

## LEGAL ANALYSIS

### *of the mass detentions of assembly participants on January 23, 2021*

On January 23, protests were held across the country demanding the release of opposition politician Alexei Navalny. In 125 cities, police detained at least 4,033 people. The detainees spent from several hours to several days in the police stations, many of them then received administrative arrests. The detainees were prosecuted for administrative offenses under articles that provide for punishment in the form of administrative arrests or large monetary fines (up to 300 thousand rubles, or 4 000 US dollars). Also, OVD-Info received information about the detention of 46 journalists from 18 cities.

Based on the information available in open sources, as well as the legal principles of the implementation of freedom of peaceful assembly and freedom of expression, we submit:

- 1) the participants of public events on January 23, 2021 in support of Alexei Navalny enjoy the protections under the right to freedom of peaceful assembly and freedom of expression, since:
  - a) individual examples of violent acts are not enough to characterize the entire assembly as non-peaceful;
  - b) interference with automobile or pedestrian traffic or daily activities is not considered violence;
  - c) the lack of notification for a public event is not enough to disperse or detain participants;
  - d) the main demands and slogans at the public events were related to an issue important to the Russian society, and public politicians and civil servants, including police officers, should show greater tolerance towards criticism.
- 2) the dispersal of public events on January 23, 2021 and the mass detentions of their participants are a disproportionate restriction on the freedom of peaceful assembly and expression, and therefore are illegal, since they:
  - a) they were massively indiscriminate;
  - b) the rallies themselves were spontaneous and did not require notification;
  - c) restrictions on holding public events due to the coronavirus pandemic in most regions of the Russian Federation were excessive, discriminatory, and did not provide for alternative ways to publicly express opinions on important socio-political issues since March 2020.

### **1. Reason for public expression in the form of assemblies on January 23, 2021**

The assemblies were triggered by several news: the detention for 30 days of a well-known opposition politician Alexey Navalny,<sup>1</sup> the detention of participants in spontaneous public events on January 17 and 18, 2021, as well as the publication by Alexey Navalny of an

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<sup>1</sup> See: OVD-Info news from January 18, 2021: <https://ovdinfo.org/express-news/2021/01/18/sud-otpravil-pod-strazhu-alekseya-navalnogo-na-30-sutok> (accessed: 18.01.2021).

investigation into Russian President Vladimir Putin with allegations of corruption<sup>2</sup> (the video was viewed more than 20 million times a day after its publication on the Youtube platform). Navalny was taken into custody on the afternoon of January 18, 2021, by order of a judge of the Khimki City Court of the Moscow Region. The day before, on January 17, 2021, Navalny was detained at Sheremetyevo Airport<sup>3</sup>, while passing through passport control after returning from Germany. The reason for the detention was the charges of violating the conditions of serving a suspended sentence.

On January 11, 2021, the Simonovsky District Court of Moscow registered case No. 4/8-0002/2021 on the cancellation of Navalny's suspended sentence and its replacement of the sentence with real imprisonment "in connection with non-performance of assigned duties, evasion of compensation for damage or the commission of a new crime." Prior to this, on December 28, 2020, Alexey Navalny's lawyer publicly stated that he received a message from the Federal Penitentiary Service of Russia demanding that Alexey Navalny appear on December 28 or 29, 2020 at the department of the criminal executive Inspectorate<sup>4</sup>. The obligation to visit the penitentiary inspection is related to Navalny's suspended sentence of 3.5 years in the so-called "Yves Rocher" criminal case, in which the European Court of Human Rights found a number of violations, including violations of various aspects of the right to a fair trial (ECHR ruling in the case "Navalny v. Russia" of October 17, 2017, complaint No. 101/15).

Navalny was unable to attend the criminal executive inspection, as at the end of August 2020, while in a coma, he was transported from Russia to Germany for emergency treatment. On September 2, 2020, the German Government announced they discovered traces of the Novichok poison in Alexey Navalny's body<sup>5</sup>. On December 14, 2020, the international journalistic project Bellingcat, together with The Insider, published an investigation in which they claimed that the Russian Federal Security Service specialists were involved in the poisoning of Alexei Navalny<sup>6</sup>. A video about this investigation with the participation of Alexei Navalny, posted on the YouTube platform, by January 17, 2021, had collected more than 22.5 million views<sup>7</sup>.

Before that, the opposition politician had already been subjected to other forms of criminal and administrative prosecution in Russia. The European Court of Human Rights, in its Judgement of 15 November 2018 (the case "Navalny v. Russia" on complaints No. 29580/12 and four others), noted the connection between the persecution and Navalny's political activism.

Thus, the return to Russia, the detention and subsequent arrest of Alexei Navalny, as well as the publication of the investigation into Russian President Vladimir Putin, were important

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<sup>2</sup> See: Video clip of the anti-corruption investigation: <https://www.youtube.com/watch?v=ipAnwilMncI> (accessed: 20.01.2020).

<sup>3</sup> See: OVD-info review of January 17, 2021: <https://ovdinfo.org/news/2021/01/17/zaderzhaniya-v-svyazi-s-vozvrashcheniem-alekseya-navalnogo-v-rossiyu-onalyn> (accessed: 18.01.2021).

<sup>4</sup> See: <https://www.kommersant.ru/doc/4636914> (date accessed: 17.01.2021).

<sup>5</sup> See: German Foreign Ministry statement: <https://www.bundesregierung.de/breg-de/aktuelles/erklaerung-der-bundesregierung-im-fall-nawalny-1781790> (accessed: 17.01.2021).

<sup>6</sup> See: Investigation of December 14, 2020: <https://www.bellingcat.com/news/uk-and-europe/2020/12/14/fsb-team-of-chemical-weapon-experts-implicated-in-alexey-navalny-novichok-poisoning/> (accessed 17.01.2021).

<sup>7</sup> See: The video investigation: <https://www.youtube.com/watch?v=smhi6jts97I> (date accessed: 17.01.2021).

social and political events that aroused wide interest and the need to exercise the right to freedom of peaceful assembly and freedom of expression.

## ***2. Peaceful nature of the public event***

The UN Human Rights Committee, in paragraph 15 of its General Comment No. 37 (2020) on the right to peaceful assembly, as enshrined in article 21 of the International Covenant on Civil and Political Rights, notes the following: "The right to peaceful assembly, by definition, cannot be exercised with the use of violence. In the context of article 21, violence generally refers to the use of physical force by participants against others, which may result in bodily injury or death, as well as significant material damage. Simply pushing and shoving or obstructing automobile or pedestrian traffic or daily activities is not violence."

In paragraph 19 of these Comments, it is noted that "the conduct of specific participants in an assembly may be deemed violent if authorities can present credible evidence that, before or during the event, those participants are inciting others to use violence, and such actions are likely to cause violence; that the participants have violent intentions and plan to act on them; or that violence on their part is imminent. Isolated instances of such conduct will not suffice to taint an entire assembly as non-peaceful ..."

The main demands and slogans of the protesters were not related to violence. For example, the report of the Joint Group of Public Monitoring of the Observance of Constitutional Rights (OGON) indicates that the main demand of the protesters was "the release of Alexei Navalny, and other chats such as 'Freedom for political prisoners', 'One for all and all for one', 'Putin is a thief', 'Russia will be free' were also featured". Some of the participants had banners, most of the people were present without posters and paraphernalia. No one displayed weapons or shouted slogans calling for violent actions."<sup>8</sup>

As for the allegation of possible individual manifestations of violence during public events in different cities of Russia on January 23, 2021, these cases should be the subject of investigation and proof in court, with the provision of basic guarantees of the right to a fair trial. At the same time, in the practice of the European Court of Human Rights, there are already several decisions that recognized violations of the right to a fair trial and restriction of freedom of assembly, in a number of criminal cases that previously arose in connection with allegations of violence by participants of public events in Russia. For example, in the case of "Belousov v. Russia" (judgment of 4 October 2016, on complaints 2653/13 and 60980/14), as well as in a number of other ECtHR judgments that are part of the same group of cases and in a group of cases similar to the case "Lashmankin and others v. Russia" (judgment of 7 February 2017, on complaints No. 57818/09 and 14 others). According to the decisions of the Committee of Ministers of the Council of Europe, which monitors the implementation of the ECHR rulings, the systemic problems identified in these cases were not corrected by the Russian authorities (decision of the Committee of Ministers No. CM/Del/Dec(2020)1377bis/H46-33 of 3 September 2020). That is, there is no evidence that the Russian authorities have taken sufficient measures to guarantee a fair trial and to ensure that the principles of the right to freedom of assembly are respected in cases of alleged violence by individual participants in a public event.

The main complaint of the authorities to this public event is that it has not undergone the notification procedure. The uncoordinated nature of a public event served as the basis for the

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<sup>8</sup> See: OGON Report of January 26, 2021: <https://media.ogonwatch.org/2021/01/26/> (accessed: 27.01.2021).

police to demand for the participants to stop participating in the event and to disperse, and to arrest members of the public event and bystanders.

In the case law of the European Court of Human Rights states that a peaceful assembly is protected by law, despite the lack of formal agreement. For example, in *Oya Ataman v. Turkey* (Judgment of 5 December 2012, application no. 74552/02), the European Court of Human Rights noted that the demonstration, which the applicants had conducted without notifying the police, as required by local law, was in fact illegal. However, the Court held that the illegality of the demonstration in terms of the lack of prior notification to the police does not in itself justify the restriction of the right to freedom of peaceful assembly in a situation where the actions of the demonstrators do not pose a threat to public safety, in addition to the possible violation of traffic (paragraph 39 of the ruling). According to the European Court of Human Rights, when demonstrators do not resort to violence, it is important for national authorities to demonstrate a certain degree of tolerance towards peaceful assemblies (paragraphs 41-42 of the Judgment).

Commenting on the mass detentions of participants of public events on January 23, 2021 in different cities of Russia, UN Secretary-General Antonio Guterres noted that "you should not detain people for expressing opinions."<sup>9</sup> Also, the UN Special Rapporteur on freedom of peaceful assembly and association, Clement Voul, drew attention to the violence by the police and called on the Russian government to allow the protesters to exercise their rights and release all those detained<sup>10</sup>. On the eve of the public event on January 23, 2021, Council of Europe Commissioner for Human Rights Dunja Mijatovic issued a statement calling on the Russian authorities to guarantee freedom of speech and freedom of assembly<sup>11</sup>.

Accordingly, the dispersal of public events on January 23, 2021 in support of Alexei Navalny, as well as mass detentions, are unacceptable, since they violate Article 11 of the Convention as interpreted by the European Court of Human Rights.

## ***2. Exercise of the right to freedom of expression***

As noted above, the main demands and slogans of the public event were related to the arrest of opposition politician Alexei Navalny, support for political prisoners, as well as criticism of the detentions. Thus, the theme of the action and the main slogans were associated with an important political discussion for Russian society, which is why the freedom of expression of such opinions should enjoy additional protection. In addition, public politicians and civil servants, including police officers, should be more tolerant of criticism. Similar legal positions have been repeatedly applied in its practice by the European Court, for example, in the case of "*Eon v. France* " (Judgment of 14 March 2013, complaint No. 26118/10).

Thus, the suppression of public expression during the actions of January 23, 2021 contradicts the provisions of Article 29 of the Constitution of the Russian Federation and Article 10 of the Convention.

## ***3. Disproportionate restrictions on the freedom of peaceful assembly and expression***

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<sup>9</sup> See: UN on rallies in Russia: you can't detain people for expressing an opinion, from January 25, 2021: <https://news.un.org/ru/story/2021/01/1395112> (accessed: 27.01.2021).

<sup>10</sup> See: UN Special Rapporteur's Statement of 25 January 2021: <https://twitter.com/cvoule/status/1353682637672632320> (accessed: 27.01.2021).

<sup>11</sup> See: Statement of the Commissioner for Human Rights of 21 January 2021: <https://www.coe.int/ru/web/commissioner/-/russian-authorities-should-release-alexey-navalny-and-guarantee-freedom-of-expression-and-of-assembly> (accessed: 27.01.2021).

In accordance with the provision of paragraph 82 of general comment No. 37 (2020) on the right to peaceful assembly, as enshrined in article 21 of the International Covenant on Civil and Political Rights, the practice of indiscriminate mass arrests before, during or after an assembly is arbitrary and therefore unlawful. In this regard, it is alleged that the detention of at least 4,033 people during public events in support of Alexei Navalny in 125 cities of Russia was massive and indiscriminate, and therefore, on this basis, are illegal.

In addition to the above arguments, we draw attention to the disproportionate restrictions on the right to freedom of assembly and expression that took place in this case.

### *3.1. Spontaneous nature of the assembly*

On January 18, 2021, Russian opposition politician Alexei Navalny was placed in custody by a judge of the Khimki City Court of the Moscow Region. On the same day, several dozen peaceful protesters who decided to publicly express their opinions were detained in several Russian cities. These events required an urgent response. Given the widespread schedule of working days and weekends in Russia, the optimal time for many people to publicly express their opinions was the nearest Saturday - January 23, 2021.

In accordance with Article 7 of Federal Law No. 54-FZ of 19.06.2004 "On Meetings, Rallies, Demonstrations, Processions and Picketing", notification of a public event in all forms, except for picketing, must be submitted no later than 10 days before the planned event, and for a collective picket, notification must be submitted at least three days in advance, while the day of submission and the day of the public event are not included in these days. Thus, the Russian legislation did not provide for the possibility of approving a public event in the near future, the only hypothetically possible form of public event for approval was a collective picket. At the same time, this form of public event has a number of restrictions: it does not provide for the movement and use of sound-amplifying technical means (paragraph 6 of Article 2 of Federal Law No. 54-FZ of 19.06.2004). At the same time, the choice of the format of the public event is the right of the organizer (judgment in the case "Lashmankin and others v. Russia " of 7 February 2017, §430). At the same time, in many cities of Russia, notifications were submitted for approval of a public event on Saturday, March 23, however, the authorities responded to many of them with a refusal, citing a missed deadline or quarantine restrictions<sup>12</sup>.

In the event that, due to urgency, the organizers cannot comply with all the formal requirements for notifying the authorities, or the meeting does not have an organizer at all, the International standard on the right to freedom of assembly introduces the category of spontaneous assemblies. Thus, according to paragraph 14 of General Comment No. 37 on the right to peaceful assembly to article 21 of the International Covenant on Civil and Political Rights, "spontaneous assemblies, which are usually a direct reaction to current events, whether coordinated or not, are equally protected by article 21". In accordance with paragraph 72 of these Comments, "Spontaneous assemblies, for which there is not enough time to submit a notification, should not be subject to notification."

### *3.2. Disproportionality of assembly restrictions due to the pandemic*

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<sup>12</sup> See: Review of refusals to approve Public events, January 21, 2021: <https://ovdinfo.org/news/2021/01/21/otkazy-v-soglasovanii-akcij-v-podderzhku-arestovannogo-politika-aleksey-a-navalnogo> (access mode: 27.01.2021).

In many regions of Russia, public events have been completely banned or severely restricted by resolutions of regional governments or decrees of the heads of subjects since March 2020<sup>13</sup>.

Taking into account the legitimacy of the purpose of restrictive measures, countering the pandemic, it should be noted that the complete restriction of freedom of assembly and expression on a topical issue that affects the interests of a large number of people, is clearly disproportionate in the circumstances. At the same time, in a number of subjects of the Russian Federation, for example, in Moscow and St. Petersburg, such restrictions are in force from March 2020, that is, about ten months (relative to January 23, 2021).

*a) The disproportionality of the restriction*

The need for proportionality of any restrictions on freedom of assembly, even in the context of a pandemic, is highlighted by the Council of Europe in the Guidelines for States to Respect the Principles of Democracy, the Rule of Law and Human Rights in the Context of the Epidemiological Crisis of COVID-19 of 7 April 2020: "Significant restrictions on ordinary public events, including restrictions on access to public places of worship, mass gatherings and wedding and funeral ceremonies, can inevitably lead to justified complaints under the above-mentioned provisions. Therefore, the authorities should ensure that any such restrictions, whether imposed on the basis of derogation from obligations, are explicitly provided for by law, are imposed in compliance with the relevant constitutional guarantees and are proportionate to the purpose they serve."

On 6 July 2020, the Commissioner for Human Rights of the Council of Europe expressed concern about the state of freedom of assembly and expression in Russia, including due to restrictions on expression and public events during the pandemic<sup>14</sup>.

On April 14, 2020, the UN Special Rapporteur on freedom of assembly and association appealed to the governments of the United Nations member states to respect human rights, including the rights to freedom of assembly and expression, even in the face of a pandemic<sup>15</sup>. The Special Rapporteur drew the attention of states to the fact that restrictive measures imposed due to the spread of coronavirus infection should not be excessive. The Special Rapporteur also called on states to ensure the rights of citizens to freedom of assembly.

*b) The discriminatory nature of the restrictions*

We argue that the restriction of freedom of assembly due to the pandemic is excessive and discriminatory, and is aimed at restricting peaceful assembly, and not only at taking measures to combat the spread of coronavirus infection.

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<sup>13</sup> See: OVD-Info Report: <https://ovdinfo.org/reports/svoboda-sobranij-na-fone-pandemii> (access mode: 21.01.2021).

<sup>14</sup> See: Statement of the Council of Europe Commissioner for Human Rights of 6 July 2020: <https://www.coe.int/en/web/commissioner/-/the-russian-authorities-should-remedy-the-long-standing-problem-of-undue-restrictions-to-freedom-of-assembly-freedom-of-expression-and-press-freedom> (accessed: 17.01.2021).

<sup>15</sup> See: Appeal of the Special Rapporteur on freedom of peaceful assembly and association to the Governments of the UN Member States: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewSID=25788&LangID=E> (accessed: 17.01.2021)

Since March 2020, any public events have been completely banned or severely restricted in various Russian cities<sup>16</sup>. At the same time, other forms of mass gatherings are allowed, for example, the use of public transport, visiting places of public catering, sports and entertainment events.

*c) Lack of alternative ways to express an opinion*

Despite severe restrictions on assembly in many Russian cities, the authorities have not taken any action to provide alternative ways to exercise the right to freedom of peaceful assembly, including online. On the contrary, information has already appeared about the limitations of such attempts to implement alternative forms of these rights.

In fact, in mid-March 2020, Roskomnadzor (federal telecommunications watchdog) restricted access to the website of the campaign against amendments to the Constitution, the all-Russian vote on which took place on July 1, 2020. A month later, in April, the media reported that Yandex, a Russian internet giant, removes comments in their applications such as Yandex.Maps and Yandex.Navigator, in which users organized "online rallies", expressing criticism of the authorities, including on the issue of the possibility of a new presidential term for Russian president Vladimir Putin<sup>17</sup>.

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<sup>16</sup> See: OVD-Info report of September 17, 2020: <https://ovdinfo.org/reports/svoboda-sobraniy-na-fone-pandemii> (accessed: 18.01.2021).

<sup>17</sup> See: the publication of the "Novaya Gazeta" of April 20, 2020: <https://novyagazeta.ru/news/2020/04/20/160869-v-yandeks-navigatore-priznali-udalenie-kommentarijev-uchastnikov-virtualnyh-mitingov> (accessed: 17.01.2021).