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OSCE Office for Democratic Institutions and Human Rights
and
EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

JOINT OPINION

ON THE DRAFT LAW ON FINANCING POLITICAL ACTIVITIES OF THE REPUBLIC OF SERBIA

by

the Venice Commission and the OSCE/ODIHR

Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010)

On the basis of comments by

Mr. James HAMILTON (Substitute Member, Ireland) and OSCE/ODIHR Experts

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I. INTRODUCTION

1. By letters dated 11 November, 2010 and 23 November the Ministry of Justice of the Republic of Serbia requested the OSCE ODIHR, through the OSCE Mission to Serbia and the Venice Commission respectively, to review the Draft Law of the Republic of Serbia on Financing Political Activities (hereinafter referred to as the "Draft Law on Financing Political Parties" or the "Draft Law").

2. In response to the abovementioned request the OSCE/ODIHR and the Venice Commission therefore undertook the assessment jointly.

3. The present opinion was prepared on the basis of comments by OSCE/ODIHR experts and Mr James Hamilton, member of the Venice Commission. It was adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

II. EXECUTIVE SUMMARY

4. The Draft Law constitutes a step forward in creating a modern and comprehensive political financing system in Serbia. On the whole the Draft Law provides a relatively clear and comprehensive framework for the regulation of the financing of political activities. The Draft Law introduces both public and private funding thus recognising that parties need appropriate resources in order to fulfil their core functions. The model of public funding reflects largely the recommendations of the Council of Europe and the OSCE. While many positive aspects of the Draft Law have been noted, in the interests of brevity the Opinion contained herein will focus mainly on areas of concern in order that shortcomings may be addressed prior to adoption of the Draft Law.

5. The OSCE/ODIHR and the Venice Commission therefore recommend as follows;

Key Recommendations

A. The Draft Law would benefit from adjustment of the provisions to focus more on prevention of possible abuse, infringements and violations, rather than the imposition of sanctions following their occurrence;
B. Establishing the conditional nature of public funding could be improved in the Draft Law;
C. The Draft Law should address the issue of provision of services by qualifying and quantifying them in detail;
D. The system of political financing could be used to create incentives for improving participation of women in political parties as well as fostering greater political participation;
E. Some of the provisions on the keeping of accounts (itemisation and listing of contributions) and the content of all reports required from political actors needs clarification and greater detail;
F. Oversight, public control and disclosure requirements should extend to all political actors and not solely political actors with representatives in legislatures.
G. The role of the Anti-corruption Agency should be strengthened to allow for the fulfilling of their supervisory function (ie, through vesting it with greater powers to obtain requested information and explanations, oversight of ordinary operations of political actors), and allowing a strengthening of their capacity through training, while their role in adjudication and imposition of sanctions could be re-considered as a role for the court

H. Sanctions provided in the Draft Law need to be revised to ensure they are proportionate, but also act as an efficient deterrent;
I. The sanctioning regime needs to be completed.

Additional Recommendations

J. Membership fees should constitute a part of the sum total contributions permissible;
K. The prohibition of monetary funds from foreign political associations may be reconsidered;
L. The prohibition on donations through third parties needs to be supplemented with appropriate sanctions;
M. Articles 13 and 16 should be clarified;
N. The Draft Law should address the funding of election campaigns through other than solely monetary benefits;
O. The Draft Law should account for the situation where more than 20 electoral lists are put forward;
P. The list of election campaign related expenses should be detailed, and closed;
Q. The abuse of public resources to support political actors should be strictly prohibited.

III. SCOPE OF REVIEW

6. The scope of this Opinion covers only the Draft Law on Financing Political Parties,as requested. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing political parties and their financing in the Republic of Serbia.

7. The Opinion assesses the Draft Law against the relevant international and regional instruments and standards as well as the OSCE commitments which have been most recently affirmed by the Astana Declaration[1].

8. This Opinion raises key issues and provides indications of areas of concern. The suggested recommendations are based on international agreements and commitments ratified and entered into by Serbia, in particular, the International Covenant on Civil and Political Rights (ICCPR)[2] which provides for the freedom of association, as the foundation of political parties[3], the European Convention on Human Rights (ECHR) which also guarantees the right to associate[4], the extensive case-law of the European Court of Human Rights (ECtHR) which establishes important benchmarks in this field, including on the question of financing of political parties.

9. The Opinion also makes extensive use of the recently adopted OSCE/ODIHR – Venice Commission Guidelines on Political Parties Regulation[5] (hereinafter, the "Guidelines") which bring together the above mentioned international standards and practice.

10. This Opinion is based on an unofficial translation of the Draft Law. Errors from translation may result.

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[1] Astana Commemorative Declaration Towards a Security Community, 3 December, 2010.
[2] Entered into force in Serbia in 2000.
[3] Article 21 if the International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976)) 999UNTS 171 (ICCPR).
[4] Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953).
[5] CDL-AD(2010)024, adopted at the 84th Plenary Session of the Venice Commission on 15-16 October, 2010.

11. The OSCE/ODIHR and the Venice Commission note that the Opinion provided herein is without prejudice to any other opinions or recommendations that the OSCE/ODIHR or the Venice Commission may wish to make on the issues under consideration in the future.

IV. ANALYSIS AND RECOMMENDATIONS

A. Sources and Ways of Funding

12. The Draft Law seeks to regulate both public and private funding. Public funding is provided to political actors both to carry out their regular work expenditure and to provide for election campaign expenditure. The private funding of political organizations is permitted subject to certain limitations, that is, the circumstances in which private donations are prohibited.

13. The Guidelines state that in the development of legislation in this sphere states should adopt several important parameters when creating political finance systems. These include: restrictions and limits on private contributions, a balance between public and private funding, restrictions on the use of state resources, fair criteria for allocation of public financial support, spending limits for campaigns, requirements that increase transparency of party funding and credibility of financial reporting as well as an independent regulatory mechanism and appropriate sanctions for violations[6].

Private Funding

14. It is welcomed that the Draft Law seeks to lay out the limits of private funding, by firstly recognising in Article 6 and 7 the various forms that private funding may take. These being, membership fees, donations, inheritance, legacy and property income.

15. The Draft Law defines membership fees in Article 6 as a financial amount that a member of a political party is due to regularly pay in a manner and under conditions stipulated by the party statute or other legal act. The said article clearly recognises that membership fees are a legitimate source of party funding, and may be reasonably imposed by parties as long as they are not of such a high level as to restrict membership unduly. While it is not for the state to establish these fees, it is noteworthy that legislation should ensure that membership fees are not on the other hand used to circumvent contribution limits[7], which can be accomplished by treating membership fees as contributions. It is therefore recommended to consider for the Draft Law to treat the amount of membership fee as part of the total contributions possible by members under the Draft Law.

16. As mentioned, Article 7 defines donation as amounts of money (other than membership fees) voluntarily donated to a political actor, or gifts. The Article details the obligations on donors carrying on business activities and donors who are natural persons, including by setting a limit of 20 monthly salaries as the maximum donation possible (by natural persons) and 100 monthly salaries in the case of legal persons. A donation is also defined to include a service rendered without compensation or under conditions deviating from market conditions. The Article thus appears to take into account a balance between recognising that all individuals should have the right to freely express their support of a political party of their choice through financial and in-kind contributions, but that at the same time reasonable limits on the total amount of contributions may be imposed in

[6] OSCE/ODIHR- Venice Commission Guidelines on Political Parties Regulations, CDL-AD(2010)024, par 160.
[7] OSCE/ODIHR – Venice Commission Guidelines on Political Parties Regulations, CDL-AD(2010)024, par 163.

order that there is not distortion in the political process in favour of wealthy interest and that corruption or the purchasing of political influence is made impossible[8]. It is also positive that the limit set is based on a form of indexation, in this way countering the effects of inflation.

17. However, the legislation is silent on how the value of donations in the form of services rendered is to be assessed. This is of particular concern as the breach of Article 7 by a donor is sanctioned by Article 36 of the Draft Law. It is therefore recommended to reconsider the said provision by specifying the manner in which services rendered may be valued.

18. Article 8 established that political organizations are entitled to own real property and moveable objects. However, it seems they may do so only to the extent that the property is used for achieving political goals, participating at elections and other permitted aims. It is not clear whether this limitation applies only to moveable objects or applies also to real property, since the Article expressly permits political organizations to obtain property income from selling or renting of real property. It is provided that political actors may acquire real property only by using funds collected from private sources and therefore the use of public donations for this purpose is excluded. However, the Draft Law does not introduce a sanction for the breach of this provision. Political organisations should be liable for misuse or abuse of public money and therefore, it is recommendable to address this shortcoming in the Draft Law, in the section dealing with sanctions and misdemeanours.

19. Article 9 establishes which sources of funding are prohibited[9]. As mentioned above, reasonable limitations on private contributions are permissible. The provision does not make clear however, whether the proposed restrictions will also apply to other forms of support, such as in-kind contributions, credits, loans, and debt cancellation. It is therefore recommended to address this omission, in order to ensure the provisions are not susceptible to circumvention.

20. In particular, Article 9 of the Draft Law prohibits contributions by foreign states, foreign natural and legal persons, except for international political associations. This is consistent with international standards[10] and is practised in many OSCE and Council of Europe states[11]. It is however, noteworthy that there are exceptions to such outright prohibition of foreign donations[12] and it is recommended that this is an area that should be regulated carefully to avoid infringement of free association of parties active at an international level. The Guidelines note that such careful

[8] Guidelines and Report on the Financing of Political Parties of the Venice Commission (Doc.CDL-INF (2001)8, par b.6(a) and; OSCE/ODIHR Guidelines on Political Parties Regulations, CDL-AD(2010)024, paragraphs 170 and 175.

[9] In this regard, the Guidelines state that: *"The regulation of political party funding is essential to guarantee parties independence from undue influence created by donors and to ensure the opportunity for all parties to compete in accordance with the principle of equal opportunity and to provide for transparency in political finance. Funding of political parties through private contributions is also a form of political participation. Thus, legislation should attempt to achieve a balance between encouraging moderate contributions and limiting unduly large contributions."* OSCE/ODIHR Guidelines on Political Parties Regulations, CDL-AD(2010)024, par 159, pg 35.

[10] Recommendation of the Committee of Ministers of the Council of Europe on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns Rec(2003)4, which states that "*states should specifically limit, prohibit or otherwise regulate donations from foreign donors*".

[11] Armenia, Azerbaijan, France, Georgia, Moldova and the Russian Federation.

[12] Foreign donations are not prohibited, for example, in Bosnia and Herzegovina, the Czech Republic, and Hungary: see: par 9 page 4 of the Venice Commission Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources CDL-AD(2006)014.

regulation may be particularly warranted in light of the growing role of European Union political parties as set out in the Charter of Fundamental Rights for the European Union[13].

21. In view of the above, it is recommended to reconsider whether the prohibition on donations from international political associations in monetary form, as stipulated in the second paragraph of Article 9 of the Draft Law is not overly restrictive. This recommendations is made in view also of the intention behind paragraphs 10.4 and 26 of the OSCE Copenhagen document, which commitments envisage external cooperation and support for individuals, groups and organisations promoting human rights and fundamental freedoms. Such a regulation in the Draft Law might allow a measure of support from the funds of a foreign chapter of a political party, which does not prevent the same regulation from limiting the amount of such foreign monetary contribution, as is practised in some OSCE and Council of Europe States[14].

22. Finally, since monetary contributions from international political organisations are prohibited in the Draft Law, then the value of the assumingly permitted in-kind contributions should also be quantified.

23. Article 10 contains what seems to be a very worthy provision to the effect that it is prohibited to exert any form of pressure against persons when collecting funds for a political actor, and that it is prohibited to give a promise or create an expectation of any privilege or personal benefit to a donor or political actor. It is also prohibited to donate to a political actor through a third party. However, no sanctions appear to be provided for a breach of this particular provision. Further, the prohibition on exerting any form of pressure is couched in somewhat vague terms. It is therefore recommended to clarify this provision.

24. Article 12 of the Draft Law is welcomed. However, it may require supplementing in the case that the recommendation on an assessment of the value of in-kind donations, made on Article 7 above, is taken on board.

B. Financing Regular Work of Political Actors

Public Funding

25. Part III of the Draft Law (Articles 13-16) concerns financing of the regular operations of political parties by the State. Public funding coupled with spending limits, disclosure and impartial enforcement has been adopted throughout the OSCE and Council of Europe region and beyond as a potential means of preventing corruption, supporting the important role played by political parties and to remove undue reliance on private donors. A public funding system strengthens political pluralism and enables parties to compete in elections in accordance with the principle of equal opportunity[15].

26. Articles 13-16 refer only to political actors who are represented in parliament or in subordinate assemblies, and political actors not so represented are thereby excluded from the provision. The public sources funds available for this purpose according to the Draft Law are to be 0.15% of the

[13] Article 12(2) Charter of Fundamental Rights of the European Union, OJ C/364/1, 18 December, 2000.
[14] Article 19(h) of the Law on Political Parties and Political Movements of the Czech Republic, or Article 25 of the Law on Political Parties of the Federal Republic of Germany(2002) which sets concrete amounts that may be received by political parties from foreign sources.
[15] OSCE/ODIHR – Venice Commission Guidelines on Political Parties Regulations, CDL-AD(2010)024, par 176, pg 38

State budget. There is a separate provision in respect of the autonomous province. This sum is quite a substantial amount. What must be borne in mind when providing for public funding is to ensure that it is set at a meaningful level, at the same time, it should not create over-dependence of political parties on state support.

27. Article 13 also provides that if funds granted pursuant to this Article are below the amount of three average monthly salaries the missing amount is to be transferred from the State budget. Perhaps by reason of translation, this provision is not very clear. It is not possible for the provision to refer to the total amount of funds, which would by far be more than three average monthly salaries. In this case, it is not clear whether it refers to any one particular grant to a political party or not. It is recommended that this provision be clarified.

28. Article 16 provides that funds for regular work of political actors are used for functioning and propaganda of ideas of the political actor and comprises: work with voters and members, expenditures for promotions, advertising materials, publications, public surveys, education, training and international cooperation, staff salaries and staff compensation expenditures, utilities (rent, heating, phone, electricity, internet etc) and other related activities. Article 36 sanctions the use of funds in contravention of Article 16 of the Draft Law. It seems to be the intention that the funds may be used only for these purposes and if there is any doubt about this in the original text (the English text being unclear on the point) then this is recommended to be clarified.

29. Furthermore, Article 16 of the Draft Law would benefit from explicitly stating that party leaders and members are prohibited from converting their party funds (both public and private, for that matter) into personal use. Lack of such a provision opens the possibility for abuse and corruption.

30. Article 16 and 18 could indeed go further in ensuring the conditionality of public funds. That means, that ideally, at first the Draft Law should require parties to meet certain reporting and accountability requirements and only then, the funds should be disbursed.

31. Additionally, it could be considered for the Draft Law to introduce a scheme of incentives through the allocation of public funds. A system of incentives could be in the form of, for example, matching grants, in which the state provides the same amount of support as the amount of funding donated by supporters. While beneficial in fostering political pluralism, a system based on incentives would also require efficient oversight.

Participation of Women

32. Furthermore, the Draft Law does not at all address the issue of political participation of women. An allocation of funds based on party support for women candidates is not considered discriminatory and should be considered in light of the requirements for special measures to be adopted by states according to the UN Convention on the Elimination of All Forms of Discrimination Against Women[16]. This would be all the more justified considering that, as stated above, the foreseen amount of 0.15% of the State Budget is very generous.

C. Financing Election Campaigns

33. Part IV of the Draft Law deals with financing election campaign expenditures. This provides that public sources funds are granted to cover election campaign expenditures separately from and

[16] Article 4 United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979.

over and above the funds granted for regular work. These expenditures are provided in the year when regular elections are held and the level of funding is 0.05 per cent of the state budget in any one year. Again this seems to be quite a sizeable amount.

34. In the case of elections in the autonomous province and local elections then funding is provided through the autonomous province budget or the local self government unit budget. The draft does not deal with donations of services or other benefits in kind which may be for election purposes, and in fact refers only to funds. It is recommendable to address the issue of financing of campaigns through other than monetary benefits.

35. Article 18 also stipulates that if less than 20 electoral lists are registered, the remaining funds are allocated in equal amounts to all registered electoral lists. Unless it is dealt with by other legislation of the Republic of Serbia, no provision is made for a situation where more than 20 electoral lists are put forward. This is recommended to be addressed.

36. Article 20 defines what may be considered as election expenditures. However, the use of the word "notably" and the expression "other related activities" in the first paragraph of the provision implies that the list of items which may fall under the category of election campaign expenditures is not exhaustive and, thus, may be open for interpretation and dispute about what does and what does not constitute an election campaign expenditure. Therefore, also since a breach of the provision entails liability under Article 36 of the Draft Law, it is recommended for the list to be clarified and closed.

37. Article 21 would also benefit from enhancement, due to the fact that just as in the case of Article 7 of the Draft Law, this provision does not take into account nor does it seek to quantify the services that may be rendered for free in the election campaign.

D. Registries and Reporting

38. Provisions on party financing are paralleled by obligations for parties to publish their funding sources. The reporting requirements should apply equally to the campaign period as to the funds allocated for ordinary operations of parties.

39. The major shortcoming of the Draft Law is that it regulates the reporting and disclosure of political actors with representatives in legislatures (Article 24, 25, 26), leaving other political parties outside public control except in relation to campaign financing. It is highly recommended for this to be rectified in the Draft Law.

40. Article 24 on record-keeping is welcomed, in that it also requires political actors to keep detailed accounts on the origin amount and structure of funds. This is in accordance with good practice and the Guidelines which firmly recommend that reports should clearly distinguish between income and expenditure and include itemized lists of donations. Reports should also include general party finance and campaign finance, clearly identifying which was to the benefit of the party and which to the individual candidate[17]. A strong system of party financing oversight outside of elections is imperative in order to avoid providing the possibility for third party interference and circumvention of the rules through conducting activities during a "pre-electoral" period. For this reason, it is recommended that the content and manner of keeping records, which according to Article 24 shall be regulated in details by the Director of the Anti-Corruption Agency,

[17] OSCE/ODIHR – Venice Commission Guidelines on Political Parties Regulations, CDL-AD(2010)024 par 204, pg 42

should include income such as loans, loan conditions (benefits i.e, in the form of interest rate reduction) etc.

41. Article 25 of the Draft Law requires that political actors submit an annual financial report to the Anti-Corruption Agency. The Draft Law is however, silent on what exactly the report should contain and it is thus recommended for the Draft Law to explicitly stipulate the requisite content of such a report. It would also be beneficial if the reports referred to in this article were published on the internet, just as those required by Article 26.

42. Referring also to Article 26 of the Draft Law, it is recommended to be made more specific (just as in Article 24) by obliging parties to provide full accounting of all income including in-kind donations, loans received (with a specification of the loan conditions), debts, assets and liabilities, during the elections campaign process.

43. Finally, the Draft Law could seek to strengthen the capacity of the Anti-Corruption agency by requiring regular training of staff on financial reporting procedures. Furthermore, apart from being vested with control powers the Draft Law is recommended to oblige the Agency to present a report on its activities and performance, on an annual basis, to the Parliament. This recommendation is made in particular since it is planned for both the Agency and political parties to receive a sizeable amount of funds for their operations from the State budget.

E. Procedures and Decisions in Case of Violation of the Law

44. Part VI of the Draft Law deals with the procedures and decisions in case of violation of the provisions of the law as well as sanctions. It must be recalled that in accordance with international standards, sanctions imposed must be 'proportionate, effective and dissuasive' in nature[18] and criminal sanctions ought be reserved only for the most serious violations[19].

45. The procedures set out in Article 32-34 deal with the procedures and decisions in cases of violation of the law. These procedures may be initiated by the Agency or a natural or legal person. The three provisions appear to be dealing with some form of administrative ruling by the Agency which can be a precursor to criminal sanctions. Where the Agency initiates this procedure it must inform the political actor. The Agency may invite the responsible person in a political actor to provide information as well as necessary data in order to decide on possible violation of the law. There does not, however, appear to be any sanction arising from a failure to do so. It is therefore recommended for the Draft Law to provide some indication of the liability a political actor may incur if the Agencies requests are ignored or not adhered to and furthermore, since they may be the basis for further action, how they may be contested.

46. Where a person other than the Agency initiates the procedure the Agency can require this person to provide information as well as the necessary data. However, again there is no sanction for a failure by that person to do so. Therefore, as above, the Draft Law ought be supplemented to indicate what such failure to comply with this requirement would entail.

47. Proceedings before the agency are behind closed doors. In the course of this procedure, the Agency can issue a measure of warning to a political actor if it finds failures that can be corrected. If a political actor fails to comply with the measure of warning within the deadline established in the

[18] Recommendation of the Council of Europe Committee of Ministers Rec(2003)4.
[19] OSCE/ODIHR – Venice Commission Guidelines on Political Parties Regulations, CDL-AD(2010)024 par 217 p. 44.

measure, the Agency then initiates the misdemeanour procedure. There is no provision requiring the Agency to provide any particular information to the political actor. This could be in contradiction with the requirements of Article 6 of the European Convention on Human Rights.

48. The Draft Law also institutes two major categories of sanctions. Article 35 of the Draft Law establishes criminal offences, which presumably are aimed at reflecting and being congruent with the Criminal Code of the Republic of Serbia, whereas, Article 36 introduces monetary penalties.

49. It is proposed to re-consider whether the Agency itself rather than a court of law should rule on such matters given that the Agency is given the primary supervisory function. However, it may be that administrative law provisions of Serbia solve this issue – in case they do not, this issue is recommended to be reconsidered.

50. In general, the sanctioning regime under the Draft Law consists entirely of the criminal offence provision in Article 35, and the creation of misdemeanours punishable by fine under Articles 36, 37 and 38. The criminal sanctions also appear disproportionately damaging, in particular due to the fact that they apply equally to every violation of the Draft Law, no matter the gravity of the violation. Furthermore, these provisions apply only after there have been breaches of the regime. It is therefore recommended to consider providing more stringent requirements for applicants for public funds before public funds are issued (as mentioned above, increase their conditionality throughout the Draft Law), rather than to leave it to the system to try and extract fines from them after the event, as in reality, it may be the case that even in the case of small fines funds may not be available to pay them.

51. Furthermore, in the case of persistent offenders, the refusal of funding for one year may be an inadequate penalty. It is recommended, for example, to provide for more stringent reporting and inspection regimes in the case of persons who have been found guilty of abusing the regulations.

52. Article 36 on financial penalties appears disproportionate and makes no attempt to distinguish between serious breaches of the legislation and the more trivial, although the fine may vary between 200,000 and two million dinars. The list of misdemeanours under the act is one which contains things ranging from submitting a report too late to very serious breaches of the Draft Law and would benefit from being further supplemented by specifying, for instance material misrepresentations, including but not limited to fraudulent backup documentation, fraudulent donations and expenditures, conducting political finance activity outside of the reporting account or through cooperation with surrogates, incurring prohibited expenditures, preventing the enforcement agency authorized officer or an external auditor from fulfilling the duties of examining the records or auditing accounts kept by the political party, and distressing Agency's staff and external auditors, amongst others.

53. It is proposed that in some cases an immediate suspension of funding in a case of breach would be appropriate. For example, in the case of a failure to designate a responsible person for financial affairs in accordance with Article 28 of the Draft Law or in a case where there has been a failure or refusal to provide necessary data or information in response to a request from the Agency it would be desirable for funding to be suspended without delay. It is therefore recommended to reconsider the provisions of this Article.

54. The Draft Law would also benefit from introducing a provision prohibiting the use of public resources (by an office holder) for the purposes of support of a political actor.