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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT JOINT OPINION

**ON THE AMENDMENTS OF 17 MARCH 2008
TO THE LAW ON CONDUCTING MEETINGS,
ASSEMBLIES, RALLIES AND DEMONSTRATIONS
OF THE REPUBLIC OF ARMENIA**

**by the Venice Commission
and
OSCE/ODIHR**

on the basis of comments by

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I. Introduction

1. *The Law on conducting meetings, assemblies, rallies and demonstrations was amended on 4 October 2005, following extensive consultation with the Council of Europe Venice Commission and with the OSCE/ODIHR, and has been in force since then.*

2. *On 19 February 2008, presidential elections took place in Armenia. According to the report of the Council of Europe Human Rights Commissioner on his Special Mission to Armenia¹, During nine days following the elections, peaceful demonstrations took place on the Opera square, in Yerevan. On 1 March, the national police and military forces tried to disperse the protesters. Clashes occurred between the police forces and the demonstrators in front of Myasnikyan's monument and the French Embassy, which resulted in the death of eight persons. That same night, the President declared State of Emergency in the capital Yerevan for a period of twenty days. On 2 March, the National Parliament endorsed the Presidential decree on Declaration of state of emergency.*

3. *The decree on the state of emergency established inter alia the ban on meetings, rallies, demonstrations, marches and other mass events.*

4. *On 17 March 2008, in the course of an extraordinary session, the Armenian parliament adopted in first and second reading the "law on amending and supplementing the Republic of Armenia law on conducting meetings, assemblies, rallies and demonstrations". This law was promulgated by the President of the Republic and entered into force on 19 March 2008.*

5. *The Law on conducting meetings, assemblies, rallies and demonstrations as it results from the amendments of 19 March appears in document CDL(2008)036.*

6. *By a letter of 21 March 2008, Mr Tigran Torossyan, Speaker of the Armenian parliament, requested the opinion of the Venice Commission on the amendments of 17 March 2008.*

7. *The present opinion was prepared on the basis of comments by Ms Finola Flanagan, member of the Commission in respect of Ireland, and by the OSCE/ODIHR Expert Panel on the Freedom of Assembly. It was sent to Mr Torossyan on ... and was subsequently endorsed by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. General observations

8. The Venice Commission and ODIHR worked extensively on the law which was ultimately adopted by the National Assembly of the Republic of Armenia on 4 October 2005 and is contained in CDL(2005)089. The opinion adopted by the Venice Commission at its 64th Plenary Session in October 2005 on this law was generally favourable and most recommendations which had previously been made were taken up and reflected in the law. Nonetheless, certain criticisms remained which were set out in the opinion. The Venice Commission and OSCE/ODIHR also recommended in paragraph 16 of the opinion that some official means of monitoring the application of the law and of collating relative statistics should be devised.

¹ Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his special mission to Armenia, 12 – 15 march 2008, Links to document: [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH\(2008\)11&Language=lanEnglish&Ver=original&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2008)11&Language=lanEnglish&Ver=original&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679)

9. On 17 March 2008, however, without the benefit of any information following such monitoring and presumably in response to the violent events of the previous weeks (see para. 2 above), the National Assembly of the Republic of Armenia proceeded to make significant amendments to the law adopted in October 2005. All of the amendments now proposed relate to matters which have been considered of significance by the Venice Commission and OSCE/ODIHR in its previous analysis. On the basis of a preliminary assessment, the Venice Commission and the OSCE/ODIHR Expert Panel on Freedom of Assembly do not consider the proposed amendments to be acceptable, to the extent that they restrict further the right of assembly in a significant fashion.

III. Analysis of the proposed amendment

A. Amendments to Article 9.4.iii and Article 13

10. The proposed amendment to Article 9.4(iii) must be read together with the amendment to Article 13.1(iii). They extend the grounds for imposing limitations upon, or prohibiting, public assemblies. These grounds now include situations where an assembly: urges the violent overthrow of the constitutional order, incites ethnic, racial or religious hatred, advocates violence or war, or threatens national security, public order, public health, public morals, or the constitutional rights and freedoms of others. These aims are as such in compliance with relevant international standards, most importantly, Article 21 of the International Covenant on Civil and Political Rights² (hereinafter referred to as "ICCPR") and Article 11.2 of the European Convention on Human Rights.³ (hereinafter referred to as "ECHR").

11. It should, however, be borne in mind that the rigorous and consistent interpretation of these grounds is of utmost importance. Moreover, the ultimate touchstone in deciding whether an assembly should be restricted or banned is the imminent threat of violence. The OSCE/ODIHR Guidelines, which were prepared in consultation with the Venice Commission, note that *"the restriction of assemblies that promote views considered to be unconstitutional is a form of content regulation and thus an unjustifiable incursion on freedom of peaceful assembly."*⁴ The Guidelines further elaborate on this point by stating that *"While the content or message of an assembly should not of itself lead to its classification as unlawful, a difficulty arises where the subject matter constitutes a criminal offence, or could be construed as inciting others to commit an offence. While a speaker can be arrested for incitement if he or she intentionally provokes people to commit violent actions, this is inevitably a question that must be assessed based on the particular circumstances, and a high threshold must be overcome. To suggest that assemblies might legitimately be restricted on the basis of their having unlawful objectives errs dangerously close to content-based restriction [...] In all cases, the touchstone must be the existence of an imminent threat of violence."*⁵

12. The proposed amendment in Article 9.4.iii relating to the procedure for verifying the reliability of information raises additional serious concerns. The new provision that where

² International Covenant on Civil and Political Rights, Article 21 'No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.'

³ European Convention on Human Rights, Article 11(2) 'No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'

⁴ OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, at para 74.

⁵ *Id.*, at para 135.

the Police or National Security Service “has issued an official opinion” that data concerning forcible overthrowing of the constitutional order, threats of violence, threats to health and morality or to encroachments on some of the constitutional rights and freedoms of others may be “considered credible” and therefore that the assembly may be prohibited, is excessive.

13. It would seem that the opinion of the Police or the National Security Service would be final on the issue. It would appear that the protections included in the current Article 13, which deals with prohibition on the conduct of mass public events, would not apply where such an opinion is issued. So, no “justified and clear explanation of the grounds whereby the mass event is prohibited” would be required. The Amendment appears to foreclose any opportunity to have the grounds or merits of such an assessment reviewed by an independent tribunal or court. The clause would also appear to fetter the discretion of the courts if such a review were to occur.

14. Nor would there be any power to offer organisers other dates or other places for their demonstration. The question of what is “credible data” on these important matters which would ground prohibition seems to be left entirely in the hands of the Police or the National Security Service. There would therefore be no right to an effective remedy for a significant limitation on a fundamental right.

15. It is important to remember that restrictions may be allowed for the regulation for public order as a legitimate aim and the State is given a wide margin of appreciation in order to deal with disorder or crime or to protect the rights and freedoms of others. Article 11 ECHR is a “qualified” right and the State is therefore entitled to justify what is a prima facie interference with the right. However the issuing of an opinion by the Police or the National Security Service without any possibility of challenge could not amount to justification. The European Convention on Human Rights permits restrictions to be placed on the right of Freedom of Assembly only in the circumstances listed in Article 11.2. The proposed amendments would have the capacity to permit the State authorities to restrict assemblies for reasons which are not permitted by the Convention and which were excessive⁶.

16. The OSCE/ODIHR Guidelines refer on a number of occasions to the need to allow for a decision to be appealed to an independent tribunal or court before the notified date of the event.⁷ Importantly, the Guidelines state that “[t]his should be a *de novo* review, empowered to quash the contested decision and to remit the case for a new ruling.”⁸ In relation to the restriction of events already underway, the Guidelines further provide: “*In such circumstances, it would be appropriate for other civil authorities (such as a prosecutor’s office) to have an oversight role in relation to the policing operation, and the police should be accountable to an independent body. In the same way that reasons must be adduced to demonstrate the need for prior restrictions, any restrictions imposed in the course of an assembly must be equally rigorously justified. Mere suspicions will not suffice, and the reasons must be both relevant and sufficient.*”⁹

17. The Guidelines also underline the importance of procedural transparency to “*ensure that freedom of peaceful assembly is not restricted on the basis of imagined risks or even real risks that, if opportunities were given, could be adequately reduced prior to the event.*”¹⁰

⁶ See CDL-AD(2004)039, Opinion on the law on conducting meetings, assemblies, rallies and demonstrations, adopted at its 60th Plenary Session in October 2004.

⁷ *Id.*, at paras.103 -111.

⁸ *Id.*, at para.110.

⁹ *Id.*, at para.85.

¹⁰ *Id.*, at para.43.

The amendment introduced by Article 9(4)(3) is fundamentally incompatible with the need for such transparency.

18. It should further be emphasized that a high standard of proof must be satisfied in order for a risk to be deemed sufficiently serious to justify restrictions. In this regard, as the Guidelines state, *“restrictions imposed on the basis of the possibility of minor incidents of violence are likely to be disproportionate, and any isolated outbreak of violence should be dealt with by way of subsequent arrest and prosecution rather than prior restraint.”*¹¹ Furthermore, *“a hypothetical risk of public disorder” is not a sufficient basis for restricting an assembly*¹², and *“[t]he burden of proof should be on the regulatory authority to show that the restrictions imposed are reasonable in the circumstances.”*¹³

19. Similar objections can be made to the proposed addition of Article 9.6 which provides *“[in] cases where mass public events has turned into mass disorder that has lead to human casualties, then, in order to prevent new crimes, if other means of prevention have been exhausted, the authorised body may temporarily prohibit the conducting of mass public events until discovering the crime circumstances and the persons that committed crimes.”*

20. It is not clear whether this provision is intended to enable the termination of the particular assembly during which lives have been lost, to temporarily ban other assemblies in the wake of such loss of life, or both. Whichever of these interpretations is correct, the provision unduly expands the discretion afforded to the Police and National Security Service, and thus greatly increases the potential for arbitrary restrictions.

21. If this provision is intended to enable the restriction of the particular assembly during which lives have been lost, it is noted that adequate powers to terminate such an assembly already exist under Article 14 of the legislation. In addition, it must be emphasized that violence by a minority of participants should not automatically result in the dispersal of the entire event, and the Police and National Security Service must always distinguish between violent and non-violent participants. Two Strasbourg cases are directly relevant in this context. In *Ziliberberg v. Moldova*, the European Court of Human Rights stated that: *“an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.”*¹⁴

20. Similarly, in *Ezelin v. France*, the Court held that *“the freedom to take part in a peaceful assembly [...] is of such importance that it cannot be restricted in any way [...] so long as the person concerned does not himself commit any reprehensible act on such an occasion.”*¹⁵

22. Furthermore, Article 9.6 – because it does not specify how the loss of life has occurred – potentially allows the Police or National Security Service to disperse an assembly where the authorities themselves have used excessive force resulting in the loss of life. As such, this provision potentially undermines the State’s positive obligation to protect the right to freedom of peaceful assembly where the organizer and participants have peaceful intentions.

¹¹ *Id.*, at para.63.

¹² *Id.*

¹³ *Id.*, at para.108.

¹⁴ ECtHR, *Ziliberberg v. Moldova* decision of 4 May 2004.

¹⁵ ECtHR, *Ezelin v. France* judgment of 26 April 1991, § 53.

23. If Article 9.6 is designed to enable the temporary prohibition of other assemblies in the aftermath of any loss of life, it enables the imposition of blanket prohibitions on wholly unrelated events. This provision does not permit each case to be considered on its own merits and restrictions can be imposed only where there is a proper link to a permissible reason for restrictions as set out in Article 11.2 ECHR. There is no overriding requirement in any given case that a restriction would have to be proportionate and for relevant and sufficient reasons. As was stated in the opinion of October 2004, paragraph 12 “[the] State may be required to intervene to secure conditions permitting the exercise of the Freedom of Assembly and this may require positive measures to be taken to enable lawful demonstrations to proceed peacefully. This necessarily means that laws regulating assemblies must not in any circumstances create unjustifiable restrictions in relation to holding peaceful assemblies”.

24. As the Guidelines note, *“the blanket application of legal restrictions – for example, banning all demonstrations during certain times or in any public place that is suitable for holding assemblies – tend to be overly inclusive and will thus fail the proportionality test because no consideration has been given to the specific circumstances of each case.”*¹⁶ Indeed, prohibitions should only ever be a measure of last resort. As further emphasized by the Guidelines: *“Prohibition ... is a measure of last resort, only to be considered when a less restrictive response would not achieve the purpose pursued by the authorities in safeguarding other relevant interests. Furthermore, given the state’s positive duty to provide adequate resources to protect peaceful assembly, prohibition may actually represent a failure of the state to meet its positive obligations.”*¹⁷

25. The vague wording of the Article 9.6 provision further aggravates these concerns. It is, for instance, unclear whether only assemblies in the immediate vicinity may be banned, or whether a nationwide ban may be introduced.

26. Similarly, the absence of any express time limitation or “sunset” clause (other than “until the circumstances of the committed offences and the identities of the perpetrators have been established”) means that this provision has potentially far-reaching and deleterious consequences. Whilst the power given is a temporary one, nonetheless the prohibition would appear to be able to be continued until the State authorities had completed all investigations in relation to criminal circumstances. This would allow the authorities arbitrarily to prohibit assemblies where there was no longer danger or violence or no legitimate aim for such prohibition.

B. Amendments to Article 10 and Article 14.1.i.

27. The removal of the text concerning non-mass public events which grow spontaneously into a mass public event in effect prohibits spontaneous assemblies. It is important to note that earlier opinions of the Venice Commission and OSCE/ODIHR objected to previous versions of the law not allowing spontaneous assemblies which are undoubtedly guaranteed under Article 11 ECHR. Indeed, the joint OSCE/ODIHR and Venice Commission Opinion of the 2005 amendments to the Law had praised the – now amended - Article 10 to the extent that it allowed expressly for non-mass public events (involving less than 100 participants) to grow “spontaneously” into mass public events. *“This clarification, which was recommended, is*

¹⁶ OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly (CDL(2005)048), at para 38.

¹⁷ *Id.*, at para.84.

welcomed. Previous opinions were particularly critical of the law's failure to permit spontaneous demonstrations."¹⁸

28. This is a step backwards which – given the definition of “participant” in Article 2 of the legislation – would allow the authorities to disperse as unlawful a non-mass event where the numbers “*present in the place of the public event*” swelled to more than 100 people, so long as the Police or National Security Service regarded their purpose to be that of taking part in the event. As such, it undermines the presumption that freedom of peaceful assembly should always be facilitated so long as its exercise remains peaceful. Furthermore, the Law does not provide for a defense for participants charged with taking part in an unlawful assembly if they were unaware of the unlawful nature of the event.¹⁹

29. As the OSCE/ODIHR Guidelines note, “*t]he ability to respond peacefully and immediately (spontaneously) to some occurrence, incident, other assembly, or speech is an essential element of freedom of assembly. Spontaneous events should be regarded as an expectable (rather than exceptional) feature of a healthy democracy. As such, the authorities should protect and facilitate any spontaneous assembly so long as it is peaceful in nature. The issue of spontaneous assemblies merits special attention with regard to the requirement of prior notification. The law should explicitly provide for an exception from the requirement of prior notification where giving prior notification is impracticable. The law should also provide a defence for participants charged with taking part in an unlawful assembly if they were unaware of the unlawful nature of the event. Furthermore, if there are reasonable grounds for compliance with the notification requirement, then no liability or sanctions should adhere.*”²⁰

C. Amendments to Articles 10.4, 12.1, 12.4 and 12.8

30. The amendment proposed to Article 10.3 (not 10.4 as contained in the text supplied) requires 5 rather than 3 working days and notice to the authorities.

31. Similarly the extension of the time within which an authorised body is required to start consideration of a notification to 3 full working days rather than from 12 o'clock on the day following notification, together with the deletion of the requirement that consideration shall not take more than one hour and can not be put off to the next day, has the potential to be a significant and arbitrary interference with the right of the public to assemble.

32. As regards the deletion of the clause in Article 12.8, it is not clear what is intended to be the effect of the deletion of the words “by 16:00 of the working day following the receipt of the notification...”. The current Article 12.8 ensured that the authorised body took a decision within a reasonable time in circumstances where it intended to prohibit an assembly, failing which the assembly was entitled to proceed according to the terms of the notification. Now there is no time limit on the authorised body and it is not clear at what point the authorised body will have failed to issue a decision on the matter.

33. While no international standards exist specifically on the issue of timeframes involved in notifying the authorities and the related decision-making, there should be proven justifications for lengthening the existing domestic standard. Any move to introduce longer deadlines should be firmly rooted in an assessment of the operation of the Law.

IV. Conclusions

¹⁸ OSCE/ODIHR and European Commission for Democracy through Law (Venice Commission), Opinion on the Law Making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia, at para 22.

¹⁹ *Id.*, para.98.

²⁰ OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, at para 97-98.

34. Three aspects of the amendments passed by the Armenian parliament on 17 March 2008 to the “Law on conducting meetings, assemblies, rallies and demonstrations” raise particularly serious concerns. First, the Amendments in Article 9.4.iii introduce a procedure for the verification of reliability of information used in risk assessment and public order decision-making. This appears to foreclose or limit the opportunity for such decisions to be reviewed by an independent tribunal or court (as ostensibly provided for by Article 13.3 of the legislation), thus raising concerns about the increased potential for arbitrary decisions and the possibility of assemblies being restricted solely because of the content of their message.

35. Second, the Amendments in Article 9.6 introduce new powers relating to the suspension of assemblies where “mass disorder” resulting in loss of life has occurred. To the extent that this provision may be intended to enable the restriction of the particular assembly during which lives have been lost, it is noted that adequate powers to terminate an assembly already exist under Article 14 of the legislation. In addition, it must be emphasized that violence by a minority of participants should not automatically result in the dispersal of the entire event, and the Police and National Security Service must always distinguish between violent and non-violent participants. Furthermore, this provision has the potential to allow the Police or National Security Service to disperse assemblies where the authorities themselves have used excessive force resulting in the loss of life. As such, this provision represents a dangerous incursion on the right to freedom of peaceful assembly.

36. If (alternatively or additionally) Article 9.6 is designed to permit the temporary prohibition of other assemblies in the wake of any loss of life during “mass disorders,” it enables the imposition of blanket prohibitions on wholly unrelated events. Such prohibitions are likely to be manifestly disproportionate as no consideration would have been given by the authorities to the individual circumstances surrounding these other events. Furthermore, the absence of any express geographical limitation or timeframe “sunset” clause (other than “until the circumstances of the committed offences and the identities of the perpetrators have been established”) means that this provision has potentially far-reaching and deleterious consequences.

37. Third, Articles 10.1 and 14.1.i repeal the provision that allowed smaller events to develop spontaneously into “mass” assemblies and requires advance notification of all “mass public assemblies.” This is a retrograde step which – given the definition of “participant” in Article 2 of the legislation – would allow the authorities to disperse as unlawful a non-mass event where the numbers “present in the place of the public event” swell to more than 100 people so long as the Police or National Security Service regarded their purpose to be that of taking part in the event. As such, it potentially runs counter to the presumption that freedom of peaceful assembly should always be facilitated so long as it remains peaceful. Furthermore, the Law does not provide for a defense for participants charged with taking part in an unlawful assembly if they were unaware of the unlawful nature of the event.

38. The Venice Commission and the OSCE/ODIHR Expert Panel on Freedom of Assembly therefore consider that:

a) the procedure envisaged by Article 9.4.iii (for verifying the reliability of information used in both risk assessment and any decisions taken in relation to “thwarting the threat”) should be amended to make explicit that both the grounds for and merits of these assessments can themselves be reviewed and potentially quashed by a Court (as ostensibly provided for by Article 13.3);

- b) All those responsible for assessing risks of this nature should be trained to ensure that they fully appreciate the high threshold that must be overcome before restrictions can legitimately be imposed. Neither hypothetical risks, nor the mere possibility of minor or sporadic outbreaks of disorder, are of themselves legitimate reasons for prohibiting an assembly where the organizers have peaceful intentions;
- c) Article 9.6 should be repealed;
- d) Articles 10.1 and 14.1.i should be reinstated by removing the ban on smaller events developing into 'mass' assemblies;
- e) the amendments to Articles 10.4, 12.1, 12.4 and 12.8 should be revisited and their impact assessed against the policy objective pursued.