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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

INTERIM OPINION

**ON THE DRAFT AMENDMENTS
TO THE LAW ON ASSEMBLY AND MANIFESTATIONS**

OF GEORGIA

**Adopted by the Venice Commission
at its 82nd Plenary Session
(Venice, 12-13 March 2010)**

**on the basis of comments by
Mr Bogdan AURESCU (substitute member, Romania)
Ms Finola FLANAGAN (member, Ireland)**

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I. Introduction

1. On 14 August 2009, the Deputy Speaker of the parliament of Georgia, Mr Machavariani, requested the assistance of the Venice Commission in respect of recently adopted amendments to the law on Assembly and Manifestations (CDL(2009)127 and 128); to the code of administrative offences (CDL(2009)126) and to the law on the police (CDL(2009)125).
2. Mr Bogdan Aurescu and Ms Finola Flanagan were appointed as rapporteurs and submitted their comments (CDL(2009) 153 and CDL(2009)152 respectively), of which the Commission took note in October 2009.
3. The Georgian authorities started preparing further amendments to the law on assembly and manifestations on the basis of the rapporteurs' recommendations.
4. On 1 March 2010, the Georgian authorities submitted to the Commission for assessment a set of draft amendments to the law of Georgia on Assembly and Manifestations (CDL(2010)026).
5. The present interim opinion, which was drawn up on the basis of comments by Mr Aurescu and Ms Flanagan, was adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

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

A. Blanket prohibitions

6. The Law on Assembly and Manifestations (Article 9 § 1, as amended on 29.12.2006) contained (even prior to the 2009 amendments) a significant blanket prohibition:

“An assemblage or a manifestation shall not be held in: the building of Georgian Parliament, residence of the President of Georgia, buildings of the Constitutional Court and Supreme Court of Georgia, courts, prosecutor’s office, police, penitentiary buildings, law enforcement bodies, military units and sites, railway stations, airports, hospitals, diplomatic missions and within 20-meter radius of their territory, buildings of governmental institutions, local government bodies, and companies, institutions and organizations of special regime or having armed guards. Entrances of these objects shall not be fully blocked (29.12.2006 N4266)”.

7. In July 2009, this provision was reformulated. Specifically, in respect of the list of buildings, the limit was reformulated so as to prohibit assemblies within 20 meters of the entrance only, as opposed to a prohibition around a 20 meter radius of the entire building.
8. The following blanket prohibitions are currently in force in Georgia:
 - there is a prohibition 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;
 - there is a prohibition against blocking buildings;

- there is a prohibition against blocking the traffic unless this is inevitable due to the number of demonstrators.

9. In their comments, the rapporteurs had expressed concern over these blanket prohibitions. Indeed, the OSCE/ODIHR - Venice Commission Guidelines (hereinafter: “the OSCE/ODIHR – Venice Commission Guidelines”)¹ state (para. 83) that “*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. In particular, the rapporteurs had suggested including 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.

11. The new draft amendments address this issue in the following way:

- Article 1 introduces a general provision to the effect that restrictions of the right to freedom of assembly must pursue one of the legitimate aims listed in Article 24 § 4 of the Georgian Constitution⁴;
- Subparagraph h, providing a definition of proportionality of a restriction is added to article 3 of the Law; proportionality is defined as follows: “restriction in line with the values protected by Article 24 § 4 of the Constitution of Georgia, if it is the most effective and the least restrictive for the achievement of the aim. Application of stricter norms shall take place only when it is otherwise impossible to achieve the values protected by Article 24 § 4 of the Constitution;

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.”

⁴ This provision, which relates to freedom of information, lists the legitimate aims for restricting the exercise of that fundamental right as follows: “ensuring state security, territorial integrity or public safety, for preventing of crime, for the protection of the rights and dignity of others, for prevention of the disclosure of information acknowledged as confidential or for ensuring the independence and impartiality of justice.”

- Draft Article 9 deletes the blanket restriction on demonstrations 20 meters around the entrance of the Parliament and the presidential administration. It introduces a rule that *"[the] State agency, where an assemblage or a manifestation is held may limit the distance of an assemblage or a manifestation, but not exceeding the 20 meters limit from the entrance of the building"* (Article 9 § 1).
- Article 11¹ is reformulated: in case of full or partial blockage of the thoroughfare, the competent authorities "may take the decision to restore transport movement if the assembly can be held otherwise due to the number of people". Such decision is required to be taken on a case-by-case basis and in application of the proportionality principle as set out in Article 1.2.;
- 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 participants⁵ (Article 11¹).

12. The Venice Commission welcomes the efforts made by the Georgian authorities to bring the law into accord with ECHR requirements and which efforts are reflected in the proposals contained in the Draft Law. As was stated in the comments of the rapporteurs noted by the Venice Commission, the law on assembly and manifestations currently lacks a general provision mirroring Article 11 § 2 ECHR setting out the need for restrictions to pursue a legitimate aim. The new draft Article 1 now does this to a certain degree. The current law in force also lacks a requirement for restrictions to be proportionate to such legitimate aims. The proposed subparagraph h reflects the case-law of the European Court of Human Rights on the concept of "necessary in a democratic society". This new provision is very important, and the Venice Commission considers that its introduction is an important step forward. It is to be noted nevertheless that the Draft Law in Article 1 together with the Constitution Article 24.4 provides for specific restrictions which are not provided for in Article 11(2) ECHR. These include power to restrict exercise of the right "to avoid the revelation of information acknowledged confidential and to guarantee the independence and impartiality of justice". Whilst it may be permissible in certain circumstances to prohibit assemblies involving such matters, it would not automatically be so in circumstances where no violence is anticipated⁶.

13. 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 1¹ 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."*

14. The Draft Law Article 1¹ is unclear. Subparagraph 2 provides for the obligation for prior notification *"if an assemblage or manifestation is held at the transport movement places"*, which

⁵ Article 12 § 1 of the Law provides: "Local governance bodies shall ensure adequate conditions for holding an assembly or manifestation".

⁶ ECtHR, *Stankov v. Bulgaria* judgment, op. cit.

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

means, according to the authorities, a place where there is car traffic, with the exclusion, therefore, of pedestrian zones. Subparagraph 3 provides that prior notification does not apply if the assembly does "not block roads or hinder the movement of transport". It would be preferable if notification were not required where no blockage or hindrance is anticipated.

15. As concerns blanket restrictions which prohibited assemblies "inside and within 20 meters from the entrance" of a list of buildings, the Venice Commission notes with satisfaction that the draft law provides that they be lifted in part, notably in respect of many state buildings, which are often an important venue for demonstrations of a political nature.

16. Similarly, the Venice Commission appreciates the lifting of the total prohibition on road blocks: under the proposed amendments, the regulatory authorities "may take decision to restore transport movement", in pursuit of a legitimate aim and in a proportional manner, but only if the block is not an inevitable result on account of the number of participants.

17. The Venice Commission finds therefore that the proposed §§ 1 and 2 of Article 9 represent an important improvement in the exercise of freedom of assembly in Georgia.

18. The Venice Commission notes nevertheless that not all blanket restrictions would be lifted under the newly proposed amendments. They are to be maintained 20 meters around the entrance to the Constitutional Court, the Supreme Court, all ordinary courts, the Prosecutor's office, the police (all police stations), penitentiaries, temporary detention facilities and law-enforcement bodies; railways, airports and ports. The Venice Commission notes 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.

19. In the Venice Commission's opinion, the discretion set out in new §§1 and 2 of Article 9 whereby the authorities may decide to restrict an assembly coming nearer than a certain distance up to a maximum of 20 meters to the entrance of a specific building⁸ should also be extended 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.

20. In this respect, the Commission takes note of the explanations provided by the Georgian authorities according to which under the law which is now in force there is an absolute prohibition against holding demonstrations in some places, while there is an obligation to submit a notification for assemblies to be held in public places (other than those in which it is prohibited). There is 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.

21. The Venice Commission considers that the current system is a very rigid one, which does not sufficiently guarantee the exercise of the right to freedom of assembly. The draft amendments under consideration represent a first step in the right direction, that is, consideration of each proposed assembly on a case-by-case basis and a general presumption in favour for the right of assembly.

⁸ It should be clarified that this is a correct interpretation of the discretion contained in Article 9.1 and 2. Another possible interpretation according to the translated text furnished is that the authority might limit the assembly by requiring it to take place *within* a distance of 20 meters from the entrance. We assume that the Georgian text is clear.

22. The proposed deletion of Article 6 of the current law⁹, which provided for the determination by the authorities of permanent places and times for holding assemblies with no previous notification, also represents a development in the right direction. The Venice Commission has indeed observed in relation to several countries 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.

23. The Venice Commission underlines 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"¹⁰ This means that the Georgian regulatory authorities should not have 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 now stated in subparagraph h of Article 3) which would allow the demonstration to take place.

24. The draft amendments therefore go in the right direction, although an additional step will be necessary: the conditions of the notification (5-day prior notice, impossibility of modifying the notification, impossibility of holding a "spontaneous" assembly without notification as well as "simultaneous" assemblies) will need to be made more flexible (see CDL(2009)152, §§ 21 and 22).

25. The Venice Commission notes in particular that the provision in article 10 para. 1 sub-para. a of the Law, according to which "*the competent authority shall recommend the organisers to change the form, place and time when another event (notified earlier) is arranged in the same form and at the same venue and time indicated in the notification*", should be revised in order to add further conditions: that 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*". A prohibition on conducting public events in the place and time of another public event would be a disproportionate response, unless there is a clear and objective indication that both events cannot be managed in an appropriate manner through the exercise of policing powers

26. The prohibition against holding assemblies within 100 meters from the entrance of military units and sites may not be problematic but this depends on what comes within the definition of "military units and sites". Further explanation of this provision is necessary.

⁹ Article 6: 1. A local government body has a right to determine a permanent place and time for holding assemblages about which no preliminary warning notice has been made. 2. The power of a local government body referred to in Paragraph 1 of this Article does not restrict the prerogative to exercise the right recognized in Article 25 of the Georgian Constitution in other places.

¹⁰ Guidelines, « Restrictions on time, place and manner ».

B. Calls for constitutional change

27. Article 4 § 2 of the law provides that *“In organizing or holding an assemblage or manifestation, it is prohibited to call for 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.”*

28. According to the OSCE/ODIHR - Venice Commission Guidelines (para. 135) *“calls for the imminent and violent overthrow of the constitutional order might provide a sufficient ground for restricting an event, whereas an assembly where non-violent change of the constitutional order is advocated would be deserving of protection”*. Consequently, 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”.

29. It is worth noting that the OSCE/ODIHR - Venice Commission Guidelines (para. 135) provide that “speech and other forms of expression will normally enjoy protection under Article 19 of the ICCPR and Article 10 of the ECHR. This is the case even where such expression is hostile or insulting to other individuals, groups, or particular sections of society. However, as provided by Article 20 of the ICCPR, “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Principle 4 of the Council of Europe Committee of Ministers Recommendation No. R(97)20 further provides that specific instances of hate speech “may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein.” Even then, resort to such speech by participants in an assembly does not of itself turn an otherwise peaceful assembly into a non-peaceful or unlawful assembly, and the regulatory authorities should arrest the particular individuals involved rather than dispersing the entire event.” They also set forth that „demonstrations supporting a military offensive against another sovereign state ... should not be deemed illegal even if such military action might itself be”.

30. The newly proposed draft Article 4 § 2 reads as follows: *“In organizing or holding an assemblage or manifestation, it is prohibited to appeal for subversion or violent 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 and which creates clear, direct and present danger of such act (emphasis added).*

31. The Venice Commission notes with satisfaction that this draft amendment takes into account the recommendations made by the rapporteurs.

32. The removal of Article 7 of the current law does not amount to a liberalisation of the law insofar as it removes the exemption from the requirement for notification where *“regular citizens”¹¹ ... would like to express their opinion by means of posters, slogans, banners, and*

¹¹ As noted by one of the rapporteurs (CDL (2009)153), article 4 refers only to “citizens” as participants of an assembly. The 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). The same kind of reference should be also included with regard to the participants to the assembly.

other visible tools...". It would now appear that when the Draft Law is in force it will be necessary to notify in these circumstances. The meaning of Article 7 is in any event unclear as is its interaction with Article 5 § 1 of the Law and should be discussed further. This point has previously been made by the rapporteurs.

C. Termination of assemblies

33. Article 13 of the Law on assembly and manifestations as modified in July 2009 and currently in force reads 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.*

34. This provision is 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.

35. The newly proposed text of Article 13 reads as follows:

1. *In case of a mass violation of Article 4(2) of this Law, an assemblage or a manifestation shall cease immediately at the request of an authorized representative of the local government body.*
2. *Immediately upon the warning concerning violation of Articles 11 and paragraph 5 of Article 11¹ by an authorized representative of a local government body, organizer of assemblage or manifestation is obliged to appeal to the participants of the assemblage or manifestation and to take all reasonable efforts within the next 15 minutes to eradicate the violations.*
3. *In case of taking the decision provided in paragraph 1 of article 11¹, an organizer of assemblage or manifestation is obliged to appeal to the participants of the assemblage or manifestation and to take all reasonable efforts within the next 15 minutes after the warning in order to restore transport movement.*
4. *If the organizer of an assemblage or manifestation does not appeal to the participants of the assemblage or manifestation and does not take all reasonable efforts within the next 15 minutes after the warning in order to eradicate the violations mentioned in paragraph 2 of this article, he/she will be held responsible under the relevant legislation of Georgia.*
5. *In case of individual violation of articles 4(2), 11 and 11¹ by the participant of an assembly or a manifestation, the individual perpetrator shall be held responsible under the relevant legislation of Georgia.*
6. *If the organizer of an assemblage or manifestation took all reasonable efforts but could not eradicate the violations mentioned in paragraph 2 of this article, law-enforcement bodies shall take all measures provided by the legislation of Georgia in order to eradicate the violation or to break up an assembly or a manifestation and to drive away the participants.*
7. *Decision on breaking up an assemblage or manifestation may be appealed in the court. The latter shall adjudge on lawfulness of the decision within three working days upon receipt of an appeal.*

36. Under the proposed amendment, provision for the immediate termination of the demonstration is provided for only in respect of calls for violent overthrow of the constitutional order and incitement to hatred when there is a "clear, direct and present" danger of violence. In other cases of "mass illegality" (non respect of the conditions for notification, undue blocking of the thoroughfare etc.), the organizers are required to "appeal" and to take "all reasonable efforts" to "eradicate the violations". While the time-limit for doing so seems excessively short (fifteen minutes), it is a positive development that the demonstration may continue.

37. However, it appears 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 to break up an assembly or a manifestation and to drive away the participants*". This obligation on the law-enforcement body would appear to

apply to any violation, even a minor one. So, for example, were an assembly to continue peacefully after the time notified or if a march deviated from the notified route, the law-enforcement body would be obliged to terminate or re-route. The positive obligation on the State to facilitate peaceful assembly, even illegal ones, means that termination in such circumstances would not be appropriate. Such eradication of violations or termination of the assembly should be spelled out clearly, and employed only as a measure of last resort.

38. Nevertheless, in the Venice Commission's view, the proposed amendment indicates a development which is generally positive, and the authorities should be encouraged to pursue their reforming efforts in this direction.

D. Responsibility of the organizers

39. 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 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."

40. 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 officials¹².

41. 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. The Venice Commission considers it necessary for the Georgian authorities to further revise the system of sanctions, a matter which the authorities appear to be willing to address.

E. Remedies

42. Article 13 § 3 of the Law in force provides that "*A decision on halting an assemblage or manifestation can be appealed against in the court. The latter shall adjudge on lawfulness of the decision within three working days of the receipt of appeal.*"

43. It is positive that a reasoned opinion of a court is required. Nevertheless, 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

¹² OSCE/ODIHR – Venice Commission Guidelines, Implementing legislation on freedom of peaceful assembly, point 6: liability of organizers.

III. Conclusions

44. The Venice Commission welcomes the draft amendments which the Georgian authorities have prepared in response to previous comments by the Commission's rapporteurs on the Law on Assembly and Manifestations and the amendments thereto adopted in July 2009. The new draft amendments represent a significant improvement of the possibility of exercising the freedom of assembly in Georgia. The Venice Commission welcomes in particular the proposed introduction of an explicit reference to the principle of proportionality and the partial introduction of the presumption in favour of holding assemblies.

45. There remain some issues (notably spontaneous and simultaneous assemblies) which the authorities should address. The Georgian authorities have expressed their willingness to continue to work on these matters in consultation with the Venice Commission. The Commission remains at their disposal and encourages them to pursue their reforming efforts in this direction.