

HCLU on Freedom of Assembly

Freedom of assembly was at once a precondition for and an achievement of the constitutional revolution that took place in Hungary in 1989. It was taken for granted afterwards for almost 15 years. However, it has now suddenly become the subject of heated controversies. Certain demonstrations (notably the rally of Neo-Nazis dressed in uniform) have recently shocked the public with their display of extremist views, while others have confronted public opinion with lifestyles which are strongly at odds with mainstream conceptions (the marijuana demonstration, the day of gay pride). It is small wonder that even some of our more liberal-minded compatriots are now expressing a desire for more effective intervention in the interest of peace and public order. On the other hand, the effervescence of 1989 progressively gave way, over the years, to a growing sense of political apathy. It is against this background that we have to understand the fact that an increasing number of people see all forms of expressing opinion that involve blocked roads, deferred traffic and noise as nothing but unjustifiable encroachments upon their privacy.

What is Freedom of Assembly and Why is it Important?

Assembling (demonstrating or rallying in a public place) is a particular type of expressing opinion and attitudes. Its most important defining features include the facts that

- the participants in an assembly express their views jointly with others;
- each participant takes part in the joint expression of opinion personally rather than through a representative;
- participation in an assembly is realized through physical presence rather than indirectly (through a signature for instance);
- the action involved usually occupies some part of public space;
- assembly is aimed at attracting public attention and exerting pressure.

Assembly multiplies the power of individual expressions of opinion. It makes it clear that

the opinion expressed is the opinion of a group of individuals ready to take concerted action and expresses their determination for joint action. Assembly is, therefore, a more effective means of influencing the social environment than individual utterances. At the same time, it is also a form of action which is more sensitive and more directly responsive to shifts and turns in public life than such forms of democratic participation which are tied to regular intervals (periodic elections, for example). Assemblies may respond to a wide variety of issues ranging from local matters to concerns raised by globalization. The participants of anti-globalization rallies held at the scene of meetings of the World Trade Organization, the World Bank and the G8, come together from a large number of countries, and these demonstrations are mostly organized through the Internet. Collective action often serves to amplify the voice of social groups lacking access to other means of public communication, such as dissenting religious communities, unconventional ideologies and alternative lifestyles. The right of assembly, then, is not a mere form of self expression: it is a means for shaping the world around us. Democracy based on the active participation of citizens is not conceivable without a robust freedom of assembly.

What are the Characteristics of the International Practice?

Article 20 of the Universal Declaration of Human Rights as well as Article 21 of the International Covenant of Civil and Political Rights declare the right to peaceful assembly.

Article 11 of the European Convention of Human Rights declares: "1. Everyone has the right to freedom of peaceful assembly (...) 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 interest 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."

The Belgian constitution of 1831 is the classic source for the statement of freedom of assembly: "Belgians have the right to gather peacefully and without arms, in conformity with the laws that regulate the exercise of this right, without submitting it to prior authorization. This provision does not apply to open-air



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meetings, which are entirely subject to police regulations." The Basic Law of the German Federal Republic includes a similar wording: "All Germans have the right to assemble peacefully and unarmed without prior notification or permission. With regard to open-air meetings this right may be restricted by pursuant to a law." Thus, the German law knows the practice of prior notification. The Federal Constitutional Court issued, however, a ruling in 1991 to the effect that in cases where there is genuine urgency to respond to some event seen to be of great importance, failure to give notice constitutes no ground for the police to dissolve the assembly. At the same time, the Court upheld the reasonableness of expecting that notice be given to authorities as soon as possible (with deadlines becoming tighter as usual).

German regulations incorporate special devices for preventing assemblies which pose a threat to democracy. It is forbidden in Germany to demonstrate in front of the building of the Parliament, or to hold meetings in uniforms, with masks on, and with dogs. On the other hand, police are allowed to make photographs of demonstrators only in cases where there are very strong reasons for doing so.

In Austria, public – open-air – assemblies are to be reported to police authorities 24 hours before the time of the event.

One of the most widely known Strasbourg Court rulings on the right of assembly is the one delivered in "Ezelin v. France". A verdict made by a court in Guadeloupe, a department of France, led to a heated mass demonstration in February 1983. The demonstrators damaged public administration buildings, insulted police officers and court personnel and painted graffiti on the walls of public buildings. Disciplinary proceedings were launched against a local attorney, Roland Ezelin who had been among the demonstrators and was later reprimanded by the appellate court. Ezelin was censured for failing to express his disapproval of the illegal acts and insults and for failing to express his disagreement through leaving the demonstration. The court had no other legal provision to appeal to in support of its decision than a code of conduct of the profession of attorneys. The Strasbourg judges held that it was wrong to use disciplinary measures to discourage attorneys from expressing their convictions in similar situations: "(...) the freedom to take part in demonstrations with a

peaceful purpose – especially in a demonstration which has not been prohibited – is so important as to forbid any restriction, even in the case of an attorney, and especially if the person concerned does not do anything objectionable in the process."

In "Platform Ärzte für das Leben v. Austria" the Strasbourg Court ruled that the state bears a responsibility for upholding the institution of the freedom of assembly. Thus, beyond its being subject to an obligation to refrain from interfering with this freedom, it has an obligation to secure the conditions of peaceful assembly, which includes the protection against harassment by counter-demonstrators.

How Does the Law Provide for Freedom of Assembly in Hungary?

According to Section (1) Paragraph 62 of its Constitution, the Hungarian Republic recognizes the right to peaceful assembly and guarantees its free exercise. The Constitution provides that the adoption of the Assembly Act requires the votes of two thirds of members of Parliament present. Enacted at the dawn of Hungary's transition to democracy, Act III/1989 (the Assembly Act) defines freedom of assembly in the following terms:

- "The right of assembly is a liberty right due to everyone which is recognized, and the undisturbed exercise of which is guaranteed, by the Hungarian Republic."
- "The right of assembly may be exercised in the form of peaceful gatherings, rallies and demonstrations (henceforward "organized events"), which give participants an opportunity to express their opinion freely."
- "Participants in organized events have the right to communicate their shared view to anyone who is interested in it."

The Act sets a general limit to the right of assembly: this right may not be exercised in any way which counts as a criminal act or an invitation to commit crime and may not involve any encroachment upon the liberties of others. The Act does not apply to religious, cultural, sports and family events or election campaign events, and it leaves the regulation of the right of assembly of members of the armed forces to the Service Act.

According to the Assembly Act, only Hungarian citizens and citizens of other countries with a residence permit in Hungary are entitled to organize public events. As to open-air

meetings, their organizers are under an obligation to notify the relevant police authorities three days before the date of the event. Notification has to be in written form, and has to specify details such as the expected beginning and finishing time of the event, the scene, the route, purpose, the number of organizers, the expected number of participants, the number of organizers in charge of the undisturbed flow of events, and the name and address of the person, or persons, entitled to represent the body or group organizing the event. The police may prohibit an event from being held at the time and place specified by the organizer within 48 hours from receipt of the notification (the organizer must be informed of the prohibition within 24 hours), if and only if one of the following three conditions obtains: 1. holding the event is likely to seriously jeopardize the undisturbed activity of representative bodies, 2. it involves the same danger for the normal functioning of courts, or 3. it is likely to cause unreasonable disturbance in the order of traffic. The organizer is entitled to request a court review of the police decision within three days from official receipt of the information. The court decides within three days from receipt of the request, in extrajudicial proceedings. If the court annuls a police decision at a time after the date to which the event was originally scheduled, it is sufficient to inform police of the new date 24 hours before it.

Participants in the event are not allowed to carry arms or other weapons. A person from the police may attend. In accordance with civil law rules, the organizer and a possible tortfeasor are responsible jointly and severally for any damage caused by the latter. Participants are under an obligation to leave the scene of the event at the time specified in the notification as the time of finishing.

The limits set to the right of assembly are embodied in the possible imposition of a ban, on the one hand, and in the dissolution of the event, on the other. The Assembly Act obligates the organizer to dissolve the event if the behavior of participants poses a hazard to the legality of the event and there is no other way to restore order. Police are entitled and obligated to dissolve an event if

- the exercise of the right of assembly conflicts with the general prohibitions enunciated in the Assembly Act (seriously endangering the functioning of representative bodies or of courts and unreasonably disrupting the order of traffic),
- participants arrive carrying firearms or other weapons,



- the event falls under a duty of notification to authorities and it is held without any such notification, or at a time, in a place, along a route or according to a schedule other than that announced, or
- despite a prohibition.

Dissolution by the police is to be preceded by a warning. A participant in the event is entitled to initiate proceedings to find out the legality or otherwise of the dissolution within 15 days. For authoritative guidance on further details of the police procedure see the Act XXIV/1994 on the Police and the Ministry of the Interior Order 15/1990. (V. 14.).

The right of assembly was classed with communication rights by the Constitutional Court Decision 30/1992. (V. 26.), a ruling which played a pioneering role in defining the constitutional content of the freedom of opinion. We have thus no reason to think that assembly as a special form of expressing opinion may be restricted on grounds other than those which circumscribe the freedom of opinion itself. The only ruling of the Constitutional Court to deal specifically with the right of assembly [55/2001. (IX.2 9.)] treats assembly as an act of collective expression: "Articulating views and information and their sharing with others and the joint forming of opinions could hardly be possible without the right to organize meetings, to hold them and to take part in them." It is rather regrettable that, in its subsequent passages, this ruling takes up a rather inconsistent attitude towards the positions adopted by the Court regarding basic rights in the 1990s.

Freedom of assembly – as any other fundamental right – imposes on the state an obligation to protect the institution ("to guarantee its free exercise" – Assembly Act). This obligation entails the responsibility for police to inform keepers of a public road before an event to be held there, to contribute, at the organizer's request, to securing the orderly flow of the event, and to take steps to remove persons whose behavior disrupts the event. The state protects the freedom of assembly with the instruments also of penal law as well: someone who, by brute force or threats, illegally hinders others in the exercise of their right of assembly is guilty of a violation of the right of assembly (Paragraph 228/A of the Penal Code) while someone who, by brute force or threats, defies the steps taken by the organizer of a public event in the interest of public order is guilty of breach of order (Paragraph 271/A of the Penal Code).

What are the Main Problems of the Freedom of Assembly in this Country?

THE PURPOSE AND CONTENT OF ASSEMBLY

1. After seeing that no legal remedies were forthcoming to complaints based on their allegations that the Socialist party had cheated at the elections of 2002, extreme right wing groups blockaded the Elizabeth bridge in Budapest without previous notification, demanding a recount of the ballot and the departure of the elected government. In February 2003 members of the association Blood and Honor, dressed in uniforms held a military-like parade in front of the Parliament. These two events moved vice ombudsman Albert Takács to submit a proposal for amending the Police

right of assembly may only have external restrictions; "obvious unconstitutionality" of the ideas popularized by the event cannot serve as an acceptable ground for prohibition. Should this position be abandoned by the state, we might see meetings outlawed on the grounds that they express legitimist, euro-skeptical or radical anti-capitalist views or those directed at the reintroduction of the death penalty or at a general ban on abortion.

The outer limit for the exercise of freedom of assembly should be the same as that of freedom of expression in general: a public event may be dissolved if it raises the clear and present danger of a violent act. Undeniably, the expression of an opinion as part of a public event is more likely to conjure up the sense of danger than the same opinion argued in an



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Act so as to empower police to prohibit in advance demonstrations which have a clearly unconstitutional purpose.

HCLU does not agree with the idea of banning a demonstration on the grounds that the ideas propounded by it are wrong and morally despicable. As freedom of assembly is a special version of freedom of expression, the Constitutional Court's dictum on the latter applies to freedom of assembly, as well: "The right to the free expression of opinion protects an opinion irrespective of the worth and truth it contains. (...) What the Constitution guarantees is free communication – understood both as individual behavior and as a social process –; the fundamental right to expression does not depend on the content of the opinion expressed." (30/1992. (V.26.)). The

article in a paper. But one can only judge as to the immediacy and seriousness of the danger in awareness of the concrete circumstances of a particular case. The right of assembly cannot be restricted with reference to a mere statistical probability of some conceivably dangerous situation emerging or of someone possibly committing a criminal act.

2. In January 2004 the national flag of Israel was burnt by a few persons at the end of a demonstration held for a ban on Tilos Rádió station. According to Paragraph 217 of the Penal Code someone who indulges in conduct so blatantly disdainful of the community and so violent as to have a tendency to shock or frighten others is guilty of violent disorder. The authorities argued also that the

exercise of the right of assembly may not be, or involve, a criminal act.

HCLU does not agree with dealing such cases as problems for criminal law. Freedom of expression protects ordinary speech and symbolic speech to the same degree. The conduct of political agents today is increasingly shaped by the way it is perceived via the media. There is a concomitant shift in political action from mass events to spectacular events. Likewise, the collective expression of opinion is more and more frequently clad in symbols. In pacifist demonstrations in the 1960s and 70s in the United States draft cards and the stars and stripes were burnt routinely, as it were. The act of burning an object (especially one in the possession of someone else) in a public place can no doubt come within the purview of the rule against violent disorder. However, if the burning (or any other act which damages an object) is performed with the purpose of expressing opinion and if, further, no one's bodily integrity or property comes to be endangered, then the considerations for symbolic expression protected by the freedom of expression outweigh the considerations of public peace which is protected by the rules on violent disorder. This is especially so where a harsh form of expression occurs as part of a larger legally permitted event rather than as wholly unexpectedly, "out of the blue", as a result of which it causes fear in passers-by.

ORDER OF TRAFFIC

Assembly has a natural tendency to disturb the flow of traffic. This is an inevitable side-effect of it, but also an important means of attracting attention. It is therefore unreasonable to demand of assembly that it should not disturb traffic at all. The question that can be reasonably discussed is the extent of disturbance which society can be expected to put up with in order that the right of assembly can be effectively exercised.

According to the Assembly Act police "may prohibit an organized event from being held in the place and at the time specified in the notification" if "it is likely to involve an unreasonable degree of disturbance in the orderly flow of traffic". This restriction is neutral towards to the purpose of, and the views to be expressed by, the event. Constitutional democracies give priority to regulations which are neutral between ideologies. Neutral are legal formulations which may be presumed to evoke the same attitudes in citizens irrespective of the ideological and party commitments they should hold. "Unreasonable harm to the order of traffic" – a neutral notion – evoked the same attitudes in the general public in the past for fourteen years. There were perhaps one or two demonstrations a year which were prohibited by police on such grounds, and this did not occasion any concerns in the public.

In February 2003, this practice suddenly had to face a crisis. The police first banned a

demonstration announced to be held by association Blood and Honor on Heroes' Square only to proceed, a couple of days later, to approve of a meeting to be held by a left-wing youth association at the same time in the same place. This was followed by a ban on a rally along Andrassy út to Heroes' Square to be held by Civilians for Peace, a loose conglomeration of various anti-war groups. In addition, police also prohibited a demonstration, which has been held for several years in support of Tibet. The ban was justified in every case with reference to "unreasonable disruption of the orderly flow of traffic". Presumably as a result of public protests, Civilians for Peace was finally allowed to meet in the original place at the original time and Blood and Honor was allowed to line up in front of the building of the Parliament.

A legal formulation which had originally been conceived to be neutral, began to be applied in a spirit contrary to its original purpose. It is

suspected that government authorities were purposefully abusing reference to "disruption of the order of traffic" in order to prevent both the Neo-Nazi event and the events critical of official Hungarian foreign policy. This suspicion is corroborated by the fact that the event organized by Civilians for Peace had been announced for a Saturday afternoon when traffic is very light in downtown Budapest. In addition, traffic statistics indicated that cordoning off the street would affect fewer people than there were going to be taking part in the rally. Regrettably enough, the Constitutional Court itself did contribute, with its decision 55/2001. (XI.29.) to the state of disorientation which befell law appliers in February 2003. The reasoning of the Court's decision is worded in such a way that it does not rule out an interpretation on which the interest in the undisturbed flow of traffic is protected by a constitutional fundamental right just as the interest in free assembly in a public place is: "meetings (...) inevitably infringe the right of those not participating in the event to



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unimpeded movement in general and thus to traffic in particular – with respect to these two fundamental rights the authorities also must aim for reducing to the ultimately inevitable minimum the difficulty caused by the exercise of the one in the effective observance of the other.” This – we think – is a mistaken view of the matter, and it is not in harmony with the view of the Constitutional Court adopted in an earlier decision. The earlier decision in question [30/1992. (V. 26.)] set up a kind of order of importance or weight among considerations competing with communication rights: “The restrictive law to be weighed as against the freedom of opinion has greater weight if it aims directly at the effective exercise and protection of another fundamental constitutional right; it has less weight if it protects such rights indirectly, with the mediation of some institution and it is the least weight if its object is some abstract value in itself (e.g. “public peace”). The legislative intent inferable from the structure of the Assembly Act took “the orderly flow of traffic” into consideration undeniably as an abstract value similar to “public peace”. The 2001 decision quoted above turned this abstract value into a fundamental right and promoted it to the rank of the most powerful reasons that are allowed to trump freedom of expression and of assembly.

On a Monday evening in December 2003, militant right-wing groups were gathering for a march from Gesztenyés kert in Buda to the Prime Minister’s private residence, a house in a street on the slopes of a nearby hill. Yet again, police banned the rally with reference to “unreasonable disruption of the order of traffic” (the rally was held despite the ban and was therefore dissolved).

SPONTANEOUS DEMONSTRATIONS

A society with a lively democratic public life faces from time to time situations where part of the public feel an urgency to respond immediately to some political event. Spontaneous outbursts of this kind of reactions show how important the freedom of assembly in a democratic society is. The first serious mass event to occur in post-1989 Hungary was a spontaneous response of this kind. The blockade of taxi drivers set up in October 1990 was unleashed by the government’s decision to raise the price of petrol drastically without any attempt at previous negotiation.

Constitutional debates of the time centered around the notion of civil disobedience. The



legality or illegality of spontaneous mass action came, for a second time, into public notice as a result of the “seizure of Elizabeth bridge” on July 4, 2002.

The petition adjudicated in decision 55/2001. (XI. 29.) of the Constitutional Court called into question the very constitutionality of the obligation to give advance notice (Paragraph 6 of the Assembly Act) arguing that the provision in question excludes the possibility of a spontaneous exercise of the right of assembly. As mentioned before, the Constitutional Court took as its point of departure the idea that every street event leads to a clash between the freedom of assembly and the freedom of movement. The court held that “(...) in order to forestall possible conflicts between the two fundamental rights, namely the right to assembly and the right to free movement, the authorities must have the power to guarantee the effective exercise of both rights, or if that is impossible, to guarantee that one of them is temporarily overridden in favor of the other only to the extent that is absolutely necessary. This substantiates the demand of authorities to be notified in time of an event to be held in a public place, and that is exactly the purpose which is served by the legal prescription that authorities are to be notified of events in advance.” What the Court failed completely to examine was the extent to which the opportunity to give an immediate response to some event of high political significance is an essential part of the freedom of assembly.

COUNTER-DEMONSTRATIONS

On the afternoon of May 4, 2003 Hempseed Association had organized an event in support of the legalization of soft drugs. Extreme right wing groups were organizing a counter-demonstration to be held at the same time and in the same place, Vörösmarty square in the central pedestrian area of Budapest. At the time the Hempseed Association event was about to start, there were two police officers on the spot. The opposed parties were separated only by cordons. From the very first moment on, the counter-demonstrators ruined the other event with their incessant, loud whistling. They also threw eggs at participants of the main demonstration and after some time started literally pushing the demonstrators off the square. One and a half hours had gone by before police intervened by dissolving both demonstrations, without making any attempt to restore order.

After the scandal on Vörösmarty square government circles blamed the Assembly Act arguing that the law in force allows for the organization of counter-demonstrations. In our view, this is not objectionable in the least. Counter-demonstrations have an important and accustomed role to play in a democratic society. When Blood and Honor finally did hold their parade in front of the Parliament in February 2003, there was an anti-Nazi event on the other side of the square, a legitimate response to the Hungarist meeting. Demonstrators of opposed creeds facing each other

angrily are a common sight in cities of Western European countries, although, no doubt, they are separated by lines of policemen with transparent glass shields and in crash helmets.

Just as the people gathering at the call of Hempseed Association had the right to demonstrate on Vörösmarty square, their opponents also had the right to demonstrate on the same square at the same time. The right to demonstrate entails the right to demonstrate against a demonstration. A counter-demonstration is subject to the same regulations as the original demonstration is: it is not allowed to involve criminal acts and it is not allowed to violate the rights of others, including, needless to say, the rights of those participating in the original demonstration to assemble and to express their views.

According to Paragraph 62 of the Constitution – and Paragraph 1 of the Assembly Act, a provision in harmony with the former – the Hungarian Republic does not only recognize the right of assembly but also guarantees its free and undisturbed exercise. According to the Police Act, the tasks of police include the prevention of criminal acts, the maintenance of order in public places (policing), and the provision of protection against acts directly threatening or injurious to life, physical integrity and the security of property. In the case of the Vörösmarty square demonstration and counter-demonstration police should have guaranteed the free and undisturbed exercise of the right to peaceful assembly. If police had isolated those who were committing the few scattered occurrences of violence – keeping within the bounds of the requirement of proportionality (see Paragraph 15 of the Police Act), the events would not have reached the stage where the only choice left was to dissolve both demonstrations.

“RED TAPE”

Organizers of demonstrations, in Hungary and especially in Budapest, sometimes have to overcome hurdles of the following bureaucratic sort. The collective expression of opinion usually results in a noisy event. The noise

made by an average demonstration usually far exceeds the upper limit laid down in ministerial and local authority orders. One particular demonstration, on an average weekday in the middle of the day in front of the Ministry of Finance building was dissolved by police with reference to such a rule. In other cases organizers of meetings were asked to show their permit for the occupation of community-owned territory; in yet another case, the local authority, the owner of the public area, demanded payment for its permission to use the area for the purpose of a meeting.

In these and similar cases authorities take the right of assembly enshrined in the constitution and regulated by a law as trumped by legal instruments of lower order. This is clearly at odds with the rule of law. Rules on noise protection, use of public areas, order of traffic and rules of similar kinds should apply to the use of public areas if and only if the acts in question are not protected by the Assembly Act. These lower order rules cannot apply to events in the purview of the Assembly Act.

What Kind of Changes do We Need?

The Assembly Act in force did well in the service of the political transformation of 1989 and then in the service of democratic political life. We know that it is not possible to make regulations which absolutely rule out all kinds of arbitrary action on the part of authorities. Nevertheless it is easy to see how the rules in force lend themselves to abuse while at other points creating unnecessary obstacles to the full use of freedom of assembly.

- The Assembly Act fails to define with the requisite concreteness the notion of an “organized event”, and this failure is a source of much practical difficulty. It is not made clear under what conditions the rules of the Assembly Act may be applied to a spontaneous company of a few people in the street or activists distributing flyers.
- The obligation of the organizer of an event to specify the “purpose and schedule of the event” is unnecessary for the purposes

of maintaining public order (i.e. for policing purposes), and it amounts to an unjustifiable interference with freedom of assembly. In addition, this rule creates the false belief in authorities dealing with such matters that they are supposed to examine the message of the assembly in deciding about approval or prohibition.

- Following the German example, Hungary ought to legalize demonstrations which arise spontaneously. The state would have no obligation to guarantee the undisturbed flow of a spontaneous demonstration, participants would be obligated to observe the general norms that regulate the use of the public area and an organizer missing a real opportunity to notify authorities of an event organized by him/her would be acting at the risk of a sanction for misdemeanor.
- The Assembly Act should unmistakably declare that participants of peaceful assemblies are bound only by the rules of assembly law (which includes provisions of the Penal Code as the Assembly Act clearly states that an organized event may not result in a criminal act.) This could provide a means for preventing the kind of harassment to which citizens forming an assembly often find themselves exposed under the pretext that they violate the rules of noise protection and similar provisions.
- There is no convincing justification for the Assembly Act to exclude foreigners and legal persons from acting as organizers of public events. Freedom of assembly is a fundamental right due everyone and one of its components is the right to organize an assembly. The Act on the service relationship of members of armed forces is too vague, imposing restrictions on the right of assembly of members of armed forces to an extent which remains poorly defined. In our view, the Service Act cannot legitimately restrict the right to assembly of members of armed forces unless the reasons for restraint are directly connected with their service duties, and only to the extent which is absolutely necessary in light of considerations of professional duty.

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