EUROPEAN COURT OF HUMAN RIGHTS
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General anti-COVID measures prohibiting public events for a lengthy period were in breach of the Convention

In the case of Communaute genevoise d'action syndicale (CGAS) v. Switzerland (application no. 21881/20) the applicant association complained of being deprived of the right to organise and participate in public events following the adoption of government measures to tackle COVID-19.

In today's **Chamber** judgment[1] the European Court of Human Rights held, by a majority (4 votes to 3), that there had been **a violation of Article 11 (freedom of assembly and association)** of the European Convention on Human Rights.

The Court, while by no means disregarding the threat posed by COVID-19 to society and to public health, nevertheless held, in the light of the importance of freedom of peaceful assembly in a democratic society, and in particular of the topics and values promoted by the applicant association under its constitution, the blanket nature and significant length of the ban on public events falling within the association's sphere of activities, and the nature and severity of the possible penalties, that the interference with the enjoyment of the rights protected by Article 11 had not been proportionate to the aims pursued. The Court further observed that the domestic courts had not conducted an effective review of the measures at issue during the relevant period. The respondent State had thus overstepped the margin of appreciation afforded to it in the present case. Consequently, the interference had not been necessary in a democratic society within the meaning of Article 11 of the Convention.

Principal facts

The applicant, Communaute genevoise d'action syndicale (CGAS), is an association under Swiss law with its registered office in Geneva. Its declared aim is to defend the interests of workers and of its member organisations, especially in the sphere of trade-union and democratic freedoms. According to the association, it organises and participates in dozens of events each year in the Canton of Geneva.

In the present case the applicant association complained of being deprived of the right to organise and participate in public events following the adoption of government measures to tackle COVID-19 under Ordinance O.2 COVID-19, enacted by the Federal Council on 13 March 2020. On the basis of that ordinance, public and private events were prohibited with effect from 16 March 2020. Failure to comply with the prohibition was punishable by a custodial sentence or a fine.

On 26 May 2020 the applicant association applied to the European Court of Human Rights, complaining that, following the enactment of O.2 COVID-19, it had been obliged to cancel a rally planned for 1 May 2020 and had withdrawn its request for authorisation.

As of 30 May 2020 the ban on gatherings was relaxed (maximum of 30 participants). Events involving more than 1,000 participants continued to be prohibited until the end of August 2020.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 20 June 2020 the ban on public events was lifted, although participants were required to wear a mask.

Complaints, procedure and composition of the Court

Relying on Article 11 (freedom of assembly and association) of the Convention, the applicant association complained of being deprived of the right to organise and participate in public events following the government measures adopted under Ordinance O.2 COVID-19.

The application was lodged with the European Court of Human Rights on 26 May 2020.

Judgment was given by a Chamber of seven judges, composed as follows:

Georges **Ravarani** (Luxembourg), *President*,
Georgios A. **Serghides** (Cyprus),
Darian **Pavli** (Albania),
Anja **Seibert-Fohr** (Germany),
Peeter **Roosma** (Estonia),
Andreas **Zünd** (Switzerland),
Frédéric **Krenc** (Belgium),

and also Milan **Blaško**, *Section Registrar.*

Decision of the Court

Article 11 (freedom of assembly and association)

Admissibility

On the question of victim status the Court found that the applicant association – which had been obliged to alter its behaviour and even to refrain, in order to avoid criminal penalties, from organising public events that would have contributed to the achievement of its declared aim – could claim to be a victim of a violation of the Convention.

With regard to the exhaustion of domestic remedies, the Court noted that at the relevant time the applicant association had not had an effective remedy, available in practice, by which to complain of a violation of its right of assembly within the meaning of Article 11 of the Convention. In particular, although federal ordinances could normally be the subject of a preliminary ruling on constitutionality by the Federal Supreme Court, including in the absence of any current interest, that court, in the very particular circumstances of the general lockdown declared by the Federal Council as part of efforts to tackle COVID-19, had not examined freedom-of-assembly applications on the merits and had not assessed the compatibility of Ordinance O.2 COVID-19 with the Constitution.

The Court therefore declared the application admissible.

Merits

The Court considered that the ban on public gatherings, which formed part of government measures to tackle COVID-19, amounted to interference with the exercise by the applicant association of its right to freedom of assembly. The interference had been based on Ordinance O.2 COVID-19 and had been aimed at the protection of health and of the rights and freedoms of others.

Regarding the necessity of the measure in a democratic society, the Court reiterated the principles set out in *Kudrevičius and Others*[2].

The Court recognised in the present case that the threat to public health from COVID-19 had been very serious and that knowledge of the characteristics and dangerousness of the virus had been very limited at the beginning of the pandemic; accordingly, States had had to react swiftly during the period under consideration. It also took into account the competing interests at stake in the very complex circumstances of the pandemic, and especially the positive obligation for the States Parties to the Convention to protect the lives and health of the persons within their jurisdiction, under Articles 2 and 8 of the Convention in particular.

The Court considered at the outset that the outright prohibition of a certain type of conduct was a drastic measure which required strong reasons to justify it and called for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake.

Between 17 March and 30 May 2020 all the events by means of which the applicant association might have conducted its activities in accordance with its statutory aim had been subject to an outright ban. According to the Court's case-law, a blanket measure of this kind required strong reasons to justify it and called for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake. Even assuming that such a reason had existed – namely the need to tackle the global COVID-19 pandemic effectively – it transpired from the Court's examination of the exhaustion of domestic remedies that no such scrutiny had been performed by the courts, including the Federal Supreme Court. Accordingly, the balancing exercise between the competing interests at stake, required by the Court for the purposes of assessing the proportionality of such a drastic measure, had not been carried out. This was especially worrying in terms of the Convention given that the blanket ban had remained in place for a significant length of time.

The Court added that, in view of the urgency of taking appropriate action to counter the unprecedented threat posed by COVID-19 in the early stages of the pandemic, it was not necessarily to be expected that very detailed discussions would be held at domestic level, and especially involving Parliament, prior to the adoption of the urgent measures deemed necessary to tackle this global scourge. However, in such circumstances independent and effective judicial review of the measures taken by the executive was all the more vital.

As to the penalty for a breach of the ban on public events under O.2 COVID-19, the Court reiterated that the imposition of criminal sanctions had to be justified by particularly strong reasons and that the organisation of a peaceful gathering should not normally entail a risk of such sanctions. In the present case, a new Article 10d had been inserted in Ordinance O.2 COVID-19 on 17 March 2020. According to that provision, any person who deliberately violated the ban on public events under Article 6 of the ordinance was liable to a custodial sentence not exceeding three years or to a fine (except in the presence of a more serious offence within the meaning of the Criminal Code). In the Court's view, these were very severe penalties that were liable to have a chilling effect on potential participants or groups seeking to organise such events.

Lastly, the Court emphasised the fact that in the face of the worldwide public-health crisis, Switzerland had not had recourse to Article 15 of the Convention, which allowed a State Party to take certain measures derogating from its Convention obligations in time of war or other public emergency threatening the life of the nation. Accordingly, it had been required to abide by the Convention under Article 1 and, in the context of the present case, to comply fully with the requirements of Article 11, within the margin of appreciation afforded to it.

While by no means disregarding the threat posed by COVID-19 to society and to public health, the Court nevertheless held, in the light of the importance of freedom of peaceful assembly in a

[2] *Kudrevičius and Others,* no. 37553/05, §§ 142-46, ECHR 2015.

democratic society, and in particular of the topics and values promoted by the applicant association under its constitution, the blanket nature and significant length of the ban on public events falling within the association's sphere of activities, and the nature and severity of the possible penalties, that the interference with the enjoyment of the rights protected by Article 11 had not been proportionate to the aims pursued. Moreover, the domestic courts had not conducted an effective review of the measures complained of during the relevant period. Switzerland had thus overstepped the margin of appreciation afforded to it in the present case. Consequently, the interference had not been necessary in a democratic society within the meaning of Article 11 of the Convention and there had therefore been a violation of that provision.

Just satisfaction (Article 41)

The Court held (4 votes to 3) that the finding of a violation of Article 11 constituted sufficient just satisfaction in respect of any non-pecuniary damage sustained by the applicant association. It also held that Switzerland was to pay the applicant association 3,000 euros (EUR) in respect of costs and expenses.

Separate opinions

Judge Krenc expressed a concurring opinion, joined by Judge Pavli.

Judges Ravarani, Seibert-Fohr and Roosma expressed a joint dissenting opinion.

These opinions are annexed to the judgment.

The judgment is available only in French.

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