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Commission de Venise



Organization for Security and  
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in Europe

High Commissioner  
on National Minorities



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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**JOINT OPINION  
ON A PROPOSAL FOR A CONSTITUTIONAL LAW  
ON CHANGES AND AMENDMENTS TO  
THE CONSTITUTION OF GEORGIA**

**by  
the Venice Commission  
and OSCE/ODIHR**

**endorsed by  
the Commission at its 61<sup>st</sup> Plenary Session  
(Venice, 3-4 December 2004)**

**on the basis of comments by  
Mr Pieter VAN DIJK (Member, The Netherlands)  
Mr James HAMILTON (Substitute Member, Ireland)  
Mr Gerard BATLINER (Expert, OSCE/ODIHR)  
Ms Dženana HADŽIOMEROVIĆ  
(Expert, OSCE High Commissioner on National Minorities)**

## I. Introduction

1. *On 5 October 2004, the Ministry of Justice of Georgia requested the Commission's comments on the draft law on Changes and Amendments to the Constitution of Georgia (CDL(2004)109, hereafter referred to as "the draft law"), which had been prepared by the Liberty Institute, a non-governmental organisation.*
2. *Mr Pieter van Dijk, member, and Mr James Hamilton, substitute member, provided comments on the draft law (CDL(2004)110 and CDL(2004)111 respectively), which were endorsed by the Commission at its 61<sup>st</sup> Plenary Session (Venice, 3-4 December 2004).*
3. *The present opinion was drawn up on the basis of these comments and the comments provided by Mr Gerard Batliner, in his capacity as independent expert for OSCE/ODIHR at the request of the OSCE Mission in Georgia, and, in respect of minority rights' protection, Ms Dženana Hadžiomerović, Legal Adviser to the OSCE High Commissioner on National Minorities. The present opinion thus represents the joint opinion of the Commission, OSCE/ODIHR, the OSCE High Commissioner on National Minorities and the OSCE Mission in Georgia on the draft law.*

## II. Introductory remarks

4. The scope of the amendments is as follows: -
  - (i) Chapter Two of the Constitution, which deals with human rights and fundamental freedoms, is to be repealed and replaced with a new charter of rights and freedoms.
  - (ii) There are a number of changes being made to the institutions and structures of government and the judiciary including:
    - (a) Changes to the composition of Parliament and its method of election.
    - (b) The abolition of the Constitutional Court and the conferring of the powers to interpret the Constitution and exercise powers of judicial review on the Supreme Court.
    - (c) The rewriting and re-formulation of Chapter Five of the Constitution dealing with the courts and the judiciary.
    - (d) The removal of references to the Procurator's Office from the Constitution (and presumably the re-formulation of the powers of this office).
    - (e) The creation of a new office of Ombudsperson (this is contained in Chapter Two dealing with human rights and fundamental freedoms).

5. The proposed text does not include an explanatory memorandum. It would be very helpful if such a memorandum were available, to indicate the rationale and background of some of

the proposals, especially in comparison with the present text of the relevant provisions of the Constitution. No information has been provided regarding the reasoning behind the proposed institutional changes.

### **III. Analysis of the draft Law**

## **CHARTER OF RIGHTS AND FREEDOMS**

### **Article 1**

6. Article 1 of the Amending Law proposes to insert a new Charter of Rights and Freedoms in the Constitution. The proposed new Charter of Rights and Freedoms is a substantial document running to some 36 articles which sets out a comprehensive range of rights and freedoms together with provisions setting out how these rights may be restricted under certain circumstances. The Charter is, generally speaking, drafted in a coherent and logical manner, beginning with provisions relating to general guarantees of rights and freedoms, followed by a clause setting out the general grounds and circumstances under which rights and freedoms may be restricted, then establishing the principle that the rights and freedoms are to be interpreted in a manner which would promote democratic values and pay regard to the European Convention on Human Rights (hereafter ECHR) and the case law of the European Court of Human Rights, and proceeding from there to separate articles dealing with individual civil and political rights and concluding with articles relating to social and economic rights and the creation of the office of ombudsperson.

7. The proposed text of Chapter 2 no longer puts the provisions concerning citizenship at the beginning. This has the advantage of avoiding the impression that citizenship is a precondition for the enjoyment and protection of fundamental rights and freedoms. Indeed, everybody under the jurisdiction of a State is entitled to the fundamental rights and freedoms laid down in international treaties to which that State is a party (Article 1 of the ECHR); the same has to apply to the rights and freedoms laid down in the Constitution. Restrictions to citizens are only allowed for those fundamental rights that are commonly reserved for citizens, especially certain political rights.

8. This starting point is reflected in the formulation of these rights and freedoms in the present Constitution ("Every human being"), although there are some important, and in the opinion of the Venice Commission unjustified, exceptions: assistance for unemployed people to find a job (Article 32) and the rights of members of national minorities (Article 38). It is also reflected in the proposed text, but without the above-mentioned exceptions, and with the express prohibition of discrimination of foreign citizens and stateless persons in paragraph 4 of Article 15.

9. It would seem that the principle of *nulla poena sine lege*, found in Article 7 paragraph 1 of the ECHR, is not included in the list of rights and freedoms.

10. It may well be useful to state explicitly that the Constitutional rights and freedoms found in Chapter II are directly applicable. This would avoid any uncertainty regarding the nature of these provisions, both for the authorities and for the individual, and ensure that individuals can go to the courts to have these rights upheld.

11. A number of specific comments and concerns are addressed below.

### **Article 12: General guarantees of rights and freedoms.**

12. The first paragraph states that rights and freedoms are recognised and protected as “eternal and supreme human values”. This phrase is taken from Chapter I of the present Constitution, with certain modifications. In the context of the new Chapter II, which contains fixed rules, it could be misleading. For example, it is difficult to see how certain rights, such as the right to property under Article 22, important though it is, should be recognised and protected as eternal human values. Such terminology runs the risk of detracting from the seriousness of the rights provided for.

13. The second paragraph of Article 12 states that the State provides necessary guarantees for the enjoyment and protection of fundamental rights and freedoms of each person. Strictly speaking, this second paragraph is superfluous in relation to the first. However, it would contain an important addition, if “guarantees” was specified as “effective remedies”, thereby implementing Article 13 of the ECHR.

14. The third paragraph of Article 12 provides that the provisions of the Constitution have to be interpreted in conformity with universally recognized rights and freedoms. This provision does not provide sufficient clarity as to the status of international human-rights treaties and other internationally recognized human rights within the domestic legal order. Do they have the same status as the Constitution or do they rank higher? Are they directly applicable within the legal order of Georgia? These issues need further clarification.

15. Paragraph 4 of Article 12 expressly recognises “other universally accepted rights, freedoms and guarantees that are not referred to in here, but can be implied from the Constitution and universally accepted general principles of law”. This provision could be a powerful tool for the development of further rights if the courts of Georgia chose to do so. The disadvantage of such a system of implied rights is that it may tend in the long run to establish power with the judiciary and diminish the authority of the elected institutions of state.

16. The fifth paragraph of Article 12 is not clear. It is presumed that the translation should read “prosecution” rather than “persecution”. The provision also would seem to have been formulated in too absolute a way. Most fundamental rights and freedoms are not of an absolute character but may be restricted in certain respects. If a person transgresses these restrictions, for instance by killing another person or setting fire to a building in the name of freedom of religion or freedom of expression, he or she may of course be prosecuted. The wording should make it more clear that the “enjoyment” refers to enjoyment within the limits as provided for in the Constitution and international treaties.

17. As a general comment, it is worth considering whether Article 12 should not appear in Chapter I of the Constitution, which lays down the basic principles of the state.

**Article 13: General grounds and rule for the restriction of rights and freedoms.**

18. The present draft seems to be somewhat contradictory in that paragraph 1 sets out a general rule whereby fundamental rights and freedoms may be restricted only in the events and according to the rules prescribed by the Constitution, in compliance with law, through proper and fair procedures, and only if all requirements provided in the Article are fulfilled. However, paragraph 2 goes on to say that no fundamental right and freedom shall be restricted which seems contradict to paragraph 1. It may be that this first sentence of paragraph 2 should simply be deleted. The second sentence of paragraph 2, stating that no fundamental right and freedom shall be restricted in a manner that would in essence equate to their abolition, is important.

19. Paragraph 3 provides a rule whereby fundamental rights and freedoms may be restricted only if “critically necessary for the existence of democratic society” and if the restriction directly contributes to the realisation of legitimate goals prescribed by the Constitution. It should be noted that the formula “is critically necessary for the existence of democratic society” is a strong requirement and goes beyond what is provided for in the ECHR, which only speaks of measures which are “necessary in a democratic society”. In addition it provides for a test of proportionality. Subject to clarifying the apparent contradictions in the article the criteria proposed appear to be on the whole appropriate ones. However, it would be preferable to expressly provide that the limitations allowed under the Constitution should be in accordance with the international human rights treaties to which Georgia is a party, or even to use the language of the ECHR in drafting clauses permitting rights to be restricted: see paragraph 34 below. There is a further restriction clause in Article 43 and there are other restriction provisions in various articles.

20. Paragraph 4 provides that any material restriction of fundamental rights and freedoms shall be realised only in compliance with law which itself provides direct request for such a restriction, concrete criteria and an exhaustive list, as well as envisages guarantees protecting the restricting rules from their incompliant application with the goals. These conditions, taken literally and as a whole, would require a considerable amount of attention from any law-maker.

**Article 14: Interpretation of rights and freedoms**

21. This Article imposes a requirement to interpret fundamental rights and freedoms in a manner which would promote the values of the open, free and democratic society, in consideration of the ECHR and the case-law of the Court of Human Rights, as well as other universally recognised norms and precedents. It is important not only that the ECHR is referred to, but also the case-law of the European Court of Human Rights. The precise meaning of “in consideration of” is not clear. If it means “taking account of” or “in conformity with” the Article could provide a basis to ensure that the Constitutional jurisprudence of Georgia is in line with the case-law of the European Court of Human Rights.

**Article 15: Rights to equality**

22. The list of prohibited grounds of discrimination includes most of the usual grounds one would find listed in equality clauses with the exception of birth, age and sexual orientation.

“Birth” may be important, for instance, for the prohibition of unequal treatment of children born outside marriage. However, there is a general prohibition of discrimination on grounds of “any other status”. “Origin” should read “national or social origin”.

23. The Article appears to be addressed to the state only and does not appear to outlaw discrimination by private individuals or institutions. The Article applies to discrimination against artificial or legal persons to the extent that the nature of such persons permit. Rights are extended to foreign citizens and stateless persons except to the extent that it is provided otherwise in the Constitution. The Article does not appear to address the question of positive discrimination.

#### **Article 16: Rights to life, dignity and personal inviolability**

24. The Article provides that these rights are inalienable and that this primarily implies a number of other matters including prohibition of capital punishment, freedom from torture and cruel, inhuman or degrading treatment or punishment, as well as corporal punishment, the right not to be an object of medical and scientific experiments, the right to medical service based on free choice and informed consent, the right to urgent medical assistance, freedom from slavery, forced labour and prohibition of human trafficking, and a prohibition of extradition or transfer to a place where any of these rights and freedoms would be threatened. The content of this provision is clear, although it is perhaps a little unusual to find all of these particular rights combined in a single provision. It is important that capital punishment is expressly abolished and that human trafficking has been prohibited. One could add to the beginning of paragraph 1 that each person shall have inalienable rights to life, dignity and personal inviolability “and to their protection”.

25. The words “any action” in the first paragraph, under b) should read: “any arbitrary action” to bring it in conformity with the provision under c) and with the second paragraph. Indeed, an action that causes severe physical or mental pain or suffering may be necessary and justified, for instance, in the framework of medical treatment, or in the framework of action by the police or the military to prevent serious crimes or protect lives.

26. In the first paragraph, under c), “informed consent” should be specified to make clear that the consent of a third person may substitute for that of the person concerned in certain situations.

27. In the first paragraph under e) the reference to “tribunal” may bring Georgia into conflict with its obligations as a member of the United Nations, and in particular with binding decisions of the Security Council.

28. Article 16 contains two exception clauses which deal with the application of “lawful, urgent necessity, precisely targeted and proportional force” and also provide that military, civil service or the serving of a sentence or the performance of public service works during martial law or a state of emergency are not to be considered forced labour”. Presumably these exception clauses are to be read in conjunction with Article 13 of the draft.

#### **Article 17: General guarantees of civil liberties**

29. The Article begins by stating that freedom of belief, faith, conscience, ideology, expression, assembly and association may be limited in certain circumstances. The particular freedoms themselves are dealt with in the subsequent four articles. The drafting of this

provision could be improved. It would be more appropriate that one would first state the content of these particular freedoms and then subsequently deal with the circumstances in which they may be limited.

30. It is not clear what exactly paragraph 1 of Article 17 means. Perhaps there is a translation difficulty. The Article refers to “neutral limitations” on the place, time and form of expression, which is not however to affect “the content of information or ideas, or the effect of the expression” and which is to leave realistic chances for their expression in an alternative way. Presumably what is intended to be covered is matters such as the banning of a meeting in a particular place where alternative arrangements may be made, although it is difficult to understand how such a concept can apply to regulation of freedom of belief, faith or conscience.

31. The notion of “administrative rights” in paragraphs 2 and 3 is not clear in itself and should include a reference to Article 24.

32. Article 17 contains a clause putting the onus of proof on those who seek to limit the rights and freedoms in question, which seems appropriate. However, it may not be advisable to regulate the burden of proof in the Constitution at all, but rather leave it to the judiciary in the framework of judicial review.

33. It is not clear why these “general” guarantees apply only in respect of the “civil liberties” listed in Article 17.

34. On the whole, the ideas set forward in this article would be better expressed as appropriate limitations to the substantive articles dealing with the freedoms themselves and it would be desirable to express those limitations the same terms as are found in the limitation provisions in the ECHR where there is a substantial case law on how these limitations are to be interpreted. Rather than re-writing a new provision in the manner proposed why not stick to the well tried and tested provisions which, for example, refer to “such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”?

### **Article 18: Freedom of belief, faith, conscience and ideology**

35. The first two paragraphs of this Article seem to provide a comprehensive protection for freedom of belief and freedom to express belief. The words “without any obstacles” in the second paragraph are in contradiction with the first paragraph of Article 17, which lists several permitted “obstacles”. The wording of the third paragraph, which refers to the “right to contradict morality”, is not clear. What is meant by “the obligation that is directed towards the rights recognized in the first and second paragraph”? If the “obligation” refers to the obligation to attend any meeting or religious service, such obligation would be justified in very special situations only, and the guarantees provided under a) and b) would be insufficient.

36. Paragraph 4 of the Article provides for a further restriction clause. It states that the rights and liberties provided for by this article may be restricted if critically necessary for the protection of, *inter alia*, the fundamental rights of others. In other restriction clauses, for

example the second paragraphs of articles 20 and 21, the notion of fundamental rights does not appear. It is not clear whether this is deliberate. It would mean, for example, that the reputation of others, which is not explicitly provided for in Chapter II, would not receive protection vis-à-vis the Constitutional right to freedom of expression or religion. Again, the reason for having different restriction clauses contained in different places is not apparent.

### **Article 19: Freedom of expression**

37. Freedom of expression is guaranteed and the Article goes on to provide that this implies a number of things. The first of these is freedom from being forced to express an opinion. It seems odd to state this before stating the positive freedom to express an opinion. However, the content of the provisions seems to be comprehensive.

38. The first paragraph, under c), guarantees, *inter alia*, the right to *receive* information and ideas. It should be clarified, at least in an explanatory memorandum, whether, and if so to what extent and under what conditions, this right implies a positive obligation on the part of the public authorities, to *provide* information if requested, in the broader context of transparency of government. It may be noted that the right of a journalist to protect the secrecy of information is guaranteed under e). It is not clear what is meant by the “right to charity” under i). The right to speak any language and use any alphabet is included in the first paragraph under j). It is not clear from that provision whether, and if so to what extent and under what conditions, this right implies the right to use a foreign language for public purposes, *e.g.* in a court room or at a town hall. This would seem the more important since Article 45, dealing with the rights of minorities, in its second paragraph, also does not contain a right to use the minorities’ language for other public purposes than local court hearings.

39. Paragraph 2 guarantees editorial independence of media. The paragraph goes on to provide that “government shall promote development of media pluralism”. On the face of it this seems to be unexceptional but is there perhaps a danger that it could be used to justify government interference with the media? Similarly, paragraph 3 provides that government is to guarantee public broadcasting free from political and commercial influence, but could such a provision be used to suppress political debate rather than to ensure that it is carried out in a fair and impartial manner? Again, the Article contains a restriction clause in paragraph 4.

40. In the fourth paragraph the words “for the protection of other rights and freedoms” should read in the English translation: “for the protection of the rights and freedoms of others”.

### **Article 20: Freedom of assembly**

41. Freedom of assembly is to be allowed without any prior permission except where an assembly is to be held in a place of public and transport movement. There is a restriction on freedom of assembly for members of the armed forces, police and security services but only in circumstances prescribed by Organic law. It should be clarified that the Organic Law, referred to in the third paragraph, may regulate freedom of assembly only under the conditions mentioned in the second paragraph. Again, the article provides for a number of restrictions.

### **Article 21: Freedom of association**

42. The provision appears to be appropriate, although the relationship between the second and third paragraphs is not clearly stated. The Organic Law referred to in the third paragraph may only restrict the freedom of association of political officials within the limits mentioned in the second paragraph. Again, there is a restriction clause and the same comments as previously made apply.

### **Article 22: The right to property**

43. The right to property and inheritance is guaranteed as is the right to purchase, possess and dispose of property. Restrictions may be introduced for purposes of public necessity but only in exchange for fair market value compensation and only in circumstances defined by organic law. It may be noted that the obligation to pay market value compensation may well mean that an owner's compensation includes an increased value of his property attributable to public expenditure or public decisions to carry out the particular works for which the property is being compulsory acquired. It may also be noted that the Article provides that the rights guaranteed by the Article do not apply to property purchased through illegal means or obtained from or intended for illegal activity which would appear to be a useful provision. The phrase "Abolition of the universal right to property" at the beginning of the article requires further clarification.

### **Article 23: Political rights**

44. The first paragraph speaks about State governance only, and not about regional and local governance. Article 45, which deals with the rights of minorities, in its third paragraph, speaks of representation "in governmental organs" without specifying whether this includes organs at the national as well as at the regional and local levels.

45. Paragraph 2 refers to "the right to solve the matters of local importance through self-government". It is not clear what this means.

46. Paragraph 3 refers to a right to exercise civil disobedience against tyranny. Without disagreeing with the sentiment, is it appropriate to insert such a provision in a Constitution? Obviously such a situation would only arise in circumstances where the institutions established under the Constitution had broken down.

47. In the fourth paragraph, the right to "fair taxing and involvement in budgeting" is restricted to "citizens". The ratio of this restriction is not clear and does not seem justified.

### **Article 24: Administrative rights**

48. These include rights to appeal to a public agency under 3) a). It is not clear in respect of what exactly such appeals may lie. The words "without any obstacle" would seem to be too absolute, unless the drafters intend to establish an *actio popularis*. In general, the right to appeal, to an administrative body or to a court, may be restricted by certain procedural

requirements, provided that they do not affect the right of appeal in its essence and are proportional.

49. The Article also deals with the right to public information and to attend meetings and to be heard and to participate in hearings. Again, the circumstances in which such rights can be

exercised may need to be clarified more precisely. Does the Article refer only to decisions affecting particular individuals or to administrative decisions generally?

### **Article 25: Access to justice**

50. The fundamental right is that of access to prompt, continuous, public, independent, impartial and legitimate trial based on equality of arms and competition of parties for the protection of rights and freedoms. Presumably “competition of parties” is intended to mean the system is to be adversarial. The rights guaranteed include the right to free legal aid and the right to an interpreter if one cannot hear or speak the language of the proceedings.

51. In the second paragraph there is reference to the right to “have his/her injured rights redressed”. However, *restitutio in integrum* is not possible in all cases. It is suggested that the words “if possible in practice” be added.

52. The meaning and scope of the fourth paragraph are not clear. The wording seems to have been derived from human-rights provisions concerning deprivation of liberty and criminal charges. If that is the intention of “restriction of rights and freedoms”, it should be expressly stated.

53. Paragraph 8 gives a right to appeal to the court for the redress of injured rights on the part of a person who acts as representative of any group, class or category of people, or as a defender of public interests. The scope of this provision seems unclear. Is it merely dealing with the right of a person in an action to be represented by such a person or does it create a right to institute a class action or *actio popularis* on the part of persons claiming to act in the interests of other persons? May any person act as a defender of public interests? It is assumed that the words “in the events and according to the rules prescribed by law” are intended to allow for the introduction of certain restrictions. In that case it is recommended that these words are placed after “may include”, since the injured person him/herself should always have access to court or - outside the context of a civil right or obligation, or a criminal charge - to another effective remedy.

54. While the Article guarantees the right to a public trial, it does not appear to authorise the holding of legal proceedings otherwise than in public, although this may on occasion be necessitated for various reasons, such as, for example, the protection of minors, the protection of secret commercial information, the protection of informants, or the protection of state security. However, the proposed new Article 84 (see paragraph 44 below) appears to address this issue, although the conditions under which cases may be closed are not set out.

### **Article 26: Rights to liberty and inviolability**

55. This deals with the right to personality, property, personal and business communication, inviolability of the work place and residence, data including personal secrets, as well as any information, place or circumstance regarding which a person has a reasonable expectation of private life. Paragraph 3 appears to be somewhat obscure. It seems to be saying that the provisions relating to privacy are not to be used to prevent publication of certain matters which it

is in the public interest to reveal but if so it is not very clearly expressed. Other appropriate provisions relating to data protection are contained in the Article.

56. A right of access to personal data held by a public agency is guaranteed in the fourth paragraph. The right of access to data may also include, under certain conditions, the right of access to data of other persons that are of direct interest to the person requesting access, *e.g.*, data concerning the natural parent (donor of sperm) or DNA-data concerning a person accused of a sexual crime.

57. The seventh paragraph should also include “the protection of the privacy of others” as a ground of limitation.

#### **Article 27: Freedom from unjustified wiretapping, search, detention and arrest**

58. These together with others kind of restriction of liberty are not permitted except in cases based on a court decision or in the event of urgent necessity. Since the right to liberty is such a basic right, consideration should be given to providing an exhaustive list at Constitutional level of the cases in which personal liberty may be restricted, as in Article 5 paragraph 1 of the ECHR. In cases of urgent necessity the prosecutor must go to court within 24 hours. An arrested person must be brought before a court no later than 48 hours following arrest. The court has to give a decision on the person’s release within 24 hours. This does not seem very realistic, unless it opens the possibility of some delay in particular circumstances. Moreover, if it is a correct understanding that these provisions may be enforced by applying to a court pursuant to paragraph 7 of Article 28, which permits an application to court to review the reasonability, justification and legitimacy of restriction of liberty after ten days, it is not clear why one would have to wait so long to review a detention which was apparently unlawful. Why should a detainee not be able to apply to a court immediately on the expiry of the periods provided for in Article 27? There may be a gap in the Constitutional provision here.

59. In the first paragraph, the words “reasonable assumption” should be supplemented by “of having committed a serious crime”.

#### **Article 28: Rights of detainees and prisoners**

60. Their fundamental rights and freedoms are guaranteed except where restricted by law, although the words “except for those established by law” are too general and should contain the limits within which the law may restrict the rights and freedoms of prisoners. Prisoners have the right to humane treatment and respect for their personality. They have certain rights

to communicate. The provision requiring a person to be brought before court within 48 hours is repeated – it is not clear why it needs to be in both Article 27 and 28. A detainee has the right to inform his family or friends of his detention. The right to bail is guaranteed except for urgent necessity prescribed by law and based on a court decision where there is a reasonable assumption that the suspect will not appear before the court or will obstruct the investigation. This appears to be an appropriate provision, although the words “or will

commit another crime” should be added. The term of pre-trial imprisonment is not to exceed ten days which may be extended up to 30 days in the event of a statutory emergency. This seems a very short period and is apparently contradicted by paragraph 9 which allows for pre-trial imprisonment of up to 100 days except when extension of this term is required for securing a defendant with the right to a fair trial in which case dates of up to six months are permissible. These provisions appear to be somewhat contradictory and confusing although the general principle of putting a time limit on the length of pre-trial imprisonment and the period within which a trial must be commenced has much to recommend it – such a system is in operation in Scotland, for example. Paragraphs 8-10 would seem to require a provision that the periods mentioned there may be extended by court decision in exceptional cases. Indeed, a suspect of a very serious crime should not be released pending trial, if there is serious reason to believe that he/she may commit another crime.

#### **Article 29: Rights of suspects and defendant**

61. These include the right to be free from physical or psychological pressure and reasonable time and resources to prepare a defence. “Persecution” of a defendant is to be terminated unless a charge is formulated within 70 days. Presumably this should read “prosecution”. Again, there is a provision to extend this time to five months in exceptional cases. These time limits are certainly reasonable where one is dealing with straightforward offences but they seem to be very short if dealing with a complicated matter such, as for example, fraud or corruption. Charges are not to be brought except on reasonable grounds. Where a charge is brought, the defendant has the right not to face more severe charges except due to newly discovered or newly revealed circumstances. This would effectively prevent a person being proceeded against on a holding charge. The practice of preferring a holding charge is legitimate where there is a difficult question whether more serious charges are appropriate and time for consideration is required. This Article also contains a non-retrospectivity of criminal law provision. The reference to “international law” at the end of the article should read “general principles of international law” or “general principles of law recognised by civilised nations” in accordance with the second paragraph of Article 7 of the ECHR.

#### **Article 30: The right to a jury trial**

62. The right is guaranteed where a defendant may face imprisonment. The wording “each defendant shall have the right not to be found guilty” is not the same as the more positive presumption of innocence found in other legal systems, although it may simply be a problem of translation. The right may be renounced. The words “fellow citizens” in the first paragraph do not take into consideration the fact that the defendant may be a non-citizen, in which case the members of the jury are not fellow citizens.

**Article 31: The right to a fair trial**

63. The right to a trial by a proper court based on the Constitution and the law is guaranteed. There is a question as to whether this article guarantees clearly enough the right to a fair trial

in all cases: civil, administrative and Constitutional as well as criminal. Such a right is of capital importance for all individuals.

64. In the second sentence of the second paragraph it is not clear, at least not in the English translation, what “normative acts” mean.

65. Defendants are given the right to attend the hearing of their cases. No provision is made to deal with the situation where a defendant is disruptive and it may be desirable to give a court the flexibility to proceed with cases in the absence of a defendant in such an event.

66. There is a right to have a case dealt with within 30 days after charge. The defendant may, however, look for more time to prepare a defence. Again, these time limits seem remarkably short if dealing with a complex matter and it would seem that a greater flexibility allowing the court to extend these time limits for good reason would be desirable.

67. Paragraph 5 guarantees a person’s right against self-incrimination. But it goes further and provides that he or she may not be required to incriminate friends or relatives. This is very broad, especially given the undefined character and scope of the notion of “friend”. The provision also goes further in providing that “giving inaccurate testimony shall not be used against, or to aggravate the case of, a suspect or a defendant”. Perjury is perjury even when committed by a defendant and this clause in effect gives a defendant a right to tell lies on oath in his defence without any penalty. This is inappropriate and not required by any reasonable interpretation of the privilege against self-incrimination.

68. The parties are guaranteed equal rights to collect evidence and the defendant is guaranteed the right of access to any acquitting or alleviating evidence. This may be too narrowly defined since the defendant should also be entitled to access evidence tending to incriminate him for the purpose of testing it. It would be preferable to guarantee the defendant’s right to access all relevant evidence in the possession or procurement of the prosecutor. In addition, paragraph 6 leaves open the question of whether there is an unlimited right to summon and question witnesses, or whether that is up to the court to decide in the interests of the administration of justice.

69. Paragraph 8 provides for a strict exclusory rule of evidence, which is unlawfully obtained. It would seem that such evidence would be excluded even where there was no deliberate or conscious violation of the accused’s rights. The presumption of innocence is guaranteed. Doubts are to be resolved in favour of the defendant. A right to cross-

examination concerning specific evidence during a verbal and direct court hearing is guaranteed, but there does not appear to be a general right to cross-examine where evidence is not given orally. Paragraph 14 requires courts to behave in a consistent manner and to treat like cases alike. Court decisions are required to be substantiated.

### **Article 32: The right to fair judgment and punishment**

70. This provides that persons are not to face criminal liability for failure to perform civil obligations, provides for punishments to be proportionate and not to be cruel, inhuman, degrading, humiliating or unusual. The purpose of punishment is to be the restoration of justice, the prevention of crime and the social rehabilitation of convicts. Convicts are to enjoy all fundamental rights and freedoms except those prescribed by law. As is the case for the first paragraph of Article 2 in relation to detainees and prisoners, the fourth paragraph of Article 32 should indicate within which limits the rights and freedoms of convicted persons may be restricted.

### **Article 33: Prohibition of repeated prosecution and the right to appeal**

71. This provides that a person is not to be prosecuted for a single offence repeatedly. It is not clear what this means. How often is “repeatedly”? For example, if a jury cannot agree on a verdict, does this mean that there cannot be a re-trial at all? If so, disagreement would be tantamount to an acquittal. Presumably there cannot be a re-trial where there has been an acquittal. It would be better to phrase this provision as a standard *non bis in idem* clause.

72. Convicted persons are given a right of appeal, but in the event of such appeal have a right not to be convicted of a more serious offence or to face a more severe punishment from a higher court. The wisdom of such a provision is questionable since it may encourage a convicted person to bring frivolous or vexatious appeals. Moreover, this paragraph is not in conformity with what is common in criminal law: appeal proceedings are to be regarded as a retrial, and consequently may lead to a more severe punishment, provided that good reasons are given by the appellate court.

### **Article 34: Citizenship**

73. A duty to protect citizens regardless of their location is imposed. It is not clear how this can be given effect to or what is its scope. It would seem to imply that citizens are also protected when they are outside the country, although if this is the case, the words “according to international law” should be added since Georgia is under an obligation to respect the sovereignty of the host state.

74. Citizenship may be acquired by birth or naturalisation as prescribed by organic law. No person may be deprived of citizenship. Dual citizenship is permitted as prescribed by organic law. The provision goes on to refer to the circumstances in which dual citizenship may be granted. It is not clear whether these are intended to be exhaustive. They appear to relate to the situation of persons who are already citizens of a foreign state and who are seeking to become citizens of Georgia as well. It is not clear the extent to which the Constitution permits a person who is a Georgian citizen to acquire the citizenship of another state.

### **Article 35: Freedom of movement**

75. This provides for free movement and free choice of residence throughout the territory to any person legitimately in the State. Citizens may freely enter Georgia and not be expelled. They may not be extradited except for events defined by international obligations and pursuant to a court decision. This raises the question of whether this may also be a decision by an international tribunal. After all, Georgia may be internationally obliged to transfer a citizen to

the tribunal if the latter so decides and a domestic court should not be given jurisdiction to decide that the order of the international tribunal should not be followed. There is a restriction clause in the provision. The right to a passport is not expressly referred to and it might be desirable to give an express guarantee of this right to citizens.

### **Article 36: Rights of refugees**

76. There may be less to this Article than meets the eye since the right to seek and secure refuge may only be exercised “in the events and according to the rules prescribed by law”. The provision seems, therefore, to be of no effect in the absence of such a law. As is the case in the first paragraph, the second paragraph should refer to the norms of international law in addition to domestic law. Collective expulsion is prohibited. The right to a travel document is not referred to.

### **Article 37: The right to family**

77. Despite its title the article refers only to the right to marriage based on free will and equality of the couple and to the inviolability of family life and raising of children according to the parents’ convictions. It does not prohibit forced marriages. It does not refer to the right to have children and found a family or to any other substantive rights of the family or the rights of spouses between themselves (for example, the right to mutual support). It is unclear whether the reference to “inviolability of family life” refers only to families based on marriage. Moreover, the word “couple” is not clear. It may refer to two persons of different sex, but also to two persons of the same sex. If the latter is not intended, that should be reflected in the wording.

### **Article 38: Children’s rights**

78. It would be helpful if the Article made it clear that the rights referred to are in addition to the other rights provided for in the Constitution. The Article makes no reference to the right of children to express views freely in all matters guaranteed by Article 12 of the UN Convention of the Rights of the Child, or the rights to freedom of expression or of thought, conscience and religion guaranteed in Article 13 and 14 of the same instrument. The unqualified reference in Article 37 to the raising of children according to the parents’ convictions seems somewhat at odds with these provisions of the UN Convention.

### **Article 39: The right to education**

79. It is not clear to what extent these rights are intended to be justiciable. The State is obliged to ensure each person’s right to education, to fully develop his or her personality and gain critical thinking, problem solving, “education usage”, further education and effective communication skills as well as to learn his or her native and foreign languages, and even to equal opportunities to success in private and public life. Singling out education in foreign languages as an element of the fundamental right to education any more than any other subject, such as mathematics, may be questioned.

80. The State is to protect freedom of educational choice and ensure diversity of forms of professional education. Universal access to obligatory free elementary, basic and secondary education are to be ensured. Paragraph 4 provides that each person is to have equal access to higher continuous education. The Article does not however say that the education is to be free and it is not clear whether the Article simply means that in principle every person has access even though in practice they may not have the means to secure such access.

81. Parents are given the right to provide their children with education according to their religious, ethical, cultural and language requirements and to freely choose an educational institution but this freedom is not to be construed as evading obligatory education or obtaining an education that would prevent them from speaking or reading the State language, acquiring national and universal values and culture, or involving any education that would encourage intolerance and conflict. The parents' freedom is effectively a freedom to choose between different institutions rather than a freedom to opt out of the education system altogether. It is not clear from the wording of the second and fifth paragraphs whether free choice of an educational institution includes the right to ensure education in conformity with the parents' religious and philosophical conviction, as guaranteed by Article 2 of the First Protocol to the ECHR.

#### **Article 40: Freedom of business and labour**

82. This includes the free transfer of people, goods, services and capital. It is not clear whether this refers solely to free transfer within Georgia. The right to collective negotiation and to strike is recognised. The right of citizens to undertake positions in public service on an equal basis is recognised, as is the obligation to appoint or promote to positions in the public service according to suitability and competitive selection. There is a restriction clause in the Article.

#### **Article 41: Access to social services**

83. In the event of pregnancy, motherhood, illness, work related trauma, old age, job loss, or other events, there is a right of access to social services. There is also a right of access to preventive medicine. It is not clear what is meant by this or to what extent this right is intended to be justiciable. The concept should be brought to reasonable proportions, for instance by specifying it as immunisation against dangerous diseases. The rights of the elderly to live in dignity and independently and to be involved in social and cultural life are recognised. The State is required to ensure free development and equal opportunity for the handicapped. The scope of this latter provision appears unclear, in particular regarding how it is to be enforced.

#### **Article 42: The right to a healthy environment**

84. This imposes on the State a duty to ensure the rational use of natural resources, protection of the environment and sustainable development for the purposes of guaranteeing a safe environment for human health. Persons have rights to obtain information regarding the work and home environment and factors affecting their health. Again, it is not clear to what extent such rights might be capable of being justiciable.

#### **Article 43: Consumer rights**

85. These rights include the right to informed consumer choice and to goods and services that are not hazardous. Duties are imposed on public service providers including duties to provide full information, to treat consumers on an equal basis, to efficiently use public funds, to consult

with consumers, to respond to their enquiries and to eliminate errors. Again, it is not clear to what extent such rights may be considered justiciable.

#### **Article 44: Right to free development**

86. This includes the right to preserve and develop cultural, ethnic and language diversity and heritage, traditions and distinctiveness. The State is obliged to support cultural development and

to protect cultural heritage through the law. It is not clear why the right of participation in cultural life, mentioned in the second paragraph, and the obligation to protect and preserve cultural heritage, referred to in the third paragraph, are restricted to “citizens”. It should be recalled, that international law confers human (including minority) rights to every person within the jurisdiction of the State. A restriction to citizens only is only allowed when it concerns those fundamental human rights that are commonly reserved for citizens, notably political rights. Even if the purpose were to make a distinction in relation to Article 45, which deals with the rights of minorities, the restriction would not be justified since there are non-citizens who do not belong to a national minority. Consequently, there should be specific reference to the right of persons belonging to national minorities to develop their cultural, linguistic or religious identity.

#### **Article 45: Rights of the minorities**

87. Article 45 of the proposal represents a definite improvement with respect to the minority rights protection currently found in Article 38 of the Constitution. In particular, it envisages the obligation of the Georgian state to promote civil integration of minorities, although it is not clear from the text exactly what is meant by this, and reinforces the prohibition of forceful assimilation (see paragraphs 3 and 4).

88. The Article does not deal with minorities in general but appears to refer to particular minorities. “Members of the minorities” are stated to have individual and collective rights on an equal basis. The concept of membership may imply an act of official recognition or acceptance by a group. In order to avoid such an interpretation it would be useful to use the terminology established in the international human rights standards, i.e. “persons belonging to national minorities”. It should be recalled that international human rights instruments do not confer “collective rights” *per se*, i.e. without reference to persons who belong to such groups. Clearly, only individuals are to be the beneficiaries of minority rights protection. However, it is worth recalling that pursuant to Article 3 of the Framework Convention “Persons belonging to national minorities may exercise the right and enjoy the freedoms flowing from the principles enshrined in the present Framework Convention individually as well as in community with others.” Notwithstanding the aforementioned, the State is free to decide whether to extend guarantees to collective rights as well. It would be important to further elaborate this notion in the ordinary legislation.

89. Members of the minorities shall have a right to access information and ideas on their native language as well as to certain rights to public broadcasting in their languages. It should be clarified whether members of national minorities have a right of access to the public media to a proportional degree and without costs.

90. There is a right to political representation, although there is no provision about the right of minorities to vote and to proportional representation, and participation in decision-making. The proposal should elaborate further the right to effective participation in public life, in the light of the Lund Recommendations on the Effective Participation of National Minorities in Public Life.

91. There is also a right to administer justice in the minority language, but only where the minority is a local majority of the population. This right should be amended to include the right of persons belonging to minorities to use their minority language in relations between these persons and the administrative authorities (see Article 10[2] of the Framework Convention). As regards a numerical threshold, i.e. the possibility for the official use of a minority language in a case where the minority represents the majority of the population, it should be recalled that in response to this highly controversial question, the Advisory Committee to the Framework

Convention made it clear that the requirement that the persons belonging to a specific minority constitute a majority in the locality concerned is incompatible with the Framework Convention (See e.g. the Opinions on Estonia, Moldova, Ukraine, etc). Consequently, the threshold should be reduced and the notion "substantial numbers" as envisaged by the Framework Convention may be introduced.

92. The right of members of minorities to preserve and express cultural and other identity is protected, as is the right to use cultural symbols publicly, speak their own language, have geographical names and topographic signs in the native language. It should be noted here that the right of persons belonging to national minorities to develop their culture in all its aspects, as guaranteed, *inter alia*, by paragraph 32 of the 1990 CSCE Document of the Conference on the Human Dimension and Article 5 of the Framework Convention, is not provided for. Importantly, Article 44 guarantees to each person "the right to free development, including the right to preserve and develop cultural, religious, ethnic and language diversity." Such a provision would suffice, in particular if there was no intention to make a distinction between this right and the right of minorities as elaborated in Article 45 of the Proposal.

93. The state is under a duty to facilitate a culture of tolerance in education, culture, media and other spheres and encourage mutual respect without any distinction based on ethnic, religious and linguistic identity. However, there is no reference to educational rights, notably the right to learn and to be instructed in the minority language, and the right of minorities to set up and to manage their own private educational and training establishments as guaranteed, *inter alia*, in Articles 12, 13 and 14 of the Framework Convention. Article 39 on the right to education refers to the "right to learn his/her native and foreign language" and to the right of parents to "provide children with education according to their religious, ethical, cultural and language requirements". Nonetheless, educational rights of national minorities constitute a key element of minority rights protection and Article 45 should contain appropriate reference to it.

#### **Article 46: Restriction of fundamental rights and liberties in the state of emergency or martial law**

94. This Article provides that during a state of emergency or martial law fundamental rights and freedoms may be derogated from pursuant to the Constitution and organic law. This may only be done if all requirements established by Article 46 are observed and the derogation is compatible with Georgia's obligations with regard to the norms of international law dealing with states of emergency and martial law. Proclamation of a state of emergency or martial law may not result in exemption of the state or any person from legal liability and may not derogate from the rights and freedoms relating to equality, life, dignity and personal inviolability, access to justice, the right to a fair trial, the right to fair judgment and punishment, the provisions relating to citizenship, the right to family and children's rights. This list should also include the principle of *ne bis in idem* found in Article 33 and elements of Article 45 regarding equality of the law and the prohibition of forced assimilation. Proclamation of a state of emergency or martial law may also not result in the interference with freedom of choice, possession and change of faith and ideology and freedom of conscience and thought. The list of rights from which no

derogation is allowed in any circumstances is considerably longer than that found in the second paragraph of Article 15 of the ECHR.

### **Article 47: Ombudsperson**

95. This position is to oversee the protection of the rule of law and the uniform application of law, the protection of human rights and freedoms, to reveal the facts of violations, and to

facilitate prevention and elimination of such violations and reinstatement of affected rights and freedoms. The Ombudsperson is given extensive powers to obtain information and proof from any person and to summon any person to provide him or her with evidence. The Ombudsperson may freely enter any location and meet any person, examine all decisions of public agency or officials produce recommendations, submit reports to parliament, and when a fact or miscarriage of justice is revealed appeal to the Supreme Court to commence disciplinary measures against the liable judges. The Ombudsperson is empowered to submit a lawsuit to the court in the events and according to the rules prescribed by law. These are substantial powers.

96. However, the Article leaves a considerable number of matters to be defined by law. These include the Ombudsperson's authority with regard to Constitutional officials, the power to submit a lawsuit to the court, as well as the number, authority, organisational structure, rules of activity, guarantees of the independence of Ombudspersons, the circumstances in which the Ombudsperson can be dismissed and the measures which can be taken in case of infringement of the authority of the Ombudsperson. A provision which leaves so much to be determined by law is not particularly useful and most of these matters are of sufficient importance to be clearly defined in the Constitution. Indeed, provisions on the Ombudsman could very well constitute a chapter of their own, like the chapter on the judiciary, since they are not really subjective rights but deal with the establishment of an institution.

97. The relationship between the powers of the Ombudsperson and the powers of courts of law are not defined at all. It is not clear the extent to which the Ombudsperson can act of his or her own violation and issue binding rulings without recourse to a court of law. It would be undesirable that the Ombudsperson could do so, for example, in the case of the right to enter "any location" in paragraph two, if this includes private homes. There are provisions in the Article whereby appeals and complaints sent to the Ombudsperson are to be confidential and not accessible by any person and whereby the Ombudsperson has the right not to testify regarding such matters. The difficulty with this provision is that if the Ombudsperson is to act on foot of such complaints in a manner affecting the rights of third parties, how are those parties to defend themselves and vindicate their own rights if they are not to be told the basis of the complaint? The meaning of "bureaus of parliamentary chambers" in the twelfth paragraph and why they should have the right to address the Supreme Court should be clarified.

## **CHANGES IN INSTITUTIONAL ARRANGEMENTS AND STRUCTURE OF GOVERNMENT AND THE JUDICIARY**

### **Article 2**

98. Article 2 of the draft Constitutional Law proposes to change existing Article 49(1) of the Constitution which provides that the Parliament of Georgia consists of 150 members elected by a proportional system and 85 members elected by a majoritarian system. Under the proposed changes the Parliament will consist of 150 deputies only. It is understood this change is necessitated following the results of a popular referendum held recently. The Parliament will continue to be for a fixed term of four years and will be elected on the basis of universal, equal

and direct suffrage by secret ballot. However, the method of voting is no longer provided for in the Constitution. No information has been provided as to why this change is proposed or what is intended to be the method of election. The method of election is sufficiently important to be specified in the Constitution.

### **Article 3**

99. Article 3. This proposal will remove the requirement to have the signatures of 50,000 electors in order for a party to confess elections or for an individual to have 1,000 signatures. It will also remove the requirement that parties require at least 7% of the vote in order to receive any seats in the Parliament. No information has been provided as to whether these provisions are being replaced by ordinary legislation or as to the intention or purpose behind these amendments.

## **TRANSFER OF FUNCTIONS FROM CONSTITUTIONAL COURT TO SUPREME COURT**

### **Article 11**

100. A number of the proposed amendments have the effect of abolishing the existing Constitutional Court. The principal change is effected by Article 11 of the amending law which proposes to replace Chapter Five of the existing Constitution, which deals with the judiciary, with a new draft.

### **Article 82**

101. The proposed new Article 82 provides for judicial power to be exercised by the courts system through Constitutional supervision, administration of justice and other procedures determined by law. The third paragraph should state as a starting point that court hearings shall be public (see Article 84, paragraph 1). Courts are to be base their decisions on the Constitution and law and refuse to use any legal act that contradicts these. This paragraph should also regulate to what extent courts may or must apply international treaties that bind Georgia, and general principles of international law, and to what extent judicial review includes review of conformity with these norms norms of international law. The independence of the judge is guaranteed subject to the Constitution and the law. The requirement of impartiality should also be specified here. Any interference in the judge's activities is prohibited and any norm limiting judicial independence is deemed invalid. Court decisions can only be annulled by a court and no person can request a report from a judge on any concrete case.

### **Article 83**

102. Article 83 provides for a courts system including a Supreme Court, an Appellate Court, a Common Court and other special courts, including Military Courts, and a Magistrates Court. It is important that the different types of court are provided for at Constitutional level. The creation of emergency courts is prohibited. A Supreme Council of Justice is provided for to ensure independence and access to judiciary and to support professional self-governance of judges and public accountability. The Supreme Council of Justice should also ensure impartiality. The composition of the Supreme Council is not defined in the Constitution and is to be prescribed by law but it is to be representative, to portray public diversity and to include

persons who possess different professional experiences. Given their crucial role in appointing judges the composition of the Supreme Council, as well as their appointment or election, should be defined in the Constitution.

#### **Article 84**

103. Under Article 84 cases are to be heard in public except in such cases as are provided for by law. The grounds for a decision to hold hearings *in camera* should nonetheless be listed. Decisions are to be announced publicly. The principle of equality of the parties is provided for (although it would be more appropriate to speak of the adversarial nature of the proceedings rather than the “competition of parties”) and the mandatory nature of court decisions is decreed. Courts are to have free access from any individual. This is rather an unusual way to put this; one would expect the provision to say that individuals have immediate and free access to the courts. The role of the Court Marshal is not clear from the fifth paragraph. It should be indicated who appoints the Court Marshal.

#### **Article 85**

104. Article 85 provides criteria for the appointment of judges who must be 30 and satisfy other criteria determined by ordinary law. Judges may not hold any other occupation or remunerative activity except teaching. The notion of “pedagogical activities” as an exception is not very clear and may prove too restrictive, especially in the case of part-time judges. It would be advisable to use a formula that guarantees that the occupation or activities may not prejudice the independence and impartiality of the judge. They may not be members of political parties or participate in political activities.

105. Their selection is to be by open competition as defined by law. The chairs of courts are to be appointed by the President on the nomination of the Supreme Council of Justice. It would be appropriate to specify the term of the chairs. Judicial appointments are to be for a period of no less than ten years and a judge must retire at the age of 70. Appointment for life would give a better guarantee of judicial independence than a ten-year appointment. At least, in the case of a general time-limit, for instance of 10 years, for the appointment of judges to a specific court, re-appointment for a second term should be excluded. The Article provides that the selection, appointment and dismissal of judges is to be determined by law. Again, guarantees for non-removability ought to be provided for in the Constitution. At the least, the Constitutional provisions should determine the minimum conditions under which a judge can be dismissed or suspended. The law also provides for disciplinary liability for judges, suspension from case hearing, removal from the post before the term or transfer to another office according to law. Again, it appears undesirable that ordinary law can provide for such matters without any Constitutional guidance.

106. There appears to be a certain contradiction in the proposed Article 85 since paragraph 9 refers to a judge being dismissed under Article 64 of the Constitution. This Article in turn refers to the dismissal of the Chairman of the Supreme Court and members of the government in cases of violation of the Constitution, high treason or the committing of other criminal offences and provides for at least one-third of the members of parliament proposing an impeachment and a vote being taken by the majority of the members of the parliament to remove the person from

office. This provision appears to contradict other provisions which say that dismissal of a judge is to be provided for by law.

107. The proposed Article 85 also provides for the immunity of judges from criminal charge, detention or arrest, except in cases where a judge is caught red-handed. It is wrong in principle that a judge should be immune from criminal liability although it may be appropriate to limit powers of arrest so as to prevent interference with the work of a judge during the hearing of a case.

### **Article 86**

108. The proposed new Article 86 provides for a Supreme Court of Georgia which is defined as the highest authority in Constitutional oversight and administration of justice and which decides on disputes related to the Constitution, exercises supervision over the administration of justice in the common courts and ensures the uniform application of a Constitution on the law. It has exclusive jurisdiction to decide on disputes on competence between central and local authorities and among territorial entities, between different branches and state bodies and on the Constitutionality of international treaties. Such issues have to be referred to the court by the President, the government, or one-fifth of the members of parliament, or certain other institutions including the Ombudsperson. There are provisions regarding *res judicata*, but the consequences for the parties of such a revision should be specified. The need for such a provision could perhaps be useful where the European Court of Human Rights has found a violation of the ECHR in a final decision of a national court. There is no express provision saying that the Supreme Court is to take decisions on the Constitutionality of a law, normative acts of the President or normative acts of the representative bodies of the autonomous regions, although this may be implicit in the provisions of the proposed new Article 86 paragraph 8 which refers to normative acts being recognised as unconstitutional. The Supreme Court has an advisory power in respect of draft legislation, which may cause problems as to the impartiality of the Supreme Court in cases where it has to interpret and apply legal provisions on which it has given a previous opinion (see the *Procolo* judgment of the European Court of Human Rights). It also has certain functions in relation to finding the President and other high state officials incompetent. These functions were formerly exercised by the Constitutional Court of Georgia and were provided for in Article 89 of the existing text. It should be added that there are a number of functions in existing Article 89 exercised by the Constitutional Court which do not appear to have been transferred to the Supreme Court under the new text. These include disputes connected with questions of the Constitutionality of referenda and elections.

109. It is not clear why it has been decided to abolish the Constitutional Court and confer these functions on the Supreme Court. In principle there is no reason why the functions of Constitutional review should not be exercised by a Supreme Court which also exercises other judicial functions, as is the case in other jurisdictions such as the United States, Canada or Ireland. Clearly each system has both advantages and disadvantages. However, where there is a functioning Constitutional Court it would not seem desirable to abolish it and transfer its functions to the Supreme Court without a clear assessment of the gains expected to arise from such a decision.

### **Articles 87, 88, 89 and 90**

110. The proposed new articles also provide for the composition of the courts and the appointments of judges, which in general are to be by the President of Georgia upon the nomination from the Supreme Council of Justice with the consent of the parliament in the case

of the Supreme Court. The second paragraph of Article 87 as well as the fourth paragraphs of Articles 88 and 89 should specify whether the President is bound by the nomination from the Supreme Council of Justice. It is suggested that the third paragraph of Article 87 would be better placed in Article 86. The fourth paragraph of Article 90 should indicate who nominates and appoints the members of the Magistrates' Courts.

## **THE PROCURATOR**

111. Article 91 of the Constitution which deals with the Procurator is to be removed. The existing Article provides that the Procurator's office is an institution of the judicial power which performs criminal prosecution, supervises an inquiry and execution of punishment and supports state indictment. The function of supervision of law is in effect being transferred to the new institution of Ombudsperson and a number of the references to the Procurator General in the Constitution are now to be substituted with references to the Ombudsperson. The separation of the powers of criminal prosecution from powers to carry out general supervision is to be welcomed. The system of procuracy which combines the power of prosecution with the power of general supervision of the law centralises too much power in the hands of one individual and is clearly contrary to the Recommendation 1604 (2003) of the Parliamentary Assembly of the Council of Europe on the role of the Public Prosecutor's Office in a democratic society governed by the rule of law. However, it would be appropriate to retain a reference to the Procurator General in the Constitution, assuming that office continues in being and is entrusted with the function of prosecution, since it could be important to provide on a Constitutional level certain provisions relating to the criminal prosecution of offences – such as, for example, the question of whether the prosecutor is to exercise functions independently of government or, if the prosecutor is to be subject to direction, the circumstances in which such direction may be given and must be published, the duty on the prosecutor to act fairly and impartially, the procedures for appointing and dismissing the Chief Prosecutor, and a prohibition on conferring certain functions on the prosecutor. In general, these questions are dealt with in Rec (2000) 19 of the Committee of Ministers of the Council of Europe on the role of Public prosecution in the criminal justice system. A number of the principles therein stated are of sufficient importance as to merit reference in the Constitution particularly in a Constitution which regulates so many matters of detail. A useful model in this regard is Article 179 of the Constitution of South Africa.

## **AMENDMENTS CONTRARY TO HUMAN RIGHTS**

112. Article 14 contains a provision which would restrict amendments to the Constitution. The provision would add to Article 103 of the existing Constitution a new paragraph 2 which would provide that no changes and amendments are to be permitted in the Constitution that restrict fundamental Constitutional human rights and freedoms, rule of law principles and a revision of the Georgian statehood. A reference to international human rights treaties to which Georgia is a party should also be included here. There are some concerns about this provision if it had the effect of freezing everything which is contained in the proposed new Charter of rights particularly when the provisions in the Charter are so detailed. However, a provision which would prevent abolition of the most fundamental rights could be desirable but it would seem important to clarify the precise ambit of the provision. Presumably the question of whether or not a proposed amendment to the Constitution comes within the terms of this new provision is to

be determined by the Supreme Court but there do not seem to be any provisions which deal with the question expressly.

113. Article 15, which states that statutory limitations shall be suspended with retroactive effect, violates the principles of legal certainty and justified expectations.

#### IV. Conclusion

114. On the whole the proposed amendments are in conformity with European standards of democracy, the rule of law and the protection of human rights, notwithstanding the reservations made in relation to questions of detail set out above. In some respects, they go beyond the rights and freedoms traditionally guaranteed in the Constitution by including very detailed social, cultural and collective rights. The rights and freedoms enshrined in Chapter 2 of the Constitution should explicitly be declared directly applicable.

115. A general critical comment to be made is that the draft goes too much into detail in regulating some of the rights and freedoms and some of the institutions, including elements that would usually be found in (organic) laws.

116. The ratio of several of the proposals require explanation in an explanatory memorandum, in particular, the reasoning behind the transfer of power from the Constitutional Court to the Supreme Court.

117. More specific points of criticism or attention are:

- a) lack of clarity as to the status of international law in general, and international human rights treaties in particular, within the domestic legal order;
- b) regulation of the restriction of rights and freedoms is not sufficiently specific in some places, for example, where the limitation of certain rights (freedom of assembly, freedom of association) or for certain groups (prisoners, convicted persons) is left to organic or ordinary law without specifying in the Constitution the criteria to be applied;
- c) the international obligations of Georgia with respect to international tribunals do not seem to be fully taken into account;
- d) the right of every individual to have access to court and to a fair trial in all cases of civil, administrative and criminal matters as well as with regard to the rights and freedoms provided for in Chapter 2 of the Constitution is not made sufficiently explicit;
- e) the principle of *nullum crimen, nulla poena sine lege* should be included in Chapter 2
- f) the right of members of national minorities to use their own language under certain conditions and in specific public bodies is not expressly regulated, apart from local court hearings;
- g) the right of members of national minorities to participate in national, regional and local government is not clearly regulated, nor is their right to proportional representation in elected bodies and their right to vote and to be elected;
- h) the right of access to the public media of national minorities is not regulated in a sufficiently specific way;
- i) the right to obtain information from public authorities concerning public policy is not expressly regulated;

- j) the right to education is not clear as to its scope, especially not as far as the right of the parent to choose, and if need be, establish educational institutions in conformity with their religious or philosophical conviction;
- k) the distinction between independence and impartiality of the judiciary is not always made.

