

## In-House Counsel

# Public order emergency: From a German perspective | Clemens Arzt

By Clemens Arzt



Clemens Arzt

(March 18, 2022, 1:02 PM EDT) -- James Manson's recent contribution (The emergencies are over, but many questions remain) on the necessity and justification of the "public order emergency" (the POE) constitutes an excellent starting point for further debate. A German professor of police law and freedom of assembly by profession, I arrived in Canada for a research stay on police powers in law-and-order policing in early February. A few days later, I unexpectedly was immersed in a challenging case study.

It is good luck from a rights-based point of view — and a tenet from our experiences in 1933 — that Germany does not have anything comparable to the *Emergencies Act* of 1988 (the EA). In our capital, we witness on average about 5,000 demonstrations a year. Very few are getting into trouble with the police, but some do. Like Canada, Germany has demonstrations stretching out for days, weeks, or months in forests, woods, coalmines, or in the middle of our cities. More recently, we had an increasing number of demonstrations on freeways, which were highly controversial in the courts but some agreed that protest against a freeway might happen on freeways.

Freedom of peaceful assembly — under German constitutional law — protects the expression of opinion in physical gathering with others. Freedom of assembly was construed as a fundamental right protected by s. 8 of the German Constitution (*Grundgesetz*) in a landmark decision of the German Constitutional Court in 1985 (BVerfGE 69, 315; short version in English) in which police have to protect and handle such events. Of course, demonstrators would often blame the police for doing so with illegal or excessive means, and often the courts would agree with them.

Yet, any means of policing a demonstration has to pass the test of freedom of assembly. For this reason, we have specific statutory laws granting demonstrators a higher level of protection against any means of policing demonstrations than in day-to-day law and order policing. Police officers and their unions would often call for more means, more equipment, more powers etc. However, under German law more police powers can only be implemented in a regular proceeding by parliament, never by executive regulation, order or bylaws.

Back to Canada. We all read about "illegal blockades" in Ottawa, which were certainly disturbing other citizens. Government stressed that peaceful protest would be admissible beyond doubt, but not the blockades. I was wondering why hardly any MPs or members of government in an extensive debate in the House of Commons attempted at least even a preliminary legal analysis of ss. 2(b) and/or (c) *Canadian Charter of Rights and Freedoms* (the Charter). According to more recent doctrinal writing, scant case law on freedom of peaceful assembly might well be overcome if one relates freedom of assembly with its physical dimension, means and forms of assembling for protest, as Guy Regimbal and Dwight Newman (*The Law of the Canadian Constitution*, 2017) and others (*Exploring a More Independent Freedom of Peaceful Assembly in Canada*, 2017, Basil Alexander; and *La manifestation: une forme d'expression collective*, 2012, Gabriel Babineau) have pointed out.

What I missed mid-February was a (more) detailed analysis or justification by government as to why the blockades in Ottawa were not protected by Charter rights, be it freedom of expression or

assembly. I do not agree with the contents and slogans of most of these protests. Nevertheless, content of slogans is predominantly a political question, which needs dispute and discussion. Slogans become illegal only if there is a clear-cut provision in law, prohibiting defamatory speech or hate speech for instance, but not thought. From a rights-based approach, any restriction of freedom of expression and/or assembly has to be general in nature, imposed by (statutory) law, being in force before an incriminated event takes place. In February 2022, it was sanctioned instead by purpose law after the protest started. Was that rule *by law* substituting for rule *of law*?

Mentioning freedom of assembly might help to look into problems from a more sophisticated, rights-based approach. What exactly was illegal in these various forms of protest in Ottawa? Certainly, it was not an insurgency despite the dreams of some participants. Is it per se illegal to use trucks as a means of protest, if you want to make "visible" such protest? For many participants, COVID-19 measures were probably an alibi for sweeping fantasies of system change. However, does that per se eliminate Charter protection? Is the temporary blockade of a bridge or road off Parliament Hill and parliamentary precinct (s. 79.51 *Parliament of Canada Act*) per se illegal if you — radically from an ideological point of view — oppose government? Is an "ideological" point of view per se illegal? Are economic interests — which seemed to be the major point of justification for the declaration of a public order emergency — per se superior to protest, temporarily impeding business?

According to the Charter, people relying on freedom of expression and/or assembly must obey reasonable limits prescribed by law justified in a free and democratic society. No doubts. Examples of limitations "prescribed by law" are, in the *Criminal Code*:

63 (1)An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they

- (a)will disturb the peace tumultuously;

To my knowledge, the government never referred to these provisions in its declaration, reports and explanations submitted to Parliament. Imagine the threshold of s. 63(1) *Criminal Code* was met. Why did police not prosecute any transgression and stop ongoing illegal behaviour? Imagine, alternatively, that the legal threshold of s. 63 (1) was not met in Ottawa but replaced by emergency measures implementing "contraventions against regulations" by government without any parliamentary deliberation and procedure. Is that still appropriate in a "free and democratic society" from a rights-based perspective?

I think a reasonable hypothesis is that Canadian law may lack a (statutory) system of clearly delimited police powers in law-and-order policing (*The Gap in Canadian Police Powers*, 2009, W. Wesley Pue). This at least is the case in former British colonies, such as India. Such (statutory) law has to take into account specific Charter rights. For instance, a loudspeaker used by private business (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62) might be something different from such use in a public assembly protected by s. 2(c) Charter. From my point of view, that would rather be a question of form (assembly) than content (expression).

Statutory powers, bylaws and common law powers seem to create an amalgam of police powers that are problematic from a rights-based standard and detrimental to the rule of law. Looking from the perspective of separation of powers, this is a challenge to democracy. Legal standards and thresholds of police powers ought to be set by Parliament or the courts, not by government as we witnessed most recently.

Emergency powers constitute a threat to material/substantial rule of law standards. Police powers should be clear-cut, transparent, precise and delimited for any case to be handled by the police. Emergency powers demonstrated to be the opposite. From my point of view it is hence surprising that the Canadian Civil Liberties Association supported the implementation of an *Emergencies Act* back in 1988 and still does not question this as a matter of principle, but only denies that legal thresholds were met mid-February 2022. This is true by itself, but stops short of the problem.

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