Comparative Study: Freedom of Peaceful Assembly in Europe

Study requested by the European Commission for Democracy through Law – Venice Commission

Prof. Dr. Anne Peters & Dr. Isabelle Ley
Max Planck Institute for Comparative Public and International Law

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With contributions by Elif Askin, Melina Garcin, Prof. Dr. Rainer Grote, Jannika Jahn, Dr. Steven Less, Esq., Dr. Halyna Perepelyuk, Dr. Orsolya Salát, Maria Stożek, Evgeniya Yushkova, Friederike Ziemer
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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 2\textsuperscript{nd} edition of their Joint Guidelines on freedom of assembly, a comprehensive overview of the normative standards for freedom of assembly legislation within the Commission’s member states. In the Commission’s and OSCE/ODIHR estimate, these standards presented the grown, established and prevalent principles and best practices of freedom of assembly regulations within its member states. The guidelines are currently being subject to revision by the OSCE/ODIHR expert panel and the Commission as new questions within the scope of the guidelines arise. 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 assembly regulation within the Venice 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 public property, 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, central, 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 OSCE/ODIHR - Venice Commission’s guidelines, its selection of states also encompasses Member States which have in the past received opinions by the Commission (Russia, 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 recently gained a new 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.


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
by Jannika Jahn

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

1. Legal bases and scope of the guarantee
Traditionally, as every civil liberty, the freedom of peaceful assembly used to be a residual right.² 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).³ 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.⁴ Art. 11 ECHR encompasses a positive and a negative right,⁵ it comprises participation in private and public meetings,⁶ processions,⁷ mass actions, demonstrations, pickets, rallies,⁸ cyber protests and flashmobs, it only excludes the participation in violent protests.⁹ 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.¹⁰ 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.¹¹ In the case of Appleby v.

¹ 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.
² 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.
³ 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.
⁶ Rassemblement Jurassien and Unité Jurassienne v Switzerland, App. No. 8191/78, 17 DR 93.
⁷ Christians Against Racism and Facism, supra fn. 4.
⁸ Rai Almond and ‘Negotiate Now v. the United Kingdom, Application no. 25522/94, 6 April 1995.
⁹ Ciriaklar 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. 8. Apparently, demonstrations of a merely social character are not excluded by statute or case law.
¹¹ 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. 5, 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. 4, paras. 22-23. The restriction of public
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.”

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. Only public processions in a public space are covered. If the procession is held to demonstrate support 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. 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. Failure to conform to the notice requirements is a summary offence for the organizer. No offence can be committed if there is no organizer and if the procession is spontaneous and lacks a specific route. The notification requirements are generally deemed to be in compliance with Art. 10 as enshrined in the HRA 1998, although the minimum notification period has been found to be too long. Conditions may be imposed by a senior police officer before or during the public procession, 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 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 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.

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12 Appleby v UK, App. No. 44306/98, 6 May 2003, para. 47.
13 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).
14 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.
15 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.
16 Section 11(6) POA 1986.
17 Section 11(7) POA 1986.
18 Held in the obiter dicta of R (Kay) v. Commissioner for the Metropolitan Police Force [2008] UKHL 69.
21 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).
that it was organized for intimidating others.\textsuperscript{22} 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.\textsuperscript{23}

Conditions may also be imposed on public assemblies\textsuperscript{24} according to section (s.) 14. The procedure is almost identical to that for public processions.\textsuperscript{25}

Organizing or participating in processions or assemblies without complying with the conditions as well as the incitement to such participation is a summary offence.\textsuperscript{26} In case of failure, the police are empowered to arrest those acting in violation of the direction.\textsuperscript{27} 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.\textsuperscript{28}

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.\textsuperscript{29} But the HRA 1998 will require proportionate conditions that do not strip the procession of its purpose.\textsuperscript{30} The organizers liability for others’ breaking of conditions\textsuperscript{31} has caused disapproval, as this may have a chilling effect on the exercise of the right.\textsuperscript{32} 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.\textsuperscript{33} The police have alleged that conditions were used sparingly and only when

\textsuperscript{22} 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.

\textsuperscript{23} Section 12(1) POA 1986.

\textsuperscript{24} 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-humanrights.org.uk/pdfs/policy08/response-to-ichr-re-protest-2.pdf, at 10-11 (last accessed: 09 March 2014).

\textsuperscript{25} The power to impose conditions applies irrespective of a certain purpose which is pursued by the assembly.

\textsuperscript{26} Sections 12 (4) and 14(4), 12(5) and 14(5), 12 (6) and 14 (6) POA 1986.

\textsuperscript{27} Sections 12(7) and 14(7) POA 1986.

\textsuperscript{28} 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.

\textsuperscript{29} 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.

\textsuperscript{30} “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, 3\textsuperscript{rd} 2011, p. 515; for pertinent case law, see R (Brehomy) 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.

\textsuperscript{31} 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).

\textsuperscript{32} This was also criticized by the UN Special Rapporteur, supra fn.29, para. 15.


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necessary. 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, is thus difficult to assess.

The power to ban processions is conveyed exclusively on the chief officer of police. 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.” The consent/approval of the Home Secretary is required, adding an element of external political control on and highlighting the exceptional character of the ordering of bans.

A ban only applies to a class of public processions in the relevant district for a period not exceeding three months. The order should be in written form. 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.

Hence, the ECHR standards are deemed important for holding the police to the principle of proportionality, especially, since recently the section has been used as legal basis for several blanket bans.

While banning public assemblies in advance is not allowed, s. 70 and 71 CJPOA 1994 have expanded s. 14 POA 1986, giving the police the power to stop trespassory assemblies in advance. Trespassory assemblies are such, where the right to access is not given or limited 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. 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. 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

34 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. 5, paras. 1-10, 47-51.
36 Section 13(1), (4) POA 1986.
37 The procedure to be followed is different for London and the rest of the country.
38 See S. Foster, supra fn. 30, 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.
39 This is in order to avoid an overly burdensome and politically motivated restraint of the right to assemble peacefully. R. Stone, supra fn. 19, p. 385.
40 Section 13(6) POA 1986.
41 Section 13(7), (8), (9) POA 1986.
42 S. R. Stone, supra fn. 19, p. 386; S. S. Foster, supra fn. 30, 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.
43 S. S. Foster, supra fn. 30, p. 516.
44 Criticized by the UN Special Rapporteur in his report, supra fn. 29, para. 13.
45 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.
46 Under s. 14A POA.
47 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.”
48 The latter must be of historical, architectural, archaeological or scientific importance.
49 DPP v Jones and Lloyd [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).
been emphasized, that the police should use this forceful power restrictively.\footnote{S. Foster, supra fn. 30, p. 520; R. Stone, supra fn. 19, p. 392.} A burdensome use of the pre-emption power of s. 14C has been criticized, however.\footnote{Netpol Report, supra fn.33.}

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.\footnote{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.}

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.\footnote{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.} Concerns of proportionality have been raised.\footnote{The Special Rapporteur is concerned that this may prevent long-term public protest in front of Parliament, supra fn. 11, para. 14.}

While the authorization of assemblies in the vicinity of Parliament has been repealed, the authorization requirement still applies to other designated areas.\footnote{ Cf. section 128 Serious Organized Crime and Police Act 2005 (SOCPA 2005).} 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.\footnote{Report, supra fn. 11, para. 108.} This has, however, not been implemented yet.

Undercover policing of activist groups is provided for by an intricate legal framework.\footnote{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).} 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 criticism\footnote{See the UN Special Rapporteur report, supra fn. 29, paras. 24-28.} and calls for reform.\footnote{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. 29, para. 93.} Additionally, the wide definition and application of the term “extremist groups” has allowed the police to use extensive powers against e.g. Occupy London.\footnote{See the Report of the UN Special Rapporteur, supra fn. 29, 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. 4, 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 protestor”, 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.”}

Surveillance by Forward Intelligence Teams (FITs) and the management of several databases on protesters, including peaceful ones,\footnote{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. 33, p. 43.} purportedly containing personal information, caused
public discontentment.\textsuperscript{62} 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.\textsuperscript{63} Moreover, they raise concerns of legality.\textsuperscript{64} Apparently, Government is working on changes, particularly the clarification of the role of FITs.\textsuperscript{65}

**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.\textsuperscript{66} 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.\textsuperscript{67}

There are two offences in the POA 1986 which forbid the causing of harassment, alarm or distress, ss. 4A\textsuperscript{68} and 5. It has been difficult for English courts to find a balance between peaceful protest and the prevention of public disorder.\textsuperscript{69} What is considered to be “reasonable” has been assessed differently, leaving the suspect in uncertainty.\textsuperscript{70} This is exacerbated in cases of “borderline extremist protest.”\textsuperscript{71} Moreover, s. 5 incurs criminal liability which may raise

\textsuperscript{62} Netpol report, \textit{supra} fn. 33, p. 42; the Special Rapporteur even reported on private security companies reportedly collecting data on and taking pictures of peaceful protestors, \textit{supra} fn. 11, 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).

\textsuperscript{63} With respect to Art. 8 and not Arts. 11 or 10. For the latest decision on this issue with further pertinent references, \textit{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 \textit{Wood v. MPC} [2009] EWCA Civ 414 it was held that the retention of data would have to be justified.

\textsuperscript{64} In \textit{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, \textit{supra} fn. 63, para. 55. In \textit{Mengesha}, even though slightly different on the facts, the court took a more restrictive approach on the scope of the common law powers.


\textsuperscript{67} 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, \textit{S. Foster, supra} fn. 30, pp. 523-524.

\textsuperscript{68} Added by the CJPOA 1994.

\textsuperscript{69} I.e. the balance between Arts. 10 and 11 and section 5 of the POA 1986.


\textsuperscript{71} In the latest case on the issue, the judicial stance was rather restrictive, in \textit{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.
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.” In order to alleviate the problem of disproportionate criminalization of only minor offences, 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.” However, doubts have been voiced concerning the coverage of behaviour, solely exercised on private grounds, saying that here ordinary criminal law offences would suffice. 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. S. 69 CJPOA 1994 allows the police to direct purported trespassers to leave the land. These powers have been considered critical, especially with a view to the privatization of public space.

Incitement to racial hatred has been criminalized by the “racial hatred” offences enacted in Part III POA 1986. They are meant to control racist speech at public assemblies. Racially aggravated offences are explicitly criminalized under ss. 28-32 Crime and Disorder Act 1998. The Racial and Religious Hatred Act 2006 added a Part 3A to the POA 1986. Offences cover speech, publications plays, recordings and broadcasts, possession of inflammatory material and the police are given powers of entry, search, and seizure and powers of forfeiture. 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.”

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. While the PHA 1997 was primarily enacted for dealing with “stalking”, the powers have been used with respect to demonstrations. Penalties can be incurred and injunctions applied. Concerning injunctions, proceedings are held in private, which is not adequate for public protest issues. Companies have used injunctions broadly to prevent protests against them. Generally, these powers have been held to bear the potential for overbroad and disproportionate application. 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 orders and football banning orders. 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. The breach of an ASOB is a criminal offence which carries a higher maximum penalty than other substantive public order offences. While the ASOBs have not been used as extensively as anticipated, they still

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

87 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 See ss. 2 and 4 PHA 1997.

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

91 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. 5, para. 99.

92 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.

93 See the HRJC Report, *supra* fn. 5, para. 99, see the report of the Special Rapporteur, *supra* fn. 11, para. 47-48, 93, 94.


95 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.

96 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.

97 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.
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,99 the only requirement being that the dispersal is ‘necessary to reduce the likelihood of anti-social behaviour’.100 This has led to criticism, as anti-social behaviour powers have often been used for constraining protests.101

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,102 but their increased use as a blanket power has been of major concern recently.103

A number of stop and search powers are used in relation to protests, including the Police and Criminal Evidence Act 1984,104 the CJPOA 1994105 and the Terrorism Act 2000.106 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,107 sections 44-47

98 R. Stone, supra fn. 19, 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.

99 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).

100 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 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. 4.

103 See the Report of Netpol, supra fn. 33, pp. 6 and 44; this was recognized by the HMIC in their 2010/2011 report, supra fn. 57, 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.

104 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.

105 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 5.2.5-5.5 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.

106 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.

107 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
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.\(^{108}\) Still, the extensive use of stop and search powers has been called to be stopped with respect to peaceful protesters.\(^{109}\)

Lastly, powers to prohibit uniforms may be used against specific political factions, but also, under terrorism legislation, to proscribe the wearing of certain emblems.\(^{110}\) 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.\(^{111}\)

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.\(^{112}\)

**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 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.\(^{113}\)

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\(^{108}\) 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. 4, 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. 11, para. 44.

\(^{109}\) UN Special Rapporteur, supra fn. 29, paras. 43-44, para. 93.

\(^{110}\) 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.

\(^{111}\) Netpol report, supra fn. 33, p. 12.


\(^{113}\) See section 5(1)(j); the Special Rapporteur rejects any authorization regimes in relation to demonstrations, supra fn. 11, para. 14. In R (Tabernacle) v Secretary of State for Defence, supra fn. 4, 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. 5, para. 49.
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.114

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.115 This case has put stricter limits on what was becoming a very broad discretionary power.116 Still, the breach of peace power is wide and can be used to complement or even circumvent the powers of the POA 1986.117 Human rights concerns were already raised in Austin v. Commissioner of Police for the Metropolis.118 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 decades119 and it was never found to be materially violating ECHR rights.120 The Home Affairs Committee’s (HAC) Report on the policing of the G20 protests found, however, that the powers of kettleing should be codified.121 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.122 Moreover, the power has been criticized for the wide discretion it leaves to the police and its disproportionate application123 which has also sparked the call for its abolition.124

114 Hashman and Harrup v. UK (1999), where a condition was imposed on protesters not to behave contra bonos mores, ie 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. 4.

115 [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.

116 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. 199, 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).

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

118 Supra fn. 30. 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.

119 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.

120 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. 4, p. [42].


122 Already stated in the OSCE, Guidelines on Freedom of Peaceful Assembly (2007), available at http://www.osce.org/odpihr/24523, para. 44 (last accessed: 10 March 2014); HRJC Report, supra fn. 5, para76; H. Fenwick, supra fn. 112, at 757, 758 argues that it would be preferable to rely on the scheme under the POA ss.11-14A; R. Stone, suprafn. 19, p. 422; R. Stone, Breach of the Peace: the Case for Abolition, [2001] 2 Web JCLI.

123 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. 112, p. 738; seen particularly critical is
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.\textsuperscript{125}

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 participants\textsuperscript{126} 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.\textsuperscript{127} 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.\textsuperscript{128} Considering the media coverage, flashmobs constitute a regular form of protest in the UK.\textsuperscript{129} The use of force and taser were heatedly discussed after the death of Ian Tomlinson and the violent arrest of Nicola Fisher during the G20 protests in 2009.\textsuperscript{130} Yet, the reproach of heavy-handed protest policing is still voiced.\textsuperscript{131} Public confidence may be reduced considerably as

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  \item the lacking differentiation between peaceful and violent protestors, OSCE guidelines 2007, supra fn. 122, para 125; also in the obiter dicta of Laporte, supra fn. 115, the power was denounced by some judges as exceptional, if it is directed against people acting lawfully. In the Netpol report, supra fn. 33, 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.
  \item 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. 29, paras. 37-38 and para. 93.
  \item [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.
  \item 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. 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).
  \item 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). 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. 121, paras. 54-65; 66-75; recommendations paras. 23-29 and the HRJC report, supra fn. 5, paras. 182-192.
  \item 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
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police forces are often filmed and the material is uploaded.\textsuperscript{132} The improvement of communication with protesters will be crucial for improving this state of affairs.\textsuperscript{133} The use of pre-emptive action was criticized as being excessive, including pre-emptive arrests,\textsuperscript{134} squat raids and an extensive use of warning letters,\textsuperscript{135} and has been called to stop with respect to peaceful protesters.\textsuperscript{136}

The use of mass arrests under breach of peace or aggravated trespass powers is criticized.\textsuperscript{137} Another way of restraining protest has been the use of excessive bail conditions.\textsuperscript{138}

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.\textsuperscript{139}

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,\textsuperscript{140} interpreting powers narrowly and asking for interferences to be adequately justified.\textsuperscript{141} 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.\textsuperscript{142} But these cases have become fewer and the courts as well as the democratic process have reacted to ECtHR judgments\textsuperscript{143} 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

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\item 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. 29, paras. 39-40.
\item This was also underlined by the HAC report, supra fn. 120, 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).
\item It has been underlined that police officers should be trained in forms of dialogic and peaceful communication, HAC report, supra fn. 121, recommendations para. 12; HRC report, supra fn. 5, para.181.
\item 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.
\item Netpol Report, supra fn. 33, pp. 7-12.
\item The UN Special Rapporteur considers them to be neither necessary nor proportionate, supra fn. 29, paras. 41-42 and para. 93.
\item Netpol report, supra fn. 33, pp. 34-41.
\item This has been urged to be stopped and to establish a protest ombudsman before whom protestors can challenge bail conditions, Special rapporteur, supra fn. 11, 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/ (last accessed: 10 March 2014).
\item This is notable, as they operate in a public order oriented legal framework.
\item See Mengesha v. MPC, supra fn. 125; R (Moos and Anor) v. The Commissioner of the Police of the Metropolis, supra fn. 116; Catt v. ACPO & MPC, supra fn. 63; Wood v. MPC, supra fn. 63.
\item See Abdul v. DPP, supra fn. 71 (construing “legitimate protest” narrowly); R (Castle and others) v. MPC, supra fn. 123; Austin v. MPC, supra fn. 30 (confirmed by the ECtHR); and Gillan v. MPC [2006] UKHL 12 (reversed by the ECtHR).
\item See e.g. Gillan v. UK and the amendment of s. 44 Terrorism Act, supra fn. 107 and 108 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.
\end{itemize}
individual can file a complaint after having unsuccessfully rendered it to the police.\textsuperscript{144} Civil society unfortunately appears not to see the Commission as being independent, however, particularly due to the fact that it does not report to the Parliament, but to the Home Secretary.\textsuperscript{145}

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.\textsuperscript{146} 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’.\textsuperscript{147}

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.\textsuperscript{148}

Finally, judicial review is the most important legal mechanism of police accountability.\textsuperscript{149}

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.\textsuperscript{150}

Moreover, the importance of personal accountability of police personnel has been pointed out.\textsuperscript{151} Crucial for holding police officers to account is the possibility to identify them by their identification numbers,\textsuperscript{152} officers’ non-identification at the G20 protests consequently spurred intensive criticism.\textsuperscript{153} But the police appear to have made progress in this respect.\textsuperscript{154}

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\textsuperscript{144} 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 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.

\textsuperscript{145} The UN Special Rapporteur regrets this, supra fn. 29, 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.


\textsuperscript{147} 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. 57, 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-21st-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.

\textsuperscript{148} See HRJC report, supra fn. 5, para. 157.

\textsuperscript{149} 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.

\textsuperscript{150} 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.

\textsuperscript{151} UN Special Rapporteur, supra fn. 150, para. 93. He believes in the courts and a democratic oversight body.

\textsuperscript{152} This has also been emphasized by the Special Rapporteur, supra fn. 11, para. 93.

\textsuperscript{153} See HAC report, supra fn. 121, paras. 17-23.

\textsuperscript{154} The HMIC report highlights that numerals are worn by police officers, otherwise they would incur liability, supra fn. 57, Annex A, recommendation 12.
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Regarding accountability, the improvement of the police’s communication strategies with the media\textsuperscript{155} is an important topic.\textsuperscript{156} According to the HMIC report, the police have made progress in entering into a dialogic relationship with the media.\textsuperscript{157}

5. Conclusions and outlook

The law on public protest has continuously been developed in a human rights friendly fashion. The general trend appears positive, particularly when analysing the structure and ductus of court decisions as well as the close scrutiny of the democratic process, the public, international and non-governmental organizations that have held the police to account and have triggered change.\textsuperscript{158} In many respects, the UK system has shown to be responsive in an exemplary fashion. Yet, some problems remain, particularly concerning 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.\textsuperscript{159} This approach also seems to determine the police’s practice, which has led to disproportionate responses to protest\textsuperscript{160} 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.\textsuperscript{161} 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.

\textsuperscript{155} The NUJ raised the problem that journalists were often prevented by the police to cover protests, see HRC report, \textit{supra} fn. 5, para. 193.

\textsuperscript{156} 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, \textit{supra} fn. 5, para. 200, or have a designated media contact point, HAC report, \textit{supra} fn. 121, recommendations para. 2.

\textsuperscript{157} See Annex A, recommendations 2, 3, 7, 9 with reference to the ACPO Manual, \textit{supra} fn. 128.

\textsuperscript{158} See the parliamentary report, the HRJC report \textit{supra} fn. 5 and the HAC report \textit{supra} fn. 121.

\textsuperscript{159} See also UN Special Rapporteur, \textit{supra} fn. 150, para. 17.

\textsuperscript{160} 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, \textit{supra} fn. 62, 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.

\textsuperscript{161} This was also recommended by the UN Special Rapporteur, \textit{supra} fn.150, 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.\footnote{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.}

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.\footnote{RIPKE, S. (2012) Europäische Versammlungsfreiheit. Tübingen: Mohr Siebeck.} 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.\footnote{COLLIARD, C.A. (2005) Libertés publiques. 8th ed. Paris: Dalloz, p. 495.} 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”.\footnote{Constitution of 1946, Preamble, para. 1.} 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”.\footnote{DRMC, Art. 11.}

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 \textit{lex specialis} to freedom of expression) is as well\footnote{WÖLKER, U. (1987) Zu Freiheit und Grenzen der politischen Betätigung von Ausländern. Berlin: Springer, p. 58.}. French law differentiates between public meetings, provided by an 1881 Act on freedom of assembly\footnote{Act of 30 June 1881 on freedom of assembly.} (“liberté de réunion”) and a 1907 Act on public meetings\footnote{Act of 28 March 1907 on public meetings, in its consolidated version of 16 May 2009.} (“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 free\footnote{Act of 30 June 1881 on freedom of assembly, Art. 1, \textit{supra} fn. 168.} and the 1907 Act states that public meetings, regardless of the object, can be held without prior notification.\footnote{Act of 28 March 1907 on public meetings, Art. 1, \textit{supra} fn. 169.} Electoral meetings are included in the protection.\footnote{Act of 28 March 1907 on public meetings, Art. 1, \textit{supra} fn. 169.} All marches, rallies, and,
generally speaking, all demonstrations on public roads are subject to prior notification. 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. 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, as opposed to public meetings or demonstrations without any participatory restrictions. 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. A public meeting is organized or concerted; it is not a chance encounter between individuals. This criterion distinguishes a meeting from a crowd. A meeting is a temporary gathering, as opposed to an association or a company, which have a long-term or a continuous nature. Its purpose can lie in the exchange of views and ideas, as well as in the defence of an interest. The subject of the debate can be political, religious, moral, artistic, or economical. 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. 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 roads 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”. 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, which encompasses indoor meetings and

172 Act of 30 June 1881 on freedom of assembly, Art. 5, supra fn. 168.
176 COLLIARD, supra fn. 164, p. 498.
177 CE, 23 December 1936, Bucard, Rec. p. 1151.
179 CE, 6 August 1915, Delmotte et Senmartin, Rec. 275.
183 Act of 30 June 1881 on freedom of assembly, Art. 6, supra fn.168.
184 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.
those taking place on public roads, and can be exercised by individuals and organizers. 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.

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 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. Flash mobs are generally formed through the Internet and social media web sites, such as Facebook and Twitter.

3. Restrictions
Freedom of assembly and freedom of demonstration are linked to freedom of expression, as their purpose is to express a common claim, belief, thought, or protest. 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.

Manner restrictions
Only electors of the district, members of the chambers, candidates, and their agents are allowed to attend electoral meetings. 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. Preventive measures, and even prohibitions, are admissible in cases of serious threats to public order. Holding a

186 supra fn. 185, para. 41.
187 supra fn. 185, para. 43.
189 Website on flash mobs in France: http://flashmob.info/fr/ (last accessed: 10 March 2014).
190 Facebook group on flash mobs in France: https://www.facebook.com/flashmobs (last accessed: 10 March 2014).
191 Twitter page on flash mobs in: https://twitter.com/flashmob_fr.
192 COLLIARD, supra fn. 164, p. 499.
195 Act of 30 June 1881 on freedom of assembly, Art. 5, supra fn. 168.
demonstration that was prohibited previously is punishable.\textsuperscript{198} In its \textit{Benjamin} decision, the Conseil d’État (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.\textsuperscript{199} Freedom is the rule, restriction the exception.\textsuperscript{200} 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.\textsuperscript{201} 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 order.\textsuperscript{202} Carrying a weapon during a demonstration or a public assembly is prohibited.\textsuperscript{203} 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.\textsuperscript{204} The participation in a “crowd” (“attroupement”), 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.\textsuperscript{205} Once legal warnings have been made to the demonstrators, it is an offense to continue participating in that crowd.\textsuperscript{206} 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.\textsuperscript{207}

\textbf{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.\textsuperscript{208} It applied the same argument to sectarian groups.\textsuperscript{209} 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.\textsuperscript{210}

\textsuperscript{198} 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.

\textsuperscript{199} CE, 19 May 1933, \textit{Benjamin}, Rec. Lebon, p. 541.


\textsuperscript{203} 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.


\textsuperscript{205} 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.

\textsuperscript{206} 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.

\textsuperscript{207} 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.


\textsuperscript{209} CE, 30 March 2007, n° 304053.

\textsuperscript{210} CE, 27 May 2005, \textit{Section française de l’Observatoire international des prisons}, n° 280866.
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. 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. 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. 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 as including the measures - such as punitive measures - taken following a meeting. 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.

4. Procedural issues

Notification/authorization

The 1881 Act provides that public meetings can take place without prior authorization under the conditions provided by law. As for the 1907 Act, public meetings, regardless of the subject, can be held without prior notification. However, all marches, rallies, and gatherings of persons, and, generally speaking, all demonstrations on public roads, are subject to prior notification. 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. Demonstrations following local customs are exempted from the requirement. Organizing a demonstration on public roads without prior notification, or introducing an incomplete or erroneous notification, both constitute punishable acts.

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211 CE, 25 October 2013, n° 372319 and n° 372321.
212 CE, Order of 9 January 2014, n° 374508.
216 Act of 30 June 1881 on freedom of assembly, Art. 1, supra fn.168.
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.\textsuperscript{222} 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.\textsuperscript{223} 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.\textsuperscript{224} The prefect, the mayor, or police officers are responsible for the legal warnings prior to the dispersal of a crowd.\textsuperscript{225}

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 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.\textsuperscript{226} A spontaneous demonstration took place against a neo-Nazi gathering. The police remained on alert to avoid any misconduct, although the location was unknown.\textsuperscript{227} Even police officers have demonstrated spontaneously without prior notification.\textsuperscript{228} 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 media\textsuperscript{229} or through text messages or emails.\textsuperscript{230} Many public meetings, demonstrations, or

\textsuperscript{229} BADINIER, E. (2013), supra fn. 227
other types of events are now organized or advertised through social networks.\textsuperscript{231} 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.

\textbf{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.

\textbf{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.\textsuperscript{232}

\section*{6. Implementing freedom of assembly legislation}

\textbf{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.\textsuperscript{233} 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.

\textbf{Costs}

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

\textbf{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.\textsuperscript{234} Weapons can be used by authorities only under strict conditions.\textsuperscript{235} 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.\textsuperscript{236} Military means can be

\begin{itemize}
  \item \textsuperscript{230} MOREAU, V. (2012) \textit{Malaise dans la police française: entre manifestations encadrées et actions “spontanées”}. 17 May, RFI. Available at: \url{http://www.rfi.fr/france/20120511-malaise-police-entre-manifestations-encadrees-actions-spontanees} (last accessed: 10 March 2014).
  \item \textsuperscript{231} I.e. a demonstration organized by Belgians supporting same-sex marriage and the LGBT community in France: \url{https://www.facebook.com/events/338081072957774/} (last accessed: 10 March 2014).
  \item \textsuperscript{232} CE, 7 March 2011, n° 347171.
  \item \textsuperscript{233} Act of 30 June 1881 on freedom of assembly, Art. 8, supra fn. 168.
  \item \textsuperscript{234} 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.
  \item \textsuperscript{235} Ibid.
\end{itemize}
used in case of threats or serious public order disturbances.\textsuperscript{237} The Parliamentary Assembly of the Council of Europe (PACE) has deplored “recent cases of excessive use of force to disperse demonstrators”\textsuperscript{238}, 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).\textsuperscript{239}

\textbf{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.\textsuperscript{240}

\section*{7. Securing governmental accountability}

\textbf{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.

\textbf{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.\textsuperscript{241}

\textbf{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.\textsuperscript{242}

\begin{footnotes}
\item[237] \textit{Ibid}, Art. R.431-5.
\item[240] Act of 30 June 1881 on freedom of assembly, Art. 8, \textit{supra} fn. 168.
\end{footnotes}
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 authorization, leading to a decision on whether to permit or prohibit the event.243


244 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.”

No ranking prioritizes the freedoms protected. Rather, the guarantees of petition, assembly, speech and press are seen as applying to coequal or “cognate” freedoms, 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 association as opposed to a temporally broader concept of assembly has been debated. 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 provison has generally been designated as the “Assembly and Petition Clause,” indicating a broader view of the expression guaranteed. Despite scholarly characterization of the Clause as “the very essence of the Bill of Rights,” little case law or academic literature focuses specifically on either petition or assembly rights.

Scope of the guarantee
Traditionally, guarantees of assembly and petition were understood as referring to activities aimed at influencing the government. A wider conception now prevails under which controversies involving speech, press, assembly or petition are all analysed in terms of free speech or expression. 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.

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245 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.


249 See M. M. Russell, ‘Editor’s Introduction,’ in Freedom of Assembly and Petition, supra fn.246, 21, at 22, 43.

250 See id., at 23.


252 See id., at 23.


254 De Jonge v. Oregon, supra fn. 246.

255 See J. Mazzone, ‘Freedom’s Associations,’ in Freedom of Assembly and Petition, supra fn. 246, 26, at 29.
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. Because of this qualification, ensuring public safety and preventing disturbances to the public order remain appropriate objects of governmental regulation. 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].” 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….”

**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) 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. 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.

**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. 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

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256 See id., at 27-28.
opened their property to the public, a few state courts have upheld state statutory limits on private-property owners’ power of exclusion.\textsuperscript{263}

2. Restrictions

Content-based restrictions
A core principle of First Amendment law forbids any regulation of expression directed at the message being communicated.\textsuperscript{264} 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,\textsuperscript{265} for example, precludes the police from arresting people who have merely insulted them.\textsuperscript{266} 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.\textsuperscript{267} The “clear and present danger” standard\textsuperscript{268} 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.\textsuperscript{269} General fears of possible lawless action are considered premature under the contemporary approach and do not justify governmental interference.\textsuperscript{270} 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.\textsuperscript{271} 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.\textsuperscript{272}

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


\textsuperscript{264} See, e.g., Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

\textsuperscript{265} Chaplinksky v. New Hampshire, 315 U.S. 568 (1942).


\textsuperscript{268} Schenck v. United States, 249 U.S. 47 (1919).

\textsuperscript{269} 395 U.S. 444 (1969).

\textsuperscript{270} Collins v. Jordan, 110 F.3d 1363 (9th Cir. 1996).

\textsuperscript{271} Wright v. Georgia, 373 U.S. 284 (1963).

criticism of the Court’s “market-place-of-ideas” 273 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; 274 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; 275 and it has upheld the right to hold cross-burning ceremonies at Ku Klux Klan rallies. 276 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. 277

**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* 278 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. 279

Regulations that entirely foreclose a medium of expression, although content-neutral, would generally not meet either of these standards. 280 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. 281 However, where there is no indication of discrimination, some total medium bans have been sustained. 282

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 ordinances 283 - ordinances protecting residential privacy, 284 anti-littering laws, 285 laws protecting against interference with

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276 *Virginia v. Black*, supra fn. 267
279 See infra, text accompanying fn. 286.
traffic as well as ingress to and egress from buildings, anti-solicitation regulations, regulation of signs and billboards, ordinances making permits a prerequisite for assembling, etc. 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 a significant government interest” and “leave ample alternative channels for communication.”

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, health clinics and private residences. Similar restrictions on assembly have been deemed constitutional also in regard to polling places. Nevertheless, the Supreme Court has often found spatial regulations unsustainable as content-based, failing to promote a significant governmental interest or overbroad. 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, 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.

**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. It also

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288 Ladue v. Gilleo, supra fn. 280.
290 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).
292 Grayned v. City of Rockford, supra fn. 261.
293 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. 313.
294 See Frisby v. Schultz, supra fn. 284.
296 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“).
297 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).
International Airport resolution prohibiting all assembly and speech activities in the airport’s central
terminal).
299 131 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 Connally v. General Construction Co., 269 U.S. 385 (1926); Grayned v. City of Rockford, supra fn 261.
facilitates consideration of the chilling effect on expression 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. Statutes that authorize police to arrest persons for “loitering,” “annoying,” “offensive,” or causing “anger” or “a condition of unrest” 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 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.

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.

**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. 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.

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, as well as the degree to which a permit’s cost and notice requirements and fulfilment of its substantive conditions 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

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302 Id., at 109.
303 Id., at 108-109.
307 Terminiello v. City of Chicago, supra fn. 258.
308 Gooding v. Wilson, supra fn. 266.
309 Shuttlesworth v. City of Birmingham, supra fn. 281.
311 Thomas v. Chicago Park District, id.
expression: Valid injunctions may not “burden … more speech than necessary to serve a significant government interest.” 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.

3. Procedural issues

Notification and spontaneous assemblies
Courts have rejected permit/notice requirements of more than a couple of days. 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.

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.

Decision-making
Permit systems dependent on an administrator’s discretion constitute prior restraints. 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” or to prevent “riots, disturbances or disorderly assemblage.”

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. Similar procedural requirements pertain to injunctions.

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

314 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, e.g., Church of the Knights of the Ku Klux Klan v. City ofGary, 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).
317 See supra I.C.6.
318 See Wright v Georgia, supra fn. 22; see also supra I.C.1.
319 See supra I.C.6.
321 See Hague v CIO, supra fn.259.
323 See, e.g., Carroll v Princess Anne, 393 U.S. 175 (1968); National Socialist Party v. Village of Skokie, supra fn. 275.
traffic regulation and police protection.\textsuperscript{324} Where the amount varies according to the estimated expense of controlling a hostile audience, however, the First Amendment is invalidly compromised.\textsuperscript{325} 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.\textsuperscript{326}

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 amount of force that is reasonably necessary to bring an incident under control while protecting the lives of the officers and others."\textsuperscript{327} The standard of reasonableness in this context is governed by the Fourth Amendment.\textsuperscript{328} 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.\textsuperscript{329}

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.\textsuperscript{330} Liability for such charges is unobjectionable in the absence of discrimination among groups and events of a similar type and size. 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.\textsuperscript{331}

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 criminal\textsuperscript{332} as well as civil liability.\textsuperscript{333} 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.\textsuperscript{334} 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.\textsuperscript{335} Police officers have qualified immunity and may thereby

\textsuperscript{324} See Cox v. New Hampshire, supra fn. 310.
\textsuperscript{325} See Forsyth County v. Nationalist Movement, supra fn. 312.
\textsuperscript{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 ….").
\textsuperscript{331} See, e.g., NYC Rules §2-08, p and t.(7), Ch. 2, Title 56.
\textsuperscript{332} NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982).
\textsuperscript{333} 18 U.S.C. §242 (making it a crime to wilfully violate federal constitutional rights while acting under colour of law.
\textsuperscript{334} 42 U.S.C. §1983 (allowing civil lawsuits for violations of constitutional rights).
avoid liability when the constitutional right they are accused of violating was not clearly established\textsuperscript{336} 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.\textsuperscript{337} However, unwarranted monitoring constitutes harassment and chills the expression of persons innocently exercising their First Amendment rights. While rejecting a claim challenging the military’s domestic monitoring of civilians on procedural grounds, the Court in *Laird v. Tatum*\textsuperscript{338} 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.\textsuperscript{339}

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 forums\textsuperscript{340} which are generally accessible to the public. Exclusion of the media from places otherwise open to others is probably unconstitutional.\textsuperscript{341}

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.\textsuperscript{342} 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.\textsuperscript{343}

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

\textsuperscript{336} See *Pierson v. Ray*, 386 U.S. 547 (1967) (recognizing immunity where the police enforce laws later declared unconstitutional).


\textsuperscript{338} 408 U.S. 1 (1972).


\textsuperscript{340} See supra I C. 3.


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’ in the national airspace by 2016. This legislation also makes it fairly easy for police departments to receive authorization to operate drones. 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. 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).

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. 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. Recently, however, has the Court accepted some limitations on searches involving more sophisticated technology. 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.

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346 See id., Sects. 333-334.
351 *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.\(^{352}\)

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”.\(^{353}\) However, the provision “does not apply to open air gatherings, which are entirely subject to police regulations”.\(^{354}\)

While the Constitution guarantees the respect of its fundamental freedoms to every human being, only Belgian citizens are entitled to the freedom of assembly\(^{355}\). 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.\(^{356}\)

The constitutional provision defines “assembly” as the temporary gathering of several persons in a public place, accessible to everyone.\(^{357}\) 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 Code\(^{358}\) 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).\(^{359}\) The Alien Act states that the lawful exercise of


\(^{353}\) Constitution, Art. 26, para. 1.

\(^{354}\) Ibid., para. 2.

\(^{355}\) Constitution, supra fn. 353, Art. 26, para. 1.


freedom of peaceful assembly cannot be held against a foreign national to justify his/her return or removal.\textsuperscript{360}

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.\textsuperscript{361} For the Conseil d’Etat, public entertainment events are included in the protection of Art. 26 of the Constitution\textsuperscript{362}, although the highest judicial court (Cour de cassation) showed some reluctance admitting it.\textsuperscript{363} In two different decisions\textsuperscript{364}, 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),\textsuperscript{365} 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,\textsuperscript{366} to Art. 21 of the International Covenant on Civil and Political Rights\textsuperscript{367} and to Art. 5 (d) (ix) of the ICERD. The Belgian Anti-Racism Act\textsuperscript{368} 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.\textsuperscript{369} 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.\textsuperscript{370}

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.\textsuperscript{371} Flash mobs are generally formed through social media web sites, such as Facebook\textsuperscript{372} and Twitter.\textsuperscript{373}

\textsuperscript{361} CE, 7 November 1998, n° 76815.
\textsuperscript{362} Cf. CE, 24 March 1953, Pas. Belge 1954, IV, 103 (105); DELPEREE, F., supra fn.357, p. 254; WIGNY, supra fn. 356, p. 181; DUPRIEZ, L. (1887) La liberté de réunion, Brussels: Lesigne, p. 3.
\textsuperscript{363} Cass., 16 November 1920, Pas., 1921, I, p. 126.
\textsuperscript{368} Act of 30 July 1981 on the punishment of acts of racism and xenophobia.
\textsuperscript{369} Const., 12 February 2009, n° 17/2009, para. B.83.5.
\textsuperscript{370} Ibid, para. B.83.6.
\textsuperscript{371} i.e. on the protection of animals: http://www.gaia.be/fr/gaia-tv/flashmob-no-cruel-cosmetics(last accessed: 10 March 2014).
\textsuperscript{372} Facebook group on flash mobs in Belgium: https://www.facebook.com/groups/318226533597/ (last accessed: 10 March 2014).
\textsuperscript{373} Twitter page on flash mobs in Belgium: https://twitter.com/Flashmobbelgium (last accessed: 10 March 2014).
3. Restrictions

Place and time restrictions
The general rule is that open air gatherings are permitted in Belgium, although submitted to police regulations. Open air gatherings and individual demonstrations are generally prohibited on Saturdays and on certain public venues of Brussels. 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.

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. Likewise, laws can regulate the exercise of the right to assemble peaceably with the purpose of maintaining public safety, policy, and health.

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. 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 taken 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. 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.

In case of a serious threat to public order, police officers are allowed to conduct security searches on individuals participating in public gatherings. 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 (“attroupements”); those which result in crimes and offences against persons or goods, or to breaches to the Act prohibiting private militias, 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.

In cases of extreme urgency, the Circular on surveillance cameras allows police officers to use surveillance

374 Constitution, supra fn. 353, Art. 26, para. 2.
375 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.
376 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.
377 Cass. 23 January 1879, Pas., I, 1879, p. 75.
381 CE, 10 November 2010, n° 208.910.
383 Act of 5 August 1992 on the police function, Art. 28.
384 Act of 29 July 1934 prohibiting private militias.
385 See supra fn. 383, Art. 22.
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). 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).

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 the control of the federal State, the communities, the regions and provinces. 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. Additionally, unless authorization has been granted, concealment of the face in public space is prohibited.

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. Any concert, show, entertainment, assembly taking place on public roads, but which have received an authorization by the municipality, cannot be disrupted.

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. 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

387 Ibid., para. 3.3.
389 General Police Regulation of the City of Brussels, Chap. III – Public safety and convenience of passage, Sect. 1 – Assemblies, demonstrations, processions, Art. 30.
390 Ibid., Art. 32.
392 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.
393 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.
people)\(^{394}\) 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.\(^{395}\) Municipalities must prevent breaches to public peace resulting in brawls or street fights, chaos, and disproportionate noise and nocturnal crowds disturbing inhabitants’ rest.\(^{396}\) 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 intervention\(^{397}\). The police are responsible for taking decisions based on an assessment between the protection of fundamental rights\(^{398}\) and the maintenance of public order.

### 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.\(^{399}\) Municipalities’ regulations and acts are therefore subject to the supervisory authority.\(^{400}\) A decision by a subordinate authority that violates the law or undermines the public interest can be suspended or annulled.\(^{401}\) 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.\(^{402}\) The jurisdiction of judicial courts is based primarily on Arts. 144 and 145 of the Constitution.\(^{403}\) 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.\(^{404}\) The jurisdictional competence of the Conseil d’Etat (CE) is based on Art. 160 of the Constitution.\(^{405}\) 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.\(^{406}\) 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.\(^{407}\) It has jurisdiction to verify the legality of administrative acts and regulations.\(^{408}\)

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

401 LEWALLE, *supra* fn. 399, p. 5.

402 Constitution, *supra* fn.353, Art. 159: “Courts only apply general, provincial or local decisions and regulations provided that they are in accordance with the law.”

403 Constitution, *supra* fn. 353, 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.”

404 LEWALLE, *supra* fn. 399, p. 9.

405 Constitution, *supra* fn. 353, 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.”


5. Specific forms of assemblies

There are more than 650 protest demonstrations in Brussels-Capital which take place peacefully every year.\(^{409}\)

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.\(^{410}\)

Spontaneous assemblies

While spontaneous assemblies are generally allowed,\(^{411}\) they can be prohibited if they take place in an area where gatherings are generally banned.\(^{412}\) Taxi drivers in Brussels 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.\(^{413}\)

Assemblies taking place on public property

As already mentioned, open air gatherings and individual demonstrations are banned on some public venues of the capital.\(^{414}\) 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.\(^{415}\)

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.\(^{416}\)

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.\(^{417}\)

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\(^{408}\) C.A., 4 April 1995, no. 31/95, roll no. 738, Belgian Official Gazette, 16 May 1995.


\(^{410}\) i.e. a demonstration organized by Belgians supporting same-sex marriage and the LGBT community in France: https://www.facebook.com/events/338081072957775/ (last accessed: 10 March 2014).


\(^{413}\) Manifestation spontanée des chauffeurs de taxi cette nuit à Bruxelles (2010) Video RTL.be. 28 May.

\(^{414}\) 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. 389, Art. 31.


\(^{416}\) CE, 28 September 2012, n° 220.792.

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. 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. 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.

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

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. 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. 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. The police used tear gas, violence, and intimidation measures; causing security misconduct. 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". 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.

**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.

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. 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. According to Arts. 46 and 49 of the Police Service Code of Ethics, the use 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. One of them, the Standing Committee on the Supervision of the Police

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


430 Act of 5 August 1992 on the police function, supra fn. 383, Art. 47.

431 Ibid., Art. 48.

432 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.”

433 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/S/Add.1, para. 11. Available at: http://daccess-dds-
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. 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. A Circular was then issued by the Ministry of Home Affairs providing a frame of reference for the handling of complaints to satisfy the recommendations put forward by the Committee.

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, 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 2010 Guidelines on Freedom of Peaceful Assembly. 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.

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435 *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, *supra* fn. 433, para. 20.
438 *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.2, *supra* fn. 433, para. 8.
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”) 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.

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). 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. 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.

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

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441 All translations of individual provisions of the Assembly Act in the text are provided by the author.
442 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).
444 Ibid., 284 (296) – Brokdorf Demonstration Case.
445 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.
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 of
an ordinary federal statute. 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. The right of non-nationals to assemble peacefully is thus legally protected in Germany. That it does not enjoy explicit constitutional protection does not raise problems under the Convention.

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. 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.

Rationae materiae
To enjoy the constitutional protection of freedom of assembly at least two people must come together for a common purpose. “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.

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. 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

447 § 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.
448 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.
449 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. 448), chap. 19 para. 16.
450 Schulze-Fielitz, supra fn. 449 , Art. 8 para. 57.
451 Ibid.
452 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.
453 Amtsgericht Frankfurt, Multimedia und Recht 2005, 863 (866); Bröhmer, supra fn. 448, chap. 9 para. 25.
454 BVerfGE (=Entscheidungen des Bundesverfassungsgerichts) vol. 104, 92 (194) – Sit-down Demonstrations III.
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.\textsuperscript{455}

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 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.\textsuperscript{456} 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.\textsuperscript{457}

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.\textsuperscript{458} The German labour courts have therefore recognized that a smart mob organized by trade union representatives may constitute a legitimate form of industrial action.\textsuperscript{459} 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.\textsuperscript{460}

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.\textsuperscript{461} 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.\textsuperscript{462} 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

\textsuperscript{455} Decisions of the Bundesverfassungsgericht, supra fn. 443, 284 (292) – Brokdorf.
\textsuperscript{456} Decision of the Bundesverfassungsgericht, 1 BvQ 28/01, paras. 19, 22 available at: www.bverfg.de/entscheidungen/ qk20010712_1bvg002801.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, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2007, 1431 (1433). 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.
\textsuperscript{458} C. Neumann, Die rechtliche Beurteilung moderner Kommunikations- und Interaktionsformen, NVwZ 2011, 1171 (1173).
\textsuperscript{459} BAGE (=Decisions of the Federal Labour Court) vol. 132, 140.
\textsuperscript{460} Neumann, supra fn. 458), 1173.
\textsuperscript{461} § 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.
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. 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.

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. 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. 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. On the other hand, the freedom to stay away from a demonstration is also protected. 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.

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. 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.

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

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463 Decisions of the Bundesverfassungsgericht, supra fn. 462, 357 (377) – Mutlangen Demonstration Case.
464 BVerfGE 104, 92 (103) – Sit-down Demonstrations III.
465 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.
466 Decisions of the Bundesverfassungsgericht, supra fn. 443, 284 (292); Schulze-Fielitz, supra fn. 449, Art. 8 para. 33.
467 Schulze-Fielitz, supra fn. 449, Art. 8 paras. 31, 34.
468 Bröhmer, supra fn. 448, chap. 19 para. 35.
470 Decisions of the Bundesverfassungsgericht, supra fn. 443, 284 (296) – Brokdorf Demonstration Case.
471 Bröhmer, supra fn. 448, chap. 19 para. 34.
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.  

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. However, measures restricting the freedom of assembly must always take into account its paramount importance in the democratic order. 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.

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

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472 Schulze-Fielitz, supra fn. 449, Art. 8 para. 72.

473 Decisions of the Bundesverfassungsgericht, supra fn. 443, 284 (297) – Brokdorf Demonstration Case.

474 Decisions of the Bundesverfassungsgericht, supra fn. 443, 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, Judgment of 22 February 2011, I 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).
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. 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. In relation to 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.

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. 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 exhaustated. 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. 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.

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

475 Decisions of the Bundesverfassungsgericht, supra fn. 443, 284 (297) – Brokdorf Demonstration Case.
476 Decisions of the Bundesverfassungsgericht, supra fn. 443, 284 (297) – Brokdorf Demonstration Case.
478 Decisions of the Bundesverfassungsgericht, supra fn. 443, 284 (298/99) – Brokdorf Demonstration Case.
479 Decisions of the Bundesverfassungsgericht, supra fn. 443, 284 (304) – Brokdorf Demonstration Case.
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 cooperate 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.  

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)). 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 specials 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. 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.  

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, the incorporation of specific provisions dealing with spontaneous and instant assemblies, 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.

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481 Decisions of the Bundesverfassungsgericht, 443, 284 (302) – Brokdorf Demonstration Case  
482 BGHZ (=Decisions of the Federal Supreme Court in civil matters) vol. 89, 383 (395); BGH, Neue Juristische Wochenschrift 1998, 377 (381).  
483 Bundesverwaltungsgericht, Neue Juristische Wochenschrift 1989, 52 (52); 53 (54).  
484 Art. 1 (2) Bayerisches Versammlungsgesetz; § 2 Niedersächsisches Versammlungsgesetz; § 1 (3) Sächsisches Versammlungsgesetz.  
485 Art. 13 (3), (4) Bayerisches Versammlungsgesetz; § 5 (4), (5) Niedersächsisches Versammlungsgesetz; § 14 (3), (4) Sächsisches Versammlungsgesetz; § 12 Abs. 1 Landesversammlungsgesetz Sachsen Anhalt.  
486 Art. 15 (2) Bayerisches Versammlungsgesetz; § 8 Abs. 4 Niedersächsisches Versammlungsgesetz.
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”). 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. 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.

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). 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 the 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

488 Schulze-Fielitz, supra fn. 449, Art. 8 para. 23.
489 Ott&Wächtl&Heinhold, supra fn. 452 speak with regard to the Bavarian case of a „thorough failure“(at 291).
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.
Turkey
by Elif Askin

1. Introduction
In Turkey, the right to freedom of peaceful assembly continues to be severely restricted.\(^{490}\) For instance, in 2012, 424 peaceful assemblies were dispersed by police forces.\(^{491}\) In the same year, a total of 252 people were sentenced to 1’163 years of imprisonment in 46 cases for exercising this right.\(^{492}\) 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.\(^{493}\) 130 applications against Turkey concerning the right to freedom of peaceful assembly are still pending before the ECtHR.\(^{494}\) 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.\(^{495}\) 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.\(^{496}\) 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.\(^{497}\)


\(^{492}\) Ibid.


\(^{495}\) 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 Gökcecicek et. al., Gezi Park Olaylari: Insan Haklari Hukuku ve Siyasi Söylem Isiginda bir Inceleme, Istanbul Bilgi Üniversitesi Yayınları, 2013, p. 55.


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.\(^{498}\) On 31 May 2013, people were prevented from accessing the Taksim area and joined the Gezi Park protests.\(^ {499}\) After 15 June 2013, access to the Gezi Park was totally blocked, and any gathering in Taksim square was prevented or immediately dispersed.\(^ {500}\) 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.\(^ {501}\)

**Flash mobs**

During the Gezi Park protests in June 2013, people gathered spontaneously in the Taksim Square and stood still and motionless for hours.\(^ {502}\) 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 media\(^ {503}\) 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.\(^ {504}\)

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

\(^{498}\) 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.

\(^{499}\) 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.


\(^{503}\) For example on Twitter, #duranadam.

“[e]veryone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.”  

According to Art. 34 (3) of the Constitution “[t]he formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.”

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.

**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”). Art. 3 of the Law provides for the right of all persons to hold peaceful assemblies without obtaining prior permission. 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.”

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. According to the Law each assembly requires an organising committee consisting of at least seven persons (organizers). 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. An assembly is a gathering at which at least seven persons participate, excluding the organising committee. 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.

**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. 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.

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.” However, there is no mention of the condition of necessity and proportionality of such restrictions, leaving the door open to arbitrary interferences. The Constitution also fails to mention the positive obligation of the State to protect peaceful assemblies established by the ECtHR.

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. 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.

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.

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. The authorities can also decide on general bans of assemblies in certain places.

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516 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).
518 Art. 34 of the Constitution, supra fn. 505.
519 Euro-Mediterranean Human Rights Network, Mission Report on the Protest Movement in Turkey and its Repression, May-July 2013, II. 1, supra fn. 494; 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).
521 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.
523 Art. 7 of the Law on Meetings and Demonstrations, supra fn. 508.
524 Ibid., see i.e. Art. 6 (2).
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.\(^{526}\)

Place restrictions concerning Cyprus and the “Green Line”

Regarding the situation in Cyprus, the ECtHR stated in Djavit An v. Turkey\(^{527}\) 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 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 (…)”\(^{528}\)

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.\(^{529}\) 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.\(^{530}\) 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.”\(^{531}\)

Participants of demonstrations are not allowed to cover their faces completely or partially specially intended to conceal their identity.\(^{532}\)

Illegal meetings and demonstrations are to be cleared following a warning to disperse, using force if necessary.\(^{533}\)

\(^{525}\) Euro-Mediterranean Human Rights Network, Turkey, November 2013, supra fn. 522, p. 5; Akbulyut Olgun, Toplanti ve Örgütlenme Özgürlükleri, in: Inceoglu Sibel, İnsan Hakları Avrupa Sözlesmesi ve Anayasa, Istanbul 2013, p. 389; see also infra public space.

\(^{526}\) Art. 22 of the Law on Meetings and Demonstrations, supra fn. 508.

\(^{527}\) ECtHR, Djavit An v. TR, judgment of 9 July 2003, App. No. 20652/92.

\(^{528}\) 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.

\(^{529}\) Art. 23 of the Law on Meetings and Demonstrations, supra fn. 508.


\(^{532}\) Art. 23 of the Law on Meetings and Demonstrations, supra fn. 508.

\(^{533}\) Art. 24 of the Law on Meetings and Demonstrations, supra fn. 508.
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 2007\textsuperscript{534} 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.\textsuperscript{535} In cases where a delay might prove an obstacle, this power was granted to the police without the need for judicial authorization.\textsuperscript{536} 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.\textsuperscript{537}

**Restrictions intended to counter terrorism**

Pursuant to Art. 220 of the Turkish Penal Code of 26 September 2004\textsuperscript{538}, a person who commits an offence on behalf of an organized criminal group without being a member of that organization shall be punished as a member of that organization.\textsuperscript{539} 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.\textsuperscript{540} 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.\textsuperscript{541} Demonstrators convicted under anti-terrorism laws\textsuperscript{542} have typically been sentenced to between 7 and 15 years in prison.\textsuperscript{543} Since the Gezi Park protests, a number of criminal


\textsuperscript{535} Human Rights Watch, Closing Ranks against Accountability, Barriers to Tackling Police Violence in Turkey, p. 24.

\textsuperscript{536} 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.

\textsuperscript{537} See Human Rights Watch, Closing Ranks against Accountability, Barriers to Tackling Police Violence in Turkey, supra fn. 535, p. 24.

\textsuperscript{538} 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).

\textsuperscript{539} 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 propaganda 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).

\textsuperscript{540} 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).

\textsuperscript{541} Ibid.

\textsuperscript{542} 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
investigations against the participants of the Gezi Park protests have been brought under anti-terrorism laws and related provisions.544

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 as well as the names, home and if available work addresses of the organizers.545 Art. 23 lists the circumstances under which a meeting or demonstration will be regarded as unlawful, and includes the absence of prior notification.546 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.547 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

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”.543

In addition to the charge of „membership in an armed organisation “for „committing a crime on behalf of an organisation“, the defendant can also face 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.

544 Amnesty International, Gezi Park Protests. Brutal Denial of the Right to Peaceful Assembly in Turkey, 2013, supra fn. 497, p. 42; European Commission, Turkey 2013 Progress Report, 16 October 2013, SWD(2013)417final, p. 5; see also the statement of Egemen Bagis, former Minister for EU Negotiations on 15 June 2013, Hurriyet Egemen Bagis’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).

545 Art. 10 of the Law on Meetings and Demonstrations, supra fn. 508; 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.

546 Art. 23 (a) of the Law on Meetings and Demonstrations, supra fn. 508; Akbulut Olgun, supra fn. 525, p. 387.

547 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. 497, p. 11.
substance”. 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.

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.

Review and appeal

Restrictions or ban decisions can be appealed against before a court. 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. 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. 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 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. The ECtHR however has already declared an application inadmissible for non-exhaustion of domestic remedies of this new constitutional mechanism.

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548 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, judgment of 5 December 2006, App No 74552/01, para. 42 (emphasis added); İzci v. TR, judgment of 23 July 2013, App No 42606/05, para. 89; Samiâ Karabulut v. TR, judgment of 27 April 2009, App No 16999/04, para. 35.
550 Art. 18 of the Law on Meetings and Demonstrations.
552 Ibid., p. 9.
553 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 Yargılaması Usulleri Hakkinda Anayasa Mahkemesinin Kuruluşu ve Yargılaması Usulleri Hakkinda 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 Fuşun, Impact of the ECtHR Rulings on Turkey’s Democratization: An Evaluation, in: Human Rights Quarterly, 35 (2013), p. 1004 et. seq.
5. Specific forms of assemblies

Spontaneous assemblies

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

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. 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. The Government attacked social media companies and during the first weekend of the demonstrations websites are blocked and Facebook and Twitter were nearly impossible to access in Istanbul, particularly in Taksim Square. A number of citizens were placed in custody for posting Twitter messages about the Gezi Park protests.

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.

Assemblies taking place on private property

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

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557 Arts. 23, 32 of the Law on Meetings and Demonstrations, supra fn. 508.
558 Law on Regulating Broadcasting in the Internet and Fighting Against Crimes Committed through Internet Broadcasting (Internet 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).
560 See for example #OccupyGezi.
561 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.
562 European Commission, 2013 Turkey Progress Report, p. 52; Amnesty International, Gezi Park Protests. Brutal Denial of the Right to Peaceful Assembly in Turkey, October 2013, EUR 44/022/2013, supra fn. 497, 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”.
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. 566

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. 567 According to Art. 17 the police can resort to forceful measures if a person or a group attacks police officers. 568 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. 569 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. 570 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. 571

The order on rapid intervention forces of 30 December 1982 572 establishes procedures for the dispersal of demonstrators, such as two or three warnings (except in cases of effective attack and resistance against police officers). 573

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. 574 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. 575 However, the Law on the Duties and Powers of the Police does not set out any specific

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564 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.

565 Art. 22 of the Law on Meetings and Demonstrations, supra fn. 508; Akbulut Olgun, supra fn. 525, p. 389.

566 Akbulut Olgun, supra fn. 525, p. 394.

567 The Law on the Duties and Powers of the Police (Polis Vazife ve Salahiyet Kanunu), 4 July 1934, supra fn. 534.

568 Art. 16 (1) of the Law on the Duties and Powers of the Police, supra fn. 534.

569 Ibid., Article 16 (1).

570 Ibid., Article 16 (1) (c).

571 Human Rights Watch, Closing Ranks against Accountability, Barriers to Tackling Police Violence in Turkey, supra fn. 535, 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.

572 Order on rapid intervention forces (Polis Cevik Kuvvet Yönetmeligi), 30 December 1982.

573 Ibid., para. 25.


575 ECHR, Izci v. TR, judgment of 23 July 2013, App No 42606/05, para. 32.
circumstances regulating its use.\textsuperscript{576} 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.\textsuperscript{577} The ECtHR emphasized in the case of Abdullah Yasa \textit{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.\textsuperscript{578} 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.\textsuperscript{579} From the starts of the protests the police used without adequate prior warnings water cannons,\textsuperscript{580} 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.\textsuperscript{581} Police trade union representatives admitted intervening without prior warnings.\textsuperscript{582} Police officers and civilians acting in cooperation with the police were also seen

\begin{itemize}
\item \textsuperscript{576} \textit{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); Euro-Mediterranean Human Rights Network, Mission Report on the Protest Movement in Turkey and its Repression, May-July 2013, II. 3.
\item \textsuperscript{577} ECtHR, \textit{Izci \textit{v. TR}}, judgment of 23 July 2013, App No 42606/05, supra fn. 575, para. 32.
\item \textsuperscript{578} ECtHR, \textit{Abdullah Yasa and Others \textit{v. TR}}, judgment of 16 July 2013, App No 44827/08, paras. 22; 48-50.
\item \textsuperscript{579} 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. 497, 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-erogeanin-milli-iradeye-saygi-erzurum-mitingi-konusmasinan-tam-metni/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. We were 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).
\item \textsuperscript{580} 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 \textit{chemical irritants have been added to water used against demonstrators during the Gezi Park protests}; Amnesty International, Gezi Park Protests. Brutal Denial of the Right to Peaceful Assembly in Turkey, October 2013, EUR 44/022/2013, supra fn. 497, p. 18 \textit{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.hurriyetdailynews.com/Default.aspx?pageID=238&nid=49009 (accessed on 5 February 2014).
\item \textsuperscript{582} 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.
beating suspected protestors – these protestors also included professionals carrying out their duties such as doctors, journalists and lawyers. 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 caught in the vicinity of protests but not taking part of them. Women detained by the police explained that they had been sexually harassed by the police.

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. Police officers were seen firing tear gas canisters horizontally and directly at people, fired at close range. 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. 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. However the circulars do not mention close-range shooting, which was a major cause for injuries during the Gezi Park protests.

Finally, law enforcement officers enjoy an extraordinary large decision margin for the forceful dispersal of assemblies in Turkey. 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.

**Liability of organizers**

Article 23 of the Law regulates the grounds for sanctions (in general) and Article 28 of the Law provides several sanctions for the organizers. 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. Individuals are held responsible 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. Many of those accused of organising the Gezi Park protests are being investigated under anti-terrorism legislation. According to Amnesty International, it is still unclear how many of those detained and questioned will ultimately stand trial.

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. However, pursuant to Art. 129 (6) of the Constitution, prior authorization of the administrative authority is required to initiate investigations of public officials. In practice, police officers enjoy a de facto immunity from prosecution, particularly in the context of demonstrations. Although

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 ist 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”.

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.

Art. 32 of the Law on Meetings and Demonstrations, supra fn. 508.


See the statement of the Ruling and Development Party (AKP) deputy chair and former Minister of Justice Mehmet Ali Sahin at: http://www.radikal.com.tr/turkiye/mehmet_alih_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).


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”.

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 yargılanması hakkında 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).

Amnesty International, Gezi Park Protests. Brutal Denial of the Right to Peaceful Assembly in Turkey, October 2013, EUR 44/022/2013, supra fn. 497, p. 35; Human Rights Committee, Concluding observations on the initial report of Turkey adopted by the Committee at ist 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
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. 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.

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

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.

**Media access**

The mainstream national media conveyed little of the Gezi Park protests. 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. As a result of the reporting of the Gezi Park protests, journalists were fired or had to resign.

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606 Ibid.
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.611 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.612 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.”613

Russia
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”. 614

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 which currently presents 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 excluding several groups of persons from the possibility to be an organizer of an assembly; introducing specially designated sites for assemblies, civil liability of the organizer, mass simultaneous presence/movement as administrative offence and raising the fines of administrative offences. The June 2012 amendments prompted wide criticism. 615

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”. 616 The definition moreover requires an objective of the event “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”.

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 especially allocated or adjusted for the purpose to collectively discuss 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

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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 without the required objective falls outside the scope of the Assembly Law and can qualify as a mass simultaneous presence and/or movement which can constitute an administrative offence under Art. 20.2.2 (1) of the Code of Administrative Offences introduced by the June 2012 amendment.617

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 Federation618 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 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“.619 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.620 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 policy as a whole.621

618 According to Art. 5 (1) of the Constitution Russia consists of republics, territories, regions, cities of federal importance, autonomous regions and autonomous areas which are commonly referred to as Subjects of the Russian Federation.
620 Ibid.
621 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“.

In 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), 19 (1), (2) and 55 (3) of the Constitution may be established.

The Court evaluates this approach as 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 jurisprudence of the European Court of Human Rights substantiating the state’s obligation to protect freedom of peaceful assembly, to ensure effective realization and to refrain from excessive control.

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.

In the view of the Court the executive authorities are not allowed to prohibit/allow a public event. 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 other similar reasons.

The Court holds that including a catalogue of such grounds in the Assembly Law would unduly restrict the discretion of the authorities.

**Experiences with flashmobs**

Many flashmobs (dancing, pillow/snowball fights etc.) were staged in Russia so far. After June 2012 amendments arrests and detentions of participants were reported during actions which have been already taking place for several years without police interference.

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

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623 Stating „the exercise of the rights and freedoms of man and citizen shall not violate the rights and freedoms of other people“.

624 Stating „all people shall be equal before the law and court“.

625 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“.

626 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."


628 Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-II, pp.15-16.


630 Ibid.

631 Ibid.

participated in a mass simultaneous presence resulting in a breach of health standards due to arising of dust and loose feathers.634

3. Restrictions

Legitimate grounds for restrictions
Art. 55 (3) of the 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 manifests.635

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 cases in which the notice is submitted by an individual who is not entitled to be an organizer, or if the notice states that the public event is to be held at a site on which the holding is prohibited by federal law or the law of the subject.

Persons which are not entitled to be an organizer of a public event are legally (limited) incapable individuals by declaration of a court, persons kept in detention under a court verdict or banned political parties, public and religious organizations (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 whole categories of people from the right to organize assemblies for breaches of not only criminal but also administrative norms without any differentiation in respect of the gravity of the breach.636

The Constitutional Court upheld the amendment arguing that the norm does not encroach the very essence of the right to peaceful assembly.637 In the view of the Court the legislator rightly dealt with the issue that the persons envisaged by Art. 5 (2.1.1) have the ability to organize a peaceful assembly in case of doubt638 and 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 required.639

As for the second alternative of the refusal of a public event it constitutes an absolute ban on assemblies on certain sites without regard to legitimate reasons of a certain case, thus limiting the autonomy of the organizer.

634 Газета.ru, 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).
635 Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, p. 16.
637 Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, p. 20.
638 Ibid., p. 18.
639 Ibid., pp. 21-22.
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 was not amended by the organizer or jointly with the authorized representative of the internal affairs body upon his demand until the violation is remedied (Art. 15 (2) in conjunction with Art. 15 (1)). If the violation is not rectified in the affixed time 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 by participants of illegal actions 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 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. Any violation no matter how grave it might be can serve as a ground for termination.

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 places” 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 for mass gatherings, thus places for the holding of assemblies and meetings. After the specially designated places are determined as a rule public events shall be held there (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 Constitutional Court approved the possibility to determine and regulate such sites per se since it facilitates the conduct of a public event for all involved parties. Nonetheless, the Court proclaimed the norm unconstitutional as it did not provide clear criteria for the executive authorities which would guarantee equal legal conditions in all Subjects. 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 district. The changes brought to the State Duma so far foresee that such places shall be provided in every settlement, city circuit and municipal region.

640 Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, pp. 44-47.
642 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 adopted yet. See on the progress of the legislative
Art. 8 (2) of the Assembly Law prohibits public events at 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, at courts, at territories and buildings of agencies executing criminal penalties and at the border zone.  

_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). The provision constitutes a problematic blanket restriction excluding any possibility of a multi-day event.

_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 weapon-like instruments designed. On 30 June 2013 the Federal Law No.135-FZ has entered into force adding Art. 6.21 to the Code of Administrative Offences. The article imposes 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 culminates years of political strife between the gay rights movement and the executive as shown by the case Alekseyev v. Russia. 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 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 places and establishment of rules for their use Art. 8 (1.2) of the Assembly Law stipulates that the executive authorities have to provide the possibility that the public event attains its aims, transport access to the sites, the possibility for the organizers or participants to use infrastructure facilities, compliance with process [http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=329301-6&02 (last accessed: 10 March 2014)]. 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. Venice Commission, Opinion on Federal Law No. 65-FZ, CDL-AD(2013)003, para. 33.

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 Applications on various dates, Application No.19700/11.
health norms and rules, and the safety of public event organizers, participants and other persons. Otherwise, the Assembly Law does not ensure the principles of proportionality or the 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. Arbitrary reasons are used by the authorities to alter the place and time of the events or the authorities abstain from further communication with the organizers until the planned date of the event has passed.

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 (Art. 5 (4) No. 1 of the Assembly Law) except for an assembly or picket participated by one person not earlier than fifteen and not later than ten days prior to the planned event (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. 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 submitted within 3 days of the receipt of the notice or on the same day in case of a notification of a group picket in less than five days (Art. 12 (2) of the Assembly Law). If the proposal disregards the “sight and sound” of the assembly it might constitute a de facto ban as Art. 5 (5) of the Assembly Law prohibits the holding of an assembly if agreement was not reached.

The concerns regarding the formulation “reasoned proposal” and the uncertainty on how an agreement process with the authorities should proceed, so that Art. 5 (5) of the Assembly Law does not alter the notification procedure into a permission procedure have been subject of proceedings before the Constitutional Court. It 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 necessary reasons to do so. To reach an agreement the authority has to propose

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648 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).

649 Cf. ECtHR, Yevdokimova v. Russia, lodged Application of 23 April 2012, Application No.31946/12, A.

650 Cf. ECtHR, Lashmankin and others v. Russia and 14 other applications, Application No.57818/09 (the authorities refused to approve a 7 person picket in a park since 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).

651 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.


653 Ibid., p.6.
alternatives which enable the organizer to reach his aims. The organizer has a duty to communicate with the authority and to undertake all available means to reach an agreement.

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 can 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
Per 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 infringed by the fact that the authorities are not bound by a time-frame during the agreement proceedings. Relief via court injunctions is not available.

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 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 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 may pose an infringement to the right to hold a counter-demonstration within the “sight and sound” of the demonstration as it stipulates that if notifications are sent by organizers of several events seeking to hold an event at a specially designated place the time of receipt determines the use of the venue. In practice possible counter-demonstrations have been used as a reason to refuse permission.

Ibid.
Cf. ECtHR, Alekseyev v. Russia, Judgment of 21 October 2010, Application Nos 4916/07, 25924/08 and 14599/09, paras. 9, 12, 30, 41, 72-77.
6. Implementing Freedom of Assembly Legislation

Pre-event planning
Art. 14 (1) of the Assembly Law provides that the executive authority or the municipal body can suggest that the chief of the law enforcement body that is servicing the territory in which the event is to take place appoints an authorized representative of the law enforcement body for purposes of rendering assistance to the organizer in maintaining public order and security of citizens. The suggestion is binding upon the chief of the law enforcement body. From the wording of Art. 14 (3) No. 1 of the Assembly Law it is unclear whether the appointed official supports the organizer in the planning of the event or only in conduct. 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 carried out on a free basis 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 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 another unlawful acts interfering with transportation or methods of communication, and to reveal persons committing crime or administrative offences (clubs, special agents, tasers, lightshockers, trained animals, methods constraining movements, et cetera). In so far as any violation of the Assembly Law can constitute an administrative offence it is possible that special methods are applied quite often. The aforementioned special methods cannot be used during the dispersal of unlawful assemblies of peaceful character not interfering with public order and the functioning of transportation and infrastructure (Art. 22 (1) No. 2). A water cannon cannot 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 establishing civil liability of the organizer for failure to fulfil his obligations under Art. 5 (4) has been found unconstitutional. 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) 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 as it did not allow the courts to individualize the fine

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in a manner compatible with the Constitution. As long as an amendment is not passed by the State Duma the courts may reduce the fines lower than the lowest bound established. 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 unconstitutional.

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 it is founded in the law unless he oversteps his powers.

Monitoring

International NGOs such as „Amnesty International“ and „Human Rights Watch“ compiled reports on the recent developments concerning the freedom of assembly. Also Russian NGOs gained popularity such as the “Levada-Center” or the “Centre of the Development of Democracy and Human Rights“. Their work has recently faced excessive control and restrain due to the Federal Laws No.121-FZ of 20 July 2012 („The Foreign Agents Law“), No.190-FZ of 12 November 2012 („Treason Law“) and No.272-FZ of 28 December 2012 (banning Russian NGOs that either engage in „political“ activities and receive funding emanating from the US or engage in activities that threaten Russia’s interests). The implementation of the freedom of assembly is monitored by the Ombudsman for Human Rights in the Russian Federation.

Media access

In the context of the 2011-2012 oppositional protests „PEN International“ reports detentions and arrests of journalists. „Amnesty International“ reports that several journalists were injured by the police during an unauthorized meeting in Moscow on 5 March 2012.

8. Conclusions and outlook

The protest movement in Russia 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

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661 Constitutional Court of the Russian Federation, Judgment of 14 February 2013 No.4-П, p.51-59.
662 Ibid., p.59.
663 Ibid., p.90.
666 Summary of the laws and its impacts, see Human Rights Watch, Laws of Attrition, p.12-45.
preparing a pilot judgment on the freedom of assembly in the case of Lashmankin and others v. Russia comprising 15 different applications all showing the deplorable state of Russian Assembly Law and its implementation. Hopefully, this will be the long needed wakeup call for the Russian authorities.

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, the main law of the state with the highest legal status in the normative hierarchy. 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".

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 Ukraine and are applied in the same manner as the norms of national laws. 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. 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. 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, the Constitutional Court defined the right to assemble peacefully as

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672 Art. 8 of the Constitution of Ukraine of 28 June 1996.
673 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).
674 Art. 9 of the Constitution of Ukraine of 28 June 1996.
"an inalienable and inviolable right".\textsuperscript{679} Furthermore, the court said that this right "relates 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."\textsuperscript{680}

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.\textsuperscript{581} 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 \textit{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.\textsuperscript{682} 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.\textsuperscript{683}

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,\textsuperscript{684} in May 2009 it was submitted to the Ukrainian parliament, and on 3 June 2009 it passed the first reading.\textsuperscript{685} After the draft was amended following the conclusions of the Main Scientific and Expert Department of the


\textsuperscript{680}Ibid.

\textsuperscript{681}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).


\textsuperscript{683}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=EB8D8D&BackColorLogged=F5D383 (last accessed: 15 November 2013).


\textsuperscript{685}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).
parliament, it was sent to the Venice Commission for an assessment 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 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 USSR (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 Ukraine and the Resolution (postanovka) of the parliament of Ukraine "On temporary application of certain legislative acts adopted by the USSR". However, there is no common position among higher Ukrainian courts and authorities as to the applicability of the Decree of 1988. Neither do courts of general jurisdiction have a common position, thus, some regard the act as valid, while the others do not. 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, 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


688 "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".


690 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.

691 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&CollapseView&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).


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 centres in Ukraine 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 Peaceful Assembly. These regulations are valid and are used by public authorities and referred to by district courts.

2. Restrictions

Time
In Kiev, Sumy, Rivne, Kharkiv 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. 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. Usually such bans on demonstrations were intended to

\(^{695}\)“Oblast” is an administrative unit in Ukraine. Ukraine is subdivided into 24 oblast', Autonomous Republic of Crimea and two cities with special status (Kiev and Sevastopol).

\(^{696}\)As to October 2013 in the following oblast' city centers were valid own regulations on regulation of holding assemblies: Kiev, Kharkiv, Rivne, Sumy, Zaporizhzhya.


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", 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 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". 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. 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

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proceeding. If the claim was submitted the same day of the assembly, or after it, the court will not consider it.\footnote{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).}


**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.\footnote{Art. 183 of the Code on Administrative Legal Proceedings of Ukraine of 6 July 2005.}

**4. Specific types of assemblies**

**Spontaneous assemblies**

The Statute of patrol service of police in Ukraine\footnote{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).} 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…” \footnote{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).} [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.\footnote{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).} 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 100,000\textsuperscript{712} and 300,000\textsuperscript{713} protesters, despite the Kiev Administrative Court decision to ban any kinds of rallies in Independence Square until 7 January 2014.\textsuperscript{714} Later, the 	extit{Euromaydan} would be called the most significant rally in Ukraine since the Orange revolution in 2004 and “the largest ever pro-European demonstration”.\textsuperscript{715}

A new type of assembly – the \textbf{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 	extit{Euromaydan} rallies.\textsuperscript{716}

\textbf{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".\textsuperscript{717}

\textbf{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.

\textit{5. Implementing freedom of assembly legislation}

\textbf{Pre-event planning}

Chapter XV of the Ukrainian Statute of police patrol service\textsuperscript{718} 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)) \textit{[transl. by author]}.

\begin{thebibliography}{99}
\bibitem{713} Deutsche Welle. \textit{Ukraine protesters keep up the pressure on President Yanukovych}, 8 December 2013. Available at: http://www.dw.de/ukraine-protesters-keep-up-the-pressure-on-president-yanukovych/a-17279272 (last accessed: 28 December 2013).
\bibitem{717} Theory of state and law. Academic Course: Ed. O. Zaichuk, N. Onishchenko. (Kiev: Inter Yurinkom, 2006), 528.
\end{thebibliography}
Costs

According to Art. 38 (b) 3 of the Law "On local self-government"719, "local authorities exercise control over public order during meetings, rallies, manifestations, demonstrations and other mass events".720 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"721, and by the Statute of police patrol service in Ukraine.722 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).

The use of drones during demonstrations

The use of drones in Ukraine is regulated by the Air Code of Ukraine.723 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 Euromaidan rally in Kiev,724 which gave an idea about the number of participants in the rally that day.

Liability of organizers

Art. 185 ¹ "Violation of the procedure for organizing and holding meetings, rallies, street marches and demonstrations" of the Code on Administrative Offences of Ukraine725:

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"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".  

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, "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".

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:

- Ukrainian Helsinki Human Rights Union;
- Maidan;
- Association of Ukrainian Monitors on Human Rights Conduct in Law Enforcement (Association UMDPL).

Media access

Art. 26 of the Law of Ukraine "On printed mass media in Ukraine" of 16 November 1992 prescribes the rights and duties of editorial journalists. According to Art. 26(7) a journalist has

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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” and Ukraine urgently needs a special law on peaceful assemblies. Human rights activists already called the draft law which awaits its reading in parliament the most liberal law on peaceful assemblies in Europe. 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. The only question remaining open is whether and when the parliament will adopt the law.

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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.”

According to the Law on Assemblies, 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. 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.

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”.

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. 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


739 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).

740 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). 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.”).


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 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” 743 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 road 744. 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). 745 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” 746. 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

743 See Judgment of the Constitutional Court of 18 January 2006, K 21/05 (OTK-A 2006, Nr 1, poz. 4).

744 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”).

745 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.”

746 Cf. Judgment of the Constitutional Court of 28 June 2000, supra Fn. 741. 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 recreational 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.
society. Such analysis would violate the constitutional freedom of assembly, and the Law on Assemblies.  

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, and suggestions to collect monetary deposits from organizers to secure the peaceful character assemblies. The Constitutional Court in 2004 disapproved restricting the anonymous participation in assemblies. 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. 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 towers).

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747 See Judgment of the Supreme Administrative Court of 25 May 2006, I OSK 329/06.


750 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.

751 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”.

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 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).'*

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 Camps', 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 then 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 leader; and name and address

753 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”.

754 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 bylych hitlerowskich obozów zagłady (Dz.U. 1999, Nr 41, poz. 412 ze zm.)

755 Each assembly has a leader who is responsible for the lawful conduct of the assembly. A leader may be the organizer of the assembly.
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, 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.

**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 Contraventions). This penalization was challenged before the Constitutional Court. 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”, 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 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”.

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758 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. 748, pp. 165-187.
760 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.
761 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”.

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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 permit\(^ {762} \).

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.\(^ {763} \) 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 should not lead to the prohibition of a peaceful assembly, even if there is a serious threat to public order.\(^ {764} \)

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.\(^ {765} \) 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.\(^ {766} \) Even though the main responsibility for the safety


\(^ {763} \) 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”.

\(^ {764} \) See Judgment of the Constitutional Court of 18 January 2006, *supra* Fn. 743.

\(^ {765} \) See Judgment of the Polish Constitutional Court of 10 November 2004, *supra* Fn. 750.

\(^ {766} \) 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:
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 people 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. (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 2011).

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.


768 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”.


770 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
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”), 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.

In Poland, spontaneous assemblies are not specifically regulated. 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. 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_ The only exceptions are urgent assemblies held in the buildings of universities.

_774_ _See_ e.g. _Skiba v. Poland, supra_ Fn. 760.
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; 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. 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 Act (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. 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. 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. 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. 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

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779 Decision Ља-4078/2010 of 29 February 2012.
lacked a sufficient statement of reasons. A violation of the Freedom of 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. 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. Furthermore, the Constitutional Court has cited ECtHR case-law when deciding on the ban of radical organizations. In these decisions, the radical organizations’ violent reactions to peaceful assemblies are cited as a further ground for establishing the unconstitutionality of said organizations.

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. 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. 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 Belgrade).

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

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782 Decision УЖ-4078/2010 of 29 February 2012.
786 Ibid.
787 Ibid.
789 Official List of the City of Belgrade No. 13/97.
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 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. 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.

A further restriction has been introduced by a 2009 law prohibiting assemblies by neo-Nazi and fascist organizations and associations.

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

791 Constitutional Court, Decision IVs-204/2013 of 30 May 2013.
792 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.
unit deems an application to be incomplete, it will set a time period for the 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.\textsuperscript{793} 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.

\textbf{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.

\textbf{5. Specific forms of assemblies}

\textbf{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.\textsuperscript{794}

\textbf{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

\textsuperscript{793} See above, 5. Procedural Issues – Notification.

Belgrade Pride Parade when several thousand counter-demonstrators attacked the assembly, 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. 

**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. 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. In 2013, although the parade was once again banned, a Belgrade Pride Festival could be held. 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.

**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. Furthermore, the Constitutional Court decided that restrictions on time and location of an assembly do not violate Freedom of Assembly.

**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.

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796 Cf. the several Belgrade Pride Parades, e.g. Constitutional Court, Decision Уж-5284/2011 of 18 April 2013; see also Decision Уж-4078/2010 of 29 February 2012.
797 On this last case see Constitutional Court, Decision Уж-1918/2009 of 22 December 2011.
Use of force by the police
Use of force is allowed within the limits of the Police Law^{803} 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 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.^{804} 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.^{805} 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.

^{804} The Complaint Resolution Procedure is then governed by the Complaints Procedure Regulation, Official Gazette RS No. 54/2006.
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 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. 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.” 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. 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

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806 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.


808 Id.

rules contained in the FL, (iv) nor by the particular circumstances of the case.\textsuperscript{810} In the future, the influence of previous jurisprudence on the present one might loosen even further, as judges elected solely with the votes of the current government parties\textsuperscript{811} 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.”\textsuperscript{812}

A further general remark about the FL which affects the legal bases of freedom of assembly is the\textsuperscript{813} general limitation clause in Art. I para. (3) 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.\textsuperscript{814} 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\textit{ lex specialis} to Art. 10 – considers freedom of expression a mother right of communicative freedoms, among them freedom of assembly.\textsuperscript{815}

\textbf{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

\textsuperscript{810} Decision Nr. 12/2013. (V. 24.) AB.
\textsuperscript{811} 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.
\textsuperscript{814} “(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).
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 right of assembly in practice.\textsuperscript{816} 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 democracy\textsuperscript{817}), 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.\textsuperscript{818} 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.\textsuperscript{819} 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.\textsuperscript{820}

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

\textsuperscript{816} HAJAS B. ed., Gyülekezési jogi projekt. (Országgyűlési Biztos Hivatala, Budapest 2009) [Project on the right to assembly. Office of the Parliamentary Commissioner, Budapest, 2009].
\textsuperscript{818} Decision 3/2013. (II. 14.) AB. [38].
\textsuperscript{819} Art. 12 (2) in conjunction with Art. 15 b) ARA.
\textsuperscript{820} Art 14. ARA.
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.

**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, 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 restrictions 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.

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”.

**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.

**3. Restrictions**

**Legitimate grounds for restrictions**

At the constitutional level, the FL’s general limitation clause allows for restriction of fundamental rights in the interest of another fundamental right or constitutional value. A

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822 The latter would be the wide notion of assembly, advocated by Judge András Bragyova in his dissent to Decision 75/2008. (V. 29.) AB.

823 Sáska against Hungary, § 21, Appl. No. 58050/08, 27 November 2012 as referred to by Decision 3/2013. (II. 14.) AB at [40].

824 Art. 15 ARA.


826 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).
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.\textsuperscript{828} 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,\textsuperscript{829} 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 4\textsuperscript{th} Amendment.\textsuperscript{830}

\textit{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.\textsuperscript{831}

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.\textsuperscript{832}

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.\textsuperscript{833} 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.

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, based on the general provisions of the ARA conceptualizing rights and freedoms of others and crime prevention as limits of freedom of assembly.

A series of openly content-based bans were issued in 2009 against 10 planned Rudolf Hess memorial marches, 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 freedoms of others and crime prevention as limits of freedom of assembly.

Furthering this reasoning, the police banned the Budapest Pride 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).

Impossible 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. ECHR found an evident violation of Art. 11. Patyi v. Hungary, Application no. 5529/05, Judgment of 7 October 2008.

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 Hajás, 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. Alláspont a 2009. augusztus 15-re tervezett felvonulással kapcsolatban http://helsinki.hu/allaspong-a-2009-augusztus-15-re-tervezett-felvonulasossal-kapcsolatban.

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.

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 49 Amendment to the FL. The court
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 license” for some central public places, to the mayor’s office for March 15, 2012, a national holiday celebrating the revolution 1848. The HCC ruled that the ARA regime cannot be circumvented this way. Hungarian law does not know general place or time restrictions around Holocaust Memorials or Memorial Days either. 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 Living and another next to the World Jewish Congress were banned.

**Manner restrictions**

Recently, legislation aims at countering the activities of the banned Hungarian Guard and its successor organizations. The Act on Administrative Offences punishes participation both


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-miheztartas-veget-rendorsegi-visszaes-es-a-biroi-jogorvoslata](http://ataszjelenti.blog.hu/2013/09/04/a-miheztartas-veget-rendorsegi-visszaes-es-a-biroi-jogorvoslata) (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://helsinki.hu/gyulekezesi-jogalkotmanybirosag-elott-tamadtak-meg-gyulekezesi-jogot-serto-biroi-dontest](http://helsinki.hu/gyulekezesi-jogalkotmanybirosag-elott-tamadtak-meg-gyulekezesi-jogot-serto-biroi-dontest) (last accessed: 10 March 2014).

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.

Decision 3/2013. (II. 14.) AB.

There was though a case which ended at the ECHR, 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 ECHR 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. Faber v. Hungary, judgment of 24 July 2012, Application no. 40721/08.

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/](http://index.hu/belfold/2013/04/15/adj_gazt_ugy_birosagi_nem_a_motorosok_beadvanyara/) (last accessed: 10 March 2014).

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 jogszerukenl tiltotta](http://hvg.hu/itthon/20130424_A_birosag_szerint_jogszerukenl_tiltotta) (last accessed: 10 March 2014).

The Hungarian Guard was banned in civil law procedure at the request of the prosecutor in 2008. The ECHR 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 ECHR: Judit Geller...
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.\textsuperscript{847} Initiation ceremonies of different versions of the Hungarian guard (New Hungarian Guard, Hungarian National Guard) still regularly take place.\textsuperscript{848} Although the police sometimes tried to ban in advance, courts reversed.\textsuperscript{849} Interpretational questions loom large around what counts as uniform, and how to determine if one uniform reminds of another, what is “formation”\textsuperscript{850} or “taking an oath”\textsuperscript{851}.

Concealing the face on assemblies and sport events is prohibited, if it is capable of frustrating the identification of the person by the authorities.\textsuperscript{852} The Supreme Court issued an opinion qualifying egg throwing (and other thrown objects incapable of causing bodily harm) as truculence or defamation.\textsuperscript{853}

**Sight and sound restrictions**

Public area events are explicitly exempted from sound level restrictions.\textsuperscript{854} 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.\textsuperscript{855} 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.\textsuperscript{856}

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\textsuperscript{847} § 174 of the Act on Administrative Offences, act Nr. II/2012.

\textsuperscript{848} Tibor Bognár, Budapest 2012.03.17. Gárdisták a Hősök terén – legették az esküt [Guardists on Heroes’s Square— they took the oath] http://indavideo.hu/video/Budapest_20120317_Gardistak_a_Hosok_teren_-lejettek_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&rld=1C1TSND_enHU403HU403.espv=210&es_sm=93&tbm=isch&tho=univ&sa=X&ei=TiborBgnr851JqJvJNce6ygP7I&ved=0CHgQsAQ&biw=1517&bih=713&dpr=0.9 (last accessed: 10 March 2014).

\textsuperscript{849} 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).

\textsuperscript{850} That’s why on one occasion guard members were sitting on the pavement.

\textsuperscript{851} Thus guard members silently sat during the speaker told the oath out loud in first person, the audience reciting the oath “muted”, to themselves.

\textsuperscript{852} § 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.

\textsuperscript{853} BKv. 71, 2008.E.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. Hajás 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.

\textsuperscript{854} 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%A9s+%C3%A9vek-okozta-zajterhel%C3%A9s%C3%A9r%C5%91/581dd32a-715e-4d39-9760-319e2636a33?version=1.0 at 30 (last accessed: 10 March 2014).

\textsuperscript{855} 4/2007. (II. 13.) AB határozat.

\textsuperscript{856} OBH 5593/2008.
diverges, sometimes being inactive despite authorization to intervene, at other times restricting core political speech disproportionately.

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. 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 foreseen for the ongoing assembly if it turns out to have different agenda or route than notified.

Notice can be submitted in person or in writing – practice diverges on whether emailed notice is acceptable.

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.

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, the HCC reversed its

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857 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 örizők 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).

858 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).

859 Decision Nr. 75/2008. (V. 29.) AB, and 3/2013. (II. 14.) AB határozat. 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.

860 Clearly since Decision Nr. 75/2008. (V. 29.) AB (similarly Hajás, 195-196).


862 The copy of the notice is available at http://nemtetszikarendszer.blog.hu/2012/01/19/szaz_evre (last accessed: 10 March 2014).

previous jurisprudence, and stated that flashmobs, spontaneous and urgent assemblies are protected by freedom of assembly as they contribute to the discussion of public matters.

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. 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. The student movement which held protests in Winter 2012/2013, often occupying important avenues and bridges of Budapest, was also organized on Facebook. 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.”

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, who are however not obliged to engage in dialogue.

d) Review and appeal
The decision banning the assembly cannot be appealed, 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

864 Decision 55/2001. (XI. 29.) AB.
865 Decision 75/2008. (V. 29.) AB.
866 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. That police could have dispersed any of them without violating proportionality. www.minimunplusz.hu/2012/12/17/m-toth-balazs-fazekas-tamas-hiba-lett-volna-oszlatni/ (last accessed: 10 March 2014).
867 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/freepresshu (last accessed: 10 March 2014)).
870 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.
871 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.
872 Art. 9 ARA.
the assembly, the organizer informs police 24 hours before the new date.\footnote{Art. 8 ARA.} No appeal is available, but a constitutional complaint can be lodged if the applicant thinks the court did not observe her fundamental rights.\footnote{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. 840 or http://tasz.hu/gyulekezesi-jog/alkotmanybirosag-elott-tamadatuk-meg-gyulekezesi-jogot-serto-biroi-dontest (last accessed: 10 March 2014).} 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.\footnote{3/2013. (II. 14.) AB határozat.} Limited review violates due process rights including the right to effective judicial protection,\footnote{Id. at [76]-[77], citing Golder v UK, Zborovsky v Slovakia from the ECtHR and three decisions of the ECJ.} and freedom of assembly.

4. Specific forms of assemblies

\textbf{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.\footnote{§ 217 Criminal Code.} Putting obstacles to the exercise of freedom of assembly by force or threat is punished with up to three years of imprisonment\footnote{Similarly http://www.arsboni.hu/tothb.html (last accessed: 10 March 2014)and Hajas 74-82.} - 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.\footnote{http://www.politics.hu/20120708/gay-pride-parade-held-in-budapest-under-heavy-security/ (last accessed: 10 March 2014).} Another event from 2012 widely reported in media was the Guard commemoration, where counterdemonstrators were not allowed on the square.\footnote{http://www.politics.hu/20120827/counter-demonstrators-detained-at-hungarian-guard-event-on-heroes-square/ (last accessed: 10 March 2014).} 

5. Implementing freedom of assembly legislation

\textbf{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,\footnote{Decision 3/2013. (II. 14.) AB.} 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.\footnote{15/1990. (V. 14.) BM rendelet a rendezvények rendjének biztosításával kapcsolatos rendőri feladatokról.} Refusing negotiations with police in principle shall not result in more burdens for the exercise of the right, to engage in negotiations is voluntary.\footnote{Hajas 76.} 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.

\textbf{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.\footnote{Hajas, 181-182.} 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).\footnote{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 \url{https://www.ajbh.hu/documents/10180/143994/201203449.rtf/3edbf7b1-9ede-4219-a6d2-dd405e91c7a2} (last accessed: 10 March 2014).}

**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”\footnote{Art. 13 ARA.}, 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.\footnote{Similarly, Balázs M. Tóth, \url{http://www.arsboni.hu/tothb.html}.} 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.\footnote{\url{http://tasz.hu/node/2812} (last accessed: 10 March 2014).} More recently, to the contrary, police were criticized for not using force to disperse an anti-Roma demonstration.\footnote{In English see Amnesty International’s report at \url{http://www.amnesty.org/en/news/hungary-must-protect-roma-communities-attack-2012-08-15} (last accessed: 10 March 2014).} 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.\footnote{The Hungarian Helsinki Committee lodged a complaint against this: \url{http://helsinki.hu/ha-ez-nem-uszitas-akkor-semmi-sem-az} (last accessed: 10 March 2014).} 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.\footnote{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).}
In 2012, police did not intervene when extreme right wing counter-protestors attacked journalists in the immediate vicinity of an anti-government demonstration. Police neither dispersed the evidently unpeaceful (and unnotified) assembly, nor were the attackers (clearly identifiable) arrested.

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. 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. 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. 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.

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.

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

893 See the video (“Death onto you, Jews!”)
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. 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.

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 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 2011.902 A state of emergency has been in place in Tunisia since and has been extended until June 2014.903 During this time, freedom of peaceful assembly can be restricted904, contradicting the repeated affirmations of the right to freedom of peaceful assembly by Tunisian authorities of the new government.905 In 2011, the 1959 Tunisian Constitution906 was first suspended907 and then completely repealed,908 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,909 which was issued in August 2012. A second draft Constitution of the Tunisian Republic910 was issued in December 2012. From 23 December 2012 to 13 January 2013 and with the help of the United Nations Development Programme (UNDP),911 a two-month outreach campaign was organized to gather input and recommendations from the Tunisian people.912 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 2013.913 The NCA began voting on the Final Draft Constitution914 (released on 1 June 2013), article by article, on 3 January 2014.915

911 United Nations Development Program.
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.” The new Constitution was adopted on 26 January 2014 and entered into force on 10 February 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.”

A 1969 Assembly Act regulates public meetings, marches, rallies, demonstrations, and assemblies, 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. 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
Al Bawsala, Amnesty International (AI), Human Rights Watch (HRW), and The Carter Centre have independently followed the constitution drafting process from the outset. 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 society 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. 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.


917 Ibid.


922 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.
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. When they are not staged as entertainment, flash mobs are used as means to protest in Tunisia and to raise awareness about important issues. But even if they are organized moderately, they can be thwarted if considered as unarmed crowds likely to disturb the public peace, pursuant to Art.13 of the 1969 Assembly Act.

3. Restrictions

The state of emergency is based on a 1978 Decree. The governor can forbid the movement of persons and vehicles in designated areas and for as long as security and public order requires. 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. 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, as well as censor the press, radio broadcasts, and other activities. The 1969 Assembly Act states that public meetings cannot be held on public roads. Additionally, they cannot continue beyond midnight, except in localities where the closure of public establishments occurs later. 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.

4. Procedural issues

Notification/authorization

The 1969 Assembly Act states that public meetings do not require prior authorization, 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. 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. Furthermore, Art. 9 of the 1969 Act states that all marches, rallies, and, generally

923 Act of 24 January 1969, Art. 9: Marches, rallies and all other forms of demonstrations on public roads necessarily have to be notified.
925 i.e. on the right to abortion: http://www.youtube.com/watch?v=1DtHHwg7xTc (last accessed: 10 March 2014).
927 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.
928 Decree n° 78-50 of 26 January 1978.
929 Decree n° 78-50 of 26 January 1978, Art. 4.
930 Decree n° 78-50 of 26 January 1978, Art. 5.
931 Decree n° 78-50 of 26 January 1978, Art. 7.
938 Act of 24 January 1969, Art. 3.
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.939

**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.940 The organizer of a demonstration has a right to be informed of the reasons why the demonstration has been prohibited.941 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.942

**Review and appeal**

Organizers of prohibited meetings can appeal to the Secretary General of the Ministry of Home Affairs, whose decision is deemed final.943 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.944 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.945 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.946 The military courts handled redress of alleged abuses by security forces during civil disturbances during the revolution.947

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941 Adm.Court, 14 November 2012, n° 121187.
944 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.
946 Ibid., p. 7.
5. 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”\(^{948}\), 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.\(^{949}\) Art. 13 of the 1969 Act forbids all unarmed crowds that are likely to disturb public peace.\(^{950}\) 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.\(^{951}\) Since the revolution though, there have been spontaneous demonstrations, protests, and strikes across the country.\(^{952}\) Some of them degenerated into violent clashes and contaminated other cities and areas.\(^{953}\)

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.\(^{954}\)

Assemblies taking place on public property
Public meetings cannot be held on public roads\(^{955}\) and all marches, rallies and demonstrations taking place on public roads are subject to prior notification.\(^{956}\)

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.\(^{957}\)

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949 Ibid. Art. 31.
950 Ibid., Art. 13.
956 Ibid., Art. 9.
6. 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.958

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,959 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.960 According to an OHCHR report,961 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.962 There were reports of security officials using excessive force in arresting protesters, including those involved in peaceful demonstrations,963 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.964 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

959 Ibid., Art. 20.
960 Ibid., Art. 22.
The same happened in cities throughout the country. Following Mohamed Brahimi’s death - founder and leader of the second left-wing party People’s Movement, hundreds of his supporters, including relatives and party members, demonstrated in front of the Ministry of Home Affairs’ building and in Brahimi’s hometown. Many witnesses 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. During his funeral, protesters called for the government to be toppled, and although the gathering was peaceful, police fired tear gas on them. Additionally, security officials often repeatedly harassed and threatened journalists during street demonstrations or protests. There were several instances of demonstrators and bystanders being arbitrarily arrested and at times, detained. 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. Private actors are jeopardizing freedom of peaceful assembly.

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Individuals who do not belong to the law-enforcement personnel have violently attacked demonstrators on several occasions.973

**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.974

7. **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.975 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 obligation976. 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 violence977. 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 2013978. Pursuant to Art. 17 of the 1972 Act,979 public authorities are to be held accountable for unusual damages caused by dangerous activities, which can result from demonstrators making use of force or from law enforcement personnel making use of force or shooting directly at demonstrators.980

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980 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.
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.\textsuperscript{981} 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 (OHCHR\textsuperscript{982}) and UN Special Rapporteurs\textsuperscript{983} carried out assessment missions in Tunisia, and an OHCHR office opened in Tunis. The NGO Euro-Mediterranean Human Rights Network (EMHRN)\textsuperscript{984} 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.\textsuperscript{985} There were, however, instances when the government did not cooperate with human rights organizations in their investigations into human rights violations.\textsuperscript{986}

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.\textsuperscript{987}

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


\textsuperscript{984} Euro-Mediterranean Human Rights Network.


legitimate aim pursued; matching therefore the criteria recognized internationally. 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. 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. Those necessities can be considered as content regulation and consequently, pre-censorship 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. 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.

988 I.e. Art. 12 of the International Covenant on Civil and Political Rights.
989 Act of 24 January 1969, Art. 3.
Freedom of Assembly in Europe – Comparison
Prof. Dr. Anne Peters, Dr. Isabelle Ley

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 temporally 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. 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). 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. 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; analogously 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.

Wording
The wording of the constitutional guarantees is quite similar. The provisions usually guarantee the freedom of peaceful – and in some cases: unarmed – assembly. Some of the

993 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 Cf. report on Hungary, supra, p. 115.
996 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
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, 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). 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.

**Scope of application**

*Ratione personae*

Importantly, the constitutional guarantees differ with regard to their scope *ratione personae*. While Art. 11 ECHR requires member states to guarantee the freedom of assembly to “everyone” within their jurisdiction, many constitutions explicitly grant it 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 for citizens can be found in the Serbian, Russian, German, French, and Belgian constitutions. In some cases (Belgium and Germany), constitutions accommodate foreigners by guaranteeing their fundamental rights through residual provisions. Still others extend the freedom of assembly of foreigners through an extensive interpretation of the constitutional guarantee of freedom of assembly (France). In some form or other, almost all legal orders thus satisfy the requirement of the ECHR to guarantee freedom of assembly in principle to everyone. Art. 16 ECHR however allows member states to restrict the political activities of foreigners. Important exceptions are 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 ECHR.

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997 The provision “does not apply to open air gatherings, which are entirely subject to police regulations.” *See supra* p. 45.


999 For further information *see* below pp. 143-150.

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.\textsuperscript{1001} A conspicuous feature of the First Amendment of the US Constitution is the seemingly absolute nature of the guarantee. While restrictions have been found to apply, the guarantee may be seen to proceed from a different premise than the corresponding provisions of the German and Hungarian constitutions. The latter reserve the freedom of assembly guarantee – as interpreted by the constitutional courts – to meetings aiming at the formation and articulation of a political will. They thus exclude purely social, cultural or “fun” gatherings from its material scope.\textsuperscript{1002} The US and the German schemes proceed from two ends of a spectrum. In comparison, the interpretation of the ECtHR presents a middle course, defining assemblies in its classic decision Plattform ‚Ärzte für das Leben‘ v. AUT as “associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community.”\textsuperscript{1003}

In the US, the notion of an “assembly” was also initially interpreted narrowly as referring only to activities aimed at influencing the government. Nowadays, however, it is central to American constitutional doctrine that freedom of expression 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. Belgium,\textsuperscript{1004} Serbia,\textsuperscript{1005} the UK\textsuperscript{1006} and Russia do not distinguish events with regard to the purpose of the meeting either, with Russia excluding election campaign meetings as well as religious rites and ceremonies from the protection, however.\textsuperscript{1007} France follows somewhat of a middle course: The law defines demonstrations as public meetings with any whatever intellectual message, not limited to political ones but stricter regulation is allowed for non-political meetings in comparison to political demonstrations.\textsuperscript{1008}

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 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.\textsuperscript{1009} 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.

\textsuperscript{1001} 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.
\textsuperscript{1002} Cf. report on Germany, supra p. 57; report on Hungary, supra pp. 117-118.
\textsuperscript{1004} Supra p. 45.
\textsuperscript{1005} Supra, p.108.
\textsuperscript{1006} Supra, p. 11.
\textsuperscript{1007} Supra, pp. 79-80.
\textsuperscript{1008} See supra, p. 27.
\textsuperscript{1009} Cf. report on Germany, supra p. 57.
**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 imminent incitement of violence in order to allow for a restriction of the freedom of assembly.\textsuperscript{1010}

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 (\textit{Bukta v. Hungary}\textsuperscript{1011}) 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.

**Federal states**

While some countries studied in this report (Belgium, the US, Germany, Russia) 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 option that diverging laws on assemblies exist in 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. In consequence, the Federal Constitutional Court has given

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\textsuperscript{1010} Cf. report on U.S., \textit{supra} p. 43.

detailed instruction on what is in constitutional terms admissable with regard to regulating assemblies 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.\footnote{\textsuperscript{1012}}

\section*{2. Restrictions}

\textbf{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. It has not been employed ever since.\footnote{\textsuperscript{1013}} 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 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.

\textbf{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

\footnotesize{\textsuperscript{1012} See infra p. 152.}

\footnotesize{\textsuperscript{1013} Cf. report on the United Kingdom, p. 20-21.}
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.  

The legal answers to this development vary. 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 private 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, it was the Federal Constitutional Court’s FRAPORT decision on the Frankfurt airport where protesters assembled to demonstrate against deportations of foreigners which brought about the change. In Hungary the legislator provided for this 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. 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.” The prohibition of assemblies in advance usually requires the existence of an elevated degree of threat to public safety or order. 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 Russia, 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.\textsuperscript{1019}

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” \textsuperscript{1020} (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 it 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.\textsuperscript{1021}

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 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 doctrinal understanding of the right.\textsuperscript{1022} 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 ordinances\textsuperscript{1023}, over ordinances protecting residential privacy,\textsuperscript{1024} anti-littering laws,\textsuperscript{1025} laws protecting against interference with traffic as well as ingress to and egress from buildings,\textsuperscript{1026} anti-solicitation regulations,\textsuperscript{1027} 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, a threat for state security, public order, public health, public morality or rights and freedoms of other people. Similarly, Art. 55 (3) of the

\begin{footnotesize}
\textsuperscript{1019} Cf. report on Serbia, p. 110.
\textsuperscript{1020} Section 13(1), (4) of the English POA 1986.
\textsuperscript{1021} Article 23, 24 of the Turkish Law on Meetings and Demonstrations.
\textsuperscript{1022} \textit{See}, e.g., \textit{Police Dept. of Chicago v. Mosley}, 408 U.S. 92 (1972).
\textsuperscript{1027} \textit{Martin v. City of Struthers}, 319 U.S. 141 (1943).
\end{footnotesize}
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 Russia 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.\textsuperscript{1028}

**Place restrictions: specifically designated areas in Russia 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, Russia 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 as well as the number of persons that 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, Russia aims at channelling assemblies into places which are confined and determined by the authorities, and which are limited in size, too.\textsuperscript{1029} 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.

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.\textsuperscript{1030} The 1969 Assembly Act states that public meetings cannot be held on public roads.\textsuperscript{1031} Additionally, they cannot continue beyond midnight, except in localities where the closure of public establishments occurs later.\textsuperscript{1032} 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.

\textsuperscript{1028} Cf. fn. 22.

\textsuperscript{1029} Cf. the report on Russia, supra pp. 83-84.

\textsuperscript{1030} Tunisian Decree n° 78-50 of 26 January 1978, Art. 4.

\textsuperscript{1031} Tunisian Act of 24 January 1969, Art. 8.

\textsuperscript{1032} Ibid., Art. 4.
(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 with regard to the free choice of the location of public events.\(^{1033}\)

**Time restrictions**

Ukraine, Serbia, Russia 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,\(^{1034}\) Sumy,\(^{1035}\) Rivne,\(^{1036}\) and Kharkiv,\(^{1037}\) which prohibit assemblies at night time after 10 or 11 p.m. Similar time restrictions exist in Serbia, where assemblies may neither 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 Russia, 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 Hungary\(^{1038}\) and, as a rule, also in Ukraine,\(^{1039}\) 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.

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1033 See infra, pp. 149-150.
1038 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%A9net+a+Cik%C3%BCCl%C3%A9l+rendezv% C3%99%20nek+kozta+a+ajtakerel%C3%A9s%C3%A9r%C3%A9%511/581dd32a-715e-4d39-9760-319ec2636a37?version=1.0 at 30 (last accessed: 10 March 2014).
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,\textsuperscript{1040} Russia,\textsuperscript{1041} Turkey,\textsuperscript{1042} and Hungary (if suited to frustrate the identification of persons by the authorities\textsuperscript{1043}). 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.\textsuperscript{1044}

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.\textsuperscript{1045} Starting on June 15,
2013, all protests on the square were banned and any gatherings being dispersed immediately.\textsuperscript{1046}

**Use of force by the police**

The use of force 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 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.\textsuperscript{1047} 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 refusing to scatter after having 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 Russia, 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.\textsuperscript{1048}

**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


\textsuperscript{1048} Cf. supra p. 95.
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.

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 *Gillian and Quinton v. United Kingdom*,1049 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: While it is six clear days before the proposed event in the UK (later ones being accepted if earlier ones were not reasonably practicable, however), 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 are 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 varies 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.1050

The rules in Ukraine and in Russia 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”.1051 However, there is no law prescribing this rule or any fixed period, the only written rule being a Decree of 1988 (issued by the former regime) setting a deadline of ten days before the event. In

1050  Cf. p. 108 et seq.
1051  Decision of the Constitutional Court of Ukraine no. 4-pn/2001 of 19 April 2001, see supra p. 94.
Russia, 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, 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 US Supreme Court would appear to support this approach.1052

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 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. As a milder means before simply determining these features unilaterally by the authorities, these schemes serve to keep with the proportionality principle. 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.1053 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

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1052 See report on the U.S., supra p. 38 et seq.
1053 Belgian Circular of 11 May 2011 concerning the negotiated management of public space for the two-level structures integrated police service, para. 4.
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.

In Russia, authorities usually appoint an official who renders assistance to the organizer in maintaining public order and security of citizens. The wording of the provision in question (Art. 14 (3) No. 1 of the Russian Assembly Law) is unclear as to whether this assistance comprises pre-event planning or only the conduct during the event as well as to how dialogical the character of the process is.

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 France and Tunisia, 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.

Russia 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 the case in Germany which tolerates urgent assemblies that are organized at short notice to respond to a current event as long as the notification occurs as soon as an opportunity to notify arises. Similarly, assemblies must be notified before the event in Poland (and lack of notification is penalized), but the 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.

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.

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1058 Cf. *supra* p. 102.
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.\textsuperscript{1060} The statute of patrol service of police in Ukraine\textsuperscript{1061} permits the police to stop an assembly if a local executive authority has not been notified in advance. In Russia, spontaneous events are neither foreseen nor tolerated in practice. Strict application of the Assembly Law renders spontaneous assemblies – outside the designated areas – impossible. Similarly, spontaneous assemblies are illegal and sanctioned in Turkey.\textsuperscript{1062}

**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 be 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.\textsuperscript{1063} The French Conseil d’État allowed similar practices of French authorities with regard to student demonstrations.\textsuperscript{1064} 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.\textsuperscript{1065}

For lack of regulation, counter-demonstrations are treated like simultaneous ones in most of Ukraine and in Russia. 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.\textsuperscript{1066} 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.\textsuperscript{1067} 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.\textsuperscript{1068}


\textsuperscript{1060} Cf. supra p. 109.


\textsuperscript{1062} Art. 23 of the Law on Meetings and Demonstrations; Art. 32 of the Law on Meetings and Demonstrations.


\textsuperscript{1064} Cf. CE, 7 March 2011, n° 347171.

\textsuperscript{1065} Cf. the various Belgrade Pride Parades, e.g. Serbian Constitutional Court, Decision Уж-5284/2011 of 18 April 2013; see also Decision Уж-4078/2010 of 29 February 2012.

\textsuperscript{1066} Cf. ECtHR, Alekseyev v. Russia, Judgment of 21 October 2010, Appl. Nos 4916/07, 25924/08 and 14599/09, paras. 9, 12, 30, 41, 72-77.

\textsuperscript{1067} Cf. p. 103.

\textsuperscript{1068} Cf. p. 124.
In Tunisia, counter-demonstrations have become relatively common in order to impede meetings and gatherings of opposition parties and NGOs.\textsuperscript{1069}

**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 Russia, too, the executive authorities of the Subject (the lower federal entity) decides on assembly affairs.

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.\textsuperscript{1070} Also in Ukraine, administrative courts review assembly restrictions; such complaints must be decided on within three days.\textsuperscript{1071} 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.\textsuperscript{1072} The military courts handled complaints about alleged abuses by security forces


\textsuperscript{1070} 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/alkotmanybiosag-elott-tamadtuk-meg-gyulekezesi-jogot-serto-biroi-donest (last accessed: 10 March 2014).

\textsuperscript{1071} Art. 183 of the Code on Administrative Legal Proceedings of Ukraine of 6 July 2005.

during civil disturbances of 2011. 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, and court injunctions are not provided for. At a different judicial level, the Russian Constitutional Court has reviewed assembly legislation and quashed important regulations.

In Serbia, 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.

The UK courts have adopted a human rights oriented approach following E CtHR 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, Russia, 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 E CtHR. 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.

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 recommendations 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

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1074 Cf. p. 109 et seq.
deplored “recent cases of excessive use of force to disperse demonstrators” 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. 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. 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 demonstration. The police neither dispersed the unnotified and violent assembly, nor were attackers arrested.

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.

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. 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

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1076 See supra fn. 33.

1077 See supra p. 22.

1078 See supra p. 125.

1079 Estimate as of 7th Mach 2014.

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.\(^{1081}\) 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.\(^ {1082}\) 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 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.\(^ {1083}\)

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.\(^ {1084}\)

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).\(^ {1085}\)

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”.\(^ {1086}\)

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.

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\(^{1081}\) See report on US, *supra*, p. 42.


\(^{1085}\) Bundesverwaltungsgericht, Neue Juristische Wochenschrift 1989, 52 (52); 53 (54).

\(^{1086}\) Art. 13 ARA.
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. In addition, the police have started to invite NGOs to monitors protests and their policing in order to regain public reputation, although experience shows that this objective is not always reached.

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. In some cases, journalists were insulted by far-right demonstrators with police standing by. These cases have been scrutinized in court.

Ukraine specifically guarantees the right of access to assemblies for journalists in a law on “printed mass media in Ukraine”.

In Russia, PEN International reported detentions and arrests of journalists during events in 2011-2012.

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.

In Turkey, media access during the Gezi Park Protests was highly problematic. Mainstream media conveyed very little information on the events. 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.

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1087 See report on UK, supra, p. 22.
1089 Ukraine specifically guarantees the right of access to assemblies for journalists in a law on “printed mass media in Ukraine”.
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. 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. It will presumably be regulated by 2016 as required by recent legislation.

In Ukraine, the use of drones is regulated by the Air Code. 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.

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 (OHCHR) and UN Special Rapporteurs carried out assessment missions in Tunisia, and an OHCHR office opened in Tunis. Freedom of assembly legislation in Russia is monitored by the Ombudsman for Human Rights in the Russian Federation. 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. 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, Russia and Serbia), however, in most states aliens are remedied by residual guarantees. In Russia 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”, this practice is allowed by the savings clause of Art. 16 ECHR which foresees “restrictions on the political activity of aliens”. We would like to highlight, however, that the wording of Art. 11 as well as international guarantees of non-discrimination speak in favour of a universal scope of application ratione personae of freedom of peaceful assembly.\textsuperscript{1105}

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. Rather, in the UK, restrictions are often based on traditional common law powers. In Ukraine, the legal basis for restrictions often are either by Soviet regulations still in force or regulations of municipalities below the rank of a statutory law. This leads to a confusing and unpredictable situation to the detriment of an overall 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 in private airports or shopping malls or similar areas which are formally under private control but opened up by owners or tenants to the public for general, normally commercial (as opposed to political) use. This raises the question whether these activities fall within the scope of the constitutional (and conventional) protection of freedom of assembly. Here, the legal situation in European countries is diverse. Further legal change 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).

5. Russia and Serbia try to channel events to specifically designated areas in which advance notification is not required. In Russia, 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, Russia 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 definite 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, Russia, 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. While 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 Russia 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 appear unnecessarily burdensome on the organizer.1106

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.

11. Spontaneous assemblies are illegal in Serbia, Ukraine, Russia, 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, Russia, 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.