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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE DRAFT AMENDMENTS TO THE CONSTITUTION OF GEORGIA

on the basis of comments by

Mr Sergio BARTOLE (Substitute Member, Italy)
Mr Olivier DUTHEILLET DE LAMOTHE (Member, France)
Mr Giorgio MALINVERNI (Member, Switzerland)
Mr Hjörtur TORFASON (Member, Iceland)
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I. Introduction

1. On 28 January 2004 the President of Georgia, Mr Mikhail Saakashvili, speaking before the Parliamentary Assembly of the Council of Europe, stated that the Georgian authorities expected an urgent opinion of the Venice Commission on the proposed amendments to the Constitution of Georgia. On 29 January 2004 the Venice Commission received an English translation of these amendments through the Constitutional Court of Georgia. The Venice Commission was informed that the amendments might be adopted within a few days.

2. The rapporteurs of the Venice Commission, Messrs Sergio Bartole (Italy), Olivier Dutheillet de Lamothe (France), Giorgio Malinverni (Switzerland), Henrik Zahle (Denmark) and Mr Hjörtur Torfason (Iceland) immediately prepared individual comments which were made available to the Georgian authorities. The present opinion is based on these comments. It was sent to the Georgian authorities on 6 February 2004.

II. General comments

3. First of all it should be noted that the present opinion only addresses the text of the proposed amendments. It does not deal with procedural issues. The comments are based on the English translation received by the Commission.

4. The aim of the amendments is to change the system of government, replacing the present purely presidential system of the present Constitution by a semi-presidential system in accordance with the French model. This intention brings Georgia closer to the usual European practice and can only be welcomed. However, this intention has not been fully realised.

5. The semi-presidential system is in fact a parliamentary system with a double executive, President and Government, and the possibility for the President to arbitrate in case of a conflict between the Government and Parliament by means of dissolving parliament.

6. This has a double consequence:

- In a semi-presidential system the Government is responsible to Parliament: this means that, if Parliament expresses its lack of confidence in the Government, the resignation of the Government cannot be left to the discretion of the President. By contrast, the President may in this case dissolve Parliament without being obliged to do so. If he does dissolve Parliament, the Government may remain in office to deal with day-to-day matters until the elections and must resign following these elections as provided in the new Article 80.1.
- If there is a conflict between Government and Parliament, the President may dissolve Parliament; this is a right of the President and not an obligation. He may exercise this right according to his discretion (as in the French Constitution), or if the Government fails to get the confidence of Parliament three times (as provided for in the new Art. 80.6).

7. The proposed Amendments do not really correspond to this model but often retain stronger powers for the President, enabling him to appoint a Government never approved by Parliament or to keep a Government other than in a caretaker function although Parliament has expressed its lack of confidence in the Government.

III. Comments Article by Article

Article 1 of the Amendments (Art. 2.5 of the Constitution as amended)

7. According to this new provision the President would be "entitled to appoint President representative in territories defined by Georgian law presented by Prime Minister". It would be more in line with the aim of strengthening the Government, and the new Articles 69 and 78 giving the Government and not the President the task of implementing the policy of the executive branch, to make this person a representative of the Government to be appointed by the Government.

Article 2 of the Amendments (Art. 12.2 of the Constitution as amended)

8. This amendment introduces an extremely limited exception to the principle in the existing Georgian Constitution completely excluding double citizenship. In accordance with the more modern tendencies of international law, including those in the Council of Europe framework, the rule should be further liberalised. In that case it would be more in line with the aim of the revision to make the Government responsible for naturalisation.

Article 3 of the Amendments (Art. 46.2 of the Constitution as amended)

9. It seems that the term "by-elections" used in the translation has to be understood in the sense of early general elections (as in the following Article). The - not very clear - amendment would give Parliament the possibility of deciding to hold early elections even during a state of emergency or under martial law. It seems unlikely that the conditions for the holding of free and fair elections can be met during a state of emergency or under martial law.

Article 4 of the Amendments (Art. 50.3^1 of the Constitution as amended)

10. This new section permits the reconvening of the dissolved parliament if a state of emergency or martial law is declared. In cases where the new Parliament is already elected, anticipating the date of the first session of the new Parliament would be preferable.

Article 5 of the Amendments (Art. 51^1 and 73.1.q) of the Constitution as amended)

11. In the first Section, as a matter of legislative technique, a reference should be made to the Articles of the Constitution permitting the dissolution of Parliament.

12. In Section 2.a) it does not make much sense to provide that Parliament may not be dissolved within the first six months following an election. This may lead to an institutional deadlock. It should rather be provided, as in the French Constitution, that Parliament may not be dissolved within 6 months or 1 year following a first dissolution. If, following the first dissolution, the people support the position of Parliament at the elections and not that of the President, the President should not have the possibility of having recourse again to dissolution to impose his or her will. Moreover, the reference made to Art. 80.5 should have been made to Art. 80.6.

13. The new section q) in Art. 73 should be deleted. If the President, according to the Constitution, cannot dismiss the Parliament, then the President has to accept its will and appoint the Prime Minister approved by Parliament. In any case, the budget should not be adopted by presidential decree. This should remain a prerogative of Parliament.

Article 6 of the Amendments (Art. 52.2 of the Constitution as amended)

14. The amendment greatly reduces the scope of parliamentary immunity and provides next to no protection for parliamentarians against abusive proceedings brought against them by the executive. The Venice Commission has already stated on other occasions that at least in a new democracy, parliamentary immunity against criminal proceedings is an important guarantee. Article 52.2 should therefore be left as it stands now.

Article 8 of the Amendments (Art. 62.2 of the Constitution as amended)

15. This new provision is to be welcomed.

Article 9 of the Amendments (Art. 67 of the Constitution as amended)

16. In the semi-presidential as in the parliamentary system the Government has the general right of legislative initiative. The qualification "only in special circumstances" should therefore be deleted. It also seems questionable whether the right of legislative initiative of the President should be retained.

Article 11 of the Amendments (Art. 69 of the Constitution as amended)

17. This amendment is important, expressing the will to move to a semi-presidential system of government.

Article 12 of the Amendments (Art. 70.4 of the Constitution)

18. The intention to delete the first sentence of Section 4 is welcome. The second sentence by contrast would seem necessary and should be retained.

Article 13 of the Amendments (Art. 73 of the Constitution as revised)

19. The new sub-section b) of Art. 73.1 is very important since it establishes the authority of the Prime Minister over the Government.

20. The new sub-section c) establishes that three ministers, for Internal Affairs, Defence and State Security, may be dismissed by the President (although the President has no special role in their appointment). By contrast, the new Art. 79.5 entitles the Prime Minister to dismiss ministers without any distinction. These provisions should be harmonised, possibly by providing for the dismissal of all ministers by the President at the proposal of the Prime Minister.

21. In the new sub-section o) the cases in which the Constitution permits the dissolution of Parliament should be enumerated.

22. The new sub-section p) is extremely problematic. It first of all provides that the President chairs the Supreme Council of Justice of Georgia. This body is not regulated elsewhere in the Constitution and it would be highly desirable to regulate its powers and composition in the Constitution. Having the President as the Chair is not necessarily the best solution (although provided for in Western European Constitutions) and his or her role as the Chair should then be purely formal. The second sentence gives the President the power to appoint and dismiss judges "according to the constitution and organic law". However, this power should be purely formal and qualified by the Constitution itself, e.g. to be exercised upon the proposal of the Supreme Council of Justice.

23. The resignation of the Government and dissolution of the Parliament should not lead to increased powers of the President in the financial field, as in the proposed new

Art. 73.1.q). The outgoing Government should in this case continue to act, but be limited to dealing with day-to-day matters. The proposed text in this Article is moreover different from the text proposed in Art. 5 of the Amendments for the same sub-section (cf. the comments at paragraph 13 above).

24. The new wording of Article 73.3 would entrust the President with quasi-judicial functions. These should be left to the courts and the section deleted completely.

Article 16 of the Amendments (Articles 78-81^3 of the Constitution as amended)

25. Section 2 of the new Article 78 seems unclear. According to the first sentence there seem to be several State Ministers (with which tasks?); according to Art. 81^3.3 there is one State Minister. The second sentence is not comprehensible in the English translation.

26. In the drafting of Art. 79.6, it should be taken into account that the need to appoint a new minister may also arise for other reasons, e.g. due to a death or the setting up of a new department.

27. The wording of the new sections 3 and 4 of Article 80 should be reviewed. It is preferable that there should be one single vote both on the composition and the programme of the government. Moreover, it is not advisable to enable Parliament to object to a specific member of Government proposed by the Prime Minister. Is the majority referred to in Art. 80.3 the majority of the members or the majority of those taking part in the vote?

28. Is it useful to enable the President under the new Art. 80.5 to submit again the same composition of the Government if this composition was already rejected by Parliament?

29. The proposed Art. 80.6 is difficult to accept. Such a Government would have no legitimacy. Where three proposals for the election of a new Government are rejected, the President should not be able to appoint a person never elected as Prime Minister but dissolve Parliament and ask the outgoing Prime Minister to stay in office to deal with day-to-day matters until the election of a new Parliament.

30. The drafting of Section 1 of Art. 81^1 seems not acceptable. If Parliament withdraws its confidence from the Government, the President cannot ignore that decision of Parliament. The Government has to resign in this case. If the President does not wish to propose to Parliament the election of a new government, he must dissolve Parliament and in this case the outgoing Government, although having resigned, remains in office to deal with day-to-day matters.

31. The proposed new Art. 81^2 should be dropped, since Parliament should not be able to decide on the appointments of individual Ministers. These appointments should be under the exclusive authority of the Prime Minister with the consent of the President.

Article 18 of the Amendments (Proposal to abrogate Art. 87 of the existing Constitution)

32. The abrogation of this Article, thereby depriving judges of any protection against criminal proceedings, seems not satisfactory. The Constitution should provide guidance to the legislator how to proceed in such cases.

Article 20 of the Amendments (Proposal to abrogate Art. 91 of the existing Constitution)

33. The abrogation of this Article would require justification. The second section, as far as it concerns the appointment of the Prosecutor General, is in fact replaced by the new Art. 73.s) (Art. 16.9 of the Amendments). In former communist countries the Prosecutor's Office tends to be very important and it seems appropriate to define its tasks in the Constitution.

Article 21 of the Amendments (Article 93 of the existing Constitution)

34. It seems inappropriate that the Government has to come to an agreement on the Budget with parliamentary committees before its submission to Parliament. The proposal should be within the discretion of the Government. By contrast, Parliament should then have some possibility of amending the draft Budget although some Western Constitutions also limit the right of Parliament to amend the Budget. The first sentence of Section 3 limits the Parliament to saying yes or no to the draft Budget, whereas examining and amending the proposed Budget should be one of the main prerogatives of Parliament.

35. Article 21.4 proposing an addition to Section 2 meets with the same objection as the proposed Art. 81^1.1. If Parliament expresses its lack of confidence in the Government, the Government may remain in office as a caretaker Government only.

36. In the new Section 3^1 of Article 93 (Art. 21.5 of the Amendments) it would be more logical for Parliament to address the Government (and not the President) with a motion to seize spending funds since the Government is entrusted with the executive and administrative functions concerning the Budget.

37. The proposed new wording for Section 4 (Art. 21.6 of the Amendment) could usefully be replaced by giving the Prime Minister in Art. 81^1.2 the possibility of engaging the responsibility of the Government on the Budget in the same way as on a governmental bill.

IV. Conclusions

38. The proposed amendments are far-reaching and important, since they amount to a change in the system of government. They raise many important and complicated issues and the drafters seem torn between the main aim of the amendments, to increase the powers of the Government, and a desire to keep a very strong President. The system established by the proposed amendments does not seem fully coherent. On some occasions the President may ignore the clearly expressed will of the Parliament or interfere in governmental affairs, on other occasions Parliament has too much say as to the composition of Government. Issues not central to the reform, especially relating to the judiciary, would seem to merit further consideration.

39. In general, while the Commission welcomes the overall aim of the Amendments as well as many of the provisions proposed, it nevertheless considers that considerable further

discussion and the refinement of the amendments before their adoption would be advisable. It remains at the disposal of the Georgian authorities if they desire further co-operation.