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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

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

(Chapter VII - Local Self-Government)

Adopted by the Venice Commission
at its 82nd Plenary Session
(Venice, 12-13 March 2010)

On the basis of comments by

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I. Introduction

1. By a decree of 16 June 2009, the President of Georgia set up a State Constitutional Commission with the task of preparing extensive amendments to the Constitution of Georgia.

2. By a letter of 9 July 2009, Mr Avtandil Demetrashvili, Chairman of the State Constitutional Commission, invited the Venice Commission to assist in the process and eventually to assess the proposed amendments.

3. A working group was set up, composed of Messers Bartole, Dutheillet de Lamothe, Sorensen and Tanchev. At the request of the Commission, the Council of Europe's Directorate General of Democracy and Political Affairs (DGDAP) also appointed an expert on local self-government, Mr Robert Hertzog.

4. On 13 January 2010, the State Constitutional Commission sent the draft Constitutional Law of Georgia "On changes and amendments to the Constitution of Georgia" for assessment. This draft law contains the new constitutional chapter on local self-government.

5. On 2-3 February 2010, a delegation of the Commission composed of Messrs Buquicchio, Sorensen and Tanchev accompanied by Ms Simona Granata-Menghini travelled to Tbilisi. It met with the State Constitutional Commission, with the President, with the Speaker of Parliament, with the Chairman of the Central Electoral Commission and with the civil society.

6. The present opinion, drawn up on the basis of comments Messers Bartole, Dutheillet de Lamothe, Sorensen, Tanchev and Hertzog, was adopted by the Venice Commission at its 82nd Plenary Session.

II. Current regulation of local self-government

7. Local self-government in Georgia is currently regulated in the first place in very few provisions of the Constitution. Article 2.4 reads:

> 4. The citizens of Georgia shall regulate the matters of local importance through local self-government without the prejudice to the state sovereignty. The office of the superiors of the executive bodies and a representative office of local self-government shall be electoral. The procedure of the creation of the bodies of local self- government, their authority and relation with state bodies shall be determined by the Organic Law.

8. According to Article 3 of the Constitution:

> 1. The following shall fall within the exclusive competence of higher state bodies of Georgia:
>
> a) legislation on Georgian citizenship, human rights and freedoms, emigration and immigration, entrance and leaving the country, temporary or permanent residence of citizens of foreign states and stateless persons in Georgia;
> b) the status, boundary regime and defence of the state frontiers; the status and defence of territorial waters, airspace, the continental shelf and Exclusive Economic Zone;
> c) state defence and security, armed forces, military industry and trade in arms;
> d) the issues of war and peace, the determination of a legal regime of the state of emergency and the martial law and their introduction;
> e) foreign policy and international relations;
> f) foreign trade, customs and tariff regimes;
> g) state finances and state loan; issuing money; legislation on banking, credit, insurance and taxes;
> h) standards and models; geodesy and cartography; determination of the exact time; state statistics;

i) a unified energetic system and regime; communications; merchant fleet; ensigns; harbours of general state importance; airports and aerodromes; control of airspace, transit and air transport, registration of air transport; meteorological service; environmental observation system;
j) railways and motor roads of state importance;
k) piscary in ocean and high seas;
l) frontier-sanitary cordon;
m) legislation on pharmaceutical medicines;
n) legislation on accreditation of educational institutions and academic degrees; (27.12.06)
o) legislation on intellectual property;
p) legislation on trade law, criminal law, civil law, administrative law and labour law, penitentiary and procedures legislation.
q) criminal police and investigation;
r) legislation on land, subsoil and natural resources.

2. Issues falling within the joint competence shall be determined separately.
3. The status of the Autonomous Republic of Ajara shall be determined by the Constitutional Law of Georgia "On the Status of the Autonomous Republic of Ajara".

9. Georgia has signed and ratified the European Charter on Local Self-government (ECLSG), which has entered into force for Georgia in 2005.

10. Local self-government is further regulated by the Organic Law on Local Self-Government of December 2005 and by the Electoral Code (which was amended in December 2009 to prepare for local elections to be held in May 2010).

11. In addition, an extensive strategy for local self-government in Georgia has been set up ("Draft National Strategy for the Local Self-Government Reform in Georgia 2009-2012").

III. The purpose of adding a specific chapter on local self-government in the constitution

12. The constitutional law under consideration aims at deleting the present Article 2(4) of the Constitution and at introducing a new chapter 7 of the Constitution, consisting of three provisions (with sub-provisions), dealing briefly with very different and quite complicated issues.

13. The amendments under consideration therefore aim at strengthening the constitutional entrenchment of local self-government. Protection at the constitutional level means that a qualified majority – higher than the majority which is needed for organic laws or ordinary laws – will be necessary in order to amend the principles of functioning of local self-government. This aim is certainly to be welcomed, as the Constitution 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 self-government institutions, which display an essential role in spreading freedom and democracy in the society through their intermediate position between the State and the citizens.

14. The Venice Commission's assessment of the draft amendments will be based not only on the two normative yardsticks which are the Constitution of Georgia and the European Charter on Local Self-government, but also on the purpose of the amendments themselves. The opinion will thus examine in particular whether the content of the new text and its provisions transferring its implementation to organic and ordinary laws of the Republic of Georgia comply with the aim of ensuring the stability, adequacy and efficiency of the rules concerning the establishment and the functioning of the institutions of the local self-government in Georgia.

IV. General comments on the draft constitutional provisions

15. The draft constitutional provisions aim to strengthen the constitutional basis for local self-government in Georgia. This follows developments in recent years which have seen, for example, a vast reduction in 2006 in the number of municipalities (from more than 800 to about 70).

16. In this respect, the draft amendments represent a positive step towards the consolidation of local self-government in Georgia, which in the opinion of the Venice Commission is to be commended. It is also in line with Article 4.1 of the ECLSG, according to which the basic powers and responsibilities of local government "shall be prescribed by constitution or by statute."

17. As mentioned above, local self-government in Georgia is currently regulated mainly at the sub-constitutional level.

18. The draft constitutional amendments appear to be quite "minimalistic" in their nature (although more detailed than the present constitutional regulation, see Article 2(4) of the Constitution). The level of constitutional detail is, of course, to a large extent a matter of choice and decision of the Georgian authorities. In this context, it should be noted that under Article 4.1 of the ECLSG, the basic powers and responsibilities of local government "shall be prescribed by constitution or by statute". This means that the ECLSG does not in itself require that the constitution contain detailed or specific provisions on local self-government, some flexibility may be practical as well as appropriate in some cases.

19. However, in the Venice Commission's opinion, the purpose of the introduction of a chapter on local self-government in the constitution of Georgia would be frustrated if at least some fundamental and operational principles were not included at the constitutional level. The Commission underlines in particular that the constitutional provisions under examination will become the yardstick in view of the evaluation of the conformity with the Constitution of the legislative regulation concerning local government. New Article 89(1)f2 will indeed provide for the possibility for the representatives of local self-government to apply to the Constitutional Court. It is true that article 101(2) states the principle that "the powers of the local self-government are partitioned (i.e. separated) 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 self-government) and on the needs of the local population "(art. 101(1)). But these two criteria do not suffice for the Constitutional Court to dispose of a clear basis for a constitutional judgment. It is necessary for the Constitution of Georgia to define the competences and functioning of local self-government more in detail.

V. Analysis of the draft provisions

a) Accountability and responsibility of executive organs of local self-government

20. Under Article 101^1(2), the "*executive organs of the local self-government are accountable and responsible before the representative organs of the local self-government*."

21. It would be appropriate, in the Commission's view, only to use the notion "accountable" in order to leave sufficient flexibility for future legislation on the subject. For example, there may well need to be a difference between arrangements of legal "responsibility" in municipalities where the Mayor is directly elected (as in Tbilisi) and municipalities where the Mayor is elected by the Municipal Council.

22. In municipalities where the Mayor is directly elected, responsibility ending in dismissal procedures would be very questionable. It is indeed difficult to justify that the Municipal Council could dismiss the Mayor, who possesses his/her own democratic mandate, independent of the Council.

23. In addition, the Venice Commission wishes to draw the attention of the Georgian Constitutional Commission to the risks of political instability which would be caused by a solution consisting in the direct election of both the Municipal Council and the Mayor, with the possibility for the former to dismiss the latter.

b) Election of representative organs

24. Under Article 101^1(3), the "*representative organ of the local self-government is elected by Georgian citizens living in the territory of the unit of the local self-government on the basis of direct, equal universal suffrage by secret ballot*."

25. This provision is ambiguous: while the elected Council is undoubtedly a "representative organ", so is the Mayor, who is elected either by the Council or directly by the citizens. However, it is not clear whether the intention behind this provision is that all mayors in Georgia, and not only that of Tbilisi, will be directly elected by citizens. In this respect, the Venice Commission has some reservations (see para. 23 above)

26. "Living in the territory of the unit" is a legally unclear concept; reference to eligibility to vote under the applicable legislation would be preferable.

c) Public consultation

27. Under article $101^1$4, *"the procedure of creation and abolition of the units of the local self-government, also the rule of changing the administrative boundaries is determined by organic law. Consultation with the unit of the local self-government is essential before making the decision* ".

28. It seems contradictory to provide for the need to consult the unit of local self-government prior to its creation. At any rate, it should be evident that – as a rule – the consultation with the people concerned is required in the case of the creation and abolition of the entities of the local self-government. 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 should be clearer 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.

d) The areas of competence of local self-government

29. Under Article 101^2(2), "*the pow*ers *of the local self-government shall be determined by organic law*". It may be deduced from Article 3(1) of the present Constitution that the areas listed there may never be left to local self-government. On other matters, it appears to be entirely up to Parliament to decide which issues are to be dealt with by central government and which by local governments.

30. The Venice Commission recalls that an essential feature of the regulation of the local government is the identification of the basic functions ("own" competences, as opposed to

"delegated" competences[1]) of its institutions. Article 101[2](2) fails to do this, and by leaving this for parliament to do through an organic law, it leaves room for the central government to effectively "starve" local governments. In addition, this means there is no yardstick for the Constitutional Court to decide possible conflicts between central and local government.

31. One solution would consist in spelling out at the constitutional level the "own competences" of local self-government units. This would prevent governments from taking away powers from local governments if they do not dispose of a qualified majority[2].

32. Another possible improvement may consist in providing in the Constitution that "the basic principles of the competences of local self-government are determined by organic law". Organic laws have an intermediate position between the Constitution and the ordinary laws because the Constitution requires for their adoption a special majority (more than half of the number of the members of the Parliament on the current nominal list, see Article 66(2) of the Constitution of Georgia), different from those required for the approval of amendments to the Constitution, on the one side, and to ordinary laws, on the other side. Organic laws are subordinate to the Constitution and prevail to the ordinary legislation. As a consequence, the Constitutional Court would declare unconstitutional any ordinary law dealing with local self-government which does not respect the principles stated in this field by the relevant organic law.

33. The latter solution would be improved if the Constitution entrusted the organic law specifically with the task of identifying the matters and the areas of intervention to be assigned to the local self-government, i.e. the "own competences" [3]. Such a provision would offer a more concrete basis of judgment to the Constitutional Court, thus ensuring the stability of the material space of intervention of the local self-government, 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 would be free in selecting the division of the functions between the different levels of the public power, without having the possibility to completely deprive the local government of functions in areas which are assigned to it by the organic legislation. Moreover, the ordinary legislator would need to 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.

34. This solution would require the organic legislator to make an accurate choice of the space which has to be given to the interventions of the local self-government 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 for the approval of the organic laws.

[1] Article 15 of the Organic Law on Local Self-government provides the distinction between "exclusive authority", "delegated authority" and "voluntary authority". Article 18 defines the latter as follows: "Within the frames set by the Georgian legislation, the self-governing unit shall be entitled at its own initiative to make decision on the creation and development of social, cultural and educational infrastructure not belonging to its exclusive authorities".

[2] The Venice Commission will address the issue of the procedure for amending the Constitution of Georgia in the context of the wider constitutional reform.

[3] Article 16 of the Organic Law on Local Self-government provides a list of exclusive competences of self-government units.

e) Financial and resource matters

35. This matter is dealt with in Article 101^2(3), which provides: "*The delegation of the powers from the state organs to the units of the local self-government is allowed by either legislative acts or contracts, only with the appropriate material and financial resources*".

36. "Delegation" may take two different forms. First, it may consist in the transfer of powers which are given to bodies of local self-government (mainly the Mayor or the holder of the executive power) in order to perform tasks or issue acts which are still considered to be state tasks. When such delegation of powers concerns legal acts (issuing regulations), the cost may be not very high and the "appropriate resources" would be rather modest. However, as it is a State competence, probably a compulsory one (population registers), it is logical that the State should compensate these costs. When such delegated competences concern equipment or public services, their cost may be very high, but the calculation of the amount is extremely complicated.

37. Second, "delegation" may mean permanent transfer of a State power or activity to local government in order to become a full "own power" of local government (for instance, transfer of policing or water distribution, cultural or sports infrastructures, social housing, etc). It is an extension of decentralisation and local self-government powers. To avoid this transfer being purely nominal, it is necessary for appropriate resources to be given to local governments so that they can implement it effectively, especially when this competence had been previously performed by the State. It concerns not only equity, but also sensible public management.

38. Whatever "delegation" means, in both cases financial compensation is needed. However, it will not be calculated using exactly the same methods. In any case, it must be clearly understood by all that the Constitution means either form of "delegation" or both.

39. It might be appropriate to foresee the allocation of resources also should new competences be added to the list of existing ones.

40. The allocation of resources is likely to become a matter of disagreement between the State and the local authorities. "Appropriate resources" is unlikely to represent a sufficiently clear yardstick for the constitutional court to decide on these controversies. The Venice Commission would therefore recommend indicating the method according to which compensation should be calculated.

41. For example, under Article 72-2 of the French Constitution, the global amount of new resources given by the state to local self-governments should not be less than the total amount of the expenses borne by the State when it was in charge of the same competences. Whilst this may not be the solution to be chosen in Georgia, it is in any event important to consider mechanisms on how to deal with the issue, as far as possible establishing a method to be used. In this context, it should be discussed whether the same method should apply to "delegated competences" and "own competences".

f) State supervision of local government activities

42. State supervision is mentioned in Article 101^3(3), which provides "*State supervision of the activities of local authorities is exercised in accordance with the procedure determined by organic law, the aim of which is to ensure the legality and expediency of the organs and the office of the local self-government*."

43. In this context, the Venice Commission refers to a very fundamental principle of local-self-government: the distinction between "own competences" and "delegated competences". This is based on Art. 4 ECLSG on "Scope of local self government", which defines the nature of powers in the local self-government.

44. Art 4.5 ECLSG refers to powers "delegated" to local self-governments by "central or regional authority" and states that local authorities should "be allowed discretion in adapting their exercise to local conditions". Article 8.2 refers to "tasks, the execution of which is delegated to local authorities". In this case, the administrative supervision of State authorities may "be exercised with regard to expediency".

45. "Delegated competences", as seen above (para 36 above) are powers given to organs of local government in order to perform tasks or edict acts that are still considered as State tasks or acts. The main consequence is that in these matters, the State control can also cover expediency. By contrast, municipalities' own competences can only be subject to a control of legality.

46. As it stands, therefore, Article 101^3(3) is at variance with the European Charter on Local Self-government, to the extent that it allows State supervision of the use of "own competences" not only with regard to legality, but also with regard to expediency.

47. In addition, this provision fails both to address the structure of such supervision and to identify the authority actually performing the supervision. In particular, it would be necessary to distinguish between 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.

VI. Conclusions

48. Local self-government is an important feature of modern democracies. While the extent and form of self-government are left by international standards, notably the European Charter on Local Self-government, to the discretion of States, certain principles are essential: that public responsibilities should be exercised, by preference, by those authorities which are the closest to the citizens; that delegation of competences should be accompanied by allocation of sufficient resources; and that administrative supervision of local authorities' activities should be limited.

49. The draft constitutional provisions aim to strengthen the constitutional basis for local self-government in Georgia. They represent a positive step towards the consolidation of such government. This is to be commended.

50. The Venice Commission is nevertheless of the opinion that the level of constitutional entrenchment which would be brought about by these amendments is insufficient. Certain important matters would need to be regulated at the level constitution, failing which the above mentioned fundamental principles of local self-government will lack sufficient protection and the Constitutional Court will not dispose of a sufficiently clear yardstick to decide on conflicts of attribution of competences and other controversies between the state and local self-government representatives.

51. The Venice Commission remains at the disposal of the State Constitutional Commission.