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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

69th plenary session
of the Commission
(Venice, 15-16 December 2006)

on the basis of comments
by
Mr Sergio BARTOLE (Substitute member, Italy)
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I. Introduction

1. On 5 December 2006 the Venice Commission received for its consideration the text of the draft Constitutional Law of Georgia on the amendments to the Constitution (document CDL(2006)104rev). Mr Olivier Dutheillet de Lamothe (France) and Mr Sergio Bartole (Italy) were appointed as reporting members and provided comments. At the 69th Plenary Session of the Venice Commission in Venice on 15 and 16 December 2006 the draft Constitutional Law was discussed in the presence of the Minister of Justice of Georgia, Mr Gia Kavtaradze. The Commission asked the reporting members to prepare this Opinion on the basis of this discussion and their previous comments and to send it to the Georgian authorities. The present Opinion relates to the text of the draft Law as it was sent to the Venice Commission on 5 December 2006 and does not take into account any subsequent amendments to this text.

2. The draft Constitutional Law is unusual insofar as it does not consist of a single text but contains two Options for most provisions as well as provisions to be retained independently of the decision for either Option. Consideration of this text was made difficult both by the very short time available and by the fact that the Commission did not receive an explanatory report or similar document setting out the motivation for the proposed amendments. The discussions with the Minister of Justice in Venice did, however, enable the Commission to obtain a clearer picture of the situation.

II. The proposal for joint parliamentary and presidential elections in the period of September to December 2008

3. The politically most important and most disputed amendment in the draft Constitutional Law is the proposal to add to Article 104¹ a third paragraph providing for the next presidential and parliamentary elections to be held jointly between 1 September and 1 December 2008, the precise date to be determined by the President. This would mean that the term of office of the present parliament, which is due to end in spring 2008, would be extended, while the term of office of the President, which is due to expire in spring 2009, would be shortened.

4. It appears that this amendment is motivated mainly by political considerations. It is not up to the Commission to assess the political motives for constitutional amendments. In any case, political reasons are on their own not sufficient to justify the prolongation of the mandate of a sitting parliament which was elected by the voters only for a specific time period. Such a prolongation is acceptable only exceptionally based on constitutional justifications.

5. A convincing constitutional justification for such an amendment would be to provide in the Constitution that presidential and parliamentary elections are to be held jointly as a general rule and not only on this one occasion. The draft Constitutional Law does not however contain such a rule. On the contrary, it maintains the present terms of office of 4 years for the Parliament and 5 years for the President. This justification therefore cannot be advanced in favour of the amendment. From the point of view of the Commission, it seems also questionable whether such a rule would be desirable. If parliamentary and presidential elections are to be held jointly, this is not a neutral procedural rule but also implicitly a decision in favour of a semi-presidential form of government with a very strong President. Since the Commission argued in its Opinion on previous amendments to the Constitution of Georgia (CDL(2004)008) in favour of more checks and balances to the powers of the President, such a rule would not necessarily be welcome.

6. An alternative justification of the amendment would be to provide in the Constitution that both regular presidential and parliamentary elections always have to take place during a specific time period. Such determination of a time period would, however, have to be based on convincing constitutional arguments. In the case of Georgia as a country where a large part of

the population works abroad, a justification could be that a specific time period will enable a larger part of the population to take part in the elections than would be possible during other parts of the year.

7. In the present draft there are indeed also proposals to introduce new provisions (Articles 49.5 and 70.9 respectively) on holding regular parliamentary and presidential elections in the period between September and November. The wish to hold, for important reasons, elections always at the same time of the year could therefore be a justification for the amendment.

8. However, the period of three months within which the President would be free to schedule elections is clearly excessive. The fixing of the date of elections is not a neutral procedural act but can have important political consequences. The discretion of the President should therefore be limited to a short time period not exceeding 2 or 3 weeks.

III. Other amendments proposed independently from the decision in favour of one or the other Option

9. One of the proposed amendments introduces a new paragraph 2¹ into Article 50 providing that, if only one list passes the 7% threshold for taking part in the distribution of seats to be attributed on the basis of the proportional system, then the list having received the second highest number of votes will also take place in this distribution. Both the Venice Commission and other Council of Europe bodies have repeatedly criticised the 7% threshold as excessively high. Most recently also at its 69th Plenary Session the Venice Commission adopted an Opinion on the Electoral Code of Georgia recommending to lower the threshold to a number within the usual range. i.e. between 3 and 5% (document CDL-AD(2006)037). While the proposed amendment is therefore a step in the right direction, it would be far better to amend Article 50.2 and lower the threshold.

10. The first proposed amendment to Article 73 of the Constitution on the powers of the President deletes the present provision that ambassadors and other diplomatic representatives are dismissed by the President with the consent of parliament while retaining this procedure for their appointment. Apparently the aim is to enable the President to dismiss them without the consent of parliament. It seems questionable whether this aim is reached in the absence of a positive provision to this effect.

11. The second proposed amendment to Article 73 provides for deleting the provision that the President chairs the highest Council of Justice and appoints and dismisses judges. This provision was indeed criticised by the Venice Commission in its above-mentioned Opinion on previous amendments to the Constitution of Georgia. Deleting this provision is, however, on its own not at all sufficient. What would be required is to clearly provide in the Constitution the composition and powers of the Council of Justice and to enshrine in its text rules on the appointment and dismissal of judges safeguarding their independence.

12. Finally, Article 2 of the draft Constitutional Law should, to dispel any doubts, be amended to read that the Law enters into force on the day following its promulgation.

IV. The choice between Option 1 and Option 2

13. Both options deal with the situation when the President decides for the second time during his or her term of office to dissolve parliament. According to Option 1, simultaneous presidential and parliamentary elections take place in this case. According to Option 2, in this event the right to decide on the composition of the government following the elections belongs

to Parliament and the Government elected in this manner is accountable only to the Parliament and not to the President.

14. As regards Option 1, this seems a logical choice within the framework of a semi-presidential system. If the President has already exercised during his or her term the right to dissolve Parliament and thereafter a new conflict arises between President and Parliament, it seems appropriate that both institutions have to hand their mandate back to the voters, who are thus put into the position of deciding on the conflict opposing both state organs. The amendment seems therefore positive but does not, on its own, correct the imbalance between parliamentary and presidential powers noted in the previous Opinion of the Venice Commission (CDL-AD(2004)008).

15. Option 2 pays more attention to strengthening the position of the Parliament and the Government with respect to the President and it in fact introduces a parliamentary system for limited periods following a second dissolution of Parliament. One may, however, doubt whether this way of balancing powers is the best one. Georgia would potentially move for a short period to a parliamentary system while the President would at the same time otherwise retain his or her strong powers under the Constitution and the legitimacy as the directly elected Head of State. There is a strong risk of institutionalising political conflicts in this manner.

V. Amendments proposed under Option 1

16. The proposed amendment to Article 70.1 provides that the same person may not be President for more than 10 years instead of the present limit to two consecutive terms of office. While the wording referring to terms of office may be preferred, it is a political choice whether to allow more than two terms of office subject to these not being consecutive.

17. The proposed amendment to Article 81.4 on the one hand now enables the Prime Minister to link the adoption of all laws and not only of some laws with a vote of confidence in the Government, on the other hand he or she may do so only twice during a session. This seems based on the willingness to have a balanced solution and is a political choice.

VI. Amendments proposed under Option 2

18. Option 2 seems no longer to be pursued seriously and can therefore be reviewed in a summary manner. Many of the amendments have only the aim of providing for an exception to the usually applicable constitutional rules for the situation following a second dissolution of parliament. Instead of the generic wording "except for the case determined by the Constitution", it would be preferable to refer to the specific constitutional provision constituting the exception.

19. The role given in this Option to the Bureau of the Assembly would require to define the composition of the Bureau more clearly in the Constitution, so as to ensure the adequate representation of the opposition within this Bureau. In general, while Option 2 seems motivated by a positive desire to obtain a better balance of power between the State organs, it seems not to have been completely thought through and other amendments to the Constitution would seem preferable in this respect.

VII. Conclusions

20. With respect to the proposed amendment to the Constitution providing for the next presidential and parliamentary elections to be held jointly in the autumn of 2008, thus at the same time extending the term of office of the present Parliament and shortening the term of

office of the President, the Venice Commission considers that such an amendment, whereby a parliament extends its term of office beyond the period for which it was originally elected, is permissible only exceptionally and on the basis of constitutional and not purely political considerations. A possible justification would be the wish to provide that such elections should generally and not only once be held jointly. If this is not the intention, and there are good reasons not to wish to do so, an alternative constitutional justification has to be found, and implemented by the amendment, such as to generally fix the dates of all regular elections in a period particularly favourable to ensuring wide participation. In any case, the date of the election should then be clearly set forth in the Constitution with the President being able to determine the precise date only within a limited range not exceeding 2 to 3 weeks and not within 2 or 3 months.

21. As regards the other proposed amendments, in particular the amendments to Articles 50 and 73.1.(p) respond to past criticism of the Constitution. They fall short, however, of providing a satisfactory solution which would be, in the first case, to lower the percentage threshold for the parliamentary elections and, in the second case, to provide a clear constitutional basis for the Council of Judges and for judicial appointments.

22. As regards the two Options in the event a President dissolves Parliament twice during his or her term of office, Option 1 is positive and can be considered a step in favour of a more balanced system of powers. Option 2 would go further in this direction but seems not the best way to achieve this aim. If, as seems the intention, Option 1 is chosen, further constitutional reform in this respect remains desirable for the future.