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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW
ON RESTITUTION OF HOUSING AND PROPERTY
TO THE VICTIMS
OF THE GEORGIAN-OSSETIAN CONFLICT
OF THE REPUBLIC OF GEORGIA**

by

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I. Introductory remark

1. The following observations are based on the English translation of the draft Law that was provided to the Venice Commission. It may well be that some of the comments made or questions raised are due to lack of clarity of that translation.

II. The scope of the draft Law

2. Article 1 of the draft Law, dealing with the purpose of the Law, provides that the present Law regulates the matters of restitution of housing and other immovable property. The Title of the draft Law, however, speaks of “restitution of housing and property”, without the restriction to immovable property. It is clear that the text of the Law is determinant for its scope, but it is advisable to also clearly express the scope of the Law in its Title.

3. In the first paragraph of Article 6 of the draft, which deals with the institution of the Commission for Housing and Property Issues, there is also reference to “application on the matters of residence and property, without the restriction to immovable property. The restriction is also not taken into account in the name of the Commission. The Venice Commission recommends including “property” among the definitions of Article 2 of the draft, clarifying that for the purposes of the present Law “property” means “immovable property”. The definition of “other immovable property” should then also be adapted.

4. This being said, the Venice Commission does not find it self-evident that the scope of the Law will be restricted to housing, land and other immovable property. First of all, the distinction between immovable and movable property is not always clear. The criterion contained in the definition of Article 2, that it must be land or property “firmly fixed on it” is legally not sufficiently determinative. Secondly, the entitlement to restitution of movable property may be as important in view of its emotional and/or financial value.

5. The Venice Commission recommends that the scope of the Law be more clearly defined, and that a clearer definition be given of “immovable property”, with reference to a definition under Georgian civil law, if there is any such definition. It also recommends reconsidering the inclusion of movable properties of significant emotional and/or financial value. Finally, it recommends using, in the third paragraph of Article 3, not the term “residual rights” but the term “right to residence” as defined in Article 2.

III. Competences of the Commission and the right of application

6. Article 10 of the draft provides in its first paragraph that the competence, activity and structure of the Commission are determined by the present Law and by the “Regulations of the Commission for Housing and Property Issues”. The draft Law, however, only contains some very general provisions concerning the Commission’s competences, such as the provision in the first paragraph of Article 6 that the Commission is established to discuss and adopt decisions on applications. That provision refers in connection with the right of application to “requirements prescribed by law” and in connection with the Commission’s competences to “competences envisaged by the national legislation”. It does not contain any further specification of these legal regulations.

7. This leaves the impression that, in actual fact, the competences of the Commission and the modalities of the right of application will be set out mainly in the “Regulations” referred to in Article 10. In the opinion of the Venice Commission, the competences of the Commission and the conditions and modalities of the right of application are of such essential importance for the application of the Law, that they should, in essence, be regulated in the Law itself, while the procedural and practical details may be left to delegated legislation.

8. The Venice Commission recommends a more detailed regulation of the competences of the Commission and of the right of application in the Law.

IV. Users and owners of an original residence; restoration or compensation

9. In Article 2, under e), of the draft Law the “right to residence” is defined as the “right to use or to own an original residence”. It is not clear from this provision whether it is meant to also protect the rights of those persons who owned an original residence but had not used it as their home. It could be argued that these persons are to be considered as “other persons with lawful interests with regard to the residence”. However, from the definition of Article 2 and from the third paragraph of Article 3 of the draft it appears that “other persons” are meant to be persons who are not refugees or internally displaced persons. Moreover, Article 3 of the draft only refers to residents and not to non-residents.

10. If the draft Law is not intended to also give a right of application to owners of an original residence who did not reside there, while such a right is granted to the owners of land or other immovable property, this would not seem to be justifiable.

11. Article 3, in the first paragraph, indicates that the application to the Commission may concern return to the original residence and other immovable property, or provision of adequate residence or compensation. When it comes to a balancing between the interests of the original user and the present user of a residence, the Commission will have to make a choice between restoration and compensation. That would be even more pertinent, however, in the case of balancing between the interests of the owner non-resident and the factual resident; in that case the outcome might be that the ownership is restored but not the right of residence, with possible additional compensation.

12. The Venice Commission recommends taking the position of the owner of an original residence who was not the user of the residence, into account in the Law.

V. Article 3

13. a) The first paragraph of Article 3 of the draft Law is not very clear in its reference to “residents who cannot return to their original residence because of security reasons” and who “are entitled to apply to the Commission for return of the original residence”. In what way, and to what extent, may the decision of the Commission remedy any security problem? This issue also relates to that of the enforcement of the decisions of the Commission, dealt with in the comments on Article 15.

14. b) Article 3, paragraph 2, of the draft Law does not specify whether the factual resident who apply to the Commission, has to be a resident in good faith in order to be entitled to compensation (“who comes to equity must come with clean hands”). Such a requirement could be included in the Law, or it may be left to the Commission to form its own case law on the issue.

15. c) Article 3, paragraph 3, of the draft Law is formulated in a general way. Does the right to “complain” mean in fact the right to “appeal”? Do the “decisions adopted on the ground of Article 69 of the Housing Code of Georgia of 1983 also include court decisions which constitute *res iudicata*? And is the “loss of residual rights ... during or after the conflict” meant to be restricted to losses caused by the conflict?

16. The Venice Commission recommends clarification of the drafting of Article 3 of the draft Law on the points mentioned.

VI. Article 4

17. Article 4 of the draft recognises the right of all refugees and IDPs to return to their original residence. It is not clear how this general recognition relates to the fact that the first paragraph of Article 3 implies compensation as an alternative to restoration. Does this mean that the choice is to the refugees and IDPs, or is it up to the Commission to make a choice on the basis of a balancing of the interests of the original resident and those of the factual resident, the latter interests finding protection under the second paragraph of Article 3.

18. The Venice Commission recommends clarification of the meaning and scope of Article 4 of the draft Law.

VII. Article 5

19. Article 5 recognises the right to an adequate, safe and accessible residence. The meaning of the word “safe” in this context is not clear, especially not if related to the competence of the Commission to decide on the return of the original residence or the allocation of another adequate residence. In what way can the Commission assess, let alone guarantee the safety of that residence?

20. The Venice Commission recommends clarification of Article 5 of the draft Law in this respect.

VIII. Article

21. As indicated before, the reference to “property” should be to “immovable property”, in conformity with Article 1 if that restriction will be retained, while the reference to “the requirements prescribed by law” and to “competences envisaged by the national legislation” should be clarified.

22. In the second paragraph it should be specified how and by whom the appointment of the 3 members on the Ossetian side will take place.

23. In the third paragraph it should be clarified whether “2/3 of the votes” means “2/3 of the votes cast” or “2/3 of the members of the Commission”.

24. The Venice Commission recommends amendment and clarification of Article 6 of the draft Law.

IX. Article 7

25. The words “punishable under the law” is not sufficiently precise. Especially it is not clear what sanction may be imposed and by whom, and whether that will be an administrative sanction or a criminal sanction. The *nulla poena, nulla crimen* principle of Article 7 of the European Convention on Human Rights is here applicable.

26. The Venice Commission recommends clarification of Article 7 of the draft Law.

X. Article 8

27. Article 8 does not make it clear what, as a consequence of the second paragraph, will be the working language of the Commission, and what, in view of the second paragraph, is the purpose of the language requirement of the Georgian members.

28. The exception in the fourth paragraph of scientific activities is, at least in the English translation, ambiguous, since “scientific” normally does not include the humanities. The word should rather be the equivalent of “scholarly and scientific”.

29. The Venice Commission recommends clarification of the language issues of paragraphs 1 and 2, and of the exception in paragraph 4 of Article 8 of the draft Law.

XI. Article 9

30. The competence of the Commission to decide on pre-term termination cannot relate to the ground of termination mentioned in paragraph 2, under g): decease. As far as the ground under a) is concerned, a member should normally be free to submit his or her resignation without any need for approval by the other members.

31. The ground of termination mentioned in paragraph 2, under e) can relate only to the members of the Commission appointed by the President of Georgia.

32. The judgment referred to in paragraph 2 under f) needs further specification. It cannot be the intention that every judgment, also those in minor civil and criminal cases, constitutes a ground for termination.

33. The Venice Commission recommends amendment of Article 9 of the draft Law on these points.

XII. Article 10

34. The voting procedure of the second paragraph is not clear. What does “two-third majority of the full composition” mean? In particular, if the Commission meets with its minimum quorum of 6 members, does the requirement of two-third of the full composition mean 6 votes or 4 votes?

35. The reference in the third paragraph to “the rule provided by law” is not clear, while “property” under a) should read “immovable property” and the words “related to the Georgian-Ossetian conflict” should be added.

36. The wording of the third paragraph under d) is not clear. In order to obtain a court decision, the Commission will have to address the court by filing an application or otherwise.

37. The fourth paragraph does not specify who may lodge an appeal and within which time limit.

38. The Venice Commission recommends clarification and elaboration of Article 10 of the draft Law.

XIII. Article 11

39. It should be specified that the Chambers will each consist of one of the members appointed by the Ossetian side, one of the members appointed by the President of Georgia and one of the members appointed by UNHCR.

40. The second paragraph should specify in which composition a Chamber will complete its consideration of, and draft a conclusion in a case that it had under examination before its composition changed.

41. The Venice Commission recommends further specification of Article 11 of the draft Law.

XIV. Article 12

42. It may happen that a person entitled to apply to the Commission is not, and could not reasonably have been aware of his or her right even two years after the Commission has started functioning. Therefore, the time limit in paragraph 3 should be: within 6 months from the time he or she knows or should reasonably know that he or she may apply to the Commission.

43. The Venice Commission recommends amendment of Article 12, paragraph 3, of the draft Law.

XV. Article 13

44. The first paragraph provides that the Commission shall consider the application and take a decision not later than 30 days from the beginning of the consideration of the case, while the third paragraph provides that the term of preparation of the case by the Chamber and its submission to the Commission shall not exceed 20 days. Although these are very short time limits, nevertheless in combination they do not guarantee that the final decision – including

any court decision on appeal - will be taken within a reasonable time in the sense of the first paragraph of Article 6 of the European Convention on Human Rights. The weak link in the chain of decision-making is the moment the Commission starts its consideration of the application.

45. The Venice Commission recommends that Article 13 also prescribe the maximum period between the submission of the application by the Chamber and the beginning of the consideration by the Commission.

XVI. Article 14

46. Article 14, under b), provides that the Chairman of the Commission participates in the activity of the Chambers. On the one hand, this provision is superfluous because it follows from Article 6, paragraph 3, that the Chairman is a member of the Commission, and from Article 11, first paragraph, that the Chambers are composed of the members of the Commission; the provision might even lead to the a contrario-conclusion that the Secretary of the Commission does not participate in any Chamber, since Article 15 does not contain a provision to that effect. On the other hand, it is not clear why the provision uses the plural. It follows from the first paragraph of Article 11 that the nine members of the Commission are divided over the three Chambers and that, as a consequence, the Chairman will be a member of only one Chamber.

47. The Venice Commission recommends replacing Article 14, under b), by a provision that the Chairman of the Commission may substitute for a member of a Chamber in case of a vacancy, or if that member is unable to participate in the work of the Chamber.

XVII. Article 15

48. Article 15 provides that the Secretary of the Commission supervises the enforcement of the decisions of the Commission. Although this task may be regulated in the Regulation, the Law should at least provide which powers the Secretary has to supervise the execution, which are his or her powers if he or she reaches the conclusion that a decision is not, or not fully executed, and whether he or she operates under his or her own authority, under that of the Chairman of the Commission, or under that of the Commission in accordance with the second paragraph of Article 10.

49. In addition, it is obvious that the execution of decisions of the Commission may require measures that can only be taken by or with the assistance of the police. Article 15 should at least contain a reference to the relevant laws and regulations.

50. The Venice Commission recommends further elaboration of Article 15 of the draft Law.

XVIII. Article 16

51. It is not clear what is meant by the “technical security of the activities of the Commission” which its Office must secure.

52. The Venice Commission recommends clarification of Article 16 of the draft Law.

XIX. Article 18

53. The second paragraph provides that the fund of the Commission shall be established according to this Law and the Regulations of the Commission, while the third paragraph provides how the fund will be established. This creates the impression that “fund” in the second paragraph is meant to be the annual budget, indicating the use of the financial sources, rather than the sources themselves. The second paragraph should provide to what authority the Commission will have to submit its budget for approval, while the third paragraph should contain some guarantee that the State budget supplements the financial sources of the Commission to the extent required for it to effectively perform its functions.

54. The Venice Commission recommends clarification and elaboration of Article 18 of the draft Law.

XX. Article 20

55. In the second paragraph “Commission” should read “Chambers”, since the Commission will only start its examination of applications after submission by a Chamber.

56. The Venice Commission recommends adaptation of Article 20 of the draft Law.

XXI Article 21

57. In the third paragraph “enforcement” should read “entry into force” in the English translation.

58. The Venice Commission recommends amendment of Article 21, if the Georgian text creates the same confusion.

XXII. Concluding observation

59. The draft Law submitted to the Venice Commission does not raise important issues concerning the Rule of Law or the protection of human rights. Whether the right to respect of one’s home and the right to the peaceful enjoyment of one’s possessions, laid down in Article 8 of the European Convention on Human Rights and Article 1 of the First Protocol, respectively, will be ensured, depends mainly on the interpretation and application of the Law. In that context it is important to point out that the “factual residents”, if acting in good faith, are equally entitled to these rights. Whether the right to a fair trial for the determination of one’s civil rights and obligations, laid down in Article 6 of the European Convention on Human Rights, is ensured depends on the way in which and the procedure according to which the Commission and its Chambers will operate, but ultimately on the way in which and the extent to which the courts of appeal will provide remedies.

60. The Venice Commission took the opportunity to also make several recommendations for clarifications, adaptations and elaborations of the draft Law that are not directly related to its mandate but which the Georgian authorities might also take into consideration.