



Strasbourg, 15 November 2013

CDL-REF(2013)055

Opinion no. 744 / 2013

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

NON-PAPER

ON THE AMENDMENTS TO THE LAW

ON THE OCCUPIED TERRITORIES AND

THE OTHER RELEVANT LAWS

OF GEORGIA

**Non-Paper on the Amendments to the Law of Georgia
on the Occupied Territories and the Other Relevant Laws**

1. Brief Overview

1.1 Amendments due to be introduced to the “Law on Occupied Territories of Georgia”

According to the amendments to the “Law of Georgia on the Occupied Territories”, the law stipulates that an illegal entry to the occupied territories “shall invoke responsibility according to the rules as defined by the laws of Georgia”. This may entail either criminal or administrative responsibility. Besides, the law provides for a special permission for the entry to the occupied territories from the forbidden direction to be issued by the Government of Georgia under the special order. Such permission may be issued either before or after the entry to the occupied territories, given the state interests.

2.1. Amendments due to be introduced to the Criminal Code

According to the amendments, Paragraph 1 of Article 322¹ of the Criminal Code invokes criminal responsibility of foreign citizens or non-citizens for the entry to the occupied territories through the violation of the statutory rules of the “Law of Georgia on the Occupied Territories” if a person has already been penalized under the Administrative Code for such act. Such illegal act is subject to fine which must be no less than the double amount of the fine (minimum GEL 800) which is imposed for such illegal act by the relevant article of the Administrative Code of Georgia. According to Paragraph 2 of Article 322¹, a person shall be punished with imprisonment (for a term of 3 to 5 years) for committing the illegal act under aggravating circumstances (act committed collectively, repeatedly or/and with violence or the threat of violence).

3.1. Amendments due to be introduced to the Administrative Code

According to the amendments initiated, the Administrative Code of Georgia is added with a new Article 199¹ which provides for the imposition of fine of GEL 400 on foreign citizens or non-citizens for the entry to the occupied territories through the violation of the statutory rules of the “Law of Georgia on the Occupied Territories.” Amendment is also made to Article 208(e), according to which court proceedings for the mentioned administrative violations are conferred to the District (City) Court. In addition, Article 239 of the Administrative Code is added with Paragraph #64, according to which protocols on the administrative violations, as defined by Article 199¹ of the Administrative Code, are drafted by persons authorized by the Ministry of Internal Affairs of Georgia.

2. Rationale

The amendment to Article 322¹ of the Criminal Code (illegal entry to the occupied territories) was essentially caused by its nature of being a blanket ban. According to the meaning of Article 36 of the Criminal Code, illegal entry to the occupied territories may not necessarily result in a criminal responsibility of the person doing this act. Specifically, according to Article 36 of the Criminal Code, those who are unaware that their action is illegal shall not be punished only in case their mistake is forgivable. The mistake is forgivable if, at that moment, the person did not know or could not have known about the illegality of the action. If the mistake is not forgivable, the person can be held responsible for his/her neglect, if commission of the act with neglect is subject to the Criminal Code. The norms of the

Criminal Law are classified into two types: classical and additional Criminal Law norms. The former relates to classical delicts such as murder, theft, robbery etc. which are in contradiction with the cultural norms. The latter includes the whole range of crimes that have a blanket nature. In order to comprehend crimes of this kind, one has to have specific knowledge of laws in a given area. The breach of such norms does not contradict the cultural norms. Article 322¹ of the Criminal Code belongs exactly to such set of norms. If one was to invoke criminal responsibility of a person under this article, he/she has to be fully aware and must realize that he/she has entered the occupied territories through the violation of the statutory rules of the “Law on Occupied Territories.” It should be taken into consideration that the crime under the given article may be committed only by a foreign citizen or a non-citizen, whilst Georgian citizens may act with impunity. Accordingly, a foreign citizen must know that he/she is violating the “Law of Georgia on Occupied Territories” which is in effect in this country. Stemming from Article 36 of the Criminal Code, a person violating the “Law on the Occupied Territories” may not be punished even if his/her ignorance and mistake are unforgivable, because Article 322¹ of the Criminal Code envisages invocation of responsibility only in cases of intent (purposefully committed crimes). There is no provision for punishment for such an act committed with neglect.

According to the amendments, a first-time illegal entry into the occupied territories is subject to administrative penalty. In case the person repeats the act, he/she can no longer justify the claim that he/she did not know about the ban. Hence, Article 36 of the Criminal Code will no longer apply to this act and thus perpetrator will be fairly held responsible under the Criminal Law.

The statistics provided by the Ministry of Internal Affairs reveal that the majority of the persons punished under Article 322¹ of the Criminal Code are foreign sailors who could never have been aware of the situation in Georgia and of the existence of its Law on Occupied Territories. The punishment of such persons was not grounded, and took place by evading Article 36 of the Criminal Code.

3. Draft Amendments to the Law on the Occupied Territories

According to the amendments presented, Paragraph 2 of Article 4 of the “Law of Georgia on the Occupied Territories” is amended in a way to stipulate that the illegal entry to the occupied territories “shall invoke responsibility according to the rules as defined by the laws of Georgia” (rather than “invoke criminal responsibility” as it is stated in the current law). In addition, Paragraph 3 of Article 4 states that the special permission for an illegal entry to the occupied territories is issued under the order of the Government of Georgia. Furthermore, Sub-Paragraph “d” is added to Paragraph 4 of the mentioned Article. This sub-paragraph discharges from responsibility a person who has entered/enters the occupied territories through the forbidden direction without the special permission of the Government of Georgia, but – given state interests - obtains such permission after the entry to the occupied territories.

3.1. The Goal of the Draft Law

The goal of the draft law is to stipulate in the “Law of Georgia on the Occupied Territories” that illegal entry to the occupied territories of Georgia shall invoke responsibility according to the rules as defined by the Georgian legislation. This may entail responsibility either under the Criminal or Administrative Code. In addition, the law provides for a special permission for the entry to the occupied territories of Georgia through the forbidden direction to be issued under the order of the Government of Georgia. Such permission may be issued either before or after the entry to the occupied territories, given the state interests.

The elaboration of the draft law is necessitated by the draft amendments to the Criminal Code of Georgia and to the Administrative Code of Georgia, according to which responsibility of a person who violates the entry procedures for the occupied territories of Georgia is moved from the realm of Criminal Law to that of Administrative Law. Criminal responsibility is invoked against a person violating the entry procedures for the occupied territories only in case he/she commits the act after a penalty under the Administrative Code has already been invoked. That's why the draft amendment to the "Law of Georgia on the Occupied Territories" states that the violation of entry procedures for the occupied territories of Georgia shall invoke responsibility in accordance with the rules as defined by the Georgian legislation.

4. Draft Amendments to the Criminal Code

According to the presented amendments, Paragraph 1 of Article 322¹ of the Criminal Code imposes criminal responsibility on foreign citizens or non-citizens for the entry to the occupied territories through the violation of the statutory rules of the "Law of Georgia on the Occupied Territories" if a person has already been penalized under the Administrative Code. The illegal act invokes a fine instead of imprisonment; and the fine must be no less than the double amount of the fine envisaged by the relevant article of the Administrative Code of Georgia (which means no less than GEL 800). According to Paragraph 2 of the mentioned article, if a person commits the illegal act under aggravating circumstances (act committed collectively, repeatedly or/and with violence or the threat of violence), he/she shall be punished with imprisonment for a term of 3 to 5 years¹.

4.1. The Goal of the Draft Law

The goal of the draft law is to liberalize the penalties under the Criminal Law for the entry to the occupied territories and to invoke criminal responsibility of a person who has earlier been penalized under the Administrative Law.

The elaboration of the draft law derives from the goal to liberalize the criminal justice policy with regard to the rules of illegal entry to the occupied territories. Article 322¹ of the Criminal Code of Georgia is a blanket rule and imposes criminal responsibility on foreign citizens or non-citizens for the entry to the occupied territories through the violation of the statutory rules of the "Law of Georgia on the Occupied Territories." Those whom the norm may concern may not know about the restrictions that are in effect in Georgia for the entry to the occupied territories. Accordingly, invoking criminal responsibility of such persons might be perceived as an unfair, coercive measure imposed by the Georgian state. Besides, the punishment authorized by Article 322¹ of the current law (imprisonment for 2 to 4 years, and imprisonment for 3 to 5 years in case of aggravating circumstances) is extremely harsh and disproportional to the illegal act for which a person is culpable. Accordingly, it would be adequate to invoke the Administrative Code instead of the Criminal Code for the first-time illegal entry into the occupied territories; and therefore to invoke criminal responsibility of a person if he/she has already been held responsible under the Administrative Code in the past.

¹ This term was raised from "fine or term up to one year" to "three to five years" after the proposal was voiced at the committees and was taken on board by the Government

5. Draft Law Amendments to the Administrative Code

According to the presented amendments, the Administrative Code of Georgia is added with a new Article 199¹ which provides for the imposition of fine of GEL 400 on foreign citizens or non-citizens for the entry into the occupied territories through the violation of the statutory rules of the “Law of Georgia on the Occupied Territories.”

Amendment is also made to Article 208, according to which, court proceedings for the mentioned administrative violations are conferred to the District (City) Court.

In addition, Article 239 of the Administrative Code is added with Paragraph 64, according to which protocol on the administrative violations as defined by Article 199¹ of the Administrative Code are drafted by persons authorized by the Ministry of Internal Affairs of Georgia.

5.1. The Goal of the Draft Law

The goal of the draft law is to replace the existing measures of punishment under the Criminal Code with the Administrative penalty for a person for the first-time illegal entry into the occupied territories.

The elaboration of the draft law is necessitated by draft amendments to the Criminal Code of Georgia, according to which a person who violates the entry procedures for the occupied territories of Georgia, as defined by Article 322¹, is held responsible under the Criminal Code only after a person has been penalized under the Administrative Code. Respectively, the Administrative Code of Georgia was added with a new article which provides for an administrative penalty for the entry into the occupied territories of Georgia in contravention of the Georgian legislation.