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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

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

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COMMENTS OF THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF GEORGIA

1. The Venice Commission has been asked to give an opinion on certain proposed amendments to the Constitution of Georgia.
2. The scope of the amendments is as follows: -
 - (i) Chapter Two of the Constitution, which deals with human rights and fundamental freedoms is to be repealed and replaced with a new charter of rights and freedoms.
 - (ii) There are a number of changes being made to the institutions and structures of government and the judiciary including:
 - (a) Changes to the composition of Parliament and its method of election.
 - (b) The abolition of the Constitutional Court and the conferring of the powers to interpret the Constitution and exercise powers of judicial review on the Supreme Court.
 - (c) The rewriting and re-formulation of Chapter Five of the Constitution dealing with the courts and the judiciary.
 - (d) The removal of references to the Procurator's Office from the Constitution (and presumably the re-formulation of the powers of this office).
 - (e) The creation of a new office of Ombudsperson (this is contained in Chapter Two dealing with human rights and fundamental freedoms).

I propose to deal with each of these matters in turn.

3. There does not appear to be any explanatory memorandum accompanying the draft Constitutional Law so the thinking behind the text is not always clear. I have not been provided with any information as to the reasoning behind the proposed institutional changes.

I. CHARTER OF RIGHTS AND FREEDOMS

4. Article 1 of the Amending Law proposes to insert a new Charter of Rights and Freedoms in the Constitution. The proposed new Charter of Rights and Freedoms is a substantial document running to some 36 articles which sets out a comprehensive range of rights and freedoms together with provisions setting out how these rights may be restricted under certain circumstances. The Charter is, generally speaking, drafted in a coherent and logical manner, beginning with provisions relating to general guarantees of rights and

freedoms, followed by a clause setting out the general grounds and circumstances under which rights and freedoms may be restricted, then establishing the principle that the rights and freedoms are to be interpreted in a manner which would promote democratic values and pay regard to the European Convention and the case law of the European Court of Human Rights, and proceeding from there to separate articles dealing with individual civil and political rights and concluding with articles relating to social and economic rights and the creation of the office of ombudsperson. I address a number of specific comments and concerns below.

5. **Article 12: General guarantees of rights and freedoms.** Rights and freedoms are recognised and protected as “eternal and supreme human values”. Paragraph 4 of Article 12 expressly recognises “other universally accepted rights, freedoms and guarantees that are not referred to in here, but can be implied from the constitution and universally accepted general principles of law”. This provision could be a powerful tool for the development of further rights if the courts of Georgia chose to do so. The disadvantage of such a system of implied rights is that it may tend in the long run to establish power with the judiciary and diminish the authority of the elected institutions of state.
6. **Article 13: General grounds and rule for the restriction of rights and freedoms.** The present draft seems to be somewhat contradictory in that paragraph 1 sets out a general rule whereby fundamental rights and freedoms may be restricted only in the events and according to the rules prescribed by the Constitution, in compliance with law, through proper and fair procedures, and only if all requirements provided in the Article are fulfilled. However, paragraph 2 goes on to say that no fundamental right and freedom shall be restricted which seems contradict to paragraph 1. Paragraph 3 goes on to provide a rule whereby fundamental rights and freedoms may be restricted only if “critically necessary for the existence of democratic society” and if the restriction directly contributes to the realisation of legitimate goals prescribed by the Constitution. In addition it provides for a test of proportionality. Subject to clarifying the apparent contradictions in the article the criteria proposed appear to be on the whole appropriate ones. However, it would be preferable in the writer’s opinion to use the language of the European Convention on Human Rights in drafting clauses permitting rights to be restricted: see paragraph 10 below. There is a further restriction clause in Article 43 and there are other restriction provisions in various articles.
7. **Article 14: Interpretation of rights and freedoms.** This Article imposes a requirement to interpret fundamental rights and freedoms in a manner which would promote the values of the open, free and democratic society, in consideration of the European Human Rights Convention and the case law of the Court of Human Rights, as well as other universally recognised norms and precedents. The precise meaning of “in consideration of” is not clear. If it means “taking account of” the Article could provide a basis to ensure that the constitutional jurisprudence of Georgia is in line with the case-law of the Court of Human Rights.
8. **Article 15: Rights to Equality.** The list of prohibited grounds of discrimination includes most of the usual grounds one would find listed in equality clauses with the exception of birth, age and sexual orientation. However, there is a general prohibition of discrimination on grounds of “any other status”. The Article appears to be addressed to the state only and does not appear to outlaw discrimination by private individuals or institutions. The Article applies to discrimination against artificial or legal persons to the extent that the nature of

such persons permit. Rights are extended to foreign citizens and stateless persons except to the extent that it is provided otherwise in the Constitution. The Article does not appear to address the question of positive discrimination.

9. **Article 16: Rights to life, dignity and personal inviolability.** The Article provides that these rights are inalienable and that this primarily implies a number of other matters including prohibition of capital punishment, freedom from torture and cruel, inhuman or degrading treatment or punishment, as well as corporal punishment, the right not to be an object of medical and scientific experiments, the right to medical service based on free choice and informed consent, the right to urgent medical assistance, freedom from slavery, forced labour and prohibition of human trafficking, and a prohibition of extradition or transfer to a place where any of these rights and freedoms would be threatened. The content of this provision is clear although it is perhaps a little unusual to find all of these particular rights combined in a single provision. Article 16 contains two exception clauses which deal with the application of “lawful, urgent necessity, precisely targeted and proportional force” and also provide that military, civil service or the serving of a sentence or the performance of public service works during martial law or a state of emergency are not to be considered forced labour”. Presumably these exception clauses are to be read in conjunction with Article 13 of the draft.
10. **Article 17: General guarantees of civil liberties.** The Article begins by stating that freedom of belief, faith, conscience, ideology, expression, assembly and association may be limited in certain circumstances. The particular freedoms themselves are dealt with in the subsequent four articles. The drafting of this provision could be improved. It would be more appropriate that one would first state the content of these particular freedoms and then subsequently deal with the circumstances in which they may be limited. It is not clear what exactly paragraph 1 of Article 17 means. Perhaps there is a translation difficulty. The Article refers to “neutral limitations” on the place, time and form of expression, which is not however to affect “the content of information or ideas, or the effect of the expression” and which is to leave realistic chances for their expression in an alternative way. Presumably what is intended to be covered is matters such as the banning of a meeting in a particular place where alternative arrangements may be made. However, it is difficult to understand how such a concept can apply to regulation of freedom of belief, faith or conscience. The Article contains a clause putting the onus of proof on those who seek to limit the rights and freedoms in question and this seems appropriate. However, on the whole the ideas set forward in this article would be better expressed as appropriate limitations to the substantive articles dealing with the freedoms themselves and it would be desirable to express those limitations the same terms as are found in the limitation provisions in the European Convention where there is a substantial case law on how these limitations are to be interpreted. Rather than re-writing a new provision in the manner proposed why not stick to the well tried and tested provisions which, for example, refer to “such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”?
11. **Article 18: Freedom of belief, faith, conscience and ideology.** The first two paragraphs of this Article seem to provide a comprehensive protection for freedom of belief and freedom to express belief. The third paragraph refers to the “right to contradict morality”. The present writer does not understand what is meant by this. Paragraph 4 of the Article

provides for a further restriction clause. Again, the reason for having different restriction clauses contained in different places is not apparent.

12. **Article 19: Freedom of expression.** Freedom of expression is guaranteed and the Article goes on to provide that this implies a number of things. The first of these is freedom from being forced to express an opinion. It seems odd to state this before stating the positive freedom to express an opinion. However, the content of the provisions seems to be comprehensive. It may be noted that the right of a journalist to protect the secrecy of information is guaranteed. The Article includes among the implications of freedom of expression the “right to charity. It is not clear to the writer what is meant by this. Paragraph 2 guarantees editorial independence of media. The paragraph goes on to provide that “government shall promote development of media pluralism”. On the face of it this seems to be unexceptional but is there perhaps a danger that it could be used to justify government interference with the media? Similarly, Article 3 provides that government is to guarantee public broadcasting free from political and commercial influence, but could such a provision be used to suppress political debate rather than to ensure that it is carried out in a fair and impartial manner? Again, the Article contains a restriction clause in paragraph 4.
13. **Article 20: Freedom of assembly.** Freedom of assembly is to be allowed without any prior permission except where an assembly is to be held in a place of public and transport movement. There is a restriction on freedom of assembly for members of the armed forces, police and security services but only circumstances prescribed by organic law. Again the Article provides for a number of restrictions.
14. **Article 21: Freedom of association.** The provisions appear to the writer to be appropriate. Again there is a restriction clause and the same comments as previously made apply.
15. **Article 22: The right to property.** The right to property and inheritance is guaranteed as is the right to purchase, possess and dispose of property. Restrictions may be introduced for purposes of public necessity but only in exchange for fair market value compensation and only in circumstances defined by organic law. It may be noted that the obligation to pay market value compensation may well mean that an owner’s compensation includes an increased value of his property attributable to public expenditure or public decisions to carry out the particular works for which the property is being compulsory acquired. It may also be noted that the Article provides that the rights guaranteed by the Article do not apply to property purchased through illegal means or obtained from or intended for illegal activity which would appear to be a useful provision.
16. **Article 23: Political rights.** Paragraph 2 refers to “the right to solve the matters of local importance through self-government”. It is not clear to the writer what this means. Paragraph 3 refers to a right to exercise civil disobedience against tyranny. Without disagreeing with the sentiment, is it appropriate to insert such a provision in a Constitution? Obviously such a situation would only arise in circumstances where the institutions established under the Constitution had broken down.
17. **Article 24: Administrative rights.** These include rights to appeal to a public agency. It is not clear in respect of what exactly such appeals may lie. The Article also deals with the right to public information and to attend meetings and to be heard and to participate in

hearings. Again, the circumstances in which such rights can be exercised may need to be clarified more precisely. Does the Article refer only to decisions affecting particular individuals or to administrative decisions generally?

18. **Article 25: Access to justice.** The fundamental right is that of access to prompt, continuous, public, independent, impartial and legitimate trial based on equality of arms and competition of parties for the protection of rights and freedoms. Presumably “competition of parties” is intended to mean the system is to be adversarial. The rights guaranteed include the right to free legal aid and the right to an interpreter if one cannot hear or speak the language of the proceedings. Paragraph 8 gives a right to appeal to the court for the redress of injured rights on the part of a person who acts as representative of any group, class or category of people, or as a defender of public interests. The scope of this provision seems unclear. Is it merely dealing with the right of a person in an action to be represented by such a person or does it create a right to institute a class action on the part of persons claiming to act in the interests of other persons? May any person act as a defender of public interests? While the Article guarantees the right to a public trial, it does not appear to authorise the holding of legal proceedings otherwise than in public, although this may on occasion be necessitated for various reasons, such as, for example, the protection of minors, the protection of secret commercial information, the protection of informants, or the protection of state security. However, the proposed new Article 84 (see paragraph 44 below) appears to address this issue, although the conditions under which cases may be closed are not set out.
19. **Article 26: Rights to liberty and inviolability.** This deals with the right to personality, property, personal and business communication, inviolability of the work place and residence, data including personal secrets, as well as any information, place or circumstance regarding which a person has a reasonable expectation of private life. Paragraph 3 appears to be somewhat obscure. It seems to be saying that the provisions relating to privacy are not to be used to prevent publication of certain matters which it is in the public interest to reveal but if so it is not very clearly expressed. A right of access to personal data held by a public agency is guaranteed. Other appropriate provisions relating to data protection are contained in the Article.
20. **Article 27: Freedom from unjustified wire tapping, search, detention and arrest.** These together with others kind of restriction of liberty are not permitted except in cases based on a court decision or in the event of urgent necessity. In cases of urgent necessity the prosecutor must go to court within 24 hours. An arrested person must be brought before a court no later than 48 hours following arrest. The court has to give a decision on the person’s release within 24 hours. If the writer has understood it correctly these provisions may be enforced by applying to a court pursuant to paragraph 7 of Article 28 which permits an application to court to review the reasonability, justification and legitimacy of restriction of liberty after ten days. If this is correct in this it is not clear to me why one would have to wait ten days to review a detention which was apparently unlawful. Why should a detainee not be able to apply to a court immediately on the expiry of the periods provided for in Article 27? There may be a gap in the constitutional provision here.
21. **Article 28: Rights of detainees and prisoners.** Their fundamental rights and freedoms are guaranteed except where restricted by law. Prisoners have the right to humane treatment and respect for their personality. They have certain rights to communicate. The

provision requiring a person to be brought before court within 48 hours is repeated – it is not clear why it needs to be in both Article 27 and 28. A detainee has the right to inform his family or friends of his detention. The right to bail is guaranteed except for urgent necessity prescribed by law and based on a court decision where there is a reasonable assumption that the suspect will not appear before the court or will obstruct the investigation. This appears to the writer to be an appropriate provision. The term of pre-trial imprisonment is not to exceed ten days which may be extended up to 30 days in the event of a statutory emergency. This seems a very short period and is apparently contradicted by paragraph 9 which allows for pre-trial imprisonment of up to 100 days except when extension of this term is required for securing a defendant with the right to a fair trial in which case dates of up to six months are permissible. These provisions appear to the writer to be somewhat contradictory and confusing although the general principle of putting a time limit on the length of pre-trial imprisonment and the period within which a trial must be commenced has much to recommend it – such a system is in operation in Scotland, for example.

22. **Article 29: Rights of suspects and defendants.** These include the right to be free from physical or psychological pressure and reasonable time and resources to prepare a defence. “Persecution” of a defendant is to be terminated unless a charge is formulated within 70 days. Presumably this should read “prosecution”. Again, there is a provision to extend this time to five months in exceptional cases. These time limits are certainly reasonable where one is dealing with straightforward offences but they seem to the writer to be very short if dealing with a complicated matter such, as for example, fraud or corruption. Charges are not to be brought except on reasonable grounds. Where a charge is brought, the defendant has the right not to face more severe charges except due to newly discovered or newly revealed circumstances. This would effectively prevent a person being proceeded against on a holding charge. The practice of preferring a holding charge is in the writer’s opinion legitimate where there is a difficult question whether more serious charges are appropriate and time for consideration is required. This Article also contains a non-retrospectivity of criminal law provision.
23. **Article 30: The right to a jury trial.** The right is guaranteed in cases where a defendant may face imprisonment. The right may be renounced.
24. **Article 31: The right to a fair trial.** The right to a trial by a proper court based on the Constitution and the law is guaranteed. Defendants are given the right to attend the hearing of their cases. No provision is made to deal with the situation where a defendant is disruptive and it may be desirable to give a court the flexibility to proceed with cases in the absence of a defendant in such an event. There is a right to have a case dealt with within 30 days after charge. The defendant may, however, look for more time to prepare a defence. Again, these time limits seem remarkably short if dealing with a complex matter and it would seem to the writer that a greater flexibility allowing the court to extend these time limits for good reason would be desirable. Paragraph 5 guarantees a person’s right against self-incrimination. But it goes further and provides that he or she may not be required to incriminate friends or relatives. This is very broad. The provision also goes further in providing that “giving inaccurate testimony shall not be used against, or to aggravate the case of, a suspect or a defendant”. Perjury is perjury even when committed by a defendant and this clause in effect gives a defendant a right to tell lies on oath in his defence without any penalty. This is inappropriate and not required by any reasonable interpretation of the privilege against self-incrimination. The parties are guaranteed equal

rights to collect evidence and the defendant is guaranteed the right of access to any acquitting or alleviating evidence. This may be too narrowly defined since the defendant should also be entitled to access evidence tending to incriminate him for the purpose of testing it. It would be preferable to guarantee the defendant's right to access all relevant evidence in the possession or procurement of the prosecutor. Paragraph 8 provides for a strict exclusory rule of evidence, which is unlawfully obtained. It would seem that such evidence would be excluded even where there was no deliberate or conscious violation of the accused's rights. The presumption of innocence is guaranteed. Doubts are to be resolved in favour of the defendant. A right to cross-examination concerning specific evidence during a verbal and direct court hearing is guaranteed, but there does not appear to be a general right to cross-examine where evidence is not given orally. Paragraph 14 requires courts to behave in a consistent manner and to treat like cases alike. Court decisions are required to be substantiated.

25. **Article 32: Right to fair judgment and punishment.** This provides that persons are not to face criminal liability for failure to perform civil obligations, provides for punishments to be proportionate and not to be cruel, inhuman, degrading, humiliating or unusual. The purpose of punishment is to be the restoration of justice, the prevention of crime and the social rehabilitation of convicts. Convicts are to enjoy all fundamental rights and freedoms except those prescribed by law.
26. **Article 33: Prohibition of repeated prosecution and the right to appeal.** This provides that a person is not to be prosecuted for a single offence repeatedly. It is not clear what this means. How often is "repeatedly"? For example, if a jury cannot agree on a verdict, does this mean that there cannot be a re-trial at all? If so, disagreement would be tantamount to an acquittal. Presumably there cannot be a re-trial where there has been an acquittal. It seems to the writer it would be better to phrase this provision as a standard *non bis in idem* clause. Convicted person are given a right of appeal, but in the event of such appeal have a right not to be convicted of a more serious offence or to face a more severe punishment from a higher court. The writer would wonder about the wisdom of such a provision which seems to create no disincentive to a convicted person not to bring frivolous or vexatious appeals.
27. **Article 34: Citizenship.** A duty to protect citizens regardless of their location is imposed. How can this be given effect to? What is its scope? Citizenship may be acquired by birth or naturalisation as prescribed by organic law. No person may be deprived of citizenship. Dual citizenship is permitted as prescribed by organic law. The provision goes on to refer to the circumstances in which dual citizenship may be granted. It is not clear whether these are intended to be exhaustive. They appear to relate to the situation of persons who are already citizens of a foreign state and who are seeking to become citizens of Georgia as well. It is not clear the extent to which the Constitution permits a person who is a Georgian citizen to acquire the citizenship of another state.
28. **Article 35: Freedom of movement.** This provides for free movement and free choice of residence throughout the territory to any person legitimately in the State. Citizens may freely enter Georgia and not be expelled. They may not be extradited except for events defined by international obligations and pursuant to a court decision. There is a restriction clause in the provision. The right to a passport is not expressly referred to and it might be desirable to given an express guarantee of this right to citizens.

29. **Article 36: Rights of refugees.** There may be less to this Article than meets the eye since the right to seek and secure refuge may only be exercised “in the events and according to the rules prescribed by law”. The provision seems, therefore, to be of no effect in the absence of such a law. Collective expulsion is prohibited. The right to a travel document is not referred to.
30. **Article 37: The right to family.** Despite its title the article refers only to the right to marriage based on free will and equality of the couple and to the inviolability of family life and raising of children according to the parents’ convictions. It does not prohibit forced marriages. It does not refer to the right to have children and found a family or to any other substantive rights of the family or the rights of spouses between themselves (for example, the right to mutual support). Does the reference to “inviolability of family life” refer only to families based on marriage?
31. **Article 38: Children’s rights.** It would be helpful if the Article made it clear that the rights referred to are in addition to the other rights provided for in the Constitution. The Article makes no reference to the right of children to express views freely in all matters guaranteed by Article 12 of the UN Convention of the Rights of the Child, or the rights to freedom of expression or of thought, conscience and religion guaranteed in Article 13 and 14 of the same instrument. The unqualified reference in Article 37 to the raising of children according to the parents convictions seems somewhat at odds with these provisions of the UN Convention.
32. **Article 39: The right to education.** It is not clear to what extent these rights are intended to be justiciable. The State is obliged to ensure each person’s right to education, to fully develop his or her personality and gain critical thinking, problem solving, “education usage”, further education and effective communication skills as well as to learn his or her native and foreign languages, and even to equal opportunities to success in private and public life. The State is to protect freedom of educational choice and ensure diversity of forms of professional education. Universal access to obligatory free elementary, basic and secondary education are to be ensured. Paragraph 4 provides that each person is to have equal access to higher continuous education. The Article does not however say that the education is to be free and it is not clear whether the Article simply means that in principle every person has access even though in practice they may not have the means to secure such access. Parents are given the right to provide their children with education according to their religious, ethical, cultural and language requirements and to freely choose an educational institution but this freedom is not to be construed as evading obligatory education or obtaining an education that would prevent them from speaking or reading the State language, acquiring national and universal values and culture, or involving any education that would encourage intolerance and conflict. The parents’ freedom is effectively a freedom to choose between different institutions rather than a freedom to opt out of the education system altogether.
33. **Article 40: Freedom of business and labour.** This includes the free transfer of people, goods, services and capital. It is not clear whether this refers solely to free transfer within Georgia. The right to collective negotiation and to strike is recognised. The right of citizens to undertake positions in public service on an equal basis is recognised, as is the obligation to appoint or promote to positions in the public service according to suitability and competitive selection. There is a restriction clause in the Article.

34. **Article 41: Access to social services.** In the event of pregnancy, motherhood, illness, work related trauma, old age, job loss, or other events, there is a right of access to social services. There is also a right of access to medicine. It is not clear to what extent this latter right is intended to be justiciable. The rights of the elderly to live in dignity and independently and to be involved in social and cultural life are recognised. The State is required to ensure free development and equal opportunity for the handicapped. The scope of this latter provision appears to the writer to be unclear. How is it to be enforced?
35. **Article 42: The right to a healthy environment.** This imposes on the State a duty to ensure the rational use of natural resources, protection of the environment and sustainable development for the purposes of guaranteeing a safe environment for human health. Persons have rights to obtain information regarding the work and home environment and factors affecting their health. Again, it is not clear to what extent such rights might be capable of being justiciable.
36. **Article 43: Consumer rights.** These rights include the right to informed consumer choice and to goods and services that are not hazardous. Duties are imposed on public service providers including duties to provide full information, to treat consumers on an equal basis, to efficiently use public funds, to consult with consumers, to respond to their enquiries and to eliminate errors. Again, it is not clear to what extent such rights may be considered justiciable.
37. **Article 44: Right to free development.** This includes the right to preserve and develop cultural, ethnic and language diversity and heritage, traditions and distinctiveness. The State is obliged to support cultural development and to protect cultural heritage through the law.
38. **Article 45: Rights of the Minorities.** The Article does not deal with minorities in general but appears to refer to particular minorities. Members of the Minorities are stated to have individual and collective rights on an equal basis and to access information and ideas on their native language as well as to certain rights to public broadcasting in their languages. The State is under a duty to promote “civil integration” of the Minorities. It is not clear from the text what is meant by this. There is a right to political representation and participation in decision-making and to administer justice in the Minority language, but only where the Minority is a local majority of the population. Forceful assimilation is prohibited. The right to preserve and express cultural and other identity is protected. The right to use cultural symbols publicly, speak their own language, have geographical names and topographic signs in the native language is protected. The state is under a duty to facilitate a culture of tolerance in education, culture, media and other spheres and encourage mutual respect without any distinction based on ethnic, religious and linguistic identity. These appear to be worthy objectives and to strike an appropriate balance between respect for minority rights and the need to ensure that minorities can play an appropriate part in the processes of government.
39. **Article 46: Restriction of fundamental rights and liberties in a state of emergency or martial law.** Again, this needs to be read in conjunction with Article 13 and also with the particular restriction clauses in the various Articles. As a general comment it seems to the writer undesirable that these various restrictions are found in different parts of the text of the Charter and are not gathered together in a single clear and comprehensive way. The Article provides that during a state of emergency or martial law fundamental rights and

freedoms may be restricted pursuant to the constitution and organic law. This may only be done if all requirements established by Article 46 are observed and the restriction is compatible with Georgia's obligations with regard to the norms of international law dealing with states of emergency and martial law. Proclamation of a state of emergency or martial law may not result in exemption of the state or any person from legal liability and may not restrict the rights and freedoms relating to equality, life, dignity and personal inviolability, access to justice, the right to a fair trial, the right to fair judgment and punishment, the provisions relating to citizenship, the right to family and children's rights. They may not result in the interference with freedom of choice, possession and change of faith and ideology and freedom of conscience and thought.

40. **Article 47: Ombudsperson.** This position is to oversee the protection of the rule of law and the uniform application of law, the protection of human rights and freedoms, to reveal the facts of violations, and to facilitate prevention and elimination of such violations and reinstatement of affected rights and freedoms. The Ombudsperson is given extensive powers to obtain information and proof from any person and to summon any person to provide him or her with evidence. The Ombudsperson may freely enter any location and meet any person, examine all decisions of public agency or officials produce recommendations, submit reports to parliament, and when a fact or miscarriage of justice is revealed appeal to the Supreme Court to commence disciplinary measures against the liable judges. The Ombudsperson is empowered to submit a lawsuit to the court in the events and according to the rules prescribed by law. These are substantial powers. However, the Article leaves a considerable number of matters to be defined by law. These include the Ombudsperson's authority with regard to constitutional officials, the power to submit a lawsuit to the court, as well as the number, authority, organisational structure, rules of activity, guarantees of the independence of Ombudspersons, the circumstances in which the Ombudsperson can be dismissed and the measures which can be taken in case of infringement of the authority of the Ombudsperson. It seems to the writer that a provision which leaves so much to be determined by law is not particularly useful and most of these matters are of sufficient importance to be clearly defined in the Constitution. The relationship between the powers of the Ombudsperson and the powers of courts of law are not defined at all. It is not clear the extent to which the Ombudsperson can act of his or her own violation and issue binding rulings without recourse to a court of law. It would appear to the writer to be undesirable that the Ombudsperson could do so. There are provisions in the Article whereby appeals and complaints sent to the Ombudsperson are to be confidential and not accessible by any person and whereby the Ombudsperson has the right not to testify regarding such matters. The difficulty that the writer see with this provision is that if the Ombudsperson is to act on foot of such complaints in a manner affecting the rights of third parties, how are those parties to defend themselves and vindicate their own rights if they are not to be told the basis of the complaint?

II. CHANGES IN INSTITUTIONAL ARRANGEMENTS AND STRUCTURE OF GOVERNMENT AND THE JUDICIARY

41. Article 2 of the draft Constitutional Law proposes to change existing Article 49(1) of the Constitution which provides that the Parliament of Georgia consists of 150 members elected by a proportional system and 85 members elected by a majoritarian system. Under the proposed changes the Parliament will consist of 150 deputies only. It is understood this change is necessitated following the results of a popular referendum held recently. The Parliament will continue to be for a fixed term of four years and will be elected on the basis

of universal, equal and direct suffrage by secret ballot. However, the method of voting is no longer provided for in the Constitution. The writer has no information as to why this change is proposed or what is intended to be the method of election. The method of election is sufficiently important to be specified in the Constitution.

42. Article 3. This proposal will remove the requirement to have the signatures of 50,000 electors in order for a party to confess elections or for an individual to have 1,000 signatures. It will also remove the requirement that parties require at least 7% of the vote in order to receive any seats in the Parliament. The writer has no information as to whether these provisions are being replaced by ordinary legislation or as to the intention or purpose behind these amendments.

III. TRANSFER OF FUNCTIONS FROM CONSTITUTIONAL COURT TO SUPREME COURT

43. A number of the proposed amendments have the effect of abolishing the existing Constitutional Court. The principal change is effected by Article 11 of the amending law which proposes to replace Chapter Five of the existing Constitution, which deals with the judiciary, with a new draft.
44. The proposed new Article 82 provides for judicial power to be exercised by the courts system through constitutional supervision, administration of justice and other procedures determined by law. Courts are to be base their decisions on the Constitution and law and refuse to use any legal act that contradicts these. The independence of the judge is guaranteed subject to the Constitution and the law. Any interference in the judge's activities is prohibited and any norm limiting judicial independence is deemed invalid. Court decisions can only be annulled by a court and no person can request a report from a judge on any concrete case.
45. Article 83 provides for a courts system including a Supreme Court, an Appellate Court, a Common Court and other special courts, including Military Courts, and a Magistrates Court. The creation of emergency courts is prohibited. A Supreme Council of Justice is provided for to ensure independence and access to judiciary and to support professional self-governance of judges and public accountability. The composition of the Supreme Council is not defined in the Constitution and is to be prescribed by law but it is to be representative, to portray public diversity and to include persons who possess different professional experiences. Given their crucial role in appointing judges the composition of the Supreme Council should be defined in the Constitution.
46. Under Article 84 cases are to be heard in public except in such cases as are provided for by law. Decisions are to be announced publicly. The principle of equality of the parties is provided for and the mandatory nature of court decisions is decreed. Courts are to have free access from any individual. This strikes the writer as a rather unusual way to put this; one would have expected that the provision would say that individuals were to have immediate and free access to the courts.
47. Article 85 provides criteria for the appointment of judges who must be 30 and satisfy other criteria determined by ordinary law. Judges may not hold any other occupation or remunerative activity except teaching. They may not be members of political parties or participate in political activities. Their selection is to be by open competition as defined by

law. The chairs of courts are to be appointed by the President on the nomination of the Supreme Council of Justice. Judicial appointments are to be for a period of no less than ten years and a judge must retire at the age of 70. It seems to the writer that appointment for life would give a better guarantee of judicial independence than a ten-year appointment. The Article provides that the selection, appointment and dismissal of judges is to be determined by law. Again, it seems to the writer that guarantees for non-removability ought to be provided for in the Constitution. At the least, the constitutional provisions should determine the minimum conditions under which this can be done. The law also provides for disciplinary liability for judges, suspension from case hearing, removal from the post before the term or transfer to another office according to law. Again, it appears undesirable that ordinary law can provide for such matters without any constitutional guidance. There appears to be a certain contradiction in the proposed Article 85 since paragraph 9 refers to a judge being dismissed under Article 64 of the Constitution. This Article in turn refers to the dismissal of the Chairman of the Supreme Court and members of the government in cases of violation of the Constitution, high treason or the committing of other criminal offences and provides for at least one-third of the members of parliament proposing an impeachment and a vote being taken by the majority of the members of the parliament to remove the person from office. This provision appears to contradict other provisions which say that dismissal of a judge is to be provided for by law. The proposed Article 85 also provides for the immunity of judges from criminal charge, detention or arrest, except in cases where a judge is caught red-handed. It seems to the writer that it is wrong in principle that a judge should be immune from criminal liability although it may be appropriate to limit powers of arrest so as to prevent interference with the work of a judge during the hearing of a case.

48. The proposed new Article 86 provides for a Supreme Court of Georgia which is defined as the highest authority in constitutional oversight and administration of justice and which decides on disputes related to the Constitution, exercises supervision over the administration of justice in the common courts and ensures the uniform application of a constitution on the law. It has exclusive jurisdiction to decide on disputes on competence between central and local authorities and among territorial entities, between different branches and state bodies and on the constitutionality of international treaties. Such issues have to be referred to the court by the President, the government, or one-fifth of the members of parliament, or certain other institutions including the Ombudsperson. The Supreme Court can also rule normative acts to be unconstitutional. It also has certain functions in relation to finding the President and other high state officials incompetent. These functions were formerly exercised by the constitutional court of Georgia and were provided for in Article 89 of the existing text. It should be added that there are a number of functions in existing Article 89 exercised by the Constitutional Court which do not appear to have been transferred to the Supreme Court under the new text. These include disputes connected with questions of the constitutionality of referenda and elections. Furthermore, there is no express provision saying that the Supreme Court is to take decisions on the constitutionality of a law, normative acts of the president or normative acts of the representative bodies of the autonomous regions although this appears to be implicit in the provisions of the proposed new Article 86 paragraph 8 which refers to normative acts being recognised as unconstitutional.
49. The writer has no information as to why it has been decided to abolish the Constitutional Court and confer these functions on the Supreme Court. In principle there is no reason why the functions of constitutional review should not be exercised by a Supreme Court

which also exercises other judicial functions, as is the case in other jurisdictions such as the United State, Canada or Ireland. Clearly each system has both advantages and disadvantages. However, where there is a functioning Constitutional Court it would not seem desirable to abolish it and transfer its functions to the Supreme Court without a clear assessment of the gains expected to arise from such a decision.

50. The proposed new articles also provide for the composition of the courts and the appointments of judges, which in general are to be by the President of Georgia upon the nomination from the Supreme Council of Justice with the consent of the parliament in the case of the Supreme Court.

IV. THE PROCURATOR

51. Article 91 of the Constitution which deals with the Procurator is to be removed. The existing Article provides that the Procurator's office is an institution of the judicial power which performs criminal prosecution, supervises an inquiry and execution of punishment and supports state indictment. The function of supervision of law is in effect being transferred to the new institution of Ombudsperson and a number of the references to the Procurator General in the constitution are now to be substituted with references to the Ombudsperson. The separation of the powers of criminal prosecution from powers to carry out general supervision is to be welcomed. The system of procuracy which combines the power of prosecution with the power of general supervision of the law centralises too much power in the hands of one individual and is clearly contrary to the Recommendation 1604 (2003) of the Parliamentary Assembly of the Council of Europe on the role of the Public Prosecutor's Office in a democratic society governed by the rule of law. However, the writer believes that it would be appropriate to retain a reference to the Procurator General in the Constitution, assuming that office continues in being and is entrusted with the function of prosecution, since it could be important to provide on a constitutional level certain provisions relating to the criminal prosecution of offences – such as, for example, the question of whether the prosecutor is to exercise functions independently of government or, if the prosecutor is to be subject to direction, the circumstances in which such direction may be given and must be published, the duty on the prosecutor to act fairly and impartially, the procedures for appointing and dismissing the Chief Prosecutor, and a prohibition on conferring certain functions on the prosecutor. In general, these questions are dealt with in Rec (2000) 19 of the Committee of Minister of the Council of Europe on the role of Public prosecution in the criminal justice system. In the writer's opinion a number of the principles therein stated are of sufficient importance as to merit reference in the Constitution particularly in a Constitution which regulates so many matters of detail. A useful model in this regard is Article 179 of the Constitution of South Africa.

V. AMENDMENTS CONTRARY TO HUMAN RIGHTS

52. Article 14 contains a provision which would restrict amendments to the Constitution. The provision would add to Article 103 of the existing constitution a new paragraph 2 which would provide that no changes and amendments are to be permitted in the Constitution that restrict fundamental constitutional human rights and freedoms, rule of law principles and a revision of the Georgian statehood. The present writer would have some concerns about this provision if it had the effect of freezing everything which is contained in the proposed new Charter of right particularly when the provisions in the Charter are so detailed. However, a provision which would prevent abolition of the most fundamental rights could

be desirable but it would seem important to clarify the precise ambit of the provision. Presumably the question of whether or not a proposed amendment to the Constitution comes within the terms of this new provision is to be determined by the Supreme Court but the writer cannot find any provision which deals with the question expressly.

VI. CONCLUSION

53. On the whole the proposed new Charter of rights is a good document, despite the reservations in relation to questions of detail set out above. So far as the institutional changes are concerned, the writer does not have information as to the reasoning behind the transfer of power from the Constitutional Court to the Supreme Court.