

## **Draft General Comment 37 on Article 21 of ICCPR (the right of peaceful assembly)**

### **Comments by the Portuguese Ombudsman, National Human Rights Institution**

*February 2020*

1. The Portuguese Ombudsman welcomes the initiative of the Human Rights Committee and recognises the valuable work undertaken in the drafting of the General Comment 37 on Article 21 of the International Covenant on Civil and Political Rights (ICCPR), finalised in its first reading. The Portuguese Ombudsman also very much welcomes the consultation launched to call for comments on the revised draft, leading to this contribution in its quality as National Human Rights Institution.

2. The right of peaceful assembly plays a key role in any State on which respect for human rights, democracy and the rule of law is to be meaningful and, hence, effective. Considering the interdependent approach to these core principles, the Portuguese Ombudsman strongly upholds the view that an express mention to «the rule of law» is made in § 1 of the Draft General Comment, together with democracy, human rights and pluralism.

Indeed, the right of peaceful assembly is deeply attached to democratic exercise and values, favouring public opinion-forming processes as well participation, inclusion, mobilisation, empowerment and citizenry, paving the way for strong civil society. This right helps open debate, with plurality of voices and presentation of alternative perspectives, not only within the framework of political action and multi-level decision-making procedures, but also, more generally, in the shaping of societies. Enjoyment of the right of peaceful assembly gives persons a voice and the power to manifest their views collectively, which is also instrumental to the full enjoyment and the advancement of implementation of other human rights (civil, political, economic, social and cultural rights). In turn, the rule of law requires that political power structures, as well as organisation of collective life in a society, are tailored to rules, procedures and institutions,

whose substance is founded on the values of respect for human dignity. Therefore, the rule of law is of prime importance for ensuring individual freedom and rights (including the right of peaceful assembly) and offering individuals the protection against arbitrariness and unlawfulness to which they are entitled as well (namely through timely access to judicial remedies in case of threat to or violation of their rights).

3. As a fundamental freedom, the right of peaceful assembly primarily requires States to abstain from interfering with its exercise (obligation to respect). This right is thus immediately applicable and encompasses various freedoms, including: freedom to promote, convene, organise and participate (but also meaning not to be compelled to participate) in a peaceful assembly; freedom to assemble peacefully without the need for prior authorisation; freedom to choose the time, location, purpose and manner of conduct of the assembly.

As a positive right that requires States actions (obligations to protect and fulfil), it is important to highlight both measures needed at domestic level (comprising legal and other appropriate measures) in order to ensure the safe exercise of the right of peaceful assembly (such as traffic regulation and protection against interference by third parties/counter-demonstrators) and procedures aimed at facilitating such exercise by providing for the use of public places and roads for purposes of peaceful gatherings.

The Portuguese Ombudsman notes with satisfaction that the Draft General Comment further elaborates on this conceptualisation, with significance for the affirmation of States' obligation in respect of the right concerned and as a significant reminder as regards the extent of States' duties in this realm.

4. The Portuguese Ombudsman also emphasises that the right of peaceful assembly constitutes a right of collective action (or, to put it better, «an individual right that is exercised collectively», as stated in § 4 of the Draft General Comment) that can be exercised private or publicly, both situations receiving protection under Article 21 of ICCPR. By other words and in order to help building the basis for consensus on the wording of §§ 4 and 13 of the Draft General Comment, the right to peacefully assemble does not necessarily encompass exercise in a public context. However, this latter

dimension must not be narrowly interpreted - public gatherings shall encompass both those that are held in public places or in places open to the public.

5. Some procedural aspects only apply to public events. In this sense, prior official notification by the organisers of a peaceful assembly can be justified where the gathering is intended to be held in the public space, taking into account the possibility for States to fulfil their positive obligations – i.e., notification systems are «permissible to the extent necessary to assist the authorities in facilitating the smooth conduct of peaceful assemblies and protecting the rights of others», as stated in § 80 of the Draft General Comment. In this context, the Portuguese Ombudsman also acknowledges the significance of the distinction the Draft General Comment makes between notification and authorisation regimes.

6. Restrictions to the exercise of the right of peaceful assembly require demanding justification. Arbitrary restrictions or bans to this right weaken collective organisation of people and social movements, damaging active and participatory citizenship (such in political, professional, religious, economic, social, cultural or environmental fields). Consideration of the approach of the authorities to peaceful assemblies, so as to assess whether State conduct leads to unduly restricting or even silencing the assembly, must not be confined solely to the site of the gathering and also encompass the moments situated up and downstream, as chilling effect measures may be present before and may remain present after the event. The Draft General Comment makes an important contribution in this direction, as it can be seen, for example, in § 37.

In this connection, the Portuguese Ombudsman considers that the issue of sanctioning procedures against organisers and or participants demands special attention, so has to make clear that a person cannot be subject to a sanction for the sole reason of convening or participating in a peaceful assembly within the scope of protection under Article 21 of ICCPR. Accordingly, the imposition of any sanction (administrative, disciplinary, criminal or civil) to be considered compatible with international human rights law must be provided for by law and be proportionate, requiring fair proceedings as well.

Cases, where sanctions for infringements involve arrest, detention or imprisonment, demand exceptional requirements, being subject to particular scrutiny.

7. The Portuguese Ombudsman takes this opportunity to recall the critical detrimental effect on societies where unjustified restrictions are particularly targeted at political parties, in view of their role in a representative and pluralistic democracy, anchored in the sovereignty of the people. The Draft General Comment rightly highlights this aspect. Moreover, as the Draft General Comment also points out, particular attention must be given to vulnerable groups as no discriminatory treatment is acceptable in the exercise of the right concerned.

8. Whilst on the subject of restrictions, States' conduct within the framework of states of emergency and/or situations requiring increased security measures (such those taken in the fight against terrorism) demand strict scrutiny, so as to prevent that, under the pretext of situations of exception, the enjoyment of the right to peaceful assembly is illegitimately curtailed.

Likewise, police conduct in the course of assemblies must be addressed with the greatest attention: police action must remain proportionate to the legitimate aims of preventing disorder and protecting the rights of the others. Within this framework and from a human rights perspective, the Portuguese Ombudsman shares the view that utmost caution must be exercised in relation to matters such as the use of surveillance technologies and both the lethality risk and indiscriminate effect of weaponry used by law enforcement officials within policing of assemblies. Compliance with international human rights law, including respect for freedom of expression and the right to privacy, on the one hand, and the rules on the use of force, on the other hand, must therefore be strictly observed.

9. Lastly, as for the mandate and the activities of the Portuguese Ombudsman, namely in view of its profile as NHRI, this institution does not lose sight of the deep connection of the right to peaceful assembly to active and participatory citizenship.

Indeed, the Portuguese Ombudsman remains attentive to compliance with international human rights and domestic law in the exercise of this right.

The Portuguese Ombudsman is empowered to receive and investigate complaints relating to events protected by the right to peaceful assembly as well as to autonomously address the competent authorities with a view to prevent and correct situations of illegality or injustice. In the work of the Portuguese Ombudsman, the number of complaints regarding peaceful assembly has not been significant. In these cases, as a non-judicial mechanism for the protection and promotion of human rights, it is therefore for the Ombudsman to assess whether restrictions and other authorities' decisions or actions on assemblies are in conformity with the relevant rules and, where applicable, to take necessary recommendatory action.

In addition, the role of the Portuguese Ombudsman arising from its NHRI mandate empowers this institution not only to monitor respect for human rights but also to raise awareness about human rights issues. The Draft General Comment highlights the role of national human rights institutions and, in this connection, the Portuguese Ombudsman notes that these bodies are also well placed to contribute to the building of a human rights culture and, with interest for the right at stake, to promote knowledge of and awareness on the applicable rules and standards among those authorities most directly involved in the process of ensuring peaceful assemblies, such as public actors at local level and law enforcement authorities.