Strasbourg, 2 June 2003

Restricted
CDL (2003) 38
Engl. only.

Opinion N° 241 / 2003

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON

THE DRAFT LAW

ON THE SUPPRESSION OF ACTIVITIES OF EXTREMIST PARTIES AND UNIONS

OF GEORGIA

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1. Article 1 of the draft indicates that the main goal of the proposed organic law is to provide additional tools for the protection of the constitutional order of Georgia against unjustifiable activities. The following articles, however, are not really focused on this particular goal.

2. The provisions of the draft organic law are basically written in a two-step pattern: Article 3 defines certain activities as extremist and article 6.1 declares any such activity impermissible in Georgia. The wording of both provisions is very broad.

3. Article 3.d[1], for example, defines "*extremist activities (extremism)"*. The definition is comprehensive and complex; included in it are not only activities of an organisation or a political union
– *"... aimed at obliterating or forcefully changing the constitutional order or the government of Georgia ..."*
but also
– *"creating illegal military groups;"*
– *"conducting terrorist, including international terrorist, activities;"*
– *"propagating war or violence, or facilitating national, regional, religious or social enmity;"*
and
– *"perpetrating acts of hooliganism and vandalism ... with motive of ideological, political, racial, ethnical [national], religious abhorrence or hatred towards any social group"*.
To this it is added in Articles 3.d[2] and 3.d[3] that the definition also includes
– *"public call for implementation or conduction of such activities, as well as distribution of extremist literature;"* and
– *"financing of such activities or any other support to their implementation"*.

Obviously, this definition includes activities, which are very heterogeneous; some of them are essentially and typically political, while others are not. No distinction is made either between generally criminal activities on the one hand and on the other such activities which basically may be considered political and therefore be met by means of political dialogue, but which because of violence etc. are no longer acceptable and justifiable and therefore may have to be penalised.

4. When it comes to essentially and typically political activities any legislation to penalise those activities, which are not acceptable and justifiable in a democratic society, has to be drafted with regard to human rights protection in this field. Freedom of association, freedom of opinion and other fundamental freedoms and human rights as enshrined in human rights documents have to be respected.

5. Concerning terrorist activities it has to be recalled that the *Committee of Ministers* [of the Council of Europe] at its 804th meeting on 11 July 2002 has adopted Guidelines on human rights and the fight against terrorism. According to section II of these guidelines all measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, and must be subject to appropriate supervision. To this it is added in section III.2 of the guidelines that, when a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

6. *Precise definition* of restrictions as well as *necessity* and *proportionality* of restrictions to the aim pursued, as required in this document, however, are requirements, which must be met not only when terrorist activities are in question, but also when it comes to other activities in general and political activities in particular which are covered by the proposed organic law.

7. Concerning activities of an essentially and typically political nature the *Venice Commission* in its Guidelines on prohibition and dissolution of political parties and analogous measures (CDL-INF (2000) 1) has emphasised that states should recognise that everyone has the right to associate freely in political parties and that this right shall include freedom to hold political opinions and to receive and impart information without interference by a public authority and regardless of frontiers. These freedoms are not without limits; restrictions can be legitimate. However, any limitations to the exercise of these fundamental human rights through the activity of political parties have to be consistent with the relevant provisions of the European Convention for the Protection of Human Rights, in normal times as well as in cases of public emergencies.

8. Complaints of violations of these fundamental human rights have reached the European Court of Human Rights in a number of cases. Well known are four Turkish cases concerning alleged violations of the freedom of assembly and association as guaranteed by Article 11 of the European Convention:
– United Communist Party of Turkey and others v. Turkey, 30.01.1998,
– Socialist Party and others v. Turkey, 25.05.1998, and
– Freedom and Democracy Party (ÖZDEP) v. Turkey, 08.12.1999,
in which three decisions the Court found that the dissolution of political parties violated Article 11 of the Convention, and
– Refah Partisi (Welfare Party) and others v. Turkey, 31.07.2001,
in which decision the Court found that Article 11 had not been violated.

9. Article 11 of the Convention is not the only provision, which is relevant in this context. In its case law the European Court of Human Rights has repeatedly stated that Article 11, notwithstanding its autonomous rule and particular sphere of application, also must be considered in the light of Article 10 of the Convention, which guarantees freedom of expression. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies according to the Court all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy. The Court has pointed out that there can be no democracy without pluralism, and that it is for that reason that freedom of expression as enshrined in Article 10 of the Convention is applicable, subject to paragraph 2 of Article 10, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. According to the Court the fact that activities of political parties form part of a collective exercise of freedom of expression in itself entitles the parties to seek the protection of Articles 10 and 11 of the Convention.[1] The Court has also both found and reiterated that it is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a state is currently organised,

[1] *Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, judgment 08.12.1999, § 37. Case of Refah Partisi (Welfare Party) and others v. Turkey, judgment 31.07.2001, § 44.*

provided that they do not harm democracy itself.[2] When it comes to place restrictions on a political party or to dissolve it as "necessary in a democratic society" it therefore has to be considered whether the measure – be it restriction or dissolution – would met a "pressing social need" and be "proportionate to the legitimate aim pursued".[3] The Court has taken the view that a political party may campaign for a change in the law or the legal and constitutional basis of the state on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental principles. But the Court has also found that it necessarily follows that a political party, whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy, cannot lay claim to the protection of the Convention against penalties imposed for those reasons.[4]

10. In order to be in compliance with the European Convention as interpreted by the European Court of Human Rights and with the Guidelines of the Committee of Ministers and the Venice Commission any legislation concerning restrictions on activities of political parties would have to pass the tests and meet the requirements, which the Court has specified. However, it is not obvious that the provisions of the proposed organic law would do that. It was mentioned above, that the wording of the draft is very broad. Indeed, the draft is so broadly written, that the provisions of the organic law would be applicable not only to activities, which would be unjustifiable and unacceptable under Articles 10 and 11 of the European Convention and the Guidelines, but also to activities which are both justifiable and acceptable in an open, democratic and pluralistic democracy. In this respect the draft in general and Articles 3 and 6.1 of the proposed organic law in particular should be adjusted to bring it in line with the European Convention and with the Guidelines of the Committee of Ministers and the Venice Commission.

11. As to *procedural requirements* the Venice Commission in its above mentioned guidelines has expressed the view that cases concerning prohibition or dissolution of a political party should be decided by the Constitutional Court or other appropriate judicial body and that the procedure should offer all guarantees of due process, openness and a fair trial. The first requirement – decision by the Constitutional Court or by the Supreme Court – is met by articles 8.1 and 8.2 of the proposed organic law. But it is not clear whether the proposed law is in compliance with the second requirement – a procedure that offers all guarantees of due process, openness and a fair trial. This second requirement would clearly not be met, if it is intended that only the proposed organic law would be guiding court procedures. The situation may be different, if the intention is to make general rules of procedure before the two Courts applicable to procedures concerning requests under the proposed organic law. If the latter is the case, it should be stated clearly either by a reference in the text of the proposed organic law to the applicable general rules of procedure or by some other clarifying legislation.

12. According to article 8.3 of the proposed organic law it would be the *Security Service of Georgia* which would have to make a *request* to the Constitutional Court or the Supreme Court to initiate proceedings concerning the prohibition of extremist organisations. However, in order to

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[2] *Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, judgment 08.12.1999, § 41.*
[3] *Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, judgment 08.12.1999, § 42.*
[4] *Case of Refah Partisi (Welfare Party) and others v. Turkey, judgment 31.07.2001, § 47.*

achieve a thorough and comprehensive examination of a possible case at an early stage the decision to initiate court proceedings aiming at prohibition or dissolution of a *political party* or other political organisation should be made, not by the Security Service, but by a political instance as, for example, the parliament, the government or a minister. Requests to prohibit or dissolve *other organisations* should be made by the public prosecutor or by an administrative agency, which is independent of the Security Service.