

Half-Day General Discussion in preparation for a General Comment on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights

Palais Wilson, 20 March 2019

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Mots clés : observation générale, droit de réunion

Résumé : In view of the Half-Day General Discussion in preparation for a General Comment on Article 21 of the International Covenant on Civil and Political Rights, the present document provides an analysis of some of the issues selected by the rapporteur of the UN Human Rights Committee. It does so with reference to French and international law, and in particular in the context of the recent demonstrations in France and of the proposed draft bill discussed before the French Parliament “aiming at strengthening and ensuring the maintaining of public order during demonstrations”.

1. The prior notification regime in the light of the French legislation

One of the issues presented by the Committee is the prior notification regime used in different countries around the world. The present analysis takes into consideration the French legal framework as an example with the aim of clarifying some aspects related to the notification requirement and the regulation of spontaneous assemblies.

The right of peaceful assembly is fundamental in all societies, as it is essential for the expression of people's views and opinions, and thus should be regarded as a right and not as a privilege¹. The importance of freedom of peaceful assembly implies that States must exercise a strict scrutiny on restrictions imposed on article 21, so that they “may not put in jeopardy the right itself”². Also as the Committee stated, concerning freedom of expression, “the relation between right and restriction and between norm and exception must not be reversed”³. Specifically, with regard to the prior notification regime, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, have stated that the right of peaceful assembly should be exercised without being subject to prior authorization by the State⁴.

¹ See *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* (hereafter “*Joint report*”), A/HRC/31/66, para. 21: <https://undocs.org/en/A/HRC/31/66>.

² HRC, *General Comment n°34 on Freedoms of opinion and expression*, CCPR/C/GC/34, 2011, § 21.

³ *Id.*

⁴ *Joint report*, para. 21. See also OSCE/ODIHR *Guidelines on Freedom of Peaceful Assembly*, Section B: explanatory notes, 2010, para. 118: “Any legal provisions concerning advance notification should require the organizers to submit a notice of the intent to hold an assembly, but not a request for permission”.

Therefore, a prior notification regime should not be interpreted as an authorization regime. The objective of the prior notification is to “allow State’s authorities an opportunity to facilitate the exercise of the right, to take measures to protect public safety and/or public order and to protect the rights and freedoms of others. Any notification procedure shall not function as a *de facto* request for authorization or as a basis for content-based regulation”.⁵

In France, the prior notification regime is regulated under the Law on Freedom of Assembly of 30 June 1881 (*loi sur la liberté de réunion*), and article 431-9 of the French Criminal Code. The Law on Freedom of Assembly states that those organizing a demonstration in a public place (specifically, 3 organizers), must notify the respective authorities in advance and indicate the purpose of the event, the date and time, the place and/or the itinerary proposed.

Moreover, the French Criminal Code in its article 431-9 provides that one will be punished with six months of imprisonment and with a 7,500 euros fine, if the person has: (i) organized a demonstration in a public place without a prior notification; (ii) organized a demonstration that had already been *prohibited* (emphasis added); (iii) have declared an incomplete or inaccurate notification with the purpose of deceiving the object or the conditions of the prospected demonstration.

Whilst the prior notification has a preventive purpose, it gives to the administrative authorities the power to prohibit a demonstration. It is important, therefore, that administrative judges⁶ can exercise maximum control over the decisions in the matter. For that purpose, French case-law has established standards to be met by the administrative authorities, when prohibiting a demonstration in case of threat of disturbance to the public order⁷.

In the landmark *Benjamin* case of 1933⁸, a mayor (the administrative authority) of the city of Nevers forbid M. Benjamin to give a speech in Nevers after a union of teachers had protested against this lecture. The Council of

State (*Conseil d’Etat*) considered that the mayor, by virtue of the law, is required to take restriction measures for the purpose of maintaining public order. These measures, however, must be reconciled with the respect of the right to freedom of assembly guaranteed by the laws of 30 June 1881. In the Council of State’s assessment, the foreseen disturbance to the public order, alleged by the administrative authority, did not present a degree of gravity that justified the prohibition imposed. In this case, the gravity threshold of the foreseen public disorder must be proportionate to the restriction taken, otherwise, the restriction becomes an excess of power.

Furthermore, the French case-law, besides considering the proportionality of the restriction with regard to the gravity threshold, also undertakes a strict scrutiny of the motivations used by the administrative authorities. In the same line, in 1997, the Council of State decided to annul a decision in the case of the Tibetan community in France who was forbidden to exercise its right to freedom of assembly during a visit of the President of the People’s Republic of China. The Council of State’s assessment was based on two grounds: i) that the administrative authority’s justification, that argued that the assembly would “undermine the international relations of the Republic”, was not under the scope of what is to be considered a threat to public order; and ii) that the restriction exceeded, in the circumstances of the case, what would have been justified by the requirements for the maintenance of public order.⁹

In summary, when a notification regime exists, the protection of the right to freedom of assembly implies strict scrutiny from the administrative judge with regard to the administrative authority’s decisions as well as genuine control over the proportionality of the restriction to the threat to the public order.¹⁰

Similarly, according to both the Human Rights Committee and the European Court of Human Rights (ECtHR) case law, the enforcement of the prior notification regime

⁵ *Joint report*, para. 21.

⁶ In France, there are two « ordres de juridictions », judiciary and administrative. Administrative judges and tribunals are generally in charge of controlling the acts of the administrative authorities.

⁷ Art. L211-4 du Code de la sécurité intérieure: <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000025503132&idArticle=LEGIARTI000025505140>.

⁸ CE, cont., 19 mai 1933, n°17413 17520: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007636694&fastReqId=1718164775&fastPos=1>.

⁹ CE, cont., 12 novembre 1997, n°169295:

<https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007953148&fastReqId=1656447460&fastPos=>

¹⁰ CE, ord., 5 janv. 2007, *Min. de l’intérieur c/ Assoc. « Solidarité des Français »*, n°300311: where the judge found that, in view of the purpose of the assembly, the prefect of police did not bring a serious and obvious unlawful interference to the freedom of assembly.

cannot become an end in itself.¹¹ It shall not translate to any unnecessary or disproportionate limitations to the right to freedom of assembly.¹² And States have the obligation to always justify the limitations to the right protected by article 21¹³ and should be able to demonstrate how participation in a peaceful assembly violates the rights and freedoms of others or poses a threat to the protection of public safety, or public order, or public health or morals.¹⁴

Criminal sanctions for non-compliance with the obligation of prior notification

Another issue is whether criminal sanctions are appropriate for regulating the right to freedom of assembly. In France, article 431-9 of the Penal Code represents a constant risk of criminalization of peaceful assembly as persons having organized a demonstration that has not been declared or that have been prohibited may potentially be criminally prosecuted. It is therefore important that restrictions imposed on article 21 do not have a chilling effect¹⁵. Criminalization may also create a perception among the general public that demonstrations are a synonym of public disorder.

Restrictions in case of state of emergency

Exceptional circumstances, such as a declaration of a state of emergency, raise the question of whether broader restrictions can be imposed on freedom of assembly. In the case of France, notification of such declaration was made to the Secretary General of the Council of Europe, as foreseen in Article 15 derogation of the European Convention of Human Rights¹⁶, as well as to the Secretary General of the United Nations, in conformity with article 4 of the ICCPR¹⁷. Hence, during the state of emergency

period, the applicable law provided that prefects could prohibit parades, marches, and rallies if they could not ensure public order in view of the policing resources available.¹⁸ Moreover, under the state of emergency, non-compliance with an emergency measure was considered a criminal offense.¹⁹ According to Amnesty International (“AI”), “prefects issued 155 decrees prohibiting public assemblies between 14 November 2015 and 5 May 2017 using emergency powers”²⁰. In this case, the main challenge was to assess if the authorities, when forbidding public assemblies, were identifying the precise nature of the threat and the specific risks posed when they invoked national security and the protection of public order. According to AI, “the Prefecture largely based its decisions to prohibit some public assemblies on the grounds simply of a likelihood, based on past events, that some protesters might commit violent acts.”²¹

The exceptional character of the context required the extension of the discretionary power of the administrative authority. It allowed imposing restrictions to the right to freedom of assembly with the aim of ensuring public order “in view of the policing resources available”. Therefore, in practice, administrative authorities applied a lower threshold for the necessity and proportionality criteria – considering that they could justify their decisions with regard to the policing resources that were available.

Restrictions to spontaneous demonstrations

States should allow the possibility of spontaneous assemblies, in particular, in circumstances where an assembly is a reaction to an unexpected event. The organizer who, in the first place, did not provide a prior

¹¹ See ECtHR, *Annenkov and others v. Russia* (No. 31475/10), 25 October 2017, para. 131 (d), <http://hudoc.echr.coe.int/eng/?i=001-175668>.

¹² ICCPR *Kivenmaa v. Finland* (412/1990), A/49/40, 31 March 1994.

¹³ ICCPR, *Severinets v. Belarus*, CCPR/C/123/D/2230/2012, 14 August 2018.

¹⁴ ICCPR, *Androsenko v. Belarus*, CCPR/C/116/D/2092/2011, 11 May 2016, para. 7.5.

¹⁵ “criminalization could have an intimidating effect on this form of participatory expression among those sectors of society that lack access to other channels of complaint or petition, such as the traditional press or the right of petition within the state body from which the object of the claim arose. Engaging in intimidating actions against free speech by imprisoning those who make use of this means of expression has a dissuading effect on those sectors of society that express their points of view or criticisms of government actions as a way of influencing the decision-making processes and state policies that directly affect them.” see *Annual Report of the Special Rapporteur for freedom of expression of the Inter-American Commission of Human Rights 2005*, OEA/Ser.L/V/II.124, 27 February 2006, page 146, para. 97: <http://www.oas.org/en/iachr/expression/docs/reports/annual/LE2005%20ENG.pdf>; see also *Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, 13 August 2007*, A/62/225, para. 32: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/457/26/PDF/N0745726.pdf?OpenElement>.

¹⁶ La représentation permanente de la France auprès du Conseil de l'Europe, Note verbale et annexe, 24 November 2015: <https://cdn.nextinpact.com/images/bd/news/157310.jpeg>.

¹⁷ All can be found on the website Treaties.un.org, under “Notifications by France to the ICCPR (treaty IV.4)”.

¹⁸ Article 8 of Law 55-385 of 3 April 1955 on the State of Emergency (Loi relative à l'état d'urgence), as modified by article 3.2 of the Law 2016-987 of 21 July 2016.

¹⁹ Article 13 f Law 55-385 of 3 April 1955.

²⁰ Amnesty International, *Report: A right not a threat (...)*, op. cit., p. 15.

²¹ Amnesty International, *Report: A right not a threat (...)*, op. cit., p. 15.

notification, should not be criminalized for the sole purpose of not notifying the required authorities.²²

According to the ECtHR, restrictions to a spontaneous demonstration always have to be justified. The immediate response of the State to restrict the demonstration, for instance with measures to disperse the participants, cannot be justified on the sole ground that there was no prior notification.²³ The ECtHR “considers that the right to hold spontaneous demonstrations may override the obligation to give prior notification to public assemblies only in special circumstances, namely if an immediate response to a current event is warranted in the form of a demonstration.”²⁴ The justification for the restrictions imposed shall be assessed with an approach that seeks to guarantee the right to freedom of assembly as a foundation of a democratic society: “the exceptions must be narrowly interpreted, and the necessity for any restriction must be convincingly established”.²⁵

Finally, in cases where sporadic demonstrations cause a certain level of disruption to ordinary life, this situation does not *per se* justifies interference with article 21. According to the ECtHR, State must have a “degree of tolerance” which is not to be defined *in abstracto*: “one must look at the particular circumstances of the case and particularly at the extent of the “disruption to ordinary life”.²⁶

Particularly, in cases of exceptional circumstances, for instance under a state of emergency, the authorities’ assessment of the threshold for the necessity and proportionality criteria, cannot impose unnecessary or disproportionate restrictions to spontaneous demonstrations. Law enforcements agents shall use means and methods to impose restrictions that do not result in an excessive use of force. For instance, AI reported that during a spontaneous public assembly that took place in France on the 5th July 2015 (as an immediate response to the labor law reforms), French authorities contained peaceful protesters who did not constitute any specific threat to public order, using hand-held batons, kinetic impact projectiles, stingball grenades, and tear gas against them; “causing injuries to hundreds of protesters”.²⁷ Therefore, even if spontaneous demonstrations take place in the context of a state of emergency, States must not fail to respect, protect and ensure the right to freedom of peaceful assembly by

imposing disproportionate restrictions that go beyond what is demonstrably necessary for protecting public order.

Recommendations

Considering the above, we encourage the Human Rights Committee while developing the General Comment on Article 21 of the ICCPR to take into account and particularly address:

- Prior notification regimes and the risk that they may become *de facto* authorization regimes; to this end, States should provide sufficient safeguards, such as effective remedies before a judicial authority that can exercise full control over the administrative authority’s decision, as well as genuine control over the proportionality of the restriction to the threat to the public order.
- Criminal sanctions imposed for non-compliance with the obligation of prior notification. In this regard, states should at least ensure that such provisions do not have a chilling or intimidating effect and at best remove those sanctions from their laws.
- The need to ensure that spontaneous demonstrations are not restricted on the sole ground that there was no prior notification – especially when they are a response to an unexpected event; that even if restrictions are applied, they have to be justified;
- Particularly, in exceptional circumstances, as contemplated in article 4 of the Covenant, the need for States to respect, protect and ensure the right to freedom of peaceful assembly and to refrain from imposing restrictions to spontaneous demonstrations, with means and methods that go beyond what is strictly required by the exigencies of the situation.

2. Preventive restrictions to the right to peaceful assembly

Another means of restricting the free-exercise of the right to peaceful assembly is to take preventive measures (*mesures de police administrative*) against individuals in order to forbid them to demonstrate or to impose specific conditions.

²² See *Joint report*, para. 23; see also and OSCE/ODIHR *Guidelines on Freedom of Peaceful Assembly*, Section B: explanatory notes, 2010, para. 128: “Spontaneous assemblies should be lawful and are to be regarded as an expectable (rather than exceptional) feature of a healthy democracy.”

²³ ECtHR, *Berladir v. Russia*, 19 nov. 2012, (No. 34202/06), paras. 38-43: <http://hudoc.echr.coe.int/eng?i=001-112101>.

²⁴ ECtHR, *Molnar v. Hungary*, 7 oct. 2008, (No. 10346/05), para. 38: <http://hudoc.echr.coe.int/eng?i=001-88775>.

²⁵ ECtHR, *Annenkov and others v. Russia*, 25 October 2017, (No. 31475/10), para. 131. <http://hudoc.echr.coe.int/eng?i=001-175668>.

²⁶ *Id.*

²⁷ Amnesty International, *Report: A right not a threat (...)*, *op. cit.*, p. 7.

The inaccuracy of the criteria that can justify a prohibition to demonstrate as a preventive measure

At present, French law provides for rules to tackle the specific problem of hooliganism. These rules allow the prefect to forbid supporters of a sports club that are deemed a threat to public order, for instance when they are identified in the recording file for stadium bans, to access a stadium or to remain next to it on game day. Provided by article L 332-16 of the Sport's Code, this restriction is considered a restriction to the freedom of movement. The French Constitutional Council (*Conseil constitutionnel*) concluded, by its decision n°2017-637 QPC (16 June 2017)²⁸, that the legal regime of the administrative stadium ban was compatible with the 1789 Declaration of the Rights of Man and of the Citizen and did not violate freedom of movement. However, the Court underscored the specificity of entering into a stadium, which is subject to the presentation of a valid title and thus to the payment of an admission.

Facing the “yellow vests” protests, a wide movement against public policies that resulted in massive, numerous and repeated demonstrations throughout France, the French parliament is considering an extension to any demonstration of the legal framework reserved until now to the prevention of hooliganism.

Currently, a draft bill is being discussed before the Parliament “*aiming at strengthening and ensuring the maintaining of public order during demonstrations*”²⁹, already gone through the first stage of the legislative process and on the verge of entering into force. The purpose of the draft is to increase the administrative police powers of the prefect, the authority in charge of representing the state at local levels. The prefect would have the power to prohibit any person under his/her jurisdiction to participate to any peaceful assembly taking place in any part of the country for a month if he/she considers that this person “*poses a particularly serious risk for public order*” according either to their “*actions during demonstrations [...] that have resulted in serious bodily harm and in serious property damage*”, or to a “*violent action during one of these demonstrations*”.³⁰

No details are provided about the content of the concept of “violent act”. The law does not specify how the

administration will examine the gravity threshold of these violations, while those are required to be “serious” to justify a prohibition. Nor does the law detail if the facts that justify such a decision must have been proven before a court or not.

The prohibition could be effective over the whole French territory and could last for a month. It can apply to all demonstrations to come, irrespective of their nature and organizers. It does not seem necessary that a link be established with the events and demonstration that initially justified the prohibition. It is not clear whether the authorities would be able to justify the prohibition by reference to a person's behavior that occurred a long time ago and that has not been repeated since.

Concerns about administrative prohibition of demonstrations have been expressed by academics³¹, and the special rapporteur on the right to peaceful assembly and the right to freedom of association, stated in his first report to the Human Rights Council that “*states have the positive obligation to protect actively the peaceful assemblies*” as the individuals have a right to be protected from “*any interference [...] even from agents of the state's apparatus*”.³² More recently, Mr. *Seong-Phil Hong* (Working Group on Arbitrary Detention), Mr. *Michel Forst* (Special Rapporteur on the situation of human rights defenders) and Mr. *Clément Nyaletsossi Voule* (Special Rapporteur on the rights to freedom of peaceful assembly and of association) have expressed a more specific concern in relation to the French proposed legislation by stating that “[*t*]he proposed administrative ban on demonstrations, the establishment of additional control measures and the imposition of heavy sanctions constitute severe restrictions on the right to freedom of peaceful assembly. These provisions can be applied arbitrarily and lead to extremely serious abuses”.³³

In France, preventive administrative measures are not decided by the judiciary, but by administrative officers. Acts adopted by administrative officers are subject to the control of administrative judges and tribunals. Administrative judges carry out the specific task of checking the respect of fundamental rights by the administration when taking individual or collective measures that may infringe it.

²⁸ CE, QPC, 16 juin 2017, *Association nationale des supporters*, n°2017-637 [Refus d'accès à une enceinte sportive et fichier d'exclusion]: <https://www.conseil-constitutionnel.fr/decision/2017/2017637QPC.htm>.

²⁹ “Proposition de loi n°226 visant à renforcer et à garantir le maintien de l'ordre public lors des manifestations”, 5th October 2018.

³⁰ Article 2 of the above-mentioned draft bill. Translations from the authors.

³¹ Pierrick Gardien, “Les dangers de l'interdiction administrative de manifester”, *La Revue des Droits de l'Homme*, juin 2015: <https://journals.openedition.org/revdh/1386>.

³² *Report of the special rapporteur to the United Nations on the right to peaceful assembly and the right to the freedom of association*, 2012 (A/HRC/20/27, para. 33).

³³ “France: UN experts denounce severe rights restrictions on ‘gilets jaunes’ protesters”, OHCHR, Geneva, 14th February 2019 (press release).

Risk of court's congestion

In the event of a declared demonstration, the new French Bill foresees that the prefectural order of individual prohibition to demonstrate would be notified to the interested individual within 48 hours before the event.

The individual concerned may request the lifting of the individual prohibition to demonstrate via an interim release on the basis of the Article L 521-2 of the Administrative Justice's Code.

However, the multiplication of prefectural orders would most likely lead to an increase in litigation and therefore to a risk of congestion of the administrative courts, and to longer processing time from 48 hours to 72 or 96 hours.

As the French Council of State ruled in a decision of 4 June 2009³⁴, the processing time of 48 hours regarding a petition for protection of fundamental liberties is not mandatory. This means that exceeding the processing time of 48 hours does not lead to the divestment of the judge. Therefore, even if a petition for protection of fundamental liberties is processed by the judge exceeding the time-limit of 48 hours, no consequences would be drawn.

In the context of the state of exception, that has been declared the 14 November 2015 and ended the 1st November 2017, a lot of administrative measures, aiming to close mosques or to assign people to house arrest, have been challenged through petition for protection of fundamental liberties. Particularly significant regarding the difficulties for the administrative jurisdiction to respect the time processing of 48 hours in such context is French Council of State order n°406013³⁵. The association managing a mosque that had been closed under a prefectural decision challenged this decision before the administrative tribunal. The administrative tribunal dismissed the application. The association challenged the decision before the Council of State, the 15 December 2016 through a petition for protection of fundamental liberties. According to the French rules applicable to the petition for protection of fundamental liberties, the Council of State should have issued its decision on 17 December 2016, 48 hours after the presentation of the application. However, order n°406013 was finally issued the 22 December 2016, one week after the presentation of the application before the Council of State.

The case of notification without delay of the administrative and individual prohibition to demonstrate: no effective legal action possible

When the lack of a declaration of the demonstration or its belated nature has prevented the administrative authority from complying with the deadline, it is provided by the Bill that the decree should be automatically enforceable and notified to the individual concerned by all means, including during the demonstration.

In such case, the individual could be notified at any time, of the prefectural decree of individual prohibition to demonstrate. In case where this decree is notified during the demonstration called "wild" because not notified to the public authorities, the individual may be notified the prohibition to demonstrate while demonstrating.

The bill also provides that the violation of the individual prohibition order entails a prison sentence of 6 months and a fine of €7,500. However, if the prohibition is notified to the individual concerned during the event, he/she won't be in a position to refer the order to a judge for urgent relief.

Recommendations

Considering the above, we encourage the Human Rights Committee while developing the General Comment on Article 21 of the ICCPR to take into account and particularly address:

- The vagueness of the criteria on the basis of which administrative authorities can make a decision to forbid someone from participating to a demonstration.
- The risk of congestion of courts that could grow out of an increase of the number of litigations considering the potential multiplication of restrictive administrative orders.
- Effective urgent remedies to challenge restrictive administrative orders. ■

³⁴ CE, ord., 4 juin 2009, n°328394: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000020869469>.

³⁵ CE, ord., 22 décembre 2016, *Association centre culturel franco-égyptien - l'association Maison d'Égypte*, n°406013: <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-ordonnance-du-22-decembre-2016-Association-centre-culturel-franco-egyptien-l-association-Maison-d-Egypte>.