Strasbourg, 3 December 2008

CDL(2008)122*

Opinion no. 503 / 2008

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON

4 CONSTITUTIONAL LAWS AMENDING THE CONSTITUTION OF GEORGIA

by

Mr Sergio BARTOLE (Member, Italy)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

The Venice Commission is required to give an opinion about amendments to the Georgian Constitution. They regard, according to the text submitted to our examination:

- the reduction of the necessary number of deputies to create a parliamentary faction
- the "government trust after granting the parliament the rights and responsibilities"
- the "property ownership rights" in Georgia
- the removal of the judge of the supreme court, member of the government, chairman of the chamber of control, members of the national bank committee
- the removal of the ministers of defence, justice and internal affairs
- the position of the departments of the prosecution.

As it is evident reading the quotation between inverted commas of the English translation of the Georgian original documents, it is not always easy to understand the meaning of the used expressions. This is specially true for the English text of the new first paragraph of article 80, but also the other texts require a " creative " interpretation.

A) Notwithstanding the wrongness of the explanation (I share the opinion of my colleague Olivier Dutheillet de Lamothe), the reduction of the necessary number of deputies to create a parliamentary faction has to be approved: it is a follow-up to the revision of the electoral law and it is aimed to favour the pluralism in the parliamentary debates.

Perhaps it is not advisable providing for these arrangements in the Constitution and it would be preferable inserting them into the Regulations of the Parliament which deal with the internal structure of the Parliament (art. 49.3). It would be a more flexible solution which does not require a revision of the Constitution for all (even of minor relevance) future amendments of the rules presently in force. But also the main provisions about the electoral system are explicitly written down in the Constitution and the two items are strictly connected. It is evident that the Georgian legislator prefers the way of the constitutional legislation to ensure the position of the political minorities: as a matter of fact, the approval of the Regulations of the Parliament does not require a special majority and, therefore, it does not offer a procedural guarantee to the minorities.

But from the point of view of the Italian parliamentary experience, the proliferation of parliamentary factions can have a dangerous impact on the functioning of the legislative assemblies: perhaps Georgia is not presently in the position of preferring efficiency to political pluralism.

B) The second amendment provides for the removal from office of the Cabinet after "the inauguration of the Georgian President or following the appointment of the newly elected parliament". It adds a new paragraph to art. 80 of the Constitution taking into account the principles of the Constitution which allow the President and the Parliament to remove the Ministers who are linked to both of them by a relation of confidence. The formal adoption of the measure requires a presidential, act but this act is an automatic consequence of the election of the President or of the Parliament. It helps the formation of a new parliamentary majority and of a new Cabinet which have to take into account the results of the parliamentary elections or the political programs of the new President. At the same time, the amendment avoids the formality of a parliamentary debate about the staying in office of the Cabinet appointed in presence of the past President or of the Cabinet which had the confidence of the old Parliament.

The novelty reduces the margin of discretion of the President in the relations with the Parliament and the Cabinet, and increases the influence of the Parliament in the matter. It is not clear what is the meaning of the last part of the provision ("he/she can also impose such rights and responsibilities until the appointment of a new government"): does it mean that the President is allowed to keep in office the Cabinet which he is revoking until the appointment of a new government, or that the President is authorized to exercise directly the rights and responsibilities of the Cabinet? The first solution is certainly more suitable because it is more coherent with the Georgian system of government. As a matter of fact, the new constitutional law could leave the country without a Cabinet for a certain period of time, pending negotiations between the political parties; in any case, a temporary system of government complying with the exigency of a division of power would be preferable.

C) The new provision dealing with "property ownership rights "emphatically states their inviolability. It does not apparently exclude the intervention of a regulatory legislation affecting the modalities of the exercise of those rights: restrictions of them are permissible in the framework of the constitution for the purposes of the society's needs. But in the provision an explicit reference to the law (parliamentary statute) is missing. It should not be implied that the executive power is allowed to restrict the property rights without the coverage of a law. Georgia is a State where the power "is exercised and based upon the principle of separation of powers" (art. 5. 4 of the Constitution), it is a member State of the Council of Europe and it is supposed to be bound by the European Convention on human rights. Therefore, restrictions of the protected rights shall be adopted only on the basis of previous legislation as it is required by art. 1 of the First Protocol to the Convention in the case of property. Perhaps such a conclusion could be drawn from the text itself of the amendment, where it permits restriction of the rights "in the framework of the constitution". In any case, it is evident that an explicit reference to the law (parliamentary statute) should have been preferable.

According to the first paragraph "voiding the general property rights is inadmissible": this part of the provision confirms the inviolability of the property rights as far as it excludes the abolition of the institute of the property in the Georgian legal order with general effects. Therefore "forfeiture of the private property" is allowed only on an individual basis, and its restrictions can have only a general relevance but they are allowed on the condition that "the fundamental rights of ownership are not violated". The meaning of this last part of the amendment is not clear, probably it shall be read in accordance with the general doctrine of the restrictions of the constitutional rights which forbids to endanger or nullify the substantial kernel of the rights when providing for their restrictions.

The rules concerning "the advance, full, and just financial reimbursement" have to be approved. But the modalities of the adoption of the forfeiture of the private property are not clear. The third paragraph mentions "a decision of the court" or "the main laws during emergency situations". Does this provision exclude an intermediation of an act of the administrative authorities, substituting for it a decision of a court or directly a legislative provision, both of them dealing with the case at stake? Perhaps the translation of the Georgian text is not correct, but it should be interpreted as entrusting the administrative authorities with the task of implementing the relevant, general, ordinary legislation under the control of the judicial bodies in the first case, and requiring administrative measures in accordance with a special legislation (but without excluding the judicial review) in the second case when a situation of emergency is present.

If it is read in this way, the provision is in conformity with the jurisprudence of the European Court of human rights.

D) It is a common opinion that the amendment of the first paragraph of art. 64 is introducing a novelty which does not only regard the exclusion of the General Procurator from the number of persons interested by the procedure of impeachment, but also it does apparently change the effects of the initiative of "non less than one third of all parliament members". While the old text of paragraph 1 allowed not less than one third of the total number of Members of Parliament "to raise the question of the impeachment" of the mentioned people, the new text entrusts no fewer than one third of all Members of the parliament with "the authority to remove" both the Judge of the Supreme Court, the chairman of the Chamber of control, the members of the national bank committee and members of the government. If the translation of the new text is correct, it would imply a radical change of the constitutional system of government introducing an enlargement of the powers of the parliamentary minority which is really difficult to understand. We could envisage the possibility that the parliamentary minority is given the power of removing the holders of institutions which have peculiar functions of guarantee, but it such a modification of the principles of the accountability of the members of the Cabinet to the Parliament which allow the minority of the members of the Parliament to remove the members of the Cabinet is unthinkable. It is true that the special impeachment procedure of removal is at stake, which could be inspired to principles different from the principles inspiring the political accountability of the Cabinet. In any case it is also true that the explanatory report does not mention a radical change in the meaning of the provision with regard the relations between Cabinet and Parliament. Therefore we must conclude that the content of the amendment regard only the dropping of the General Procurator from the list of the persons who can be interested by the impeachment procedure provided for by the paragraph.

E) Also paragraph 1 of art. 73 is amended to add the Minister of Justice to the number of the Ministers (Minister of Defence and Minister of Internal Affairs) who can be dismissed by the President of the Republic "on his/her own initiative, or for other reasons defined by the constitution". The change is connected with the reform of the organization of the offices of the prosecution and will deal with it in the following paragraph, trying to understand whether the provision complies with the exigency of insuring the neutrality and impartiality of the system of the prosecution in Georgia. The new provision cancels the accountability of the Minister of Justice to Parliament, while it strengthens is dependence on the President of the Republic. As a matter of fact, the President of the Republic in Georgia does not have only functions of guarantee of the compliance with the Constitution and of the correct functioning of the constitutional bodies, but he is also a political actor: therefore the dependence on him of the offices of the prosecution could acquire political relevance.

F) The amendment of art. 91 with the addition of a 4th paragraph is certainly an important novelty for the Georgian legal system, as far as it abolishes the old system of the Prokuratura, which is strongly criticized by the international, legal institutions. It puts the "departments of the prosecution…under the system of the ministry of Justice. The minister of Justice is overseeing their operations. The rights, responsibilities, and operations of the prosecution office are defined by the law." The reform is supported by a general report (*Recent amendments to the Georgian constitution and legislation on the public prosecutor's office*) submitted by the CoE Legal Task Force for Georgia. The report underlines that "there is no precise, clearly formulated catalogue of the principles defining the position of a prosecutor's office from which a democratic state can not deviate", but – at the same time – concludes that the structural separation between judicial authorities and prosecution offices "follows the requirement stipulated in the Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system". It is well known that the Recommendation was adopted in view of the exigency of providing for a clear directive aimed at ensuring that "a person cannot at the same time perform duties as a public prosecutor and as a court judge": its main purpose was the guarantee of the independence and impartiality of the court judges. But it is also well known that there is a problem of avoiding that the prosecution offices become instruments of political interests identifiable with the interests of groups or factions present among their personnel or with the political interests of the political parties in power. The danger that the prosecution

offices become an instrument of the political conflict between political and economic interests is a real danger. Also the independence of these offices should be guaranteed.

The text of the amendment does not state any principle about the personal position of the holders of the offices of the prosecution and it does not appear to address the exigency that those offices have to be independent of the Executive. It is true that directives in the matter are present in some recommendations of international bodies, and specially of the Council of Europe, but there is no internal constitutional guarantee that these directives are complied with by the internal legislator. If they had the legal status of international agreements (for instance the ECHR), their observance would be ensured by the constitutional principle that the internal legislation of a State is bound by the international engagements of the concerned State (see art. 6 of the Georgian Constitution). But at the moment, for instance, the Constitutional Court of Georgia does not have the possibility of judicially reviewing and nullifying the national legislation which does not guarantee the position of the offices and the personnel of the prosecution, because an adequate and constitutionally relevant yardstick is missing.

Therefore it is advisable concluding that the mentioned amendment is not satisfactory. The constitutional rule providing for the dependence of the Executive of the prosecution offices should be balanced by a constitutional provision about the personal status of the holders of these offices and about the institutional position of the offices themselves. It is true that the new art. 94.4 entrusts the legislator with the task of defining “the rights, responsibilities, and operations of the prosecution office”, but it apparently deals with the activity of the prosecution, that is with procedural matters leaving aside the problem of the principles which have to control the legislation concerning the position of the offices and of its holders. Moreover the new art. 73.1, g), which authorizes the President to dismiss the minister of Justice, “on his/her own initiative, or for other reasons defined by the Constitution”, is not a sufficient guarantee of the independence of the prosecution system. It has to be read in connection a) with the abrogation of art. 76.1, which provided for the election of the General Procurator by the Parliament on a proposal submitted by the President, and b) with the new rule according to which the Minister of Justice, who becomes the Attorney General, shall be appointed in the office as a member of the government on general grounds – by the Prime Minister and by the consent of the President (see the additional note to the explanatory report). In the future there will not be any guarantee about the professional and legal experience of the Attorney General and his position in the Georgian system of government will entirely depend on the developments of the political conflict. In addition, no procedural constraint is provided for in view of the adoption of the act of the President removing the Minister of Justice: the interested person shall not be given the possibility to have a hearing and the advice of other bodies of the State is not required.