

33 ‘YOU COULD HAVE PUT IT MORE POLITELY’ – REMARKS ON THE CONSTITUTIONAL REGULATIONS OF FREEDOM OF ASSEMBLY

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A lot of criticism has been voiced against the Hungarian regulatory system of freedom of assembly contesting its obsolescence and need-of-change in the past years. As a scholar researching the topic, I was looking forward to the formulation of freedom of assembly in the new Hungarian Constitution with heightened waiting. In advance I am telling that substantially – except for the need of qualified majority¹ – the constitutional rule of the freedom of assembly is appropriate for me. On the other hand, my opinion is that the new Hungarian Constitution could have been capable of reacting suitably in the light of the 21st century’s challenges to create a new law of freedom of assembly. While writing this study I had double purpose in mind: on one hand, the examination of the suspected new law of freedom of assembly’s regulatory prerequisites and its underlying constitutional provisions. In doing so, I was reviewing Article VIII of the Fundamental Law if it complies with the challenges of the age, namely how it matches other European countries’ constitutions or rather how it serves the standards of international and regional human rights’ documents. In this context I reviewed if the relevant provisions of the Fundamental Law occur any difference from the previous interpretation or legislation. On the other hand, I was endeavouring to mark the issues that could have been differently defined or a better way interfaced with the foreign standards. (Moreover I did not conceive *de lege ferenda* suggestions.)

If we compare the old and the new, Article 62(1) of the former Constitution stipulated that the Republic of Hungary recognizes freedom of peaceful assembly and provides the free exercise of this right. To adopt the law of freedom of assembly, the majority of two thirds of the members of the Parliament present was required – added paragraph (2).

Nonetheless, Article VIII(1) of the Fundamental Law of Hungary – which regulates the freedom of assembly besides the right of association containing the freedom to

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1 Agreeing with András Jakab’s constitutional draft (András Jakab 2011. évi ... törvény. A Magyar Köztársaság Alkotmánya. Magántervezet, szakmai álláspont kialakítása céljából. PPCU FLPS, 10 January 2010, www.jak.ppke.hu/tanszek/alkotm/letolt/alkt.pdf).

organise and the freedom of establishing a party – is merely about that ‘Every person shall have the right to peaceful assembly.’ It’s notable that the pertinent provisions of Hungary’s Fundamental Law do not contain any specifications about the majority of two thirds in the subject.

33.1 IS IT APPROPRIATE TO REGULATE THE FREEDOM OF ASSEMBLY IN THE SAME PROVISION WITH THE FREEDOM OF ASSOCIATION?

It can be a question, if freedom of assembly’s constitutional regulations’ formulation matches the foreign and international practice. According to my research which covers thirty documents, six national constitutions² and three regional documents,³ regulates the freedom of assembly and freedom of association at the same provision. This method is not unprecedented; however it cannot be called as an average jurisprudence. As far as I’m concerned – simply in the light of the fundamental rights’ dogmatics, considering the significance of the fundamental right mentioned above – it could have been more appropriate to regulate each of the fundamental rights in separate provisions.

33.2 THE HUMAN RIGHT-ASPECT OF FREEDOM OF ASSEMBLY

Freedom of assembly developed with the first generation of fundamental rights, which means it is one of the political and communications freedom rights according to its content and function.

The human right-aspect of the freedom of assembly – in relation to the other human rights – was fairly lately accepted.⁴ At the time of the establishment of nation-states, constitutions and law regulated freedom of assembly as a part of legal rights.⁵ According to Drinóczi and Petrétei ‘since the middle of 20th century, international expectations had an effect on each states’ constitution-making and legislation – with rare exceptions – and it can be stated that during the new procedures of drafting and adopting period of constitutions freedom of assembly was spreading as a part of human rights.’⁶ As exceptions, the Greek

2 Cyprus, Finnish, Irish, Maltese, Swedish and Slovenian constitutions.

3 Universal Declaration of Human Rights (1948), European Convention on Human Rights (1950), Charter of Fundamental Rights of the European Union (2009).

4 There is a literary position from 19th century which says, even if there is lack of regulation, it cannot be questioned, that freedom of assembly is free for everyone, not just for those who have political rights.

5 T. Drinóczi and J. Petrétei, ‘a gyülekezési jog a Magyar Köztársaságban’, 1 *Jura* (2002), fn. 13th – Cf. I. Szikinger, ‘A gyülekezési jog szabályozásának mai kérdései’, 1 *Új rendészeti tanulmányok* (1996), p. 21, I. Szikinger, ‘Gyűlésáthatár’, 1 *Fundamentum* (2002) – points the Belgian Constitution of 1831.

6 Drinóczi and Petrétei, p. 22.

Constitution of 1975 and the Portuguese Constitution of 1976 can be mentioned.⁷ The Greek Constitution lives with the phrase 'the Greeks have the right' (*Οι Έλληνες έχουν το δικαίωμα*) to mark the subjects of freedom of assembly (Article 11). Monitoring that the Greek Constitution uses the same or similar phrases for almost every fundamental rights, moreover if the citizenship has significance, the constitution appoints with the word *πολίτης* (for instance: Article 4(3)-(5)-(7) and Article 29(1)).

Because of the similarity it is reasonable to pay attention to the followings: Article 8 of the German Constitution (GG) uses 'every German has the right'⁸ phrase, so in this case it seems like the document regulates the assembly as a legal right; on the other hand, the Law on Freedom of Assembly (VersG) and its jurisprudence is clear and unbroken about the fact that freedom of assembly is essential right for everyone.⁹

Article 45 of the Portuguese Constitution defines the subjects of assembly with the phrase 'citizens' (*cidadãos*). According to the legal rights (for instance: Article 4 – citizenship, Article 14 – protection of Portuguese citizens residing abroad, Article 15(2) – political rights, Article 33 – prohibition of Portuguese citizens' expulsion, Article 121 – right to vote, Article 150 – right of eligibility, Article 164 – exclusive legislation objects), however the document uses the Portuguese citizens (*cidadãos portugueses*) phrase. Nevertheless the Portuguese regulation of the freedom of assembly does not provide Szikinger's line which is preferred by Drinóczi and Petrétei.

According to this issue it is reasonable to refer to former examples in which I mentioned that in a number of European constitutions freedom of assembly (same as other freedom rights) is regulated as the right of 'citizens'¹⁰ or the right of those citizens who belong to the titular nation.¹¹ From this fact the conclusion cannot be that assembly is the part of civil liberties, for the constitutions in the context of civil status use different, specific phrases.¹²

7 According to Drinóczi and Petrétei, fn. 14th, 'Exceptions Include the 1975 Greek and the 1976 Portugese Constitutions'. Cf. Szikinger, 1996 (fn. 5) p. 21.

8 Commonly with freedom of association (GG Art. 9), free choice of place of stay (GG Art. 11), free choice of profession (GG Art. 12).

9 The German Law of Assembly, which was adopted in 1953, uses the 'everyone has the right to' phrase, but several regional Law of Assembly define freedom of assembly as a human right.

10 Art. 26 of the Constitution of Belgian Kingdom ('*Les Belges ont le droit*' and '*De Belgen hebben het recht*'), but the Art. 25 of the Constitution of Luxemburg has mainly same content.

11 See: Art. 88 of the Danish Constitution.

12 S. Ripke interprets the topic as a French-Belgian effect. See more: S. Ripke, *Europäische Versammlungsfreiheit: das Unionsgrundrecht der Versammlungsfreiheit im Grundrechtsschutzsystem aus Grundrechtecharta, EMRK und gemeinsamer Verfassungsüberlieferung*, Mohr Siebeck, Tübingen 2012, pp. 14-43.

In my point of view the constitutions followed by the World War II basically defined freedom of assembly as a fundamental right – different wording but with the same conception.¹³

The conception of the Fundamental Law of Hungary matches the trend, and regulates freedom of assembly as a human right and lives with the ‘everyone has the right’ phrase. The subjects of the right are not purely the citizens of the state, according to the general jurisprudence none of the European states provide only for their citizens the right for assembly.

33.2.1 Peaceful Aspect

Same as the former Hungarian Constitution, the new Fundamental Law of Hungary provides freedom of assembly, but also requires the peaceful aspect of it. The regulation contained in the Fundamental Law of Hungary complies with the foreign and international jurisprudence: twenty-two of the examined legal documents protect exclusively the peaceful freedom of assembly.¹⁴ It is obvious that most of the international documents and the national constitutions recognize not simply the freedom of assembly rather identify and provide the peaceful aspect of it. It is true that the restless freedom of assembly can accomplish the dogmatic criterions¹⁵ of assembly; however it is surely not under the freedom of assembly’s constitutional protection. The peaceful aspect is inseparable and an essential element¹⁶ of the constitutional meaning of the freedom of assembly, not the special limitation¹⁷ of this right.

It is appropriate to mention that Hungarian jurisprudence has not tried to give a handhold to the phrase of ‘peaceful aspect’ yet. In concrete cases the court established, that the certified behaviour did not lead to ruin the peacefulness of the event, therefore it was unlawfully cancelled; however clear requirements have not been laid down.

13 Constitutions are not differentiated according to the part-eligibilities, therefore they don’t have special provisions whether organisations enjoy the right of organization.

14 Besides the Belgian, Cyprus, Czech, Estonian Greek, Irish, Latvian, Lithuanian, Luxembourg, Maltese, German, Italian, Portuguese, Romanian, Spanish, Slovakian, Slovenian constitutions; UDHR, American Declaration of Human Rights (ADHR), ECHR, the Charter of Fundamental Rights of the EU, and the International Covenant on Civil and Political Rights.

15 See more: B. Hajas, ‘A gyülekezési jog tárgya: A gyülekezés fogalma’, 12 *Új magyar közigazgatás* (2009), pp. 36-48.

16 Rényi considers the same, when he mentions that ‘it would be a smaller mistake if the »peaceful-aspect« would be left out of law, not like the lack of prohibition of »armed« assembly. Peaceful assembly [...] generally comes from the freedom of assembly’s right interpretation [...]’, J. Rényi, *A gyülekezési jog – tanulmány a rendőri közigazgatás köréből*, Lampel Róbert, Wodianer és Fiai, Budapest, 1900, p. 155.

17 Contrary to: Drinóczi and Petrétei, p. 29; M. Kniessel and R. Poscher, ‘Die Entwicklung des Versammlungsrechts 2000 bis 2003’, 7 *Neue Juristische Wochenschrift* (2004), p. 424.

The requirement of peace relates to the whole event and it means violence is forbidden against others and material assets, moreover – as VersG uses – loss of 'rebellious'¹⁸ behaviour is needed. According to the facts mentioned above the event cannot be stated 'peaceful' which contains violence – either against others or material assets. Conforming to the German jurisprudence it is enough to lose the peacefulness of the event if the violence is indispensable – not to mention the concrete violence.¹⁹ But this can be only awarded from case to case considering all the circumstances. (Masking the face – even of the masses – cannot support it.)²⁰

To allocate the loss of peaceful-aspect, the overall impression of the event should be violent. One person's or smaller part of participants' violent behaviour will not lead to lose the peaceful-aspect, until mass of the participants take part in the breach of peace or someone assume solidarity with them. For instance the people, who do not take part in the breach of peace, close the way from police to protect the riots and they prevent the appropriate fight or support the riots.²¹ The passive introspection of the participants cannot be considered as taking part in solidarity.²²

The target of violence is irrelevant, so if there's violation against person or object it can state the loss of peaceful-aspect even if it is directed to the participants of the event. However the violence is caused not by the participants, loss of peaceful-aspect cannot be stated.

It is understood that the most important attitude of loss of peace is physical violence which is committed by the participants of the event and it is against person or object.²³ Demonstrations do not lose the peaceful-aspect if participants live with freedom of expression in a very direct way – for instance about the police or government – because

18 VersG § 5. Nr. 3, § 13. (1) No. 2.

19 G.M. Köhler and C. Dürig-Friedl, *Demonstrations- und Versammlungsrecht: Versammlungsgesetz mit Auszügen aus Grundgesetz, StGB, StPO und OWiG, Polizei- und Ordnungsgesetze und Bannmeilengesetze der Länder, Textausgabe mit Erläuterungen*, C.H. Beck, München, 2001, Art. 8. GG number of margin 16.

20 A. Dietel et al., *Versammlungsgesetz, Kommentar zum Gesetz über Versammlungen und Aufzüge*, Heymann, Köln – München 2008) § 1, number of margin 14.

21 R. Keplinger, *Versammlungsrecht, Kurzkomentar zum Versammlungsrecht samt Judikatur*, Linde, Wien 2002, p. 38.

22 The Constitution Protection Office issued a message in autumn of 2006, in which it warned the citizens about the possible criminal sanctions according to the passive participation in unlawful activities (psychical accessory). For the summary of the Ombudsman's test (OBH 4583/2007) according to the topic see: B. Hajas (Ed.), *Gyülekezési jogi projekt [Á]OB project booklets, 2009/1.*, Budapest, Országgyűlési Biztos Hivatala 2009, p. 91.

23 According to the topic it is appropriate to mention that the guiding phrase is not in the criminal meaning ('violence', 'violent behaviour'), rather in the vulgarly meaning: 'actual violence'. It turns out, that the possibility of violence is not enough. The use of violent, offensive or degrading phrases, will not lead to the loss of peaceful-aspect, whether it is on the placards, or participants shout them. So it might be frightening, but it will not lead to the loss of peaceful aspect, if participants shout: 'Get armed! Get armed!'

it is not lucky to yell at the police, freedom of political expression is not forbidden, it is part of these events.²⁴

The requirement of peacefulness applies to the demonstration's measure, not the purpose or object; therefore a demonstration will not become restless, if participants endanger public policy, social peace or damage peace – against a neighbour country declaring war – with their requirements.

The criteria of peaceful aspect does not mean that the demonstration has to be free from feelings, conflicts or anger with passengers and the loud debates of the event will not make it restless.

Although the demonstration was announced, restless assembly cannot be under the protection of Article VIII of the Fundamental Law of Hungary – by contrast, not announced but peaceful demonstrations. Restlessness is not a synonym of infringement, not even of impact of criminal law, so infringement or crime commission will not lead in particular to the lack of peaceful-aspect.²⁵ As a summary and simplification, the requirements of assembly's peaceful-aspect is the prohibition of violent behaviour.²⁶

The loss of peaceful-aspect is not causing any penalty, however restless demonstrations cannot stand under the protection of the Fundamental Law of Hungary. (Ever since this method was suitable if an originally peaceful demonstration lost its aspect and it could result disband.²⁷ However disband is the final device, if other methods are useless to keep the demonstration's peaceful-aspect.²⁸).

There is a strong connection between peaceful-aspect, prohibition of armed forces appearance and requirement of unarmed appearance. The parliament did not capture this criteria as important to fix it in the previous Constitution of Hungary or in the new Fundamental Law – neither in 1989, nor in 2011. However, eleven European or Northern-American constitutions²⁹ and HRAC gives protection to the unarmed, weaponless assembly.

It would be incompatible with the peaceful-aspect – as a grammatical interpretation – that participants of the demonstration would take part armed. According to Article 12(2) of the Law of Assembly – in absence of constitutional provisions – this trivial prohibition is repeated, moreover Article 14(1) second indent defines as a cause of disband if 'partici-

24 Supreme Court judgment No. Kfv. 39.077/2006/6. In the actual issue anti-governmental demonstrators were aware of their event's lawfulness and the unlawful procedure of Police; and they started to offend the acting policemen.

25 However it does not mean, that demonstration should not be disbanded, if it carries out a crime or call for a crime.

26 Dietel et al., *op. cit.* § 1, margin number 140.

27 Decision of the Constitutional Court No. 55/2001 (XI. 29) AB, ABH 2001, p. 442.

28 BVerfGE 69, p. 315.

29 Thus Belgian, Danish, Greek, Irish, Lithuanian, Luxembourg, German, Italian, Portuguese, Romanian and Spanish constitutions.

pants of the demonstration appear by displaying a deadly weapon or by carrying a deadly weapon'. Article 15 lit. b) of the Law of Assembly also defines 'by displaying a deadly weapon' and 'by carrying a deadly weapon' phrases in appearance.

As for the experiences it is almost sure that participants' appearance 'by displaying a deadly weapon' or 'by carrying a deadly weapon' will lead to the loss of peaceful-aspect. The Law of Assembly's ministerial justification mentions 'to keep the peaceful and legal aspect of the demonstration, the Proposal – same as the international jurisprudence – prohibits the 'by displaying a deadly weapon' and 'by carrying a deadly weapon' appearance [...].'³⁰ The purpose of prohibition of carrying a weapon is to protect the process of the demonstration from violence and to minimize the danger. On one hand, this is necessary because of the protection of public policy and public security. On the other hand, the communication law aspect of freedom of assembly protects free communication: either individual behaviour or social process. It is easily acceptable that in the shadow of violence, free communication cannot be recognized.

A question appears in this context: why did not Fundamental Law of Hungary take the weaponless criteria as a basic phrase of freedom of assembly according to the mentioned foreign examples? It is almost impossible to define the purpose of the constitution-makers, for example Draft Resolution No. H/2057 of the Parliament does not contain any referrals to Hungarian Constitution's provisional principles and during the adoption of the Fundamental Law of Hungary it was not a question of interests, and it was not mentioned either in the *ad hoc* committee work, or in the Parliament's debate.

33.2.2 'Recognizes and Provides' versus 'Has the Right to'

It is outstanding, that the former Hungarian Constitution used 'recognizes and provides' terminus, while the new Fundamental Law of Hungary mentions 'has the right to' phrase in Article VIII. This regulation method is also known in foreign constitutions and international documents, for those regularly use 'has/have the right to',³¹ 'eligible',³² 'shall apply in',³³ 'it is free to'³⁴ etc. forms. It is a question if the provision's meaning changed comparing to the old Hungarian Constitution, namely: did Article 62(1) have the meaning which is not equal with the Fundamental Law of Hungary – not only Article VIII (1)! – provision? The term 'recognizes' does not have this differentiated meaning.

30 C.f. the detailed explanatory memorandum to Art. 12 of the Law of Assembly.

31 The EU Charter of Fundamental Rights, ADHR, UDHR, Estonian, German, Portuguese, Danish, Finnish, Belgian, Italian, Greek, Lithuanian constitutions.

32 Thus in the Danish and Finnish constitutions.

33 See: Canadian and Cyprus constitutions.

34 E.g.: Romanian and Spanish constitutions.

We have to scan the question of the lack of the term ‘provides’: does Article VII(1) of the Fundamental Law of Hungary replace the relevant provision of the previous Hungarian Constitution, or is there any rule of the Fundamental Law which makes unjustified or unnecessary the previous regulation? The question is interesting, for seven European constitutions³⁵ use the phrase ‘provides’ according to the practice freedom of assembly and the Latvian Constitution regulates the protection of freedom of assembly.

According to Article I(1) of the Fundamental Law of Hungary, ‘[t]he inviolable and inalienable fundamental rights of MAN shall be respected.’ It shall be the primary obligation of the state to protect these rights. To ensure the basic human rights this provision regulates negative and positive behaviour of the state. On one hand the respect of fundamental rights obligates abstention³⁶ – without determinate consignee, from everyone, from public body, from natural persons, from legal persons also –, on the other hand protection of fundamental rights shall be an active behaviour of the state. So the Fundamental Law of Hungary – according to every fundamental rights – regulates that every right has a subjective side (the chance to exercise the exact right, which needs to be respected by everyone) and an objective side, which means the obligation of the state according to the rights’ protection and application.

In most of the provisions of the Fundamental Law, the obligation of the state’s protection and application of fundamental rights does not appear – notwithstanding Article 62(1) of the Hungarian Constitution. Article I(1) of the Fundamental Law of Hungary fills this gap, for it makes the protection of fundamental rights the object of general obligation of the state.

As the Constitutional Court of Hungary pointed out in an early decision³⁷:

the state’s obligation is not finished with abstention from infringement of subjective fundamental rights, but also contains to take care and provide the conditions for the proper application. Human exercise their fundamental rights

35 Thus the Czech, the Irish, the Polish, the Luxembourg, the Swedish, the Slovakian and Slovenian constitutions.

36 Art. 8 of the former Constitution defined ‘shall respect’ as the mission of the state.

37 The Constitutional Court of Hungary in Decision No. 22/2012 (V.11) AB pointed that ‘whether the same provisions appear in the previous Constitution and in the Basic Law of Hungary it is useless to justify the transposed principles from early decisions, rather justification is needed where these principles are ignored’. However the Constitutional Court in its Decision No. II/3484/2012 AB highlighted that the provisions of the decision concerned are ought to be examined according to the 4th Amendment of the Fundamental Law in connection with the usability earlier resolutions. The Court stated that ‘the Constitutional Court of Hungary can only use repealed resolutions if they define them as a source; they shall refer to appropriate amount operational, textual parts or quote the arguments or principles. The justification and constitutional sources shall be knowable and verifiable in a democratic state governed by the rule of law, moreover legal security shall be transparent and followable. Public argument is the basis of the decision’s justification. The Constitutional Court of Hungary always examines’ usability form early resolutions from case to case, in the context of each, actual matter.’

in the context of their individual freedom and personal needs. On the other hand – besides the protection of subjective fundamental rights –, the state needs to ensure the life situations and values themselves also, they shall be protected according to other fundamental rights, not only related to the personal needs. For the state the protection of fundamental rights is part of maintenance and operation of the whole constitutional order. Having regard to other fundamental rights and constitutional missions, the state establishes the required legislation and organisation conditions; moreover it provides the most favourable interests of each rights promoting the consistency with fundamental rights. According to the holder of a fundamental right, and the criteria of the state, the fundamental right's subjective and objective side may be different. In addition the topics of a subjective basic right's protection, the state can define the same right's objective side of it. This matter comes alive if the individual exercise of a freedom right does not seem endangered, but overall the freedom or the life situation guaranteed by the basic right is threatened.³⁸

From Article I(1) of the Fundamental Law of Hungary comes the obligation of the fundamental rights' protection, which requires a system of criteria for the area of these rights. It contains the obligation of regulation (establishment of organizational and proceeding securities), the obligation of financial support, and the obligation of existing or required protection of institutional forms of the Fundamental Law of Hungary from the aspect of fundamental rights' enforcement (and also residence from the operational interference), and the protection of the forums are also part of the obligation where impairment of fundamental rights can be remedied, but for the state it's a general obligation to protect the whole system of fundamental rights (as a system of values). It should be pointed out that objective obligation of fundamental rights' protection supposes the existing of the rights' subjective side, but typically do not impose subjective rights on the side of individuals, therefore they cannot be directly enforced.

The state's obligation for fundamental rights' protection is wider than 'the possibility of operation', the appropriate fundamental right shall be taken under protection generally, in an abstract way as a value. In principle, every fundamental right – as 'constitutional values' – has an institutional side, but as a priority, the protected values contain the life and human dignity, the pluralism of opinions, or the freedom of conscience. Moreover it comes from the fundamental right's nature, that what kind of and how much state obligation is needed to exercise it.

As the Constitutional Court of Hungary pointed out in Decision No. 30/1992 (V. 26):

38 Decision No. 64/1991 (XII. 17) AB, ABH 1991, pp. 297, 302-303.

[b]esides the subjective side of the individual freedom of expression, Article 61 of the Constitution mentions the obligation of the state is to provide the origin requirements and sustainable operation of the democratic public. The freedom of expression's objective side does not only refer to freedom of the press, educational freedom, etc., but refers to the side of institutional system, which puts the freedom of expression generally next to other protected values. Therefore freedom of expression's constitutional borders should be defined to take into account on one hand the expresser's subjective right, on the other hand the interests of the public – origin and free figuration – from the aspect of democracy.

Decision No. 55/2001 (XI. 29) AB of the Constitutional Court stated that there are positive obligations of the state according to the peaceful freedom of assembly to provide the stability of this institution – as a prior fundamental right of communication. Freedom of assembly is also needs to be protected from the state's unauthorized intervention and for instance from the demonstrator who is against the demonstration or disorderly people. The Constitutional Court of Hungary pointed that the authorities have to provide the lawful demonstrations, even with force, if it is necessary and have to prevent from other's disturbance.

It is appropriate to mention that comparing the objects of other communication rights, assembly cannot reach the level of 'institutionalness' like freedom of the press, for its limited in time. That is why my opinion is that Article I(1) of the Fundamental Law – and also Article 1 of the Law of Assembly – protects the exercisers of freedom of assembly (organiser, manager, director, participant), not the assembly itself.

The European Court of Human Rights in Strasbourg – also referred by the case-law of the Constitutional Court of Hungary – mentioned that the limit of the peaceful freedom of assembly cannot be the possibility of a violent demonstration against the peaceful one, or the accession of extremes whose purposes are not peaceful, or the extremes appearance with violent intentions. The peaceful freedom of assembly shall be protected, moreover the exercise of it must be provided even if there is the possibility that demonstration will turn unrest,³⁹ reasons beyond the organisers.

After all, it can be stated that the different definitions used by Article VIII(1) of the Fundamental Law of Hungary – arising from its Article I and inspired by the jurisprudence of the European Court of Human Rights – will not bring change according to the obligation of state's institutional protection, the jurisdiction of freedom of assembly in connection with mission of the state.

39 *Christians against Racism and Fascism v. the United Kingdom*, No. 8440/78, Commission decision of 16 July 1980, Decisions and Reports 21, p. 138.

The provisions of the Fundamental Law of Hungary do not mention – notwithstanding the resolution of the Parliament about the new constitution's preparation – that freedom of assembly's rules or constitutional securities shall be regulated by qualified majority. But the reasons of this change do not turn out either from the explanatory memorandum of the Fundamental Law of Hungary, or from the discussions in the Parliament. It is notable that András Jakab's own constitutional draft⁴⁰ also proposed to leave out Article 62(2) of the previous Hungarian Constitution, for the object would not contain the qualified majority regulations, because the ex post review of conformity with the Fundamental Law of Hungary in the Constitutional Court's procedure is able to keep the level of the protection of fundamental rights. [Katalin Szili's legislative proposal (T/2628) used the regulation of the Hungarian Constitution without any changes.] Basically I agree with András Jakab that the Constitutional Court can keep the level of protection of fundamental rights, however I would also mention the jurisprudence and the effect of the European Court of Human Rights to Hungarian judicial interpretation of the freedom of assembly – it has the same importance.

33.2.3 *Unexploited Opportunities*

Another exciting topic is what kind of regulation opportunities have been unused by the Parliament according to Article VIII?

Limitation of Constitutional Reasons

If we have a look at the foreign constitutions and international law documents, we experience that freedom of assembly's regulation is differentiated; the basic requirements and limits are also stated, not like the 'minimalist' Fundamental Law of Hungary. Accordingly, it follows that it could be possible to make special rules to limit freedom of assembly not only because of another fundamental right; so constitution-makers could limit it with the mediation of another institution with underlying instruments, even if it is only an abstract value. According to my analysis, out of thirty documents, twenty contain at least one reason to limitation, or authorization of legislation to limitation. We can say, it is an average tendency, that a number of provisions can limit freedom of assembly – besides other people's rights and freedom – because of public policy,⁴¹ including this we can mention: public morality, public security or traffic. Unfortunately regulations in force have a lot of

40 J. András, 'évi ... törvény. A Magyar Köztársaság Alkotmánya. Magántervezet, szakmai álláspont kialakítása céljából. PPKE JÁK', 2011, január 10, www.jak.ppke.hu/tanszek/alkotm/letolt/alkt.pdf.

41 About the term of public policy, see: K. Karsai, *Az európai büntetőjogi integráció alapkérdései*, KJK-Kerszöv, Budapest 2004, pp. 204-207, moreover K. Karsai, 'A közrend európai (jogi) fogalmáról', in Gy. Gaál and Z. Hautzinger (Eds.), *Rendészeti kutatások – a rendvédelem fejlesztése*, Pécsi Határőr Tudományos Közlemények XII, 2011, p. 29.

challenges according to the presence of limitation clauses. The so-called prohibition cause ‘the traffic cannot be provided on another itinerary’ is a public security clause in most of the cases; and Police often prohibits demonstrations with less participators on the same itinerary according to bigger ones.⁴² In my opinion it could be greater to approach from the other side the relation between public policy and traffic policy; namely which level of limitation of traffic can endanger public policy or public security.⁴³ It is reasonable to mention that prohibiting demonstrations which seriously endanger public policy or public security – whether or not the effect on traffic – can be needed and proportional limitation of freedom of assembly. However, the Hungarian references refrain from public policy clauses. This limitation of freedom of assembly can provide a higher standard⁴⁴ according to and besides the *Brokdorf* decision of the German Constitutional Court.⁴⁵

According to my opinion, if the Fundamental Law of Hungary had defined the most important regulation points of freedom of assembly, it would have been a useful for the legislator to recodificate the topic. It is notable that international and regional human rights documents, to which Hungary is a party, allow freedom of assembly’s legal limitation according to abstract values without any constitutional provisions.⁴⁶

‘Without Permission’

According to my analysis, one third of the documents regulate that it is not required for exercising freedom of assembly to allow⁴⁷ or announce⁴⁸ the demonstration. Latvian, Italian and Spanish constitutions prominently regulate the need of announcement of the

42 For the first time the Commissioner for Civil Rights in AJB 6021/2009. report had a critics about the jurisdiction of the ‘same itinerary’ which he mentioned as inconsistent; and laid down that measures of the Police caused maladministration according to absence of discrimination in connection with the prohibition of demonstrations on Andrassy Avenue and on Hero’s Square. The ombudsman’s statement could be complemented with that, the judges’ jurisdiction seems to be similarly inconsistent.

43 H. Hofer-Zeni, ‘Versammlungsfreiheit in Österreich’, 11(13) *Europäische Grundrechte Zeitschrift* (1984), p. 360.

44 BVerfGE 69, p. 315.

45 In Hungarian summary: P. Sólyom, ‘Demokrácia és gyülekezési szabadság’, 1 *Fundamentum* (2007), pp. 12-13.

46 Art. 12(2) of ECHR stipulates: No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State. ICCPR Art. 21. second sentence: No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others..

47 See: Belgian, Czech, Danish, Finnish, Luxembourg, Portuguese, Spanish, Slovakian constitutions.

48 According to the German Constitution, freedom of assembly can be practiced without notification or permission. (According to the GG., outdoor demonstrations can be limited, and VersG. prominently requests these events’ notification.)

demonstration. The lack of provision in the Fundamental Law of Hungary is not causing any regulation and jurisdictional difficulties, for Decision No. 55/2011 (XI. 29) AB of the Constitutional Court, that obligation for announcement is only needed if the demonstration is held on public ground – public ground means: road, street, square according to Article 15 lit. a) of the Law of Assembly. The availability for everyone means that the participants and other people have to be capable of using public grounds. The opportunity of using public grounds is also a requirement of another fundamental right called freedom of movement. Freedom of movement's most frequent scene is road and public ground. The practice of the Hungarian Constitutional Court is consistent about that state's obligation to provide and to protect fundamental rights, and it is not finished with abstention from infringement; obligation also contains for the state to provide the requirements for application of these rights. To prevent freedom of assembly and freedom of movement from any conflicts, authorities shall have access by legislation to provide both of the fundamental rights' application and if it is not possible, the state's obligation is to limit one of them only on the most necessary level. After all, it is reasonable for authorities to get information in time about demonstrations held on public ground, and announcement in advance also serves this purpose. I can partly agree with the Constitutional Court's analysis, because announcement is essential for freedom of assembly's exercise, not for freedom of movement.

We can find interesting regulations in some European constitutions. At first it gives total freedom for freedom of assembly and at the second look the constitutions define special regulations for demonstrations held on public grounds, or give authorization for special regulations. According to this, in the Belgian Constitution, outdoor demonstrations are under the regulation of the Law of Police, then Greek Constitution allows presence for policemen during outdoor events, last but not least the Czech and Slovakian Constitutions only allow presence of police during demonstrations held in public places.

33.3 SUMMARY

After having taken a look at the content of the constitutional regulation – according to the international documents and the case-law of the Hungarian Constitutional Court – it does not bring any change except for the lack of so called two-thirds of fundamental rights. The lack of provisions that could make Article VII complete, does not cause any jurisdictional difficulty; it could have made sense about the regulation principles of the new Law of Assembly, about the institution's development, and about definition of legislation's notion. It is notable that the legislator chose the shortest, conflict-less choice of words about the definition which is equivalent to other countries' constitutions; it is a 'security' definition, saving it from home and foreign criticism.

Since the Fundamental Law of Hungary is in force, the Constitutional Court of Hungary used Article VIII(1) at once in a decision based on a constitutional complaint initiated by political party '*Lehet Más a Politika*' ('Politics Can Be Different').⁴⁹ During these two years there was not any relevant problem for which the Constitutional Court of Hungary should have changed its practice relating to the freedom of assembly.

⁴⁹ Decision No. 3/2013 (II.14) AB of the Constitutional Court.