Cf. p. 104.

¹⁰⁶⁹ Cf. p. 124.

¹⁰⁷⁰ EMHRN, *supra* fn. 921, p. 128.

In Hungary, assembly issues are controlled by the police. Similarly, in Germany assembly issues are decided by a specific police department at the municipal level.

In France, the police regulates most issues, including prohibitions, the mayor and the prefect (institutions belonging to the general state administration) also have the overriding competence to prohibit assemblies.

In Serbia, the local representations of the Ministry of the Interior decide about assembly issues.

In Tunisia, the municipalities are usually entrusted with the handling of assemblies. In the capital of Tunis, however, it is the Department of Homeland Security.

Review and appeal

In principle, all countries offer judicial protection against executive decisions such as restrictions of assemblies. In France, recourse can be lodged at the administrative tribunals, then appeals to administrative courts of appeal and then to the Conseil d'Etat in last instance are possible. Legislation can be reviewed for its constitutionality by the new French Constitutional Court. A similar scheme of review exists in Germany, where administrative courts normally issue injunctions against assembly prohibitions in a timely manner. In Turkey, too, administrative courts are competent to review decisions of the authorities. Since 2010, the Turkish constitutional court may receive individual complaints for human rights violations. Hungarian courts can be seized for deciding about an assembly ban within three days of the communication of the ban. No appeal possibilities are available, but the applicant can file a constitutional complaint (Art. 24 Fundamental Law) if he or she considers her fundamental rights to be violated.¹⁰⁷¹ Also in Ukraine, administrative courts review assembly restrictions; such complaints must be decided on within three days.¹⁰⁷²

In Tunisia, recourse against the prohibition of a meeting must first be addressed to the Secretary General of the Ministry of Home Affairs. Formally, administrative courts can be seized against the Secretary General's decision. In practice, however, this recourse often comes too late. Also, judicial independence is not always guaranteed, since the executive branch sometimes influences the judiciary heavily. Cases involving freedom of expression resulted in lengthy trials and harsh verdicts.¹⁰⁷³ The military courts handled complaints about alleged abuses by security forces during civil disturbances of 2011.¹⁰⁷⁴

In Serbia, the county courts decide about banning an assembly upon request by the authorities. The hearing has to be held within 24 hours upon receiving that request. Complaints can be filed with the Serbian Supreme Court within 24 hours and will be decided again in 24 hours.

Russian executive decisions can be challenged in court. However, no time frames guarantee that a decision will be issued in time. Court injunctions are not provided for (which is a general feature of the Russian legal system). At a different judicial level, the Russian Constitutional Court has reviewed assembly legislation and quashed important regulations. In Poland, complaints about prohibitions can be directed to the Governor (*wojewoda*), complaints about other restrictions with regard to assemblies can be filed directly with the administrative courts.

¹⁰⁷¹ The Hungarian Civil Liberties Union (HCLU-TASZ in Hungarian) initiated a constitutional complaint procedure with regard to a demonstration in front of the prime ministerial residence where a court upheld a police's ban, see *supra* text accompanying note [841] or the information on the complaint at the organization's website, <http://tasz.hu/gyulekezesi-jog/alkotmanybirosag-elott-tamadtuk-meg-gyulekezesi-jogot-serto-biroi-dontest> (last accessed: 10 March 2014).

¹⁰⁷² Art. 183 of the Code on Administrative Legal Proceedings of Ukraine of 6 July 2005.

¹⁰⁷³ U.S. Department of State, *supra* fn. 947, p. 7.

¹⁰⁷⁴ *Ibid.*, p. 8.

The UK courts have adopted a human rights oriented approach following ECtHR decisions. However, some of the non-targeted and even non-statutory powers often take place beyond their radar screen. No judicial review is available against private injunctions prohibiting assemblies.

4. Implementing freedom of assembly

Same sex pride parades

The prohibition and, more generally, difficulties faced by same sex pride parades have been a virulent issue especially in some central European countries (Poland, Hungary, the Russian Federation, and Serbia).

In Poland, the prohibition of a gay pride parade in Warsaw in 2005 under the pretext of a missing traffic organization plan triggered several critical court decisions, inter alia by the Polish constitutional court and the ECtHR. Eventually, however, the parade was held despite the ban and was left undispersed by the police. Similarly, in Hungary, the Budapest Pride has been banned several times under the pretext of the impossibility to reroute traffic.

The assembly rights of LGBTI groups are most controversial in Serbia where the Belgrade Pride Parade has been banned in 2011, 2012, and 2013 and de facto banned by a last minute change of location in 2009. While the parade took place in 2010, it was heavily protected by the police but escalated due to violence exercised by spectators, resulting in 150 injured police officers and members of the public, as well as infrastructure damage amounting to over 1.000.000 € and the arrest of approximately 250 persons. The Minister of the Interior therefore usually argues that the parades constitute a high security risk and that even the most severe police escort would not be able to protect the participants. In 2013, the Parade had been banned again. However, organizations spontaneously held a midnight march which was eventually protected by the police who rushed to the scene.¹⁰⁷⁵

Use of force

Instances of erupting physical violence, exercised by demonstrators and by police officials, have in the past arisen in many countries and have in part been criticized by international bodies. An example is the United Nations Human Rights Committee's recommendation to Belgium in reaction to massive preventive arrests and use of tear gas and intimidating measures surrounding the "No Border" demonstrations in Brussels in 2010. PACE has deplored "recent cases of excessive use of force to disperse demonstrators"¹⁰⁷⁶ in France in connection with demonstrations against same-sex marriage during which four people were injured and hundreds arrested. Recently, the UK police has been criticized for making extensive use of the "Scene Management Barrier System" which allegedly has an intimidating effect.¹⁰⁷⁷ Also in the UK, the use of force and tasers were heatedly discussed after the death and the violent arrest of protestors during the G20 protests in 2009.¹⁰⁷⁸

Recently, the police of the German city of Hamburg has been criticized for massive use of water cannons and the establishment of danger-zones, allowing for increased preventive measures, in connection with demonstrations against gentrification, for the preservation of an alternative cultural centre and for the rights of migrants.

In Hungary, the opposite phenomenon was criticized. Here, the non-use of force against anti-Roma protests allowed demonstrators to throw stones, concrete, and bottles into yards of houses inhabited by Roma people. In 2012, police did not intervene when extreme right wing counter-protestors attacked journalists in the immediate vicinity of an anti-government

¹⁰⁷⁵ Cf. p. 109 et seq.

¹⁰⁷⁶ PACE Resolution 1947, *supra* fn. 239.

¹⁰⁷⁷ See *supra* fn. 34.

¹⁰⁷⁸ See *supra* p. 22.

demonstration. The police neither dispersed the unnotified and violent assembly, nor were attackers arrested.¹⁰⁷⁹

During the Gezi park protests in Turkey of 2013, reports note that water cannons and tear gas have been used, and that police beatings, arrests and sexual harassment have occurred, all this in an excessive and largely disproportionate manner.

These happenings are relatively harmless compared with the use of force by police during the Tunisian revolution of 2011 (with 147 deaths and hundreds injured), and the 2014 events in Ukraine fighting over the country's rapprochement to the EU during which estimated 100 persons have died.¹⁰⁸⁰

Liability and accountability of law enforcement personnel

Liability and (both criminal and disciplinary) accountability of law enforcement personnel employing excessive police force are usually ensured by law.

In the US, police officers are civilly as well as criminally liable for violations of constitutional rights and, while federal officers fall outside the scope of the relevant federal legislation, even they may be sued directly under the Constitution for civil damages.¹⁰⁸¹ Where complainants can establish that the police overstepped the boundaries of lawful action, the qualified immunity enjoyed by the latter will be lifted. Immunity, however, poses a serious obstacle to police accountability in Turkey where investigations against public officials are rarely authorized and therefore in practical terms excluded.

Similarly, Tunisian police are criminally accountable for excessive use of force and the public authorities are civilly accountable for any damages caused. The same is true for Russia. Criminal responsibility of police officers interfering with peaceful assemblies is also provided for in Ukraine in a special provision on the interference with assemblies.

The Hungarian legal order also has rules on the books which guarantee the liability and accountability of state officials, including criminal penalties for assault and unlawful detention. The state must compensate victims of violations of personal freedom and other human rights. However, several police excesses which allegedly took place during demonstrations in 2006, remained unaccounted for, in part because the responsible police officers could not be identified. Since those events, police have been obliged to wear clearly visible identification badges.

In Serbia, complaints against officers policing assemblies can be filed with the Ministry of the Interior, and afterwards other legal remedies can be sought.

Police in several countries are making efforts in training officers to behave correctly in stressful situations and to manage escalating assemblies. Such trainings have been reported for France and Serbia. British police have organized a flashmob themselves in order to inform citizens of their assembly rights.

Liability of organizers

In some countries, organizers are required or can be required by local governments to contract insurance which cover the reimbursement of costs that the authorities incur for cleaning or repairing the venue. This is the case in some US American cities.¹⁰⁸² In Poland, a statute holding assembly organizers fully liable for damages committed by participants was quashed by the Constitutional Court, since it could have discouraged potential organizers.¹⁰⁸³

¹⁰⁷⁹ See *supra* p. 125.

¹⁰⁸⁰ Estimate as of 7th March 2014.

¹⁰⁸¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁰⁸² See report on US, *supra* p. 42.

¹⁰⁸³ See Judgment of the Polish Constitutional Court of 10 November 2004, *supra* fn. 753.

Similarly, the Russian Constitutional Court declared invalid Article 5 (6) of the Russian Assembly Law establishing the civil liability of the organizer for failure to fulfil certain obligations. However, increasingly onerous administrative fines are being imposed for violations of the established administrative procedure prescribed for organizing an assembly. The new Russian law of 2012 increased the fines and introduced community services as new type of penalty. However, community work as an administrative punishment for administrative offences not resulting in damage to health or property but consisting only in violation of formalities of the process for organizing or conducting a public event was held unconstitutional.¹⁰⁸⁴

In Turkey, various criminal sanctions for failure of dispersal and for violence and material damage can be imposed on organizers. They are also liable for cleaning and providing for security. In addition, protestors of the Gezi park demonstrations of 2013 are awaiting trial for alleged violations of anti-terrorism provisions.¹⁰⁸⁵

In Germany, no special provisions on costs and liability of the organizers exist. It is generally acknowledged that no undue burdens shall obliterate the enjoyment of the constitutional guarantee of Art. 8 of the German Basic Law. On the other hand, Art. 8 does not per se exclude liability of the organizers for cleaning after an event, especially if the purpose was primarily a social one (as opposed to a political one).¹⁰⁸⁶

Hungarian law knows a more civil-law typical type of exculpation, stating that organizers are exempted from liability for damages caused by participants if they “acted as it could be expected in the particular situation”.¹⁰⁸⁷

In addition or alternatively, several countries provide for criminalization or administrative offences of the organizers when these fail to maintain order during the event. The Serbian assembly law envisages an administrative fine for failure to maintain order, for gathering citizens without application and for holding assemblies regardless of a ban (Art. 15 PAA). In Ukraine, a special penal law provision particularly provides for the punishment of organizers in cases of violation of “the established procedure” (Art. 185 Penal Code). This rule, however, seems to pertain not to the civil liability of the organizers for damages but to a different form of criminal responsibility for breach of a public duty.

Media access and documentation

Private documentation of police action has become the object of increasing regulation. The background is that privacy rights of police officers and public confidence have become issues of concern. In the UK, private film material of assemblies is more and more often released and multiplied online, especially after heavy handed police action during the G 20 protests in 2009.¹⁰⁸⁸ In addition, the police have started to invite NGOs to monitor protests and their policing in order to regain public reputation, although experience shows that this objective is not always reached.¹⁰⁸⁹

¹⁰⁸⁴ Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, p. 13 (*Постановление Конституционного Суда от 14 февраля 2013 года № 4-П*), the English translation provided by the Court, <http://www.ksrf.ru/en/Decision/Judgments/Pages/2013.aspx> (last accessed: 10 March 2014), p.90.

¹⁰⁸⁵ Amnesty International, *supra* fn. 500, p. 42.

¹⁰⁸⁶ Bundesverwaltungsgericht, Urteile vom 06.9.1988 – 1 C 71/86 und vom 06.9.1988 – 1 C 15/86, *Neue Juristische Wochenschrift* 1989, 52 (52); 53 (54).

¹⁰⁸⁷ Art. 13 ARA.

¹⁰⁸⁸ See report on UK, *supra*, p. 22 et seq.

¹⁰⁸⁹ Report of the UN Special Rapporteur on freedom of peaceful assembly in the UK, A/HRC/23/39/Add.1, 29 May 2013, paras. 52, 53.

In countries like Belgium and France, media access to assemblies is not specifically regulated, but common and unquestioned practice. This sometimes has an impact on the handling of events as currently in the prohibition of performances of the anti-semitic humorist Dieudonné M'Bala M'Bala.

In Hungary, the law prescribes that media representatives must be especially protected. In reality, media freedom has been declining during the past years.¹⁰⁹⁰ In some cases, journalists were insulted by far-right demonstrators with police standing by. These cases have been scrutinized in court.¹⁰⁹¹

Ukraine specifically guarantees the right of access to assemblies for journalists in a law on "printed mass media in Ukraine".¹⁰⁹²

In the Russian Federation, PEN International reported detentions and arrests of journalists during events in 2011-2012.¹⁰⁹³

In Tunisia, the Ministry of Home Affairs has in the past issued a public apology for beatings of media people and for other impediments of the work of local and foreign media during assemblies.¹⁰⁹⁴

In Turkey, media access during the Gezi Park Protests was highly problematic. Mainstream media conveyed very little information on the events.¹⁰⁹⁵ According to journalist associations, journalists were exposed to police violence and hindered from reporting. Incidents of censorship and journalists pressured to give up their jobs later posed further obstacles.¹⁰⁹⁶ Recently, the issue of drones employed in order to supervise assemblies arose. In the US, for instance, helicopters and blimps have been used to support live monitoring of assemblies.¹⁰⁹⁷ While it is acknowledged from a constitutional law perspective that individuals cannot prevent aerial surveillance in public spaces, the recording is more problematic in constitutional terms.¹⁰⁹⁸ It will presumably be regulated in the US by 2016 as required by recent American legislation.¹⁰⁹⁹

In Ukraine, the use of drones is regulated by the Air Code.¹¹⁰⁰ According to its Art. 39, drones with a weight of less than 20kg used for entertainment or sports need not be registered. They are often employed by media during demonstrations. During the Euromaidan assemblies of 2014, such drones had taken several images which were circulated in the media widely, conveying an idea of the number of participants.¹¹⁰¹

¹⁰⁹⁰ In the Press Freedom Index, Hungary fell from the 23rd to the 56th rank between 2010 and 2013. See *supra* fn. 903.

¹⁰⁹¹ <http://helsinki.hu/mulasztott-a-rendorseg-az-osszevert-videos-ugyeben> (last accessed: 10 March 2014).

¹⁰⁹² Law of Ukraine "On printed mass media in Ukraine", *supra* fn. 735.

¹⁰⁹³ Amnesty International, *supra* fn. 618, p.16.

¹⁰⁹⁴ HRC, *supra* fn. 964, para. 39.

¹⁰⁹⁵ CNN Türk's decision to air a pre-scheduled two-hour documentary on penguins during the first weekend of mass protest across Turkey became a symbol for self-censorship in the national media in general, in the eyes of many protestors and the wider public. Al-Monitor, *supra* fn. 611.

¹⁰⁹⁶ EMHRN, *supra* fn. 497, III. 2; The Independent, *supra* fn. 613.

¹⁰⁹⁷ Police Executive Research Forum, *supra* fn. 350, at 35, 38.

¹⁰⁹⁸ See Global Justice Information Sharing Initiative, *supra* fn. 351, at 16-19; cf. *Handschu v. Special Servs. Div.*, *supra* fn. 351 (involving continued litigation with respect to guidelines included in the Handschu 1985 consent decree, which was modified after 9/11 and re-modified subsequently); 28 CFR Part 23, § 23.20 (operating principles).

¹⁰⁹⁹ See the US-American FAA Modernization and Reform Act, *supra* fn. 348.

¹¹⁰⁰ The Air Code of Ukraine, *supra* fn. 726.

¹¹⁰¹ Yura Yakymets, *supra* fn. 727.

Monitoring

In some countries, international bodies play an important role in the monitoring of respect for freedom of assembly. International organizations have also played a role in the constitution making process of relatively new constitutions.

In Tunisia, where the new constitution has been adopted in January 2014, different draft versions were commented on by the Venice Commission, and these comments were taken into account. Additionally, UN Agencies (OHCHR¹¹⁰²) and UN Special Rapporteurs¹¹⁰³ carried out assessment missions in Tunisia, and an OHCHR office opened in Tunis. Freedom of assembly legislation in the Russian Federation is monitored by the Ombudsman for Human Rights in the Russian Federation.¹¹⁰⁴

The Hungarian ombudsman launched a large-scale project in 2007, monitoring around fifty demonstrations over the period of one year, and organized conferences and workshops with scholars, officials and civil society actors.

The newly created Turkish ombudsman received a number of complaints relating to the Gezi Park protests in November 2013.¹¹⁰⁵ France, however, denied OSCE/ODIHR (Office for Democratic Institutions and Human Rights, a human rights monitoring body of the OSCE) access to monitor assemblies in France.

5. Final Assessment

The most important findings of this study can be summarized as follows:

1. **Flashmobs** (events organized through social media) have become quite frequent all over European countries. While no legislation on the matter exists, courts in most countries have decided to protect these assemblies to the same extent as traditionally gathered assemblies.
2. Several studied countries grant freedom of assembly to **citizens only** (France, Belgium, Germany, the Russian Federation and Serbia), however, in most states aliens are protected by residual guarantees. In the Russian Federation and Serbia, however, this is not the case: Here, assemblies by foreigners do not enjoy constitutional protection. While Art. 11 ECHR guarantees the right to freedom of peaceful assembly” to “everyone”. The complete exclusion of foreigners from the personal scope of the freedom of assembly is not covered by the clause of Art. 16 ECHR which foresees “restrictions on the political activity of aliens”, because this provision must be read in the light of the International and European prohibitions of discrimination. These prohibitions require distinctions on the basis of nationality to be reasonable. Taken together with the broad wording of Art. 11, the principle of non-discrimination speaks in favour of a universal scope of application *ratione personae* of the freedom of peaceful assembly.¹¹⁰⁶
3. The UK and Ukraine do not have specific assembly laws. In consequence, in both countries some restrictions to the freedom of assembly are not prescribed by law. In the UK, restrictions are often based on traditional common law powers. In Ukraine, the **legal basis** for restrictions often are either Soviet regulations still in force or regulations of municipalities

¹¹⁰² OHCHR, *supra* fn. 963

¹¹⁰³ Cf. HRC, *supra* fn. 962; HRC, 20th Session, *supra* fn. 985; HRC, 22nd Session, *supra* fn. 985.

¹¹⁰⁴ Уполномоченный по правам человека в Российской Федерации, <http://ombudsmanrf.org/> (last accessed: 10 March 2014).

¹¹⁰⁵ See for further information on the Ombudsman *supra* fn. 610; European Commission, *supra* fn. 545, p. 10.

¹¹⁰⁶ Cf. OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly (2nd ed.) of 9 July 2010, CDL-AD (2010)020, study no. 581/2010, Section B, para. 55, referring to U.N. Human Rights Committee, General Comment 15, The position of aliens under the Covenant, para. 7; Venice Commission, Opinion on the Compatibility with Human Rights Standards of the Legislation of Non-Governmental Organisations of the Republic of Azerbaijan, Oct 2011, CDL-AD(2011)035e, paras 79-81, the Venice Commission finds that the restriction of freedom of assembly to citizens only does not present a proportionate application of Art. 16 ECHR.

below the rank of a statutory law. This leads to a confusing and unpredictable situation to the detriment of an overall consistent standard of protection.

4. In many countries, more and more publicly accessible spaces are rented out to or owned by private entities (whose shares are then sometimes owned in part by the state) and are in that sense privatized. In consequence, demonstrations or leafleting increasingly occur in **private airports or shopping malls** or similar areas which are formally owned or rented by private actors but which have been opened up by owners or tenants to the public for a general, normally commercial (as opposed to political) use. This raises the question whether the constitutional guarantees are directly applicable in these spaces and can bind the private owners or tenants. Here, the legal situation in European countries is diverse. Further legal evolution is to be expected: While Germany, the US and Hungary have adapted to the new situation and have extended the guarantee to publicly accessible private or mixed public-private property, the majority of states under scrutiny limits the scope of the freedom of assembly to traditional public spaces (streets and squares devoted to public use, normally also owned by the state).

5. The Russian Federation and Serbia try to channel events to **specifically designated areas** in which advance notification of the event is not required. In the Russian Federation, they are to be determined by the subjects (lower federal level). Apart from these areas, organizers have to undergo a **“settlement process” with Russian authorities**. This process may lead to alterations of time and place of the planned events. In some cases, this renders the planned event futile or takes so long that the envisaged date has passed when the settlement is finally issued. This practice risks to unduly curtail the freedom of assembly.

6. Ukraine, Serbia, the Russian Federation and Turkey place **general time limitations** on the exercise of the freedom of assembly, excluding assemblies during night-time and, in some cases, restricting the holding of an assembly at certain hours during the day. The majority of the countries under study does not in a general fashion define time limitations in their laws but relies on the option to apply temporal restrictions in the concrete case at hand upon notification.

7. The **anonymity of protestors** is not always guaranteed: While the UK operate a database listing even peaceful demonstrators, other countries prohibit the concealment of faces in order to allow for easy identification of participants (Belgium, the Russian Federation, Turkey, and Hungary). Such measures to facilitate personal identification of protestors may serve legitimate security objectives, however, they may also have a chilling effect on the exercise of the right to free assembly and free expression.

8. Countries such as Turkey and Hungary have made use of **anti-terrorist legislation** in a problematic way to restrict freedom of assembly. Kurdish and leftist organizations suffer from discriminatory applications of the Terrorism Act in Turkey. The Hungarian counter-terrorism centre has begun to establish “operational zones” in which assemblies are entirely banned.

9. Ukraine and the Russian Federation demand organizers to **notify** planned events **at least ten days in advance**. The same is true in Belgium for open air assemblies which moreover not only must be notified, but **require an authorization**. Some US states require permits. Especially the requirement for authorization appears unnecessarily burdensome on the organizer.¹¹⁰⁷

10. Russia restricts the **capacity of persons of being an organizer** to an assembly tightly by excluding everyone who has been convicted of minor administrative offences. The majority of states under scrutiny do not limit the circle of potential organizers to such an extent.

¹¹⁰⁷ OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly, *supra* fn. 1106, Section B, § 118.

11. **Spontaneous assemblies** are illegal in Serbia, Ukraine, the Russian Federation, and in Turkey. While the prohibition of such assemblies may serve legitimate interests of public order, the right to freedom of assembly requires that such assemblies should not be sanctioned if the event is truly spontaneous and not an allegation made to circumvent the notification requirement.

12. **Same-sex parades** face difficulties up to prohibitions in Eastern European countries such as Poland, Hungary, the Russian Federation, and Serbia. Governmental restrictions and prohibitions must therefore be assessed against the fundamental right, and should avoid targeting assemblies due to their content.

Most countries studied for this report have faced difficulties in respecting and protecting the freedom of assembly, and have been criticized by the ECtHR for this. This report shows that some countries have better implemented Court judgments than others. A number of states have reformed their legal regime on assemblies, last but not least to respond to current challenges such as new security risks or new forms of social activity. Overall, there are only a few states which are less in line with the general European standard.

Annex I: Comment on the legal situation in Austria

By Christoph Grabenwarter¹¹⁰⁸

1. Introduction

The draft study takes a comparative approach and deals with the legislation in a limited number of states. This selection may be discussed but it is based on criteria that are reasonable.

Following the request the comments try to contribute from the perspective of a small country with a long tradition in legislation and jurisprudence in the field of the freedom of assembly, with a specific relation between “ordinary legislation” and the corresponding fundamental right, and last but not least an intensive confrontation with the ECHR. For the sake of completeness and accuracy of the study the following lines have the purpose to give some additional information that may lead to some amendments and additional paragraphs in the final version of the study.

The Austrian Act on Freedom of Assembly was enacted in 1867, i.e. even before the French Act of 1881, together with the Basic Law on Fundamental Freedoms of Citizens. There was only little change in the course of time. The new publication of the Act in 1953 took nearly all provisions of the 1867 Act.

There is a considerably body of case law of the ECtHR and the ECommHR concerning Austria, including the leading case of *Plattform „Ärzte für das Leben“*. The comments focus on the legal background in Austria and the case law of the ECtHR.

2. Legal Basis

The freedom of assembly is guaranteed in Art. 12 of the Austrian Basic Law¹¹⁰⁹, which states that “Austrian nationals have the right of assembly and to constitute associations. The exercise of these rights will be prescribed in special laws.” Furthermore figure 3 of the Resolution of the Provisional National Assembly of 30 October 1918 abolishes the war-related emergency ordinances with respect to rights of assembly and reestablishes the freedom of assembly without distinction of sex.¹¹¹⁰ The Austrian Constitutional Court applies Art. 11 ECHR in cases, which go beyond the narrower scope of Art. 12 of the Basic Law.¹¹¹¹ The freedom of assembly intends to create frame conditions for free political discourse and therefore is the basis for democratic forming of opinion and political will.¹¹¹²

3. Scope of the guarantee of freedom of Assembly

Art. 12 of the Basic Law grants the freedom of assembly only to Austrians, whereas Art. 11 of the ECHR provides the right to peaceful assembly to “everyone”. According to the constant jurisdiction of the Austrian Constitutional Court, an assembly in terms of Art. 12 of the Austrian Basic Law can be defined as a gathering of divers people, in case it is arranged in order to bring the attendees to a joint effort (debate, discussion, manifestation, etc.), in such a way as to create a certain association among the attendees.¹¹¹³ However, it does not constitute an assembly, if a group of persons solely proclaims their opinion, without engaging

¹¹⁰⁸ Univ. Prof. DDr., Member, Austria.

¹¹⁰⁹ Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Länder represented in the Council of the Realm (Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder – StGG).

¹¹¹⁰ Resolution of the Provisional National Assembly of 30 October 1918 (Beschluss der Provisorischen Nationalversammlung vom 30. Oktober 1918).

¹¹¹¹ Grabenwarter/Holoubek, Verfassungsrecht – Allgemeines Verwaltungsrecht², 2014, § 548.

¹¹¹² Walter/Mayer/Kucsko-Stadlmayer, Bundesverfassungsrecht¹⁰, 2007, § 1466.

¹¹¹³ VfSlg. 4586/1963, 5193/1966, 5195/1966 and 8685/1979, 9783/1983.

the attendees into a discussion or collective activities.¹¹¹⁴ Pure information events or showing of posters are equally not covered by Art. 12.¹¹¹⁵ Although there is no legal definition of the term “assembly” in Austrian law, the Constitutional Court developed this definition by interpreting the sub-constitutional Assembly Act¹¹¹⁶. In general the sub-constitutional Assembly Act affects the scope of Art. 12 Basic Law, since the Constitutional Court interprets the restriction (“will be described in special law”) insofar, as the freedom of assembly is guaranteed pursuant to this sub-constitutional concretion.¹¹¹⁷ Therefore it falls into the remit of the legislator (with simple majority) to further specify the freedom of assembly.

The ECtHR defines assemblies as “associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community”.¹¹¹⁸ The term assembly in the Convention is interpreted more broadly. Every organized gathering that seems to be an assembly due to “common parlance” falls within the scope of Art. 11 of the Convention. Even a public ceremony for unveiling a monument constituted an assembly in the sense of the ECHR.¹¹¹⁹

4. Restrictions and Obligations

All measures that hamper the organization of an assembly, limit, prohibit or cease an assembly represent interferences in the freedom of assembly. Equally criminal sanctions for the organization of or participation in an assembly interfere with the exercise of this freedom.¹¹²⁰

Legislation

The Constitutional Court derives from Article 3 of the Resolution of the Provisional National Assembly of 30 October 1918, that the requirement of an administrative authorization before the holding of an assembly cannot be in line with the freedom of assembly.¹¹²¹ Every interference by the legislator has to pursue a legitimate aim, has to be necessary in a democratic society to achieve the legitimate aim in question and furthermore it has to be proportionate. Referring to this the Constitutional Court ruled that ignoring the obligation to notify an assembly twenty-four hours in advance does not justify the dissolution of the assembly. In fact the dissolution has to be necessary due to the public interests enumerated in Art. 11 para. 2 of the Convention. In this respect even spontaneous assemblies can fall within the scope of Basic Law and the Convention.¹¹²²

In the case *Plattform “Ärzte für das Leben” v AUT*¹¹²³ the ECtHR dealt with the question, whether Art. 11 “impliedly required the State to protect demonstrations from those wishing to interfere with or disrupt them.”¹¹²⁴ The case was about an association of doctors, who intended to hold two demonstrations against abortions. Despite the presence of the police, the demonstrations were violently disrupted by counter-demonstrators. The Court came to the conclusion that even in the sphere of individuals positive action has to be taken by the Contracting States to ensure effectively the freedom of assembly.¹¹²⁵ The participants of a demonstration must therefore be able to hold their assembly without being subjected to

¹¹¹⁴ VfSlg. 15.680/1990.

¹¹¹⁵ VfSlg. 11.651/1988, 12.161/1989.

¹¹¹⁶ Assembly Act 1953 (Versammlungsgesetz 1953).

¹¹¹⁷ Grabenwarter/Holoubek, *Verfassungsrecht – Allgemeines Verwaltungsrecht*², 2014, § 549. In Austrian terminology „Ausgestaltungsvorbehalt“.

¹¹¹⁸ ECtHR, 21/6/1988, *Plattform „Ärzte für das Leben“ v. AUT*, No. 10126/82, § 32.

¹¹¹⁹ VfSlg. 12501/1990.

¹¹²⁰ Grabenwarter/Holoubek, *Verfassungsrecht – Allgemeines Verwaltungsrecht*², 2014, § 554.

¹¹²¹ VfSlg. 17.600/2005.

¹¹²² VfSlg. 14.366/1995.

¹¹²³ ECtHR, 21/6/1988, *Plattform „Ärzte für das Leben“ v AUT*, No. 10126/82.

¹¹²⁴ ECtHR, 21/6/1988, *Plattform „Ärzte für das Leben“ v AUT*, No. 10126/82, § 30.

¹¹²⁵ ECtHR, 21/6/1988, *Plattform „Ärzte für das Leben“ v AUT*, No. 10126/82, §§ 32 et seq.

physical violence by their opponents.¹¹²⁶ Consequently “in a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.”¹¹²⁷

This basic obligation of the Contracting State to protect demonstrations by positive action does not automatically lead into a general duty to prohibit counter-demonstrations. In the case *Öllinger v AUT*¹¹²⁸ the ECtHR considered the prohibition of a demonstration to be unlawful. This prohibited demonstration was intended as a counter-demonstration to protest against an assembly of Comradeship IV on All Saints’ Day, which was held annually on a cemetery. Comradeship IV was an association consisting mostly of former members of the SS, which wanted to commemorate SS soldiers killed in the Second World War. This unconditional prohibition of the counter-demonstration represents a very far-reaching measure, which was considered disproportionate.¹¹²⁹ In this regard the Court referred to the case *Stankov and the United Macedonian Organization of Ilinden v BUL*¹¹³⁰ in which was declared, “If every probability of tension and heated exchange between opposing groups during a demonstration was to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views.”¹¹³¹

In the case *Chorherr v AUT* the states’ duty to take positive action in order to ensure that lawful manifestations can take place peacefully was confirmed.¹¹³² The Court dealt with the question whether the interference in the right of expression of Mr Chorherr was justified, inter alia, by these positive duties deriving from Art. 11.¹¹³³ During a military ceremony that was held to mark the anniversaries of Austrian neutrality and the end of the Second World War, Mr Chorherr carried a bill above the heads of the spectators, which bore the slogan “Austria does not need any interceptor fighter planes”. Since those actions caused commotion and blocked the views of the spectators, policemen first instructed Mr Chorherr to cease and arrested him after further warnings. The Court decided that the nature, importance and scale of the parade justified the police’s forces to ensure a peaceful ceremony. Additionally the ECtHR referred to the Constitutional Courts decision that had approved these measures since they had been intended to prevent breaches of the peace and not to frustrate the expression of an opinion.¹¹³⁴

Execution

Since the Austrian Assembly Act has to specify the freedom of assembly guaranteed by the Basic Law, the Constitutional Court stated that “every violation of the Austrian Assemblies Act constitutes a violation of Art. 12 Basic Law and Art. 11 ECHR, provided that it concerns directly the exercise of the freedom of assembly and therefore is an interference in constitutionally guaranteed rights.”¹¹³⁵ The consequence of this approach is, that a violation of this sub-constitutional law has to be fought in the Constitutional Court, whereas there is no space for a scrutiny by the Austrian Higher Administrative Court that usually scrutinizes violations of sub-constitutional law.¹¹³⁶ A breach of procedural rules in executing the Assembly Act constitutes a violation of the freedom of assembly, if the Administrative Court could have decided differently in a lawful procedure.¹¹³⁷

¹¹²⁶ ECtHR, 21/6/1988, *Plattform „Ärzte für das Leben“ v AUT*, No. 10126/82, § 32.

¹¹²⁷ ECtHR, 21/6/1988, *Plattform „Ärzte für das Leben“ v AUT*, No. 10126/82, § 32.

¹¹²⁸ ECtHR, 26/4/1991, *Öllinger v AUT*, No. 76900/01.

¹¹²⁹ ECtHR, 26/4/1991, *Öllinger v AUT*, No. 76900/01, §§ 43 et seq.

¹¹³⁰ ECtHR 2/19/2001, *Stankov a. o. v BUL*, No. 29221/95 et al.

¹¹³¹ ECtHR 2/19/2001, *Stankov a. o. v BUL*, No. 29221/95 et al, § 107.

¹¹³² ECtHR 25/8/1993, *Chorherr v AUT* No. 13308/87, § 31; mutatis mutandis ECtHR, 21/6/1988, *Plattform „Ärzte für das Leben“ v AUT*, No. 10126/82, § 34.

¹¹³³ ECtHR 25/8/1993, *Chorherr v AUT* No. 13308/87, § 27..

¹¹³⁴ ECtHR, 25/8/1993, *Chorherr v AUT* No. 13308/87, § 32.

¹¹³⁵ VfSlg. 12257/1990.

¹¹³⁶ VfSlg. 17.600/2005.

¹¹³⁷ VfSlg. 14.365/1995.

With a view to interferences with Art. 11 of the Convention, the Constitutional Court applies the following approach: A decision of an Administrative Court violates the freedom of assembly, if it was rendered lawlessly, if the law was applied in a misconceived manner or interpreted unconstitutionally or if the applied law is unconstitutional itself.¹¹³⁸

5. Conclusions and Outlook

The current Assembly Act 1953 is based on the Austrian Assembly Act 1867 and thus is one of the oldest Acts of its kind in Europe. Since then an enormous transformation process took place. In its original version the Assembly Act stipulated for instance an obligation to prior authorization for outdoor assemblies.¹¹³⁹ In 1918 the Resolution of the Provisional National Assembly of 30 October reestablished the freedom of assembly without distinction of sex and abolished the obligation of prior authorization. After the accession of Austria to the ECHR, the freedom of assembly was developed further, since its Art. 11 guarantees the right to peaceful assembly to everyone. If only Art. 12 of the Basic Law were in force in Austria, it would be solely up to the sub-constitutional legislator to specify the substance and scope of the freedom of assembly. On the other hand, Art. 11 ECHR leads to an obligation of the Contracting States to balance the right of peaceful assembly, and other public interests that are necessary in a democratic society. The ECtHR's jurisdiction further influenced the right to assembly in Austria, since it inter alia developed the obligation of the Contracting State to take positive action in order to ensure that lawful manifestations can take place peacefully.

¹¹³⁸ VfSlg. 16.123/2001.

¹¹³⁹ Section 3, Assembly Act 1867 (Versammlungsgesetz 1867).

**ANNEX II:
Comment on the legal situation in the Netherlands**

By Mr Ben Vermeulen¹¹⁴⁰ and Ms Marjolein van Roosmalen¹¹⁴¹

1. Legislation

- the Netherlands Constitution (*Grondwet*; hereafter Constitution); and
- the Public Assemblies Act (*Wet openbare manifestaties*; hereafter PAA).¹¹⁴²

Extract (translated into English)

Constitution

Article 9

1. The right of assembly and demonstration shall be recognised, without prejudice to the responsibility of everyone under the law (*specified in Acts of Parliament*).
2. Rules to protect health, in the interest of traffic and to combat or prevent disorders may be laid down by law (*either by Act of Parliament or by other laws such as municipal laws*).

PAA

§ I. Definitions

Section 1

1. In this Act, 'public place' shall mean: a place open to the public by virtue of its intended or established use.
2. 'Public place' shall not include buildings or enclosed places as referred to in article 6 (2) of the Constitution.

§ II. Provisions for public places

Section 2

The powers to restrict the right to profess a religion or belief and the right of assembly and demonstration, as conferred on government bodies by or pursuant to the provisions of this division, may be exercised only to protect health, in the interest of traffic and to combat or prevent disorder.

Section 3

1. The municipal council shall lay down rules by ordinance concerning the cases in which prior notification is required of assemblies for the profession of a religion or belief in public places.
2. A one-off notification shall suffice for assemblies as referred to in subsection 1 which recur periodically at predetermined times and are organised by a religious organisation, an independent part thereof or another spiritual organisation.
3. The ordinance shall in any event contain:
 - a. rules concerning the cases in which the person intending to hold an assembly is required to give written notification;
 - b. rules concerning when notification must be given, the details to be provided, and the issuing of a receipt to the person giving the notification.
4. No details shall be requested about the religion or belief to be professed.

¹¹⁴⁰ Member of and Judge in the Dutch Council of State and Member of the Venice Commission.

¹¹⁴¹ Legal Adviser to the Dutch Council of State and Liaison Officer for the Dutch Council of State.

¹¹⁴² Act of 20 April 1988, *Bulletin of Acts and Decrees* 157; full text in Dutch is available on the internet <http://wetten.overheid.nl/BWBR0004318/geldigheidsdatum_02-04-2014>; translation by Utrecht University Library (<http://www.uu.nl/university/Library/EN/disciplines/law/law/Dutch%20legislation/Pages/default.aspx>).

Section 4

1. The municipal council shall lay down rules by ordinance concerning cases in which prior notification is required of meetings and demonstrations in public places.
2. The ordinance shall in any event contain:
 - a. rules concerning the cases in which the person intending to hold a meeting or demonstration is required to give written notification;
 - b. rules concerning when notification must be given, the details to be provided and the issuing of a receipt to the person giving the notification.
3. No details shall be requested about the thoughts or feelings to be expressed.

Section 5

1. The mayor may impose conditions and restrictions or a prohibition after receiving a notification.
2. A prohibition may be imposed only if:
 - a. the required notification was not given on time;
 - b. the required details were not provided on time;
 - c. one of the interests referred to in section 2 so requires.
3. A condition, restriction or prohibition may not relate to the religion or belief to be professed, or the thoughts or feelings to be expressed.
4. The person who gave the notification shall be informed of decisions as referred to in subsection 1 as quickly as possible.

Section 6

During an assembly for the profession of a religion or belief, or a meeting or demonstration, the mayor may issue instructions which the persons holding or participating in them must observe.

Section 7

The mayor may order the persons holding or participating in an assembly for the profession of a religion or belief, or a meeting or demonstration to end it and disperse forthwith, if:

- a. the required notification has not been given or a prohibition has been imposed;
- b. a condition, restriction or instruction has been infringed;
- c. one of the interests referred to in section 2 so requires.

§ III. Provisions for non-public places

Section 8

1. The mayor may order persons holding or participating in a meeting or demonstration open to the public in a non-public place to end it and disperse forthwith, if the protection of health or the combating or prevention of disorder so requires.
2. The mayor and persons to be designated by him shall have access to the meetings and demonstrations referred to in subsection 1. If necessary, they shall obtain access with the help of the police.

§ IV. Special provisions

Section 9

1. Those who hold or participate in an assembly for the profession of a religion or belief, or a meeting or demonstration in the vicinity of a building used by the International Court of Justice or a diplomatic or consular mission shall refrain from any conduct that may affect the way the organisation in question functions.

2. To prevent conduct as referred to in subsection 1, the mayor may, during an assembly for the profession of a religion or belief, or a meeting or demonstration, issue instructions that those holding or participating in them must observe.

3. If an instruction as referred to in subsection 2 is infringed, and the circumstances so require, the mayor may order persons holding an assembly for the profession of a religion or belief, or a meeting or demonstration to end it and disperse forthwith.

4. The provisions of subsection 1 to 3 shall apply *mutatis mutandis* with respect to buildings used by international organisations, if the Netherlands has assumed an obligation to protect the organisations similar to its obligation with respect to the organisations referred to in subsection 1.

5. A list of buildings as referred to in subsection 4 shall be published by Our Minister of the Interior and Our Minister of Foreign Affairs in the Government Gazette.

Section 10

Bell ringing on the occasion of religious or belief-related ceremonies, including funeral ceremonies, and calls to profess a religion or belief shall be permitted. The municipal council shall be authorised to lay down rules in this regard concerning duration and noise level.

§ V. Penal provisions

Section 11

1. The following shall be punishable by a term of detention not exceeding two months or a second-category fine:

- a. holding or participating in an assembly for the profession of a religion or belief, or a meeting or demonstration for which the required notification has not been given or which has been prohibited;
- b. infringement of a condition or restriction as referred to in section 5 (1), an instruction as referred to in section 6 and section 9 (2), or an order as referred to in section 7, section 8 (1) and section 9 (3).

2. Such conduct shall constitute a minor offence.

2. Topics of comparison

The draft study of March 2014 (p. 9) expresses an interest in new questions (such as flash mobs, social networks, content-based restrictions, amongst others) and identifies various questions such as: the scope of guarantees in constitutional and in primary legislation and case-law; legally provided restrictions (legitimate grounds for restrictions; time, place, and manner restrictions; sight and sound); and procedural issues (such as notification requirements, spontaneous assemblies, assemblies taking place on public property, counter-demonstrations, decision-making, review and appeal) as well as.¹¹⁴³

3. Scope of guarantees

Assemblies and demonstrations may not easily be distinguished. It seems that assemblies are mainly aimed at exchanging amongst the participants thoughts and ideas and/or at decision making, whereas demonstrations primarily seem to focus on sharing opinions and ideas with third parties/members of the public.¹¹⁴⁴ In any case, on the occasion of the 1983 major constitutional revision, freedom of assembly received less attention than the freedom of demonstration.

Be that as it may, Article 9(2) of the Constitution is specified in relation to both freedoms in the PAA, which provides for an extensive legal framework. Note that the Act distinguishes between public places and non-public places. In the latter case the mayor may order persons holding or participating in a meeting (or demonstration) *open to the public* in a non-public place to end it and disperse forthwith, if the protection of health or the combating or prevention of disorder so requires (Section 8).

¹¹⁴³ We are only able to provide information in relation to these three questions. Unfortunately the topics in the fourth question (on implementation, like pre-event planning, costs, use of force by the police, liability of enforcement personnel and organizers, monitoring and media access) are out of our reach.

¹¹⁴⁴ Cf J.H Gerards and Others (eds.), *Grondrechten. De nationale, Europese en internationale dimensie* [Fundamental Rights. The National, European and International Dimension], Nijmegen: Ars Aequi Libri 2013, p. 119.

With regard to flash mobs: to our knowledge cases on flash mobs have not been brought before the Dutch courts.

With regard to the Occupy Movement: the question whether the manner and duration of the obstruction of public places, and the public nuisance inherent in that obstruction, affects the scope of the freedom of demonstration is yet to be answered by the highest court.¹¹⁴⁵

4. Restrictions

The law provides three criteria: the protection of health, the interest of traffic and combatting or preventing disorder (see Article 9(2) of the Constitution and Section 2 of the PAA).

As to time and place: on the occasion of the 1983 major revision of the Constitution, Government stated that the rights and freedoms protected by the Constitution did not have an absolute character, in the sense that they can be relied upon regardless of time and place.¹¹⁴⁶

As to manner: modalities, like sound amplification, may be regulated outside the PAA framework; three criteria (derived from case-law) are to be met: restrictions do not relate to the content, pass the proportionality test and allow at least some enjoyment of the freedom concerned.¹¹⁴⁷

As to sight and sound: see 'as to manner' and Section 10 PAA, which deals specifically with bell ringing on the occasion of religious or belief-related ceremonies.¹¹⁴⁸

5. Procedural issues

Section 3(1) PAA stipulates that the municipal council lays down rules by ordinance concerning the cases in which prior notification is required of assemblies for the profession of a religion or belief in public places. Section 7 PAA provides that the mayor may order the persons holding or participating in an assembly for the profession of a religion or belief, or a meeting or demonstration to end it and disperse forthwith, if, *inter alia* the required notification has not been given (sub a).

Legal protection may involve various types of courts: administrative law courts, criminal law courts (*cf.* Section 11 PAA) and occasionally civil law courts (in case of preliminary relief).¹¹⁴⁹

¹¹⁴⁵ Two cases are currently pending before the Council of State: Occupy Rotterdam and Occupy The Hague.

¹¹⁴⁶ See Parliamentary Documents II 1976/77, 13 872, No. 3, p. 10: "niet absoluut" (...) in die zin dat de 'inhoud onafhankelijk van tijd en plaats vaststaat."

¹¹⁴⁷ Council of State, judgment of 5 January 1996, No. R03903668, *Administratiefrechtelijke Beslissingen* [Administrative Law Judgments] 1996, 179.

¹¹⁴⁸ *Cf.* Council of State, judgment of 13 July 2011, No. 201011441/1/H3 CODICES NED-2011-2-005.

¹¹⁴⁹ See for instance District Court The Hague 29 January 2012, ECLI:NL:RBSGR:2012:BV2842 (in relation to Section 6 PAA).