

# Memorandum On Some Legal Questions Of Refugee Struggle in Eastern Europe

## How can the Freedom of Assembly be utilized for the Refugee Struggle for Savety and Refuge?

### A. Summary of the Endeavor

All along the Balkan routes, the borders are closing, while the war in Syria is steadily escalating. The next wave of refugees is merely a matter of time. And soon people could begin to flee from sout eastern Turkey, too. The european states are responding to this with trying to limit the influx. This in effect will judge thousands of people to death, starvation and misery. The humane alternative would be to provide for a safe passage for refugees. This solution must be fought hard for, on many layers. This paper deals with a legal idea that could support a refugee struggle for safe passages through the Balkans. It discusses, whether refugees could put their fights under the umbrella of the Freedom of Assembly, enshrined in constituional an European law.

### B. Freedom of Assembly

The European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU) both establish Freedom of Assembly as a fundamental human right. The member states of the Convention or the Union both transform Communal or Conventional Law into national law in some way or another. Also, every one of these states recognize the same right in their respective constitutions. The big difference is in judicial review: rights derived from national law are reviewed by national courts of justice. For the review of cases on European Law there are supernational courts, the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU). These courts are competent in as much as European law is concerned in the case.

This European layer may prove indispensable for the practicability of the idea. Judicial review by European Courtst is by a far greater measure immune form government interference, as eastern European states tend to have only limited influence in Strasbourg and Luxemburg. Also, willfull change of law is not to be expected. Strasbourg and Luxemburg are not that deeply embroiled by the new wave of authoritarianism that holds sway in eastern Europe at the moment. What is even more, both Art. 11 ECHR and Art 12 CFREU specify tha Freedom of Assembly is a human right and not limited to citizens. Those reasons are why the European law dimension might be interesting for support of non-citizen movements. For restrictions and complications of these provisions, see beneath.

### C. Scope of Protection

Freedom of Assembly pertains to a plurality of persons (1) gathering (2) in private or public space (3) to voice, discuss or symbolically express an opinion (4) political (also cultural or civic) matters (5) peacefully (6).

#### 1. Plurality of Persons

There need to be two or more people. These people need not be citizens or nationals, but national law can provide restrictions for the political activity of foreigners, Art. 16 ECHR. However, both Luxemburg and Strasbourg hold that EU citizens can not be deemed foreigners in that sense in a EU member state. Provisions against refugee political activity are something to be reckoned with, although the Courts allow that only restrictively. The raison d'etre of Art 16 ECHR is the fear of foreign influence on domestic affairs. That could be circumvented if refugee activity is ostensibly directed towards their own legal interest. But to be on the safe side, it is advisable that the participants and legal representatives of the assembly should be mixed, refugees and EU citizens. That way, it will be hard for authorities to invoke Art 16 EHRC.

#### 2. Gathering on private or public ground

Freedom of Assembly pertains to a physical gathering on private or public ground. By that, it also pertains to the means to maintain the gathering. It does not give a right to chose the precice timimng and location of the gathering but gives room for dispositions of the authorities, decisions Appleby and "Negotiate Now". Inversely, an assembly can not be forbidden simply because the authorities hold the location unfit for the gathering; they are obliged to offer an alternative location, decision Stankov.

Freedom of Assembly conveyes a right to use public ground. It also provides a legal ground for infrastructure to facilitate the gathering. It encompasses the stay at the gathering and the way to get there, in the

framework of general law. There are no legal limits to the magnitude of the gathering nor to its duration. The law in principle provides for gatherings on a fixed place or for marches, although the administration can put limits to that. For those limits the administration needs an objective and, untechnically spoken, practical reason. It can not just limit the gathering from a march to a gathering at a fixed location if it can not cite practicability.

### **Excursion 1 on Right of Residency**

This, of course, does not override other regulations in national law that govern the residency of a person. It does not constitute a right to residency, and it does not away with regulations that are imposed on refugees in European countries. On the contrary, those regulations, that basically amount to detention, will be brought forth against the legality of assemblies of this type. It is important to keep in mind two aspects: 1. Regulations like these are one of the targets of these actions. There is a history in the Civil Rights movement that lives on openly and publicly breaking these kind of laws, while invoking basic human rights that are denied by them. The risk that this will not be tolerated comes with it. You can work to make that risk smaller, and that is what we are trying in that memo. 2. Freedom of Assembly is, by logic, superior law to these administrative regulations. In purely legal terms, there is a chance to use it to overthrow them. That is not to expect salvation from the courts, but to make use of them. Rights can be one by struggle alone, but struggle has legal aspects, too. And struggles like these will in the end fail if they don't succeed in that point: that by the standards even of the law of these societies their practices are abominable, and that law that regards one kind of people as legally inferior is little else than mere force; or, as Immanuel Kant observed, that no one has a better right to live on a certain land as anyone else.

#### **3. Voicing, Discussing and Symbolically Expressing Opinions**

European law recognizes (as opposed to for example German constitutional law) three types of aims which are protected by Freedom of Assembly. An assembly can simply voice an opinion, but it is also justified to discuss and to symbolically express them. Those are pretty good grounds for political and legal creativity.

Symbolic expression can go pretty far. When the Austrians blocked the Brenner pass for for 30 hours, the CJEU ruled it not illegal although it cut the main land artery of European traffic, on the grounds that it expressed the opinion of the protesters that the traffic and the noise and pollution that comes with it is something to be done about, *Schmidberger v. Austria*.

This has a preset limit in European Law when the inner nerve of the European Treaties is touched, as similar action was not supported when French peasants blocked the import of Spanish produce, *I-06959 Comm. v. France*. The Free Movement of Goods is a basic principle of the old EU. That is important, since we should not want to risk our action being construed as going against EU law in the same way. Going against secondary EU law is quite a different thing, but going against that still is pretty sensitive. It can be challenged and must be challenged, and in legal terms it can be weighed against Freedom of Assembly. It is up to political and legal creativity to make sure that this weighing doesn't make an assembly illegal.

Another interesting example of an action protected by Freedom of Assembly are: the occupation of a church (with the consent of the community) by refugees without right of residency, *CJEU Cisse*. It is clearly possible to put a lot of different actions under the umbrella of Freedom of Assembly, provided they stay away from caveat 6.

#### **5. Political, Cultural and Civic Matters**

The Courts have not *expressis verbis*, but nonetheless in *praxi* included cultural actions like techno parades or mass happenings under Freedom of Assembly. Although that may not what we're looking for, it may be of interest.

#### **6. Peacefully**

Not protected are actions that aim to assert demands directly and by force. Freedom of Assembly is meant to be a component, although an important one of the regular political life of the democratic state, and even one of its constituents; it is not meant to protect revolutionary action. That does not mean that revolutionary action must or can forfeit legal protection; it means law can not cover all of what is necessary to be done.

It is not always possible to reliably foretell what will be judged as peaceful and what won't. It is therefore imperative to uncouple the components of the whole campaign into parts that can stand alone. These should link together but be independent of each other so as not to infect each other, if one of them is deemed

unlawfull.

## **Excursion 2 on Legal Considerations for Protests**

That leads us to further conclusion on the strategy a campaign should follow so as to take advantage of the full scope of Freedom of Assembly. A campaign can be composed of different kinds of actions; some that are not legally problematic and will probably not get interdicted; other components that could be more problematic or more prone to being interdicted should be organized separately around it. Basic infrastructure that is vital for all of the campaign should be grouped with the legally unproblematic actions. It can then serve as a way to maintain momentum in the unavoidable phases when other components are put on hold, for example pending a court decision when other actions have become interdicted.

Let us have a practical example. Let us assume we are planning on a protest infrastructure set up from a station on one the eastern border of a country over one or more stations in major cities to a station on the western border (and from there preferably onwards along the next country). Then you might think of organizing a kind of bus route between the stations. What you will need is for example humanitarian aid, food or medical supplies. You may organize that by help of international volunteers or of the Red Cross. But for that, you will need to maintain at least the stations in the cities. It will be adviseable to organize theses as protest assemblies separate from each other for practical reasons, and separate from any action you may take at the border for a compelling legal reason. Anything that happens at the border might be seen as forcefull attack on the security of the state. If the protest infrastructure inside the country is not organized as separate assemblies it can be construed as serving a non-peacefull aim, and with it goes the only possible vehicle by which you can organize the aid and supply you badly need.

Another important legal aspect is a lot less obvious. European Law is a rapidly developing system. The pace of that development is set by legal cases. There are lots of questions that are unresolved even in the most elementary matters. What is interesting for us in this is that there is a great deal of interest in professional circles and on the part of the European Courts to have cases brought forth on unresolved matters. With a bit of legal experience and creativity that is something that can be used to great advantage.

Actions can be planned so that they are harder to forbid, or so that legal action against interdiction can be facilitated. They can be arranged in such a way that the European Courts will be inclined to hear the case, because of their own institutional interest in the legal matter involved. There is no real way, in the Treaty on the Functioning of the European Union (TFEU), for a plaintiff to escalate his case by himself to the European Courts. The national supreme courts are under obligation to bring any case where there is relation to matters of European Law to a preliminary ruling of the European Courts, but there is no explicit way for the plaintiff to force them to if national law doesn't provide for that (which is a matter for the experts in the respective national law system.) (Art. 34 ECHR can be invoked, too, if there is willfull disregard for said obligation on part of national supreme courts. There can also be interim measures according to Rule 39 of the Court. But it is pretty improbable to obtain an injunction like that, since this instrument is mostly used for cases of imminent risk of death.)

Also, Hoffmann-La Roche must be taken into consideration: there is no obligation of the court to bring the case to Luxemburg, if the case is about a interim or provisional ruling and there is interpretation, not validity of European Law in question. Though, then, there is no real way to force a national court into obtaining a preliminary decision by European Courts, it still can be facilitated by resorting to plans of action that deliberately play on the EU/ECHR influence in national law, thereby creating at least the possibility to involve European Courts against national practice. This means making use of the provisions of Freedom of Assembly in ECHR and CFREU that go beyond national constitutional law.

### **D. Legal Limits of Protection**

Limitations of Freedom of Assembly are constituted by inhibitions, constrictions, but also sanctions of criminal law against participants or expulsion orders of foreigners who have taken part in protests. These measures must be justified according to Art 10, 2 and Art. 11, 2 EHRC by considerations of national security, territorial integrity or public safety (1), prevention of disorder or crime (2) and some other reasons (3) that are prescribed by national law (4) and necessary in a democratic society (5). These limitations are the same for Freedom of Assembly according to Art. 12 CFREU, cf. Art. 52, 3 CFREU.

#### **1. National Security, Territorial Integrity or Public Safety**

This provision might well be invoked here. There is ample explication of it in Stankov et. al vs. Bulgaria. This

goes so far as to uphold the right of a separatist organisation rallying thousands of supporters for its cause and even calling for expulsion of parts of the native population of its claimed territory. In the time of the last Balkan wars, that is pretty strong. Even in an atmosphere of civil wars the Court was not deterred from such a ruling. Also, it is worthwhile to know the decisions *Rassemblement and Christians against Fascism* (notifications, indiscriminate ban on demonstrations for security reasons). The CJEU decision *Schmidberger* was mentioned earlier.

## 2. Prevention of Disorder and Crime

Just the same way that here is not the room here to discuss what will, in these days and age, might be considered detrimental to public safety, it is with the concept of disorder. In principle, it means that law and regulations are upheld and enforced. Of course, public action against the border regime is an act that will go against existing regulations. Although the protection of European law might well permit actions that are not protected under national law, it shows that in the last, emancipatory action contains an irreducible element that is not to be subsumed under existing law. It is therefore vital to disassemble the campaign legally into components that are more endangered by interdiction, and other that serve to maintain the infrastructure and can keep the campaign viable. As long as there are legal ways of supply, and legal spaces for gathering and deliberation, the interdiction of one action or the other will not mean the end. Alternative plans can be discussed and organized as long there is enough support, the supporters and infrastructure are kept together and supply lines are holding. And for action to succeed will not depend on a victory in court alone but on pressure you can build and hold.

## 3. Other

There are other provisions for limitations, but they might not be as important, as the protection of health and morals (the health issue should be dealt with in cooperation with the Red Cross though), and the protection of rights and freedom of others. These are provisions that are in no way specific for our plans and therefore will not be discussed here.

## 4. National Law

Limitations must be motivated by said considerations and must be enshrined in national law. This must be judged with respect to respective national law, of which I am not an expert.

## 5. Necessary in a Democratic Society

This provision takes into consideration the role of Freedom of Assembly as a constituting principle of democratic societies. Necessary means the least intrusive means of limitation. There also has to be consideration of proportionality, cf. recently ECHR *Schwabe vs. Germany*.

## E. Derogation in State of Emergency, Art. 15 ECHR

Conventional states can declare Art. 10 and 11 ECHR derogated in case of war or emergency. In this, they are not subject to judicial review. The Court has ruled in *Ireland vs. UK* that the states have a wide margin of discretion. In fact the ECHR has never denied invocation of state of emergency. It concedes to the states the discretion on the factual preconditions of derogations, and holds them only to measures they can reasonably see as urgently necessary.

Although the Court will not judge on the preconditions of state of emergency, it has asserted its judgement over the disproportionality of state actions, cases *Aksoy and Demir*. It is also of interest that derogation under that provision does not away with obligations the state has taken upon himself in international binding treaties, so as the Geneva Convention on Refugee Rights 1951.

## F. Summary

Materially, political refugee action stands to gain something from making use of Freedom of Assembly as enshrined in European Law, as opposed to national Law. There are two main caveats. One is a fundamental limitation of public law itself, in that I cannot supersede or initiate meaningful social change but is designed to preserve social power relations. Change, ultimately, is up to much greater social forces. The law can be used to protest this process only to a certain extent.

The other limitation lies in the nature of European procedural law, which does not provide for an adequate means of legal remedy from the national courts to the European level. That weak point plays out especially

when interim or provisional measures of a court, or injunctions, are at stake. Sadly, legal protection of Freedom of Assembly rests, by experience, on swift legal remedies. Taking, for example, the administration to court for interdiction or restriction of an assembly will take years. A summary verdict of a court protecting the assembly from interdiction will take much less time. It will also make the fundamental rights a much sharper sword against the administration. Although generally helpful, the European dimension of Freedom of Assembly is greatly hampered by that. Nonetheless it is imperative to be taken into account.

Interim legal protection lies, then, in the realm of the national states, and subject to European judicial overview only later on in the principal proceedings. As a lever that is outside of the licence of national government or lawgivers, on the other hand, it is invaluable.