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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT JOINT OPINION**

**ON THE LAW ON  
PEACEFUL ASSEMBLIES  
OF UKRAINE**

by

**THE VENICE COMMISSION  
and  
OSCE/ODIHR**

on the basis of comments by

**Mrs Finola FLANAGAN (Member, Ireland)**  
**Mr Christopher GRABENWARTER (Member, Austria)**  
**Mr Hubert HAENEL (Substitute Member, France)**  
and  
**Mr David GOLDBERGER, Mr Michael HAMILTON and Mr Neil  
JARMAN (Members of the OSCE/ODIHR Advisory Panel on Freedom  
of Assembly)**

## I. Introduction

1. By letter of 14 July 2010, Mr Volodymyr Lytvyn, the Chairman of the Verkhovna Rada of Ukraine, asked the Venice Commission to provide an expert assessment of the Draft Law of Ukraine "On Peaceful Assemblies" (CDL(2010)081), jointly with the OSCE/ODIHR.

2. The Venice Commission and the OSCE/ODIHR have had the occasion to assess previous versions of this Draft Law. In 2006, they adopted the joint opinion on the "Draft Law on Peaceful Assemblies in Ukraine" (CDL-AD(2006)033), which considered that the law was excessively detailed and that a certain number of amendments were necessary in order to achieve full compliance with the relevant standards. During 2007 and 2008, the new "Draft Law of Ukraine on Order of Organising and Conducting of Peaceful Events" was prepared by the Ukrainian authorities. In May 2009, it was submitted to Parliament, which adopted it in the first reading on 3 June 2009. This revised version of the law was again sent to the Venice Commission and the OSCE/ODIHR for a legal assessment.

3. A new joint opinion was adopted on this law in December 2009 (CDL-AD(2009)052)<sup>1</sup>. In their joint opinion, the Venice Commission and the OSCE/ODIHR were of the view that while clearly endeavouring to establish a legal framework for the exercise of freedom of peaceful assembly compatible with international standards, the new Draft Law of Ukraine on Order of Organising and Conducting of Peaceful Events contained provisions that lack clear standards to guide official decision-making. The opinion recommended that close attention be paid to the OSCE/ODIHR and Venice Commission's Guidelines on the Freedom of Assembly which cover comprehensively the law and practice on this matter.

4. The Draft Law of Ukraine "On Peaceful Assemblies" under review herein was prepared in response to these concerns. It will be assessed in light of the European and international standards on freedom of peaceful assembly as well as the above mentioned Joint Opinion on the Order of Organising and Conducting Peaceful Events of Ukraine (hereinafter, "the 2009 Joint Opinion").

*5. The present opinion was prepared on the basis of the comments by Mrs Finola Flanagan and Messrs Christopher Grabenwarter and Hubert Haenel for the Venice Commission, and Mr David Goldberger, Mr Michael Hamilton and Mr Neil Jarman for the OSCE/ODIHR Advisory Panel on Freedom of Assembly. It was adopted by the Venice Commission at its Plenary Session (Venice, 2010).*

## II. Executive Summary

6. The Venice Commission and the OSCE/ODIHR welcome the new Draft Law of Ukraine "On Peaceful Assemblies" (hereinafter, "the Draft Law") under consideration, which has followed most suggestions expressed in their 2009 Joint Opinion. These include: the change in the title which now only mentions "peaceful assemblies", the recognition of simultaneous assemblies, counter demonstrations and spontaneous assemblies; the clarification and extensions regarding the organizer of a public assembly; and the provisions concerning the possibility of receiving legal protection in case of restriction of assemblies and other violations of the right to freedom of a peaceful assembly. Furthermore, the procedure of restriction of peaceful assemblies has been amended and delegated to the courts. The Draft Law may be considered as a further step towards ensuring that freedom of assembly is properly protected in Ukraine.

7. Nevertheless, the philosophy of the Draft Law under consideration does not appear to reflect sufficiently the presumption in favour of holding assemblies and the proportionality principle. It contains a certain number of shortcomings that should be modified in order to achieve full

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<sup>1</sup> ODIHR Opinion-Nr:FOA-UKR/144/2009

clarity and compliance with the relevant European and international standards. In this respect, the Venice Commission and OSCE/ODIHR make the following key recommendations:

- A. The excessive differentiation of types and categories of assemblies, contained in the definitions provided in the Act should be reduced in number and revised, while the inclusion of the definition of “spontaneous” assemblies and “counter-assemblies” is welcomed;
- B. The right of non-nationals and stateless persons as well as of other categories of people to organise a peaceful assembly should be explicitly stated;
- C. A provision should be included in the Draft law requiring the authorities to give immediate written confirmation of receipt of notification in all cases; it should be explicitly mentioned in the law that a failure by the authorities to provide timely confirmation will be tantamount to acceptance of the assembly;
- D. The provisions related to the issues of funding of assemblies must be clarified; there is no reason to prohibit otherwise peaceful assemblies because of the controversial nature of their funding;
- E. In principle, every public space should be seen fit to host an assembly; the prohibition of assembly in the immediate vicinity of high risk facilities should be limited to areas closed to the public; the Draft Law should ideally dispose of the idea of legislating for a list of prohibited locations for assemblies, or in the alternative, add a provision providing for a procedure allowing for the modification of the list of places designed to holding of assemblies, including at the initiative of individuals;
- F. The Draft Law should clearly define and limit actions connected with keeping the peace and security during assemblies that can be taken by the law enforcement bodies; it should also specify that officials can use force only as a last resort in proportion to the aim pursued, and in a way that minimizes damage and injury;
- G. The Draft Law should include an explicit requirement of prompt decision-making for both administrative and judicial proceedings.
- H The Draft Law should provide that a lack of notification does not lead to an automatic prohibition of an assembly.<sup>2</sup> The legislation should specify that an opportunity would be provided to the assembly organiser to correct any error or omission noted by the authorities in the submitted form.
- H. The Draft Law should clearly set out the liability and penalties for lack of adherence to the law.

8. It is also important that improvements in the text of the Law be coupled with progress made in its implementation, which may justify awareness-raising measures and adequate training for the competent authorities so as to avoid an overly restrictive reading of the Law. Indeed the way in which the Law is interpreted and implemented is of great significance in terms of its compliance with international human rights standards.

9. The Venice Commission and OSCE/ODIHR stand ready to continue to assist the authorities of Ukraine in this matter. An opportunity to meet with representatives of the Cabinet of Ministers as well as the key drafters of the Draft Law would be welcomed so that a fuller understanding could be gained of how the administrative and other systems are intended to operate.

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<sup>2</sup> See the 2009 Joint Opinion, ad § 45.

### III. The European and international standards on the freedom of peaceful assembly

10. The freedom of assembly constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment.

11. The 2006 Joint Opinion on the "Draft Law on Peaceful Assemblies in Ukraine" set out in some detail the international standards governing the right to freedom of assembly and which have been emphasised by the Venice Commission and OSCE/ODIHR in many other opinions<sup>3</sup>. It may be useful to summarise them once again:

- *Freedom of assembly is a fundamental democratic right and should not be interpreted restrictively. It covers all types of gathering, whether public or private provided they are "peaceful".*
- *It is a "qualified" right and the state may justify what is a prima facie interference with the right. Article 11(2) ECHR expressly permits limitations provided 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 and freedoms of others". 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.*
- *A regime of prior authorisation of peaceful assemblies is not necessarily an infringement of the right but this must not affect the right as such.*
- *The state may be required to intervene to secure conditions permitting the exercise of the freedom of assembly and this may require positive measures to be taken to enable lawful demonstrations to proceed peacefully. This involves arriving at a fair balance between the interests of those seeking to exercise the right of assembly and the general interests of the rest of the community i.e. by applying the principle of proportionality.*
- *The exercise of fundamental rights and freedoms is a constitutional matter par excellence and, as such, should be governed in principle primarily by the Constitution.*
- *Fundamental rights should, insofar as possible, be allowed to be exercised without regulation, except where their exercise would pose a threat to public order and where necessity would demand state intervention. A legislative basis for any interference with fundamental rights such as the right of peaceful assembly is required by the Convention. The relevant regulation, in other words, should focus on what is forbidden rather than on what is allowed: it should be clear that all that is not forbidden is permissible, and not vice-versa.*
- *Accordingly, it is not indispensable for a State to enact a specific law on public events and assemblies, as control of such events may be left to general policing and the rights in relation to them may be subject to the general administrative law.*
- *Laws specifically devoted to the right of freedom of assembly, if they are enacted, should be limited to setting out the legislative bases for permissible interferences by State authorities and regulating the system of permits without unnecessary details.*
- *The public should be informed which body is responsible for taking decisions about the regulation of freedom of assembly, and this should be clearly stated in law. The*

<sup>3</sup> Cf. for example, CDL-AD (2006) 034, para. 8; CDL-AD (2008), 025, para. 8; CDL-AD (2009) 035, para. 6.

*regulatory authority should ensure that the general public has adequate access to reliable information relating to public assemblies,<sup>4</sup> and also about its procedures and operation.*

- *The regulatory authorities must comply with their legal obligations, and should be accountable for any failure – procedural or substantive – to do so. Liability should be gauged according to the relevant principles of administrative law and judicial review concerning the misuse of public power.*

12. The Venice Commission and OSCE/ODIHR also make reference to their common revised Guidelines on Freedom of Peaceful Assembly<sup>5</sup> (hereinafter referred to as “the Guidelines”), which reflect the international best practice and also provide useful guidance for implementing national legislation on freedom of peaceful assembly.

13. The present Opinion essentially focuses on the wording of the provisions of the Draft Law. The manner in which the Draft Law is and will be implemented in practice by the competent administrative authorities, the police and the judiciary is not addressed. It should however be emphasised that how the Law is interpreted and implemented is of great significance in terms of its compliance with international human rights standards. In this regard, the Venice Commission and OSCE/ODIHR wish to stress that the right to peaceful assembly should not be interpreted restrictively and any restrictions should be construed narrowly, and that in general, rights must be “practical and effective” not “theoretical or illusory”<sup>6</sup>.

#### **IV. Analysis**

14. The present Opinion has to be seen as a follow-up to the 2009 Joint Opinion. It will focus on issues where the Commission had expressed critical views in its previous opinion.

#### **Articles 1 and 2 - Scope of application and definitions**

15. Article 1 provides for the definitions of nine different types of assemblies (demonstration, meeting, counter-meeting, rally, peaceful assembly, simultaneous peaceful assembly, picketing, crusade and spontaneous peaceful assembly) and of the term “citizen”. It is a positive development that definitions of “spontaneous assemblies” and “counter-assemblies” have been added in this provision and are provided in the Draft Law. Furthermore, the Venice Commission and the OSCE/ODIHR appreciate the inclusion of a separate article which stresses the positive obligation resting on the state authorities to facilitate the holding of spontaneous assemblies (Article 13).

16. However, the Venice Commission and the OSCE/ODIHR reiterate their concerns with regard to excessive differentiation between categories of event<sup>7</sup>. This approach was criticised in that it fails to crystallize a set of general characteristics shared by all public assemblies, thus distorting the essence of freedom of assembly as a fundamental element of a functioning democracy by reducing it to the right to organize certain narrowly defined types of events. Indeed, some of the words defined in Article 1 are not, in fact, ever used elsewhere in the Draft Law (“Demonstration”, “Rally”, “Picketing”, “Crusade”) and therefore their definition does not appear to serve any specific purpose in the Draft Law. The Draft Law does not state that the

<sup>4</sup> See, for example, ‘Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression’. One example of good practice is provided by the Northern Ireland Parades Commission which publishes details of all notified parades and related protests in Northern Ireland categorized according to the town in which they are due to take place. See further <http://www.paradescommission.org>. See also, for example, the records maintained by Strathclyde Police in Scotland relating to the policing of public processions. Available at <http://strathclydepoliceauthority.gov.uk/images/stories/CommitteePapers/FullAuthority2009/FA1October2009/item%206%20-%20review%20of%20police%20resources%20deployed%20at%20marches%20and%20parades.pdf>

<sup>5</sup> Guidelines, 2<sup>nd</sup> Edition (CDL-AD (2010)020).

<sup>6</sup> See CDL-AD (2006) 034, Opinion on the Law on Freedom of Assembly in Azerbaijan, para. 5.

<sup>7</sup> See the 2009 Joint Opinion, paras. 20-24.

defined types of peaceful assembly are all, in principle, permitted though in Article 2 it is provided that the Draft Law "*regulates social relations*" which are undefined

17. It is recommended that these definitions of different categories of event be deleted and that the definition of peaceful assembly be amended to clarify that it includes all types of gatherings, meetings, marches, demonstrations and picketing which are all public assemblies. The Draft Law should specifically provide that all peaceful assemblies are permitted subject to specific lawful exclusions based on the restrictions provided for in Article 11(2) ECHR.

18. Furthermore, as recommended in the 2009 Opinion, the definition of peaceful assembly should be amended to clarify that it refers only to open-air public assemblies on public property. This might also be reiterated in Article 2 by emphasizing that meetings on private property are excluded from the purview of the law.

19. Article 1§1 defines "citizens" as citizens of Ukraine, as well as foreign persons and stateless persons who "*reside in Ukraine on legal grounds*" which is interpreted as meaning "*lawfully resident in Ukraine*". This definition is relevant to Articles 4 and 5 of the Draft Law which requires most organisers of assemblies to be a citizen and sets out their rights and obligations. It is also relevant to Article 6 of the Draft Law which confers right on citizens who are participants in an assembly. Article 1 ECHR requires "*[t]he High Contracting Parties [to] secure to everyone within their jurisdiction the rights and freedoms defined...in [the] Convention*". Therefore, the freedom or right to organise a peaceful assembly is to be enjoyed equally by everyone and should not depend on a person's lawful residence in Ukraine. Foreigners and stateless persons within the jurisdiction of Ukraine who wish to assemble peacefully should be entitled to do. As the Venice Commission and the OSCE/ODIHR observed in relation to the Act on Public Assembly of the Sarajevo canton (Bosnia and Herzegovina), "*While it is true that Article 16 ECHR explicitly permits "restrictions on the political activity of aliens", the content of this provision is questionable, and the Parliamentary Assembly of the Council of Europe has long ago called for its amendment so as to exclude restrictions currently allowed with regard to Articles 10 and 11 ECHR<sup>8</sup>. According to the OSCE/ODHIR Guidelines, the application of Article 16 ECHR should be confined to speech by non-nationals that directly threatens national security (paragraph 55). A more liberal approach without distinction between nationals and non-nationals is common in today's Europe<sup>9</sup>.*"

20. It is therefore recommended to reformulate the definition of "citizen" in light of this position.

21. According to Article 2 of the Draft Law, certain types of gathering are excluded from its scope of application. In this regard, the Venice Commission and the OSCE/ODIHR note that the exclusion of "meetings of voters with candidates" has not been extended to apply to "all election-related meetings", as was recommended by the 2009 Joint Opinion. A general law on assemblies should cover assemblies associated with election campaigns, an integral part of which is the organisation of public events. Therefore, the Venice Commission and the OSCE/ODIHR reiterate their recommendation to amend this provision to ensure that gatherings of staff, meetings of statutory management body, citizens' associations, meetings of voters with candidates for members of parliament and elected deputies, candidates for the post of the President of Ukraine, in public places, are protected under the Draft Law, or any other primary act that the Draft Law may wish to specify, ensuring that its provisions prevail over any other regulations affecting assemblies which may be more stringent than the existing Draft Law.

21. As noted in the 2009 Joint Opinion, the Venice Commission and the OSCE/ODIHR welcome the desire not to regulate certain types of event. Nonetheless, we would suggest that some of the categories of assembly excluded from the purview of the law in Article 2 (for example, 'gatherings held with the view of recreation' or 'public entertainment events') potentially undermine the clarity and foreseeability of the law. For example, assembly

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<sup>8</sup> Rec. 799 (1977) On the Political Rights and Position of Aliens, paragraph 10.c.

<sup>9</sup> CDL-AD(2010)016, para. 46; see also ECtHR, *Piermont v. France* (Judgment of 27 April 1995, §§ 60 et seq.).

organisers may believe that their assembly falls within the category of recreation or entertainment, and therefore that notification is not required. The authorities might, however, take a different view about a particular assembly, believing that it is neither recreational nor intended for public entertainment purposes, and thus subject it to the notification (and other) requirements of the law. It is therefore recommended that some further consideration be given to the definition of these exclusions so that the events not subject to regulation are precisely defined, and that the potential for conflicting interpretations is reduced.

### Article 3 – Legislation of Ukraine on Peaceful Assemblies

22. As outlined in the 2009 Joint Opinion, the term “other laws of Ukraine”) (in the previous version translated as “other acts of legislation”) used in Article 3 of the Draft Law, is rather vague and may also be understood as including secondary legislation. According Article 92(1) of the Constitution of Ukraine, “human and citizens' rights and freedoms” as well as the guarantees of these rights and freedoms shall be determined exclusively by laws. Therefore, it is recommended that the Draft Law should make reference only to primary law.

### Article 4 - Organisers of Peaceful Event

27. According to the Draft Law, an organizer of a peaceful assembly shall be “*a citizen, an association of citizens, an office, an enterprise, an establishment, or an organization*”. As mentioned above, also foreigners and stateless persons should also be entitled to participate in a peaceful assembly as well as to stand as organizers (see above).

28. The revised Article 4 now correctly stipulates that also juvenile persons may act as organizers, which is highly appreciated. Nevertheless, there are certain restrictions that affect juvenile persons in this respect: they are only allowed to act as an organizer if they have obtained a written consent of their parents or caregivers. The Venice Commission and the OSCE/ODIHR wish to recall that children also have legitimate claims and interests that may sometimes differ from those of their parents or caregivers. Since children at the age of fourteen are likely to already have a certain extent of legal capacity and intellectual maturity, obtaining a written consent of parents or caregivers should not be mandatory in all cases to enable them to act as organizers. In this light, it is recommended to delete the phrase that requires assemblies organised by juveniles under 14 years to be ‘with a view of protecting his/her rights’. This potentially imposes content-based restrictions on the right to peacefully assemble, and young people should be able to organise assemblies for all manner of lawful purposes.

23. Furthermore, the Draft law under consideration has also kept the exclusion of certain categories of persons from being organisers. As said in the 2009 Joint Opinion “*Legally incapable people should never be denied this right altogether, since in many cases the issue that they would wish to raise is not likely to be raised by any other group and they should be appropriately facilitated*”<sup>10</sup>. Also, while it is recognized that a conviction might be combined with the deprivation of several civil rights in some legal systems, such a deprivation of rights has to be proportionate. It cannot be considered as proportionate to have blanket exclusion as provided for in Article 4 of prisoners, persons in detention or in custody, including pre-trial detention, from organising any event irrespective of the negative impact of a criminal offence. These persons do also have legitimate claims and interests and should also have the possibility to express their views<sup>11</sup>. It is therefore, recommended to reformulate this provision so as to enable the competent authority to decide upon a restriction of assemblies organized by prisoners on a case by case basis.

24. The Draft Law should contain a presumption in favour of holding an assembly in these instances as well; any ban of such an assembly should only be possible in justifiable circumstances, as provided for in Article 11(2) ECHR such as reasons of national security or public order.

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<sup>10</sup> See 2009 Joint Opinion, para. 29.

<sup>11</sup> *Ibidem*, para. 30.

#### Article 5 - Rights and Obligations of an Organizer of a Peaceful Event

25. It is positive that this provision has removed the law enforcement responsibilities of organisers of public assemblies.

26. However, the phrase “[an organiser can *conduct*] *an agitation in support of a purpose of a peaceful assembly via mass media as well as by distribution of leaflets, posters, banners, slogans and in another form not prohibited by law*” was kept in this Article. This might lead to the assumption that these activities were unlawful if not carried out under the Draft Law. It is recommended to delete this phrase from this provision. The same can be said of the right given to organisers to “*[o]rganise collecting the voluntary donations, the signatures to resolutions, demands and other public appeals of citizens*” and the right to “*adopt and submit applications, complaints and other forms of appeals to bodies of executive power and local self-government*”. It is also therefore recommended that these be deleted from the Draft Law. Insofar as these matters may require regulation they are not specifically relevant to a law on peaceful assembly

27. It is also recommended that the word ‘disproportionately’ be inserted into the sentence dealing with impediments to vehicular traffic and free movement of citizens: public assemblies (and temporary constructions) may on occasion legitimately ‘impede’ traffic and free movement so long as they do not disproportionately affect these other rights.

#### Article 6 – Rights and Obligations of a Participant of a Peaceful Assembly

28. Article 6 appears to provide the participants with a possibility to be involved in the decision-making process of the assembly. To the extent that this is an accurate reading of the intention behind the Article, this legislates for a decision-making process which governs the activities of and assembly as a whole. The Venice Commission and the OSCE/ODIHR believe that the government should not decide (by way of this Article) upon how the internal decision-making process of the organisers and participants should proceed. The organisers of the assembly should be responsible for the decision-making process. This article is thus recommended to be revised.

#### Articles 7 and 8 - Notification of Holding the Peaceful Assembly

29. The 2006 Joint Opinion considered the time period of five days prior to the event as “unusually long” to submit notification. In response to this concern, the previous Draft Law of Ukraine on Order of Organising and Conducting of Peaceful Events removed this requirement altogether. In its 2009 Joint Opinion, the Venice Commission and the OSCE/ODIHR recommended an explicit time frame in order to prevent an arbitrary decision-making by authorities on what is “a reasonable time”. The revised Article 7 of the Draft Law under consideration now states that it is the duty of the organizer(s) to notify the responsible authority in written form about the assembly no later than four working days prior to its beginning. Although a time period of four working days is long in comparison to some other countries and their laws concerning peaceful assemblies, this time period is acceptable.

30. The notification of holding the peaceful assembly shall be considered as filed on the day it is received by the responsible body of executive power or a body of local self-government. It is recommended to focus on the day of submission of the notification and/or the day of sending the notification instead of focusing on the arrival of the notification, because unintentional delays might occur due to post services.

31. The notification also requires the approximate number of participants (Article 8). This may sometimes be possible but equally an organiser, despite providing a best estimate, may prove to be significantly wrong in the numbers that participate. This should not lead to any consequences for the demonstration unless they are linked to legitimate reasons for restriction

detailed in Article 11(2) ECHR. The Venice Commission and the OSCE/ODIHR reiterate their recommendation to explicitly provide in the Draft Law that a lack of notification does not lead to an automatic prohibition of an assembly.<sup>12</sup> Indeed, the law should make clear what liability adheres to any departure or deviation from the submitted notification. The legislation might usefully specify that in the first instance, an opportunity would be provided to the assembly organiser to correct any error or omission noted by the authorities in the submitted form. In its 2009 Joint Opinion the Venice Commission recommended at paragraph 46 that "*[t]here should be an express provision in the Draft Law that organisers are entitled to fix flaws in notification at any time up to the commencement of the assembly.*" Such a provision should be included in this Draft Law.

32. Also, the Draft Law should require the competent authority to issue a written acknowledgment of receipt of due notification, confirming that the organiser of the assembly has fulfilled the applicable notice requirements in all cases and not only "*upon a request by the organiser*" as currently provided for in Article 12.

33. Furthermore, it appears that the documentation required to be presented based on Article 8 par 3 may be overly bureaucratic and burdensome, and these requirements are thus recommended to be deleted.

#### Article 9 - Requirements of Holding a Peaceful Assembly

34. The Venice Commission and the OSCE/ODIHR reiterate their positive assessment of Article 9, which provides for the general possibility of holding peaceful events "*in any place of public resort fit for it*" and "*at any time of the day*". It is also appreciated that the blanket ban of assemblies near high risk objects has been removed.

35. However, some definitions in this list (especially Article 9§1.1, 2 and 4) are not worded in a way which allows them to be clearly interpreted. The extent of the prohibited areas is not clearly defined. These provisions should therefore be amended to achieve this. As far as the prohibition of public assemblies near hazardous production facilities, facilities which operate under safety rules, and other high risk objects is concerned, the ban should be limited to those areas closed to the public, and presumably fenced in. If the high risk area is open to the public, there appears to be no reason to exclude an orderly public assembly in the same area. Similarly, the provision in Article 9(2) appears to grant an excessively broad ground for the prohibition of events: for example, the phrase 'acts which violate the normal functioning' of an office might be given an arbitrary interpretation. Therefore, it is recommended that Article 9 be reconsidered in light of this position. As with Article 5 (above), one possible amendment might be the insertion of the word 'disproportionately' in Article 9(2) so as to read: 'disproportionately impede free passage' and 'disproportionately affect their normal functioning'.

36. Furthermore, this provision uses the expression "shall not be allowed", which entails a disproportionate limitation on the exercise of freedom of assembly by virtually excluding the use of the proportionality test on a case by case basis. The purpose of an assembly is often closely linked to a certain location. The freedom of assembly includes the right of the assembly to take place within "sight and sound" of its target object. A provision allowing for more flexibility in the decision-making by the competent authorities would be preferable.

37. As regards Article 9 § 1. 5, alinea 2 in particular, the Draft Law may be interpreted to suggest that authorities may include locations which are not included in the five categories listed in points 1 to 5 of Article 9 § 1. Indeed the necessity of such a catch-all phrase is questionable since the range of locations is made clear. Designation by the authorities of assembly locations raises concerns as it is incompatible with the very concept of the right to peaceful assemble as a fundamental freedom. All public spaces should be open and available for the purpose of holding assemblies and so, official designation of sites suitable for assemblies inevitably limits the number of public places that may be used for an assembly as it

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<sup>12</sup> See the 2009 Joint Opinion, ad § 45.

excludes locations that are suitable for assemblies, simply because they have not been designated. The only legitimate restriction on location of an assembly is on site of hazardous areas and facilities which are closed to the public. However, if Article 9 § 1. 5, alinea 2 is kept, it should at least provide for a procedure allowing for the modification of the list of places designed for the holding of assemblies, including at the initiative of individuals, should the list be too limited.

#### Article 10 - Preliminary agitation

38. The revised Article 10 of the Draft Law removed an indirect restriction on peaceful assembly, i.e. the prohibition to conduct a preliminary agitation in the form of a peaceful event. However, its paragraph 3, which prohibits an agitation in a form that “offends and degrades the honour and dignity of man and citizen” was kept in the Draft Law. The contents of leaflets and other materials about an assembly or circulated at an assembly should not be governed by this Draft Law. The quoted phrase runs counter to established European Convention case law which permits the expression of ideas that may shock, offend or disturb a section of the public.

#### Article 11 - Logistic support

39. Article 11 continues to prohibit state enterprises, institutions and organisations as well as foreigners and stateless persons from financing assemblies. As indicated in the 2009 Joint Opinion, this prohibition means that the capacity of these persons to organize public assemblies may be seriously undermined. Indeed, according to Article 1, foreign nationals and stateless persons residing in Ukraine are allowed to participate in peaceful assemblies, and should also be allowed to act as organisers (see above, para. 17) and contribute to such events.

40. The Venice Commission and the OSCE/ODIHR also reiterate their recommendation to provide competent authorities’ officials with sufficient guidance as to repercussions in case such financing does take place so as to ensure that the Draft Law does not prohibit sponsorship of speech activities by institutions, unless such support is secret<sup>13</sup>.

#### Articles 12 to 14 - Responsibilities of Executive, Local authorities and law-enforcement bodies

41. The new, revised version of Articles 12 and 13 addresses some of the concerns raised by the Venice Commission and OSCE/ODIHR in their 2009 Joint opinion. A number of shortcomings remain: as mentioned above, the Draft Law should require the competent authority to issue a written acknowledgment of receipt of due notification immediately and in all cases (see above, para. 26). In addition, the requirement to ensure public order and safety of people as well as observance of law during the conduct of an event is redundant as this is the obligation of the law-enforcement bodies (mentioned in Article 14 § 2), and not of the local authorities.

42. While the inclusion of a separate article on the responsibilities of the law-enforcement bodies is certainly welcome (Article 14), the Commission and the OSCE/ODIHR note that the Draft Law has removed *all provisions* on termination of assemblies. The role of the law-enforcement personnel during an assembly may include, when the situation on the ground deteriorates (e.g. participants might begin using or inciting imminent violence), imposing restrictions or terminating an assembly. In doing so, the law-enforcing authorities should consider first their duty to facilitate the enjoyment of the right to freedom of peaceful assembly<sup>14</sup>. The current Draft Law however, confines itself to referring to the Law of Ukraine “On militia” as the legislation applicable for taking “*other actions connected with keeping the peace and security of citizens at the time of holding an assembly*” (Article 14 § 1.5). It is not possible, in the absence of the mentioned legislation, to assess whether this reference and the relevant legislation provide for a sufficient protection of fundamental rights and freedoms. For

<sup>13</sup> See CDL-AD(2009)052, para.57.

<sup>14</sup> See the OSCE/ODIHR and Venice Commission Guidelines on Freedom of Peaceful Assembly, para.145.

maximum transparency, the Draft Law could usefully add a provision that makes this clear. In any case, it is essential that expressions such as “*other actions connected with keeping the peace and security*”, which the police are entitled to take according to Article 14, are clearly defined and limited. The Draft Law should also specify that officials can use force only as a last resort in proportion to the aim pursued, and in a way that minimizes damage and injury. In this regard, the Venice Commission and the OSCE/ODIHR also refer to the general principles of good practice for policing assemblies (Guidelines, paras. 149 - 171).

#### Article 15 - Restrictions of Peaceful Assemblies

43. The revised Article 15 on restrictions to public assemblies now requires that they have to be imposed “*by courts according to law and only in the interests of national security and public order with the purpose of preventing disturbances or crimes, protecting public health or rights and freedoms of others*” (Article 15§1). When it decides to address the court with “*a statement of claim*”, the competent authority is required to inform the organiser of a peaceful assembly “*without delay and not later than a date from the moment of declaring it*” (Article 15 § 2).

44. These new provisions are welcomed. It is also positive that the Draft Law lists very limited and exhaustive grounds for imposing restrictions on the exercise of the freedom of peaceful assembly. The Commission and the OSCE/ODHIR strongly recommend adding a provision stating that these restrictions by the court have to be proportionate in all cases.

45. In relation to judicial review, the Venice Commission and OSCE/ODHIR recall the Guidelines which state that the court review “*must be prompt so that the case is heard and the court ruling published before the planned assembly date. To expedite this process the courts should be required to give priority to appeals concerning restrictions on assemblies*” (para. 138).

46. It is recommended to add in Article 15 § 3 a provision requiring the courts to pass a final decision within 48 hours. The Draft Law should also provide for the possibility to obtain a preliminary injunction when a court is unable to hand down a final decision prior to the planned assembly<sup>15</sup>.

#### Article 16 - Review and appeal

47. The Draft Law provides for administrative and judicial review of the decisions, actions and inactions of the bodies of executive power. Both administrative and judicial procedures should be sufficiently prompt to enable the organiser to receive a final decision prior to the notified date of the assembly.

#### Article 18 – Responsibility for violation of the right to freedom of peaceful assembly

48. This provision stipulates that persons who violate “the requirements of this Law” shall bear “disciplinary, administrative, civil and criminal responsibility in accordance with the law”. It would be necessary to have further information on what other legislation, whether imposing administrative, civil or criminal liability, is involved and how it is implemented in practice. As it stands, the legislation, on the whole, does not specify what the consequences for breaching particular provisions will be. The Venice Commission and the OSCE/ODIHR recommend that liability for failure to adhere to any provision of the law be clearly stated, that a maximum penalty be explicitly provided, and that in all cases the stated penalties should be strictly proportionate to the nature of the breach, as the way in which this legislation is applied in practice by the competent authorities might act as a deterrent for the population’s readiness to avail itself of the right to freedom of peaceful assembly. It is however not possible to comment further without this additional information.

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<sup>15</sup> See Venice Commission - OSCE/ODHIR Guidelines, para. 138.