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(VENICE COMMISSION)

"THE ROLE OF CIVIL SOCIETY IN THE DUE APPLICATION OF THE LEGISLATION OF FREEDOM OF ASSEMBLY

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The Venice Commission examines laws and expresses opinions on them when invited to do so.

In March 2004, the then Vice Speaker of the Armenian National Assembly Mr. Tigran Torossyan requested the Venice Commission to carry out an expert assessment of the draft law "*on the procedure of conducting gatherings, meetings, rallies and demonstrations in the Republic of Armenia*"[1]. Over a period, the Venice Commission and OSCE/ODIHR worked extensively on the law which was ultimately adopted by the National Assembly on 4 October 2005[2]. The Venice Commission's initial opinion was that the law severely limited the freedom to assemble and subjected it to very significant regulation by the public authorities. There was no sense that the effect of the law would be to facilitate and protect in a positive way the guaranteed freedom. The Venice Commission considered the law to be complicated, imprecise, excessively bureaucratic and unclear as to what was and was not allowed. The law was not facilitative of the exercise of the freedom and did not discharge the state's positive duty to protect it. In effect, the Venice Commission considered that the law would not operate to avoid arbitrary decision-making by the authorities. In due course, after significant amendment of the draft law by the Armenian authorities in response to the opinions of the Venice Commission, the Venice Commission expressed a generally favourable opinion on the amended law when most of its recommendations taken into account and reflected in the law. Nonetheless, certain criticisms remained which were set out in the opinion.

Significantly the Venice Commission and OSCE/ODIHR also recommended in the opinion that some official means of monitoring the application of the law and of collating relative statistics should be devised[3].

Then, in March 2008 after the presidential election of February 2008, without the benefit of any information following such monitoring the National Assembly proceeded to make significant amendments to the law adopted in October 2005[4] following clashes between police and protestors at protests held without prior notification in the centre of Yerevan. These clashes resulted in ten deaths and hundreds of people injured. All of the amendments proposed related to matters which had been considered of significance by the Venice Commission and OSCE/ODIHR in its previous analysis and neither body considered the amendments acceptable. In due course after much detailed discussion and important amendments to the new law (discussed below) the Commission and OSCE/ODIHR agreed that the law had been taken to a situation where it was generally in conformity with European standards.[5]

This new opinion generally approving the new law stressed that the quality of any law is as much in how it is applied as in how it is drafted. The opinion reiterated that it was essential that the application of the law be monitored and relevant statistics be collated. It observed that the

[1] CDL(2004)022 Draft Law on the Procedure for Conducting Gatherings, Meetings, Rallies and Demonstrations in the Republic of Armenia of April 2004
[2] CDL(2005)089 Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia as amended by the law adopted on 4 October 2005
[3] CDL-AD(2005)035 Opinion on the Law making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia of November 2005 at paragraph 16
[4] CDL(2005)089 Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia as amended by the law adopted on 4 October 2005 of October 2005
[5] CDL(2008)050 Draft Joint Opinion on the Draft Law of April 2008 on Amending and Supplementing the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia by the Venice Commission and the OSCE/ODIHR of May 2008 at paragraph 31

Armenian Human Rights Defender would appear to be in a position to carry out this crucial activity effectively[6].

These opinions are all available to be seen on the Venice Commission's website together with the laws and drafts thereof on which the Commission and OSCE/ODIHR were commenting.[7]

This sequence of events demonstrates the importance to be attached not only to the compliance of the written law in matters of fundamental rights and the functioning of democratic institutions with the standards of the European Convention of Human Rights but also the importance to be attached to how those laws are actually implemented.

In the opinion adopted by the Venice Commission in relation to the earlier law of 4 October 2005, it stated that it was *"…vitally important that the government consult with local NGOs, civil society representatives and other relevant stakeholders after any reforms [had] been adopted. Such groups [would] clearly be affected by the legislation in different ways, and it [would be] imperative that their experience and views be given serious consideration so that the legislation, and the procedures and working practices which develop[ed] around it, [would] work to the mutual benefit of all concerned. Such consultation [would] help foster a spirit of co-operation rather than confrontation, and [would] also improve understanding of the government's intentions in bringing forward the…amendments."*[8]

It was pointed out that *"…new legislation inevitably entail[ed] a process of 'bedding in' and fine tuning, [and that] it [would] be important to monitor the operation of the law. [The opinion] confirmed that some official means of monitoring the application of the law, and of collating relevant statistics, should be devised. A duty could be placed on the bodies charged with its administration (principally local self-governance bodies) to "*keep under review*" and make such recommendations as they [thought] fit to the Government concerning the operation of the law."*[9]

Article 11 of the European Convention of Human Rights protects freedom of assembly. Peaceful assembly is guaranteed. The exercise of this freedom, together with its closely related freedom of expression protected by Article 10 of the Convention, allows in a very specific and important way for the participation of civil society in the life of the state. The formally established democratic institutions of state, Legislature, Executive and Judiciary, all exercise functions in ruling how these freedoms may be exercised and their limitations. Nonetheless, these arms of government must always be aware that these freedoms are fundamental in a democracy and are so important that they cannot be restricted in any way so long as the persons exercising them have not committed any reprehensible acts. The right of assembly covers all types of gathering including assemblies and meetings, demonstrations, marches and processions, whether public or private provided they are peaceful. Where organisers or participants have violent intentions likely to result in violence or disorder there is no right to freedom of assembly. However, incidental or sporadic violence or criminal acts committed by others in the assembly will not remove protection from on individual nor will the violent response of counter-demonstrators to an otherwise peaceful assembly.

[6] CDL(2008)050 Draft Joint Opinion on the Draft Law of April 2008 on Amending and Supplementing the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia by the Venice Commission and the OSCE/ODIHR of May 2008 at paragraph 32

[7] http://www.venice.coe.int/site/dynamics/N_Recent_ef.asp?L=E

[8] CDL-AD(2005)035 Opinion on the Law making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia of November 2005 at paragraph 15

[9] CDL-AD(2005)035 Opinion on the Law making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia of November 2005 at paragraph 16

In its opinion adopted at the 64th Plenary Session,[10] the Venice Commission Opinion said that

> *"…as a fundamental right, the right to assemble should, insofar as possible, be allowed to be exercised without regulation except where its exercise would pose a threat to public order and where necessity would demand state intervention. A legislative basis for any interference with the right is required by the European Convention on Human Rights. Whilst it is not essential to have a specific law on public events and assemblies, states may have such a law but it must be limited to setting out the legislative bases for permissible interferences by state authorities. Any system of notification for holding assemblies must not impair or prevent the lawful exercise of the right."*

Thus it can be seen that the default position in relation to assemblies is that they are permitted and limitations are only permitted in accordance with ECHR Article 11(2) where they are "*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 of others".* So, restrictions may be allowed for the regulation of public order as a legitimate aim and the state is given a wide margin of appreciation in order to deal with disorder or crime or to protect the rights and freedoms of others. In its discussions with the Armenian authorities the Venice Commission strongly recommended that the full text of Article 11(2) be included in the law itself. As a result this came to pass and it is now contained, word for word, in Article 1. As set out in the OSCE/ODIHR Guidelines *"the touchstone [for restriction] must be the existence of an imminent threat of violence"*[11].

It is particularly important to remember that the state has a positive obligation to guarantee the effective exercise of the freedom. The state may be required to intervene to secure conditions permitting the exercise of the freedom - there must be no unjustifiable restrictions of peaceful assemblies. The state must act in a manner calculated to allow the exercise of the freedom.
There is a major role to be played by civil society in defending the freedom and assuring its assertion and easy exercise. Elaborate legislative and administrative rules describing how the freedom may be exercised which are restrictively interpreted and implemented will undoubtedly have the effect of making people disinclined to make the effort to organise public assemblies.

I will deal with two specific amendments to the law adopted on 17th March 2008 in response to the violent events of 1st March.

The Venice Commission had serious concerns about the new terms of Article 9.4(iii) which provided that information from the Police or National Security Service concerning threats of violence etc would be "*considered credible"* and therefore justifying prohibition of the assembly. It appeared from the law that the police opinion would be final and therefore that no justified and clear explanation of the grounds whereby the mass event was being prohibited would be required. ECHR Article 11 requires that any restrictions or prohibitions on the right of assembly must be "justified" and the opinion of the police without the possibility of challenge would not amount to such a justification. Rather it would admit to arbitrary decisions to restrict or prohibit with no independent assessment by a court or tribunal whether there was, in fact, a real and imminent risk of violence. The Venice Commission expressed the opinion[12] that this was contrary to the requirements of the European Convention. The threshold for restriction should be high and prohibition should be a matter of last resort. The burden of proving that restrictions, and in particular prohibition, were necessary lay on the restricting authority. In particular

[10] CDL-AD(2005)035 Opinion on the Law making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia, of November 2005 at paragraph 8
[11] CDL(2008)062 OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly of June 2008 at paragraph 135
[12] CDL-AD(2008)018 Joint Opinion on the Amendments of 17 March 2008 to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia of June 2008 at paragraph 10

sporadic or isolated acts of violence should be managed by policing and should not, if at all possible, be grounds for a prohibition.

The Venice Commission also considered that another amendment contained in the law adopted on 17th March 2008 amounted to an effective prohibition on "spontaneous assemblies" which are undoubtedly guaranteed under Article 11 of the ECHR.

As already explained, after various further amendments were introduced taking account of Venice Commission views in its opinion of June 2008 the Venice Commission reached the opinion that the law was generally in conformity with the European Convention. This opinion took into account that:

- The procedure for verifying police and National Security Service information had been amended, and
- The possibility of spontaneous assemblies of any size had been introduced.

The amended law required that data showing an imminent danger of violence or real threat to national security etc would only "*be considered credible, if the Police or the National Security Service… has issued a justified official opinion on the data".* The law provided for an appeal to court which would have to give judgement within 24 hours so as to ensure that the assembly could go ahead as originally planned in the event of the appeal succeeding.

In the course of our discussions it was explained by the Armenian authorities to the Venice Commission that any *"justified official opinion"* would be in writing and copies made available to event organisers at the notification proceedings. It was made clear that event organisers would have the opportunity to challenge the *"justified official opinion"* at notification stage and before the court if there were an appeal. Whilst this is not expressed in these terms in the legislation it is nonetheless implicit in the terms of Article 12 of the law which sets out the process for consideration of a notification of a proposed event. This Article sets out in detail the rights of organisers in this process as follows:

> *"…the organiser shall be fully entitled to the right to present his/her position. Participants to consideration of notifications shall have the right to speak, ask questions, answer questions, make suggestions or interventions and submit additional documents, judgements or other information."*

Furthermore the body considering the notification is required to reach its decision within 72 hours otherwise the organisers have the right to conduct the event in accordance with the terms set out in their notification. The hearing is required to be in public. Should the organisers "*submit a flawed notification"* the organisers are entitled to rectify this, if possible, on the spot[13].

From this it will be seen that according to the European Convention and under the law of the Republic of Armenia on assemblies the onus is on the authorities to justify any prohibition or restriction they impose and this is reflected in the terms of the law. Mere statements by the police or National Security Service of a belief that there will be violence should not under the law as adopted lead to prohibition.

[13] CDL(2008)036 Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia of March 2008 at Article 12.5

It is important to note that according to the jurisprudence of the European Court of Human Rights the existence of another assembly at the same time and place is not a good reason of itself to restrict or prohibit. Nor is the existence of a counter demonstration of itself a good reason for prohibition. Rather counter-demonstrations require to be facilitated by the authorities; a simple statement that there is "an imminent danger of violence" is not justification enough for prohibition - effective policing should be used to manage sporadic or isolated incidents of violence. Inconvenience to the public or disruption of traffic is not of itself an adequate reason for prohibition. Once again, this is a matter to be managed by the police and authorities. The streets are not only for use for the purposes of free and efficient movement of people in their everyday business. They are also a place where people are entitled to assemble and protest and communicate important messages to the state and to their fellow citizens. Therefore a balance must be struck between competing needs with the emphasis on the state's duty to protect and facilitate the freedom of assembly. All of these standards are capable of recognition and implementation by the law as it stands.

This leads to the following conclusions:

- Prohibitions or restrictions on the freedom of assembly may not be formulaic, rather, each notification must be considered on its own merits;
- Prohibition or restrictions may never be automatic;
- All restrictions or prohibitions must be justified by the restricting authority; and
- The state has a positive obligation to facilitate freedom of assembly.

In order to engage in the process provided for in the current law, organisers who notify of intended assemblies therefore need to appear at the notification hearing to make their case and hear and consider the justification for any restriction or prohibition imposed. The organisers are entitled to see and challenge such justifications or, if they are not provided, challenge the failure to provide them. The law provides for an appeal to a court on these matters[14]. When domestic remedies are exhausted in this process organisers or any person, non-governmental organisation or group of individuals who consider that their right to freedom of assembly has been infringed contrary to the rights guaranteed by the Convention may apply to the European Court of Human Rights to determine whether, in that case, there has been such a breach.[15]

A project of assistance to NGOs in improving their capacity as regards monitoring law and practice on freedom of assembly was launched by the OSCE/ODIHR in co-operation with the Council of Europe commenced in September 2008. The leading NGO in this project is the Armenian Helsinki Committee, and the first part of this project will come to an end soon. The Venice Commission will participate in the further steps of this project.

[14] CDL(2008)036 Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia of March 2008 at Article 13.3

[15] European Convention for the Protection of Human Rights and Fundamental Freedoms Article 34 provides: "*The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.*" Article 35(1) provides: "*The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."*