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Council of Europe
Conseil de l'Europe

COE253586

Strasbourg, 21 April 1994
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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

COMMENTS ON THE DRAFT CONSTITUTION OF THE REPUBLIC OF GEORGIA

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Comments on the
Draft Constitution of the Republic of Georgia
Chapter 1 (Basic Provisions) and Arts. 83 - 87

by

Mr Jan HELGESEN (Norway)

1. The first Chapter lays down the "Basics" of the whole Constitution. As normally is the case in such chapters, the provisions are of a general and abstract nature. This fact makes it somewhat difficult to submit detailed comments on the first Chapter. Furthermore, since the first Chapter is concerned with identifying the values on which the new democracy is built, these comments must be of a less technical/legal nature than the Venice Commission would normally make. Comments on these values may also depend on one's own political preferences.

In view of these considerations, I shall restrict myself to the following comments.

2. I have noted that the Draft (Preamble) establishes a formal link between the 1921 Constitution and the future Constitution, in the sense that the new Constitution is a "revision" of the old Constitution. Technically, it is a new Constitution, while the legitimacy of the new Constitution is based on the old one. Such a model seems to be a good one, it combines flexibility with continuity.

3. **Art. 2 para. 3** proclaims that "major issues" are decided by universal ballot. Obviously, a concept like "major" is a very open concept. This question is, however, elaborated later in the Draft.

4. **Art. 4** states that "principles and norms of international law" are recognised.

The concept "principles of international law" is certainly not uncontroversial, the implication of **Art. 4** is consequently not evident.

It must also be added that it leaves one with some uncertainty when the Article, in the first sentence, declares that the State "recognizes" these international commitments. If the intention is nothing but to declare the state's willingness to honour its international obligations and commitments, it is hardly necessary to state this in the opening part of the Constitution. If, however, the intention is to stipulate the applicability, in the domestic legal system, of the international norms, it is slightly confusing when the second sentence of **Art. 4** explicitly declares that treaties only have this status. According to my opinion, **Art. 4** would profit from even more elaboration. This seems to be all the more so since **Art. 7** also deals with the status of international law.

I welcome the fact that the second sentence of **Art. 4** declares that treaties are given priority over "national laws and other normative acts". In that respect, the Draft is equal to other constitutions already adopted in Europe. (See also comments relating to **Art. 7 para. 3**).

5. **Arts. 5 and 6** declare that the right to private property, market economy, the right to education and culture are basic values on which the new democracy is built. The articles invite no comments from the Venice Commission.

6. **Art. 7 para. 1** declares that the Constitution has the status of *lex superior* in the legal system of Georgia. Such a statement of principle is appropriate, although in most legal systems, the situation would be the same without such an explicit statement. Furthermore, **Art. 7 para. 1** also states the obligatory character of the Constitution, as well as legal acts passed in accordance with the Constitution. The same comments would apply to this provision.

7. **Art. 7 para 2** seems to be a repetition (unnecessary) of **Art. 4.** This problem shall obviously have to be sorted out, before the adoption of the new Constitution.

8. **Art. 7 para. 3** contains a stipulation which might be interpreted in a way which gives the obligations stemming from international treaties a prominent place in the domestic legal system. This approach is, first, that the international obligations do not precede the Constitution. That approach is shared by quite a few other European constitutions. Secondly, **para. 3** might indicate a willingness to amend the Constitution to meet the requirements at the international level.

I must add, however, that **para. 3** would profit from a somewhat clearer wording. Of course, I do leave open the possibility that the unofficial English translation might be creating unnecessary complications at this stage of the work.

9. **Art. 8** declares that Georgia is a secular state, while the equality of religion is given constitutional protection. (The individual freedom of belief is established in **Art. 16**).

10. **Art. 9** relates to the central issues of the state language. The Republic of Georgia is a mono-lingual state, while the province of Abkhazia is a bi-lingual state. This Article must be seen in conjunction with **Art. 29**, which guarantees the use of native languages. It seems to me that the crucial problems, seen from a legal point of view, will be linked to the implementation of **Art. 29**, rather than to **Art. 9**.

11. **Art. 10 and 11** do not invite comments from the Venice Commission.

12. **Art. 83 - 85** is of a very general nature ; they do not invite further comments.

13. **Art. 86** leaves it up to legislation, at the statutory level, to determine the competences of the state organs during an emergency situation. If this is to be interpreted as an unqualified delegation from the Constitutional to the statutory level, some concern must be expressed. Experience, at the global level, has shown that the significance of constitutional protection is most evident during less peaceful situations in the history of a nation. The constitutional guarantees are most needed when conflicts within a state have escalated from political arguments into violent clashes.

In order to give a complete picture of the constitutional protection during emergency situations according to the Draft, one must also analyse whether the other articles of the Constitution permit derogations during emergency situations.

14. **Art. 87** contains a provision which requires the Parliament to consent to the use of the military force, firstly, during emergency situations and, secondly, to fulfil international commitments abroad.

The second alternative is parallel to the regulation in many other European constitutions.

The first alternative seems certainly a good one ; it must be added, however, that one should also address, in the same article or elsewhere, a situation where the Parliament is unable to conduct normal business.

Chapter 2 : Person and State

by

Mr Janos ZLINSZKY (Hungary)

According to the agreement among the persons giving observations and comments on the draft I have concentrated on Chapter 2 of the draft "Person and State". I have dealt with other chapters as far as they contain regulations concerning human and citizen's rights. Besides Chapter 2, I have paid a more intensive attention to Chapter 1 on "Basic Provisions" that sets out the fundaments of a state and the rule of law.

The draft Constitution gives a list of the fundamental rights and freedoms which are guaranteed by international treaties and are generally accepted in states based on the rule of law. There is a discrepancy between the main body of the draft and Chapter 6 on the judicial power, the existence of a Constitutional Court, procedural rights, etc., that is likely to be a consequence of different working groups assisting in the development. Some provisions could not be judged because of this reason, especially the procedural guaranties of the draft Constitution. As a general observation it can be said that the regulation of fundamental rights should be placed preferably in one chapter.

The rather comprehensive list of fundamental rights and freedoms is however restricted by several limitations or is considered restrictable by the Constitution. These factors have established the value of this impressive list.

In several cases the draft Constitution seems to reflect the actual political and social situation in Georgia. Keeping in mind that the Constitution is set for a longer period and its frequent amendment should be avoided it would be advisable to place these rules of provisional character into another law instead of the Constitution. This is true, both for the rules on the structure, institutions and competence of the institutions, and for the rules on restrictions of rights (if they are just the consequence of the present situation of and in Georgia).

My comments and questions on special items :

As to Art. 23.

The guarantee of the human rights and freedoms is made dependent on the rights (not only human rights !) of other affairs relative to these rights and freedoms and this provision may be interpreted in a way that at the very end, these rights are not guaranteed. There are principles to be applied in the case of the collision of human rights, citizen's rights and freedoms. But the simple denial of these rights, if their realization limits the right of others, is surely not acceptable. In international law, there are some human rights, the main content of which are accepted to be unlimited.

As to Art. 12.2.

Art. 4 and Art. 7.2. recognize the priority of principles and norms of international law over domestic laws and normative acts (Art. 7.2. seems to be a repetition of Art. 4). In this connection, it is implied that Georgia recognizes the citizenship of other states. Do the referred rules mean that in any case when a Georgian citizen becomes the citizen of another state he/she loses his/her citizenship automatically and when a new born future Georgian citizen becomes by birth citizen of another state, its Georgian citizenship is denied automatically ? What if the Georgian citizen becomes a citizen of another state against his/her will by the legal regulation of that other state (e.g. by marrying a citizen of another state) ? If he/she loses his/her citizenship automatically but renounces his/her other citizenship immediately should he/she then apply for the Georgian citizenship as any other foreigner ? In my opinion the strict prohibition of double citizenship may cause a problem and will hinder later the detailed regulation. Therefore it should be regulated more generally in the Constitution.

As to Art. 16

The provision does not differentiate between the freedom of conscience and belief and the exercise of these rights. The difference is of importance as to the possibility of the limitation of these rights. While the rights themselves must not be limited in any case, this is not so with the exercise of these rights.

As to Art. 18

Paras. 2 and 3 are too detailed as provisions for a Constitution. It may be of importance in respect of the past of Georgia but this importance is likely to be of provisional character.

As to Art. 19

The principles "nullum crimen sine lege" and "nulla poena sine lege" should be included to give a minimum set of guarantees in the penal procedure. Art. 78 contains some other provisions concerning the penal procedure. It is not clear whether the presence of the provisions in the chapter on human rights and in the chapter on judicial power, formulate human rights or are only binding provisions for the state institutions and state officials.

As to Art. 21

The withholding of the right to vote from persons who are serving prison sentences might be explained by the special situation of these people that may make them very susceptible to influential. The rights of persons sentenced to a punishment to be served in a prison can be limited however only according to the sentence: only by limitations that are an inherent part of the prison life (e.g. limitation of the right to freedom of movement). Another concept would violate the principles of "nulla poena sine lege" and individual judgment of any wrongdoing.

As to Art. 23.2

The prohibition of the use of any right guaranteed otherwise by the Constitution against the unity of Georgia violates the right of everyone to freedom of expression and opinion provided by Art. 21.2. At the present political situation, the reasons for introducing this prohibition into the Constitution may be understandable but not acceptable from the point of view of human rights. The prohibition may be also over-abused as it enables the limitation or the denial of even the use of rights being in very fare or in no relation with the defended unity of Georgia (e.g. ex facto expropriation because the object of property could be used against the unity of Georgia).

As to Art. 24

The catalogue of the procedural rights is lacking. The general formulation definitely weakens the guarantiees provided. The right to appeal as one of the generally accepted procedural rules is missing. See also comment as to Art. 78.

What is the reason for not guaranteeing the procedural rights in procedures other than court procedures by the Constitution ?

As to Art. 26.1

The responsibility of the Government for the creation of work for the citizens should be formulated rather in a programme-like way according to the real possibilities.

As to Art. 26.7

The prohibition of formation of trade unions in armed forces or militarized organizations may be explained by the present political situation. It means however the limitation of the human rights of the members of these organizations. The peculiarities of the duties of these organisations enable certain limitation (but not prohibition) of this right in these organisations.

As to Art. 27.4

Is everybody obliged by this provision also to an active protection and preservation of the historical and cultural monuments or only to abstention ?

As to Art. 74 and 75

The Court of Justice seems to be the highest ordinary court and to have the power of constitutional review. According to the provisions on the chambers of parliament they elect members of the Constitutional Court. Will there be a separate Constitutional Court in Georgia or is the supremacy of the Constitution to be provided by the ordinary court system ?

As to Art. 78

A provision of the article prohibits judges to be a member of any political organisation. This prohibition may be explained by the present situation of the states in a transition from the one-party system. It cannot be denied however that this prohibition violates the human right of the judges available to everyone by Art. 21.5. This provision if any should remain in force for no longer than a transitory period.

Another provision of the article enables the Supreme Court to consider first instance cases. As the right to appeal belongs to the fundamental procedural rights, this provision violates the fundamental right of the parties of the case considered on first instance.

Chapter 3 : Parliament
Chapter 11 : Revision of the Constitution

by

Mr Matti NIEMIVUO (Finland)

1. Introduction

The draft constitution of the Republic of Georgia, dated on 25th February 1994, follows to a great extent the same legislative tradition as the former Constitution of 1921. A quite scanty way of regulating has been adopted in the draft constitution. There are only about one hundred articles and unnecessary details have been avoided in general even in these ones. This chosen form of regulating is to be considered worthy of support. It gives certain dignity and sturdiness to the constitution. On the other hand scanty regulations might lead to problems of interpretation in the future. These problems, however, can be solved by resilient interpretation of the constitution, which would not change the essence of the constitutional provisions.

In this advisory opinion I will restrict this examination to only two issues included in the draft constitution, namely Parliament (Chapter 3) and the provisions on the revision of the constitution (Chapter 11). Both of these issues are such, which should be regulated in the constitution. The constitution has to include the provisions on the highest state organs, on their mutual relation as well as on their competence. The constitution does not necessarily have to include comprehensive provisions on Parliament as one of the highest state organs. Rather the contrary, it would be more desirable, if the constitution covered only the essential provisions particularly on the workings of Parliament, and more detailed regulations would be included in the procedure of parliament or in a corresponding enactment, as is the case in many countries. All the provisions concerning the amendment of the constitution, however, have to be placed in an enactment with a constitutional status.

2. Parliament of the Republic of Georgia (Chapter 3)

Direct or Representative Democracy ?

In a state, which is built on the democratic principles, the status of Parliament can vary depending on how the relation between direct participation of the citizens and representative democracy has been settled. Article 2 in the draft constitution indicates that the citizens exercise power both directly and indirectly through the representative organs. In principle it is to be considered desirable, that the constitution offers a possibility of referendum in important issues. Thus the citizens could influence directly important decisions. This, again, might increase the legitimacy of the whole governmental system and its decisions.

On the other hand, to hold often referendums in separate questions might harm the implementation of long-term social policy and confuse the responsibility of political decision-makers. Therefore, a definite stand should be taken in the constitution in regard to whether

one should build the governmental system primarily on *the principle of representation* or whether direct democracy should have a decisive standing.

At least in the long run it might be well-founded to choose a governmental system which would be based on representative democracy, consequently, on a Parliament elected by the enfranchised. Along with this, the system of decision-making should be developed by increasing the possibilities of the citizens to influence the decision-making in state affairs. A useful means in this respect would be *a consultative referendum.* It is, however, a rather heavy procedure and it demands a lot of resources. Therefore it has to be used with due consideration. It would be most useful in far-reaching matters of social importance and interest. Applied in these matters the referendum could successfully *amplify* representative democracy.

Parliament and parliamentarism

In the evaluation of the status of Parliament one has to scrutinize closely its relationship to parliamentarism. This concept can be understood as a common term for such state principles, born in different times, which all include the decisive role of Parliament, not only as a holder of legislative and budgetary power but also as a controller of governmental and executive power.

Various forms of parliamentarism have been adopted in different countries in organising the relations between the highest state organs, such as the so-called normal parliamentarism and the majority parliamentarism.

> *Normal parliamentarism* means an institutional system, where the Cabinet of Ministers exercising governmental power has legal and political responsibility towards Parliament. In this system there are no other power centres outside of this relation of reciprocity, as for instance a head of state with independent prerogatives. The responsibility of the Government to parliament may present itself in various ways, such as in appointing and releasing the Cabinet of Ministers. The substance of this responsibility is that the Cabinet must enjoy the confidence of Parliament or, at least, of its majority.
>
> *Majority parliamentarism* is a political structure developed on the basis of the institutional system referred above, where Parliament is clearly divided in party groups and the Cabinet acts upon the confidence of the majority of Parliament. In this system the Cabinet in fact manages the majority group in Parliament. A typical example of this kind of parliamentarism is the British system.

In western democracies both forms of parliamentarism, normal parliamentarism as an institutional system and majority parliamentarism as a political structure, express usually the monistic nature of the governmental system, based on the power centre of Parliament and the Cabinet acting upon its confidence. The source of the Cabinet's wielding of power lies clearly on the confidence of Parliament. The constitution, moreover, does not include any other competing power centre. Germany and Sweden are examples of these kinds of monistic systems. The prerogatives of the Federal President in Germany and the Monarch in Sweden are very limited compared with the ones of the Federal Chancellor or the Prime Minister

acting upon the confidence of Parliament. Then again, in these systems the Head of the State may have significance as a symbol of the nation.

Parliamentarism may also appear as *dualism*. When such is the case, both Parliament and the Head of the State are real power centres according to the constitution. The role of the Head of the State can be seen either as a balancing and relieving element of those tensions arising inside the political system based on the principles of normal parliamentarism or actually as an independent factor in the political life. Among the European countries, particularly in France, the President has significant constitutional prerogatives beside Parliament. The position of the President is also very strong in the actual political life.

> The *Finnish* constitution also represents a variation of dualistic parliamentarism. The Finnish Parliament is the highest state organ, and the Council of State, i.e. the Cabinet of Ministers responsible to Parliament and headed by the Prime Minister, has a central role in the political life. Also the President of the Republic, not responsible to Parliament and elected by direct elections for the first time in 1994, has significant independent prerogatives according to the constitution. The President exercises the most part of these prerogatives in accordance with the opinion of the Cabinet, although this obligation, which is implementing the principle of parliamentarism, is not expressly provided by the constitution.

The system of the draft constitution of Georgia has certain features of parliamentarism. On the other hand, the draft is characterized by the strong position and independent prerogatives of the President of the Republic. Also the President may call for a vote of no-confidence on the Cabinet of Ministers (Art. 70). All in all, the position of Parliament adopted in the system of the draft constitution is probably not strong enough.

If the status of Parliament is desired to be strengthened in relation to other state organs, this could be carried out in two different ways. In the first place, Parliament's position could be strengthened by emphasizing the parliamentary features of the governmental system. This could be done by intensifying Parliament's control over the governmental power. The other way could be the transferral of new functions to Parliament itself.

Parliament's role as a controller of the Government's activities could be developed by reforming the parliamentary procedures regarding matters connected with the surveillance of the Government's activities, such as Parliament's questions to the Government and the Government's explanations and reports to Parliament, as well as, the possibility of parliamentary debate at all times on current issues. Also, the position of the parliamentary commissions could be improved by strengthening their access of information.

The transfer of new functions to Parliament is complicated by the fact that Parliament's burden of work in its central functions is already heavy. It is predictable that the amount of matters relating to legislation and budgetary power will constantly increase as the society is getting more complicated and the decision-making faster.

From the point of view of developing the mentioned preconditions of Parliament's activities it is necessary to also consider the question of whether Parliament should consist of one or two chambers.

One or Two Chambers in Parliament ?

The Parliament of Georgia consists of the Council of the Republic and the Council of the Representatives. The deputies of the former organ are elected by general elections, whereas the deputies of the latter are elected by the provinces. This suggested arrangement differs from the system of the constitution of 1921, which is based on a unicameral Parliament.

Comparisons between different countries indicate that there are systems of both types, unicameral and bicameral. Various aspects, above all the historical ones, have influenced the formation of these systems in different countries.

When considering the advantages and disadvantages of unicameral and bicameral Parliaments, it has often been maintained that there are no sufficient reasons for having two chambers in Parliament, if the state is not based on a federal system. A federal system may require two chambers, one representing the population of the country as a whole and the other representing the states. But in other cases conflicts and certain difficulties may arise between the two chambers. Particularly in situations where the chambers are bound to compete with one another. This may complicate the decision-making in the interest of the whole nation.

It might also be difficult to determine the principles by which the two chambers should be elected. Moreover, in a unicameral Parliament the regional representation can be secured by defining the divisions of electoral districts and the number of deputies in the electoral legislation.

The bicameral system is due to make the legislative process slower and also more difficult. This is a factor to be taken into account in modern times, when prompt legislative decisions are often needed. The swiftness of the legislative process and the other factors mentioned above speak in favour of unicameral parliamentary system.

Members of Parliament

According to article 37 of the draft constitution the Council of the Republic would consist of 120 deputies elected by direct vote for the term of four years. The proposed term of four years is in many respect well-grounded. It offers sufficient preconditions for long-term parliamentary work.

Somewhat problematic, however, is the article which states that the deputy should be a 23 year-old citizen of Georgia <Art. 37(2)>. Correspondingly, a member of the Council of Representatives should be a 30 year-old citizen of Georgia <Art. 38(3)>. The necessity of these age limits in the constitution can be questioned. It would be natural if all the enfranchised were eligible for Parliament <see Art. 21(1)>. Presumably in practice a very young candidate would not be elected in any case.

The prohibition to form parliamentary fractions of less than six deputies of the Council of the Republic <Art. 43(1)> seems odd. In several countries there are parliamentary fractions consisting of one deputy only. The formation of these small fractions would be thought of for instance when one or several deputies resign from a larger fraction or simply because only few candidates supporting certain policy have been elected. There should be no impediment of principle of forming small parliamentary fractions. Correspondingly, it is odd in principle that the formation of fractions in the Council of the Representatives is prohibited <Art. 43(2)>.

Articles 56-58 of the draft constitution include rather loose provisions on the rights and duties of a Member of Parliament. In addition, a general provision on the duties of a Member of Parliament might be compatible with the adopted style of regulating. The substance of this provision could, for instance, be as follows : "A member of Parliament has a duty to uphold justice and truth in his actions. In doing so, he is bound by the Constitution and by no other regulations". On the other hand, the provisions are in some parts too detailed <e.g. article 56(6) on the salary of a Member of Parliament determined by law> and even unnecessary <e.g. article 58(1) on the ceasing of the rights of a Member of Parliament in case of his death>.

Article 33 in chapter 2 is significant in principle. It gives a right to the Members of parliament to use *their native language* on certain conditions. Presumably this article is primarily directed at the language of abkhazian, which is, according to article 9, also a state language within the territory of the province of Abkhazia. Theoretically, Article 33 offers a possibility to use any other language whatsoever, if the deputy shall not have sufficient command of the state language.

The Organization of Parliament

The provisions on the organization of Parliament are rather loose. Because of this they offer a possibility to organize the parliamentary work flexibly. In regard to the long-term aspect of parliamentary work, for instance after the general elections, it is necessary to make the organizational provisions more precise by enactments with a lower status than the constitution. For example, more detailed provisions on the institution of parliamentary commissions are needed (compare with Art. 41).

In Article 39 of the draft constitution there are provisions on *the Speaker and the Deputy Speaker*. According to the article only one Deputy Speaker shall be elected. To elect two Deputy Speakers might be worth considering because of the considerable amount of work of the Speaker and because of potential hindrances. Furthermore, a provision prohibiting the Speaker to participate in the debate or the voting would be apparently necessary in the constitution.

The Duties of Parliament

The duties of Parliament are listed in the draft constitution in detail. This is the right way to proceed. The duties have been defined by starting from the functions which belong to Parliament particularly, thus issues relating to the legislative and budgetary power and to the surveillance of executive power. The sketched duties of Parliament need to be further

analysed from two different viewpoints. To begin with, the expediency of the proposed duties should be evaluated in regard to the principle of parliamentarism. The due balance between parliamentary and presidential prerogatives should be considered as well.

Secondly, the provisions on the duties of Parliament and on their management have to be reconsidered, if a unicameral parliamentary system is adopted when drafting the proposal further.

3. The Revision of the Constitution (Chapter 11)

General Remarks

The provisions on the revision of the constitution need still profound consideration. The proposed provisions presuppose a referendum for amending the constitution. The expediency of this kind of heavy procedure may well be questioned. Although the constitution of a state has great symbolic significance and certain consistency, the development of a modern society requires inevitably at times the revision of the constitution; needs of amendment may arise for instance in issues relating to the relations between the highest state organs.

If the revision of the constitution is very difficult, there may appear in the course of time aspirations to act in the extreme limits permitted by the constitution. The interpretation of the constitution might be extended to the very utmost, possibly against the spirit of the constitution or even against its wording. Because of this, it might serve the purpose best, if the revision of the constitution were in principle possible without a referendum, only by Parliament's decision. The revision of the constitution should be, however, more difficult than the amendment of an ordinary law. In regard to the order of enactment there might be reason to consider whether the citizens should be able to influence on the issue, at least indirectly. In the following part of the text two patterns for amending the constitution, namely the Finnish and the Swedish ones, which have functioned well in practice, will be described.

The Finnish and the Swedish Order of Procedure Required for Revising the Constitution

In Finland the constitutional laws are revised in an order of procedure more complicated than that required for ordinary laws. A bill concerning the revision of the constitutional laws shall be approved at the third reading in Parliament by simple majority to be held over until after the first session following the next election when it must be adopted without amendments by a 2/3 majority of the votes cast. Parliament can, however, decide on an urgent order of procedure for constitutional laws. If a bill is declared to be urgent by a 5/6 majority, it can be approved in the same session by a 2/3 majority of the votes cast. This urgent procedure, intended to be exceptional, has been used by Parliament considerably more often than the so-called normal procedure.

The Constitutional Act of Finland offers the possibility of a consultative referendum. It can be used in any issue whatsoever, also in amending the constitutional laws. In practice, a referendum has been held in Finland only once (in 1931) since 1917, thus during the time

of Finland's independence. There is going to be a referendum on Finland's accession to the European Union in the near future.

According to the Constitution of Sweden (Art. 15 in Chapter 8) its revision is carried out principally by two parliamentary decisions of the same contents, with parliamentary elections in between them. This offers to the citizens in principle a chance to influence the composition of Parliament and, indirectly, also the adoption of the constitutional amendment.

The Swedish Constitution <Art. 15(3 and 4) in Chapter 8> includes also a possibility that the constitutional amendment, after been adopted for the first time by Parliament, is submitted for a referendum. The provisions read as follows :

> "A referendum on a constitutional amendment, left in abeyance until after the elections, shall be held, if a motion by at least one tenth of the Members of Parliament is been raised and if at least one third of the Members vote for approval of the motion. Such motion shall be raised within fifteen days after the bill has been approved to be left in abeyance. The motion shall not be prepared preliminary in a commission.
>
> The referendum shall be held concurrently with the parliamentary elections referred to in the first clause. In the referendum the enfranchised shall state in which form they will accept the bill or not. The bill is rejected, if a majority of the votes cast is against the bill and if there is a majority of the votes accepted in the parliamentary elections. Otherwise Parliament shall take up the bill for the final decision."

In practice, no referendum on constitutional amendments has been held in Sweden.

On the whole, according to the Finnish and Swedish experience there seems to be no reason, why a democratically elected Parliament should not decide the reforms of the Constitution.

4. Conclusions

The draft constitution of Georgia forms a well-balanced and consistent whole. Its importance is emphasized by the fact that the draft is most obviously an outcome of several compromises.

From the point of view of an outside appraiser the draft constitution includes quite a lot of issues of great significance of principle which should be further discussed. In regard to the strengthening of the status of Parliament, it is essential to consider the relation between representative democracy and various forms of direct democracy. Particular attention should be paid to the questions concerning Parliament and parliamentarism. The most difficult issue may be, however, the choice between a unicameral and a bicameral Parliament. In the foregoing a strong doubt has been cast on the ability of a bicameral Parliament to function efficiently. The experience on other than federal states imply that a bicameral Parliament is mainly a historical relic. Therefore, the necessity of the second chamber is to be considered profoundly when establishing the new system.

Also the provisions on the revision of the constitution need to be reconsidered. Maybe such a legislative settlement, which would not necessarily demand a referendum, could be aimed at.

Chapter 4 : The President of the Republic

by

Mr Ergun ÖZBUDUN (Turkey)

The Draft Constitution of Georgia seems to have adopted a semi-presidential system. The President is elected by popular vote (Art. 61) and has important constitutional powers. On the other hand, the Draft creates a Council of Ministers responsible to the Parliament (Art. 69). Popular election of the President is possible however, only if a candidate receives at least three-fifths of the votes of the electorate. It should be made clear here what is meant by the "electorate" : total number of registered voters, or the total number of votes cast ? Failure in obtaining such a majority would result in the election of the President by the Parliament (i.e., in a joint session of both houses). If more than half of the electorate does not take part in the first round of elections, elections are again transferred to the Parliament. In Parliament, a simple majority would suffice. The last sentence of Article 61, no. 5 is not clear : "In the case of vote splitting ...". Presumably what is meant here is "in case the two leading candidates receive the same number of votes". If so, the phrase should be rewritten in a more explicit fashion.

With regard to the powers of the President, the following observations can be made :

a) The President has the power to appoint judges to the local courts <Art. 63 (1) (b)>. It is not clear whether he does so after their nomination from another body (e.g., a supreme council of judiciary, which seems to be preferable in the interests of the independence of the judiciary).

b) The President appoints two members of the Constitutional Court. However, elsewhere the Constitution does not provide for a separate constitutional court and instead endows the Supreme Court with constitutional review powers.

c) The President submits the candidacy of the chairmen and members of "the Court of the Republic" <Art. 63 (1) (f)>. Are all the judges members of "the Court of the Republic" (including the Supreme Court judges) with the exception of local and regional judges (for the latter, confirmation by the Council of Representatives is necessary) ?

d) A minimum number of voters should be fixed, on whose demand the President may initiate a referendum <Art. 63 (1) (h)>.

e) The President has power to declare martial law and a state of emergency. In such a case he must submit it to the Parliament for approval. The word "or" is probably a mistake and should be replaced by "and" <Art. 63 (1) (i) ; cf. Art. 45 (1) (g)>.

f) It is not clear what is meant by the President's suspension of laws <Art. 63 (l) (j)>. Presumably, this is not the suspension of the legislation in force, but simply a legislative veto,

or the right to return a bill to Parliament for reconsideration. There is a separate article on this subject (Art. 50) and the two provisions should be aligned.

g) Art. 63 (1) (n) would benefit from clarification. Is the opinion of the Constitutional Court (Supreme Court ?) binding or merely advisory. At any rate, it is doubtful whether a judicial body would be the best qualified to judge upon the highly political circumstances leading to a dissolution.

Chapter 5 : the Cabinet

by
Mr Jean-Claude SCHOLSEM (Belgium)

1. Chapter V of the draft constitution of Georgia contains only a few articles (Nos. 67 to 73). If, however, these provisions are to be analysed, they must be placed in a wider context and compared with those of Chapter III (Parliament) and Chapter IV (the President of the Republic). The role of the cabinet must be studied from this angle in order to see how it fits in with that of all the other institutions and therefore if they counterbalance each other.

The President of the Republic is elected by universal, direct vote (Article 61). He has fairly wide powers which are described in Article 63. They include the power to appoint the Prime Minister (Article 63 (1) d) and dissolve the Council of the Republic (Article 63 (1) n). It seems that the President of the Republic may exercise the powers conferred upon him independently without the endorsement of the Prime Minister or members of the cabinet.

Parliament is bicameral and consists of the Council of the Republic (Article 37) and the Council of Representatives (Article 38). It appears that the Council of Representatives cannot be dissolved. One third of it is renewed every two years (Article 38 (4)). Both assemblies have exclusive powers (Article 45 sets forth those of the Council of the Republic and Article 46 those of the Council of Representatives) as well as joint competence (Article 47). The exclusive powers of the Council of the Republic include confirmation of the appointment of the Prime Minister and a vote of (no) confidence in the cabinet (Article 45 (1) b and c).

2. Articles 67 to 73 of the draft constitution must be analysed in the light of these factors. The cabinet consists of the Prime Minister, Deputy Prime Minister (who has particular responsibility for regions with special status) and ministers (Article 67).

Except for the Prime Minister, ministers may not be members of parliament or of a local government or hold any other remunerated office (Article 72). Only a member of the Council of the Republic may be appointed Prime Minister (Article 69 (1)). I do not immediately perceive reasons why the rules applying to the Prime Minister are different from those pertaining to the other ministers.

The cabinet's duties, as described in Article 68 of the draft text, are classic. It must be added that, under Article 45 (1) j, the Council of the Republic (Council of Deputies) may delegate authority to legislate to it.

3. The President of the Republic appoints the Prime Minister (Article 63 (1) d). But this appointment must be confirmed within two weeks by the Council of the Republic which has sole competence in the matter (Article 69 (1)). The President then appoints the other ministers proposed by the Prime Minister (Article 69 (1)). The whole cabinet must then receive a vote of confidence from the absolute majority of the members of both chambers of parliament (Article 69 (4)). It is hard to see why different rules apply to the appointment of the Prime

Minister (the Council of the Republic has sole power) and the initial vote of confidence when the government is formed and presents its programme (joint competence of both chambers).

This is particularly puzzling, given that the Council of the Republic has exclusive competence to pass a vote of confidence (Article 70 (1)) or no confidence (Article 70 (2)). It therefore seems that the cabinet is politically answerable only to the Council of the Republic. Is this compatible with Article 55 which entitles members of parliament, ie members of both chambers, to question and interpellate the cabinet? In current parliamentary terms, interpellation amounts to politically calling the government to account.

It likewise seems strange that the President of the Republic can move a vote of no confidence in a government he has appointed (Article 70 (2)). It seems that the government is in fact answerable to both parliament and the President of the Republic (Article 73 (1)).

Normally, the vote of no confidence must be passed by the absolute majority of the members of the Council of the Republic (Article 70 (2)). It seems that Article 70 (2) must be interpreted to mean that a special two-thirds majority is required in the six months following the appointment of the government or a vote of confidence.

4. The President of the Republic alone has the power to dissolve the Council of the Republic (Article 63 (1) n)). It is not clear on what basis the Constitutional Court intervenes in this process. Apparently the act of dissolution does not have to be countersigned by the Prime Minister. This increases the political weight of the President of the Republic, who is normally elected by universal suffrage.

5. To sum up, the most important questions which may be raised about the cabinet in the draft constitution of Georgia are as follows:

a). Is the government answerable to both the President and parliament?

b). Is the government politically answerable to both chambers or only to the Council of the Republic? Articles 69 and 70 ought to be clarified: in principle the government may be called to account only by the Council of the Republic, but the appointment of a new government requires the assent of both chambers (Article 69 (4)). The consistency of these provisions with Article 47 of the draft text, which defines a wide range of powers jointly exercised by both chambers, should be checked.

Chapter 6 - Judicial Power

by

Mr Sergio Bartole (Italy)
and Mr Helmut Steinberger (Germany)

I. General remarks on the judicial power

Preliminary remark : The following comments are based on the unofficial English translation of the Draft Constitution, Chapt. 6 ; the authors do not have the text in the Georgian language at their disposal nor do they have the command of this language.

Art. 87 (1) (b) vests competence in the administration of justice at the regional level to the Lands... Does this mean that the Lands have their own judicial organizations separate from the republican organization of the judicial power ? If this hypothesis is true, art. 79 (4) contradicts art. 87 (1) (b), because the appointment of judges to local courts falls then in the competence of republican bodies. The same remark can be made with regard to art. 74 of the draft prepared by the working group of the State Constitutional Commission, which mentions the Supreme Courts of the Abkhazian and Adzharian autonomous units but does not clarify the position of these Courts: are they component parts of the republican organization of the judicial power ? or are they the top bodies of the special and separate organizations of the judicial power of the two autonomous units ?

Art. 75 deals with the independence of judges. The guarantees of this independence are not very clear even when we look at it through the provision of point 4 of this article. Is the independence of a judge a personal subjective right whose protection and implementation can be claimed in a court of law ? Or is the task of ensuring the independence of judges entrusted to the Council of Justice according to a model adopted in some European countries ? Has this body the power of seizing the Constitutional Court when other bodies of the Republic infringe legal rules aimed guaranteeing the independence of judges ?

The election of judges by the Council of the Republic <art. 76 (1)> or by the Council of Representatives (art. 79) can endanger their independence from the other bodies of the Republic, especially if they are not appointed for life. Moreover the draft does not mention the problems connected with the removal of a judge from one Court to another Court: such a removal is always dangerous if it is adopted against the will of the judge concerned, because it may be used against a judge whose activity does not please other State bodies.

The draft Constitution does not explain clearly whether its rules imply a bureaucratic arrangement of judicial organization (similar to those adopted in France or in Italy, for instance) with judges being appointed after technical examinations and promoted from inferior courts to superior courts as time runs, their ability and knowledge grow up and possible vacancies have to be filled; or involve the introduction of the anglo-saxon model which does not require the passage of exams and the promotion of judges according to the hierarchy of the courts and allows for the appointment of judges to the inferior or superior courts without any regard to their previous membership of the judicial organization. Art 75 (4) mentions a

special order of nomination and therefore gives the impression that it looks to the bureaucratic model, but other provisions suggest a different construction of this part of the draft. If the first hypothesis is correct, it would be useful to provide for more detailed rules on the promotion of judges from inferior court to superior courts. Leaving a large discretion to the political bodies entrusted with the competence in this matter could allow interference in the functioning of the judicial power. In addition, the legislator has to be instructed about the exercise of the power which art. 75 (4) gives to him: reserving the competence of ruling about a matter to the legislator is not sufficient if the Constitution does not provide for the content of the legislation which has to be adopted.

Also if the draft implies the adoption of the anglo-saxon model, it would be useful to look at art. 97 (2) of the German Constitution for more specific rules in the matter.

Art. 75 (5) is incomplete because it deals with the criminal prosecution of judges only, and does not provide for their disciplinary prosecution. Which procedure can be applied when a judge is charged with minor misdemeanours which don't give rise to the impeachment procedure provided for by art. 76 (3) ? Does this last procedure envisage that judges be ruled by art. 79 also ? In some European countries the rule of law and the "nullum crimen sine lege" apply to disciplinary prosecutions too.

The problems which we are dealing with, are strictly connected with the question of the role and the position of the Council of Justice (art. 83). In other European systems of law such a body is entrusted with the task of appointing, removing, transferring and sanctioning judges according to the s.c. selfgovernment of the judiciary, in the frame of the bureaucratic model of the organization of judicial power. Art. 83 could suggest the idea that the Georgian Constitution is also following this path. But we have seen that the problem of having to choose between two different approaches to judicial organization has not been solved. Perhaps, at the present stage of its development to democracy and the rule of law, the Republic of Georgia cannot trust the incumbent judges appointed during the past regime and give them a complete selfgovernment. In any case, the role and the position of the Council of Justice has to be clarified in the Constitution also with regard to the power of appointing judges associated with political bodies. All the relevant rules have to be connected to the implementation of the independence of the judges <art. 75 (4) and (5)>.

In this context the provision of art. 76 (1) (a), which gives the Court of the Republic of Georgia the task of surveying the administration of justice in all common Courts of Georgia, deserves a special attention. Does this provision mean that the Court is the Court of last resort in the judicial system of Georgia ? Or does it imply the devolution of administrative and governing functions to the Court having regard to the organization and the functioning of the judiciary ? In the latter hypothesis, it is also difficult to understand the real extension of the probable powers of the Council of Justice. Moreover, another body whose role and position is not very clear is the Council of the representatives of judges of the Court of the Republic of Georgia mentioned in art. 76.2. Moreover, the Council of Representatives of the judges of the Court of the Republic of Georgia mentioned in art. 76 (2), is another body whose role and position is not very clear.

The insertion of other two provisions in art. 77 may be suggested, the first one requiring the motivation of all decisions and sentences mentioned in art. 77 (2); and the

second one introducing a general two tiered system of adjudication: perhaps a combined lecture of art. 76 (1) (b) and 80 (1) confirms the implicit presence of this principle in the draft though art. 76 (1) (c) is not in agreement with the largely shared principles conveyed in this matter.

II. Competencies of the Courts in general

Art. 73 defines the judicial power exercised by the Courts and mentions the constitutional control as a component part of it. This solution does not seem appropriate if Alt. I is chosen, i.e. if a centralized arrangement of the constitutional control is adopted. In this case, constitutional control belongs to a Constitutional Court only - according to the European model (art. 81). The proposed solution would however be appropriate if Alt. II were adopted. It uses the American system of legislation, and, consequently, entrusts all the Courts with the task of judging the conformity of the statutes to the Constitution.

In this regard, it is necessary to distinguish between the judicial power exercised by the Courts and by constitutional control. Most of the European civil law countries apply a separate status to the Constitutional Courts and to Organization of judicial power. This solution would appear appropriate in the frame of the Georgian constitution because - inter alia - the bodies of the judicial power could take part in a trial before the Constitutional Court according to art. 82 (1) (b). Obviously the solution adopted by art. 73 is acceptable - even though it is inappropriate in a civil law system where the alternative version of chapter 6 drafted by the working group of the State Constitutional Commission was adopted. It entrusts the Supreme Court of the Republic of Georgia <<which exercises ordinary judicial functions too) with the task of constitutional control. But in this case the broad competencies of the Constitutional Court <according to art. 82 (1) (b)> of the draft prepared by the Secretariat of the Constitutional Commission>> would be restricted to the "conflicts on the delimitation of terms of reference between the legislative and the executive powers, the central power and the autonomies" only.

In addition, this arrangement is different from that adopted by the USA system of law because the competence of constitutional control is restricted to the Supreme Court and is not spread to all judges.

In the Italian Constitution (art. 101) a different formulation of art. 73 (3) is preferred, which requires the judicial decisions to be taken on behalf of the people who are the holder of the sovereignty (art. 1) as in the Georgian draft <art. 2 (1)> the people are "the source of the state power in Georgia".

Art. 74.3 does not explain the subjects who are judged by the military Courts. Are they the present members of the Armed Forces only ? Or does the competence of those Courts interest people, also who, after having performed the conscription service, are in the position of members of the Armed Forces Reserve ?

III. Special Constitutional Court or Supreme Court to exercise constitutional jurisdiction

A member of the Commission submits to have constitutional jurisdiction exercised by a permanent special Constitutional Court (art. 81 sec. 1 Alternative I). To entrust constitutional jurisdiction to the Supreme Court (as proposed in art. 75x Alt. II) may very soon lead to the overburdening of the Supreme Court with constitutional issues in the light of the new Constitution. The new Constitution fundamentally changes the political, economic and constitutional system of Georgia which has prevailed over the recent decades (See: Preamble and Chapter 1 of the Draft Constitution). This will also raise many constitutional issues which are new in kind. The Supreme Court functioning at the same time as the highest court of ordinary jurisdiction may also be kept from having sufficient time for fulfilling this task. Deciding constitutional issues diligently, as a rule, is very time consuming; it would be appropriate, therefore, to entrust these issues to justices who could concentrate and specialize on them.

IV. Status of justices of a Constitutional Court

It is submitted to provide in art. 81 sec. 4 Alt. I that the impeachment procedure for dismissing a justice of the Constitutional Court shall take place before the Constitutional Court itself and the decision on dismissal shall require a high quorum and a high majority of votes for dismissal.

V. Composition of the Constitutional Court

According to art. 81.2 the Constitutional Court has eight members: this arrangement is precarious because it could be difficult, if not impossible, to have a majority in the court with regard to a decision. It would be convenient providing for a ninth member or giving the chairman the splitting vote when the body cannot obtain a majority.

Art. 82 follows two different approaches to constitutional control : in the first part, ensures the conformity to the Constitution of the functioning of the State organization, and its compliance with the distribution of powers to the State bodies, the bodies of the Lands and of the local selfgovernment; In the second part, it provides for the protection of individuals against breaches of the Constitution by the legislator. Therefore constitutional control is dealt with in an efficient way. Perhaps it would be advisable to insert in the first part of art. 82, a new provision allowing a substantial number of the minority of members of the Chambers of Parliament, to claim a judgement of the Constitutional Court relating to the conformity to the Constitution of the statutes approved by the two Chambers. In some European Constitutions, the Constitutional Courts are entrusted with the competence of judging the conformity to the Constitution of the charters and activities of the political parties.

VI. Competencies of the Constitutional Court

1. The provision for a separate and distinct competence to give interpretations of the Constitution, as is provided in art. 82 sec. 1 lit. d Alt. I, is problematic in so far as the Constitutional Court will be widely used as an institution for advisory opinions, most likely

on draft laws. Thus forcing the Court to become involved in political controversies which would embarrass the Court if such a law later became an issue before the Court.

It is not a genuine function of courts to give advisory opinions with the provision for "recommendations" (as provided in art. 82 sec. 2 Alt. I) but instead to decide cases or controversies. The authority of the Court could be endangered by the compliance with its interpretations.

2. The procedure of collateral norm control by the Constitutional Court, provided for in art. 82 sec. 3 Alt. I, should not be admissible on petition of the parties of a pending case but only on petition of the court before which the case is pending, and only if this court is convinced (not just in case of doubts) of the unconstitutionality of the law it would have to apply if the law was constitutional. The Constitutional Court, on such (admissible) petitions should not decide the case as such but only on the constitutional issue referred to it, i.e. the compatibility of the law within the Constitution.

To this extent art. 75 x lit. d Alt. II appears preferable.

3. It is to be regretted that Alternative I does not provide for a procedure of complaint of unconstitutionality by private individuals, to be entered with the Constitutional Court, in case the complainant substantiates a claim that he/she/it has been directly violated in his/her/its fundamental rights or liberties - as guaranteed by the Constitution - by public power (legislative, executive, or judicial).

4. It is submitted to consider supplementing art. 82 sec. 1 lit. e Alt. I by providing that (not only by the Constitution but also) by organic law other judicial competencies of a constitutional nature can be conferred upon the Constitutional Court. Among these matters could be a procedure for complaint of unconstitutionality to be entered by private individuals (see above III: 3), or a procedure for verifying general rules of public international law on petition of courts if relevant to a case pending before them.

Chapter 7 : Chamber of Control

by

Mr Gérard REUTER (Luxembourg)

1) General comments:

The notion of independence is inherent in a supreme body responsible for auditing public finances. The independence of an audit court or office is an expression of the principle of the separation of powers. It merely reflects the parliamentary nature of the political system. In order to exercise political and financial scrutiny over government action, parliament must be able to rely on information gathered by an independent public-finance audit body. To this end, the Chamber of Control must only be governed by the law (Article 82 of the Draft Constitution) and must be able to operate, subject to approval of its budget, without interference from the executive or legislature.

2) Article 80 (1):

The rules on the appointment of the Chamber's members and the conditions governing the exercise of their functions must guarantee this independence.

It is questionable whether the appointment of the future Chairman of the Chamber of Control of Georgia by the President of the Republic without consultation or advice and without presentation by parliament is consistent with the required independence.

3) Article 79:

a) The Chamber of Control should be assigned responsibility for all the tasks carried out by such public audit bodies in modern states. Article 79 (1) does not refer to auditing of revenue (taxes, VAT, duties, registration fees, etc). Has this been forgotten?

b) The audit court is an for external control mechanism. In this respect, the co-ordinating role set out in Article 79 (2) is conceivable only if the government department concerned or the Ministry of Finance has already carried out internal controls. The audit court cannot be statutorily incorporated in the internal control process.

c) Would it not be advisable to stipulate that the new Chamber of Control is responsible for checking the sound financial management of public funds?

Checks could then be made on the quality and economic soundness of government action at the planning, implementation and supervision stages in terms of:

- economy (was the least expensive option chosen?),
- efficiency (was the option with the highest return chosen?),
- effectiveness (was the system most suited to achieving the desired result chosen?).

d) Have the drafters of the Draft Constitution made no provision for overseeing the finances of local and municipal authorities?

4) Article 80 (2):

It is not appropriate to assign the Chairman of the new Chamber of Control political functions which would undermine his/her independence in relation to the bodies overseen by the Chamber.

While it may be appropriate to allow him/her to take part in cabinet meetings and sessions of parliament, he/she should not, however, be able to participate "in a deliberative function", but merely in an advisory or consultative capacity.

I have no comments on the remaining articles.

Chapter 10 : Territorial Structure and Local Self-Government

by

Mr Jaime NICOLAS (Spain)

1. The draft Constitution of the Republic of Georgia, adapting the 1921 Constitution to the very different circumstances of the present day, is intended, in respect of the Republic's territorial structure, to define the constitutional framework of self-government for sub-State territorial units in far more detail than was the case in Chapters 10 and 11 of the old Constitution. As the following observations show, the draft Constitution under examination goes on to describe in some detail the institutional set-up and powers of the various territorial units in Georgia. Nevertheless, the constitutional framework could be made even more precise and could be further developed in the actual text of the Constitution.

As is to be expected in the case of a first draft, given the likelihood that the Constitution will be fleshed out as the debate on its preparation progresses, this text displays a certain tendency towards "deconstitutionalisation" in the way in which it regulates the model of local self-government and, more importantly, in the way in which it defines it. As we shall see, this is reflected in the relatively large number of clauses granting Parliament considerable freedom or discretion - and sometimes complete freedom - to decide certain matters.

2. The implicit objective of the draft Constitution is to make Georgia a unitary Republic compatible with the pursuit of effective levels of decentralisation and self-government. This not only becomes clear throughout Chapter 10, which is specifically concerned with the Republic's territorial structure, but also emerges from other relevant provisions, especially in Chapter 1, devoted to the "Basic Provisions" (Articles 1, 2.4, 3.1 and 9) and Chapter 3 ("The Parliament of the Republic of Georgia"), in particular the reference to the composition of the "territorial" Chamber of the Georgian Parliament, the Council of Representatives (representing the individual republics or "Lands"), Article 38, this Chamber's powers, Article 46, and the powers exercised jointly by the two Chambers, Article 47. Other provisions of the draft could also be interpreted as being part of Georgia's "territorial structure", especially Article 76 which above all takes account of the special status of two Georgian republics, Abkhazia and Adzharia, in terms of judicial powers, and Article 78.2 (a), which makes the decisions of local self-government institutions subject to constitutional control by the courts.

3. The draft Constitution adopts a conventional three-tier model for the territorial structure, the top tier being the central government of the Republic of Georgia. There would be a lower tier ("local" or "municipal"), referred to in Article 84.1 and 84.2 as a "system of local self-government", and an intermediate tier (Article 84.3), namely the "Lands", equivalent to regions, autonomous communities, provinces or Länder in other countries, or "States" in those with formal federal systems. Neither of these sub-State levels is absolutely uniform and they may assume a variety of different forms, especially the intermediate tier. Here, "Lands" or as they are referred to in the draft, "republics" with an "ordinary" degree of self-government, (Article 85) stand side by side with two Republics - Abkhazia and Adzharia -

enjoying a special legal status of autonomy (Article 86) and regions or "territories" (Article 90). This diversity is inevitable for historical reasons, in some cases, or because of the increased complexity of the phenomenon of local self-government, but the draft Constitution's definitions are perhaps vaguer than they ought to be, especially in the case of the regions or "territories" referred to in Article 90.

4. The above-mentioned problem of the "deconstitutionalisation" of the territorial model proposed in the draft may be seen clearly in the way in which it deals with the "intermediate" level - and this is not confined to what we have just said about the "territories".

In respect of both the ordinary "Lands" and the republics enjoying special status, the draft establishes a limited constitutional framework by over-generously referring matters to Parliament. However, this problem could be partly if not fully overcome if it were made clear that these are referrals to "organic laws", which would be perfectly possible under the terms of this draft: in other words, referrals to laws which are derived directly from the text of the Constitution and which can therefore only be passed if three-fifths of all members of both Chambers of Parliament vote in favour of them (Article 48.3).

This referral to Parliament is less important in the case of the creation of new "Lands", which, once the constituent elements of the Republic of Georgia have been enumerated (Article 85.1), is left to Parliament, despite the fact that such a decision would in practice require a reform of the Constitution, possibly a significant one. In fact, since any parliamentary decision to this effect must also be approved by referendum (Article 85.3), the situation is similar to that of laws entailing a revision of the Constitution (Article 48.2).

More significant, however, and, in some respects, of decisive importance, is the referral to Parliament of the "legal" status or basis of both categories of republic (Article 85.4 for ordinary "Lands" and Article 86.2 for the autonomous republics). This could be a case of genuine deconstitutionalisation.

The situation is highlighted and made worse by the draft's treatment of the powers to be conferred on the republics. Article 87 lists some of the powers which the ordinary "Lands" (or republics) could be granted under the Constitution. What matters is not that this list of powers (which are qualitatively important) is limited in comparison with other, though not all, examples in comparative law but that the granting of these powers may depend totally on State legislation (although the "Lands" are involved in the formation of the Council of Representatives, which amounts to a kind of senatorial chamber).

It should be noted that this deconstitutionalisation is less marked in the case of the republics enjoying special status. In respect of their legal basis, the draft significantly stipulates that in order to be adopted by the Parliament of the Republic of Georgia, the laws in question must first be approved by the representative body of the "Land" concerned (Article 86.2). Yet once again this referral to Parliament is perhaps too generous. It is not compensated for by the fact that, under the draft Constitution, these "Lands" enjoying special status may be granted additional powers by Parliament, as there is no express constitutional guarantee of extra powers.

5. Two important points relating to the organic aspects of the draft need to be made. The first concerns the status of the "Land" Assemblies, which the draft defines as the supreme representative bodies of "Lands". The indirect election of their members detracts from the political significance of these bodies which consist of delegates appointed in proportion to the size of the population by the representative bodies of self-government (or municipalities), among their members. This reduces, by extension, the political significance of the republics themselves and, along with other factors, certainly affects the political significance of the Council of Representatives of the Georgian Parliament (Article 38.1), whose members would be elected, again indirectly, by the members of the intermediate-level Assemblies.

What is more important, of course, not so much for the political significance of the institutions of regional self-government as for the regions' potential for real autonomy, is the fact that, under the draft, the regional executive, significantly referred to as the "Administration" (thereby reducing the possible "political" elements of self-government) would be led by a "Head of Administration", appointed for four years by the President of the Republic of Georgia (Article 89).

Although, in principle, there is no reason why legislation - organic or otherwise - amplifying the planned Constitution, should not establish some kind of machinery giving the republics' representative bodies a say in the appointment of the Head of Administration (for example, entitling those bodies to propose or even impose a candidate), it must be observed that by proposing this type of appointment system the draft runs the risk of undermining the very autonomy of the "Lands" and, at worst, turning the intermediate self-government bodies into more or less decentralised tiers of the central State authorities.

6. The draft deals more concisely with local (or municipal) self-government bodies. With regard to the membership of these bodies, it stresses the representative democracy element (direct election) and even the possibility that self-government may be exercised through some form of direct democracy.

Article 91.2 makes an assembly or the general assembly of the inhabitants the representative body of local self-government in the smaller communities. Article 91.3 allows local voters to elect an executive to head the representative body, but the way in which the local assembly and executive would share power is left rather confused and unclear.

Article 91.4 lists the powers to be exercised by local bodies, which could be further specified in later work on the draft, although these powers are more definite than is the case with the "Lands". Nevertheless, one can see a discretionary element here in that Article 91.5 gives the Council of Representatives exclusive power to determine the principles of organisation and functioning of self-government bodies through the adoption of corresponding legislation.

Finally, it should be observed that, although Article 92 guarantees the autonomy of the local representative bodies by giving the (independent) courts exclusive control over their decisions and the right to set them aside, Article 89.2 nonetheless gives the Head of the Administration of the respective Land wide powers of control since it grants him the active and unlimited right to suspend or postpone the entry into effect of decisions taken by the local bodies and refer them to the courts. These powers of oversight might well be a serious restriction of local self-government even if the final say lies with the judicial authorities.

Provisions on international law

by

Mr Constantin ECONOMIDES (Greece)

1. Article 4 and article 7 para. 2

These articles contain almost the same provisions. One of them should be deleted therefore, preferably that of article 7 para. 2. Article 4 could be worded as follows : "The State recognises the principles and norms of international law. Such principles and norms, as well as validly concluded and published international treaties, are part of domestic law. They have priority over laws and other domestic normative acts."

The proposed wording recognizes that principles and norms of international law, and alongside treaties, form part of international law and have priority over domestic legislation. This solution is in conformity with international law in force.

It would also be useful to provide that in case of doubt or conflict as regards the existence of a principle or norm of international law, the Supreme Court would be competent to decide on the matter. (This possibility could be added in (art. 78 (para. c last).

2. Article 7 para. 3 (proposed para. 2)

I must note that this is an advanced provision, which conforms with the modern tendencies of international law. It is useful for such a provision to have a place in the corpus of the Constitution.

3. Article 12

Paragraph 3, first sentence, should be reformulated as follows: "The State is obliged to protect and care for its citizens on its territory and beyond its borders to the extent provided by international law".

4. Article 26, para. 2

This provision seems to be rather far-fetched and should, in our opinion be moderated : "In accordance with relevant international agreements, the State protects migrant workers and cares for Georgian citizens working abroad."

5. Article 28

At the end of paragraph 1, the sentence "principles and norms of international laws" should be added. In paragraph 2, the phrase "in accordance with law" should be completed by the mention of "international treaties".

6. Articles 29-34

While these provisions are quite advanced as far as the rights of minorities are concerned, they do not seem to expressly recognize religious rights.

7. Articles 44 (para. 1, subpara. b), article 46 (para. 1, subpara. d), article 47 (para. 1, subpara. d), article 63 (para. 1, subpara. a)

The above mentioned provisions, which refer to the conclusion of international treaties by Georgia, must be carefully reexamined, since they seem to lend themselves to confusion which must be eliminated.

In principle, the President of the Republic should be the organ to ratify international treaties and agreements which need to be ratified. Agreements of lesser importance should be concluded by the Cabinet of Ministers (the Government).

The Parliament or the Council of Representatives should give their consent for the conclusion, by the Head of State or the Government, of at least the most important treaties or agreements. Such agreements, as a rule, are the peace treaties, political and military treaties, treaties with territorial implications, etc. (see : the relationship between international and domestic law, European Commission for Democracy through law, p. 8).

The Constitution <art. 47 (1) (d)> is, however, correct in providing that the treaties establishing intergovernmental and interstate unions need the consent of the Council of the Republic and the Council of Representatives.

The denunciation of treaties and agreements should on the other hand, be effected by the Head of State or the Government, as the case may be.

8. Articles 44 (para. 1, subpara. e) and 45 (para. 1, subpara. f)

These provisions must also be reexamined. It must be made clear by an express addition to this effect that a declaration of war can only be made under the conditions provided for by international law. Such a case is the one foreseen by art. 83.

9. Final remark

In connection with provisions of the Draft Constitution of the Republic of Georgia relating to matters of international law, we consider that, generally, they are not mature enough to be included in a final text of the Constitution. There should, therefore, be a new draft of the provisions in question which it would be advisable to submit to the Venice Commission for observations.