 

**Comments on the revised draft of General Comment**

**No. 37, Article 21: Right of peaceful assembly**

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I am a media law professor at the University of Georgia, in the United States, and I am the press freedom correspondent for the *Columbia Journalism Review*, published by Columbia University. I research free expression in digital spaces, and I am coauthor of the book *The Law of Public Communication*. Outside of my research, I have written about free expression for *Esquire*, *The Atlantic*, *Slate*, *Wired*, and CNN, and I have blogged about the First Amendment for the *Harvard Law Review*. Two years ago, I prepared a report on press rights at peaceful assemblies for OSCE and ODIHR, and last year I participated in an expert workshop at the University of Cambridge about whether/how Article 21 could be interpreted to protect virtual assemblies.

The purpose of this submission is to offer perspectives and information that I hope will be of use in revising General Comment No. 37. I focus on three issues: (A) the extent of assembly and/or expressive rights in private spaces, (B) the relationship between technology and the exercise of the right of peaceful assembly, and (C) the role of journalists in both documenting and reporting on assemblies.

**A) The revised draft addresses in several places the extent of assembly and/or expressive rights in private spaces. For example:**

*4. The right of peaceful assembly protects the non-violent gathering of persons with a common expressive purpose in [a publicly accessible / the same] place …*

*13. … Assemblies can be held on publicly or privately-owned property [provided the property is publicly accessible].*

*64. As for any restriction on the element of place: peaceful assemblies may in principle be conducted in all places to which the public has access or should have access, such as public squares and streets …*

*67. The increased privatization of public spaces highlights the fact that assembly rights may require some recognition on private property that is open to the public. The interests of private owners have to be given due weight, but may have to be limited if the participants have no other reasonable way to convey their message to their target audience. Assemblies held on privately owned property with the consent of the owners enjoy the same protection as other assemblies.*

It might be useful to consider the evolution of American law on these issues, under the state action doctrine. For many years, it held that the Fourteenth Amendment and the Bill of Rights restricted only government action.[[1]](#footnote-1) But as the doctrine evolved in the twentieth century, it came to apply to private action.[[2]](#footnote-2) For example, in the 1946 case *Marsh v. Alabama*, the U.S. Supreme Court ruled that Alabama violated the First and Fourteenth Amendments by forbidding a Jehovah’s Witness from distributing materials in a privately-owned town.[[3]](#footnote-3)

In its most recent state action case, *Manhattan Community Access Corp. v. Halleck*, decided in 2019, the Supreme Court held: “The Free Speech Clause … does not prohibit private abridgment of speech.”[[4]](#footnote-4) The reasoning: “By enforcing that … boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty.”[[5]](#footnote-5) However, *Halleck* went on to acknowledge clearly that “a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional [and] exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity.”[[6]](#footnote-6)

Notably, *Halleck* involved a private nonprofit entity that operated a public access channel for a city, and the state action claim came under (i). The Court “stressed that ‘very few’ functions fall into that category,” and noted: “[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor.”[[7]](#footnote-7) The court added: “[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.”[[8]](#footnote-8) The Court then concluded: “If the rule were otherwise, all private property owners and private lessees who open their property for speech … would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum.”[[9]](#footnote-9)

*Halleck*, therefore, reflected a narrow and formalist conception of the state action doctrine. This is the current federal approach. But some states have developed their own. The California Supreme Court, for example, has adopted a more expansive view of state action under its state constitution that can be satisfied if private property is “freely and openly accessible to the public.”[[10]](#footnote-10) This means California focuses on a property’s public use rather than its ownership, and the U.S. Supreme Court once affirmed this approach in the face of a federal constitutional challenge, finding that a state does not necessarily violate property rights by protecting expressive activity on private property under a state constitution.[[11]](#footnote-11)

These opposing conceptions of state action and public/private spaces stem from conscious choices based, at least in part, on the social and political values underlying them. The U.S. Supreme Court has chosen to emphasize the values of autonomy and property rights, and the California Supreme Court has chosen to emphasize the expressive rights of individuals in a world “where public title and public use overlap with less frequency.”[[12]](#footnote-12)

**B) The revised draft addresses in several places the relationship between technology and the exercise of the right of peaceful assembly. For example:**

*11. … emerging technologies present new spaces and opportunities as well as challenges for the exercise of the right of peaceful assembly. Communication technologies often play an integral role in organizing and monitoring, but also in impeding assemblies. … Moreover, there is increased private ownership of public spaces. Considerations such as these need to inform a contemporary understanding of the legal framework required to give full effect to article 21.*

*15. … although the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons, comparable human rights protections also apply to acts of collective expression through digital means, for example online …*

*38. In the digital age, many [activities conducted outside an assembly that are integral to the right of peaceful assembly’s practical exercise] happen online or otherwise rely upon digital services. Such associated activities are also protected under article 21 …*

In the context of whether and how Article 21 could be interpreted to protect virtual assemblies, it is useful to consider some relevant, emerging American case law. Several federal appeals courts have ruled recently that a social media account run by a public official qualifies as a public forum if the official uses the account for public business and engaging with constituents.[[13]](#footnote-13) That means the official may not, on the basis of viewpoint, block users from the account or otherwise limit their speech on the account. For example, the U.S. Court of Appeals for the Second Circuit held that President Donald Trump’s practice of blocking critics from his Twitter feed was a form of unconstitutional viewpoint discrimination.[[14]](#footnote-14) As the court reasoned: “[T]he First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees.”[[15]](#footnote-15)

Roughly six months earlier, the U.S. Court of Appeals for the Fourth Circuit held that a county official who blocked a critic from her Facebook page had violated the First Amendment.[[16]](#footnote-16) The court said the page had all “the hallmarks of a public forum” and that blocking access was “black-letter viewpoint discrimination.”[[17]](#footnote-17) This was the first federal appeals court ruling addressing the First Amendment’s application to government-run social media accounts.

These are increasingly important issues, because, as U.S. Supreme Court Justice Anthony Kennedy wrote more than 20 years ago, “Minds are not changed in streets and parks as they once were … [Instead], the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.”[[18]](#footnote-18) Today, clearly, that includes platforms like Facebook and Twitter and YouTube, a point the Supreme Court reiterated not long ago in *Packingham v. North Carolina*, decided in 2017 and cited in the Second Circuit’s opinion in the Trump case.[[19]](#footnote-19)

*Packingham* involved a statute making it a felony for a registered sex offender to access social media platforms. The Court, finding it unconstitutional, made a number of valuable comments about the role of social media in a modern society and democracy. The opinion acknowledged that “a fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen,” adding, “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.”[[20]](#footnote-20)

Calling *Packingham* “one of the first [the] Court has taken to address the relationship between the First Amendment and the modern Internet,” the majority opinion said social media platforms “can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”[[21]](#footnote-21) Such platforms, the Court said, “allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’”[[22]](#footnote-22) All of this language speaks loudly to the role of social media and other information and communication technologies in the exercise of the right of peaceful assembly.

**C) The revised draft addresses the role of journalists in both documenting and reporting on assemblies. For example:**

*34. The role of journalists … involved in monitoring, including documenting or reporting on assemblies, is of special importance, and they are entitled to protection under [article 21 of] the Covenant. They may not be prohibited from exercising these functions, also in respect of the actions of law enforcement officials. The equipment they use must not be confiscated or damaged. Even if the assembly is declared unlawful or is dispersed, that does not terminate the right to monitor it. No one should be harassed or penalised as a result of their attendance at demonstrations …*

These principles should be expanded generally and in the context of virtual assemblies. Journalists “have an important role to play in providing independent coverage of public assemblies.”[[23]](#footnote-23) Indeed, “uninhibited reporting on demonstrations is as much a part of the right to free assembly as the demonstrations are themselves the exercise of the right to free speech.”[[24]](#footnote-24) In some cases, assemblies are the “only means that those without access to the media may have to bring their grievances to … the public,” so media coverage of assemblies can be essential to the free flow of information about matters of public concern that otherwise would not get the public’s attention.[[25]](#footnote-25)

Further, channeling *Packingham,* the modern media industry is one in which the production and distribution of news and information is widely dispersed. Technology has made it possible for all manner of people to perform acts of journalism. The freedom to report on assemblies, thus, is guaranteed to media professionals and to others in civil society who perform journalistic acts and roles. As the European Court of Human Rights once put it: “[T]he function of the press includes the creation of forums for public debate, [and] the [realization] of this function is not limited to the media or professional journalists.”[[26]](#footnote-26) Similarly, the U.N. Human Rights Committee observed in 2013 that “journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere.”[[27]](#footnote-27)

More broadly, journalists “make an essential contribution to public debate and opinion-making processes in a democratic society by acting as public or social watchdogs and by creating shared spaces for the exchange of information and ideas and for discussion.”[[28]](#footnote-28) In addition, “by facilitating the free flow of information and ideas on matters of … interest, and by ensuring transparency and accountability, independent media constitute [a] cornerstone[] of a democratic society.”[[29]](#footnote-29) All of these principles raise novel questions in the context of virtual assemblies and media rights.

To what extent must the state accommodate the media in a virtual assembly? To what extent must an ISP or social media platform accommodate the media in a virtual assembly? What is the scope of the media’s protection, if any, against Internet surveillance in connection with a virtual assembly? What is the scope of the media’s protection, if any, against Internet blocking or filtering in connection with a virtual assembly? What would constitute media “presence” in a virtual assembly? If a virtual assembly involves non-peaceful collective action like trolling or hacktivism, what rights would the media have, if any, to be “present” at the assembly in order to cover it? Under what circumstances could the media be blocked or removed from a virtual assembly? When, if ever, could media credentials be required to access a virtual assembly? The Human Rights Committee should consider these questions, among others, as it refines General Comment No. 37.

1. *Civil Rights Cases*, 109 U.S. 3, 18 (1883). [↑](#footnote-ref-1)
2. *Marsh v. Alabama*, 326 U.S. 501 (1946). [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. *Id.* [↑](#footnote-ref-6)
7. *Id.* at 1929. [↑](#footnote-ref-7)
8. *Id.* at 1930. [↑](#footnote-ref-8)
9. *Id.* [↑](#footnote-ref-9)
10. *Golden Gateway Center v. Golden Gateway Tenants Association*, 29 P.3d 797, 810 (Cal. 2001). [↑](#footnote-ref-10)
11. *Robins v. Pruneyard Shopping Ctr.*, 447 U.S. 74, 88 (1980). [↑](#footnote-ref-11)
12. *Developments in the Law: State Action and the Public/Private Distinction*, 123 Harv. L. Rev. 1248, 1312 (2010) [hereinafter *State Action and the Public/Private Distinction*]. [↑](#footnote-ref-12)
13. Jonathan Peters, *Public Officials: Beware Blocking Critics on Social Media*, American Bar Association (July 22, 2019), <https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2019/blocking-social/>. [↑](#footnote-ref-13)
14. *Knight First Amendment Institute v. Donald J. Trump*, No.18‐1691‐cv (2nd Cir. 2019). [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. *Brian Davison v. Phyllis Randall, et al*., No. 17-2002 (4th Cir. 2019). [↑](#footnote-ref-16)
17. *Id.* [↑](#footnote-ref-17)
18. *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 802-803 (1996). [↑](#footnote-ref-18)
19. 137 S. Ct. 1730 (2017). [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *Id.* [↑](#footnote-ref-22)
23. Eur. Comm. for Democracy Through Law, *Guidelines on Freedom of Peaceful Assembly* ¶ 207, 83rd Sess. Study No. 581/2010 (2010) [hereinafter *Guidelines on Freedom of Peaceful Assembly*]. [↑](#footnote-ref-23)
24. *Id.* [↑](#footnote-ref-24)
25. *Id.* ¶ 208. [↑](#footnote-ref-25)
26. *Társaság a Szabadságjogokért v. Hung*., HUDOC para. 27 (2009). [↑](#footnote-ref-26)
27. *UNESCO Calls for Proposals: Research on the Safety of Online Media Actors Doing Journalism*, UNESCO (May 4, 2013), https://en.unesco.org/news/unesco-calls-proposals-research-safety-online-media-actors-doing-journalism. [↑](#footnote-ref-27)
28. Eur. Comm. of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors* pmbl. ¶ 29, 1253rd Meeting (2016). [↑](#footnote-ref-28)
29. Council of the EU, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*,¶ 4, (May 12, 2014). [↑](#footnote-ref-29)