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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

JOINT OPINION

**ON THE ORDER OF ORGANISING AND CONDUCTING
PEACEFUL EVENTS**

OF UKRAINE

by

**the Venice Commission
and
OSCE/ODIHR**

**Adopted by the Venice Commission
at its 81th Plenary Session (Venice, 11-12 December 2009)**

On the basis of comments by:

Ms Finola FLANAGAN (Member, Ireland)
Mr Christoph GRABENWARTER (Member, Austria)
Mr Hubert HAENEL (Substitute Member, France)
OSCE/ODIHR Expert Panel on Freedom of Assembly

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I. Executive summary

1. The current Draft Law is considered not only in light of the standards numerated above, but against the Joint Opinion on Peaceful Assemblies in Ukraine, CDL-AD(2006)033, issued in 2006 (hereinafter: the 2006 Joint Opinion). An opportunity to meet with representatives of the Cabinet of Ministers as well as the key figures in the Verkhovna Rada of Ukraine would be welcomed so that a fuller understanding could be gained of how the administrative and other systems provided for in this Draft Law are intended to operate.

2. The current law is already clearly endeavouring to establish a legal framework for the exercise of freedom of peaceful assembly which is compatible with international standards and may be considered liberal in its approach. The draft Law is a further step towards ensuring that freedom of peaceful assembly is properly protected in Ukraine. However, it contains provisions that lack clear standards to guide official decision-making. This creates a potential for abuse that needs to be remedied. In addition, the provisions of the Draft Law also give rise to concern as to how they would be implemented in practice.

3. While the desire of the initiators of the Draft Law to set up a legal framework for the exercise of the freedom of peaceful assembly is understandable, the right to freedom of peaceful assembly is a fundamental right in a democratic society and as such, it should be primarily governed by the Constitution.

4. It is of paramount importance to test the provisions of the Draft Law against the principles of legality and proportionality as well as their necessity in a democratic society. All three elements (legality, proportionality and necessity) ought to be met simultaneously in order to guarantee that freedom of peaceful assembly is respected in line with international standards.

5. In particular, the following recommendations for amendment are made:

- a) The title of the Draft Law should correspond to the generally accepted term of “peaceful assemblies”;

- b) The legislation Draft Law should be based on primary laws, explicitly excluding secondary legislation;
- c) The position of the current Draft Law in the hierarchy of legal norms in Ukraine should be made clear in order to ensure that its provisions prevail over any other regulations affecting assemblies which may be more stringent than the extant Draft Law;
- d) The definitions provided in the Draft Law need to be revised; the definition of a peaceful assembly should be amended to clarify that it refers only to open-air public assemblies on public property;
- e) The Draft Law should allow for simultaneous (including counter-demonstrations) and spontaneous assemblies;
- f) The right of non-nationals and stateless people as well as of other categories of people, including minors to organise a peaceful assembly should be explicitly stated in the Draft Law;
- g) The Draft Law should be amended to remove any content-based restrictions on freedom of peaceful assembly at any stage, unless violence, hatred or discrimination are advocated;
- h) The organisers of a public assembly should be required to provide written notification of an assembly within a clearly articulated timeframe to avoid any misunderstandings or misjudgements on the part of the authorities;
- i) There should be an express opinion in the Draft Law that organisers are entitled to fix flaws in notifications at any time up to the commencement of the assembly;
- j) On the request of an assembly organiser, the authorities must give immediate written confirmation of receipt of notification; provisions of the Draft law should also provide that a failure by the authorities to provide timely confirmation will be tantamount to acceptance of the assembly;
- k) The Draft Law should eliminate prohibition of a peaceful assembly on the grounds of failure to submit a notification;
- l) The Draft Law should clearly outline the responsibility of the authorities to provide public security, free medical services, and cleaning services during the assembly;
- m) The organisers should not be liable for damage and violations inflicted by others;
- n) It is recommended that a provision in the Draft Law be introduced which would provide a defence for participants charged with taking part in an unlawful assembly in the case that such participants were unaware of the unlawful nature of the event;
- o) The provisions related to the issues of funding of assemblies must be clarified in the Draft Law: there is no reason to prohibit otherwise peaceful assemblies because of the controversial nature of their funding;
- p) The provision which states that organisers have the right to hold gatherings at specially designated and arranged premises should be removed;
- q) The ban on assemblies in the immediate vicinity of hazardous facilities should be limited to areas which are closed to the public;
- r) The Draft Law needs to be amended to state that it is the positive obligation of the State to facilitate two or more assemblies in one place and time;
- s) The Draft Law should provide better and clearer division of obligations between organisers of an assembly, authorised representatives of local authorities and law-enforcement bodies;
- t) Blanket provisions for the termination of a peaceful assembly should be removed;
- u) The Draft Law should ensure that a peaceful assembly can not be terminated whilst it remains peaceful in both form and content;
- v) It is recommended that the reasons for termination of an assembly be narrowed down to a threat to public safety, or clear and imminent danger of substantial disorder only. Measures should only be taken against those persons who violate public order, commit or instigate commission of unlawful actions that prevent a peaceful assembly from meeting its objectives;
- w) The Draft Law should clearly state that law enforcement officials can use force only as a last resort, in proportion to the aim pursued, and in a way that minimizes damage

- and injury; the use of force should be authorized and based on the clear provisions of the law, and the relevant justification should be subjected to public scrutiny;
- x) The grounds for liability for unlawful or excessive use of force by law enforcement bodies should be established by law;
 - y) The list of grounds on which a peaceful assembly can be prohibited should be revised so as to bring it in line with the proportionality test;
 - z) The Draft Law should explicitly provide that the burden of proof for establishing the grounds upon which an assembly may be banned lies with the regulatory authority and the police, both in administrative proceedings and as part of the judicial proceedings;
 - aa) The Draft Law should ensure access to a court of law, in case an application is filed to prohibit an assembly; any prohibition to conduct a peaceful assembly may be appealed against to a court of higher instance; the possibility must be given to obtain preliminary injunctions.

II. Introduction

6. On 30 September 2009, both the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (hereinafter referred to as "OSCE/ODIHR") received an official letter from the Office of the Acting Minister for Foreign Affairs of Ukraine requesting a review of a new Draft Law of Ukraine on Order of Organising and Conducting of Peaceful Events (CDL(2009)165, hereinafter referred to as "the Draft Law" or "the Draft") that is currently under consideration in the Verkhovna Rada.

7. The Draft Law under review was initially prepared by the Ministry of Justice of Ukraine and, following its approval by the Cabinet of Ministers, was submitted to the Verkhovna Rada (also referred to as the "Rada" or "Parliament of Ukraine") which adopted it in the first reading on 3 June 2009.

8. This Opinion was prepared jointly by the OSCE/ODHIR Expert Panel on Freedom of Assembly and the Venice Commission on the basis of an unofficial English translation of the Draft Law presented by the Ministry of Foreign Affairs of Ukraine. It was adopted by the Venice Commission at its 81th Plenary Session (Venice, 11-12 December 2009).

III. General Observations

9. The Draft Law under examination is a development of a previous draft law entitled "Draft Law on Peaceful Assemblies in Ukraine" (CDL(2006)063) on the same subject and which was submitted to the Venice Commission in 2006. The Venice Commission and the OSCE/ODIHR Panel adopted a Joint Opinion on this draft law (CDL-AD(2006)033) which concluded at paragraphs 47 and 48:

"The draft law under consideration is clearly endeavouring to establish a legal framework for the exercise of freedom of peaceful assembly which is compatible with international standards. Moreover, it may be considered liberal in its approach and generally complies with the European standards on freedom of peaceful assembly.

The law is however excessively detailed. A certain number of amendments are nonetheless considered necessary in order to achieve full clarity and full compliance with the relevant standards."

10. The new Draft Law contains certain improvements in respect of the draft law previously examined by the Commission. The law however still presents several substantial shortcomings and continues to be excessively detailed with excessive differentiation between categories of event in a manner which is not properly linked to permissible reasons for restrictions. Several

recommendations of the 2006 Joint Opinion have not been addressed. It is recommended that close attention be paid to the OSCE/ODIHR Guidelines on the Freedom of Assembly (the Guidelines)¹ which cover comprehensively the law and practice on this matter.

11. The 2006 Joint Opinion set out in some detail the international standards governing the right to freedom of assembly and which have been emphasised by the Venice Commission and OSCE/ODIHR in many opinions. These are the standards against which the law is assessed.

IV. Analysis

Title of the Draft Law

12. Article 39 of the Constitution of Ukraine sets forth “the right to assemble peacefully”, therefore, as concerns the title of the Draft Law, it is recommended to use the term “peaceful assemblies”, instead of “event”. The term “assemblies” is already applied in other legislative acts of Ukraine such as the Code of Administrative Court Proceedings and the Civil Code. Since the Draft Law also acknowledges that a “peaceful event” is an “assembly”, there is no compelling reason to use the term “peaceful event” which may be misleading. In addition, as the Guidelines suggest, the draft law should apply to assemblies in open air public spaces and not to events in premises as is suggested by the definition “f. gatherings”.

Article 1.2 – exclusion of certain assemblies from the scope of application of the Draft Law

13. This article sets out a list of events to which the Draft Law does not apply. These are:

- "1) gatherings of all or part of residents of a village (villages), a town or a city to solve local issues in accordance with the Law of Ukraine “on Local Self-Government in Ukraine”;
- 2) gatherings of staff, meetings of statutory management body, citizens’ associations, meetings of voters with candidates for members of parliament and elected deputies, candidates for the post of the President of Ukraine;
- 3) peaceful events with the purpose to rest, public entertainment events, sport events, wedding processions, folk festivals, funerals;
- 4) religious rites and ceremonies in cases provided by the Law of Ukraine “On liberty of conscience and religious organizations”.

14. Paragraph 4) covering religious ceremonies is a new category which did not appear in the 2006 Draft Law.

15. The right of assembly covers all types of gathering provided they are peaceful and therefore the types of assembly listed in Article 1.2 are protected by the international conventions and domestic law alike. One assumes that the purpose of excluding these categories is to remove from organisers and participants the obligations contained in the rest of the Draft Law and, in particular, the obligation of notification. It may be that categories 1) and 4), those involving local self-government and religious rites and ceremonies respectively, are governed by other specific laws. These exceptions do not appear problematic unless their aim is to target these categories of public assemblies by providing them with less favourable treatment. For this reason, it is recommended that a provision be added, stating that, in case the cited legislation imposes more stringent restrictions on these categories of assemblies, including religious assemblies, then the current Draft Law should be applicable.

¹ The Guidelines on Freedom of Peaceful Assembly have been prepared by the OSCE/ODIHR Panel of Experts on Freedom of Assembly. They were published in 2007 and endorsed by the Venice Commission in June 2008 (CDL(2008)062). The full text of the Guidelines is available at http://www.osce.org/odihr/item_11_23835.html (last visited on 15 October 2009).

16. However, it is not clear what the basis is for the different treatment of each of these categories of assembly. One can understand that there might be a desire not to regulate recreational and funeral gatherings to the same degree as political ones. However, one presumes that meetings of "citizens associations" could be for political purposes or for social agitation and meetings of "voters with candidates" for certain elections would certainly be for political purposes and could involve large numbers of participants gathering on the public thoroughfare. The Venice Commission and the OSCE/ODIHR would welcome clear explanation of the policy behind these provisions. Measuring it against the international standards would assist in bringing clarity to the legislative text so as to ensure that the Draft Law, on its face, complies with those international standards.

17. The Venice Commission and OSCE/ODIHR note that category 2), insofar as it excludes from the application of the Draft Law certain "meetings of voters with candidates", has not been extended to apply to "all election-related meetings" as was recommended by the 2006 Joint Opinion. It is not clear why these assemblies are excluded, while the law fails to provide references to regulation under other laws. A general law on assemblies should cover assemblies associated with election campaigns, an integral part of which is the organisation of public events. Therefore, the provision is recommended to be amended, to ensure that gatherings of staff, meetings of statutory management body, citizens' associations, meetings of voters with candidates for members of parliament and elected deputies, candidates for the post of the President of Ukraine, are protected under the Draft Law, or any other primary act that the Draft Law may wish to specify, ensuring that its provisions prevail over any other regulations affecting assemblies which may be more stringent than the extant Draft Law.

Article 2 – Definitions of Main Terms

18. Article 2 provides for the definitions of six different types of assemblies (demonstration, gathering, peaceful event, meeting, picketing, march) and of the "notification". This article was the subject of criticism in the 2006 Joint Opinion as "being of little value", and has nonetheless been maintained in the present Draft Law. As concerns the term "gathering", see para. 12 above, in fine).

19. The Guidelines define an assembly as "the intentional and temporary presence of a number of individuals in a public place that is not a building or structure for a common expressive purpose." (Guidelines, para. 13) The Draft Law introduces the following definition of a public assembly: "peaceful event is a free public peaceful expression of civil or political position of a person that allow expression of thoughts, adopting a resolution, other addresses on various issues of public life at an assembly open for everyone that is held in the form of gathering, meeting, march, demonstration, or picketing or any various combination of these forms on initiative of an individual or legal person."

20. Since the Draft Law does not provide for any legal consequences for different forms of assemblies, there appears to be no reason to define them. Additionally, the factual difference between "demonstration" and "march", or between "gathering" and "meeting" is also not clear. Any definitions of assemblies or attempts to categorize them over and above a peaceful assembly risk a violation of the ECHR and ICCPR as forms of assemblies may be inadvertently or even intentionally left out and become subject to prohibition. Ascribing a specific purpose to each type of assembly defined is inappropriate. As was said in relation to the Law on Freedom of Assembly in Azerbaijan : "The purpose of the assembly should be irrelevant in these definitions. Where an assembly, of whatever kind for whatever purpose is peaceful its restriction can only be justified for the reasons listed in Article 11(2) ECHR... The definitions in this provision of the Law are likely to result in arbitrary decision-making in relation to what assemblies are permitted and in unjustifiable restrictions in relation to the holding of peaceful

assemblies... [The] distinction [between the various types of assembly defined] is not easy to apply in practice and could result in unjustified restrictions on the freedom of assembly."²

21. It is recommended that these definitions be deleted and that the definition of peaceful assembly be amended to clarify that it includes gatherings, meetings, marches, demonstrations and picketing which are public assemblies, and applies only to open-air public assemblies.

22. Additionally, it is recommended for the Draft Law to provide a definition of simultaneous assemblies. While Article 9 (6) refers to simultaneous assemblies by reading that "[i]n case of submission a notification on holding a peaceful event, which states the date and time of the event that coincide with the one specified in a notification submitted earlier, organisers (organiser) may amend their notification at the suggestion of the executive authority or institution of local governing, or submit a new notification with changed place or time of the peaceful event(...)", the Draft Law does not contain a specific definition thereof. The definition of "simultaneous assemblies" should also include "counter-demonstrations" that is, when persons exercise their right to assemble to express their disagreement with the views expressed in another assembly .

23. It is further recommended to add in the draft Law a definition of "spontaneous assemblies". The Guidelines stress that the ability to respond peacefully and immediately that is, spontaneously and without providing formal notification, to some events, news, incidents or other assembly is an essential element of freedom of assembly. The authorities should protect and facilitate any spontaneous assembly as long as it is peaceful in nature .

24. It is therefore recommended to include definitions of these types of assemblies in Article 2 of this Draft Law, as well as to introduce relevant articles dedicated to these types of assemblies in the text of the Draft Law.

Article 3 – Applicable law

25. Article 3 states that the law on Order of Organising and Conducting Peaceful Events "is based on the Constitution of Ukraine, the generally recognized principles and norms of international law and consists of this Law and other acts of legislation that ensure the right to conduct peaceful events" .

26. The term "other acts of legislation" used in Article 3 of the Draft Law, is rather vague and may also be understood as including secondary legislation. According Article 92(1) of the Constitution of Ukraine, "human and citizens' rights and freedoms" as well as the guarantees of these rights and freedoms shall be determined exclusively by laws. Therefore, it is recommended that the Draft Law should make reference only to primary law.

Article 4 - Organisers of Peaceful Event

27. The Draft Law now includes, as recommended in the 2006 Joint Opinion, "legal persons" within the definition of "organiser".

28. However, it is not satisfactory that there has been introduced a complete prohibition on the following persons from being organisers:

- "1) a person aged under eighteen;
- 2) persons recognized by court legally incapable or a dependent adult, as well as a person subjected to administrative detention, is in custody, or is in prison by a judgment of court".

² CDL-AD(2006)034, Opinion on the freedom of assembly in Azerbaijan, § 20.

29. Whilst certain restrictions may be placed on the exercise of the right of assembly by these categories of person in view of the serious responsibilities of organisers, neither the Convention on the Rights of the Child nor the ICCPR nor ECHR case law permit complete prohibition. Children have legitimate claims and interests. Under Article 15 of the UN Convention on the Rights of the Child,³ they should have the possibility of expressing their views and of contributing to society through freedom of peaceful assembly. They should therefore be permitted to organise assemblies with the consent of parents or guardians. Legally incapable people should never be denied this right altogether, since in many cases the issue that they would wish to raise is not likely to be raised by any other group and they should be appropriately facilitated.

30. Furthermore, Article 4 excludes persons in administrative detention, persons in custody or in prison by a judgment of court, from organising a peaceful assembly under this Law. This provision has to be qualified as a blanket ban. The law does not distinguish between persons that are subject to administrative detention, persons in custody, or persons in prison by a judgment of court. It is recognized that a conviction might be combined with the deprivation of several civil rights in some legal systems, but such a deprivation of rights has to be proportionate. It cannot be qualified as proportionate at all to exclude prisoners, persons in detention or in custody from organising any event irrespective of the negative impact of a criminal offence. These persons do also have legitimate claims and interests and should also have the possibility to express their views. For sure, peaceful events organized by arrested persons might sometimes offer higher risks concerning the public order, than peaceful events organized by persons who are not arrested. However, the imprisonment itself cannot be seen as a reason to ban these persons from organising peaceful events in general. A peaceful event can be organized by several persons. It cannot be considered problematic if one of these organisers is arrested and cannot make use of his rights and duties to the full extent, because the other organisers might replace him in this regard. Therefore, it is recommended to withdraw this provision and instead of deciding upon a restriction of assemblies organized by prisoners on a case by case basis.

31. The Draft Law should contain a presumption in favour of holding an assembly in these instances as well; any ban of such an assembly should only be possible in justifiable circumstances, such as reasons of national security or public order.

32. Article 4 (2)(3) also gives rise to concern. This provision states that “association of citizens that in accordance with the established procedure is subjected to a decision on temporary prohibition to conduct peaceful events, or its activities are subjected to a temporary ban or suspension in accordance with the established procedure”. It is recommended that this provision be removed as, regardless of the reasons why an association, as any legal entity, has been banned or its activities have been suspended, it can not be prohibited to organise and conduct an assembly, unless it is not peaceful⁴ or incites hatred or racism.

Articles 5 and 6 – Rights and Obligations of Organisers and Participants

33. Much of Article 5 and all of article 6 are the same as the provisions in the 2006 Draft Law (Articles 4 and 5 respectively) and the important criticisms made in the 2006 Joint Opinion apply

³ See UN Convention on the Rights of the Child, Article 15, which reads that “1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. 2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”; the full text can be found at <http://www2.ohchr.org/english/law/crc.htm>.

⁴ 2006 Joint Opinion, para. 24.

equally to the current Draft Law. It is disappointing that the authorities have not been able to address these criticisms.

34. Article 5(1) states that organisers have the right to hold "gatherings" at specially designated and arranged premises. This provision contradicts Article 9 (1) that provides, in line with the recommendations of the Venice Commission and the OSCE/ODIHR, that a peaceful event may be held in any suitable place: it should therefore be deleted.

35. Article 5(1) includes preparatory agitation via mass media, through dissemination of leaflets, posters, banners, slogans and in other forms not prohibited by law; as the 2006 Joint Opinion already previously stressed, this phrase might lead to the assumption that these activities were unlawful if not carried out under this Law. Therefore, it is recommended to withdraw this phrase. Article 10 stipulates these rights of preliminary agitation of the organiser again and should therefore be withdrawn too.

36. The most significant of the deficiencies in the provisions under consideration is that "...the article appears to impose law enforcement responsibilities on organisers of public assemblies...", which also appears to be inconsistent with Article 20 (3), and which the participants are required to obey: this is inappropriate where the requirement goes beyond mere stewarding by organisers. Organisers bear a certain responsibility to prevent disorder, however, this responsibility should only extend as far as exercising due care to prevent interference with public order by the assembly participants. The Venice Commission previously commented in relation to another law that it imposed "excessive responsibilities on the organiser. An organiser cannot be held responsible for everything that occurs at a gathering governed by the draft law. An organiser might not be in a position to terminate a public event which had got out of his or her control. Nor would the organiser necessarily be able to cause violations of the law to cease or ensure that property was not damaged or ensure access to private property."⁵ The 2006 Joint Opinion recommended at paragraph 28 that "[a] better approach to Article [5] would eliminate mention of formal duties of organisers beyond compliance with the notice requirement and compliance with reasonable time, place, and manner restrictions equally applicable to all participating in the assembly." This recommendation is repeated in relation to this Draft Law.

37. Indeed, Article 5(2) seeks to impose additional obligations on the organisers which were not specified in the 2006 Draft Law. One such additional obligation is to "stop or interrupt the peaceful event if its participants act unlawfully or violate the procedures..." Apart from the fact that it is undesirable that a policing obligation beyond stewarding may be imposed on the organisers it is disproportionate that they are required to "stop or interrupt" the event for all violations of procedures, it would appear, whatever their nature. Minor deviations from what has been detailed in the notification should be accommodated without penalty.

38. Article 5(3) provides that "[organisers]...of a peaceful event have no right to conduct the peaceful event if notification on holding it was not submitted in order established by this Law." In the absence of a specific provision permitting spontaneous assemblies this means that no spontaneous assemblies are permitted and they are undoubtedly protected by the Convention. This requires to be remedied as was recommended in the 2006 Joint Opinion. It should be made clear that spontaneous assemblies do not require an organiser. "The law should explicitly provide for an exception from the requirement of advance notice where giving advance notice is impracticable. Even if no reasonable grounds for the failure to give advance notice are provided, the authorities should still protect and facilitate any spontaneous assembly so long as it is peaceful in nature. Organisers who ignore or refuse to comply with valid advance-notice requirements may be subsequently prosecuted."⁶

⁵ CDL(2004)026 Comments on the Draft Law on the procedure of conducting gatherings, meetings, rallies and demonstrations in the Republic of Armenia, paragraph 19.

⁶ http://www.osce.org/documents/odihr/2004/10/3776_en.pdf.

39. Article 6(1) explicitly states that participants of a peaceful assembly may be citizens of Ukraine, foreigners or stateless persons. This is in conformity with a previous recommendation of the Venice Commission and OSCE/ODIHR in this respect, and it is to be welcomed.

40. The Draft Law, however, does not stipulate that foreigners (that is, non-nationals) or stateless people can also organize a peaceful assembly. The freedom to organize and participate in public assemblies must be guaranteed to both nationals and non-nationals as well as stateless persons, refugees, foreign nationals, asylum seekers, migrants, and tourists (Guidelines para. 14⁷). It is therefore recommended to use the language of the ICCPR and the ECHR and refer to “everyone” in this regard.

Articles 7 and 8 – Notification

41. Article 7(1) of the Draft Law states that an organiser of a peaceful event shall provide a written notification to the executive authorities and local self-government bodies “taking into the consideration the time that is required for these bodies and law-enforcement bodies to be prepared to ensure public order and security of people during the peaceful event”. The positive aspect of this provision is that it explicitly refers to “informing about” and not “asking permission for” holding a peaceful event. Written notification will facilitate the administration of the assembly as well as all necessary arrangements to be made by the relevant state bodies to ensure proper policing. Notification also ensures that the details of the proposed event are clearly established in order to avoid any potential misunderstanding at a later stage.

42. The Draft Law has removed the requirement that notification must be submitted five days prior to the event. The 2006 Joint Opinion considered this “unusually long”. While this amendment is in itself welcome, it must be underlined that once there is a requirement to have a written notification, organisers should know how long in advance it is required to be submitted. Having no stipulated time means that organisers could be caught unaware and be refused because the authorities considered that too little time was allowed. This allows for arbitrary decision-making by authorities on what is a reasonable time. The positive duty on states to permit and facilitate the exercise of the freedom means that the least feasible time be required for notification. It is often important to participants that assemblies take place at a time proximate to a particular event and any lapse of time due to administrative undue procedures may make the assembly less relevant and have less impact.

43. It is therefore recommended that the Draft Law provide an explicit timeframe (for example 48 hours) for organisers to provide notification of a planned assembly.

44. It is further recommended that the Draft Law require the authorities to issue a written acknowledgement of receipt, confirming that the organiser of the assembly has fulfilled the applicable notice requirements (Guidelines, no 94) to the organisers immediately upon its receipt and that any failure to provide confirmation by the authorities is tantamount to a confirmation being issued.

45. At the same time, the Draft Law should explicitly provide that a lack of notification does not lead to an automatic prohibition of an assembly. Even in cases where no notification has been provided, the presumption should be in favour of holding the assembly and it should thus be

⁷ See in particular ECtHR judgment of 9 April 2002, *Cissé v. France*, at § 50, where the Court found that a breach of the right to freedom of peaceful assembly cannot be justified by reference to the fact that the applicant is an illegal immigrant; see also General Comment 15 by the UN Human Rights Committee under the ICCPR, at § 7: “Aliens receive the benefit of the right of peaceful assembly and of freedom of association. (...) There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant”. See also Venice Commission, Opinion on the law on freedom of assembly in Azerbaijan, CDL-AD(2006)034, §§ 29 -30.

facilitated by the police as long as it remains peaceful and does not impose unreasonable regulatory or law enforcement problems.⁸ This, however, would not prevent authorities from imposing reasonable regulations on assemblies, for which no advance notice has been given to authorities. Furthermore, sanctions may still be applicable to participants of planned assemblies, for which no notice has been given after the assembly is over, providing such a notice is required.⁹

46. There should be an express provision in the Draft Law that organisers are entitled to fix flaws in notifications at any time up to the commencement of the assembly. This is so particularly since Article 5.3 removes the right from organisers to conduct assemblies if notification is not submitted according to the requirements of the Draft Law.

47. The draft law should allow for spontaneous assemblies, when these are designed to respond immediately (that is, spontaneously) to some occurrence, incident, other assembly or speech (Guidelines, para. 97).

48. It is not clear what is required by Article 8.1 where it requires that the notification contain "form and methods of guaranteed providing by the organisers (organiser) of public order, medical care during the event". If this means that the organisers have to guarantee "public order" and also that they are responsible for the provision of all first aid and medical care, this should not be. It is recommended that this provision be removed. As has been stated above and in the 2006 Joint Opinion, organisers cannot be required to take on policing or other state functions.

49. Article 8(3) contains a positive provision that prohibits executive or local authorities to refuse accepting notification of an assembly, submitted in compliance with the requirements of this Draft Law. As was said above (para. 43), it is recommended to add a provision that includes the instruction to the competent authority to issue an acknowledgement of receipt of due notification.

Article 9 – Place and Time

50. Article 9.1 positively provides for the general possibility of holding a peaceful events "in any place suitable for this purpose" and at any time of the day. The same provision prohibits holding events near "high risk objects, defined as such according to the laws..." It is not clear what is intended: while it is considered justifiable to prohibit public assemblies near hazardous facilities that pose a threat to life or safety and which are closed to the public, and presumably fenced in, if the area near a hazardous facility is open to the public, there appears to be no reason to exclude an orderly public assembly in the same area. In addition, it is unclear what laws are referred to. This should be clarified.

51. It is positive that the Draft Law stipulates that prohibitions are limited to those that will be disruptive of activities that regularly occur at the site, which is in line with the 2006 Joint Opinion, thus, respecting another key principle, according to which an assembly should be able to take place within "sight and sound" of its target subject.¹⁰ However, mere inconvenience to the institutions mentioned in the Draft Law (schools, hospitals, prisons, courts) should not be a reason for prohibition. Using "devices that are sources of noise etc." should not necessarily be ground for prohibition. The assembly must genuinely interfere with the activities at such sites. In order to make one's point, some noise will almost inevitably be essential and temporary

⁸ ECtHR, *Oya Ataman and others v. Turkey*.

⁹ ECtHR, *Ziliberberg v. Moldova*.

¹⁰ Guidelines, para. 40, ECtHR *Patyi and others v. Hungary*.

disturbance should not result in prohibition. This applies equally to state buildings and diplomatic missions as to other buildings.

52. Article 9.6 does not provide for a sufficient and satisfactory guarantee for simultaneous demonstrations (see paras. 21-22 above). "Where notification is given for two or more assemblies at the same place and time, they should be facilitated as much as possible. Emphasis should be placed on the state's duty to prevent disruption of the main event where counter-demonstrations are organized". This means that appropriate policing is required to permit both events unless this should present an unmanageable threat to public order.

53. Article 9(6) appears to regulate counter-demonstrations and simultaneous assemblies, and to do so unsatisfactorily to the extent that it provides only for the possibility of changing the time or the place of one of the assemblies. It is necessary for the authorities to take account of the fact that the only restrictions permitted are for the reasons set out in Article 11(2) of the European Convention on Human Rights and inconvenience is not sufficient. A blanket prohibition on two assemblies taking place close to each other is not permissible. The Guidelines explicitly provide that where notification is given for two or more assemblies at the same place and time, they should all be permitted and facilitated as much as possible, notwithstanding who submitted the notification first and how close to each other they plan to gather. This owes also to the fact that all persons and groups have an equal right to be present in public places to express their views. Thus, persons have a right to assemble as counter-demonstrators to express their disagreement with the views expressed by another public assembly. Indeed, in such a case, there is a possibility of disruption of an assembly by a counter-demonstration, and it is the state's positive obligation to prevent disruption of the event, against which counter-demonstrations are organized. Where possible, the authorities should take measures to ensure all assemblies can take place, rather than use the notification of simultaneous events as a justification of imposing automatic restrictions and prohibitions.¹¹ Furthermore, the state has a positive obligation to provide adequate policing to facilitate counter-demonstrations within sight and sound of one another.

54. It is therefore recommended that Article 9 (6) be amended to bring it into line with international standards by removing the requirement for one of two or many assemblies to change the place and/or time; this provision should rather state the positive obligation of the state to facilitate two or more assemblies in one place and time.

Article 10 – Preliminary agitation

55. The Draft Law contains an indirect restriction on peaceful assembly in Article 10, which provides that preliminary agitation may not be conducted in the form of a peaceful event. It is recommended to delete Article 10(3), which goes much further than the wording of Article 11(2) of the ECHR and can impede the right to freedom of expression. The contents of leaflets and other materials about an assembly or circulated at an assembly should not be governed by this Draft Law. The phrase "insults and humiliates the honour and dignity of man and citizen" is rather broad and should also be limited to language that appears in the ECHR.

Article 11 – Support for assembly

56. Article 11 (2) prohibits financing of an assembly by state enterprises, institutions and organizations, as well as foreign states, their citizens and legal entities. This provision raises concerns. Foreign citizens residing in Ukraine should be permitted to contribute to such events. Indeed, Article 6.1 permits foreigners and stateless persons to participate in peaceful assemblies. Additionally, banning state-owned enterprises, institutions and organizations from

¹¹ ECtHR *Ollinger v. Austria*.

funding public assemblies means that their capacity to organise public assemblies may be seriously undermined.

57. Furthermore, it is not clear what kind of repercussions will ensue in case such financing takes place. It is recommended that the Draft Law clarify to which entities it specifically applies and provide officials with sufficient guidance so that the Draft Law does not, as a result, prohibit sponsorship of speech activities by institutions, unless such support is secret.

58. Article 11 (3) requires "[p]owers of a peaceful event participants, who provide material and technical support of its holding, are to be verified in written form by the organisers (organiser) of the event." It is unclear exactly what this means since such persons may have no "powers" in relation to the holding of the event; it is not clear what kind of powers need to be verified and when they need to be verified. On the contrary, this provision can be considered onerous and disproportionate: if its purpose is to require the organisers to identify financial supporters and persons who provide free services or supplies, it should be deleted, since it is not relevant to the issue of reasonable time, place, and manner of the assembly. This should be clarified or removed.

Articles 12, 13 and 14 – Responsibilities of Executive, Local authorities and law-enforcement bodies

59. The role of an authorized representative of an executive authority or local self-government body needs clarification. Article 13(1) states that the representative has a right to "adopt decision on termination of a peaceful event on the basis and on the grounds provided by this Law". The requirement to ensure public order and safety of people as well as observance of law during the conduct of event also seems to be redundant as this is manifestly the obligation of the law-enforcement bodies and not the local authorities.

60. Article 13(2), according to which an executive authority or local self-government body shall inform the relevant authorities about the demands and / or appeals of the participants of an assembly, is positive. It is welcomed that there will be a focal point within the local authority with which assembly organisers may directly communicate.

61. The same Article also outlines the rights and responsibilities of an authorized representative of law-enforcement body, who is appointed upon receipt of a notice about an assembly from local authorities. It is not clear what the demand to "follow procedure and conditions for holding such event" refers to. Should the assembly follow exactly what was provided in the notification? This might be relevant when it concerns the time, place and route. However, what if it concerns dissemination of leaflets? Should the organisers be ordered to stop dissemination because the notification did not mention it, otherwise the assembly would be terminated? It is recommended that this provision be reformulated in order to eliminate these uncertainties.

62. Article 14(2) gives the right to an authorized representative of a law-enforcement body to "remove from a place of holding the event persons that do not follow lawful requests of its organisers". It is not clear exactly who such an "authorized representative" is. This power should be exercisable only by the police. Whilst it may be appropriate for the police to use such a power in certain circumstances, it should not be used for minor infractions which have no significant consequences for law and order. The offending individual could more appropriately be charged with the offence after the event and perhaps fined if convicted. The authorities should not be permitted to use this power disproportionately.

63. It is thus recommended that the provision clearly state that the authorised representative is permitted to take measures only against those persons who violate public order or commit or instigate commission of unlawful actions that prevent achievement of the peaceful assembly objectives. The provision should further state that a removal of individuals based on Article 14(2) point 2, shall not be tantamount to a termination of the entire assembly.

Article 15 and 16 – Termination of assembly¹²

64. Article 15(1) provides that in case of a violation of public order during a peaceful assembly that does not present a threat to human life and health “an authorized representative of executive authority or local self-government body has the right to demand from the organisers (organiser) to eliminate such violation by themselves”. In case of non-compliance with this demand, a peaceful assembly can be suspended first, and then, if the violation has not been eliminated “within the period established by authorized representative of executive authority or local self-government body”, the peaceful assembly will be terminated. This three-step procedure giving the organiser and the participants the possibility to eliminate violating behaviour is highly appreciated.

65. However, the blanket provision of terminating an assembly in cases when participants have violated requirements of law does not appear to be in line with the principle of proportionality as it does not take into account the specific circumstances of each particular case. This provision could lead to termination of a peaceful assembly on the grounds of a minor breach, which is an unacceptable result. For instance, if a small assembly is scheduled to take place and, on the day of the event, it turns into a significantly larger assembly because of an unexpectedly high turnout, the assembly should be accommodated by law enforcement authorities and should be treated as being lawful so long as it remains peaceful.¹³

66. The Guidelines also provide that as long as assemblies remain peaceful, they should not be terminated since termination of assemblies is a measure of last resort. They should be governed by prospective rules; expressed in domestic police guidelines. Legislation should require that such guidelines be developed.¹⁴

67. An assembly can be subject to prohibition only if the prohibition pursues a legitimate aim, is proportionate and necessary in a democratic society. This implies that an assembly can be terminated in response to an imminent threat of violence and disorder associated with a particular assembly. Thus, provisions in Articles 15(2) and 15(3) do not fully reflect the proportionality principle, as they are unlikely to be considered as necessary in a democratic society. Termination might be considered as a proportionate measure if a significant number of participants engage in a substantial violation of public order and “there is no reasonable likelihood that voluntary cessation of the substantial violation can be accomplished by means of communication with violators or, if that fails, arrest of the particular persons engaged in the violation of public order.”¹⁵ Therefore, it is recommended that the Draft Law explicitly states the above cited instance of when an assembly may be terminated.

68. Article 16 on the grounds for termination of a peaceful assembly is formulated in an overly broad manner, with the exception of the provision stating that “actual threat to human life and health, to property of individuals or legal entities” can lead to termination of an assembly. Other grounds include: abuse of state symbols (which should not be a ground for termination), public order violations (without specifying how serious they should be in order to fall within the ambit

¹² In Ukrainian, the title of this Article reads: « Suspension and termination ».

¹³ Guidelines, para. 61.

¹⁴ Guidelines, paras. 137-140.

¹⁵ Joint Opinion, para. 37.

the Draft Law) and all grounds for prohibition of a peaceful assembly as outlined in Article 22 (see below). Thus, while only a court can prohibit an assembly, the decision regarding its termination is made by an authorized representative of executive authority or local self-government body.

69. It is not clear what criteria the executive authority should apply in order to decide whether a peaceful assembly, for instance, violates sovereignty of the state. Such decision belongs rather to the competence of a court of law. Furthermore, the provision allowing termination of a peaceful assembly due to "abuse of state symbols" by participants should be removed, for reasons of being too broad. It is recommended to narrow down the reasons for termination of an assembly to include only threats to public safety, or clear and imminent danger of substantial disorder only.

70. As regards the procedures for termination of an ongoing peaceful assembly, Article 17(1) of the Draft Law provides for the requirement of written instructions of termination that should be given by an authorized representative of executive authority or local self-government body to the organisers, who are obliged to carry out these instructions.

71. Further, Article 17(1) states that [f]ailure to comply with the instruction to terminate the peaceful event leads to necessary actions of the police officers aimed at its termination in accordance with the law". It is recommended that this clause be supplemented with a provision reflecting the principle of proportionality. Namely, international standards require that law enforcement officials should use force only as a last resort, in proportion to the aim pursued, and in a way that minimizes damage and injury.¹⁶ While it is not indispensable for the provision, a reference to liability for unlawful or excessive use of force by law enforcement bodies might be beneficial,¹⁷ though such liability is necessarily already contained in laws governing conduct of officials.

Article 18 – Compensation

72. This provision is the same as that contained in the 2006 Draft Law, which was criticised in the 2006 Joint Opinion.

73. Article 18 imposes excessive liability of an organiser who, according to the provision, covers any material damage inflicted upon public or private property during a peaceful assembly. This provision of the Draft Law should be modified. First, organisers should not be held liable for spontaneous violence providing they did not participate and made reasonable efforts to prevent it. Second, only the damage that was caused wilfully by the organiser should be compensated. Third, an organiser, or any other participant, should be liable only for the damage that s/he personally and knowingly inflicted during the assembly and should not be liable for the personal actions of individual participants. It should be kept in mind that damages as well as violations of the established procedures of an assembly can be breached by third parties and neither organisers nor participants of an assembly should be held liable for their actions.

74. The Venice Commission and the OSCE/ODIHR underline in this context that it is the responsibility of the State, not the organiser to limit damage if an assembly degenerates into serious public disorder. "In no circumstances should the organiser of a lawful and peaceful assembly be held liable for disruption caused to others."¹⁸ Indeed, the responsibility of the State

¹⁶ See UN basic principles on the Use of Force and Firearms by Law Enforcement Officials, paras. 13-14; http://unhchr.ch/html/menu3/b/h_comp43.htm).

¹⁷ Guidelines, para. 146.

¹⁸ Guidelines paragraph 6.2

to maintain public order including regulation of traffic and provision of medical assistance is specifically provided for in Article 20(3). This reflects the primary responsibility of the State for maintaining public order rather than delegating this to the organisers of an assembly.

75. Furthermore, the Draft Law does not include a defence for participants charged with taking part in an unlawful but peaceful assembly, providing they were not aware that the assembly was unlawful or that it pursued illegitimate. It is recommended that the Draft Law be supplemented with a provision embedding an exemption from liability in such cases.

Article 22 – Limitation of rights of assembly

76. The Draft Law provides a list of circumstances, under which the right to hold a peaceful assembly might be limited. Among the reasons directly connected to violence, hatred instigation, threat to public health or life, etc, the list also includes “violation of state sovereignty and territorial integrity”. This appears ambiguous, unless the component of incitement to violence is added. Speeches and demonstrations which call for territorial changes do not automatically amount to a threat to the country’s territorial integrity and national security. Freedom of assembly and the right to express one’s views through it are among the paramount values of a democratic society. As the ECtHR stresses, “[s]weeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.”¹⁹ The Guidelines note that “the making of unlawful statements by participants in an assembly (whether verbal or written) does not of itself turn an otherwise peaceful assembly into a non-peaceful assembly(...).”²⁰

77. The provision of the Draft Law allowing prohibition of a peaceful assembly in case it impedes implementation of an election right is ambiguous and needs to be clarified. For instance, if the assembly participants advocate for not taking part in elections or a referendum, would this suffice to prohibit a peaceful assembly?

78. This Article does not fit coherently with the powers given to the "authorised representative of executive authority or local self Government body" to stop an event temporarily or terminate it completely as provided for in Article 15. On the one hand Article 22 says that only the court can restrict an assembly whereas Article 15, and other Articles, give powers of restriction to other bodies. The precise parameters of the powers of the courts and authorised representatives need to be delineated clearly.

79. It is appreciated that the court is only allowed to impose limitations on a peaceful event in case of several listed unlawful aims of a peaceful event. This is in line with Article 11 of the Convention.

80. For maximum transparency, it is recommended to add provisions that make a clear explanation of the decision-making procedures publicly available (Guidelines, no 103). This provision should not only apply to limitations by the court but also to proposals of changes of date or time of a peaceful event by an executive authority.

81. It is necessary that there be an appeal to the courts in relation to administrative decisions made concerning assemblies which impose restrictions upon them including an outright prohibition. While Article 21 provides for a general possibility of appealing in court “decisions,

¹⁹ ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*.

²⁰ Guidelines, para. 136.

actions or inactivity which violate the right to hold a peaceful event... in the order established by the law", the law should deal specifically with such an appeal ensuring, in so far as possible, that court decisions are made prior to the date proposed for holding the assembly or that the possibility is given to obtain preliminary injunctions. Article 39 of the Constitution provides that restrictions on the exercisable right of assembly "may be established by a court in accordance with the law..." for reasons that reflect Article 11(2) ECHR. In order for organisers and others to be in a position to take court proceedings it is necessary that the administrative authorities give reasons for any restrictions which they seek to impose. Organisers and others should be permitted to challenge these decisions and the basis upon which they were made in the court.

82. At the same time as having such access to the court in relation to restrictions sought to be imposed, it is necessary that organisers and the police and the administrative authorities cooperate in the practical management of events. The police must be in a position to safeguard public order and security. Therefore Article 22.1 which provides that limitations on assembly may only be determined by the court does not fit with other provisions in the Draft Law or with the decision making that is required from organisers, administrative authorities and the police. This needs to be amended.

83. The Draft Law allows the authorities to request the court to prohibit a peaceful assembly in case it is "established that the aim of peaceful event contravenes the Constitution". This formulation is ambiguous as it provides room for possible abuse or misinterpretation by the authorities. It is an essential element of democracy that people are free to express political views that contradict those of the authorities. A possibility should be provided for diverse political proposals to be put forward and discussed, even the ones that call into question the way a state is organized.²¹ A peaceful assembly organized in support of changes to the constitution can not be banned or terminated on the sole ground of its political demand. Political ideas which challenge the existing order and whose realisation is advocated by peaceful means should be afforded a proper opportunity of expression through the right of assembly as well as through other lawful means.²² On the other hand, an assembly, which incites people to use violence or instigate hatred can be legitimately banned or terminated: though it might be peaceful by form, it can not be considered as peaceful by substance and, consequently, falls short of protection. Thus, the test for defining the legitimacy of an imposed restriction must be the existence of an imminent threat of violence. It is recommended to reflect this crucial distinction in the Draft Law.

84. The Draft Law should also provide that the burden of proof for establishing the grounds upon which an assembly may be banned lies with the applicant (that is, the body which seeks for the assembly to be banned), both in the administrative proceedings and as part of the judicial proceedings.

²¹ ECtHR *Freedom and Democracy Party (Ozdep) v. Turkey*.

²² ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*.