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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS**

**ON THE DRAFT CONSTITUTIONAL LAW  
ON CHANGES AND AMENDMENTS  
TO THE CONSTITUTION OF GEORGIA**

**(Chapter VII - Local Self-Government)**

**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.*

### **Introductory Remarks**

The process of constitutional drafting in Georgia that has started with the adoption of the 1995 Georgian Constitution should receive a positive appraisal by the Venice Commission.

Constitutional drafting has followed the gradualist top bottom approach. The parliamentary statutory law was enacted first and only then the constitutional drafting follows. During these developments Georgian constitutional drafters have accumulated knowledge and elaborated skills prerequisite to democratic constitutional drafting.

During our visit in the beginning of February 2010 different views on the time schedule of constitutional reform were expressed ranging from one –one and a half year and prolonging the time for the constitutional reform to 3 years.

Different concepts about the scope of constitutional reform were expressed with the three forms of democratic republican government being under consideration . However, in the exchanges we held with the three different constitutional commissions ( state, public and civil society and NGO's) preference to semi presidential government was expressed. The President was of the opinion that a presidential parliamentary form following the pattern of the 1958 Constitution of the Vth French Republic should be the best option for Georgia.

The constitutional entrenchment authentic core purpose has been to declare the basic values and principles of democratic, limited, responsible government and the fundamental human rights. Being a part of the European democratic constitutional heritage all of them have been recognized in the international treaties and the soft law as standards in the democratic constitutional drafting.

Constitutional supremacy has been most instrumental tool to safeguard these fundamental values, principles, and unalienable human rights to open the opportunities and support sustainable political democracy and civil society.

### **General Remarks on the Constitutional Amendment Chapter VII on Local Self Government**

The amendment on Local self government has been the next brick in the making Georgian constitution. The need of constitutionalization of the local self government and present draft of the chapter should be welcomed by the Venice Commission as a positive step in the right direction by within the process of constitution drafting in Georgia. However, here the order of legal drafting that has gone from bottom to the top and this ordering of drafting has to be taken into account (implied) when the evaluation of the contents of the constitutional chapter should be evaluated. For example in the area of local self government first the European Charter on Local Self Government has been ratified, followed by the Organic Law of Georgia on Local Self government in 2006 and only in 2009 a draft constitutional amendment has been introduced in the Parliament.

Without any doubt the scale, format and extent of constitutional regulation is to be decided by the people of each country adopting a nation state constitution drafted by the national experts and agreed by the parliaments or constitutional assemblies.

Compared to other constitutions, however, the chapter on the local self government in the draft amendment to the Georgian constitution is extremely laconic and minimalistic. Besides the most important issues have been transferred by the constitutional drafters to organic law.

The problem with the content of the draft constitutional amendment is not that something in it is superfluous, wrong, but a lack of content which should be considered as indispensable for a constitutional chapter on local self government. One can say that the bones of the constitutional frame are there but flesh and blood are missing in the chapter if it is to achieve its constitutional purpose of entrenching and guaranteeing stability and sustainability of the local self government.

At first glance by reducing the essence of constitutional regulation to the minimal content Georgians seem to follow Napoleon's advice on drafting and the content of the constitutions prescribing that they should be brief and obscure. However, taking the constitution drafting seriously leads to the belief that the true reasons for this approach seem to concern more the aspiration to stick to flexibility and securing easier adaptation of constitutional regulation to the practical needs of developing local self government.

With the present content this chapter is a constitutional safeguard only on the option of non prohibition or abolishment of self government by parliamentary majorities changing in government which would be in a position to amend the organic law on local self government easier than constitutional provisions on local self government. Moreover I consider, the current Georgian constitution to be quite a flexible one since it can be amended if proposed by the President, more than half of the total number of the deputies or more of 200 000 voters, and adopted with qualified two thirds majority of the total number of mp's ( art. 102 ) while the organic laws are to be changed with overall or absolute majority of the mp's votes in the Parliament ( art. 66, par.2 ) which is likely to be achieved more often.

It would be advisable for the constitutional drafters to transfer some of the principles and rules established in the organic law on the local self government and incorporate them in the text of the constitutional amendment.

### **Some Substantive Proposals for Supplementing the Content of the Constitutional Amendment**

Certain important provisions have to be added to the draft constitutional amendment on the local self government. By supplementing the text of the chapter they would cure out the minimalistic approach of regulation, bring more clarity to the constitutional chapter and entrench firmly features of local self government placing them outside the reach of absolute majority which is sufficient to amend the organic law of self government, for after a change of government new majorities might be tempted to amend or even restrict local self government bodies which might be beyond their political control and influence.

The provisions to supplement the content of this draft are related to the following areas:

1. Principles of the Local Self government – which are to be found at present in the art. 5 of the Organic law on Self Government;
2. The competence of the State authority in the sphere of Self Government stated at present in the art. 4 par. 4 of the Organic law on Self Government;
3. Spelling in the draft constitutional chapter most of the competences from art.15 and 16 of the Organic law on Self Government to clarify and entrench the different kinds of powers of the Local Self Government bodies;
4. Some property, financial, taxation and budget norms would provide firm foundations to the local self government – see for example ( most of these are now contained in art.49,50, and 51 of the Organic law on Self Government);
5. Resolution of power disputes between Central Government and Local Self Government should be written establishing which one would go to the Constitutional Court according to the art. 89, par.1, b. of the Constitution of Georgia and which if any should be decided by other courts;

6. Fundamentals on the relationship between the agents of Central Government and Local Self Government organs should be written in the constitutional chapter;
7. Last but not least there is a need to list the possible tiers of Local Self Government in Georgia in the draft chapter of the Constitution.

I find useful the mentioning of the principles of direct, universal, equal suffrage with the secret ballot in art.101. 1 , par.3 concerning the elections of the bodies of Local Self Government. By stating these hallmark principles of democratic elections Georgian constitution drafters have provided criteria for deciding constitutionality of the electoral laws and their compatibility to the ECHR prot 1, art 3 which could be decided by the Constitutional court and might be a stable yardstick for the courts when they decide electoral disputes serving as a constitutional ground for the complaints brought by the parties, candidates and citizens.

The last paragraph under the title F 2 as addition to the art.89, par.1 of the Constitution should receive special appraisal and should be welcomed by the Venice Commission since it provides the option for local self government institutions to challenge parliamentary law they consider to contradict to the provisions of the Chapter VII on the local self government.

### **Some Suggestions on the Elaboration of Editing of the Constitutional Amendment**

Drafters might consider elaborating on the precise wording of art.101,1 par. 3 that it concerns the election of municipal council and mayor when directly elected ( instead of the used representative organ ) by the citizens residing on the territory of the local government unit instead of the used term – citizens living.

Some of the particular suggestions on the text of provisions have been due to the translation quality and were clarified by the Russian version of the draft amendment provided by the president of the State Constitutional Commission prof. Demetrashvili. For example the correct meaning of art .101 2 par.1 is that powers of the institutions of local government are separate from the central government bodies instead of the used in the text partitioned, which clearly has been the case as seen from the Russian version of the constitution amendment text.

To avoid ambiguities it would be wiser to use the words municipal councils instead of representative organs of local self government . This usage should avoid any doctrinal controversy or practical disagreement between the politicians concerning the bodies of local self government envisaged excluding thus the directly elected executive organs of local self government. ( see art. 101 1 par.1 of the draft amendment).

In art.101 3, par. 3 it would be more consistent with the autonomy of the local self government and the rule of law to limit state supervision to the legality of normative and administrative acts but not to the expediency which might open a serious controversies and pave the way to restrictions for the local self government institutions.