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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT JOINT OPINION

ON THE DRAFT LAW ON FREEDOM OF ASSEMBLY

OF UKRAINE

by
THE VENICE COMMISSION
and
OSCE/ODIHR

on the basis of comments by:

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TABLE OF CONTENT

I. Introduction 3

II. Executive Summary 4

 Key Recommendations: 4

 Additional Recommendations:..... 5

III. Analysis and Recommendations 6

I. Introduction

1. By letter dated 4 July 2011, Mr. Serhiy Holovaty in his function as chairman of the 'Ukrainian Commission for Strengthening Democracy and the Rule of Law' a body constituted under the President of Ukraine, requested the Venice Commission and the OSCE/ODIHR to assess – in light of applicable international standards – a Draft Law on Freedom of Assembly of Ukraine (CDL-REF(2011)037) adopted by the above-mentioned Commission (hereinafter referred to as 'the Draft').
2. The following Opinion is provided based upon the United Nations International Covenant on Civil and Political Rights (hereinafter, the "ICCPR"), the European Convention on Human Rights (hereinafter, the "ECHR"), relevant OSCE commitments and the OSCE/ODIHR– Venice Commission *Guidelines on the Freedom of Peaceful Assembly*, second edition, 2010 (hereinafter also referred to as "the Guidelines").
3. The present Opinion is limited in scope to the Draft Law, and does not examine any other legislation which may affect the exercise of the right to freedom of peaceful assembly in Ukraine. Therefore, the Opinion should not be read as a comprehensive review of all the domestic legislative provisions which might impact upon the enjoyment of the right to freedom of peaceful assembly in Ukraine.
4. It is noteworthy that the Venice Commission and the OSCE/ODIHR have had the occasion to examine other drafts pertaining to the exercise of the freedom of assembly in Ukraine in the past. In this regard, the Venice Commission and the OSCE/ODIHR wish to make mention that the sole aim of all recommendations made, regardless of which version of which draft has been reviewed, is to assist the authorities of Ukraine to meet, when adopting legislation on the matter, the applicable international standards and the country's commitments on the freedom of peaceful assembly.
5. The Opinion is based on an English translation of the Draft Law and certain recommendations may reflect the way in which particular terms have been translated rather than their intended meaning. Instances where doubts surrounding translation have arisen in the drafting of the present Opinion, have been noted accordingly, below.
6. 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 and the *Verkhovna Rada* as well as the key drafters of this Draft Law would be welcomed, so that a fuller understanding could be gained of how the administrative and other systems are intended to operate.
7. The OSCE/ODIHR and the Venice Commission note that the Opinion provided herein is without prejudice to any other opinions or recommendations that the OSCE/ODIHR or the Venice Commission may wish to make on the issues under consideration in the future.
8. The present Opinion was prepared on the basis of the comments by Ms Slavica Banic and Mr Wolfgang Hoffmann-Riem for the Venice Commission, and Mr David Goldberger, Mr Michael Hamilton, Mr Neil Jarman, Mr Serghei Ostaf and Mr Alexander Vashkevich for the OSCE/ODIHR Expert Panel on Freedom of Assembly. It was approved by the OSCE/ODIHR Expert Panel on Freedom of Assembly as a collective body and should not be interpreted as endorsing any comments on the Act made by individual Panel members in their personal capacities. *The Opinion was adopted by the Venice Commission at itsth Plenary Session (Venice, 2011).*

II. Executive Summary

9. The Venice Commission and the OSCE/ODIHR welcome the submission for legal expertise of the Draft Law, which in many respects, draws upon and reflects the principles enunciated in international standards and the *ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly*.

10. Moreover, the structure of the Draft Law is relatively clear and, importantly, provides for the amendment of the Codes on Administrative Offences, Administrative Proceedings and other legal acts, which, if not amended alongside the law on freedom of assembly, could significantly impact upon and delay the effective enjoyment of the right to peacefully assemble in Ukrainian practice.

11. Notwithstanding these accomplishments, further improvements to the Draft Law ought to be considered. The recommendations and analysis contained in this Opinion are drafted in the spirit of ensuring coherence and clarity of the text as a whole, and with a view to limiting the potential for misinterpretation.

12. The concerns or shortcomings which the Venice Commission and OSCE/ODIHR have identified may be summarized as follows:

Key Recommendations:

- A. The definition of spontaneous assembly ought be amended in order to avoid misinterpretation;
- B. Article 2 para 3 should be amended to ensure a consistent regulatory framework for all assemblies, for as long as they are held on public space and are open. It should also be clear from the provisions of the Draft Law that private meetings need not be subject to the notification and other requirements required under the draft Law;
- C. Article 5 para 3 should be amended to ensure that a lack of notification does not lead to an automatic prohibition of an assembly;
- D. Article 7 para 2 of the Draft Law should make clear that limitations on the freedom of assembly sought to be imposed for the purposes of national security shall also be done in a proportional manner;
- E. The reference in Article 7 para 6 to “threat to protected interests” should be clarified and applied in line with European case-law;
- F. The Draft Law should ensure that the responsibility of the organizers does not include law enforcement duties;
- G. Article 17 is proposed to be amended in order to ensure that any person may record the actions of law enforcement officials, without restraint;
- H. The time frames for notification are recommended to be substantially revised;
- I. Decisions of the competent authorities on proportionate time, place and manner restrictions, articulated in Article 21, should be subject to a swift and timely response;
- J. Organisers, while encouraged to co-operate with authorities on the organization of an assembly, should not be coerced to follow suggestions, in the case that these would undermine the very essence of the assembly (Article 21 para 4 of the Draft Law);
- K. The possibility to issue an interim decision, in the form of an injunction, may be considered in the Draft Law, with reference to Article 182 and 183 of the Administrative Code.

Additional Recommendations:

- L. The definition of simultaneous peaceful assembly should be clarified in order to ensure that assemblies that are notified for the same place and time are included, regardless of the content of the message carried by any of the assemblies;
- M. The definitions of organizer and the term “due notice” should be clarified and cross-referenced with Article 18 of the Draft Law.
- N. The regulation of assemblies on the premises of penitentiary institutions should be excluded from the Draft Law and regulated by the appropriate legislative acts concerning such institutions and rights of convicted;
- O. The submission of notification of an assembly should be simplified and made uniform;
- P. The scope of application of the draft Law, outlined in Article 2 para 1 should be clarified;
- Q. The term “other laws” in Article 3 of the draft Law, should be made more precise;
- R. While the principles enunciated in Article 4 of the Draft Law are welcomed, it is proposed that the provision be supplemented and that the protection from discrimination contained in para 4 receives the right interpretation;
- S. The reference to restrictions contained in Article 5 is suggested to be reformulated;
- T. The reference to regulation of assemblies in penitentiary institutions made in para 4 of Article 5 should be removed from within the ambit of the law;
- U. Article 6 would necessitate further clarification;
- V. Article 6 para 3 of the Draft Law, which refers to liability for participation in an assembly should be clarified;
- W. While the power bestowed on the courts as the body responsible for imposing restrictions is welcomed, the Draft Law is recommended to leave room for the possibility of law enforcement officials to impose certain restrictions when an assembly is in progress for the purpose of protecting the life, safety and rights of others;
- X. The term “public unrest” in Article 7 of the Draft Law, should be re-formulated;
- Y. The list of prohibited grounds in Article 7 should be clarified vis-à-vis, Article 9 of the Draft Law;
- Z. The provision of Article 10 is recommended to be deleted, as it refers to the internal business of an assembly, and is not a matter to be regulated by the legislator;
- AA. Article 10 of the Draft Law should make clear that the authorities are liable only for negligent or intentional conduct;
- BB. The draft Law should specify the exact penalties and liability for violation of the law;
- CC. Article 13 is recommended to be revised in order to avoid impinging on the internal affairs of the assembly;
- DD. The breadth of Article 13 of the Draft Law is recommended to be reconsidered for reasons of practicability;
- EE. The obligations of organizers concerning noise levels and use of loudspeakers and other equipment, should be clarified;
- FF. Article 15 of the Draft Law while presenting an innovative approach, should not constitute an obligation on the addresses of the assembly;
- GG. Article 16 of the Draft Law is recommended to be deleted;
- HH. The notification period is recommended at 4 days and the provision of Article 18 may further stipulate the exact manner of receipt and confirmation of receipt of notification;
- II. Article 22 of the Draft Law is recommended to be revised in order to ensure that police powers of coercion are used based on the doctrine of proportionality and necessity;
- JJ. A justification for all claims whether accepted or dismissed by the courts ought be provided (Article 182 of the Draft Law – final provisions on the Administrative Code);

13. It should be emphasized that a well-drafted law does not, of itself, guarantee adequate protection of the right to freedom of peaceful assembly. The way in which the Law is interpreted and implemented is of great significance in terms of its compliance with international human rights standards. It is therefore imperative that attention is also given to awareness-raising measures and the training of relevant regulatory and enforcement authorities so as to ensure a full understanding of their responsibilities - in particular, those that are entailed by the positive obligation to protect and facilitate the enjoyment of the right to freedom of peaceful assembly. 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”¹.

III. Analysis and Recommendations

Article 1 - Definitions of Main Terms

14. A reordering of the definitions in Article 1 is suggested so that the definitions appear in a more logical sequence. The definitions might, for example, be sequenced as follows: (1) ‘Peaceful assembly’; (2) ‘Counter-demonstration’; (3) ‘Simultaneous peaceful assembly’; (4) ‘Spontaneous peaceful assembly’; (5) ‘Public place’; (6) ‘Organizer(s)’; (7) ‘Participants’; (8) ‘Notification of intention to hold an assembly’ [combining present Articles 1 para 1 and Article 1 para 6 and para 9 Respective executive or local self-government bodies. The analysis and recommendations to the definitions outlined below follow this suggested sequence.

15. **Simultaneous peaceful assembly:** The Draft Law defines a simultaneous assembly as that taking place at the same time and “near” another assembly. It is recommended that the definition may be made more precise by stipulating that a simultaneous assembly is one which is held *at the same place and time as* another assembly². It might also be added (for the purposes of clarification) that a simultaneous assembly includes both those which address the same subject as another assembly, and those which address entirely unrelated subjects.

16. **Spontaneous peaceful assembly:** The inclusion of a definition of “spontaneous assembly” in the Draft Law is welcomed. Nonetheless, the definition is suggested to be amended as it may give rise to a number of interpretative difficulties. First, the definition provided in the Draft Law may not be sufficiently wide to encompass for instance, one of the legitimate reasons for holding a spontaneous assembly, that being, if the purpose of the assembly would effectively be nullified because of the notification period (where, for example, the target audience of a protest would no longer be available if the protest were delayed merely to comply with the notification requirement). Indeed, the question of what constitutes a “new event” (as opposed to a “continuing event”) may be difficult to determine. Second, the definition includes the criterion “held without due notice”. Although it is true that spontaneous assemblies *are* held without prior notification, this should be considered rather as a consequence than a definitional prerequisite. As stated in the *OSCE/ODIHR-Venice Commission Guidelines*, a spontaneous assembly forms an exception from the requirement of prior notification, because it occurs under circumstances where the legally established deadline cannot be met.³ Third, difficulties may arise from the term “unplanned” - despite the seeming paradox, spontaneous assemblies may actually be planned in advance. The key defining criterion ought simply to be that timely notification is not possible (or is impracticable). This definition might therefore be remedied simply by stating that “[a] spontaneous peaceful assembly is an assembly for which timely notification according to

¹ See CDL-AD (2006) 034, Opinion on the Law on Freedom of Assembly in Azerbaijan, para 5.

² See para 122 of the Guidelines.

³ Guidelines, para 26.

(present Article 18 of the Draft Law) was not reasonably practicable.” Such definition still provides the relevant authorities with the margin to estimate whether timely notification was, in fact, reasonably practicable.

17. Public place: The definition of public space clearly includes the possibility of organizing peaceful assemblies in publicly owned buildings or constructions where they are open for free access. To an extent, this falls in line with the *OSCE/ODIHR-Venice Commission Guidelines* which state that buildings and structures that are ordinarily accessible to the public should be regarded as legitimate sites for public assemblies⁴. However, the Draft Law could be potentially interpreted as also applicable to (and thereby regulating of) assemblies in privately owned buildings or structures that are generally open for free and equal access to the public (such as shopping malls). While assemblies in such locations should not be precluded from protection⁵, they raise different regulatory issues than open-air assemblies in publicly owned places.

18. Organizer(s) of a peaceful assembly: While this may be due to the translation into English, the use of the verb “initiate” is somewhat imprecise. The organizer should be defined first and foremost as the legal or physical entity in whose name the prior notification is submitted in accordance with the provisions of present Article 18 of this Draft Law.⁶ Furthermore, it is recommended to combine present Article 1 para 6 with present Article 1 para 1, with a cross-reference to the specific provision in the law governing notification (Article 18 of the Draft Law). Furthermore, such cross reference to Article 18 of the Draft Law would eliminate any potential doubt as to the meaning of “due notice” (in other words, whether this refers to *submission* of the notification form by the organiser⁷, or instead, to the *notification form* itself⁸). Indeed, a cross-reference to the relevant article would alleviate the need to use the term “due” notice, altogether.

19. Article 1 para 1 sub-para (1) of the Draft Law, by referencing penitentiary institutions, appears to imply that the Draft Law applies to freedom of assembly in penitentiary institutions. At the outset it should be noted, that the OSCE/ODIHR and Venice Commission have consistently maintained and continue to maintain, that prisoners should not be precluded from enjoying the right to freedom of assembly. Further, while 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. The OSCE/ODIHR and Venice Commission remain of the stance that it cannot be qualified as proportionate at all to exclude prisoners, persons in detention or in custody from organising any event irrespective of the negative impact of a criminal offence. However, it should be acknowledged that such assemblies generate a series of special security considerations that should be taken into account and that penitentiary institutions are not places open to the public, therefore, assemblies taking place thereon, ought be addressed in separate regulations relating to penal institutions and rights of convicted⁹. Therefore, penitential institutions are recommended to be excluded from the scope of the present law (see also, for example, Article 5 para 2, Article 12 para 3 and Articles 18 para 5 – para 7 and para 12, Article 20, and Article 23 below).

20. Participants in a peaceful assembly: The Guidelines make it clear that “law enforcement officials should differentiate between participants and non-participants (such as accidental bystanders or observers)”¹⁰. The inclusion of a definition of participant in the Draft Law is therefore welcome. However, the primary criterion for assessing whether or not

⁴ Guidelines, para 21.

⁵ The State may, on occasion, have a positive obligation to ensure access to privately owned places (particularly where the essence of the right of assembly and/or expression has been lost). See Guidelines, para 23, citing *Appleby v United Kingdom* (2003).

⁶ Guidelines, para 185.

⁷ As suggested by present Article 1(8), Article 5(4), Article 18(3), Article 21(1), Article 22(2) and (6).

⁸ As suggested by present Article 1(5), Article 21(9), Article 23(4).

⁹ See, for example, *Jones v. North Carolina Prisoners Union*, 433 U.S. 119 (1977).

¹⁰ Guidelines, para 158.

someone is a participant in an assembly ought to be their “intention” (possibly inferred from their proximity to the event together with their behaviour). The English translation of the Draft Law includes the phrase “willingly and conscientiously” which is suggested to be made more precise by replacing it with the word “intentionally”.

21. **Notification of intention to hold a peaceful assembly:** Provisions relating to the notification of the “respective executive or local self-government bodies” in Article 1 para 10 appear to be unduly complex, requiring the organizer to ascertain to whom notification should be given (from a wide range of different authorities depending on the territory and geographical coverage of the assembly). A “single gateway” approach for notification would be preferable. This might, for example, simply require organisers to submit the notification documents at the village, town or city council office which is closest to the venue (or starting point) of the proposed assembly.

Article 2 - Application of Law

22. The Draft Law in Article 2 para 1 states that it applies to “any legal relations” connected with the realization and protection of the freedom of peaceful assembly in Ukraine. However, the precise purpose of this provision is unclear and the term “legal relations” lends itself to misinterpretation. It is therefore, recommended to clarify this provision.

23. Article 2 para 3 points to the separate regulation (through different laws) of “electorate meetings with members of parliament, public hearings, meetings of citizens, self-organization bodies and other special forms of peaceful assembly”, while at the same time, requiring that the present Draft Law be taken into account. This provision is vague and overly broad. Indeed, meetings of political groups, members of parliament, meetings of citizens etc., that are not open to the public should not be covered by the Draft Law, as they are not public assemblies and consequently, should also not be subject to any notification requirements. However, the types of meetings listed in the para may also potentially be held in places which are open to the public, and would fall within the definition of “public assembly” in Article 1 and should therefore fall within the scope of the present Draft Law, and not be regulated by specific other laws, as currently mentioned in Article 2(3). It is recommended that Article 2 para 3 be deleted, and all forms of such public assembly covered by Article 1 (regardless of their purpose or their organiser) be subject to the same regulatory procedure¹¹. Meanwhile, it should be clear that private meetings not open to the public, should not come within the remit of the Draft Law, and thus not be subject to notification and other requirements as the case for public assemblies.

Article 3 - Laws on the Freedom of Peaceful Assembly

24. The status of international treaties that have not been ratified by the *Verkhovna Rada* of Ukraine (but which might be relevant to the regulation of freedom of peaceful assembly) is not clear from Article 3 of the present Draft. Furthermore, the term “other laws” is too vague since it might encompass secondary legislation, thereby potentially undermining the protections set out in the present Draft Law.¹² If this phrase is intended to refer only to primary laws, this could perhaps be emphasized in an explanatory memorandum or justification to the draft Law. Indeed, in any case, it would be preferable to list any such other laws exhaustively so as to maximize the transparency and foreseeability of the law.

Article 4 - Principles for the Exercise and Protection of Freedom of Peaceful Assembly

25. It is welcome that the “Principles for the Exercise and Protection of the Freedom of Peaceful Assembly” laid down in Article 4 largely resemble the “Guiding Principles” as elaborated in the *ODIHR-Venice Commission Guidelines*¹³. It may also be considered to

¹¹ See, the Joint Opinions CDL(2010)099 and CDL-AD(2009)052.

¹² As recommended in Joint Opinion CDL(2010)099.

¹³ Guidelines, para 29 *et seq.*

include the seventh principle enunciated in the Guidelines regarding the liability of the regulatory authority¹⁴ (especially because the Draft Law already contains several express provisions concerning liability of the regulatory authorities)¹⁵.

26. Article 4 para 1(1) emphasizes the “priority” of holding peaceful assemblies. This phrasing might be reformulated as a “presumption in favour of holding peaceful assemblies” (although this may be an issue of translation).

27. Article 4 para 1(4) states that freedom of assembly is limited by principles of “equality and prevention of discrimination”. Potentially, this sweeps too broadly and may enable the imposition of restrictions which themselves amount to content discrimination. The core of the principle of “non-discrimination” in this context is that the freedom of peaceful assembly should be enjoyed equally by all (as provided in Article 8 of the Draft Law).

Article 5 - Priority of holding a peaceful assembly

28. In line with the suggestion concerning the reformulation of Article 4 para 1(1), Article 5 might be more appropriately entitled “[t]he presumption in favour of peaceful assembly”. It is also recommended that the wording in Article 5(1) – “except for the limitations established by this Law” – be revised slightly to emphasize that the imposition of proportionate restrictions is pursuant to the law, rather than expressly established in its text. This phrase therefore might simply be replaced by – “except for proportionate restrictions imposed pursuant to this Law”.

29. As noted in relation to Article 1 para 1 above, it is recommended to delete references to the administration of penitentiary facilities – as contained, inter alia, in Article 5 para 2 – and all subsequent references to the holding of assemblies in a prison. Any such events should be covered by more specific prison regulations. Since the *ODIHR-Venice Commission Guidelines* focus on peaceful assemblies in open public places, the revised definition recommended in relation to Article 1 above would serve to exclude assemblies in penitentiaries (as well as those in any other building or closed construction not open to the public). See further the comments in relation to Article 18 paras 5-7 and para 12 below.

30. According to Article 5 para 3 of the Draft Law, an assembly may not be prohibited due to lack of a timely notification. The intention of this provision is welcomed however, its formulation may be reconsidered in order to ensure that a failure to submit prior notification should neither lead to prohibition of the entire assembly automatically, nor should the failure as such suffice for prohibition. Such clarity in the provision is important because, even in cases where no notification has been provided, the presumption should be in favour of holding the assembly and it should thus be facilitated by the police as long as it remains peaceful and does not impose unreasonable regulatory or law enforcement problems¹⁶. This, however, would not prevent authorities from imposing reasonable regulations on assemblies, for which no advance notice has been given. Furthermore, sanctions may still be applicable to participants of planned assemblies, for which no notice has been given after the assembly is over, providing such a notice is required¹⁷.

31. In Article 5 para 4, officials of executive bodies and local self-government authorities should “facilitate” rather than “protect” peaceful assemblies since “protection” is primarily the responsibility of law enforcement officials.

32. It is suggested that Articles 18 and 19 may be better relocated to this point in the Draft Law.

¹⁴ Guidelines, para 2.7.

¹⁵ See, for example, present Article 10(3), Article 21(9) and Article 22(7) and (11).

¹⁶ ECtHR, *Oya Ataman and others v. Turkey*.

¹⁷ ECtHR, *Ziliberberg v. Moldova*.

Article 6 - Voluntary participation in peaceful assemblies

33. Article 6 of the Draft Law requires clarification in two respects; at first, the exact interpretation of “Nobody shall be forced to participate or omit to participate in peaceful assemblies” is unclear; second, the provision could potentially be misused as a ground for intervention against assemblies or to suggest that assembly organizers and participants should have to prove that their involvement was voluntary. From the English translation of the Draft, it seems that Article 6 is intended to expand upon the principle already stated in Article 4 para 1(2).

34. Article 6 para 2 suggests that no liability should ever be incurred as a result of participation in an assembly. At the very least, the translation of Article 6 para 2 appears much too broad. Clearly, those who commit crimes should not be exempted from liability simply due to their participation in an assembly. This provision should be clarified to state that penalties should not be levied against any individual solely on account of their participation in a peaceful assembly, nor should they be considered responsible for the unlawful conduct of others. Moreover, the decision to take part in or to refrain from taking part in, an assembly should not be subject to sanctions. In addition, noting the comments in relation to Article 10 para 4 below, it is important to ensure that avoidance of any unnecessary duplication in the law.

Article 7 - Lawful limitation of the freedom of peaceful assembly

35. The regime of restrictions under the Draft Law stems from Article 39 para 2 of the Constitution of Ukraine, under which only a court of law may establish restrictions on freedom of public assembly “and only in the interests of national security and public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons.” This provision is repeated in Articles 7 para 1 and 23 para 1 of the Draft Law. While bestowing such powers only upon a court helps ensure the legality of restrictions, this approach also potentially removes the possibility of imposing restrictions in the course of an assembly. It thus potentially reduces the scope for more flexible solutions, and the courts may therefore be prone to impose more onerous prior restrictions in the first instance.

36. It is also important to acknowledge the powers reserved for internal affairs bodies under Articles 22 para 7 and 22 para 9 to impose proportionate limitations on - or terminate - an assembly which is no longer peaceful and which poses a serious and imminent threat to public order, or the life and health of others (see further the comments on Article 22 below). Indeed, such powers might be extended to allow for the imposition of limitations during an assembly where there is a serious threat of unlawful acts. Therefore, while retention of the courts as the appropriate body for assessing the necessity of imposing prior restrictions is welcomed, it is nevertheless recommended that Article 22 of the Draft Law should also be amended to allow internal affairs bodies (or law enforcement officials) to impose proportionate restrictions (during an assembly) in pursuit of any of the legitimate aims provided for in Article 21 ICCPR or Article 11 para 2 of the ECHR, including the protection of the rights and freedoms of others¹⁸.

37. It is recommended that the term “public unrest” contained in Article 7 para 1, should be substituted with “a serious or imminent threat of unlawful acts or crimes” so as to establish a higher threshold for the imposition of limitations and ensure compliance with international standards and law. The term “public unrest” may otherwise lend itself to an interpretation

¹⁸ See further, Article 22 below. Such a power would be different again from the purely consensual/advisory nature of the mechanism provided for in Article 21 of the Draft whereby the authorities may make efforts to cooperate with the organizers of an assembly to negotiate mutually acceptable changes to the time, place and manner of an assembly.

which would for example, include speech that merely generates controversy. Furthermore, rather than positioning the wording “and if it is necessary to do so in the democratic society” at the end of Article 7 para 1, where it might be understood to provide a separate, additional basis for restriction, this phrase should be included earlier in the sentence (following more closely the wording of the international standards upon which the draft is modelled). The reader of this Draft Law would also be helped by including a cross-reference to Article 182 of the Code of Administrative Proceedings of Ukraine in this section.

38. Regarding the limitation of peaceful assemblies in the interests of national security contained in Article 7 para 2 it is recommended to insert the term “proportionate” or “reasonable” so that this sub-section reads: “(...) shall mean proportionate (or reasonable) limitations imposed in order to protect state sovereignty and defence (...)” This serves to underscore that the principle of proportionality continues to apply when questions of national security are raised (even though this is also expressly provided by Article 9).

39. The intention behind Article 7 of the Draft Law to limit the list of grounds upon which restrictions on the right to freedom of peaceful assembly may properly be justified (Article 7 para 4) is welcomed. This list usefully includes the blocking of streets and roads (though see further below), and content-based justifications including the discussion of contentious political issues such as changing the government or constitutional order, or pre-term elections etc.¹⁹ That said, whilst acknowledging that the following point may be an issue of translation, it is recommended to reword the phrase: “discussion of (...) a change of the government, constitutional order, administrative arrangement or territorial integrity in a lawful manner” since it is not entirely clear whether “lawful manner” refers to the means of promoting or instigating such change or the mere discussion of such activities (which would infer the existence of content-based restrictions in laws other than the present Draft Law).

40. Indeed, this list of prohibited grounds should be given further consideration since the outright exclusion of certain grounds may lead to practical problems. When re-evaluating the list, it will be important to consider the relation of Article 7 para 4 to Article 7 para 5 and to Article 9. Presumably, the list of prohibited grounds is intended to bind the courts in their regulation of freedom of peaceful assembly under Article 7 para 5²⁰. There is, however, an apparent contradiction between Articles 7 para 4 sub sections, (1), (2) and (3) (prohibiting restrictions on the basis of place, time and duration), while in Article 7 para 5, the court may limit freedom of assembly on precisely these grounds (the place, time [and manner] of holding a peaceful assembly). It is worth highlighting that the *ODIHR-Venice Commission Guidelines* refer to a wide spectrum of time, place and manner restrictions, ‘which do not interfere with the message communicated’.²¹ Thus, the Guidelines do not call for a prohibition of such restrictions, but rather for the authorities to offer reasonable alternatives²². In this context the Guidelines underline the importance of imposing restrictions in the course of an event²³, which is unfortunately not provided for in this Draft Law.

41. Furthermore, in relation to Article 7 para 4, sub section 10, it is suggested to consider the precise wording since the phrase ‘continues for a short time’ leaves much room for interpretation. It might, for example, be more accurate to state that “the temporary blocking of

¹⁹ With regard to content-based restrictions, the Guidelines (at para 94) state: “Any restrictions on the visual or audible content of any message displayed or voiced should therefore face heightened scrutiny, and only be imposed if there is an imminent threat of violence. Moreover, criticism of government or State officials should never, of itself, constitute a sufficient ground for imposing restrictions on freedom of assembly”.

²⁰ Otherwise, the question would arise as to whom Article 7(4) was addressed (since the court is the only body that may lawfully limit freedom of peaceful assembly).

²¹ Guidelines, para 3.4.

²² Guidelines, para 3.4.

²³ Guidelines, para 100.

streets and roads by the participants in a peaceful assembly while the assembly is in progress” may not be a ground for limitation.

42. Finally, Article 7 para 6 suggests that the mere existence of a threat to protected interests is a sufficient ground to prohibit a peaceful assembly. However, prohibition should be a measure of last resort (as recognised in Article 22 para 5 of the Draft Law), and a wide range of other less intrusive restrictions should first be considered.²⁴ Moreover, the goal of limitations should not necessarily be to eliminate (‘liquidate’) the threat to protected interests, but rather to reduce them and thereby achieve a proportionate balance effected through parallel scrutiny of the different rights engaged (similarly, in Article 9 para 2). Article 7 para 6 could thus be reformulated to state that the court may prohibit a peaceful assembly only when a less restrictive response would not achieve the purpose pursued by the authorities in safeguarding other relevant interests²⁵.

Article 9 - Proportional Limitation of the Freedom of Peaceful Assembly

43. As noted in relation to Article 7 para 6 (above), the goal of limitations should not necessarily be to eliminate (“liquidate”) the threat to protected interests, but rather to reduce this threat and thereby achieve a proportionate balance effected through parallel scrutiny of the different rights engaged. This comment applies similarly to Article 9 para 2.

Article 10 - Rights of the Peaceful Assembly Participants

44. Article 10(1) purports to create statutory rights of participants in an assembly to participate in decisions made by the assembly. However, a public assembly is an expressive event not a deliberative one. The internal processes of the assembly are the business of the organizers not a legislature enacting a public assembly law. This provision is thus recommended to be deleted.

45. In relation to the liability imposed on the relevant authorities by Articles 10 para 2 and para 3, (and later in the Draft Law, imposed by Article 21 para 9 and Article 22 para 11), it is important to emphasize that officials should be liable only for their own negligent or intentional conduct. It may be that the threshold for liability established in the Draft creates the potential for strict liability (the term “undue performance”, if it is intended to encompass unsatisfactory performance, may give rise to an influx of claims where the authorities are perceived to have acted unsatisfactorily albeit not negligently). If this is the case, the threshold should be clarified accordingly.

46. 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 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.

47. The notion in Article 10 para 4 that participants in a peaceful assembly should not face prosecution solely on account of their participation is already stated Article 6 para 2 and is therefore redundant. In any case such a provision should rather prohibit prosecution and punishment rather than provide “protection” against these, and might be supplemented with a

²⁴ In *Barankevich v. Russia* (2007) at para 33. the ECtHR has observed, “[a]ssuming that there existed a threat of a violent counter-demonstration (...) the domestic authorities had a wide discretion in the choice of means which would have enabled the religious assembly planned by the applicant to take place without disturbance(...)”.

²⁵ Guidelines, para 104.

clause which states that participants “shall not be responsible for the unlawful conduct of others.”

Article 11 - Obligations of Participants

48. It is not clear what is meant by ‘special personal defence devices’ in Article 11 para 1 of the Draft Law. For example, if the leader of political party at an assembly wore a bulletproof vest, would this constitute a violation of this provision? The Article is thus recommended to be clarified.

Article 12 - Organizers

49. The provisions in Articles 12(1) and 12(2) which reflect the guidance stipulated in the *OSCE/ODIHR - Venice Commission Guidelines* are welcomed²⁶. Article 12 para 3, however, again suggests that assemblies in penitential institutions fall within the scope of the present law. As recommended elsewhere in this opinion²⁷, it is suggested that assemblies in such closed spaces are excluded from the scope of the law (and regulated in appropriate legislation).

Article 13 - Rights of Peaceful Assembly Organizers

50. In accordance with the recommendations concerning Article 10 para 1, it is recommended that Article 13 para 1 should also be revised so that it does not attempt to prescribe regulations on the internal decision-making process of the organizer and participants.

51. While the protection given in Article 13 para 6 to the temporary erection of tents, stages and other constructions is welcomed, such protection should not be stated in absolute terms (which are ultimately inflexible and may prove impracticable). Such protection should rather be based on the nature of the particular site chosen for, and the actual circumstances of, the assembly in question. For example, it is not always reasonable to construct a stage in the middle of a busy street (especially when a proximate alternative site which would enable the participants to communicate with their intended audience is also readily available).

52. Article 13 para 8 describes a *responsibility* of the organizer rather than a *right*. It might therefore be better repositioned in Article 14 which addresses obligations. Additionally, the language of Article 13 para 8 might be amended to reflect the fact that assembly organizers do not have enforcement powers to ‘require’ participants to do anything. Instead, the organizer might legitimately be entitled to ‘Take action to ensure that participants in the peaceful assembly are aware of their obligation to observe public order, in particular, by announcing the applicable rules for holding a peaceful assembly’²⁸.

Article 14 - Obligations of Organizers

53. Article 14 para 1 of the Draft law imposes a rather vague obligation upon the organizer of an assembly to cooperate with and assist the police in ensuring public order ‘*as much as possible*’. Certainly, the law can expect the organizer to use his/her influence to try and persuade participants to respect public order and obey the lawful instructions of law enforcement officials. If he/she is unsuccessful in doing so, it is the duty of the law enforcement authorities to act themselves, and no liability should attach to the assembly

²⁶ Guidelines, paras.57-59, stating that: “*the law may set a certain minimum age for organizers, having due regard to the evolving capacity of the child*” and “[t]he law may also provide that minors may organize a public event only if their parents or legal guardians consent to their doing so”.

²⁷ See comments in relation to the definition of ‘organizers’ in Article 1, the ‘priority principle’ in Article 5(2), and the notification procedure in Article 18(2), (5)-(7) and (12).

²⁸ See Guidelines, para 197.

organiser for any purported *failure* on their part to persuade others to maintain (let alone themselves 'ensure') public order²⁹.

54. It is recommended that Article 14 para 3 be relocated to the section dealing with notification. If left here, it is confusing and appears to impose a separate and additional notification requirement.

55. In Article 14 para 6, it is suggested to omit the words 'shall not use loudspeakers, audio and video equipment'. This may be unduly restrictive since a more general prohibition against exceeding a certain noise level ought to be sufficient for the protection of the rights of others. From the text of Article 14 paras 5 and 6, it appears that this noise level is already established in the *Law on Ensuring Citizens' Sanitary and Epidemiological Safety* (in which case, a reference might also usefully be included to the applicable noise levels). In addition, reservations arise about the inclusion of 'resorts' in Article 14 para 6 if this could, for example, be interpreted to include holiday resorts and suggest deletion of this term. It is also recommended that the term 'near ...' be substituted with a determinate distance – for example, 'within 100 meters of ...'.

Article 15 - Resolutions, Proposals, Demands and Appeals of the Participants of a Peaceful Assembly

56. This provision presents an innovative approach to assemblies, and its assumed intention of diffusing social tensions is commendable. However, it is recommended not to be understood and interpreted as an outright obligation of the addressees of an assembly to hear and consider concerns of the assembly, and provide responses. Furthermore, it is recommended that the Article be clarified in order to ensure certainty about which laws of Ukraine are referred to in the final sentence of this provision.

Article 16 - Logistical Support for Holding an Assembly

57. The Article 16 ban on all government logistical support for an assembly is excessively broad. The state has a responsibility to provide some key resources in order to facilitate the enjoyment of the right to peacefully assemble. However, as it stands, this provision would prevent the presence of police, access to public toilets, and emergency medical care. This provision also contradicts Article 21 para 6 which authorizes emergency medical care and provision of routine cleanup services, both of which are forms of logistical support (see further below). This article is recommended to be deleted.

Article 17 - Right to Freely Receive and Distribute Information on Peaceful Assemblies

58. It is recommended to insert the following wording in Article 17 para 1 of the draft Law: "and the actions of law enforcement authorities" so as to eliminate any possible ambiguity about the use of photographic equipment to record the actions of police officers as any person should be permitted to do so, without restraint.

Article 18 - Notification on Holding a Peaceful Assembly

59. The starting point for consideration of the notification requirement is the Decision of the Constitutional Court of Ukraine from April 19, 2001 which dealt with the official interpretation of Article 39(1) of the Constitution. In its decision, the Court explicitly ruled that the organizers of assemblies are obliged to notify the authorities in advance, in the sense of providing notice within an acceptable timeframe prior to the event. The Venice Commission and OSCE/ODIHR believe that a clearly worded notification clause can help bring further

²⁹ *ibid*

clarity to this obligation. However, a number of substantive concerns regarding this provision as presently drafted remain and are outlined below.

60. Article 18 para 2 refers to notification for assemblies within buildings. As recommended above (particularly in relation to the definition of 'public place' in Article 1), notification for such assemblies should not be required. Instead, they should be administered by specific provisions.

61. The primary concern regarding Article 18 is that the timeframes for notification specified in this provision appear to be somewhat confusing and contradictory. The requisite timeframes include '3 days' in Article 18 para 3; '6 hours' in Article 18 para 9; '24 hours' in Article 18 para 10; and '48 hours' in Article 18 para 11. There are two issues raised. First, the potential for confusion by having different notification periods for different locations/areas and secondly, short notification periods provide little time for other aspects of the regulatory procedure as set out in Articles 15, 21, 22 and 23. Indeed, the notification timeframes might not actually be sufficient for the relevant bodies '*to take measures to provide for unobstructed conduct of assemblies, meetings, rallies and demonstrations and to ensure public order and protection of rights and freedoms of others*'³⁰ as stipulated by the decision of the Constitutional Court. The sections covering the procedure for notification - including how the various authorities respond to notification are therefore, proposed to be substantially revised to ensure that the envisaged procedure is actually feasible. These timeframes should also be reconsidered in light of the deadlines for the judicial review process envisaged in Articles 182 and 183 of the Code on Administrative Proceedings.

62. It is suggested a proposed 4-day notification period would be adequate and should be considered to be introduced in the draft Law. Furthermore, in contrast to Article 18 para 3 it is suggested that the date of receipt (rather than the date of mailing) should be regarded as the date of filing since officials need time to prepare for the assembly and cannot start preparation until notice has actually been received. It is also proposed that a copy of the notice issued as a receipt for filing of a notice in Article 18 paras 7 and 8 be stamped with the date and time actually received and should be issued to all assembly organisers whether personally or by mail.

63. Finally, as noted previously, it is suggested that Articles 18 and 19 be moved to an earlier position in the law (for example, to immediately follow Article 5) so as to more logically reflect the sequencing of notification in the regulatory framework.

Article 19 - Notification Requirements

64. The requirement to provide 'a seal' in Article 19 para 7 is unduly burdensome for informally organized groups who are unlikely to have a seal. It is therefore recommended that this requirement be deleted. It is also suggested that 'e-mail addresses' might also usefully be included in Article 19 para 8.

Article 20 - Peculiarities of Holding a Peaceful Assembly in a Penitentiary Facility

65. As highlighted previously, it is recommend that assemblies which take place inside penitentiary facilities should be excluded from the scope of the present law, meanwhile, ensuring that any restrictions on the rights and freedoms of convicted are restricted only based on the test of proportionality, as explained above.

³⁰ See, extract from the Decision of the Constitutional Court of Ukraine; April 19, 2001.

Article 21 - Powers of the Respective Executive Authorities and Local Self-Government Bodies Related to the Protection of Freedom of Peaceful Assembly

66. This Article addresses the period after notice has been filed during which time officials are considering the notification and deciding whether proportionate time, place, and manner restrictions are necessary. However, this provision does not require that such decisions are to be made promptly and communicated to organizers so that the problems can either be worked out informally or an appeal hearing by a court can be completed before the notified date of the proposed assembly. Language requiring a prompt consideration of the notice and determination of any restrictions by officials should be added. Otherwise officials could wait until the last minute before the assembly, surprising organizers and leaving insufficient time for appeal.

67. The focus in Article 21 para 4 upon promoting co-operation between assembly organisers and the authorities is warmly welcomed. Nonetheless, the autonomy of the assembly must be respected. The organizer must be free to deviate from suggestions made by the authorities if they believe that they undermine the purpose of the assembly. While the organiser's rejection of any proposed measures could in the end lead to the imposition of further restrictions (and even the termination of the entire assembly, if this is proportionate in the circumstances), it is worth drawing attention to the *ODIHR-Venice Commission Guidelines* which state, in this regard, that:

*'The organizer of an assembly should not be compelled or coerced either to accept whatever alternative(s) the authorities propose or to negotiate with the authorities about key aspects, particularly the time or place, of a planned assembly. To require otherwise would undermine the very essence of the right to freedom of peaceful assembly.'*³¹

68. In addition, Article 21 para 5 proposes the creation of a formal 'approval commission' as part of the regulatory process 'if necessary' in certain defined circumstances. Such a process may be unduly burdensome and bureaucratic. Informal meetings between organizers, appropriate public officials and other stakeholders are usually sufficient. Indeed, the appointment of a mediator to facilitate an informal meeting might be appropriate where there is likely to be sharp disagreement between participants. Again, however, the 'results' of any such dialogue should not be considered binding - but at most, an indication of the willingness of the organizer to take steps to persuade assembly participants to follow the lawful directions of law enforcement officials and/or to respect the rights and freedoms of others.

69. It has already been noted above, that there exists an apparent contradiction between Article 16 para 2 and the terms of Article 21 para 6. It is also suggested that Article 21 para 7 is repetitive and could safely be deleted given that under Article 14 para 5, the organizer is already obliged not to exceed the noise level established by health and safety norms at night time³².

Article 22 - Powers of Internal Affairs Bodies Related to the Protection of Freedom of Peaceful Assembly

70. In the analysis provided on the definition of "*Organizer(s) of a peaceful assembly*" in Article 1, it was suggested that some revision of the text may be necessary to address the lack of clarity regarding the term 'due notice', and the question of whether this was intended to refer to the *submission* of the notification form by the organiser (as suggested here in Article 22 para 2 and Article 22 para 6 or the *notification form* itself.

³¹ *Guidelines*, para 103.

³² Article 14(6) further prohibits the organizer and participants from using loudspeakers, audio and video equipment etc, but we have suggested that this provision be deleted.

71. The inclusion of definitions for, and the explicit protection of, simultaneous, counter- and spontaneous assemblies, has already been welcomed. The protection of these types of assembly is essential for the functioning of modern democracies. If there is, however, an evidenced risk of imminent unlawful conduct, the courts and/or law enforcement officials must be entitled to find ways to minimize such risk. In this light, it should be noted that the installation of temporary fences, currently prohibited by Article 22 para 4, is a widely used police tactic to help manage and control crowds, and indeed, such tools can actually assist in the facilitation and protection of the right to freedom of assembly (for example, when used to separate potentially violent counter-demonstrators from a controversial assembly, whilst still enabling the two demonstrations to take place in close proximity). This provision may thus be reconsidered.

72. We also recommend that some clarifying text be added to Article 22 paras, 6, 7 and 9. In Article 22 para 5, the internal affairs bodies should be obligated to isolate and stop the violation of public order without terminating a peaceful assembly '*to the extent possible*' (so as not to impose an impossible burden on the authorities). In Article 22 para 6, the obligation to stop traffic might be qualified by the insertion of 'temporarily' (since assemblies which block all traffic on a permanent basis can legitimately be restricted). By way of emphasis, the powers of internal affairs bodies to use physical coercion as set out in Article 22 (para should also be expressly 'subject to the legal doctrines of necessity and proportionality'. Furthermore, the 'threat to life or health' referred to in Article 22 para 9, c should be amended to emphasize that termination of an assembly is not justified where the threat is merely trivial. There must instead be a 'serious and imminent threat to public order, or to the life and health of others ...'. Furthermore, as discussed above in relation to Article 7 para 1, Article 22 might also be amended to allow law enforcement officials to impose proportionate restrictions during an assembly in pursuit of *any* of the legitimate aims provided for in Article 21 ICCPR or Article 11(2) ECHR, including the protection of the rights and freedoms of others³³. Any such limitations should also be subject to subsequent legal scrutiny and the possibility of legal challenge.

73. Finally, in relation to Article 22 concern Article 22 paras 10 and 11, which may benefit from a reference to the *UN Code of Conduct for Law Enforcement Officials*³⁴ and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* which set out some grounds in which firearms may legally be used at an assembly.³⁵ Furthermore, Article 22 para 11 appears to be missing the words 'and participants' in its final part of – "... *on ensuring the guarding of peaceful assembly organizer (organizers) and their assets*" - which would mean that only organizers could claim for such damage.

Article 23 – Court protection of the Freedom of Peaceful Assembly

74. As noted in relation to Article 7 para 1 above, the assertion that 'freedom of peaceful assembly may be limited only on the basis of a court decision' (as again provided in Article 23 para 1) suggests a rather limited possibility for imposing restrictions *during* an assembly, thereby potentially reducing flexibility and possibly encouraging the courts to impose more onerous prior restrictions in the first instance. To this end, it has been suggested that the

³³ Such a power would be different again from the purely consensual/advisory nature of the mechanism provided for in Article 21 of the Draft whereby the authorities may make efforts to cooperate with the organizers of an assembly to negotiate mutually acceptable changes to the time, place and manner of an assembly.

³⁴ UNGA Res. 34/169 (1979). Available at: <http://www2.ohchr.org/english/law/codeofconduct.htm>

³⁵ Adopted at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Cuba (1990). Available at: <http://www2.ohchr.org/english/law/firearms.htm> See also, more recently, the *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Christof Heyns (23 May 2011, A/HRC/17/28). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/134/47/PDF/G1113447.pdf?OpenElement>

powers of internal affairs bodies (in Article 22 paras 7-9) be limited to termination of an assembly if necessary, in pursuit of any of the legitimate aims listed in Article 11(2) ECHR.

75. It is recommended that further consideration be given to ensure that the remedies and avenues for appeal set out in Article 23 para 4 fully correspond with those established in Article 183(1), (5) and (7) of the Code of Administrative Proceedings. It will be important to be absolutely clear what remedies are at the disposal of the organizer in seeking to protect his/her right to freedom of peaceful assembly (and also, for example, to determine what domestic remedies must be exhausted for the purposes of the admissibility criteria under Article 35(1) ECHR)³⁶.

Article 24 – Final Provisions

76. The directive in Article 182(5) (2) that the court should “*take into account case law of the European Court of Human Rights*” is welcomed. It may, however, also be worth adding to Article 182 para 4 that “*the burden of proof to justify a restriction of the right of assembly shall be upon the government*”. This makes it clear that that the government carries the burden of justification in legal proceedings, not the organizers.

77. In addition, it is not clear why, under Article 183(5), the court should be required to explain its reasoning *only* if a claim is dismissed. Such an explanation should be given for all decisions (whether a claim is granted or dismissed).

78. Furthermore, the legal proceedings as outlined in Draft Articles 182 and 183 of the *Code of Administrative Proceedings* are designed to reach final judicial decisions prior to the planned date of assembly. As experience shows, sometimes there may be practical difficulties in reaching this goal, especially to conduct full (and perhaps complex) legal proceedings within such a short time. It may therefore be preferable to allow the appeal courts to render an interim decision instead (for instance, by a temporary injunction lifting or amending the restrictions imposed on an assembly by the first instance court)³⁷.

³⁶ In other words, is there a claim procedure, or a claim procedure with the opportunity of a further appeal? Under Article 23(4), the organizer may: appeal to the court against decisions, actions or omissions of the respective bodies if they impede or interfere with the exercise of the freedom of peaceful assembly; and submit a claim on elimination of obstacles to and interference with the exercise. However, according to Article 183(1) of the Code, the organizer may: apply to the court with a claim on elimination of obstacles to and interferences with the freedom of peaceful assembly, while under Article 183(7), there seems to be a further stage involving the Court of Appeal.

³⁷ See further, *Guidelines*, para 138.