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COMMENTS ON THE
DRAFT LAW OF GEORGIA ON THE AMENDMENTS
TO THE CONSTITUTION OF GEORGIA

by

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OPINION ON THE DRAFT LAW OF GEORGIA ON THE AMENDMENTS TO THE CONSTITUTION OF GEORGIA

1. The Venice Commission was required to give an opinion on a draft constitutional law of Georgia aimed at amending the Georgian constitution. The most important proposed amendments regard the presidential power of dissolving the parliament, the appointment and the taking office of the Cabinet (id. est, the Government), the establishment of a confidence relation between this body and the Parliament and the withdrawing of the confidence of the Parliament from the Cabinet.

2. The purpose of the draft is apparently the strengthening of the position of the Cabinet in its relations with the President. The system presently in force is supposed to be leaning towards emphasizing the role of the Head of the State and restricting the cooperation between the Cabinet and the Parliament. The current system does not guarantee the transparency of the ways in which these two State's bodies behave towards each other and deal with each other. It was frequently defined bureaucratic and not fitted for the implementation of the principle of a democratic government. To the commentators the executive branch of the State looks fragmented and unable to function according to the exigencies of coherence and consistency, even if until to-day the President has been presenting himself as the Head of the government and pretending to be able of insuring the cohesion of the State's executive power.

3. The main idea underpinning the draft is that a solution can be found in the frame of the cabinet system of government, which implies a strong collective executive body placed under the chairmanship of a Prime Minister and connected by strong links to the Parliament through the approval of the Cabinet's program by the MPs. The collective leadership of the Cabinet should not substitute its collective responsibility for the personal leadership and responsibility of the President, but could counterbalance them and strengthen the powers of control and direction of the Parliament. The role of the political parties will be increased through the machinery of the representative democracy while the direct election of the President by the people will keep alive the possibility of the electorate of concurring as a whole to the elaboration of the main political guidelines of the country.

4. If we start our analysis from the presidential power of dissolving the Parliament, we immediately realise that the Head of the State is allowed to dissolve the Parliament only in the cases provided for in an explicit, detailed and exact way by the constitutional rules (new art.73. 1 il.). That is, he has the power of adopting the measure of the dissolution:

- when the Parliament denies its consent the appointment of the proposed Prime Minister three times: while dissolving the Parliament, the President may appoint the Prime Minister without the Parliament consent and call new parliamentary elections (new art. 80.5);

- when the Parliament withdraws the confidence to the Cabinet on the initiative of MPs, or denies the confidence to the Cabinet when the Prime Minister raises the matter of confidence: in both these cases the President may dismiss the Cabinet or dissolve the Parliament (new art. 81.1);

- when the Parliament does not approve the national budget before a new fiscal year, the President may dissolve the Parliament, while approving the budget " by a decree equal to law" (new art. 93. 4).

5. It is evident that the President is not allowed to dissolve freely the Parliament: he may only react to a decision of the Parliament to the confidence relation between the Parliament itself and the Cabinet. Providing for such a possible presidential reaction, the draft of the constitutional law can implicitly suggest to the Parliament a more prudent behaviour that is avoiding a frequent adoption of votes of no confidence. Threatening dissolution, the Head of the State has the possibility of pushing for a solution of conflicts between the other branches of the State without recourse to a formal crisis of Cabinet.

6. On the other side, when the mentioned provisions allow the President not to provide for and to postpone the dissolution, they put the President in the position of the guarantor of the continuity and the stability of the Cabinet against possible and harmful initiatives of the Parliament. As a matter of fact, the Cabinet should be able to keep surviving and working behind the shield of the authority of the President; it will be able to adopt the acts and measures, which it is allowed to adopt with the cooperation of the President and without the support of the Parliament. But it is difficult envisaging a smooth functioning of institutions of the State, when the Parliament is in the position of refusing its consent to the legislative initiatives of the executive power.

7. The described provisions of the draft could certainly help the President by providing him suitable conditions for choosing the convenient time for dissolving the Parliament and calling new elections. But obviously the President (and the Cabinet) will be able to get such a result only if they deal efficiently with the political, social and economic difficulties without the support of the Parliament and comply with the demands of the people. But may we define acceptable a solution which prolongs the life of a Cabinet which is distasteful to the Parliament?

8. When the draft provides for the exercise of the presidential power of dissolving the Parliament only in presence of clearly defined situations and - in any case only as a reaction to a move of the Parliament directly affecting the relations between the Parliament itself and the Cabinet, the draft apparently inhibits the President from dissolving the Parliament by its own choice and initiative. This solution is obviously justified by the idea that the existence of a functioning Parliament is considered an essential feature of a constitutional system and it has specially to be able to legislate and control the executive power.

9. Therefore the President is not apparently allowed to stop the development of a parliamentary policy, which he does not approve. We could argue that, without a previous initiative of the Parliament, the President has not the power of calling new elections asking to the people to make a choice between the guidelines of his own policy and the policy adopted by the majority in the Parliament. As a matter of fact, the President is not allowed to interrupt the fruitful cooperation between the Cabinet and the Parliament through the dissolution of the elected assembly. Moreover the new art 75. 3 entrusts the President with the power of repealing acts adopted by the Cabinet only “ if such acts contravene the Constitution of Georgia, international agreements, legislative and normative acts issued by the President ”; political disagreement should not allow the presidential repeal of an act of the Cabinet.

10. But the rules dealing with the appointment of the Cabinet don't allow the Parliament to vote the confidence in a Cabinet, which is not supported by a previous nomination made by the President. Therefore it is very difficult that conflicts can soon arise between the Head of the State and a Cabinet, which was appointed on the basis of a presidential initiative. We can only envisage the possibility of conflicts between these two bodies of the State if and when

the Cabinet has been in office since a period of time and has had the chance of establishing cooperation with the Parliament bypassing its own previous dependence on the President.

11. On the other side, we have to keep in mind that, even after the adoption of the new art. 78.1 according to which " the Government of Georgia shall exercise executive power", the President will still be the head of the executive (art 69). And, even if " only the Government of Georgia may introduce to the Parliament a draft national budget, after having agreed its essential details and directions with parliamentary committees", in any case it has to obtain the consent of the President (new articles 73. 1 e and 93. 1). Furthermore only " the President shall approve the national budget by a decree equal to a law" if the Parliament fails to adopt the national budget before a new fiscal year" (new art. 93. 4). It is quite impossible for a Cabinet staying fruitfully in power without the support of the President.

12. Therefore allowing the President to dismiss the Cabinet and remove its members (new art. 73 1. r.) is coherent with the aspects of the Georgian system of government, which should be provided for by the amended Constitution. It is also coherent with the rule of the new art. 79. 2, which provides for the accountability of the Prime Minister before both the President and the Parliament. The removal of the Cabinet is supposed to be the result of a free choice of the President, who is allowed to open freely a Cabinet crisis even if the Prime Minister and the Ministers are supported by the confidence of the Parliament. The president has the means of solving directly his conflicts with the Cabinet.

13. This mentioned rule is the new version of art. 73. 1 c presently in force, which authorises the President to remove the ministers. It takes into account the fact that the reform is aimed at establishing the Cabinet as an autonomous State body chaired by a Prime Minister separately appointed by the President " with the Parliament's consent (the other members of the Cabinet are also appointed by the President, but " by the Prime Minister's nomination " - new art. 73 1 b). Apparently, from the legal point of view, the Cabinet is independent of the President: it can meet without the presence of the President, under the chairmanship of the Prime Minister and is allowed to exercise, in many cases, its own functions independently from the Head of the State and to adopt decrees and orders which " shall be signed by the Prime Minister " (new art. 78. 3 and 5). However, from the political point of view, the Cabinet needs the support of the President.

14. It should be kept in mind that the Parliament is not able to resist pressure exerted on it by the President when he dismisses the Cabinet. The Parliament may deny three times its consent to the appointment of the Prime Minister nominated by the President but, if this is the case, "the President may appoint the Prime Minister without the Parliament's consent" and dissolve the Parliament (new art. 80. 5). This provision allows the Head of the State to call new elections and ask to the people to choose between his own political line and the policy supported by the Parliament, or by its majority. There is not a constitutional provision or a rule included in the draft, which allows the Parliament to take a similar initiative: according to art. 73 it has the power " to relieve the President of his duties" only a) " for violation of the Constitution if this is confirmed by the Constitutional Court " and b) "on high treason, or other capital crimes by the Supreme court ". Instead the Parliament cannot solve a political conflict both dismissing the Head of the State and calling new elections.

15. If we try to summarize the results of our analysis, we have first of all to underline that the purpose of the strengthening of the position of the Cabinet in the Georgian system of government is only partially fulfilled by the draft submitted to the Venice Commission. The new provisions will certainly help the Cabinet in dealing fruitfully with the exercise of the

executive power, and especially of the functions listed in the new art. 78.5. The executive body will be able to work independently of the President as far as it keeps in the frame of the guidelines of the presidential policy. But it will have a great deal of difficulties if a political conflict with the President arises, and the Head of the State will be able to say the last word dismissing the Cabinet and dissolving the Parliament. On the other side, in case of conflict between the Cabinet and the Parliament, the Cabinet will be able to keep working behind the shield of the presidential authority and profiting from the exercise of the presidential functions which implies both the adoption of the national budget by decree and the issue (at least in the case of a state of emergency) of decrees with the power of law which have to be submitted to the Parliament only "when it gathers", and not within a fixed deadline (art. 73. 1 g). Apparently the presidential authority is given more relevance than to that of the other bodies of the State, and even to the exigency of having a functioning parliamentary control and legislation.

16. A clear evaluation of the draft cannot be offered from the legal point of view only. One needs to look at the possible functioning of the new rules from the perspective of the political analysis. The results, which can be obtained from their implementation, can be very different according to the different political situations in which it will take place and to the number, dimensions and popular support of the political parties and their mutual relations. If the President, the Cabinet and - at least - the majority of the Parliament are expression of the same political positions, the possibility of an efficient functioning of the Georgian government will be high, while in the case of conflicts between these bodies of the State, the smoothness of the activity of the government will be put in danger. In any case, the power of finding a way for solving political conflicts and settling political differences stays with the Head of the State who keeps to be, not only from a formal point of view, the most relevant and powerful authority of the Georgian Republic.