



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

## Judicial Seminar ECHR 2023

### “Judges preserving democracy through the protection of human rights”

#### Freedom of Assembly and Association and Democracy

Speech by Mirjana Lazarova Trajkovska

*Strasbourg, 27 January 2023*

The right to freedom of peaceful assembly and to freedom of association is not only one of the moving forces of modern democratic society, but – and perhaps more fundamentally – of living in society with others who are similar to or different from us. In this perspective, I am in agreement with the famous French diplomat and sociologist Alexis de Tocqueville, when he said that the human spirit and the art of association are fundamental not only to democracy but to progress in all other areas of human life.<sup>1</sup> Therefore, we need to contribute not only to the protection of freedom of association but also to the perfection of the legal aspects of the art of association and assembly.

This is even more relevant in times like the past few years when, owing to the COVID-19 pandemic, a number of protective measures were introduced which in one way or another put at risk this fundamental precondition of human existence in democratic and civilised societies. We have experienced different forms of restrictions such as closures and restrictions of public and private meetings. Various social distancing policies prevented gatherings with others, not only expressive but also private and intimate ones. Social gatherings were either banned completely or limited by the number of people. Many political, sports, cultural, religious, or other events across Europe and the world were cancelled. We accepted and adopted alternative forms of communication, expression, and association, most of all through online meetings. Yet, people are social beings, and they need to gather both publicly and privately for social, political, cultural, humanitarian or any other reason.

In this regard, I intend to point out here some of the key contributions of the Court to the perfection of the art of association and assembly as one of the fundamental rights protected by the Convention, recognising that participation in the democratic process is, to a large extent, achieved through belonging to associations in which citizens can integrate with each other and achieve common objectives collectively.<sup>2</sup>

The Court has established that the right to freedom of association and assembly does not, however, protect intentionally violent protests or gatherings. For example, the Court found no violation in the case of *Ayoub and Others v. France*, concerning the dissolution of a paramilitary-type far-right association following violence and public-order disturbances by its members.<sup>3</sup>

---

<sup>1</sup> Alexis de Tocqueville; *Democracy in America* (Edited and translated by Harvey C. Mansfield and Delba Winthrop and with an Introduction by Harvey C. Mansfield and Delba Winthrop) ©2000.

<sup>2</sup> *Kudrevičius and Others v. Lithuania*, GC judgment of 15 October 2015, no. 37553/05, § 91

<sup>3</sup> *Ayoub and Others v. France*, judgment of 8 October 2020, applications nos. 77400/14, 34532/15 and 34550/15.

The aims of the right to freedom of peaceful assembly and to freedom of association with others include protecting the freedom to form and express opinions and securing a public forum for debate and the open expression of protest.<sup>4</sup> The Court has attached importance to the fact that those taking part in a gathering are seeking not only to express their opinion, but to do so together with like-minded others.<sup>5</sup>

In *Ekrem Can and Others v. Turkey*, the protest at the courthouse – where the applicants had opened a banner, chanted slogans and thrown leaflets, thereby disrupting an essential public service – namely the orderly administration of justice – was examined under Article 11 considered in light of Article 10. The Court noted that the applicants' complaint concerned not only the fact that they had been prevented from making a statement, but – more predominantly – the police's intervention resulting in their forcible removal from the premises.<sup>6</sup> The right to express opinions under Article 11 recognises the power of expressing such opinions collectively. In the *Primov and Others v. Russia* judgment, the Court attached importance to the fact that those participating in an assembly were seeking not only to express their opinion, but to do so together with others.<sup>7</sup>

The right to freedom of peaceful assembly comprises negative and positive obligations on the part of the Contracting State.<sup>8</sup> A positive obligation to secure the effective enjoyment of freedom of assembly is of particular importance for persons belonging to minorities, because they are more vulnerable to victimisation.<sup>9</sup> The Court has affirmed that, in addition to political parties, gatherings and associations which seek to protect cultural or spiritual heritage, pursue socio-economic aims, proclaim or teach religion, seek an ethnic identity, or assert a minority consciousness, are also important to the proper functioning of democracy.<sup>10</sup>

In *Navalnyy v. Russia*, where a political activist was repeatedly arrested and prosecuted for administrative offences related to the unlawfulness of public gatherings, the Court found a violation on Article 11 and, on the basis of Article 46 paragraph 2, requested the respondent State to take general measures to ensure that the legislative framework governing the exercise of the right to freedom of peaceful assembly did not represent a hidden obstacle to that freedom.<sup>11</sup> In a case that differed from the above, *Makarashvili and Others v. Georgia*, the Court applied a more restrictive approach by emphasising that those organising and participating in demonstrations, as actors in the democratic process, should respect the rules governing that process by complying with the regulations in force.<sup>12</sup>

The question then arises as to where the line should be drawn for permitted interferences with the right to freedom of association and assembly when it comes to the measures taken by States? In the Chamber judgement *Communauté genevoise d'action syndicale v. Switzerland* it was not disputed by either party that the prohibition on public meetings constituted an interference with the right to freedom of association.<sup>13</sup> The Court has previously upheld significant restrictions on public gatherings where the aim

---

<sup>4</sup> *Éva Molnár v. Hungary*, judgment of 07 October 2008, application no. 10346/05, § 42

<sup>5</sup> *Novikova and Others v. Russia*, judgment of 26 April 2016, applications nos. 25501/07 57569/11 80153/12 5790/13 35015/13.

<sup>6</sup> *Ekrem Can and Others v. Turkey*, judgment of 08 March 2022, application no. 10613/10 §§ 68-91.

<sup>7</sup> *Primov and Others v. Russia*, judgment of 12 June 2014, application no. 17391/06, § 91

<sup>8</sup> *Djavit An v. Turkey*, judgment of 20 February 2003, application no. 20652/92 § 57

<sup>9</sup> *Bączkowski and Others v. Poland*, judgment of 03 May 2007, application no. 1543/06 § 64

<sup>10</sup> *Centre of Societies for Krishna Consciousness in Russia*, judgment of 23 November 2021, application no. 37477/11 § 46 and *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, judgment of 03 May 2007, application no. 71156/01 §§ 143-144.

<sup>11</sup> *Navalnyy v. Russia*, judgment of 15 November 2018, applications nos. 29580/12 and 4 others.

<sup>12</sup> *Makarashvili and Others v. Georgia*, judgment of 01 September 2022, application nos. 23158/20, 31365/20, 32525/20. The case is waiting for decision based on the pending request for referral to the Grand Chamber.

<sup>13</sup> *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 42 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

was to protect public safety or to preserve public order and did not find a breach of Article 11 where a gathering had been dispersed to protect the health and safety of those participating.<sup>14</sup> However, these restrictions did not relate to general bans on gatherings, they were targeted to containing the particular risk posed by the demonstrations in question.<sup>15</sup>

Throughout the pandemic, citizens were highly creative, and they engaged in alternative forms of assembly and protest. Whilst protests should rarely be banned because of the substance of the message which participants wish to convey, the purpose of a demonstration may also be relevant to the proportionality assessment. The Black Lives Matter protests during the pandemic exemplify this, a positive obligation of a State to secure the effective enjoyment of freedom of assembly being of particular importance for persons belonging to minorities, who are more vulnerable to victimisation.<sup>16</sup> The aim of these protests was to elevate the voices of ethnic minorities more at risk of discrimination because of their minority status. Further, in restricting a demonstration, States must consider the harm caused by not permitting a demonstration to take place and conclude that the benefits of restricting an assembly outweigh that harm.

The gravity of enforcement measures and the nature and severity of any sanctions for participation in a gathering or demonstration must also be considered in a proportionality assessment.<sup>17</sup> In a number of cases where demonstrators had engaged in acts of violence, the Court held that while the demonstrations were within the scope of Article 11, the interferences were justified for the prevention of disorder or crime and for the protection of the rights of others.<sup>18</sup> In *Christian Democratic People's Party v. Moldova*, the Court underlined that the burden of proving violent intentions on the part of the assembly organisers lay with the authorities.<sup>19</sup>

In addition to these more general remarks on the right to freedom of association and assembly, I would like to point out some specific aspects of this universal right when it applies to the freedom of association and assembly of judges. As a professional category but also as public servants, judges are also members of associations, and they have a crucial right to assemble and demonstrate. A 2012 Council of Europe Recommendation on judges' independence, efficiency, and responsibilities, provides that, "Judges may engage in activities outside their official functions" and that "judges should be free to form and join professional organisations whose objectives are to safeguard not only their independence, and to promote the rule of law but also to protect and develop their interests as citizens and human beings".<sup>20</sup>

In line with this, in *Maestri v Italy* the Court found a violation of Article 11 in relation to the imposition of a disciplinary sanction on a judge on account of his membership of the Freemasons.<sup>21</sup> The interference had not been foreseeable and had therefore not been "prescribed by law".

In *Miroslava Todorova v Bulgaria*,<sup>22</sup> following her public statements in her role as head of an association of judges, the applicant, who was a judge, was subjected to disciplinary proceedings based on alleged inefficiency and performance issues. The predominant purpose of the disciplinary proceedings against the

---

<sup>14</sup> *Cisse v. France*, judgment of 9 April 2002, application no. 51346/99.

<sup>15</sup> *Christians against Racism and Fascism v. the United Kingdom*, admissibility decision of 16 July 1980, application no. 8440/78

<sup>16</sup> *Bączkowski and Others v. Poland*, judgment of 3 May 2007, application no. 1543/06, § 64

<sup>17</sup> *Kudreivičius and Others v. Lithuania* [GC], 2015, § 92.

<sup>18</sup> *Osmani and Others v. "the former Yugoslav Republic of Macedonia"* (dec.) from 11 October 2001 application no. 50841/99.

<sup>19</sup> *Christian Democratic People's Party v. Moldova (no. 2)*, judgment from 02 February 2010, application no. 25196/04, § 23

<sup>20</sup> CoE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Para 21.

<sup>21</sup> *Maestri v. Italy*, GC judgment from 17 February 2004, application no.39748/98.

<sup>22</sup> *Miroslava Todorova v. Bulgaria*, application no.40072/13, judgment of 19 October 2021.

applicant and of the sanctions imposed on her had not been to ensure compliance with the time-limits for concluding cases, but rather to penalise and intimidate the applicant on account of her criticism.<sup>23</sup> The effect of these measures was to cause a “chilling effect” on the exercise of freedom of expression by other judges wishing to participate in the public debate on issues related to the administration of justice. This effect, “...which works to the detriment of society, is also a factor that concerns the proportionality of the sanction or punitive measure imposed...”<sup>24</sup>

As such, in the short time impaired to me I have attempted to demonstrate some of the many facets and domains in which the Court has crafted the right to freedom of association. Indeed, throughout its case-law the Court has defined and sculpted the right to freedom of association and demonstration, it has carefully framed the scope of Contracting States’ permitted interferences with these rights, seeking to balance the latter against the rights of others. This exercise by the Court consistently takes account of the circumstances, the context, and the aims towards which the freedom of association and assembly is used: whether this is in an extraordinary context such as the Pandemic or through casual acts of the democratic process, whether done by ordinary democratic actors or particular professional categories such as that of judges.

Dear colleagues,

Let me conclude by stressing that the right to freedom of association and assembly is a crucial element for any democratic society. The right to freedom of association is linked with all human activities – political parties, unions, non-governmental organisations, cultural or any form of association. It covers voluntary organisations, groups and entities with or without legal personality. States have a positive obligation to ensure that people are free to form and participate in associations of any type and to engage independently in any legal and lawful activity.

We are now faced with a post-pandemic period, but also a time of war where peace is under attack both in Europe and in the world, a period of serious economic and energy crisis that threatens the very basis of our civilised societies. Our successes in protecting and furthering the right to freedom of association and assembly prevent our more and more polarised societies – and more and more confronted nations – from sliding into a new barbarianism.

---

<sup>23</sup> See ICJ and Judges for Judges, *Judicial Independence, and Accountability in Bulgaria : The Case of Judge Miroslava Todorova* (2017), pp. 2-3 and 16; “Bulgaria: ICJ raises concern at dismissal of Judge Todorova” (August 27, 2012), <https://www.icj.org/bulgaria-icj-raises-concern-at-dismissal-of-judge-todorova/>

<sup>24</sup> *Baka v Hungary*, judgment of 23 June 2016, application no. 20261/12 §§ 162-67