39 Restrictions on the Freedom of Assembly

Seeking the Domestic and International Legal Practice on the Conflict between Rights and Freedoms of "Them" and "Others"

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39.1 Introduction

This essay primarily focuses on the exercise of the right of assembly and the protection of the rights of others and its possible restrictions. At the same time, the essay forms part of a greater research that aims to identify typical cases where in practice real and supposed conflicts occur between certain basic human rights laid down in domestic constitutions and international treaties. We identify these cases to demarcate them and to search for possible methods of resolving these conflicts. A main point of the research is the analysis of assembly-related basic human rights conflicts, with special focus on the freedom of assembly and the "rights of others" – for instance the right to privacy and the rights of communities. The other point of inquiry is the examination of certain conflicts that appear in legal practice related to the right to life and the right to human dignity. As a result of the research, we aim to identify intersections and methods that can help the development of a legal practice that is in conformity with international standards and in accordance with domestic constitutional arrangements, i.e. to properly apply the theoretical background of resolving fundamental rights conflicts in practice.

In the following, we shall introduce selected domestic and international practices to highlight the theoretical background of the restriction of assemblies. As mentioned above, we limit this examination to the freedom of assembly and the "rights and freedoms of others", with a special focus on the right to privacy, the content and limitations of which – most likely due to its intangible nature – is difficult to determine. When comparing the theories underlying the issue of restricting the freedom of assembly, we will proceed by analyzing decisions of constitutional value in both the domestic and international context.

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39.2 Introduction to the Restrictions on the Freedom of Assembly – in Light of the Jurisprudence of the Constitutional Court of Hungary and the Legislative Procedure

When rifling through different countries' constitutions and international law documents it is apparent that the restrictions on the freedom of assembly are also spelled out, in contrast with the laconic provisions of the Hungarian Basic Law on the freedom of assembly.[1] Not only do the former documents set forth the basic principles of exercising the freedom of assembly, they also determine the applicable restrictions. This means that there is a possibility to lay down special rules determining restrictions on the freedom of assembly, based on which, the legislator – without prejudice to the special protection of communication rights – can not only restrict the freedom of assembly to enforce and protect other basic rights, but may also act to safeguard an abstract value or legal institution.

As far as Article 11 of the European Convention of Human Rights[2] is concerned it is important to point out that a restriction of a human right is lawful in case three requirements are met simultaneously. Firstly, the restriction has to be defined by the law.[3] Secondly, the reason for the restriction shall be stated in Paragraph (2) Article 11 of the Convention. And thirdly, the restriction shall be *necessary* in a democratic society. As a consequence of the third requirement, the European Court on Human Rights[4] also underlined the necessity of a *pressing social need* to be an additional restriction.[5]

In its Decision No. 30/1992. (V. 26.) the Constitutional Court of Hungary[6] carried out a comprehensive examination of the rules – derived from the Constitution – related to the restriction of fundamental rights, concluding that communication rights assume a special position among constitutional rights.

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1 Art. VIII. para. (1) of the Basic Law of Hungary: Everyone shall have the right to peaceful assembly.

2 Hereinafter referred to as Convention.

3 Art. 11 para. 2 of the Convention: 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.
Second phrase of Art. 21. of the International Covenant on Civil and Political Rights (hereinafter referred to as: ICCPR) 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.

4 Hereinafter referred to as: ECHR.

5 Without citing exact reference of the decision of the ECHR: Zierl, Hans Peter: Die Präventive Untersagung von Versammlungen. Zeitschrift für Verwaltung 3/2001. 362.

6 Hereinafter referred to as Constitutional Court.

In this decision[7] the Constitutional Court reviewed the rules governing the restriction of basic rights stemming from the Constitution, while also establishing the prominent status of communication rights (freedom of expression, freedom of thought, conscience and religion, freedom of assembly) within the system of fundamental rights. These communicational rights are not absolute (non-restrictable), yet such a restriction may only take place – in accordance with (3) Article I of the Basic Law of Hungary – through law, for the purposes of enforcing or protecting a constitutional value or other basic right, only to the extent strictly necessary and proportionate to the aim pursued, while respecting the essence of the restricted fundamental right. In respect of communication rights, going beyond the "basic law-test" the principle of affording restrictive provisions a narrow interpretation must also be recalled.

In support of the above, Decision No. 55/2001. (XI. 29.) of the Constitutional Court[8] specifically pointed out that the right of assembly is not an absolute right. The freedom of peaceful assembly is a prerequisite and a fundamental value of a democratic society, while events held on the basis of the right of assembly are inextricably linked to the value of democratic public opinion formation. These events make it possible for the citizens to criticize the political process and to affect through protest. Peaceful events represent a value by consolidating the political and social order and supplying legitimacy to representative bodies. Demonstrations and protest actions also indicate existing tensions in society towards the government and representative bodies, making it possible for authorities to take appropriate action in due time to reduce the causes of such tensions. A democratic society cannot choose to silence protests through unnecessary and disproportionate restrictions, for such restrictions on political freedoms not only affect citizens wishing to exercise their rights, but also the society as a whole, including those these restrictions are addressed. The purpose of events held on the basis of the freedom of assembly is for citizens to formulate a joint opinion, share their views with others and let their voice be heard.[9]

It is important to mention, that restrictions laid down in Act III of 1989 on the Freedom of Assembly at the time the law was passed – if not in dogmatically flawless form, but nevertheless – established a coherent and closed system. According to its provisions, events that were held despite the prohibitive decision shall be dissolved, including events not notified to the authorities, those that were held differently than stated in the notification, an finally, those events that breached 2 § (3) of the Assembly Act.

The amendment of the above mentioned reasons for prohibiting the assembly started to chip away at the closed structure of the system: firstly, Article 4. of the Assembly Act banning assemblies around the Parliament was repealed, furthermore, the phrase "would

7 Decision No. 30/1992. (V. 26.) of the Constitutional Court.

8 Decision No. 55/2001. (XI. 29.) decision of the Constitutional Court.

9 Decision No. 4/2007. (II. 13.) of the Constitutional Court, ABH 2007, 911, 914.

disproportionately obstruct the order of traffic" in Article 8 Paragraph (1) was also replaced by the clause "if traffic through other routes cannot be guaranteed" rendering the former subjective aspect of prohibition more objective. The most significant amendment of the Assembly Act took place on 29 May 2008 when the Constitutional Court with Decision No. 75/2008. (V. 29.) annulled Article 14 Paragraph (1) of the Assembly Act that regulated the causes for dissolving an event.[10] As a result, the possibility of holding an event with late notification or even an unannounced gathering was created. Since then, it has become apparent that these amendments have caused severe difficulties for the application of the law, with which it may not be able to cope.

39.3 General Restrictions on the Right of Assembly[11]

The Assembly Act defines two general limitations to the right of assembly set forth under Article 2 Paragraph 3 where it is stated that the exercise of the right of assembly cannot constitute committing a crime or to incitement to commit a crime and may not result in the violation of the rights and freedoms of others. Hungarian judicial practice is not clear on whether these limitations may lead to the prohibition of an event, or may 'only' prevail as reasons for dissolving the assembly as specified in Article 14 Paragraph 1 of the Assembly Act.

39.4 Exercising the Freedom of Assembly Cannot Constitute a Crime or Incitement to Commit a Crime

As far as the above mentioned general limitations laid down in the Assembly Act are concerned, it is worth mentioning that there is no judicial practice regarding the interpretation of the provision of the Assembly Act reading: "The assembly shall not constitute a crime, or incite someone to commit a crime". It would be useful to analyze the parliamentary debate on this provision of the Act in order to be able to determine the content and consistently apply its rules.

In our view, the correct understanding of this provision is a broader interpretation of incitement under criminal law, since it has been formulated as part of the context of crimes discussed in the Special Section of the Criminal Code. Moreover, reasons excluding culpability for preparation for a crime are not considered (e.g. voluntary restitution) by the Assembly Act either.

10 75/2008. (V. 29.) decision of the Constitutional Court, ABH 2008, 651.

11 See more about the restrictions on freedom of assembly in the practice in: Barnabás Hajas: Utcák, terek szabadsága. Századvég Publishing, 2014. 246-288.

The Assembly Act – unlike in case of a commitment of a crime – does not afford any relevance to cases where the exercise of the freedom of assembly or the assembly itself constitutes a misdemeanor, or if the person taking part in the assembly commits a misdemeanor. This way if the mere fact of holding the event or the behavior of organizers, leaders and participants' contravenes the provisions of Act II of 2012 on offences, the procedure in relation to offences and the offence record system,[12] this cannot be considered to the disadvantage of the assembly. Accordingly, the legality of the assembly itself remains unaffected by the fact that for example that the behaviour of the vast majority or even all of the participants constitutes a misdemeanor. This does not mean that the assembly would provide protection or exemption against prosecution for the misdemeanor: the authority shall carry out the necessary procedures against the offenders in such cases. In this regard, the identification of offenders may prove to be difficult. However, it shall be noted that searching for certain offenders, or taking measures against them during the assembly shall not lead to the dissolution of the event. With other words, the identification of offenders, or the limitation of personal freedom on the basis of Act XXXIV of 1994 on the Police Department and Act on Offences can only take place in such a way that it causes the least possible restriction on the exercise of the freedom of assembly. However, following the end of the event (or its dissolution), if the general conditions are given, nothing precludes instituting proceedings against the participants.

39.5 Exercising the Freedom of Assembly May Not Result in the Violation of "the Rights and Freedoms of Others"

According to the motivation of the Assembly Act, any violation of the rights and freedoms of others can amount to committing a crime, but such a violation can also occur without committing a criminal offense. It was therefore appropriate to mention the latter protected interests separately, employing the phrasing used in the International Covenant on Civil and Political Rights.[13] In the parliamentary debate of the Assembly Act a proposal was submitted which claimed that any reference to the rights and freedoms of others is pointless since the freedom of assembly can only be exercised by violating the rights of others, because, for instance street traffic[14] is interrupted by almost all demonstrations. This argument has resurfaced a number of times in debates. Minister of Justice, Kalman Kulcsar countered by stating that "it is possible to exercise and abuse all rights. Law always provides for the correct use and purpose of rights. And here it is obviously the proportionality that

12 Hereinafter referred to as Act on Offences.

13 Hereinafter referred to as: ICCPR.

14 In response, the Minister referred to the proposal on Art. 6 para. (1) on assemblies causing disproportionate disruption to traffic.

is at play, the reconciliation of various rights, and in particular cases the abuse of rights may also occur."[15] By putting 'the rights and freedoms of others' clause in this context "the matter of proportion can be sufficiently managed by the law".[16] The Minister also stated that judicial practice will develop the appropriate level of protection should any inconvenience or interference arise in the interpretation of defining these proportions. So far, the ECHR did not expressly interpret the right of assembly in light of these conditions.[17]

István Kukorelli pointed out in his dissenting opinion to Decision No. 55/2001. (XI. 29.) of the Constitutional Court[18] that there may be cases where exercising the right of assembly may result in the violation of the fundamental rights of others. By way of example, he mentioned that a public event may violate rights deriving from the right to human dignity, such as general personality rights and the right to privacy, where "participants deliver their opinion against and about other individuals in a way that those affected cannot avoid hearing and listening to statements that adversely affects them" ('captive audience').

This approach is compatible with the argumentation set forth in Decision No. 95/2008. (VII. 3.) of the Constitutional Court stressing that

> these are times when expression not only violates the sensitivity, sense of dignity of certain people, but also violates their constitutional right. For example, when the offender manifests extreme political beliefs in a way that a person belonging to the group of victims who is forced to listen feels intimidated, and there is no way to avoid the hearing the speech (referring yet again to the "captured audience" clause). In this case, the right of this certain individual is worthy of protection so that he or she has the possibility to choose to listen to or otherwise ignore the opinions that might violate his rights.[19]

At the same time, there are those who take another point of view, claiming that events aimed at inciting hatred against racial, ethnic, religious or other groups or otherwise motivated by obvious violent purposes should be deemed illegal. In this case – since the exercise of the freedom of assembly would amount to a disproportionate violation of the rights and freedoms of others, in particular through negative discrimination – a prohibition may be justified. However, there is a fine line between the necessity of restrictions for the protection of the rights and freedoms of others and the encroachment upon the freedom

15 Minister of Justice Kalman Kulcsar's expose on 28th of June, 1985, Book III. Records of the Parliament.

16 Minister of Justice Kalman Kulcsar's expose on 28th of June, 1985, Book III. Records of the Parliament.

17 See also: *Wingrove v. the United Kingdom* (Appl. No. 17419/90), *Otto-Preminger-Institut v. Austria* (Appl. No. 13470/87) ECtHR cases. In. Hamilton, Michael – Jarman, Neil – Bryan, Dominic: Parades, Protests and Policing: A Human Rights Framework (Belfast: Northern Ireland Human Rights Commission, 2001) 33-35.

18 Decision No. 55/2001. (XI. 29.) of the Constitutional Court.

19 Decision No. 95/2008. (VII. 3.) of the Constitutional Court, ABH 2008, 782, 789-790.

of assembly and the freedom of expression. According to the Venice Commission, the demarcation line is overstepped, when violence occurs.[20]

The above notwithstanding, we often hear formal statements referring to this provision of the Assembly Act claiming that mentioning the rights and freedoms of others in this context is pointless, because the exercise of the right of assembly can only be realized through the breach of the rights of others anyway. Such an approach would lead to a complete restriction on the freedom of assembly, and this way, exercising this basic right would become impossible. In fact, the current phrasing employed by the Assembly Act – echoing the formulation used in international treaties – does not refer to an absolute restriction. Instead, it aims at resolving the possible conflict between basic rights – in this case between the freedom of assembly and other basic right through an important element, the requirement of proportionality. In other words, this phrase of the Assembly Act is none other than the one that ensures that the majority does not have to suffer a disproportionate violation of its rights. In its order, the Administration and Labour Court (Budapest) arrived at a similar conclusion. It stated that

> the street referred to in the notification is a narrow area, the density of buildings, the lack of street connections between residential houses would result in a situation where locals would be forced to face the assembly (and related phenomena) on a daily basis without the possibility to escape it. There is no doubt that a simple inconvenience arising from the exercise of rights by others is no reason to restrict the freedom of assembly. However, the exercise of a basic right that is continuous, and lasts throughout weeks, specifically in residential environments, injuring the right to privacy would be a legitimate reason for restriction. Such an event would result in the violation of the rights and freedoms of others and this is the reason why these events can be restricted.[21]

Analyzing the question from another point of view, we believe that although the relevant clause of the Assembly Act would be suitable to serve as – a very narrowly defined – restriction of the exercise of the freedom of assembly that violates public policy, public security and public order without it amounting to a crime. For this, however, the following cumulative conditions must be met: the meaning of 'others' and their 'right and freedom' must be defined just as precisely as the specific and disproportionate violation that affects the same. Thus, in cases where no one can be concretely identified as belonging under the

20 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 §29-30.

21 Decision No. 5.Kpk.46.118/2013/7. of the Administrative and Labour Court, Győr.

meaning of 'others', whose – likewise concrete – human rights were disproportionately violated, the above mentioned phrase of the Assembly Act cannot be applied.

This contradicts a decision of the Administrative and Labour Court, which, albeit not followed by recent court decisions, repealed an order issued by the police prohibiting an event on the grounds that it would lead to a significant breach of public order and public peace. According to the Court, a prohibitive order may not be based on reasons outside Article 8 Paragraph (1) of the Assembly Act. Article 2 Paragraph (3) of the Assembly Act sets forth the reasons for dissolving the event, however, these reasons cannot be invoked to justify prohibiting the event beforehand. There is a recent court decision that linked the 'rights and freedoms of others' formula – as a reason for prohibiting the event – to public policy.

The court stated that

> in the case, the exercise of the right of assembly competes with other people's rights such as the right to human dignity and with the public interest of public policy – which involves public security and public peace. The court stated that a (presumably) peaceful demonstration can be prohibited on these grounds (in case the specific measures are necessary and proportionate), since less restrictive means cannot safeguard the rights of others nor do they serve their interests.

Prior to this decision, the court only subsidiarily linked public policy grounds with the rights and freedoms of others.[22]

The exercise of the freedom of assembly may stand in conflict with the right to human dignity and other basic rights that may be derived from it, such as the freedom of expression, the right to privacy, the protection of the private sector. Decision No. 13/2016 (VII. 18.)[23] and No. 14/2016 (VII. 18.) of the Constitutional Court[24] prescribed taking legislative measures for clarifying the conflict between the freedom of assembly and the right to privacy, especially the 'rights and freedoms of others'. According to the above mentioned two decisions, the Constitutional Court found that while defining the legislative solution for the collision between the freedom of assembly and the right to privacy, both the protection of peaceful assemblies and the tranquility of the home shall be considered. In its earlier decision the Constitutional Court referred to the doctrine of 'captive audience' as a reflection on privacy protection and the 'right to be left alone' in one's own residence.[25] It is safe to say that when seeking for a solution to the conflict between the freedom of

22 See also: Decision No. 27.Kpk.45.004/2010/2. of the Metropolitan Court, Budapest.
23 Decision No. 13/2016. (VII. 18.) of the Constitutional Court.
24 Decision No. 14/2016. (VII. 18.) of the Constitutional Court.
25 Decision No. 13/2016. (VII. 18.) of the Constitutional Court.

assembly and 'the rights and freedoms of others', the captive audience doctrine goes hand in hand with the content of privacy protection.

Yet, examining the meaning and practice of captive audience doctrine, and detecting its role in a proportionate, necessary and expedient restriction of the freedom of assembly might help seeking this solution.

39.6 RESTRICTIONS ON THE FREEDOM OF ASSEMBLY, ON THE GROUNDS OF THE PROTECTION OF PRIVACY

39.6.1 *"I Will Defend to the Death Your Right to Say It...But Not to Me"*[26] – *the 'Captive Audience Doctrine'*

As is apparent from the above, domestic legal practice often referred to the doctrine of captive audience. The captive audience doctrine traditionally originated from the United States of America, when the Supreme Court rendered decisions based on the concept that government may curtail a speaker's right to free speech in case those rights are outweighed by the listener's privacy rights.[27] The right to privacy is believed to be an amorphous concept that can have several different meanings. As it has been noted "[...] perhaps the most striking thing about the right to privacy is that nobody seems to have any [...] clear idea what it is."[28]

The right to privacy was first advocated for in an article written by Louis D. Brandeis and Samuel D. Warren in 1890. Brandeis and Warren called attention to the fact that a new era is dawning where the protection of privacy becomes essential: "[...] Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, – the right to be let alone; [...]"[29]

Today, the right to privacy constitutes both a constitutional right and – where appropriate – deserves common law protection. Caroline Mala Corbin university professor[30] examined Supreme Court decisions related to free speech, the freedom of expression, yet some of the Supreme Court's reasoning on ones' right to speak and another person's right to be left alone may be applicable also to court practice on the freedom of assembly. According to Corbin, even though the Supreme Court has as of yet failed recognized the right to free speech against government-compelled listening, free speech jurisprudence

26 Evelyn Beatrice Hall.

27 See Haiman, supra note 28, at 154 ("The issue of whether there is a right to be free from speech poses a sharp conflict between freedom of speech, on the one hand, and privacy, on the other.").

28 Strauss, Captive Audience, supra note 17, at 107-08 [quoting Judith Jarvis Thomson, The Right to Privacy, 4 PHIL. & PUB. AFF. 1975. 295, 295].

29 Louis D. Brandeis and Samuel D. Warren: The right to Privacy. Harvard Law Review, 1890.

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nevertheless does recognize that, under certain circumstances, a listener's right to not hear speech may trump a private speaker's right to convey speech. The default rule in free speech is that "citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space to the freedoms protected by the First Amendment."[31] Yet the right to speak is not absolute.[32] One well-established limitation to this freedom is the government's ability to curb private speech aimed at 'captive audiences'. According to the captive audience doctrine, private speakers cannot always foist their speech on to unwilling listeners. Instead, the government may restrict such speech if substantial privacy interests are invaded in an essentially intolerable manner.[33]

However, according to Corbin, this definition of a captive audience is not self-explanatory. In order to apply the doctrine, two requirements must be met. Firstly, the audience cannot readily avoid the message: "[...] The First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid [the] objectionable speech." The second one is a normative matter. The audience should not have to be forced to leave the space to avoid the message. For example, courts and commentators uniformly agree that people should not be held captive to unwanted speech in the privacy of their own home: "Even people in their homes are not physically prevented from leaving them. The point of captive audience doctrine, however, is that they should not have to be put to such a choice."[34] "Captivity in this sense ... is about the right not to have to flee rather than the inability to flee."[35]

Corbin also stated that captive audience cases demonstrates that visual messages are usually deemed to be easily avoidable, while audible ones are not. This is because speech is more difficult to evade if the speaker follows the unwilling listener, so that the listener suffers not just a first exposure but is forced to hear the same offensive speech repeatedly. The Supreme Court has recognized that escaping audible messages is more difficult. In *Madsen v. Women's Health Center, Inc.*,[36] for example, the Court upheld restrictions on sound audible inside a clinic but not on images observable from within the clinic on the

31 *Boos v. Barry*, 485 U.S. 312, 322 (1988) [quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)]. In. Caroline Mala Corbin: The First Amendment Right Against Compelled Listening. Boston University Law Review, 2009. 943.

32 *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."). In. Corbin. 943.

33 *Cohen v. California*, 403 U.S. 15, 21 (1971); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-10 (1975). In. Corbin, 943.

34 In. Corbin, 943.

35 Jack M. Balkin: Free Speech and Hostile Environments, 1999. supra note 18, at 2312. www.yale.edu/lawweb/jbalkin/articles/frsphoen.htm.

36 *Madsen v. Women's Health Center*, Inc., 512 U.S. 753 (1994).

grounds that "it is much easier for the clinic to pull its curtains than for a patient to stop up her ears."[37]

On the other hand, the Court compared the ability to control what one sees with what one hears in connection to sound amplification trucks. Here, the Court stated, that

> the unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers....[38]

There is a Supreme Court case that specifically investigates the relationship between the freedom of assembly and the privacy of others.[39] In the case *Frisby v. Schultz* the Court adjudicated a case involving a residential Town Board ordinance restricting picketing. The Town Board argued that "it is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." The ordinance set out the primary purpose of the ban: "the protection and preservation of the home" through ensuring "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." The Town Board believed that a ban was necessary because it determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants ... [and] has as its object the harassing of such occupants." The ordinance also demonstrates a concern for public safety, noting that picketing obstructs and interferes with "the free use of public sidewalks and public ways of travel."

In the case the Supreme Court stated the following: "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Prior decisions often remarked on the unique nature of the home as "the last citadel of the tired, the weary, and the sick," and recognized that "preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."[40, 41]

37 See also: Jerome A. Barron, C. Thomas Dienes, Wayne McCormack, Martin H. Redish: Constitutional Law: Principles and Policy, Cases and Materials. LexisNexis, 2012.

38 *Kovacs v. Cooper*, 336 U S. 77. (1949).

39 For restrictions on residence see also: Orsolya Salát: The Right to Freedom of Assembly. A Comparative Study. Hart Publishing, 2015. 262.

40 *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

41 Douglas M. Fraleigh, Joseph S. Tuman: Freedom of Expression in the Marketplace of Ideas. SAGE Publications, 2010. 330-333. See also: Arthur D. Hellman, William D. Araiza, Thomas E. Baker: First Amendment Law: Freedom of Expression & Freedom of Religion. LexisNexis, 2010.

39.6.2 *ECtHR Jurisprudence on the Freedom of Assembly and the "Rights and Freedoms of Others"*

The European Court of Human Rights did not decide many cases on the connection between the freedom of assembly and the "rights and freedoms of others". Nevertheless, the Court spelled out useful principles in its decisions on the intersection of free speech and "the rights and freedoms of others", privacy in particular. These decision are important for free speech and the freedom of assembly are deeply connected in respect of exercising the freedom of expression. Although promoting the freedom to impart one's opinion in practice may differ, the essential grounds for letting the society do so, is founded on similar reasons. And in this relation it may hold water, that the theoretical principles and values laid down and applied to cases where the freedom of expression conflicts with the 'rights and freedoms of others' may also be applicable – with proper differentiation and specification – to the conflict between the freedom of assembly and the 'rights and freedoms of others', albeit strictly on a theoretical basis.

In its *Von Hannover v. Germany* ruling the ECtHR stated that

> the concept of private life extends to aspects relating to personal identity, such as a person's name, photo, or physical and moral integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. Publication of a photo may thus intrude upon a person's private life [even where that person is a public figure].

The Court reiterated that, "in certain circumstances, even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection of and respect for his or her private life".[42]

On the other hand, there is one specific ECtHR case, where the Court did determine some connection between the freedom of assembly and "the rights and freedoms of others". The case of *Kudrevičius and Others v. Lithuania* is interesting for the reasoning put forward by the demonstrators and also because of the Court decision itself. In this case the applicants alleged, that their conviction for rioting[43] had violated their freedom of assembly and expression and that the law under which they had been convicted had not met the requirements under Article 7 of the Convention. The Klaipėda municipality issued a permit

42 Case of *Von Hannover v. Germany*, ECHR, 2012.

43 It turned out in the case, that according to the ECtHR, since this assembly was deemed to be a riot, the Lithuanian courts were unable to carry out a proper consideration of the proportionality of the interference.

to hold an assembly in the area of the Divupiai village next to, but not closer than twenty-five meters from the Vilnius-Klaipėda highway between 11 a.m. and 11 p.m. from the 19th to the 25th of May 2003. The permit specified that it granted the right to organize a peaceful assembly in compliance with the provisions set forth, *inter alia*, in the Constitution and in the Law on Assembly. It was also indicated that the organizers and the participants were to observe the laws and to adhere to any orders from the authorities and the police. The Klaipėda police received information about the demonstrators' possible intention to overstep the limits established in the permits. The farmers blocked and continued to demonstrate on the roads next to Dirvupiai village, on the Vilnius-Klaipėda highway, at the sixty-third kilometer of the Panevėžys-Pasvalys-Riga highway, and at the ninety-fourth kilometre of the Kaunas-Marijampolė-Suvalkai highway, which exceeded the allowed limitations. The Lithuanian Government underlined in its reasoning, that the police had not received any prior official notification of the demonstrators' intention to block the three major roads of the country.

The applicants (demonstrators) put forward an interesting reasoning, according to which their decision to stage the roadblocks had been a last resort in order to defend their interests as farmers. This way, they invoked a form of demonstration accepted in Europe, organized in situations where no other means of protecting the demonstrators' rights exist. In such circumstances, the freedom of peaceful assembly should prevail over any ensuing minor disturbances to the flow of goods.

On the other hand, the Lithuanian Government maintained that the intervention pursued the legitimate aims of "preventing disorder" and the "protection of the rights and freedoms of others". The Government asserted that the applicants had not been convicted for participation in the protest actions, but for specific criminal behavior during the demonstrations. Thus, the demonstration had put greater strain on public life than the exercise of freedom of peaceful assembly should normally do. Another interesting argument of the Government was that the roadblocks were not an immediate and spontaneous response to a sudden event, overriding the obligation of prior notification. Consequently, the Government was convinced that the mode of exercising Article 11 rights chosen by the applicants had shown a severe lack of respect for other members of society.

In its decision the ECtHR declared that even assuming that police intervention pursued the legitimate aims of "preventing disorder" and "protecting of the rights and freedoms of others", the interference at issue was not proportionate, because the farmers were granted permits to hold peaceful assemblies in selected areas and even though major disruptions of traffic were caused on three main roads, any demonstration in a public place inevitably provoked a certain level of disruption to ordinary life. The Court reasoned that the authorities were expected to show tolerance in this regard.[44]

44 Case of *Kudrevičius and Others v. Lithuania*, ECHR, 2015.

39.7 Conclusion

Apart from what was provoked by the events of the last few years, the question how the Hungarian Assembly Act's general restrictions enshrined in Article 2 Paragraph (3) shall be applied did not emerge, nor how they relate to reasons for prohibiting events laid down in Article 8 Paragraph (1). In court practice – the police usually also refers to general restrictions as reasons for the prohibition – two different views seem to emerge. None of them seem to be exclusive however, since in a case there was an argument between the parties on whether the assembly could be permitted by referring to Article 2 Paragraph (3) of the Assembly Act, or only for any reason specified in Article 8 Paragraph (1).[45] Under Hungarian legislation restrictions on the freedom of assembly are not explicitly permitted, the Assembly Act knows only two reasons for prohibition. The idea regularly resurfaces that the list of prohibitions should be expanded by a clause referring to the protection of public order. It is important to note that the current restrictions on the freedom of assembly (notification, prohibition and dissolution) are created specifically for securing public order and safeguarding public security. However, this does not mean that the scale of prohibitions are defined perfectly.

There are two striking differences between countries' solutions for protecting the functioning of the legislative power. On the one hand, there is a much narrower range of bodies, to which the practice of the freedom of assembly can be confined (typically the parliament and – where appropriate – its two chambers). On the other hand, regulatory solutions minimize the scope of police discretion by identifying areas and times where and when it is forbidden to exercise the freedom of assembly to ensure the uninterrupted functioning of the parliament. The restriction is otherwise not simply aimed at ensuring that the event does not interfere with the functioning of the parliament, but – since the German Reichstag attack on 13th January 1920 – there are also security reasons for doing so. Exceptions to this restriction are possible and may be granted upon request for an exemption for that event.[46, 47] In addition – for the protection of the communities and the dignity of their members – the freedom of assembly is restricted in certain areas (historical places, monuments etc.).

45 Decision No. 7.Kpk.45.009/2015/2. of the Administrative and Labour Court.

46 The mitigation of the strict restrictions in the United Kingdom based on the Serious Organised Crime and Police Act 2005 Parliament Square was initiated by former Prime Minister Gordon Brown in July 2007, but since then, there has been no modification in this regard. In. Thornton, Peter QC – Brander, Ruth – Thomas, Richard – Rhodes, David – Schwarz, Mike – Rees, Edward: The Law of Public Order and Protest (Oxford: OUP. 2010) 3.126-3.129.

47 See further: Schwarze, Jürgen: Demonstrationen vor den Parlamenten – Die Problematik von Versammlungen innerhalb der Bannkreise im Lichte der jüngsten Verwaltungsrechtssprechung. *Die Öffentliche Verwaltung* 6/1985. 213-222; Soiné, Michael – Mende, Boris: Das Gesetz zur neuregelung des Schutzes von Verfassungsorganen des Bundes – eine Bestandsaufnahme. *Deutsches Verwaltungsblatt* 20/2000. 1500.

However, the practical solution to these conflicts in specific cases is seldom straightforward. Further research is needed to find practical solutions for domestic legal practice in restricting the freedom of assembly on the basis of constitutionally permissible grounds.