

THE RIGHT OF ASSEMBLY IN CENTRAL EUROPE

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Abstract: The article deals with the legal regulation of the right to freedom of peaceful assembly in Germany, Austria, the Czech Republic and the Slovak Republic with regard to the jurisdiction of the European Court of Human Rights (ECHR). The chosen topics focus on the definition of assembly, the relationship between freedom of expression and property rights together with the right of assembly. In each of above-mentioned countries, the assembly to which constitutional protection is granted, the definition differs slightly; with the widest concept of assembly deriving from the judicature of the ECHR. The constitutional protection of the Assembly, in particular found in Germany and Austria, which is significantly narrower than the protection provided by the European Convention on Human Rights, may thus at some stage come into conflict with the requirements of the ECHR. The section devoted to freedom of speech deals, among other things, with cases exhibiting shocking photographs, which were part of the campaign against abortion, in front of schools in the Czech Republic and the Slovak Republic. In the future, the most serious problem is the conflict of the right of assembly along with the right of ownership, consisting in assemblies held on private property, which is used by the public, such as shopping malls, airports or railway stations. This has been the focus of the professional public and the courts for a long time, especially in Germany.

Keywords: right to freedom of assembly, freedom of expression, assembly, european convention on human rights, european court of human rights, law of property/ownership right.

Summary: 1. INTRODUCTION. 2. THE CONCEPT OF ASSEMBLY. 3. REATIONSHIP TO FREEDOM OF EXPRESSION. 4. RELATIONSHIP TO THE OWNERSHIP RIGHT. 5. CONCLUSION.

1. INTRODUCTION

The right to freedom of assembly is considered to be one of the fundamental rights and is guaranteed both in the constitutional documents of European states and in Article 11 of the European Convention on Human Rights (hereinafter “the Convention”).² In recent decades, the right to freedom of peaceful assembly with juridical science (jurisprudence) has been neglected and has been referred to by some authors as a forgotten right.³ At present, however, it is receiving more and more attention not only in Central Europe. The European Court of Human Rights (the “ECHR”) plays an important role in the application

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² Article 11 of the Convention: “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 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.”

³ Some authors have also referred to it as a neglected right (Peters & Ley, 2016; Inazu, 2010).

of the right to assembly, interpreting the rights anchored in the Convention and providing its contractually bound states with a basic framework of the level of human rights.

At the beginning of the development of civil and political rights in the 18th century, the right of assembly was defined as the possibility for citizens to speak together at an assembly against an absolutist state (Stein, 1998: 315). In a democratic state governed by the rule of law (as opposed to an absolutist, totalitarian or autocratic state), this freedom of the right of assembly, like other freedoms, takes on a broader dimension which allows them to discuss and address all issues of societal importance, and thereby elevates it one of the structural elements of democracy. At present, it is no longer possible to restrict the right of assembly to its original function of shaping politics and political views aimed at managing public affairs (similarly Dreier, 2004: 897-898). In a similar fashion, the function of the state (if we speak of Central and Western Europe) has changed, whereby the limited passive state tolerates the holding of the assembly that has become an active guardian of the realization (implementation) of this freedom.

The right of assembly sometimes remains the only effective way of expressing certain groups of the population, or in general, representatives of minority views, who do not have access to the media or at least sufficient funds to spread their ideas. The assembly gives a certain added value to the expressed opinion, because the presence of a certain number of people in a particular place strengthens the significance of the expressed attitude adds to it a certain emotional dimension.

In the states of Central Europe, namely in Germany (Art. 8 Grundgesetz - GG), the Czech Republic (Art. 19 Charter of Fundamental Rights and Freedoms – (Listina základních práv a svobod, the Czech acronym LPS), Slovakia (Art. 19 Charter of Fundamental Rights and Freedoms (the Slovak acronym LPZS) and Austria (Art. 12 Staatsgrundgesetz - StGG) the right of assembly is enshrined directly in constitutional law, where it is included among political rights for historical reasons, but it is recognized that its scope is broader, including even for non-political assemblies (identically Bartoň, 2016: 405; Molek, 2014: 250; Mangoldt & Klein & Starck, 2010: 825; Öhlinger, 2009: 408-413; Wagnerová & Šimíček & Langášek & Pospíšil, 2012: 459). This approach is also in accordance with the Convention, which does not declare the right of assembly to be a political right.

On the other hand, there are differences in legislation and the concept of the right of assembly between the individual Central European countries above-mentioned. Even in these states we find differences from the way the ECHR interprets the right of assembly. The subject of this paper is a description and comparison of the legislation of these states, taking into consideration the case law of the ECHR. First of all, however, it should be noted that due to historical circumstances, Austrian legislation and juridical theory are very similar to the German approach and Slovak legislation and practice are very similar to Czech legislation and practice.⁴ For this reason, special attention will be paid to Germany

⁴ Due to the fact that the Czech Republic and the Slovak Republic did not form one state until 01/01/1993, they still have the original Act on Assemblies No. 84/1990, which, however, is no longer completely identical due to the amendments in both of these states.

and the Czech Republic, and an Austrian or Slovak approach will be introduced only if it is beneficial for the topic.

2. THE CONCEPT OF ASSEMBLY

One of the key problems in the application of the law of assembly is the definition of assembly and the resulting protection provided not only by the Convention but also by the constitutional laws of individual states. Where an assembly can be defined as an assembly falling under Article 11 of the Convention or an assembly under constitutional law, it follows that the assembly qualifies for additional increased protection against interference on the part of state and third parties, who must respect the application of this fundamental right. On the contrary, unless it is an assembly under the protection of the Convention, it may be restricted by ordinary legal prohibitions. Assemblies within the meaning of the Convention are generally considered to be private and publicly accessible assemblies of persons, as well as street processions, i.e. assemblies not limited to one place, whose participants have a common goal. The ECHR, while/in applying Article 11 of the Convention, proceeds from the assumption that the concept of “assembly” means a grouping of a large number of individuals, processions and public parades in a peaceful form. The concept of assembly according to the Convention also includes political and religious,⁵ cultural,⁶ social and other assemblies⁷ and even a long-term occupation of buildings.⁸

It should be called to mind here that Article 11 of the Convention, as well as the constitutional laws of Germany, the Czech Republic, Slovakia and Austria, protect only peaceful assemblies. This means, among other things, that the meeting is not convened for the purpose of committing violence, riots and other illegal acts or that these activities are not organized by the convener or another person (organizer) during the meeting. Minor incidents during the course of assembly do not make the assembly peaceless (troubled/restless).⁹

Neither the Convention nor the legislation of the above named states defines what may be considered an assembly, and therefore the definition is based on juridical theory and judicature. In Germany, an assembly is defined as a shorter time frame¹⁰ of a local

⁵ Judgment of the ECHR in the matter of Barankevich v. Russia of 26/07/2007, no. 10519/03

⁶ Judgment of the ECHR in the matter of the Gypsy Council v. the United Kingdom of 14/05/2002, no. 66336/01

⁷ Furthermore, judgments of the ECHR in the matter of Djavit An v. Turkey of 2/02/2003, no.20652/92; Bączkowski and Others v. Poland of 03/05/2007, no. 1543/06; Sergey Kuznetsov v. Russia of 23/10.2008, no. 10877/04; Decision of the European Commission on Human Rassemblement Jurassien Unité Jurassienne v. Switzerland of 10/10/1979, no. 8191/78

⁸ Judgment of the ECHR Cissé v. France of 09/04/2002, no. 51346/99

⁹ Decision of the European Commission for Human Christians against Racism and Fascism v. The United Kingdom 16/07/1980, No. 8440/78; Judgment of the ECHR Stankov and the United Macedonian Organization Ilinden v. Bulgaria of 02/10/2001, Complaint no.29221/95 and no. 29225/95

¹⁰ However, it is problematic to determine what is a shorter time frame. Dreier (2004: 898) states that this can be a few seconds, for example by unfolding a banner, or a few days or weeks when protesters spend the night on the spot, which is not generally accepted.

meeting of several people with the common goal of the collective formation of opinions or expression thereof (Düring & Enders, 2016: 8). A typical feature is considered to be common communication-oriented behaviour, where people are connected by an internal bond and move towards joint action. For this reason, random gatherings (e.g. before advertising) or intentional celebrations are not considered gatherings. Nor do the formal announcement and designation of the event determine it to be an assembly (Schmidt, 2007: 379). However, it is recognized that an inner bond may be formed in these random gatherings and then they in part may emerge as an assembly under the protection of the GG (Jarass & Pieroth, 2006: 252).

The basic feature of the assembly according to Article 8 of the GG is the focus of the assembly on the formation of a common opinion or expression of opinion, which is communicated either between the participants of the assembly or outside the assembly. It is irrelevant whether this assembly is limited to the participants invited and is therefore a private assembly, or a public assembly aimed at influencing public opinion by presenting a particular opinion. It is indifferent how the opinion is presented, it can be done non-verbally – by means of banners, even by singing a song or participating in some other musical production. The crucial question to be examined is whether there was clearly a unifying internal psychological element which either acted among the participants in the assembly or was an expression of opinion (albeit non-verbally) in such a way that the opinion was clear to the non-participating observer. For this reason, a person/persons led by his/their own intrinsic motif/motives without collective knowledge and connection cannot be considered an assembly, i.e. for instance, attending an artist's concert, because the participant agrees with his political views, not because I am interested in his music. If this motif remains hidden and is not shared at least with other concert goers, it cannot be considered, according to the German theory, an assembly under the protection of GG (cf. Dreier, 2004: 896-898).

In addition, the view has emerged in Germany that, in order for an assembly to be regarded as an assembly under the GG, it must not only seek to form opinions, but must also be an opinion on a matter of public interest. However, this is regarded as a minority view, which is not in line with Article 8 of the GG (Schmidt, 2007: 378).

The Austrian approach to the right of assembly is based on a similar concept as the German one (Öhlinger, 2009: 408-413), since it defines an assembly as an organized temporary meeting of several people at a certain place and time who meet with the common intention of participating in the formation of a common opinion, or in order to present this opinion to the general public (Winkler, 1991: 199; Bachmann & Baumgartner & Feik, 2000: 47; Wieser, 2012: 207). The previous definition based on Article 12 StGG¹¹ states that it is a gathering of several persons for the purpose of the joint presentation of a certain opinion or will. Another previous definition according to the StGG contains the already overdue claim (even in the Czech Republic) that an assembly is considered to be one that is publicly accessible, planned and serves a political purpose (Walter &

¹¹ Article 12 of StGG reads as follows: “An Austrian citizen has the right to assemble and form associations. The exercise of these rights is regulated by law.”

Mayer: 1987, 54). This example demonstrates what an alteration has been made by the interpretation of political rights in Central Europe, as the Assembly may not be, according to the current interpretation shared with different nuances, either publicly accessible, or planned or existing for a political purpose, and still it may enjoy constitutional and legal protection.

In Austria, as well as in Germany, it has been pointed out that the provisions of Article 11 of the Convention are considerably broader than the protection of constitutional rules and apply to the concept of assembly under Article 11 of the Convention and also to other assemblies. In such a case, the Convention applies as a matter of priority, as this is a more favourable regulation.

This approach towards the necessity for an interest in solving public issues, sharing or forming opinions, recognized in Germany and Austria, has interesting consequences. In 1989, a fine was imposed for failing to properly and timely announce its assembly in Innsbruck in front of the entrance to the Andreas Hofer Memorial, which consisted of the person, his wife and three minor children. Participants held handwritten banners, one of which read, “Partle, give us our rights. Amen.” The complainant defended himself by directing his appeal to the provincial governor, Dr. Partl, awakening his awareness of responsibility in the complainant’s case. The complainant alleged that his intention was not to engage in public debate, but to assert rights in his case. The Austrian Constitutional Court (Verfassungsgerichtshof) ruled in favor of the complainant when he stated that his intention was only to express his opinion and not to address the public, initiate a debate or initiate an action, and therefore it did not constitute an Austrian assembly law¹² and a fine was imposed unjustifiably.¹³

In all the countries surveyed, the question arose as to how many people were needed in order for the event to be considered an assembly. The doctrine in Germany eventually concluded that two people were sufficient (Kniesel & Poscher, 2004: 422; Jarass & Pieroth, 2006: 252; Dreier, 2004: 896),¹⁴ although prior views were based on the need for three people to participate (Stein, 1998: 316). In Austria, three people are needed. However, it is also stated that as participants are free to come and go during a meeting, this is not a necessary simultaneous presence and, in addition, it is pointed out that it may be difficult to determine whether it is a meeting (Bachmann & Baumgartner & Feik, 2000: 48).

The requirement of at least two persons to assemble has been explicitly defined by certain German provincial laws, such as par.2 (1) of the Bavarian BayVersG, which defines an assembly, inter alia, as a meeting of at least two persons.

¹² Versammlungsgesetz no. 98/1953 BGBl of 07/08/1953

¹³ Judgment of the Austrian Constitutional Court (Verfassungsgerichtshof) of 29/09/1989, Reference B706/8,

¹⁴ Furthermore, see for instance the Judgment of the German Federal Constitutional Court of 24/10/2001, Reference 1 BvR 1190/90

However, the unanimous opinion in all the examined states is that the demonstration of one person as a realization of the right of assembly is not allowed, but this does not change the possibilities of the realization of freedom of speech.

An Assembly, according to the Czech Act on Assembly,¹⁵ can generally be characterized as a voluntary meeting of at least two people in a public place for the purpose of exercising constitutional rights and freedoms, exchanging information and opinions or participating in public or other common issues by expressing the attitudes and opinions of participants.

Similarly, for example, the authors Potměšil and Jamborová (2017: 223) define an assembly as a meeting of at least two persons, used primarily to exercise freedom of speech and other (especially political) rights, to exchange views and information and to participate in public and other societal issues by expressing attitudes and opinions.

In Czech literature, we can also come across an opinion based on the historical Latin saying “*tres faciunt collegium*” (three form an association), according to which it is necessary to accept the subject as an assembly of at least three people (Wagnerová & Šimíček & Langášek & Pospíšil, 2012: 353). The Supreme Administrative Court of the Czech Republic in its judgment of 11/06/2013, file no. 8 As 101/2011-186, took the view that two participants in the Assembly were sufficient, stating: “*The Supreme Administrative Court considered that it would be in accordance with the principal of tres faciunt collegium that the Assembly be composed of at least three persons. He agreed with the concept that an assembly can be defined as a voluntary meeting of at least two persons in a public place for the purpose defined in section 1 subsection 2 of the Act on the Right of Assembly, ie the exercise of freedom of expression and other constitutional rights and freedoms and to participate in the resolution of public and other common issues by expressing positions and opinions.*” (Černý & Lehká, 2010: 18).

According to the opinion stated in another judgment of the Supreme Administrative Court of the Czech Republic, five features must be cumulatively met in order to speak of an assembly according to the Czech Assembly Act:

- 1) It must be an assembly of several people.
- 2) Participants must be physically present at one specific location.
- 3) The assembly must have a certain beginning and end, with the participants being present at the same time.
- 4) The purpose of the meeting is the exchange of information and opinions, expression of participants’ attitudes to the solution of public and other common issues in the sense of the provisions of section 2 letter. c) of the Assembly Act.

¹⁵ Act no. 84/1990 Sb. (Coll.), on the Right of Assembly of 29/03/1990

5) The participants in the assembly must express their intention to exercise the right of assembly towards the general public and must be aware that they are exercising the right of assembly. In a particular situation, it must be objectively ascertainable that the right to assemble is exercised at all.

However, these features must be understood in the context of a very specific case of blockade of tree-felling (Černý, 2016: 408). While features 1), 2) and 4) can be agreed upon, we must be careful with characters 3) and 5). The meeting can also take place in such a way that the individual participants come and go and thus participate only in a part of the meeting. The beginning of the assembly can be determined only when all the features of the assembly are fulfilled, which can be quite difficult in practice. In this context, it is possible to point out a number of ambiguities that have not yet been resolved. Is it possible to consider as an assembly several persons already gathered on the spot, but awaiting the convener who is to lead the assembly (procession) or, in the case of a stationary assembly, who is to give an introductory speech? Is it an assembly only after the participants leave the spot where they gathered, or is it an assembly when the first two participants come to the assembly, but cannot still be distinguished from passers-by? If we think about the manifestation of an assembly towards the outside, i.e. without the participants of the assembly, it is necessary to be approached with regard to the type of assembly (whether it is public or private).

Here we come to the question as to whether the relatively narrow definition of assembly according to German (or Czech) doctrine is not in conflict with the concept according to the Convention. The German doctrine is, of course, aware of this and states that all private and public assemblies are considered to be assemblies under Article 11 of the Convention, regardless of their intended content. However, there is no ambition to resolve this apparent contradiction and it deals with the interpretation of Article 8 of the GG (Dreier, 2004: 889).

Let us recall the case of the *Gypsy Council v. The United Kingdom*.¹⁶ It was a traditional Romani horse race, which was banned for fear of undue public nuisance. The ECHR qualified this action as an assembly under Article 11 of the Convention, but without justification.

According to these theories, this action/event would not fall under the constitutional protection of these states, as its purpose was only a horse race lacking the presentation of common ideas outside or inside the assembly. However, the problem does not arise here for the time being, as no ECHR decision on the right of assembly against the Czech Republic, Germany, Austria or Slovakia has been issued in the last five years (2015-2020). During this period, cases where Russia and Turkey are being sued are mainly resolved, and the list is supplemented mainly by the post-Soviet states (Ukraine, Armenia, Azerbaijan, etc.). In these cases, given their seriousness, there is no doubt that the complainants wanted to comment on issues of public interest.

¹⁶ Judgment of the ECHR in the case of the *Gypsy Council v. The United Kingdom* of 14/05/2002, Complaint no. 66336/01

It is also necessary to mention the problem with the ECHR judicature, which lies in its quality of being casuistic (or of dealing with cases) and does not reveal the ambition to create a comprehensive concept, which thus comes into being (or develops) very slowly on the basis of individual decisions. After all, the ECHR itself declares, as it explicitly states in its decisions, that its sole task is to monitor the application of the legislation of the Member States and to make a final decision whether the restrictions on the right of assembly are in compliance with the Convention. It states that it does not replace the views of the governments of the Member States by its own opinion, but merely considers the decision submitted.¹⁷

As a substitute for the absence of a general definition of assembly in the case law of the ECHR, we can use the definition of Lithuanian authors¹⁸ seeking a universal concept across European states. According to this definition, an assembly is when individuals come together to share ideas with each other or with others, to influence others or to symbolically express their individual views, which usually correspond to the goals of the whole group. This means that the assembly is held with the conscious participation of these natural persons.

3. RELATIONSHIP TO FREEDOM OF EXPRESSION

The right to freedom of assembly is closely linked to freedom of expression, which is a fundamental political right, sometimes referred to as universal law or super-freedom (Filip, 1998: 618–637). Without the opportunity to express ideas or opinions, other political rights would lose their significance. What good would a person be able to associate or gather with others if they could not express common views? If freedom of expression cannot be restricted in a particular area (e.g. only because shocking and offensive ideas are presented), freedom of assembly cannot be restricted for this reason either. The right of assembly is one of the most important rights by which freedom of expression is exercised. Freedom of expression also demonstrates the extent to which political rights are perceived today.

Without freedom of expression, it is difficult to imagine participating in solving public issues and problems, participating in elections or the opportunity to obtain information without one being able to spread it. J. Gericke states¹⁹ that no other right is so connected with freedom of speech and acts as a seismograph of political, social and societal change.

Freedom of expression is one of the most important foundations of a democratic society and one of the main conditions for its progress and the development of any individual. Promoting free political debate is a very important feature of a democratic society. The ECHR (as well as the constitutional courts of Germany, the Czech Republic,

¹⁷ Judgment of the ECHR in the case concerning Stankov and the United Macedonian organization Ilinden v. Bulgaria of 02/10/2001, Complaint no. 29221/95 and no. 29225/95.

¹⁸ Judgment of the Constitutional Court of the Czech Republic of 10/07/1997, Ref. III. ÚS 359/96.

¹⁹ Judgments of the Constitutional Court of the Czech Republic of 15/03/2005, Ref. I. ÚS 367/03 of 03/02/2015, Ref. II. ÚS 2051/14 of 20/05/2014, and Ref. IV. ÚS 1511/13 of 11/06/2018, I. ÚS 4022/17.

Slovakia and Austria) attaches the utmost significance to freedom of expression in the political debate and considers that very compelling reasons are needed to justify restrictions on political expression. Political expression can be defined as the expression of a person's will to participate in solving public problems or to express an attitude to certain issues of general interest.²⁰

Freedom of assembly and the right to express opinions through it are among the paramount structures of a democratic society. The essence of democracy is its ability to solve problems through open discussion. Radical preventive measures that suppress freedom of assembly and expression in cases other than incitement to violence or rejection of democratic principles - however shocking and unacceptable some views and words may seem to state authorities and whatever the illegitimate demands may be, prove democracy bad service and often even threaten it. In a democratic society based on the rule of law, political ideas which call into question the existing order and the implementation of which is advocated by peaceful means must be given a fair opportunity to express themselves through the exercise of the right of assembly as well as other legal means. If any likelihood of tensions or violent exchanges between opposing groups during a demonstration were to justify banning it, society would be deprived of the opportunity of being confronted with differing views on any issue that offends the sensitivity of the majority opinion.²¹

On the other hand, for example, the Czech Constitutional Court stated that the right to freely express one's views is already limited in content by the rights of others, whether these rights flow as constitutionally guaranteed by the constitutional order or other barriers imposed by law, protecting societal interests or values; not only content restrictions can deprive the right to express opinions of its constitutional protection, because the form in which opinions are expressed externally is closely connected with the constitutionally guaranteed right to which it is attached. If the published opinion deviates from the limits of the generally recognized rules of decency in a democratic society, it loses the character of correct judgment (reports, comments) and as such usually finds itself outside the limits of constitutional protection (Výborný, 2015: 12). However, it can be generally stated that public figures, ie politicians, public figures, media stars, etc., must accept a greater degree of public criticism than other citizens (Jarass & Pieroth, 2006: 252).

The Czech Constitutional Court (Constitutional Court) further stated that the rule of the presumption of their admissibility, i.e. the presumption of constitutional conformity, applies to statements concerning the resolution of public issues. At the same time, the presumption of constitutional conformity only protects the evaluative judgment, not the assertion of facts, which, to the extent that it is presented as the basis of criticism, must, on the contrary, be proved by the critic himself. It is important to consider the legitimate disclosure of information when examining the motive for disclosure. The legitimacy of a disclosure of information cannot be inferred if it was predominantly motivated by a desire

²⁰ Judgments of the Constitutional Court of the Czech Republic of 11/11/2005, I. ÚS 453/03; of 17/07/, IV. ÚS 23/05.

²¹ Judgment of the ECHR in the case concerning Yilmaz and Kiliç v. Turkey of 17/07/2008, Complaint no. 68514/01.

to harm the defamed person, if the disseminator did not believe the information himself, or if he provided it recklessly without properly worrying about whether or not it was true.²²

According to the case law of the ECHR, even illegal activities and manifestations that occur at the assembly cannot be attributed indirectly to the organizers of the assembly, unless it is proven that the individuals concerned were directly involved in these activities.²³

The Czech author Š. Výborný states that he often finds a specific distinction between freedom of speech and the right of assembly justification blurred, as any interference with the right of assembly will also be an interference with freedom of expression and similarly an interference with the freedom of expression of a participant or convener.²⁴ This is, moreover, in accordance with the German approach to the link between freedom of assembly and freedom of expression, where it is accepted that measures against assembly also (may) interfere with or directly violate the right to freedom of expression (Article 5 (1) and Article 8) GG.²⁵

The freedom of speech realized in assemblies does not have to consist only of the hanting of logans, but can also be realized or achieved through images. Furthermore, the implementation of the right of assembly does not guarantee the immunity of the participants or the convener against liability for speeches of all kinds.

An example in this area is the case of *Alexeyev v. Russia* dealt with by ECHR (Černý & Lehká, 2010: 16-20). In this case, marches of the gay community were banned to warn the public about discrimination against this minority in Russia (the marches were called either Pride March or Gay Pride). Moscow municipal authorities have banned these rallies, citing violations of the rights of others and those who have a negative attitude toward homosexuality out of religious or moral convictions. They argued that the state must also take into account the requirements of major religious associations, which demanded a ban on such assemblies. In the ruling, the ECHR pointed out that the mayor of Moscow had repeatedly publicly expressed his determination to prevent gay marches, as he said the promotion of homosexuality is considered to be incompatible with the religious doctrines and moral values of the majority. The ECHR stated, inter alia, that democracy did not mean that the opinion of the majority must always prevail and that only the moral values of officials were reflected in the ban on assemblies, so it did not consider the ban on marches necessary in a democratic society and thus violated Article 11.

Another case of protection of religious sentiment versus the right of assembly was dealt with by the Austrian Constitutional Court²⁶ in the case of “No to Meat / Yes

²² Judgment of the ECHR of 21/10/2010, Complaints no. 4916/07, no. 25924/08 and no.14599/09

²³ Judgment of the Austrian Constitutional Court of 11/03/2014, file no. E 717/2014

²⁴ Commentary to this Judgment and Reference to a change of approach by the Austrian Constitutional Court is offered by Haas (2015).

²⁵ Judgment of the German Federal Constitutional Court of 12/07/2001, file no. 1 BvQ 28/01, file no. 1 BvQ 30/01

²⁶ Judgments of the Supreme Administrative Court of 30/10/2012, file no. 2 As 104 / 2012-35, and of 18/052017, file no. 9 As 33 / 2017-16

to Vegetarism”, which consisted in the planning of an assembly in 2014 in the center of Linz. The participants of this assembly (about 50) were to have masks of animals, death, various bloodied costumes depicting butchers and were to wear wooden crosses. The congregation was to pass church buildings as well. The assembly was forbidden due to the possibility of affecting the religious feelings of the faithful. The Austrian Constitutional Court recalled that in the present case it was not appropriate to weigh the individual social interests (values) of the faithful and the participants in the assembly, as the assembly was not to prevent church visitors from accessing it, nor to disrupt religious ceremonies. Among other things, he referred to his previous decision, according to which it is incorrect to perceive the cross as an expression of the relationship to religion, but rather as a symbol of Western history. He further stated that wearing crosses near the church was not a reason to ban gatherings.²⁷

The German Federal Constitutional Court (Bundesverfassungsgericht) assessed techno parties in Berlin (“Fuckparade” and “Loveparade”)²⁸ and came to the conclusion that the purpose of the assessed techno parties was only, or mainly, entertainment and any expressions of opinion were only a negligible ancillary act and therefore the right of assembly was not to be exercised on them, which led to their prohibition. According to the Federal Constitutional Court, the constitutional and legal significance of this right lies in its role in the process of forming public opinion. Correspondingly, assemblies are local meetings of several people focused on discussion and speech in order to participate in the formation of public opinion. The purpose of the collective formation of opinion and its collective expression in the given case were not fulfilled, as the invitation of the organizers was only aimed at the participants to come and have fun together.

It should be pointed out that the scope of the Czech Assembly Act is wider than presented by the above-mentioned opinion of the German Federal Constitutional Court, as it does not only apply to communication rights (other constitutionally guaranteed rights and freedoms, such as national minorities (Černý & Lehká, 2010: 16-20).

Let us also mention the meetings of the “Stop Genocide” association held in various cities in the Czech Republic and the Slovak Republic. This association with very harsh and naturalistic billboards with photographs of aborted fetuses and people killed in wars placed in front of or near schools fought abortion. In the case of these assemblies, two levels can be traced. On the one hand, the organizers were sanctioned for the misdemeanour consisting in provoking public outrage by displaying outrageous photographs.

The second level consisted in the dissolution of the assembly on the grounds that offensive photographs attacked the children, as they were deliberately placed near schools. The Supreme Administrative Court of the Czech Republic stated, inter alia, that the assembly of opponents of abortion, an integral part of which is the display of

²⁷ Judgments of the Supreme Administrative Court of 30/12/2012, file no. 2 As 104/2012-35, and of 18/05/2017, file no. 9 As 33/2017-16

²⁸ Judgment of the German Federal Constitutional Court of 12/07/2001, file no. 1 BvQ 28/01, file no 1 BvQ 30/01

panels with photographs depicting human embryos, fetuses removed from a woman's body during abortion and people killed in war, genocide and pogroms, i.e. the dissolution in accordance with the Czech law on gatherings, if it took place in front of the school attended by children. In such a case, the best interests of the child shall prevail over the right to freedom of assembly.²⁹

The Constitutional Court of the Czech Republic ruled on another case of the assembly of the "Stop Genocide" association that the right to peaceful assembly is a collective exercise of freedom of expression. It is this aspect that can help to stimulate public debate and debate on public affairs, as some citizens do not have the will to publicly present and present their views individually and to try to convince others of their correctness. However, attending the meeting gives them the opportunity to publicly identify with and support their views. Constitutional protection is also enjoyed by shocking and outrageous expressions (including visuals) used to stir up public debate, as democracy is based on "trust" in citizens to actively and conscientiously participate in the debate and are able to discern the credibility or acceptability of individual ideas. However, this cannot reasonably be demanded of children, as they, given their moral and mental maturity, must be protected from certain forms of expression that would affect or harass them beyond a tolerable level. The right of everyone to present their views (including outrageous ones) is equated with an interest in children and adolescents not receiving messages that are inappropriate for them. It is therefore up to the convener of the assembly to propose specific measures to enable the assembly to take place without jeopardizing the interests of the children (shocking information panels would be placed in a tent, for example) or assembled in a closed shape so that the person wanted to see, she had to enter this space, while the organizer would prevent small children from entering this such a space.

This opinion corresponds with the ECHR judgment in *Animal Defenders International*,³⁰ in which the ban on the broadcasting of drastic animal advertising on television was found to be consistent with freedom of expression.

A very similar case of the assembly entitled "*STOP GENOCIDE - against the violation of human rights in the world*" was dealt with by the Constitutional Court in Slovakia (Constitutional Court).³¹ Again, it was a matter of exhibiting photographs of victims of genocide and the human fetus after an abortion in an attempt to draw attention to the incorrectness of abortions, this time placed in front of the university. The display of these photographs was qualified by the police to be an offense against public order, as they aroused public outrage. The police demanded their removal, which the convener refused and preferred to end the assembly, as he considered the exhibition to be functional only in its entirety. In its ruling, the Constitutional Court of the Slovak Republic stated that it had not found any fact that would reasonably justify the conclusion that the information panels

²⁹ Judgments of the Supreme Administrative Court of 30/10/ 2012, Ref./ file no. 2 As 104 / 2012-35, dated 18 May 2017, Reference 9 As 33 / 2017-16

³⁰ Judgment of the ECHR in the matter of *Animal Defenders International v. The United Kingdom* of 22/04/2013, Complaint No. 48876/08.

³¹ Rozsudek Ústavného súdu Slovenskej republiky (Judgment of the Constitutional Court of the Slovak Republic) of 02/06/2009, Reference III. ÚS 42/09

with photographs presented during the meeting contained visual representations contrary to the principles of morality, ethics or human dignity.

The main difference between the cases handled in the Czech Republic and Slovakia was the placement of information panels, which were once located in front of or near the primary school (Czech Republic) and could affect relatively young children and in the second case were placed in front of the university (Slovakia).

4. RELATIONSHIP TO THE OWNERSHIP RIGHT

While the relationship between freedom of expression and the right of assembly is already relatively well clarified in case law and theory, the problematic in recent years is that of the competition between the right of assembly and the right of ownership. This primarily consists in a situation where the exercise of the right of assembly leads to the use of third-party property (land, buildings) and thus to the restriction of the right of ownership. The question is whether the owner must tolerate the implementation of the assembly on his property and, if so, under what conditions and to what extent. While in Germany, much attention has been paid to this issue for several years (Fischer-Lescano & Maurer, 2006: 1394; Frau, 2016: 625; Kersten & Meinel, 2007: 1127; Papier, 2016: 1417; Prothmann, 2013; Schmidt, 2007: 381-383), in the Czech Republic it has been rather sporadic contributions devoted mainly to the use of public property (roads etc.; Jamborová, 2012; Balounová, 2019).³²

This may also be the case because the provisions of Section 5, subs. 4 of the Czech Assembly Act³³ unlike the German or Austrian Assembly Act, it states that: *“If the assembly is to be held in the open air outside public places, the convener is required to attach to the notification the written consent of the owner or user of the land.”* (In greater detail see Černý & Lehká, 2017: 82-87).

According to section 34 of the Czech Act on Municipalities³⁴, public space means all squares, streets, markets, sidewalks, public greenery, parks and other spaces accessible to everyone without restrictions, i.e. serving general use, regardless of ownership of this space. The key feature of a public space is its accessibility to the public, not whether it is privately owned or actually used by the public.

According to the current comprehension of the Czech Assembly Act, if the participants of the assembly are not in serious danger to their health or another reason is not fulfilled due to the ban on assembly, they are entitled to use not only sidewalks, but also roads or other areas on which they can move, as it is concerned with a common use of roads.³⁵ To be more precise, the Supreme Administrative Court of the Czech Republic

³² As well the Judgment of the Constitutional Court of the Czech Republic of 27/06/2017, Reference Pl. ÚS 21/16

³³ The Slovak Assembly Act contains the same provision in section 5 subs. 3.

³⁴ Act no.128/2000 Sb (Coll.), on Municipalities

³⁵ Cf. Rozhodnutí Ústavního soudu České republiky (Resolution of the Constitutional Court of the Czech Rep.) of 27/06/2017, Reference Pl. ÚS 21/16.

stated that the Czech Assembly Act presupposes an assembly in the form of a procession along the road (even on the road) and for this purpose sets obligations for the convener to ensure the proper conduct of the assembly, for instance by means of the police, provided that traffic restrictions are also necessary for the for the holding of the assembly.³⁶

However, the above-mentioned provision of Section 5, subs. 4 of the Czech Assembly Act does not address all possible conflicts between the ownership right and the right of assembly.

In general, the problem of the conflict of these two rights can be divided into several large circles related to the place of assembly. Firstly, it is the access of the assembly to public places (owned by the state, municipality or region), secondly, access to privately owned places and thirdly, access to privately owned places, where the owner is a legal person under private law, but with a share of persons governed by public law (e.g. the share of a municipality, region or state in private companies owning a department store, railway station, etc.).

The ECHR also had the opportunity to comment on these conflicts. In the case of *Appleby v. The United Kingdom*³⁷ the claimants (complainants) argued that they could not hold a meeting in a city shopping centre belonging to a private person. This shopping centre was built by a legal entity established by the city, which, however, subsequently transferred the center to private hands. The complainants argued that the shopping centre was not only a shopping centre, but also a social centre where people met, and thereby had a number of other functions. In this case, the ECHR took into account that the centre is marked on maps as an urban centre providing a number of other services and participating in the cultural and social life of the city. The ECHR stated that due to democratic, social, economic and technological developments, a positive obligation of the state may enforce the implementation of the right of assembly also towards a private entity, especially if it is a private entity in some way connected with a public institution. However, in the present case, he considered that the claimants (complainants) had ample opportunity to exercise their right of assembly without restricting private property, as they could demonstrate (set up an information stand) at the centre's entrances, on its galleries or negotiate with individual traders within the centre, they were also able to hold their meetings in the old city centre, which is why the ECHR did not find there a positive commitment from the state and a violation of Article 11 of the ECHR.

The Slovak author J. Svák (2011: 263) is critical of this judgment, pointing to the development of society and the real privatization of a number of public services provided so far by the state, such as transport, post, energy supply, healthcare. He wonders whether, in this situation, property rights should prevail over other rights and whether the state should ensure a fair balance of these rights. In this case, there was no doubt that the premises were set up from public funds and, even after being transferred to private hands,

³⁶ Cf. *Rozsudek Nejvyššího správního soudu (Judgment of the Supreme Administrative Court) of 04/09/2007, Reference 5 As 26/2007-86*

³⁷ *Judgment in the case concerning Appleby v. The United Kingdom of 06/05/2003, Complaint no. 44306/98*

served as a quasi-public space (*forum publicum*). According to J. Svák, public money and public interests were present in this project, which was briefly in private hands in the new building. It was located in the centre near public institutions. As the claimants /complainants/ did not interfere with the running of the centre and did not disrupt its business activities, Svák does not find the ECHR's decision correct. In his view, it cannot be accepted that privatization will relieve them of their responsibility to ensure fundamental human rights and freedoms through privatization. Under the current conditions, in his opinion, it is no longer an unsustainable opinion that a private owner can expel anyone from his land without restraint.

The Appleby case versus the United Kingdom was followed by the recent case of *Tuskia and Others versus Georgia*³⁸, in which it was a case of assembly held inside the University of Tbilisi. During the education reform, educators and others held meetings and other gatherings to discuss and criticize the reform. Some assemblies were dispersed by the police at the request of the Rector. The complainants argued that the university was not “privately owned” and that the State was therefore obliged to protect their assembly, especially in situations where most of the complainants had the right to be employees on campus. The ECHR stated, regarding general considerations as to the use of the place of assembly, that on the one hand that it is part of the right of assembly to choose its place, time and manner, on the other hand the right of assembly does not automatically establish a right of access to private property or unrestricted access to public property, such as the property of ministries or government agencies. In particular, he considered in the case that the violent intentions of the demonstrators had not been identified and that the assembly therefore fell under Article 11 of the ECHR, but during the assembly, which lasted several hours, there was significant interference with the university and its activities. In the light of this circumstance, as well as the fact that the demonstrators were allowed to demonstrate to a sufficient extent and thus fulfill the purpose of the assembly, which was to draw attention to the planned reform, the ECHR concluded that the subsequent closure of the assembly by the police was appropriate.

Two decisions of the Federal Constitutional Court in Germany, the so-called “Fraport”³⁹ “Bierdosen-Flashmob” cases, made an important contribution to the discussion of the Assembly's entry into private property.⁴⁰

In the Fraport case, the convener wanted to hold a demonstration at Frankfurt Airport. The airport was operated by the private company Fraport AG, in which, however, the City of Frankfurt am Main, the Land of Hesse and the Federal State of Germany had a majority shareholding.⁴¹ In the airport buildings, the necessary infrastructure for air traffic was combined with restaurants, shops and similar facilities. The demonstration was banned by Fraport AG and the convener was not successful even in civil courts. However,

³⁸ Judgment of the ECHR in *Tuskia and Others v. Georgia* of 11/01/2019, Complaint no. 14237/07.

³⁹ Judgment of the German Federal Constitutional Court of 22/02/2011, file no.1 BvR 699/06.

⁴⁰ Judgment of the German Federal Constitutional Court of 18/07/2015, file no.1 BvQ 25/15.

⁴¹ It is whether or not a public institution has a majority in a private company that J.H. Paper is one of the basic conditions for the possibility of interfering with the right of ownership (Papier, 2016: 1422).

the Federal Constitutional Court ruled in favour of the convener. He stated that the right referred to in para 8 (1) of the GG (right of assembly) includes the right to choose the place of assembly. However, that right does not go so far as to allow unrestricted access, since para 8 (1) of the GG extends only to places which are open to general public traffic. Public traffic is not where access is individually controlled and limited to individual limited purposes. In such areas, where public communication is also possible, the state cannot relinquish its obligation to protect communication freedoms. This was precisely the case with the airport, as it was also used as a place for conversations, shopping, gastronomy, even for non-travelling guests.

In the case of Bierdosen-Flashmob,⁴² the rally was to take place in a square in Passau. The assembled participants were to pour beer cans together and thus draw attention to the gradual loss of freedoms and the privatization of public space. The whole event was to last about 15 minutes. This gathering was to take place in the part of the square where cafes and restaurants were located, and this place was owned by a private company. This company did not want the assembly and forbade it to the convener, who did not find support in the civil courts, but only in the Federal Constitutional Court. He based his reasoning on the theses presented in the Fraport case. Here, too, the Federal Constitutional Court took into account that the space was also used for communication, the assembly was to last a short time, it was planned to be stationary and the convener should ensure the cleaning up after the event.

In response to that decision, R. Frau (2016: 634) points out that with along with the place of assembly its social function must always be considered (similarly Mangoldt & Klein & Starck, 2010: 839). Another change brought about by the above-mentioned Fraport and Bierdose-Flashmob judgments is that private law and the rules of protection of property rights must be interpreted in a constitutional manner in the light of the existence of the right of assembly (Prothmann, 2013: 201). However, it is critically pointed out that the right of ownership is no lower right (of lower value) than the right of assembly, which should not be automatically preferred, although this follows from the judicature of the Federal Constitutional Court (Frau, 2016: 644-645).

Germany, along with Hungary, are included among the states that have extended the right of assembly to areas provided for public access (regardless of ownership) and are thus located on one side of the imaginary scale of access to the right of assembly, most other European states including the Czech Republic and Slovakia adhere to an opinion that it is not possible to hold the meeting on private ownership, but with some exceptions (Peters & Ley, 2016: 286-287).

⁴² Flashmob is a very short and quick gathering or performance that is convened over the Internet (e.g. Facebook) and does not need to be organized in order to express something (such as a pillow battle). It is not only in Germany that it is a form of action used, and states approach it differently. The main problem is the speed with which the meeting is organized and implemented, including the number of participants, which is difficult to predict. If the meeting lasts literally a few minutes, the reaction of the public authorities is quite limited (Peters & Ley, 2016: 282-283).

The scope of the German approach demonstrates the case of counter-demonstration in the cemetery in Dresden.⁴³ Although it was contrary to the rules of the cemetery to hold any demonstrations, the Federal Constitutional Court's view had to make an exception in the event of a counter-demonstration against the meeting commemorating World War II victims, which took place on that day. It was an assembly to which the counter-protesters took a negative stance and wanted to express it in the cemetery, to which, according to the Federal Constitutional Court, they were entitled. In such a case, their counter-demonstration was permissible, although otherwise it would not be possible to hold a meeting in the cemetery.

Thus, on the one hand, German doctrine still states that Article 8 of the GG does not confer the right to assemble on foreign land or on foreign premises and that the owner is not obliged to provide his property for the assembly (Jarass & Pieroth, 2006: 256; Mangoldt & Klein & Starck, 2010: 839). On the other hand, with regard to the choice of venue, there is already a relatively stable view that the choice of venue is governed by the purpose of the assembly and that the choices are quite wide. The assembly receives the most attention in the place where the criticized problem is present.

R. Frau (2016: 650) suggests that a compromise should be made in the event of a conflict between the above-mentioned rights, so that if the assembly can be held, for example, on an access (public) route to an object criticized by the assembly and privately owned, the assembly should be held on that path. There is no possibility to choose a meeting place in Germany either, as there is a requirement for public access to the meeting place. From this, H.J. Papier (2016: 1419) precludes that it is excluded to hold an assembly, for example, in administrative buildings, public swimming pools or hospitals, as they are not open to public traffic without additional conditions of entry.

In Austria, for example, the case of the occupation of a power plant site by protesters was being addressed. As early as 1994, the High Court⁴⁴ reached a similar conclusion as above, namely that the interests of the demonstrators in the exercise of the right of assembly and the right of ownership of the company operating the power plant should be taken into consideration. However, this view has been criticized (especially at the time), as an assembly that affects third parties in this way can hardly be considered peaceful (without violence), and therefore such an assembly should not be granted constitutional protection (Stelzer, 1997; Öhlinger, 2009: 412).

In the Czech Republic, the question arose as to how to deal with assemblies that intentionally occupy foreign real estate (squatting). The basic question was whether such an event is an assembly protected by the LPS. The action consists of demonstratively occupying abandoned buildings, posting political statements or even holding supporting actions in them, and refusing to leave an occupied building, even through passive resistance. This is obviously not a simple squatting consisting in obtaining housing in abandoned real estate, but at the same time a civic attitude presented externally.

⁴³ Judgment of the German Federal Constitutional Court of 20/06/2014, file no. 1 BvR 980/13.

⁴⁴ Judgment of the High Court (Obersgerichtshof) of 25/05/1994, file no. 3 Ob 501/94

One of the means of maintaining an occupied property is the declaration of its new inhabitants as an assembly protected by constitutional regulations, stating that they are demonstrating a socially important topic.

One of the most famous cases in the Czech Republic is the occupation of Villa Milada in Prague, which became a kind of cultural center after the occupation, but after a few years this property was vacated and squatters expelled. In June 2012, on the occasion of the third anniversary of the eviction of Villa Milada, several dozen people entered the building through a balcony door on the first floor, where they were producing and listening to music until the police arrived. At the request of the police, they refused to leave the building, barricaded themselves in it and hung a banner with the slogan “3 years and enough, Milada”. After that, after unsuccessful negotiations, the police were made to force in and end the operation. From the point of view of the right of assembly, it is interesting that this event was not defined as an assembly, because there was no unifying element of the assembly. Its participants acted as individuals and they were acting for themselves. The squatters themselves emphasized the amusing nature of the event and their focus on maintaining the property. Regarding the conduct of these persons, the Supreme Administrative Court⁴⁵ stated, *inter alia*, that: *“although political and other assemblies are usually held in public places, it can certainly not be ruled out that the assemblies may be held elsewhere. This is evidenced both by the judicature of the European Court of Human Rights (cf. the above-cited judgment in the case concerning Cissé v. France, where participants gathered in the church, and the Czech historical experience used for the exchange of political and philosophical views between their participants). In these cases, however, it was always a space that was not fully publicly accessible, but the meeting was held with the knowledge and consent of its owner or authorized user. One can certainly imagine a situation where the participants of the meeting, with regard to the absence of some other suitable space or with regard to the message of the whole event, choose as the meeting place without the owner’s knowledge or with his patience, such as private land or dilapidated building, which is virtually and freely accessible for anyone. However, as the municipal court rightly pointed out, the situation is different in this case, as a group of participants in the FOOD NOT BOMBS event arbitrarily occupied the building after consulting the owner, which was secured against forcible entry at the time of the event. In order to occupy the building, they had to overcome a number of physical obstacles - using a ladder to penetrate the balcony of the villa, breaking the lattice and cutting a hole leading in. In a democratic society, it is difficult to accept and judicially protect, as an exercise of the right of assembly, an attempt to enforce one’s views and values by force, regardless of the rights of others.”*

In relation to the occupation of buildings as a form of assembly, the ECHR judgment in the case of Cissé v. France is cited above.⁴⁶ In this case, however, it was a very specific situation where, with the consent of the ecclesiastical authorities, French immigrants occupied and inhabited the French Church for a long time in order to draw

⁴⁵ Judgment of the Supreme Administrative Court of the Czech Republic of 01/03/ 2007, file no. 6 As 256/2016-79, par. 31, 32

⁴⁶ Judgment of the ECHR in the case concerning Cissé v. France of 09/04/2002, Complaint no. 51346/99

attention to the disproportionately strict French immigration laws and to demand their change. Following the deterioration of the hygiene situation, the assembly was disbanded by the French police operation, which the ECHR found to be a legitimate reason for closing the assembly.

5. CONCLUSION

As a result of its common history, the approaches of all the studied states are similar in the basic aspects of the right of assembly, but they still differ. In Germany, the emphasis is on the Assembly being a means of exchanging views and attitudes, either internally or externally, emphasizing the role of the Assembly in shaping public opinion. In the Czech Republic and Slovakia, the demand for orientation towards the formation of public opinion is not so strong, and assemblies exercising other rights and freedoms, such as religious or cultural rights, are also considered assemblies. In all states, however, it is impossible to consider an assembly under the constitutional protection as an assembly intended solely for entertainment or sport. On the contrary, the ECHR considers such events to be assemblies under the protection of the Convention, thus creating a conflict between the scope of protection afforded by the constitutional requirements of those States and the scope of protection afforded by the Convention.

The right of assembly as a *lex specialis* to freedom of expression is applied in accordance with the judicature of the ECHR and the case law of the examined states work regularly with the judicature of the ECHR. It is of great interest to look at the limits of freedom of speech always in specific cases, because it is not possible to specify the limits of admissibility of speech at the assembly.

In relation to the conflict of property rights with the assembly, we can state that as follows from the case law of the ECHR and the German Federal Constitutional Court or the Supreme Administrative Court of the Czech Republic, the assembly may be held on private property, even against the will of the owner, such as for economic reasons) their property for use by the public. In particular, these are shopping centers, airports, railway stations, etc. It is clear that in some cases the right of ownership must cease and is not inherently unlimited, but when this is to happen has it yet been comprehensively and satisfactorily resolved in any of the countries examined or case law. The ECHR, by virtue of the fact that the number of cases that have been reviewed by the Supreme Courts or the ECHR is too small.

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