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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# DRAFT OPINION

# ON FOUR CONSTITUTIONAL LAWS AMENDING THE CONSTITUTION OF GEORGIA

## On the basis of comments by


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## I. Introduction

*1. By a letter of 31 October 2008, the First Deputy Speaker of the Parliament of Georgia, Mr Mikheil Machiavariani, requested the opinion of the Venice Commission on four constitutional laws amending the Constitution of Georgia (CDL(2008)121).*

*2. Messrs Bartole, Dutheillet de Lamothe, Hamilton and Sorensen were appointed as rapporteurs and submitted preliminary comments (CDL(2008)122, 123, 123 and 124) which were the object of a preliminary discussion in the presence of the Georgian authorities at the Plenary Session of December 2008.*

*3. A report on "Recent amendments to the Georgian Constitution and Legislation of the Public Prosecutor's Office" was submitted by the Council of Europe Legal Task Force for Georgia.*

*4. Subsequently Messrs Sorensen, Hamilton and Dutheillet de Lamothe travelled to Georgia on 1-2 February 2009. The delegation met the Chairman of the Committee on Legal Issues of the Parliament of Georgia, Mr. Pavle Kubhlashvili, the Deputy Minister for Justice, Mr. Dito Dzagnidze, the Head of the Analytical Department of the Ministry of Justice, Mr. George Jokhadze, the Chairman of the Foreign Affairs Committee of the Parliament of Georgia, Mr. Akaki Minashvili, the First Deputy Chairman of the Parliament of Georgia, Mr. Mikheil Machavariani, the Deputy Chief Prosecutor, Mr. David Sakvarelidze, the Head of Staff of the Chief Prosecutor's Office, Mr. Irakli Kotetishvili, as well as representatives of the Georgian Young Lawyers Association.*

*5. The present opinion, which was finalized after this visit, was adopted by the Commission at its … Plenary Session (Venice, ...).*

## II. The constitutional amendments

6. The constitutional amendments brought about in October 2008 through the four constitutional laws which are the object of this opinion concern:

- the reduction of the number of deputies necessary to create a parliamentary faction (first constitutional law);
- the "government trust after granting the parliament the rights and responsibilities" (second constitutional law);
- "property ownership rights" (third constitutional law);
- the removal of a 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 (fourth constitutional law).

## III. The setting up of parliamentary factions

7. The amendment to Article 58 of the Constitution concerns the reduction – from 7 to 6 - in the number of members required to form a parliamentary faction. This amendment follows up to the revision of the electoral law which reduced the number of members elected proportionately

(from 100 members to 75, with the threshold for taking part in the distribution of seats passing from 7 percent to 5 percent[1]).

8. Irrespective of the mathematical calculation, which does not appear correct (5 percent of 75 is 4, not 5), this reform is to be approved as it aimed to favour pluralism in the parliamentary debates.

9. The Commission notes that in principle these arrangements belong more to the rules of procedure of parliament (pursuant to Article 49.3 of the Georgian Constitution, these rules deal with the internal structure of parliament) than to the Constitution. It would be a more flexible solution, which would not require a revision of the Constitution for all (even of minor relevance) future amendments of the rules presently in force. In Georgia, however, also the main provisions about the electoral system are explicitly written down in the Constitution, and the two items are strictly connected. It is therefore evident that the Georgian legislator has chosen to have recourse to constitutional rules in order to ensure the position of the political minorities: as a matter of fact, the approval of the Rules of Parliament does not require a special majority and, therefore, it does not offer a procedural guarantee to minorities.

## IV. The automatic removal from office of the Cabinet after the inauguration of a new parliament

10. The second amendment provides for the automatic 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 Article 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 (ministers are appointed by the President with the consent of Parliament). Under the old system, a Government would continue in office although lacking in parliamentary support.

11. Under the new system, the formal adoption of the measure of removal 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 will 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.

12. 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. This amendment is consistent with the transition from a purely presidential to a semi-presidential system of government, a transition which has been encouraged by the Venice Commission.[2] The Commission thus welcomes this amendment.

13. 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") is unclear, but has been explained by the Georgian authorities as meaning that the President is allowed to keep in office the Cabinet which he is revoking in order for it to rule day-to-day matters until the appointment of a new Cabinet (and not that the President is allowed to exercise directly the rights and

[1] The Commission had indeed encouraged the reduction of the threshold to 3-5 percent: see Opinion on the electoral code of Georgia, CDL-AD(2006)037 and Opinion on the draft constitutional amendments to the Constitution of Georgia, CDL-AD(2006)040, § 9.

[2] The Commission had expressed criticism of the old system in its "Opinion on the draft amendments to the Constitution of Georgia", CDL-AD(2004)008, § 30.

responsibilities of the Cabinet, which would have been less consistent with the Georgian system of Government).

## V. The reinforcement of property rights

14. 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. This should mean that the executive power is allowed to restrict the property rights without a legal basis. 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 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 relation to property. While it could be argued that this conclusion can be drawn from the wording of the amendment, to the extent that it permits restriction of the rights "in the framework of the constitution", an explicit reference to the law (parliamentary statute) would have been preferable.

15. 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. "Forfeiture of the private property" is thus allowed only on an individual basis, and restrictions to it can have only a general relevance and are only 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; it must likely be read in accordance with the general doctrine of restrictions to constitutional rights, which forbids endangering or nullifying the substantial kernel of the rights when providing for their restrictions.

16. The rules concerning "the advance, full, and just financial reimbursement" have to be approved. The third paragraph dealing with the modalities of expropriation mentions "a decision of the court" or "the main laws during emergency situations". It is unclear (possibly due to translation inaccuracies) whether this provision requires a decision of a court or a legislative provision, both directly dealing with the case at stake, thereby excluding the possibility of an act of the administrative authorities. In the Commission's opinion, this provision 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 normal cases, and as requiring administrative measures in accordance with a special legislation (but without excluding the judicial review) in situations of emergency.

17. If it is interpreted in this manner, the provision in question is in conformity with the jurisprudence of the European Court of Human Rights.

## VI. The reform of the Prosecution services

18. According to new Article 81(4) of the Constitution, the departments of the prosecution are under the system of the Ministry of Justice. The prosecution service will be a part of executive government[3] and the Attorney General's office will become a sub-unit under the

[3] Article 91 of the Constitution, which formerly provided for a Prosecutor-General as part of the judicial power, was removed in 2004.

Ministry of Justice. Thus, the office of the Attorney General will be governed by the Minister of Justice who will, at the same time, assume the role of Attorney General.

19. According to new Article 64(1), the Attorney General is removed from the list of authorities who are subject to removal from office by means of impeachment.

20. According to new Article 73(c), only the President of Georgia will be empowered to remove, i.a., the Minister of Justice/Attorney General. This will no longer be under the competences of the Prime Minister.

21. The member countries of the Council of Europe are clearly divided when it comes to the relationship between the public prosecution service and the executive (and legislative) powers. In some countries, the prosecution service enjoys complete independence from parliament and government. In other countries, the prosecution service is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action.

22. Under Council of Europe standards, a system under which the prosecution is part of, or subordinate to, the executive power is not in itself unacceptable.

23. However, the basic principle for any prosecution service in a member state is laid down in Article 11 of CoE Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system[4]:

> *"11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the Public Prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out."*

24. This basic principle is further developed in Articles 13-16 of the Recommendation.

25. Article 13 concerns specifically those member states where the public prosecution service is part of or subordinate to the government. In such states, effective measures should be taken to guarantee that:

a) the nature and the scope of the powers of the government with respect to the prosecution are established by law;
b) government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;
c) where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;
d) where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example
    i. to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;

[4] Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000. See also Recommendation 1604(2003) of the Council of Europe's Parliamentary Assembly on the Role of the public prosecutor's office in a democratic society governed by the rule of law, adopted on 27 May 2003.

ii. duly to explain its written instructions, especially when they deviate from the public prosecutor´s advices and to transmit them through the hierarchical channels;
iii. to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;

e) public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;

f) instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs d) and e) above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

26. Such principles have also been expressed by the Venice Commission on numerous occasions.[5]

27. The Commission notes at the outset that, consequent on the constitutional amendments, the Office of the Prosecutor General, which was formerly established on the constitutional plane, no longer has any constitutional recognition. The new constitutional provision simply recognizes that "*the Department of the Prosecution is under the system of the Ministry of Justice who oversees their operations. The rights, responsibilities and operations of the prosecution office are to be defined by the law.* "

28. The recent constitutional amendments thus fail to introduce at the constitutional level any principle about the personal position of the holders of the offices of the prosecution, and do not state the need for prosecutors to be independent of the Executive.

29. It is true that such principles are contained in certain recommendations of international bodies, and especially of the Council of Europe, but there is no internal constitutional guarantee that these directives are complied with by the domestic 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 as they do not have such status, at the moment the Constitutional Court of Georgia does not have the possibility of judicially reviewing and nullifying the national legislation which does not guarantee the independence of the prosecution services, because an adequate and constitutionally relevant yardstick is missing.

30. The constitutional rule providing for the subordination to the Executive of the prosecution offices should be balanced by constitutional provisions about the independence of the Minister in carrying out its prosecution-related functions, about the personal status of the holders of these offices and about the institutional position of the offices themselves. The new art. 94.4 entrusts the legislator with the task of defining "the rights, responsibilities, and operations of the prosecution office", but this concerns the activity of the prosecution, that is procedural matters, and leaves unanswered the issue of the constitutional principles which should guide the legislator in respect of the position of the offices and of its holders.

31. In its contacts with the Georgian authorities in relation to this matter, the Venice Commission made it clear that in principle it was open to the authorities in Georgia to site the prosecution either within the judiciary, as was formerly the case, or within the executive, as was

[5] See, for example, part II of the draft vademecum on the judiciary (CDL-JD(2008)001) with further references.

now the case following the recent reform which had transferred executive responsibility for the overall direction of prosecution policy to the Minister for Justice and the conduct of the prosecutor's office.

32. However, the Commission delegation made it clear that its concerns focused primarily on two issues. The first was whether there was a sufficient degree of separation between the politically appointed and answerable Minister for Justice and the officers who were responsible for taking prosecution decisions in individual cases.

33. Secondly, the concerns of the delegation focused not merely on the formal responsibility for taking individual prosecution decisions but on the actual chain of authority, and in particular on the methods of appointment of dismissal of persons who would be responsible for prosecution decisions.

34. The Commission has of course been requested to examine the Georgian constitutional amendments. However, in evaluating the amendment as it applied to the prosecution service, it was necessary to obtain information about how that service functioned and to look at the recently adopted (October 2008) law of Georgia on the prosecution service (CDL(2009)018) as well as the recent amendments to the Law of Georgia on the Structure, authorities and activities of the Government of Georgia (CDL(2009)017).[6] It is, however, important to note that this was done merely for the purpose of evaluating the constitutional amendments and it is not proposed in the opinion to examine all the law in relation to the prosecution service in detail.

35. As well as transferring responsibility for the prosecution service from an independent prosecutor general sited within the judiciary to the Minister of Justice who is of course a member of the government, a number of practical steps were taken to reform the prosecution service in Georgia in the last several years. Most if not all of the existing prosecutors under the old arrangements no longer work for the prosecution service. The service has been considerably slimmed down and by the standards of post-Soviet countries (and indeed by the standards of most western European countries as well) the prosecution service is relatively small, employing no more than about 400 lawyers. The Commission delegation was informed that prosecutors are relatively well paid in Georgia and positions as prosecutors are keenly sought after by lawyers. It was also informed that corruption in the prosecution service, which had been a problem in the past, is no longer significant.

36. The Commission delegation encountered some criticism of the prosecutors' office as an over powerful institution. In this respect the authorities informed us that one of the purposes of transferring the Office from an independent prosecutor general to the Ministry of Justice had been to curb the excessive power of the prosecutor. The Commission considers that the mere transfer of an office in this manner does not necessarily curb its power. However, it may be noted that *prokuratura* style features of the old prosecutors' office, such as powers of general supervision, no longer exist. The function of the prosecutors' office is now to conduct criminal investigations and prosecutions and to exercise supervision over the bodies of investigation and in relation to persons who are detained. These appear to be appropriate functions to confer on a modern prosecution office.

37. The Law on the prosecution service provides for a very hierarchical system. The prosecution service is defined as being a state authority within the system of the Ministry of Justice. The term "prosecutor" is defined in Article 2 (a) to include the Minister of Justice as

[6] Previously, the public prosecutor's office was regulated through a constitutional law. The Law on the Prosecution Service adopted in October 2008 is an ordinary law. The Commission was explained that this is due to a constitutional amendment of 2004 reducing the matters which may be regulated through constitutional laws, which excluded the prosecution services. In the absence of constitutional provisions on the independence of the prosecutor office, an organic law would clearly offer better guarantees than an ordinary law.

well as the Chief Prosecutor, Deputy Chief Prosecutors, and other prosecutors at all levels. Under the terms of the Constitution the Minister of Justice, together with other ministers of government, is appointed by the President of Georgia with the consent of parliament. Pursuant to Article 64 of the Constitution he may be removed from office on the proposal of one third of the total members of parliament and by a vote of the majority in cases of violation of the constitution, high treason, or the commission of other criminal offences.

38. The functions of the Minister of Justice in the prosecution service are defined in Article 8 of the Law on the Prosecution Service. He has power to create an abolish prosecution agencies, determine the territory of their activities and establish the competency of structural units within the service. He has the power to appoint and dismiss deputy chief prosecutors, the prosecutors of the autonomous republics and district prosecutors on the nomination of the Chief Prosecutor. He has power to conduct the actual prosecution in the case of prosecutions against the President of Georgia, members of parliament, judges, members of the government, the Public Defender, the Chamber of Control, members of the national bank and ambassadors, prosecutors, investigators in the prosecution service and high ranking military officers. His function is to approve the principles of criminal law policy. He is to work out proposals on financing and the provision of resources of the Chief Prosecutor. On the proposal of the Chief Prosecutor he is also to decide the application of disciplinary punishment against deputy chief prosecutors and prosecutors of the autonomous republics and district prosecutors. Article 8 (j) states that "on the basis of the law and for its accomplishment he issues *normative* and individual legal acts – orders, instructions and directives" (but such acts are not – and should not be - "normative") and under Article 8 (k) it is stated that he "abolishes the illegal orders, instructions and directives of the subordinated prosecutors."

39. Article 9 provides for an Office of Chief Prosecutor headed by the Chief Prosecutor, who is appointed and dismissed by the President upon the nomination of the Minister of Justice. The role of the President in his appointment is apparently unusual for an official below the level of cabinet rank and we were informed was intended to mark out the importance of the position of Chief Prosecutor and to afford him a degree of independence.

40. The Chief Prosecutor is described as organizing the activities of the prosecution service, and as already mentioned he proposes the candidacy of deputy chief prosecutors and prosecutors of the autonomous republics and district prosecutors, and is also responsible for proposing their dismissal. He is responsible for appointing and dismissing subordinate prosecutors below the ranks of those already described. Criminal prosecutions against the Minister of Justice are to be conducted by the Chief Prosecutor. He is responsible for making proposals to the Minister on financing the prosecution service and providing it with resources, as well as making proposals concerning the structure of the prosecution service and salaries and the number and positions of staff. He determines the functional duties of his or her deputies and decides on matters of discipline except in the cases of the senior prosecutors already referred to. In the case of those senior persons he is responsible for making proposals to the Minister concerning discipline. Like the Minister of Justice he is described as issuing normative and individual legal acts for the implementation of the law and as abolishing illegal orders, instructions and directives of subordinated prosecutors.

41. Article 13 describes the form of subordination of subordinate prosecutors to supervising prosecutors. While the English text is not in all respects totally clear, it is obvious that a very hierarchical system is envisaged. Subordinated prosecutors are obliged to report to the supervising prosecutors and to carry out their instructions. Subordinated prosecutors acts and decisions may be abolished or replaced by other decisions and acts of the supervising prosecutor. Subordinated prosecutors are obliged to fulfil all lawful requirements and instruction of the supervising prosecutor.

42. The Commission delegation expressed concern that the combination of the inclusion of the Minister of Justice in the definition of prosecutor in Article 2, together with the power conferred on him in Article 8 to issue normative and individual legal acts and to abolish illegal orders, instructions and directives, taken in conjunction with the provisions of Article 13 dealing with the relationship between supervising and subordinated prosecutors, could enable the Minister of Justice to give instructions in individual cases, if he is to be regarded as a supervising prosecutor. The delegation was assured that in practice this is not the case and that the Minister of Justice does not give such instructions. However, it was conceded to us that Article 8 (k) is at least open to the possible interpretation that the Minister of Justice may override decisions of prosecutors in individual cases.

43. In order to ensure that the law is in conformity with the practice which the Commission delegation was assured existed, the Commission considers that it would be desirable that the Minister of Justice is not included in the definition of prosecutor in Article 2 of the Law, and that in Article 8 it is made clear that his functions relate to overall responsibility and not to the issuing of decrees or directives in individual cases.

44. It should also be made clear that the Minister of Justice is not to be regarded as a supervising prosecutor for the purposes of Article 13 of the law. In addition, it should be made clear in Article 9 that it is the Chief Prosecutor who is responsible for making decisions in relation to individual cases, together with the other subordinate prosecutors who are ultimately answerable to him. At present, there is at the very least an ambiguity concerning the law and, despite the assurances which the Commission delegation received about the situation in practice, it is conceivable that at some date a court might decide that the Minister for Justice did have powers to intervene and act in individual cases.

45. If, contrary to the assurances the delegation was given, the Minister for Justice can issue instructions in specific cases, it would be necessary to have legislation to give effect to paragraph 13 of Recommendation Rec 2000 (19).

46. A further area of concern related to the procedures for appointment, disciplining and dismissal of prosecutors.

47. Firstly, in the case of the Minister of Justice, he is of course a member of government and the provisions for his appointment or dismissal are appropriate for such an office holder.

48. In the case of the Chief Prosecutor, he is appointed and dismissed by the President on the nomination of the Minister of Justice. It would be desirable that there should be some technical input into his selection, possibly by a committee of independent persons such as the Ombudsman, the deans of law faculties, members of the judiciary or the constitutional court, who could give technical advice as to the suitability of candidates for office. It would also be desirable that some method of insuring the suitability of deputy chief prosecutors for office be devised.[7]

49. In the case of other prosecutors, Article 31 of the law sets out qualifications for appointment. However, the actual appointments of the deputies are made by the Minister of Justice upon the nomination of the Chief Prosecutor. It would be desirable to have some technical input into this process. The Chief Prosecutor also proposes the candidacy of the prosecutors of the autonomous republics and district prosecutors. Again, some independent and objective form of assessment would be desirable.

[7] The setting up of a Prosecution Council has been envisaged in Georgia (see Implementation Plan for the Strategy on Criminal Justice reforms in Georgia, January 2007).

50. In the case of subordinate prosecutors, investigators and other employees of the prosecution service, these are appointed and dismissed by the Chief Prosecutor. The Delegation was informed that the Law on Public Service provides safeguards against wrongful dismissal of these subordinate prosecutors.

51. The Chief Prosecutor may be dismissed by the President of Georgia on the proposal of the Minister of Justice (Article 9 (1) Law on the Prosecution Service). No criteria for such dismissal are established, nor is there any provision for independent assessment of a proposal to dismiss the Chief Prosecutor. This should be remedied.

52. Similarly, the Chief Prosecutor can propose the dismissal of his deputies and the prosecutors of the autonomous republics and the district prosecutors to the Minister of Justice. No criteria for such dismissals are established nor does there appear to be any independent mechanism to assess such proposal. There is no provision for an appeal to a court of law in relation to such a matter. This should also be remedied.

53. As concerns the other prosecutors, the Commission Delegation was informed by the authorities that the Law on Public Service, which the Delegation has however not seen, provides for rights of representation, rights to know the case made in favour of a dismissal and to answer and an appeal to a court of law. According to the information provided, disciplinary proceedings against prosecutors are conducted independently by the General Inspection of the Prosecutor's Office. When there is a proposal to discipline prosecutors, written explanations are first sought from the person who is to be disciplined and an appeal is possible before the Disciplinary Commission of the Council, and subsequently the decision of the Prosecutor General imposing the disciplinary sanction can be appealed to court. If this is the case, then such procedures would be appropriate. It would be useful to obtain some further clarifications in writing on this point.[8]

54. During the visit, the Commission Delegation raised the issue of the appropriateness of conferring the individual prosecution function on the Minister of Justice in the case of the President and high office holders. On the one hand, there is the consideration that a political office holder may be reluctant to prosecute his own colleagues. Conversely, he may be more willing to prosecute members of the opposition for political reasons. On the other hand, there is the argument that such prosecutions, being politically contentious, are likely to have repercussions in the political arena and should not perhaps be taken by an unelected official.

55. On the whole, the Commission takes the view that this matter requires further thought and there should be some safeguards to ensure that prosecutions of senior office holders cannot be instituted without the consent of some senior independent person or persons and that a decision not to prosecute such persons in the case of a complaint being made should be subject to some form of review. It may be noted that any prosecutions of the Minister of Justice are to be taken by the Chief Prosecutor himself, and in these circumstances it is difficult to see why that power could not be extended, subject, perhaps, to a power in a court of law to review his decision.

56. It may be queried whether the existing arrangements whereby the Minister of Justice prosecutes high officials are compatible with Rec 2000 (19). Although this precise issue is not dealt with, paragraph 16 of this recommendation refers to the need for prosecutors to have the power to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognized by international law. Under the existing arrangements the Minister could not only

[8] A brief description of the procedure is contained in the paper "Strategy reform of the Criminal Legislation of Georgia", which was given to the Commission Delegation during the visit.

obstruct such prosecutions, but prevent them entirely. Furthermore, none of the safeguards of paragraph 13 where the Government give instructions to prosecute or not to prosecute apply to the Minister's decision. Safeguards applying to such instructions when given to prosecutors should apply, *a fortiori*, in cases where the Minister not merely gives instructions but actually makes the decisions.

## VII. Conclusions

57. The Commission has reached the following conclusions:

(a) the reduction in the number of deputies (from 7 to 6) necessary to create a parliamentary faction is to be approved;

(b) the automatic removal from office of the cabinet after new parliamentary elections represents is to be approved in that it strengthens the powers of the parliament;

(c) the reinforcement of property rights is to be approved, subject to interpreting this provision as entrusting the administrative authorities with the task of implementing the relevant, general, ordinary legislation under the control of the judicial bodies in the normal cases, and as requiring administrative measures in accordance with a special legislation (but without excluding the judicial review) in situations of emergency; it would have been appropriate to state explicitly the need for restrictions to property rights to have a legal basis;

(d) the transfer of the prosecution service to the executive must be accompanied by sufficient and appropriate constitutional guarantees of the independence of the prosecutors: such guarantees are at present missing in the Constitution. If the Constitution refers to the Ministry of Justice's role in the prosecution service, then the text should also refer to the independence of the Ministry in carrying out its prosecution-related functions and to the independence of the prosecution service at the level of specific cases. Alternatively, if the Ministry is to have a power to give instructions, safeguards need to be spelled out.

(e) The law on the prosecution service needs to define more clearly the role of the Ministry of Justice with regard to the prosecution service, and in particular its role at the level of the individual case. The safeguards in paragraph 10, 13 and 14 of Recommendation Rec (2000) 19 should, where applicable, be expressly provided for.

(f) There should be an independent input into the appointment procedure for all prosecutors from the Chief Prosecutor down to ensure that only properly qualified persons are appointed.

(g) The safeguards concerning discipline and removal of office of *all* prosecutors, *from the Chief Prosecutor* down, should be reviewed to ensure (a) that the grounds on which prosecutors may be disciplined or removed from office are clearly provided for in law (b) that in each case a prosecutor is fully informed of the grounds on which it is proposed to discipline or remove him or her from office (c) that the prosecutor is entitled to be represented and heard on the issue before an independent body (d) that the prosecutor has a right of appeal to a court of law against any decision to discipline or dismiss him or her.

(h) The appropriateness of the Minister of Justice acting as prosecutor in relation to high office holders should be considered. If the Minister is to retain such a role there is a need to ensure transparency in relation both to decisions to prosecute and decisions not to prosecute, and the possibility for an independent review of such decisions should be considered. In the case of prosecution decisions by the Minister of Justice paragraph 13 of Recommendation Rec (2000) 19 should be given effect.