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### **The power of state versus freedom of assembly in the light of the case-law of the European Court of Human Rights and the Hungarian jurisprudence<sup>2</sup>**

The establishment of the freedom of expression and assembly as fundamental rights was one of the major issues of the change of the Hungarian legal system in the late 80's and early 90's, the corollary of which was the ratification of the European Convention on Human Rights in 1992. The abovementioned rights form part of the Hungarian legal system, they are not contested in any document or communication of the authorities or of the state, notwithstanding, after the brutal police intervention against violent and non-violent protesters and citizens on the streets of Budapest in September and October 2006, the establishment of the freedom of expression and assembly became an issue which generated passionate reactions from the part of both jurists and politicians.

In my present essay I attempt to present an analysis of the recent jurisprudence of the European Court of Human Rights concerning the limitations of the freedom of expression and assembly in order to give a more distinct image regarding the limits of the state authorities' intervention in these fundamental freedoms assured by the European Convention on Human Rights. The limitation of the rights is not impracticable, the Convention assures a right for the states parties to intervene, but the necessity in a democratic society remains a question of capital importance, it can be cleared with the help of the interpretation of the Convention given by the ECHR. Nevertheless, police brutality against non-violent citizens exercising human rights is difficult to tolerate.

In the second part of my analysis I present a judgement given by the Central District Court of Pest with the aim of arriving to a conclusion which could help to better judge the legal context of the events of September-October 2006, and the intervention of the Hungarian police and the state authorities in cases, where the right to freedom of assembly have to be ensured.

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The freedom of assembly is a significant element of the documents on human rights of the 20<sup>th</sup> century<sup>3</sup>. It is the responsibility of the state to ensure this freedom, though the possibility of exercising these rights is similarly for example to the freedom of expression which allows intervention for the sake of public order or public security. The right to freedom of assembly forms integral part of state constitutions and internal laws, at the same time in the majority of the states, especially in Europe, the international legal protection offers a kind of „secondary” security in respect of the exercise of the rights. (This study does not aim at analysing this question from the point of view of the relation between international law and internal law, it does not wish to treat the theoretical problems of the relation between international legal obligations and internal legal regulation on the basis of legal theory.) Fundamentally, besides the obligations undertaken in the internal law (constitution and other laws), the states undertook in the 20<sup>th</sup> century as international legal obligation the respect and ensurance of certain basic human rights. For private persons this represents also real opportunity if the convention in question ensures individual right of complaint, – so the legal remedy can be considered as effective – the organ which exercises the control mechanism may bring a judgment binding on the state which, besides stating the violation of law, may establish liability for damages. It can be therefore stated that only the European Convention on Human Rights, offer a kind of surplus security for private persons who in the case of violation of the Articles of the European Convention on Human Rights may directly initiate proceedings before the European Court of Human Rights.

## Freedom of assembly in the European Convention on Human Rights

As per the Convention

### Article 11 – Freedom of assembly and association

“1 *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

2 *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”*

One of the major problems is the question of how to find a lawful and correct reaction to demonstrations which are peaceful, but not previously notified to the police or administrative authorities.

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3 The most significant documents are the followings: Universal Declaration of Human Rights (*General Assembly resolution 217 A (III) of 10 December 1948*, „Article 20. (1) Everyone has the right to freedom of peaceful assembly and association.”) International Covenant on Civil and Political Rights. („Article 21 The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”)

According to Frédéric Sudre, on the basis of the jurisprudence of the Court it can be stated that the freedom of peaceful assembly does not mean other than the spontaneous formation of groups (meeting, demonstration) as a result of which ideas are exchanged.<sup>4</sup> However state authorities are free to require prior notification, or – if prescribed by law – to demand even authorisation for open air assemblies. As the European Commission of Human Rights stated in the *Rassemblement jurassien v. Switzerland* case in 1979: „a) *The right to freedom of peaceful assembly relates to both private and public meetings. b) A requirement for authorisation of meetings in public does not, as such, constitute an interference with the right to freedom of assembly.*”<sup>5</sup> To find an answer on the above mentioned question concerning the problem of non notified assemblies, the analysis of the recent case-law of the European Court of Human rights is indispensable.

### The Case-Law of the European Court of Human Rights

*“In principle, regulations of this nature (required notification 72 hours prior to the event) should not represent a hidden obstacle to the freedom of peaceful assembly as it is protected by the Convention. It goes without saying that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility; this being so, it is important that associations and others organising demonstrations, as actors in the democratic process, respect the rules governing that process by complying with the regulations in force.”*<sup>6</sup>

Demonstrations, where people are exercising their freedom of assembly may not only pose the problem of prior notification or authorisation, it can generate hostility, or counter-demonstrations, for which the police or authorities responsible for public order should be prepared, to ensure the right of assembly for all persons, and not disturb the right to freedom of expression. The Court, authorised interpreter of the Convention in the *Oya Ataman Case*, where a peaceful demonstration was held on a public place without prior notification, stipulated as follows:

*“The Court considers, in the absence of notification, the demonstration was unlawful, a fact that the applicant does not contest. However, it points out that an unlawful situation does not justify an infringement of freedom of assembly (see *Cisse v. France*, no. 51346/99, § 50, ECHR 2002-III (extracts))”*<sup>7</sup>

In this case the police dispersed the demonstration, the rally ended with the group’s and the applicant’s arrest. The Court considered that Turkish authorities violated Article 11 of the Convention, because the forceful intervention was disproportionate and was not necessary for the prevention of disorder. *“In the Court’s view, where demonstrators do not engage in acts of violence it is*

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<sup>4</sup> Sudre, Frédéric: *Droit international et européenne des droits de l’homme*. Presses Universitaires de France, Paris, 2001, p. 308.

<sup>5</sup> *Rassemblement jurassien v. Switzerland*, decision of 10 October 1979, p. 98.

<sup>6</sup> ECHR, *Case of Oya Ataman v. Turkey*, judgment of 5 December 2006, § 38.

<sup>7</sup> ECHR, *Case of Oya Ataman v. Turkey*, (cited above) § 39.

*important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.”<sup>8</sup>*

In its judgement brought on 26 April 1991 in the case of *Ezēlin v. France*, the Court went even further since in respect of non prohibited demonstrations it did not consider as illegal even the fact that violent acts happened at the demonstration.

*“that the freedom to take part in a peaceful assembly - in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way, (...) so long as the person concerned does not himself commit any reprehensible act on such an occasion.”<sup>9</sup>*

### The Hungarian practice

In September and October 2006 in Budapest, the police referred several times to the fact when dispersing the crowd that demonstrators participated at a demonstration, which had not been previously notified, so it dispersed the demonstration and applied sanctions for administrative offences, for example detention or arrest against private persons who manifested peaceful behaviour at these undeclared demonstrations.<sup>10</sup>

It must be mentioned in connection with previous authorisation that the Hungarian Assembly Act (Act III. of 1989.) prescribes only the obligation of declaration (notification) in respect of demonstrations, consequently pursuant to paragraph 2 of Article 11, the right of limitation ensured for the state can be exercised up to the degree specified in the Act. Therefore previous authorisation proceedings cannot come into question. At the same time the law ensures the right of prohibiting the program if traffic is not warrantable on other itinerary, or the work of the parliamentary system, or the judicatures are significantly menaced. (q.v. Art. 8. of the Assembly Act).

Paragraph (1) of Article 14 of the Assembly Act stipulates, that the police disperse demonstrations, which were not notified previously. (3 days before the projected date of the event)

The Hungarian practice concerning police interventions in cases of spontaneous, non-notified peaceful demonstrations was criticised not only by the Civilian Lawyers Committee<sup>11</sup>, but also by Mr. Gábor Halmai, member of the Gönczöl-Commission, the official expert Commission, set up by the Hungarian government for the analysis of the events in Budapest, September-October 2006.<sup>12</sup> Prof. Halmai, in his dissenting opinion stated, that “*enabling spontaneous*

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<sup>8</sup> ECHR, *Case of Oya Ataman v. Turkey*, (cited above) § 42.

<sup>9</sup> ECHR, *Case Ezēlin v. France*, judgment of 26 April 1991, § 53.

<sup>10</sup> Q. v. the case of Norbert I, Magyar Nemzet Online, 8 January, 2007.

<http://www.mno.hu/print.mno?type=3&id=391003&trvt=2&t=undefine> (10 August 2007)

<sup>11</sup> Committee of Civil Jurists set up for the Investigation of the Violent Acts of 23 October 2006. See: <http://www.oktober23bizottsag.hu>

<sup>12</sup> Special Commission of Experts on the Demonstrations, Street Riots and Police Measures in September-October 2006. set up by Government Decree no. 1105/2006 (XI. 06.). See: <http://www.gonczolbizottsag.gov.hu>

*gatherings without advance registration would be more advisable*<sup>13</sup> The Committee of Civil Jurists, (Morvai Committee) is going further, they considered the Assembly Act infringes on the European Convention of Human Rights.<sup>14</sup>

However the collision between the Hungarian Assembly Act and the judicial practice of the ECHR is more grave, since the Constitutional Court in 2001 confirmed its constitutionality, in the decision 55/2001. (XI. 29.)

Persons under proceeding in consequence of the event of September-October turned to the court which at the first instance reinforced the standpoint of the police, and the decision complying with the European Convention on Human Rights was taken only at the second instance, although no reference was made to the Convention.

“The Budapest Regional Court repealed the first instance judgement and annulled the decision in the case of Norbert I. and his three companions who were arrested on 23 October in the afternoon by the police near Deák square at an undeclared demonstration, and on 26 October the Central District Court of Pest punished each of them with four days of imprisonment<sup>15</sup> for disturbance<sup>16</sup>.”

It was stated without any doubt that the persons under proceeding have not committed any infraction at the undeclared program, therefore the police ordered their custody illegally – writes Népszabadság (a Hungarian political daily).

According to the decision of the chamber of the Budapest Regional Court acting upon the affected persons’ appeal and headed by dr. János Szolnoki, the first instance court was wrong when it condemned and punished the affected persons for infraction. According to the reasons for the judgement of the court, the right of assembly is a basic liberty due to everyone the exercise of which is recognised and ensured by the Republic of Hungary. According to the written reasons for the legally binding decision, exercising this right without declaration is not lawful, nevertheless it cannot be qualified neither as a crime nor as a infraction.

In the opinion of the court, the provision of Act on Administrative Offences stipulating that those persons who manifest disobedience<sup>17</sup> against the measures of the authorities or of the acting official person in the event of disturbance<sup>18</sup> or truculence<sup>19</sup> can be punished with imprisonment or fine up to one hundred and fifty thousand Hungarian forints cannot be applied in the case of manifestations falling within the scope of the Assembly Act. It can be read in the reasons for the legally binding judgement that “We cannot form or continue a jurisprudence which on the one hand limits the exercise of the right of assembly only to the narrowest degree at the level of laws and legislation, and on the other hand the legal executor considers its slightest

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13 English Summary of Conclusions and Recommendations of the Gönczöl Committee. pp. 8-9. [http://www.gonczolbizottsag.gov.hu/jelentes/gonczolbizottsag\\_jelentes\\_eng.pdf](http://www.gonczolbizottsag.gov.hu/jelentes/gonczolbizottsag_jelentes_eng.pdf) (10 August 2007)

14 Report on the Violation of Human Rights in September and October 2006 by the Committee of Civil Jurists set up for the Investigation of the Violent Acts of 23 October 2006 p. 85. [http://www.oktober23bizottsag.hu/CJB\\_teljes2\\_20070301EN.doc](http://www.oktober23bizottsag.hu/CJB_teljes2_20070301EN.doc) (10 August 2007)

15 The Hungarian term is “elzárás”.

16 The Hungarian term is “rendzavarás”.

17 The Hungarian term is “engedetlenség”.

18 The Hungarian term is “rendzavarás”.

19 The Hungarian term is “garázdaság”.

violation as a serious infraction which requires immediate police intervention.”

Later the court mentions that the Act on Administrative Offences orders to punish under the pretext of abuse with the right of assembly only those persons who organise undeclared demonstrations but not the participants. Therefore those persons who participate at an undeclared demonstration does not commit any violation of law with their simple presence; the police has not the right to arrest them simply for this reason, unless they commit other violation of law.

The reasons for the infraction procedure and the base of the first instance judgement was in the case of I. Norbert and his companions that the four men did not execute the warnings of the police and did not leave the place of the undeclared demonstration. In this respect the court stated that when judging the affected persons' acts, it must be taken into consideration that “disobedience” (i.e. if someone does not leave the given place in spite of warnings) in itself can never be punished except if it hinders the policeman in his other measures to be taken for the sake of public order or public security”. In the opinion of the Court, the participants of the undeclared demonstration do not commit any infraction to the termination of which they could be called upon by the authorities, warnings for leaving and all further police measures are unjustified and illegal. Taking into consideration the abovementioned facts, the court stated that the arrest and the custody of Norbert I. and his companions was illegal since it was stated without any doubt that the aforesaid persons did not commit any infraction.”<sup>20</sup>

The reasoning and the judgment of the Budapest Regional Court is “confirmed” by the European Court of Human Rights, in his judgment in the case *Bukta v. Hungary* at 17 July 2007 The Court stated the following:

*“In the Court’s view, in special circumstances when an immediate response might be justified, in the form of a demonstration, to a political event, to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly.” (...)* “The Court recalls that, “where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance”<sup>21</sup>

### The question of counter-demonstrations

In its jurisprudence the Court stated that the right to “counter-demonstration” cannot go as far as rendering impossible the exercise of the right of (notified) demonstration.  
(...)

<sup>20</sup> *Nem jogsértő be nem jelentett tüntetésen részt venni.* Magyar Nemzet Online, 8 January 2007. <http://www.mno.hu/print.mno?type=3&id=391003&rvt=2&t=undefine> (10 August 2007)

<sup>21</sup> ECHR, *Case Bukta v. Hungary*, judgment of 17 July 2007, §§ 36-37.

*“A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.”<sup>22</sup>*

In the Case *Plattform „Ärzte für das Leben” v. Austria*, judgment of 21 June 1988, the Court dealt with the problem of a rally, which was disturbed by counter-demonstrators, however, the notified demonstrators changed the route of the rally, but they failed to communicate it to the police authorities.

The Court recognised that counter-demonstrations are not prohibited (on the contrary, it mentions clearly the right of counter-demonstration), and it shifted upon the state the responsibility of ensuring even by police means those persons’ right of assembly who participate at the declared demonstration. It stated at the same time that ensuring this right does not mean a responsibility of result but only a simple obligation. Consequently if the police cannot guarantee this right with its own forces the state cannot be condemned for violating the Convention if in the given case the police authorities try to protect unsuccessfully the participants of the declared demonstration.

With the words of the Court:

*“While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used (see, mutatis mutandis, the *Abdulaziz, Cabales and Balkandali* judgment of 28 May 1985, Series A no. 94, pp. 33-34, § 67, and the *Rees* judgment of 17 October 1986, Series A no. 106, pp. 14-15, §§ 35-37). In this area the obligation they enter into under Article 11 (art. 11) of the Convention is an obligation as to measures to be taken and not as to results to be achieved.”<sup>23</sup>*

As to the counter demonstrations, in the case *Plattform „Ärzte für das Leben” v. Austria*, contrary to some of the events of 23 October 2007 Budapest, the Court dealt with a problem of the non-intervention of the police, at a demonstration held in Stadl-Paura, where counter-demonstrators chanted slogans, waved banners and threw eggs or clumps of grass. In this case the police secured the way of the notified demonstration, but the special riot-control units only placed themselves between the opposing groups, when tempers had risen to the point where violence threatened to break out.<sup>24</sup>

Consequently, we can see a different approach of the Austrian police, concerning the ensuring of freedom of assembly, since their attitude remained peaceful, despite of the violence of the counter-demonstrators. (e.g. throwing eggs, chanting slogans) In the eye of the Austrian government, *“immediate intervention was not justified in the absence of any serious assaults and would inevitably have provoked physical violence.”<sup>25</sup>*

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<sup>22</sup> ECHR, *Case Plattform „Ärzte für das Leben” v. Austria*, judgment of 21 June 1988, § 32.

<sup>23</sup> ECHR, *Case Plattform „Ärzte für das Leben” v. Austria*, (cited above) § 34.

<sup>24</sup> ECHR, *Case Plattform „Ärzte für das Leben” v. Austria*, (cited above) § 37.

<sup>25</sup> ECHR, *Case Plattform „Ärzte für das Leben” v. Austria*, (cited above) § 35.

As a consequence previously non notified demonstrations represent the exercise of the freedom of assembly and not its abuse, naturally only if its peaceful character is respected. Contrary to the courts of lower instance and the police, the Budapest Regional Court seems to form a jurisprudence in compliance with the Convention, especially with regard to the recent judgment in the case of *Bukta v. Hungary*<sup>26</sup> but I mention to a certain extent regretfully that it acts in this way without making any reference to the European Convention of Human rights, (which forms also part of the Hungarian internal law) or to its interpretation by the Court of Strasbourg.

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<sup>26</sup> Cited above.