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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT FINAL OPINION
ON THE AMENDMENTS
TO THE LAW ON ASSEMBLY AND MANIFESTATIONS
OF GEORGIA

on the basis of comments by

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I. Introduction

1. In October 2009, the Venice Commission took note of two sets of comments by Mr Bogdan Aurescu and Ms Finola Flanagan (CDL(2009) 153 and CDL(2009)152 respectively), on recently adopted amendments (CDL(2009)127, hereinafter referred to as “the 2009 amendments”) to the law on Assembly and Manifestations (CDL(2009)128). Further, at its 82nd Plenary Session (Venice, 12-13 March 2010), the Venice Commission adopted an interim opinion (CDL-AD(2010)009) on a set of draft amendments (CDL(2010)026, hereinafter “the 2010 draft amendments”) to the law of Georgia on Assembly and Manifestations as amended in 2009.
2. The 2010 draft amendments were subsequently adopted by the parliament of Georgia on 1 July 2011 and entered into force on 14 July 2011.
3. On 26 September 2011, the Georgian authorities sent the translation of the amendments as adopted (CDL-REF(2011)054, hereinafter: “the July 2011 amendments”) to the Commission and requested its opinion thereon.
4. Mr Bogdan Aurescu and Ms Finola Flanagan continued to act as rapporteurs. The present final opinion, which was drawn up on the basis of their comments, was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).
5. To the extent that it is still pertinent and applicable, the Commission refers to the detailed analysis contained in its previous opinion (CDL-AD(2010)009).

II. Analysis of the amendments to the law on assembly and manifestations

A. The law previously in force

6. The Venice Commission recalls that it has previously found that the system established in Georgia by the Law on Assembly and Demonstrations prior to the amendments under examination (hereinafter referred to as “the Law previously in force”) was a “very rigid one” which did “not sufficiently guarantee the exercise of the right to freedom of assembly“(CDL-AD(2010)009, para. 21).
7. The Commission had noted in particular that there was “no possibility for the authorities to modify, for example for reasons of public safety, the modalities, the venue and the duration of the assembly as envisaged by the organizers. The notification is either accepted or refused, and the assembly is terminated if the conditions are violated.” (CDL-AD(2009)009, para. 20).
8. Article 6 of the Law previously in force provided for the determination by the authorities of permanent places and times for holding assemblies with no previous notification. The Venice Commission had already expressed the critical view that the availability of such places may serve as a pretext for the regulatory authorities not to allow demonstrations to be held otherwise and elsewhere.
9. Article 9 § 1 of the law previously in force further contained blanket prohibitions: a) against organising demonstrations inside and within a radius of 20 meters from the entrance of the Parliament, the presidential administration; the Constitutional Court, the Supreme Court, the ordinary courts, the Prosecutor’s Office, the Police, penitentiary and law enforcement bodies; military units and sites; railway stations, airports and ports; hospitals; diplomatic offices; government buildings; local self-government buildings; enterprises, institutions and organizations of special regime or having armed guards; b) against blocking buildings; c)

against blocking the traffic unless this is inevitable due to the number of demonstrators. The Venice Commission has previously and repeatedly expressed concern over blanket prohibitions, referring inter alia to the OSCE/ODIHR - Venice Commission Guidelines (hereinafter: "the OSCE/ODIHR – Venice Commission Guidelines", para. 83)¹: "*blanket legislative provisions that ban assemblies at specific times or in particular locations require much greater justification than restrictions on individual assemblies. Given the impossibility of having regard to the specific circumstances of each particular case, the incorporation of such blanket provisions in legislation (and their application) may be found to be disproportionate unless a pressing social need can be demonstrated. As the European Court of Human Rights has stated², "Sweeping 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."*

10. The Venice Commission had issued several recommendations aiming at improving the legislative regulation of the fundamental right to freedom of assembly in Georgia. It had been recommended in the first place to include in the law a provision mirroring paragraph 2 of Article 11 ECHR³. Such a provision would provide a proper basis for deciding upon restrictions on assemblies, including restrictions on the location of holding an assembly, on a case-by-case basis taking into account the specific circumstances.

B. The July 2011 amendments

Underlying principles

11. The Venice Commission notes with satisfaction that the July 2011 amendments introduce the important principles of legality, of necessity in a democratic society and of proportionality. Indeed Article 2 as amended sets out the following principles:

- "3. The action which restricts the rights recognized and protected by this law shall be:*
- a) Directly intended for the fulfillment of values protected by Article 24, paragraph 4 of the constitution of Georgia;*
 - b) Prescribed by law;*
 - c) Necessary in a democratic society;*
 - d) Non-discriminative;*
 - e) Proportionally restrictive;*
 - f) The good protected by the restriction should exceed the damage caused by it."*

12. These new provisions are very important, and represent a welcome, significant step forward made by the Georgian authorities to bring the law into accord with ECHR requirements.

¹ CDL(2008)062

² ECtHR, Stankov and the United Macedonian Organisation Ilinden v. Bulgaria judgment (2001), para. 97.

³ Article 11 ECHR provides: „1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

13. The previously criticised power to restrict exercise of the right to assemble "to avoid the revelation of information acknowledged confidential and to guarantee the independence and impartiality of justice" has been maintained in Article 24.4 of the Constitution. This power, which is not provided for in Article 11(2) ECHR, may be permissible in certain circumstances but not automatically⁴. On this point, both the Constitution and the Law should be brought into compliance with the strictly prescribed and exhaustive list of possible limitations set out in ECHR Article 11.2. the Constitution of Georgia (Article 24.4) and the Law on Assembly and Manifestations should be amended.

14. The July 2011 amendments bring about the principles of "proportionality" and "necessity in a democratic society" in several other provisions. Subparagraph "h" of Article 3 defines "proportionality of a restriction" as follows: *restriction in line with the values protected by Article 24, paragraph 4 of the constitution of Georgia, if it is the most effective and the least restrictive for the achievement of the aim. Application of the stricter norms shall take place only when it is otherwise impossible to achieve the values protected by Article 24, paragraph 4 of the constitution of Georgia.*"

Protection of the rights of others

15. New Article 11² instructs the executive authorities to implement the principle of proportionality by striking a proper balance with "the rights of others". Importantly, rather radical statements such as "these persons shall not be interrupted in carrying out their activities" (para. 1 in fine) are mitigated by the prescription not to restrict a demonstration if the interference with the rights of others "is limited to a short period of time" (para. 4).

Blocking of traffic

16. The law previously in force prohibited the blocking of traffic (article 11.3(b)) and provided for severe consequences for it (termination: article 13.1) even though the 2009 amendments had introduced a provision (Article 11¹) whereby the full or partial blockage of a carriageway was allowed only if, and as long as, an assembly or a manifestation cannot be held otherwise due to the number of people participating in it".

17. New Article 11¹ provides for the possibility – and not for the obligation - for the executive authorities to restore transport movement. It is positive that decisions to restore the traffic need to be taken on case-by-case and only if this does not make it impossible to carry out the demonstrations. The obligation is introduced for the law-enforcement agencies to ensure the safety of persons and find an alternative traffic route if the carriageway is blocked due to the number of participants (Article 11¹para. 5).

18. In addition, this provision is to be read in combination with the new Article 11² (see para. 15 above) which calls for a proper balances between the right to assemble and the rights of others and explicitly allows restrictions of the rights of others for a limited period of time.

Blanket restrictions

Article 9.3 prohibits absolutely the blocking of "*railways, highways [and] an entrance of buildings...*" It should be made absolutely clear in the law that the provisions of Articles 11¹ which appears to require the authorities to allow an assembly to block the highway "*due to the number of people participating in it*" and Article 11² which appear to allow and 11² interference "*for a short period of time*" with the "rights of those who live, work, shop, trade and carry on business in the locality" to carry out these activities override this prohibition. Indeed, the absolute prohibition is superfluous having regard to these latter provisions and

⁴ ECtHR, Stankov v. Bulgaria judgment, op. cit.

should be removed. Similarly the prohibition contained in Article 11.2(e) against "[d]eliberately hindering the transport movement" by participants of an assembly is excessive.

19. The Venice Commission notes that the blanket restrictions which existed under the law previously in force at Article 9 have been lifted in part under the July 2011 amendments, notably in respect of court buildings.

20. Blanket restrictions however have been maintained 20 meters around the entrance to the Prosecutor's office, the police (all police stations), penitentiaries, temporary detention facilities and law-enforcement bodies; railways, airports and ports. The Commission had previously expressed its view that the need to decide on a case-by-case basis ought to have been provided also in relation to these buildings, as it would allow the Georgian authorities to ensure a balance between the need for these institutions to function and be safe, which is an important element of public order and safety, and the individual right to freedom of assembly.

21. Paragraphs 4 and 5 of Article 9 are unclear, at least in the English translation. They seem to confer on the administrative authority or the court where the assembly is taking place the power to impose restrictions within an area extending to a maximum of 20 meters from the entrance. The Venice Commission underlines that restrictions on the exercise of the right to assemble should only be imposed by the competent executive authority or by the law-enforcement agency.

22. The Interim Opinion at paragraph 18 noted in particular *"...that how the "entrance" to railway stations, airports and ports will be identified will be problematic in many cases, possibly excluding assemblies in very large areas where people may wish to demonstrate."* No account has been taken in the new law of this observation.

Calls for constitutional change

23. New Article 11 § 1 reads as follows: *"During organizing or holding an assembly or manifestation, it is prohibited to appeal for subversion or forced change of the constitutional order of Georgia, infringement of independence or violation of the territorial integrity of the country, or to make appeals which constitute propaganda of war and violence and trigger a national, ethnical, religious or social confrontation which creates clear, direct and present danger of such act (emphasis added).*

24. The Venice Commission notes with satisfaction that this provision takes into account the recommendations made by the rapporteurs and by the Venice Commission that the proportionality condition for stopping such an assembly is met when the "violent overthrow of the constitutional order" called by the assembly participants is also "imminent" (see OSCE/ODIHR - Venice Commission Guidelines, para. 135). As previously recommended, the violation of this prohibition does not result in the dispersal of the assembly, but in the call and in measures to eradicate the violation.

Pre-determined place for assemblies

25. The Commission notes with satisfaction that Article 6 of the law previously in force had been abrogated (see para. 8 above).

Conditions of notification

26. The Venice Commission had previously recommended that the conditions of the notification in Article 8 (5-day prior notice, impossibility of modifying the notification, impossibility of holding a "spontaneous" assembly without notification) be made more flexible (CDI-

AD(2010)009, para. 34; CDL(2009)152, §§ 21 and 22). This important recommendation has regrettably not been addressed.

Change of place or venue

27. The Venice Commission had previously criticized a proposal to introduce a general prohibition on conducting public events in the place and time of another public event. Such a prohibition would only be permissible if there is a clear and objective indication that both events cannot be managed in an appropriate manner through the exercise of policing powers. (CDL-AD(2010)009, para. 33).

28. Article 10 of the Law now reads: *“To maintain public order and ensure normal functioning of governmental and public bodies, enterprises, institutions, and public transport, a local self-government’s executive body may, within three days upon receipt of a notification and in the presence of responsible persons, consider whether it would be appropriate to change the place and date of an assembly or manifestation and give a written recommendation to the responsible persons, if: the assembly or manifestation creates a real threat to the normal functioning of enterprises, institutions and organizations; other assembly or manifestation (on which local self-government’s executive body was notified earlier) is scheduled to take place at the same time and at the same place.* The new provision requires a decision to be taken on a case-by-case basis (the executive may) and to allow for simultaneous assemblies (see also Article 11², para. 3), which is positive. However, in this respect, the Venice Commission recalls that the presumption in favour of holding assemblies is a very important notion; it is expressed in the First Guiding Principles of the OSCE/ODIHR-Venice Commission Guidelines. A corollary of this principle is that “a broad spectrum of possible restrictions that do not interfere with the message communicated are available to the regulatory authority. As a general rule, assemblies should be facilitated within sight and sound of their targeted audiences”⁵ It is therefore positive that the Georgian regulatory authorities do not have anymore, as under the law previously in force, only two options, either to accept or to refuse the holding of an assembly: when there are public order problems, they should be able to accommodate them and suggest appropriate alternatives (guided by the principle of proportionality) which would allow the demonstration to take place.

29. Nevertheless, the decision should aim only at maintaining public order, not also at “ensuring the normal functioning of governmental and public bodies, enterprises, institutions, and public transport”, as demonstrations almost invariably and inevitably create some disturbance, which should be tolerated. As concerns simultaneous demonstrations, the venue and time should only be changed if there is a practical, objective impossibility for both events to take place simultaneously and, when the second assembly is a counter-demonstration, there are grounds for assumption that a conflict between the participants to the two assemblies may occur and the sufficient policing resources to manage both meetings are lacking. Indeed, according to the OSCE/ODIHR - Venice Commission Guidelines, *“related simultaneous assemblies should be facilitated so that they occur within sight and sound of their target insofar as this does not physically interfere with the other assembly”*. In order to ensure that a proper balance is struck in the situations described in Article 10, Article 10 should properly be part of Article 11² which addresses the power of local authorities to impose *“restrictions on time and place”* and which sets out the *“duty to strike a proper balance between the...freedom...and the competing rights of [others]...”* “[Th]reats to the normal functioning of enterprises, institutions and organizations” and problems with simultaneous assemblies - itemised in Article 10 - require to be balanced against the right to assemble in the same way as other competing activities.

⁵ Guidelines, « Restrictions on time, place and manner ».

Termination and dispersal of assemblies

30. Article 13 of the Law previously in force read as follows:

1. *In case of a mass violation of Articles 4(2) 11 and 11¹ of this Law, an assemblage or a manifestation shall be halted immediately at the request of an authorized representative of a local government body.*
2. *Where the circumstances referred to in Paragraph 1 of this Article take place, responsible persons shall break up an assemblage or a manifestation and take measures to drive the participants away. Participants of the assemblage or manifestation must leave the assemblage or manifestation immediately at the request of responsible persons or an authorized representative.*
3. *A decision on halting an assemblage or manifestation can be appealed in the court. The latter shall adjudge on lawfulness of the decision within three working days upon receipt of the appeal.*

31. Under the law previously in force, termination of a demonstration was the consequence of mass violations of the prohibition to carry weapons and other hazardous objects and arms, and alcohol (11 para. 3), of the prohibition to disrupt traffic(11 para. 3), and the prohibition to call for a subversion or forced change of the constitutional order of Georgia, infringement of independence or violation of the territorial integrity of the country, also to make appeals which constitute propaganda of war and violence and trigger a national, ethnical, religious or social confrontation (Article 4 para. 2).

32. The Venice Commission had previously criticized this provision as being inconsistent with the presumption in favour of holding assemblies. As set out in the OSCE/ODIHR – Venice Commission Guidelines “*the touchstone [for restriction] must be the existence of an imminent threat of violence*”. Peaceful assembly should, in principle be permitted and facilitated.

33. New Article 13 makes provision for the immediate termination and dispersal of an assembly only in case of mass violations of the prohibitions: to carry fire-arms, explosives, inflammables, radioactive or side-arms; to have objects or substances, that is exploited or might be exploited to cause serious injury or death of participants or other persons; to have tear gas, paralyzing and poisonous substances or alcoholic beverages. In case of “non massive” violations of these provisions, in case of violation of the prohibition to carry alcoholic drinks, and in case of violation of the prohibition to damage of public historical buildings, the organizer has to appeal to participants and to take all reasonable efforts to put an end to the violations within 15 minutes. Similar provisions apply in case of breach of the prohibition to disrupt the traffic intentionally.

34. These new provisions are welcome, as they are in line with the presumption in favour of assemblies by allowing the demonstration to continue if the violations are removed, although the time-limit for doing so seems excessively short (fifteen minutes). It is also positive that if the organiser's appeal to participants to “eradicate violations” is unsuccessful, “*law-enforcement bodies shall take all measures provided by the legislation of Georgia in order to eradicate the violation or restore traffic movement*”. The draft amendments of 2010 provided for the obligation on the law-enforcement body also “to disperse the assembly”, which the Commission had found to be disproportionate, as the positive obligation on the State to facilitate peaceful assembly, even illegal ones, means that termination in such circumstances would not be appropriate (CDL-AD(2010)009, para. 46). This obligation to terminate the assembly has now been dropped, which is welcome.

Responsibility of the organizers

35. As concerns the responsibility of the organizers, the amendments of July 2009 to the Code on administrative offences had increased from 30 days to 90 days maximum the length of administrative detention for "minor hooliganism that is punishable by administrative detention for 90 days; disobeying to the orders of officials/ police; blockage of administrative buildings and traffic in violation of law."

36. In this context, it is recalled that the Venice Commission and the OSCE/ODIHR have expressed the view that "*organizers of assemblies should not be held liable for their failure to perform their duties if they make reasonable efforts to do so, nor should organizers be held liable for the actions of non-participants or agents provocateurs*". Organizers should not be liable for the actions of individual participants. Instead, individual liability should arise for any participant if they commit an offence or fail to carry out the lawful directions of law enforcement officials⁶.

37. Under § 4 of the newly proposed Article 13, the organizers' liability only arises if they fail to appeal to participants to put an end to the violations or fail to take reasonable efforts for this to happen (but within fifteen minutes, which is too short a deadline, as stated above). This is a positive development. Individual liability has been introduced (Article 13 para. 5). However, the Venice Commission reiterates its view that it is necessary for the Georgian authorities to further revise the system of sanctions.

Prohibitions on members of the army

38. The absolute prohibition against exercising the right of assembly placed on members of "the Armed Forces, the Ministry of Internal Affairs and special authorities working in relevant services of the Ministry of Finance" contained in new Article 2 para. 2 remains⁷. This was criticised in the earlier comments as being excessive. Indeed, while it is true that Article 11 para. 2 ECHR permits the imposition of "lawful restrictions" on the exercise of the right of freedom of assembly by members of the armed forces, of the police or of the administration of the State, these restrictions must nevertheless be imposed in each case in pursuance of a legitimate aim and in a proportional manner. The OSCE/ODIHR – Venice Commission Guidelines at paragraph 58 explain this as follows: "*Legislation should therefore not restrict the freedom of assembly of the police or military personnel unless the reasons for restriction are directly connected with their service duties, and only to the extent absolutely necessary in light of considerations of professional duty. Restrictions should be imposed only where participation in an assembly would impugn the neutrality of police or military personnel in serving all sections of society.*"

The rights of non-citizens

39. The Interim Opinion stated (at paragraph 32 footnote 11) that "*[t]he law should provide also for the possibility for non-citizens to be participants or among the organizers. Also, according to the international standards on the matter, the Law may also include a reference to the possibility of children and persons without full legal capacity other than children to be among the organisers, under certain conditions (age requirement and/or consent of the parents or legal guardians).*" However, the new Article 5.3 states that "*[r]esponsible persons [i.e. "organizers"] shall not be the citizens of other countries or/and persons under 18 years of age*".

⁶ OSCE/ODIHR – Venice Commission Guidelines, Implementing legislation on freedom of peaceful assembly, point 6: liability of organizers.

⁷ It is contained also in Article 25 § 1 of the Georgian Constitution.

40. This provision of article 5 (3) might be seen as too restrictive, since the international standards provide that aliens “receive the benefit of the right of peaceful assembly.”⁸ It is therefore important that the law does not extend the right to peaceful assembly to citizens only, but covers foreign nationals and stateless persons, including as organizers. Also, the Convention on the Rights of the Child requires the States Parties to recognize the rights of the child to freedom of peaceful assembly.⁹ It further stipulates that “[n]o 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.”¹⁰ While it would not be consistent with the international standards to deny the child the right to organize assemblies altogether, it is nevertheless permissible to impose certain constraints on the exercise of this right in light of the serious responsibilities of the organizers and the minors’ status as not yet fully legally capable. The law may set a certain minimum age for the organizers of public assemblies, thus giving due regard to the evolving capacity of the child. It may also provide that minors may organize a public event only if their parents or legal guardians consent to this.

Reference to international treaties

41. On a positive side, it must be noted in addition that the July 2011 amendments have added (new Article 1 replacing former Article 2 of the Law previously in force) “*international treaties*” to the legal sources of regulation of freedom of assembly in Georgia. The European Convention on Human Rights is clearly one of the treaties which directly regulates, including through the case-law of the European Court of Human Rights, the right to freely assemble.

Protection of journalists

42. Article 2 para. 4 provides for the obligation for both organizers and law enforcement agencies not to hinder the professional activities of journalists who cover the assembly. This provision deserves approval.

Remedies

43. Article 13 para. 7 provides that “*A decision on dispersing an assembly or manifestation may be appealed against in the court. Each instance of court shall discuss the appeal within three working days.*”

44. The Venice Commission reiterates its previously expressed view in this respect that “it is necessary to state in the law what remedy the organisers and participants have where an assembly has been improperly halted. The prompt and thorough investigation of the unlawful use of force by the police during assemblies, including in dispersal of the assemblies, should be ensured, and also the subsequent prosecution, if the situation so requires. It should be expressly provided that the appellant is entitled to call evidence and examine and cross-examine witnesses, including police witnesses”.

⁸ U.N. Human Rights Committee, General Comment 15, The position of aliens under the Covenant.

⁹ Article 15, Convention on the Rights of the Child.

¹⁰ *Id.*

III. Conclusions

45. The Venice Commission considers that the amendments to the Law on Assembly and Demonstrations adopted in July 2011 represent a significant improvement of the possibility of exercising the freedom of assembly in Georgia. The Venice Commission welcomes in particular the introduction of an explicit reference to the principles of legality, proportionality and necessity in a democratic society and the introduction of the presumption in favour of holding assemblies.

46. There remain some important issues (notably the impossibility to hold spontaneous assemblies) which the authorities should address. The Venice Commission remains at the disposal of the Georgian authorities in this respect.

47. The Venice Commission finally recalls that, while the adoption of the 2011 amendments represents a significant step forward, the effective guarantee of the right to freedom of assembly in Georgia will depend on the manner in which they will be implemented. The presumption in favour of assemblies will need to become a part of the legal culture and influence the use by the executive authorities and by the law-enforcement agencies of the discretionary powers which the amendments confer upon them.