



**NICEM RESPONSE TO
OFMDFM
CONSULTATION PAPER
“PUBLIC ASSEMBLIES,
PARADES AND PROTESTS
IN NORTHERN IRELAND”**

JULY 2010

Introduction

NICEM is an independent non-governmental organisation monitoring human rights and racial equality in Northern Ireland. Our aim is to promote good race relations and to endeavour the elimination of racial discrimination and the promotion of racial equality.

Our vision is of a society where equality and diversity are respected, valued and embraced, a society free from all forms of racism, sectarianism, discrimination and social exclusion, where human rights are guaranteed. NICEM works in partnership, to bring about social change through partnership and alliance building, and to achieve equality of outcome and full participation in society.

As an umbrella organisation we currently have 29 affiliated black and minority ethnic groups as full member. NICEM is neither directly nor indirectly involved in the historical and controversial issues related to parades in Northern Ireland; nevertheless the public interest in the rights and freedom of assembly and association is paramount in any civil society.

My personal experiences in Hong Kong as the licensee of key demonstrations, public processions and political meetings on a big scale from the late 1970s onwards have enable me to develop a holistic view of the issues addressed under the Draft Bill. Under the British colonial rules the Public Order Ordinance 1967, the main public order law, which was repressive and disproportionate in its role to curb peaceful assembly. Our experiences in challenging the excessive power of the police under the public order law, as well as other laws aimed at curbing public demonstrations and public meetings in the name of public order and public security, equips me to understand the balance between fundamental rights and state obligations under international human rights law.

Accidentally or otherwise, the Hong Kong Public Order (amendment) Ordinance 1981 is almost identical to the Public Order Act 1986 (the equivalent Public Order (Northern Ireland) Order 1987 in Northern Ireland).¹ The 1981 amendment Ordinance is the product of the struggles of social workers in Hong Kong who organised peaceful public demonstrations on key policy issues such as housing from the 1970s onwards, but were arrested and convicted under the public order offence in 1971 and later in 1979. The original Public Order Ordinance (Cap 245) 1967² which was passed in three readings in one afternoon,

¹ The key feature of the 1986 Act is to set up a notification system in public procession and imposing conditions on public assemblies (Part II Processions and Assemblies: Section 11-16) and “assembly” means an assembly of 20 or more persons (Section 14A(9)); whereas the Hong Kong notification system is, more or less, a licensing system if any public meeting over 20 people in public place and 200 people in private place and over 20 people in public procession (Part III Control of meetings, processions and gatherings: Section 6-17, Public Order (amendment) Ordinance 1981).

² The 1967 Ordinance is almost copy and paste the Public Order Act 1936, the public order law to curb with the fascist movement at that time.

dealt with the public riots in Hong Kong as the result of the Cultural Revolution in China. By nature, it was implemented as emergency law from then on.

The current Public Order Ordinance 1997 added two major clauses³ into the 1995 Ordinance in which repealed most of the 1981 Ordinance that is not compatible with the Hong Kong Bill of Rights Ordinance 1991⁴. Today the 2008 Ordinance regarding the definition of public meetings⁵ is identical in terms of how many people constitute an assembly in Clause 7⁶ of the Draft Bill. Maybe this is another coincidence!

In Northern Ireland decades of communal divisions and violence expressed through parades (religious and political), as well as counter-protests, are not compatible with our post-conflict society and our shared future under the Belfast Agreement. We need to redouble our efforts to promote and to provide social conditions that foster dialogue, engagement and understanding of the meaning of co-existence and inter-dependence between key players, particularly the Orange Institution and the local residents' groups, in order to resolve issues of competing interests in parades and counter-protests under the societal values of human rights, equality, democracy and the rule of law which enshrined in the Belfast Agreement.

In this respect the Bill of Rights for Northern Ireland should be entrenched as the cornerstone of our shared future under the Belfast Agreement. The advice given by the Northern Ireland Human Rights Commission is and should be our blueprint for the future. The new UK Coalition government, as well as the political parties in Northern Ireland, should consider this as a priority and treat it as a matter of urgency.

We welcome the publication of the consultation paper setting up new bodies to replace the current Parades Commission, such as the Office of Public Assembly, Parades and Protest (OPAPP); the Public Assemblies, Parade and Protest Body Appointment Panel (Appointment Panel); and the Adjudication body which will endeavour to tackle decades of communal divisions and violence expressed

³ The first change was the addition of two new grounds on which the Commissioner of Police may object to the holding of a public procession. These are national security and the protection of the rights and freedoms of others (Section 6). The second change was the introduction of a "notice of no objection" system for public processions (Section 7, 8, 13, 13A and 14). Under the new system, after the Commissioner of Police receives a notice of intention to hold a public procession, he is required to notify the person concerned of his decision within the specified time limit. If he objects to the procession, he is required to issue a notice of objection as soon as is reasonably practicable and with the time limit set out in the Ordinance.

⁴ The Hong Kong Bill of Rights Ordinance is copy and paste the provisions of the International Covenant for Civil and Political Rights (ICCPR).

⁵ Amended under the 1995 Ordinance by increasing the number of people from previous 30 to 50.

⁶ Increase from 30 under the 1986 Act to the proposed 50.

through parades and counter-protests.

We also welcome this new political direction, which builds upon the interim report of the Strategic Review of Parading, otherwise known as the Ashdown Report. But the proposal can only work if the key player, in particular the Orange Institution, agreed to work under this framework. The rejection by the Orange Grand Lodge on the Draft Bill last week will cast doubt on the proposals. We urge our political leaders to take ownership and leadership collectively to resolve this historical dispute and to steer our shared future, based on human rights protection, democracy and the rule of law.

The world is watching us, and so are our children and grandchildren. We rely on external investments as well as our exports to different parts of the world. The ugly images of communal violence during the parade season, as well as the racist attacks against minority ethnic people, will not be helpful in terms of inward investment and tourism. This is a new dimension of co-existence and inter-dependence in the global village. We have gone much beyond the lines of orange and green; we are now part of a rainbow of all colors and nations. This forms the basis of cohesion, sharing and integration. And this is our shared future.

Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedom

Introduction

Article 11 provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the rights to form and to join trade unions for the protection of his interests.
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 member so the armed forces, or the police or other administration of the State.

The rights and freedoms protected by Article 11 are closely related to those protected by Article 9 and 10 of the Convention. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association enshrined in Article 11⁷ Freedom of peaceful assembly and of association “are fundamental rights in a democratic society and, like the right to

⁷ Young, James and Webster v UK (1981) 4 EHRR 38 (para.57); United Communist Party v Turkey (1998) 26 EHRR 121 (para.42); Ahmed v UK (1998) 29 EHRR 1 (para.70).

freedom of expression, one of the foundations of such a society”.⁸ Thus it should not be interpreted restrictively.⁹ This includes a right not to be prevented from exercising the rights outside the territory of the Contracting State.¹⁰ Where the organisation of the religious community is in issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified state interference.¹¹

Scope

Article 11 comprises two related rights, freedom of peaceful assembly and freedom of association with others. Primarily, it amounts to a negative right; a right not to be prevented or restricted by the state from meeting and associating with others to pursue particular aims, except to the extent permitted by Article 11(2). This is not confined to restrictions that take place prior to a meeting but also comprises any indirect restrictions on the exercise of the right, including punitive measures consequent on the exercise of the right.¹² In view of its status as a “freedom” it also comprises a right not to be compelled to associate with others. However, Article 11 does not provide solely a “negative right”. Such a conception would not be compatible with its object and purpose.¹³ Article 11 may also require positive measures to be taken, even in the sphere of relations between individuals to ensure that the rights provided are secured.¹⁴ Moreover, freedom of assembly includes the right to protection against counter-demonstrations.¹⁵

Nature

The restrictions laid down in Article 11(2) are similar to those set out in Article 8 to 10 of the Convention. However, the second sentence of Article 11(2) is exceptional in appearing to give the state greater scope to restrict the freedoms of individuals in the armed forces, the police and the administration of the state. The limited interpretation of that sentence that exists suggests, however, that the justification requirements laid down in Article 11(2) apply equally to such individuals.

⁸ *Sidiropoulos v Greece* (1998) 27 EHRR 633; *Rassemblement Jurassien and Unite Jurassienne v Switzerland*, App. No.8191/78; 17 D.R.93.

⁹ *Djavit An v Turkey* App.No.20652/92, Judgment of February 20, 2003, para.56.

¹⁰ *Izmir Savas Karsitlari Dernegi v Turkey*, App.No.46257/99, Judgment of March 2, 2006: the requirement on members of the Izmir Association Against War to obtain permission from the authorities before travelling abroad to meetings of the association did not pursue a legitimate aim and was therefore violate article 11.

¹¹ *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 (para.62); cf. *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13.

¹² *Ezelin v France* (1992) 14 EHRR 362 para.39; *Djavit An v Turkey* App.No.20652/92, Judgment of February 20, 2003, para. 57.

¹³ *Plattform “Arzte fur das Leben” v Austria* (1988) 13 EHRR 204 (para.32).

¹⁴ (1988)13 EHRR 204(para.332), with reference to *X and Y v Netherland* (1986) 8 EHRR 235 (para.23).

¹⁵ See the Commission’s analysis in *Plattform “Arzte fur das Leben” v Austria*, App.No.10126/82; 44 D.R.65.

Who is protected under Article 11?

Article 11 protects the participants and organisers¹⁶ of peaceful assemblies and associations from interference by the state in their activities. Individuals who are prevented from participating in assemblies or associations,¹⁷ or compelled to join such associations, are also protected¹⁸ but Article 11 cannot be relied on by individuals simply on the basis of their membership of an association without them showing a link to the matters complained of¹⁹ Article 11 applies to those who intend to organise a peaceful assembly,²⁰ or form an association.²¹ For an organisation to be a “victim” within the meaning of Article 24 of the Convention, it must be directly prejudiced by the measures at issue. Thus, a complaint by a hunting association regarding the prohibition of its members carrying arms was not considered directly to affect the association’s rights, but only those of its members.²² And, a challenge brought by two Basque associations to “common positions” adopted by Member States of European Union to counter the threat of terrorism were rejected as inadmissible on the basis that there was no direct link between these measures and the applicants (or their spokespersons).²³

Who is bound by Article 11?

The “state” for the purposes of Article 11, includes the state as employer, whether its relations are bound by public or by private law.²⁴ In *Schmidt and Dahlstrom v Sweden*,²⁵ the Court stated that:

“The Convention nowhere makes an express distinction between the functions of a contracting state as holder of public power and its responsibilities as employer. In this respect, Article 11 is no exception.

¹⁶ *United Communist Party of Turkey v Turkey* (1998) 26 EHHR 121(para.24-25); *Grande Oriente d’Italia di Palazzo Giustiniani v Italy* (2002) 34 EHHR 22.

¹⁷ *Rassemblement Jurrassien and Unite Jurassinne v Switzerland*, App. No.8191/78; 17 D.R.93.

¹⁸ *Young, James and Webster v UK* (1981) 4 EHRR 38. The English District Court was doubtful that a committed sex offender could rely on Article 11 to challenge restrictions on his conduct: *B v Chief Constable of Avon and Somerset* [2001] 1 WLR 340 (para.34).

¹⁹ *Steel and Morris v UK*, App. No.68416/01, Dec. 22.10.01 (finding of defamation against member of Greenpeace).

²⁰ *Plattform “Arzte fur das Leben” v Austria* (1998) 13 EHHR 204(paras 32-38); *Rai, Allmond and “Negotiate Now” v UK*, App.No.25522/94(1995) 19 EHHR CD93; *Christians against Racism and Facism v UK*, App. No.8440/78; 21 D.R. 138.

²¹ *United Communist Party of Turkey v Turkey* (1998) 26 EHHR 121 (para.36).

²² *Societatea de Vanatoare “Mistretful” v Romania*, App. No.33346/96, Dec. 4.4.99.

²³ *SEGI v IS States of the EU*, App. Nos6422/02 and 9916/02, Dec.23.5.02. See further *Vatan v Russia*, App. No.47978/99, Dec. 7.10.04 (the specific victim must claim, in this case the regional organisation, and not some larger organisation of which it might, in practice but not in law, form a part).

²⁴ *Swedish Engine Drivers’ Union v Sweden* (1976) 1EHHR 617 (para.37); *Schmidt and Dahlstrom v Sweden* (1976) 1 EHHR 632 (para.33); *Vogt v Germany* (1996) 21 EHRR 205 (para.43) (regarding the applicability of the ECHR in general to civil servants).

²⁵ (1976) 1EHHR 632 (para.33).

What is more, para.2 in fine of this provision clearly indicates that the state is bound to respect the freedom of assembly and association of its employees, subject to the possible imposition of 'lawful restrictions' in the case of members of its armed forces, police or administration. Article 11 is accordingly binding upon the 'state as employer', whether the latter's relations with its employees are governed by public or private law."

"Freedom of peaceful assembly"

1. Informal groupings and activities

The term "assembly" is characterised by less formal groupings than the term "association". It includes private and public meetings,²⁶ processions,²⁷ "sit-ins" on a public road,²⁸ and rallies.²⁹ Freedom of assembly is an essential part of the activities of political parties and the conduct of elections.³⁰ However, in *Adams v Scottish Ministers*,³¹ in the context of a ban on hunting with dogs, the Inner House of the Scottish Court of Sessions held that a material distinction should be drawn between the prohibition of an activity which has the indirect effect of people not assembling to carry out that activity and the prohibition or restriction of assembly itself. The Court held that in the former case, Article 11 was not even engaged.³² In *R. (On the application of Countryside Alliance) v Attorney General*,³³ the majority of their Lordships took the same approach. Baroness Hale considered that the essential purpose of Article 10 and 11 was "to protect the freedom to share and express opinions, and to try to persuade others to one's point of view" such that while the right to protest against the ban would be covered, the right hunt would not.³⁴

2. Violent demonstrations excluded

²⁶ *Rassemblement Jurassien and Unite Jurassienne v Switzerland*, App. No.8191/78; 17 D.R.93; cf. *Cyprus v Turkey*, App. No.25781/94, Judgment of May 10, 2001 (bi-communal meetings, case rejected on facts.).

²⁷ *Christians against Racism and Fascism v UK*, App. No.8440/78; 21 D.R. 138; *Plattform "Arzte fur das Leben" v Austria*, App. No.101267/82; 44 D.R.65.

²⁸ *G v Germany*, App. No.13079/87; 60 D.R. 256 (para.263); cf. *Lucas v UK*, App. No.39013/02, Dec. 18.3.03.

²⁹ *Rai, Allmond and "Negotiate Now" v UK*, App. No.25522/95; (1995) 19 EHRR CD93.

³⁰ *Denmark, Norway, Sweden and Netherlands v Greece* (1969) Y.B.XII.

³¹ [2002] UKHRR 1189 (Outer House) and 2004 S.C. 665 (Inner House).

³² That approach was followed by the English Court of Appeal in *R. (Countryside Alliance) v Attorney General* [2005] EWHC 1677, paras 155 and 159.

³³ [2008] 1 AC 719.

³⁴ [2008] 1 AC 719 §118. See further Lord Hope § 56-57, Lord Brown §143 and Lord Rodger §90 (agreeing with Lord Brown). Lord Bingham disagreed with that approach, however, stating that to restrict their right to assemble: [2008] 1 AC 719 §18. See further *Friend v Advocate* [2007] UKHL 53, (also known as *Whaley v Lord Advocate*), where their Lordships also took the view that Article 11 was not intended to extend the right of assembly for purely social purposes or for the purposes of sport and recreation.

Those who participate in violent demonstrations cannot rely on Article 11.³⁵ However, a “sit-ins” on a public road does not constitute a “violent” demonstration within the meaning of Article 11, even if traffic is stopped as a result.³⁶ In determining whether a demonstration is peaceful, the Commission has focused on the intention of the organisers. Thus, the Commission has held that:³⁷

“[T]he right to freedom of peaceful assembly is secured to everyone who has the intention of organising a peaceful demonstration....[T]he possibility of violent counter-demonstration, or the possibility of extremists with violent intentions....joining the demonstration cannot as such take away that right.”

Even where there is an infringement of a right of peaceful assembly, any incitement to violence will be highly material to issues of justification under Article 11(2).³⁸

3. Assembly on private property not generally protected

In *Anderson v UK*³⁹ the applications had been excluded from a private⁴⁰ shopping mall following allegations of disorderly conduct. The Commission declared an application alleging a violation of Article 11 inadmissible on the ground that the freedom of peaceful association and assembly relates to gatherings of individuals “in order to attain various ends” and does not apply to people assembling for purely social purposes. A further application by individuals seeking to use private property to campaign on local issues was rejected in *Appleby v UK*,⁴¹ although the Court left open the possibility that a state might have a positive right obligation to protect free expression and freedom of assembly within a “corporate town, where the entire municipality was controlled by a private body.”⁴²

Positive obligations to secure the freedom

Positive obligation on the state and margin of appreciation

Although the essential object of Article 11 is to protect the individual against arbitrary restrictions on his rights by public authorities, there may in addition be

³⁵ *Ciraklar v Turkey*, App. No.19601/92; 80-A/B(E) D.R. 46 at 52.

³⁶ *G v Germany*, App. No.13079/87; 60 D.R. 256 at 263.

³⁷ *Christian Against Racism and Fascism v UK*, App. No.8440/78; 21 D.R.138.

³⁸ *Osmanic v The Former Yugoslav Republic of Macedonia*, App. No.50841/99, Dec. 11.10.01.

³⁹ [1998] EHRLR 218.

⁴⁰ As to the right to assemble on private premises, see Kevin Gray and Susan Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space* [1999] EHRLR 46; Fitzpatrick and Taylor, *Trespassers Might Be Prosecuted: The European Convention and Restrictions on the Right to Assemble* [1998] EHRLR 292.

⁴¹ App. No.44306/98; (2003) 37 EHRR 38.

⁴² App. No.44306/98; (2003) 37 EHRR 38 (para.47, citing US case law *Marsh v Alabama* 326 U.S. 501).

positive obligations on the state to secure the effective enjoyment of those rights.⁴³ Where individuals act so as to undermine Article 11 rights, national authorities may be required to intervene in relationships between private individuals to secure their protection.⁴⁴ This may include the need for active police measures to secure the right and further, entails the obligation to investigate violent incidents affecting the exercise of the right.⁴⁵

However, in such cases the European Court of Human Rights have frequently accorded the state a substantial margin of appreciation in balancing the sensitive social and political issues that may arise.⁴⁶

Example of positive obligation: Counter-demonstrations

Freedom of peaceful assembly include the right to protection against counter-demonstrations.⁴⁷ In Plattform “Ärzte für das Leben” v Austria,⁴⁸ the Court stated that:

“[A] demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right of counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the state not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes require positive measures to be taken, even in the sphere of relations between individuals, if need be.”

However, the Court recognised that this obligation is not absolute:

⁴³ Plattform “Ärzte für das Leben” v Austria (1988) 13 EHRR 204 (para.32).

⁴⁴ Gustafsson v Sweden (1996) 22 EHRR 409 (para.45) (obligation to intervene in relations between private individuals to ensure the right not to join an association).

⁴⁵ Ouranio Toxo v Greece, App. No.74989/01 (2007) 45 EHRR 8, para.43.

⁴⁶ Gustafsson v Sweden (1996) 22 EHRR 409 (para.45). For a parallel in respect of the obligations of the EC member States to protect the free movement of goods against counter demonstrations, see Case C-112/00 Schmidberger, Judgment of June 12, 2003, (restriction imposed to allow lawful demonstration) and R. V Chief Constable of Sussex Ex p. ITF [1999] 2 AC 418 arising from police against unlawful demonstrations).

⁴⁷ Plattform “Ärzte für das Leben” v Austria (1988) 13 EHRR 204; Ouranio Toxo v Greece, App. No.74989/01, Judgment of October 20, 2005 (para.37) (the right to protest must not be allowed to go so far as to extinguish or paralyse the right of association. The state is obliged to take measures to protect the latter from the former).

⁴⁸ (1998) 13 EHRR 204 (para.32).

“While it is the duty of contracting states to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.... The Court does not have to assess the expediency or effectiveness of the tactics adopted but only to determine whether there is an arguable claim that the appropriate authorities failed to take the necessary measures.”⁴⁹

Restrictions

1. Punitive measures and criminal sanctions

Punitive measures relating to the exercise of freedom of association and assembly will constitute a restriction that must be justified in accordance with Article 11(2).⁵⁰ However, Article 11 cannot be relied on to resist all forms of restriction on co-operation such as the European Community rules in respect of anti-competitive agreement.⁵¹

2. Chilling effect

A claim that the existence of an offence has the effect of restricting the freedoms protected by Article 11 must be substantiated. In *X v UK*⁵² it was claimed that the offence of corruption of public morals and outrage to public decency, where homosexual acts in private were themselves criminal,⁵³ had the potential effect of preventing homosexuals meeting in groups, clubs, societies or providing counselling services. The Commission, acting ex officio, considered whether there might be a restriction of Article 11 right. Since the applicant had failed to establish the effect alleged, it found no restriction under Article 11. Had the applicant been able to substantiate the effect, the restriction would have had to have been justified under Article 11(2). However, in the case of *Baxzkowski v Poland*,⁵⁴ the Court held that the refusal of authorization for a march, which did in fact take place, could have had a chilling effect by discouraging participants, such that it had to be justified under Article 11(2).⁵⁵ The liability in domestic tort law of a trade union for inciting its members to strike was held by the English High Court not to breach Article 11.⁵⁶

⁴⁹ (1998) 13 EHRR (para.34).

⁵⁰ *X v Germany*, App. No.9234/81; 26 D.R. 270.

⁵¹ E.g. C-235/92 *Monstecatini v Commission* [1999] ECR I-4539 (paras 135-137); and cf. C-67/97 *Albany* [1999] ECR I-5751 (para.141).

⁵² App. No.7525/76; 11 D.R. 117.

⁵³ In *ADT v UK*, Judgment of July 31, 2000, the Court held that the criminalisation of group homosexual activity in private was a violation of Article 8.

⁵⁴ (2009) 48 EHRR 19

⁵⁵ (2009) 48 EHRR 19 para.67.

⁵⁶ *Willerby Holiday Homes Ltd v Union of Construction Allied Trades and Technicians* [2003] EWHC 2608.

3. Storage of information on political opinions

In *Segerstedt-Wiberg v Sweden*,⁵⁷ the Court held that even in the absence of specific information as to how the storage on the Security Police register of information about the political opinions and activities of the applicants hindered the exercise of their rights under Article 10 and 11, such storage ipso facto constituted a violation of their rights under both Article 10 and 11, where it had been held to violate Article 8.

4. Ban and refusals

A ban on a meeting,⁵⁸ or a restriction as to where it may take place,⁵⁹ constitute a restriction on the freedom of assembly. In *Rassemblement Jurassien and Unite Jurassienne v Switzerland*⁶⁰ the Commission upheld a temporary ban on all demonstrations in a particular town;⁶¹ and in *Christians against Racism and Fascism v UK*⁶² the Commission held that two separate bans imposed under the Public Order Act 1936⁶³ on all marches in the Metropolitan Police area were justified under Article 11(2) on the ground that there was mounting tension in the London area and the police expected disorder. The ban was aimed primarily at marches organised by the National Front and was supported by evidence that such marches had frequently degenerated into violence in the past.⁶⁴ The refusal to allow an individual to cross the “Green Line” in Cyprus to attend a meeting organised by a radio station in the Republic of Cyprus (south side) was held to violate Article 11.⁶⁵ A ban on a march organised by the Foundation for Equality with a view to alerting public opinion to the issue of discrimination against minorities – sexual, national, ethnic and religious – and also against women and disable persons, was held to violate Article 11.⁶⁶

5. States of emergency and national security

⁵⁷ (2007) 44 EHRR 2, para.107.

⁵⁸ *A Association and H v Austria*, App. No.9905/82; 36 D.R. 187; *Rassemblement Jurassien and Unite Jurassienne v Switzerland*, App. No. 8191/78; 17 D.R. 93; *Christians against Racism and Fascism v UK*, App. No.8440/78; 21 D.R. 138. See further *Djavit An v Turkey*, App. No.20652/92, Judgment of February 20, 2003.

⁵⁹ *Rai, Allmond and “Negotiate Nw” v UK*, App.No.25522/94; (1995) 19 EHRR CD93.

⁶⁰ App. No.8191/78; 17 D.R. 93.

⁶¹ The Commission emphasised the need to ensure that such bans were proportionate in scope. Nevertheless, the margin of appreciation would be “fairly wide” where there was a foreseeable risk to public safety which required prompt action in response.

⁶² App. No.8440/78; 21 D.R. 138.

⁶³ See now the Public Order Act 1986, Part II (as amended by the Criminal Justice and Public Order Act 1994).

⁶⁴ In the light of the Court’s subsequent decision in *Plattform “Arzte fur das Leben” v Austria* (1998) 13 EHRR 04 it is at least open to question whether *Christians against Racism and Fascism v UK* would be decided in the same way today.

⁶⁵ *Adali v Turkey*, App. No.38187/97, Judgment of March 31, 2005.

⁶⁶ (2009) 48 EHRR 19.

While security risks may be a reason for refusing to permit an individual or association to exercise its right to freedom of assembly, such as restriction must be justified by reference to the specific risks posed by the individual or association; it is not enough for the state to refer merely to the security situation in the specific area.⁶⁷

Authorisation requirements for public meetings

Where the purpose of requiring authorisation for a public meeting is to prevent violent assemblies and to protect peaceful ones from disruption, neither the obligation to obtain authorisation, nor the requirement to give information to the police regarding the meeting, constitutes an interference with the right to freedom of assembly.⁶⁸ Moreover, a conviction for holding a meeting without having obtained authorisation may be justifiable under Article 10(2), such that no further Article 11 issues arise.⁶⁹

In *Ziliberber v Moldova*,⁷⁰ the Court dismissed a complaint regarding a conviction for participation in an unauthorized demonstration on the basis that the penalty was not excessive. It further noted that since the authorization requirement was lawful, it must be permissible to penalize those who breached it, providing the penalty was not excessive. The English Divisional Court relied on that decision in rejecting a challenge to the procedure for authorising demonstrations in a designated area under s.134 of the Serious Organised Crime and Police Act 2005. The Court held that since this procedure complied with Article 11, there was no need for the state, in its various public authority guises, to justify the necessity in each individual case of charging an individual with organising or taking part in an unauthorised demonstration in a designated area.⁷¹

Legitimate Restriction on Article 11 Rights

For a restriction to be justified under Article 11(2) it must be “prescribed by law”, in pursuit of one of the legitimate aims laid down in the paragraph, and “necessary in a democratic society”, (that is in pursuit of a pressing social need

⁶⁷ *Yesilgoz v Turkey*, App. No.45454/99, Judgment of September 20, 2005, para.30 (French only).

⁶⁸ *Rassemblement Jurassien and Unite Jurassienne v Switzerland*, App. No.8191/78; 17 D.R. 93 (para.3); *Ciraklar v Turkey*, App. No.19601/92; 80-A/B(E) D.R.46.

⁶⁹ *F v Austria*, App. No.14923/89; (1992) 15 EHRR CD68; *J v Austria*, App. No.15509/89; (1992) 15 EHRR CD74. In both cases, convictions for failure to obtain prior authorisation for public meetings were found to be justified under Article 10(2), such that the Article 11 issue did not need to be considered. However, Article 11 usually operates as the *lex specialis* and Article 10 as the *lex generalis*, such that the Article 11 issue supersedes the Article 10 issue.

⁷⁰ App. No.61821/00, Dec. 4.4.04.

⁷¹ *Evans v DPP* [2006] EWHC 3209 (Admin).

and proportionate to the aim pursued). The exception laid down in Article 11(2) must be narrowly construed.⁷²

1. “Prescribed by law”

For a measure to be “prescribed by law”, it must not only have a basis in domestic law; but the domestic law must be sufficiently precise and accessible to enable the individual to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁷³

The law include case law⁷⁴ and professional rules,⁷⁵ as well as statute law.⁷⁶ Discretionary powers may form the legal basis for the measure at issue.⁷⁷

However, this requirement was not satisfied when the Court found that “there seems to be no law applicable in the present case regulating the issuance of permits to Turkish Cypriots living in northern Cyprus to cross the “green line” into Southern Cyprus in order to assemble peacefully with Greek Cypriots.”⁷⁸

For a law to be “**sufficiently precise and accessible**”_an individual must be able to regulate his conduct, if necessary on appropriate advice. The Court has, however, accepted the impossibility of attaining absolute precision in the framing of laws, particularly in areas which are susceptible to change, according to the prevailing views of society.⁷⁹ The disciplining of a judge for his association with the Freemasons was not sufficiently foreseeable to meet this condition.⁸⁰ In *Cetinkaya v Turkey*,⁸¹ the Court held that the conviction of an individual for having attended a press conference at a meeting did not meet the necessity and proportionality test, essentially because the classification of the meeting as unlawful was based on insufficiently precise legal provisions.

The scope of a discretion and the manner of its exercise must be defined with sufficient clarity to give the individual protection against arbitrary interference.⁸² A public statement in the House of Commons regarding the restriction on demonstration relating to Northern Ireland, was found by the

⁷² *Sidiropoulos v Greece* (1998) 27 EHRR 633 (para.40).

⁷³ *Ezelin v France* (1991) 14 EHRR 362 (para.45).

⁷⁴ (1991) 14 EHRR 362.

⁷⁵ (1991) 14 EHRR 362 (para.45)

⁷⁶ *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121 (para.38); *Van der Heijden v Netherland*, App. No.11002/84; 41 D.R. 264 (Civil code accessible: regional director of an association whose object was the welfare of immigrants was in a reasonable position to foresee that by joining a political party opposed to immigrants, he would be dismissed).

⁷⁷ *Rai, Allmond and “Negotiate Now” v UK*, App. No.25522/94; (1995) 19 EHRR CD93.

⁷⁸ *Djavit An v Turkey*, App. No.20652/92, Judgment of February 20,2003.

⁷⁹ *Ezelin v France* (1991) 14 EHRR 362 (para.45).

⁸⁰ *Maestri v Italy*, App. No.39748/98, Judgment of February 17, 2004.

⁸¹ App. No.75569/01, Judgment of June 27, 2006 (French only), para.30.

⁸² *Ezelin v France* (1991) 14 EHRR 362 (para.45).

Commission to be compatible with the requirements of foreseeability.⁸³ The Commission stated:

“It is compatible with the requirements of foreseeability that terms which are on their face general and unlimited are explained by executive or administrative statements, since it is the provision of sufficiently precise guidance to individuals to regulate their conduct rather than the source of that guidance which is of relevance.”

By contrast, where guidelines for the Italian judiciary stated that membership of the freemasons “raises delicate questions” and proposed Ministerial consideration of restrictions on membership of “all associations which ...impose particularly strong bounds of hierarchy and solidarity on their members”, the Court found that “the condition of foreseeability was not satisfied.”⁸⁴

In *R. (Laporte) v Chief Constable of Gloucestershire*,⁸⁵ the House of Lords holds that it had not been prescribed by law for the police to take action short of arrest (namely turning the coaches back) to prevent a breach of the peace that they did not consider what imminent.

2. In pursuit of a legitimate aim

The European Court of Human Rights almost invariably accept that a measure pursues one of the legitimate aims set out in the second paragraph of Article 11.⁸⁶ Proper consideration of whether the restriction or interference can be justified takes place **when the court determines whether the measures was necessary in a democratic society, that is in pursuit of a “pressing social need” and proportionate to the legitimate aim pursued.**

“National security or public safety”

The concept of national security appears to be wide enough to cover the “duty of political loyalty” imposed on civil servants in Germany, requiring the to renounce all groups and movements which the competent authorities hold to be inimical to the German Constitution.⁸⁷ It also covers threats to the integrity of a state or its

⁸³ *Rai, Allmond and “Negotiate Now” v UK*, App. No.25522/94; (1995) EHRR CD93 (a statement in Parliament and numerous subsequent refusals of permission were considered by the Commission to be sufficient to satisfy the requirement of foreseeability).

⁸⁴ *NF v Italy* (2002) EHRR; cf. *Maestri v Italy*, App. No.29748/99, Dec. 4.7.02.

⁸⁵ [2007] 2 AC 105.

⁸⁶ In *Tweed* [2000] NICA 24, the Northern Irish Court of Appeal noted that this issue concerns the substance of the justification even if the original decision under challenge took account of wider considerations.

⁸⁷ *Vogt v Germany* (1996) 21 EHRR 205 (para.59): the Court took full account of the special position of Germany because of its experience under the Weimar Republic, leading to the constitution of the Federal Republic being based on the principle of a “democracy capable of defending itself”. The court was not persuaded that this principle justified the restriction at issue in the *Vogt* case itself.

society; and the Court accepted the Turkish government's claim that in dissolving the Communist Party it was pursuing the legitimate aim of the protection of national security.⁸⁸ However, in *Yesilgoz v Turkey*,⁸⁹ the Court held that the existence of a state emergency was not sufficient to justify the use of wide and non-justiciable prerogative powers to prevent assembly.

"Prevention of disorder or crime"

Measures intended to penalise conduct contravening the law,⁹⁰ or prevent crime or disorder from occurring will pursue legitimate aim.⁹¹ The disciplining of a lawyer by his professional body for failing to disassociate himself from unruly acts that occurred during a demonstration in which he took part, was accepted as pursuing the legitimate aim of the prevention of disorder.⁹² Similarly, arrest for failure to obtain authorisation for a demonstration and for refusal to disperse it, pursue the legitimate aim of preventing disorder and crime.⁹³ In *Pendragon v UK*⁹⁴ the Commission found no violation of Article 11⁹⁵ where an order had been made under s.14A of the Public Order Act 1986, as amended, prohibiting all trespassory assemblies within a four-mile radius of Stonehenge for a four-day period. The Commission noted the level of disorder which had occurred at the monument in previous years.⁹⁶ More controversially, refusal of the authorities

⁸⁸ *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121 (para.41); cf. *Sidiropoulos v Greece* (1998) 27 EHRR 633. See also *A Association and H v Austria*, App. No.9905/82; 36 D.R. 187 (ban on public meeting in support of union between Austria and Germany, contrary to Austrian Treaty obligations to prevent any such union); *Christians against Racism and Fascism v UK*, App. No.8440/78; 21 D.R. 138 (two moths ban on processions in London because of tensions resulting from activities by and against the National Front).

⁸⁹ App. No. 45454/99, Judgment of September 20, 2005; see further *Guner v Turkey*, App. No.42853/98 and 44291/98, Judgment of July 12, 2005.

⁹⁰ *X v Austria*, App. No.8652/79; 26 D.R. 89 (prohibition of an association that was continuing the activities of the Moon sect in Austria, having previously been found to be illegal).

⁹¹ e.g. *Silverton v Gravett* Unreported October 19, 2001, QBD (harassment of fur trader by animal rights activists).

⁹² *Ezelin v France* (1991) 14 EHRR 362 (para.47). However, the penalties imposed on him were found not to be "necessary in a democratic society".

⁹³ *Ciraklar v Turkey*, App. No.19601/92; 80-A/B(E) D.R. 46 (dispersal, arrest and convictions in context of a demonstration involving violence); *G and E v Norway*, App. No.9278/81 and 9415/81; 35 D.R. 30 (demonstrators set up a tent for several days and nights in an area open to public traffic in front of the national Parliament. Their arrest pursued the legitimate aim of the prevention of disorder); *G v Germany*, App. No.13079/87; 60 D.R. 256 at 263 (conviction for non-violent obstruction of traffic necessary for the prevention of disorder); *Aberdeen Bon Accord Loyal Orange Lodge v Aberdeen City Council*, 2002 SLT 52. *Wishart Arch Defenders Loyal Orange Lodge 404 v Angus Council*, 2002 SLT 43.

⁹⁴ [1999] EHRLR 223. See also *Chappell v UK* (1988) 10 EHRR 510; and cf. the House of Lords' analysis in *DPP v Jones* [1999] 2 AC 240.

⁹⁵ Nor of Article 9 and 10.

⁹⁶ cf. *The Gypsy Council v UK* App. No.66336/01, Dec. 14.5.02 (s.14A prohibition on traditional horse fair upheld on public order grounds).

to register an association that promoted surrogate motherhood was held to pursue the legitimate aim of the prevention of crime, incitement to abandon a child being a crime in French law.⁹⁷

“Protection of health and morals”

Refusal to register an association having as its principal aim the legalisation of use of cannabis was held to pursue the legitimate aim of the protection of health and morals.⁹⁸ The House of Lords considered that even assuming the prohibition of fox-hunting in the Hunting Act 2004 engaged Article 11 it was necessary and proportionate for the protection of morals and rights and freedoms of others.⁹⁹

“Protection of the rights and freedom of others”

Examples of restrictions imposed for the protection of the rights and freedoms of others include compulsory membership of an automobile association for taxi drivers,¹⁰⁰ the banning of sensitive political demonstrations,¹⁰¹ ban on certain political parties,¹⁰² the termination of an employment contract where the employee was active in a political party opposed to the objective of its employer, a foundation concerned with the welfare of immigrants,¹⁰³ the refusal of the authorities to register a trade association with a similar name to an existing association,¹⁰⁴ and the restriction of the freedom of local government officers to take part in political activities.¹⁰⁵

“Necessary in a democratic society”

⁹⁷ *Lavissee v France*, App. No.14223/88; 70 D.R. 218 (association in defence of surrogate mothers).

⁹⁸ *Larmela v Finland*, App. No.26712/95 89-A(E)B D.R.64.

⁹⁹ *R. (On the application of Countryside Alliance) v Attorney General* [2008] 1 AC 719.

¹⁰⁰ *Sigurdur A Sigurjonsson v Iceland* (1993) 16 EHRR 462 (para.39). It was not however, necessary in a democratic society.

¹⁰¹ *Rai, Almond and “Negotiate Now” v UK*, App. No.25522/94; (1995) 19 EHRR CD93 (prohibition of marches in Trafalgar Square, London, regarding Northern Ireland. Also necessary for the prevention of disorder); *Christian against Racism and Fascism v UK*, App. No.8440/78; 21 D.R. 138 (ban on demonstrations also intended for protection of public safety and prevention of disorder).

¹⁰² *X v Italy*, App. No.6741/74; 5 D.R. 83 (criminal sanctions against the fascist party in Italy also necessary for the protection of public order).

¹⁰³ *Van de Heijden v Netherlands*, App. No. 11002/84; 41 D.R. 264 (it is thus clear that “others” does not refer only to other citizens of that state, but may include, e.g. other staff in an organisation or the beneficiaries of an organisation, in this case immigrants).

¹⁰⁴ *X v Switzerland*, App. No.18874/91; 76-A(E)B D.R. 44.

¹⁰⁵ *Ahmed v UK* (1998) 29 EHRR 1.

Specific comments on the Draft Bill

1. Purpose of the Draft Bill

NICEM recognises that the purpose of the Draft Bill is to deal with less than a dozen of contentious parades and counter-protest each year through a new mechanism (the Draft Bill and the Code of Conduct) and new bodies (OPAPP, the Appointments Panel and PAPPB) to replace the current Parade Commission. It is narrow focus to public processions and related protest meetings as outline in the Public Processions (Northern Ireland) Act 1998 that set up the Parade Commission.

At the same time NICEM has serious doubt and concern that the Draft Bill goes far beyond the narrow focus that covers the wider concept of Public Assembly (clause 5 – 8) – the fundamental human rights that exercise the freedom of thought, conscience and religion (Article 9 of ECHR) and the freedom of expression (Article 10 of ECHR).

In our analysis the Draft Bill extend to curb with any peaceful assembly and association that enjoys under Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedom, such as all public meetings, public processions, and non-political parade such as May Day parade,

Lord Mayor's parade, Gay pride, Remembrance Sunday parades, and St. Patrick's Day parades. The exemptions under Clause 5(1) is either too narrow (funeral processions) or lack of transparent (by Order of secondary legislation under negative resolution on specify processions and meetings).

It also goes beyond the original power under the current Parade Commission, which deals with public procession and related protest meetings. Therefore we recommend amending Clause 5 (see below).

3. The nature of public procession, public meeting and counter-protest

A public procession, at certain stage, becomes a public meeting if speakers are addressed to the audience either at the beginning or at the end of the public procession. Apply the same analogy a public meeting deems to be a public procession when the audience march into and from the venue either at the beginning or at the end of a public meeting. Or in some rare scenarios participants of the public meeting take the lead for an unlawful public procession.

In most case, the organiser only concerns that they are either holding a public procession or a public meeting. They never consider that their meeting or procession can turn out to be the other end at the same time. This might create an unnecessary and technical breach on certain part of the public order law.

For the purpose of counter-protest on parade, the nature is more a procession than a public meeting, but nevertheless it can technically be at the same time. We also have concern that the blanket discretionary power to make order on exemption, even though through negative resolution procedure. In *Friend v Advocate* [2007] UKHL 53, (also know as *Whaley v Lord Advocate*), where their Lordships also took the view that Article 11 was not intended to extend the right of assembly for purely social purposes or for the purposes of sport and recreation.

If the purpose of the Draft Bill is narrow focus to deal with contentious parades and counter-protests, we proposed the following amendments:

Clause 5: Public Assembly

5(1) People in Northern Ireland shall enjoy the right to public assembly.

(2) The right to public assembly is subject to restriction under section 6 (public procession), section 7 (public meeting) and section 8 (protest meeting) of this Act and other public order offence under Public Order (Northern Ireland) Order 1987, the Public Processions (Northern Ireland) Act 1998, The Public Processions (Amendment) (Northern Ireland) Order 2005 and other common law offence on the breach of peace.

(3) It is the duty of the public authority in:

- (a) determining the decision for a parade and /or a protesting meeting;
and
- (b) exercising the statutory duty for public security, public safety, and

prevention of disorder or crime in the course of a parade and / or a protesting meeting.
have due regard to the protection of the rights and freedom of others.

Clause 6: Public procession

6. (1) In this Act “Public procession” means a parade in a public place (whether or not including vehicles), including counter-protest.

(2) In this section “public place” means a road or footway within the meaning of the Roads (Northern Ireland) Order 1993.

Clause 7: Public Meeting

7. (1) In this Act “Public meeting” means a meeting directly or indirectly related to parade or counter-protest of 50 or more persons-

- (a) held in a public place, and
- (b) which the public, or a section of the public, are invited to attend.

(2) In this section “public place” means –

- (a) a road or footway within the meaning of the Road (Northern Ireland) Order 1993, or
- (b) any other place, apart from a building, to which the public or a section of the public has access (whether or not on payment and whether by right or by virtue of express or implied permission).

(3) “Section of the public” includes a class consisting of all or some of the members of a club or organisation.

(4) This section is subject to section 8(3)