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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION
ON THREE DRAFT CONSTITUTIONAL LAWS AMENDING
TWO CONSTITUTIONAL LAWS AMENDING
THE CONSTITUTION

OF GEORGIA

Adopted by the Venice Commission
At its 96th Plenary Session
(Venice, 11-12 October 2013)

on the basis of comments by

Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)
Mr Evgeni TANCHEV (Member, Bulgaria)

I. Introduction

1. By a letter of 31 July 2013, the Georgian authorities requested the Venice Commission to provide an opinion on three draft constitutional Laws amending respectively two constitutional Laws amending the Constitution which have not yet entered into force or the text of the current Constitution (CDL-REF(2013)024).
2. Mr Jean-Claude Scholsem and Mr Evgueni Tanchev acted as rapporteurs.
3. Since the amendments will be discussed in the Georgian Parliament as from the second week of September, with the authorisation of the Bureau the draft opinion was forwarded to the Georgian authorities on 10 September 2013. The opinion was subsequently adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013).

II. Preliminary remarks

4. The Constitution of Georgia was adopted on 24 August 1995. Since then, it has been amended several times.
5. The Venice Commission has assisted the authorities of Georgia in respect of several sets of constitutional amendments: in 2004 (Opinion on draft amendments to the constitution of Georgia, CDL-AD(2004)008); in 2006 (Opinion on the draft constitutional law on amendments to the Constitution of Georgia, CDL-AD(2006)040); in 2009 (Opinion on four constitutional laws amending the Constitution of Georgia (CDL-AD(2009)017rev and Opinion on a draft constitutional law on the amendments to the Constitution of Georgia (CDL-AD(2009)030); in 2010 (Final opinion on the draft constitutional law on amendments and changes to the Constitution CDL-AD(2010)028).
6. After the last parliamentary elections, the majority in parliament changed. The proposed reform is the proposal of the new majority. The 2010 constitutional reform made the Georgian system evolve from a semi-presidential system towards a more parliamentarian one. The current reform does not fundamentally call into question this trend.
7. The draft amendments under examination in this draft opinion mostly intend to repeal amendments which have been adopted in 2010 and 2011 but have not yet entered into force and should enter into force "upon the oath taken by the newly elected President in October 2013". One of the amendments, however, concerns an Article of the Constitution which is already in force (Article 29).
8. The draft amendments are analysed below in the order of appearance of the Articles in the Constitution. A table is appended to this document which sets out the reference of the draft Laws under examination and the reference of the Laws they are amending, the current version of the Article of the Constitution, the wording of the 2010 or 2011 version and the amendments proposed by the amendments under examination (see appendix p 10). It should be pointed out that the form in which this reform is presented does not make it easily understandable to the members of the public who are primarily concerned and should be the main beneficiaries of the modifications of the fundamental Law.
9. This opinion is based on an English translation of the draft Laws. The translation may not accurately reflect the original version on all points and, certain comments may result from problems in the translation.

III. Analysis of the draft amendments

1. Amendment to Article 29, § 1¹ of the Constitution (double citizenship and public functions)

10. Article 29, § 1¹ of the Constitution had been introduced by the constitutional revision of 2010. This Article provides that the office of the President of Georgia, the Prime-Minister and the Chairman of the Parliament may not be occupied by a person who is simultaneously a citizen of Georgia and a foreign country.

11. This provision was analysed by the Venice Commission in its last opinion on the draft constitutional law on amendments and changes to the Constitution¹ CDL-AD(2010)028. Double citizenship is generally excluded in Georgia, with narrow exceptions. Citizens of foreign countries may be granted the citizenship of Georgia by the President of Georgia only in two cases: either if they have a special merit before Georgia or if granting them the citizenship is due to State interests.

12. In its previous opinion, the Venice Commission stated: "in each country's public-service sector certain posts involve responsibilities in the general interest or participation in the exercise of powers conferred by public law which justify that the State should have a legitimate interest in requiring of these servants a special bond of trust and loyalty, The posts of President of the Republic, Prime Minister and Speaker of parliament belong to this category. In the Venice Commission's view, they may therefore legitimately be reserved to persons who only hold the Georgian citizenship".

13. In other words, this limitation was considered as part of the margin of appreciation of states.

14. The suppression of this limit linked to the double nationality does not raise any legal objection.

2. Amendment to Articles 68.4 of the Constitution and 102 § 3 (Revision of the Constitution)

15. Article 68.4 deals with the procedure for adopting Laws and the majority to be reached by Parliament to adopt Laws, in particular laws amending the Constitution. The amendments proposed concern the required majority for the adoption of an organic Law.

Procedure of revision of the Constitution today

16. Today, a revision of the constitution is adopted by one vote at a majority of two thirds of the total number of the members of Parliament.

17. The President, more than half of the total number of the members of the Parliament or not less than 200,000 electors are entitled to submit a draft law on general or partial revision of the Constitution:

18. A draft law on the revision of the Constitution shall be submitted to the Parliament, which shall promulgate the former for public discussion. The Parliament shall begin the discussion of the draft law after a month from its promulgation (promulgation) (Article 102, § 2).

¹ CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the Constitution, §§ 21 and 22.

19. It shall be deemed adopted if it is supported by at least two thirds of the total number of the members of Parliament of Georgia (Article 102 § 3).

20. The law on the revision of the Constitution shall be signed and promulgated by the President of Georgia in accordance with a procedure provided for by Article 68 of the Constitution (Article 102 § 4).

21. Like for ordinary Laws, the President may return the draft to the Parliament with reasoned remarks. The Parliament shall put to the vote the remarks of the President. Remarks of the President shall be rejected by no less than two third of the total number of the members of the Parliament.

22. The constitutional amendments of 2010 and 2011 have been adopted under this procedure: one single vote with a majority of two third of the total number of the members of the Parliament. The same procedure will apply to the amendments of July 2013 under examination.

Procedure of revision of the Constitution after the entry into force “upon the oath taken by the newly elected President in October 2013” of the amendments of 2010 and 2011

23. A revision of the constitution is adopted by two votes held at least 3 months interval at a majority of three-fourths of the total number of the members of Parliament.

24. The right of initiative belongs to more than half the members or no less than 200,000 voters (Article 102, § 1) The right of initiative of the President shall, in accordance with the Constitutional Law of 15 October 2010, disappear after elections presidential elections of October 2013.

25. The proposed revision is submitted to parliament that can begin to discuss it a month after its receipt, to promote public discussion (Article 102, § 2).

26. The draft is approved after two votes, cast in two subsequent sessions, by the three-fourths majority of the total number of members (Article 102, § 3).

27. The law on the revision of the Constitution shall be signed and promulgated by the President of Georgia in accordance with a procedure provided for by Article 68 of the Constitution. Like for ordinary Laws, the President may return the draft to the Parliament with reasoned remarks. The Parliament shall put to the vote the remarks of the President. Remarks of the President shall be rejected by no less than three fourths of the total number of the members of the Parliament.

Proposed Procedure of revision of the Constitution according to the amendments under examination

28. The constitutional bill of July 2013 proposes to repeal, on the one hand, the reflection period of at least three months between the two votes (2010 reform) and, on the other hand, the need to achieve a three-fourths majority for the adoption of a constitutional reform and to reject the president's remarks (2011 reform)

29. The amendments of 2010 and 2011 would be repealed before having entered into force. Article 102, § 3 of the current constitution would remain in force: « The draft law on the revision of the Constitution shall be deemed to be adopted if it is supported by at least two thirds of the total number of the members of the Parliament of Georgia. »

30. The procedure for amending the constitution is one of the most sensitive issues of any constitution. It is also a highly political issue that can only be determined in light of the history of the country and its political and legal culture.

31. The Venice Commission has devoted an extensive study to the process of revising the Constitution (CDL-AD(2010)001). It stressed that there is no "magic formula". The challenge is to balance the requirements of rigidity and flexibility. The report states, however, that "if there is not a "best model", then there is at least a fairly wide-spread model – which typically requires a certain qualified majority in parliament (most often 2/3), and then one or more additional obstacles – either multiple decisions in parliament (with a time delay), or additional decision by other actors (multiple players), most often in the form of ratification through referendum"².

32. The question arose as to whether the "new democracies" would tend towards a very rigid regime (to preserve the new democratic gains) or a more flexible regime (in order to adapt to rapid social changes). This question was also highly controversial. The Venice Commission noted, however, that " a majority of the new democracies chose a middle-of-the-road solution, usually with the requirement of a 2/3 parliamentary majority and a certain time delay, but without other very strict obstacles"³.

33. The report further states "When faced with the question of constitutional amendment procedures, the Venice Commission has several times expressed its concern over excessively rigid procedures and warned against the difficulty of constitutional reform. In other cases, the Commission has been confronted with the opposite challenge, that too frequent amendments of (or attempts to amend) the constitution negatively affect constitutional and political stability. (The Commission) has thus stressed that the constitution cannot "be amended in conjunction with every change in the political situation in the country or after a formation of a new parliamentary majority"⁴.

34. The report finally concludes.⁵ "It is neither possible nor desirable to try to formulate in the abstract a constitutional amendment optimal model. The point of balance between rigidity and flexibility may be different from one state to another, depending on the social and political context, constitutional culture, age, level of detail and the characteristics of the constitution, and number of other factors, especially as this balance is not static and can move over time according to social, economic and political transformations."

35. The fact that the Georgian constitution is revised on important issues - even including the revision procedure - modified recently (2010 and 2011) and that these recent amendments are repealed even before they came into force, suggests that the current amendment process, which would re-enter into force because of the repeal, may not be rigid enough for the harmonious development the state and the Georgian society, in the medium and long term.

36. This was already expressed by the Commission in its opinion CDL-AD(2010)028. This opinion concerned the 2010 reform which introduced the period of reflection of three months between the two votes on the constitutional amendment. The Commission considered the system of a single vote by 2/3 majority of the total number of MPs as insufficiently protective

² CDL-AD(2010)001 Report on constitutional amendments, § 62.

³ CDL-AD(2010)001 Report on constitutional amendments, § 67.

⁴ CDL-AD(2010)001 Report on constitutional amendments, § 106.

⁵ CDL-AD(2010)001 Report on constitutional amendments, § 107.

and considered the introduction of a double vote separated by a period of three months as "nevertheless a step forward, (...) probably the best option at this stage".⁶

37. The proposed amendment would be equivalent to a return to the pre-2010 system and calls for the same reservations.

38. Indeed there is, in this system, a period of one month before the text of the amendment is considered by the Parliament, but the second vote and the time that must separate these two votes are removed. Since there is only one vote, the revision may be adopted in a hurry and there is no counterweight by another chamber/house, representing other interests. It is true that, the President may make comments and send the text back to parliament, which introduces in itself a period of reflection, but it is only a possibility and moreover the majority to reject the president's remarks is the same as that required to pass the constitutional amendment.

39. This system seems to be leaning toward an excess of flexibility and is not sufficiently protective of the constitution.

40. The fact that the draft amendments of July 2013 modify amendments that have not yet even entered into force only illustrates and confirms this deficiency.

3. Amendment to Article 81 of the Constitution (question of confidence)

41. This amendment seeks to delete Article 81¹ as it was introduced by the revision of 2010, a text that would come into force "upon the oath taken by the newly elected President in October 2013".

42. The text proposed for deletion introduced into the law of the Georgian Constitution a mechanism similar to that of Article 49, paragraph 3 of the French Constitution. The Prime Minister may engage the responsibility of government on a text. In this case, the text is adopted without a formal vote, unless a motion of censure is passed by parliament⁷.

43. In its opinion CDL-AD(2010)028, the Venice Commission had considered the new mechanism (the repeal of which is now proposed) as "coherent with the mixed system of government". But it also noted that "[t]he parliament's refusal to declare its confidence in the government opens the procedure of constructive confidence provided in Article 81. In this context, the real margin of manoeuvre of the parliament, faced with the threat of dissolution, can therefore be questioned"

44. The repeal of the new Article 81¹ will give back greater freedom to Parliament in the adoption of legislation and is therefore welcome.

45. It is to be noted, however, that former Article 81¹ would be reinstated. According to this provision changing the composition of the government in the proportion of one-third, but not less than five members, equates the formation of a new government and requests the confidence of parliament. The President of Georgia shall submit the new composition of the

⁶ CDL-AD (2010) 028 Final opinion on the draft constitutional law on amendments and changes to the Constitution, §108 and 109.

⁷ It was, as in French law, a kind of fiction (Article 81-1 § 4 "A draft law shall be deemed adopted"-compare with Article 49, paragraph 3 of the French Constitution "In this case, the draft is considered adopted "). This mechanism could be considered the "masterpiece of rationalization of [parliamentarism]."J. Gicquel, *Droit constitutionnel et institutions politiques*, Montchrestien, Paris, 11^{ème} éd., 1991, p. 788. Note also that Article 49, paragraph 3 of the French Constitution was amended in 2008 and this mechanism is now limited to finance laws, laws on the funding of social security and one Bill by session.

Government to the Parliament for confidence. This might be problematic in case of successive changes of government, each remaining below the afore-mentioned limits, but which would exceed these limits if combined.

4. Amendment to Article 93 of the Constitution (approval of the state budget)

46. Point 2 of the Constitutional Law on introduction of changes to the Constitutional Law of Georgia "on introduction of changes and amendments to the Constitution of Georgia"

47. This amendment introduces a new § 4¹ in Article 93 as it results from the constitutional revision of 2010. This text provides that if the parliament is not able to adopt the budget within the two months of the fiscal year, this should be considered as a motion of non-confidence, motion subject to the procedure of §§ 2-5 of Article 81. Article 81 is one of the articles amended in 2010 (see appendix 2). The reform introduced the constructive vote of no confidence. The proceeding will be the following: Parliament will have to agree on the name of a candidate Prime Minister to submit to the President (with a majority of more than half of the members of parliament). The President will have 5 days to nominate or refuse to nominate the candidate; if the President nominates the candidate, confidence shall be voted to the new composition of the Government; if Parliament does not vote confidence, the President shall within three days dissolve parliament and call early elections.

48. This new paragraph might be intended to counterweight the suppression of the possibility for the prime Minister to raise the question of confidence in relation to a draft law (see above § 42). However, it should be noted that the new mechanism is automatic and not left to the discretion of the Prime Minister.

49. In its former opinion in 2010, the Venice Commission had noted: « the role of the parliament in budget matters is too limited. Indeed, only the government has legislative initiative in budget matters (Article 93 § 1), the parliament cannot change the draft budget (§ 3) and increased public spending, reduced revenues or additional financial obligations vis-à-vis the current budget need to be approved by the government (§ 6). It would seem appropriate that the parliament be more significantly involved in budget matters.»⁸

50. This new amendment put a greater pressure on the parliament and further reduces its leeway in budgetary matter. Indeed, unless the parliament agrees on the name of a new Prime Minister, the Parliament has to vote the budget if it does not want to cause dissolution and new elections.

51. Moreover, the starting point of the period may raise some questions. Budgets are intended to be voted before the start of the fiscal year. This is reflected in Article 93, § 2, which requires the government to table the proposed budget at least three months before the end of the fiscal year. Article 93 § 4 draws the logical consequence: "If the Parliament fails to approve the proposed budget within three months, the last year budget shall cover the expenses".

52. The new period of two months from the beginning of the fiscal year is therefore added to the three months, making a total of five months. From the beginning of the fiscal year, the regime of Article 93 § 4 applies: it is a system of provisional credits ("last year budget shall cover the expenses"). If the new period of two months is exceeded the same regime of provisional credit will continue to apply throughout the proceedings of the constructive vote of mistrust, and, if the motion fails, at least until the elections.

⁸ CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the Constitution, § 98.

53. To sum up, the new provision appears to significantly weaken the budgetary powers of parliament. Care should be taken to harmonise the new text with the other provisions of Article 93.

5. Amendment to Article 102 §3 of the Constitution of Georgia (Revision of the Constitution)

54. This Article of the Constitution had been amended twice (in 2010 and 2011). According to the new amendments, the new wording of Article 102 § 3 would be the current drafting. See analysis of Articles 68 § 4 and 102 § 3 supra § 15 to 40.

6. Amendment to the Constitutional Law on changes and amendments to the Constitution of Georgia (entry into force of certain provisions)

55. According to this amendment, "Paragraphs 11, 14, 16-21, 24-35, 39 and 44 of the Article 1 of this law shall be *enacted after the President elected as a result of the 2013 October Presidential Elections take oath*". The former draft referred to amendments "shall enter into force upon taking of the oath by the President elected through next 2013 October Presidential Elections"

56. The aim of the amendment is not completely clear. It seems to be a mere technical correction to correctly identify the entry into force of the constitutional law of 2010 « On Introduction of Changes and Amendments to the Constitution of Georgia ».

IV. Conclusion

57. In its last opinion the Venice Commission concluded that "it would be desirable to further strengthen the power of the Parliament". The reform underway is ambiguous in this respect. On the one hand, it will give back greater freedom to Parliament in the adoption of legislation (with the repeal of Article 81¹ in its 2011 version) and, on the other hand, further weaken the budgetary powers of parliament (new wording of Article 93).

58. As concerns the procedure for revising the constitution, the reinstatement of the current procedure - one vote at 2/3 majority of the total number of MPs - cannot be considered satisfactory. When analysing the 2010 revision of this procedure, which introduced two votes at three months of interval at the same majority, the Venice Commission welcomed the reform and noted that it provided a limited protection of constitutional stability. The removal of the two subsequent votes without any measure to compensate but combined with a return to the 2/3 majority requirement can only be considered as a step back. An appropriate balance must be found between flexibility and constitutional stability. In this respect, the Venice Commission refers to its previous opinions on the draft constitution of Georgia as well as to its Report on constitutional amendment (CDL-AD(2010)001).

59. The Venice Commission remains at the disposal of the Georgian authorities for further assistance.