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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON THE DRAFT CONSTITUTIONAL LAW OF GEORGIA ON THE STATUS OF THE AUTONOMOUS REPUBLIC OF ADJARA

Adopted by the Venice Commission
at its 59th Plenary Session
(Venice, 18-19 June 2004)

on the basis of comments by

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Introduction

1. At its meeting of 26 May 2004 the Monitoring Committee of the Parliamentary Assembly asked the Venice Commission to provide an opinion on the draft Constitutional Law of Georgia Concerning the Status of the Autonomous Republic of Adjara (CDL(2004)58). It asked for this opinion to be provided as a matter of urgency before the adoption of the Constitutional Law by the Georgian authorities.

2. The present draft opinion was prepared by Messrs Giorgio Malinverni (Switzerland) and Hans-Heinrich Vogel (Sweden). It was adopted by the Venice Commission at its 59th Plenary Session on 18 June 2004.

I. The constitutional basis and context of the draft

3. Article 3.3 of the Georgian Constitution provides that the status of the Autonomous Republic of Adjara shall be determined by a constitutional law of Georgia. This provision of the Georgian Constitution was added in April 2000. Hitherto there was no clear legal basis for determining the scope of the autonomy of Adjara.

4. The draft Constitutional Law is proposed following the restoration of the authority of the legitimate government of Georgia on the territory of the Autonomous Republic of Adjara. Since it has not yet been possible to re-establish Georgian government authority in South Ossetia and Abkhazia, it will indeed be the first time that the status of an Autonomous Region in Georgia is defined by law. The Georgian Constitution does not provide comprehensive rules on territorial structure. In its Article 2.3 it provides that the territorial state structure of Georgia shall be determined after the complete restoration of the jurisdiction of Georgia over the whole territory of the country.

5. The task of the drafters of the constitutional law was particularly important and difficult since such rules are prepared for the first time and the Constitution does not provide much guidance in this respect. The constitutional law will be applicable to the situation in Adjara only and not serve as a model for other autonomous regions. In particular the settlement of the conflict with the Autonomous Republic of Abkhazia will require the adoption of quite different rules, granting a far broader autonomy.

General principles of the draft Constitutional Law (Arts. 1, 2, 5 and 22.2)

6. Art. 1.2 provides that the constitutional law represents an inseparable part of the Constitution of Georgia. This would mean that the provisions of the law have equal status with the provisions of the Georgian Constitution and may lead to difficulties in cases of contradictions between both texts. The considerations in paragraph 30 below show that this is not an entirely theoretical issue.

7. Article 2.1 of the draft rightly provides that Adjara is an inseparable part of Georgia and that its powers are determined by the constitutional law or on its basis. Article 22.2 of the draft also corresponds to a generally recognised principle. It provides that, subject to the principle of division of competences between the central state and the Republic which leaves certain areas within the exclusive competence of Adjara, normative acts of Georgia prevail over normative acts of Adjara.

8. The first sentence of Article 2.2 binding Adjara to the principles of the Constitution of Georgia is also welcome. It is entirely legitimate and necessary that the Georgian legal order ensures that state power in Adjara is exercised on the basis of the principles of democracy, human rights and the rule of law enshrined in the Georgian Constitution.

9. By contrast, the second sentence of Art. 2.2 forbidding the creation of government organs not explicitly foreseen in the draft seems difficult to justify. While it is not up to Adjara to usurp any powers not conferred upon it by the central state, the way of structuring the bodies exercising the powers conferred upon Adjara by Georgia can and should be left to the Autonomous Region. The very meaning of autonomy is to have one's own laws and institutions. Article 2.2 severely limits the scope for such laws without being justified by an obvious interest of the central state.

10. Article 5 of the draft contains provisions preventing Adjara from restricting the free movement of people or goods or legislating on basic rights. These provisions obviously reflect recent experience. The prohibition of restrictions on the free movement of citizens and goods should be extended to include the prohibition of restrictions on the free movement of services and capital as well. By contrast, the prohibition on legislating in the area of basic rights could be limited to legislation restricting human rights.

The scope of the competences of Adjara (Articles 3 and 4)

11. Art. 3.1 of the Georgian Constitution contains a list of exclusive competences of the central state bodies. Art. 4.3 of the draft rightly prohibits any delegation of these powers to Adjara.

12. In other respects the Georgian Constitution leaves a lot of room for decisions on the scope of the competences of the Autonomous Region. There are also no general European standards on the areas which should be within the competence of autonomous regions, although there are certain fields typically left to regions such as education and culture. If one wishes to speak of autonomy, the autonomous region obviously has to have substantial responsibilities. Looking at the list of competences of Adjara in Art. 3.1, these include important areas such as maintaining public order, tourism, agriculture, health care, social insurance etc. This seems indeed substantial.

13. However, the respective competences of the central state and the autonomous region have also to be defined clearly and precisely in order to avoid unnecessary disputes between both sides. This has to be determined in the context of the national legal order and it is not easy for foreign lawyers to determine whether the terms used and submitted in translation are precise enough in the Georgian context. Nevertheless it seems that the list provided contains ambiguities and that it should be further refined.

14. For example, according to Art. 3.1.e) Adjara has the competence to facilitate[1] education and science. What does this mean? May Adjara actually provide education and at which levels? Art. 3.1.h provides for Adjaran competence on inter alia culture while Art. 3.1.g separately provides for competence on libraries and museums of local importance. One therefore wonders what the scope of the competence on culture is supposed to be. The meaning of "social insurance"[2] in 3.l.j) may be clear in the original Georgian version or not so clear.

[1] An alternative translation by Transparency International uses the term « promotion »

[2] The Transparency International translation uses the term "social protection"

15. In this context, the Commission can only underline the need for clear and precise definition of the respective competences. This should indeed be the main purpose of the constitutional law.

16. As regards the types of competences, the draft distinguishes between issues within the competence of Adjara (Art. 3) and powers which may be delegated to Adjara (Art. 4). This is a welcome distinction. However, the possibility to delegate competences to Adjara will have to be used in practice to become meaningful.

17. Among the own powers of Adjara, no further distinction as to the type of competence is made. All competences listed in Art. 3 of the draft constitutional law may be exercised by the Georgian authorities only if the Adjaran authorities do not exercise them. The possibility to provide for joint competences as foreseen in Art. 3.2 of the Georgian Constitution is not used. Also, there is no distinction between the competence to adopt normative acts and the competences to implement such acts. It might be useful to provide that bodies of Adjara are competent to provide for the administrative implementation of Georgian laws.

Structure of the Adjaran institutions (Arts. 6-15 and 19)

18. Articles 6-15 provide detailed rules on the structure of the state organs of Adjara. This is surprising since Art. 3.1.a) leaves it to Adjara to adopt its own Constitution and this responsibility becomes fairly meaningless if the content of the Constitution is predetermined in detail by a law of Georgia. The democratic character of the institutions of Adjara is ensured by Art. 2.2 (see above). Otherwise it should be left to the democratic process in Adjara to determine how the state organs are structured.

19. Art. 6 provides for a bicameral parliament with two chambers of 18 and 12 deputies. The need for a bi-cameral parliament in an autonomous region is not obvious and all these rules could be left to the Adjaran Constitution. It also seems surprising that the President of Georgia calls the elections to the Supreme Council of Adjara.

20. Art. 8.3 provides that the Parliament of Georgia may abrogate a legal act adopted by the Supreme Council of Adjara if it contradicts Georgian law. This is a legal question which should not be left to a decision of a political body. The better procedure would be to provide that acts of the Supreme Council of Adjara contradicting Georgian law may be declared void by the Constitutional Court of Georgia, on the motion of the Parliament of Georgia or another state organ.

21. Article 9.2 provides for a legislative veto of the Head of the Council of Ministers of Adjara which can be overridden by a three-fifths majority. A legislative veto fits into a presidential system of government and is inappropriate for a head of a council of ministers elected by parliament. In any case, this issue should be left to the Constitution of Adjara.

22. Art. 10.c provides that a motion of no-confidence in the Council of Ministers requires a majority of three-fourths of the House of Representatives. This seems exaggerated. In any case, this issue should be left to the Constitution of Adjara.

23. Art. 12.4 provides that the Council of Ministers is responsible in front of the President of Georgia and the Supreme Council of Adjara. It is not clear what the responsibility in front of the President of Georgia means and in any case the ministers should only be responsible to the assembly electing them.

24. Art. 12.5 gives to the President of Georgia the possibility to suspend or abolish an act of the Council of Ministers of Adjara if it contradicts Georgian law. Art. 15.2 grants to him the same right with respect to acts of the Head of the Council of Ministers. This is again a legal issue which should not be left to the discretion of a politician. The President of Georgia could appeal in such cases to the Constitutional Court of Georgia. At the most, he could be granted the power to suspend in urgent cases the act pending a decision by the Court.

25. According to Art. 14.1, the Head of the Council of Ministers is elected by the Supreme Council upon the proposal of the President of Georgia. This proposal is within the discretion of the President of Georgia who is in no way bound to propose candidates likely to obtain the confidence of the majority of the Supreme Council. If the Supreme Council three times fails to approve the candidate(s) proposed by the President of Georgia, the President of Georgia may dissolve the Supreme Council (Art. 17.2.b). This role of the President of Georgia seems democratically questionable and scarcely compatible with a status of autonomy.

26. According to Art. 14.3, in case of the early termination of the powers of a member of the Council of Ministers, the Head of the Council appoints the new member "by consenting with the head (heads) of relative governmental body of Georgia". It is difficult to see any justification for such a role of heads of Georgian bodies.

27. Art. 19.1 provides for the creation of an administrative organ of Adjara to administer the issues within the competence of Adjara. Art. 19.2 makes this organ part of the system of the respective administrative organ of Georgia. In order to speak of autonomy, the administrative bodies of Adjara should be subordinate to the respective ministries of Adjara and not be integrated into administrative bodies of the central state.

28. Art. 19.3 provides that Ministries of Adjara may be created only in five fields of activity (maintenance of public order; economics, finances and tourism; health protection and social care; education, culture and sports; and agriculture).It is obvious that Adjara can create no ministries for areas in which it has no competence. This does not have to be stated. The limitation to five ministries seems arbitrary and Adjara should be free to structure its own ministries.

29. Art. 19.4 provides that the Chairman of the Council of Ministers needs the agreement of the heads of the respective government bodies of Georgia to present a candidate for Minister to the Supreme Council. This seems incompatible with a status of autonomy.

Supervision of the organs of the Autonomous Republic by organs of Georgia (Arts. 16-20)

30. According to Art. 17.1 and 2 the President of Georgia may suspend or dismiss the Supreme Council of Adjara in a number of cases. This provision is in contradiction with Art. 73.1.i) of the Constitution of Georgia which provides that "by the consent of the Parliament, <the President of Georgia shall> be entitled to suspend the activity of the institutions of self-government or other representative bodies of territorial units or dismiss them if their activity endangers the sovereignty, territorial integrity of the country or the exercise of the constitutional authority of the state bodies;". No justification is apparent for abandoning the requirement of the consent of the Georgian parliament or extending this extreme rule to cases of legislative inefficiency.

31. It also seems highly questionable that the President of Georgia may in such cases appoint a provisional body exercising the functions of the Supreme Council pending the election of the

new Supreme Council. A parliament should indeed always be elected by the people and not be appointed.

32. Art. 18 provides for the dismissal of the Council of Ministers of Adjara by the President of Georgia. Again, this should at least be limited to the cases provided for in Art. 73.1.i) of the Georgian Constitution and require the consent of the Parliament of Georgia and the involvement of the Supreme Council of Adjara.

Financial and property issues (Arts. 21 and 23)

33. Art. 3.1.n) provides that Adjara is competent for the introduction and adoption of local taxes determined by the laws of Georgia. It does however in no way specify which are these local taxes. Art. 21.1 mentions established taxes and fees but again does not clarify which are these taxes. Adjara has considerable competences of its own under the draft and the funding for these tasks has to be ensured. The proper place to determine the taxes under the responsibility of Adjara is the Constitutional Law on its status and this cannot be left to the future discretion of the Georgian legislature. To find a sustainable solution for this problem seems to be of utmost importance for the future relationship to Adjara and for the determination of the essentials of the status of Adjara.

34. Art. 23 on property is not very clear. It seems to give a lot of discretion to the government of Georgia to decide on property issues.

Judicial issues

35. The draft does not provide for the establishment of courts under the responsibility of Adjara. The courts on the territory of Adjara will therefore be under the responsibility of the (central) state of Georgia. This decision seems understandable since in a country with a short tradition of the rule of law the establishment of different court systems risks leading to excessive discrepancies in the application of legal rules.

36. Adjara also does not seem to have the power to establish a Constitutional Court dealing with disputes between the main organs of the autonomy. Some legal procedure will have to be provided for such disputes.

37. It is very welcome that the draft Constitutional Law of Georgia concerning the Amendments to the Constitution of Georgia accompanying the present draft provides for the insertion of a new sub-paragraph into Art. 89 of the Georgian Constitution providing that the Constitutional Court of Georgia considers disputes concerning the violation of the draft law. In addition, Art. 22.3 of the draft enables the Supreme Council to address the "common court" or Constitutional Court of Georgia in case of violation of the constitutional law. This choice is problematic. It has to be clear which court is competent and, having regard to the contents of the constitutional law, this should be the Constitutional Court of Georgia and not an ordinary court.

Conclusions

38. The draft constitutional law contains some important and positive general principles and grants substantial powers to the Autonomous Republic of Adjara. The scope of these

powers should however be defined more clearly and the financial resources available for exercising these powers should be set forth in the constitutional law.

39. Moreover, the draft regulates in detail the internal structures of the Autonomous Republic, while this should largely be left to the discretion of the democratically elected organs of the autonomy, and it provides for excessive interference of Georgian state organs in the affairs of the autonomy. This is certainly an understandable reaction to the recent negative experience of Georgia with the abuse of the autonomy during the Abashidze period. However, this approach does not take into account the fact that during the second rose revolution the people of Adjara freely and voluntarily expressed their wish to be part of Georgia and to abide by the rules established by the Georgian Constitution. It does therefore seem likely that the institutions elected in Adjara will exercise their powers responsibly without being subject to constant supervision. However, should the unlikely case arise, that the institutions of Adjara (again) do not exercise their powers responsibly, the Commission is of the opinion that the generally accepted powers of supervision as they exist in states granting autonomy and as they are provided for in the Georgian Constitution, as properly interpreted, are sufficient to successfully resolve such a situation.