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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE LAW
ON THE FINANCING OF POLITICAL PARTIES
OF BOSNIA AND HERZEGOVINA**

on the basis of comments by

Mr Hans-Heinrich VOGEL (Member, Sweden)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. By letter of 28 November 2007 the Central Election Commission (CEC) of Bosnia and Herzegovina (BiH), and more precisely Mr Stjepan Mikic, at that time its president, together with the Head of OSCE Mission to BiH, Ambassador Douglas Davidson, have requested the assistance of the Venice Commission in dealing with three issues concerning the BiH legislation on political party financing, mainly codified in the Law on Political Party Financing as enacted in 2000 and published in the Official Gazette of Bosnia and Herzegovina, No. 22/00 (Doc. CDL (2008) 006).

2. The three issues – as described in the letter – are the following:

“Use of externally donated monies: It is unclear how to regulate funds received by political parties from external sources – i.e., from outside of Bosnia and Herzegovina – in general and those in particular provided by “sister” political parties abroad for projects.

Barring political parties from elections: In the application of Article 14, Paragraph 7 of the Law, which covers the barring of political parties from participating in forthcoming elections, it is unclear whether parties should be so barred simply because they have failed to submit the required financial reports.

Acceptable range of fines: At the moment the law does not clearly specify the range of acceptable fines for violations of it.”

3. A translation into English of the Law on Political Party Financing of 2000 has been provided by the Office of the High Representative Legal Department in Sarajevo. Other legislative provisions on financing of political parties are to be found in the Election Law as originally published in the Official Gazette of BiH Nr. 23/01 (and later amended) and a BiH Law on Conflict of Interest.

4. A visit of a delegation of the Venice Commission to Sarajevo (on 18/19 February 2008) has been arranged to meet members of the Central Electoral Commission, auditors of the CEC Audit Service, Ambassador Davidson, Head of the OSCE mission to Bosnia and Herzegovina, and the BiH Inter-Agency Working Group on this matter. Subject of the meetings were planned, but not yet drafted, amendments to the Law on political party financing of 2000 dealing – mainly but not exclusively – with the three issues mentioned in the request.

5. The present individual opinion prepared by Mr H.-H. Vogel, Member of the Venice Commission, was endorsed by the Venice Commission at its ... plenary session (Venice, 14-15 March 2008). The text was transmitted to the authorities of Bosnia and Herzegovina immediately after the session.

II. Comprehensive codification or separate laws?

6. Initially during the visit to Sarajevo the additional issue was raised whether the planned legislation should aim at a comprehensive codification of the legislation on political parties with provisions on financing included or at separate laws, one of which would be the Law on Political Party Financing of 2000 with amendments.

7. Any choice between comprehensiveness and co-ordination will have to take into account that the general framework on the law of political parties is usually outlined in the constitution of a state, while detailed regulations are enacted in ordinary legislation and supplemented by detailed norms at lower level in the national hierarchy of norms. The content of the written law varies to a large extent. Political experience within the country and legislative tradition determine what to regulate, how to do it and how to apply it.

8. In some respects Bosnia and Herzegovina does not entirely fit into this picture. Due to the special political circumstances in 1994 and 1995, the Constitution of Bosnia and Herzegovina, as set out in Annex 4 to the General Framework Agreement for Peace, initiated in Dayton and signed in Paris in 1995, contains general framework provisions neither on political parties in general nor on financing of political parties in particular. Instead both general framework provisions and detailed regulations on financing of political parties are only to be found in ordinary legislation as for example the Law on Party Financing of 2000.

9. However, according to Article II (2) the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols shall apply directly in Bosnia and Herzegovina, and – it is prescribed there – they shall have priority over all other laws. Therefore, the Convention and the judgments of the European Court of Human Rights can provide guidance in matters concerning the financing of political parties with regard to both legislation and day to day application.

10. The main provisions to be observed are Articles 10 and 11 of the Convention which broadly guarantee freedom of expression and freedom of assembly and association. Another provision to be remembered here is Article 3 of the First Additional Protocol to the Convention concerning the right to free elections.

11. These guarantees of the Convention are broad, but they are not without limits. Articles 10 and 11 both permit restrictions, but only if these restrictions meet certain requirements as for example that they are “*necessary in a democratic society*”. Thus, a “*pressing social need*”, as the European Court of Human rights once wrote, can make restrictions permissible under the Convention.

12. Another requirement to be remembered is that any possible restriction may have to pass the general test whether it is proportionate to the goal which is to be achieved.

III. Definition of “Political Party”

13. A second additional issue raised in Sarajevo was whether it was really suitable for the purpose of financing of political parties to define the legal term “political party” as it was done in Article 2 of the Law on political party financing. According to this Article those organisations are to be considered political parties, “into which citizens are ... organized ... to carry out political activities and pursue political goals.”

14. It is obvious that this definition is very broad. It covers not only core activities of political parties as for example participation in general elections or legislative work in parliament but any political activity and any pursuance of political goals. Thus, activities of youth organisations in a broad sense are covered as well as specific activities which otherwise would be typical activities for one-purpose non-governmental organisations or even charitable associations and foundations. Under the law it would not be impossible for such organisations to get public funding for their activities if labelled “political parties”. But if they qualify as political parties in the sense of the special legislation on financing of political parties, they also would have to observe the provisions of the law on limits for private funding and on special obligations concerning accountability and transparency. If the broad definition in Article 2 were replaced by a narrow one, the trade-off would be different: On the one hand public funding would not be available for the excluded organisations, but on the other hand they would enjoy greater freedom to accept private funding and they would only be subject to rules mainly in civil and tax law on accountability and transparency for associations, foundations etc. but not subject to the additional and possibly more elaborate rules of constitutional and administrative law concerning political parties.

IV. Use of externally donated monies

15. The most important purpose of restrictions on the “use of externally donated monies” in the sense of the request is that no clandestine political influence is to be allowed on national politics from unknown or uncontrollable sources abroad as distinguished, for example, from open and transparent support by international organisations as the Council of Europe or the European Union or even by other states when based on international agreements. If the use of externally donated monies is to be restricted, it has to be remembered that any restrictions will have to meet the above mentioned standards of the ECHR and the European Court of Human Rights for example on necessity in a democratic society.

V. Barring political parties from elections

16. The Venice Commission has adopted, during the last few years, different guidelines and opinions on legislation on political parties. These documents underlined the essential role of political parties in the electoral process and highlighted the existence of some issues of great importance in the practical implementation of the right to free and fair elections. However, many of these questions cannot be answered solely on the basis of the legislation on political parties. They are the main players in the electoral process, the ground and rules of which are defined mainly by electoral laws. Consequently, the understanding of elections as one of the main reasons for the existence of political parties requires the analysis of all the elements of the ‘electoral game.’¹

17. Barring political parties from elections under Article 14.7 of the BiH Law on Political Party Financing might be acceptable if and when that is necessary in a democratic society. However, a requirement would be that there is a pressing social need for this measure. Participation in elections is one of the core activities of a political party, and any restriction placed on such an activity must be in compliance with the ECHR as explained above. It must be taken into account that the barring of a political party from elections may lead to the demise of the party concerned. A sanction of such severity can be considered only under very exceptional circumstances and only if this measure is not disproportionate to the goal which is to be achieved.

VI. Acceptable range of fines

18. Fines under Article 15 of the BiH Law on Political Party Financing – as well as sanctions under general criminal law – are a widely used tool to achieve compliance of political parties and their functionaries with legislative provisions. Such sanctions, however, must adhere to the standards of the ECHR. They must not be excessive, and the BiH legislator should provide that their application does not lead to disproportionate consequences for the political party or the functionary concerned.

18. The Guidelines on financing of political parties adopted by the Venice Commission in 2001 provide that:

- 1 *Any irregularity in the financing of a political party shall entail sanctions proportionate to the severity of the offence that may consist of the loss of all or part of public financing for the following year.*

¹ See also **CDL-AD(2006)025** Report on the Participation of Political Parties in Elections adopted by the Council for Democratic Elections at its 16th meeting (Venice, 16 March 2006) and the Venice Commission at its 67th plenary session (Venice, 9-10 June 2006)

- 2 *Any irregularity in the financing of an electoral campaign shall entail, for the party or candidate at fault, sanctions proportionate to the severity of the offence that may consist of the loss or the total or partial reimbursement of the public contribution, the payment of a fine or another financial sanction or the annulment of the election.*
- 3 *The above-mentioned rules including the imposition of sanctions shall be enforced by the election judge (constitutional or other) in accordance with the law.*

19. Legislation foreseeing sanctions of any kind should also foresee a possibility for an appeal against such decisions and an efficient procedure for the examination of such complaints by the competent bodies.