

The Right to Freedom of Peaceful Assembly: Article 11 of the European Convention on Human Rights (ECHR)

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Introduction

1. This short insight paper will focus on Article 11 of the European Convention on Human Rights (ECHR). The right to freedom of peaceful assembly guarantees the capacity of all persons to join with others to collectively express, promote, pursue, and defend their interests. This right enables people to express their political opinions, join trade unions, engage in religious observances, engage in artistic pursuits and elect their representatives and hold them accountable. Article 11 is therefore vital to the very idea of a democratic society and state institutions that respect, protects and fulfil the full range of rights under international law: civil, political, economic, social and cultural.
2. The issue of assembly is of topical importance coming at a time of worldwide mass gatherings in support of the Black Lives Matter movement, as well as other issues such as refugee rights, Covid-19 restrictions, climate change and the school children's response to the Scottish Qualification Authority's SQA results in Glasgow (and the corresponding in the rest of the UK). Article 11 has become of particular importance to marginalised individuals and groups, including children or foreign nationals, as they are traditionally excluded from the right to vote and involvement in legal and policy decision-making. The protection of opinions and the freedom to express them is one of the objectives of Article 11.
3. Freedom to a peaceful assembly is interrelated and interdependent with a number of rights, including freedom of opinion and the right to express them (Article 10), freedom of religion (Article 9) and the right to privacy (Article 8). Each of these ECHR rights are mirrored for children under the age of 18 in the UN Convention on the Rights of the Child as autonomous rights. This paper will provides a general overview of the legal obligations under Article 11 that are binding on state institutions and their officials, and also explains the scope of and permissible limitations, drawing primarily on the ECHR, but also references other international treaties and standards. The use of indoor

spaces for association, for example political meetings, is outwith the scope of this paper.

4. The pandemic has created extraordinary challenges for all, including significant implications for our democratic freedoms. These freedoms include the right to respect for freedom of expression, the right to peaceful assembly and association, and freedom of thought, conscience and religion. The rights protected by Article 11, like those of Article 9 and 10, are not however absolute. Human rights law recognises that restrictions upon the exercise of these rights may be justified in particular situations. To be lawful, any interference with these rights must however comply with a number of conditions:
 - in accordance with the law;
 - in pursuance of a legitimate aim;
 - temporary; and,
 - necessary in a democratic society.

Article 11 – text and meaning

Article 11 states:

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

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

5. The first paragraph of Article 11 defines the right and type of assembly. As mentioned above, it is not only important to understand the content of the right in itself, but also the role it plays in guaranteeing the effective implementation of other human rights and democracy. Furthermore, the fulfilment of this right includes a positive duty to protect and enable peaceful protests. Freedom of peaceful assembly cannot be reduced to a mere duty on the part of the State not to interfere with a peaceful assembly. The police also play a key role in ensuring the general safety of the public and participants (positive duty). This will ordinarily involve taking into account public health and public safety considerations, discussed below.

Assembly which is not peaceful

6. Article 11 of the Convention only protects the right to “*peaceful*” assembly. This is key as the guarantee applies to *all* gatherings except those where the organisers and participants incite violence or otherwise reject the foundations of a democratic society. It is also important to note that an assembly tarnished with isolated acts of violence is not automatically considered non-peaceful so as to forfeit the protection of Article 11. The European Court of

Human Rights (ECtHR) has examined this issue in a 2015 case against Lithuania.¹ The question whether an assembly as such was peaceful is distinct from the assessment of the applicant's conduct. This is an important consideration for the police and law enforcement agencies acting in Scotland. The ECtHR has found that obstructing traffic arteries and occupation of public buildings as part of a demonstration is conduct which is, by itself, considered peaceful.² The UN Human Rights Committee has also found that collective civil disobedience or direct-action campaigns can be covered by Article 21 of the ICCPR (right to peaceful assembly), provided they are non-violent.

7. Article 11 covers both private meetings and meetings in public places, whether static or in the form of a procession. Restrictions in terms of the number of participants in assemblies can be accepted only if there is a clear connection with a legitimate ground, for example where public safety considerations dictate a maximum crowd capacity or where public health considerations dictate physical distancing. The right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly (within the limits established in paragraph 2 of Article 11). This does not mean the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property in order to protest.³

The links with other rights (Articles 9 and 10)

8. The right to freedom of expression includes the freedom to hold opinions and to receive and impart information and ideas (Article 10). The right to freedom of thought, conscience and religion is protected by Article 9. It includes freedom to manifest one's

¹ Kudrevičius and others vs the Republic of Lithuania, Application no. 37553/05.

² Ezelin vs France, [1991] ECHR 29 and Laporte, Regina (on the application of) v Chief Constable of Gloucestershire HL (Bailli, [2006] UKHL 55.

³ Appleby and Others v. the United Kingdom. Application no. 44306/98.

religion or beliefs in community with others in public. The principal objectives of exercising the freedom of assembly and association are to exercise those rights to expression and to thought, conscience and belief. Therefore, there is a strong link between Article 11 and Articles 10 and 9 of the ECHR. This is particularly the case where public authorities⁴ interfere with the right to freedom of peaceful assembly in reaction to the views held or statements made by participants in a demonstration. The exercise of the right to freedom of expression carries with it duties and responsibilities. Everyone, including children, migrant workers, asylum seekers and refugees, can exercise the right of peaceful assembly.

9. In a number of cases the ECtHR has held that restrictions on freedom of expression (hate speech) can be justified under the general clauses of Article 10(2) or thought Article 17 of the ECHR⁵.

Restrictions to freedom of peaceful assembly

10. Restrictions can take many forms and have many origins, such as statutes, regulations, local government policies, police guidance and tactical decisions on the ground. The second paragraph of Article 11 provides the foundation for restrictions to the right. In addition, however, to be lawful any restriction must be applied in a way that is compatible with the ECHR, which means it must be 'narrowly construed' and 'convincingly established'.⁶

⁴ Section 6 of the Human Rights Act 1998 places a duty on public authorities not to act incompatibly with certain rights and freedoms drawn from the ECHR. The words "public authority" for the purposes of section 6 are defined in section 6(3) as including courts and tribunals, and "any person certain of whose functions are functions of a public nature" The police is defined as a "public authority".

⁵ For example: *Norwood v. the United Kingdom*, ECHR16 Nov 2004.

⁶ See for example, *Sunday Times v UK (No 2)* [1992] 14 EHRR 229.

11. Any interference with the right to freedom of peaceful assembly will constitute a breach of Article 11 unless it is:
- **Prescribed by law.** This requires both that the measure should have a *legal basis* in domestic law, and ‘sufficient’ quality of the law to be *accessible* to the person concerned and *foreseeable* as to its effects. This has clear implications for the public and requires public bodies taking action to publicise the rules, particularly in the current fast-moving situation with frequent rule changes coming into force.
 - **Pursue a legitimate aim.** The requirement of a narrow interpretation of the exceptions to the right to freedom of assembly applies also to the legitimate aims enumerated in *paragraph 2* of Article 11, which includes the *protection of health*. Restrictions for example on the number of participants in assemblies can be accepted only if there is a clear connection with a legitimate ground, for example where public safety considerations dictate a maximum crowd capacity or where public health considerations dictate physical distancing.
 - **Necessary in a democratic society.** This notion includes two conditions: a) any interference must correspond to a “pressing social need” in other words there are *relevant and sufficient* reasons for the restriction, and b) the interference must be *proportionate* to the legitimate aim pursued. For example, a general ban on demonstrations can only be justified if there is a real and present danger of their resulting

in disorder which cannot be prevented by other less stringent measures.⁷

Blanket Ban on Demonstrations

12. On April 15, the German Federal Constitutional Court (BVerfG) ruled, by means of an accelerated procedure, that the Giessen assembly authority had incorrectly assessed the ordinance of the Hessian government in relation to lockdown and freedom of assembly, after two lower courts upheld the ban on demonstrations. The Constitutional Court ruled that a general ban on demonstrations would be unconstitutional based on Article 8 of the Basic Law for the Federal Republic of Germany and ordered the Assembly to review their decision. One of the assemblies affected by the ban was carried out on April 17 in Gießen, but with conditions such as safe distancing and mouth protection.
13. The UN [Special Rapporteur](#) on the rights to freedoms of peaceful assembly and of association, Mr. Clément Voule, has made clear that states' responses to Covid-19 should not halt freedoms of assembly and association more than required.⁸ This requirement responds to paragraph 2 of Article 11. Restrictions based on public health concerns may be justified only in circumstances where they fulfil paragraph 2 of Article 11, for example restrictions are deemed necessary and proportionate. This means that the restriction must be the least restrictive interference required to meet the legitimate aim of protecting public health. Furthermore, consultation with civil society and other actors will be valuable in the process of designing or reviewing appropriate measures of response which are the most proportionate, and therefore least restrictive of the right possible. Lawfulness also requires sufficient

⁷ The Council of Europe published an update Guide to Article 11 on 31st August 2020, available at https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf

⁸ "States responses to Covid 19 threat should not halt freedoms of assembly and association", Geneva, April 14,2020.

quality of the law to be accessible to the person concerned and foreseeable as to its effects. This is a crucial point as laws, regulations and guidance around Covid-19 are not subject to the ordinary parliamentary and external scrutiny, which often means that it could be unclear or ambiguous. This gets worse when legislation is not accompanied by proper and timely widespread dissemination of the new laws. Mr. Voule has also emphasised the need to ensure that the penalties imposed, if justified, are proportionate and non-discriminatory. It is also important to provide for effective and accessible mechanisms to review such penalties.

Children and Young People

14. The United Nations Convention on the Rights of the Child (UNCRC) mirrors the relevant ECHR rights for children under the age of 18 as autonomous rights to freedoms of expression, (Article 13); thought, conscience and religion (Art 14); privacy (Article 16) and particularly association and peaceful assembly (Art 15). Article 15 of the UNCRC qualifies the right only to the extent that 'in conformity with the law' for protection of rights and 'necessary in a democratic society' - reflecting Articles 11 ECHR and Articles 21 and 22 ICCPR. Special considerations of age and evolving capacities, risks of harm or conflict and competing rights of parents exist when it comes to the enjoyment of these rights by children. In engaging with the Scottish Government, the [Children and Young People's Commissioner Scotland](#) has supported a human rights-based approach in highlighting the requirements of the UNCRC and that children who are engaging in protests must not be unfairly penalised by schools. The UN Committee on the Rights of the Child has stressed a number of obligations on all states in this context, including: to facilitate protest; to protect the safety of children in this context; to educate officials on children's protest rights; to encourage children to form associations, and to

refrain from requiring children to seek parental consent to join those associations.⁹

Content-based restrictions

15. Content-based restrictions on Articles 9 -11 are subject to the most serious scrutiny by national and international courts, including ECtHR. In the case of freedom of expression, the ECtHR has confirmed that “as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.”¹⁰ Furthermore, the ECtHR has also taken the approach of excluding speech from the protection of the ECHR by virtue of Article 17 of the ECHR¹¹ (the prohibition on the abuse of rights), for example where it is contrary to the “values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.”¹² This is known as the *theory of the paradox of tolerance*: an absolute tolerance may lead to the tolerance of ideas promoting intolerance, and the latter could then destroy the tolerance.¹³

⁹ For example in Concluding Observations: Myanmar, adopted 14 Mar. 2012, U.N. GAOR, Comm. on Rts. of the Child, 59th Sess., ¶ 47-48, U.N. Doc. CRC/C/MMR/CO/3-4 (2012).

¹⁰ *Erkaban v Turkey*, 2006. In accordance with article 20 of the ICCPR, peaceful assemblies may not be used for propaganda for war (para. 1), or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (para 2).

¹¹ *Norwood v. the United Kingdom*. ECHR16 Nov 2004.

¹² *M'Bala M'Bala v. France*, ECHR No. 25239/13.

¹³ For example, in *Norwood v. the United Kingdom*, the applicant displayed in his window a poster supplied by the British National Party, of which he was a member, representing the Twin Towers in flames. The picture was accompanied by the words “Islam out of Britain – Protect the British People”. The applicant was convicted of aggravated hostility towards a religious group under section 5 of the UK Public Order Act of 1986. The applicant complaint to the European Court of Human Rights. The Court dismissed the complaint on Article 10 from the applicant and declared it inadmissible, referring to Article 17 of the Convention, which prohibits any activity “aimed at the destruction of any of the rights and freedoms set forth herein”. The Court observed that the freedom of expression may not be used for the destruction of the rights and freedoms set forth in the Convention. It found that such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably

Online and face-to-face gatherings and private bodies

16. On 6 July 2018, the Human Rights Council adopted a resolution on the promotion and protection of human rights in the context of peaceful protests.¹⁴ The resolution makes clear that the right to freedom of assembly must be protected on the Internet to enable (online and) offline protests. This normative development, also addressed how limitations on human rights online have implications for the exercise of the right to freedom of assembly offline. The activities of internet service providers and intermediaries can potentially restrict assemblies or the privacy of assembly participants.¹⁵ Any restrictions on the operation of information dissemination systems must conform with the tests for restrictions on freedom of expression, Article 10(2).

Reasonable and appropriate measures

17. Notification, and even authorisation procedures, for a public event may not infringe Article 11 as long as the purpose of the procedure is to allow the public authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly. The use of invasive technologies and force to disperse the assembly, arrests of participants and ensuing fines, must remain in line with human rights standards. For example, 'kettling' is a controversial tactic in any situation, but in a pandemic it is one that is particularly alarming to see. Similarly the collection of personal data to harass or intimidate participants during demonstrations has raised some concerns from the UN

tolerance, social peace and non-discrimination. Any expression containing elements of racial and religious discrimination will thus fall outside the scope of Article 10.

¹⁴ UN HRC resolution 38/11.

¹⁵ States should create an enabling legal framework for the right to peaceful assembly and association in the digital age. This is very important for some groups, including children and young people, so the government should promote and facilitate access to digital technologies, and any restrictions should be based on the rule of law and be human rights compliant.

Human Rights Committee.¹⁶ A wide discretion is granted, by the courts, to public authorities in relation to evaluate the security risks for both demonstrators and police officers and the appropriate measures dictated by the perceived risks. The provision of personal protective equipment during the coronavirus crisis is essential for police officers.

Dissemination and public participation

18. An important aspect, which has been highlighted in the recent lockdowns in Aberdeen (West of Scotland and north of England), is the lack of clarity and confusion between the regulations and government (& other bodies') guidance. In the case of Aberdeen, the 'new' regulations were published only hours before the Aberdeen lockdown came into force on 5th August and they were laid before the Scottish Parliament one hour before implementation. The same can be said from the set of guidance to university students, which emerged over the weekend of 25th September. This processes have allowed little time for thinking, preparation (for public authorities and public) and wide dissemination.¹⁷ This is important for those who want to exercise Article 11 rights. As it is the participation of those impacted by the policies in the design and evaluation of polices. The Information on any new measures adopted must be widely disseminated and accessible, this is translated into plain English, and appropriate time must be given for the public to familiarise themselves with these laws before criminal penalties are imposed.

¹⁶ General Comment No. 37 on Article 21 of the International Covenant on Civil and Political Rights – Right of peaceful assembly.

¹⁷ There is further evidence of the lack of sufficient consultation and scrutiny of proposed new measures in the circumstances which arose over the weekend of 25th September 2020, when new regulations were laid to further restrict public gatherings and associations in households in the aftermath of a spike in the number of positive tests amongst the Scottish student population. Significant confusion resulted between the implications in both law and universities' disciplinary procedures, after seemingly conflicted 'guidance' was issued.

Counter-assemblies

19. The right of peaceful assembly does not exempt participants from challenges by other members of society. Public authorities must treat counter-assemblies as assemblies in their own right, applying the rules set out above, while preventing undue disruption of the assemblies to which they are opposed.¹⁸ The possibility that a peaceful assembly may provoke adverse or even violent reactions from some members of the public or other organised group(s) is not sufficient grounds in itself to prohibit or restrict the assembly. Restrictions have to comply with the Convention. This makes central the adequate training and resources for police officers involved in these operations/decisions to ensure the effective exercise of this right.
20. As mentioned above, the police has substantial discretion in assessing whether a proposed assembly poses any risk of endangering public safety in the current pandemic, but the presumption must be for the exercise of the right to a peaceful assembly. As stated above, any interference requires justification by the strict standards of paragraph 2 of Article 11. Conditions for dispersal should be set out in law and be exceptional. In addition, the authorities must ensure that restrictions are non-discriminatory in order to comply with the ECHR, particularly Article 14, and that they are temporary due to the nature of the health risk.

Oversight

21. Finally, oversight and independent scrutiny is an enduring and robust feature in Scottish and British society. So, it is essential to continue ensuring independent and transparent oversight of all bodies involved with peaceful assemblies, including through

¹⁸ *Ärzte für das Leben* v. Austria (application No. 10126/82), judgment of 21 June 1988.

timely access to effective remedies (e.g. judicial and quasi-judicial remedies, Scottish Police Authority, HMICS, UK NPM, NGOs and national human rights institutions) before, during and after assemblies.

End.