



COMMENTS TO THE DRAFT TEMPORARY ACT MEASURES COVID-19 AND THE IMPLICATION ON THE RIGHT TO FREEDOM OF ASSEMBLY

Developed by the European Center for Not-for-Profit Law Stichting (ECNL)

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The European Center for Not-for-Profit Law Stichting is providing the following brief analysis on the draft law regarding temporary measures in light of Covid-19 health crisis in the Netherlands ([Tijdelijke wet maatregelen covid-19](#), as of July 13, 2020) along the lines of fundamental freedoms and human rights, with a particular focus on the right to freedom of assembly.

An overarching concern with the draft law is that it gives the minister full scope to impose far-reaching restrictions on the behaviour of citizens through a ministerial regulation, which the Dutch Parliament cannot discuss substantively and which cannot be amended (Parliamentary oversight is an important safeguard and constitutional right of parliament when it comes to important freedom-restricting measures). This is contrary to the standards in the European Convention of Human Rights which provide that any restrictions imposed must have a formal basis in law. We understand that this is under discussion in the Parliament. Therefore, in this analysis, ECNL will only focus on the impact on the right to peaceful assembly.

Concerns with the draft law regarding its impact on the right to peaceful assembly

The law guarantees the right to freedom of assembly in that it provides that groups can come together to exercise this right as long as they respect other measures of the act such as keeping safe distance (Article 58g (2)d.) even if restrictions on other types of gatherings may be imposed by the minister.

However, the draft among others, introduces a possibility for the use of public (Article 58h) and private places (Article 58n) to be restricted. This means that the minister through a ministerial order can introduce limitations to the right to freedom of assembly in terms of the public place where assemblies can take place or limit the number of people.

According to Article 58h of the draft law, the minister with a regulation can designate which public places or publicly accessible places may be closed for the public (e.g., parks, shopping malls, squares) or may be opened but under conditions set forth in the regulation, including on the number of persons that may be present in that public





space.¹ The draft law does not provide criteria or minimum conditions that will guide the decision of the minister in drafting the ministerial regulation, which creates uncertainty, gives discretion to the minister and may lead to potentially unnecessary and disproportionate limitation on the freedom of assembly.

With this the draft law raises concerns from human rights standards perspective in regard to the **foreseeability, necessity and proportionality of the law** and will likely violate international standards and commitments under the European Convention of Human Rights and International Covenant on Civil and Political Rights.

International and European standards regarding regulating the place of assemblies

According to the international and European law standards², it is the obligation of authorities to ensure that any restriction on civic freedoms during times of emergency, whether or not it is based on a derogation of relevant international conventions, is *clearly established by law, in compliance with relevant constitutional guarantees and proportionate to the aim it pursues*³.

In addition, *“also in times of emergency, that restrictions on the freedom of peaceful assembly are clearly prescribed and easily accessible to the public, and that they are based on law, proportionate, time-bound and non-discriminatory.”*⁴

Based on these international standards, Article 58h does not meet the requirements of legality and foreseeability as its formulation is an open-ended provision that does not include specific requirements regarding when and under which criteria access to public places may be restricted via ministerial regulation.

“The more specific the legislation, the more precise the language used ought to be. Constitutional provisions, for example, will be less precise than primary legislation because of their general nature. In contrast, legislative provisions that confer discretionary powers on the regulatory authorities should be narrowly framed and should contain an exhaustive list of the grounds for restricting assemblies. Clear guidelines or criteria should also be established to

¹ This excludes places such as polling station, a place intended for a meeting of the States General or a committee thereof, a courthouse and a place intended for a meeting of the municipal council, provincial councils and the general management of a water board, or of a committee set up by these bodies.

² Including, but not limited to: International Covenant for Cultural and Political Rights; General Comment No. 37² on Article 21 of the ICCPR on Right of peaceful assembly – by the UN Human Rights Committee General; European Convention on Human Rights; relevant case law of European Court of Human Rights; work of the European Commission for Democracy through Law (Venice Commission); the standards on freedom of assembly of The OSCE Office for Democratic Institutions and Human Rights.

³ See [Mehmet Hasan Altan v. Turkey, 13237/17](#), European Court of Human Rights, 20 March 2018.

⁴ “OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic”, https://www.osce.org/files/f/documents/e/c/457567_o.pdf, OSCE/ODIHR 2020





govern the exercise of such powers and limit the potential for arbitrary interpretation.” (para 37, Guidelines on Freedom of Assembly, 2nd edition, ODIHR)

With regard to the requirement of proportionality and necessity, both Article 58h as well as the rest of the proposal (i.e. Article 58b sub 2), do not articulate a clear and concrete assessment framework. In terms of necessity, it is not clear in what concrete type of situations restrictions are needed to be imposed in relation to accessing certain public places. Articulation of a clear assessment framework for the necessity would prevent unnecessary restriction on access to public spaces and thereby freedom of assembly.

In a situation whereby it would be established that restrictions are indeed necessary, the measures ought to be proportionate to the aim as well. This needs to be balanced out in a particular situation under clear and specific conditions. However, this is not included as a part of the provision of Article 58h, neither throughout the rest of the proposal. This means that the proportionality of a given ministerial regulation cannot be in effect assessed, even though this is a requirement of the international law.

In terms of the possible prohibition of assemblies a general prohibition on demonstration is only acceptable if there is a real danger of these resulting in disorder which cannot be prevented by other, less stringent measures and if the disadvantage of the ban’s impact on demonstrations is clearly outweighed by the security or public health considerations invoked to justify it⁵. This is not clearly guaranteed in the draft law.

The recently changed and adopted General Comment No. 37⁶ on Article 21 of the International Covenant on Civil and Political Rights (ICCPR) on Right of Peaceful Assembly – by the UN Human Rights Committee – addresses the restrictions on the element of place. It stipulates that peaceful assemblies may in principle be conducted in all spaces to which the public has access or should have access, such as public squares and streets.⁷ While rules concerning public access to some spaces, such as buildings and parks, may also limit the right to assemble in such places, the application of such restrictions to peaceful assemblies must be justifiable in terms of Article 21 of ICCPR. Peaceful assemblies should not be relegated to remote areas where they cannot effectively capture the attention of those who are being

⁵ See [Lashmankin and Others v. Russia, no. 57818/09](#), European Court of Human Rights, 7 February 2017, at para. 434.

⁶ Accessible [here](#).

⁷ Inter-American Commission on Human Rights, [Protest and Human Rights](#), para. 72, p.31.





addressed, or the general public.⁸ As a general rule, prohibitions on all assemblies anywhere in the capital;⁹ in any public location except a single specified place, either in a city,¹⁰ or outside the city centre;¹¹ or prohibitions on assemblies in “all the streets in the city”, may not be imposed.

In addition, the designation of the perimeters of places such as courts, parliament, sites of historical significance or other official buildings as areas where assemblies may not take place should generally be avoided, inter alia because these are public spaces. To the extent that assemblies in and around such places are restricted, this must be specifically justified and narrowly circumscribed.¹²

This demonstrates that international standards for the protection of peaceful assemblies stress the importance of respecting also the place of the assembly. For these reasons, it would be important to continue discussions with civil society and experts on how to further strengthen standards through Article 58h so to ensure that it address the standards of foreseeability, proportionality and necessity.

About ECNL Stichting

The [European Center for Not-for-Profit Law Stichting](#) (ECNL) is a non-governmental organization based in the Hague, Netherlands, which aims to create legal and policy environments that enable individuals, movements and organisations to exercise and protect their civic freedoms. The work of the ECNL is focused around a number of strategic priorities including civic space, public participation, the right of peaceful assembly, and technology and artificial intelligence. In all of these areas, ECNL's objective is to put into action transformational ideas that address pressing human rights challenges.

⁸[CCPR/C/KOR/CO/4](#), para. 52; [CCPR/C/KAZ/CO/1](#), para. 26.

⁹[CCPR/C/DZA/CO/4](#), para. 45.

¹⁰[Turchenyak et al. v. Belarus](#), Views of the Human Rights Committee, July 2013, para. 7.5.

¹¹[Sudalenko v. Belarus](#), Views of the Human Rights Committee, April 2015, para. 8.5.

¹²[Zündel v. Canada](#), Views of the Human Rights Committee, August 2003, para. 8.5.

