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(VENICE COMMISSION)

DRAFT OPINION ON CONSTITUTIONAL AMENDMENTS RELATING TO THE REFORM OF THE JUDICIARY IN GEORGIA

Based on comments by
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Introduction

1. By letter dated 28 February 2005, the Minister of Justice of Georgia, Mr. Kemularia, requested the Venice Commission to give an opinion on the Draft Constitutional Law on Changes and Addenda to the Constitutional of Georgia (CDL(200()028) concerning the reform of the judiciary. By letter dated 31 December 2004, the Commission had already been asked by the Chairman of the Constitutional Court of Georgia, Mr. Khetsuriani, to give an opinion on a previous version of the amendments. The Commission asked Messrs Cardoso da Costa and Hamilton to act as rapporteur in this issue. Their informal comments were transmitted to the Georgian authorities and taken into account in drafting the revised version of the draft constitutional amendments.

2. The present opinion has been adopted by the Commission at it 62nd Plenary Session (Venice, 11-12 March 2005).

General remarks

3. The previous draft had raised a number of concerns by the rapporteurs, in particular the proposal to remove and replace the existing members of the Constitutional Court and the Supreme Court (except its President), the reduction of the jurisdiction of the Constitutional Court in relation to electoral matters and the possible reduction of the jurisdiction of the Constitutional Court in relation to normative acts.

4. The new draft is shorter and less ambitious but still provides for a substantial rewriting of the provisions of the Constitution concerning judicial power and the addition of a new chapter headed “Constitutional Control”. The principal changes in what is proposed are the establishment of the Constitutional Court separated from the ordinary judiciary as a body of constitutional review, with powers only over constitutional issues, with power to deprive unconstitutional legal acts of legal effect. The method of appointment of the Court is changed and its membership increased from 9 to 15.

A. Supreme Court and ordinary judiciary

1. Appointment of members of the Supreme Court

5. The Chairman and Judges of the Supreme Court are at present elected by Parliament on the President’s nomination. In future they are to be nominated by the President with Parliament’s consent (Article 87^1). It is not clear whether this involves a difference of substance. A reduction of the quorum required for the election would however be a step backwards. The involvement in the appointment procedure of a judicial council with constitutionally guaranteed independence would be advisable (on this issue see also paragraph 16 below).

2. Incompatibilities

6. Judges at present may not engage in any other occupation or remunerative activities except for "pedagogical activities". To that is now to be added "scientific activities", which is positive (Article 86.3). They may not be members of political parties or engage in political activities. Curiously, similar restrictions do not appear to attach to members of the Constitutional Court under the amended Constitution as it now deals with the Constitutional Court in a separate chapter.

7. On a strict reading this provision might prevent the appointment of judges to public inquiries or commissions representing the state abroad, membership of charitable institutions or the like. Such an interpretation would seem unduly restrictive.

3. Term of office

8. The term of office of a Supreme Court judge is to be ten years rather than "at least" ten years as at present (Article 87^1.1). In line with European standards and in order to ensure the independence of the judges, life tenure – or rather tenure until the age of retirement – would be more appropriate than renewable terms.

9. The Georgian Constitution does not provide for a judicial council with constitutional guarantees of independence (see Article 73.1.p of the Constitution). It would be desirable that an expert body like such a judicial council could give an opinion on the suitability or qualification of candidates for office.

10. It may be noted that the text provides no right to remove a judge or other official for incapacity or refusal or failure to fulfill functions, nor does it provide a mechanism to determine the issue in question.

4. Immunity of the judges

11. Under the current Constitution (Article 90.4), the members Supreme Court enjoy immunity from prosecution, arrest, detention or search, except where caught in the commission of a crime (*in flagrante delicto*). Waiver is by the Head of the Supreme Court. The amendments introduces an additional Article 87^1.4, under which waiver will be for Parliament. Article 90.4 will however not be changed. The failure to delete Article 90.4 seems to be an oversight in the draft. More important than this issue of drafting are possible problems related to the lifting of immunity by Parliament. One is the risk of politicizing the Court if Parliament has such a power. Secondly, a limited functional immunity from arrest and detention which would interfere with the workings of the court is one thing but a total immunity from prosecution is difficult to justify. A judge who is prosecuted should have the same right of defence as any citizen – no more, no less. This is especially true as no distinction is made between serious and less serious offences. This is a problem in the existing constitution rather than related to the amendments, though.

12. Another problem is the practical one of how to exercise the waiver by Parliament. If the authorities have a suspicion that a judge has committed an offence, how is an order for search to be approved by Parliament without a serious risk of prejudice to a judge who subsequently proves to be innocent? It would be preferable that the power of waiver be exercised by another judicial body rather than the executive or the legislature. A system of mutual waiver of immunity between the Constitutional Court and the Supreme Court - without any involvement of Parliament - could be established, each court being competent to waive the immunity of members of the other court.

B. Constitutional Court

1. Autonomisation

13. According to the draft, the Constitutional Court is to be provided for in a new chapter headed "Constitutional Supervision" rather than in the chapter headed "Judicial Power". Thus, Court is 'autonomised' and redefined as an institution of state separate from the legislature, executive and judiciary, in effect as a fourth branch of government. This necessitates a number of changes – for example, in Article 82(1) the definition of judicial power no longer includes constitutional control. Article 83, which defines what is meant by the judicial power, excludes reference to the Constitutional Court. Article 88 of the Constitution, which deals with the powers, functions and composition of the Constitutional Court, remains, but the reference to the Court as exercising "judicial power", is deleted. Instead is substituted a provision to the effect that the Court exercises "constitutional control".

14. The separation between Constitutional Court and the ordinary judiciary probably represents the most widespread model in Europe. On the other hand, a court exercising a power of constitutional review might be considered a part of the judiciary even though it may have a power of review over other courts. However, this seems to be primarily a dogmatic question of classification rather than having a practical effect provided that the Constitutional Court receives the fundamental guarantees for its independence and respect for its authority which should be afforded to the highest judicial organ. In this respect it is to be welcomed that the revised draft speaks about judges rather than 'members' of the Constitutional Court as was the case in the previous draft. This could be further underlined by adding a clause to Article 88.2 referring to the "judicial function" of the Constitutional Court.

2. Composition and appointment

15. According to the draft, the Constitutional Court is to have 15 members as compared with the existing 9. The term of office is to be a non-renewable 10 years, with retirement at 65. The Court is to elect its own chairman for a non-renewable term of 5 years. Appointment is to be made by the Parliament on the proposal of the President. Currently three judges each are appointed by the executive, legislative and judicial branches of power.

16. The requirement for presidential proposal and approval by Parliament is not very common in Europe but rather resembles the American system. While the presidential proposal coupled with approval by three-fifths of the Parliament - as opposed to judges of the Supreme Court who are elected by the majority of members on the current nominal list - appear to provide a balance between the two institutions, the exclusive competence of the President to nominate highest judges ensures in fact that only candidates who have the trust of the President can accede to these positions. Given that the President currently enjoys an overwhelming majority in Parliament, a diversified system like the existing one seems to ensure a better balance. In such an unusual situation, proposals for a part of the candidates from a judicial council with a constitutionally guaranteed independence could provide for a more pluralistic composition of the Constitutional Court.

17. The proposal also raises the problem that a deadlock could arise if a 40% blocking majority existed in the Parliament but there is no procedure to resolve such a deadlock between the President and Parliament.

18. The limitation of the tenure to a single term is to be welcomed. The lowering of the minimum age for Constitutional Court judges to 30 years may be explained by the special circumstances in a country in transition.

19. As to the size of the Court, the practical question to answer is whether the jurisdiction of the Court and the size of the country warrant the increase of the number of judges. The increase can partly be explained by the introduction of the real constitutional complaint (see below).

3. Competence in electoral matters

20. Currently, Article 89.1.d provides that the Constitutional Court "considers disputes connected with the question of the constitutionality of referenda and elections." The amendments would change this to "consider disputes of constitutionality of norms regulating elections and referendums and the constitutionality of held or next elections and referenda." The competence of the Constitutional Court in electoral matters does not seem to be negatively affected by this amendment. Electoral disputes will typically involve the right to vote or to be elected and can thus be seen as a constitutional issue. If a narrower interpretation of the expression "constitutionality " were used, it should be ensured that a court has jurisdiction in electoral cases not relating to constitutional issues.

4. Individual complaint

21. Current Article 89 of the Constitution sets out the circumstances in which the Constitutional Court can exercise judicial review. They include:

(a) decisions on the constitutionality of the law and normative acts,
(b) disputes on competence between state bodies,
(c) questions of constitutionality of the creation and activity of political associations,
(d) disputes connected with questions of the constitutionality of referenda and elections,
(e) questions of constitutionality of international treaties and agreements,
(f) the constitutionality of normative acts based on alleged violations of human rights Chapter Two of the Constitution (dealing with citizenship, human rights and fundamental freedoms) on the complaint of a citizen and
(g) other powers conferred by the Constitution and organic law.

22. The existing Article 89.1.f already provides for individual access to the Constitutional Court in the form a so-called "unreal" constitutional complaint (term used in German doctrine) against normative acts. It is welcomed that the draft Article 89.1.f would give this right not only to citizens but to persons in general.

23. In addition to this, draft Article 89.1.f[2] would allow the Constitutional Court to consider the "constitutionality of decisions of courts with regards to fundamental human rights and freedoms set forth in the Chapter II of the Constitution on the basis of a claim of an individual or the application by the Public Defender of Georgia." The draft thus adds a "real" constitutional complaint also against individual acts – final court decisions.

24. This provision represents a substantial increase in the jurisdiction and powers of the Constitutional Court. The Constitutional Court is given a power of review over the ordinary courts' decisions where human rights questions are concerned. The fact that the jurisdiction to review can be exercised on the complaint of a citizen creates a powerful new tool for the enforcement of the human rights and fundamental freedoms guaranteed by Chapter Two.

25. The "real" constitutional complaint may result in a significantly higher number of cases before the court and there is a risk that the Court may become overburdened. The requirement of the exhaustion of remedies will help to stem the flow of complaints. The increase in the number of judges from 9 to 15 may help to address this problem but it will also be necessary to provide for an efficient procedure in amendments to the Law on the Court. With more judges it should also be possible to establish a higher number of chambers within the Court, which can work in parallel (currently the Law on the Constitutional Court provides for two chambers).

26. The access of the Public Defender to the Constitutional Court in respect of court decisions could be reconsidered as in European practice judicial decisions are open to

control usually only upon request by the parties. On the other hand, the right to request the control of norms as referred to in Article 89.1.f seems to be an appropriate competence for the Public Defender.

C. Dismissal of the Chairman of the Chamber of Control

27. Article 64 of the Constitution provides a procedure for the impeachment of the Chairman of the Supreme Court, members of the Government, the Procurator General, the Chairman of the Chamber of Control and Members of the Council of the National Bank. The grounds are violation of the Constitution, high treason, or committing criminal offences. Impeachment must be proposed by one third of the total membership and voted for by one-half. The dismissal of members of the existing Constitutional Court is a matter for law (Article 88.4).

28. The Draft makes an amendment to Article 97 of the Constitution providing for an additional vote of no confidence in the Chairman of the Chamber of Control. The difference to the existing procedure in Article 64 seems to be that no "violation of the Constitution, high treason, and commitment of capital crimes" is required for the dismissal of the Chairman of the Chamber of Control under the new procedure. The new proposal would require a three fifth majority of Parliament "on the current nominal list". This represents an improved safeguard. It does not seem clear why such a special procedure is introduced specifically in respect of the Chamber of Control. On the other hand, while it is independent, the Chamber of Control is "responsible before the Parliament" (Article 97.2). Therefore, the dismissal of its Chairman does not raise similar issues as the dismissal of members of the judiciary (ordinary or constitutional).

D. Transitory Provisions

29. Article 2.1 of the draft law provides that within one month after enactment of the amendments the President shall propose six members of the Constitutional Court to Parliament for election. The termination of the appointment of existing members as had been proposed in the previous draft would not be justifiable.

Conclusions

30. The revised amendments are clearly and coherently drafted and present a significant progress as compared to the previous text. The Commission welcomes in particular the introduction of a "real' constitutional complaint and the limitation of the tenure of judges of the Constitutional Court to a single term. Some other issues remain subject to concern:

a. The nomination all of the judges of the constitutional and supreme court by the President does not ensure a pluralistic composition of these bodies. The

involvement of a judicial council with constitutionally guaranteed independence is recommended.

b. The near-total immunity from prosecution conferred on judges is not justified. Giving the power to waive such immunities as exist to Parliament creates difficulties both of principle and practice. The power of waiver of judges of the Supreme Court and the Constitutional Court should lie with the other court respectively.
c. In order to guarantee the independence of the judiciary, the terms of ordinary judges including the judges of the Supreme Court should not be renewable but judges should hold tenure until retirement.
d. It would be desirable that an expert body like an independent judicial council could give an opinion on the suitability or qualification of candidates for the office of judge.

The Commission remains at the disposal of the authorities of Georgia for further assistance with the constitutional amendments and subsequent changes in the Law on the Constitutional Court.