Strasbourg, 19 May 2009

Opinion no. 519/2009

CDL (2009)070*
Engl. Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON A DRAFT CONSTITUTIONAL LAW ON THE AMENDMENTS TO THE CONSTITUTION

OF GEORGIA

On the basis of comments by

Mr Sergio BARTOLE (Member, Italy)
Mr Olivier DUTHEILLET DE LAMOTHE (Substitute Member, France)

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I. Introduction

1. By a letter of 27 January 2009, Mr Mikhail Machiavariani, First Deputy Chairman of the Parliament of Georgia, requested the opinion of the Venice Commission on a draft constitutional law on the amendments to the constitution of Georgia (CDL(2009)069).

2. Messrs Sergio Bartole and Dutheillet de Lamothe acted as rapporteurs.

3. The present opinion, which was prepared on the basis of the rapporteurs' comments, was transmitted to the Georgian authorities on … and subsequently endorsed by the Commission at its … Plenary Session (Venice, …).

II. Analysis of the proposed amendments

A. Parliamentary elections and state of emergency or martial law

4. The first proposed constitutional amendment concerns the end of mandate or dissolution of parliament during a state of emergency. The draft revised Art. 50 §§ 3 and 3.1 provides (the changes are underlined):

> 3. If the date of holding the elections coincides with a state of emergency or martial law, the elections shall be held on the 60th day after the state has been lifted. The President of Georgia shall fix the date of the elections immediately upon lifting the state of emergency or martial law. In case of pre-term dissolution of the parliament, extraordinary elections shall be held on the 60th day after the pre-term dissolution of the Parliament, and the President shall fix the date of extraordinary elections immediately upon pre-term dissolution of the parliament.
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> 3.1 The Parliament shall terminate the activity upon the enforcement of the order of the President on the dissolution of the Parliament, or from the day of summing up of the appropriate results of the referendum. From the dissolution of the Parliament to the first convocation of the newly elected parliament, the dissolved parliament shall assemble only in case of declaration of a state of emergency or martial law by the President to decide on the issues of prolongation or approval of a state of emergency or martial law. In case the parliament is not assembled within five days or does not approve (prolong) the order of the President on the declaration (prolongation) of a state of emergency, the announced state of emergency shall be cancelled. In case the Parliament does not approve the order of the President on the declaration (prolongation) of the state of martial law within 48 hours, the state of martial law shall be cancelled. Convocation of the Parliament shall not result in restoration of the offices and salaries of the members of parliament. The Parliament shall terminate an activity upon the adoption of a decision on the above-mentioned issues.

5. The suspension of the possibility of new elections during sixty days after the lifting of the state of emergency or a martial law is to be approved, as elections require a peaceful political atmosphere and the complete fruition of all the freedoms and human rights and a condition of full guarantee of public order and security.

6. The proposed amendments provide for (even more) fixed time-frames for the new elections (including in case of pre-term dissolution) to be fixed ("immediately" upon lifting the state of emergency) and held (on the 60th day after the state has been lifted). This represents a simplification.

7. Paragraph 3.1 of art. 50 confirms the soundness of the previous suggestion, when it allows a meeting of the dissolved Parliament "only in case of declaration of a state of emergency or martial law". It is evident that a democratic system requires the active presence of a Parliament and the possible continuity of its authority.

8. Article 50 § 3.1 – both in the old and in the proposed revised version – makes provision for the need to cancel the announced state of emergency, should the dissolved Parliament not be convened within five days. The reasons for this provision are not clear. The case cannot be compared to the case of a parliamentary vote denying, with an explicit vote, the approval of the state of emergency. The failed meeting of the Parliament may have many different causes, which do are not always the sign of a negative attitude of the Parliament on the item of the state of emergency or martial law. It could be the result of the situation itself which requires the declaration of the state of emergency and blocks, for instance, the exercise of the freedom of movement of the members of the Parliament, which are not able to meet because of reasons not depending on their will. The point deserves attention to avoid treating different situations in a similar way.

B. Limitation of the President's right to dissolve the parliament

9. The second proposed amendment concerns the limitation of the right of the President to dissolve the parliament during his or her term of office, which is of five years. This amendment is explained by the Georgian authorities as a measure aimed at "strengthening the principle of division of power" and at "significantly increasing the powers of the parliament".

10. The proposed revised Article 51.1 provides (the changes are underlined):

> 1. The Parliament shall be dissolved by the President only in cases and by the procedure determined by the Constitution, save for:
> a. within six months from the holding of the elections of the Parliament;
> b. discharging of an authority determined by Article 63 of the Constitution by the Parliament;
> c. in time of a state of emergency or martial law;
> d. within the last 6 months of the term of office of the President of Georgia.
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> 2. The President has the right to dissolve the parliament of his/her own initiative only once within a term of his/her office.
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> 3. In case the President has already dissolved the parliament within his/her term of office, the dissolution of the parliament a second time is permitted only on the basis of the results of the referendum. The President of Georgia calls the referendum on the dissolution of the parliament.
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> 4. If, in the case provides by paragraph 3 of this Article, more than half of the participants in the referendum support the dissolution of the parliament, the parliament shall be deemed as dissolved from the day of summing up of the results of the referendum, and extraordinary parliamentary elections shall be held. If the majority of the participants in the referendum held on the dissolution of the parliament do not support the dissolution of the parliament of Georgia, extraordinary elections of the President of Georgia shall be held on the 45th day from the summing up of the referendum results.

11. The proposed amendments to Art. 51.1 add to the list of the cases when the Parliament cannot be dissolved new rules concerning the dissolution of the Parliament by the President. The discretionary exercise by the President of his or her right to dissolve the parliament would be limited to once during his or her term. A second presidential dissolution would not be allowed, and the President would have to leave the decision to the people by calling a referendum on the matter, if he deems that dissolution of the Parliament is necessary.

12. Indeed, the Commission had previously expressed the view that "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 the

dissolution to impose his or her will".[1] This proposed amendment is consistent with this reasoning.

13. In the Commission's view, however, this proposed amendment would undoubtedly complicate the functioning of the constitutional system of Georgia. The calling of a referendum can have the same political relevance and impact of the calling of the parliamentary elections, but it emphasizes the political accountability of the President, insofar as the popular refusal of the dissolution obliges him to resign, and implies the holding of new presidential elections (with two electoral campaigns, the first on the referendum and the second on the parliamentary elections, overlapping).

14. It is true that this amendment would restrict the discretion or freedom of choice of the President in dealing with a possible second dissolution of the Parliament: he would have to balance the possibility of a victory in the referendum with the alternative of being obliged to leave the office. On the other hand, however, parliament would be faced with the risk of being dissolved not by the President but directly by the people in a referendum which, in case of a positive outcome, would reveal the orientation of the electorate and thus likely anticipate the results of the ensuing elections.

15. The Commission notes at the outset that this solution is not a common one; in Europe, it is only found in Switzerland (at least theoretically[2]); it also exists in the United States, but with the important difference that the recall, there, is at the initiative of the people.

16. In its recent Code of Good Practice on referendums[3], the Commission has not specifically addressed this case. However, the Commission takes the view that, while it is true that a referendum may concern a question of principle[4], any such question must lead to the adoption,

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[1] Venice Commission, Opinion on the draft amendments to the constitution of Georgia, Adopted on 12-13 March 2004, CDL-AD (2004)008, § 12.

[2] See CDL (2009)057, Draft Report on the imperative mandate and similar practices, Adopted by the Council for Democratic Elections at its 28th meeting (Venice, 14 March 2009), § 16.

[3] Code of Good Practice on referendums, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007), CDL-AD(2007)008.

[4] In the explanatory memorandum to the Code of Good practice on referendums, the Commission explained that:

"28. The text submitted to referendum may be presented in various forms:

- a specifically-worded draft of a constitutional amendment, legislative enactment or other measure

- repeal of an existing provision

- a question of principle (for example: "Are you in favour of amending the Constitution to introduce a presidential system of government?") or

- a concrete proposal, not presented in the form of a specific provision and known as a "generally-worded proposal" (for example: "Are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?") .

29. A "yes" vote on a specifically-worded draft – at least in the case of a legally binding referendum – means a statute is enacted and the procedure comes to an end, subject to procedural aspects such as publication and promulgation. On the other hand, a "yes" vote on a question of principle or a generally-worded proposal is simply a stage, which will be followed by the drafting and

amendment or abrogation of a legal text (the constitution or a law). A referendum may not instead be used as a means of settling a dispute between state institutions, as would be the case under the Georgian proposed amendment.

17. The Commission considers therefore that it would be more appropriate to submit to a referendum, rather than the question of the dissolution of parliament, the legal text whose non-adoption by parliament gave rise to the conflict with the President.

18. At any rate, the Commission points out that there exist other possibilities of reducing the possibility for the President to dissolve the parliament without increasing political conflict at the top of the State.

19. A first option would be to introduce rules providing for a mandatory dissolution of the Parliament only in cases explicitly indicated in the Constitution. This would eliminate the possibility which the current Constitution gives to the President to decide between the two different options of dismissing the Government or of dissolving the Parliament.

20. Another manner of reaching this aim had already been suggested by the Commission in its opinion on previous constitutional amendments[5] and consists of excluding the possibility for the President to dissolve the parliament within a certain period (e.g. one or two years) following a first dissolution. This solution (which exists in France: article 12 of the Constitution of 1958) would be much simpler than the one chosen by the Georgian authorities, and would not present the same downsides.

21. The proposed amendment to Article 76 § 2[6] is limited to the provision – technically necessary - of the impossibility for the substitute "to call a referendum under Article 51.1 as well". This provision is coherent with the exclusion of the presidential power of dissolution within the last six months of the term of office of the President. A substitute is supposed to stay in office less than six months.

C. The issue of non confidence

22. The following amendment is proposed to Article 80 § 5 (the changes are underlined):

> 5. In case a composition of the Government and the program of the Governmental thereof do not gain the confidence of the Parliament for three times successively, the President of Georgia shall nominate a new candidate of the Prime Minister within a term of 5 days or appoint the Prime Minister without consent of the Parliament, whereas the Prime Minister shall appoint the Ministers by the consent of the President of Georgia within a term of 5 days as well. In such a case the President of Georgia shall dissolve the Parliament and schedule extraordinary elections, or in the case provided by Paragraph 3 of Article 51.1 [second dissolution of parliament] shall call the referendum on the dissolution of the parliament.

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subsequent enactment of a statute. Combining a specifically-worded draft with a generally-worded proposal or a question of principle would create confusion, preventing electors from being informed of the import of their votes and thereby prejudicing their free suffrage."

[5] Venice Commission, Opinion on the draft amendments to the constitution of Georgia, Adopted on 12-13 March 2004, CDL-AD (2004)008, § 12.

[6] Current Article 76 § 2 provides:

"2. A person acting as the President shall not be entitled to use the rights defined in subparagraphs c) and i) of the first paragraph of Article 73 and the rights defined in the first paragraph of Article 74 and dissolve the Parliament as well."

23. The following amendment is proposed to Article 81 §§ 1 and 5 of the Constitution (the changes are underlined):

> 1. The Parliament shall be entitled to declare non-confidence to the Government by the majority of the total number. Not less than one fifth ~~third~~ of the total number of the members of the Parliament, also the minority, shall be entitled to raise a question of declaration of non- confidence. It shall not be permitted to raise the question of declaration of non confidence, if 6 months term is not passed from the declaration of confidence to the government. After the declaration of non-confidence to the Government the President of Georgia shall dismiss the Government or not approve the decision of the Parliament. In case the Parliament declares non- confidence to the Government again not earlier than ~~90~~ 45 days ant not later than ~~100~~ 60 days, the President of Georgia shall dismiss the Government or dissolve the Parliament and schedule extraordinary elections or in the case provided by Paragraph 3 of Article 51.1 [second dissolution of parliament] shall call the referendum on the dissolution of the parliament. In the case the parliament does not manage to declare non-confidence to the Government, the same subjects shall not be authorised to raise the question of non confidence to the Government for the consecutive 6 months. In case of circumstances provided for by subparagraphs "a"-"d" of Article 51.1 re-voting of non-confidence shall be held within 15 days from the end of these circumstances.
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> 4. The Prime Minister shall be entitled to put the question of confidence of the Government on the draft laws on the State Budget, Tax Code and a procedure of the structure, authority and activity of the Government considering at the Parliament. The Parliament shall declare the confidence to the Government by the majority of the total number. In case the Parliament does not declare the confidence to the Government, the President of Georgia shall dismiss the Government or dissolve the Parliament within a week and schedule extraordinary elections or in the case provided by Paragraph 3 of Article 51.1 [second dissolution of parliament] shall call the referendum on the dissolution of the parliament.

24. The proposed amendment of Article 81 § 1 reduces the number of MPs necessary to introduce a motion of non-confidence in the government from one third to one fifth (that is, from 50 to 30 members). This amendment has to be approved. Despite the amendment, the number is still rather high in comparison with other countries (in France, for example, one tenth of the MPs is sufficient: see article 49 of the Constitution of 1958).

25. The Commission notes however that while the proposed amendment opens the possibility of introducing a motion of non confidence to « the minority », the latter concept is not defined in the current Constitution, which only provides the definition of parliamentary faction (whose minimum number has recently been decreased to six MPs): it would be necessary to introduce the notion of "minority" or, for example, of "opposition faction".

26. More in general, the Commission considers that the Georgian constitutional rules on the dissolution of the parliament call for certain observations.

27. Under the Georgian Constitution, the dissolution of the Parliament clearly depends on the choice of the President in all the articles under consideration (and in article 93.6[7]). All these cases are treated in the same way also with regard to their compliance with art. 51.1 § 3. As a matter of fact, the proposed restriction of the presidential discretion by providing for a referendum in case of a "second " dissolution can be justified only if the dissolution is not mandatory.

[7] In this article, it is proposed to add the following at the very end: "or in the case provided by Paragraph 3 of Article 51.1 [in time of state of emergency or martial law] shall call the referendum on the dissolution of the parliament."

28. As the Commission had noted in its previous opinion[8], doubts can be expressed with regard to art. 80.5. The dissolution of the Parliament is apparently mandatory when a Government does not gain the parliamentary confidence for three times successively and the President prefers to appoint a Prime Minister without the consent of the Parliament, instead of nominating and proposing to the Parliament a new candidate for the post of Prime Minister. After the appointment of the Prime Minister and of the Ministers (by the Prime Ministers), the President has to dissolve the Parliament. But also in this case, the dissolution depends on a presidential choice, that is, it depends on the preliminary choice between the appointment of a Prime Minister without the consent of the Parliament or the nomination of a new candidate for that post. Therefore the case deserves a treatment similar to the treatment reserved to the other cases of not mandatory dissolution.

29. The possibility for the Parliament to vote the confidence to the same government three successive times (art.80. § 5) does not appear to be convincing. The relevant procedure appears very laborious. In other constitutions there are provisions allowing or requiring the change of the candidate for the post of Prime Minister after a first negative vote of the Parliament. The vote of confidence may be repeated two or three times, but each time with different candidates.

30. The provision of art. 81.1 according to which the President is empowered "not to approve" the parliamentary decision of withdrawing the confidence from the Government and to leave it in office is equally not convincing. This presidential decision should require an immediate dissolution of the Parliament, decision which, instead, can be adopted by the President only if the Parliament "declares non confidence to the Government again not earlier than 45 days and not later than 60 days". Also in this case there is the danger of wasting time adopting a laborious procedure.

31. It is not clear sub art. 81.4 if the Prime Minister's power to put the question of confidence of the Government is restricted only to the listed cases or if it can be exercised also in other cases. Perhaps there is the exigency of providing a larger discretion or freedom of choice to the Prime Minister who should be entitled to engage the confidence of the Parliament also on other different items (foreign policy, internal security, etc.).

32. Finally, as regards the calling of a referendum in case of emergency situation or martial law, the Commission finds that it is questionable whether it is appropriate to allow the people (as regards the President, see para. 7 above) to dissolve the Parliament during a state of emergency or martial law.

33. Art. 93.6 as well as art. 73.1, o1) do not seem to raise any problems.

III. Conclusions

34. The amendments are evidently drafted in view of a rationalization of the Georgian constitutional system of government. They are coherent with the choice of strengthening the parliamentary government through balancing the limits of the exercise of the powers of the President and the enlargement of the authority of the Parliament. The Commission has constantly encouraged this development.

35. The proposed amendments however introduce very complex procedures which are likely to cause waste of time. It would be preferable to aim for the strengthening of the role of the parliament while preserving the efficiency of the overall constitutional system.

[8] Venice Commission, Opinion on the draft amendments to the constitution of Georgia, Adopted on 12-13 March 2004, CDL-AD (2004)008, § 28-30.

36. As concerns the proposal to limit to once the power of the President to dissolve the parliament during the same mandate, by obliging him to submit the matter to a referendum, the Commission does not view this solution as appropriate, as it complicates the functioning of the constitutional system of Georgia and risks increasing tensions at the top of the state. The same aim could be achieved in different manners, for example by introducing a comprehensive list of the cases in which the dissolution of the parliament by the President is mandatory, or by excluding the possibility for the President to dissolve parliament within a certain period (e.g. one or two years) following a first dissolution.

37. The reduction of the number of MPs necessary to introduce a motion of non-confidence in the government from one third to one fifth is to be approved, although it will be necessary to introduce in the Constitution the definition of "minority".

38. In general, however, the constitutional rules on the dissolution of parliament would require a rationalisation, as the Commission has already indicated in 2004.

39. The Commission remains at the disposal of the Georgian authorities.