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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW OF GEORGIA ON REHABILITATION AND RESTITUTION OF PROPERTY OF VICTIMS OF THE GEORGIAN-OSSETIAN CONFLICT

by

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1. The first general provision of the draft states the purpose of the law. Perhaps it should be more correct to talk about the purposes of the law. As a matter of fact the draft is aimed at providing the solution of three different kinds of problems. All of them affect the s.c. victims of the Georgian - ossetian conflict, but they regard different personal situations of these persons. On one side,

a) the draft is dealing with the rehabilition (that is, the reinstatement) of the rights and freedoms violated as a result of the conflict, when other effective legal remedies are not available, and, on the other side,

b) it regards the restitution both of the properties of the persons concerned and

c) of the residences which were owned by the government in the past and were handed over by the goverment before the conflict for loan, rental or the right to use to the victims of the conflict

Point **a)** is phrased in very general terms and certainly regards situations where, in principle, immovable or movable properties are not at stake. Points **b)** and **c)** are dealing with immovable goods which had and have a different legal status depending on the legal relations they had with the people concerned before the conflict: therefore the immovable goods which were owned by the victims of the conflict should have a different legal treatment than the immovable goods which were owned by the government and were handed over for loan, rental or the right to use to the interested people. These differences are not very clearly dealt with by the draft and, therefore, the solutions offered by the draft in the matter are not very easily understandable. The draft would be more likely to work effectively if it were redrafted by clearly distinguishing the relevant rules which should be applied to the different cases. For instance, it has to be clearly stated that the compensation for the deprivation of a private property has to be larger than the compensation for the deprivation of a immovable good given by the government for loan, rental or the right to use, even if in both the situations there is the urgent exigency of providing for the necessities of the people who have to live in the interested regions, fall in the mentioned categories and need a house.

Moreover, while in the case of people who lived in the past in houses owned by the government the granting of an adequate residence could substitute (in absence of other damages) for the payment of a money compensation, in the case of the deprivation of a property the granting of an adequate residence is not sufficient and should be linked to the payment of a money compensation. The draft tries to state rules which should be applicable to all the described situations, but in this way it increases the uncertainty of the results of the intervention and enlarges the scope of the discretional powers of the compentent bodies.This is specially true with regard to the treatment of the deprivation of the immovable goods, but also the treatment of the reistatement of the rights and freedoms of the individuals requires refinements and clarifications to avoid a confusion between the rules which have to be applied in the different cases.

These remarks specially regard articles 4 - 7, 32 - 34, and 35 - 43. But the distinction I have introduced shall apply also to the procedural aspects of the draft.

2. On the basis of the previous general notes it should be advisable to look at the details of the draft starting from art.4.

This provision is very confused because it does not clearly explain whether, as far as the main purpose of the draft is the solution of the problems of people looking for a house in the regions concerned, the payment of a money compensation could be sufficient while it leaves to the interested people the task of finding a residence somewhere. In areas which were heavily destroyed it could be difficult to find a house. On the other side, the alinea 3 of the article provides for the review of the decisions which implied the deprivation of the rights to a

residence, and it apparently requires the nullification of the acts which provided for that deprivation. Shall the nullification imply the restitution of the houses to the interested persons or shall the restitution be substituted by a money compensation even if the house is still phisically existent and can be inhabited? When is it possible substituting the compensation for the restitution?

The final alinea 5 of the article does not clearly explain whether the compensation of the damages is the only measure which shall be adopted in the case of severe violation of the human rights and freedoms, or whether other measures can be taken. Moreover which is the yardstick to distinguish the severe violation from violation which is not severe?

Art. 5 does not offer any useful element of judgement to answer to the questions arised sub art. 4. Is art. 6 establishing a principle of clear preference for the providing of a residence to the people concerned? When can the money compensation substitute for the providing of a residence? Shall a compensation also to be given even when a residence is assigned to people who lost their property during the conflict? Is a person allowed to ask a compensation when he/she lost a residence which was given in the past to him/her by the government for loan, rental or the right to use? Or is it in this case sufficient the adoption of the measure of providing a residence to the interested person?

3. Chapter IV of the draft is apparently offering general rules of the damage compensation. It should give clear answers to the questions previosly formulated.

In principle, the restitution looks as the preferred solution when the property is presently owned by the government or by an unfair owner (art. 35. 1). The government is considered to be the owner when the property was handed over by the government for loan, rental or the right to use (art. 35). We can advance the hypothesis that this rule regards the present situation. Does it imply that the restitution has to be provided for even if the property is occupied by a fair (bona fide) person who got it by the government for loan, rental and the right to use during or after the conflict? Which are the rights of this person? His/her position should be taken in consideration in view of the coherence of the draft: art. 35.4 provides for the substitution of other realty of adequate value for the restitution of a property which was owned or destroyed, demolished or reconstructed by a fair owner during or after the conflict. Art. 35.6 is speaking about pecuniary compensation when the restitution of a property is not possible: shall a pecuniary compensation be given also to a person who got before the conflict a realty owned by the government for loan, rental or the right to use, and cannot get it restituted because the restitution is not possible?

Art. 36 does not deal with the situation when a fair (bona fide) person is owning a forfeited or confiscated realty. The following art. 37 is apparently aimed at taking in consideration the condition of a fair (bona fede) person and provides for the adoption of a measure different from the restitution when the property is not owned by the state.

It is evident that a clear rule for distinguishing fair and unfair present owners or users of the realties at stake should be adopted to allow a coherent and faithful implementation of the law. Probably the draft could be improved if the rules concerning the different situations which were identified in this paper, were stated separately and general principles in Chapter I were expressed in view of the exigency of providing a basis for the detailed rules to be applied in the different situations. Different articles or provisions should be devoted to the different situations and the general principles should take in consideration the differences between the situations covered by the draft.

Not dissimilar ideas from the previous ones are suggested by articles 38, 39 and 42. Have these rules to be applied even to the cases of realties owned by the goverment and assigned to people

for loan, rental or the right to use are at stake? Are the rules defining destroyed or restituted properties able to be applied also to realties given for loan, rental or the right to use? What can be said about the amount of the compensation which has to be paid in case of realties given for loan, rental or the right to use which cannot be restituted? Are the heirs interested in the payment of the compensation also in these last cases? All these questions could be easily answered if general principles were clearly stated taking into accont the differences of the relevant situations.

4. Three different personal positions are normally at stake in the situations dealt with in the draft, i.e. the positions

1) of the public authorities which are in charge of implementing the purposes of the law,
2) of the victims of the conflict who had properties before the conflict and were deprived of them, or who had got in the past governmen'properties for loan, rental or the right to use,
3) of the present owners of the properties, who can be fair or unfair.

All these subjects can take part in the procedure for the restitution of the concerned realties because all of them have an interest in the procedure, that is 1) the authorities because they have the responsibility of adopting the necessary measures, 2) the victims who are interested in the restitution and 3) the incumbent owners who can be deprived of the properties in view of the implementation of the law. All these subjects should have a say in the procedure if the rules of the procedure were stated in conformity with the principle of the due process of law. This principle is not explicitly mentioned in art. 3, even if points c) and d) of this article can be read in conformity with the principle itself. But as a matter of fact the interested people should have not only the right " to have comprehensive information on the issues related to him/her " and the right " to be provided with ...remedies ", but also the right to submit and explain their reasons in the development of the procedure: for instance, a person should have the right to explain his/her reasons in view of the qualification of his/her position as fair or unfair. Even a person who is defined as unfair by the public authorities should take profit from the principle of the rule of law and, therefore, have the right to contest the qualification given to him/her by the authorities. From the point of view of the principle of the rule of law the provisions of articles 19 and 21 are extremly poor, the first one leaving a great deal of space to the discretionality of the public authorities and the second one being silent about the participation of the people concerned to the procedure, the examination of the informations and the data which are collected and the inspection of the phisical condition of the properties at stake. These conclusions are relevant for the interpretation of art. 7, which guarantees the publicity of the Commission's procedure, but - at the same time - allows the secrecy of acts of the Commission, but it does not clearly define the meaning of the reference to the secrecy: the principle of due process of law shall require a narrow construction of the secrecy in view of insuring the transparency of the procedure and the enforcement of the liability of the members of the Commission.

As a matter of fact, the Commission on restitution and rehabilitation, which is in chrage of the implementation of the law, is defined as an administrative authority even if it is given the power of adopting resolutions which are normative legal acts, and decisions dealig with the internal organization of the body " which involve general rules of behaviour for certain section of the society ". It should be clear that all the acts of the Commission have to be adopted in conformity with the law. Perhaps it could be advisable providing in the draft an explicit desciption of the kind of acts which can be adopted by the body in a more detailed manner than that choosen by art. 20 of the draft.

Art. 23 - 25 deal with the collection of informations and evidences by the Committees of the Commission and, therefore, deal with the working of inspections and the hearing of witnesses. Are the relevant decisions of these bodies mandatory for the people concerned and can they be enforced by the public authorities? Do these bodies have powers which can be compared to the powers of the judicial authorities? Are the witnesses allowed to refuse the convocation or to

refrain from answering to the questions submitted to them? Can the present owner of realty deny the entrance to members or officials of the Commission who want make an inspection there? Some elements can be drawn from art. 26 but the provisions of this article don't say if the decisions of the bodies can be enforced by the help of the public authorities.

5. The status of the Commission is an essential feature of the draft. According to art. 8 is a legal entity of public law, which is an indipendent body and is not subordinated to any of the state institutions. Art. 18 provides for the guarantees of its independence. Illegal pressures on its activity are prohibited but the draft does not say which the illegal pressures are. Also " trampling " on its independence and creation of obstacles for its activities are not clearly defined.

On the other side, the rules concerning the establishment of the Commission are extremly vague: for instance nothing is said about the choosing of the representatives of the Georgian side, of the Ossetian party and of the candidates nominated by international organization. Who is competent to submit the nomination of the members of the Commission and who is competent to appoint them? A special procedure is required to connect the nomination with the appointment of the members but the draft is silent on this point. It will be possible to say that the Commission is independent only if the procedure of nomination and appointment will guarantee this independence, but the draft is not satisfying on this point. Moreover the criteria of the working experience, of the public acknowledgment and of the trust of the society (art. 10) are evidently vague.

There are rules concerning the conflict of interests in art. 12. Only point 1 e) is dealing with previous experiences of the members. Persons who directly participated to the armed collision during the conflict or openly called upon violence and ethnic discrimination and enmity, are excluded from the membership. The draft is silent about the position of person who had political responsibilities in the conflict or had the power of deciding about the deprivation of properties and the assignement of them to the incumbent owners. Perhaps it could be advisable completing the list with some new additions.