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Only in English

30 September, 2009

2009 Human Dimension Implementation Meeting
Session 3, Peaceful assembly

Ukraine

Written submission
A new draft law on peaceful assembly is not compatible with OSCE and Council of Europe recommendations

The Ukrainian Helsinki Human Rights Union has made the following analysis of the Draft Law No. 2450 from 6 May 2008 "On the procedure for organizing and holding peaceful gatherings".

Some background to the bill

Back in 2006 the Ministry of Justice, in accordance with a Presidential Decree on implementation of Ukraine's commitments to the Council of Europe, drew up a draft law "On procedure for organizing and holding meetings, rallies, marches, demonstrations and pickets" which was posted for public discussion on the Ministry's website.

UHHRU then made a considerable number of comments, and presented an alternative draft law.

Following public discussion, both draft laws were sent to the Council of Europe's Venice Commission for assessment regarding their adherence to international human rights standards. Following a visit to Ukraine, the Commission issued a Joint opinion on the draft law on peaceful assemblies in Ukraine [1] with many comments regarding the Government's draft law.

On the basis of these opinions, the decision was taken to combine the draft laws into one. One version of the draft law was produced, with this subsequently being changed considerably. Later, during the second half of 2007 and beginning of 2008, the preparation of the draft law continued without public involvement. A large number of comments were added which fundamentally changed the draft law, despite the Venice Commission's recommendations.

This draft law was quite unexpectedly and without public discussion, tabled in parliament by the Cabinet of Ministers in May 2009. The new draft law has thus had significant changes which do not take into account the Venice Commission's assessment or UHHRU proposals

Scope of the law

The following are not in line with international standards:

- The narrowing of the scope of the law in not applying to “religious rites and ceremonies in cases envisaged by the law “On freedom of conscience and religious organizations”. The European Court of Human Rights stipulates that religious associations have the right to practice their faith taking into consideration Article 11 of the European Convention, i.e. with all guarantees of freedom of peaceful assembly.

- Peaceful assembly for the purpose of rest, public entertainment events, sports competitions, weddings, national festivals, funerals, commercial events are also covered by freedom of peaceful assembly although, as noted by the European Court of Human Rights, the boundaries for restricting such events may be broader since they have less significance for the functioning of a democratic system.

The point here is that people decide on these occasions why they are gathering and therefore one cannot confine freedom of peaceful assembly to merely political or social gatherings. The latter on the other hand will have a greater level of protection since they have more significance in a democratic society, and the grounds for their restriction must be interpreted extremely narrowly and scrupulously.

Neither Ukraine’s Constitution, nor any international agreement contains restrictions regarding the type of interests which prompt people to gather. The European Court of Human Rights directly stipulates that peaceful assembly may be for economic, social and cultural interests.

Such a narrow interpretation of freedom of peaceful assembly does not therefore comply with international human rights standards. Furthermore, such differentiation can give rise to questions as to whether certain rights or interests are being discriminated against, this being directly prohibited by Article 24 of the Constitution.

There should also clearly be an indication that the law only applies to gatherings in public places. This will prevent ambiguous interpretation of some provisions of the law and possible intrusion into people’s private life.

Terminology

The draft law introduces dangerous terminological confusion: in the European Convention, other international agreements and the Constitution, the term “peaceful assembly” is the general term. The draft law instead uses the new term “mass event”, with peaceful assembly being one type. This can clearly lead to difficulties and discrepancies in application of European standards, where peaceful assembly covers rallies, marches, demonstrations, etc.

There is also use of tautology, with two words having virtually the same meaning (zbory and meetingi; pokhody and demonstratsiyi).

The terminology is thus not clear and definite, and it does not coincide with the commonly used terms of international law.

Unfortunately, the draft law does not explain certain extremely important terms: “counter-demonstration”; “participant in a peaceful assembly”; “tent city”; “tent”. These terms have enormous importance in practice. For example, you can’t ban a counter-demonstration purely on the grounds that it is envisaged Who can be liable as a participant in a peaceful assembly? Or what is a tent city, or tent, and what is a “small architectural form” which is a very widespread means of formally banning peaceful assembly in Ukraine.

The organizer of a peaceful assembly

The concept in the draft law is essentially that there is a certain person who is the organizer and at the same time responsible for everything that happens. These organizers should, on top of everything else, have something to make it possible to recognize them.

This is far from reality. Firstly, the possibility of a spontaneous gathering means that there may simply not be an organizer, and the mere call to gather cannot be considered organization. The lack of an organizer must not be cause for stopping peaceful assembly.

Secondly, in very many cases, particularly involving large gatherings, there may be very many organizers. This also negates the draft law which clearly envisages one organizer alone. If two organizers have different views on how the gathering should develop, who bears responsibility?

There is no consideration of the fact that the organizer has no power over the participants. This makes his or her control over the peaceful assembly fairly fictitious and formal, and it is often non-existent. The organizer cannot bear responsibility for the actions of participants who don't listen to him or her.

The bill's authors want peaceful assemblies to take place like military parades where each person has clearly defined obligations and obeys the organizer. This fails to take any consideration of the nature of large peaceful assemblies where participants are ordinary passers-by who have no obligation to heed the organizers. The authors have clearly ignored the chaotic nature of such events, their spontaneous quality, as well as the frequent lack of any programme or hierarchical structure.

It should also be noted that in breach of the Civil Code, the draft law makes the organizers of a peaceful assembly liable for compensation of all losses incurred. This legislates liability not on the person responsible for an offence, but on another person regardless of whether they were to blame. This contravenes fundamental principles of law, the provisions of the Civil Code as well as the Constitution since the principle of personal responsibility is breached.

Restrictions and requirements on the organizers regarding control of noise where amplifiers are used are also unwarranted and simply unrealistic.

The requirement that an organizer wear something to identify him or her is a direct breach of the European Convention in the light of its interpretation by the European Court of Human Rights.

It is worth noting that such indicators make it conveniently possible for the police or other authorities to simply stop an opposition peaceful gathering by "removing" its organizers.

Furthermore legislation does not envisage prohibition by the court of particular types of activity by associations of individuals, although the draft law in Article 4 stipulates that such associations do not have the right to be organizers of a peaceful assembly.

It is also unclear why civic organizations legalized by means of notification cannot be organizers of a peaceful assembly. This in our view contravenes the law on civic associations and establishes a certain form of discrimination. This applies in full to religious communities which according to the law on freedom of conscience and religious organizations are entitled to exist with registration and have the same rights, except with regard to property, as registered communities.

The fact that a person aged between 14 and 18 cannot organize a peaceful assembly is also dubious from the point of view of civic responsibility. A youth organization, created by this person, can be an organizer.

There is also little justification, and contravention of Council of Europe standards, in the restriction on people who are under administrative arrest, held in custody or imprisoned to organize a peaceful assembly via their representatives. It is not clear why these people cannot organize peaceful events. In our view the key question in any restriction is not who is organizing a peaceful event, but the form and content of the peaceful gathering.

Notification of peaceful assemblies and spontaneous peaceful gatherings

The draft law simply prohibits spontaneous peaceful gatherings since they can't be held without notification. For example, would there have been sense in a rally on Independence Square after the announcement of the results of the presidential elections if it had taken place several days later? Such measures effectively deprive citizens of the right to warranted opposition to the actions of the authorities. This is also in breach of the judgment of the Constitutional Court regarding Article 39 of the Constitution which states that any stipulation of time frames for notification should not prevent the exercising of this right. This means that the Constitutional Court stipulates that the provision of notification is not an unconditional prerequisite for exercising the right. It directly states that the mere lack of notification cannot be grounds for preventing a peaceful assembly which does not threaten public order. The authors of the draft law have ignored this.

The State's positive duties and counter-demonstrations

The State is obliged to ensure that freedom of peaceful assembly can be exercised. It is largely for this reason that there is a system of notification so that the authorities can be ready to fulfil their duties. The authorities are responsible, where there has been notification, for any obstructions or damage caused by opponents of a peaceful gathering.

The concept of positive duties of the State is the basis for legal regulation of counter-demonstrations.

The draft law provides ambiguous wording regarding the holding of counter-demonstrations which, according to the European Court of Human Rights, are an inalienable component of freedom of peaceful assembly. It is clear that the formal existence of two applications regarding plans to hold a peaceful gathering cannot serve as grounds for an outright prohibition on the holding of one of them. It is not at all important who first submitted such an application. This should be clearly stated in the draft law, yet there is no such provision.

Of course, every demonstration, march or other similar action causes the authorities a lot of problems. However, the European Court of Human Rights has confirmed that Article 11 refers to the positive obligations of the State to defend those who are carrying out their rights to peaceful assemblies free of violence from opponents, in particular from counter-demonstrations (the case of the organization «The Platform of «Doctors for Life» against Austria, 1985, Paragraphs from 65 to 72). Since both parties have the same right which is guaranteed by Article 11 of the European Convention, where one of the parties is aiming to disrupt the activity of the other, the authorities must in the first instance protect the rights of those who are carrying out their gathering peacefully:

«Any demonstration can irritate or offend those who are against the ideas or demands in support of which it is being held. Nonetheless, its participants must have the opportunity to hold it without fear of physical force being applied by opponents; such fears would hinder them in expressing their opinions on socially important issues. In a democratic society the right to hold a counter-demonstration cannot determine the right to a demonstration. Following from this, the protection of true, effective freedom to hold peaceful meetings cannot lie only in the State's lack of interference: the purely negative concept of the role of the State contradicts both the subject and the aim of Article 11» – the European Court of Human Rights states with regard to this decision.

The draft law does not contain provisions at all on these positive duties. What is more, Article 15 directly obliges the organizers to themselves get rid of infringements of public order, that is, effectively carry out the duties of the law enforcement bodies. And they can be penalized for not doing so. Yet if there is a danger that certain peaceful gatherings can cause disturbances and this is beyond the control of the organizers, this fact cannot be justification for restricting freedom of assembly (cf. "Christians against fascism and racism v. the United Kingdom", 8440/78, 1981).

In our view, the draft law totally fails to consider the State's positive duties regarding the safeguarding of freedom of peaceful assembly.

Stopping peaceful assembly

The draft law envisages a new person – an authorized representative of an executive body of power or bodies of local self-government who plays a key role in the holding of a peaceful assembly. This person has very broad and unclear grounds for stopping a peaceful assembly. It is interesting that these grounds are even broader than those for banning such an assembly through the courts. This can easily be seen by comparing Articles 16 and 22 of the draft law.

There is a positive aspect to there being such a person making it possible to better coordinate the actions of the local authorities however their powers with regarding to stopping peaceful assembly in our opinion are in contravention of the Constitution. Article 39 states that only the court is allowed to restrict freedom of peaceful assembly. Clearly, in the case of an offence, then the police may also impose such restrictions. There is no provision in the Constitution for granting such powers to representatives of the authorities. This also makes applications to the court to have a gathering banned redundant since this can be done without court order and on the basis of a much broader range of grounds.

In our opinion, no representatives of executive bodies should have such powers to stop peaceful assemblies, and such clearly defined powers can only be held by the police.

We should also point out that the grounds on which such an authorized representative would be able to stop a peaceful gathering are effectively unlimited.

It is also clear that such an authorized representative cannot control the police, and therefore his or her orders, without being agreed with an authorized representative of the law enforcement bodies cannot, in principle, be carried out. Yet this potential conflict between authorized representatives is not resolved in the draft law.

It is important that the law stipulates the time frame for court examination of applications to have a peaceful assembly stopped, as well as for appeals against this. In practice, it is impossible to reinstate a person's violated right since they receive an appellate court ruling cancelling the ruling of a local court which cancelled the peaceful assembly many months later. This situation

deprives a person of the protection of their rights through the courts as envisaged by the Constitution.

The Code of Administrative Justice stipulates that applications by the authorities to have a gathering banned should be reviewed by the court before the beginning of the gathering (in practice several days or hours before). That means that the organizers do not have time to reinstate their right since the appeal takes months. The law, in our opinion, should stipulate special time frames for the examination of appeals against the banning of meetings, just as legislation does with regard to the elections. Unfortunately this is not provided by the draft law.

Liability

The draft law considerably broadens the grounds for holding organizers of peaceful assemblies responsible, yet there is no liability stipulated for representatives of the authorities. The latter is needed for failure to carry out duties with regard to providing proper protection of participants in a peaceful gathering, obstruction in holding a peaceful gathering through the issue of unlawful decisions, or through inaction (for example, in not accepting notification of plans for a peaceful gathering), as well as compensation for damages incurred by the organizers or participants through unlawful decisions by representatives of the authorities.

It is clear that simply stating that it is possible to appeal against unlawful actions or inaction by the authorities through the courts is not enough since the law does not even stipulate the time frame for examination of such cases, which in present conditions where court proceedings are drawn out makes the renewal of this right meaningless.

Overall conclusion

In our opinion, the draft law does not comply with the requirements of the European Convention on Human Rights and Fundamental Freedoms in the context of European Court case law, OSCE Recommendations for legislation on freedom of peaceful assembly (approved by the Venice Commission); the Council of Europe Recommendations for legislation on religion and faith (approved by the Venice Commission from 18-19 June 2004 and the OSCE Parliamentary Assembly on 5-9 July 2004), and in view of this, also the Ukrainian Constitution in the light of its interpretation of particular rights and individual freedoms.

We believe that this draft law needs conceptual refining and cannot be passed in its present form or with merely cosmetic amendments. We consider that the adoption of this draft law will:

- significantly narrow the scope of existing freedom of peaceful assembly;

- lead to social tension due to the unwarranted stopping of peaceful assembly.