Strasbourg, 8 March 2006

Restricted
CDL(2006)005
Engl. only

Opinion no. 364 / 2005

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW OF GEORGIA ON REHABILITATION AND RESTITUTION OF PROPERTY OF VICTIMS OF THE GEORGIAN-OSSETIAN CONFLICT

by

Mr. P. van DIJK (Member, Netherlands)

1. Introductory remark

These provisional comments are based upon the English translation of the text of the draft law, as it was submitted to the Venice Commission. It may well be that some of the comments originate from a misunderstanding of the draft due to an unclear or imprecise translation.

Moreover, the draft law as submitted, was not accompanied by an explanatory memorandum that could have explained the scope and meaning of several of its provisions and, consequently, have made some of the comments superfluous.

The following comments are partly of a general character and partly in the order of the articles of the draft.

2. Scope of the draft law

The title of the draft law speaks of "rehabilitation and restitution". From Article 1 of the draft it appears that "rehabilitation" refers to the rehabilitation of the violation of rights and freedoms of individuals as a result of the Georgian-Ossetian conflict due to their ethnic origin, while "restitution" concerns to the restitution of property of the victims of the Georgian-Ossetian conflict, including both compensation of property damage and of non-property damage. This raises several questions about the scope of the draft law.

*First of all, rehabilitation of the violation of rights and freedoms is a very broad concept, which may cover several incidents and situations, ranging from killings and torture to infringements of the freedom of speech and the freedom of religion. And since the prohibition of discrimination constitutes an integral part of the protection of fundamental rights and freedoms, it is difficult to understand why rehabilitation of violations of rights and freedoms on ethnical grounds, even if related to the Georgian-Sestina conflict, are not covered by the regular civil and administrative legal remedies. Article 4, paragraph 5, of the draft law indicates that this concerns violations of human rights and freedoms for which no effective legal remedies were available; this still keeps the scope of the law very broad and undefined.
* Secondly, restitution of property and restitution of property and non-property damage is connected with the right to life and, consequently, would seem to be a special case of rehabilitation of violation of a right.
* Thirdly, in the definition of "right to reside" in Article 2, under e), the words "usage and ownership" suggest that the two relationships to the residence that are required, are cumulative and not alternative. This would mean that initial residents who did not own the house, have no right of restitution or compensation. In contrast, in the definition of "following resident" in Article 2, under f) the element of "right to reside", and consequently also the element of "ownership", is missing. Owners of houses who did not live there themselves, seem to be covered by the definition of "other individuals" in Article 2 under I).
* Fourthly, the concept of "property and non-property damage" would seem to be very broad and would risk to overburden the Commission with applications if no element of a certain severity of damage will be included.
* Fifthly, the third paragraph of Article 4 seems to indicate that only those refuges, IDPs and other individuals are covered by the law, against whom a decision under Article 69 of the Residence Code of 1983 has been taken, and not also those who lost their house or other realty as a consequence of the Georgian-Ossetian conflict but with respect to whom no such decision has (yet) been taken. In that respect, Article 9, under b), is formulated without the said restriction.

In these respects the scope of the draft needs clarification. This should then also be reflected in the goals or functions of the Commission in Article 9.

3. Comments on an article-by-article basis

Article 1, under b): This provision puts restitution and compensation at the same level, without indicating whether priority has to be given to restitution, and only if restitution of property is no longer possible, compensation comes in the picture. The same applies to the wording of Article 4, paragraph 1, and also to Article 5, which provision, however, gives the impression that the choice lies with the initial resident concerned.

Article 2, under b): The abbreviation IDP is not explained in the right way. In contrast with the "refugee" under a), the IDP should stand for: internally displaced person.

Article 2, under d): Following the provision under c), here as well the words "at the moment of leaving the latter" should be added.

Article 2, under i): The words "legitimate interests" is very broad and needs further specification.

Article 3, under c): The words "information on issues related to him/her" are also very broad. It should be specified that only information that is at the disposal of [public authorities and is related to public administration is covered. In that sense, the right to information could be combined with the principle of accountability under e).

Article 4, paragraph 4: The last part of the sentence should read: "if, according to the decision of the Commission, the value of their initial residence exceeds the received compensation or the value of the substitute residence".

Article 6: The words "safe and available" are not very clear. What is meant by "a safe residence" and how can it be guaranteed by the authorities? And what is meant by "the right to available residence"? Does it imply the restriction that the right to a residence will be honoured only to the extent available, or does it imply that the government has the obligation to ensure the availability of sufficient adequate housing for those who wish to return? This needs clarification.

Article 7, according to its title, regulates the public character of the procedure provided by the law. However, the exceptions formulated in the first three paragraphs of the article would seem to have so broad a scope that publicity is the exception rather than the rule. The principle of effective legal remedies referred to in Article 3, under d), implies as a rule a public procedure under certain strict exceptions. This public character is in the general interest ("justice must also be seen to be done") but also in the interest of third parties for whom the outcome of the procedure may have certain consequences. Therefore, the grounds for secrecy have to be defined more explicitly and restrictively in Article 7.

Article 10, paragraph 1: It would seem advisable to have an odd number of members in view of the simple majority rule of Article 19, paragraph 2, of the draft. An alternative would be to give the chair a casting vote, which is, however, only feasible if the chair is one of the international members.
Moreover, the law should regulate the division of members among the three different groups. Although one could imagine a division according to the size of the Georgian and Ossetian population, respectively, in view of the character and purposes of the law it is recommended to divide the members of the Commission equally among the three groups.

Finally, the law should provide by whom and according to which procedure the members of the Commission will be nominated and elected or appointed.

Article 10, paragraph 2: The concepts of "Georgian party" and "Ossetian party" need further specification, while the "international organizations' which have the right to nominate candidates should be mentioned by name.
Moreover, the exact

Article 10, paragraph 3: It would seem advisable, if not necessary, that at least part of the members of the Commission consists of lawyers. Moreover, the concepts of "capable" and "working experience" are too broad. These concepts should be defined in relation to the function of the Commission to make sure that the members of the Commission have qualifications and experience relevant to the work of the Commission.

Article 11, paragraph 1: "From its own staff" should read: "from its membership".

Article 11, paragraphs 2 and 3: It would be advisable to provide that the chair is always one of the international members of the Commission. In that case rotation within the period of nine years would not be necessary. The chair could be elected for three years with the possibility of re-election, which would benefit the continuity of the functioning of the Commission.

Article 11, paragraph 4: It would seem advisable to provide that the composition of the staff reflects the several groups on an even basis.

Article 11, paragraph 6: The composition of the two Committees is not regulated here. Article 22, paragraph 1, provides that the Committees will be composed on a parity basis. It is not clear whether that also means that the three groups will be represented in the Committees with an equal number. In any case it would seem advisable to have the Committees reflect the composition of the Commission. Moreover, it is recommended to provide that one of the international members of each of the Committees will be its chair.

Article 12, paragraph 1, under b): The exclusion of members of a political party would seem unnecessarily strict, especially with respect to the international members. For the members on the Georgian and Ossetian sides it would seem sufficient to exclude those persons who have a function in a political party.

Article 12, paragraph 1 (d): This provision would also seem unnecessarily strict. It is recommended to provide that members of the Commission may not perform any other function that is incompatible with an independent, impartial and efficient performance of their membership, to be judged by the chair or a majority of the Commission.

Article 12, paragraph 5: It is not clear why not at least the "conflict of interest" mentioned under paragraph 1 (d) is exempted from the notification obligation. Moreover, different from paragraph 4, paragraph 5 does not indicate what consequences would have to be drawn from the "conflict of interest" mentioned there.

Article 14, paragraph 1 (b): Here, again, it should be provided that the chair takes into account the principle of even distribution among the different groups.

Article 16, under b): It is not clear which powers the secretary has to supervise the fulfilment of the decisions of the Commission. Do the decisions constitute a writ of execution under Georgian law? Does the secretary refer the case to the court or to the Commission in case of failure of execution? In the latter case, what powers does the Commission have to enforce its decisions?

Article 18: The title should read: Guarantees of Independence and Impartiality of the Commission.

Article 18, paragraphs 1 and 3: It is submitted that complaints about lack of independence or impartiality on the part of one or more members of the Commission should be addresses, at first instance, to the Commission itself, which should judge upon it without the participation of the members involved. If the person concerned is not satisfied with the outcome of the complaint procedure, appeal should not lie with any court. Given the status of the Commission, it is recommended that the Supreme Court should judge on the complaint in second and final instance.

Article 18, paragraph 2: The character of the prohibition should be specified: does it involve a criminal act and, if so, what will be the sanction?

Article 19, paragraph 1: The quorum requirement should be an odd number of members in view of the simple majority rule of the second paragraph.

Article 19, paragraph 2: There should be a provision for the situation of an equal division of votes, *e.g.* a casting vote for the chair.

Article 20, paragraphs 1 and 2: The Commission seems to be granted power to adopt resolutions as normative legal acts without any specification of the areas to which these resolutions will have to relate and without any other limitations of the Commission's legislative power than "the rules set by the legislation within the limits of its authority". From the fourth paragraph it appears that these resolutions do not concern the internal functioning of the Commission. The character and scope of these resolutions need further clarification.

Article 21, paragraph 2(a): The Commission is authorized to "revise applications of victims, their attorneys or other parties concerned". This power is quite unusual, not only in civil law but also in administrative law. Of course, an application may be rejected or granted in part, and a subsidiary claim may be granted instead of the primary claim, but in those cases the decision is still based upon the application as brought before the Commission. It is recommended to clarify the authority of the Commission; "decide on applications" would be a more appropriate wording.

Article 21, paragraph 2(d): In this provision it is provided that the Commission, together with its annual report, sends to Parliament and the President a « package of recommendations for measures for compensation and rehabilitation of rights of the victims of the conflict attached". This gives the impression that the Commission has only recommendatory power and that the final decision about compensation and rehabilitation is made by Parliament and the President. This would seem to be at odd with the whole structure of the law, with paragraph 5 of Article 21 stating that the decisions of the Commission are mandatory, and with Article 16(b) of the draft concerning execution of the Commission's decisions, while Article 32, paragraph 5, also speaks of "final decision".
Moreover, it is not clear in what way the power to decide on the recommendations of the Commission are divided between Parliament and the President. Finally, the words "the conflict attached" are not clear, since the application of the law will be restricted to the Georgian-Ossetian conflict.
There would seem to be some inconsistency between the present provision that speaks of "annual reports" and Article 28, paragraph 1, which speaks of "periodic reports" "every six months".

Article 21, paragraph 3(c): It would not seem appropriate that the Commission, which has to take a decision on an application, may itself assist in preparing the application, since this could affect the objective impartiality of the Commission. It is, therefore, recommended to establish a separate office or unit within the Commission, but not under its direct instructions, to assist applicants in preparing their applications. An alternative would be to assign that task to a legal aid bureau.

Article 22, paragraph 2: It is not clear whether "staff" here means "membership". It would not seem advisable to change the complete staff of the Committees at one and the same moment since this would jeopardize the continuation and consistency of the work of the Committees. But the same would be true for the membership of the Committees. It is recommended to provide that each year one third of the members will rotate.

Article 22, paragraph 4: From this provision it ensues, more or less implicitly, that the Committees do not take a decision themselves but prepare a draft decision for the Commission. It is recommended to regulate the relationship between the Commission and its Committees in a more specific and clear way.

Article 23, paragraph 2c: It is not mentioned here that the Committee submits a draft decision to the Commission. It is recommended to clarify whether that should always be done or it is for the Committee to choose to do so.

Article 24, paragraph 2(e): This provision should also make it clear whether the Committee should always submit a draft decision to the Commission.
It should also specify, with a reference to Article 21, paragraph 4, what should be done with the information concerning the alleged violators of the human rights concerned and whether and in what way it makes a difference if the alleged perpetrator is a public official o a private person.

Article 25, paragraph 1: It is not clear from this provision whether the Inquiry Group is composed of staff members of the Commission and, if that is not the case, whether after its establishment the Inquiry Group forms part of the staff or constitutes a separate organ with its own staff.
In view of its task, and the trust it must raise with the possible victims, the composition of the Group, with even division among the groups, would also seem important.

Article 26, paragraph 1(a): The extent to which third parties have access to the files of pending procedures, will have to be decided by the competent court.

Article 26, paragraph 1(b): Entering a detention centre should always require previous consultation with the authorities concerned; entering private homes should require previous permission of a judicial authority.

Article 26, paragraph 1(c) and paragraph 2, and Article 27, paragraph 1(b): A provision should be made concerning official and professional confidentiality.

Article 28, paragraph 7: While the Commission has to report every six months and may make recommendations, the President of Georgia must report on implementation measures only six months "after termination of the activities of the Commission", which could mean: after nine years. It is recommended to distinguish between reporting on measures taken for the implementation of recommendations in individual cases, and general measures for the implementation of any final recommendations of the Commission.

Article 28, paragraph 8: This provision is not clear, probably due to the translation “dismiss”. Since the Commission will have to present a report every six months, it cannot be dismissed every three months thereafter.

Article 32, paragraph 1(c): The concept of “public organisation” is not clear. It is recommended to also give access to the Commission to (certain) non-governmental organisations.

Article 32, paragraph 1(d): It is recommended to also include gross violations of human rights by private persons, as their investigation and assessment may also be of great importance to facilitate regulating the conflict and the alleged victims may not always be in the position to bring an application themselves.

Article 32, paragraph 2: The period of 15 days would seem to be unrealistically short given the sometimes very complicated facts and the long time that may have passed since those facts took place. Moreover, the assessment of whether an effective remedy has been available to the victim may also be a complicated issue.

Article 33, paragraph 5: As a matter of translation, “staff of the Commission” should read: “members of the Commission”.

Article 33, paragraph 6: As a matter of translation, “justified” should read: “reasoned”.

Article 34: It should be specified which court is competent to hear the appeal.

Chapter IV: According to its title, chapter IV contains general rules of damage compensation. However, its articles reveal that this chapter is only concerned with restitution and compensation related to property and non-property damage, not with rehabilitation and moral compensation in cases of violation of other human rights than the right to property, unless Article 41 is supposed to deal with such cases. If the latter is the case, the regulation should be more specific. If it is not meant to cover rehabilitation and moral compensation, a specific chapter should be added for that purpose.
.
Articles 35-37: The concept of “unfair owner” (read: *mala fide* owner) should be defined.
It is not clear from these provisions whether and to what extent an initial resident of non-State property, who was not the owner of the house, may also claim restitution of residence.

Article 35, paragraph 5: It would seem realistic to qualify “the same place”.

Article 44, paragraph 3: Since the grants and contributions from other sources are not guaranteed, it must be secured that the sources from the State Budget will be supplementary to a sufficient degree.
Since the funds needed to implement the decisions of the Commission are not part of financing the Commission, these funds and their sources are not regulated in the draft law. It is recommended to include a provision regulating and guaranteeing these funds.

Article 47, paragraph 2: The election of the two Deputy Chairs should be included.

4. Concluding observation
Although the draft law is an important improvement as compared to the previous draft, from the above observations it may be clear that, in the opinion of the Venice Commission, several amendments, additions and clarifications could be made to make the law implemental and effective.*