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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION
ON THE ORGANIC LAW OF GEORGIA
ON CHANGES AND ADDITIONS TO THE ORGANIC LAW OF GEORGIA ON POLITICAL UNIONS OF CITIZENS

on the basis of comments by

Mr Srdjan DARMANOVIC (Member, Montenegro)
Mr Hans-Heinrich VOGEL (Former Member, Sweden)

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I. Introduction

Mandate

1. In December 2008, the Parliament of Georgia adopted the Organic Law of Georgia on Changes and Additions to the Organic Law of Georgia on Political Unions of the Citizens. Subsequently, on 4 March 2009, the First Deputy Chairman of the Parliament of Georgia, Mr Mikheil Machavariani, invited the Venice Commission to give an opinion to the above-mentioned law. As the law adopted in December 2008 (the Organic Law of Georgia on Changes and Additions to the Organic Law of Georgia on Political Unions of the Citizens, CDL(2009)054) amends the already existing law on political parties (the Organic Law of Georgia on Political Unions of the Citizens, adopted in 1997) the former will be described as "the Amendments", while the later will be described as "the Organic Law". This opinion will address not only the Amendments, but also the Organic Law without which they cannot be understood.

2. This opinion was adopted by the Venice Commission at its … session (Venice, … 2009).

Reference Documents

3. This opinion is based upon:

- The English translation of the Organic Law of Georgia on Political Unions of the Citizens, CDL(2009)060;
- The English translation of the Organic Law of Georgia on Changes and Additions to Organic Law of Georgia on Political Unions of the Citizens, CDL(2009)054;
- The Explanatory Note of the Organic Law of Georgia on Political Unions of the Citizens, CDL(2009)061;
- The Unified Election Code of Georgia as revised up to March 21, 2008, CDL-EL(2008)016;
- The Guidelines and Report on the Financing of Political Parties (CDL-INF(2001)008, adopted by the Venice Commission at its 46th plenary session, March 9-10, 2001;
- The Code of Good Practice in the field of Political Parties, CDL-AD(2009)002, adopted by the Venice Commission in its 77th Plenary session, December 12-13, 2008.

General remarks

4. The two available texts are not consistent. The law of 2008 changed Articles 30, 31, and 39 of the law of 1997 and added Articles 29[1] and 30[1] to that law. The text of the amending law of 2008 and the consolidated text of the law *as amended* should therefore be partially identical. But they are not.

5. Amendments to the Organic Law on political parties were adopted in the context of an internal political crisis and tensions between the ruling party – the United National Movement - and opposition parties. Ultimately, the Amendments were a product of intensive political dialogue between opposition and the ruling party that was conducted in the framework of the so-called Anti-Crisis Council, the body created upon the initiative of the President of Georgia and comprising representatives of the Government and the ruling party and members of the parliamentary and extra-parliamentary opposition.[1]

6. The outcome of this political dialogue comprised whatfollows:

[1] Extra-parliamentary opposition actually comprises those parties that refused to serve their tenure in Parliament after the May 2008 parliamentary elections.

- restoration of budgetary funding for parties that refused to serve their tenure in Parliament after the May 2008 parliamentary elections, pursuant to the formula of party financing that includes a basic part as well as an additional sum assigned for MPs elected through proportional system and a component related to the number of votes received;

- budgetary funding to six additional opposition parties along with the nine parties that have already been financed by the state budget;

- creation of a fund for research activities, conferences, business trips, seminars and other similar activities that will be distributed partly directed to the parties and partly to the think tanks and NGOs affiliated with political parties.

II. Amendments of March 2009 – general overview

7. The Amendments of March 2009 to the Organic Law on political parties introduced several positive elements in the field of party financing in Georgia and can be understood as a step forward. The Amendments establish a fairer and more balanced distribution of budgetary money to the political parties by significantly increasing financing of the opposition parties and decreasing direct financing of the ruling party. In the same time, the basic proportions of party financing, in accordance with the election results and the number of seats in the parliament is generally preserved.

8. Introduction of new forms of financing political parties, i.e. the creation of a fund for the development of the parties as well as budgetary financing of the NGOs affiliated with the parties can also be seen as a step forward. New forms of financing can make the Georgian system of party financing more alike to those of advanced democracies where foundations of political parties play an important role.

III. Some open questions related to the Organic Law on political parties

Terminology

9. In Articles 25-27 of the Organic Law, two different ways are used to explain the same situation regarding the subjects of party financing, i.e. those entities that can give donation to the parties: *natural persons* and *legal entities* as well as *physical* and *juridical persons*. Unless this terminology is just a matter of translation, it can be understood that along with standard terms *natural persons* and *legal entities* that are internationally used in legal matters, introduction of terms “physical and juridical persons” might be remnants of legal terminology used in former socialist countries. Although this is not an l issue of principle, it should be useful if double terminology can be avoided. Moreover, this kind of double terminology does not exist in the Unified Election Code of Georgia.

10. The Organic Law makes also a difference between *physical* and *material distribution* of money. This difference is also not mentioned in the Unified Election Code whatsoever. It will be simpler if the Georgian legal system avoids double terminology of this kind too.

Other contradictions

11. a) Article 25 of the Organic Law states that party property may be, among other things, made up of donations received as a result of public events. The Unified Election Code does not make any reference to that.

b) The Organic Law (Article 26, par. 1b) limits the state share of an entity being able to make a contribution on the other hand, while the Election Code does not establish any limit (Article 47).

c) The Organic Law stipulates that parties which received financial and material donation in violation have to hand over these donation to the state treasury no longer than in one month (Article 28 par. 1), while the time limit in the Electoral Code (Article 48 par. 4) is ten days.

d) A sentence in the Organic Law (Article 26 par. 11d) concerning "citizens having no citizenship" is not clear. Maybe it is a problem with the in English translation and Georgian law makers actually have had in minds persons who are residents in the country, but have not obtained citizenship, or stateless persons.

12. It is not certain that these contradictions are essential, but it should be useful for the Georgian authorities to consider changing the provisions of the Organic Law that might be in contradiction with the Unified Election Code or vice versa.

Article 30[1]

13. It is obvious, however, that a crucial part of the legislation of 2008 is enacted in the new Article 30[1]. The essence of this article seems to be that a foundation – which is the term used in the translation of the amending law of 2008 – or a fund – the term used in the translation of the law as amended – is established as a public legal entity under the name of "Development and Reforms Foundation" or "development or reform fund". In Article 30[1].1, this foundation or fund is said to aim "at the support of the development of parties and nongovernmental sector and creation of fair, competitive political system" (according to the amending law) or (according to the text as amended) aiming "to contribute to the development of parties and NGO sector and creation of a healthy and competitive political system".

14. In this legal context the use of the term "foundation" on the one hand might imply that the founded institution or organisation is a legal entity on its own, with full own legal capacity. The use of the term "fund" on the other hand might imply that there is only a sum of money made available for the purpose given in the law. But these interpretations of the two terms are not the only possible in the context of the law which explicitly provides that the entity is a "public legal entity" or "entity of public law". Both terms are vague. Because of their vagueness it is not entirely clear in which legal form the entity in question is established. Is it supposed to be a legal person independent from the state of Georgia; is it an accumulation of money, which is administrated separately while at the same time remaining an integral part of the resources of the state of Georgia; or, if it is something else, what is it? This question should be answered.

15. In this context a rule of thumb has to be mentioned which sometimes is followed by business lawyers from European jurisdictions: The choice of the legal entity "foundation", "Stiftung", "stiftelse" and their equivalents in both private and public law should always be considered if it is desirable or necessary to reduce, minimise and even avoid entirely external requirements concerning governance, accountability and transparency. The absence of precise, detailed and explicit rules in the basic documents establishing legal entities of this kind under civil or public law may lead to deficiencies with regard to accountability and transparency.

16. It appears reasonable, that there should be the same high level of accountability and transparency when budget funds are allocated directly – in one step – to political parties and when they are allocated to them (and NGOs) in a two-step-procedure by first transferring them to a fund or foundation and thereafter from this fund or foundation to the political parties (or NGOs).

17. In the Georgian Organic Law, however, there are no specific provisions on governance, accountability and transparency of the "Development and Reforms Foundation" or "development or reform fund" provided for in Article 30^1. If there are no such provisions elsewhere in Georgian legislation, it should be spelled out explicitly and in precise detail that the level of accountability and transparency is the same whether state funds are allocated in one step according to Article 30 or in two steps according to Article 30^1.

18. According to Article 30^1.9 funds from the foundation or fund are to be allocated for certain purposes only. According to the translation of the amending law funds are to be allocated "only for the purpose of financing of researches, trainings, conferences, business trips and regional projects", and according to the translation of the consolidated text "[f]unds from the fund are released only for financing researches, studies, conferences, official visits and regional projects". Both versions of the provision in Article 30^1.9 cover a very broad range of purposes. But how does this provision fit together with the similarly broad range of aims mentioned in Article 30^1.1? It is obvious that the two provisions in paragraphs 1 and 9 are not solidly coordinated.

19. Finally, it has to be noted that the wording of paragraphs 1 and 9 of Article 30^1 is very broad; both aims and purposes are defined so broadly that almost any allocation of budgetary funds can be justified by reference to either aims or purposes. This amounts to a delegation of budgetary powers from parliament to the "Development and Reforms Foundation" or "development or reform fund" in the constitutionally sensitive field of allocation of public funds to political parties and even to NGOs with activities close to those of political parties. This delegation is very far reaching - so far reaching, that is very doubtful whether it is in compliance with fundamental concepts underlying the Constitution of Georgia, which is based on the view that basic budgetary decisions must be taken by parliament, that proper auditing takes place and that accountability and transparency has to be ensured.

IV. Conclusion

20. In the current political context of Georgia renovated mechanisms and formulas of party financing, generally agreed by all main parties in the country and legally confirmed through Amendments to the Organic Law on political parties, present a step in the right direction in efforts to normalise political competition between ruling and opposition parties and strengthen democratic reforms in the country.

21. Nevertheless, important recommendations contained in the present opinion should be implemented in the Election Code and in the Organic Law on the political unions of citizens.

22. The commented provisions would however need revision on a number of points. The legal status of the fund or foundation has to be clarified, which includes that there must be clear provisions on appeal to a Court of Law against decisions of the fund or foundation. It has to be ensured that at least framework budget decisions concerning the fund's or foundation's distribution of appropriate means are taken in ordinary budget proceedings as provided for in the Constitution. Further, it has also to be ensured that the fund or foundation can be fully audited by external auditors. Finally, it has to be ensured that there is full accountability and transparency in matters of the fund or foundation.