Beiträge zum ausländischen und vergleichenden öffentlichen Recht

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Why regulate the freedom of assembly? Is it at all necessary to impose
detailed rules, conditions and administrative burdens on the peaceful exer-
cise of a fundamental right of such importance for a democratic society?
Does this limit the use of this freedom? If everything which is not
forbidden is allowed, if everyone is free to do anything which has not been
legally prohibited, does it not suffice to regulate the intervention of law
enforcement and leave all the rest to the natural course of democracy?

The answers to these questions vary according to the history, traditions
and political context of each country, and relate to the different functions
that laws on the enjoyment of freedom of assembly may serve, either
directly or indirectly.

As the experience of several countries in recent years has shown, a
public event may spark off a revolution. Thus, in countries with a low
level of democratic security or with an authoritarian government, the
freedom of assembly is one of the first to be curtailed. Laws on the
freedom of assembly may then become powerful tools to prohibit public
events and to impair the very essence of this right. The process of building
or maintaining an acceptable level of unhindered exercise of this freedom
is a lengthy and complex one.

But, laws on freedom of assembly, when they are at least partly liberal,
may serve as enabling tools for civil society. In the absence of any legal
regulation, it may be feared that, unless a specific kind of assembly is
explicitly provided in and protected by a law, the competent authorities
will not allow it, and the courts will probably sanction whoever organises
it or takes part in it. This is typical for counter-demonstrations or sponta-
neous assemblies, which, instead, are an essential manifestation of the
freedom of assembly. Liberal and even semi-liberal laws on the freedom
of assembly list the types of assembly that exist, and are allowed. It may
come as a surprise to some societies that so many forms of public demon-
strations are protected by European and international standards. Law-
makers must accept to guarantee them and the people must learn to prac-
tise them.

Liberal and semi-liberal laws on the freedom of assembly protect
peaceful protesters and the general public from violence and excessive
disturbance of public order. These laws fix the limits of the acceptable conduct of authorities and of law-enforcement. They restrain the discretion of the former and the use of force by the latter. They point to the existence of judicial remedies and provide guarantees for their effectiveness: this represents an encouragement for society, but also a warning to the authorities. They often provide good guidance for their correct interpretation and may shape the judges’ approach to this freedom.

Laws on the freedom of assembly are a starting point for achieving an acceptable level of exercise of the freedom of assembly. An essential one – as it is unlikely that in the absence of a good law the enjoyment of this freedom could be satisfactory – but it is only a starting point. Unless they are duly implemented and interpreted in the light of a presumption in favour of the freedom of assembly, the legal texts will not be sufficient. By way of example, the dividing line between mere notification and request of authorisation of an event is very thin, and often resides in the correct interpretation of the legal provisions. A democratic frame of mind is necessary on the part of the implementing authorities, the courts, and the law-enforcement agencies. As we have witnessed, this kind of culture is often absent or low when the process of preparation of freedom of assembly laws starts in countries in transition. In the experience of the Council of Europe’s Venice Commission, however, there may be steady progress once laws are adopted and civil society learns how to practise its freedom under a legal umbrella, yet constantly strives to expand it. It is through civil society’s repeated attempts to stage public events within sight and sound of their target, and thanks to its obstinacy and sometimes sense of sacrifice that the authorities of many states have finally started to give in. The international community has tried to assist civil society in many countries in transition, primarily through assistance in the preparation of good laws, but also in training law-enforcement to prevent the excessive use of force in policing public events.

Comparative studies such as this provide an invaluable insight into the existing laws and help identify best practices which may, and should, serve as a source of inspiration for states that have not yet reached a satisfactory level of protection of the freedom of assembly, in line with European and international standards.

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