

THE CONSTITUTIONAL PRINCIPLES OF FREEDOM OF ASSEMBLY IN HUNGARY*

The right to freedom of assembly generally attracts a wider audience if parliamentary majority loses popular support. Frequent demonstrations not only signal the discontent of the public with the ruling majority, but as it happened in Hungary they also represent growing distrust in political parties and the parliamentary institutional structure.

The debate on freedom of assembly concentrates on the limits of exercising fundamental freedoms and rights. In Hungary the past two years produced a turbulent period for the debate on the specific conception of freedom of assembly. A recent decision of the Hungarian Constitutional Court providing a reconsidered interpretation of the right of assembly forcefully influenced the discourse. This paper examines the substance of freedom of assembly as it follows from the Hungarian Constitution in the light of recent decision of the Constitutional Court. On this basis the paper develops an interpretation of freedom of assembly that may enable reinforcing constitutional democracy in Hungary.

TEXTS AND INSTITUTIONS

Freedom of assembly together with the right of association and freedom of expression gained particular importance as a fundamental freedom in the era of the enlightenment. In the US tradition in connection with the right to petition it stood for the right of citizens to discuss public affairs and to present their opinions in this regard in public and to communicate those opinions to their representatives and public authorities. In the French tradition freedom of assembly was granted first in the 1791 Constitution as a democratic means of expressing directly the will of citizens against the state; later, however, as a result of restrictive interpretation for a considerable period it lost its political significance. The 1831 Belgian Constitution included in Article 19 the right of peaceful assembly, however, public assemblies remained to be regulated under public order measures.

In Hungary the right of assembly was left unregulated in the laws of April 1848 and the radical youths leading the revolution of March 1848 failed to address this issue in their demands. The reason for this was that freedom of assembly was an important privilege of municipal nobility practiced regularly in the era of the feudal monarchy.¹ This also explains why the authorities decided not to interfere with the mass demonstration on 15 March 1848 (which remains to provide the example for all subsequent demonstrations).

In the Austro-Hungarian Empire the regulation of freedom of assembly was constantly on the agenda, but the government in fear of the ethnic minorities and the opponents of the constitutional arrangements with Austria was interested in regulation by public order measures providing ample discretionary powers to the authorities. This, although for different reasons, remained to be the case under the Horthy-regime. The regulatory approach was first altered in regulation (*BM Rendelet*) 5159/1945 (III.24.) on the system of notification of public assemblies which required only a notification to the authorities before citizens wished to exercise their right of peaceful assembly. This regulation forgotten for long decades played a significant role in the demonstrations of the regime-change in the late 80s before the adoption of the Act on the Right of Assembly (ARA 1989).²

Freedom of assembly was regarded as a mere declaration of rights by socialist constitutional theory. Article 55(1) of the 1949 Stalinist Constitution included freedom of assembly for the protection of workers' interests and from 1972 freedom of assembly exercised in harmony with the interests of socialism and the people was guaranteed by Article 64.³ The contemporary foundations of the right of assembly were laid down by Act 1989:I on the amendment of the Constitution and the ARA 1989. Before the adoption of the latter act freedom of assembly had been regulated in regulations of a minister of government or in lower ranking laws, as the obligation to regulate fundamental rights and freedoms on the

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level of acts of Parliament emerged only in the Act on Legislation and Regulation.⁴ Regulation in lower ranking laws (ministerial regulations) enabled the highest party leaders to control political activity in public, which was finally lost after the adoption of this act. This made this act an important achievement of the regime-change, an act of symbolic significance. Article 65 of the Constitution modified by Act 1989:I includes now freedom of assembly and association. Article 62(1) of the Constitution was finally determined by Act 1989:XXXI on the amendment of the Constitution. As in case of other constitutions the Hungarian Constitution acknowledges the right of peaceful assembly and regulates the right of assembly as a universal fundamental right.

THE ROLE OF FREEDOM OF ASSEMBLY WITHIN THE DEMOCRATIC INSTITUTIONAL STRUCTURE

Freedom of assembly provides the right of individuals to express freely their opinion in public affairs with others. Freedom of assembly belongs to the category of communicational rights and it is associated with freedom of expression [Decision 30/1992. (V. 26.) of the Constitutional Court, ABH 1992, 167, 171]. The significance of communicational rights rests in their capacity to act in ensuring the self-realisation of human beings. The self-realisation of a person is dependent upon the condition that his communicational rights are observed.

The significance of communicational rights, including freedom of assembly, can only be assessed with reference to their role in the democratic institutional structure. These rights enable the individual to take part with weight in social and political processes. According to the Constitutional Court [Decision 30/1992. (V. 26.)] "the free expression of views, opinions, the free expression of unpopular or peculiar ideas is the basic condition of a living society capable of evolution" (ABH 1992, 167, 171). Without freedom of assembly getting hold of such opinion and information and sharing them with others, the possibility of drawing up views together with others, would be unattainable [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442, 449]. In a society where direct access to the press is a privilege of few, individuals have no other means but to influence public opinion by means of exercising their right of assembly.⁵

Democracy provides the institutional solutions and procedural conditions of making common de-

isions under the condition of ensuring equality among individuals. Decision by the majority appears to be the only justifiable exception to the principle of equality in decision-making. The majority principle, however, is capable of infringing the rights of the minority. The Constitutional Court has confirmed that the constitutional limitations of freedom of expression, the most important communicational right, must be defined by taking into consideration the interests lying in shaping and creating public opinion which bears high significance in the democratic process. A manifestation of this is the protection of opinion irrespective of its content. Freedom of assembly is closely associated to the democratic function of freedom of expression. The right of individuals to take part in creating political inputs may not only manifest in the votes cast at general elections but in participation in the processes governing the creation political opinion or in the decision-making process. Between general elections the possibilities of influencing the political majority in government are limited and freedom of assembly provides a very important means for minority opinions to influence the political process. By exercising the right of assembly genuine minority interests may gain access to the political process highlighting that freedom of assembly has a stabilising function: it reveals the gaps in the integrity of the political community enabling the correction government politics.⁶ This function of freedom of assembly protecting minority opinion and interest makes it a key fundamental freedom of the democratic process.

THE SCOPE OF FREEDOM OF ASSEMBLY

The Notion of Freedom of Assembly

The notion of freedom of assembly entails a general and a more specific meaning.⁷ In general it stands for the freedom of individuals to gather in public or private spaces for the purpose of expressing their opinion collectively. In its more specific meaning not all collective forms of exercising freedom of expression need to be protected under freedom of assembly. The reason for this is that freedom of assembly may only be associated with discussing public affairs. Its most important function is to ensure in a parliamentary democracy based on the majority principle participation in public affairs for those that are excluded from utilising other channels of publicity. In the case law of the German Constitutional Court the conflict between freedom of expres-

sion and the interests of local residents and the users of public roads needed to be resolved with reference to the fact whether exercising the right of assembly concerns participating in a public debate on public affairs. In case the purpose of the event is different, it will attract (a lesser) constitutional protection only under the general freedom of action of individuals.⁸ The Hungarian Constitutional Court interprets freedom of assembly as an informational right having particular importance in the democratic institutional structure, which stands closer to the specific meaning of freedom of assembly. On this basis, Article 62 of the Constitution covers those gatherings, events the purpose of which is to facilitate the collective expression of opinion in public affairs.⁹ This specific purpose binds the members of the group together. This distinguishes the group from groups consisting of individuals pursuing their own ends (for instance a group formed at the customer service desk of an event) or from random gatherings (for instance the spectators of a road accident).¹⁰ Events the purpose of which is purely commercial or leisure in the absence of a shared aim or objective do not fall under the scope of freedom of assembly. This does not mean, however, that when a common aim can be identified, and for instance artists perform in support of this aim, the event (a charity event) in question cannot be protected under the right of assembly.

In general, freedom of assembly is in close relationship with other fundamental rights including those that are more distant from the objective of discussing public affairs and relate more closely to the realisation of one's personality, thus, to one's private sphere. In this respect religious ceremonies of the church and religious groups (religious processions), or cultural, sport or family events (wedding processions) could be mentioned. The interpretation that freedom of assembly primarily concerns the collective expression of opinions in public affairs is reinforced by the fact that the ARA 1989 in its Article 3 excludes these private events from its scope.¹¹

Freedom of assembly manifests typically in organised marches or in demonstrations, gatherings held at a particular place. The Constitution protects *all forms* of assembly; until Decision 75/2008. (V. 29.) of the Constitutional Court constitutional jurisprudence failed to distinguish among the different forms of assembly. Even the legislator remained unconscious of the different expressions used for freedom of assembly as demonstrated by Article 2(1) of the ARA 1989. There was no distinction between a procession or a gathering as the same rules applied to them. The event was only granted consti-

tutional protection when the organisers had discharged their duty of notification to the authorities. However, the approach of the Constitutional Court was changed in the above mentioned decision, as the constitutional protection of freedom of assembly was extended to cover peaceful public gatherings where the nature of the event giving cause to exercising freedom of assembly event necessitates a gathering at short notice (rapid assemblies) or (spontaneously) without any preceding organisation.¹² According to the Constitutional Court such peaceful gatherings reacting to public affairs are covered by freedom of assembly as protected under the Constitution. "The right of collective and public expression of opinion belongs to every individual irrespective whether the assembly was organised and independent of the nature and time of the event in public life to which the individual wishes to react" (ABK 2008, 715, 721).

Freedom of assembly covers occasions of collective expression of opinion having a delimited timeframe. It is difficult to determine what may constitute the shortest or the longest interval of time that is necessary to organise a demonstration. Demonstrations could in principle last for days or weeks where the participants are in constant change. It is important, however, that only events of definite duration may be protected under freedom of assembly. The organiser must define the duration of the event in advance, even if it cannot be predicted when the event that may last for days achieves its objective or becomes unjustified. The organiser may decide to repeat the notification of the event in order to extend its duration. In such circumstance the authorities must examine the objectives of the occupation of public spaces, and whether it remains to relate to exercising the right of free expression in public affairs.¹³

The Personal Scope of Freedom of Assembly

Under the Constitution freedom of assembly is a fundamental freedom of individuals. Its personal scope covers the organiser and the participant. According to the Constitution apart from participating at a public gathering, organising such events also constitutes a fundamental right. On this basis it appears unreasonably restrictive to grant in regulation the right of organising events in public spaces only to those that are more closely connected to the establishment in Hungary.¹⁴ This distinction was confirmed by the Constitutional Court by stating that "only a person familiar with local (Hungarian) circumstances may organise a public event, who by virtue of his physical presence in the country is capable

exercising the rights and fulfilling the obligations—for instance his liability in tort—prescribed by law” [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442, 457]. These qualifications appear to be irrelevant when one considers that it is of little importance whether the debtor is present in the country.¹⁵ The current status of law is clearly at variance with the Constitution and the law of the European Convention on Human Rights (ECHR). While the ECHR permits restrictions on the political activity of aliens, this must be interpreted restrictively making it applicable only in case of activities with direct relevance to the use of public powers, and organising public events is not such case.¹⁶

Another important limitation in domestic law on the person of the organiser is that aliens as beneficiaries of temporary protection under the Act on Asylum are excluded from organising public events. In our opinion nothing excludes that refugees and asylum seekers would wish to express their opinion in a public event, for instance against the state from the persecution of which they fled [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442, 470].

Freedom of assembly is a personal freedom, but that does not exclude that legal persons are prevented from initiating a demonstration in Hungary or abroad. The restriction applicable in this respect is that they must entrust an organiser with the organisation of the event who fulfils the criteria mentioned in the ARA 1989 (ABH 2001, 442, 457). However, in the light of the protective nature of freedom of assembly legal persons under public law are excluded from its personal scope.

The Substantive Scope of Freedom of Assembly

The Constitution provides protection not only to an assembly, but also to the act of organising and participating in an assembly. On this basis, all those acts of individuals are protected that enable them to decide with others where, when, in what way and for what purpose they wish to exercise this fundamental freedom.¹⁷ Consequently, freedom of assembly incorporates the freedom to choose the place, time, form and purpose of an assembly. Within this framework protection is extended to those acts that relate to the preparation of assemblies: the notification and the organisation of the public event and the act of approaching the place of the event.¹⁸ The right to participate at an assembly entails the protection of rights by means of which the collective expression of opinion could materialise: making speeches, hold-

ing signs, the distribution of flyers, shouting political slogans, singing songs etc. These are acts that enable the participants to attract attention to their cause. The forms of exercising the right of assembly are multiple. It would include not only acts that relate to the argumentative and debating aspects of collective communication, but also those that are regarded as the non-verbal manifestations of communication (human chains, processions with torches).

The Requirement of a Peaceful Assembly

The right of assembly provided by the Constitution only applies to peaceful events. This requirement is not satisfied when the demonstration is attended by participants armed with weapons or objects capable of causing bodily harm. Similarly, assemblies in the framework of which acts are committed that qualify as criminal offences or where the breach of public order has taken place must be regarded as falling short of the requirement of peacefulness.¹⁹ On this basis, it may appear that the peacefulness of assemblies is simple to determine. However, a low threshold applied to determine the peacefulness of the event could lead to the breach of freedom of assembly.

The restriction of the right of assembly could appear as unnecessary when a demonstration is declared to breach the requirement of peacefulness on grounds that the opinion expressed disturbs others or violates their sentiments.²⁰ The said requirement cannot be said to be violated even when the demonstration puts forward demands for a radical amendment to the Constitution.²¹ Such demonstrations, however, are rendered unlawful when an incitement to violence has taken place.

In the case when certain individuals or a smaller group commit violent acts in a peaceful event, the right of assembly must be ensured to those who assemble peacefully. Banning the complete event is only feasible under strict conditions when the conditions of peaceful assembly can no longer be secured.²²

RESTRICTIONS ON THE RIGHT OF ASSEMBLY

The General Limits of the Right of Assembly

The Hungarian Constitution only provides for the right of free assembly. The condition ‘free’ suggests that the Constitution of democratic Hunga-

ry includes among human and political rights the right of every individual to participate freely in assemblies, processions and demonstrations. The limits of this fundamental freedom can be defined according to the general principles applicable to fundamental rights. According to the jurisprudence of the Constitutional Court these could be the protection of the fundamental rights of others,²³ the institutional obligation of the state to observe fundamental rights,²⁴ or limitations available in international instruments for the protection of fundamental rights such as public order, an important public interest and morality.²⁵ The objectives justifying an interference with the right of assembly are not of equal weight: interferences implemented in order to secure another fundamental right are treated more favourably than those serving a right more indirectly with the mediation of an institution. Interferences serving an abstract value (morality and public order) require an even stronger justification [Decision 30/1992. (V. 26.) of the Constitutional Court, ABH 1992, 167, 178].

According to the case law of the Constitutional Court the state may only resort to restrictions on fundamental rights when it is necessary, in other words, when securing another fundamental right or freedom or the protection of other constitutional values cannot be achieved by pursuing other means. Moreover, the interference must be proportionate, the legislator must choose the solution appropriate to achieve the given aim that is the least damaging [Decision 879B/1992 of the Constitutional Court, ABH 1996, 397, 401].

A general limit to the right of assembly is the requirement that exercising the right must not entail the breach of the rights of others or it must not result in committing a criminal act or inciting others to commit such an act, moreover, participants—in order to ensure that the event remains peaceful, lawful and orderly—must not carry weapons or objects that can be used as weapons.²⁶

Exercising the right of assembly may manifest in a great variety of forms. The free choice of these forms is part of freedom of assembly. Since the Constitution provides protection exclusively to peaceful assemblies, individuals may only opt for peaceful ways of exercising the right of assembly choosing behaviours that do not qualify as criminal offences. Those cases are the most controversial when it is debated whether a given conduct can be regarded as peaceful, for instance when participants cover their faces with masks or wear bullet-proof vests. Similarly, the peaceful nature of the event can be questioned when participants wear uniforms and

their behaviour gives the impression that they are part of a military organisation.²⁷ These must be decided on the facts of the given instance as a general prohibition in an act of parliament would entail an unacceptably broad limitation on the right of assembly. Wearing masks could be prompted by fear of the intelligence services of the state of origin at events organised by political refugees and wearing a bullet-proof vest can be regarded as a symbolic demonstration against the unlawful use of force (weaponry) by the police (for instance when the police uses rubber bullets without having a prior assessment of the damage it may cause and without introducing it to the ordinary weaponry of the police). When these behaviours do not qualify as criminal offences, and when they are peaceful and relate to the purpose of the event, state interference must be avoided.

The Obligation of Notification

The specific limitations of freedom of assembly relate to the choice of place, time and method of the assembly. The free choice of place and time are limited by the obligation of notification of the organiser. This obligation applies to all forms of assembly with the exception of spontaneous gatherings when it is impossible to impose such obligation [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 725]. The purpose of the obligation of notification is to ensure that freedom of assembly is exercised respecting public order and the safety of road traffic. The reason for this is that events with a great number of participants and involving movement due to the number of participants, the disruption to road traffic or the potential counter-demonstrations entails a risk to public order requiring preparations from the police in order to maintain the safety of the event. It follows that the requirement in law that the organiser of a public event at latest three days before the event must notify the appropriate police authority in case of events, processions of such nature is justifiable.²⁸

The failure to discharge the obligation of notification could attract negative legal consequences. However, as ruled by the Constitutional Court “the failure of the organiser to fulfil his obligation cannot entail in all circumstances that the police—without setting further conditions—would disband the event the participants of which did not breach the law” [ABK 2008, 715, 724]. Similar rules apply when the event takes place at a time, place, route or following

an aim and timetable that is different from that notified to the police. According to the long-standing case law of the European Court of Human Rights (ECtHR) the obligation of prior notification of public events entails a limitation on the very essence of the right of assembly.²⁹ However, when the general public had no prior knowledge at an appropriate time of the event giving cause to exercising the right of assembly, individuals have two options: either they refrain from exercising their right of peaceful assembly or they exercise their fundamental rights in breach of relevant domestic law. According to the ECtHR “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 Article 11 of the Convention is not to be deprived of all substance.”³⁰

The fact that the failure of organisers cannot attract the most serious legal consequences does not mean that the breach of law would entail no consequences at all. Those who without notification organise a gathering, procession or demonstration that is subject to the obligation of notification or that is not permitted by an act of the police authority³¹ can be held responsible like those that use public roads without the assistance of the police. As a result when the obligation of notification was not fulfilled or the event was organised in circumstances different from those stated in the notification, in order to maintain public order and to avoid conducts prohibited by law, both parties, the participants and the police, are burdened by an increased duty of cooperation [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 727]. Cooperation between the organisers and the police is one of the fundamental conditions of exercising the right of assembly. The duty of cooperation is more important in the event of spontaneous or rapid assemblies. In such instances the willingness to cooperate could suffice in order to maintain public order.

In the first decision of the Constitutional Court on freedom of assembly [Decision 55/2001. (XI. 29.) of the Constitutional Court] it found the obligation of notification justified on grounds that besides the right of assembly the use of public space affects another fundamental right, the right to free movement provided under Article 58 of the Constitution. Assemblies impose a restriction on the right to free movement, particularly the right of taking part in road traffic, of those not participating in the event and this provides the reason why public authorities must be notified in due time before the event to be held in public [ABH 2001, 458-459]. In the second

relevant decision on freedom of assembly [Decision 75/2008. (V. 29.) of the Constitutional Court] the Court departed from this opinion and ruled that in many instances the right of assembly will conflict with the public interest of ensuring the order of road traffic and not with the fundamental right of “taking part freely in road traffic with or without a vehicle” (ABK 2008, 715, 718).³² Restrictions of freedom of assembly on grounds of the public interest of ensuring the order of road traffic are justified less readily than those pursuing the protection of another fundamental right.³³ The weight of freedom of assembly and of the public interest of free road traffic must be determined in the light of the facts of the given case.³⁴

Other Limitations on Freedom of Assembly

Freedom of assembly incorporates the free choice of the public space where the event will be held. These are usually public spaces that are able to accommodate the purpose of calling public attention to the opinion expressed collectively. In principle, all public spaces can be appropriate for this purpose. However, a distinction must be made between public spaces on the basis whether they are appropriate for the function of public communication, for the purpose that they serve as an adequate public forum. The ability of public spaces to fulfil such a function depends to a great extent on the traditions of using public spaces in a state or on the particular purpose of the event. Moreover, it is not disputed that, generally, taking into account the function of freedom of assembly streets, squares, parks and, in particular, the direct environment of public offices, the Parliament or court buildings are the most appropriate places for public communication. The free choice of holding an event at these places can only be overruled on grounds of imperative reasons. In case of public offices ensuring the personal safety of MPs, judges, civil servants could serve as an appropriate reason. For the protection of this interest the authorities may exclude certain locations from the list of potential public spaces. At the time when the ARA 1989 was constructed opinions were formulated that freedom of assembly should be banned in the direct environment of the Parliament.³⁵ In response to the unrests of autumn 2006 the need for a similar restriction was advocated again.³⁶ Under Article 8 of the ARA 1989 “when an event subject to an obligation of notification would jeopardise the undisturbed functioning of democratic institutions and courts” that event can be banned. The lawful-

ness of the restriction depends on how the formula “would jeopardise the undisturbed functioning” is interpreted. In the light of the purpose of freedom of assembly a restrictive interpretation appears acceptable that would allow a ban only when the personal safety of MPs, judges or civil servants were in danger. It would be highly controversial when demonstrations aimed at influencing the work of democratic institutions would be banned on the basis of this provision. This would mean that the psychological pressure exerted on MPs by means of the demonstration is regarded as a grave interference with the functioning of Parliament, while at the same time the system of financing political parties and political lobbying, which are in place to exert pressure on MPs, are not regarded as unlawful. This could damage the relationship between the people and government institutions exercising public powers on the basis of the principle of democratic legitimacy.³⁷ It follows that a restriction may only be justified when public order was subject to direct danger³⁸ and this circumstance is supported by facts accessible publicly.

The use of public spaces may not only be restricted on grounds of protecting the functioning of public institutions, but protecting the interests of those not participating in the event are also of importance. The use of public spaces is regulated by the local authorities and in the framework of this they may implement various restrictions as to the time and level of noise of the event taking the characteristics of the given location into account. These conditions, however, must not impose burdens that are heavier than those provided in the ARA 1989 and must not render exercising the right of assembly impossible.³⁹

The duty to state reasons and the right of legal redress are jeopardised when the police imposes a restriction on freedom of assembly on grounds of Article 46(1) of the Police Act. This provision to ensure the safety of a person the protection of whom is ordered by government enables the police to secure any public (and private) space to prevent any person entering the location and to order those staying at the location to leave. The potential grounds of the interference are visible, but freedom of assembly will be violated when the police fail to disclose the grounds and extent of the restriction. It is of significance that the Police Act does not clarify who and in what process of law could be entitled to challenge the measures involved.⁴⁰

The interest of public order and defence interests could serve as the justification of the restriction relating to military personnel that at the place of serv-

ice public events may only be organised after obtaining the leave of the appropriate person in command.⁴¹

The institution of political campaign moratorium, the period between the day before the general election and the end of the election, can be seen as a general restriction on freedom of assembly provided in an act of Parliament. In this interval it is prohibited to influence the electorate by any possible means⁴² including the organisation of public events. Another important question relating to the time of the assembly concerns the duration of the event. A general rule on duration could qualify as unnecessary in the given circumstances, therefore, when determining the permitted duration of an event from the perspective of the general lawfulness of the interference it must be examined whether the aims intended to be achieved by the event can be realised in the given circumstances.⁴³

BANNING AND DISBANDING THE ASSEMBLY

The most serious restriction on freedom of assembly is the prior ban of the assembly. It may only take place on grounds of particularly serious reasons. When assessing the implications of a potential ban regard must be had of the significance of freedom of assembly in the democratic institutional structure. The ban of an event as a measure of last resort may only be justified when the police are unable to secure public order with measures imposing a lesser restriction on fundamental rights.⁴⁴ This applies to the interpretation of the relevant provisions of the ARA 1989 according to which the police within 48 hours after the notification by the organiser may ban the event at the place and time as indicated in the notification⁴⁵ in case an event subject to an obligation of notification would seriously jeopardise the undisturbed functioning of democratic institutions and courts or road traffic could not be redirected onto other routes.⁴⁶

Another serious restriction on freedom of assembly is the *ex post facto* ban of assemblies which necessitates their disbanding. When exercising the right of assembly results in committing a criminal act or inciting others to commit such an act, or it breaches the rights and freedoms of others, or when participants are armed with weapons or objects that can be used as weapons, the disbanding of demonstrations can be proportionate with a view to ensuring the *ultima ratio* protection of the said interests. The second freedom of assembly decision of the Constitution-

al Court found the legal provision disproportionate which required the instant disbanding of demonstrations organised without notification or when they took place in a time and place, and following a route, a purpose and timetable different from that indicated in the notification [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 723-725].

THE POSITIVE OBLIGATIONS OF STATES

With respect to exercising the right of assembly the state is to discharge certain positive obligations. Apart from the duty of cooperation discussed above these include the obligation of the state to protect the participants of events from spectators demonstrating their dislike of the event, from counter-demonstrations and from others breaching public order.⁴⁷ The state must protect the event from potential counter-demonstrations even when the event qualifies as breaching the requirement of a peaceful assembly. It follows that authorities must ensure by the use of force, if necessary, the security of lawful public events, and they must prevent others from disturbing such events. This obligation is provided in Article 11(2) of the ARA 1989 and Articles 228/A and 271/A of the Criminal Code. Even Article 1 of the ARA 1989 can be recalled here declaring that the state ensures the undisturbed exercise of freedom of assembly—in other words, the state ensures that exercising the right of assembly is not disturbed by others.

SUMMARY

In examining the substance of freedom of assembly, emphasis was given to defining the aim and function of this fundamental right. The interpretation of freedom of assembly in this paper is constructed on this basis together with the case law of the Constitutional Court that provided an important source of constitutional benchmarks. These benchmarks may serve as guidelines when exercising the right of assembly. Only when the function of freedom of assembly in protecting minority interests is respected, can we expect that this right, which entails many risks, helps reinforcing respect for the Constitution

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NOTES

1. On the history of freedom of assembly see: RÉNYI József, *A gyülekezeti jog* [Right of Assembly] (Lampel, Budapest 1900); HORVÁTH Attila, 'A gyülekezési jog elméletének és gyakorlatának története Magyarországon 1989-ig' [History of the Theory and Practice of the Right to Assembly until 1989 in Hungary] [2007] 1 Jogtörténeti Szemle 4–15.
2. On this see: HALMAI Gábor, 'Egyesüljetek, gyülekezzetek! Egy kodifikáció története' [Associate, Assemble! History of a Codification.] in KURTÁN Sándor, SÁNDOR Péter, VASS László (eds), *Magyarország politikai évkönyve 1988* [Political Yearbook of Hungary 1988] (R-Forma Kiadói Kft., Budapest 1989) 239.
3. Act 1972:I on the amendment of Act 1949:XX and on the consolidated version of the Constitution of the Democratic Republic of Hungary.
4. SZIKINGER István, 'A tüntetések és a rendőrség '88-ban' [Demonstrations and Police in 1988] in KURTÁN, SÁNDOR, VASS (n 2) 362–363.
5. Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 720; BVerfGE 69, 315 – „Brokdorf”. See on this: SÓLYOM Péter, 'Demokrácia és gyülekezési szabadság' [Democracy and Freedom of Assembly] [2007] 1 Fundamentum 5–17.
6. "Peaceful demonstrations represent a value from the perspective of securing the political and social order and the legitimacy of democratic institutions. Demonstrations signal to the democratic institutions and society tensions within society enabling the adequate treatment of the causes of those tensions" [Decision 4/2007. (II. 13.) of the Constitutional Court, ABH 2007, 911, 914; Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 720]. "The relationship between freedom of expression and assembly stands for the collective and public expression of opinions. The significance of freedom of assembly as a communications rights is increased by the fact that—contrary to the functioning of the press—it enables direct access without limitations to anyone to participation in political life. Article 61(1 and 2) of the Constitution provides the right to set up a press publication; this requires significant investment. It does not follow from the Constitution, however, that the press should publish the opinion of any particular person. Consequently, among legal institutions enabling participation in public life those are of particular significance that allow equal access. Traditionally, freedom of assembly in public spaces belongs to this category, and nowadays the internet provides similar opportunities" [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 720-721].

7. DRINÓCZI Tímea, PETRÉTEI József, 'A gyülekezési jog' [Right to Assembly] in CHRONOWSKI Nóra e. a., *A magyar alkotmány jog III. Alapvető jogok* [Hungarian Constitutional Law III. - Fundamental Rights] (Dialóg Campus, Pécs 2006) 423–424.
8. BVerfGE 1 BvQ 28/01 – „Musikparaden”.
9. The Constitutional Court placed flash mobs under constitutional protection on the basis that they contribute to spontaneous and rapid discourse in public affairs [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 721]. On a similar approach see: DRINÓCZI, PETRÉTEI (n 7) 426–427. The separate opinion of Judge Bragyova to Decision 75/2008 represents a contrasting opinion: “Freedom of assembly must be interpreted broadly encapsulating any event held in a public space and allowing access for every individual (a public event) (for instance a sport event)” ABK 2008, 715, 726–727.
10. Helmuth SCHULZE-FIELITZ, 'Artikel 8' in: Horst DREIER (ed), *Grundgesetz. Kommentar I.* (Mohr, Tübingen 2004) 896.
11. **Until the second leading decision of the Constitutional Court, Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, an increased protection of electoral campaign events appeared justifiable.** It is difficult to reconcile with the function of freedom of assembly in the protection of minority opinions that only in the election campaign period was it allowed to exercise the right of assembly without notification, as a political rally requires similar preparations from the police as any other event. While the increased importance of electoral rallies in a democratic society is unquestionable, the expression of opinions in public affairs between elections demands equal protection. The Constitutional Court by extending protection to spontaneous and rapid assemblies has excluded this difference in regulation. This differentiation proved to be problematic in connection with the demonstrations of September 2006. See on this matter: SZIKINGER István, „Kordonka” [Little Cordon] *Népszabadság* (Budapest 21 September 2006).
12. **The Court, while distinguishing them from spontaneous assemblies, provided equal protection to events of artistic, and more relevantly of political purposes, when participants after a rapid sharing of information gather for a short period of time, and call attention to their presence, or to the message they intend to convey by their extraordinary, startling appearance (flash mob) [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 721]. As to the notion of assembly see: KÁDÁR András Kristóf, M. TÓTH Balázs, 'A gyülekezési jog külföldi és magyar szabályai' [The Hungarian and Foreign Rules of The Right to Assembly] [2007] 1 *Fundamentum* 63–76.**
13. Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 719.
14. According to Article 5 of the ARA 1989 (01/07/08) the organiser of public events is a) a Hungarian citizen, b) citizen of a Member State of the EU, c) or a third country national lawfully residing in Hungary.
15. See the separate opinion of Judge Kukorelli [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442, 470].
16. Jürgen BRÖHMER, 'Kapitel 19: Versammlungs- und Vereinigungsfreiheit' in: Rainer GROTE, Thilo MARAUHN (eds), *EMRK/GG, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck, Tübingen 2006) 1013–1014.
17. DRINÓCZI, PETRÉTEI (n 7) 431–432; (n 10).
18. BVerfGE, 69, 315 – „Brokdorf”.
19. Article 2(3) ARA 1989. According to Sajó András these limitations do not provide protection against all forms of abuse of the right of assembly requiring corrections that without breaching the right of assembly are able to increase the ability of democratic states to defend themselves. See further: SAJÓ András, "Önvédő jogállam" [The Self-Protecting Constitutional State] [2002] 3–4 *Fundamentum* 55–68.
20. BVerfGE 69, 315 – „Brokdorf”.
21. *Stankov and the United Macedonian Organisation „Ilinden” v Bulgaria*, no. 29221/95, Article 11 § 39–41, ECHR 2001-IX.
22. BVerfGE 69, 315 – „Brokdorf”.
23. Decision 2/1990. (II. 18.) of the Constitutional Court, ABH 1990, 18, 20.
24. Decision 64/1991. (XII. 17.) of the Constitutional Court, ABH 1991, 297, 302–303.
25. On restrictions of fundamental rights see: HALMAI Gábor, TÓTH Gábor Attila, 'Az emberi jogok korlátozása' [Restrictions on Fundamental Rights] in HALMAI Gábor, TÓTH Gábor Attila (eds), *Emberi jogok* [Human Rights] (Osiris, Budapest 2003) 109–135.
26. Articles 2(3) and 12(2) of the ARA 1989.
27. Act 2001:XCV on the status of military personnel in the Hungarian Defence Forces. According to Article 23 military personnel in political events may only wear a uniform when representing the Defence Forces with the leave of the appropriate person in command.
28. Under Article 7 of the ARA 1989 notification must be in a written form and must include the following: (1) the duration, place or route of the event, (2) the aims and time-table of the event, (3) the approximate number of participants, the number of organisers responsible for the event, (4) the name and address of the organiser person(s) and the person representing the organiser.
29. *Rassemblement jurassien Unité jurassienne v Switzerland*, no. 8191/78, Commission Decision of 10 October

- 1979, DR 17. See further: BÁN Tamás, 'Nemzetközi emberi jogi testületek gyakorlata gyülekezési ügyekben' [2007] 1 Acta Humana 5–25.
30. *Oya Ataman v Turkey*, no. 74552/01, § 42, ECHR 2006-... See further: *Bukta v Hungary*, no. 25691/04, Judgment of 7 July 2007, and SZIKINGER István, 'A Bukta-ügy tanulságai' [Lessons of The Case Bukta] [2007] 4 Fundamentum 103–109.
31. Article 152(1) of the Act on Minor Offences.
32. In this respect the Court refers to a decision of the Polish Constitutional Court according to which the right of free movement does not concern free movement on public roads but the freedom to move from one place to another [Decision K 21/05, 18 January 2006].
33. Decision 30/1992. (V. 26.) of the Constitutional Court, ABH 1992, 167, 178; Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 471–473.
34. The use of discretion may not establish an unjustifiable restriction at variance with the purpose of the event, as it happened in case of the 2003 neo-nazi demonstrations and the 2008 gay and lesbian procession. The public interest of free road traffic must be assessed respecting the requirement of neutrality.
35. HALMAI (n 2) 239.
36. It was raised by Ombudsman SZABÓ Máté; see KAPCSÁNDI Dóra, 'Megdöböntek a jogvédők az ombudsman ötletén' [Idea of the Ombudsman Has Schocked The Defenders of Rights] <www.origo.hu/itthon/20080111-kitiltana-a-tunteteket-a-kosuth-terrol-az-ombudsman.html> accessed 8 January 2009. On the problems in US jurisprudence see: Mary M. CHEH, 'emonstrations, Security Zones, and First Amendment Protection of Special Places' University of the District of Columbia Law Review 53.
37. See in this respect: Dagmar RICHTER, "Befriedete Bezirke" und andere demonstrationsfreie Zonen – Kategorienbildung und Problemtypologie anhand in- und ausländischen Versammlungsrechts' in Hans-Joachim CREMER e. a. (ed), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger* (C. F. Müller, Heidelberg 2002) 899–982.
38. *Christians against Racism and Fascism v United Kingdom*, no. 8440/78, Commission Decision of 16 July 1980, D.R. 21, 138, 150.
39. „When it is obvious that the regulation of uses of public space took place with the intention to restrict the right of assembly, and the conditions of using public spaces were amended only in order to restrict freedom of assembly, legal provisions with no direct connection to fundamental rights may qualify as unconstitutional” [Decision 4/2007. (II. 13.) of the Constitutional Court, ABH 2007, 911, 915].
40. „Az őrzők őrzése. A magyar Helsinki Bizottság értékelése a 2006–2007-es zavargásokról” [Guardian of the Guardians. Report of the Hungarian Helsinki Committee on Riots in 2006–2007 in Budapest] [2007] 1 Fundamentum 114.
41. Article 22 of Act 2001:XCV on the status of military personnel in the Hungarian Defence Forces.
42. Articles 40–41 of the Act on the Electoral Process.
43. See in this respect: *Cisse v France*, no 51346/99, § 39, ECHR 2002-III.
44. *Christians against Racism and Fascism v United Kingdom*, no 8440/78, Commission Decision of 16 July 1980, R. 21, 138, 150.
45. Article 8(1) of the ARA 1989 was amended by Article 147(1)(a) of Act 2004:XXIX on Legislative Changes Necessitated by Membership in the European Union. The formula „would entail an unnecessary interference with the order of road traffic” was replaced by the formula „road traffic could not be redirected onto other routes”. The amendment entered into force on 1 May 2004. The previous formula was held constitutional by the Constitutional Court [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442].
46. Article 8(1) of the ARA 1989.
47. *Plattform „Ärzte für das Leben” v Austria*, judgment of 21 June 1988, Series A no. 139, p. 12, § 32.