

M A N U A L

**FREEDOM
OF ASSEMBLY
AND ASSOCIATION**



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TABLE OF CONTENT

Foreword.....	7
Methodology.....	9
Abbreviations.....	11
I. DEFINITIONS AND HISTORICAL OVERVIEW	
1.1. Freedom of Assembly.....	15
1.2. Freedom of Association.....	15
II. ALBANIAN CONSTITUTIONAL AND LEGAL FRAMEWORK ON FREEDOM OF ASSEMBLY AND ASSOCIATION	
2.1. Freedom of Assembly – enforcement, restrictions, normative and institutional guarantees.....	24
2.2. Freedom of Association – enforcement, restrictions, normative and institutional guarantees.....	33
2.2.1. Political parties.....	33
2.2.2. Unions.....	36
2.2.3. Civil Society.....	39
2.3. Presentation of the Albanian reality on the restriction of Freedom of Assembly and Association dictated by the state of the pandemic.....	40
2.4. Assembly in Albania - goals, locations, participation.....	43
III. INTERNATIONAL NORMATIVE AND INSTITUTIONAL FRAMEWORK ON FREEDOM OF ASSEMBLY AND ASSOCIATION	
3.1. Global perspective – United Nations Organization.....	47
3.2. European perspective – Council of Europe legislation and safeguards.....	53
3.3. Developments of European jurisprudence for protection of Freedom of Assembly and Association.....	68
Vocabulary.....	77
Bibliography.....	83



FOREWORD

As Director of the Rule of Law Programme South East Europe of Konrad-Adenauer-Stiftung, I would like to recommend reading this manual not only to lawyers, but to all Albanians interested in the field of Human Rights and questions like what are the exact rules – and possible limitations – for public gatherings, for forming associations, in Albania and elsewhere.

The Association “European Centre of Albania” for more than five years has been one of our partner organizations in Albania. Training judges, public prosecutors, practicing lawyers, law students and the general public about European legal standards including Human Rights affairs has been and remains being a goal, which both our organizations strive to achieve.

In your hands, you are holding a publication focusing especially on the freedom of assembly and freedom of association. When I was asked by Ina Xhepa, co-author of this publication, to contribute by writ-

ing a short foreword, I immediately agreed, as this year (2020), the question about practicing certain basic rights has been visibly limited, and questions like “what is still allowed, and what not” have been discussed in most European countries.

This year has seen protests about limitations to public gatherings in many, if not in most European countries. Some of the demonstrations have been directed against governmental measures such as prohibitions to meet in public or the obligation to wear masks in public. Among the news from Albania which have been reported about this year beyond the countries’ borders, I recall the protest against plans to tear down the National Theatre (and then again the piece of news, when the theatre was actually taken down - including the circumstances how this was done).

Peaceful protest is one classical “real life” expression of the freedom of assembly. By studying this publication, the reader will grasp a better understanding of what are the preconditions to freely exercise this right, and, on the other hand, what may be reasons to temporarily limit such freedom.

Bucharest, November 2020

Hartmut Rank, LL.M.

Head of Rule of Law Programme

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METHODOLOGY

The work for drafting this Manual was conceived and based on several activities:

Initially, the work began with research on publications related to freedom of assembly and association, as well as by identifying the range of domestic legislation on these freedoms.

Further, it continued with the selection of relevant source materials, national and international normative acts in the field of human rights, focusing on the essence of the topic of the Manual and taking into account the domestic reality. Part of the theoretical material presented mainly in the First and Second Part of the Manual is enriched with European and world-wide normative acts, as well as information on the mechanisms that guarantee the protection of these freedoms.

The connection of the abstract with the concrete, the theory with practice, is reflected in the Third Part of the Manual, where due to political and social developments in the country, on our continent and even around the world, freedom of assembly and organization take on a new dimension and a new value. The size of the social organization, the purpose of this organization, the strategies followed for the realization of the social purpose against the state power, serve, among others, the analysis of the validity of the normative acts in force.

Focusing on a certain category of the wide range of freedoms and human rights in Albania and in the world, it is understandable that we limit ourselves in terms of thematics and other methodological elements. The main purpose of this Manual is to respond to the need to supplement the information framework with theoretical treatments and practical reflections on freedom of assembly and association in Albania.



ABBREVIATION

ASCS	Agency for Support of Civil Society
EU	European Union
CC	Constitutional Court of the Republic of Albania
ECtHR	European Court of Human Rights, CoE
UDHR	Universal Declaration on Human Rights, UN, 1948
Constitution	Law no. 8417, dt 21.10.1998, “The Constitution of the Republic of Albania”, amended
ECHR	European Convention on Human Rights, CoE, 1950
Assembly	The Assembly of the Republic of Albania
CM	Council of Ministers of the Republic of Albania

- Criminal Code** Criminal Code of the Republic of Albania, Law no. 7895, dt 27.1.1995, amended
- Labor Code** Labor Code of the Republic of Albania, Law no. 7961, dt 12.7.1995
- ICCPR** International Convention on Civil and Political Rights, UN, 1966
- ILO** International Labor Organization
- UN** United Nations Organization
- CSO** Civil Society Organizations



DEFINITIONS AND A HISTORICAL OVERVIEW

This Manual treats two freedoms related to each-other: freedom of assembly and freedom of association. The human being is of a social nature and our living is regulated by communication and interaction between us. In every country, social life is subject to regulatory framework with binding legal norms emanating from the rulers. As a result, in different countries there are different regulations regarding freedoms and rights. In the framework of regional and international cooperation between states, in addition to national legal norms in different countries, it is accepted to apply international legal norms. More specifically, Albania, as a country aiming at integration into the European Union, has undertaken the alignment of domestic legislation with the *acquis*. Also, by joining regional and international organizations, Albania is engaged in the

implementation of regional and global conventions and agreements.

In the following, as the title of this manual dictates, we will address two normative plans; that on freedom of assembly and association. We will further address these freedoms from three perspectives; national, regional - European and global.

Freedom is the enjoyment of a right without any interference by state bodies. Unlike a right, for freedom there is no one who has the obligation to supervise it or to compel any individual in its exercise and enjoyment. However, freedom is not absolute. The legislation in each state is designed to legitimize the state activity for restrictions of individual or collective freedoms for reasons provided by the legislation itself and / or accepted by the jurisprudence.

1.1. Freedom of assembly

Freedom of assembly includes public and private gatherings, marches, processions, demonstrations and protests where protesters refuse to leave until their requests have been fulfilled. The purpose can be political, religious or spiritual, or any other. As for the aim of the assembly, there is not any definition, but every assembly should be peaceful.

1.2 Freedom of association

Freedom of association is the right to organize with others to form bodies in order to follow common objectives. It specifically includes the right to form unions for the protection of the interests of its members. Just like unions, there are two types of important organizations: political parties and religious bodies.



ALBANIAN CONSTITUTIONAL AND LEGAL FRAMEWORK ON FREEDOM OF ASSEMBLY AND ASSOCIATION

The Albanian Constitution treats the general principles of the organization and functioning of the state, in its first part. One of the provisions is specifically related to the freedom of association. Article 9 of the Constitution¹ foresees social organization in the form of a political party:

- 1. Political parties are created freely.**
Their organization must be in line with the democratic principles.
- 2. Political parties and other associations, the programs and activity of which rely on *totalitarian methods, which en-***

¹ Constitution of the Republic of Albania, law no. 8417, dated 21.10.1998, approved by referendum on 22.11.1998 amended, accessed on <http://www.parlament.al/Files/sKuvendi/kushtetuta.pdf>

courage and support racial, religious, regional or ethnic hatred, which use violence to seize power or to influence in state policy, as well as covet ones, are prohibited by law.

3. Financial sources of political parties, as well as their expenses are always made public.

In appearance, political parties as social and political association can be created **freely**, which in other words can be expressed as **without any obstacles**. However, the very article that foresees the creation of political parties mentions cases of restrictions in the second paragraph. These restrictions, being at the level of the fundamental law of the Albanian state, are absolute. Thus, the Albanian legislation that originates and is based on the Constitution, cannot overcome the constitutional limitations, but must respect them.

In addition to the limitations of the article on political parties itself, in terms of the program that a political party may have, the methods it follows to obtain and exercise power and the character of their very existence, the Constitution provides for other restrictions. Article 17, in the Second Part of the Constitution, which deals with fundamental

freedoms and rights, is the article that provides for restrictions on freedoms and human rights and the limits of these restrictions:

1. Limitations on the rights and freedoms foreseen in this Constitution can be made only **by law for a wide public interest or for the protections of the rights of others**. The limitation should be **proportional to the state** that has dictated it.
2. These limitations **cannot violate the core of rights and freedoms** and in no case, they can **exceed the restrictions foreseen in the European Convention on Human Rights**.

Thus, freedom of social organization in the form of a political party may be restricted in the public interest or to protect the rights of others. Thus, this restriction can be interpreted and understood that when two freedoms or rights collide with each other, one takes on more importance than the other when the public interest prevails, or the enjoyment of a right or freedom impairs or may impair the enjoyment of the rights of others. Since these restrictions are at the constitutional level, any conflict that may arise in practice becomes interpre-

table and solvable by the Constitutional Court, as the body charged by the Constitution itself with the interpretation, protection and guaranteeing of the implementation of its provisions.

The provision of the second point of Article 17 of the Constitution makes the connection with the ECHR, providing that the restrictions on freedoms or human rights at the national level should not be greater than those provided for in the ECHR. From the point of view of the importance and hierarchy of legal norms in Albania, the ECHR, unlike all other international agreements ratified by the Republic of Albania, is placed at the same level with the Constitution as the basic law of the state. The exercise of these rights may not be subject to restrictions other than those provided by law and which are necessary in a democratic society, in the interest of national security or public safety, for the protection of order and the prevention of crime, for the preservation of health or morals, or for the protection of the rights and freedoms of others. This article should also be understood as not prohibiting lawful restrictions on the exercise of these rights by members of the armed forces, the police or the state administration. We devote a special part to this issue in the following section of this manual.

The Constitution also foresees the freedom of association for people who are part of minorities.² People who are part of minority groups have the right, among others, to join associations and foundations for the protection of their interests and their identity.

In addition, the Constitution recognizes the right to social organization based on religion. Thus, the Constitution provides that religious communities have legal personality and independence in the administration of their assets, accordingly with their principles, rules and canons, for as long as they do not violate the interests of others.

In the second part, Chapter III of the Constitution on political rights and freedoms, there are other provisions on freedom of assembly and association. Thus, we present Article 46 of the Constitution:

1. Everyone has the right to organize collectively for any lawful purpose.
2. The registration in court of organizations or associations is done according to the procedure provided by law.

² Article 20, Constitution of the Republic of Albania, law no. 8417, dated 21.10.1998

3. Organizations or associations that pursue unconstitutional purposes are prohibited by law.

The provisions of this article are more general than the right to establish political parties. Social (collective) organization is allowed, as long as the purpose of this organization does not conflict with the legislation. There are also no restrictions on the subject of organization as long as the constitutional language uses the term “anyone” in connection with the right of collective organization. The social, collective organization within the legal framework provided in paragraph 1 of this article must be a formal, documented organization, according to a certain procedure and under the direction of the court. Thus, the judiciary is given other powers, in addition to resolving social disputes, such as to register social organizations or associations that are a form of social organization in a state. Since we are again within the provisions of the constitutional level, this article provides guarantees for the non-violation of the basic law, legal system and state order, clearly stipulating that the goals to be pursued by every organization or association that is created and operates in our country should comply with purposes permitted by our Constitution.

Furthermore, Article 47 of the Constitution is related to freedom of assembly, providing that:

1. Freedom of peaceful and non-armed assembly, as well as participation in them, is guaranteed.
2. Peaceful assembly in squares and places of public crossing are held according to the procedures provided by law.

This article represents the constitutional guarantee for the freedom of collective assembly, peaceful assembly. Again, conditions or restrictions are presented for this category of freedoms as well. The assembly should not only be peaceful, thus not violent or aggressive, but the participants in the assembly must not be armed. The articles stipulate that the assembly can be moved, move to places of public crossing, always applying procedures previously approved by law. The guarantees and conditions of the assembly are more detailed at the legal level, as the constitutional level is summarized in the provision of a single article. This provision also means the temporary character of the assembly, unlike that of the social organization which is of a stable, formal character through registration in court as in the case of associations, political parties. In the following section we pres-

ent in more detail the special legal framework on freedom of assembly and association.

2.1. Freedom of Assembly – enforcement, restrictions, normative and institutional guarantees

The Constitution lays the foundations for the domestic legislation and is further extended by specific regulations made by law. The law regulating freedom of assembly dates back to 2001, about 3 years after the adoption and entry into force of the Constitution. This law guarantees the freedom of pure assembly for everyone.

Other laws that meet the provisions for organizing rallies are Law no. 7895, dated 27.1.1995 “Criminal Code of the Republic of Albania”, as amended and Law no. 108/2014 “On the State Police”, as amended.

The law on assembly initially provides the definition of the term ‘assembly’. The term “assembly” means gatherings, demonstrations, rallies and parades of a peaceful and unarmed nature, in which a group of persons express their demands and views on issues of interest to them and include urgent rallies.³

³ Article 2, para. 5 Law no. 8773, dated 23.4.2001 “For Assemblies”

The gatherings are classified into three main groups having as classification criteria the place where the gathering takes place:

- ❖ **Assembly in squares or public crossings** - the organizer and the director are obliged to notify the chief of the police department in writing no later than three days before the date of the rally. For urgent cases, when rallies are organized due to drastic circumstances, the notice must be submitted 3 hours before the time of the rally.
- ❖ **Assembly in private areas** - where the police can not enter without the permission of the rally leader or its owner, except in flagrant cases to stop an immediate danger to the life and health of rally participants. The law does not provide prior notice for such gatherings.

On the other hand, the law provides for a gathering that is not considered assembly or rally, because it lacks purpose and organization. The law foresees that “When groups of people are gathered spontaneously and do not violate public order, their activity is not called an assembly”.

According to the law on assembly, **the organizer of the rally** must appoint **a leader and assistants** to him. The leader is responsible for planning, conducting and closing the rally, as well as being responsible for proper conduct during the rally and cooperating with the State Police. The leader has the right to allow or interrupt those who take the floor during their talk. He and the auxiliaries have the authority to give orders to the participants of the rally to maintain public order and if they do not respond to the orders of the leader, the latter has the authority to close the rally.

According to the provisions of the law on assembly, the decision-making power for organizing a rally in Albania belongs to the State Police. The State Police is the authority that guarantees the right to organize and participate in the rally. It has the power to allow a rally to be organized in squares and public crossings, or to stop it if there is information of destructive or violent acts during the rally. The organization aiming at the rally must submit a written notice to the chief of the police⁴ station, and the latter after receiving the request, through a reasoned decision he must:

⁴ Article 5, Law no. 8773, dated 23.4.2001 “For Assemblies “

- Communicate to the organizer or the leader of the rally the restrictions, possible limitations and other conditions, including the number of assisting people during the rally; and
- Give a copy of the official order for appointing police officers responsible for helping and monitoring the development of the rally.⁵

Written notice for the State Police for the organization of a rally in squares or public crossings, must include: identitetin dhe adresën e drejtuesit dhe organizatorëve;

- Purpose of the rally;
- Date, place, time of beginning and end of the rally, as well as its itinerary
- Average number of participants and
- List of people that will give speeches.

The decision to hold the rally by the State Police must be given within 24 hours after receiving full information from the organizers. If the organizers do not submit all the relevant information, the State Police requires them to complete it as required by law.

⁵ Article 6, Law no. 8773, dated 23.4.2001 “For Assemblies“

Regarding the restrictions on freedom of assembly, the law provides that the right to organize rallies is restricted only if there is any danger for national security, public safety, protection of order, prevention of crime, preservation of health or morals or protection of the rights and freedoms of others.

Other restrictions are those related to the participants, as they are forbidden to carry tools or equipment which, while using them, may cause harm to the life and health of others. Flags and banners are exempt from this obligation.

In addition, it is not allowed to participate in the rally using items or clothing for the purpose of concealing identity. At public gatherings, organizers, leaders, facilitators, and participants are not allowed to wear uniforms, signs, or symbols referring to groups that promote racial, ethnic, or religious discrimination and violence

To guarantee the implementation of its provisions, the Law on Assemblies also provides sanctions for violations at the level of criminal offenses with fines or imprisonment that can reach up to two years.

Decisions of the State Police can be appealed by the organizers of a rally. However, the law is very gener-

al regarding the appeal process and only provides that the appeal should be made according to the legal provisions in force, without specifying in detail how it should be made, when, what is the authority where the appeal is filed.

Criminal Code in protection of freedom of peaceful assembly and protection of public order

Albanian Criminal Code foresees, among others, criminal offenses against public order, including protection of the gathering, peaceful organization and if these organizations are not peaceful, they would be accompanied by punishments through trial and court decisions.⁶

- ❖ Thus, committing actions to prevent citizens from exercising their freedom of expression, assembly or manifestation constitutes a criminal offense and is punishable by a fine or up to six months of imprisonment. When the actions are accompanied by the use of physical violence, they are punished with a fine or with imprisonment of up to three years.⁷

⁶ Criminal Code of the Republic of Albania, Law no.7895, dated 27.1.1995.

⁷ Article 261 – Obstruction in the exercise of the right to express, gather or manifest, Criminal Code of the Republic of Albania, Law no. 7895, dated 27.1.1995.

The wording followed in the Criminal Code is different from that used in the Law on Assemblies. The Criminal Code uses the term ‘gathering’ instead of ‘rally’. According to the above provision, the freedom of assembly or manifestation is guaranteed by the state and if violated, the perpetrator / perpetrators of the criminal offense are punished with a fine or imprisonment of up to six months.

The following articles of the Criminal Code reiterate the condition that freedom of association must be legal, thus that the provisions of the Law on Assemblies regarding obtaining a permit for assembly be respected and that the latter be peaceful. Thus, the provisions of the Criminal Code go in parallel and aim to guarantee the implementation of the provisions of the special law on assemblies.

- ❖ Organizing gatherings and manifestations of persons in squares and public crossing places, without first obtaining permission from the competent body according to special provisions or when the organizers violate the conditions set out in the request for permission, constitutes a criminal offense and is punishable by fine or imprisonment for up to one year.

Participation in an illegal gathering or manifestation even after the warning made for dissemination, constitutes a criminal offense and is punishable by a fine or imprisonment of up to three months.⁸

Meanwhile, the penalties for violations of the obligation of peaceful assembly and manifestation are more severe, as the violation is considered of a more serious degree. The provisions of the Criminal Code follow the provisions of the Constitution for lawful and peaceful assembly and aim at maintaining public order and safety in our country.

- ❖ Organizing illegal gatherings and demonstrations with the participation of armed persons is punishable by a fine or up to three years of imprisonment. Participation in illegal gatherings and demonstrations of armed persons constitutes a criminal offense and is punishable by a fine or imprisonment of up to one year.⁹

⁸ Article 262 Organization and participation in illegal gatherings and manifestations, Criminal Code of the Republic of Albania, Law no. 7895, dated 27.1.1995.

⁹ Article 263 Organization of illegal gatherings and manifestations with the participation of armed persons, Criminal Code of the Republic of Albania, Law no. 7895, dated 27.1.1995.

Furthermore, the Criminal Code provides the criminal offense regarding the right to assembly in form of a protest through strikes:

- ❖ The obligation of the employee against his will to participate or to not participate in the strike or the creation of obstacles and difficulties to continue working when the employee wants to work, constitutes a criminal contravention and is punishable by a fine or imprisonment of up to three months.¹⁰

The above article does not list the categories of employees that can be organized to protest on issues related to their status as employees of a certain category. Other laws in the public sphere provide in more detail for which categories of professions or employees, the right to protest in the form of a strike is allowed.

At the beginning of this section, we addressed the provisions of the Constitution regarding the right to organize in the form of a political party. The Criminal

¹⁰ Article 264 Obligation to participate or not to participate in the strike, Criminal Code of the Republic of Albania, Law no. 7895, dated 27.1.1995.

Code in defense of the constitutional right to social organization in the form of a political party or other social organization includes a special provision:

- ❖ Creating or participating in parties, organizations or associations that aim to violently overthrow the constitutional order, is punishable by a fine or up to three years in prison. Recreating a party, organization or association disseminated as unconstitutional or continuing to operate secretly or openly is punishable by imprisonment of one to five years.¹¹

2.2. Freedom of Association – enforcement, restrictions, normative and institutional guarantees

2.2.1. Political parties

The Constitution sets the preconditions for the establishment and existence of political parties as social organizations, but does not provide their meaning, or other detailed normative regulations on their functioning. According to Max Weber's classic defi-

¹¹ Article 224 - Establishment of unconstitutional parties and associations, Criminal Code of the Republic of Albania, Law no. 7895, dated 27.1.1995.

nition, “Party is a social relationship, an affiliation based on recruitment, the purpose of which is to provide power to its leaders in the midst of an institutionalized group to achieve an ideal or to gain material benefits for the militants.”¹² According to our legislation “Political parties are voluntary unions of citizens based on ideas, beliefs and views or common political interests, which aim to influence the life of the country through participation in elections and representation of the people in elected bodies of power.”¹³

In our country, just like in many democratic countries, there is some principal criteria as reasons to ban political parties as below mentioned:

- When political parties threaten the territorial integrity of the country;
- When they threaten the existence and sovereignty of the state;
- When they encourage differences and hatred;
- When they rely on totalitarian and extremist ideologies;

¹² Daniel-Louis Seiler, *Political Parties*, UET Press, Tirana, 2010, page 23

¹³ Article 1, Law no. 8580, dated 17.2.2000 “On political parties”, as amended

- When they intend to and use violence as a mean to reach their goals;
- When they are related to criminal organizations;
- When they operate in secret.¹⁴

The European Court of Human Rights (ECtHR) has emphasized that political parties are a form of organization that is essential to the proper functioning of democracy and as an actor with an “essential role in ensuring pluralism and the proper functioning of democracy.” Political parties remain the *sine qua non* condition of Western democracies. The issue of banning them in certain cases when they violate the principles of democracy is very debatable, precisely given the fact that they represent an essential condition for the functioning of genuine democracy. The issue of banning them has been important in European human rights legislation since the 1990s. Prior to this time, the banning and dissolution of a political party was known as a Cold War phenomenon and was not so widely recognized in European practice¹⁵.

¹⁴ Article 7, Law no. 8580, dated 17.2.2000 “On political parties”, as amended

¹⁵ Olgun Akbulut, *Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties*, Fordham International Law Journal, Volume 34, Issue 1, 2010, accessed on <http://ir.lawnet.fordham.edu/ilj/vol34/iss1/2/>

ECtHR has set a standard regarding banning of political parties, emphasizing the compliance of the political party's programme with the constitutional order such for the constitutional order is the principle of secularism.

2.2.2. Unions

Unions are organizations with membership (employees) united to protect the rights of members and to promote their interests. Some of the main goals and tasks of the unions are: to negotiate wages and working conditions, to regulate the relations between employees and workers, to take actions to strengthen the negotiations for collective agreements, to demand the rights and to raise issues on behalf of the workers as well as to solve various problems related to the working class.

The legal basis for the activity of trade unions in Albania is the Labor Code. According to this legal framework, trade unions are professional organizations and their organizational structure in federations and confederations is defined by law. The signature of twenty members is enough to establish a union. Thus, the Albanian legislation presents easily feasible provisions for the creation of a social organization with a focus on labor relations

in the service of employees. Collective conflicts between trade union members and employers can be resolved through a mediator appointed by the Ministry of Labor, which also undertakes the establishment of regional and national Reconciliation Offices by order of the Minister of Labor. Furthermore, Albania has accepted international legal norms in the field of labor relations approved by the International Labor Organization - ILO.¹⁶

In order to achieve their goals, mainly the protection of the workplace, the improvement of working conditions and the salary of their members, the unions can use the democratic method of protest, that is, the proper organization provided by the legislation, the strike. Strike is a constitutional right that is addressed in more detail in the Labor Code.¹⁷ The unions have the right to exercise the right to strike to resolve their economic and social demands, while participation in the strike is voluntary. The provisions of the Labor Code prohibit the violation of the right to strike and its participants. In the case of Albania,

¹⁶ Convention no. 87 and Convention no. 98 of the International Labor Organization (ILO). For more see “*Freedom of association according to the jurisprudence of the ECtHR*”, Msc. Ina Xhepa, JUS & JUSTICIA, no.10, 2014

¹⁷ Article 197, Law no. 7961, dated 12.7.1995, “Labor Code of the Republic of Albania”, as amended

a problem in the field of trade union social organization is the informal labor market, which hinders the establishment and functioning according to the constitutional and legal provisions of trade unions and consequently the realization of the objectives of trade union organization.¹⁸

However, the provisions of the Labor Code should not be understood as absolute. There are categories of employees, who are not allowed to organize strikes, although they can be organized in unions. Thus, the law on the civil servant provides that the civil servant has the right to establish and become a member of trade unions and professional associations that aim to protect their interests in the civil service. Furthermore, he can be elected to the governing bodies of the unions and participate in their activity, outside the official hours. Meanwhile, the senior management category of the civil servant is prohibited from being simultaneously in the executive bodies of the trade union or professional association.¹⁹

¹⁸ Erka Çaro, Sonila Danaj, Armela Xhaho, Liria Sindikale në Shqipëri, *Kërkimi Gjeografik*, 17/2015, page 7, accessed on <http://cessalbania.al/wp-content/uploads/2017/02/6-Sindikatat-ne-Shqiperi.pdf>

¹⁹ Article 36, Law no. 152/2013, dated 30.5.2013, "On the civil servant", amended by law no. 178/2014, law no.41 / 2017

The law on civil servants provides in a separate article the constitutional right to strike. The civil servant has the right to strike, but this right is prohibited in the following cases:

- In the field of essential services of state activity such as transport, public television, water supply, gas and electricity;
- In the administration of prisons and justice system;
- In national protection services, urgent health services, services for food supply or services of air traffic control.²⁰

These restrictions aim to guarantee the uninterrupted functioning of work in some state links of special importance for a state.

2.2.3. Civil Society

The development of civil society organizations sector (CSOs) in Albania has gone through legal initiatives and changes that have aimed to create a suitable environment for CSOs. Regarding the freedom of assembly, the legal framework gives every Alba-

²⁰ Article 35, Law no. 152/2013, dated 30.5.2013, "On the civil servant", amended by law no. 178/2014, law no.41 / 2017

nian citizen the right to establish an association, foundation or center for the purposes permitted by law. The special legislation for the support of civil society organizations aims at the development of institutional cooperation with civil society organizations, for the drafting and implementation of the national strategy and the guide of the Albanian Government, for cross-sectoral cooperation relations between public institutions and civil society organizations, and for the development of philanthropy and social capital.²¹

2.3 Presentation of the Albanian reality for the limitation of freedom of assembly and association, dictated by the state of pandemic

We presented above the constitutional provision, that the Constitutional Court is among other things, the guardian of the constitutional freedoms and rights of individuals and social groups. In its jurisprudence, the Constitutional Court has stated that:... *restrictions on freedoms and rights can be made “only by law” means that if it is necessary to*

²¹ Article 1, para. 2, Law no. 119/2015, dated 6.11.2015, “On the establishment and functioning of the National Council for civil society”

*limit a right provided in the Constitution, then this assessment is at the discretion of the legislature alone and not of other bodies, including the Council of Ministers. ... “.*²²

The Council of Ministers may adopt acts by force of law according to Article 101 of our Constitution for taking interim measures. The right of the executive power to exercise authority by means of normative acts with the force of law must be justified in each case by the presence of special circumstances which make it necessary to adopt urgent regulation regarding the need and urgency of resolving a situation, the special nature of which means that immediate action must be taken if a serious public danger is to be prevented.²³

We have conditions of need and urgency in the concrete situation when we are experiencing a massive spread of the Covid-19 virus, which dictates

²² Decision No. 20, dated 11.07.2006 of the Constitutional Court.

²³ Megi Islamaj, 2020, “Kufizimi i të drejtave dhe lirive themelore të njeriut (si e drejta e lëvizjes apo liria ekonomike) me Akt Normativ me Fuqinë e Ligjit. Kushtetutshmëria e këtyre kufizimeve në kuadër të jurisprudencës të Gjykatës Kushtetuese dhe Gjykatës Europiane të të Drejtave të Njeriut”, accessed on <https://crpartners.al/2020/04/06/kufizimi-te-drejtave-dhe-lirive-themelore-te-njeriut-si-e-drejta-e-levizjes-apo-liria-ekonomike-me-akt-normativ-me-fuqine-e-ligjit-kushtetutshmeria-e-ketyre-kufizimeve-ne-kuader-te-jurisprud/>

the taking of extraordinary measures by every state and government in the world, an unprecedented case for the size it has taken and its duration. The legal force of the normative act with the force of law is equal to the force of law from the moment of its issuance. Thus, with Normative Act no. 3, Dated 15.3.2020 “On Taking Special Administrative Measures During the Period of Infection Caused by Covid-19”, restrictions on constitutional freedoms and rights were imposed.

The purpose of the normative act is the protection of health and, most importantly, the protection of life, without the enjoyment of which, no other human rights and freedoms can be thought of or enjoyed. More specifically, with the Normative Act no. 3, date 15.3.2020 “On Taking Special Administrative Measures During the Period of Infection Caused by Covid-19”, special measures have been defined that will be taken against natural / legal persons or individuals, Albanian or foreign, regardless of their place of residence, who violate the rules, decisions, orders and instructions issued by the competent authorities, throughout the duration of the period of infection caused by this virus, *as the protection of health and above all the right to life prevails over any right next*. The legal opinion on the content of the normative act is not unified,

as there are opinions for and against it not only for the measures taken, but also for their proportionality in relation to the situation that has dictated these measures, as well as their duration, as long as we are not dealing with a legal act adopted by Parliament.

2.4. Assembly in Albania – purpose, locations, participation

Freedom of assembly in our country has been widely used since the early 1990s, mainly for **political** topics, but has also expanded to broader and common **social** and **environmental** purposes. Rallies have often been driven by dissatisfaction with governance and the way public institutions operate and implement governance policies, increasingly reflecting in practice the constitutional freedom of assembly and social organization.

Over the years and with the strengthening of civil society organizations or trade union organizations there is an increase in mass rallies without political colors. Thus, the main issues raised through these rallies are related to the protection of the environment and green areas, social issues such as improving working conditions and wages and the protection of human rights.

In the political direction, we can mention the rally organized by the opposition parties, where the most visible and longest in time, was the one organized in March 2017, when the protests of the opposition parties boycotted the Parliament and set up a tent on the boulevard “Dëshmorët e Kombit”, between the Prime Ministry and the Parliament.

The rallies were organized mainly in the capital, near the locations of public institutions responsible for the issue for which the rally was organized. Rallies organized by citizens or civil society organizations in recent years seem to have had widespread support and participation.

The protest organized by the Alliance Against the Import of Fertilizers is another example of organizing rallies in Albania.²⁴ It called for the repeal of the law on the import of waste from other countries. The request of the participants was also addressed to the President of the Republic for non-enactment of the law. This protest was completely peaceful and there was no commitment or reaction from the state police. The protest achieved its goal as the President did not enact the law due to its unconstitutionality.

²⁴ The protest was organized on October 2016 in front of the building of the Prime-Ministry.

ty. Also, in the continuation of the organization and civic gathering there have been protests against hydropower plants in the rivers of Valbona and Vjosa, although they did not achieve their goal.

If we look at the behavior and attitude of the state authorities charged by law with monitoring and regulating rallies, we note that police authorities have generally allowed rallies, while restrictions or prohibitions have been related to breaches of public order or security, restrictions on which are provided for in the Constitution.

In our country, organized student rallies began in the 1990s with demands for political change and democratization of the state. From those years, the student category has had few massive organizations on issues related to higher education and student status. In December 2019, a large student protest began, that spread to other universities in the country. Student opposition reaction also as a result of the bylaws for additional fees for the exams taken. The protest was joined by many students who chose to protest in front of the building of the Ministry of Education, Sports and Youth. When their demands were not taken into account the students decided to continue their protest. The protests were peaceful and extended to university premises, although

there were cases when police forces entered university premises and even violated some students. The Albanian government promised to meet some conditions, mainly technical, but not the revision of the higher education law. The student protest also found support from academic staff at all universities in the country.

One of the most recent rallies, which was held in violation of the measures taken to limit the spread of the Covid-19 pandemic, was precisely the one against the demolition of the National Theater in Tirana. This protest which culminated on May 17, 2020 had started some time ago, in order to protect the Theater building from collapsing. Despite the purpose for which it was organized, which dates back to before the start of the pandemic, some of the participants in this protest, including politicians and journalists, were raped and escorted to police stations.



INTERNATIONAL NORMATIVE AND INSTITUTIONAL FRAMEWORK ON FREEDOM OF ASSEMBLY AND ASSOCIATION

3.1. Global perspective – United Nations Organization

Human rights, in the way they are perceived today are the result of the creation of the United Nations (UN). After World War II, governments committed to the creation of the UN with the primary goal of establishing international peace and preventing conflict.¹

In 1946, the United Nations established the Commission on Human Rights, which was tasked with submitting proposals for the International Bill of Rights. The draft Declaration was adopted by the

¹ The Slynn Foundation & The Foreign and Commonwealth Office, *Zbatimi i të Drejtave të Njeriut në Praktikë, Manual Trajnimi për të Drejtat Ndërkombëtare të Njeriut*, London, UK, January 2016, pg.6

General Assembly in 1948 and became known as the Universal Declaration of Human Rights (UDHR). This instrument has had a profound impact on the development of regional and global standards for the protection of general or specific human rights.²

The direct consequence of the UDHR was the creation of a universal language for human rights. Human rights are now considered universal values precisely because they derive from this international community. The UDHR provides that in order to guarantee human dignity, along with civil and political rights, economic and social rights must be included and guaranteed, including freedom of assembly and social organization. Although the UDHR is not a binding document (in the legal sense, as it is a Declaration) for the parties, it has inspired more than 20 important human rights instruments, which together constitute the international standard of human rights.³

UDHR provides freedom of assembly and association in Article 20:

² Ibid, pg. 6

³ Ibid, pg. 7

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to any association.

As noted in this article, the forecast at both paragraphs is brief, concise. In the second paragraph, the language is used in the negative form, which in the current legislation we find mainly used in criminal codes. The meaning and interpretation of this provision is that everyone should feel free in their choice to organize with others, or not, in associations, but without including any details or examples of what the categories of associations might be and this leaves room for an extended interpretation in practice.

The UDHR laid the foundations for other international acts (within the framework of the UN) on freedom and human rights. International Convention on Civil and Political Rights (ICCPR) and International Convention on Economic, Social and Cultural Rights (ICCPR). Unlike the UDHR, membership in these conventions generates concrete legal obligations to be implemented by the states that become parties to the convention, according to their provisions. These Conventions also have additional Protocols, which

provide for additional rights, as well as accountability and control mechanisms.⁴

The ICCPR cannot be construed as acknowledging to any State, group or person any right to engage in any activity or to perform any action aimed at restricting the rights provided for in it to a greater extent than provided for by the Convention itself and moreover no restriction or derogation from any fundamental human rights which is recognized or in force in any State party to this Convention is permitted on the grounds that it does not recognize, or recognizes to a smaller degree⁵.

- ❖ KNDCP contains two separate articles regarding freedom of assembly and that of social organization. Thus, according to Article 21, the right to peaceful assembly is recognized. The exercise of this right may be subject only to restrictions imposed by law and necessary in a democratic society, in the interests of national security, peace and public order, or to protect public health or morals, or the rights of the public. and the freedoms of others.

⁴ The Slyn Foundation & The Foreign and Commonwealth Office, *Zbatimi i të Drejtave të Njeriut në Praktikë, Manual Trajnimi për të Drejtat Ndërkombëtare të Njeriut*, London, UK, January 2016, pg. 8

⁵ Article 5, ICCPR

So, as can be seen, this provision is much more complete in elements than the UDHR in terms of freedom of assembly, setting the limits of state intervention for the exercise of this freedom.

The following article of the ICCPR provides for the right to social organization and again presents some details regarding social organizations, emphasizing that of the trade union form.

- ❖ Everyone has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. The exercise of this right may be subject only to restrictions provided by law and which are necessary in a democratic society in the interests of national security, peace and public order, or to protect public health or morals or the rights and freedoms of the of others. This article does not prohibit legal restrictions on the exercise of this right by members of the armed forces and the police. Nothing in this article shall authorize States Parties to the 1948 International Labor Organization Convention relating to freedom of association and the protection of the right to organize to take legislative action which may violate or enforce the law or provided for in the said Convention.

The ICCPR details the basic civil and political rights of the individual, as well as the obligations associated with the state. As can be seen from the content of the above provisions, they have served as the basis for the provisions of the current Albanian legislation on freedom of peaceful assembly and social organization. The ICCPR is also recognized as having practical value after establishing the UN Human Rights Committee (UNHRC), which reviews reports submitted by States Parties on the measures they have taken to give effect to the rights provided for in the Convention. The Committee may also accept and consider requests from individuals claiming to be victims of a violation of the rights set forth in this Convention, if the State concerned has ratified the Protocol authorizing such complaints, and after the person has exhausted domestic remedies of the complaint.

The HRC issues ‘press releases’ concerning individual complaints of human rights violations - these are *quasi* (almost) judicial proceedings that culminate in a decision declaring that there has been a violation of the Convention by a State to whom the complaint has been filed, as well as to show the appropriate legal remedies to restore the violated right in the country, including a financial compensation.

In addition to universal normative acts aimed at extending to all states within the UN, regional human rights systems have been established, based on treaties whose membership is limited to states within a particular region, which we present in the following part.

3.2. European perspective – Council of Europe legislation and safeguards

In the context of the analysis of the guarantees given for the freedom of assembly and organization in the European context, for the purposes of this material we will focus on the instruments adopted by the Council of Europe.

The Council of Europe is an international regional organization established after World War II to guarantee the fundamental rights and freedoms of individuals living in Europe. Today, the Council has 47 member states and is the only international human rights institution of which the Russian Federation is a party⁶. Albania has been part of the organization since July 2, 1995.

⁶ <https://www.coe.int/en/web/portal/47-members-states> [accessed on 13.10.2020].

The most important act adopted by the organization is the European Convention on Human Rights (ECHR or Convention). The Convention was conceived in response to the events of the Second World War and provides a basic framework for the protection of fundamental rights and freedoms at the international level. The novelty of the Convention at the international level is the active role of individuals, which until its adoption was non-existent, to seek protection of their rights and freedoms after the exhaustion of all domestic remedies.⁷

The catalog of rights protected by the Convention includes mainly civil and political rights, with the exception of only a few socio-economic rights, which are provided for in Protocol no. 1 addendum to the ECHR.

The fundamental rights guaranteed by the Convention are divided into four main categories. Thus, we have: absolute rights, substantive rights, rights related to the administration of justice and other rights⁸:

⁷ Mole, Nuala. & Liaki, Vasi. (2018). *Drejt një zbatimi efektiv në nivel kombëtar të Konventës Evropiane për të Drejtat e Njeriut: një guidë mbi parimet konceptet kyçe të Konventës dhe përdorimi i tyre nga gjykatat vendase*. Beograd: AIRE Centre, pg. 9.

⁸ Mole, Nuala. & Liaki, Vasi. (2018). *Cited above*, pg. 18.

- ❖ **Absolute absolute rights** - their restriction / violation is not allowed in any case for any reason - the right to life (Article 2); prohibition of torture, inhuman or degrading treatment or punishment (Article 3); prohibition of slavery (Article 4); no punishment without law (Article 7); abolition of the death penalty (Article 1 Protocol No. 6 and Article 1 Protocol No. 13); the right not to be convicted twice (Article 4 Protocol No. 7).
- ❖ **Substantive rights** - this category of rights can be restricted but only if there is a legitimate aim, the intervention is provided by law and the restrictive measure is proportionate to the aim. This category includes: the right to a peaceful private and family life (Article 8); freedom of religion, conscience and religion (Article 9); freedom of expression and the right to information (Article 10); freedom of assembly and organization (Article 11).
- ❖ **rights related to the administration of justice** - the scope of assessment allowed to states to restrict these rights is too narrow, the restrictions themselves are provided for in the Convention - the right to liberty and security (Article 5); the right to fair trial (Article 6); no punishment

without law (Article 7); the right to appeal criminal proceedings (Article 2 Protocol No. 7); the right not to be convicted or punished twice for the same offense (Article 4 of Protocol No. 7).

- ❖ **other rights** - are rights that are not included in any of the above categories, in their text there are no exhaustive cases when restrictions are allowed and for which governments are given a wider scope of assessment in case a restriction is needed - the right to marry (Article 12); property right (Article 1 of Protocol No. 1); the right to education (Article 2 of Protocol No. 1); the right to free elections (Article 3 of Protocol No. 1).

The right in focus of this manual, freedom of assembly and organization, is precisely a material right.

To determine whether material rights have been violated or not, the Court has decided that the following questions should be answered:

1. Do the facts constitute an event relating to a right protected by the Convention as determined by the Court?

2. Has there been an intervention in law or a proposal for intervention?
3. Is the intervention pursued for a legitimate purpose?
4. Was this intervention necessary in a democratic society?

If the answer to the first two questions is “Yes” and the answer to any other question is “No” then we will have a violation of a substantive right.⁹

The text of Article 11 of the ECHR on this right provides:

Freedom of assembly and association

1. *Everyone has the right to freedom of peaceful assembly and association with others, including the right to form and to join trade unions for the protection of his interests.*
2. *The exercise of these rights may not be subject to restrictions other than those provided by law and which are necessary in a democratic society, in the interest of national security or public safety, for the protection of law and order and the*

⁹ Ibid, pg. 20-22.

prevention of crime; for the preservation of health or morals, or for the protection of the rights and freedoms of others. This article does not prohibit lawful restrictions on the exercise of these rights by members of the armed forces, police or state administration

Freedom of assembly and association is one of the fundamental rights of a democratic society, which together with **freedom of expression** are the basis for the functioning of democracy. Thus, these rights should not be construed narrowly by any party to the Convention.

Freedom to assemble

Article 11 protects the right of people to assemble in public or private places, peacefully. The organization and participation in protests, rallies, marches, conferences, etc., are included within the scope of Article 11. One of the objectives of this right is the protection provided to opinions and the way of citizens to express them. Despite its autonomous nature, Article 11 of the Convention should also be read in the light of Article 10 - freedom of expression, where the aim of exercising freedom of assembly and association is the expression of personal opinions, the op-

portunity to provide forums of public debate and the right to protest. The European Court of Human Rights (Strasbourg Court or ECtHR) has given importance to the fact that those who take part in rallies do not only seek to express their opinion, but to express this opinion together with others.¹⁰ This concept includes the expression of political, philosophical or religious opinions. Thus, the freedom to assemble and organize is closely linked to Article 9 of the ECHR [freedom of thought, conscience and religion].¹¹

According to the interpretation of the Strasbourg Court, the concept of “freedom of assembly” is autonomous, it covers especially the meetings, which are not of local legal regulation, regardless of whether there is requested prior notice or permission / authorization in order to organize them. Thus, according to the Court, Article 11 applies to the smooth organization of meetings or group walks or marches, where individuals act in a coordinated manner, pursuing a specific purpose to express a political or ideological message of theirs¹².

¹⁰ *Primov and Others v. Russia*, no. 17391/06, decision of 12 June 2014, § 91.

¹¹ Bianku, L. & Mole, N. & Smith, H. (2020). *Covid-19 dhe impati mbi të drejtat e njeriut: shikim i përgjithshëm mbi jurisprudencën përkatëse të Gjykatës Evropiane për të Drejtat e Njeriut*, pg. 106-107.

¹² *Navalnyy v. Russia*, no. 29580/12, Grand Chamber decision, 2 February 2017, § 106

This right covers both gatherings in public places and meetings in private places. The right can be exercised by both individual members and the organizers of these meetings¹³. The Strasbourg Court has noted that despite the fact that the purpose of Article 11 is to protect the political right to peaceful assembly / protest and participation in democratic processes, this right would be considered too narrow if it were limited to protecting only these types of meetings.¹⁴

The authorities of the member states to the Convention are subject to both positive and negative obligations with regard to the practical exercise of freedom of assembly¹⁵. This means that not only the government should not interfere in the right of citizens to assemble peacefully, but also should take action to ensure in practice this right from the interference of third parties. The essence of Article 11 is the protection of individuals from arbitrary actions of the state, but also positive obligations on the state in order for individuals to enjoy their right in

¹³ *Kudrevičius and Others v. Lithuania*, no. 37553/05, Grand Chamber Decision, 15 October 2015, § 91.

¹⁴ *Friend and Others v. the United Kingdom (admissibility)*, no. 16072/06 & 27809/08, decision of 24 November 2009, § 50.

¹⁵ *Öllinger v. Austria*, no. 76900/01, decision of 29 June 2006, § 35.

practice¹⁶. So, the authorities must take all necessary measures, so that individuals who legally exercise their right of assembly, are not hindered by this right by external factors, such as, by persons with different views from them.¹⁷

As mentioned above, the freedom of individuals to assemble peacefully may be subject to certain restrictions, which must meet the test of restriction of all material rights, explained above. These restrictions at the European level were encountered especially during the Covid-19 pandemic period.

The main measures of almost all governments in trying to prevent the virus were to ban the exercise of the right to gatherings, organizations or manifestations, limit the number of people who could gather in public or private places¹⁸. Also, access to all public or private spaces where gatherings, manifestations, meetings or cultural events could be organized, was closed / restricted. Of course, these measures to restrict this freedom were accompanied by

¹⁶ *Kudrevičius and Others v. Lithuania*, cited above, § 158.

¹⁷ *Ibid*, § 159.

¹⁸ Bianku, L. & Mole, N. & Smith, H. (2020). *Cited above*, pg/ 107. See also Normative Act no. 3 dated 15.3.2020 of the Council of Ministers of the Republic of Albania, and decisions of other state's governments related.

restrictions on the freedom of movement of citizens, who in most cases had to be provided with special permits to move within a certain schedule.

Despite these, austerity measures and the restriction of the right of assembly were not respected after the occurrence of some events which caused popular revolts. One such case is the killing of an African-American man in the United States by police uniforms, which sparked worldwide movements and protests aimed at protecting the right to life and protection against racial discrimination. There can also be mentioned the developments in Albania and the protests against the demolition of the National Theater.

However, the provisions of paragraph 2 of Article 11 of the Convention allow the imposition of restrictions on this right in order to protect the health of the population. However, these restrictions must be provided for by law, pursued by a legitimate aim and be proportionate.¹⁹

With regard to the provision for the restriction of fundamental rights by law, including freedom of assembly, this provision should be clear, including measures for this purpose and duration, in order to avoid

¹⁹ Ibid, f. 108.

arbitrary actions. When the law is not clear and the restrictions are expressed in evasive language, they will not be considered to meet the criteria of legality.

Of course, measures to restrict this freedom must be necessary in a democratic society. So the public authorities have to prove that there is no other way. Such a situation was argued / justified to be the closure of some states in spring 2020 [and autumn] due to the risk of spreading the Sars-Cov-2 virus and the collapse of the health system.

The principle of proportionality must also be taken into account in the assessment of restrictive measures. This means that not only the restriction imposed must be commensurate with the dangerousness of the situation, but also the punishment / sanction in case of non-implementation of the measures must also be proportionate to the violation. An example to illustrate this case is the fines imposed as a result of non-compliance with restrictive protocols on Covid-19, e.g. a fine of 40,000 euros imposed by the Albanian Government in case of organizing mass gatherings for any reason cannot be considered a proportional sanction²⁰.

²⁰ Ibid, f. 112 see as well reference no. 353 po aty “*Shqipëria miraton gjoba ndëshkuese për shkelje të kufizimeve të koronavirusit*”.

However, some of the member states of the Council, immediately after the declaration of the state of emergency due to Covid-19, exercised the right provided by Article 15 of the Convention by submitting to the Secretariat of the Council, waiver of part of the rights of the Convention, including freedom of assembly and association. This waiver does not mean that the state avoids responsibility for the implementation and observance of these rights to the extent of 100%. Albania was part of these countries²¹.

Freedom of association

Trade union law represents the set of legal norms that regulate the legal position of professional organizations, collective agreements, the right to strike and the resolution of labor disputes.²²

Article 11 of the Convention, in addition to freedom of assembly, guarantees the right of individuals to organize, including in terms of work. Pursuant to Article 11 of the ECHR, every individual has the right to form, as well as to join a trade union. Freedom of association guarantees the right to be heard while pro-

²¹ <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>

²² Uka, Nj. (2011). *Fjalor i Drejtësisë*. Tiranë: botimet Iliar, pg. 199.

protecting the interests of the union and its members.²³ Citizen participation in democratic processes is achieved to a large extent through participation in trade unions, where they integrate with each other and pursue collective objectives.²⁴ This freedom is particularly important for persons belonging to minorities, including national or ethnic minorities.

The protection of personal opinions provided by Articles 9 and 10 of the Convention in the context of freedom of thought, conscience and religion, as well as freedom of expression is one of the purposes of freedom of association guaranteed by Article 11 of the Convention. This protection, as in the case of freedom of assembly, includes positive and negative obligations for the state. This means that protection is provided not only for positive thoughts but also for those that offend, shock or disturb one or several categories of society.²⁵

The term “union” means a voluntary grouping of individuals who are guided by a common objective²⁶

²³ Xhepa, I. (Dimër, 2014). *Jus & Justicia 10*: “Liria sindikale sipas jurisprudencës së GjEDNj-së”. Tirana: UET Press, pg. 27.

²⁴ *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, decision of 5 October 2006, § 61.

²⁵ *Sørensen and Rasmussen v. Denmark*, no. 52562/99 & 52620/99, Grand Chamber Decision 11 January 2006, § 54

²⁶ *Young, James and Webster v. the United Kingdom*, Commissions Report, § 167

and should not be confused with the right of individuals to associate with different social groups²⁷. In order for a trade union to fall within the scope of Article 11 of the Convention it must be subject to private law.

The discussion on the democracy of internal organization in trade unions may seem “*non sense*”. However, unions also suffer from internal problems related to the failure to achieve statutory goals and objectives. Thus, the right guaranteed by Article 11 of the Convention consists of both sides of the coin, where on one hand there is the right of employees or other individuals to join the union and on the other hand, the right not to participate if a such a thing is not desired²⁸.

In cases where individuals are forced to participate, the Strasbourg Court has noted that these situations violate the right to membership, in its negative aspect. So no one can be forced to participate in an organization if it is not an expression of his will. We can illustrate this case with an example addressed in the case *Sigurdur A. Sigurjonsson k. Iceland*²⁹,

²⁷ *McFeeley v. the United Kingdom*, Commission’s decision, § 114.

²⁸ Xhepa, I. (Dimër 2014), *Cited above*, f. 29.

²⁹ *Sigurdur A. Sigurjonsson v. Iceland* no. 16130/90, decision of 30 June 1993.

where every taxi driver was forced to join the taxi drivers' association, or his license was revoked.

However, there are some categories of professions for which the non-recognition of the freedom to organize in trade unions is considered legal, not only by the member states, but also in the interpretation of the Strasbourg Court. These occupations are mainly concerned with the protection and guarantee of public and national security such as police officers, the armed forces and certain categories of state administration, but these restrictions need to be interpreted as closely as possible. However, the Court has acknowledged that not all employees of the state administration may be part of this restriction, not enjoying the right of Article 11 of the Convention³⁰.

Another aspect of trade union freedom is the right to enter into collective agreements, which are an essential tool in promoting the interests of trade unions. Thus, in a democratic society, a category of employees cannot be allowed to be excluded from the right to enter into a collective contract. Although, the interpretation of this principle should be done in accordance with the evolution of legal employment relations.

³⁰ Xhepa, I. (Dimër 2014), *Cited above*, f. 27-28.

With regard to the manner of restriction of freedom of association and the examination of whether or not this restriction violates the right guaranteed by Article 11 of the Convention, the same procedure / test is followed as with regard to freedom of assembly.

3.3. Developments of European jurisprudence for protection of Freedom of Assembly and Association

Decisions of the European Court of Human Rights on Article 11 of the Convention

United Communist Party of Turkey and Others v. Turkey

no. 133/1996/752/951

30 January 1998

FACTS The United Communist Party of Turkey (“the TBKP”) was formed in June 1990. It was dissolved by an order of the Constitutional Court in July 1991 on the grounds that it had incorporated the word “communist” into its name, which was against Turkish law, and, in particular, that it had encouraged separatism and the division of the Turkish nation.

DECISION The Court found a violation of Article 11 of the Convention. It considered that a political party's choice of name could not in principle justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances. In the absence of any concrete evidence to show that in choosing to call itself "communist", the TBKP had opted for a policy that represented a real threat to Turkish society or the Turkish State, the Court could not accept that the submission based on the party's name might, by itself, entail the party's dissolution. The Court noted that although the TBKP referred in its programme to the Kurdish "people" and "nation" and Kurdish "citizens", it neither described them as a "minority" nor make any claim – other than for recognition of their existence – for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population. The Court underlined that one of the principal characteristics of democracy was the possibility it offered of resolving a country's problems through dialogue. There could thus be no justification for hindering a political group solely because it sought to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.

Socialist Party and Others v. Turkey

no. 20/1997/804/1007

25 May 1998

FACTS The Socialist Party (“the SP”) had been formed in February 1988. It was dissolved by an order of the Constitutional Court in July 1992. The Turkish court noted in particular that in its political message the SP referred to two nations: The Kurdish nation and the Turkish nation. It concluded that the SP encouraged separatism and incited a socially integrated community to fight for the creation of an independent federal State, which was unacceptable and justified the party’s dissolution.

DECISION The Court found a violation of Article 11 of the Convention. It noted that statements by the party’s former chairman had referred to the right to self-determination of the “Kurdish nation” and its right to “secede”. However, read in their context, the statements did not encourage secession from Turkey but sought to emphasise that the proposed federal system could not come about without the Kurds’ freely given consent, which should be expressed through a referendum. In the Court’s view, the fact that such a political programme was considered incompati-

ble with the principles and structures of the Turkish State at the time did not make it incompatible with the rules of democracy. It was of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that called into question the way a State was currently organised, provided that they did not harm democracy itself.

* * *

Freedom and Democracy Party (ÖZDEP) v. Turkey

no. 23885/94

Grand Chamber

8 December 1999

FACTS The Freedom and Democracy Party (ÖZDEP) was founded in October 1992. In July 1993, the Turkish Constitutional Court made an order dissolving ÖZDEP. While the proceedings concerning the party's dissolution – brought on the grounds that its programme sought to undermine the territorial integrity and secular nature of the State and the unity of the nation – were still pending, the founding members of the party resolved to dissolve it in order to protect themselves and the party leaders from the consequences of a dissolution order – namely a ban on their carrying on similar activities in other political parties.

DECISION The Court found a violation of Article 11 of the Convention. It had not found anything in ÖZDEP’s programme that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. On the contrary, the need to abide by democratic rules when implementing the proposed political project was stressed in the programme. In its programme ÖZDEP also referred to the right to self-determination of the “national or religious minorities”. However, taken in context, those words did not encourage separation from Turkey but were intended instead to emphasise that the proposed political project must be underpinned by the freely given, democratically expressed, consent of the Kurds. In the Court’s view, the fact that such a political project was considered incompatible with the current principles and structures of the Turkish State did not mean that it infringed democratic rules. It was of the essence of democracy to allow diverse political projects to be proposed and debated, even those that called into question the way a State was currently organised, provided that they did not seek to harm democracy itself.

Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania

no. 46626/99

3 February 2005

FACTS Partidul Comunistilor (Nepeceristi), a party of Communists who had not been members of the Romanian Communist Party, “the PCN”, had been founded in March 1996. Its registration as a party was refused by the Romanian courts in a decision upheld in August 1996 on the grounds that the PCN was seeking to gain political power in order to establish a “humane State” founded on communist doctrine, meaning that it considered the constitutional and legal order that had been in place since 1989 as inhumane and not based on genuine democracy.

DECISION The Court found a violation of Article 11 of the Convention. Having examined the PCN’s constitution and political programme – on the sole basis of which the Romanian courts had rejected the application for the party’s registration – it noted that they stressed the importance of upholding the national sovereignty, territorial integrity and legal and constitutional order of the country, and democratic principles including political pluralism, universal suffrage and freedom to participate in politics. They did not contain any passages that might be considered a call

for the use of violence, an uprising or any other form of rejection of democratic principles. It was true that there were passages criticising both the abuses of the former Communist Party before 1989, from which the PCN distanced itself, and the policy that had been followed subsequently. However, the Court considered that there could be no justification for hindering a political group that complied with the fundamental principles of democracy solely because it had criticised the constitutional and legal order of the country and had sought a public debate in the political arena. Romania's experience of totalitarian communism prior to 1989 could not by itself justify the need for the interference with the party's freedom of association.

* * *

Herri Batasuna and Batasuna v. Spain

no. 25803/04 and 25817/04

30 June 2009

FACTS Having previously been established as an electoral coalition Herri Batasuna was registered as a political party in 1986 and Batasuna sought registration as a political party in 2001. In 2003, the Spanish Supreme Court declared both parties illegal, ordered their dissolution and liquidated their assets. It referred to the 2002 law on political par-

ties, finding that the parties were part of “a terrorist strategy of ‘tactical separation’” and that there were significant similarities between them and the terrorist organisation ETA.

DECISION - The Court found no violation of Article 11 of the Convention. It held in particular that the Spanish courts, after a detailed study of the evidence before them, had arrived at the reasonable conclusion that there was a link between the applicant parties and ETA. In view of the situation that had existed in Spain for many years with regard to terrorist attacks, those links could objectively be considered as a threat for democracy.

* * *

HADEP and Demir v. Turkey

no. 28003/03

14 December 2010

FACTS The People’s Democracy Party, “HADEP”, a smaller opposition party, had been established in May 1994. According to its programme, it advocated “a democratic solution to the Kurdish problem”. HADEP was dissolved in 2003 by a decision of the Turkish Constitutional Court, finding that the party had become a centre of illegal activities, which in-

cluded aiding and abetting the illegal Workers Party of Kurdistan (PKK). The Constitutional Court further banned a number of HADEP's party members from becoming founders or members of any other political party for five years.

DECISION - The Court found a violation of Article 11 of the Convention. It held that certain statements made by party members – calling the actions of the Turkish security forces in south-east Turkey in their fight against terrorism a “dirty war” – to which the Turkish court had referred when concluding that HADEP was guilty of aiding and abetting the PKK, were a sharp criticism of the Government's policy but did not encourage violence, armed resistance or insurrection. Those statements could therefore not in themselves constitute sufficient evidence to equate the party with armed groups carrying out acts of violence. The European Court further found, in particular, that statements by HADEP members which considered the Kurdish nation as distinct from the Turkish nation had to be read together with the party's aims as set out in its programme, namely that it had been established to solve the country's problems in a democratic manner. Even if HADEP advocated the right to self-determination of the Kurds, that would not in itself be contrary to democratic principles and could not be equated to supporting acts of terrorism.



DICTIONARY

Bylaws - Decisions, regulations, instructions issued by executive bodies or local bodies on the basis and for the implementation of the law. These acts have a normative character - they are mandatory for everyone.

Normative acts - Broad meaning: Acts issued by legislative, executive or local bodies that are binding on all. Narrow meaning: Normative acts of the Council of Ministers, other central institutions or local bodies - Acts adopted by the Council of Ministers, other central institutions or local bodies, in case of need and urgency, which lose their force from the beginning in in case they are not ratified by the Assembly within a certain time limit.

Public authority - is any administrative body provided in the legislation in force for administrative procedures, legislative, judicial and prosecution bodies of any level, bodies of local government units of any level, state bodies and public entities, established by the Constitution or by law, companies, any natural or legal person, who has been given by law, sub-legal act or any other form, provided by the legislation in force, the right to exercise public functions.

International law - The set of rules and principles of general application that govern the conduct of states and international organizations and the relations between them, as well as some of their relations with natural or legal persons. International customs and international treaties are the two most important sources of international law.

Balance of powers - The constitutional principle of organization of powers that gives each branch of state power the responsibility to control the actions of other branches; this principle also requires that the powers of each branch be relatively balanced to prevent one branch of government from dominating the others.

Strike - organized cessation of work by employees in order to realize economic, social and profession-

al rights and interests from the employment relationship. Characteristic of this protest is the boycott of activities or in some cases the boycott of food intake.

ILO - The International Labor Organization is a United Nations agency that deals with labor issues, particularly international labor standards, social protection, and equal employment opportunities for all. The ILO has 186 member states.

Constitution - The fundamental law of the state that expresses the basic principles of the legal system. The document that defines the basic norms of state organization, the structure and functions of the main governing bodies of the state, the basic principles of the political process and the basic relations of the citizens with the state.

Minority - a national minority living in one country or another that enjoys rights. A person with a disability is a person who has long-term physical, mental, sensory, behavioral or combined impairments that, in interaction, may prevent her from participating fully and equally in her education and social life.

UN - The United Nations is the largest organization in the world which aims at international security, economic development and social equality. It

was formed in 1945 at the initiative of the victorious states of World War II (USA, China, England, the Soviet Union and France) and replaced the League of Nations which was formed in 1919 but was not shown to be effective in avoiding the World War. World War II.

Democratic state - Those states that guarantee periodic, free and secret general elections, political pluralism and media pluralism are considered democratic.

Rule of law - The distinguishing features of the rule of law are: 1. The supremacy of the law as an expression of popular sovereignty through the principle of representation. 2. A hierarchical system of legal norms, at the head of which is the Constitution. 3. Separation of public powers, each with a certain sphere of competencies, as a guarantee of democracy. 4. Guarantee system of freedoms provided in the Constitution. 5. The principle of legality (compliance with the constitution and laws) of the actions of the administration and a system of appeals against illegal administrative actions. The rule of law also requires guarantees against possible abuses of the legislature by checking the constitutionality of laws.

Trade union - is a self-organizing group of individuals, companies, corporations or other entities, independent of labor and politics, that aim to pursue a common interest and fight to protect the economic and social rights of its members.

Rally - includes public and private meetings, marches, processions, demonstrations and protests where protesters refuse to leave until their demands are met. The purpose can be political, religious or spiritual, or any other purpose; no restrictions have been placed on the purpose, but any gathering must be peaceful. Casual violence does not mean that the rally loses protection, unless it has a divisive purpose.



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