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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE OSCE GUIDELINES
ON FREEDOM OF ASSEMBLY

on the basis of comments by

Ms Finola FLANAGAN (Member, Ireland)
Mr Giorgio MALINVERNI (Member, Switzerland)

Introduction

1. In January 2005, the OSCE/ODHIR Head of Legislative Support Unit requested the Venice Commission opinion on the Draft Guidelines on Freedom of Assembly, prepared by the OSCE/ODHIR Legislative Support Unit.
2. Mrs Finola Flanagan and Mr Giorgio Malinverni were appointed rapporteurs on this matter.
3. The present opinion has been prepared on the basis of their comments and adopted by the Venice Commission at its 63rd Plenary Session (Venice, 10 – 11 June 2005).

Comments with respect to specific points of the Guidelines

4. The OSCE/ODHIR Guidelines on Freedom of Assembly (hereinafter: “the Guidelines”) are prepared to be used by practitioners in the preparation of legislation pertaining to freedom of assembly. In that regard they are useful checklist and a description of the law in the OSCE region on this fundamental right. The reference to the legislative practices of the Council of Europe member states could also be added.
5. The Guidelines set out in some detail the issues that typically arise in relation to such legislation and the application of the law having regard to the European Convention on Human Rights and its jurisprudence and the International Covenant on Economic, Social and Cultural Rights and the jurisprudence of the UN Human Rights Committee. The detail of the Guidelines illustrate that whilst it is easy to state the fundamental principle – “everyone has the right to freedom of peaceful assembly” - it is much less easy to create a proper balance of restrictions or limitations on the exercise of the right, whilst at the same time respecting the basic right. This presents particular difficulty for both lawmakers and law-enforcers. For this reason the Guidelines are to be welcomed.

Introduction

6. The “Introduction” usefully recalls two main international instruments guaranteeing freedom of assembly and establishing the general context for its interpretation. It might be useful in this part of the Guidelines, to also mention other international instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child as well as the Council of Europe Framework Convention on National Minorities. Such a reference would also allow to underline the need not to restrict the possible participants of assemblies (see *infra*, under point 14).
7. It would perhaps also be worthwhile in an introductory part of the Guidelines - rather than in a last chapter - to elaborate more on the close association and overlap between the freedoms of assembly and association, expression and of thought, conscience and religion. The paragraph on the relation between counterterrorist measures and freedom of assembly might also fit in this introductory part.

Point 2. Regulating the exercise of freedom of assembly

8. As rightly pointed out in the second paragraph, the exercise of freedom of assembly is a constitutional matter *par excellence*. As such, it might be questionable whether it is indeed indispensable for a State to enact a specific law on assemblies. The fundamental rights and freedoms, including the right of assembly should, insofar as possible, be allowed to be exercised without regulation except where their exercise would pose a threat to public order and where necessity would demand state intervention.

9. A legislative basis for any interference with fundamental rights, such as the right of peaceful assembly, is required by the Convention. The requirement that the restrictions must be “prescribed by law” means that they must be enunciated with sufficient precision that a person can regulate his or her conduct in order to obviate arbitrary prohibition (see under paragraph 13).

10. It does not appear essential for a State to enact a specific law on public events and assemblies. Control of such events may be left to general policing and the rights in relation to them may be subject to the general administrative law. This approach can be adopted perfectly satisfactorily. In Ireland, for example, no system requiring prior notification or consent from the police or anyone else to hold public meetings exists, although organisers will generally notify the appropriate local police station. The general criminal and civil law is applied. Nonetheless, States may decide to enact laws specifically regulating freedom of assembly.

11. A danger that exists when enacting legislation in relation to fundamental rights is that an excessively regulatory, bureaucratic system is designed which seeks to prescribe for all matters and which may operate to inhibit the right. Such laws sometimes seek to create an extensive range of restrictions which are not linked to the list of permissible reasons set out in the conventions. Using the general law may in appropriate circumstances provide a suitable means for meeting the requirements of the international conventions.

Point 3. Definitions

12. In practice, assemblies and protests might take multiple and various forms. A categorisation of assemblies and difficulty connected to clearly distinguish between different categories might potentially lead to an arbitrary control of what is permitted. It might be useful instead to focus on how “peaceful” and “lawful” assembly is to be understood and interpreted in particular, in the light of the European Court of Human Rights case-law.

Point 4. General principles

13. The main difficulty connected with the exercise of the freedom of assembly is most probably assessing the restrictions or qualifications of this right. Article 11 of the Convention (as Articles 8 to 10) allows for a state authority to interfere with this right. There exist a case-law of the European Court on Human Rights on justification of such restrictions based on a standard analysis. It might therefore be useful adding a more elaborate description of the European Court’s approach to assessing restrictions under specific headings “prescribed by law”, “legislative aims”, “necessary in a democratic society” including the principle of proportionality. Paragraphs under 4.6 and 4.7 could then be merged into a single one, and elaborated as to include the above mentioned aspects. This chapter should also clearly distinguish a “legislative aims” allowing the interference with this right on the one hand, and the respect for the principle

of proportionality (balance of interests) on the other. It could also be mentioned that the European Court leaves a certain margin of appreciation to States when assessing the respect for the principle of proportionality.

- *State's duty to protect lawful assembly*

14. The State's affirmative obligation¹ to provide protection to groups exercising the right of peaceful assembly is established by the Court's case-law (e.g. *Zingler v. France*, *Plattform "Ärzte für das Leben" v. Austria*). The Court does, however, recognise the practical difficulties attached to public assemblies, and allows States a certain discretion to deal with these difficulties, whether through the provision of police protection for controversial demonstrations, or through other means.

15. In general, what creates the problems arising out of public demonstrations is the risk of violence. It might therefore be useful to elaborate more on the police powers and responsibilities (including provisions on the use of force and firearms by police officers²) under a separate heading.

Point 5. Regulation of public assemblies

16. With respect to point 5.1, it should be noted that in a number of European countries (e.g. Switzerland) in order to be lawful, an assembly must demand and obtain an "authorisation" before it is organised.

Point 6. Organisers and participants

17. While organisers must be clearly identified and do bear certain responsibilities, it seems difficult to establish, by way of legislation, the categories of persons who will participate to an assembly. It can easily happen for example, that persons join an assembly "*en cours de route*".

18. Furthermore, as concerns more particularly foreigners and persons without full legal capacity, it is today unanimously admitted that they too, are beneficiaries of the right to assembly. The reference to a specific international instruments (such as the UN Convention on the rights of the Child, the Convention on Prohibition of Discrimination, or the Framework Convention on National Minorities) quoted in the introductory part might suffice to ensure that these categories of persons do freely exercise the right to assembly.

19. The specific reference to detainees does not appear to be necessary either. It is obvious that a person deprived of liberty may not participate to an assembly even inside prison, when this is inconsistent with the prison rules.

20. These last remarks mainly aim at avoiding to submerge the legislation with articles that are not really indispensable.

¹ *An obligation as to measures to be taken, and not as to results to be achieved.*

² *A reference to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) could be added here.*