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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE DRAFT CONSTITUTION
OF THE CHECHEN REPUBLIC

ON THE BASIS OF COMMENTS BY

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I. INTRODUCTION

1. By letter dated 17 January 2003 the President of the Parliamentary Assembly, Mr Peter Schieder, asked the Venice Commission to draw up an opinion on the draft Constitution of the Chechen Republic which will be submitted to referendum on 23 March 2003¹. The present draft opinion is based on contributions by the Commission's rapporteurs, Messrs Jowell (United Kingdom), Malinverni (Switzerland), Nolte (Germany) and Scholsem (Belgium), as well as on a contribution by Messrs Merloni (Italy) and Lesage (France) on behalf of the Congress of Local and Regional Authorities of Europe, and contributions by two experts of the Council of Europe's Directorate General of Legal Affairs, Mr Campbell (United Kingdom) and Mr Marcou (France). A preliminary version of this opinion was discussed at a meeting on 3 March 2003 between the rapporteurs and a delegation from the Russian Federation composed of Mr Dimitry Kozak, Deputy Head of the Presidential Administration, Mr Andrey Yatskin, Head of the Office of the Deputy Head of the Presidential Administration, and Mr Khakim Sultygov, Special Representative of the President of the Russian Federation for ensuring human and civil rights and freedoms in the Chechen Republic.

2. Having regard to the present situation in the Chechen Republic the Commission would like to underline that it has been called upon to comment the text of the draft Constitution submitted to referendum. Its task is not to determine whether the conditions in Chechnya permit the holding of a referendum at the present moment or whether it is opportune to hold such a referendum at the present stage. This is for the political organs of the Council of Europe, in particular the Parliamentary Assembly, to assess and, while the quality of the text of the Constitution is one element relevant in this respect, it is by no means the only one.

3. The Commission does, however, consider it appropriate to assess the text by the standards of European democracy in the context of the specific conflict situation in the Chechen Republic. Such an assessment requires a sensitive appreciation of the need to restore legality to the Chechen Republic by establishing institutions which are in line with the constitution of the Russian Federation yet which also allow sufficient opportunity for the expression of the specific aspirations of the Chechen Republic.

II. MAJOR ISSUES

1. The specific place of the Chechen Republic within the Russian Federation

4. It is not surprising that the text of the draft Constitution unambiguously reaffirms that the Chechen Republic is a part of the Russian Federation. The Preamble refers to the historical unity of the Republic with Russia and Article 1.2 states that the territory of the Chechen Republic shall be an inalienable part of the territory of the Russian Federation. The fact that Article 1.1 uses the term "sovereignty of the Chechen Republic" is no argument to the contrary. While the term sovereignty is in principle inappropriate for a federated entity and has indeed been declared unconstitutional by the Constitutional Court of the Russian Federation with respect to constitutions of other subjects of the Federation, it is clearly used not in the usual sense of sovereignty but as a synonym of "competence" or "power".

¹ In the same letter he also asks for an opinion on the two draft laws for the election of the President and Parliament of the Chechen Republic. These draft laws will be the subject of an opinion by Mr Nolte.

Ultimately it will be for the Constitutional Court of the Russian Federation to decide whether the use of the term “sovereignty” is permissible in this context.

5. When reading the text of the draft Constitution in parallel with the Federal Constitution, it is apparent that, as is the practice in other subjects of the Russian Federation, the draft closely follows the model of the Federal Constitution. Not only is the structure very much the same but large parts of the text are directly copied from the Federal Constitution, in particular but not only in the area of human rights. This already seems to indicate that the purpose of the draft is to underline the future of the Republic as a part of the Russian Federation like any other without any specific status. There are many other links with the Federal Constitution. The need to respect Federal law is mentioned repeatedly and emphatically. Moreover, many provisions taken from the Constitution of the Russian Federation do not have, from a legal point of view, their proper place in the draft since it is up to the Federal and not to the Republican Constitutions to define the powers of federal organs and bodies.

6. This gives the impression of a standard text which could be used for any subject of the Federation and not a text tailored to the specific needs of a conflict situation. The need to respect federal law is a fundamental principle in any federal system and it is legitimate to insist on its full application. The constant reiteration of this principle may be regarded as a reaction to the conflict². By contrast positive incentives designed to win over the sceptical or hostile parts of the population seem to be largely lacking. What could be cited is the use of the word “sovereignty” in Article 1 and a reference to “generally recognised customs and traditions in the Chechen Republic” in Article 35.4. This does not seem sufficient having regard to an exceptional situation. As will be set out below, under the Russian Constitution it would seem possible to do more in this respect (see e.g. the situation in Dagestan) although the drafters had to respect the principle of the equal rights of the subjects of the Russian Federation set forth in Article 5.4 of the Federal Constitution.

7. It should also be noted that the draft avoids any reference to the Chechen people as the titular nationality. The Preamble refers to the “multinational people of the Chechen Republic” in the same way as the Federal Constitution refers to the “multinational people of the Russian Federation”. It is certainly welcome that in this way there is no basis for any discrimination on ethnic grounds. Nevertheless a reference to the Chechen people or the term “people of the Chechen Republic” might have facilitated the identification of the Chechen people with the Republic. The multinational character of the Republic could be underlined in a separate phrase as is done in other Republics.

8. Russian Federal law does not provide for the possibility of a separate citizenship of the Republics. The term “citizens of the Chechen Republic” used throughout the text could therefore be regarded as contradicting Federal law. It should however be noted that the term is defined in Article 29.1 as “citizens of the Russian Federation who live in the Chechen Republic”. The contradiction is therefore more apparent than real.

² Cf. also Article 8.4.

2. The jurisdiction of the Chechen Republic

9. In a federal state the Constitution of the Federation and not of the federated entities is the text determining the jurisdiction of the various levels. Article 73 of the Constitution of the Russian Federation is quite clear in setting out the general principle: “Outside the jurisdiction of the Russian Federation and powers of the Russian Federation on matters of joint jurisdiction of the Russian Federation and the subjects of the Russian Federation, all powers of state authority shall be exercised by the subjects of the Russian Federation”.

10. The respective provisions in the constitutions of federated entities therefore have more symbolic than real meaning. The provisions in the draft generally correspond to the respective provisions of the Federal Constitution. Article 60 on joint jurisdiction corresponds exactly to Article 72 of the Federal Constitution and the second subsection of Article 1 sets out that the Republic has jurisdiction “outside the limits of jurisdiction of the Russian Federation and its authority on matters under joint jurisdiction of the Russian Federation and the Chechen Republic”. By contrast, Article 61 setting forth the jurisdiction of the Chechen Republic seems to be worded in an unsatisfactory way. It lists a number of powers of the Republic without making it explicit that this cannot be, having regard to Article 73 of the Federal Constitution, an exhaustive list but constitutes only a list of examples. Many of the powers actually mentioned are purely organisational. There is no mention of powers which, in federal states, tend to belong to the level of the federated entities such as education and culture. This omission in the text of the draft Constitution is particularly regrettable since an explicit articulation of the autonomy of the Republic in these areas could contribute to the acceptance of the legitimacy of the Republican institutions. Under Article 72.1.f of the Federal Constitution general matters of upbringing, education, science, culture, physical culture and sports are within the joint jurisdiction of the Federation and the subjects of the Federation. This should leave sufficient scope for powers of the Republic in this area which could be further clarified by means of a treaty in accordance with Article 11 of the Federal Constitution.

11. A specific feature of the Russian constitutional system is the possibility of supplementing the legal and constitutional arrangements by means of treaties or agreements between the Federation and the subjects. Article 11 of the Federal Constitution mentions this possibility and the “Federal Law on the principles and procedure for the division of the matters of competences and authority between the bodies of state power of the Russian Federation and the bodies of state power of the Russian Federation subjects” regulates such agreements. This provides an opening towards a differentiated form of federalism such as is particularly attractive in conflict situations. The explicit reference to such agreements in Article 58 of the draft is therefore welcome and, once constitutional bodies have been established in the Republic, this possibility should be used.

3. The state language

12. In a multinational society the possibilities for the use of languages other than the dominant one are a particularly sensitive issue. Article 68 of the Russian Constitution adopts a fairly positive approach to the use of non-Russian languages. While according to Article 68.1 Russian is the state language throughout the Russian Federation, Article 68.2 provides: “Republics shall have the right to introduce their own state languages. In state bodies, bodies of self-government and institutions of Republics they shall be used equally with the state language of the Russian Federation.”

13. It is therefore striking that the draft does not give an equal status to the Chechen language. While Article 10.1 declares both Chechen and Russian state languages, Article 10.2 makes Russian “the language of official office work in the Chechen Republic”³. The practical importance of Chechen as a State language is thereby greatly reduced and the draft falls far short of the possibilities offered by the Federal Constitution. This seems all the more regrettable since Chechnya is relatively ethnically homogeneous compared to other Republics. Furthermore, it should be borne in mind that the Russian Federation has signed the European Charter for Regional or Minority Languages and is preparing its ratification; it is therefore under an obligation not to adopt any measures that would run counter to the purpose of that convention. The current text of Article 10.2 of the draft constitution would appear to make it difficult for the Russian Federation to apply much of Article 10 of the Charter (“Administrative authorities and public services”) in relation to the Chechen Republic.

4. Human rights

14. As is usual in democratic federal states the Constitution of the Russian Federation contains a comprehensive catalogue of fundamental rights, thereby leaving little room for regulation by the subjects of the Federation. The draft explicitly opts in Article 3 for the incorporation of the respective provisions of the Federal Constitution into its text and correspondingly Articles 14 et seq. are a generally faithful copy of the respective provisions of the Federal Constitution. From the legal point of view this approach does not make much sense and it may lead to difficulties, especially in the case of amendments to the Federal Constitution. Nevertheless it does not do much harm and may be justified as a symbolic reaffirmation of the commitment of the Republic to these values.

15. As a consequence the weaknesses of the respective text in the Federal Constitution apply also to the present text⁴. The articles guaranteeing fundamental freedoms such as Articles 20, 25, 26, 27 or 28 set forth these freedoms but do not define the permissible restrictions. These should normally be prescribed by law, pursue a legitimate aim and respect the principle of proportionality. It is in particular regrettable that the reasons justifying the detention of a person are not indicated either in Article 19.2 or Article 45.2. In addition, on three occasions the text of the draft differs significantly from the Federal Constitution and all three times it reduces protection. In Article 17 the right to life⁵ is qualified by a sentence “No one can be deprived of life arbitrarily”. This, probably unintentionally, reduces protection and might be interpreted as allowing the death penalty or even preventive killings in certain cases. The right to appeal, in accordance with international treaties of the Russian Federation, to international human rights bodies which appears in Article 46.3 of the Federal Constitution is omitted in the otherwise corresponding Article 43 of the Republic Constitution. Finally, Article 53 on the state of emergency, contrary to the otherwise corresponding Article 56 of the Federal Constitution, does not contain a list of human rights that may not be restricted in a state of emergency. If it is decided to incorporate the human rights provisions of the Federal Constitution into the Chechen Constitution, this should be done fully and not selectively. Nevertheless it has to be

³ Article 99.2 adds that court proceedings are conducted in the Russian language (reflecting in this respect Federal law).

⁴ See the Opinion of the Venice Commission on the Constitution of the Russian Federation, CDL(94)11.

⁵ “Everyone has the right to life “

acknowledged that the practical relevance of these shortcomings seems limited since such situations will be determined in any case on the basis of Federal law.

5. The role of the President of the Chechen Republic

16. The draft clearly opts for a presidential system of government in which power is concentrated in the hands of a President who is the highest official of the Chechen Republic and head of the executive authority of the Chechen Republic (Article 63). This largely corresponds to the system chosen by the Russian Constitution and to the system adopted in some other subjects of the Federation. In the presence of sufficient checks and balances with respect to the power of the President this is in principle a legitimate democratic choice. In a conflict situation such as in Chechnya or a post-conflict situation it has however important drawbacks. Since power is concentrated in the hands of a single person, it may not be easy to effectively associate different groups with the exercise of power, thus making it more difficult to integrate opposing political groups into the system.

17. In addition, the powers of the President listed in Article 70 of the Constitution seem excessive even within the framework of a presidential system, although it has to be acknowledged that to a large extent these powers reflect Federal law, in particular the “Federal Law on General Principles of the Organisation of the legislative and representative organs of State power of the subjects of the Russian Federation”. Particularly problematic is Article 70.2.m according to which the President appoints half of the members of the Central Electoral Commission. This is not in line with international standards requiring the organisation of elections by an impartial body⁶ although it seems not unusual in the Russian Federation. The exclusive power to present the candidatures for the appointment of the chairman, deputy chairmen and judges of the Constitutional Court (Article 70.2.f) is also problematic.

18. Article 70.2⁷ gives the President the power to issue edicts and directives, a power made even stronger by Article 85 enabling the President “to issue edicts to make up for deficiency of law”. These provisions, taken together, appear to provide the President with wide-ranging legislative powers although there may be the opportunity for Parliamentary scrutiny of these powers. His right to dissolve Parliament if Parliament adopts a normative act which contradicts federal law or the Constitution of the Republic (Article 70.2.g and Article 91.1.b) appears dangerous. If the Parliament adopts such an act and refuses to withdraw it, the act should simply be declared void by the competent court. However, it has to be acknowledged that this power reflects the provisions of Article 9.2 of the “Federal Law on General Principles of the Organisation of the legislative and representative organs of State power of the subjects of the Russian Federation”. The Commission has been informed that this possibility has existed under Federal law since 1997 but has never to date been exercised in respect of any subject of the Russian Federation.

19. The power to suspend regulatory and other acts of executive authorities (Article 70.2.r) should also be reserved to a court. Other powers of the President such as the power to veto laws (Article 70.2.b) and to take part in Parliament sessions (Article 70.2.o) are derived from the “Federal Law on General Principles of the Organisation of the legislative and

⁶ Cf. sections. 68 et seq. of the Code of Good Conduct in Electoral Matters, CDL-AD(2002)23.

⁷ Article 70 has two sections 2 in the translations available to the Commission.

representative organs of State power of the subjects of the Russian Federation”. The latter power poses problems in respect of the separation of powers.

6. The role of Parliament

20. As a consequence of and compared to the powers of the President Parliament seems quite weak. No reason is provided for the choice of a bicameral Parliament which seems questionable in a federated entity and threatens to further weaken the weight of the chambers with respect to the President. Article 5.3.e of the “Federal Law on General Principles of the Organisation of the legislative and representative organs of State power of the subjects of the Russian Federation” provides for the possibility that the Parliament of a federated entity may exercise a vote of no confidence not only with respect to the President but also with respect to the Government or individual ministers. This possibility should be included in the Constitution of the Republic. There seems also no justification why only some and not all Ministers are appointed with the consent of the People’s Assembly (Article 70.2.d). The possibility of dissolution of Parliament by the Supreme Court of the Republic (Article 91.1.c) is also highly unusual.

7. Federal Control of the organs of the Republic

21. The text of the draft constantly underlines the need for the organs of the Republic to respect federal law (see e.g. Article 71 for the President and Article 94.2 for the Government). According to Article 71 the President of the Republic must “fulfil edicts and directives of the President of the Russian Federation and resolutions and instructions of the government of the Russian Federation”. Article 72.d, providing the power to depose (impeach) the President by the President of the Russian Federation without setting out the reasons for such a step or the procedure seems highly unusual in a Federal system, especially but not only with respect to a directly elected President with such broad powers. The provision seems based on Article 29-2 of the “Federal Law on General Principles of the Organisation of the legislative and representative organs of State power of the subjects of the Russian Federation” which permits the President to be deposed where certain violations of law have been confirmed by court decision but not implemented. If it is considered necessary to have this provision reflected in the Constitution of the Republic, reference should at least be made to the possible grounds for deposing the President and the procedure under Federal law. Article 91.1.d provides for the dissolution of the Parliament of the Republic by a Federal law. This appears again in contradiction with the usual functioning of a democratic federal system. Such provisions may be understandable in the specific context of the Russian Federation where violations of Federal law by the entities are more likely than in other federations. The Commission was also informed that such powers have in practice never been exercised in the Russian Federation, although their presence is an incentive to the observance of Federal law.

III. COMMENTS ON SPECIFIC ARTICLES

Article 6

22. This Article largely reflects Article 76 of the Constitution of the Russian Federation. From a legal point of view it does not seem necessary to restate the principles set forth there in the Constitution of the Republic.

Article 8

23. Section 4 of this Article seems a reaction to the present conflict situation. The wording “inflaming social, racist, national and religious discord” is extremely broad and there is a risk of it being used to outlaw any opposition. A reference to the freedom of expression in this context would be welcome.

Article 13

24. Section 1 establishes, following the model of Article 16 of the Federal Constitution, a kind of hierarchy between the provisions of the first chapter and the rest of the Constitution. The consequences of this provision, which is very unusual from an international point of view, would have to be clarified. It threatens to weaken the provisions of the following chapters of the Constitution. It gets some meaning if seen together with Article 112 of the draft which does not allow amendments to this Chapter of the Constitution.

Article 59

25. Section 5 lists the present administrative districts. There is however no reason to give constitutional force to the existing system of territorial division, in particular not in a Chapter which is difficult to amend later on (see Article 112.5).

Article 64

26. The oath of the President does not refer to the Constitution of the Federation although he has to respect it and depends on it.

Article 67

27. This Article provides no details as to the way of electing the President although Section 2 implies that there is a second round. Section 2 appears extremely complicated.

Article 79

28. This Article defines the electoral system for the Council of the Republic but not for the People’s Assembly.

Article 83

29. Section 2 provides for an important role of the Council of the Republic with respect to appointments. Since this Council is elected on the basis of the existing administrative subdivisions, there is a risk that it becomes dominated by local administrations.

With respect to the appointment of judges the involvement of an independent professional body would be highly desirable.

Article 84

30. The establishment of a Human Rights Commissioner of the Chechen Republic is welcome (lit.n). Basic elements of his status, tasks and powers should however be defined in the Constitution.

Article 87

31. Lit. a) seems to go beyond the usual powers of a parliament.

Article 88

32. The right to legislative initiative should not be given to courts (or the Election Commission). This is difficult to reconcile with their independence and impartiality when later interpreting these provisions. The rule corresponds however to the situation at the Federal level where the highest courts also enjoy this right.

Article 96

33. It is difficult to assess on the basis of this Article whether there is a risk of overlap between Federal and Republican courts and what is the extent of the powers of the courts of the Republic.

Article 98

34. It seems strange to provide that judges “answer to” Federal law but are only “guided by” Republican law. Is Republican law not law binding on judges? This impression may be due to translation, but, if not, the provision should be appropriately amended.

Article 100

35. The powers of the Constitutional Court appear quite limited. They should include in particular a procedure on abstract and concrete control of norms. The law on the Constitutional Court to be adopted on the basis of Article 100.4 should provide an opportunity to introduce such a procedure in the future. The present situation in the Republic would also seem to make it particularly desirable to give to the Court the possibility of

hearing claims from individuals that their human rights were violated. This would give some meaning to the repetition of the human rights set forth in the Federal Constitution in the Constitution of the Republic.

Article 112

36. Section 2 of this Article provides that amendments to the Constitution may be adopted by a Constitutional Assembly without specifying in any way the composition of this Assembly. This cannot however be left to an ordinary law.

Sections 3 and 4 strongly limit the possibility for constitutional amendments. These provisions, especially read together with Section 5, are not at all clear. According to section 4 Chapters 4 to 7 may be amended by the Constitutional Assembly and such decisions may be confirmed by referendum according to section 5. According to Section 3, Chapter 1 may not be amended. It seems that section 5 has to be understood, although this is not made explicit, in the sense that other chapters may be amended by referendum if two thirds of the Constitutional Assembly so propose.

Concluding and transitional provisions

37. Half of the members of the State Council during the transitional period will be the heads of district administration and the other half people elected during meetings of citizens. This solution is in no way satisfactory. If it is possible to hold a referendum, why not elect at the same time the heads of district administrations?

The establishment of the lists of assessors in the future people's courts during this period should also be done in a more democratic manner.

IV. CONCLUSIONS

38. The above analysis of the draft has shown that it is mainly guided by the intention to emphasise the status of the Chechen Republic as a subject of the Federation on an equal footing with the other subjects. However, it seems that the full opportunity to ensure the acceptance of the system by the local population may not have been taken. In particular the powers the Republic enjoys by virtue of the Federal Constitution are not clearly set forth in the draft. The strong concentration of powers in the hands of the President and the relatively weak Parliament may not facilitate the integration of the sceptical or hostile parts of the population into the political system.

39. This does however not mean that the adoption of the draft Constitution cannot contribute to a future settlement. The Constitution will allow the establishment of a new tier of institutions at the level of the Republic which act as a means of legitimate interlocution between the Republic and the Federal institutions. It may thus be a first step leading to a further process of devolution of powers to the Republic on the basis of the possibilities offered by the Federal Constitution. Nevertheless it may be regretted that a bigger step in this direction was not taken when preparing this draft.