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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

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

(Chapter VII - Local Self-Government)

by

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1. Following the visit to Tbilisi, Georgia, on 3rd and 4th February 2010, I would like to make the following contribution to an opinion on the draft constitutional amendments concerning local self-government.

2. I refer also to my preliminary observations submitted to the Secretariat on 31st January 2010.

I. The background

3. Since independence, Georgia has had various experiences with local self-government. There has, generally, been progress. In 2006, municipalities were amalgamated and reduced from more than 800 to about 70.

4. Local self-government is today regulated in various pieces of legislation. This includes the Constitution (see below), the Organic Law on Local Self-Government and the Electoral Code (amended in December 2009 to prepare for local elections expected to be held in May 2010).

5. 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"). The draft strategy has been commented upon by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs (DPA/PAD 2/2009).

6. In his address to Parliament in July 2009, the President of Georgia offered to reform the system of local self-government and to introduce direct elections of the mayor of Tbilisi (currently elected by the city council). Taking into account the dynamic political environment and diversity of political sympathies in Tbilisi, this initiative enables the opposition to contest the next mayoral elections in May 2010. The issue has been discussed and relevant decisions have been made within the Election Reform Group.

7. This initiative has now been incorporated into the new election code, adopted in December 2009.

II. The present constitution and relevant international legislation

8. The present constitution (adopted on 24th August 1995 and later amended) deals with local self-government in a few very brief and basic provisions.

9. According to article 2(4), the citizens of Georgia "shall regulate the matters of local importance through local self-government without the prejudice to the state sovereignty". 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."

10. According to article 3(1), a number of listed issues "shall fall within the exclusive competence of higher state bodies of Georgia". These issues include, e.g., citizenship, human rights and freedoms, emigration and immigration, state defence and security, foreign policy and international relations, criminal police and investigation. The effect of this provision is that such issues cannot be delegated to local authorities.

11. Georgia has also signed and ratified the European Charter on Local Self Government (ECLSG). This was done in 2004. The Charter entered into force in 2005.

III. The draft constitutional amendments

12. The present draft will mean that

- a) the present Article 2(4) (see above) of the Constitution will be deleted, and
- b) a new chapter 7 of the Constitution will be added.

13. The new chapter contains three provisions (with sub-provisions), dealing briefly with very different and quite complicated issues.

14. The wording of the draft provisions is the following:

“Chapter seven¹

Local Self-government

Article 101¹

1. Local self-government is the right and opportunity to regulate the matters of the local importance independently under their own responsibility and in the needs of the local population in accordance with Georgian legislation without the prejudice of state sovereignty.

2. The procedure of the creation and activities of the representative and executive organs of the local self-government shall be determined by organic law. The executive organs of the local self-government are accountable and responsible before the representative organs of the local self-government.

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.

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.

Article 101²

1. The powers of the local self-government are partitioned from the powers of the state bodies.

2. The powers of the local self-government shall be determined by organic law.

3. 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.

Article 101³

1. Local self-government has its own property and finances.

2. The decisions of the local authorities within the framework of their powers are obligatory on the territory of the unit of the local self-government.

3. State supervision on 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 expedience of the organs and the office of the local self-government.

3. Sub-paragraph F² shall be added in the 1st paragraph of article 89:

F2) Representative organ of local self-government shall be entitled to apply to the Constitutional Court with regard to compliance with the Constitution of Georgia of the normative acts with the provisions of Chapter 7¹.”

1. According to the draft amendments, the law shall enter into force after the publication. However, Article 101(1)(3) shall enter into force on 1st January 2011.

IV. The purpose of adding a particular chapter on local self-government to the constitution

15. During the visit of the Venice Commission to Georgia in February 2010, the delegation sought to explore what is the particular purpose of devoting a separate chapter in the Constitution to local self-government. This is important since the present draft, as will be explained below, appears very “minimalistic” in the sense that its provisions are brief and very general in their formulation, leaving a number of important questions unanswered. This will, for example, be a problem to the extent that the draft amendments are intended to be a tool for solving conflicts before the Constitutional Court of Georgia (as prescribed in new Article 89(1)f2, see above) since it will to some extent leave the judiciary empty-handed.

16. Discussions with, in particular, the State Constitutional Commission revealed that the question is difficult to answer. This has, presumably, amongst other things to do with the fact that the Commission is dealing with a large amount of constitutional issues including also the relationships between the President, the Government and the Parliament, and the judiciary. It appears that no single principle or philosophy has emerged, dictating the contents of the draft as regards local self-government.

17. The discussions also revealed that there were very different opinions within the Commission on crucial issues concerning local self-government.

18. For example, there appeared to be some disagreement between members of the Commission as to whether the Constitution should establish at least some binding principles as to the division of powers between central and local government or whether, as is the case with the present draft, this should be left entirely to the Organic Law. Apparently, a previous draft had contained some sort of list dividing, in a basic way, competences between the two levels of government.

19. Also, there appeared to be some disagreement on the issue of how to regulate the transfer of material and financial resources in situations where powers/competences are transferred from central to local government. While some members appeared to be in favour of writing some sort of principle on this matter into the Constitution, others seemed to favour not to.

V. General comments on the draft constitutional provisions

20. 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 the number of municipalities.

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

22. As mentioned above, local self-government in Georgia is regulated in a vast number of provisions in various legislations, including for example the Election Code and the Organic Law of Georgia on Local Self-Government. The Venice Commission has not been asked to examine this legislation, but only the draft constitutional amendments.

23. As pointed out above, the draft amendments appear to be quite “minimalistic” in their nature (although of course more detailed than the present regulation, see Article 2(4) of the Constitution).

24. 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 charter does not in itself require that the constitution contain detailed or specific provisions on local self-government. Indeed, it may in some cases be practical as well as appropriate for the constitution to leave much flexibility.

25. However, the lack of details on crucial issues is striking in the present draft. This might of course be reasonable in a country where local government has not previously existed and it would therefore be wise for some time to have a maximum of flexibility at the constitutional level. This is not the situation in Georgia today and it may be quite difficult to see the purpose of devoting an entire separate chapter of the Constitution to local Self Government without securing or “locking up” at least some fundamental and operational principles at the constitutional level. This is particularly so to the extent that the purpose of a new constitutional basis for local government is to provide a basis for solving disagreements before the Constitutional Court (as provided for in new Article 89(1)f2).

26. Examples on important issues perhaps not dealt with sufficiently in the present draft are:

a) The areas of competence of local self-government: under Article 101(2)(2), the powers (presumably competences) of the local self-government shall be determined by organic law. It is to be deduced from Article 3(1) of the present Constitution that the areas listed here may never be left to local self-government (which makes, for most of them, good sense). On other matters, it appears to be entirely up to Parliament to decide which issues to be dealt with by central government and which by local governments. This will mean there is no tool for Constitutional Court in case of conflicts between central and local government, and the constitution apparently leaves room for central government to effectively “starve” local governments.

In this respect, it does not seem to suffice that division of competences between central and local government should be regulated in the Organic Law of Georgia on Local Self-Government as indicated in Article 101(2)(2). Organic laws are not very difficult to amend as this only requires support from more than half of the number of the members of the Parliament on the current nominal list, re Article 66(2) of the Constitution of Georgia.

The Venice Commission would recommend the Georgian authorities to consider this issue again.

b) Financial and resource matters: this is dealt with in Article 101(2)(3) which merely says that delegation of powers is allowed “only with the appropriate material and financial resources”. It is difficult to fathom the legal content of this provision, and it will be very difficult to use by the Constitutional Court in cases of disagreement over resources between local and central government. Therefore, it would seem appropriate to add a sentence stating the method according to which compensation should be calculated.

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”.

c) The draft comprises practically no provisions on the principles of election. Also, the important issue of the mayor to be elected directly or indirectly is not addressed (this is presumably a difficult political issue). However, it will be important to consider whether it should be addressed in the Constitution.

d) State supervision of local government activities: state supervision is mentioned in Article 101(3)(3). However, no provisions are made for the structure of such supervision – which authority actually performs the supervision etc.? It would seem appropriate to deal with the basic principles of state supervision in the Constitution.

VI. Comments on individual provisions

27. A number of comments could be made in respect of the individual provisions of the present draft.

28. 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.” It might be considered whether it would be appropriate 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. In municipalities where the Mayor is directly elected, responsibility ending in dismissal procedures would be very questionable.

29. 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.”

30. During the visit to Georgia, the State Constitutional Commission indicated that this draft provision is under revision. In any event, it would appear that the provision should not only regulate election of the “representative organ”, but also of the Mayor.

31. Under Article 101(2)(2), the “powers of the local self-government shall be determined by organic law”. Presumably, “powers” means “competences” in the sense of missions and functions (building schools, organising waste collection etc.). In that case, requiring an organic law whenever dealing with the “powers” of local self-government would probably be very complicated since it would mean that ordinary sectoral legislation or bylaws could never contain provisions on the competences of local self-governments. Also, this provision does not seem to comply with Article 101(2)(3) according to which delegation of powers from state government to local self-government is “allowed by either legislative acts or contracts”. Alternatively, the provision could state the basic principles on the division of powers between central and local government (see also paragraph 27(a) above) and leave the rest to ordinary legislation.

32. Under Article 101(3)(3), state supervision on 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 expedience of the organs and the office of the local self-government.”

33. During discussions with the State Constitutional Commission it was revealed that this draft provision is under revision. The delegation of the Venice Commission indicated that the provision, as it stands in the present draft, is problematic in the light of Article 8(2) of the ECLSG:

“Article 8 – Administrative supervision of local authorities’ activities

1 Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.

2 Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.

3 Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.”

34. The State Constitutional Commission was understood to confirm that the draft provision will be revised in the light of Article 8.

VII. Contributions to a conclusion

35. 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.

36. There is, however, some doubt as to what is the exact legal purpose of devoting a separate chapter of the Constitution to local self-government, and discussions with the State Constitutional Commission revealed that this question is difficult to answer. It appears that no single principle or philosophy has emerged, dictating the contents of the draft.

37. The present draft is also quite “minimalistic”, as it leaves a number of crucial issues unanswered.

38. To the extent that the draft amendments will function as a tool for solving conflicts before the Constitutional Court, the present draft will therefore to some extent leave the Court “empty-handed”. This is very problematic since the draft provisions, in fact, aim to function as such a tool, cf. new Article 89(1)f2 of the Constitution.

39. It is understood that the present draft will be revised by the State Constitutional Commission. The Venice Commission supports such a revision and would recommend the issues described in V and VI above to be taken into further close consideration.

40. The Venice Commission remains at the disposal of the Georgian authorities.