

I. THE WAY WITHOUT A SPECIAL LAW

First of all we would like to mention, that the Draft Laws should be considered not only in terms of international standards, but also taking into account the Ukrainian practice. And the today's reality of Ukraine is such that a special law on peaceful assemblies would be harmful for the democracy of our country. And there are three arguments against a special law in Ukraine:

- 1) Civil society of Ukraine is still too weak to control the Parliament well, and too weak to stop harmful changes into a special law during the future political crises. The authors of most of these and previous special Draft Laws on peaceful assemblies tried to adopt some excessive duties of the protesters, and over-regulate freedom of assembly.
- 2) Current police reform in Ukraine is not successful - we still have execution of illegal orders and excessive use of force of law-enforcement governmental agencies as in other post-USSR countries. Recent constitutional judicial reform in Ukraine increased the influence of the President to appoint the judges, and expanded opportunities for the executive power to arrest the judge's[3]. And in the other hand - the judicial reform did not affect the actual influence of the local authorities. That's why the central and the local authorities retain the influence on the courts.
- 3) Problems with freedom of assembly in Ukraine exist not due to the absence of any new laws, but due to a very low level of knowledge of nowadays laws in Ukraine. For example, in our country human and citizens rights and freedoms, and the guarantees of these rights, are determined exclusively by the laws of the Parliament of Ukraine (art. 75 and 92 of the Constitution)[4]. But over the decades some local authorities without any delegated permissions from the Parliament of Ukraine in unconstitutional way prohibit the parties[5], implement the unconstitutional curfew for citizens[6], adopt unconstitutional local rules for peaceful assembly[7]. Even the administrations of high education institutions accept unconstitutional acts about the freedom of assembly of the students[8].

We know that even now not all the countries of Europe have some special laws on peaceful assemblies. If we take a look at the whole world – United Nations Special Rapporteur Christof Heyns said in his report about the countries of the world in 2011[9]: *“About the 76 countries considered have specialised legislation in place on demonstrations. In other countries, demonstrations are regulated together with other public order issues or in the countries’ penal codes”*. In Ukraine there is no lawmaking custom to inscribe the duties of common people into the laws about the duties of executive and judiciary powers of the country. That's why we offer a safer way for Ukrainian society - to amend and fix the nowadays laws of Ukraine on freedom of assembly and to rewrite some secondary legislation acts.

Several Ukrainian deputies think in a similar way, that's why today there are five “not special” Draft Laws about peaceful assembly in our Parliament: 1779[10], 2073[11], 2391[12], 2651[13] and 4479[14]. And some of these Draft Laws are really progressive (4479, 2391, 1779), and we would like you to look at them.

II. COMMENTS ON THE DRAFT LAWS №3587 AND №3587-1

Our experts are sure that the Draft Law №3587-1 is much more liberal and less aggravating regulation of freedom of assembly than the Draft Law №3587. But the dangers of adoption even the best special law are mentioned above.

Our comments on the Draft Law №3587:

1. THE LEGITIMATION OF POWER DISPERSAL OF ASSEMBLY.

According to the Draft Law the National Police, National Guard and other law-enforcement agencies of Ukraine will determine whether the assembly has lost the peaceful nature and will announce the time frame within which the people must disperse (art. 18, Draft Law №3587):

Article 18. Actions of the National Police, National Guards of Ukraine and other law-enforcement bodies in case an assembly ceases to be peaceful

1. The National Police, National Guards of Ukraine and other law-enforcement bodies, shall, according to their competence, announce assembly's ceasing to be peaceful, if its participants massively apply violence, or through their actions prevent detention of persons applying violence during peaceful assembly, unless violence cannot be otherwise stopped.

2. Announcement on assembly's ceasing to be peaceful shall contain information on:

1) time provided for leaving the place of assembly for persons, who do not participate in acts of violence;

2) the possibility to realize one's right to peaceful assembly in such a way as not to prevent legal actions of employees of the law-enforcement bodies, including by holding a spontaneous assembly.

Then the law-enforcement forces can detain and indiscriminately force to disperse all the protesters for any formal reason (all of them are unlawful – see for example European Court of Human Rights decisions in cases *Vyrentsov v. Ukraine*, *Shmushkovich v. Ukraine*, *Shvydka v. Ukraine*. The law-enforcement can disperse all the protesters for "malicious disobedience of a lawful order or demand" (art. 185, the Code of Ukraine about Administrative Offences[15]) or "resistance to the representative of a law enforcement body" (art. 342, the Criminal Code of Ukraine[16]), "hooliganism" (art. 173, the Code of Ukraine about Administrative Offences; or art. 296 the Criminal Code of Ukraine), "group public nuisances" (art. 293, the Criminal Code of Ukraine) or "mass riot" (art. 294, the Criminal Code of Ukraine).

Several provocateurs at the peaceful assembly or myths about them will be enough to start the procedure of forceful dispersal of the protesters and to legally use the force even against the peaceful protesters who just will not listen.

2. "DANGEROUS" ASSEMBLY WITHOUT NOTIFICATION IS ILLEGAL.

According to the Draft Law the National Police, the National Guard and other law enforcement agencies will decide on the spot whether the people have the power to hold the peaceful assembly without prior notice since "spontaneous" assembly has two criteria – urgency and impossibility of notification within the period of 48 hours (clause 5, p. 1, art. 1, Draft Law №3587):

Article 1. Definitions

...

5) spontaneous peaceful assembly shall mean a peaceful assembly constituting an instrument of immediate responding by society or a group of people to a certain event or information, notice of which could not be filed within the period established by the Law.

Such wording in the law would create considerable discretionary power for authorities in definition of “spontaneity”. Given the level of development of the law enforcement bodies in Ukraine, this would impose a significant threat to the restrictive interpretation of the law.

Only the National Police, National Guard and other law-enforcement agencies of Ukraine will determine whether the assembly has the peaceful nature, has lost the peaceful nature, and whether the assembly is spontaneous (art. 18, Draft Law №3587). Also people will have to hold the assembly only within the framework established by the special law (clause 1, p. 3, art. 6; clause 1, p. 2, art. 5; sub clause 2, p. 2, art. 18, Draft Law №3587). Therefore due to the “non spontaneity” of the assembly without notification the law-enforcement authorities will be able to detain people for "malicious disobedience of a legal order or request" or "resistance to the representative of a law enforcement body" (art. 185, the Code of Ukraine about Administrative Offences ; art. 342, the Criminal Code of Ukraine). It would be particularly difficult for the people to prove the “spontaneity” of assembly, if they still come to the protest after the injunction. Law enforcement officers would detain them for “organizing and holding of peaceful assembly in violation of the judicial prohibition” (paragraph 1, clause 2 p. 2 “Final and Transitional Provisions” section, Draft Law №3587) or "resistance to the representative of a law enforcement body" (art. 342, the Criminal Code of Ukraine).

The absence of notification on holding a peaceful assembly can also serve as additional basis for the assembly’s injunction (p. 7, p. 2, art. 16, Draft Law №3587):

Article 16. Restricting the right to freedom of peaceful assembly

...

7. Untimely notification of holding a peaceful assembly shall not result in its restriction, unless grounds for restriction defined in part two of this Article are available.

3. THE LEGITIMATION OF A “DEADLINE” FOR NOTIFICATION ABOUT ASSEMBLY AND OF A POSSIBILITY FOR ITS PROHIBITION ANY TIME

The courts of administrative jurisdiction will receive new, legitimate reasons to ban peaceful assembly at any time, before the start and the end of the assembly, if “circumstances determining the need of addressing a court” are present (paragraph 4, p. 1, clause 1 p. 2 “Final and Transitional Provisions” section, Draft Law №3587):

2. The following legislative acts of Ukraine shall be amended as set forth below:

1) Code of Administrative Court Proceedings of Ukraine (Vidomosti Verkhovnoi Rady Ukrainy, 2005, No. 35 - 36, No. 37, p.446):

...

The statement of claim must be filed directly by administrative court within twenty four hours after registration of notice of holding a peaceful assembly.

If circumstances determining the need of addressing a court emerge after expiry of this period, statement of claim may be filed not later than twenty four hours from the day of emerging of these circumstances without regard to the beginning of the peaceful assembly.

For example, an organizer of peaceful assembly submits the notice exactly 48 hours before the peaceful assembly. Then the city officials respectively either manage to file a claim in the period of 48 to 24 hours prior to the assembly, or not. However, in the time period of 24 hours prior to the start of the campaign up until its completion the city officials can come up with the moment

of occurrence of “circumstances determining the need of addressing a court”, which would allow them to have additional 24 hours to file a claim.

Also the Draft Law sets an unified period of notice no later than 48 hours prior to the holding of peaceful assembly (part 1, article 7, Draft Law №3587). Taking into consideration the unsuccessful judicial reform, which has just started, and decentralization reform in Ukraine, the “deadline” of 48 hours will significantly increase the risk of politically motivated injunction of meetings by instruction of local or central authorities.

The “deadline” of 48 hours from the Draft Law №3587 was mentioned in the thirteenth report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the situation of human rights in Ukraine^[17], based on the work of the United Nations Human Rights Monitoring Mission in Ukraine (HRMMU), which covers the period from 16 November 2015 to 15 February 2016: *“On 7 December 2015, the Parliament of Ukraine registered a draft law ‘On Guarantees for Peaceful Assemblies’. ...it requires notification two days prior to assembly. Furthermore, the draft foresees judicial discretion in prohibiting rallies that threaten “public order and safety”. These two requirements can lead to arbitrary prohibition or limitation of peaceful assemblies by discouraging legitimate protest activity and allowing for broad judicial authority to restrict lawful protests”.*

It is worth noting that in spite of the fact that the Draft Law №3587 specifies the constitutional basis for injunctions (article 16, Draft Law №3587), this would only lead to the specified patterns of prohibitive resolutions, primarily because the real thorough judicial reform in Ukraine has not been carried out yet.

It is dangerous if “the decision of the the Cabinet of Ministers [Ukrainian Government], in the corresponding territory, of quarantine according to the Law of Ukraine On Protecting Population from Infectious Diseases, if such decision provides for possibility of the court to impose restrictions for exercising the right to freedom of peaceful assembly for the purpose of protecting population from epidemics (outbreak) of especially dangerous infectious disease (clause 6, p. 2, art. 16, Draft Law №3587) is recognized as a ground for prohibiting peaceful assemblies. This legislative innovation can take place only if quarantine restrictions on the rights are confirmed by the relevant decision of the Verkhovna Rada of Ukraine, along with the procedures of public emergency or martial law. Such a rule contradicts art. 92 of the Constitution of Ukraine which stipulates that only law defines the rights and freedoms of a person and a citizen, and guarantees of these rights and freedoms.

The untimely notification on holding a peaceful assembly can serve as additional basis for the assembly’s injunction (p. 7, p.2 art. 16, draft law №3587).

4. NEW LOCAL RULES OF PEACEFUL ASSEMBLY.

The Draft Law allows local authorities to adopt new acts, designed to restrict freedom of assembly – now, under the special law on peaceful assembly in matters that this law does not regulate (clause 4 p. 2, p. 4 and p. 5 of “Final and Transitional Provisions” section, draft bill №3587):

2. The following legislative acts of Ukraine shall be amended as set forth below:

...

4) *Law of Ukraine On Local Self-Government In Ukraine (Vidomosti Verkhovnoi Rady Ukrainy, 1997, No.24, p. 170): Article 38, part one, paragraph “b”, subparagraph 3 shall have the following wording: “3) resolving, according to the law on freedom of peaceful assembly, of issues related to securing holding of peaceful assemblies;...*

In particular, the draft bill may legitimize additional regulation by the local authorities of the permissible number of assembly participants, or identification of places where installation of tents by participants *"impede road traffic, movement of pedestrians and blocks access to buildings"* (p. 2 art. 3, clause 3 p. 2 art. 5, draft law №3587).

Today there are approximately 50 unconstitutional acts of local authorities that remain in Ukraine. As of June 2014 such acts were recorded[7] in 53 settlements among 492 surveyed regional, district centers and cities of regional subordination (about 10.8 %). These acts are the legacy of the USSR — in 1988 in order to stop the national liberation movements Presidium of the Verkhovna Rada of USSR allowed local authorities to regulate the procedure of peaceful assembly "according to local conditions" (Decree of Presidium of the Verkhovna Rada of USSR dated July 28,1988 No. 9306-XI On Organizing and Holding Assemblies, Meetings, Street Processions and Demonstrations in the USSR[18]). But since the adoption of the Constitution of Ukraine in 1996 all such acts of local assemblies are unconstitutional or have some unconstitutional norms (art. 8, p. 2, art. 19 , p. 39 , p. 75, p. 1 art. 92 of Constitution). Moreover, the Decision of the Supreme Court of Ukraine № 5-49кc13 of 3 March 2014[19] and the Decision of the Constitutional Court of Ukraine No. 6-пр/2016 of 8 September 2016[20] also prove that Decree of 1988 is unconstitutional. That is why from the time of the adoption of the Constitution local activists, human rights activists or politicians gradually eliminated most of such unconstitutional acts, also with the help of the courts. Not in every city where such acts remained they hamper the assemblies - in some places local government simply forgot about it, somewhere people persistently ignore these acts as unlawful orders (p. 1 art. 19, art. 60 of Constitution, p. 2 art. 41, the Criminal Code of Ukraine). For example, people ignore them in Kyiv and Kharkiv, where local deputies have not abolished such unconstitutional documents yet.

All the problems with the Local Self-Government acts could be solved by the adoption of the Draft Law №4479 "On amendments to some legislative acts on the non-use of separate legal acts of the Communist totalitarian regime and local self-government contradicting the Constitution and threaten the unitary structure of Ukraine on the territory of the country"[14]. It would create a permanent legal reason to appeal in the court such acts, and insert some reliable fuses against appearance of such acts in future into the laws 'On Local Self-Government' and 'On the Capital of Ukraine – Hero City of Kyiv'.

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[1] http://www.npd.in.ua/?page_id=12

[2] <http://www.venice.coe.int/webforms/documents/?opinion=854&year=all>

[3] <http://www.npd.in.ua/?p=28>

- [4] <http://zakon5.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/print1472973317809973>
- [5] http://www.bbc.com/ukrainian/politics/2015/04/150417_ivano-frankivsk_prohibit_party_dk
- [6] <http://www.radiosvoboda.org/a/1947485.html>
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[http://studmisto.knu.ua/%d0%bf%d0%be%d0%bb%d0%be%d0%b6%d0%b5%d0%bd%d0%bd%d1%8f-%d0%bf%d1%80%d0%be-%d1%81%d1%82%d1%83%d0%b4%d0%b5%d0%bd%d1%82%d1%81%d1%8c%d0%ba%d0%b5-%d0%bc%d1%96%d1%81%d1%82%d0%b5%d1%87%d0%ba%d0%be-%d1%82/](http://studmisto.knu.ua/%d0%bf%d1%80%d0%b0%d0%b2%d0%b8%d0%bb%d0%b0-%d0%b2%d0%bd%d1%83%d1%82%d1%80%d1%96%d1%88%d0%bd%d1%8c%d0%be%d0%b3%d0%be-%d1%80%d0%be%d0%b7%d0%bf%d0%be%d1%80%d1%8f%d0%b4%d0%ba%d1%83/)
- [9] <http://www.icnl.org/research/resources/assembly/Report%20of%20the%20Special%20Rapporteur%20on%20extrajudicial%20summary.pdf>
- [10] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53612
- [11] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53949
- [12] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54424
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- [15] <http://zakon5.rada.gov.ua/laws/show/80731-10/print1472973317809973>
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- [17] http://www.ohchr.org/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf
- [18] <http://zakon4.rada.gov.ua/laws/show/v9306400-88>
- [19] [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(print\)/E6AED63678316B1CC2257CA00054708C](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(print)/E6AED63678316B1CC2257CA00054708C)
- [20] <http://www.ccu.gov.ua/novyna/pres-reliz-u-spravi-za-konstytucijnym-podannyam-upovnovazhenogo-vru-z-pravlyudyny-pro>, <http://www.ccu.gov.ua/sites/default/files/docs/6-pn.pdf>