Strasbourg, 23 June 2009

Opinion no. 532 / 2009

CDL(2009)104
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION OF THE MINISTRY OF JUSTICE OF BULGARIA ON THE DRAFT OPINION OF THE VENICE COMMISSION ON THE DRAFT LAW ON MEETINGS, RALLIES AND MANIFESTATIONS

OF BULGARIA*

* In .pdf only.

Translation from Bulgarian

OPINION OF THE MINISTRY OF JUSTICE ON THE DRAFT OPINION OF THE VENICE COMISSION ON THE DRAFT LAW ON MEETINGS, RALLIES AND MANIFESTATIONS OF THE REPUBLIC OF BULGARIA

I. INTRODUCTION

1. This opinion is provided in response to the draft opinion of the rapporteurs Mrs. Flanagan and the Mr Arescu and Mr.Grabenwarter, on the draft Law on Meetings, Rallies and Manifestations of the Republic of Bulgaria, sent for assessment to the Venice Commission on 27.03.2009 (CDL (2009) 067, hereinafter referred to as "the draft law").

2. The Ministry of Justice of Bulgaria expresses its gratitude to the Venice Commission for the so made assessment and the provided objective recommendations, propositions and guidance.
This opinion of the Ministry of Justice perceives a great number of the theses stated in the assessment of the rapporteurs, but it also expresses essential objections, grounded below.

II. ADOPTION OF THE INTERNATIONAL AND EUROPEAN STANDARDS FOR FREEDOM OF ASSEMBLY

3. The legislation of the Republic of Bulgaria has fully adopted the principles and international standards, related to the freedom of assembly, ensuing mainly from ECHR and ICCPR, together with the related ECtHR practices. Thy are regulated in the Constitution – Art.5 and Art.43. The exercising of the basic rights and freedoms is most of constitutional issue and being such it is in principle regulated

mainly by the Constitution. The Constitution of Bulgaria provides in such a way appropriate and sound basis for guaranteeing the freedom of assembly, and the Constitution itself provides for the creation of a separate law – Art.43 para 2) reads: "The order of organizing and holding of meetings and demonstrations is determined by law". Due to such constitutional requirement, the discussed here law was drafted.

4. The freedom of peaceful assembly is accepted as a fundamental democratic right and shall not be interpreted restrictively, unless its exercise thereof constitutes a threat for the public order and then upon necessity intervention of the state shall be required. For such a reason, a wide margin of appreciation is given to the state, for coping with disorders or offences or for protecting the rights and freedoms of others. These could require positive measures to be taken, which will make possible the quiet and peaceful ongoing of the legal demonstrations. This includes achieving of fair balance, equilibrium between the interests of persons, willing to exercise their right to assembly and the common interests of the remaining part of the society, i.e. through applying the principle of proportionality.

5. Ensuing from such a position, the Government has prepared this draft law, the purpose of which is to create all necessary mechanisms for protecting the rights of citizens, including precise and clear administrative and judicial procedures.

III. OPINION ON THE PROPOSED GENERAL COMMENTS REGARDING THE DRAFT LAW

6. The Ministry of Justice accepts the general assessment of the rapporteus and underlines that the draft law is in conformity with OSCE/ODIHR -Venice Commission Guidelines on Freedom of Peaceful Assembly, (hereinafter referred to as OSCE/ODIHR –Venice Commission), and the three principles are clearly

articulated in it: the presumption in favor of holding gatherings, the obligation of the state to protect peaceful assemblies and proportionality.

7. Concerning the ascertainments as per para. 10 of the Draft opinion, regarding the ambiguity and vagueness of some norms of the draft law and their objectives, detailed additional explanations shall be done in the analysis stated below.

IV. ANALYSIS

8. Notes and considerations shall be stated on essential problem points from the assessment of the rapporteurs, as follows:

9. Notes as per para. 12 regarding the application field of the law – the project is in conformity with the requirements set by the Constitution –Art.43 para (1) "The citizens are entitled to peacefully gather and unarmed **on meetings and manifestations**", and the definitions used in are in conformity with the forms of assembly shown in the quoted text.
We underline that according to national legislation, the "strikes" as independent form of the right of assembly and social protest are regulated in a separate law – Law on Arrangement of Collective Labor Disputes – Chapter Three "Strikes". This is an approach, which has been adopted by the national legislator and which does not confront the principles of ECHR.

10. Remarks on para. 14 – the recommendation for placing the provision of Art.2 of the draft law in the very beginning of the law may not be adopted due to the established legislative technique, which requires in Art.1 of a law, its subject and objective to be determined and positively outlined, then logically follow the exceptions from its scope, as the content of the text of Art.2 is.

11. Remarks on para.15 – in principle the proposal of the rapporteurs for the text of Art.2 could be accepted and after the expression of "and other such" the words: "unless these are implied for the purposes of Art.4" shall be added

12. The remark on para. 16 may be adopted, and the quoted text to be erased with a view to the legal principle, that application of the special law derogates the general law (***lex specialis derogate generali***).

13. Remarks on para.17 - The Ministry of Justice considers that the regulation arranging counter-demonstrations – Art.15, para 3 and 4 is sufficient in scope and it meets the purposes of the law. The recommendation regarding the creation of a special text for the spontaneous assemblies shall be carefully discussed.

14. Conerning para.18 and para. 24, we do not express considerations, since the comments are advisable and no contradiction with the Convention has been ascertained.

15. Remarks on para. 21 - according to the national legislation, the responsibility for damages caused intentionally is personal and responsibility for an activity of a third persons is always explicitly indicated in the law, when such is provided for. To this end, there are permanent established doctrine and practice in the country, and for such a reason the text as per Art.23of the law fully complies with the understandings and recommendations expressed by the rapporteurs, and any additional explanation is not necessary.

16. Notes on para. 22 – the recommendation concerning the necessity of an "organiser" is adopted by the legislator. This figure is set in the law, as it is perceived that the presence of an organizer is of an essential importance for the holding of the event. As far as the difference between "organiser" and "leader" is

concerned, we clarify that the draft law makes possible the existence of both figures, as the organizer is also a leader at the same time, but for the purpose of facilitating the event itself it has been acceptable for a separate leader to be present (for presiding the event). The rights are explicitly established in Art.10. Similar practice is also adopted in the legislation of other states. These comments also refer to para. 27.

17. Remarks as per para. 23 – the time framework, provided for in the regulation as per Art.7, para. 1 under the law is in conformity with the practice and the understanding of the legislator for "public order", in which the rights of the other citizens are included, and the considerations for health and morality. The term of "**public order**" is adopted by the Constitution and a number of other laws. Separately, a definition of "public order" contains Decision No. 7/1996, case No. 1/1996 of the Constitutional Court, according to which this is "*the order established by the legislative acts, which provides the normal tranquility and possibility for the relevant civil rights to be executed*". In the practice of the courts, such a notion is interpreted and adopted, that under public order it shall be understood the relations based on established norms for morality and determining the conduct of people in the process of the public life. Based on these considerations, our understanding is that the principle of proportionality is not violated in Art.7and for that reason the remark in para.23 has no grounds.

18. Remarks as per para.24 – the required information, provided for in Art.8, para 2, p.3 of the draft law is necessary for the purposes of communication with the organizer and for the establishment of the necessary organization on behalf of the authorities for unproblematic and smooth running of the event – such is also the practice of ECtHR (see *Serguey Koznetsov versus Russia, Bukta and others v. Hungary* No. 25691/04, §35, *Oya Ataman v Turkey*, no. 74552/01, Rassemblement Jurassien Unite v. Switzerland, no. 819/78, Commission decision of 10.10.1979;

and also Platform Arzte fur das Leben v. Austria). The presentation of an information, including identification of the organizations or its absence is not a condition, due to which the event could be prohibited or prevented. *The decision of ECHR on the case of Stankov and OMO "Ilinden", No. 29221/95 has been carefully reviewed and already has been established administrative practice, which does not allow interpretation in harm of the organizers.* The reasons for prohibition are enumerated in details in Art.16. The information in discussion is the minimum necessary level of knowledge, which is to provide guarantee for the balance and proportionality of the measures, the state authorities should adopt for the normal running of the event, and which is in conformity with the ECHR.

19. Remark on item 26 – the standpoint of rapporteurs does not differ from the idea of the text of the draft law, and para.159 from the Guidances. From the text does not follow the conclusion that the burden is transferred to the organizers and in no way it could take the positive obligation of the state. No one can be authorized with police functions but the police itself - "the police shall bear the full responsibility for the public order", as the rapporteurs note.

20. Remarks on para. 28 – the quoted as not fully clear provisions of Art.10 para 2 regarding the authority of the leader of the event are in direct connection with the powers vested to the leader as per Art.8 para 1 item 2 of the law, and it cannot be separately reviewed. The leader is not identified with the police nor he has such authority, and his functions are commented above in item 16.

21. Remarks on para. 29 – the text of Art.11, para 1 does not duplicates Art. 5, which creates the principle of participation – its voluntary essence and expression of personal freedom. Art.11, para 1 does not suppose other construing understanding contrary to that expressed by the rapporteurs, namely every participant at any time may leave the event and terminate its participation in it.

22. Remarks on para. 30 – prohibition of blocking the free entrance and exit from buildings etc, near the place of holding - Art.11 para 2 item 5. The idea of the text is to guarantee the possibility of free access of the citizens to places of public importance – *forum publicum* and appropriate balance and proportionality to be found with the rights of the participants in the event. The purpose is not to prohibit or limit the rights of the people but to preserve the **possibility** of free access to buildings in or close to the area of the event. Indisputable in this sense is the practice of ECtHR (*see Kuznetsov v. Russia; Galdstyan §§ 116-117;Bukta § 37 and Oya Ataman §§ 38-42*),saying that the exercise of the right of gathering in public places inevitably would lead to certain extent of public discomfort and inconvenience, and the authorities shall tolerate it to a reasonable degree. To this end the text does not exclude assessment of holding the meeting and assessment in case by case basis, and it supposes respect for the rights of the others including providing organization of the necessary access.

23. Remarks as per para.31 – art.11 para 3 item 3, determining the prohibition for the participants to wear masks does not provide for blanket prohibition. The participants are allowed to wear masks and supposedly the possibility of their identification is preserved. The competent authorities shall decide on a case by case basis whether to prohibit the wearing of masks when such wearing is on purpose for deliberate impeding the identification of participants, for instance when executing illegal acts, and considering the potential risk of the gathering. Such assessment shall always be done by the law enforcement authorities during the event, and it does not reflect to its permission or prohibition. The decision shall be based on the principle of proportionality.

24. Remarks as per para. 32 – the proposition supposes assessment by expedience, therefore we consider that the text of the law meets the requirements.

25. Remarks on para.34, para.35, para.37 are accepted as the "written notification" is considered as the necessary form and if possible a provision in this sense will be added.

26. Comments on para. 36 - the text of Article 15, paragraph 4 must be considered in view of the statements made by the rapporteurs and in accordance with the international standards in the field of human rights and the Guidelines of the OSCE / ODIHR – the Venice Commission, as the **text explicitly admits** the simultaneous holding of more than one event in the same place and at the same time and in such cases the police shall be obliged to take necessary measures to ensure the safety of participants.

27. Comments on para. 38 – there is a procedure providing the possibility for the organizers to object against a change of the place and the time of an event - it is envisaged under Article 16. Failure to agree upon changing the terms of the event shall lead to an explicit ban thereof. The ban on holding the event shall be adopted by virtue of an act of the competent authority (the mayor), which is an essential prerequisite and its absence in accordance with Article 20, paragraph 3 shall result in holding the event. The act of the mayor may be appealed in front of the courts.

28. Comments on para. 39 - the term "undisputable data" is applicable under the national law, exists in the current Meetings, Rallies and Manifestations Act, in the Penal Procedural Code and in the case law referring to the application of the latter and there is no reason to believe that the term is unclear and incorrect.

29. Comments on para. 40 - see the text of para. 13 referring spontaneous meetings.

30. Comments on para. 41 - the recommendation is fully agreeable.

31. Comments on para. 42 and para.43 -- the options provided for under Article 16, paragraph 3 for the establishment of "marked zones" around certain institutions and buildings (including the National Assembly and military facilities), or roads and facilities, shall represent a legal option based on the obligations of the government related to the national security. These are not blanket prohibitions to the extent that they are within the authority of the mayors and as such are legal options. Their implementation in practice is of utmost importance. They allow assessment on case by case basis and do not enter into conflict with the implementation of the European Convention on Human Rights (ECHR). The same spirit is shared by Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, which obliges member states to create the necessary conditions and guarantees for free and unhindered movement of goods between the Member States.

32. Comments on item 44 - the term "populated places" used in the text of Article 16, paragraph 6 refers to the capital city and larger cities, where it is likely during protests of farmers to use animals. Such events threaten the life and the health of both animals and humans who are in contact with them. Gatherings of large groups of animals in urban conditions can not meet the standards of the sanitary-hygienic norms and the requirements for breeding them and can to a large extent put in jeopardy of epidemics and other health problems the lives of citizens and the animals too. The free movement (on its own motion) of animals to the place of the event endangers the traffic and is unacceptable in view of traffic safety.

33. Comments on para. 45 - see herein above item 13.

34. Comments on para. 46 - the deadline for notification of five working days is bound by the law in terms of subsequent procedures for the response of the competent authority and its appeal. These terms have been adopted in the case practice of most Member States. The assessment of the conditions or prohibition shall be made in accordance with the latest occurrences and conditions at the time of the conduct of the event itself, and for this reason a prior notice will not allow adequate consideration of the necessary conditions. In this regard we consider reasonable the adopted period of not more than 20 (twenty) days prior to submitting notification.

35. Comments on para. 47 – there is no requirement and the law does not provide that the actual submission of the notification shall take place in the personal presence of two or more event organizers (there is obviously ambiguity in the translation of the draft). It is sufficient for the document to be signed by all parties - Article 19, paragraph 1.

36. Comments on para. 48 - "competent authority", according to the technique of the national legislature, is determined by an Additional Provision under paragraph 1, item 7 of the draft law, stipulating that this is "the mayor of the municipality, which organizes the public event". There is no ambiguity about its content and could not be, including for the notification of manifestation, wherever there is any movement and the route passes through various towns and villages.

37. Comments on para. 49 - the recommendation is accepted, the procedural regime is in place and sets forth a requirement in the case practice of the administrative bodies. With each submission the documents are registered with a reference number, and the applicant receives an issued notice by the clergyman.

38. Comments on para. 53 – the acts of the authorities, including the orders of the mayor shall be made in writing and shall be public (in pursuance of Access to Public Information Act). It is the obligation of the authority to inform the organizers - "immediately", which is made part of the requirements for 48 (forty-eight) hours in pursuance of Article 20, paragraph 2.

39. Comments on para.54 - see para.36 referring to "competent authority".

40. Comments on para.55, para. 56, para.57 - the procedures of appeal before the courts as set forth in the draft law ensure the provision of maximum speed and control over the legality of the acts referred to by the mayor. The appeal before the courts allows inspection by an independent and impartial body. The procedures include control not only against the prohibition, but also against any possible limitation. It is in compliance with the Guidelines of the OSCE / ODIHR – the Venice Commission: "any such procedure must be speedy enough so that the case can be considered and the court decision can be announced in advance of the planned date of the meeting", and such a procedure is provided for in the laws of Georgia and Kyrgyz Republic as quoted therein.

41. Comments on para. 59 - see herein above item 13.

42. Comments on para. 60 - the text of Article 21, paragraph 2, item 3 provides for cumulative presence of both options: violations of public order and the requirements of the law on one hand and jeopardizing the lives and health, the national security and the public order on the other hand, a result which may be present in the actions of an extremely small (minimum) number of participants. While interpreting and implementing the law provision, it should be taken account of the injurious result, rather than the number of participants.

43. Comments on para. 61 and para. 62 – the recommended procedure is set forth under Article 21 and does not contradict the understanding of the rapporteurs. The proposals concern the technical performance and the practice in enforcement. At present Bulgaria has its Meetings, Rallies and Manifestations Act, and has established practices for normal and lawful enforcement of these procedures.

44. Comments on para. 63 - see herein above para. 40.

45. Comments on para. 64 - the recommendation is acceptable.

46. Comments on para. 65 – it is worth noting again that the liability is personal and this issue is referred to under para.15 herein above.

47. Comments on para. 66 - provisions regarding the investigation of unlawful use of force by the police while holding the event are set forth in the Penal Code - Article 143, paragraph 2 and there is a possibility under Article 356 of the Penal Code to have speedy investigation in summary proceedings against the police officers. The reglamentation of crimes, according to the usual legislative technique and practice is regulated only under the Penal Code.

V. CONCLUSIONS

The Ministry of Justice accepts this general assessment of the Venice Commission stating that the Bulgarian draft Law on the Meetings, Rallies and Manifestations clearly distinguishes the three main principles: the presumption in favor of holding assemblies; the State's obligation to protect peaceful assembly; and the proportionality. This is in line with the European and the international standards. The draft law presents further positive features, such as tight deadlines for

decision making by the authorities and the presumption that in case of lack of response on their part, the meeting may be held.

Regarding the recommendations made by the Venice Commission we strongly suggest to consider and to adopt the detailed reasoning as set out in this statement of opinion.