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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON PROPOSAL FOR A CONSTITUTIONAL LAW
ON CHANGES AND AMENDMENTS
TO THE CONSTITUTION
OF GEORGIA**

by

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Introductory remarks

a) The proposed text, as submitted to the Venice Commission by the Georgian Ministry of Justice, does not include an Explanatory Memorandum. It would, however, be very helpful, if such a Memorandum would be prepared to indicate the rationale and background of some of the proposals, especially in comparison with the present text of the relevant provisions of the Constitution.

b) The proposed text of Chapter 2 no longer puts the provisions concerning citizenship at the beginning. This has the advantage that the impression would be avoided that citizenship is a precondition of the enjoyment and protection of fundamental rights and freedoms. Indeed, everybody under the jurisdiction of a State is entitled to the fundamental rights and freedoms laid down in international treaties to which that State is a party (Article 1 of the European Convention on Human Rights; hereafter: ECHR); the same has to apply to the rights and freedoms laid down in the Constitution. Restrictions to citizens are allowed for those fundamental rights only that are commonly reserved for citizens, especially certain political rights.

This starting point is duly reflected in the formulation of these rights and freedoms in the present Constitution (“Every human being”) be it with some important, and in the opinion of the Venice Commission unjustified, exceptions: the assistance for unemployed people to find a job (Article 32), and the rights of members of national minorities (Article 38).

The same is reflected in the proposed text, but without the just-mentioned exceptions, and with the express prohibition of discrimination of foreign citizens and stateless persons in paragraph 4 of Article 15.

Article 12

The second paragraph of Article 12 states that the State provides necessary guarantees for the enjoyment and protection of fundamental rights and freedoms of each person. Strictly speaking, this provision is superfluous next to the first paragraph where it is stated that the State recognizes and protects human rights and freedoms. The second paragraph would contain an important addition, if “guarantees” was specified as “effective remedies”. In that way it would give implementation to Article 13 of the ECHR.

The third paragraph provides that the provisions of the Constitution have to be interpreted in conformity with universally recognized rights and freedoms. This provision does not provide sufficient clarity as to the status of international human-rights treaties and other internationally recognized human rights within the domestic legal order. Do they have the same status as the Constitution or do they rank higher? Are they directly applicable within the legal order of Georgia? These issues need further clarification.

The provision of the fifth paragraph is not clear. What is meant by “persecution”? It may be presumed that the translation should read: “prosecution”. The provision also would seem to have been formulated in too absolute a way. Most fundamental rights and freedoms are not of an absolute character but may be restricted in certain respects. If a person transgresses these restrictions, for instance by killing another person or setting fire to a building in the name of freedom of religion or freedom of expression, he or she may of course be prosecuted. The wording should make it more clear that the “enjoyment” refers to enjoyment within the limits as provided for in the Constitution and international treaties.

Article 13

The first paragraph refers to the rules prescribed by the Constitution. In view of the obligations of Georgia under international human-rights treaties, this reference is sufficient only if and in so far as these rules are in conformity with those international treaties in that they do not provide for further-going limitations. The other paragraphs of Article 13 do indeed reflect important elements of those international guarantees, while the specific grounds of limitation are listed in the articles dealing with the separate rights and freedoms. It, consequently, depends on the formulation of the latter articles whether the Constitution is in conformity with Georgia's international obligations in this respect. However, it would be preferable that Article 13 expressly provides that the limitations allowed under the Constitution may not be construed broader than provided for in international treaties to which Georgia is a party.

It may be assumed that the first sentence of paragraph 2 in the English translation should be deleted.

Article 14

The words "in consideration of" in the English translation should rather read: "in conformity with", indicating that international human-rights treaties to which Georgia is a party, and their interpretation by the competent treaty bodies, are binding upon Georgia and its legislative, executive and judicial bodies.

Article 15

In the first paragraph "birth" as a ground of discrimination, which figures in Article 14 of the ECHR, is missing. This ground may be important, for instance, for the prohibition of unequal treatment of children born outside the bond of marriage.

Although not listed in Article 14 of the ECHR, nor in Additional Protocol No. 12, it is more and more common to also include among the grounds of discrimination "sexual orientation". "Origin" should read: "national or social origin"

Article 16

The words "any action" in the first paragraph, under b) should read: "any arbitrary action" to bring it in conformity with the provision under c) and with the second paragraph. Indeed, an action that causes severe physical or mental pain or suffering may be necessary and justified, for instance, in the framework of medical treatment, or in the framework of action by the police or the military to prevent serious crimes or protect lives.

In the first paragraph, under c) "informed consent" should be specified to make clear that the consent of a third person may substitute for that of the person concerned in certain situations.

In the first paragraph under e) the reference to "tribunal" may bring Georgia in conflict with its obligations as a member of the United Nations, and in particular with binding decisions of the Security Council.

Article 17

The notion of “administrative rights” in paragraphs 2 and 3 is not clear in itself. There should be a reference to Article 24.

It would not seem to be advisable to regulate the burden of proof in the Constitution. This should rather be left to the judiciary in the framework of judicial review. Moreover, it is not clear why these “general” guarantees apply only in respect of the “civil liberties” listed in Article 17.

Article 18

The words “without any obstacles” in the second paragraph are in contradiction with the first paragraph of Article 17, which lists several permitted “obstacles”.

The wording of the third paragraph is not clear. What is meant by “the obligation that is directed towards the rights recognized in the first and second paragraph”? If the “obligation” refers to the obligation to attend any meeting or religious service, such obligation would be justified in very special situations only, and the guarantees provided under a) and b) would be insufficient.

Article 19

The first paragraph, under c, guarantees, *inter alia*, the right to *receive* information and ideas. It should be clarified, at least in an Explanatory Memorandum, whether, and if so to what extent and under what conditions, this right implies a positive obligation on the part of the public authorities, to *provide* information if requested, in the broader context of transparency of government.

The first paragraph, under j, contains the right to speak any language and use any alphabet. It is not clear from that provision whether, and if so to what extent and under what conditions, this right implies the right to use a foreign language for public purposes, *e.g.* in a court room or at a town hall. This would seem the more important since Article 45, dealing with the rights of minorities, in its second paragraph also does not contain a right to use the minorities’ language for other public purposes than local court hearings.

In the fourth paragraph the words “for the protection of other rights and freedoms” should read in the English translation: “for the protection of the rights and freedoms of others”.

Article 20

The relation between the second and the third paragraph is not clearly stated. It should be clarified that the Organic Law, referred to in the third paragraph, may regulate freedom of assembly only under the conditions mentioned in the second paragraph.

Article 21

Here again, the relation between the second and the third paragraph is not clearly stated. The Organic Law referred to in the third paragraph may not restrict the freedom of association of political officials without any limits, but has to remain within the limits mentioned in the second paragraph.

Article 22

The words “Abolition of the universal right to property” need some further clarification.

Article 23

The first paragraph speaks about State governance only, and not about regional and local governance. Article 45, which deals with the rights of minorities, in its third paragraph, speaks of representation “in governmental organs” without specifying whether this includes organs at the national as well as at the regional and local levels.

In the fourth paragraph, the right to “fair taxing and involvement in budgeting” is restricted to “citizens”. The ratio of this restriction is not clear and does not seem justified.

Article 24

The words “without any obstacle” in the third paragraph under a) would seem to be too absolute, unless the drafters intend to establish an *actio popularis*. In general, the right to appeal, to an administrative body or to a court, may be restricted by certain procedural requirements, provided that they do not affect the right of appeal in its essence and are proportional.

Article 25

In the first paragraph, the words “competition of parties” in the English translation are not clear. It is assumed that a reference to the adversarial character of the proceedings is meant.

In the second paragraph there is reference to the right to “have his/her injured rights redressed”. However, *restitutio in integrum* is not possible in all cases. It is suggested that the words “if possible in practice” be added.

The meaning and scope of the fourth paragraph are not clear. The wording seems to have been derived from human-rights provisions concerning deprivation of liberty and criminal charges. If that is the intention of “restriction of rights and freedoms”, it should be expressly stated.

The wording of the eighth paragraph, under b), seems to establish the possibility of “class action” and *actio popularis* on the whole line. It is assumed that the words “in the events and according to the rules prescribed by law” are intended to allow for the introduction of certain restrictions. In that case it is recommended that these words are placed after “may include”, since the injured person him/herself should always have access to court or - outside the context of a civil right or obligation, or a criminal charge - to another effective remedy.

Article 26

The right of access to data, included in the fourth paragraph, may also include, under certain conditions, the right of access to data of other persons that are of direct interest to the person requesting access, e.g., data concerning the natural parent (donor of sperm) or DNA-data concerning a person accused of a sexual crime.

The seventh paragraph should also include “the protection of the privacy of others” as a ground of limitation.

Article 27

In the first paragraph, the words “reasonable assumption” should be supplemented by “of having committed a serious crime”.

The provision of the fourth paragraph does not seem very realistic, unless it opens the possibility of some delay in particular circumstances.

Article 28

The words “except for those established by law” in the first paragraph are too general. The provision should contain the limits within which the law may restrict the rights and freedoms of prisoners.

To the sixth paragraph the words “or will commit another crime” should be added.

Paragraphs 8-10 would seem to require a provision that the periods mentioned there may be extended by court decision in exceptional cases. Indeed, a suspect of a very serious crime should not be released pending trial, if there is serious reason to believe that he/she may commit another crime.

Article 29

“Persecution” in the English translation should read “prosecution”.

Although the third paragraph provides for an extension, there should be a possibility for a further extension for very complicated cases. In cases with several suspects and/or with several foreign connections even 5 months may not be realistic.

The reference to “international law” in the sixth paragraph should be to “general principles of international law” or “general principles of law recognized by civilised nations” in accordance with the second paragraph of Article 7 of the ECHR.

Article 30

The words “fellow citizens” do not take into consideration that the defendant may be a non-citizen, in which case the members of the jury are not fellow citizens.

Article 31

The second sentence of the second paragraph is not clear, at least not in the English translation. Which “normative acts” are meant?

The right of the fifth paragraph not to give evidence that may be used against a friend would seem to be too broad, especially given the undefined character and scope of the notion of “friend”.

The sixth paragraph deals with equal rights only. This leaves open the question of whether there is an unlimited right to summon and question witnesses, or whether that is up to the court to decide in the interest of the administration of justice.

Article 32

As is the case for the first paragraph of Article 2 in relation to detainees and prisoners, the fourth paragraph of Article 32 should indicate within which limits the rights and freedoms of convicted persons may be restricted.

Article 33

The third paragraph is not in conformity with what is common in criminal law: the appeal proceedings are to be regarded as a retrial, and consequently may lead to a more severe punishment, provided that good reasons are given by the appellate court.

Article 34

In the first paragraph the words “regardless of their location” seem to imply that citizens are also protected when they are outside of the country. If this is meant, the words “according to international law” should be added, because Georgia has to respect the sovereignty of the host state.

Article 35

The words “and based on court decision” raise the question of whether this may also be a decision by the international tribunal concerned. After all, Georgia may be internationally obliged to transfer a citizen to the tribunal if the latter so decides, and a domestic court should not be given jurisdiction to decide that the order of the international tribunal does not have to be followed.

Article 36

As is the case in the first paragraph, the second paragraph should also refer to the norms of international law in addition to domestic law.

Article 37

The word “couple” is not clear. It may refer to two persons of different sex, but also to two persons of the same sex. If the latter is not intended, that should be reflected in the wording.

Article 39

It is not clear from the first paragraph, under a), why education in foreign languages other than the native language of the person concerned, is worth mentioning as an element of the fundamental right to education any more than *e.g.* mathematics.

From the wording of the second and fifth paragraph it is not clear whether free choice of an educational institution includes the right to ensure education in conformity with the parents’

religious and philosophical conviction, as guaranteed in Article 2 of the First Protocol to the ECHR.

Article 41

It is not clear what is meant by “preventive medicine” in the second paragraph. The concept should be brought to reasonable proportions, for instance by specifying it as immunization against dangerous diseases.

Article 44

It is not clear why the right of participation in the cultural life, mentioned in the second paragraph, and the obligation to protect and preserve the cultural heritage, referred to in the third paragraph, are restricted to “citizens”. Even if the purpose would be to distinguish in relation to Article 45, which deals with rights of minorities, the restriction would not be justified, since there are non-citizens who do not belong to a national minority.

Article 45

The second paragraph should clarify whether members of national minorities have a right of access to the public media to a proportional degree and without costs.

The third paragraph deals with public representation of minorities but does not contain any provision about their right to vote and to proportional representation. The right to use the minorities’ language is restricted to administration of justice at local level. It is not clear why the same right should not apply to other public occasions at local level. That right is also not included in the right, mentioned in the fourth paragraph, to publicly preserve their identity and use their own symbols.

Article 46

The enumeration of the third paragraph, under b), should also contain Article 33 (*ne bis in idem*), and elements of Article 45 (equality of the law, and prohibition of forceful assimilation).

Article 47

If in the second paragraph, under b), “any location” includes private homes, the right to enter should require court permission.

In the twelfth paragraph the meaning of “bureaus of parliamentary chambers”, and why they should have the right to address the Supreme Court, is not clear.

Articles 54, 63 and 65

It is not clear why it is proposed to transfer the functions and powers of the Constitutional Court to the Supreme Court.

Article 82

The third paragraph should state as a starting point that court hearings shall be public (see Article 84, paragraph 1).

The fourth paragraph should also regulate to what extent courts may or must apply international treaties that bind Georgia, and general principles of international law, and to what extent judicial review includes review for conformity with these norms of international law.

The fifth paragraph should also specify the requirement of impartiality.

Article 83

The third paragraph should also provide that the Supreme Council of Justice shall ensure impartiality.

The appointment or election of the Supreme Council of Justice should be regulated in the fourth or fifth paragraph.

Article 84

The grounds for a decision to hold hearings *in camera* should be listed in the first paragraph.

The words “competition of the parties” in the second paragraph are not correct for criminal and administrative proceedings. A more appropriate notion in the English translation would be “with an adversarial character”.

The fifth paragraph should provide by whom the Court Marshal is appointed.

Article 85

The notion of “pedagogical activities” as an exception is not very clear and would seem to be too restrictive, especially in the case of part-time judges. It would be advisable to use a formula that guarantees that the occupation or activities may not prejudice the independence and impartiality of the judge.

The third paragraph should specify the “term” of the chairman.

It would seem preferable, from the point of view of independence, to provide that full-time judges are appointed for life time.

Paragraphs 7-9 should specify by whom a judge may be dismissed or suspended. If the reference to Article 64 indicates that this is the power of (the majority of) Parliament, it is submitted that this would place the judiciary under political control. It would seem advisable to empower the Supreme Court to decide on dismissal or suspension, and only subject the President of the Supreme Court to the procedure of impeachment in the cases provided for in the present Article 64.

Article 86

It is not clear why in the proposed amendment constitutional review is no longer put in the hands of a Constitutional Court, contrary to what has become the trend in more and more countries.

The seventh paragraph should specify what are the consequences of revision of a *res judicata* for the parties in the case.

The advisory power of the Supreme Court on draft legislation may create problems as to the impartiality of the Supreme Court in cases where it has to interpret and apply legal provisions on which it has given a previous opinion (The *Procola* judgment of the European Court of Human Rights).

Article 87

The second paragraph should specify whether the President is bound by the nomination. The same holds good for the fourth paragraph of Article 88 and Article 89.

The third paragraph does not fit very well into Article 87. It should rather have its place in Article 86.

Article 90

The fourth paragraph should indicate by whom the members of the Magistrates' Courts are appointed, and on whose nomination.

Article 91

It is not clear why deletion of this provision is proposed.

Article 103

The proposed second paragraph should also contain a reference to international human-rights treaties to which Georgia is a party.

Article 15

Suspension of statutory limitations with retroactive effect, as proposed in the fifth paragraph, violates the principles of legal certainty and justified expectations.

Concluding observations

* The proposed amendments are, on the whole, in conformity with European standards of democracy, the rule of law and protection of human rights. In some respects, they go beyond the rights and freedoms traditionally guaranteed in the Constitution by also including very detailed social, cultural and collective rights.

* A general critical comment to be made is that the draft goes too much in detail in regulating some of the rights and freedoms, and some of the state organs, by including elements that

usually will be regulated in (organic) laws, and that the ratio of several of the proposals need explanation in an explanatory memorandum.

* More specific points of criticism, or at least attention are:

- a) lack of clarity as to the status of international law in general, and international human-rights treaties in particular, within the domestic legal order;
- b) regulation of the restriction of rights and freedoms is not sufficiently specific at some places, *e.g.* where the limitation of certain rights (freedom of assembly; freedom of association) or for certain groups (prisoners; convicted persons) is left to the organic or ordinary law without specifying in the Constitution the criteria to be applied;
- c) the international obligations for Georgia with respect to international tribunals are not fully taken into account;
- d) the right of members of national minorities to use their own language under certain conditions and at specific public occasions is not expressly regulated apart from the instance of local court hearings;
- e) the right of members of national minorities to participate in national, regional and local government is not clearly regulated, nor is their right to proportional representation in elected bodies and their right to vote and to be elected;
- f) the right of access to the public media of national minorities is not regulated in a sufficiently specific way;
- g) the right to obtain information from public authorities concerning public policy is not expressly regulated;
- h) the right to education is not clear as to its scope, especially not as far as the right of parent is concerned to choose, and if need be, establish educational institutions in conformity with their religious or philosophical conviction;
- i) the distinction between independence and impartiality of the judiciary is not always made.