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

**UKRAINE**

**JOINT OPINION**

**OF THE VENICE COMMISSION,**

**THE DIRECTORATE OF HUMAN RIGHTS (DHR)  
OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS  
AND RULE OF LAW (DGI)  
OF THE COUNCIL OF EUROPE  
AND  
THE OSCE OFFICE FOR DEMOCRATIC INSTITUTION  
AND HUMAN RIGHTS (OSCE/ODIHR)**

**ON TWO DRAFT LAWS  
ON GUARANTEES FOR FREEDOM OF PEACEFUL ASSEMBLY**

**Adopted by the Venice Commission  
at its 108<sup>th</sup> Plenary Session  
(Venice, 14-15 October 2016)**

**on the basis of comments by**

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Programmatic Cooperation Framework for  
Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus

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## I. Introduction

1. By a letter of 31 May 2016, the Speaker of the *Verkhovna Rada* (Parliament), Mr Andrii Parubii, requested the opinion of the Venice Commission on the compatibility with international standards on human rights and fundamental freedoms of two draft laws on “Guarantees for Freedom of Peaceful Assembly”.<sup>1</sup>

2. Ms Claire Bazy-Malaurie, Mr Latif Huseynov and Mr Nicolae Esanu acted as rapporteurs on behalf of the Venice Commission.

3. Mr Alexander Vashkevich analysed the draft laws on behalf of the Directorate of Human Rights (“the Directorate” or “DHR”).

4. Mr Michael Hamilton, Mr Neil Jarman, Ms Katerina Hadzi-Micheva Evans, Ms Milena Costas and Mr David Goldberger, members of the OSCE/ODIHR Panel of Experts on the Freedom of Assembly, analysed the draft laws on behalf of the OSCE/ODIHR.

5. On 28-29 September 2016, a joint delegation of the Venice Commission, the Directorate and the OSCE/ODIHR visited Kyiv and held meetings with the representatives of the Parliamentary Commission on Human Rights, of the Ombudsman’s Office, of the Ministry of Justice and of the Ministry of Interior, as well as representatives of a number of civil society organisations. The Venice Commission, the Directorate and the OSCE/ODIHR are grateful to the Ukrainian authorities and the other stakeholders for their excellent co-operation during the visit.

6. The scope of this Joint Opinion covers Draft laws nos. 3587 and 3587-1 on Guarantees for Freedom of Peaceful Assembly. The Joint Opinion does not constitute a full and comprehensive analysis of all the domestic legal provisions which may be of relevance for the exercise of the right to freedom of peaceful assembly in Ukraine.

7. This Joint Opinion is based on English translations of the Draft laws. Errors from translation may result. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

8. This Joint Opinion is without prejudice to any written or oral recommendations or comments on the respective legal acts or related legislation that the Venice Commission and the OSCE/ODIHR may make in the future.

9. This Joint Opinion, which was prepared on the basis of the comments submitted by the experts above, was subsequently adopted by the Venice Commission at its 108<sup>th</sup> Plenary Session, in Venice (14-15 October 2016).

## II. Executive summary

10. The Venice Commission, the Directorate General and the OSCE/ODIHR welcome the efforts which are being made in Ukraine with a view to providing a legal framework for the exercise of the right to freedom of peaceful assembly.

11. Both drafts, submitted for assessment, large parts of which are in line with international standards, constitute a genuine attempt to fill the existing legislative lacuna in this area, as highlighted by the ECtHR in its *Vyerentsov v. Ukraine*<sup>2</sup> judgment.

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<sup>1</sup> CDL-REF(2016)046 Draft Law no 3587 on Guarantees for Freedom of Peaceful Assembly and Draft Law no 3587-1 on Guarantees for Freedom of Peaceful Assembly in Ukraine.

<sup>2</sup> ECtHR, *Vyerentsov v. Ukraine*, no. 20372/11, 14 April 2013.

12. It is up to the Ukrainian authorities to choose the appropriate way to satisfy the requirements of this judgment, either by enacting a specific law on freedom of assembly or by introducing amendments to the existing legislation in order to regulate this field. The present Draft Laws may be seen as a step towards adopting a specific law in this area. Subject to further improvements, both draft laws would form a good basis for a future legal framework.

13. In the end, the Ukrainian decision-makers will decide which draft law should be the subject of subsequent steps in the legislative procedure. Regardless of their choice, the substance of the observations and recommendations contained in the present joint opinion concerning both drafts, as well as those contained in the previous opinions adopted by the Venice Commission in respect of Ukraine in the field of freedom of assembly, remain applicable.

14. In addition to more specific recommendations already made in this Opinion, the following main recommendations are addressed to the Ukrainian authorities:

*Common recommendations for both Draft Laws:*

- the definition of assembly provided in both Draft Laws should be narrowed and the term “event” in those definitions should be replaced by “the gathering of people for expressive purposes” which is inherent to the concept of assembly;

- the concept of spontaneous assembly should be introduced in Draft Law no. 3587-1 and the provision concerning spontaneous assemblies in Draft Law no. 3587 should explain why the notification procedure is not reasonably practical in cases of spontaneous assemblies;

- Article 2 of both drafts excluding certain categories of assemblies from the scope of the future Law is to be reconsidered. A provision may be added stating that, in case other legislation imposes more stringent restrictions on these categories of assemblies, the Law on Assemblies should be applicable. The exclusion of meetings with MP candidates, members of parliament and candidates to the post of President of Republic should be deleted, since such assemblies should be covered by the concept of assembly;

- The provisions concerning the grounds for restriction of assemblies should be harmonized with Article 39(2) of the Constitution. Content-based restrictions of the freedom of assembly should be excluded from both Draft Laws;

- Exceptions to the rule that only courts may order restrictions to freedom of assembly should be provided in both Drafts and the law enforcement bodies should have the power to impose certain necessary and proportionate restrictions during an assembly without court order. The Draft Laws should set out the conditions under which the law-enforcement bodies may, in a proportionate manner, use force.

*Recommendations for the Draft Law no. 3587*

- Article 7(1) should clearly set out a list of assemblies that do not require notification, including assemblies below a certain size threshold and spontaneous assemblies;

- The authority that should be notified prior to holding an assembly should be specified. A single gateway approach is preferable to a multitude of notification authorities indicated in the Draft Law;

- The requirement that the notification should contain information on the “aim of the assembly” should be deleted. A wrong estimation, in the notification, as to the number of participants to and duration of an assembly should not have negative consequences on the right to freedom of peaceful assembly;

- The reference, under Article 8(1)8, to the need for a “special permission” in case of temporary restriction of road traffic should be deleted.

*Recommendations for the Draft Law no. 3587-1*

- The optional character of the notification (Article 6), although in line with international standards, appears to be in contradiction to Article 39 of the Constitution which requires advance notification of holding an assembly. In case the optional character of the notification is to be maintained, the constitutional provision should be amended accordingly;

- The provision justifying the notification requirement should be reconsidered; other grounds than the security of participants should be introduced, since ensuring security is not the only purpose of notification. The draft should clarify which authority/entity is competent to assess whether, in view of the security and other needs, a notification is required; and

- Article 6 should be clarified as to which authority should be notified of a planned assembly and a time-frame for notification should be introduced. Clear indications should be provided concerning the information to be included in the notification.

**III. Background information and preliminary remarks**

15. The right to freedom of peaceful assembly is a fundamental right guaranteed under Article 39, paragraph 1, of the Constitution of Ukraine, which states that: “*Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government.*” The second paragraph of this provision provides for restrictions to the exercise of this right which “*may be established by a court in accordance with the law 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.*” Further, according to Article 92 of the Constitution, “*human and citizens’ rights and freedoms; the guarantees of these rights and freedoms; the main duties of the citizens;*” are determined “*exclusively by the laws of Ukraine*”.

16. So far, no specific, stand-alone legislation has been enacted in Ukraine regulating the conduct of assemblies and no amendments have been introduced into the existing legislation in order to provide a clear framework in this respect. On 12 September 1991, the *Verkhovna Rada* adopted the resolution on temporary application of certain legislative acts of the Soviet Union, which provides, *inter alia*, “*before the relevant legislation of Ukraine is enacted, the legislation of the USSR shall be applicable within the territory of the republic in respect of issues that have not been regulated by the legislation of Ukraine and in so far as they do not contravene the Constitution and legislation of Ukraine.*” Accordingly, some aspects of the right to freedom of assembly, in the absence of relevant legislative regulations, are regulated by the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 on the procedure for organising and holding meetings, rallies, street marches and demonstrations in the USSR (hereinafter, “the 1988 Decree”).

17. However, there are inconsistencies between the provisions of the 1988 Decree and Article 39 of the Constitution, in particular, concerning the notification procedure for holding peaceful assemblies. For instance, the provisions of the 1988 Decree establish the procedure for authorising (registering) peaceful assemblies and empower the authorities and bodies of

local self-governments to ban such events, whereas Article 39 of the Constitution provides for a procedure whereby the authorities are “notified” that a gathering is to be held and provides that only the courts have the power to impose restrictions on a peaceful gathering. In an information note of April 2012, the High Administrative Court of Ukraine, after having pointed to this inconsistency, considered that the provisions of the 1988 Decree on the authorisation procedure should not be applied by courts when deciding such cases.<sup>3</sup> Nevertheless, according to an information note of 21 November 2013 submitted by the Ukrainian government to the Committee of Ministers of the Council of Europe<sup>4</sup>, there is no common position among the Ukrainian courts as to the applicability of the Decree of 1988.<sup>5</sup>

18. By decision of 8 September 2016 (No 6-rp/2016), the Constitutional Court of Ukraine, after having observed that Article 39 of the Constitution stipulates only the requirement of submitting “notification” to executive or local self-government bodies of the intention to hold an assembly, concluded that the 1988 Decree, which established the procedure for “authorising” assemblies, contradicted the Constitution, is thus invalid on the territory of Ukraine and may not be applied.

19. It is further noted that the Constitutional Court of Ukraine in an earlier decision rendered on 19 April 2001, following a request by the Ministry of Interior for an official interpretation of the provisions of Article 39 of the Constitution regarding the timely notification of executive authorities or bodies of local self-government, stated that: “[s]pecifying the exact deadlines for timely notification with regard to the particularities of different forms of peaceful assembly, the number of participants, the venue, at what time the event is to be held, and so on, is a matter for legislative regulation (...).”<sup>6</sup> Further, in an information note of 26 November 2009, the Ministry of Justice of Ukraine considered that “(...) given the inadequacy of the current state of the legal regulation of the procedure for the organisation and conduct of peaceful demonstrations, which results in problems in the application of law, since the legal norms are not formulated with sufficient clarity and are subject to ambiguous interpretation by those wishing to have recourse to them (including bodies of local government), only legislative regulation of the procedure for organising and holding such demonstrations will eliminate the negative practices that have arisen.” To address this legislative shortcoming, in 2009, the Ministry of Justice prepared a draft law on the organisation and conduct of peaceful demonstrations which was submitted to the *Verkhovna Rada* (registration N 2450) and passed the first reading on 3 June 2009. However, the second reading was postponed by the Parliament and never took place.<sup>7</sup>

20. In 2013, two more draft laws on freedom of assembly (Draft Law no. 2508a of 4 July 2013 and Draft Law no. 2508a-1 of 17 July 2013), which also included necessary amendments to the relevant articles of other legislation such as the Code of administrative offences, Code on administrative procedures, Law on the police etc., were submitted to the *Verkhovna Rada* for consideration and registered in the agenda of the fourth plenary session of the *Verkhovna Rada* (February – July 2014).<sup>8</sup> However, those drafts were withdrawn from the *Verkhovna Rada* in November 2014, due to the fact that they had never been voted on in the first reading.<sup>9</sup>

<sup>3</sup> See, ECtHR, *Vyerentsov v. Ukraine*, no. 20372/11, 11 April 2013, para. 33.

<sup>4</sup> DH-DD(2013)1270 (21 November 2013) Action plan on measures to comply with the ECtHR’s judgment in the case of *Vyerentsov v. Ukraine*.

<sup>5</sup> See, CDL-AD(2014)024, Comparative study on national legislation on freedom of peaceful assembly endorsed by the Venice Commission at its 99th plenary session (Venice, 13-14 June 2014), para. 283 and the references given under footnote 695 and 696.

<sup>6</sup> Decision of the Constitutional Court of Ukraine, 19 April 2001, Case N 1-30/2001. Emphasis added.

<sup>7</sup> See, CDL-AD(2014)024, Comparative study on national legislation on freedom of peaceful assembly, para. 282.

<sup>8</sup> Information submitted by the Government of Ukraine to the Committee of Ministers of the Council of Europe (DH-DD(2014)458, 8 April 2014).

<sup>9</sup> Information submitted by the Government of Ukraine to the Committee of Ministers of the Council of Europe (DH-DD(2014)458, 28 October 2015).

21. At the beginning of 2014, in a context of wide public protests and demonstrations, the Verkhovna Rada adopted a set of 10 laws which, according to civil society organisations, severely restricted the right to peaceful assembly and met with severe public reactions domestically and internationally. Consequently, 9 of the 10 laws were repealed on 28 January 2014.<sup>10</sup>

22. According to the 2013 Annual Report of the Ukrainian Parliament Commissioner for Human Rights<sup>11</sup>, “*due to lack of such a law, legal vacuum is filled in with by-laws adopted by local authorities. It also result[ed] in unjustified bans of peaceful assembly by administrative courts, bringing participants of peaceful assembly to administrative liability, various violations of human rights by law enforcement officers (...).*”

23. On 25 August 2015, the President of Ukraine issued the Decree No 501/2015 “on approval of the National Human Rights Strategy in Ukraine”. The Strategy stipulates that one of the systemic problems in this area [i.e. freedom of assembly] is the lack of high-quality legislation on peaceful assembly.<sup>12</sup>

24. The urgent need for Ukraine to adopt regulations on the freedom of peaceful assembly was also stressed by many international bodies. In the case of *Vyerentsov v. Ukraine*, the applicant was convicted and sentenced to three days of administrative detention on the basis of the provisions of the Code on Administrative Offences for having “breached the procedure for organising and holding a demonstration”. The European Court of Human Rights (hereinafter, “ECtHR”) held that given that there were no clear and foreseeable legislative provisions regulating the procedure for organising and holding demonstrations, the applicant’s conviction for violating a non-existing procedure was incompatible with Articles 7 and 11 of the Convention. Furthermore, the ECtHR held that the violations under Articles 7 and 11 “*stemmed from a legislative lacuna concerning freedom of assembly which remained in the Ukrainian legal system for more than two decades*”. “*Having regard to the structural nature of the problem disclosed in the present case, the Court stressed that specific reforms in Ukraine’s legislation and administrative practice should be urgently implemented in order to bring such legislation and practice into line with the Court’s conclusions in the present judgment and to ensure their compliance with the requirements of Articles 7 and 11 of the Convention*”. In the *Shmushkovych* case<sup>13</sup>, the ECtHR likewise found a violation of Article 11 ECHR due to the fine imposed upon the applicant for the purportedly late notification of the picket he had organised in 2009 in the absence of clear and foreseeable legislative provisions regulating the procedure for organising and holding demonstrations.

25. In the context of supervision of the execution of the *Vyerentsov* judgment, the Committee of Ministers of the Council of Europe, during its 1243<sup>rd</sup> meeting (December 2015) noted with concern that, despite the specific indications given by the ECtHR in this case, the required measures (i.e. the adoption of regulations) still remained to be taken. At the same time, the Committee of Ministers noted with interest the information provided by the authorities that a draft law “On Guarantees of the right to freedom of assembly” had been submitted to the Parliament on 7 December 2015.<sup>14</sup>

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<sup>10</sup> Information submitted by Ukrainian Helsinki Human Rights Union to the Committee of Ministers of the Council of Europe (DD-DH(2015)593 Individual Communication from Ukrainian Helsinki Human Rights Union on the Execution of the Judgment of the ECtHR in the case of *Vyerentsov v. Ukraine*). See OSCE/ODIHR Opinion on Amendments to Certain Laws of Ukraine passed on 16 January 2014, Opinion-Nr.: GEN -UKR/244/2014 [RJU], Warsaw, 10 February 2014.

<sup>11</sup> Report of the Ukrainian Parliament Commissioner for Human Rights on the observance of human and citizens' rights and freedoms (2013).

<sup>12</sup> <http://www.cpt.coe.int/documents/ukr/2015-24-inf-add2-appendices.pdf>

<sup>13</sup> ECtHR, *Shmushkovych v. Ukraine*, no. 3276/10, 14 November 2013.

<sup>14</sup> [http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=vyerentsov&StateCode=&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=vyerentsov&StateCode=&SectionCode=)

26. In its Resolution 2116(2016) of 27 May 2016, the Parliamentary Assembly of the Council of Europe noted with concern the lack of legislative regulations on freedom of assembly in certain countries, including Ukraine, and called on the member States to “*review existing legislation with a view to bringing it into conformity with international human rights instruments regarding the right to freedom of peaceful assembly (...)*”<sup>15</sup>

27. In parallel, the Human Rights Council of the United Nations, in December 2012, within the framework of the Universal Periodic Review, recommended to Ukraine to “*implement a law on freedom of assembly that complies with applicable standards under Article 21 of the International Covenant on Civil and Political rights*”.<sup>16</sup>

28. Since 2006, the Venice Commission and the OSCE/ODIHR have had the occasion to examine several draft laws pertaining to the exercise of the freedom of assembly in Ukraine.<sup>17</sup> None of the draft laws submitted for their assessment were adopted by the *Verkhovna Rada*. Following the adoption of the Joint Opinion CDL-AD(2006)033 on the Draft Law on Peaceful Assemblies in Ukraine, a new Draft Law on Order of Organising and Conducting of Peaceful Events was prepared by the Ukrainian authorities and subsequently submitted, in 2009, to the *Verkhovna Rada*. The draft was adopted by the *Verkhovna Rada* at the first reading (3 June 2009) and the revised version was again sent to the Venice Commission and the OSCE/ODIHR for a legal assessment. A new Joint Opinion was adopted on this draft in December 2009 (CDL-AD (2009)052). 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 draft contained provisions that lacked clear standards to guide official decision-making.

29. In response to the concerns expressed by the Venice Commission and the OSCE/ODIHR in their Joint Opinion, a new draft law on Peaceful Assemblies was prepared by the authorities and resubmitted to the Venice Commission for assessment. In their Joint Opinion CDL-AD(2010)033, the Venice Commission and the OSCE/ODIHR, while acknowledging that the new draft law had followed most of the suggestions expressed in their 2009 Joint Opinion, considered that the philosophy of the Draft Law did not appear to reflect sufficiently the presumption in favour of holding assemblies and the proportionality principle. This draft law was not adopted by the *Verkhovna Rada*.

30. Finally, in their ensuing Joint Opinion CDL-AD(2011)031 on yet another Draft Law on Freedom of Peaceful Assembly of Ukraine prepared and approved by the Ukrainian Commission for Strengthening the Democracy and Rule of Law, the Venice Commission and the OSCE/ODIHR found that the Draft Law reflected in many respects the principles enunciated in applicable international standards and formulated a number of recommendations, including that:

- the definition of “spontaneous assemblies” should be amended;
- the lack of notification should not lead to an automatic prohibition of an assembly;
- the time frames for notification should be amended;
- the limitations on the freedom of assembly should be necessary and proportionate;
- the responsibilities of the organisers should not include law enforcement duties;
- any person should be able to record the actions of law enforcement officials, without restraint.

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<sup>15</sup> Resolution 2116 (2016) Urgent need to prevent human rights violations during peaceful protests.

<sup>16</sup> A/HRC/22/7, Human Rights Council, Twenty-second session, Agenda item 6, Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, recommendation 97.123.

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC227\\_English.PDF](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC227_English.PDF)

<sup>17</sup> CDL-AD(2006)033 Joint Opinion on the Draft Law on Peaceful Assemblies in Ukraine; CDL-AD(2009)052 Joint Opinion on the Order or Organising and Conducting Peaceful Events of Ukraine; CDL-AD(2010)033 Joint Opinion on the Draft Law on Peaceful Assemblies of Ukraine and CDL-AD(2011)031 Joint Opinion on the Draft Law on Freedom of Peaceful Assembly of Ukraine.



31. In the end, this Draft law was likewise not adopted by the *Verkhovna Rada* and never entered into force.

32. The Venice Commission, the Directorate and the OSCE/ODIHR delegation learned during their most recent visit in Kyiv that civil society appeared to be divided on the need to adopt of specific legislation on the right to freedom of peaceful assembly. The supporters of the “no-law approach” claim that, civil society in Ukraine is still too weak to control the *Verkhovna Rada* and fear that in case specific legislation is adopted in Ukraine, the *Verkhovna Rada* could introduce negative amendments into the specific law during possible future political crises. For them, a safer method would be to amend the existing legislation in order to introduce regulations on freedom of assembly and to adopt some secondary legislation in this field. Others assert that the adoption of a specific law on public assemblies would provide greater clarity and precision regarding the obligations of the State in this field, the grounds for restriction and the procedures to be followed.

33. In practice, in the absence of clear legislative regulations in this area, local authorities have issued specific (and widely varying) local rules in order to regulate the exercise of the right to freedom of assembly. According to certain civil society organisations, regulation of this right by local decisions is a widespread practice in Ukraine, which would contradict Article 92 of the Constitution which provides that human and citizens’ rights and freedoms (...) are determined “*exclusively by the laws of Ukraine*”.

#### **IV. Analysis**

##### **A. General provisions**

###### **Article 1 of both Draft Laws - Definitions**

34. As the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly underline, only peaceful assemblies are protected. An assembly should be deemed peaceful if its organisers have professed peaceful intentions and the conduct of the assembly is non-violent. However, as the ECtHR has considered in the case of *Schwabe and M.G. v. Germany*, “*the possibility of extremists with violent intentions who are not members of the organising group joining a demonstration cannot as such take away that right. Even if there is a real risk of a public demonstration resulting in disorder as a result of developments outside the control of those organising it, such a demonstration does not as such fall outside the scope of Article 11 § 1, but any restriction placed on such an assembly must be in conformity with the terms of paragraph 2 of that provision.*”<sup>18</sup> Thus, an intentional gathering of a number of individuals in a public or private space for a common expressive purpose must be considered to be a peaceful assembly even in cases where some participants are not peaceful and all actions taken by the Government, including the measures of dispersal and prohibition, should be in conformity with the principle of necessity and proportionality. Therefore, the reference to the peaceful character of the event in the definition of an assembly contained in both drafts should not result in a complete denial of the protection provided by the law where there are only sporadic non-peaceful activities of some participants of an assembly.<sup>19</sup>

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<sup>18</sup> ECtHR *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, 1 December 2011, para. 103. See also, ECtHR *Ezelin v. France*.

<sup>19</sup> See, para. 25 of the Joint Guidelines on Freedom of Peaceful Assembly: “An assembly should (...) be deemed peaceful if its organizers have professed peaceful intentions, and this should be presumed unless there is compelling and demonstrable evidence that those organizing or participating in that particular event themselves intend to use, advocate or incite imminent violence.”

35. In Article 1 of both drafts, the term “event” (“public event” in Draft no. 3587) is not defined. This term in general covers a very wide range of human activity and does not necessarily involve the gathering of people, which is inherent to the concept of an assembly. It is thus recommended to replace the term “event” with that of “gathering” which would clarify the wording in relation to the scope of the draft laws.

36. According to the definitions of “peaceful assembly” in Articles 1 of both drafts, a gathering can be considered to constitute an “assembly” unless it is prohibited by law. However, the fact that an assembly is prohibited by law does not mean that it is not held with an expressive purpose and in this case, the participants to such a gathering must still be considered as exercising their fundamental right to freedom of assembly. The fact that the assembly is considered to be illegal by the authorities (for example due to lack of previous notification) is not a sufficient reason to deny the right to freedom of assembly. Moreover, the term “peaceful” should be interpreted to include conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties, which may be considered illegal under the domestic legislation.

37. Article 1(5) of the Draft no. 3587 provides for a definition of a “spontaneous assembly”. This definition follows the previous recommendations of the Venice Commission and the OSCE/ODIHR<sup>20</sup>, in that it acknowledges that the notice of a spontaneous assembly cannot be filed within the period established by law. However, the definition of “spontaneous assembly” should explicitly and clearly specify why a spontaneous assembly, without notification, would still be legitimate and legal. In particular, it may be helpful to add that an immediate response to a certain occurrence *cannot be postponed and as a result* the notification procedure as laid down in the law *is not reasonably practicable*. It is also noted that Draft no. 3587-1 does not contain a definition of a spontaneous assembly. Although the notification procedure in this draft is liberal and the lack of notification is not considered as a ground for preventing an assembly (see, for instance, Articles 8(1)6, 9(2), 16(2)4), it is still recommended to introduce in the Draft no. 3587-1, Article 1, a definition of the notion of spontaneous assembly in line with the Venice Commission/OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly.

### **Article 2 of both Draft Laws – Scope of the Law**

38. Articles 2 of both Drafts state that the Law shall apply to “any legal relations” (Draft no. 3587-1) and to “social relations” (Draft no. 3587) associated with exercising and protecting freedom of peaceful assembly. The precise purpose of those provisions is unclear and the terms “legal relations” and “social relations” may lend themselves to misinterpretation. It is therefore recommended to clarify these provisions.<sup>21</sup>

39. Both drafts, in their Articles 2(2) exclude certain categories of assemblies from the scope of the Law, including general meetings of residents of a village, assemblies (conferences) of residents held according to the Law on Bodies of Self-Organisation of Population, assemblies of employees according to the Law on Resolving Collective Labour Disputes, assemblies held with the aim of recreation, public celebrations, sports events, etc. In the 2009 Joint Opinion on the Order of Organising and Conducting Peaceful Events of Ukraine<sup>22</sup>, the Venice Commission and the OSCE/ODIHR considered, as regards a similar draft provision, that this exclusion was not in itself problematic unless its aim was to target these categories of assemblies by providing them with less favourable treatment. They thus recommended, in the 2009 Opinion, that a provision be added to the Draft Law, stating that, in case the cited legislation imposes more stringent restrictions on these categories of assemblies, the Draft Law should then be applicable. The Venice Commission and the OSCE/ODIHR reiterate this previous recommendation in relation to the current Draft Laws. At the same time, they note that these provisions are, on the one hand, not useful, since

<sup>20</sup> See, for instance, CDL-AD(2011)031 Joint Opinion on the Draft Law on Freedom of Assembly of Ukraine, adopted by the Venice Commission at its 88<sup>th</sup> Plenary Session (Venice, 14-15 October 2011), para. 16.

<sup>21</sup> See, for a similar recommendation, CDL-AD(2011)031 Joint Opinion on the Draft Law on Peaceful Assembly of Ukraine, para. 22.

<sup>22</sup> CDL-AD(2009)052 Joint Opinion on the Order of Organising and Conducting Peaceful Events of Ukraine, para. 15.

some of the respective general meetings and conferences indicated in Articles 2(2) of both drafts are, in any case, not “assemblies” in accordance with the definition of “assembly” provided in Articles 1 of the Draft Laws. On the other hand, an assembly is generally often defined, for instance in the Joint Guidelines on Freedom of Assembly, as the intentional and temporary presence of a number of individuals for a “common expressive purpose” (see also the respective definitions provided in the Draft Laws). Thus, a gathering without the element of “common expressive purpose”, but which does not fall under one of the excluded categories in Articles 2(2) of the Drafts, may in practice erroneously be considered to fall under the scope of application of the Draft Laws. The danger of such misinterpretation is another reason for recommending the deleting the provision of Articles 2(2) from both Drafts.

40. According to Article 2(2)3 of the Draft no. 3587, “electorate’s meetings with MP candidates and elected members of parliaments, candidates to the post of President of Ukraine (...)” are excluded from the scope of the Draft Law. Also, according to Article 2(3) of the Draft no. 3587-1 “electorate’s meetings with members of parliament shall be organised and held according to the order established by special legislation (...)”. Firstly, it is not clear in Article 2(3) of the Draft no. 3587-1, why there is a difference in treatment of the parliamentary elections compared with other -for instance, presidential- elections. Secondly, the reference to “members of parliament” in the same draft provision may lead to confusion as during parliamentary elections, one could speak of “candidates” who are not –yet- members of parliament and there are no grounds for treating them differently. Thirdly, this provision may also be interpreted as referring to meetings between an MP and the people from his/her constituency. In any case, as stated in the 2011 Joint Opinion<sup>23</sup>, meetings of political groups, members of parliament, meetings of citizens etc., that are held in places which are open to the public, would fall within the definition of “assembly” and therefore fall within the scope of application of the Draft Laws, and may not be regulated by other special legislation. As the Venice Commission and the OSCE/ODIHR have stressed in the past “*a specific law should not be necessary to regulate assemblies in an election period. On the contrary, the general law on assemblies should cover assemblies associated with election campaigns, an integral part of which is the organisation of public events. Indeed, the exercise of the freedom to peacefully assemble typically increases in the context of elections when opposing political parties, as well as other groups and organisations, wish to publicise their views.*”<sup>24</sup> The same could be said about assemblies associated with referendum campaigns. It is recommended that Article 2(2)3 of the Draft no. 3587 and Article 2(3) of the Draft no. 3587-1 be deleted and that all forms of such public assembly be covered by the definition given under Articles 1 of both drafts and subjected to the same regulatory procedure.<sup>25</sup>

### **Article 3 of both Draft Laws – Legislation of Ukraine on freedom of peaceful assembly**

41. Articles 3(1) of both drafts<sup>26</sup> are superfluous and have no real value for the application and interpretation of the Law, in the light of, more specifically, Articles 8 and 9 of the Constitution of Ukraine.<sup>27</sup> Moreover, the term “other laws of Ukraine” as a source of law

<sup>23</sup> CDL-AD(2011)031 Joint Opinion on the Draft Law on Peaceful Assembly of Ukraine, para. 23.

<sup>24</sup> CDL-AD (2009)034 Joint Opinion on the Draft Law on Assemblies of the Kyrgyz Republic, para. 20. See also, CDL-AD (2010)033 Joint Opinion on the Law on Peaceful Assemblies of Ukraine, para. 20.

<sup>25</sup> See, the Resolution 21/16 of the UN Human Rights Council A/HRC/RES/21/16 on the rights to freedom of peaceful assembly and of association: “*Reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, (...) and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law;*”

<sup>26</sup> “Legislation on Ukraine on freedom of assembly shall consist of the Constitution of Ukraine, this Law and other laws of Ukraine regulating relations in the sphere, as well as of the Convention for the Protection of Human Rights and Fundamental Freedoms and other treaties ratified by the Verkhovna Rada”.

<sup>27</sup> **Article 8**

In Ukraine, the principle of the rule of law is recognised and effective.

The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it.

The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed.

**Article 9**

in the field of freedom of assembly is not specific enough. As the Venice Commission and the OSCE/ODIHR have stressed in the past “*it would be essential for this provision to be more explicit in order to safeguard the requirement of foreseeability of laws and elimination of any room for potential abuse and violation of freedom to assembly through other legislative acts.*”<sup>28</sup> Should this provision be maintained, it is recommended to list any such “other laws of Ukraine” exhaustively so as to maximise the transparency and foreseeability of the law.

42. In line with the wording of Article 92 of the Constitution, which states that “*human and citizens’ rights and freedoms; the guarantees of these rights and freedoms; the main duties of the citizens;*” are determined “*exclusively by the laws of Ukraine*”, Articles 3(1) of both Draft Laws appear to exclude any secondary legislation from the legal framework pertaining to the right to freedom of assembly in Ukraine. The Venice Commission, the Directorate and the OSCE/ODIHR agree that the guarantees for human rights and freedoms should be regulated by primary legislation, i.e. an act of parliament. However, the possibility to adopt secondary legislation, in addition to the primary legislation in this field, should not be totally excluded. The Joint Guidelines on Freedom of Peaceful Assembly even expressly recommend, for instance, that national legislation should allow for the development of specific law-enforcement guidelines for the dispersal of assemblies.<sup>29</sup> It is up to the Constitutional Court of Ukraine to interpret the Constitution and to clarify whether Article 92 excludes the possibility of adoption of secondary legislation or specific guidelines, along with the primary legislation in this field, as long as the former complies with the latter and does not impose further restrictions.

## **B. Organising and holding an assembly**

### **Articles 4 and 5 of both Drafts – Organisers of an assembly**

43. It is positive that both drafts, in their Article 4(1), recognise the right of foreigners, stateless persons, legal persons and civic associations “irrespective of availability of status of a legal person” to organise peaceful demonstrations. This implies that informal groups may also organise assemblies regardless of whether they have legal personality or not.

44. It is also positive that both drafts recognise the right of juveniles to organise assemblies. Article 4(2) of the Draft Law no. 3587 provides that persons under 16 years’ of age or legally incapable natural persons may organise a peaceful assembly, provided that at least one co-organiser is a natural person with full legal capacity. This limitation does not appear to be problematic. The Joint Guidelines provide as an example of good practice the Moldovan legislation, which imposes a similar requirement.<sup>30</sup> Indeed, in light of the important responsibilities of the organiser of public assemblies, it would be advisable to set a minimum age for organisers. The Draft Law no. 3587-1, as it currently stands, does not provide for any limitations of age or other conditions to the rights of juveniles to organise public assemblies. The Law may also provide that minors may organise a public event only if their parents or legal guardians consent to their doing so.<sup>31</sup>

45. According to Article 4(3) of the Draft Law no. 3587 “*State authorities, authorities of the Autonomous Republic of Crimea, local self-government bodies may not organise a peaceful assembly.*” According to the Joint Guidelines<sup>32</sup>, “*legislation should not (...) restrict*

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International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.

<sup>28</sup> CDL-AD(2012)006 Joint Opinion on the Law on Mass Events of the Republic of Belarus, para. 49.

<sup>29</sup> Joint Guidelines on Freedom of Peaceful Assembly, para. 165.

<sup>30</sup> Article 6 of the 2008 Law on Public Assemblies of the Republic of Moldova. See also, the Joint Guidelines on Freedom of Peaceful Assembly, para. 58.

<sup>31</sup> See, Joint Guidelines on Freedom of Peaceful Assembly, para. 58. See also, Article 14(4) of the Law on Freedom of Assembly of the Republic of Armenia: “*Persons under 14 can organise assemblies only upon the written agreement of their legal representatives.*”

<sup>32</sup> Para. 60.

*the freedom of assembly of law-enforcement personnel (including the police and the military) or state officials unless the reasons for restriction are directly connected with their service duties and then only to the extent absolutely necessary in the light of considerations of professional duty*'. Thus Article 4(3) should not be interpreted as imposing a blanket restriction on State and municipality officials to exercise their freedom of peaceful assembly. During the meetings in Kyiv, the authorities explained that this provision does not cover civil servants and that the ban concerns only the authorities of different levels, as legal entities. The wording should thus be clarified accordingly.

46. Moreover, Article 4 of the Draft no. 3587 does not envisage the situation of a 'leaderless assembly', i.e. an assembly which does not have a formal leader or organiser. Article 5(2) and Article 8(2) also seem to assume that assemblies necessarily have 'organisers'. It is recommended to consider recognising leaderless assemblies in the Draft Law in some way, for example by including terms such as 'representative' or 'contact point' of assemblies in addition to the term 'organiser'.

47. According to Article 5(2)3 of the Draft no. 3587, the organiser of an assembly has the right to erect temporary constructions during an assembly "*which do not impede road traffic, movement of pedestrians and do not block access to buildings*". However, in some cases, temporary constructions may legitimately impede road traffic or movement of pedestrians. It is recommended to change the wording of this provision to specify that such constructions should not impede traffic, movement or access "disproportionately".

48. Article 5(3) of the Draft no. 3587 imposes on the organisers the obligation to immediately inform the relevant authority of any "decision to change place, time and route of a peaceful assembly, to introduce other amendments or supplements to the notice or to *refuse from holding a peaceful assembly*". "Refusal from holding a peaceful assembly" appears thus to be an obligation for the organiser in case he/she does not inform the authorities on the modifications about place, time and venue of the public assembly. This runs counter to the presumption in favour of holding of assemblies. The phrase "or to refuse from holding a peaceful assembly" should thus be deleted.

49. Article 5(3) of the Draft Law no. 3587-1 provides that "*only organiser of an event (or participants of an event which is organised without an organiser) shall have the right to determine whether the event is a peaceful assembly*". The meaning of this provision is not clear. While it is important to decide whether an assembly is a peaceful one, it is not acceptable that only the organiser or participants of the assembly should have the exclusive right to decide on this issue. As the burden of proving violent intentions of the organiser of a demonstration lies with the authorities<sup>33</sup>, state agencies, including law enforcement authorities, must have the right to decide whether an assembly has a peaceful or non-peaceful character in order to take the necessary steps to prevent the commission of crimes. This decision should be based upon an objective assessment of the situation and it should be possible to challenge such a decision before a court. This provision should be amended accordingly.

50. Article 5(5) of the Draft Law no. 3587-1 states that the "*organiser shall have the right to define participants of an assembly*." The meaning and the practical need of this provision is not clear. It can be interpreted as a right granted to the organiser to determine the circle of persons who are to be admitted to the assembly but also as a right to determine if a person, who is already in the crowd, can be considered to be a participant of the assembly. Unless this is a translation issue, neither of these interpretations is acceptable. Organisers or participants of an assembly should not be granted the full discretionary right to determine whether a person can or cannot be considered to be participant of an assembly. While at the stage of preparation of the assembly, the organiser(s) have the right to establish the conditions under which the assembly is to be held, during the event, this right should also

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<sup>33</sup> See, *Christian Democratic People's Party v. Moldova* (no. 2), no. 25196/04, 2 February 2010, para. 23.

belong to other participants together with the organisers. In any case, the rights of the participants in an assembly should not be dependent on the decision taken by the organiser.

#### **Article 6 of the Draft no. 3587 – Participants in a peaceful assembly**

51. Article 6(2)1 of the Draft no. 3587 aims at creating statutory rights for the participants of an assembly “to participate in discussions and decision making”. However, there is no need to regulate the internal decision-making process by the organisers and the participants. As pointed out in the 2011 Opinion<sup>34</sup>, the internal process of the assembly is the business of the organisers and the participants and not of the legislator enacting a law on public assembly. This provision should therefore to be deleted.

52. Article 6(2)2 provides participants in an assembly with the right to use symbols and other facilities which are not prohibited by law. However, this specific provision is not needed since according to paragraph 4 of the same provision, the participants have the right to take any action which is not prohibited by law or a court decision, which also encompasses using symbols and other facilities indicated under Article 6(2)2. This provision should be deleted.

#### **Article 6 of Draft no. 3587-1 and Articles 7 and 8 of the Draft no. 3587 – Notice of holding an assembly**

53. According to Article 6(1) of Draft Law no. 3587-1, the organiser has the obligation to notify the authorities only “*in case ensuring security of assembly participants is regarded as necessary*”. Thus, the notification is not an obligation unless it is considered necessary for security purposes. It is true that, as indicated in the Joint Guidelines on Freedom of Assembly “*it is not necessary under international human rights law for domestic legislation to require advance notification of an assembly.*” However, Article 6(1) does not seem to be in conformity with Article 39(1) of the Constitution of Ukraine, which provides that “*Citizens have the right to assemble peacefully (...) upon notifying in advance the bodies of executive power or bodies of local self-government.*” Moreover, in its decision of 19 April 2001<sup>35</sup> (regarding the official interpretation of paragraph 1 of Article 39 of the Constitution), the Constitutional Court of Ukraine considered that Article 39 shall mean that “*the organisers of these events are obliged to notify these authorities in advance in the sense of doing it within the acceptable timeframe before the event*”.

54. The provision of Article 6(1) of Draft Law no. 3587-1, stating that the notification is required only “(...) in case ensuring security of assembly participants is regarded as necessary” also raises some other issues: first, generally, “ensuring security of participants” cannot be considered as the only justification for a notification requirement. The purpose of notification is (and should be) to enable the State to put in place the necessary arrangements to facilitate freedom of assembly and to protect public order, public safety and the rights and freedoms of others.<sup>36</sup> For instance, even when an assembly with a significant number of participants does not raise any security issues, it may still cause disturbance to traffic, and the rights of others can require necessary measures to be taken in order to provide for alternative routes. Secondly, it is not clear who should assess whether “ensuring security of participants” is a necessity which requires notification. Although draft Article 6(1) does not give the organisers the right to determine this issue, reading this provision together with Article 5(3) (“*only organiser of an event (...) shall have the right to determine whether the event is a peaceful assembly*”) and Article 16(2)4 (“*lacking (...) notice of holding of assembly cannot be regarded as a ground for restricting freedom of assembly*”), gives the impression that the organiser will have full discretion to decide whether the notification is necessary or not. If this interpretation is correct, then this solution is not ideal as the organisers usually do not have enough expertise and information on security issues that may

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<sup>34</sup> CDL-AD(2011)031 Joint Opinion on the Draft Law on Peaceful Assembly of Ukraine, para. 44.

<sup>35</sup> Case N 1-30/2001

<sup>36</sup> See, Joint Guidelines on Freedom of Peaceful Assembly, para. 113.

occur during an assembly. In any event, if the Ukrainian legislator wishes to make notification of assemblies optional, which is possible under international standards, then, in the interest of consistency, a first step would be to amend the Constitution in this regard.

55. Thirdly, this provision does not sufficiently specify which authority should be notified of the intention to hold an assembly. Article 6, in its paragraph 1, provides that the organiser shall notify “an executive authority or local self-government body” whereas its paragraph 8, refers also to “local authorities” that are different from “local self-government body”. The term “an executive authority” is not clear enough and requires the organiser to ascertain to whom the notification should be given from a wide range of different authorities. In any case, the necessity to provide for alternative authorities (i.e. executive authority or local self-government body) is questionable. A “single gateway” approach for notification would be preferable and would prevent inevitable problems of conflict of competence.

56. Further, Article 6 should be amended in order to introduce a time-frame for notification, which is lacking in the current draft. Also, although paragraph 2 of Article 6 provides that notice can be given in writing or orally, other provisions of the Draft Law, as for instance Article 6(6), seem to be drafted without taking into consideration the possibility to make oral notification. Unless this is a translation problem, the respective provisions should be reconsidered in order to provide modalities/solutions for cases where the notice is given orally. However, it might be advisable to give priority to the procedure of written notification over the procedure of oral notification. As the Venice Commission and the OSCE/ODIHR have previously suggested: “(...) *the form used to notify the authorities should also ensure that relevant details of the proposed event are set out in a clear manner; consequently, oral notification should be allowed solely in exceptional cases.*”<sup>37</sup>

57. Under Article 6(5), after receiving the notification about holding an assembly, the relevant authorities have the obligation to register it and inform the organiser or his/her representative about registration “in any available way”. It is recommended, in the interest of legal certainty, to ensure that the response by the authorities is provided in writing.

58. Finally, Article 6 should be amended in order to clarify what kind of information should be included in the notification.

59. Unlike Draft Law no. 3587-1, Draft Law no. 3587 follows the approach adopted by Article 39 of the Constitution and makes notification mandatory (Article 7(1) of the Draft Law no. 3587). Under Article 2 par 2, the Draft Law does not apply to various types of meetings, which presumably implies that these meetings do not need to be notified to the authorities in advance. If this is indeed the case, it is recommended that the Draft Law also set out a list of certain types of assemblies that do not require notification, which should also include assemblies below a certain size threshold<sup>38</sup>. Similarly, there should be exceptions for assemblies which respond to a current event and would lose their meaning if the notification requirement were strictly enforced, and for spontaneous assemblies, i.e. assemblies in which people gather spontaneously in response to a particular situation or event.<sup>39</sup> However, this requires an amendment of Article 39(1) of the Constitution, which provides no exception to the requirement of notification.

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<sup>37</sup> CDL-AD(2009)034-e Joint Opinion on the Draft Law on Assemblies of the Kyrgyz Republic , paragraph 15, F.

<sup>38</sup> See, the Joint Guidelines on Freedom of Peaceful Assembly, para. 115.

<sup>39</sup> *ibid.*, para, 126-131.

60. It is positive that the Draft Law no. 3587 provides for a time-frame for notification (48 hours) (Article 7(1)) which is in conformity with international standards<sup>40</sup> as well as detailed information on the content of a notice of holding a peaceful assembly (Article 8). Article 7, paragraph 3, provides that “*notice of holding a peaceful assembly shall be regarded as filed on the day and time of its submitting or sending to executive authority or local self-government body.*” As suggested in the 2011 Opinion<sup>41</sup>, the date of receipt (rather than the date of mailing) should be regarded as the date of filing since the officials need time to prepare for the assembly and cannot start preparations until the notice has actually been received.

61. Article 7 (4) concerning the list of authorities to which the notification should be made is drafted in the same manner as Article 1(10) of the Draft Law on Freedom of Peaceful Assembly submitted to the Venice Commission in 2011.<sup>42</sup> The Venice Commission and the OSCE/ODIHR reiterate that this provision is unduly complex, requiring the organiser to ascertain to whom the notification should be submitted. As already indicated, a “single gateway” approach for notification would be preferable. This might, for example, simply require organisers to submit the notification documents to the village, town or city council office that is closest to the venue of the proposed assembly.

62. Article 8 of the Draft Law no. 3587 concerns the content and form of a notice of holding a peaceful assembly. As mentioned above, prior notification can be required only with the purpose to enable the state authorities to make necessary arrangements in order to facilitate assembly and to protect public order, public safety and the rights and freedoms of others. Therefore, organisers can be obliged to submit only such information as is necessary for the achievement of the mentioned goals. First, Article 8(1)2 imposes the obligation on the organisers to submit information concerning the “aim of holding a peaceful assembly.” This can hardly, if at all, be considered necessary for the above mentioned goals of the notification procedure and should be deleted.

63. The notification, according to Article 8(1) should also contain information on the duration of the assembly (Article 8(1)1) as well as on the anticipated number of participants (Article 8(1)4).

64. First, although it can be legitimate to ask organisers to indicate the approximate duration of the assembly, information on the exact duration of the assembly seems to be excessive. In this context, it is important that the legislation provides the possibility for the organisers and participants to submit, even during the assembly, a supplementary notification, on whether they wish to continue the assembly after the expiration of the duration mentioned in the notification, as an assembly should not be considered illegal just because of the expiry of the period notified to the authorities in the notification. Although Article 8(4) provides for a procedure of amending the information submitted in the notice, according to the same provision, the updated information should be submitted within the period envisaged by Article 7, i.e. 48 hours prior to the beginning of the assembly. It is recommended to make this provision more flexible, by allowing amendments to the notification also after the assembly’s commencement and during the assembly.

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<sup>40</sup> See, for instance, CDL-AD(2011)031 Joint Opinion, para. 62. Human Rights Council, Thirty-first session, A/HRC/31/66 Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, para. 28(d): Any notice period must be as short as possible, while still allowing the authorities sufficient time to prepare for the assembly — a maximum of several days, ideally within 48 hours.

<sup>41</sup> CDL-AD(2011)031 Joint Opinion on the Draft Law on Peaceful Assembly of Ukraine, para. 62.

<sup>42</sup> CDL-REF(2011)037 Draft Law on Freedom of Peaceful Assembly, approved on the fourth plenary session of the Commission for Strengthening the Democracy and Rule of Law on June 30, 2011, examined by the Venice Commission and the OSCE/ODIHR in their Joint Opinion CDL-AD(2011)031, para. 21.



65. Second, as to the information concerning the anticipated number of participants and following what was stated in the 2010 Joint Opinion<sup>43</sup>, this may be possible in some circumstances, but in some cases, the organiser may also prove to have incorrectly estimated the number of participants. A wrong estimate of the number of participants should not have negative consequences for the exercise of the right to freedom of assembly of the participants.

66. According to Article 8(1)8, the notification should also contain information, “on temporary restriction of road traffic for the purpose of receiving a *special permission*.”<sup>44</sup> First, it is not clear whether the issuance of such a “special permission” is regulated by the existing legislation. Secondly, such a requirement for special permission has the negative consequence that it *de facto* transforms the “notification procedure” into an “authorisation procedure”. The use of public roads for expressive purposes is as legitimate as the disturbance caused to the traffic. Therefore, any requirement and procedure of special permission will be incompatible with the right to freedom of assembly. The right to freedom of assembly can be restricted, in some exceptional circumstances, in order to ensure the traffic circulation on the roads. However, the presumption should be in favour of holding peaceful assemblies on a public road without any special permission. It is recommended that this provision be deleted.

67. Under Article 13 of the Draft law no. 3587, the authorities shall immediately provide the organiser with a written confirmation of the receipt of the notice indicating the time of its receipt. It is recommended that this provision state that a failure by the authorities to provide timely confirmation will be tantamount to acceptance of the conditions contained in the notification. Moreover, Article 13(4)1, which provides that the authorities have no right to reject the registration of the notice of holding an assembly does not appear to be needed, as the obligation of the authorities to register the notice is already provided in paragraph 1(1) of this provision.

**Articles 9 and 10 of the Draft Law no. 3587 and Articles 3(2) of both Draft Laws— Requirements regarding place, time and other conditions for holding a peaceful assembly**

68. Articles 3(2) of both Draft Laws ban the establishment, by the various national and local executive authorities, of “*the order, including the places, for exercising the freedom of assembly*”. Insofar as this means that there should not be “designated places” for assemblies, but rather that assemblies should in principle be possible anywhere, these provisions are welcome. However, such wording may also be interpreted to mean that no further regulation is possible, for example in police regulations on assemblies, at any level of the executive (national, regional or local). Such regulations, which should clearly not serve to further limit the freedom of peaceful assembly and must be in line with the primary legislation, can be a useful tool to clarify the obligations of the police and/or local authorities in relation to the implementation of the freedom of peaceful assembly. It is recommended to reconsider and clarify these provisions.

69. Article 9(1) of Draft no 3587 stipulates that “[p]eaceful assembly may be held in any public place” and seems to exclude any possibility to hold a peaceful assembly on privately owned premises or structures. As stated in the 2010 Joint Guidelines, “*In general, property owners may legitimately restrict access to their property to whomsoever they choose. Nonetheless, there has been a discernible trend towards the privatization of public spaces in a number of jurisdictions, and this has potentially serious implications for assembly, expression and dissent. The state may, on occasion, have a positive obligation to ensure access to privately owned places for the purposes of assembly or expression. In the case of Appleby and Others v. the United Kingdom (2003), a case concerning freedom of expression*

<sup>43</sup> CDL-AD(2010)033 Joint Opinion on the Law on Peaceful Assemblies of Ukraine, para. 30.

<sup>44</sup> Emphasis added.

*in a privately owned shopping centre, the European Court of Human Rights stated that the effective exercise of freedom of expression “may require positive measures of protection, even in the sphere of relations between individuals.” Freedom of assembly in privately owned spaces may be deserving of protection where the essence of the right has been breached.*<sup>45</sup> Thus, the exclusion of privately owned places in Article 9(1) should not be absolute, bearing in mind the possible positive obligation of the state authorities in some circumstances to ensure access when an assembly is held in such a place.

70. Article 9(2) imposes an obligation on the authorities to inform the organisers of assemblies “on places with “legally limited access” if such places cross the place (route) of holding a peaceful assembly indicated in the notice of holding such assembly”. Presumably, this refers to places where not everyone can legally enter, but this is not clear as no definition is provided, nor is reference made to other legislative provisions (another law) providing such definition. It is recommended to clarify the term “places with limited legal access”, either by providing a definition in the law or by adding reference to a legal provision in another law in which this term is defined.

71. The prohibition to “*fully block access to establishments, enterprises, institutions, organisations, state authorities, authorities of the Autonomous Republic of Crimea and local self-government bodies, in the vicinity of which the assembly is held*” (Article 9(3)) is hardly compatible with international standards. Any interference with the right to freedom of assembly should be “necessary” and “proportionate”, which requires an assessment of the proportionality of the restriction to the legitimate aim(s) pursued in the specific circumstances of each concrete case. A blanket prohibition, excluding such a “necessity” and “proportionality” assessment, would be in breach of the second paragraph of Article 11 ECHR, considering especially that the provision seems to cover both public and private establishments, enterprises, institutions and organisations. It is recommended to remove this provision, or to redraft it in a less restrictive manner, in line with the criteria provided by Article 11(2) ECHR.

72. Lastly, the prohibition in Article 9, paragraph 6, to carry “*devices and adapted objects, which may be used against life and health of people*”, despite the obvious legitimate aim to protect the rights of others, is not sufficiently precise, as almost any object can be used against life and health of people. It is important that there is a demonstrated intention to use them as weapons. In order to ensure clarity, it is recommended to provide more precise description of the objects which cannot be carried by participants in an assembly.

### **C. Restrictions on right to freedom of peaceful assembly**

#### **Article 16 of the Draft Law no. 3587 and Articles 15 and 16 of the Draft Law no. 3587-1**

73. Article 16 of the Draft Law no. 3587 and Article 15 of the Draft Law no. 3587-1, which concern the possible grounds for restriction on assemblies, appear to add new grounds for restriction to those contained in Article 39(2) of the Constitution of Ukraine. Article 39(2) of the Constitution provides limitations “*only in the interest 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.*” The grounds for restriction provided in Articles 15(3) (Draft no. 3587) and 16(2) (Draft no. 3587-1) are formulated in more detailed manner and at the same time, not all grounds included in the constitutional provision are incorporated in those draft articles. It is however difficult to suppose that the authors intended to exclude the possibility to restrict freedom of assembly on the grounds provided in the Constitution. The provisions in both drafts should be harmonized with Article 39(2) of the Constitution.

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<sup>45</sup> See, Joint Guidelines on Freedom of Peaceful Assembly, para. 23.

74. In addition, a number of provisions appear to be aimed at regulating the content of an assembly outside of the context of non-peaceful assemblies. These include Article 16(2)1 (Draft no. 3587) which lists as grounds for restriction where “*the purpose of the assembly consists in liquidation of independence of Ukraine, violent change of the constitutional order, change of the territory or border of Ukraine, seizure of state or public buildings or constructions, impeding activity of the Armed Forces of Ukraine or military units*” and Article 15(3)2 (Draft no. 3587-1) which provides for grounds for restriction as “*purpose of the assembly consists in liquidation of independence of Ukraine, reduction of its territory or narrowing of the State border of Ukraine*”. It should be noted that only necessary and proportionate interferences are permitted and that regulation should in principle only affect matters of time, place and manner, not the content of an assembly. As long as such calls remain peaceful, restrictions of this nature would be a disproportionate interference with the freedom of assembly, since they constitute content restrictions. The content-based restriction of the freedom of assembly is clearly not in conformity with international standards. The ECtHR has expressly stated that requests for secession of part of the country’s territory cannot justify as such the restriction of the freedom of assembly if its realisation is advocated by peaceful means.<sup>46</sup> Moreover, in the context of the Draft no. 3587-1, these grounds for restriction under Article 15 appear to contradict the wording of Article 16(2)7 which explicitly prohibits bans on grounds of “*discussing, during an assembly, legal change of power, constitutional order, administrative system or territorial integrity (...)*.” In light of the above, in order to ensure consistency, it is recommended not to include restrictions aimed at suppressing certain types of content, but instead to reduce the number of grounds for restriction to those contemplated in Article 39(2) of the Constitution of Ukraine. Additional wording in the draft can, however, further clarify these grounds, without, of course, restricting assemblies beyond the scope foreseen in the Constitution.

75. Further, according to Article 15(3)1 (Draft no. 3587-1) and Article 16(2)5 (Draft no. 3587) one of the grounds for restriction is “*establishment, in the corresponding territory, of a temporary restriction for holding peaceful assemblies by a decree of the President of Ukraine on introducing the state of emergency or martial law (...)*.” This provision refers to the derogation clause from the Human Rights standards under the international mechanisms (i.e. declaration of state of emergency) as one of the grounds for restricting the right to freedom of assembly. However, restrictions that are usually introduced through ordinary legislation must be distinguished from derogations resulting from the declaration of state of emergency. Restriction of rights in a state of emergency is generally regulated in the Constitution and the legislation on state of emergency or martial law. It is thus recommended that these provisions be deleted.

76. Article 15(5)2 (Draft no. 3587-1) refers to the possibility of restricting assemblies in case they cross a “place with lawfully limited access”. It is recommended to clarify what this term refers to, either by including a definition of this term, or referring to another legal provision in which this concept is defined (see paragraph 70 of this Opinion).

77. According to 16(2)8 (Draft Law no. 3587-1) “*temporary blocking of streets and roads or limiting movement of other persons or vehicles for the time of holding an assembly*” cannot be regarded as a ground for restricting freedom of assembly. The provision should be more nuanced. There may be situations where it is necessary to restrict freedom of assembly in order to protect rights and freedoms of others may occur, even in the context of temporary blocking of streets, etc. The ECtHR stated that “*the intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by normal exercise of the right of peaceful assembly in a public place, might be considered a “reprehensible act” within the meaning of the Court’s case-law. Such behaviour might therefore justify the imposition of penalties, even of a criminal nature.*”<sup>47</sup> It is recommended to use the ECtHR case-law wording in this provision

<sup>46</sup> See, for instance, ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, 29221/95 and 29225/95, 2 October 2001, para. 97.

<sup>47</sup> See, among others, *Kudrevicius and others v. Lithuania*, 37553/05, 15 October 2015, para. 173.

and to add the words “*in case the disruption caused is not more significant than that caused by normal exercise of the right to peaceful assembly*” at the end of the provision.

78. Articles 7(4)c and 15(1) (Draft Law no. 3587-1) and 16(1) (Draft Law no. 3587) allow restrictions only if they are imposed by courts. Article 7(4)c (Draft Law no. 3587-1), for instance, bans any form of restriction by local authorities which is not the result of a court order. Also, according to Article 16(1) (Draft no. 3587) peaceful assembly shall be restricted only by court. Although the intentions of the authors to limit the possibility to restrict the freedom of assembly is commendable and it is understandable that the possibility to restrict the freedom of assembly should be given only to courts considering the second paragraph of Article 39 of the Constitution<sup>48</sup>, certain proportionate restrictions imposed by the executive, including the police, may be entirely legitimate during assemblies as well. There is no iron-clad distinction in practice between a “peaceful assembly” and a “violent assembly”. For example, police may sometimes need to apprehend a violent participant in an assembly during an otherwise peaceful assembly. It would be impractical, in such or similar circumstances, to wait for a court order before imposing such restrictions and taking measures in the interest of public safety, including the safety of other participants. Therefore, exceptions to the rule that only courts may order restrictions to freedom of assembly are needed, for example in urgent cases involving threats to life. It is recommended to provide in the law the possibility of legal, necessary and proportionate restrictions not requiring prior court intervention.

79. Article 15(6) (Draft Law no. 3587-1) states that “restrictions of the freedom of assembly shall be applied exceptionally to a specific assembly”. The meaning of this provision should be clarified. Moreover, Article 15(5)4, second paragraph, provides that “*prohibition of an assembly shall be applied only as an exceptional measure, and only in cases, when legal restriction purposes cannot be reached in other way envisaged by the paragraph*”. This positive general principle which underlines the exceptional character of the prohibition of an assembly and the need to ensure the proportionality principle should be moved to the beginning of Article 15.

#### **D. Powers and obligations of law enforcement bodies**

##### **Articles 7, 8 and 9 of the Draft Law no. 3587-1 and Articles 14 and 18 of the Draft Law no. 3587**

80. Article 7, paragraph 1, of the Draft Law no. 3587-1 provides for an obligation on “*executive authorities and local self-government bodies to take all necessary measures for facilitating assembly (...) and protecting its participants.*” Unless this is a translation issue, this provision should be amended considering that the protection of participants of an assembly should be an obligation for law enforcement authorities and not for executive authorities or local self-government bodies.

81. Under Article 7, paragraph 4 b), the executive authorities or local self-government bodies have an obligation to provide equal possibilities for all parties in case of simultaneous assemblies, including counter-assemblies. The goal to provide equal opportunities is commendable but hardly achievable. Bearing in mind that the authorities should be under an obligation of means and not of result, this paragraph should be redrafted in order to oblige the executive authorities and the local self-government bodies to take all necessary steps with the aim of providing equal possibilities. Moreover, it is not clear how the authorities will achieve this task of providing equal opportunities without having the power to change the place, time and route of an assembly without a court order (Article 7(4)c and Article 16(4)). The provisions of Articles 7 and 16 should thus be harmonised.

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<sup>48</sup> “Restrictions on the exercise of this right may be established by a court”.

82. Under Article 7(3), the authorities have the possibility to contact the organisers with a “*suggestion*” to reduce noise emanating from an assembly. Whilst a significant amount of noise coming from an assembly is natural and should be tolerated, there may be extreme cases where organisers should be required to reduce noise levels at least to some degree as a matter which may affect the rights and freedoms of others<sup>49</sup> and/or as a matter of public order (see e.g. Article 11 (2) ECHR). It is recommended that this be clarified in Article 7(3).

83. According to Article 8(1)1 of Draft no 3587-1, the authorities should attempt to find out about pending assemblies by “organis[ing] their work for independent search of information on holding assemblies, including in Internet”. This may be problematic. Including such activities as a primary legal obligation of law enforcement bodies may have a chilling effect on the assembly organisers and potential participants who may feel themselves to be under surveillance when discussing assemblies in person or online. In any event, it should be clarified in the Draft Law that the information search by the authorities should not be the result of intrusive surveillance, whether in cyberspace or otherwise, but should consist of seeking out publicly available sources in various legal ways.

84. Article 8(1)2 provides that the National Police, the National Guards and other law-enforcement bodies shall organise their work in such a way as to ensure round-the-clock and immediate registration of notices of holding assemblies. However, under Article 6(1), the notice of holding an assembly should be submitted to other bodies, i.e. “an executive authority” or “local self-government body”. This contradiction should be addressed.

85. Article 9(1), which concerns the necessity for the law-enforcement bodies to determine a representative authorised to interact with the organiser of an assembly is welcome. This is in line with the case law of the ECtHR, which underlines that the authorities’ duty to communicate with the assembly organiser is an essential part of their positive obligation to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all the citizens involved.<sup>50</sup>

86. Article 9(2) prohibits in quite broad terms any form of interference in an assembly by the police.<sup>51</sup> The arguments concerning Articles 7(4)c and 16(4) above (see para. 78 of this Opinion) seem to apply also under this provision. According to Article 8(1)7, the police seems to be able to intervene where, in case of simultaneous assemblies, parties need to be brought within a safe distance from each other, and it is difficult to see why they should not, as an exceptional matter and under strictly limited circumstances, also be able to intervene in other situations during assemblies where this is necessary, if such measures are carried out in a proportionate manner, in particular where the rights and freedoms of others are threatened.<sup>52</sup> There may conceivably be certain situations where the suspension or dispersal of an assembly becomes necessary to maintain public order or safeguard the rights and freedoms of others, in particular the right to life. Similarly, it may be impossible, in practice, to stop and detain an offender, as required under Article 9(1)4, without impeding an assembly in some form. It is recommended to reconsider all blanket bans on interference by the authorities contained in the Draft Law in light of these considerations.

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<sup>49</sup> See, Joint Guidelines on Freedom of Peaceful Assembly, para 99: “[a]n example of manner restrictions might relate to the use of sound amplification equipment”

<sup>50</sup> See, *Frumkin v. Russia*, no. 74568/12, 5 January 2016, paras. 127-129.

<sup>51</sup> “The National Police and National Guards of Ukraine, as well as other law enforcement bodies (...) shall have no right to restrict the freedom of assembly, including to suspend or demand suspending of the assembly, disperse or segment the assembly or impede its holding in any other way;”

<sup>52</sup> As was stated by the Venice Commission and the OSCE/ODIHR “the role of the law enforcement personnel during an assembly may include, when the situation on ground deteriorates (e.g. participants might begin using or inciting imminent violence), imposing restrictions or terminating an assembly. In doing so, the law enforcement authorities should consider first their duty to facilitate the enjoyment of the right to freedom of peaceful assembly” (CDL-AD (2010)033 Joint Opinion on the Law of Peaceful Assemblies of Ukraine, para. 41.)

87. Article 9(3) states that law enforcement officials cannot prevent the participants from expressing, in any way, their points of view, which is a useful provision. However, an exception is allowed when “such way of expression contradicts ‘the law’”. This vague statement is likely to lead to excessive interference as it may be interpreted too broadly to encompass anything contained in legislation. It is recalled that restrictions of fundamental rights on freedom of assembly or expression are acceptable only in the cases expressly provided in the Constitution and international human rights treaties. It is therefore recommended to remove this phrase or to choose more specific wording, in line with the Constitution and the international human rights treaties.

88. As to Draft Law no. 3587, the overall principle behind Article 13(2) is positive in that it ensures that multiple assemblies planned for the same place and time may take place to the greatest extent possible. However, expecting the respective organisers to come up with a solution may not be the most appropriate method to address such a situation, for example where the space in question cannot accommodate the number of people expected to attend the assemblies in question, or where organisers of different assemblies cannot reach an agreement. It is recommended to consider including, in Article 13(2), some type of objective tie-breaker system (after discussions between the authorities and representatives of those wishing to move one of the assemblies elsewhere, etc.), with appropriate safeguards against possible abuse of such a system.

89. Under Article 14(3), if a state authority receives, during or after the holding of an assembly, resolutions, demands or other applications, it shall ensure their consideration, with the participation of the organiser. The need for such a provision is not entirely clear. It may be assumed that its intention is to diffuse social tensions, which is commendable. However, this should not be interpreted as an outright obligation of the addressees of an assembly to hear and consider concerns of the assembly.<sup>53</sup>

90. Article 18 of the Draft Law no. 3587 concerns actions of the National Police, National Guards of Ukraine and other law-enforcement bodies in case an assembly ceases to be peaceful. First, it should be stressed that apart from enforcing prior restrictions imposed by a court, law enforcement bodies should also have the power to impose certain restrictions during an assembly, while respecting the principle of proportionality, if this proves necessary to achieve one of the legitimate aims provided for in Article 39(2) of the Constitution. This provision regulates the actions of the law enforcement forces in cases where assemblies cease to be peaceful. It provides for the circumstances in which the law enforcement officials may decide to end an assembly, and the requirements applicable to the announcement of this decision: to inform peaceful participants of the time provided for leaving the place of the assembly, and of available possibilities for them to exercise their right to peaceful assembly without preventing legal actions being taken by law enforcement officials. No provision is made, however, for the conditions under which the law-enforcement bodies may, in a proportionate manner, use force. There actually is no provision in the Draft Law specifying the conditions for the use of force by the law enforcement officials. This lacuna should be filled. In case there are other legislative provisions in Ukraine that regulate the use of force by law enforcement bodies during assemblies, the Draft Law should include a clear reference to those regulations.

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<sup>53</sup> See, CDL-AD(2006)033 Joint Opinion on the Draft Law on Peaceful Assemblies in Ukraine, para. 43; CDL-AD(2011)031 Joint Opinion on the Draft Law on Freedom of Peaceful Assembly of Ukraine, para. 56.

## **E. Liability of authorities**

### **Articles 19 and 20 of the Draft Law no. 3587-1**

91. Article 19 (4) provides that if the organiser of an assembly notifies an assembly, “*executive authorities or local self-government bodies shall be liable for material and moral damage inflicted to the organiser, participants of the assembly and/or other persons as a result of non-attendance or improper attendance by executive authorities or local self-government bodies of their duties as regards facilitating the assemblies*”. It is not clear what “moral damage” refers to, or how to establish the monetary value of this. Similarly, the concept of “improper attendance” may also be difficult to define. It is recommended to clarify these points.

92. Moreover, Article 20(2) states that law enforcement officers shall be held criminally liable for impeding assemblies, including suspending, dispersing, or segmenting assemblies by the use of force. If this constitutes a mere reference to existing criminal provisions, then this would not be problematic; if, however, this includes any use of force, regardless of whether it was necessary and proportionate or not, then this would appear to take the concept of police liability and accountability to the extreme. As stated above, there may be situations where both dispersal and the use of force are necessary to protect public order and the rights and freedoms of others.

93. The same considerations also apply with respect to paragraph 3 of this provision. While law enforcement officers are under an obligation to do their best to avoid disruptions, they should not be punished for the failure to do so if they exerted their best efforts to prevent harm to the assembly and its participants. Even if such failure to prevent harm is due to a lack of sufficient police officers on site, this would not be the individual failure of the police officers present, but would need to be attributed to their supervisors or to insufficient resources.

## **F. Monitoring of an assembly**

### **Articles 10 and 11 of the Draft Law no. 3587-1 and Article 12 of the Draft Law no. 3587**

94. Article 10 of the Draft Law no. 3587-1, which deals with independent assembly monitoring is in principle welcome as it recognises the important role of observers.<sup>54</sup> It is recommended that the explicit statement under Article 11(1) on the right to observe assemblies is moved under Article 10.

95. Article 10(5) suggests that observers can be involved in mediation at the initiative of any party. Whilst the law should not forbid anyone from voluntarily doing so, it is questionable whether this is the role of observers, who are meant to record what happens, not to resolve conflicts. It is recommended to reconsider this provision. A similar remark may be made about the involvement of independent observers as mediators in Article 13 (3). It is also noted that mediation should not take place in public, unless the parties agree to it.

96. Article 10(4), which provides that observers “*shall not represent assembly organiser and its participants, shall be impartial and shall refrain from active participation in actions of the assembly participants*” should be nuanced somewhat. There is no reason why organisers cannot invite observers who are sympathetic with the organisers' views, which is not an uncommon practice. It is recommended to reconsider this provision.

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<sup>54</sup> Concerning the issue of assembly monitoring, see Joint Guidelines, paragraphs 199-205.

97. According to paragraph 6 of Article 10, “*observers shall have free access to any territory. They can freely move through the borders of National Police (...) and other law enforcement bodies.*” Indeed, the authorities should not, as a way of concealing the actions of the police with respect to the demonstration from the public gaze, prevent the observers and the media from covering the demonstrations. This requires, as a rule, that the observers and the media can move freely at the venue of such an event. However, in a situation where an assembly acquire a non-peaceful character, the law enforcement bodies should be able to take reasonable steps in order to stop violence and limit the freedom of movement of participants, mass media representatives and observers.<sup>55</sup> Nevertheless, journalists and other media workers should not be prevented from observing the actions of the law enforcement officials.

98. The introduction in paragraph 8 of Article 10 of the obligation of the authorities and institutions to consider the monitoring report submitted to them is welcome. But the obligation to take the recommendations in the monitoring report into account as regards future activities seems to be excessive, unless this is a translation issue.

99. Article 11(2) appears to contemplate that filming and photography should be possible for a wide range of parties, which is positive and in line with international principles in the sphere of the freedom of peaceful assemblies.<sup>56</sup> However, the phrasing used, which includes granting the right to do so to ‘other persons’, could be interpreted as also including authorities. As the Joint Guidelines also note in paragraph 169, “the systematic processing or permanent nature of the record created and retained might give rise to violations of privacy”. It is recommended to rephrase this provision to clarify that public authorities are not covered by this provision. Consideration should also be given to including some provision on the need to protect the right to private life in the context of police and other surveillance.

100. It is also necessary to provide in Article 11 that the respective persons may only be required to surrender film or digitally recorded images or footage to law enforcement officers or agencies where there is a court order obliging them to do so. In that case, the owner of the footage should have the right to retain an exact copy of the material in question.

101. As to the Draft law no. 3587, its Article 12(2) requires that organisers and participants of peaceful assemblies, as well as various relevant authorities, within their competence, should “*contribute to professional activity of journalists and mass media representatives during peaceful assemblies*”. Whilst it would certainly be a matter of good practice for assembly organisers and participants to have good relations with the media, it appears inappropriate to oblige the organisers and participants to ‘contribute’ to their professional activity. This is more relevant as an obligation for the state authorities<sup>57</sup>, as a way to enable the journalists to provide accurate coverage of the event. Generally, the provision might be interpreted as creating certain obligations on the part of the organisers to co-operate with media representatives, whereas they should be able to decide freely to refuse interviews and other forms of co-operation with the media.

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<sup>55</sup> See, ECtHR, *Pentikäinen v. Finland*, 11882/10, 20 October 2015.

<sup>56</sup> See, Joint Guidelines on Freedom of Peaceful Assembly, para. 169 and UN Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, in particular, points F, G and H.

<sup>57</sup> See, Joint Guidelines on Freedom of Peaceful Assembly, paras. 206-210.



## G. Mediation

### **Articles 12 and 13 of the Draft Law no. 3587-1 and Articles 5(2)6 and 17 of the Draft Law no. 3587**

102. Article 12 (Draft Law no. 3587-1) sets out the process of negotiations prior to an assembly, which it describes as 'mediation'. The draft provision does not, however, provide that such negotiations shall be voluntary in nature, though this may be implied by the wording of Article 12(4) which leaves key decisions on the assembly in the hands of the organiser. Considering the need to avoid long, drawn-out negotiations and the risk that assembly organisers or representatives may feel compelled or pressured to accept restrictions suggested in the context of negotiations,<sup>58</sup> it is recommended to provide explicitly that negotiations should be voluntary in nature and that assembly participants or organisers have the right to reject proposals made by the authorities.

103. Article 12, paragraph 6, provides that “[n]egotiation results shall be fixed in a mediation protocol, which can be signed by organiser of the assembly.” It is recommended to replace the words “can be signed by organiser” by “should be signed by the organiser”. However, signature should not be an obligation if the negotiations did not lead to an agreement.

104. In the same way, Article 17 (Draft Law no. 3587) concerns the initiation of negotiations between the authorities and the organisers for the purpose of changing the conditions of holding such an assembly. While positive in that this requires authorities to seek compromise, the provision may exert pressure on the organisers to comply with authorities' recommendations. It is true that Article 5(2)6 states that the assembly organisers may also refuse to participate in such negotiations. However, it would be preferable if such a principle implying that organisers may also refuse or discontinue negotiations were also stated explicitly in Article 17. Although, to some extent, this principle is already implied in Article 17(4), it could be worded more clearly.<sup>59</sup>

## H. Final provisions

### **Draft Articles 182 and 183 of the Code of Administrative Justice Proceedings in both Draft Laws**

105. Draft Articles 182 and 183 of the Code of Administrative Justice Proceedings as amended by both Draft Laws, are similar to those submitted to the Venice Commission and the OSCE/ODIHR in 2011.<sup>60</sup> As stated in the 2011 Joint Opinion<sup>61</sup>, both draft provisions are designed to allow final decisions to be reached in court prior to the planned date of the assembly. However, as practical difficulties might occur in the conduct of full legal proceedings within such a short time, it may be preferable to allow the appeals courts to render interim decisions (for instance, via temporary injunctions lifting or amending the restrictions imposed on an assembly by the first instance court).

106. Under Draft Article 182 (in both Draft Laws), the deadline for the submission of a statement of claim relating to a potential restriction on an assembly is one day, which can hardly be considered to be sufficient. According to Article 12 of the Draft Law no. 3587-1, if the notification of an assembly gives reasons to anticipate the need to impose restrictions on it, the authority in question shall initiate negotiations with the organiser before addressing the

<sup>58</sup> See, Joint Guidelines on Freedom of Peaceful Assembly, para. 103, “[t]he organiser 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.”

<sup>59</sup> *ibid.*

<sup>60</sup> CDL-REF(2011)037 Draft Law on Freedom of Peaceful Assembly of Ukraine.

<sup>61</sup> CDL-AD(2011)031 Joint Opinion on the Draft Law on Freedom of Peaceful Assembly of Ukraine, para. 78.

issue in court. It is not realistic to expect the authorities to make this prior assessment, organise the mediation, and conduct negotiations seriously and to prepare and submit the file to the court in one day. This deadline should therefore be reconsidered.

107. It appears from Draft Article 182(11) (Draft Law no. 3587-1) and Draft Article 182 (10) (Draft Law no. 3587) (“*[r]estrictions of freedom of assembly shall be imposed only with regards to the defendants, who were duly informed on the court session*”) that the authors of the drafts envisage not a restriction on holding an assembly as a whole, but a restriction on the right to freedom of assembly of concrete individuals. Article 182 (11) in Draft no. 3587-1 is even more explicit on this point as it adds that “*statements of claim, which concerns indefinite list of defendants, shall be dismissed by court.*” It is recommended to clarify both provisions to avoid excluding any possibility for the court to impose restrictions on the assembly as such or even to ban an assembly.

108. Finally, it is welcome that both drafts require the Cabinet of Ministers of Ukraine to bring legal acts of central and local executive authorities in compliance with the provisions of the Drafts.