THE NEW LAW ON THE RIGHT TO ASSEMBLY IN HUNGARY AS APPLIED IN PRACTICE

a collaborative research paper prepared by
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The project is supported by the Friedrich Naumann Foundation for Freedom.

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Central Europe and the Baltic States

EXECUTIVE SUMMARY

The regulatory framework of the right to peaceful assembly in Hungary was radically reshaped by a new law enacted in October 2018 by the Parliament where the governing party holds a qualified majority enabling it to modify laws in accordance with its political will. Although the professed reason for the modification was a series of specific deficiencies of the previous legislation, the Parliament introduced an overall reform that considerably transformed the legislative framework. The new law redefined the concept of "assembly", thoroughly regulated the notification procedure, introduced new grounds and measures for restrictions and vested the police with broad discretionary powers in the application of these. The reform clarified some controversial issues not covered by the previous legislation, but failed to remedy some of the deficiencies giving rise to the modification and created new problems hindering the exercise of right to assembly. Due to the uncertainties built into the regulation, the outcome of the notification process has become less foreseeable, requiring the organisers to be ready to challenge bans and restrictive measures before courts. Consequently, the judicial review of police resolutions has gained an even greater importance in the protection of this liberty.

The analysis of the new law's jurisprudence indicates that the established legislative framework as applied by the regulatory authority can hinder the enjoyment of the freedom of peaceful assembly. In several cases organisers had to turn to courts in order to freely exercise their right or maintain the level of protection enjoyed before the new law came into force. In a lot of other cases, organisers simply accepted the restrictions imposed by the police without seeking judicial review. Resolutions also reveal that organisers may face severe administrative obstacles both during the notification process and in the court proceeding.

Despite these difficulties, citizens are using the possibility to express their opinions in the streets. In the last three years, citizens have notified the police of more than 3,000 demonstrations in Hungary, where the organizers were expecting more than 1.7 million participants altogether. Furthermore, most courts tend to adjudicate cases in line with the principles of constitutionality and thus maintain a continuity in the jurisprudence.

The present research paper provides a rights-based analysis of the new legislation on assembly in light of the court rulings issued since its entry into force.[1] The chapters of the research paper reflect the main problems detected in the practical application of the law and the structure of each chapter allows the reader to understand the controversies of the practice of the right to assembly arising in the Hungarian context, the shift in the law and its evaluation on the basis of the international standards, the jurisdiction of the Constitutional Court and the European Court of Human Rights.

[1] The present research was conducted on the basis of the jurisprudence of Hungarian courts under the scope of the new legislation on the right to assembly. Throughout the project, the authors have made several efforts to gain access to or obtain the relevant judgments of the courts that are available both at the regulatory authority and the courts, but faced various obstacles in part due to the restricted operation of the courts throughout the COVID-19 pandemic and in part due to bureaucratic difficulties of access to case files for research purposes. For the longest part of the project, the research was conducted on the basis of judgments provided by legal experts and lawyers working in the field of the right to peaceful assembly. Finally, the President of the Budapest-Capital Regional Court provided the team with the anonymised versions of 22 judgments in the last couple of days of the research, which demanded the team to perform a last minute revision of the research paper, but also allowed us to assume that the research covers all relevant judgments.

Authors of the present collaborative research paper include academics, lawyers of human rights NGOs and attorneys providing representation in individual cases. The research was based on documentary sources, court rulings and police resolutions published officially or obtained from competent police departments and courts.

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I. HISTORICAL INTRODUCTION

I.1. The Old Assembly Act and the right to assembly under its scope

The Parliament of Hungary replaced Act III of 1989 on the Right to Assembly (hereinafter: **Old Assembly Act**) with a new one in 2018. The Old Assembly Act was one of the first pieces of legislation adopted in the course of the democratic transition in 1989. The Old Assembly Act enacted a notification regime, which offered the authorities only narrow possibilities to restrict the assemblies in relation to their time, place and manner; it also contained strict procedural rules that ensured a fast and effective judicial remedy, and settled the obligation of the state in terms of peaceful assemblies. While in force, the Old Assembly Act underwent only one substantial amendment: in 2004, before Hungary joined the EU, the wording of the provision allowing to ban an assembly on traffic-related reasons was improved.[2]

The Constitutional Court of Hungary (hereinafter: **Constitutional Court**) examined certain provisions of the Old Assembly Act, but not the overall law. Decision no. 55/2001 (XI. 29.) AB of the Constitutional Court[3] declared the notification regime -- namely that the organiser should notify the local police about the planned assembly -- to be constitutional, while decision no. 75/2008 (V. 29.) AB of the Constitutional Court[4] confirmed that the right to assembly covers quickly organised and spontaneous assemblies as well (even though these forms of assemblies were not regulated by the Old Assembly Act), ruling that a peaceful assembly shall not be banned on the sole ground of violating the notification rules. Decision no. 3/2013 (II. 14.) AB of the Constitutional Court[5] concluded that a judicial review of resolutions of the police concerning gatherings held on public premises shall be carried out in accordance with the special fast-track rules applicable to assemblies, even if the police, instead of issuing a ban, refuses to recognise it as an assembly on the basis that the planned gathering falls outside the scope of the legislation regulating assemblies. Decision no. 30/2015 (X. 15.) AB of the Constitutional Court[6] laid down the detailed requirements of prior negotiations between the regulatory authority and the organiser.

The European Court of Human Rights (hereinafter: **ECtHR**), in the light of its wide-range jurisdiction on the right to assembly has also dealt with Hungarian protest cases. In its judgments in the cases of *Patyi and Others v. Hungary*[7] and *Körtvélyessy v. Hungary*[8] the ECtHR reiterated the principles of traffic-related constraints on assemblies, while the

[2] Enacted by Article 147 (1) a) of Act XXIX of 2004 on legislative steps related to accession to the European Union. It also amended the scope of the Old Assembly Act as a result of which election rallies did not qualify as assemblies in terms of the Old Assembly Act (and therefore were exempted from the notification obligation).
[3] See the official English translation of the decision under http://hunconcourt.hu/uploads/sites/3/2017/11/en_0055_2001.pdf
[4] See the official English translation of the decision under http://hunconcourt.hu/uploads/sites/3/2017/11/en_0075_2008.pdf
[5] See the Codices summary of the decision in English http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2013-1-002
[6] Available in Hungarian at http://public.mkab.hu/dev/dontesek.nsf/0/9b333619596ff1a0c1257d5600588181/$FILE/0030_2015_hat%C3%A1rozat.pdf
[7] ECtHR, Patyi and Others v. Hungary, (Application no. 5529/05., judgment of 7 October 2008) see: http://hudoc.echr.coe.int/eng?i=001-88748
[8] ECtHR, Körtvélyessy v. Hungary (Application no. 7871/10., judgment of 5 April 2016) see: http://hudoc.echr.coe.int/eng?i=001-161952

judgment in the case of *Bukta and Others v. Hungary*[9] the ECtHR interpreted the conditions of dispersing an assembly.

The Old Assembly Act was short; quite liberal in its provisions, nevertheless its application showed that the law itself did not arrange several issues that were sources of conflicts. Still, relying on the decisions of the Constitutional Court and the jurisdiction of the ECtHR, courts were generally able to apply in a rights-oriented manner the rules of the Old Assembly Act in most protest-cases, and the blind spots of the written law were covered by the case-law of the Constitutional Court (spontaneous assemblies, prior negotiations between the police and the organiser). The application of the law was also supported by further means. The Parliamentary Commissioner for Citizens' Rights conducted a research on the practice of the right to assembly in 2008 and published its results in 2009 (hereinafter: **Report of the Ombudsman**).[10] In 2015, the Curia (the Supreme Court of Hungary, hereinafter: **Curia**) set up a "Group for the Analysis of Jurisprudence" to look into the problems arising in the application of the Old Assembly Act. The Group - in which judges worked with experts from the Constitutional Court's office, the Ministry of Justice, the Ombudsman's office, the police and the Hungarian Helsinki Committee - examined more than hundred court decisions passed since 2010 and issued an opinion analysing the case-law of the Old Assembly Act (hereinafter: **Opinion of the Curia's Working Group**). As it was not binding for the courts, the aim of the Opinion of the Curia's Working Group was to guide jurisdiction.[11]

I.2. Decisions of the Constitutional Court and the New Assembly Act

In 2018, the Hungarian Parliament adopted a new law: Act LV of 2018 on the Right to Assembly (hereinafter: **New Assembly Act**) replaced the Old Assembly Act with effect of 1 October 2018. The legislative development was inspired by decisions no. 13/2016 (VII. 18.) AB[12] and 14/2016 (VII. 18.) AB[13] of the Constitutional Court. In these decisions the Constitutional Court stated that there was no legal framework to guide the police on how to act when faced with a clash between the right to the privacy of a home, the freedom of movement and other fundamental rights on the one hand and the right to assembly on the other. The Constitutional Court ruled that the Parliament should enact appropriate legislation by the end of 2016 to assist the police and the courts in cases of such conflict.

The Parliament took advantage, and instead of amending it, replaced the whole act. The main changes are as follows:

A. The conditions of prior bans were radically revised. While the Old Assembly Act empowered the regulatory authority to ban an assembly on the basis of well-

[9] ECtHR, Bukta and Others v. Hungary (Application no. 25691/04, judgment of 17 July 2007) see: http://hudoc.echr.coe.int/eng?i=001-81728
[10] The Report of the Ombudsman is available in Hungarian at http://www.ajbh.hu/static/beszamolok_hu/2008/pdf/gyulekezesijogi.pdf
[11] The Opinion of the Curia's Working Group is available in Hungarian at https://kuria-birosag.hu/sites/default/files/joggyak/gyulekezesi_jog_joggyakorlat-elemzo_csoport_osszefoglalo_velemenye.pdf
[12] See the Codices summary of the decision in English http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2016-2-003
[13] Published in Hungarian at http://www.kozlonyok.hu/kozlonyok/Kozlonyok/1/PDF/2016/17.pdf

defined and exhaustively listed grounds,[14] the New Assembly Act introduced two entirely new grounds for issuing a ban: a reasonable likelihood of unnecessary and disproportionate (i) danger to public order or public safety, or (ii) violation of rights and freedoms of others. Though the New Assembly Act provides examples of others' rights (privacy, the freedom of movement, the dignity of certain communities), and of specific cases in which public order is affected (disturbing the traffic, disrupting the work of the judiciary), it does not specify how the new conditions for a ban would be applied.

B. A list of examples of threats to the public order or violating others' rights is presented as assisting the regulatory authority in applying the law and as resolving clashes between fundamental rights. However, the new law has undoubtedly widened the range of grounds for the police to ban a protest. With a wide discretion of the police to ban demonstrations, the New Assembly Act maintains the system of notification in its wording, but in practice, organising a demonstration has become more exposed to the permission of the police, which is highly concerning in the present situation when Hungary is moving further and further down on the "illiberal" scale. The first experiences of how the police applies these grounds justifies the concerns voiced by the new law's critiques, and although the courts have remained consistent with principles developed under the Old Assembly Act, the organising and holding of assemblies have become more taxing under the new law.

C. New forms of liability were introduced in the context of peaceful assemblies, increasing the legal costs of organising and participating in assemblies: holding a banned but non-violent protest became a crime, punishable with up to one year in prison;[15] protesters who participate in a banned protest in good faith are liable for a petty offense;[16] the organiser became financially liable for waste management.[17]

D. The New Assembly Act addresses issues which were missing from the Old Assembly Act incorporating regulation of holding spontaneous and quickly organised assemblies, of ranking simultaneous assemblies, of defining the earliest date of notification, and of clarifying the organiser's competences. The New Assembly Act empowers the regulatory authority to issue a prior restraint that determines the specific conditions to be met by the organisers.

E. The New Assembly Act contains more detailed procedural rules for the notification process and incorporates the obligation of negotiation between the organiser and the regulatory authority.

[14] According to Article 8(1) of the Old Assembly Act "*If the holding of an event subject to prior notification seriously endangers the proper functioning of the representative bodies or courts, or the circulation of traffic cannot be secured by another route, the police may ban the holding of the event at the place or time indicated in the notification, within forty-eight hours of receipt of the notification by the authority.*"
[15] Act C of 2012 on the Criminal Code, Article 217/C.
[16] Act II of 2012 on Petty Offences, Article 189 (3a) a).
[17] Article 21 of the New Assembly Act.

THE NOTIFICATION PROCESS UNDER THE NEW ASSEMBLY ACT

Notification of the police
- at earliest three months / at latest 48 hours in advance
- in all cases 48 hours before an invitation to the event is published (except for urgent assemblies)

Examination and completion of the notification by the police
- immediately after receipt of the notification

Negotiations between the organizer and the police
- as soon as possible after receipt of the notification

Resolution on banning or placing conditions to the assembly
- within 48 hours after receipt of the notification (no resolution is passed if the police takes note of the assembly)

Delivery of the resolution and publishing on the website of the police
- immediately after passing the resolution

Submission of a claim for judicial review
- within three calendar days after the resolution is delivered

Observations of the police
- to be forwarded to the court together with the claim within three calendar days after the claim is submitted

Final and binding judgment of the court
- final and binding judgment of the court within three calendar days after receiving the claim
- sustaining or quashing the ban, sustaining, modifying or annulling the resolution on conditions placed

Publishing the quashing, modifying or annulling judgment on the website of the police

THE NOTIFICATION PROCESS UNDER THE OLD ASSEMBLY ACT

1

Notification of the police
- at latest three calendar days in advance

2

Resolution on banning the assembly
- within 48 hours after receipt of the notification (no resolution is passed if the police takes note of the assembly)

Delivery of the resolution
- within 24 hours after issuing the resolution

3

Submission of a claim for judicial review
- within three calendar days after the resolution is delivered

4

Final and binding judgment of the court
- within three calendar days after submission of the claim
- on quashing or sustaining the ban

I.3. Major demonstrations under the New Assembly Act

Since 2018 several gatherings have been organised in the context of the New Assembly Act. The very first protests at the end of 2018 were half-way road-blockades and challenged the new rules on the traffic ban: the police banned them, but the court quashed the bans. In 2019, the police issued a prior restraint regarding the Pride March, which gave an opportunity to the court to interpret the application of this new tool in the hands of the police. The police bans on the so-called "Day of Honour" commemorations (when right-wing extremists remember World War II) in 2019 and 2020 were also challenged, therefore the court was in the position to define the conditions of prior bans justified by a potential violation of others' rights and liberties.

Before the closing of this research, one more considerable legislative step was taken in terms of the procedure of obtaining judicial remedy. Since 1 April 2020, the Curia reviews all resolutions of the police concerning notified assemblies, taking the place of the Budapest-Capital Regional Court which used to exercise this competence exclusively. In the absence of substantive case law produced by the Curia, we are not in the position to assess the significance of this change as far as the jurisprudence is concerned. The only decision that the Curia has issued so far (an inadmissibility decision due to the lack of a legal representative) raises concerns about a more restrictive approach, however, more time is needed to give a fair analysis in this regard.

II. THE SCOPE OF THE NEW ASSEMBLY ACT

II.1. The legal definition of assembly

Under the Old Assembly Act, the definition of assembly was constructed in a negative way, by excluding election rallies, religious events, cultural and sport events, and family celebrations from the scope of the Act. As a result, all gatherings of citizens with the aim of expressing views counted as assemblies. By contrast, the New Assembly Act defines the political gathering positively, and does not provide exceptions. Article 2 reads as follows: "*(1) Under the scope of the present act, the public gathering of at least two individuals with the aim of expressing their views on a public matter shall qualify as an assembly. (2) The gathering is public if anyone can join freely.*"

The definition of assembly and its interpretation enables the regulatory to determine whether a notified gathering shall qualify as an assembly under the provisions of the New Assembly Act. As a consequence of this evaluation, the regulatory authority may come to the conclusion that the notified event shall not be deemed as an assembly and thus establish the lack of its competence. Such a decision deprives the gathering of its constitutional guarantees and removes the protection granted to participants under the fundamental right to peaceful assembly. In practical terms, if the gathering does not qualify as assembly, the organisers may be required to obtain permission to use public space and may face further administrative obstacles, pecuniary and non-pecuniary burdens with respect to the holding the event.

It is clear, that the interpretation and the application of the definition of assembly has a decisive role with respect to the scope of the New Assembly Act. Due to the fact, that the

text of the law is drawn up in general terms, the regulatory authority is vested with a wide margin of interpretation as to the scope of the Act. Considering the consequences of a resolution on lack of competence of the regulatory authority, however technical such a decision may seem, it predetermines the future of the gathering to the merits, and therefore it shall be delivered with due consideration taking into account all relevant information acquired throughout the notification process. Only well-founded and carefully justified resolutions guarantee protection against arbitrary application of the definitive propositions of the New Assembly Act. As the decision whether the gathering falls under the scope of the Act determines the level of constitutional protection granted to the event and the participants, constitutional standards ought to be applied in the decision-making process.

II.2. The pre-2018 situation

Under the Old Assembly Act the most important case of restricting the right to assembly by way of establishing lack of competence was resolved by decision of the Constitutional Court. The constitutional complaint was filed by a political party which intended to organise an event on 15 March 2012 to commemorate the Hungarian freedom-fight of 1848/49 at the Heroes' Square, in Budapest. The police established its lack of competence and refused to deal with the notification, arguing that on 15 March 2012 the area in question would be used by Office of the Municipality of Budapest, based on an agreement between the municipality and the Office. The police claimed that because of the agreement the venue did not qualify as public space in the meaning of the Old Assembly Act, and the court exercising judicial review confirmed this interpretation of the factual circumstances and the legal context. Decision no. 3/2013. (II. 14.) AB of the Constitutional Court[18] annulled the court decision, and determined a constitutional requirement, deriving from the Fundamental Law of Hungary, that "*judicial supervision under the Assembly Act shall be in place against the decision of the police on the lack of its competence in the context of the notification, and the court shall consider the legality and the justification of the police decision on its own merits.*" Unfortunately, the decision of the Constitutional Court, procedural in nature, did not prevent the police from further attempts to restrict subsequent assemblies by establishing its lack of competence.[19]

It is not disputed that deciding on the nature of a gathering may involve difficulties (e.g. in cases of collecting signatures for a petition on the street). However, the New Assembly Act's definition of assembly, as some recent decisions suggest, fails to result in a more refined application of the law than before.

[18] See note 5 above.
[19] See, for example, the case of "More Techno to the Parliament!", judgment no. 17.Kpk.45.528/2016/4. of the Budapest-Capital Administrative and Labour Court available in Hungarian at https://m.blog.hu/at/ataszjelenti/file/ttp_ve_gze_s_anonim.pdf

II.3. The jurisprudence under the New Assembly Act

Establishing the lack of competence

Only one month after the entry into force of the New Assembly Act, **judgment no. 105.K.700.890/2018/2** of the Budapest-Capital Regional Court quashed a police decision which established lack of competence in relation to a gathering, organised by a political party.[20] The purpose of the assembly was to collect supportive signatures for Hungary's accession to the European Public Prosecutor's Office and the propagation of the policies of the organising party by flyers. In view of the police, the intention of the participants was not aimed at forming and expressing common views, and therefore the planned event did not qualify as an assembly under the New Assembly Act.

The court quashed the resolution reiterating previous decisions of the Constitutional Court. Besides the above-mentioned decision no. 3/2013. (II. 14.) AB of the Constitutional Court, the court recalled decision no. 30/1992. (V. 26.) AB of the Constitutional Court,[21] a landmark decision in terms of the freedom of expression, which stated that *„the right to assembly is closely connected to the freedom of expression, since organising, holding and participating in assemblies enables the common expressing of opinions*". In relation to the definition of the assembly and factors that determine a public gathering with the aim of expressing views in a public matter, the court accepted and reiterated the extended interpretation of "public matter", provided by the Constitutional Court in its decisions no. 55/2001. (XI. 29.) AB[22] and 75/2008 (V. 29.) AB,[23] when it stated: "*Any issue that does not concern private entities' private interests, but is an object of debates on state of affairs or on questions of public interest in the widest sense, shall be seen as a public matter. Besides assemblies addressing political issues, any other gathering shall be regarded as assemblies that address questions related especially to the operating and acting of central or local governmental bodies, to public services and utilities, to social conflicts and their solutions. The range of opinions on public matters is not limited to political issues, since these issues are only an important but not exclusionary part of the domain of public matters.*" Upon these considerations the court decided that the notified assembly obviously falls within the scope of the New Assembly Act's definition.

Despite the fact that the above court ruling was fully published on the website of the regulatory authority together with the detailed reasoning behind the decision, two months later a similar case arose in another county. The same political party notified the police of a similar event with the same aim, and the police rejected the notification establishing the lack of its competence once again. Therefore in **judgment no. 105.K.700.013/2019/3** the Budapest-Capital Regional Court was compelled to repeat the reasoning elaborated in the previous case and quash the resolution of the police under the same argumentation. This case conveys with particular clarity the fine line between the two possible understandings of the resolution on establishing the lack of competence of the regulatory authority. In this case, the police did not deliver a resolution under the New Assembly Act, just issued an order establishing the lack of its competence under the general rules of

[20] Resolution 190/160/150/2018 of the regulatory authority, quashed by judgment no. 105.K.700.890/2018/2. of the Budapest-Capital Regional Court.
[21] Published in Hungarian at http://public.mkab.hu/mkab/dontesek.nsf/0/C12579890041A608C125798800473E9B?OpenDocument
[22] See note 3 above.
[23] See note 4 above.

administrative law and provided instructions as to the possible legal remedies accordingly. As a result, the resolution establishing the scope of the New Assembly Act was not delivered in conformity with the procedure regulated in the New Assembly Act (which is a fast-track procedure compared to the regular remedial procedure to be followed in matters of public administration). This solution mirrors an understanding according to which the decision on the lack of competence of the regulatory authority is a purely technical issue the evaluation of which does not fall under specific rules governing the freedom of assembly. The organiser however, disregarded the instructions of the police and instead of following the regular remedial route turned to the Budapest-Capital Regional Court requesting judicial review under the rules of the New Assembly Act. The court declared that the regulatory authority had committed a substantial breach of procedural laws and reminded that the legality of the resolution shall be examined to the merits within the procedure regulated in the New Assembly Act.

The New Assembly Act qualifies a gathering as assembly if it is public, anyone can join freely. Establishing or denying the public nature of an event by the police entails the above-mentioned consequences: non-public events held on public premises shall not be notified and the regulatory authority has no competence. As a consequence, the decision on the public nature of an event affects directly the application of the right to assembly. The exemption of non-public events from the scope of the Act also provides a possibility for the organisers to avoid complying with the duty of notification and to slip aside from the banning power of the police. In the case of the 2019 "Day of Honour" rally the organiser notified the police on his planned assembly, but when the police banned the rally, challenged the ban before the court, partly on the ground of slipping aside from the scope of the New Assembly Act and claiming that the police issued the ban lacking competence. The organiser insisted before the court that the event would be closed and only those would be allowed to participate who agreed with the purpose of the event, but the court didn't accept this argumentation. **Judgment no. 103.K.700.069/2019/5** of the Budapest-Capital Regional Court took that the event is not deprived from its public nature solely on the ground that only those are allowed to join, who agree with the purpose of the event. The court stated, in line with the justification of the New Assembly Act, that participation in an assembly itself involves the agreement with the purpose of the event one participates in: the phrase of "anyone" [who can join freely] means "anyone who agrees with the purpose of the gathering". The fact that the organiser intends to let only those who agree in is not rendering the event as non-public, therefore it was lawful to qualify the event as public and handle it as an assembly. In this respect the court recalled that the organiser is responsible for excluding those who seriously disturb the event, instead of excluding those who disagree.

Assessment of symbolic events

According to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) Guidelines on Freedom of Peaceful Assembly (hereinafter: **ODIHR Guidelines**)[24] "*the right to freedom of expression includes the choice of the form in which ideas are conveyed, without unreasonable interference by the authorities – particularly in the case of symbolic protest activities.*"[25]

[24] All references to the ODIHR Guidelines in the present research shall indicate the Second Edition of the ODIHR Guidelines, issued in 2010, available at osce.org/odihr/73405?download=true
[25] ODIHR Guidelines, para 17., p. 30.

In March 2019, the police excluded a symbolic soccer game from the programme of an assembly to be held in front of the Parliament as a protest against lowering the level of education. The aim of the demonstration was to draw attention to the fact that the government spends much more public funds on professional football than on public education. Though the organiser explicitly indicated the symbolic feature of this element of the gathering during the negotiations, the police treated the match as a sports event and obliged the organiser to eliminate it from the programme of the assembly. In its **judgment no. 102.K.700.158/2019/3**, the Budapest-Capital Regional Court, however, accepted the organiser's statement, and declared that "*a gathering should be evaluated primarily by its aim*", instead of by its devices and equipment. The court agreed with the organiser that "*the symbolic soccer match would be the primary expressive way and the most appropriate communicative instrument in expressing the assembly's message*", therefore preventing the organiser to hold the match had restricted freedom of expressing political views unnecessarily.

Assessment of election rallies

"*Legal measures that are potentially more restrictive than the normal regulatory framework governing freedom of assembly should not be necessary to regulate assemblies during or immediately after an election period, even if there is heightened tension. On the contrary, the general law on assemblies should be sufficient to cover assemblies associated with election campaigns, an integral part of which is the organisation of public events.*"[26]

Election rallies did not fall within the scope of the Old Assembly Act, which practically resulted in that assemblies organised by parties and candidates during the campaign period were exempt from the duty of notification. The New Assembly Act does not distinguish electoral rallies from other types of gatherings, therefore they fall within the scope of the Act and are subject to the duty of notification. Though the current regulation is in line with the international standards of non-discrimination, regarding that the previous legal regime was more liberal and that the current notification system may raise concerns (see below the chapter on administrative obstacles of the right to peaceful assembly), the New Assembly Act can be evaluated as a step backwards in this regard.

III. ADMINISTRATIVE OBSTACLES

The New Assembly Act and related legislation introduced several new administrative obstacles to the right of assembly, despite that according to standards, the (legal) costs of organising and holding assemblies should be as low as possible. In terms of the ODIHR Guidelines: "*Any notification process should not be onerous or bureaucratic, as this would undermine the freedom to assemble by discouraging those who might wish to hold an assembly.*"[27]

[26] ODIHR Guidelines, para 6., p. 24.
[27] ODIHR Guidelines, para 116., p. 64.

III.1. The electronic form of notification

The New Assembly Act maintained that the planned assembly shall be notified to the police in a written or oral form. While previously the police had accepted the notification via email, since the New Assembly Act entered into force the police only accepted notifications via the official electronic channel established by state authorities. Failing to use this official electronic channel, namely sending the notification to the police in a simple email, is seen by the police as an invalid notification. Thus the police will consider the subsequent assembly unnotified. At the same time, organising an unnotified assembly constitutes a petty offence, punishable with a fine up to HUF 150,000 (around EUR 450).

While an email with the required information on the planned assembly could be sent even from a smartphone, the usage of the official electronic channel requires electronic registration into an official state provided account (and the registration process can be completed only in person), substantial IT-skills and PC-optimized applications from organisers. Although the official electronic channel and the electronic notification form were simplified,[28] the fact that email-notification is not accepted, registration for using the official electronic communication channel is still required, and the failing to fulfil the notification requirements is sanctioned with a fine can constitute significant administrative barriers. This is especially problematic for organisers of urgent assemblies, as they are obliged to notify the police even when they have very limited time to do so.

In 2019 the police fined an activist of HUF 100,000 (around EUR 300) in total, who notified an instant assembly via email, on the grounds of both organising and holding a gathering without valid notification.[29]

In another case, the court acquitted an organiser whose e-mail was first admitted by the police as a valid notification, but on the following day, a few hours before the assembly's planned beginning she was informed that she could only submit the notification either in person at the police station or through the official electronic communication system. She attempted to install the system on her computer, but failed and could not go to the police station either. She was sanctioned with a warning by the police for still holding the assembly, but the court concluded that - since the police originally accepted the notification - the organiser was not at fault for not being able to meet the formal requirements in time and therefore acquitted her.[30]

III.2. Prohibition of advertising the notified but not decided assembly

"*The right to freedom of peaceful assembly includes the right to plan, organise, promote and advertise an assembly in any lawful manner. Any restrictions on such activities should be considered as a prior restriction on the exercise of the right.*"[31] "*While laws may legitimately specify a minimum period of advance notification for an assembly, any*

[28] The online platform for initiating a notification procedure is accessible via the website of the police under https://ugyintezes.police.hu/web/guest/uj-ugy-inditasa/
[29] Procedure no. 01813/1279-5/2019.szabs. The judicial review of the resolution was still pending at the time of closing the research.
[30] Judgment no. 19.Szk.1615/2019/5. of 24 June 2019 of the Pécs County Court.
[31] Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, 19. available at https://digitallibrary.un.org/record/831673

maximum period for notification should not preclude advance planning for assemblies. When a certain time limit is set out in the law, it should only be indicative."[32]

Confronting the above recommendations, the New Assembly Act establishes a maximum period and permits the notification of an assembly only three months in advance. Besides, under the new rules, the organiser is not allowed to inform the public about the planned assembly until the period open for the police to decide on the notification expires. Article 10 (1) of the New Assembly Act stipulates that the "*organiser shall notify the competent authority at least 48 hours before an invitation to the event is published*". Violating this rule constitutes a petty offence, punishable with a fine up to HUF 150,000 (around EUR 450).[33]

The proportionality of this constraint depends on the duration between the moment of the notification and the time of the planned assembly: the more limited this period is, the more serious constraint this rule imposes on the organising process. The limitation is particularly heavy on the shoulder of the organiser in case of counter demonstrations, which are always bound to the opposed gathering, but it may also cause problems regarding demonstrations that intend to react to quickly evolving political developments.

In the beginning of 2019 the police imposed a fine of HUF 100,000 (approximately EUR 300) on an organiser who started to advertise a planned assembly via social media right after submitting the notification to the police. In a subsequent procedure the court overruled the fine and issued a warning instead, but it upheld the organiser's liability for not complying with the regulation.[34]

III.3. Compulsory legal representation

The New Assembly Act maintained the regime of quick judicial remedy in case of banned (or restricted) assemblies: the law provides three calendar days for the organiser to challenge the resolution, three calendar days for the police to prepare statements and to forward the case file to the court, and three calendar days for the administrative court to decide. As of 1 January 2018, Act I of 2017 on the Administrative Court Procedure (hereinafter the **ACP**) introduced compulsory legal representation[35] in assembly law cases. This means that the organiser is forced to find a lawyer who is willing to prepare the lawsuit in a very limited period of time, occasionally during the weekend. Such a short deadline is unusual under Hungarian law, and since freedom of assembly cases are relatively rare and not financially lucrative, very few lawyers specialise in these cases, leaving organisers in a difficult position when looking for a lawyer willing to represent them.

The practice of the Budapest-Capital Regional Court -- vested with exclusive competence to review resolutions of the regulatory authority until 31 March 2020 -- was divergent as to the consequences of lack of legal representation. In some cases, on the basis of Article 46 of the ACP, the court has set a deadline for plaintiffs initiating the judicial review without a legal representative to remedy the lack of legal representation. This allowed the

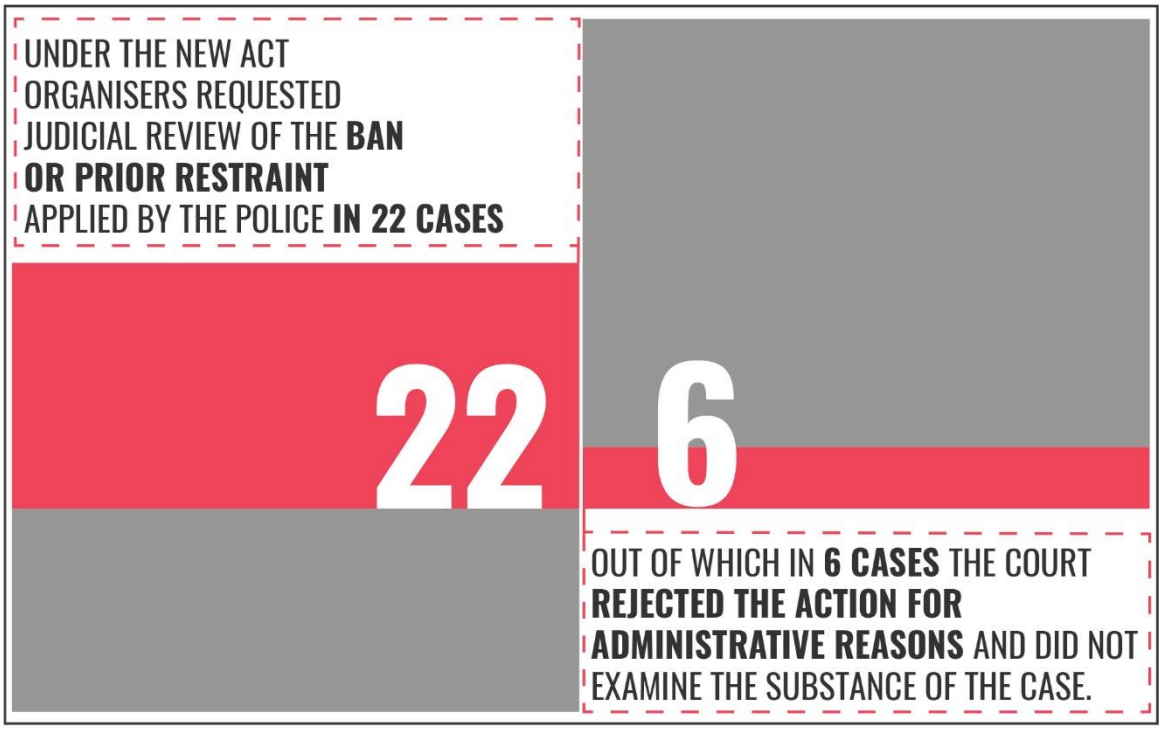
[32] ODIHR Guidelines, para 116.
[33] Advertising a banned assembly constitutes a crime.
[34] Resolution no. 63.Szk.279/2019/6-I. of the Szombathely County Court.
[35] Under the wording of Article 13 (11) of the ACP effective until 31 March 2020, the assembly law jurisdiction was exclusive competence of the Budapest-Capital Regional Court, and Article 27 (1) of the ACP prescribed compulsory legal representation before regional courts.

organisers to put the proceeding into motion within the short deadline and then try to secure representation either through a retained lawyer or by seeking legal aid. For instance, **judgment no. 105.K.700.085/2019/16** delivered in a traffic ban case, the Budapest-Capital Regional Court called on the organiser to remedy the lack of legal representation within 30 days and granted exemption from costs and expenses, which allowed the organiser to secure a legal aid lawyer. The legal aid authority granted *pro bono* legal representation, which enabled the court to decide on the merit of the ban. Nonetheless, in **decision no. 105.K.700.881/2018/2** the same court rejected the organiser's claim on the basis of the lack of legal representation. In a third case, the organiser indicated in his petition that he was going to apply for a legal aid lawyer to meet the requirement of mandatory legal representation. Still the same court, by **decision no. 104.K.700.121/2020/11** obliged the organiser to present within 24 hours proof of the fact that he had done so. The organiser submitted the cover page of his application, however, the court took the stance that since it was not clear from the cover page what kind of assistance exactly his request to the legal aid authority was directed at and since the organiser failed to submit the complete application despite express request from the court, the petition was found to be inadmissible for the lack of legal representation.[36]

Legal representation remained compulsory after the Curia gained exclusive competence to review resolutions of the regulatory authority as of 1 April 2020.[37] Based on its first published decision, it seems that the Curia is taking the more restrictive approach to the issue. By **resolution no. K.I.39.006/2020/2**[38] delivered on 6 April 2020, the Curia rejected a petition against a ban, without substantive examination, on the ground of missing legal representation. The Curia applied the general norm of Act CXXX of 2016 on the Code of Civil Procedure, which indeed obliges the courts to reject petitions submitted without a legal representative if legal representation is mandatory. In fact, the ACP is *lex specialis* compared to the Code of Civil Procedure, therefore in our view, the Curia should have applied it instead of the general norm (which is less favourable for the plaintiffs) and should have provided a deadline for the organiser to arrange legal representation. Unless the interpretation of the Curia changes, it will set insurmountable obstacles for a number of organisers in challenging restrictive resolutions of the police.

It must be pointed out that even if the Curia takes a more lenient stance, the need to apply for legal aid and then -- if legal aid is granted -- find a legal aid lawyer obviously prolongs the proceedings and may make assemblies devoid of meaning if the passing of time makes the opinion to be expressed through the rally irrelevant. Therefore, mandatory legal representation in the course of the judicial review of police bans and prior restraints can be seen as an obstacle seriously hindering the exercise of the right to assembly.

[36] Judgment no. 104.K.700.121/2020/11. of the Budapest-Capital Regional Court.
[37] Articles 12 (2) d) and 27 (1) a) of the ACP.
[38] Published in Hungarian at https://kuria-birosag.hu/hu/gyulhat/ki3900620202-szamu-hatarozat



*The table was drawn up taking into account court decisions issued between 1 October 2018 and 30 April 2020.

III. 4. The consequences of a judicial decision quashing the police ban

As explained above, in terms of Article 15 of the New Assembly Act, within three calendar days from the communication of the regulatory authority's decision to prohibit the assembly, the organiser may request a judicial review of the decision. The court shall adopt a decision within three calendar days and if it finds in favour of the organiser, it shall annul the prohibition. If this happens after the originally scheduled time of the assembly, the organiser shall communicate to the regulatory authority the planned new time of the assembly with no less than 24 hours before holding the assembly.

While this is undoubtedly a welcome development, an important issue remains unsolved: if the court delivers its annulling decision only shortly (e.g. one day) before the scheduled time of the assembly, the organiser might not have time to properly prepare and advertise the assembly (especially due to the above outlined restrictions on advertising the assembly).

The problem is illustrated by **case no. 101.K.700.142/2019** of the Budapest-Capital Regional Court. In the given case, the organiser announced on 31 January 2019 his intention to block on 25 February one lane of a main road as a demonstration against a piece of legislation. The police prohibited the assembly, but on 21 February, the court quashed the ban upon judicial review. The next day, the organiser notified the police that he wanted to postpone the demonstration to 11 March with the same parameters, however, the police informed him that in their view this was a new notification regarding a completely new assembly, which they restricted in a decision to a smaller area than what was originally planned. Since the law allows the holding of a prohibited assembly at a different time but with the same parameters only if the court quashes the police ban after the planned time of the assembly, the Budapest-Capital Regional Court accepted the police's interpretation that the second notification was a completely new one triggering

the whole process of assessment and negotiation irrespective of the fact that most of the issues have already been examined and adjudicated by a court.

In our view, in such cases the second notification should not be regarded as "new", and only the date of the new assembly should be "up for debate", because that indeed can have a bearing to the circumstances that the authorities must take into account (e.g. traffic on weekends can be very different from traffic in the rush hour of a weekdays). For the sake of legal certainty, this would require the amendment of the New Assembly Act.

III. 5. Further requirements

The New Assembly Act increased the responsibilities of the organiser when introduced the obligation of cleaning the place at the end of the assembly. Article 3(6) says that "*The organiser shall take care of restoring the state of the gathering's place, especially of the tearing down the technical infrastructure, of removing posters, of cleaning trash and of repairing environmental damages.*" Failing to comply with these duties the organiser shall be fined up to HUF 50,000 (around EUR 150).

This regulation does not comply with the ODIHR Guidelines, which set forth that in light of the importance of freedom of assembly for democracy, the infrastructural costs arising in relation to an assembly should be borne by the state. This includes not only the costs of providing adequate security and safety measures (including traffic and crowd management, and first-aid services), but also "*the responsibility to clean up after a public assembly should lie with the municipal authorities. [...] To require assembly organisers to pay such costs would create a significant deterrent for those wishing to enjoy their right to freedom of assembly and might actually be prohibitive for many organisers. As such, imposing onerous financial requirements on assembly organisers is likely to constitute a disproportionate prior restraint*."[39]

[39] ODIHR Guidelines, para 30, p. 36.

IV. THE DUTY TO COOPERATE IN THE PREPARATORY PHASE

IV.1. Standards

The duty of cooperation between the regulatory authorities and the organisers does not always appear as an expressly proclaimed standard, but it is implicit in several requirements formulated concerning the freedom of assembly.

Stemming inevitably from the structure of the right, this is most often emphasised with regard to the authorities. In terms of the ODIHR Guidelines, "*the state should always seek to facilitate […] public assemblies at the organisers' preferred location*".[40] The Explanatory Notes to the Guidelines elaborate on this positive obligation, committing the regulatory authority to "*ensure that any relevant concerns raised are communicated to the event organisers, who should be offered an opportunity to respond to any concerns raised. This is especially important if these concerns might later be cited as the basis for imposing restrictions on the event*", as this helps fostering *"a co-operative, rather than confrontational, relationship between the organisers and the authorities*".[41]

However, the duty to cooperate also pertains to the organisers. The Explanatory Notes emphasise that "*the organisers of an assembly"* along with the designated regulatory authorities, law-enforcement officials and other parties whose rights might be affected by an assembly *"should make every effort to reach mutual agreement on the time, place and manner of an assembly*."[42] The jurisprudence of the ECtHR also makes it clear that organisers of public gatherings, as actors in the democratic process, "*should abide by the rules governing that process by complying with the regulations in force"*[43] as "*this allows the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering*".[44]

The ECtHR's Budaházy decision expressly relied on the organiser's unwillingness to cooperate, although not in relation to the preparatory phase (as the case concerned an unannounced demonstration). The applicant and his co-demonstrators blocked all six lanes of a major Budapest bridge by parking six passenger cars across it. In coming to the conclusion that no violation of Article 11 had taken place the Court attributed significant importance to the fact that "*the applicant and other protesters failed to give evidence of flexibility and readiness to cooperate […]. Indeed, it was rather the authorities who showed a certain degree of tolerance in the situation, in that they allowed the demonstration to continue for several hours, before dispersing it […]*."[45]

IV.2. The pre-2018 situation

The Old Assembly Act did not contain any express norm on the duty to cooperate, although its Article 8(3) did invoke the laws on administrative procedure, which set the requirement

[40] Ibid., guideline 2.2, p. 15.
[41] Ibid., pp. 69-70.
[42] Ibid., p. 70.
[43] ECtHR, Primov and Others v. Russia, (Application no. 17391/06., judgment of 12 June 2014) § 117. See: http://hudoc.echr.coe.int/rus?i=001-144673
[44] ECtHR, Sergey Kuznetsov v. Russia, (Application no. 10877/04., judgment of 23 October 2008) § 42. See: http://hudoc.echr.coe.int/eng?i=001-89066
[45] ECtHR, Budaházy v. Hungary, (Application no. 41479/1015., judgment of 15 December 2015) § 41. See: http://hudoc.echr.coe.int/eng?i=001-159203

of cooperation and acting in good faith for both the authorities and the parties.[46] Decree 15/1990 (V. 14.) of the Minister of Interior on Police Tasks Regarding the Management of Assemblies (hereinafter: **MI Decree I.**) made a reference to the records of the negotiations between the police and the organisers (as one of those documents that serve as the basis of the decision on the notification), however, there were no clear procedural provisions and guidelines on how these negotiations were to be carried out, or whether they were obligatory at all. Although the police developed a practice of regularly holding negotiations with the organisers, in the absence of clear legal norms requiring so, courts for a long time disregarded this issue when an assessment of the lawfulness of prohibitions was made.

A turn in the case law came with decision no. 30/2015 (X. 15.) AB of the Constitutional Court,[47] in which -- upon a constitutional complaint -- the Constitutional Court quashed a judicial decision upholding a prohibition by the police. In June 2014, the organiser notified the police of a demonstration regarding a court case. The assembly of 50-200 people would have taken place in front of the Curia while the case was being heard. The police contacted the vice president of the Curia, who gave the opinion that such a demonstration would exert pressure on the sitting judges so it would severely interfere with the functioning of the court (which was one of the reasons for prohibition under the Old Assembly Act). Based on this opinion and without holding a negotiation with the organiser, the police prohibited the assembly. A judicial review was requested, but the court upheld the ban on the basis that the only purpose of the negotiation *"was to provide the police with an opportunity to call the organiser's attention to circumstances that might serve as the basis of a prohibition"*.

However, the Constitutional Court regarded the omission of the negotiation to be a decisive error in the procedure: "*the Constitutional Court has come to the conclusion that the regulatory authorities can only meet their obligation to provide [well-grounded] reasons if they […] mandatorily conduct a [pre-assembly] negotiation […]. In the course of the negotiation, the public authority conducts a dialogue with the organiser, which […] provides both the organiser and the authority with the possibility of getting more thoroughly acquainted with the other's stance […]. The application of […] the negotiation procedure […] enhances the exercising of the fundamental right and can prevent […] the fundamental right's unjustified restriction. […] Hence, […] the negotiation procedure assists the demonstrators and the authority in finding a compromise, creating a proper balance between the freedom of assembly on the one hand and the constitutional requirement protected by the ground for prohibition on the other. Based on the above, the negotiation process is an important procedural safeguard of the enforcement of the fundamental right to assembly, the omission of which […] does not only violate the freedom of assembly, but also breaches the constitutional requirement of legal certainty […]*." The Court added that the police shall attempt to find a compromise with the organiser in the course of the negotiation and pointed out that the legislator should think about clarifying the obligation to consult the organiser in an Act of Parliament.

Mention must also be made of **Decision no. 14/2016 (VII. 18.) AB of the Constitutional Court**, which outlined the body's approach to the most severe violation of the duty to cooperate on the part of the organiser: the attempt to deceive the regulatory

[46] See for instance Articles 2 and 6 of Act CL of 2016 on the general Rules of Administrative Procedure.
[47] See note 6 above.

authority in terms of the actual objective and other important elements of the assembly. One of the two complaints before the Court concerned a far-right demonstration commemorating certain events of WWII, but the organiser announced it as an event aimed at expressing solidarity with Russia and its leader, Vladimir Putin. In its decision rejecting this constitutional complaint, the Court stated that the organiser shall not deceive the regulatory authority, as it would be against the very purpose of prior notification if the body vested with the task of protecting the assembly was given false information. The Court expressed the view that an assembly that is falsely notified shall be regarded as an unnotified assembly, since the police is not actually notified about constitutive elements of the assembly: its aim and the authentic agenda linked to it.

IV.3. The New Assembly Act and its jurisprudence

The New Assembly Act contains express provisions regarding the parties' duty to cooperate and exercise their rights bona fide[48] and also regarding the pre-assembly negotiations. In terms of Article 11, the regulatory authority is obliged to hold a negotiation –- in the form of an official hearing -– if the organiser needs to be heard for any reason. If in the course of the negotiation the authority concludes that the assembly cannot be held at the notified place and time, it shall call the organiser's attention to the possibility of holding it in other places. If the organiser fails to attend the negotiation or the negotiation is unsuccessful, the authority shall adopt a decision determining what conditions the assembly must meet so that it can be held.

The express appearance of the duty to cooperate has resulted in the development of new jurisprudence elaborating on this principle. In its **decision no. 105.K.700.291/2019**, the Budapest-Capital Regional Court decided on the prohibition of an assembly that would have demonstrated against a controversial legislative act by blocking one lane of a major road for four hours. The police obtained an opinion from its traffic department, which was of the view that since the concerned road section was difficult to replace with a detour, the demonstration would cause a significant traffic jam, threatening not only the order of traffic, but also life and limb as well as property. The police suggested that the blocking should concern another road, but the organiser rejected the suggestion to which the police reacted with a practically immediate prohibition of the assembly.

Upon the organiser's request for judicial review, the court concluded that the prohibition was unlawful for reasons related to the improper conducting of the negotiation by the police. Relying on the above quoted decision of the Constitutional Court, the regional court emphasised that the fundamental purpose of the negotiation for the police should be to avoid having to prohibit the assembly. This is why an unsuccessful negotiation can be followed by not only a ban, but also the adoption of restrictions that allow the holding of the planned assembly –- even if in a more limited format or manner. The police can only adopt such restrictions if it listens to the organiser's stance on the alternatives it offers. The police shall not apply the grounds for prohibition in a schematic manner, so the negotiation must be substantive and not formal. Based on the evidence before it, the court concluded that the police immediately applied the most severe restriction, i.e. the prohibition of the demonstration, without considering the application of less intrusive

[48] Article 8 of the New Assembly Act.

limitations, which amounts to a violation of its duty to cooperate and facilitate the exercise of the freedom of assembly.

This approach was reinforced in **decision no. 105.K.700.241/2019/2** of the same court, where the court condemned the police not only for simply not offering alternatives to the organiser (who wished to set up a 500-meter long roadblock in protest against a piece of legislation), but also for banning the demonstration after a negotiation where the officer simply quoted the text of the law to the organiser and concluded that in his view the grounds for banning the demonstrations were not in place, thus completely preventing the organiser from entering into a meaningful negotiation with the regulatory authority.

In its **decision no. 104.K.700.083/2019/3**, the Budapest-Capital Regional Court had to decide whether a brief telephone negotiation between the organiser and the police satisfied the requirements of the New Assembly Act. In the case, the organiser planned to hold an assembly on one of the Budapest bridges. After receiving the notification, the police contacted the organiser, clarified the details of the assembly, informed the organiser about the provisions allowing the police to prohibit or limit the assembly, took the organiser's declaration that he did not wish to modify the parameters of the demonstration, and prepared an official note on the phone conversation. Subsequently -- on the basis of the note and the opinion of its traffic department -- the police prohibited the assembly.

The organiser requested a judicial review and the court quashed the ban on the basis that the New Assembly Act prescribes an official hearing requiring the presence of the organiser or his/her representative exactly to facilitate substantive communication between the parties with a realistic chance of reaching a consensus, as "*this is the interpretation that is compatible with the requirement of the widest implementation of the right to assembly*". After quoting at length from Decision no. 30/2015 (X. 15.) AB of the Constitutional Court, the court went on to point out that "*the authority failed to offer alternative options regarding a limited realisation of the event […]. This made the negotiation devoid of its purpose, as there could be no actual cooperation between the organiser and the police that […] could have facilitated the enforcement of the fundamental right to assembly. With this, the respondent [police] violated the rules of the negotiation procedure in such a substantial manner that it had a [significant] impact on the merits of the case […].*"

In yet another case, the court linked the regulatory authority's duty to cooperate to the requirement of a fair trial (proceeding). In the case the organiser notified the police about a demonstration regarding which the police imposed a prior restriction concerning the place (the police obliged the organiser to move the assembly's venue from a Budapest bridge to a nearby parking lot). The organiser withdrew the notification and submitted another notification to the same date and place but with less participants and a slightly different agenda. The police rejected the notification without examining its merits on the basis that this was a matter already decided upon. The organiser requested a judicial review. In its **decision no. 107.K.700.128/2019/6,** the Budapest-Capital Regional Court agreed with the police that the two notifications concerned substantially the same identical assembly, however, concluded that the police had violated the organiser's right to a fair proceeding, because that implies the authority's obligation to inform the client about all relevant circumstances and issues to consider. In the given case this meant that during the negotiation the police should have informed that it regarded the notification as

relating to an already adjudicated assembly and therefore it was considering the rejection of the notification without examining it on the merits.

But the duty to cooperate is also enforced with regard to organisers. In **case no. 101.K.700.142/2019,** the Budapest-Capital Regional Court was faced with the question whether the fact that there is an earlier court decision quashing a prohibition of an assembly exempts the organiser from participating in the negotiation regarding a very similar assembly. In the given case, the organiser announced the blocking of one lane of a main road as a demonstration against a piece of legislation. The police prohibited the assembly, but the court quashed the ban upon judicial review. However, instead of holding the demonstration on the originally scheduled day, the organiser informed the police that he would hold the assembly with identical parameters on a different day. The police handled this information as a completely new notification, and invited the organiser for a negotiation. However, the organiser refused to attend on the basis that there was a court decision on the assembly.

The Budapest-Capital Regional Court sided with the police on the issue and regarded the notification as a new one, which made it necessary to examine the organiser's behaviour regarding the negotiation. In this respect, the court concluded that the organiser had failed to comply with his duty to cooperate and took this fact into account when rejecting his challenge and upholding the police ban: "*it is not a justified reason for shirking from the negotiation and thus from the duty to cooperate that the organiser wished to hold the assembly with the same parameters […]. By refusing to participate in the negotiation, the [organiser] barred himself from presenting his arguments to the [police] so that it can assess them and take them into account*."

In summary, it can be said that with regard to the duty to cooperate, the pre-2018 jurisprudence of the Constitutional Court was rather progressive, and the new legal framework built on this jurisprudence, creating a favourable environment for the courts to use the New Assembly Act's now express requirements concerning the negotiation procedure to force the police to move from prohibiting "problematic" assemblies into the direction of trying to find less restrictive alternatives.

V. THE PROBLEM OF PUBLIC/PRIVATE VENUES: THE RESTRICTIVE DEFINITION OF PRIVATE VENUES

V.1. Standards

"Assemblies are as legitimate uses of public space as commercial activity or the movement of vehicular and pedestrian traffic. This must be acknowledged when considering the necessity of any restrictions."[49] The right to freedom of peaceful assembly covers assemblies taking place both on public and private property. *"However, the use of private property for assemblies raises issues that are different from the use of public property. For example, prior notification (other than booking the venue or seeking the permission of the owner of the premises) is not required for meetings on private property."*[50]

Civil and criminal laws also apply to assemblies on private property, enabling appropriate action to be taken if assemblies on private property harm the rights of other members of

[49] ODIHR Guidelines, guideline 3.2, p. 17.
[50] ODIHR Guidelines, para 22., pp. 32 and 153.

the public. The owner of private property has a much greater discretion to choose whether to permit an organiser of an assembly to use his or her property than the authorities have in relation to publicly owned property. Compelling the owner to make his or her property available for an assembly may, for example, breach the owner's rights to private and family life or to peaceful enjoyment of their possessions.

However, Article 11 of the ECHR does not require the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, for instance, government offices or university premises.[51]

V.2. The pre-2018 situation

According to the definition of the Old Assembly Act,[52] every venue, road, street or square freely accessible to any person without restrictions is qualified as a public venue. This rather broad definition was not sensitive to the question of ownership, meaning that the proprietor of such a venue could be either a public legal entity (state, municipality etc.) or a private entity. Nor was it sensitive to the legal nature of private entities, i.e. even the property of a private citizen could be considered as a public venue.[53] Therefore, the key question of this definition was the accessibility -- the interpretation and applicability of the provisions caused no problem for more than 20 years.

In the early 2010's, the Ombudsman often dealt with the question of accessibility and the function of public venues[54] in cases where demonstrators used the tool of peaceful "sit-in" demonstrations. Amongst many others, in a case from November 2011, when the General Assembly of Budapest District VIII passed decrees against homeless people, police apprehended members of an activist group called "The City is for All!" which staged a sit-in at the city hall as part of their protest. In July 2012, a similar police apprehension occurred in the case of a state-linked company called KÖZGÉP when the courtyard-entrance of its headquarters was blocked by members and activists of a green political party "Politics Can Be Different" who chained themselves together. These demonstrations were not announced in advance and were not banned or dispersed but participants faced charges and were sentenced to pay fines for committing petty offences.[55] In February 2013, hundreds of university students demonstrated against changes in the higher education system and occupied halls of the universities without any police response. In March 2013, again without any prior notification, around 70 protesters climbed into the private premises of the ruling Government party FIDESZ-MPSZ to demonstrate against the 4th amendment of the Fundamental Law. Despite or perhaps as a consequence of the media-attention,[56] no police force was used either to evict the protesters or to protect them during the hunch started by private security guards (some of them former convicts).

The qualification of public venues emerged from other perspectives as well in that period. As mentioned above, under Chapter II.2., in March 2012, the regulatory authority declared its formal lack of competence concerning an assembly to be organised by the

[51] Guide on Article 11 of the European Convention on Human Rights (31 December 2019, first edition) point I.C.2.
[52] Article 15 a) of the Old Assembly Act.
[53] Opinion of the Curia's Working Group, pp. 77 and 137.
[54] Reports of the Ombudsman No's. AJB-730/2012., AJB-1690/2012., AJB-5662/2012.
[55] Mainly the ground was the so called „defiance against legal police measures". Upon the motion of the Ombudsman, decision no. 31/2015 (XI.18) AB of the Constitutional Court found this petty offence unconstitutional.
[56] Background: http://budapesttimes-archiv.bzt.hu/2013/03/11/occupy-fidesz/

above-mentioned political party "Politics Can Be Different" to a symbolic public venue in the centrum of Budapest (Heroes' Square) on a national holiday, because the Office of the Municipality of Budapest suddenly decided to use that public venue for its own purposes. The Budapest-Capital Regional Court agreed with the police but its decision was later annulled by the Constitutional Court.[57] In this decision the Constitutional Court described the typical categories of excuses in rejections issued by the police when a right to use the public venue was denied[58] and set out that police breached the party's right to assembly by failing to examine the notification in merits.

In 2016, several demonstrations were organised by a group of victims of the 2008 bank credit crisis called "I don't give my house!" at bank branch offices sometimes in the streets in front of the office and sometimes inside the offices without any prior announcements. Police interference was scarce, these demonstrations were not dispersed and the participants were not fined.

V.3. The New Assembly Act and its jurisprudence

According to the New Assembly Act,[59] an assembly organised at places not classified as a public venue shall require the consent of the owner and the user of the property. For the purposes of the New Assembly Act, a public venue is any piece of land for public use owned by the State or by a local government and registered as such in the real estate register, provided that it may be accessed by any person without restriction, including those parts of the public venue that are used as public roads or squares.[60] Only demonstrations held in public venues require a prior notification to the regulatory authority.[61] According to Decree 26/2018 (IX. 27.) of the Minister of Interior on Detailed Rules of Execution of Police Tasks Regarding the Management of Assemblies and Processing Notifications on Assemblies under the Scope of the Assembly Act (hereinafter **MI Decree II.**) it is the obligation of the authority to clarify the legal nature of the venue in question.[62]

The new, long and overly complicated definition links the public venue to (i) an administrative act of registration instead of constitutional provisions; (ii) only certain types of owners; (iii) only a restricted purpose of the piece of land dedicated for public use; and (iv) actual accessibility at the same time. These criteria clearly restrict the scope of the areas available for public assemblies.

Besides the provision requiring the consent of the owner and user, the New Assembly Act does not regulate assemblies held in privately owned venues accessible to the public, like parking lots of shopping malls, branch offices of banks etc. This means that the legislator has not adequately considered that in certain cases the wish to convey the message of the assembly with full power (e.g. a demonstration against a rigged public procurement, or a racist statement made by the owner of a store chain) might justify interventions to secure that an assembly may be held at a privately owned venue (e.g. in the premises of the company or in the parking lot of the store).

[57] Decision 3/2013 (II.14) AB of the Constitutional Court.
[58] The other is the "security/safety areas", see also the test established by the ECtHR in case Patyi v. Hungary (No.2), Application no. 35127/08.
[59] Article 1(2) of the New Assembly Act.
[60] Article 10 (8) of the New Assembly Act.
[61] Article 10 (1) of the New Assembly Act.
[62] Article 1 (1) d of MI Decree II.

The possibility of such an intervention is realised by the ODIHR Guidelines, which state the following: "*In general, property owners may legitimately restrict access to their property to whomsoever they choose. Nonetheless, there has been a discernable trend towards the privatization of public spaces in a number of jurisdictions, and this has potentially serious implications for assembly, expression and dissent. The state may, on occasion, have a positive obligation to ensure access to privately owned places for the purposes of assembly or expression. In the case of Appleby and Others v. the United Kingdom (2003), a case concerning freedom of expression in a privately owned shopping centre, the European Court of Human Rights stated that the effective exercise of freedom of expression 'may require positive measures of protection, even in the sphere of relations between individuals.' Freedom of assembly in privately owned spaces may be deserving of protection where the essence of the right has been breached.*"[63]

In our opinion the lack of clear provisions in this regard constitute an omission of the Parliament.

In a case before a county court, an assembly was held in November 2016 by the movement of the victims of the 2008 credit crisis in the city of Zalaegerszeg. The demonstrators criticized the practice of a bank(s), handed out leaflets to the visiting clients inside the publicly accessible premises of the branch office without disturbing them or obstructing the daily operation of the office. The police only conducted ID checks of the demonstrators. The bank then successfully[64] started a civil lawsuit in order to pursue a ban against the movement holding any future assembly in the building. The court of first instance suspended the proceeding and asked the Constitutional Court for an interpretation on the definition of "public venue" with special regard to publicly accessible, but privately owned venues.

After providing an overview of its own tests set out in its previous decisions, the Constitutional Court stated in its decision no. 3057/2019 (III.25.) AB [65] that the limitation of the new law is in accordance with the constitution, as the limitation of the freedom of assembly serves a legitimate goal (enforcing another fundamental right, the right to property), and it is proportionate, since it does not exclude the holding of assemblies in private premises, and if the person to whom the message of the assembly is addressed is the owner or user of the premise, then it is possible to hold the assembly in the public areas in front of the private venue, provided that it does not disproportionately limits the right to privacy of the addressees.

At the same time, the Constitutional Court emphasized that the specificities of each case must be taken into account when the norm is applied between private parties, which can be done through interpreting the notion of "permission". In doing so, the jurisprudence shall not unconditionally prefer the right to property, because it would lead to a hierarchy between this right and the freedom of assembly that is not permissible under the Fundamental Law, and would lead to a disproportionate limitation of the right to assembly.

The Constitutional Court contemplates on how the societal function of privately owned but publicly accessible venues has changed in recent years, the way these can operate as

[63] ODIHR Guidelines, para 23., p. 32.
[64] Judgment no. 3.Pf.20.634/2019/7. of the Zalaegerszeg Regional Court.
[65] A short summary of the decision is available in English at http://public.mkab.hu/dev/dontesek.nsf/0/F5ADADB32AE33234C125834A005E5811?OpenDocument&english

public venues under certain conditions, also as public forums regardless of their legal ownership status. In this regard, to provide guidance for those vested with the task of implementing the law, the Constitutional Court analyses some typical issues to consider and finds that (i) the right to freedom of peaceful assembly must be exercised in line with the function of the private venue; (ii) there might be a difference between private venues based on whether they are open air venues or buildings; (iii) court buildings are not venues where demonstrations could be held, and due to their function, demonstrations in bank branch offices may also be held only if the owner gives a permission, while (iv) the open air spaces (such as parking lots) are venues that are legally not necessary to avoid during a(n otherwise legal) march. Finally, the Constitutional Court calls attention to the possibility of a tacit approval by the owners/users.

On the basis of the Constitutional Court's decision, it seems likely that assemblies in private premises will be very difficult to organise in the future even if the place of a demonstration would be very important from the point of view of the opinion to be expressed, and even if the disturbance to the owner or user would be negligible, which does not seem to be in line with the international standards embodied in the ODIHR Guidelines.

VI. TRAFFIC BANS

VI.1. Standards

When it comes to limitations on the right to assembly, the prior ban of a demonstration is the most serious constraint, the *ultima ratio*, since it prevents citizens from expressing their views. Therefore, the most stringent constitutional limitations should be placed on the application of a ban.

As already cited above, under Chapter V.1., one of the fundamental principles of the right to assembly is that "*assemblies are as legitimate uses of public space as commercial activity or the movement of vehicular and pedestrian traffic.*"[66] Also, "*any demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption of traffic and, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the ECHR is not to be deprived of all substance.*"[67] In its judgments *Patyi and Others v. Hungary*[68] and *Körtvélyessy v. Hungary*[69] the ECtHR reiterated these principles.

In its Decision 3/2013. (II. 14.) AB, the Constitutional Court went beyond these principles when it stated that "*traditionally one of the functions of public venues is to serve as a public forum, obviously accessible by everyone, therefore gatherings held in public venues must enjoy particularly strong constitutional protection.*"[70] In its decisions no. 55/2001

[66] ODIHR Guidelines, Guideline 3.2, p. 17.
[67] ECtHR, Balcik and Others v. Turkey, (Application no. 25/02, judgment of 29 November 2007) § 52, see: http://hudoc.echr.coe.int/rus?i=001-83580; and Ashughyan v. Armenia, (Application no. 33268/03, judgment of 17 July 2008), § 90. see: http://hudoc.echr.coe.int/eng?i=001-87642.
[68] See note 7 above, § 40.
[69] See note 8 above.
[70] See note 5 above, paras [41] and [60].

(XI. 29.) AB[71] and 75/2008 (V. 29.) AB,[72] the Constitutional Court clarified the function of the traffic ban: the right to assembly generally clashes with the public interest attached to the free and ordered flow of the traffic, and not with the individuals' right to move. While the right to assembly can be limited in order to enforce the public interest of the order of the traffic, such constraints have lesser weight than in cases when the freedom of gathering clashes with fundamental rights of others.[73]

As a consequence, the purpose of the traffic ban is that the planned assembly shall not block the traffic entirely. In this regard it is crucial to recite the positive obligations of the authorities in the context of the right to assembly, as it requires the police to facilitate both planned assemblies and the smooth flow of the traffic -- for example, by the timely dissemination of information on the prospective changes in the traffic -- before banning the assembly. As the Budapest-Capital Administrative and Labour Court stated in its decision 27.Kpk.45.710/2015/2., "*the Court pointed out in numerous decisions (for example 27.Kpk.46.202/2011., 27.Kpk.46.204/2011.) that the fact that the police, in order to secure the rights of the participants of an assembly, find it necessary for traffic-management reasons to close the venue for traffic, and as a consequence the traffic shall be rerouted, and might become heavier on the detour routes, does not in itself result in a complete blocking of the traffic it can be only regarded as a difficulty in the flow of the traffic. The fact that at the time and place of the assembly detours, restrictions, delays or interruptions in the public transportation occur and the traffic becomes slower, does not in itself substantiate that it is impossible to secure the circulation of traffic through different routes, since in such cases the time and place of traffic-restrictions and the disruption of public transport lines are predictable and can be planned, which means only disturbances in the traffic, and not its full blocking*."

VI.2. The New Assembly Act

The rule in force says: "*(1) Within 48 hours from receiving the notification, the regulatory authority [the police] shall prohibit the holding of the assembly in the place or time specified in the notification if, according to the information available after the negotiation, there are valid grounds to assume that the assembly would pose an immediate, unnecessary and disproportionate risk to public safety or public order, or it would imply an unnecessary and disproportionate infringement of the rights and freedoms of others, and the protection of public safety, public order or the rights and freedoms of others cannot be guaranteed with a more lenient restriction under paragraph (5) [prescriptive measures]. […] (3) Public order is in danger if the assembly or the announcement concerning the assembly [...] impairs the order of traffic."*

Article 8(1) of the Old Assembly Act entitled the police to ban the holding of the assembly at the place or time indicated in the notification if it resulted *"in a disproportionate hindrance of traffic."* As of May 2004, the provision was amended to limit the regulatory authority's possibility to ban an assembly for traffic-related reasons only *"if the flow of traffic cannot be secured through any other route".* This amendment resulted in a higher

[71] See note 3 above.
[7272] See note 4 above.
[73] The general ranking of possible constraints on the freedom of opinion was laid in the Decision 30/1992 (V. 26.) AB of the Constitutional Court: "*The laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another subjective fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an "institution", and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance).*" See note 21 above.

threshold for the application of the *ultima ratio* restriction (prior ban) of the freedom of assembly than the previous provision.

The wording of the New Assembly Act echoes the pre-2004 provision: the objective criteria of "*cannot be secured*" was replaced with broad categories, which enables the police to decide on considerations foreign to the freedom of assembly, and, therefore, decide in an arbitrary manner. While under the Old Assembly Act only the most serious obstructions of traffic counted as legitimate grounds for banning an assembly, the New Assembly Act aims to legitimize less serious disturbances as a justification for prior bans.

VI.3. The jurisdiction under the New Assembly Act

The traffic ban rule was the first to undergo judicial review under the New Assembly Act. The case decided by **judgment no. 105.K.700.864/2018/3** of the Budapest-Capital Regional Court was about a three-hour-long halfway road blockade at the border of a small town which was banned by the police on the ground of endangering the order of the traffic. The court ruled that the demonstration would not block the traffic and consequently would not endanger public order directly, unnecessarily and disproportionately. The court declared that an assembly can be banned, in line with the established jurisprudence, only if "*the event makes third parties' movement and use of public transportation impossible for a protracted even though temporary period.*" Detours and traffic jams cannot be seen as justifying this conclusion. The court also emphasized the positive obligation of the police in terms of securing the order of the traffic.

The virtue of the decision is that it starts by declaring that banning an assembly on traffic grounds can be lawful, in spite of the vague wording of the New Assembly Act and in line with the previously established jurisprudence of the courts and the Constitutional Court, only when the demonstration would block the traffic completely. The court recalls that "*it is an inevitable feature of exercising the right to assembly that others' rights are necessarily limited*", and adds that in relation to the traffic ban "*the Act provides a proportionality requirement, which guarantees that the majority of citizens shall not suffer a disproportionate limitation of their rights.*"

This pioneering court decision has been confirmed by subsequent decisions. During the winter of 2018-2019, a wave of protests swept across the country, including further half-way road blockades. The police intended to apply the new rules of traffic ban to these blockades, but the court proceeded further on its self-appointed path. In one of its leading decisions published under no. **EBD2020. K.4.**, the Budapest-Capital Regional Court concluded the following on basis of a detailed reasoning:[74]

- A predictable slowing down or halting of the traffic or the need of detouring is not a legitimate reason to limit the right of assembly.
- The New Assembly Act does not empower the police to ban an assembly upon a minor disturbance in the traffic.
- The police must conduct a substantive negotiation procedure with the organiser and provide a detailed reasoning on the application of the provisions governing bans.

[74] Judgment no. 105.K.700.291/2019 of the Budapest-Capital Regional Court - decision in a case with higher importance in terms of public interest or concerning to a wide range of people, involving matters of principle, determined as such by the Curia.

In another road-blockade case, the court defined the positive obligation of the police to provide reasons why less restrictive traffic-related limitations aimed at securing the gathering (traffic signals, police actions, etc.) are not sufficient to avoid a ban. In the court's view, the law requires the police to justify that the gathering would undoubtedly constitute an unnecessary danger to the traffic.[75]

While these first judgments were quite sensitive to the obligation to facilitate the freedom of assembly and aimed at maintaining the constitutional guarantees of the right, even in the light of the more restrictive wording of the New Assembly Act, there are cases where the court ignored the human rights aspect. In its **judgment no. 101.K.700.142/2019/8 the Budapest-Capital Regional Court** stated that "*the right to assembly does not imply the right to slow down the traffic*". It is perhaps more surprising that the court seemed to require the plaintiff, the organiser of the planned assembly to provide factual evidence against the police's expert opinion concerning potential traffic disturbances: "*the police ban relies on clear evidence - on the expert opinion from the police department of traffic control -, and provides a detailed and coherent reasoning, which was not rebutted by the plaintiff.*" In this regard it must be emphasized that the organiser has no constitutional obligation to prove the consequences of his or her planned assembly on the traffic. Still, the wording of the New Assembly Act may be seen as requiring, indeed, such a reversed argumentation: instead of police-provided factual evidence supporting the necessity and proportionality of the ban (or any other constraint), the New Assembly Act can be interpreted - much more than the Old Assembly Act - to require the organiser to prove that the planned assembly will not cause unnecessary and disproportionate disturbances in the traffic.

In the case of another halfway road blockade the Budapest-Capital Regional Court in its **judgment no. 106.K.700.122/2019/7** upheld the police ban, arguing that neither the substantive negotiation procedure, nor the detailed reasoning of the ban were objectionable. In terms of the traffic disturbances caused by the planned assembly, however, the court stated that "the criteria of 'cannot be secured through any other route' involves not only the total impossibility of securing the flow of the traffic but the disproportionate effects of having detours as well". In establishing the level of disproportionality in this regard, the court attached importance to the low number of demonstrators and the high number of those who would suffer from the disruption, and disregarded that any halfway road blockade causes disruption to the traffic. Furthermore, while the court accepted the detailed reasoning of the police on the predictable disturbances the blockade would cause to the traffic, it failed to call on the police - as other courts did - to account for the means through which the safe and free flow of the detoured traffic could have been secured (for instance prior information, traffic signals, police actions) with a view to balance the freedom of assembly with the requirements of public safety.

VI.4. The line of the judicial practice

Although the new law widened the regulatory authorities' powers to ban a public demonstration on the basis of traffic related arguments, the courts, in most of their judgments, interpret this possibility in a somewhat restrictive way, which results in

[75] Judgment no. 105.K.700.085/2019/16 of the Budapest-Capital Regional Court.

decisions that would have been very similar under the old legislation: judges allow a prior ban only in situations where the Old Assembly Act also allowed it, despite the fact that they are applying the new -- more restrictive -- law. The consequence of this interpretation is a higher level of protection of the fundamental right to assembly than what would directly stem from the legislation. However, we cannot detect uniform jurisprudence, and it will be very important to see whether the Curia also follows this line of interpretation, or the shift in the competences will also lead to a shift in the jurisprudence.

VII. NEW GROUNDS FOR PRIOR BAN: THE PROTECTION OF THE RIGHTS AND FREEDOMS OF OTHERS

VII.1. The issue and the pre-2018 situation

The legal framework

The Old Assembly Act allowed for the prior ban of assemblies in a very limited number of cases and under very specific circumstances. The original Article 8(1) of the Act ran as follows: "*if the holding of an assembly subject to prior notification severely endangers the undisturbed functioning of the people's representative bodies or courts, or results in a disproportionate hindrance of traffic, the police may ban the holding of the event at the place or time indicated in the notification, within 48 hours from the receipt of the notification by the authority*." As of May 2004, the provision was amended to limit the regulatory authority's possibility to ban an assembly for traffic-related reasons only "*if the flow of traffic cannot be secured through any other route*". Partial pre-assembly limitations were not at all foreseen by the law.

Compared to many other countries, where a ban or other, less severe restrictions may be applied on the basis of much more abstractly defined grounds (such as public order, public health, national security),[76] the Hungarian regulation left the police with very little moving space for limiting the right to assembly in advance. More abstract grounds for interference with the right to assembly listed in Article 2(3) of the Old Assembly Act (such as the violation of the rights and freedoms of others, or the non-peaceful nature of the assembly) came to play only as grounds for dispersing already ongoing assemblies, but not as justifications for prior restraints.

The practice of the law

This regulatory concept, which by all probability was a result of the mistrust stemming from the role the police played in suppressing assemblies during the Communist regime, was undoubtedly very favourable for the organisers, but did create certain problems in the practice of enforcing the law and the pertaining jurisprudence.

Some of these difficulties were only perceived as such by the police, but some of them were real. The three main types of demonstrations where the issue of the police's restricted manoeuvring space came up were: (i) demonstrations with shocking, threatening contents; (ii) demonstrations by far right groups; and (iii) demonstrations to be held in front of the private residences of politicians. At the beginning the police tried to handle

[76] Kádár, A. – Tóth, B.: A gyülekezési jog külföldi és magyar szabályai. In: Fundamentum, 1/2007. pp. 63-76. See: http://fundamentum.hu/sites/default/files/07-1-04.pdf

these through relying on the "hindrance of traffic" argument -- even in cases where its constrained nature and weakness was transparent. However, although initially some domestic courts "bought" into it, a series of ECtHR decisions finding Hungary in breach of Article 11 of the Convention made this approach unmaintainable (see for example *Patyi and Others v. Hungary*).[77]

Therefore, the police started to rely on Article 2(3) -- mainly the protection of the rights and freedoms of others -- as the ground for the prior bans in such cases, although, as mentioned above, this was clearly not one of the potential grounds in the exhaustive list of Article 8(1). The domestic courts' practice as to whether they accepted this reference was rather divergent. Some examples of cases where the courts upheld this line of argument are given below.

A case exemplifying the application of Article 2(3) for assemblies conveying a shocking, repulsive message was a demonstration where -- in protest against some court decisions he regarded as unlawful -- the organiser announced that in the course of the assembly he would set up two gallows 100 meters from the court building and hang two puppets covered in judge's gowns. The police banned the demonstration on the basis of Article 2(3) and the court upheld this decision.[78]

A whole separate group of cases is constituted by the so-called "Day of Honour" demonstrations. The "Day of Honour" was an event of World War II when German and Hungarian soldiers attempted to break out of the Buda Castle besieged by the Soviet Red Army on 11 February 1945. The "Day of Honour" is commonly known to bear great symbolic importance to far-right movements in Hungary and each year far right groups try to organise commemorative assemblies on or around this day.

These were repeatedly banned by the police relying on Article 2(3) of the Old Assembly Act on the basis that such assemblies are capable of disturbing public peace, carry the risk of spreading extreme rightist Nazi ideologies, and violate the memory of the victims and the dignity of their surviving relatives to an extent going beyond the constitutional limits of the freedom of assembly. Several -- although not all -- courts across Hungary accepted these and similar arguments and upheld the bans.[79]

The type of case where the "rights and freedoms of others" argument should have certainly been raised was the threatening marches of far-right groups in Roma neighbourhoods. By way of example, the police did not ban the demonstration that provided the starting point for the intimidation of the two Roma applicants of the *Király and Dömötör v. Hungary* case,[80] although the threat to the rights and freedoms of others was more direct and real than in many of the instances where it happened. Following a conflict between Roma and non-Roma families in the town of Devecser, an MP from the extreme right-wing party Jobbik announced that a demonstration would take place on 5 August 2012 in Devecser.

[77] See note 7 above.
[78] Judgment no. 1.Kpk.50.101/2014/3 of 11 August 2014 of the Nyíregyháza County Administrative and Labour Court.
[79] Judgment no. 3.Kpk.50.007/2014/3. of 6 February 2014 of the Veszprém County Administrative and Labour Court, judgment no. 9.Kpk.30.132/2014/8. of 7 February 2014 of the Debrecen County Administrative and Labour Court, judgment no. 20.Kpk.46.621/2014/4. of 15 December 2014. of the Budapest-Capital Administrative and Labour Court.
[80] ECtHR, Király and Dömötör v. Hungary, (Application no. 10851/13, judgment of 17 January 2017) see: http://hudoc.echr.coe.int/eng?i=001-170391.

The police had been informed that in addition to the members of Jobbik, nine far-right groups, known for their militant behaviour and anti-Roma and racist stance, would also be present at the demonstration. They had also been informed that the demonstrators would seek conflict with the police and the minority community. According to far-right websites, the demonstration was aimed "against Roma criminality", "against the Roma of Devecser beating up Hungarians" and "against the Roma criminals unable to respect the rules of living together".

In accordance with the notified schedule of the rally, after the speeches, the demonstrators marched down the Roma neighbourhood of the town, chanting "Roma criminality", "Roma, you will die", and "We will burn your house down and you will die inside", "We will come back when the police are gone", and obscene insults. Those leading the demonstration threw pieces of concrete, stones and plastic bottles into the gardens, encouraged by the crowd following them. One person standing in one of the yards had to be hospitalised after a stone hit her shoulder.

From the police's action plan prepared for the event, it was clear that they were aware that the presence of a hostile crowd in the municipality could lead to violent acts, however, in the course of the complaint procedure initiated by the two applicants for police inactivity, the police argued that they were not in the position to ban the demonstration in advance, because neither of the two grounds listed in Article 8(1) of the Old Assembly Act were in place.

The third group of cases concerns demonstrations targeting government members. As stated above, in the beginning, the police tried to ban these on the basis of traffic-related arguments. By way of example, in the case *Patyi and Others v. Hungary*,[81] a series of demonstrations planned to take place in front of the Prime Minister's private residence were banned on the basis that "*the pavement was not wide enough to secure the necessary space for the demonstrators and other pedestrians at the same time. Therefore, in order to prevent possible accidents […], it would be necessary to close half the street."* As three bus services operated on that street, the police claimed that "*the demonstration would cause a disproportionate hindrance to the traffic*". These arguments were upheld by the Budapest-Capital Regional Court as being in compliance with the law and in particular with Article 11 of the Convention. However, the ECtHR "*perceived strong and concordant indications militating against the Government's contentions*", as the applicant "*planned to organise demonstrations with twenty participants, whose only action would have been to stand silently in line on the pavement in front of the Prime Minister's house*" and it was clear that the space in question was wide enough to allow other pedestrians to walk by during a demonstration. The Court concluded that "*the authorities, when issuing repetitive prohibitions on the demonstrations, mechanically relying on the same reasons and not taking into account Mr Patyi's factual clarifications, failed to strike a fair balance between the rights of those wishing to exercise their freedom of assembly and those others whose freedom of movement may have been frustrated temporarily, if at all*".

Following this, similarly to the handling of "Days of Honour" assemblies, the police's argumentation related to demonstrations before the private residences of high-ranking politicians shifted to Article 2(3). In one case, in December 2014 the police banned a rally organised by individuals who were seriously indebted in foreign currencies. The

[81] See note 7 above.

demonstration was to be held in different premises within Budapest, among others, in front of the Prime Minister's house. After their negotiation with the police, the organisers reduced the time that they would spend there from 45 to 10 minutes, and undertook to approach the house on foot instead of by car as well as to use a megaphone instead of electronic amplification. Despite these concessions, the police banned the assembly on the basis that it would infringe the residents' right to privacy and family life (e.g. the demonstrators could peek into their gardens), it would disturb the "peace of everyday life", and that it could incite fear in the children coming home from school. The court upheld the ban on the basis that "*there are public premises where -- due to the special circumstances -- the freedom of assembly must take a step back*" and „*the organiser must also understand that he wanted to have his rally in a residential area, which is first and foremost the scene of private family life*". The court also emphasised that the residents -- other than the Prime Minister -- are not public actors, so they are not obliged to tolerate the exercise of the right to assembly.[82]

At the same time, in another case, in September 2015, the court came to a different conclusion. In this case, the police also banned a rally, organised by the same group of individuals, planned to be held at the same venue, among others, in front of the Prime Minister's house again, but this time the court annulled the ban. Recalling Constitutional Court decisions and court decisions that came to the same conclusions, the court stated that "*only the two grounds listed in Article 8(1) may serve as the basis of a prior ban*" and that "*the danger of violating the rights and freedoms of others is applicable lawfully only as a ground for the dispersal of a rally, and not for its prior ban*".[83]

The divergence of the jurisprudence regarding the applicability of Article 2(3) was also sensed by the Curia. The Group's opinion was however half-hearted at best regarding this issue. In light of the Constitutional Court's Decision no. 30/2015 (X. 15.) AB (which was handed down while the Group's work was still in progress), the opinion stated that courts were not "constitutionally" allowed to uphold bans based on any reason not listed expressly in Article 8(1), but insisted that -- in the absence of such a decision by the Constitutional Court -- a different interpretation would also be "legitimate" based on the Fundamental Law's provisions on the interpretation of laws and the objective the Assembly Act was intended to serve.[84]

<u>The Constitutional Court's Decision no. 13/2016. (VII. 18.) AB</u>

The case stemming from the above-mentioned December 2014 assembly to be held in front of the Prime Minister's private residence ended up before the Constitutional Court, as the organiser filed a constitutional complaint challenging the court's upholding decision. The Constitutional Court delivered a very controversial decision on the matter, which eventually led to the passing of the New Assembly Law.

The Constitutional Court reiterated what it stated in its decision no. 30/2015 (X.15.) AB, namely that Article 8(1) is an exhaustive enumeration for the grounds on which the police may ban an assembly in advance: "*The Court points out that […] 'the breach of the rights of others' was not included in the grounds for the prior ban of an assembly, but in Article*

[82] Judgment no. 5.Kpk.46.622/2014/2. of 16 December 2014 of the Budapest-Capital Administrative and Labour Court.
[83] Judgment no. 20.Kpk.46.418/2015/2. of the Budapest-Capital Administrative and Labour Court.
[84] See the Opinion of the Curia's Working Group, p. 23.

2(3) of the [Old] Assembly Act, which constitutes a ground for dispersing an assembly under Article 14(1)." Furthermore, "*a ground for dispersal, which -- as a response to violations taking place during an assembly -- is necessarily reactive, may not be automatically transferred into a ground for a prior ban*".

After stipulating these very important principles, the Constitutional Court came to a rather surprising conclusion: although the police and the court obviously violated the Assembly Act when they issued and upheld a ban based on Article 2(3) -- i.e. on a ground not included in the exhaustive list of Article 8(1) -- this did not "*disproportionately violate the complainant's right to peaceful assembly*", since the demonstration in front of the Prime Minister's residence would have been one only station in a series of demonstrations to be held at different premises, and the organiser "*eventually had the chance to express his opinion at the other premises of his dynamic rally*".

The Constitutional Court went on to raise concerns over the Old Assembly Act's lack of provisions to resolve clashes between the right to assembly and the right to privacy, stating that no appropriate legal framework existed to guide the police in terms of either substance or procedure when such a collision arose. In the Constitutional Court's view, the police rightly realised that there was a collision between the right to assembly and the right to privacy, but had no appropriate way to respond to it prior to the assembly: "*the reason for the restrictive approach to enforcing the law that could be seen in this case is the lack of adequate statutory regulation that would allow for [prior] limitations and conditions that are less restrictive than a prior ban of an assembly*". As a consequence, the Constitutional Court called on the Parliament to enact appropriate legislation by the end of 2016.

The assessment of the Constitutional Court's decision is not fully unanimous among the authors of the present paper.

There is agreement that the Court could not have rejected the actual complaint. If it was of the -- correct -- view there was no proper constitutional ground for banning the demonstration in advance on the basis of the breach of the resident's right to privacy, then the ban should have been found unlawful and quashed by the Constitutional Court. By considering the prospective infringement of others' rights and liberties before the assembly, and justifying a ban on such ground, the police and the court reviewing the ban placed themselves into the position of the lawmaker.

Furthermore, it is also clear that the authorities acting in the case -- as well as the Constitutional Court -- disregarded the fact that previous similar demonstrations that were effectively held in the proximity of the Prime Minister's residence were not dispersed by the police on the ground of any actual infringement of others' rights, which questions the validity of the collision argument.

In addition, even without formal procedural rules concerning the negotiations and allowing the police to impose limitations less restrictive than a prior ban on the assembly, it was possible to convince the organisers to reduce the time period to be spent in front of the residence to as little as 10 minutes and to give other concessions aimed at reducing the disturbance residence would have to put up with. This also questions the pressing need for amending the Old Assembly Act.

Some disagreement lies regarding the acceptability of the idea that a very likely and serious threat that the assembly will severely violate the rights and freedoms of others can be a ground for a prior ban or limitation. Those authors against it argue that a very specific list of grounds for banning assemblies is much more conducive to the exercise of the right, as the clarity and foreseeability of such a legislative solution significantly reduces the chances of abuses by the authorities. Furthermore, the Old Assembly Act empowered the police to disperse assemblies violating rights and freedoms of others, even immediately after the commencement of such assemblies, which is a sufficient safeguard in case a gathering goes beyond the constitutional limitations of the freedom of assembly.

Even those authors who are less critical towards the Constitutional Court's approach acknowledge that in the present state of Hungarian constitutionality, the likelihood of the authorities abusing less specific legislation is a substantial risk. However, they call attention to the fact that in cases like the above-mentioned Devecser incident (where it was clear from the very beginning that the march through the Roma part of the town was aimed at the intimidation of an ethnic minority, which constituted a captive audience), even an immediate attempt at the dispersal of a crowd of militants inclined to violence carries a tangible danger to public order and safety and even to the security of the minority group it might intend to protect.

The police – which repeatedly tried to shield government members from having to face protesters – never actually attempted to ban a demonstration on the basis of Article 2(3) in order to protect minority groups in such situations (and nor interrupted the demonstration in the most severe cases when it turned to be violent), and it is also obvious that the Constitutional Court also raised the issue when it came rushing in to defend the Prime Minister's right to privacy. However, taking into account the marches of the militant right in Roma-dense villages and towns, it might have been an acceptable idea for all the wrong reasons.

The Constitutional Court's Decision no. 14/2016 (VII. 18.) AB

The same day that the Constitutional Court adopted decision no. 13/2016 (VII. 18.) AB, it passed another decision that also had a remarkable impact on the new legislation. Decision no. 14/2016 (VII. 18.) AB of the Constitutional Court resolved two cases, one of these, dating from 2014, concerned an assembly in commemoration of the "Day of Honour". The police banned the assembly presuming that holding it would entail future breaches of law and claiming that the event may violate the human dignity of others. The resolution of the police was based on Article 2(3) of the Old Assembly Act and on the Paris Peace Treaty promulgated by Act XVIII of 1947, none of these constituting an explicit legal basis for prior ban. The ordinary court upheld the decision of the regulatory authority, stating that although the Old Assembly Act did not expressly allow for a prior ban on such a basis, considering the significance of the "Day of Honour" for the far-right in Hungary, there was an imminent risk of the breach of law, namely, the spreading of Nazi views.

The petitioner complained before the Constitutional Court that the assembly had been banned for grounds falling outside the scope of Article 8(1) of the Old Assembly Act and that the extended interpretation of prior bans applied by the regulatory authority resulted in censorship.

The Constitutional Court concluded that the complaint was well founded, as the regulatory authorities had been mistaken in founding the prior ban on Article 2(3) of the Old Assembly Act. The Court also provided an analysis of the constitutional framework regarding the types of assemblies (assemblies organised by far-right groups) concerned by the complaint.

After recalling the constitutional duty of courts to *"reduce the restriction of the fundamental right to the necessary and proportionate level of interference within the margin of interpretation framed by the laws,"*[85] it reaffirmed the principle of content-neutrality, according to which *"concerns related to the content of the messages communicated at the event cannot be taken into account as grounds of prior bans"*.[86] While it pointed out that the rights of others, the dignity of vulnerable communities, certain constitutional values and Hungary's international obligations may serve as grounds for limiting expressions (e.g. those inciting to hatred and racial discrimination), it emphasised that distant and hypothetical assumptions were not sufficient for establishing the non-peacefulness of the planned assembly, adding that *"a peaceful assembly is not necessarily free from emotions and passion, on the contrary, it includes by concept temporary annoyance in order to be capable of drawing attention to the message communicated."*[87]

In the Court's view it was especially problematic that the sole ground for banning the assembly was the organiser's "*program published on their world-wide web*", which -- in the given case -- was only very distantly related to the planned assembly. The inference the regulatory authorities drew from the contents of the organiser's website was especially problematic in the light of the organiser's willingness to present the speeches to the police and the fact that he had been organising similar demonstrations in the preceding ten years, which had been held without any major violations of the law. Based on these considerations, the Constitutional Court concluded that the hypothetical violation of inherent personal rights (i.e. the fact that statements violating other persons' dignity may be made at the event) may not serve as a ground for banning an assembly. "*A potential breach of public peace is an assumption that does not in itself justify the limitation of the freedom of assembly […] in a satisfactory manner.*"

In this decision, the Constitutional Court declared that it had detected a gap in the legislation. *"The State is obliged […] to provide the fundamental rights of […] third parties* [i.e. persons other than the participants of the assembly] *with sufficient protection. In this regard the Constitutional Court detected that the specificities of the right to assembly would require from those implementing the law that they can enforce the requirement of proportionality on a case-by-case basis by finding the balance between the freedom of assembly and the fundamental rights competing with it […]. However, the Constitutional Court is of the view that the norms facilitating the parallel exercise of the [competing] fundamental rights are missing from the current regulatory framework. […] Principally, it is the duty of the legislature to ensure that the restriction imposed stays within a proportionate framework. The legislator shall also assure that the police would interfere under a sufficiently differentiated regulation […] [and] shall allow the application of slighter restrictions or conditions as compared to the ban of the event, in order to strike a fair*

[85] The Constitutional Court referred back to section [21] of the decision no. 3/2015 (II. 2.) AB of the Constitutional Court.
[86] Decision no. 75/2008 (V.28.) AB of the Constitutional Court, (see note 4 above) para 5.2., referring back to decision no. 30/1992 (V.26.) AB of the Constitutional Court (see note 21 above).
[87] Section [46] of decision no. 14/2016 (VII. 18.) AB of the Constitutional Court.

balance of clashing fundamental rights."[88] For this purpose, the Constitutional Court concluded that the legislator has infringed Article I (3) of the Fundamental Law by omission for not enacting rules that guarantee the simultaneous exercise of clashing fundamental rights with the least possible restrictions. The Court obliged the Parliament to comply with its legislative obligations by 31 December 2016.

In criticism of the Constitutional Court's decision it can be raised that the direct logical link between the underlying individual complaints and the conclusions concerning the legislative omission is missing to an even greater extent than from the court's decision no. 13/2016. Here the Constitutional Court did not find that the police would have been right to ban the "Day of Honour" demonstration but had no legal means to do so because of the lack of a proper legal framework. It actually concluded that in the given case the threat to the violation of the rights of others was highly distant and hypothetical, and even that similar demonstrations had been held in the past without any serious rights violations. Therefore, the – otherwise not fully ungrounded – conclusion that it would be conducive to the exercise of the freedom of assembly if the police could avail themselves of measures less restrictive than a ban, seems to be linked in a very contorted manner to the actual case.

VII.2. The New Assembly Act in light of the applicable standards

Partly relying on the above-mentioned Constitutional Court decisions, the New Assembly Act introduced the protection of the rights and freedoms of others as a potential ground for banning assemblies in advance. In terms of Article 13(1) of the Act, the police shall prohibit the holding of the assembly in the place or time specified in the notification if, according to the information available after the negotiation, there are valid grounds to assume that the assembly would imply an unnecessary and disproportionate infringement of the rights and freedoms of others, and the rights and freedoms of others cannot be guaranteed with a more lenient restriction under Paragraph (5).

Furthermore, Article 14 stipulates that the regulatory authority shall also prohibit holding the assembly if

(a) the place of the assembly is a historical memorial site of national importance or the date of the assembly is a day that commemorates the victims of the inhuman crimes committed during the national socialist or the communist dictatorship, and
(b) according to the circumstances known at the time of the notification, there is an immediate risk of the assembly denying, doubting, trivialising or trying to justify the fact of the inhuman crimes committed by the national socialist or communist dictatorship, and therefore the assembly is suitable to disturb public peace.

Article 20 of the ICCPR proclaims that "*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*". In terms of Principle 4 of the Council of Europe Committee of Ministers Recommendation No. R(97)20, "*specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the*

[88] Section [65] of decision no. 14/2016 (VII. 18.) AB of the Constitutional Court.

European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein".

Recalling these principles, the ODIHR Guidelines still warns that "*resort to such speech by participants in an assembly does not, of itself, necessarily justify the dispersal of all persons participating in the event, and law-enforcement officials should take measures […] only against the particular individuals involved […].*" The ODIHR Guidelines go on the emphasize that "*where the insignia, uniforms, emblems, music, flags, signs or banners to be displayed or played during an assembly conjure memories of a painful historical past, this should not, of itself, be reason to interfere with the right to freedom of peaceful assembly to protect the rights of others. On the other hand, where such symbols are intrinsically and exclusively associated with acts of physical violence, the assembly might legitimately be restricted to prevent the reoccurrence of such violence or to protect the rights of others*."[89]

There is ample international jurisprudence on instances when the rights of other individuals or communities were seen as legitimate grounds for limiting the freedom of "reprehensible" speech that does not warrant protection under international human rights norms.

E.g. in the *Robert Faurisson v. France* case (§ 9.6),[90] where the complainant challenged his conviction for questioning the extermination of Jews during WWII, the UN Human Rights Committee concluded that "*the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of other persons or to those of the community as a whole. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible […]*."

On the basis of Article 17 of the Convention,[91] the ECtHR also concluded in a number of decisions that "*the general purpose of Article 17 is to make it impossible for individuals to take advantage of a right with the aim of promoting ideas contrary to the text and the spirit of the Convention*".[92] The Court held that "*like any other remark directed against the Convention's underlying values [...], the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10*".[93]

In *Garaudy v. France*, it was put forth that "*Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to*

[89] ODIHR Guidelines, paras 96. and 97., pp. 57-58.
[90] Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996).
[91] "*Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*"
[92] ECtHR, Witzsch v. Germany, (Application no. 7485/03, decision of 13 December 2005) see: http://hudoc.echr.coe.int/eng?i=001-72786
[93] ECtHR, Lehideux and Isorni v. France, (Application no. 24662/94, judgment of 23 September 1998) § 53. see: http://hudoc.echr.coe.int/eng?i=001-58245

public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention."[94]

Finally, in *W.P. and Others v. Poland*,[95] the Court observed that "*the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention. To achieve that purpose, it is not necessary to take away every one of the rights and freedoms guaranteed from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms. Article 17 covers essentially those rights which, if invoked, will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention*."

What is common in most of these and similar cases is that the interference with the Convention rights that the applicants complained of reacted to instances that had already taken place (the displaying of a racist poster, the publication of a book denying the Holocaust, the submission of a request for the registration of an association named "Polish Victims of Bolshevism and Zionism"), and not to expected future violations. One of the few examples is the case *Vona v. Hungary*, where the ECtHR expressed the view "*that the State is also entitled to take preventive measures to protect democracy […] if a sufficiently imminent prejudice to the rights of others threatens to undermine the fundamental values on the basis of which a democratic society exists and functions. One such value is the coexistence of members of society free from racial segregation, without which a democratic society is inconceivable. The State cannot be required to wait, before intervening, until a political movement takes action to undermine democracy or has recourse to violence*."[96] However, even in that case the ECtHR could rely on the past actions of the movement the dispersal of which was the subject matter of the complaint ("*[t]he Movement's subsequent activities involved rallies and demonstrations, the members sporting uniforms and parading in military-like formations […] in various parts of the country, and in particular in villages with large Roma populations*").

It must also be remembered that the Constitutional Court's Decision no. 14/2016 (VII. 18.) AB found the prior ban of an assembly that might be one of those that are targeted by the new legislation unconstitutional on the basis that the threat to the rights of others was too distant and hypothetical.

Based on the above it might be concluded that the way in which Article 14 restricts the freedom of assembly by applying an obligatory ban on the basis of plausibility is not fully in line with the international standards, especially if we take into account the police and court practice of the recent years that tried to ban far-right demonstrations on much more shaky grounds even if no threat of directly threatening messages reaching vulnerable individuals and communities was in place.

[94] ECtHR, Garaudy v. France, (Application no. 65831/01, decision of 24 June 2003) see: http://hudoc.echr.coe.int/eng?i=001-23829
[95] ECtHR, W.P. and Others v. Poland (Application no. 42264/98 decision of 2 September 2004) see: http://hudoc.echr.coe.int/eng?i=001-66711
[96] ECtHR, Vona v. Hungary (Application no. 35943/10, judgment of 9 July 2013) § 57. see: http://hudoc.echr.coe.int/eng?i=001-122183

Where there are intimidated captive audiences (like the Roma residents of the areas where far-right rallies are being held), a prior ban on the right to assembly can be undoubtedly justified. However, it is highly possible that an assembly will be seen by the regulatory authorities as falling under Article 14 without a sufficiently direct violation of the dignity of vulnerable individuals and groups.

VII.3. Captive audiences

At the same time, there are demonstrations where others' rights and liberties, especially privacy rights, are in direct and imminent danger. For more than a decade, right-wing extremist groups have been trying to intimidate the Roma minority by rallying in countryside villages, right in front of the houses of Roma inhabitants. While such rallies are paradigmatic cases of the violation of rights and freedoms of others and of the captive audience problem, the police has never used its power to disperse such a rally on this ground,[97] even though one of these groups, the so-called "Magyar Gárda Egyesület" [Hungarian Guard Association], was disbanded by the court on the ground of conducting intimidating demonstrations where the audience was captured - a decision that the ECtHR found to be in line with European Convention on Human Rights.[98]

The notion of "captive audience" was created by Justice István Kukorelli in his dissenting opinion attached to **Decision no. 55/2001. (XI.29.) AB of the Constitutional Court**. "*There may be, of course, cases in which exercising the right of assembly leads to a violation of others' fundamental rights. [...] if the participants express their opinions against other individuals in a situation where the latter have no chance to avoid hearing the utterances expressed to their detriment at the assembly ('captive audience').*"[99] Later on, in its Decision no. 95/2008. (VII. 3.) AB, the Constitutional Court decided that protecting people who become a captive audience and are forced to listen to hate speech against them is a legitimate aim of constraining freedom of expression: "*if a perpetrator expresses his or her extremist political convictions in such a manner that a person belonging to the injured group is forced to listen to the communication in a state of intimidation, and is not in a position to avoid it [it constitutes a 'captive audience'] [...] In this case, the right of the person concerned not to listen to or become aware of the distasteful or injurious opinion deserves protection.*"[100] In the ECtHR's view, "*[captive audience] exceeds the limits of the scope of protection secured by the Convention in relation to expression [...] or assemblies and amounts to intimidation [...] The State is therefore entitled to protect the right of the members of the target groups to live without intimidation.*"[101]

In spite of the clear interpretation of the notion of captive audience as a case of the infringement of the rights and liberties of others, for a long time the police cited this concept as the basis of curtailing the right to assembly only in the protection of rights and liberties of the Prime Minister's neighbours (see above under Chapter VII.1.). However, the police used this new power, conferred by the New Assembly Act, to ban right wing

[97] ECtHR, Király and Dömötör v. Hungary, see note 80 above.
[98] ECtHR, Vona v. Hungary, see note 96 above.
[99] See the official English translation of the decision under http://hunconcourt.hu/uploads/sites/3/2017/11/en_0055_2001.pdf
[100] See the Codices summary of the decision in English under http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2008-2-005?fn=document-frameset.htm$f=templates$3.0
[101] ECtHR, Vona v. Hungary, § 66, see note 96 above.

extremist rallies against the Roma on the ground of the infringement of the rights and freedoms of others.

On 10 and 12 May 2019, organisers notified the police of rallies, planned to be held in Törökszentmiklós (a smaller rural city in the countryside), where a brawl had happened before. The purposes of these rallies would have been to "Protest against criminality" and to "Protest against Gypsy terror and censorship". In the course of the prior negotiations, the police suggested that the demonstrators should hold a static assembly instead of a rally, but the organisers maintained that their aim was to draw attention to the so-called Roma-terror, and clung to the chosen route of the rally (through the town's Roma neighbourhood), claiming that the demonstration should be held within sight-and-sound of those who are concerned. The police, considering the organiser's statements, the professed racial ideologies of the organisations behind the organiser, and the danger that the members of those organisations would be present at the rally in a high number, banned both rallies, based on the "*considerable possibility that the rally involves incitement to hatred and violence against the Roma community*", and the conclusion that the rally would violate others' right to dignity and privacy.[102] In justification of the ban, the police cited Decisions no. 55/2001. (XI.29.) AB, no. 75/2008. (V. 29.) AB and no. 95/2008. (VII. 3.) AB, and also the judgment in the case of disbanding the right-wing extremist Magyar Gárda Egyesület.[103]

Both bans were challenged before the court, however in its **judgments no. 104.K.700.269/2019/4 and 104.K.700.273/2019/4,** the Budapest-Capital Regional Court upheld the bans. The court recalled that the president of the movement who was also one of the scheduled speakers at the event had stated to the media that the rally would be a show of force to compel the authorities to protect "hard working Hungarians", because they had had enough of some "Gypsy families terrorising the whole town". The court pointed out that the police were right to take into account this statement when coming to the conclusion that the assembly's actual aim was the intimidation and exclusion of a particular social group and therefore must be banned. Furthermore, the court concluded that *"in the course of a rally aimed at showing force the participants express their opinions against other private persons in a manner that those residents of the concerned streets -- with members of [ethnic] minorities among them -- cannot avoid to having to listen to the statements that are derogatory to them. The police [...] found it unacceptable -- and violating the test of necessity and proportionality -- to force any person to listen to messages aimed at inciting to exclusion and hate against him or her, a conclusion which the court upholds."* The significance of the concept of a "captive audience" comes from the fact that the *"unavoidable constraint to listen to the derogatory political opinion is a decisive feature of rallies for those persons who live along its route; this is what makes the assembly a show of force. As opposed to a static demonstration, this manner of expressing an opinion is what makes the communication of negative (potentially offensive) views -- which is something that is allowed in a democracy -- violate Article 13(1) of the New Assembly Act."*

The case also reflects the importance of prior restraints, also a new power in the hand of the police (see below under Chapter VIII.), and its relation to the ban. The demonstration

[102] Törökszentmiklós Police Department Decree no. 16070-160/21/2019. rendb. and no. 16070-160/24/2019. rendb.
[103] Judgment no. 5.pf.20.738/2009/7. of the Budapest-Capital Referring Court.

was finally held, upon a new notification, in a static form at the main square of the town. The acknowledgment of this latter notification by the police can be seen as an implicit recognition of the excessive nature of the practice of relying too much on bans and disregarding the possibility of applying prior restraints.

The same group of right-wing extremist organisations demonstrated again against what they allege to be "Gypsy-criminality" in February 2020, in Sály, a small village where an old woman had been murdered before. In this case, in spite of the clear and present danger of incitement to hatred, the possible violation of the rights and liberties of the members of the local Roma community, and the expected counter demonstration, the police neither banned, nor restrained the rally, though police officers in an extremely high number were at present, and eventually no violent act had happened.

VII.4. Bans based on Article 14

The other group of far-right demonstrations concerns "commemorative" assemblies expressing identification with actors and the extreme views of WW II Germany and its allies, particularly "Day of Honour" assemblies. Two court decisions quashing police bans on such assemblies have been delivered since the adoption of the New Assembly Act.

The first assembly (with an expected participation of 150-200 persons) was announced in January 2019 for 9 February 2019 with the aim of "duly commemorating the heroes who fell during the Budapest battles of WW II". The police banned the demonstration based on Article 14 of the New Assembly Act, claiming that the day chosen for the assembly can be brought into connection with the "Day of Honour", (as it was the Saturday preceding 11 February, which enabled people from all over to country to attend the event). For that reason, Article 14 must be examined. Experiences of previous years show that such assemblies are linked to extremist groups, the contents of the speeches, the appearance of the participants, the music played are capable of intimidating and scaring onlookers. Extremist groups are likely to appear, which carries in it a risk of disturbing public order and peace. It can also be presumed that -- in contradiction with the declared purpose of the assembly -- extreme rightist ideologies will be spread that violate the memory of the victims and the dignity of their surviving relatives to an extent going beyond the constitutional limits of the freedom of assembly.

In its **decision no. 103.K.700.069/2019/5,** the Budapest-Capital Regional Court quashed the ban for a number of reasons. It emphasised that not only demonstrations held on the actual days commemorating or reminding people of the victims of Communism and Nazism can be banned on Article 14, a clear link to such days is sufficient. However, the police failed to comply with its duty to cooperate when it did not take a statement from the organiser on whether and how the day he chose for the assembly is related to the "Day of Honour". More importantly from the substantive point of view, the court emphasised that point b) of Article 14 requires an *"immediate risk"* of the realisation of the behaviours forbidden therein, and -- due to the importance of the freedom of assembly and to the fact that in such cases a limitation of a right must be made on the basis of plausibility -- a restrictive approach must be taken in this regard, as otherwise there is a danger of the arbitrary application of the regulatory authority's discretionary powers. The court invoked decision no. 14/2016. (VII. 18.) AB of the Constitutional Court, in which the body declared that distant, hypothetical references to the violation of the rights of others cannot serve as the basis for prior bans. The court therefore concluded that the police had

not identified a sufficiently imminent risk of the perpetration of the behaviours that can justify a ban under Article 14, and therefore, the ban must be quashed. Finally, the court recalled that a dispersal of the assembly is possible if the risks the police assumes to exist are realised in the course of the assembly, however, *"the inevitably reactive reasons for dispersal triggered by breaches of the law during an assembly, shall not be converted into grounds for a prior ban. Due to the fundamental nature of the freedom of assembly, a very restrictive approach must be taken to prior bans, especially because the potentially erroneous omission to ban an assembly that should have been banned can still be corrected subsequently through its dispersal."*

One year later, a somewhat larger but still smaller scale demonstration (400 persons) to be held without "demonstrative marching" and without banned symbols in a less frequented public park to commemorate the "fallen Hungarian heroes" close to the "Day of Honour" was banned by the Budapest police in December 2019 on the basis of Article 14. The banning decision explicitly emphasised that "*the organisers try to articulate the objectives of the assembly not in a direct, but rather in an associative manner so that it would still be obvious for the people identifying with this ideology that this is a "Day of Honour' commemoration*."

The Budapest-Capital Regional Court quashed the ban in its **decision no. 103.K.700.567/2019/8.** The court largely repeated its decision from the previous year, adding that while the degree of plausibility required for a ban based on a potential future violation of the law cannot reach the level of certainty (being proven beyond reasonable doubt), it must be sufficiently high. This means that such a ban cannot be based on hypothetical assumptions or the general public's views and opinions regarding a particular event.

It can be concluded that no matter how reprehensible the hidden meaning of "Day of Honour" demonstrations is, if the assembly is of an "associative" nature, as described by the police, and the limitations undertaken by the organisers are respected (lack of forbidden symbols, no military type of marching), then the threat it may pose to the dignity of individuals and communities is also necessarily much less direct, and therefore does not warrant a full prior ban, especially in the absence of such incidents in the prior years. As the Budapest-Capital Regional Court pointed out: a restrictive approach must be taken and the need to demonstrate an imminent risk must be respected in order to avoid arbitrariness and content-based limitations of the freedom of expression.

As stated by the court and also put forth in the ODIHR Guidelines, if the threats the police referred to in the decision (the appearance of extremist groups that might disrupt public order and tranquillity, the spreading of Nazi ideas) actually eventuate, the police can and must take the necessary steps to call those violating the laws to account (during or after the event), however, the distant and indirect risk of such results is not sufficient for a ban.

It must be borne in mind that -- as bases of the complaints examined by the Constitutional Court in its decision no. 14/2016 (VII. 18.) AB -- the "Day of Honour" rallies were amongst the root causes of the adoption of the New Assembly Act. By example of the banned "Day of Honour" demonstrations, the Constitutional Court called the legislator to ensure that *"the restriction imposed stays within a proportionate framework"* and *"that the police would interfere under a sufficiently differentiated regulation".* For this purpose, the Constitutional Court obliged the legislator to establish rules that *"allow the application of*

slighter restrictions or conditions as compared to the ban of the event, in order to strike a fair balance of clashing fundamental rights".

The jurisprudence on "Day of Honour" assemblies under the New Assembly Act clearly points out that the legislator failed to comply with the order of the Constitutional Court. In point of fact, the procedural rules governing the judicial review of bans expressly deprive the courts of the possibility to apply balanced restrictions, as expected by the Constitutional Court. Although the New Assembly Act enables the police to choose between the application of a ban or less severe restrictions, once the police bans an event, the margin of discretion provided to courts remains limited. Under the procedural rules of judicial review set out in Article 15(4) of the New Assembly Act, the outcome of a judgment on a banned assembly is binary: the court can either maintain the ban -- upholding the severest restriction to the right to peaceful assembly -- or quash it -- allowing the assembly to be held without restrictions of any kind. While the police actually has the power to differentiate the restrictive measures applied, the court is deprived of this same possibility by technical rules of judicial review. As a result of this procedural rule, the gap detected by the Constitutional Court in decision no. 14/2016 (VII. 18.) AB has not been covered by the new legislation. This is mirrored by the judgments on the "Day of Honour" assemblies that were allowed without any restrictions issued by the authorities.

Finally, the interesting development must be pointed out that while Article 14 was most probably inserted in the New Assembly Act to provide the police with a tool to prevent commemorative events of extremist groups from taking place, the jurisprudence so far has been interpreting this provision in compliance with the international standards through emphasising the need to demonstrate with sufficient plausibility the existence of imminent risk. In this regard, the new law has so far had an impact that by all probability goes against what the legislators intended and what critics of the law were afraid of.

VIII. PRIOR RESTRAINTS

VIII.1. Standards

Even though the right to peaceful assembly is recognised as a privileged fundamental right within the Hungarian law, the freedom to organize and participate in assemblies is not unlimited and may be subject to certain restrictions. The type of restrictions is diverse and include a variety of measures, like setting administrative requirements (such as prescribing prior notification), imposing substantial obligations (such as the duty to cooperate with authorities in the notification process), or empowering the authorities with the right to apply prior restraints or last resort measures (such as the dispersal or prior ban of an assembly). Irrespective of the type of restriction applied, some well-recognised general standards for restrictions to the right of peaceful assembly must be observed, including the requirement of legality, necessity and proportionality.

For the purposes of this article, prior restraints shall comprise all restrictions, conditions and prescriptions set out by the resolution of the regulatory authorities in advance, excluding the total ban of the assembly. Prior restraints are also generally referred to as "time, place and manner type restrictions" covering a wide range of possible measures that must not interfere with the core message of the assembly. As the ODIHR Guidelines indicate: *"Public assemblies are held to convey a message to a particular target person,*

group or organization. Therefore, as a general rule, assemblies should be facilitated within 'sight and sound' of their target audience."[104]

VIII.2. The pre-2018 situation

As illustrated by decision no. 14/2016 (VII. 18.) AB of the Constitutional Court on the banned "Day of Honour" assemblies, the Old Assembly Act did not entitle the regulatory authorities to employ less restrictive measures than a ban. Within the old legal framework, the police either took note of holding an assembly or banned it. The choice between these two measures was so contrasted, that in certain cases regulatory authorities did not have sufficient margin to ensure the peacefulness of assemblies in advance. Although the police did develop the practice of using the pre-assembly negotiations to try to convince organisers to accept certain limitations in order for the notice to be taken note of, this legislative solution still led in practice to situations where the authorities had to take note of assemblies that foreseeably needed to be dispersed subsequently or unlawfully banned an event on grounds not specified in the act.

As an attempt to respond to the obvious necessity of making prior efforts to secure the peacefulness of the assembly and preventing the forced dispersal of the assembly to the extent possible, the Minister of Interior empowered the authorities by decree[105] to issue a prior written warning to the organisers on the consequences of an eventual breach of law. Although the possibility of issuing a warning could have had some preventive effect on the application of last resort measures (the prior banning or the forced dispersal of the assembly), formally it could not be deemed as a prior restraint. The warning did not have the consequences of a resolution and it could impose no specific obligation or precondition on the organisers. Thus, there was no truly effective tool in the hands of the police to assure an optimal environment for the exercise of the right to peaceful assembly and the balancing of competing rights even in cases where there was a sufficiently direct possibility of collision or the overstepping of the constitutional boundaries of the freedom of peaceful assembly.

VIII.3. The provisions of the New Assembly Act

In the wake of the omissions pointed out by the Constitutional Court, the New Assembly Act introduced the possibility of applying prior restraints and vested the regulatory authorities with wide discretional rights to determine the circumstances of the assembly. From the information available at the online archive of restrictive resolutions,[106] it can be seen that throughout the first year of the New Assembly Act, the police applied prior restraints all together in 24 cases, while assemblies were banned in 31 cases. The fact that prior bans are applied still more frequently than less restrictive constraints at least questions the Constitutional Court's assumption that the possibility of imposing prior restrictions concerning the time, place and manner of assemblies, will enable the police to show significantly more flexibility and act in a manner that is more conducive to the exercise of the freedom of assembly.

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[104] ODIHR Guidelines, guideline 3.5, p. 17.

[105] According to article 6 of MI Decree I: *"If it can be concluded from the notification that the planned event contravenes the provisions of the Assembly Act, but it cannot be banned in advance, the police shall warn the organiser in writing to that effect."* The warning was prescribed to contain information on the legal consequences of breaching the law, including the possibility of dispersal.

[106] The regulatory authority is obliged by law to publish all restrictive resolutions (bans and prior restraints as well) at its own website under www.police.hu.

It is also clear from the available numbers, that organisers are more likely to request judicial review of a resolution on the total ban of an assembly (16 out of 31 cases approximately 51%) than of the application of a prior restraint (2 out of 24 cases, approximately 12%).

*The table was drawn up taking into account police resolutions issued between 1 October 2018 and 1 October 2019.

This fact can be interpreted in a number of ways. The interpretation that is favourable for the new law is that most prior restrictions are all in all acceptable for the organisers, as they still allow for the expression of the intended message of the assembly, although in a somewhat amended manner. The less optimistic interpretation is that due to the tight time limits, the legal obstacles and other -- financial and other -- costs that challenging these restrictions would mean for organisers (see under the relevant Chapters) discourage them from asserting their rights to the full and choose to sacrifice some elements of their communication in exchange for the possibility of holding any assembly. It would however require in-depth interviews with organisers to be able to see which of the two explanations is closer to the actual truth of the situation. Nevertheless, the introduction of this new instrument in the hands of the police raised some concerns that directly affect its application in practice.

Inconsistencies in the new legislation

The New Assembly Act provides two grounds for prior restraints.

A. According to Article 11(4) of the New Assembly Act: *"if the organiser or his/her representative fails to attend the negotiation or when the negotiation is*

unsuccessful, the regulatory authority shall adopt a decision in the interest of maintaining the order of the assembly and securing public order."

In terms of Article 11(5) *"the decision shall regulate in particular (a) the safety conditions connected to holding the assembly and necessary for the protection of public safety, public order or the rights and freedoms of others, (b) the contacts between the police and the organiser or leader of the assembly, (c) the number of staff, (d) the application of the technical equipment that secure providing on-site information to the participants and (e) the safety rules necessary for carrying out the assembly safely, without the disclosure of classified data."*

B. Parallel to the above, Article 13(5) of the New Assembly Act provides: *"if the regulatory authority does not prohibit holding the assembly, it may adopt a decision specifying for the organiser the conditions of holding the assembly, provided that it is necessary for the purposes of protecting public safety public order and the rights and freedoms of others."*

Both legal grounds are separate and individual bases for delivering a resolution on prior restraints. Nevertheless, the relation and the scope of these are not quite clear from the text of the law. It seems at first sight that the latter ground is defined so broadly *("if the regulatory authority does not prohibit holding the assembly"*), that it necessarily covers the situation regulated in the former ground (*"if the negotiation was unsuccessful"*). In addition, Article 11(5) sets out certain requirements against resolutions on prior restraints, which may also be relevant for resolutions delivered under Article 13(5), yet, the law does not explicitly stipulate the application of these in both cases.

Just as in the case of the Old Assembly Act, the Minister of Interior attempted to clarify and detail the general norms of the Act by a decree (the MI Decree II). However, instead of clearing up the inconsistency, the MI Decree further blurred the boundaries between the two grounds by establishing common rules for the content of resolutions on prior restraints and partly duplicating the regulation already contained in Article 11(5) of the New Assembly Act.

Due to the above uncertainties, the New Assembly Act does not fully comply with the domestic and international principle of the legality of restrictions posed to the freedom of peaceful assembly. As the ODIHR Guidelines declare, the standard of legality requires *"consistency among the various laws that might be invoked to regulate freedom of assembly. Any law that regulates freedom of peaceful assembly should not duplicate provisions already contained in other legislation, as this would reduce the overall consistency and transparency of the legislative framework."*[107]

The practical consequence of the duplicated regulation of legal grounds for prior restraints is that the regulatory authority tends to apply the ground that is defined more broadly: Article 13(5) of the New Assembly Act was applied as basis for prior restraints 23 times out of 24 cases, even though in most of the cases the precondition for applying restraints under Article 11(4) prevailed. This tendency may result in the long run in that Article 11(4) of the New Assembly Act will become superfluous in practice.

[107] ODIHR Guidelines, para 36., p. 38.

The fact that the regulatory authorities do not rely on Article 11(4) as a ground for prior restraint can also be seen as a positive development. Applying prior restraint as a consequence of an unsuccessful negotiation would in effect impose a sanction for not agreeing with the authorities, and the organisers would see themselves forced to accept whatever alternative the authorities propose throughout the negotiation.

Broad discretionary powers

Introducing the possibility to apply prior restraints granted a new tool in the hands of the regulatory authority. An inherent risk of the creation of new legal measures is the complete lack of available domestic jurisprudence that could provide guidance to the regulatory authorities. This is especially true in the case of prior restraints as it provides a very wide margin of discretion to the regulatory authorities, carrying the potential of arbitrariness. According to the ODIHR Guidelines: *"legislative provisions that confer discretionary powers on the regulatory authorities should be narrowly framed and should contain an exhaustive list of the grounds for restricting assemblies. Clear guidelines or criteria should also be established to govern the exercise of such powers and limit the potential for arbitrary interpretation."*[108]

The New Assembly Act draws up the grounds for prior restraint in very general terms allowing the regulatory authorities to take restrictive measures to protect "public safety", "public order", and "the protection of the rights and freedoms of others". The general wording of the act requires the regulatory authorities to be aware of constitutional and international standards of restrictions to the right to peaceful assembly and carry out an exhaustive analysis of the specific factors of each individual case in order to strike a proper balance between the freedom of peaceful assembly and the legitimate bases for prior restraints.

As the practice indicates so far, this task does not always prove easy for the police.

In light of the published resolutions, it is a general concern that the police consistently refers to all three legitimate grounds of prior restraint (public safety, public order and the rights and freedoms of others), even if the reasoning behind the decision does not underpin all grounds. Although reference to all possible grounds in the resolution might be a mere formality, this practice is very confusing as to the real reasons behind the restriction and raises questions regarding the substance of the resolution.

VIII.4. The jurisprudence under the New Assembly Act

Despite the few available judgments on prior restraints, the jurisprudence has already had the chance to pronounce on core requirements concerning the reasoning behind restrictive resolutions. In the already cited case concluded with **decision no. 102.K.700.158/2019**, the Budapest-Capital Regional Court where the regulatory authority excluded a symbolic soccer game from the programme of an assembly to be held in front of the Parliament as a protest against lowering the level of education, the court found the reasoning of the regulatory authority to be insufficient (see also above at Chapter II.3.).

[108] ODIHR Guidelines, para 37. p. 38.

The regulatory authority banned the soccer game referring to a violation of human dignity and the protection of national heritage. The police claimed that the square in front of the Parliament is of outstanding significance in the history of Hungary and a place with memorial significance for the nation, therefore, it cannot be used as location of a football-match. The reasoning of the police also raised concerns of public safety due to the risks of a sports injury or a traffic calamity caused by a kicked ball.

The court established that the application of the prior restraint was not substantiated. According to the court, the regulatory authority did not comply with the strict constitutional and legal standards for weighing the restriction of the fundamental right and did not assess the clashing rights. *"Summarising the relevant legislation and principles does not* [adequately] *substitute the* [proper description of the] *assessment of the authority."* The court considered that the protection of cultural heritage as an abstract constitutional value cannot be deemed as a competing fundamental right and therefore its collision with the right to peaceful assembly does not even arise. By contrast, the symbolic match serves as the primary method for communicating the message of the assembly, therefore its complete ban substantively affects the right to peaceful assembly and unreasonably curtails the expression of the political opinion.

Critics of the prior restraint as a new tool in hands of the police expected the lowering of the level of protection of the right to peaceful assembly. In their view, there is a risk that the introduction of the possibility to set prior restraints does not keep the regulatory authority from banning assemblies, but rather encourages it to impose restrictions more widely. Such an intention was perceptible in case of the 2019 Budapest Pride March, the largest LGBTQ annual event in Hungary. In accordance with the "sight and sound" principle, the initial intention of the organisers was to open the event towards its target audience as much as possible and enable others to join freely. For this purpose – contrary to the practice of former years – the organisers requested the police to omit completely the application of barriers and abandon the obligation of individual admission by stewards at entry points. In view of the organisers, the barriers established in previous years were pointless, as counter-protestors have entered the assembly despite of the cordons. The organisers suggested the police to secure the event via personal presence of police officers and set aside the total closing of the march. The police held that the security of the event cannot be guaranteed without establishing barriers and suggested the creation of three entry points at two static programme locations of the gathering, preventing the audience from joining or leaving the march along the way. As no agreement was reached throughout the negotiations between the parties, the police adopted a resolution prescribing the application of barriers and the establishment of three entry points for individual admission by stewards.

The resolution of the police imposed stricter conditions to the Pride March under the New Assembly Act, than the practice applied in former years.

The resolution of the police was modified by **judgment 103.K.700.197/2019/6** of the Budapest-Capital Regional Court. The court reminded that it is the duty of the police to demonstrate that the applied measures ensured the legitimate aim of securing the event imposing the least possible restriction of the right to peaceful assembly. The court found that the limitation applied by the police was disproportionate. Although establishing entry points and arranging individual admission to the event by stewards are needed to avoid confrontation with counter-protesters, limiting the number of entry points was

unnecessary. The court therefore allowed the organisers to establish entry points at each crossing along the way of the Pride March. By this ruling, the court managed to maintain the status quo under the Old Assembly Act, and prevented the lowering of the protection of the right to peaceful assembly under the New Assembly Act.

Unchallenged breaches

Due to the fact that organisers tend to accept prior restraints to a greater extent as compared to complete bans, courts have so far had little chance to rule with respect to prescriptive resolutions under the New Assembly Act. The hesitation of organisers to challenge restrictive resolutions in some cases have led to gross breach of the right to peaceful assembly.

Examples of evidently mistaken application of the new grounds of prior restriction include a case[109] in which the police relocated a heavily government-critical static demonstration to be held on a very busy and touristic square near the office of the Prime Minister of Hungary. The notified aim of the assembly was "to bid farewell to the resigning dictator of our homeland before his defeat at the upcoming elections". The organiser intended to set up tents on the grass-covered part of the square where the demonstration was planned.

In the phase of the negotiation, the police claimed that there was a collision of fundamental rights and offered the demonstration to take place at the nearest place covered with gravel (in fact, the former sanctuary of a ruined ancient church). The organiser refused to accept the offered location on various grounds: the religious character of the alternative location and the difficulties of putting up tents on gravel.

The police invoked the protection of rights and freedoms of others, and specifically, the fundamental right to the protection of natural environment as the basis of the decision.[110]In view of the police, holding the planned assembly on the part of the square which was covered with grass would have collided with others' fundamental right to the protection of nature. The police also obtained the expert opinion of the gardening department of the police on the harm caused to nature (namely, the grass on the square). The gardening expert of the police claimed that putting up tents would lead to a ruination (of the grass) that is exclusively repairable by physical intervention (some gardening activity). In its resolution delivered under Article 13(5) of the New Assembly Act, the police obliged the organiser to refrain from the originally planned location.

Just as in case of the symbolic soccer match, it can be argued that the abstract right to the protection of the natural environment is not a relevant fundamental right that can collide with the right to peaceful assembly. In a more practical sense, the consistent application of the above reasoning can lead to the absurd interpretation that the right to peaceful assembly cannot be exercised on places covered with grass, and the authorities may carve out areas of public space demarcating these as free from assemblies by simply grassing them over.

[109] Resolution No. 01000-160/1209-9/2019. rendb. of the police.
[110] According to Article P of the Fundamental Law: "Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

IX. CONCLUSIONS

From the results of the analysis above, some general conclusions can be made regarding the judicial practice of the fundamental freedom of assembly in Hungary.

First, the courts -- especially the Budapest-Capital Regional Court -- seem to be conservative. They tend to uphold the settled jurisprudence and the level of protection of the fundamental right, sometimes even against the wording of the New Assembly Act (for examples, see Chapter VI on the traffic ban above). When the New Assembly Act came into force, its critics expressed particular concerns that the new provisions will lead to the lowering of the level of protection and will cause a significant change in how the fundamental right to assembly can be legally enforced. These concerns were not unfounded.

On the one hand, the New Assembly Act introduced new legal bases for restricting this fundamental right, and made the guarantees of the right less clear. On the other hand, courts are closely bound by the text of the laws and refuse their interpretation using constitutional principles.[111] But the judgments of the first years of the application of the new Act on assemblies do not confirm what the critics had presumed. A certain level of continuity can be observed in the court decisions: they contain references to and draw conclusions from judgments of the previous era that were applying the former, less restrictive law. Consequently, the courts try to find the meaning of the new provisions in consistence with the former regulations and try to transfer the results of the legal interpretation of the previous law to the application of the new law. The courts quote and build their argumentation on the decisions of the Constitutional Court with considerable frequency, and not only on the most recent ones but also on those that were applying the Constitution of the Hungarian Republic, the predecessor of the Fundamental Law of Hungary. Therefore, it seems that, according to most of the ordinary courts, the scope of protection of the fundamental right to assembly has not changed despite the new legislation. We need to see whether and how this approach will be changed as a result of delegating the judicial review of the regulatory authority's decisions to the Curia in 2020.

Second, in the cases related to the freedom of assembly, the courts seem to be aware that they need to perform fundamental rights jurisdiction. Traditionally, ordinary courts in Hungary averted the task of building a coherent interpretation and enforcement of fundamental rights, and they rarely use fundamental rights arguments when they make their decisions.[112] It is noticeable that the traditional approach of the Hungarian courts has changed a lot during the last decade, and it is observable in the assembly law related jurisdiction, too. In relation to this, it has to be mentioned that the courts recognize that the case they are deciding is about the legal enforcement of a claim derived from a fundamental right, where the right holder of fundamental freedom is in a lawsuit against the state (authority) that is the subject of obligations in relation of this fundamental right.

This recognition helps the courts to decide the case on constitutional grounds, even though they are administrative courts, where most of the cases do not require the use of

[111] This is described but not criticised by Béla Pokol in his book, A jog elmélete (Budapest: Rejtjel 2001), 277–285, and criticised by András Jakab in several of his pieces, e.g., A bírói jogértelmezés az Alaptörvény tükrében, Jogesetek Magyarázata, 2011. 4., 86-89.

[112] See Somody-Szabó-Szigeti-Vissy, Alapjogi igények, alapjogi szabályok: az alapjogi ítélkezés egy koncepciója, in Alapjogi bíráskodás - alapjogok az ítélkezésben. l'Harmattan, 2013, 31.

constitutional argumentation. The frequent citation and quotes from judgments of the Constitutional Court are not accidental: the courts use them to justify the adequacy of the interpretation they follow. Furthermore, this approach also helps the courts to find the understanding of the law that conforms with the constitutional norms.

Despite all these positive remarks, at the end of this analysis, it needs to be pointed out that the exercise of the fundamental right to assembly is guaranteed only if the citizens are able to express their opinion at public demonstrations freely, without unjustified interference. A jurisprudence that adequately protects fundamental freedoms against state power is an essential precondition to the exercise of the right, but the truly free exercise of this right is when citizens do not need to always enforce their rights before the courts.

The quality of the laws and their application by the authorities shall be good enough to ensure the free expression of opinions, it constitutes a concern if the deficiencies of the law on assemblies need to be repaired by the courts regularly. When people need to go to courts if they wish to exercise their rights, then we cannot say that their freedom is guaranteed on an appropriate level. Not every organiser or participant of demonstrations has the time, financial background, and capabilities to sue the state bodies when they interfere with their rights. Bad laws (and incorrect application by the authorities) can discourage citizens from the expression of their opinion since they cause constant disputes with the authorities. Even the best jurisdiction is incapable of protecting the exercise of the right to assembly in those cases where the citizen abandons the battle for his or her rights and does not go to courts. And the worse the laws are, the more restrictions and other difficulties the citizens have to face, the more citizens decide to remain silent.