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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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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

A. Background

The Deputy Speaker of the Georgian Parliament has asked the Venice Commission for an opinion on a constitutional reform adopted on 10 October 2008.

The following remarks will deal only with the amendments concerning the position of the Prosecution Service. With respect to the other amendments – which I believe to be of minor importance – I fully agree with the observations presented by Monsieur Olivier Dutheillet de Lamothe.

It should be noted that my remarks are based solely upon the documents presented by the secretariat of the Commission. There is no substantial material explaining in detail the reasoning behind the amendments, and no discussion has taken place with Georgian authorities.

Therefore, no final opinion should be provided on basis of the present material. Rather, preliminary observations could be made on the basis of which a discussion could be held with the Speaker of the Georgian Parliament at the December session of the Commission. The opinion would then be finalised at the March session.

B. The amendments

Three important changes are made:

- According to new Article 81(4), departments of the prosecution are under the system of the Ministry of Justice. This means that the Minister of Justice is overseeing the operations of the prosecution service and may direct the outcome of individual cases. The prosecution service will be a part of executive government and the Attorney General's office will become a sub unit under the Ministry of Justice. Thus, the office of the Attorney General will be governed by the Minister of Justice who will, at the same time, assume the role of Attorney General.
- According to new Article 64(1), the title of Attorney General is removed from the list of authorities who are subject to removal from offices by means of impeachment.
- According to new Article 73(c), only the President of Georgia will be empowered to remove, i.a., the Minister of Justice/Attorney General. This will no longer be under the competences of the Prime Minister.

It further follows from new Article 81(4) that the "rights, responsibilities and operations of the prosecution service are defined by the law." No draft legislation under this provision is available.

The reasoning behind the amendments is briefly described in the available documents. It appears that the purpose of the arrangement is to "transform the Georgian Prosecution into a sub unit under Georgian Ministry of Justice" in order to "increase the effectiveness of the prosecution work in general."

In the available material, few observations are made as to how the independence of the prosecution service will be ensured. Apparently, however, some independence would follow from the fact that removal of the Minister of Justice/Attorney General can only be decided by the President of Georgia and not by the Prime Minister. No other safeguards in this respect appear to be mentioned.

C. Comments

Two important reservations need to be made:

- As said under A above, the material available is insufficient to form a basis for a final opinion on the amendments. There may be explanations behind the amendments of which the rapporteurs are not aware. This will need to be investigated as part of the discussions with the Deputy Speaker of the Parliament of Georgia during the upcoming December session of the Commission.
- Much will depend on the legislation envisaged under new Article 81(4) according to which the “rights, responsibilities and operations of the prosecution service are defined by the law.” As said above, no draft legislation is available at the present time.

With these reservations, however, the amendments give rise to concern.

The member countries of the Council of Europe are clearly divided when it comes to the relationship between the public prosecution service and the executive (and legislative) powers. In some countries, the prosecution service enjoys complete independence from parliament and government. In other countries, the prosecution service is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action.

Under Council of Europe standards, a system under which the prosecution is part of, or subordinate to, the executive power is not in itself unacceptable.

However, the basic principle for any prosecution service in a member state is laid down in Article 11 of CoE Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system:

“11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the Public Prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out.”

This basic principle is further developed in Articles 13-16 of the Recommendation.

Article 13 concerns specifically those member states where the public prosecution service is part of or subordinate to the government. In such states, effective measures should be taken to guarantee that:

- a) the nature and the scope of the powers of the government with respect to the prosecution are established by law;
- b) government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;
- c) where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;
- d) where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example
 - to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;

- duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels;
 - to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;
- e) public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;
- f) instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs d) and e) above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

Such principles have also been expressed by the Venice Commission on numerous occasions. See, for example, part II of the draft vademecum on the judiciary (CDL-JD(2008)001) with further references.

Fundamentally, a construction as now established in Georgia, must give rise to concern. It puts the basic principle of the independence of prosecution services in danger. This is, probably, particularly relevant with regard to the former communist countries of Eastern Europe.

In this respect, the fact that the Attorney General/Minister of Justice can now only be removed by the President of Georgia and not by the Prime Minister clearly does not constitute sufficient guarantees.

D. Further process

The constitutional reform has now been adopted. This means, presumably, that the provisions in question are now to be taken as a fact.

Given this, it will now be crucial to ensure that as many safeguards as possible are laid down in the legislation provided for in new Article 81(4) concerning "rights, responsibilities and operations of the prosecution service".

This issue would be the appropriate subject of discussion with the Deputy Speaker of the Georgian Parliament at the December plenary session of the Commission. Also, it would be very appropriate for the Commission to be involved in the drafting of that legislation.