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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE PROVISIONS RELATING TO POLITICAL PRISONERS IN THE AMNESTY LAW

OF GEORGIA

Adopted by the Venice Commission
at its 94th Plenary Session
(Venice, 8-9 March 2013)

on the basis of comments by

Mr Nicolae ESANU (Member, Moldova)
Mr James HAMILTON (Substitute member, Ireland)
Mr Angel SANCHEZ NAVARRO (Substitute member, Spain)

I. Introduction

1. By a letter of 19 December 2012, the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion on the draft Amnesty Law of Georgia (CDL-REF(2013)003).

2. The request is worded as follows: "*During its meeting in Paris on 12 December 2012, the Monitoring Committee of the Parliamentary Assembly decided to ask the opinion of the Venice Commission on the specific provisions in the amnesty law currently being considered by the Georgian Parliament that include in this amnesty the list of individuals that are considered political prisoners by a recently adopted resolution of the Georgian Parliament. We would be grateful if the Venice Commission could adopt its opinion on this law at it earliest convenience.*"

3. The following rapporteurs were invited by the Venice Commission to provide their comments on this draft Law: Mr Nicolae Esanu, Mr James Hamilton and Mr Angel Sanchez Navarro.

4. The draft Law was adopted in its third and final reading on 21 December 2012 by the Parliament of Georgia. On 27 December, the President vetoed the draft Law. However on 28 December the Parliament overrode the veto. The President refused to sign the bill into Law and the Chairman of the Parliament signed it on 12 January 2013.

5. On 13 January 2013, the persons, whose names had been included in the list of political prisoners, were released.

6. On 6-7 February 2013, Mr Esanu and Mr Hamilton accompanied by Ms de Broutelles from the Secretariat visited Tbilisi and had meetings with the Vice President of the Constitutional Court, the President of the Supreme Court, the Minister of Justice and the Deputy Minister of Justice, President and members of the Association of Judges, representatives of the Public Defender Office, members of Parliament and several NGOs.

7. The opinion takes into account information provided by the Government, NGOs and the results of the visit to Tbilisi. The Venice Commission is grateful to the Georgian authorities and to other stakeholders for the excellent co-operation during this visit.

8. The present opinion was discussed at the Sub-Commission on Fundamental Rights on 7 March 2013 and was subsequently adopted by the Commission at its 94th Plenary Session (Venice, 8 - 9 March 2013).

II. Scope of the opinion

9. The law on Amnesty is divided into three parts:

The first part consists of Articles 1 to 21 and applies to ordinary crimes. There are different provisions relating to different types of offenders, different gradations of the reduction in sentences or complete remission of punishment on the basis of various criteria.

10. The second part consists in Article 22 of the Law and provides that *persons who have been granted the status of politically imprisoned or politically persecuted person by virtue of (the) resolution of the Parliament of Georgia shall be discharged from criminal responsibility and punishment*.

11. A resolution was adopted by the Parliament of Georgia on 19 December 2012 in which:

- It refers to the studies done by a "working group on the deliberation of issues relating to the persons incarcerated on political grounds" set up by the Committee of the Human Rights and Civil Integration as well as to Resolution 1900 (2012) of the Parliamentary Assembly of the Council of Europe "The definition of political prisoners"[1] ;
- it establishes a list of 190 names of "persons incarcerated on political grounds" and four names of "persons persecuted on political grounds";
- it declares itself resolved to provide, at the earliest date possible, the elaboration of legal mechanisms of release from criminal responsibility and punishment and/or Right to Fair Trial.

12. Finally, part 3 of the Law - Articles 23 to 27 - deals with the implementation of the Law.

13. Given the terms of the request by the PACE, the present opinion will only deal with Article 22 of the Amnesty Law, given that Articles 1 - 21 and 23 clearly only concern only ordinary crimes, and therefore fall outside the scope of this opinion.

14. Moreover, this opinion does not intend to take a stand on whether or not the people included in the list set by the Parliament of Georgia are political prisoners, whether on the basis of the works of the Parliament of Georgia or on the basis of the definition given by the Parliamentary Assembly in its Resolution 1900 (2012).

15. It should be pointed out from the outset that, even if it were considered that the Law was contrary to international standards, it would be contrary to the principle of legal certainty and to the principle of non-retroactivity of criminal law that the persons covered by Article 22 of the Law, who have now been released, should be returned to prison. In this sense, the question referred to the Venice Commission may now be considered something of a moot as the Law was passed and implemented.

16. Finally, like in any other opinion given by the Venice Commission, there might be errors or misunderstandings due to difficulties with the translation. One of these difficulties deserves to be set forth here. Article 22 of the Amnesty Law refers to *resolution of the Parliament of Georgia.* As articles (definite or indefinite) do not exist in the Georgian language, the question was raised whether the Parliament of Georgia may draft new lists of political prisoners- or update the list drawn up in December 2012 adding new persons - who would then benefit from Article 22 the Law. However, it transpires from the replies given to the Commission's delegation

[1] Resolution 1900(2012) of the Parliamentary Assembly of the Council of Europe on the definition of political prisoners - See in particular the criteria defined in the Resolution
"The Assembly reaffirms its support for these criteria, summed up as follows:
"A person deprived of his or her personal liberty is to be regarded as a 'political prisoner':
a. if the detention has been imposed in violation of one of the fundamental guarantees set out in the European Convention on Human Rights and its Protocols (ECHR), in particular freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association;
b. if the detention has been imposed for purely political reasons without connection to any offence;
c. if, for political motives, the length of the detention or its conditions are clearly out of proportion to the offence the person has been found guilty of or is suspected of;
d. if, for political motives, he or she is detained in a discriminatory manner as compared to other persons; or,
e. if the detention is the result of proceedings which were clearly unfair and this appears to be connected with political motives of the authorities."(SG/Inf(2001)34, paragraph 10)."

Resolution 1900(2012) of the Parliamentary Assembly of the Council of Europe on the definition of political prisoners
http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=19150&Language=EN
and report of the PACE on the same issue :
http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileId=18995&Language=EN

by its interlocutors that this Law will, more probably, remain a one-off. Moreover, the preamble of the Law sets out that "The Parliament of Georgia hereby grants amnesty as a single, temporal and special measure".

III. Measures of mercy in comparative law and in Georgian law

Within the Council of Europe members' states[2]

17. The two principal forms of measures of mercy within the Council of Europe members' states are Amnesty and Pardon.

18. Amnesty is usually referred to as a measure which is impersonal and applies to all persons or to a class of persons, while a pardon concerns a specific individual or a group of individuals.

19. While a pardon typically serves to remit a sentence, an amnesty may be granted before criminal proceedings have commenced or at any stage thereafter.

20. While amnesty is usually considered to fall within the realm of the legislature, the power to grant a pardon is seen as one of the prerogatives of the head of State.

21. However, in certain Contracting Parties the above distinctions between the two concepts are not always present or are not clearly indicated, as a result of which, in legal theory, the clemency institutions are considered to have "hybrid forms".

22. It is worth mentioning that Pardons granted by the executive are generally conceived as atypical discretionary acts, and the discretionary character of these measures does not, in principle, allow for their revocation.

23. Similarly, with regard to amnesties, their retroactive revocation is generally not allowed, as they are adopted by the legislature and their revocation would be contrary to the principle of legal certainty and to the principle of non-retroactivity of criminal law.

24. Finally, it should be noted that this kind of measures are considered legal in European Law and are expressly stated in some international instruments. For example Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) expressly state in par. 16 that "With the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers should not take decisions which invalidate judicial decisions."

In International Law

25. Outside the Council of Europe area, examples of Amnesty Law could only be found in the context of end of conflicts, dictatorships, insurrections, just after democratic transition but no later than that.

26. Limits that international law imposes on domestic law can be summarised in the three following points:

[2] More information on these issues can be found, for example, in the Case of LEXA v. SLOVAKIA (Application no. 54334/00), Judgment, Strasbourg, 23 September 2008

- Obligation to prosecute international crimes (for example crimes against humanity, torture) / fight against impunity;
- Obligation to offer remedies to the victims and to compensate them;
- right to know the truth – see for instance : *Principle 2 of the UN Set of Principles also declares that "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes." While Principle 4 thereof articulates that "[i]irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate".*

Amnesty and Pardon in Georgian Law

27. The Georgian Constitution foresees the presidential power to "grant pardon to convicted persons" (art. 73.1. O).

28. The Constitution does not provide for an express parliamentary power to adopt amnesty laws. Amnesty is mentioned only in Article 74.2 the Constitution which deals with referendum and states "*The referendum shall not be held with the view of adopting or repealing law, in terms of **amnesty** or pardon, ratification or denunciation of international treaties and agreements, as well as the issues restricting the basic constitutional rights and freedoms of individuals*".

29. Like in many member states of the Council of Europe, in Georgia, an Amnesty is decided by the Parliament and is intended to a group of individuals but is impersonal. The Criminal Code of Procedure states, in Article 77, that the *Amnesty shall be declared by the Parliament to be applied to individually unspecified people; it may discharge a criminal offender from criminal liability, and a convict may be discharged from his/her punishment, or the punishment may be mitigated or replaced with a lighter punishment; Amnesty may nullify previous criminal convictions.*

30. On the contrary, pardon is granted to specified individuals. Article 78 of the Criminal Code of Procedure reads as follows "*Pardon is granted by the President of Georgia to specified individuals. Pardon may discharge a convict from further serving sentence, or mitigate or replace a punishment with a lighter one. Pardon may nullify previous criminal convictions*"

31. A Decree of the President establishes the rule for granting pardons; a special commission is established, which considers requests for pardon. The Commission submits its recommendations to the President who has discretion to accept or refuse the recommendation.

IV. The Law on Amnesty and the respect for certain fundamental principles and the rule of Law

32. The Law adopted on 22 December 2012 is called the Amnesty Law. However, it is unclear whether Article 22 of the Amnesty Law referring to a resolution listing the people who are considered as political prisoners and to whom the Amnesty applies, really presents the features of an Amnesty Law.

33. In Georgian Law, measures of mercy directed to specified individuals rather take the form of a Presidential pardon (see above). In theory, the Georgian authorities had the option between addressing the issue of the "political prisoners" through amnesty or pardon. According to them pardon was not a politically feasible option: the persons concerned ("political

prisoners") would have had to appeal to the President who they considered to be responsible for their imprisonment and such an appeal would have meant an implicit recognition of their guilt. In addition, the authorities do not think that the President would have granted pardon to "political prisoners". They therefore chose to proceed with an amnesty. This choice was a political choice which belonged exclusively to the Georgian authorities and which may not be questioned or reviewed by the Venice Commission.

34. However, there are legal consequences to this choice. Amnesty laws adopted by parliament have to comply with the rule of law[3] principles of legality, prohibition of arbitrariness as well as non-discrimination and equality before the law.

Article 22 and the principle of legality and transparency of the process for enacting Law

35. Prima facie, Article 22 of the Law on Amnesty of Georgia seems to be dedicated to "individually unspecified people" since it refers to "person who has been granted status of politically imprisoned or politically persecuted person" without naming them.

36. However, the Law on Amnesty adopted on 22 December 2012 and the Resolution adopted on 19 December 2012 which list the names of individuals are two acts adopted by the same body, the Parliament of Georgia, which serve the same purpose and have to be seen and considered together.

37. Therefore, the mere fact that the list of names of individuals appears in a distinct document cannot lead to the conclusion that this Amnesty Law was intended to "unspecified people", as it should have been.

38. In addition, as concerns the process of adoption of the list of names, as is mentioned expressly in the Resolution of the Parliament of Georgia, this list was drafted by the special "working group on the deliberation of issues relating to the persons politically imprisoned or politically persecuted" created by the Human Rights and Civil integration Committee of the Parliament of Georgia. This working group included an important number of representatives of human rights non-governmental organisations (NGOs). Names were submitted by NGOs and the inclusion of names into the list was decided, after having studied the "relevant materials", by the working group in which the same NGOs were also represented.

39. The criteria for selecting the cases were not disclosed to the public. As a consequence, the procedure lacks the required element of transparency.

Article 22 of the Amnesty Law and the principle of separation of powers

40. In conformity with the European democratic tradition, in Georgia the Constitution is "the supreme law of the State" (Article 6 of the Constitution of Georgia hereinafter "CG"), and "State authority shall be exercised on the basis of the principle of separation of powers" (Art. 5.4).

[3] See report on the Rule of Law (CDL-AD (2011)003 rev) in which the Venice Commission came to the conclusion that "a *consensus* can now be found for the necessary elements of the rule of law as well as those of the Rechtsstaat which are not only formal but also substantial or material.
These are:
(1) Legality, including a transparent, accountable and democratic process for enacting law
(2) Legal certainty
(3) Prohibition of arbitrariness
(4) Access to justice before independent and impartial courts, including judicial review of administrative acts
(5) Respect for human rights
(6) Non-discrimination and equality before the law."

41. Parliament shall be "the supreme representative body of the country, which shall exercise legislative power, determine the principle directions of domestic and foreign policy, exercise control over the activity of the Government within the framework determined by the Constitution and discharge other powers" (Article 48).

42. The Judiciary power "shall be independent and exercised exclusively by courts", which "shall adopt a judgment in the name of Georgia" (82.3 and .4 CG). Moreover and among other things, "only a court shall be authorised to repeal, change or suspend a court judgment in accordance with a procedure determined by law" (Article 84, par. 1 and 5).

43. By choosing to list the names of political prisoners after studying the "relevant material", rather than giving an abstract definition of *politically imprisoned or politically persecuted person*, Parliament took the place of the Judiciary which should, in principle, have been entrusted by decision of Parliament to decide whether individuals were fulfilling the criteria Parliament would have determined.

44. It is true that according to Article 25[4] of the Law, the beneficiaries of the Amnesty Law have a "right to a fair trial during the hearing of their criminal cases". But this is only an option, which comes after the decision to grant the status of political prisoner and depends on the will of the individuals already released.

45. This is not equivalent to a procedure by which the Judiciary is entrusted by decision of Parliament to decide on whether individuals fulfil the criteria determined by Parliament.

46. In a democratic society where peaceful changes in majority are the sign of a healthy political life, the public as well as the authorities should be able to trust that each power will keep on acting in its own sphere.

<u>The Amnesty Law and the principles of prohibition of arbitrariness, non-discrimination and equality before the Law</u>

47. Article 22 of the Law on Amnesty, as already pointed out, provides for discharge from criminal responsibility and punishment of persons who have been granted politically imprisoned or persecuted status by virtue of the Resolution of the Parliament of Georgia.

48. No attempt was made in the Law to establish objective criteria according to which an individual is considered a political prisoner. The Law does not specify what offences are covered or during what period. It does not mention a criterion such as "serious doubt about the fairness of the proceedings leading to the conviction of the individual". Although reference is made to the Council of Europe's resolution on political prisoners in the preamble of the Law, these criteria are not incorporated in the Law itself.

49. As previously mentioned, the process of selection of cases was non transparent, and therefore appears to be arbitrary.

50. Failure to incorporate clear criteria into the Law has also as a consequence that it would be extremely difficult and perhaps not possible for any person to challenge Parliament's decision.

51. The Law does not provide for an appeal to a court of law in the case of a person whose name is not on the list and considers that he or she is entitled, as anybody else, to be

[4] Article 25 of the Law on Amnesty reads as follows "All the persons who fall under the scope of the application of the Amnesty Law, shall enjoy the right to a fair trial during the hearing of their criminal cases".

released on the grounds that he or she was a political offender. In any event, in the absence of clear criteria for inclusion in and exclusion from the list, a challenge could hardly succeed.

52. Article 22 of the Law on Amnesty is meant to be an amnesty for people imprisoned on political motives but appears to be a general amnesty. On a literal reading, the Law would appear to cover not only political offences, but also ordinary offences which had no connection to politics and even - although most probably theoretically - international criminal offences such as torture or war crimes.

53. Even if one allows that the process was carried out in good faith, if a person who had genuinely been imprisoned for political reasons turned out to have previously committed a serious offence unrelated to politics he or she appears to have been granted immunity from prosecution for non-political offence at all times.

54. Moreover, in case Parliament have included in their list persons who are not in any sense political offenders or the objects of political persecution and who have committed ordinary offences unconnected to politics, there is no method by which the decision can be challenged.

55. The Venice Commission is mindful of the reasons put forward for the adoption of these texts (i.e. the urgency to take immediate steps to end the scandal of persons being held in prisons for political reasons as it was explained to the delegation during its visit; see, also in the preamble of the Law, references to a general "principle of humanity" and to particular circumstances in the country "pursuant to the demand from society to restore justice, taking into consideration necessity to reduce number of inmates and conditionally sentenced persons and interest of public safety") and has taken note of the exceptional scope of the measure ("single, temporal and special").

56. Nevertheless, the Commission is of the opinion that this measure was taken irrespective of the rule of Law and of the above-mentioned fundamental principles. This has to be said without questioning the sincerity of the members of NGOs who had been campaigning on the issue.

V. Conclusion

57. The Venice Commission has taken note of the resolute will of the Georgian authorities to address the situation of the "political prisoners" and of their decision to do so through an amnesty taken by Parliament. This opinion is in no way questioning such political choice, but represents an attempt to provide a legal analysis of the situation with a view to strengthening the rule of law.

58. An amnesty by Parliament must comply with certain fundamental principles of the rule of law, namely legality (including transparency), the prohibition of arbitrariness, non-discrimination and equality before the law. The Venice Commission is of the opinion that Article 22 of the Amnesty Law failed to comply with these principles. Nevertheless, it is undisputable that it would be contrary to the principles of legal certainty and non-retroactivity of criminal law if the persons who have been released were to be returned to prison.

59. During its visit to Georgia, the delegation of the Venice Commission was informed that there are, at present, a substantial number of persons still in prison in Georgia who claim to have been imprisoned for political reasons. Some mechanism which would involve courts has to be found to determine their cases. Criteria to be applied in this mechanism would need to be made public, including any criteria used in the past.

60. The Venice Commission recommends that the Georgian authorities follow the principles set out in this opinion in the possible future procedure.

61. The Venice Commission remains at the disposal of the Georgian authorities for any further assistance they may need.