



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 2 June 2003

Restricted
CDL (2003) 37
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

By

Ms Finola FLANAGAN (Member, Ireland)

1. The Venice Commission has been invited to comment on a draft '*Organic Law of Georgia on Prohibition of Activities of Extremist Organisations and Unions*'. The stated purpose of the draft law is to prohibit the use of force in Georgia for political purposes, to protect the constitutional order from coup or forceful change "as well as prevention of other manifestations of extremism". This law is stated to be in accordance with Article 26 of the Georgian Constitution which provides for rights for individuals to form and join associations and political parties in accordance with law. The Article prohibits such associations or political parties whose aims include subversion of the State or attempts to create "ethnic, racial, social or national unrest". Prohibition of public and political organisations is only possible by court order. Article 2 states that the "law defines grounds and rules of prohibition of organisations and political unions".
2. The translation provided, which was done in Tbilisi, is poor and sometimes ambiguous. The draft law, distributed in the press on 19 February 2003 was described as a working draft aimed at filling gaps in Georgian legislation to curb extremism and terrorism, including militancy by extreme religious groups.

Main Provision of the draft

3. Article 3 of the draft law defines and draws a distinction between '*an organisation*' and '*a political union*'. An '*organisation*' appears to comprehend all organisations or combinations of persons of whatever number and for whatever purpose whether officially registered or not, whether structured or unstructured, other than political parties. There is no requirement that an organisation be established for any particular period of time to be covered by the definition. '*Organisation*' includes '*religious*' unions and '*commercial organisations*' and presumably trade unions.
4. A '*political union*' which is separately defined includes a political party within the meaning of the law on Political Unions of Citizens, as well as other unions of citizens which may not be legally registered as political parties but whose activities are political.
5. The definition of '*extremist activities*' applies equally to both '*organisations*' and '*political unions*'. I will set out in full the somewhat lengthy and complicated definition which encompasses many disparate activities:

d¹) *activity of an organization or a political union, connected with planning, organizing, preparing and conducting activities, aimed at obliterating or forcefully changing the constitutional order or the government of Georgia, undermining independence or territorial integrity of the country; creating illegal paramilitary groups; conducting terrorist (including international terrorist) activities; propagating war or violence or facilitating national, regional, religious or social enmity; perpetrating acts of hooliganism and vandalism, creating massive disorders, with motive of ideological, political, racial, ethnical [national], religious abhorrence or hatred towards any social group;*

d²) *public call for implementation or conduction of such activities, as well as distribution or extremist literature;*

d³) *financing of such activities or any other support to their implementation.*'

6. Article 6 makes '*extremist activities...impermissible in Georgia*' whether carried out by an '*organisation*' or a '*political union*'. If either an organisation or a political union conducts '*extremist activities*' it can be declared to be '*an extremist union*' by the Supreme Court or the Constitutional Court. The draft law applies to an extremist union a range of consequences including liquidation, prohibition of all activities and forfeiture of its property to the state.

Application of the European Convention on Human Rights

7. Article 1 of the European Convention on Human Rights requires that the contracting parties secure to everyone subject to their jurisdiction the rights set out in the Convention and in the protocols where ratified. Care must therefore be taken by governments and legislatures to ensure that laws of their states contain only legitimate restrictions on fundamental freedoms and that implementation of those laws do not impose burdens or restrictions on or harm other legitimate interests which are disproportionate to the objects to be achieved by the restrictions. Therefore restrictions should be narrowly interpreted and applied and the need for those restrictions convincingly established. As a ratifier of the Convention, Georgia must abide by this requirement for legitimacy and proportionality.
8. Both the European Convention and the Georgian Constitution guarantee freedom of association¹ and freedom of expression² and this draft law seeks to impose on all Georgian organisations significant restrictions on the freedom of association primarily, and through these restrictions on the freedom of expression. Freedom of association is regarded as fundamental to the democratic process and is closely related to freedom of political expression which secures the right of the citizen to be involved in the political process. The protection of opinions and freedom to express them is one of the objectives of the freedoms of assembly and association in article 11. Freedom of expression constitutes one of the essential foundations of a democratic society and effective advocacy of political views requires organisation and freedom of association. Freedom of association and expression are also fundamental to the operation of trade unions and also the promotion of other economic, social and cultural rights. Restrictions on these rights will necessarily be contentious and therefore require a clear justification and narrow application.
9. This is especially so in relation to restrictions imposed on political parties which, of course, is one of the intentions of the draft law. Only convincing and compelling reasons can justify restrictions on such parties' freedom of association. The European Court of Human Rights' case law on this topic is reflected in the Guidelines on Prohibition and Dissolution of Political parties adopted by the Venice Commission – CDL-INF (2000)1. These, *inter alia*, require that states recognise that everyone has the right to associate freely in political parties. Limitations on the exercise of the right to associate freely in political parties and to hold

¹ Article 11 ECHR and Article 26 Georgian Constitution

² Article 10 ECHR and Article 24 Georgian Constitution

political opinions must be consistent with the European Convention on Human Rights.³ In particular the Guideline 3 provide that *'prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.'*

10. Restrictions affecting any organisation, whether a political party or not, must pursue a legitimate aim, strictly interpreted in accordance with Article 11(2). This draft law proposes significant civil restrictions applicable to the activities of all organisations operating in the state of Georgia. The general justification for the restrictions proposed in the draft law is one of national security and the State's need to be equipped with legislation to prohibit potential terrorism. These are, in principle, justifiable aims but can only be used to justify restrictions on guaranteed rights and freedoms in a manner or by a method which is prescribed by law, pursues a legitimate aim within the meaning of Article 11(2) and is necessary in a democratic society ie in response to a pressing social need.
11. As pointed out in paragraph 1 above, the aim of the draft law is the prohibition of the use of force in Georgia for political purposes and to protect the constitutional order of Georgia from coup or forceful change. However the definition of *'extremist activities'* includes activities which would not necessarily be political in character even though they would all appear to be activities of a violent character ie *'acts of hooliganism and vandalism, creating massive disorders, with motive of ideological, political, racial, ethnical [national], religious abhorrence or hatred towards any social group.'*
12. In order for a restriction on the guaranteed freedoms to be justified in accordance with article 11(2) or 10(2) the European Court of Human Rights require the state to show that the interference is prescribed by law and, in particular, that it is formulated with sufficient precision to enable persons likely to be affected by it of their rights to understand the circumstances in which any such restriction may be imposed and on the other hand, to enable such persons to foresee with a reasonable degree of accuracy the consequences of their actions⁴. A law entailing a degree of discretion need not necessarily fall foul of this requirement provided the limits of the discretion are clear.
13. The apparent divergence of purpose between Article 1 and the definition in Article 3 must raise a question about who and what activities are the target of the draft law which is perhaps sufficient to make the law insufficiently precise so as to be prescribed by law according to the jurisprudence of the European Court. Whilst Article 11(2) does permit an interference with the freedom of association if its objective is either the prevention of disorder and crime or the protection of the rights and freedoms or others, it should be made completely clear just who and what activities are sought to be controlled by the draft law.

³ See *Refah Partisi and Others (13/02/2003) app. No. 41340/98*

⁴ See *Sunday Times v UK 2EHRR 245*

14. The restriction must pursue a legitimate aim in accordance with Article 11(2) ie its objective must be
- The prevention of disorder and crime;
 - The protection of health or morals; or
 - The protection of the rights and freedoms of others.
15. The list of '*extremist activities*' whether relating to political organisations or non-political organisations, is, I assume, intended to be directed exclusively at violent activity. However, this needs to be made quite clear in relation to each and every activity listed in the definition. So, for example, is the activity of '*undermining independence or territorial integrity of the country*' intended to be covered by the definition only where the use of violence to achieve it is intended? An organisation or political party that aims at a peaceful change of the constitutional order through lawful means cannot be prohibited or dissolved on the basis of freedom of opinion or association.
16. Interferences with the freedoms of association or expression must be necessary in a democratic society. A certain margin of appreciation is granted to contracting states in imposing restriction on qualified rights. However this is not unlimited and the European Court will ultimately decide whether the restriction is compatible with the European Convention. The phrase means that in order to be compatible the interference must be in response to a 'pressing social need' and must be 'proportionate to the legitimate aim pursued'. In assessing the proportionality of the interference the Court will ask, *inter alia*, whether there was a less restrictive alternative capable of meeting the same aim⁵, whether safeguards are in place to prevent abuse⁶ and whether the restriction in question destroys the 'very essence' of the Convention right in issue⁷. So, for instance, if it is the case that any of the definition of '*extremist activity*' would result in the restriction of non-violent political dialogue or protest with the aim of constitutional change this would not be necessary in a democratic society. It needs to be examined, for example, whether an organisation or some of its members which is involved in an isolated incident of 'hooliganism' or 'vandalism' should be prohibited pursuant to the draft law or otherwise dealt with pursuant to the ordinary criminal law.
17. When considering the definitions set out in this section the Georgian authorities might consider the more precise definitions and the close connection between the organisation and its subversive or terrorist aims that are made in various international instruments which have dealt with the difficult area of international terrorism. For example, see the definition of "terrorist group" set out in the EU Council Framework Decision of 13th June 2002 on combating terrorism. The formulation of words used in Article 2 is:
18. *"For the purposes of this Framework Decision, "terrorist group" shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. "Structured group" shall mean a group that is not randomly*

⁵ See *Informationsveerin Lentier v Austria* (1993) 17 EHRR 93

⁶ See *Klass v Germany* (1978) 2 EHRR 214

⁷ See *Rees v UK* (1986) 9 EHRR 56

formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity for its membership or a developed structure".

19. A list of ‘*intentional acts*’ where committed with specified terrorist aims is set out in Article 1 of the Framework Decision. The Preamble to the Framework Decision states that the EU endeavoured to draft the Framework Decision in a way that respected fundamental rights and freedoms though to date it has not been the subject of any judicial decision. The European Convention on Human Rights has been given indirect effect through incorporation into EC and EU norms⁸.

Judicial review

20. The Venice Commission Guidelines provide that the prohibition of a political party should be decided by ‘*an appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial*’. In fact the draft law provides that a decision to declare an organisation and ‘*extremist union*’ must be made by order of either the Supreme Court or the Constitutional Court of Georgia. Article 8(6), (7) and (12) of the draft law are concerned with the role of the Court in making its decision. In considering the question of whether to declare an organisation as extremist and to prohibit it, it is not clear from the text whether the Court has the jurisdiction to examine fully whether there are sufficient reasons for prohibiting an organisation or a political union or whether for example there are more appropriate less restrictive measures. There should be national judicial control over the question whether the prohibition is ‘*necessary in a democratic society*’.

⁸ Article 6 Treaty on European Union