Strasbourg, 20 September 2005

Restricted
CDL(2005)062
Engl. only

Study no. 332 / 2005

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE OSCE/ODIHR GUIDELINES FOR DRAFTING LAWS PERTAINING TO FREEDOM OF ASSEMBLY

by

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I. Introduction

1. Following my brief comments made on these Guidelines at the plenary meeting of the Venice Commission on 11 June 2005, I have been asked by the Commission's Secretariat to amplify my observations. At the time of my intervention, I had not had the advantage of reading the draft Opinion on these Guidelines based upon comments by Ms Finola Flanagan (Ireland) and Mr Giorgio Malinverni (Switzerland). I have now had that benefit, and I very largely concur with all the points contained in that Opinion. However, I suggest that the draft Opinion may need to go somewhat further in the criticisms that it makes of the Guidelines, since at present, for the reasons set out below, there is in my opinion considerable room for improvement in the Guidelines.

II. General observations

2. The purpose of the Guidelines is stated to be to assist practitioners involved in preparing draft legislation pertaining to the freedom of assembly. The Guidelines state that they offer a practical toolkit for legislators "by drawing on best practice examples from the OSCE participating States" to illustrate various legislative options that exist. Certainly, the Guidelines draw attention to some important questions of general principle relating to the freedom of assembly, including (for instance) the necessity for restrictions on the freedom of assembly to be consistent with the rights guaranteed by the European Convention on Human Rights. However, although the Guidelines may assist some legislators by introducing them to aspects of the jurisprudence of the Strasbourg Court, I doubt whether the Guidelines provide much practical help to future legislators. The Guidelines mention the wide variety of legislation provisions that exists in OSCE States, but they do not attempt to identify examples from OSCE States that conform with best practice, nor do they provide anything like a model law on public assemblies. I advise that the authors of the Guidelines should be asked to list, say, five or six laws from OSCE States that in their view conform with best practice.

3. One difficulty arises from the imprecise goals set by the Guidelines. I share the view of Ms Flanagan and Mr Malinverni that there is not a need for legislation that covers all the law relating to freedom of assembly. The more extensive such legislation is, the greater the risk that some aspects of the law will infringe requirements of the ECHR and ICCPR. In my view, the Guidelines do not provide a sufficiently sharp focus by concentrating on those aspects of the freedom of assembly on which some legislative regulation is needed. For instance, in the United Kingdom since 1936 legislation has existed on the control of processions by the police and other authorities; and more recently the scope of this control has been extended. But such legislation does not justify setting up an apparatus of notification, permission and control for the hundreds and thousands of public meetings that are regularly held by churches, trade unions, political parties, environmental groups, ethnic minorities and other groups.

4. The point that I would draw from this is the importance of avoiding vague generalities like 'public meetings' or 'public assemblies' and the need, in discussion of any form of regulation, to specify the particular class of events that it is necessary to regulate, and to keep clearly in mind the reasons why such regulation is necessary. In some countries, the local police or the Interior Ministry might find it 'useful' to maintain an on-going list of all gatherings of members of the public, of their organisers and of those who attend those gatherings. Such a practice would be inimical to the maintenance of a vigorous democracy.

5. Although the Guidelines make a number of important points, the drafting of the paper is uneven and some of the discussion is rather diffuse. I have noticed in particular various generalisations that are over-stated or, in my opinion, are capable of being interpreted as encouraging more intervention by public authorities (including the police) in important aspects of life in an open, democratic society than would be good for the health of democracy. I advise that the Guidelines should be subject to a process of detailed revision, to enable the authors to take into account the observations already made by Ms Flanagan and Mr Malinverni. For assistance in this process, the remainder of this paper consists of detailed observations and criticisms of the Guidelines. I am confident that many of these criticisms can be met in the course of redrafting.

III. Detailed observations on the text of the Guidelines

Section 2 – ***Legislative Basis …*** The enactment of regulatory and police powers on the freedom of assembly should be limited to those powers that are necessary to meet a legitimate public interest, and the substance of these powers should not negate essential public freedoms. This point needs to be emphasised in respect of the list of principal categories of assembly mentioned in the next section.

Section 3 – ***Definitions …*** **3.1 Principal categories** It must not be assumed that the four categories listed give rise to the same public interest in regulation and control. Item (b) (a picket) should possibly be rephrased as a stationary gathering <u>on a public thoroughfare</u>. Items (c) and (d) as phrased do not include an open air meeting on land that is privately owned – such as a football ground or a private estate.

More important, it is assumed later in the paper that there is, or may be, a public interest in regulating and controlling all meetings open to the public, even those that are held on private premises. It needs to be stated categorically, and early in the Guidelines, that in an open society, meetings open to the public may be held on the proposal of political parties, interest groups, cultural bodies, environmental groups, trade unions, religious groups etc which do not justify any form of official regulation or permission or control – for example, where the meeting can be held with the permission of the owners of the land or building concerned.

3.2 Lawful assembly The present drafting of the first implication of the term 'lawful' does not sufficiently stress the need for preconditions for the holding of an assembly to be 'admissible' in this context. If (for instance) national legislation requires that the approval of the police is needed before any public meeting can be held, and if the legislation gives the police an unlimited discretion to grant or withhold permission, does it become 'unlawful' to hold the meeting just because the police have refused permission for it?

Section 4 – ***General principles …***

4.2 Right to counter-demonstration This section rightly develops the importance of the right to counter-demonstration and of using police powers to regulate counter-demonstrations. However, the second sentence swings much too far in this respect in saying that it '**would be'** a disproportionate response to prohibit other public events at the same time and place. The question of proportionality inevitably depends on a whole lot of circumstances. What is meant by the 'same time', the 'same place'? What has been the history of previous demonstrations and counter-demonstrations between the same groups? And what records of violent or non-violent action do the two groups have? Depending on the detailed situation, it could well be a proportionate response to let the first demonstration go ahead and to postpone the second

demonstration to a later time or require it to be held elsewhere. It would be absurd to let two processions organised by strongly opposed groups take place along the same streets at the same time! There is also a 'first in the field' assessment to be made – 'let group A go ahead this Saturday afternoon, because group A made the first application for this time and place; and if group B wishes to make the first application for another time and place, group B will be allowed to go ahead (next Saturday afternoon)'. Such an assessment could well be justified as being even-handed as between the two groups.

In this section, it seems very unclear to state: "'policing' is meant to imply a range of measures to maintain public order, normally not amounting to more than organizing traffic control". The word 'normally' is difficult here, since the content of 'public order' is generally considered to go beyond traffic control and to include measures necessary to prevent there being violence on the streets that can reasonably be apprehended.

The paragraph on heckling contains an important point – but is it really helpful advice, since there will inevitably be much disagreement about the qualification "as long as such heckling does not actually disrupt the holding of the meeting concerned"? If a meeting in a public place is attended by several hundred people who do not want to hear the planned speakers, and boo the speakers so that the speeches are inaudible, should police powers be used to silence or arrest those hundreds of people? Or what if the meeting is being televised and the organisers, a political party, believe that any hostile sounds will frustrate the purpose of the meeting?

4.3 State's duty to protect lawful assembly Does this duty of the state go as far as stated in the first paragraph? The point already made on section 4.2 about counter-demonstrators applies here. Admittedly, the third paragraph of this section seeks to deal with this point.

4.5 Prompt judicial review of restrictions Reliance on there being prompt judicial review of undue restrictions seems very speculative indeed. It would be more practical to advise the authorities (in line with the important points made in section 4.3 and 4.4) to seek to reach agreement with the organisers of a public event for which permission is required over the details of any conditions that the police may wish to impose.

One difficulty with creating a time-table that would permit judicial review of restrictions in advance of the event is that this might require too long a period of advance notice.

4.7 Proportionality The point made in the second paragraph here is that "all public events – official events as much as public assemblies – will cause some inconvenience to some members of the public not involved in them". It is not clear what is meant by 'all public events' here. As has already been stated, in an open society meetings open to the public are frequently organised that raise no question of public regulation and control; such meetings cause no inconvenience to anyone. If members of the public do not want to attend the meeting, they need not do so. What is probably meant is (a) that the use of the highway for public processions or for static meetings is likely to cause some inconvenience to other users of the highway; and (b) that events like football matches, pop-music festivals, cinemas and theatres may cause increased congestion in the streets at certain times. But such congestion has to be accepted as a factor of urban life today.

5.1 Requirement of advance notice "It is common for the public authorities to require an advance notice of a public meeting". This statement is phrased far too broadly. As already stated, in an open society meetings open to the public are frequently organised that raise no question of public regulation and control – whether on the proposal of political parties, interest groups, cultural bodies, environmental groups, trade unions, religious groups and so on. The need for advance notice arises only in respect of certain meetings or assemblies – for instance, when a procession is planned to take place on the highway, or a static assembly is planned to take place on a public square. In such situations, the need for advance notice ensures that the police and other authorities know of the event, are prepared to enable it to occur and do not use powers that they may validly have (for instance, of regulating traffic) to obstruct the event.

There will be a need for advance notice of a different kind if the organisers want to hold a meeting in a town hall that is owned by the council, in a school that is owned by the education authority, in a conference room in a hotel, in a church hall owned by a religious body etc – this need for advance notice is simply to make a booking of the premises at a particular time, since without permission of the owners, no meeting can be held. But the booking of a hall or other meeting-place is a separate matter from any requirement of notification to the police.

5.2 Place, time and manner "It is assumed that all public places are available for the purpose of holding assemblies". The difficulty with this statement is to know what is meant by 'public places' here. It cannot mean land or buildings owned by a public authority, since (to take an absurd example) the offices used by the police or the local council are plainly not available for the purpose of holding assemblies. A possible meaning is 'all places to which the public have a right of access', but what about an art gallery owned by the municipality? Or the ticket hall at a bus or railway station?

The statement is rather more accurate if it applies to all highways, circulation space adjacent to highways, market squares, publicly owned grounds for recreation and sport, and *all publicly owned buildings and spaces customarily used for the purpose of holding meetings and other functions*. Even so, the need for qualification arises, since there is no reason why every part of every highway should be available for holding assemblies. Nor is there any reason why every part of a public park (a botanical garden?) should be walked over and its beauty destroyed by religious or politically motivated citizens. (In London, Hyde Park and Trafalgar Square are both regularly used for political and other events – but in each case subject to legal regulations that the organisers must observe, and subject to a booking system; but no booking system applies to 'Speakers' Corner' in Hyde Park where anyone may turn up and speak to those who wish to listen.)

"In exceptional cases, it cannot be excluded that private property can be used as a venue for public assembly." As already stated, in an open society meetings open to the public are frequently organised that raise no question of public regulation and control – whether on the proposal of political parties, interest groups, cultural bodies, environmental groups, trade unions, religious groups and so on. The great majority of these meetings are probably held on private property. The final paragraph of this section deals with the regulation of assemblies on private property – the difficulty may be that in this section the meaning of a 'public assembly' is not at all clear.

It needs to be articulated more clearly than at present that a public authority acts properly in regulating the use for public meetings of property that it owns or controls that is customarily used for holding meetings and other functions, provided that the scheme of regulation does not discriminate between different groups of organisers, preferring one political party to another, or one religion to another etc.

6.2 Definition of participant It is difficult to see how "the law" can make clear who is a participant and who is not. Certainly there may be legislative rules that seek to do this, but in a particular case the decision will depend on the facts and will have to be made by a court. There is an infinite gradation possible between organising, participating, sympathising and being present, observing, not sympathising but being present, accidentally being caught up in an event, attending to object to the assembly, failing to disperse if lawfully required by the police to do so etc (as is recognised later in the paper in section 7, Liability).