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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

FINAL DRAFT OPINION

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

on the basis of comments by

Mr Anthony BRADLEY (Substitute member, United Kingdom)

Ms Finola FLANAGAN (Member, Ireland)

Mr Giorgio MALINVERNI (Member, Switzerland)

I. Introduction

1. In January 2005, the OSCE/ODHIR requested the Venice Commission an opinion on the Draft Guidelines on Freedom of Assembly, prepared by the OSCE/ODHIR Legislative Support Unit.
2. Mrs Finola Flanagan, Mr Giorgio Malinverni and Mr Anthony Bradley were appointed rapporteurs on this matter.
3. The present opinion was prepared on the basis of the comments of three rapporteurs and adopted by the Venice Commission at its ... Plenary Session (Venice, October 2005).

II. General considerations

4. The OSCE/ODHIR Guidelines on Freedom of Assembly (hereinafter: “the Guidelines”) are designed to be used by practitioners in the preparation of legislation pertaining to freedom of assembly but also and in particular, by competent administrative authorities and law enforcement agencies. The Guidelines set out in some detail the issues that typically arise in relation to a legislation pertaining to freedom of assembly and its application having regard to the European Convention on Human Rights (hereinafter: “the Convention”) and its jurisprudence as well as the International Covenant on Civil and Political Rights and the jurisprudence of the UN Human Rights Committee.
5. The detailed nature of the Guidelines illustrates 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 between restricting or limiting the exercise of the right while at the same time respecting the basic right. This presents particular difficulty for both lawmakers and law-enforcers. For this reason the Guidelines for drafting laws pertaining to the freedom of assembly are to be welcomed.

III. Comments with respect to specific points of the Guidelines

A. 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 worthy 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*, para 36).
7. Any legislation pertaining to freedom of assembly should be thought of in the context of other human rights and freedoms, in particular the freedom of expression. The protection of opinions and freedom to express them are among the objectives of the freedom of assembly and association as enshrined in Article 11 of the Convention. The introductory part of the Guidelines - rather than its other chapters (presently Chapters 3.2 and 8) – should elaborate more on the close association and overlap between the freedoms of assembly and association and freedom of

expression. The paragraph on the relation between counterterrorist measures and freedom of assembly (presently Chapter 8) might also fit in this introductory part.

B. 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 should be governed in principle primarily by the Constitution and by the Convention.

9. Certainly, 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.

10. The control of events whose exercise would pose a threat to public order and where necessity would demand state intervention may very well be left to general policing and the rights in relation to them may be subject to the general administrative law. 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.

11. Accordingly, the Commission is of the opinion that it is not indispensable for a State to enact a specific law on assemblies (see, Opinion on the Law on conducting meetings, assemblies, rallies and demonstrations in Armenia CDL-AD(2004)039, §§ 15-16).

12. Nonetheless, States may decide to enact laws specifically regulating freedom of assembly (and indeed several European States do have similar laws). 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.

13. The Guidelines should therefore focus more sharply on those aspects of the freedom of assembly on which some legislative regulation is needed.

C. Point 3. Definitions

14. In practice, assemblies and protests take multiple and various forms. Within the meaning of the Convention, the term “assembly” is characterised by less formal groupings; it includes private and public meetings, processions, sits-in on a public road and rallies. It is also an essential part of the activities of political parties and the conduct of elections.

15. Items (c) and (d) of the Guidelines as presently 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 appears later in the Guidelines that there is, or may sometimes be, a public interest in regulating and controlling all meetings open to the public, even those that are held on private premises.

16. Today, in the practice of most European States, assemblies open to the public may be held on the proposal of political parties, interest groups, cultural bodies, environmental groups, trade unions, religious groups or similar, 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).

17. Accordingly, in the Commission's opinion, a categorisation of assemblies and the difficulty of clearly distinguishing between different categories might potentially lead to an arbitrary control of what is permitted. It could be useful, instead, to point out in the Guidelines that in discussion of any form of regulation of this fundamental freedom, only the particular category of events that it *is* necessary to regulate should be specified, and the reasons why such regulation is necessary must be clearly kept in mind.

D. Lawful assembly

18. 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. For example, when the national legislation requires the approval of the police before any public meeting can be held, and when it gives the police a broad discretion to grant or withhold permission, holding of an assembly should not become "unlawful" merely because the police have refused permission for it.

19. In order to avoid such an interpretation, this section of the Guidelines could 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 (hereinafter: "the Court") case-law.

E. Point 4. General principles

20. The essence of the freedom of assembly is to be found in active participation in democratic life and process. Article 11 of the Convention (as Articles 8 to 10) allows for a state authority to interfere with this right. The main difficulty connected with the exercise of the freedom of assembly is most probably assessing whether such interferences are justified in the sense of Article 11 of the Convention. There exists an extensive case-law of the Court on grounds for restricting or limiting the exercise of rights under the Convention.

21. It might therefore be useful to add to the Guidelines a more elaborate description of the Court's approach to assessing restrictions or limitations of the Convention's rights under specific headings "prescribed by law", "legitimate aims", "necessary in a democratic society" including the principle of proportionality. This chapter should also clearly distinguish a "legitimate aim" 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 Court leaves a certain margin of appreciation to States when assessing the respect for the principle of proportionality.

F. Right to counter-demonstration

22. This section rightly develops the importance of the right to counter-demonstration and of using police powers to regulate counter-demonstrations. However, it may be questioned whether a prohibition on conducting public events "in the place and at the time of another public

event would be a disproportionate response to the risk of disruption". The question of proportionality inevitably depends on a whole lot of circumstances in each specific case. The competent authorities will have to assess, among other, 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 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.

23. Further, it appears inappropriate to state that "policing is meant to imply a range of measures to maintain public order, normally not amounting to more than organizing traffic control". 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.

24. The paragraph on heckling recalls an important aspect of the realisation of the right to assembly. However, 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?

G. State's duty to protect lawful assembly

25. The State's affirmative obligation¹ to provide protection to groups exercising the right of peaceful assembly is established by the Court's case-law. The Court does, however, recognise the practical difficulties attached to public assemblies, and allows States a certain discretion to deal with this difficulties, whether through the provision of police protection for controversial demonstrations, or through other means.

26. In general, what creates the problems arising out of public demonstrations is the risk of violence going out of control. 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.

H. Prompt judicial review of restrictions

27. A possibility for the assembly organisers to appeal any undue restrictions before the court is indeed important for an effective realisation of the freedom to assembly. However, creating a time-table that would permit judicial review of restrictions in advance of the event might require too long a period of advance notice. It might thus be more useful to advise the authorities (in line with the important points made in sections 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

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.

that the police may wish to impose. The Guidelines could also underline the principle that laws regulating assemblies must not in any circumstances create unjustifiable restrictions in relation to holding peaceful assemblies (see above, para 12).

I. Proportionality

28. The Guidelines assume 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”. In an open and democratic 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. Indeed, the traffic problems caused by the use of the streets or highways by the participants in a public event cannot constitute a justifiable restriction to the exercise of the right to assembly.

J. Point 5. Regulation of public assemblies

a. Requirement of advance notice

29. Establishing a regime of prior notification of peaceful assemblies does not necessarily extend to an infringement of the right. In fact, in several European countries such regimes do exist³. The need for advance notice generally arises 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 - which require the police and other authorities to enable it to occur and not to use powers that they may validly have (for instance, of regulating traffic) to obstruct the event.

30. In the Commission’s opinion, the Guidelines should state that any regime of prior notification must not be such so as to frustrate the intention of the organisers to hold a peaceful assembly, and thus indirectly restrict their rights (for instance, by providing for too detailed and complicated requirements, and/or too onerous procedural conditions).

b. Place, time and manner

31. The wording of this section could be reviewed; it might be more accurate instead of using a too broad term “public places”, to clearly state that 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 should be available for the purpose of holding assemblies. This, naturally, may be subject to legal regulations that the organisers must observe, and subject to a booking system if necessary.

32. It should also be articulated more clearly 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).

³ For instance, in Latvia, Lithuania, Lichtenstein, Malta, Norway, Netherlands and Switzerland.

33. With respect to public events held on private property, such situation does not seem to be an exception. In practice, the majority of the meetings organised by political parties, various interest groups or cultural bodies are probably held on private property (see above, paras. 14 – 17).

K. Point 6. Organisers and participants

34. 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. 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 Guidelines, in chapter 7). It can also easily happen that persons join an assembly “*en cours de route*”.

35. 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.

36. 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.

IV. CONCLUSION

37. The OSCE/ODHIR initiative to draft Guidelines on Freedom of Assembly for the purpose of providing guidance to legislative authorities as well as to competent administrative authorities and law enforcement agencies is very welcome and useful. However, as they presently stand, the draft Guidelines contain some provisions that might be interpreted as encouraging more intervention by public authorities than is justifiable. On the other hand, a number of points of particular importance for the law enforcement agencies (including the police) would merit further elaboration.

38. The Commission thus considers that the Guidelines should be subject to revision and the observations above be taken into account.