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(VENICE COMMISSION)

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

by
Mr S. BARTOLE (Substitute member, Italy)

The draft constitutional law submitted to the attention of the Venice Commission arises many doubts. Inter alia, the interpreter has the feeling that the translation is not always correct. Moreover, the absence of an explanatory report makes more difficult the understanding of some provisions: for instance, it is not easy to realize the purpose of some of the proposed amendments, which apparently replicate constitutional provisions presently in force or only add to the present text of the concerned provisions a not specific reference to other constitutional provisions. This is, for example, the case of the amendments of art. 78 paras. 2, 4, and 5, which are proposed in option 2: the text of the amendments is not different from the text of the Constitution with the exception of the reference to different rules provided for by the Constitution. It would be advisable to correct these generic references and expressly mention the constitutional provisions, which state the mentioned different rules.

If we look at **the amendments which will be retained " independently of the decision for either options "**, art. 49 does not raise doubts from a technical point of view. But, as a matter of fact, it is not easy to understand the reason why explicit provisions are devoted in para. 5 to "parliamentary elections following extraordinary parliamentary elections" when the amending provisions are not different from those concerning the " regular parliamentary elections ".These amendments could be useful only if the terms of the Parliament (and of the President) elected through extraordinary elections were different from the terms of the regularly elected Parliament (and Parliament). Perhaps some criticism is connected with the proposal of adding to art. 104^1 the new para. 3 providing for the dates of the election of the President and of the Parliament in 2008, but we don't have information about a possible modification of the terms of the incumbent President and Parliament. On the other side the choice of explicitly providing rules about the time of the election looks wise and correct.

Analogous comments obviously deserve the amendments concerning art. 70.

In art. 50 the para. 2 one deserves attention: it apparently provides for the participation in the distribution of seats of the political party which showed the second best result in the election even if it does not cross the electoral threshold. The amendment can be useful to guarantee the presence in the Parliament of an opposition and to insure the election of representatives of the national minorities, specially if the electoral threshold is too high for the political parties of the national minorities.

The amendments to para. 1 of art. 73 raise some doubts because, while restricting the powers of the President, they do not provide for new rules in view of substituting for the amended ones. Who shall be entrusted with the task of dismissing ambassadors and other diplomatic representatives? Shall art. 79 para. 6 be applied? And who shall preside the highest Council of Justice and appoint and dismiss the judges if other constitutional rules in the matter are missing? Is the organic law giving an answer to these questions? However, even the rules concerning this organic law are covered by the abrogation provided for by the amendment.

Art. 2 of the draft should be corrected providing for the entering in force of the law the day after its promulgation: the present amendment can raise doubts about its meaning.

In **option 1** the new art. 51^1 is aimed at correctly restricting the powers of the President and prohibiting the dissolution of the Parliament in time of state of emergency or martial law: the solution has to be appreciated because the state of emergency and of martial law are not suited to holding free elections which require the unrestricted exercise of rights and freedoms. Moreover, the dissolution of the Parliament cannot be used by the President as a reaction to the deliberation adopted by the Parliament in conformity to art. 63 to dismiss the President himself.

It will be very difficult to apply the proposed new para. 3 of art. 51^1 if we think that the term of the President is five years and the President cannot dissolve the Parliament within the last six months of his term of office. The justification of the proposal is unclear.

The new formulation of para. 1 of art. 70 summarises provisions which are present in the text previously commented. But the proposed formula "the same person may exercise presidential authority only for a period of ten years" is less accurate then the other provision that" the same person may be elected as the President only for two consecutive terms".

The proposed new para. 4 of art. 81 is apparently suggesting a balanced solution which enlarges the power of the Prime Minister of putting the question of confidence to all drafts law (and not only to a restricted number of them) while limiting the exercise of this power to two times during a session. The final part of the proposal keeps the present rules concerning the powers of the President in case of refusal of the confidence.

The opening provision of **option 2** replicates the text of art. 51^1 of option 1. Therefore it does not deserve further attention.

Some of the additions suggested by the proposed amendments to art. 73 para. 1 are very limited and only imply reference to other constitutional provisions, which are not expressly specified. This is the case of the new subparagraphs b, d, and e (para. 1 a), c) and e)) . The point is commented in the first part of this opinion.

The amendment to subparagraph c strengthens the constitutional position of the Government prohibiting the dismissal of individual Ministers by the President. But the newly proposed subparagraph d-a is apparently restricting the powers of the Prime Minister of dismissing officials by requiring the acceptance of the resignation of officials by the President. The justification of this last proposal is not clear.

The meaning of the subparagraph r is ambiguous because it apparently authorizes the appointment of a new Prime Ministers and new Ministers within six months from holding the parliamentary elections and within the last six months of the presidential term without requiring a vote of confidence. Why? The principles of a democratic government are contradicted.

Paras. 5 and 7 of art. 79 propose to change the Constitution in force providing for the intervention of the Bureau of the Parliament (instead of the President) in the appointment and dismissal of the Ministers in cases provided for by the Constitution. The composition of the Bureau is stated in art. 57 but it is not clear if it has a membership distributed between the political parliamentary fractions according to the principles of proportionality. If this is not the case, the provisions of para. 2 of art. 57 (the issues concerning the appointment of the officials as defined by the Constitution shall be discussed by the Bureau upon the basis of the conclusion of the respective Committees and in accordance with a procedure provided for by the Regulations) does non offer solid guarantees of openness and democracy.

It is not clear if the proposal of the new para. 5 of art. 80 keeps alive or cancels the previous para. 4 of the same article, which shall be in any case coordinated with the proposed new para. 4 of art. 81. Which is similar to the new text of the same para. proposed in option 1. The new para. 5 allows the President to appoint a new Government if the newly appointed Government does not get the confidence of the Parliament within a month from its submission. This solution contrasts with some examples of the comparative experience of the democratic States which provide for the appointment of a presidential Government and for the dissolution of the Parliament only after more than one experiments of appointing a Government able to get the confidence of the Parliament.

The new para. 7 of the same article is connected with the rule which prohibits the presidential dissolution of Parliament more than two times during the term of the President. The amendment is providing for the appointment of a Government based on the proposal of at least one third of the total members of Parliament. This Government has in any case to get the approval of the majority of Parliament. If the new Government does not get the confidence,

Parliament is deemed de jure dissolved. If the Government gets the confidence, it is responsible only before the Parliament (an exception is made to art. 78, para. 1, of the Constitution, which states that the Government shall be responsible both before the President both before the Parliament).

But the stability of this “parliamentary " Government is specially insured by the additional new para. 9 according to which it can be dismissed only by the Parliament through the parliamentary appointment of a new Government. If this new Government does not get the confidence, the old Government stays in power and the initiation of its dismissal is not permitted.

These rules strengthen the position of the Parliament in the relation with the President, but their success depends on the presence in the Parliament of a majority sufficiently strong to balance the powers of the President.

The proposed amendment to art. 81^1 para. 1, which curtail the powers of the Prime Minister, wisely requires a new submission of the Government to the Parliament in case of the renewal of its first composition by not less of five members. A rule dealing with the reshuffles of the Government which is usually missing in the other Constitutions.

At the stage of a final evaluation of the draft, special attention has to be devoted to those parts of it which deal with the relations between the top constitutional bodies of the State. On one side, some provisions are evidently aimed at strengthening the position of the Government and of the Prime Ministers (for instance, the amendment of art. 81 para. 4 in option 1 or of art. 73 para. 1 c, and art. 80 para. 7 - 9 in option 2). But, on the other side, also after the possible acceptance of the amendments the President will keep the power of dismissing the Government by his or her initiative (art. 73 para. 1 c of the option 2) and have the exceptional powers provided for by the new subparagraph r of 73 art. para. 1 of option 2. Notwithstanding these remarks, the observer has perhaps correctly the impression that the option 2 is more attentive at the position of the Government in comparison with the option 1 which keeps the existing powers of the President and only enlarges the powers of the President sub art. 81 para. 4. In any case, all the provisions dealing with the appointment and the dismissal of the Government have to be coordinated in a better way. For instance, the new art. 80 para. 5 of the option 2 should be applicable only after a delay of time, which could offer to Parliament the chance of using the procedure for appointing the Government provided for by art. 80 para. 7 of the same option. And art. 80 para. 9 of this text could be transformed in a general rule and applied to all the Governments, not only to the Governments appointed in accordance with the rule determined by the new para. 7 of the same article. This change could balance the presidential power of dismissing the Government by his or her initiative.

If the draft is aimed at insuring a better equilibrium between the top constitutional bodies of the State it shoul give more attention to the position of the Government and of the Parliament. The result cannot be obtained through amendments of the presidential powers which - as art. 51 one para. 3 in option 1 – do not have any practical relevance.