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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS ON
4 CONSTITUTIONAL LAWS
AMENDING THE CONSTITUTION OF
GEORGIA

by

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1. The advice of the Venice Commission is sought concerning four amendments to the Georgian Constitution.

2. The first amendment is to Article 58 and concerns a reduction in the number of members required to form a Parliamentary Faction (note: not Fraction) from 7 to 6. This is said to be consequent on the reduction in the number of members elected proportionately. While I do not altogether understand the basis of the mathematical calculation assuming it is correctly done as stated in the explanatory memorandum I see no objection to the amendment. When the number of members elected in proportional distribution was 150 it took at least 10 members to form a faction, so now that it is 75 it is not clear to me why it will take 6 rather than 5.

3. Article 80 of the Constitution is to be altered to provide for the automatic removal of the Government following the inauguration of the President or the election of a new Parliament.

4. This shifts the focus towards a greater power for the Parliament since members of the Government are appointed by the President with the consent of Parliament. Under the old system a Government could continue in office although lacking in parliamentary support. It thereby marks a move away from a purely presidential system.

5. Article 64(1) at present allows one-third of the members of parliament to raise the question of impeachment of various office holders. Under a proposed amendment the text now refers to one-third actually removing office-holders. I wonder if this is a mistranslation? In principle it seems wrong that a minority in parliament could remove office-holders as distinct from proposing their removal.

The list of office-holders is extended to include all judges of the Supreme Court and not just its chairman. The power to remove the Procurator General is removed. The latter arises because he or she will now be answerable to the Minister for Justice and will not be an independent office-holder.

The draft provides for the deletion of Article 73.1.g – I understand this should read 73.1.c.

6. A new provision in Article 73.1.g will authorize the President to remove the entire Government from office and to dismiss the ministers for Defence, Justice and Internal Affairs. There seems to be overlap with existing Article 73.1.c allowing the President to remove Ministers.

7. Article 76.1 which empowers the Chairman of Parliament to exercise presidential powers when the President cannot act is to be repealed. It is unclear what is to replace it or indeed how Article 76.2 can stand alone. (Is this again a misprint?)

8. The major change in these amendments is to transfer the responsibility for prosecution to the Minister for Justice. The effect is to transfer the prosecution from the judiciary to the executive. Article 91 which formerly provided for a Prosecutor-General as part of the judicial power was removed in 2004.

9. With regard to the proposal to transfer the prosecution service from the judiciary to the executive and to make the Prosecutor General subject to the Minister for Justice who is himself a member of the cabinet, I agree fully with the opinion expressed by Mr. Sørensen. In particular I do not believe that we are in a position to issue a final opinion at this stage. However, I fully share his concerns in relation to the matter.

10. I will merely add a number of observations.

11. The proposal cannot be described as a dismantling of the prokuratura system. In fact, it seems that all the powers of the existing prosecutor's office will be retained in the new structure. In my opinion, the basic problem with many prokuratura type systems is not the independence of the prosecutor general but the reality that the prosecution service is in many cases subordinate to the presidential power and is itself given over broad powers which include not only criminal prosecution but powers of general superintendence and in many cases powers to take steps without reference to a court of law. I have no information as to the current powers of the Georgian prosecution but it does not seem likely to me that a simple transfer of the service from an independent prosecutor general to a cabinet officer who is presumably subject to instruction by the government as a whole is capable of safeguarding the necessary independence of the prosecutor in relation to individual cases. However, like Mr. Sørensen I agree that until we see details of the legislation that is proposed it is impossible to be categorical about the new system.

12. It is indeed true that the United States of America has a system whereby the prosecution at the federal level is subject ultimately to an Attorney General who is a cabinet officer and is also in effect the Minister for Justice. The system in the United States of America is not necessarily the best precedent for an emerging democracy with only a short experience of democratic rule. American prosecutors operate in a context where there is a strongly developed rule of law, where judicial independence is strong and where there is a highly developed system of judicial review. All of these factors operate as constraints on any improper use of power by a prosecutor. In addition, in the American system prosecutors powers are confined to those of criminal prosecution and do not include such elements as general supervision.

13. It should not be assumed that siting the prosecution office within the executive necessarily means that the prosecutor must be dependent on government. In fact, there is an increasing tendency within common law countries (though not in the United States of America) to establish the public prosecutor as an independent person exercising the prosecution power as a part of the executive but independently of the government. This is the case at the federal level in Canada, in Ireland, in Northern Ireland, as well as in some Australian states and Canadian provinces.

14. In addition, in common law countries where a politically appointed attorney general has powers of supervision over the prosecutor, those powers generally extend to general supervision rather than a power to direct in individual cases. This is the position in England and Wales for example. In systems where a politically appointed Attorney General has power to give instruction in any particular case it is usually required that this fact be made public where it occurs. Furthermore, it should be noted that under the system in England and Wales, although the Attorney General is a politically appointed member of the cabinet, in exercising a power of prosecution he does so independently of government and is not subject to direction by his cabinet colleagues. This is also the position in Ireland in so far as the Attorney General retains certain prosecution powers which have not been transferred to the Director of Public Prosecutions.

15. Finally, the law on the prosecutor's office is apparently to be an ordinary law. If the matter is not to be regulated in the Constitution an organic law would provide better guarantees than an ordinary law.