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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT CONSTITUTIONAL LAW ON CHANGES AND AMENDMENTS TO THE CONSTITUTION OF GEORGIA

(Chapter VII - Local Self-Government)

by

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The Venice Commission is required to prepare an opinion on a draft constitutional law of Georgia which provides for changes and amendments to the Constitution of Georgia. The modifications of this text imply the addition of a completely new Chapter Seven (1) dealing with local selfgovernment. In principle the initiative deserves great attention and appreciation as far as it fills a lacuna of the Constitution presently in force, which is aimed at insuring to the institutions of local selfgovernment the constitutional guarantee which is missing to day.

Therefore the evaluation of the text which is submitted to the Venice Commission requires not only the adoption of two different normative yardsticks (the Constitution of Georgia and the European Charter of local selfgovernment) but also an examination of the proposed constitutional amendments in the light of their own purposes. It is important to understand whether the content of the new text and its provisions transferring its implementation to organic and ordinary laws of the Republic of Georgia are complying with the aim of insuring the stability, adequacy and efficiency of the rules concerning the establishment and the functioning of the institutions of the local selfgovernment in Georgia.

The opinion of the Directorate general of democracy and political affairs exetensively dealt with the relation between the present draft law and the European Charter of local selfgovernment. Therefore the present comments will specially have regard to the place of the new Chapter in the frame of the Georgian Constitution and to the exigency of the drafting of a text able to comply with the purposes of the legislator. We have to keep in mind that the main exigency of this text is filling the lacuna in the field of local government which is an evident shortcoming of the Constitution whose guarantee should cover not only the arrangements of the organization of the central powers of the State and the rights and freedoms of the citizens, but also the existence and the functioning of the local selfgovernment institutions which display an essential role in spreading freedom and democracy in the society through their intermediate position between the State and the citizens.

An essential feature of the regulation of the local government is the identification of the basic functions of its institutions. I mean those functions which are entrusted to the local government in a stable and permanent way. I mean functions which are not temporarily delegated to the selgovernment institutions by the State, but have to be exercised at the intermediate local level as far as they imply the care of local interests which are dealt with in a better way when they are taken in charge by the bodies and entities which are located at the local level and are expression of the local community.

The amendments don't list the powers of the local selfgovernment. According to art.101 (2) 2 those powers "shall be determined by organic law "This provision cannot be easily accepted. We have to keep in mind that on the basis of a rule which should be added to art. 89.1"representative organ of local selfgovernment shall be entitled to apply to the Constitutional Court with regard to compliance with the Constitution of Georgia of the normative acts with the provisions of the Chapter Seven (1)". Notwithstanding the fact that the English translation of this part of the draft is not very clear, it is evident that the draft, if approved, shall allow the representatives of the local government to complain before the Constitutional Court when and if a normative act conflicts with the constitutional provisions in the matter. The constitutional provisions shall be the yardstick in view of the evaluation of the conformity with the Constitution of the legislative regulation concerning the local government. But constitutional provisions will be a very hollow yardstick if in the Constitution a list of the functions of the local government institutions is missing. It is true that art. 101 (2) states the principle that " the powers of the local selfgovernment are partitioned from the powers of the state bodies ": therefore the powers can

be identified on the basis of the rule according to which they have to be “the expression of the right and opportunity to regulate the matters of local importance independently under…responsibility (of selfgovernment) and on the needs of the local population “(art. 101 (1)). But both these two criteria don’t offer a clear basis for a constitutional judgement.

It would be advisable, therefore, looking for a solution which can combine the exigency of having an yardstick in view of the judgement of constitutionality of the laws in the field of local government with the flexibility of the normative provisions in the matter. The General Directorate of democracy and political affairs criticized the rigid choice of entrusting the task of identifying the functions of the local government to an organic law and suggested to adopt a more flexible provision stating that “the general principles of the competences of local selfgovernment are determined by organic law“. The suggestion is interesting. The organic laws have an intermediate position between the Constitution and the ordinary laws because the Constitution requires for their adoption a special majority different from those required for the approval of the amedments of the Constitution, on one side, and, on the other side, of the ordinary laws. It is evident that in the hierarchy of the sources of law the organic laws are subordinate to the Constitution and prevail to the ordinary legislation. Therefore they have to comply with the Constitution, while the ordinary legislation shall respect their provisions. An ordinary law, which does not comply with an organic law, is unconstitutional and, obviously, the Constitutional Court shall declare unconstitutional an ordinary law dealing with local selgovernment which does not respect the principles stated in this field by the relevant organic law. The commented suggestion of the Directorate is important because it takes into account the exigencies of the judical review of the legislation in the field of the local selfgovernment.

But perhaps the proposal of the Directorate can be improved just looking at its impact on the judgement of the Constitutional Court. Principles are always ambiguous provisions which are not easily interpreted and leave a great deal of discretion to the interpreter. The proposed new provision could gain elements of clarity and stability if it were written taking into account the exigency of entrusting the organic law also with the task of identifying the matters, the areas of intervention to be assigned to the local selfgovernment. Such a provision could offer a more concrete basis of judgement to the Constitutional Court insuring the stability of the material space of intervention of the local selfgovernment, binding the choice of the ordinary legislation in the matter and abstaining from interfering in the identification of the specific functions which have to be attributed to the local government. The ordinary legislation will be free in selecting the division of the functions between the different levels of the public power, but he could not completely deprive the local government of functions in areas which are assigned to it by the organic legislation. Moreover the ordinary legislator shall justify his choices according to the principles of rationality and subsidiarity, complying with the substantial rules (different from those concerning the areas of competence) stated by the organic law.

Therefore the Constitution shall require to the organic legislator an accurate choice of the space which have to be given to the interventions of the local selfgovernment institutions, choice which – perhaps – cannot be made at this moment of the constitutional reforms of Georgia but shall be made in the future with the support of the special parliamentary majority required fot the approval of the organic laws.

A second issue dealt with by the draft which deserves our attention is its art. 101 (1) 4. According to this provision the procedure of creation and abolition of the units of the local selfgovernment, also the rule of changing the administrative boundaries is determined by organic law. Consultation with the unit of the local selfgovernment is essential before making the decision “.

It is the second part of the provision which is difficult to understand. What does it mean the requirement of the consultation with the unit of the local selgovernment during the procedure of the creation of the unit itself? At the moment it does not exist. How is it possible a consultation with an unit which has not been created? Probably the use of the expression " unit "is the source of the difficulties, of some amibiguities as far as the draft akes reference to the entities of the local government calling them "units", and, at the same time, the espression "unit" is used to make reference to the people concerned. We don't know whether a mistake of the drafters is at stake or the translator made is work uncorrectly.

In any case it should be evident that – as a rule – the consultation with the people concerned is required in the case of the creation and aboltion of the entities of the local selfgovernment. Is a popular consultation required in all other cases of change of the administrative boundaries too? Or are consultations with the bodies of the entities sufficient in the case of minor changes? The draft shoul be more clear on this point, distinguishing consultation of the people directly through referendums and consultation with the bodies of the entities which are representative of the interested people.

Two minor remarks:

1. It would be advisable providing some rules about the trasfrontier cooperation between units of the local government, and authorizing them to transfer some functions to the entities created by the participants in the transfrontier cooperation (see the recent protocol n. 3 in the matter).

2. Art. 101 (3) 3 does not identify the State's authorities responsible for the supervision on the activities of the local authorities. It would be convenient distinguishing administrative and judicial supervision also with regard to the effects on the acts of the local government and the accountability and responsibility (political, civil, criminal and administrative) of the local administrators.