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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

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

On the basis of comments by

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I. Introduction

1. By a decree of 16 June 2009, the President of Georgia set up a State Constitutional Commission with the task of preparing extensive amendments to the Constitution of Georgia.

2. By a letter of 9 July 2009, Mr Avtandil Demetrashvili, Chairman of the State Constitutional Commission (SCC), invited the Venice Commission to assist in the process and eventually to assess the proposed amendments.

3. A working group was set up, composed of Messers Bartole, Dutheillet de Lamothe, Sorensen and Tanchev. At the request of the Venice Commission, the Council of Europe's Directorate General of Democracy and Political Affairs (DGDAP) also appointed an expert on local self-government, Mr Robert Hertzog. This working group assessed the draft Constitutional Law of Georgia "On changes and amendments to the Constitution of Georgia" containing the new constitutional chapter on local self-government in March 2010 (CDL-AD(2010)008)).

4. On 17 May 2010, the State Constitutional Commission sent the draft constitutional law on the changes and amendments to the constitution of Georgia (CDL(2010)044rev) to the Venice Commission for assessment. This draft law contains the proposed amendments to the Constitution of Georgia which the State Constitutional Commission adopted on 11 May 2010.

5. A working group was set up within the Venice Commission, composed of Mr Bartole, Ms Nussberger, Mr Scholsem and Mr Sorensen, as well as by Mr Robert Herzog, DGDAP expert.

6. A conference on "Constitutional reform in Georgia", organized by the German Technical Co-operation (GTZ), took place in Berlin on 15-16 July 2010. Ms Nussberger, Mr Bartole and Mr Herzog participated in it, as well as several members of the State Constitutional Commission and other international experts. The rapporteurs wish to thank GTZ for giving them this good opportunity of holding fruitful discussions with the SCC.

7. At its last plenary session of 19 July 2010, the State Constitutional Commission adopted a revised draft constitutional law on the amendments and changes to the constitution of Georgia (CDL (2010)071).

8. The present draft opinion was prepared on the basis of the rapporteurs' contributions and of the discussions which took place in Berlin; it was sent to the State Constitutional Commission and to the Georgian authorities on 30 July 2010 and subsequently adopted by the Venice Commission at its … Plenary Session (Venice, …).

II. Previous opinions of the Venice Commission relating to the Constitution of Georgia

9. The Venice Commission has assisted the authorities of Georgia in respect of several sets of constitutional amendments: in 2004 (Opinion on draft amendments to the constitution of Georgia, CDL-AD(2004)008); in 2006 (Opinion on the draft constitutional law on amendments to the Constitution of Georgia, CDL-AD(2006)040); in 2009 (Opinion on four constitutional laws amending the Constitution of Georgia (CDL-AD(2009)017rev and Opinion on a draft constitutional law on the amendments to the Constitution of Georgia (CDL-AD(2009)030) and in 2010 (Opinion on the draft constitutional law on changes and amendments to the Constitution of Georgia - Chapter VII, Local Self-Government, CDL-AD(2010)008).

III. Analysis of the draft amendments

a) Protection of property

10. It is proposed to amend Article 21 of the Constitution, which protects private property. The main change concerns the terms of compensation for expropriation: under the amended paragraph 3, deprivation of property for the purposes of public necessity shall be subject to fair compensation *exempted from taxes, duties and fees (emphasis added)*.

11. The Venice Commission recalls that according to a proposal in 2008 Article 21 of the Georgian Constitution should have been amended through the adoption of a constitutional law (CDL(2008)121, "third constitutional law"), which was submitted to the Venice Commission for assessment (CDL-AD(2009)017rev). The Commission had found, in relation to the third paragraph of Article 21, that it was appropriate to interpret it "as entrusting the administrative authorities with the task of implementing the relevant, general, ordinary legislation under the control of the judicial bodies in the normal cases, and as requiring administrative measures in accordance with a special legislation (but without excluding the judicial review) in situations of emergency". As it is not proposed to amend the relevant wording, the Commission reiterates its recommendation as to the correct interpretation of this provision.

12. As concerns the exemption from the payment of taxes and duties on the amounts paid as compensation for the expropriation, the Venice Commission does not have any objection to this provision.

b) Double citizenship and public functions

13. A new paragraph 1.1 is proposed to be added to Article 29 of the Constitution, whereby Georgian citizens who also possess another citizenship may not become President, Prime Minister or Speaker of parliament. This regulation has to be read together with Article 12 of the Constitution, according to which double citizenship is generally excluded, with narrow exceptions. Citizens of foreign countries may be granted the citizenship of Georgia by the President of Georgia only in two cases: either if they have a special merit before Georgia of if granting them the citizenship is due to State interests. The new regulation thus targets only these very specific cases.

14. In the Venice Commission's opinion, in each country's public-service sector certain posts involve responsibilities in the general interest or participation in the exercise of powers conferred by public law which justify that the State should have a legitimate interest in requiring of these servants a special bond of trust and loyalty, The posts of President of the Republic, Prime Minister and Speaker of parliament belong to this category. In the Venice Commission's view, they may therefore legitimately be reserved to persons who only hold Georgian citizenship.

c) The removal of organic laws

15. Article 1 § 3 of the draft constitutional law provides for the removal of the term "organic" everywhere in the constitution; as a consequence, no reference to "organic laws" will be contained in the future constitution.

16. Provision is further made for the deletion of paragraph 2 of Article 66 of the Constitution, which provides for the adoption of organic laws by "more than half of the Parliament on the current nominal list". This means that, if the amendments are adopted, all laws will be adopted pursuant to Article 66 § 1 of the Constitution, i.e. by the majority of the members of parliament present, but by no less than one third of all MPs.

17. The Commission considers that this proposal raises certain issues.

18. Organic laws have a special status in the hierarchy of laws: they prevail over conflicting ordinary laws. Organic laws are less easy to amend than ordinary laws, but are easier to amend than the Constitution itself. The special majority required for the adoption of organic laws is justified by the need of greater attention and agreement in the decision-making process concerning those laws which touch upon very delicate and specific matters where the implementation of important constitutional principles is at stake: the composition of the Chambers of the Parliament, the acquisition of the citizenship, the deprivation of property, the right of association, the Public Defender, the participation of the political associations in the elections, the election of the President, the immunity of the President, the Constitutional Court, the appointment of the judges, the National Bank and the Council of National Security, local self-government.

19. If the category of organic laws is removed from the Constitution, these matters will be submitted to the decision of the simple majority of present MPs and will therefore be deprived of the reinforced protection which they currently enjoy. The relevant laws will not prevail over other laws any more.

20. In the Commission's view, this matter deserves careful consideration. If the category of organic laws is removed from the Georgian legal order, it will be necessary to include in the constitution at least certain important provisions of principle which until now have been contained in organic laws but which should not lose the special protection they have enjoyed so far (see for example local self-government, below).

d) Establishment of parliamentary commissions

21. The new text of Article 56 § 2 provides for the possibility for one fifth (instead of one fourth) of MPs to establish investigative or other temporary parliamentary commissions through a resolution of the parliament. The reduction of the number of MPs required for establishing a parliamentary commission might help to strengthen the role of smaller opposition parties and is therefore to be welcomed.

e) Issue of responsibility of individual ministers

22. Draft article 59 § 3 requires the majority of MPs for parliament to raise before the Prime Ministers an issue of responsibility of individual ministers; it thus diminishes the influence of the parliament on the composition of the government. There is no clear regulation of the consequences of a discussion on the liability of a minister. It should be clear that it is the Prime Minister that is responsible for all the actions of the government: in this sense, the proposed amendment deserves approval.

f) Special sessions of the parliament

23. The proposed paragraph 2 of Article 61 correctly proposes to add the Cabinet to the list of the State bodies allowed to request the calling of a special session of the Parliament. The proposal is coherent with the new role envisaged by the proposal for the Cabinet.

g) Impeachment of the President

24. The proposed Articles 63 and 75 render the procedure of impeachment less complicated. The Supreme Court is not involved any more. The impeachment can be based on a criminal charge as well as on the violation of the Constitution. Both changes are welcome. As the impeachment procedure consists of a judicial and a political part, it does not seem absolutely necessary to define "corpus delicti" and "violation of the Constitution". Minor incidents will not be

supported by the majority of the Parliament. Nevertheless, it might be useful to add the word "serious" in both instances.

h) Legislative initiative

25. The proposed paragraph 1 of Article 67 would eliminate the current limitation of the power of legislative initiative of the President "only in exclusive cases". The President will therefore enjoy a wide power of legislative initiative.

26. Paragraph 2 would extend to the government the same possibility which the President already has to request the parliament to consider a draft law proposed by it even if it is not on the parliament's agenda. While the equal treatment of the President and the government is coherent with a more parliamentary system, the Venice Commission underlines that it will lead to a duplication of functions in the governmental and presidential administrations. This is counter-productive in building up an efficient state administration.

i) Promulgation of laws – President's veto

27. The proposed new Article 68 § 4 of the Constitution requires the absolute majority of all members of parliament (instead of three fifths) for the rejection of the remarks made by the President before the promulgation of the law. This is a significant change in the direction of a parliamentary system. The procedure for rejecting the President's veto remains nevertheless complex, requiring a first vote of the Parliament on the remarks of the President and a second vote about the adoption of the law if the remarks are rejected.

j) The role of the President of the Republic

28. Article 69 intends to introduce a substantial change: the President of the Republic will not "lead and exercise the internal and foreign policy of the state" any more (see the deletion of the first sentence in current paragraph 2 of Article 69), and will instead be "the guarantor of Georgia's unity and national independence". The President will continue to be responsible for securing the functioning of the institutions "on the basis of the competences enumerated in the constitution".

29. This provision does not bestow any additional, general powers on the President (thanks in particular to the reference to the limits of the powers conferred to the President by the constitution), but marks the different role which the President has under the new constitution.

30. The President will keep the position of supreme representative of Georgia in foreign relations (already foreseen in current paragraph 3 of Article 69). This provision risks being a source of conflict with the government, should it not be clear that the representation functions of the President should be confined to symbolic ones. This aspect will be discussed in more detail below, in connection with the President's powers.

k) The requirements for being President of the Republic

31. The proposed new paragraph 2 of Article 70 requires candidates to the Presidency to have resided in Georgia for at least three years before the day of the election. Currently, candidates have to live in Georgia on the day of the election.

32. It is understandable to require a sufficient connection of the candidate with the country. The Venice Commission has been explained that this provision will be interpreted in a manner as to exclude only those persons who do not have genuine connections with the country.

l) The powers of the President of the Republic

33. Article 73 lists the powers of the President of the Republic. The abrogation of current points b) (authorisation for the Prime Minister to appoint the ministers) and c) (dissolution of government, dismissal of ministers of internal affairs and justice) of the current constitution is justified by the new role of the President and by the new provisions concerning the relations between the President, the Cabinet and the Parliament, and is to be approved.

34. The reformulation of point a) (holding talks with foreign states, conclude international treaties) appears more problematic. The delimitation of the competences between the President and the Government in the field of foreign affairs does seem to be entirely clear. If it is intended, as was explained by the Constitutional Commission, that the President has generally a representative function and can decide only in the most important cases, it is not understandable why the President should have the power of "holding talks with foreign states" and "concluding international conventions and agreements" (all of them, at all levels), even if this has to be "by agreement with the Government". Should this mean that the Government has no power of negotiating any international treaties at all, this would be hardly compatible with Article 78 § 1 whereby i.a. the government is in charge of the execution of foreign policy. The need for the Government's consent will not eliminate, and instead is likely to increase the risk of conflicts between the government and the President, if the latter has a say in the matter. Against the background of the new role of the President, who has to guarantee the fundamental features of the State, it could be envisaged that he or she would be responsible for the main lines of foreign policy, while the Government would take care of the day-by-day foreign relations. It would seem difficult, however, to distinguish between the two spheres of activity.

35. The abrogation of e) (consent to the government to submit the state budget to the parliament) is justified by the new role of the Cabinet.

36. The President's power under point f) (power to submit to parliament candidates for certain offices, appoint and dismiss them) is maintained. This competence should be clearly distinguished from the power of the Prime Minister to appoint and dismiss "other officials" in accordance with a procedure and in the cases envisaged by the law (Article 79 para. 6). Otherwise this provision may become a source of conflict.

37. The President's powers under points g) (declaration of martial law), h (declaration of state of emergency), and i) (suspension of institutions of self-government) are maintained. These powers are counterbalanced by the relevant powers of the Parliament (Article 62 of the Constitution). However, the declaration of martial law and state of emergency should not be exempted from the counter-signature by the Prime Minister (see Article 73.1 o)).

38. It is also proposed to abrogate art. 73 § 3 (power of the President to suspend or abrogate acts of the Government and executive bodies which are in contradiction with the constitution, international treaties, laws and normative acts of the President). This deserves a positive evaluation. It could be useful to provide for the power of the President to seek the intervention of the Constitutional Court or of the judiciary in case of alleged violation of the Constitution or of a law.

39. The appointment of the high officials of the armed forces (Article 73 § 4) should require the consent of the Government (see below).

40. Art. 73.1 is a novelty. It introduces the countersignature of the Prime Minister to the acts of the President, which entails responsibility of both the President and the Prime Minister (Article 73.1 para. 3). The countersignature of the Ministers is not required, not even in case of connection of the relevant act with the functions of a single Minister.

41. The need for a counter-signature is consistent with the proposed shift to a mixed, less presidential system.

42. It must be noted, however, that the counter-signature of the Prime Minister is not required for acts issued under martial law (Article 73.1 §1) and for a long list of acts (Article 73.1 § 2) which appear to have the potential to interfere with the activity of the Government. As a consequence, notwithstanding the enlargement of the powers of the Government, the President will remain a powerful institution, which will be in the position of establishing a direct relation with the Parliament, by-passing the Government in cases which affect the unity of the State and the correct functioning of the constitutional institutions, which can be the source of conflicts between the supreme bodies of the State and which is not coherent with the role of impartial guarantor of the continuity of the constitutional order of the State and of its unity.

43. A stringent legal ground for this exclusion of the countersignature does not appear evident for all of the cases listed in para. 2 of Article 73.1 and the Venice Commission recommends removing the following from this list:

- Point d) - the signing of the international treaties and agreements and their submission to parliament in cases provided for by the Constitution. It is not entirely clear what these cases are. Under Article 65 paragraph 2 a) to e), it is obligatory for the parliament to ratify an international treaty or agreement which: a) provides for accession of Georgia to an international organisation or intergovernmental union; b) is of a military character; c) pertains to the territorial integrity of the state or change the state frontiers; d) is related to borrowing or lending loans by the state; and e) requires a change of domestic legislation, adoption of necessary laws and acts with force of law with a view to honouring the undertaken international obligations. These are, presumably, the cases foreseen under point d) of Article 73.1, but this matter should be clarified. At any rate, in the Venice Commission's view it would seem reasonable that the Constitution should provide that the President has to be involved in the negotiations of these treaties, but it would not be consistent with the role of the government as leader of foreign policy that the President should have exclusive competence in these matters.

- Point e) - the appointment of military leaders, which must be consensual and should not be exempted from the counter-signature;

- Point k) - the granting and termination of citizenship: the President's powers connected to citizenship matters appear very extensive (see para. 13 above); it would be appropriate to provide for the legislative regulation of the granting and termination of the citizenship, with the need for a judicial decision in case of termination;

- Point n) - the activities and functions of the President's administration, the National Security Council and the bodies under presidential subordination: these should be regulated by law;

- Point o) - the declaration or revocation of the state of war and of martial law: these acts should require the countersignature of the government, as they do not logically belong to the exclusive competences of the President.

44. Under the proposed amendment to paragraph 6 of Article 73, the President shall exercise other powers as determined "by the Constitution" only, and no more also "by the law". This change is to be welcomed.

m) Role and functions of the government

45. The new text of art. 78, which states the principle that the Government is the supreme organ of the executive branch, which exercises domestic and foreign policy of the State and is accountable before the Parliament (and no more before the President), paves the way for the shift towards a less presidential system.

46. The draft amendments point to a collective exercise of the powers of the Government: ministers do not countersign the acts of the President which affect their competences (see article 78.3).

47. Article 78 paragraph 4 provides for the possibility for the President to request the government to consider a specific issue and to participate in the relevant discussions. This provision represents an improvement in comparison with the previous proposal to give the President the power to summon and preside over a government meeting on matters requiring the counter-signature of the government, which would have given the President the power to interfere significantly with the work of the government, thus risking institutional conflicts (if the government refuses to act as the President expects).

48. Little changes in art. 79 emphasize the role of the Prime Minister, who is entrusted with the determination of the directions of the activity of the Government, while the competences of the Government affecting the main lines of its policy are collectively exercised.

49. The most important change is that the President's consent is no longer needed for the appointment of the members of Government. This is in line with the new, mixed system of balance of powers.

50. The obligation for the government to report to the President and its responsibility before the President are removed (deletion of paragraph 2 of Article 79).This is consistent with the new powers of the government.

n) Formation of the government

51. Article 80 provides for the procedure of formation of the government after parliamentary elections. The President nominates a candidate for Prime Minister on the basis of the proposal of the political group with the best results in the elections. Within seven days, the candidate selects the Ministers and presents the composition and the programme of the government to the Parliament for the vote of confidence.

52. If the vote of confidence is approved by the majority of the deputies, the President appoints the Prime Minister, who appoints the Ministers.

53. If the confidence is refused, the Parliament within a month repeats the vote, either on the same or on a revised composition of the government. If the confidence is denied again, the President nominates within seven days the candidate put forward by no less than two-fifths of all MPs, or if there are two candidates the one proposed b a greater number of MPs, or either candidate if the number is equal. After the Prime Ministers selects the ministers, the parliament votes on the confidence. If the confidence is refused, the President dissolves the parliament within three days and calls for early elections.

54. When the confidence is given, the President appoints the Prime Minister, who appoints the ministers. If the President fails to duly appoint the President, the Constitution foresees that the appointment is presumed.

55. The Venice Commission notes that this procedure has been improved in comparison with the previous proposal; in particular, the time-frames have been reduced and better defined, which is to be welcomed even if they remain quite long. The Commission notes however that the possibility for a repeated vote, possibly on the same composition of the government, after as long a period as one month risks prolonging unduly the negotiations – including non transparent ones - between the political parties[1].

56. The term „political groups" is used in paragraph 6. There is no relevant definition in the Constitution, which in Article 58 only defines parliamentary „factions". The terminology should be revised or the definition added.

o) Resignation or dissolution of the government

57. The newly proposed Article 80.1 provides for the procedure to be followed in case of resignation of the government or termination of the powers of the Prime Minister. The President has to nominate the candidate put forward by the parliamentary majority or, in case there is none, by the "parliamentary faction with the largest membership". The procedure to be followed subsequently is the same as for the formation of the government, and thus calls for the same remarks.

p) Motion of non-confidence in the government

58. Article 81 sets out the procedure for a declaration of non-confidence in the government. Two fifths of the MPs are entitled to present a motion of non-confidence. Parliament must discuss it no less than 30 and no more than 35 days after its submission. The decision to vote on the non-confidence must be taken by more than half of the members of parliament. If the motion is refused, it cannot be represented by the same MPs for six months.

59. If the motion is accepted, there follows a lengthy (no less than two months) and complex procedure.

60. Between 30 and 35 days of the decision to vote on the confidence, the parliament must vote by absolute majority on the submission to the President of one (or two) new candidate(s) for Prime Minister, presented by at least two fifths of MPs.

61. Within five days of the submission of the candidate(s), the President must decide as to whether officially nominate him of her (or one of them if there are two) - in which case the government is subsequently formed pursuant to Article 80 – or reject the candidate(s).

62. If the President refuses to appoint the candidate, the parliament may decide – within 30 to 35 days – by at least three fifths to re-present the same candidate(s), in which case the President is obliged to appoint him or her (or one of them if there are two) and the government is subsequently formed pursuant to Article 80.

63. If parliament fails to approve the new government, the President is entitled to dissolve the parliament and call for new elections.

64. The Venice Commission notes that two different approaches appear to have been chosen and currently coexist - with great difficulty - in the draft. On the one hand, it is foreseen to introduce a constructive vote of non confidence, in order to ensure political stability. On the

[1] Article 80 § 4 of the current Constitution allows the President to submit the same or a new composition of the proposed government to a second vote of confidence, but within one week. The Venice Commission had already raised the question of the appropriateness of this provision (CDL-AD(2004)008, § 28).

other hand, it is intended to give the President a substantial role in this procedure. Three subsequent votes are thus foreseen: a first vote to launch the procedure of non-confidence, a second vote on non-confidence and a third vote on the new candidate for Prime Minister. The President is empowered under Article 81 § 3 to choose between the *official nomination* (= a*ppointment*?) of the candidate and the dissolution of the Parliament with subsequent call for new elections, and this notwithstanding the fact that the vote of non-confidence and the presentation of the new Prime Minister are supported by the required majority in parliament. A qualified majority is necessary to overcome the President's veto.

65. In the Venice Commission's view, the power of the President to dissolve parliament at this stage is not compatible with the constructive vote of non confidence and should be removed.

66. In addition, the Venice Commission finds that the time-frame of the procedure is still excessively long, and opens the way to potentially non transparent negotiations between the political parties. As it is, this procedure risks prolonging a political crisis instead of solving it.

q) Question of confidence

67. Art. 81.1 of the present Constitution (submission by the President of a new composition of the government to parliament for the confidence) is abrogated in conformity with the choice of reducing the powers of the President.

68. Pursuant to new paragraph 1 of Article 81.1, the Prime Minister is allowed to raise the question of confidence in relation to a draft law. This is coherent with the mixed system of government which has been chosen for this reform. The parliament's refusal to declare its confidence in the government opens the procedure of constructive confidence provided in Article 81. The real margin of manoeuvre of parliament in this context can be questioned.

r) Appointment of State Envoy-Governor

69. The appointment of the State Envoy – Governor involves only the Prime Minister. It is unclear why a deliberation of the Government is not required.

s) Appointment of judges

70. Art. 86 paragraph 2 provides for the appointment for life of judges, which is to be welcomed. Indeed, the Venice Commission has consistently favoured judges' tenure until retirement (see CDL-AD (2010)004, Report on the independence of the judicial system – Part I, the Judges, § 35).

71. The same provision also introduces a probationary period of "not more than 3 years". This proposal appears to be problematic.

72. The Venice Commission recalls in the first place that the European Charter on the Statute of Judges sets out at 3.3:

> *"3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period."*

73. The Venice Commission has previously clearly stated that "*setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. […] This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office". The main idea is to exclude the factors that could challenge the impartiality of judges: "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value*." (See Report on the independence of the judiciary, op. cit., § 37).

74. The Venice Commission therefore recommends removing this proposal for a trial period for judges.

t) Re-election of the Chairman of the Constitutional Court

75. It is proposed to delete the provision in Article 88 paragraph 2, last sentence, that the Chairman of the Constitutional Court may not be re-elected. The lack of regulation of this issue might lead to controversies in practice.

u) Access to the Constitutional Court

76. The amendments to article 89 §1 (sub-paragraphs f^2 and f^3) enlarge the list of the entities which are allowed to apply to the Constitutional Court. It regards the representative body of a local self-government unit – Sakrebulo and the High Council of Justice. This is a very welcome development. The difference between a "claim" and a "motion" (which is used also in current Article 89 of the Constitution) is not clear to the Venice Commission.

77. It might be advisable to clarify that representatives of local self-government bodies may appeal to the constitutional court only in the interest of the unit they represent.

78. Directly elected mayors, such as the Mayor of Tbilisi, should also be empowered to appeal to the Constitutional Court.

v) Approval of the State budget

79. The Government will be allowed to submit the State Budget to the Parliament with the report about the implementation of the current budget without the need for the consent of the President. Only with the consent of the Government may the Budget be amended. Art. 93.5 provides for the provisional exercise of the Budget when the parliament fails to approve it. The Parliament can provide for new expenses and can cut revenues only with the consent of the Government.

80. Further to the proposed abrogation of current Article 93 §§ 2 and 6, the President will no longer have the power to consider the question of liability of the government in case of non-fulfilment of the state budget, and dismiss the government or dissolve the parliament if the budget fails to be adopted.

81. These are welcome proposals, which strengthen the government and ensure continuity in public finances, thus contributing to political stability. It must be noted however that the role of the parliament in budget matters is quite limited. Indeed, only the government has legislative initiative in budget matters (Article 93 § 1), the parliament cannot change the draft budget (§ 3)

and increased public spending, reduced revenues or additional financial obligations vis-à-vis the current budget need to be approved by the government (§ 6). It would seem appropriate that the parliament be more significantly involved in budget matters.

82. The need for the President's consent for cuts in the presidential expenditures (para. 4 of Article 93) seems to be at odds with the parliamentary feature of the new constitution.

w) Local self-government

83. The Venice Commission has already assessed a previous set of proposed constitutional provisions aiming at regulating local self-government with some detail[2]. In that context, the Commission had recalled that "local self-government is an important feature of modern democracies. While the extent and form of self-government are left by international standards, notably the European Charter on Local Self-government, to the discretion of States, certain principles are essential: that public responsibilities should be exercised, by preference, by those authorities which are the closest to the citizens; that delegation of competences should be accompanied by allocation of sufficient resources; and that administrative supervision of local authorities' activities should be limited." The Venice Commission had concluded that "the level of constitutional entrenchment which would be brought about by these amendments is insufficient. Certain important matters would need to be regulated at the level of the constitution, failing which the above mentioned fundamental principles of local self-government will lack sufficient protection and the Constitutional Court will not dispose of a sufficiently clear yardstick to decide on conflicts of attribution of competences and other controversies between the state and local self-government representatives."

84. The Venice Commission underlines that the prospected removal of the category of organic law would diminish the guarantees for local self-government, as it would deprive certain important principles contained in the organic law on local self-government of their current reinforced protection. The Venice Commission therefore considers that it is necessary to protect these principles – first and foremost the "own" competences of local self-government units – in the constitution (see CDL-AD (2010)008, paragraphs 31-34).

85. Draft chapter 7 contains some (if not all) important principles. Local self-government is a basic principle in Article 2 paragraph 4. The independence and autonomy of local self-government units is set out in paragraph 2 of Article 101.2.

86. The plural term "executive *bodies*" (emphasis added) in the second sentence of paragraph 1 of Article 101.1 might lead to misunderstanding: only a directly or indirectly *elected body* may be considered as the "executive body". The latter term should therefore be used in the singular, and the term "elected" should be added.

87. Article 101-2 §§ 1 and 2 duly introduces the distinction used by the European Charter of Local Self-government (Article 4 §§ 4 and 5) between "own" and "delegated" competences. It further sets out in Article 101-2 § 3 a "general clause of competence" of local self-government authorities, thus recognising that local self-government authorities have, as a rule, own competences and that the delegated competences are the exception which needs to be provided by the law. This general clause is to be welcomed.

88. Article 101-2 § 4 should distinguish between "delegation" of competences and "transfer" of competences. The first concept, set out in Article 4 §§ 4 and 5 of the ECLSG, has an important legal consequence: the State has the right to supervise and even direct *delegated* powers on

[2] See CDL-AD(2010)008.

the basis of both legality and expediency, whereas State supervision of *transferred* competences (which become *own* competences) is limited to legality.

89. The transfer of relevant financial resources should be compulsory not only, as foreseen in Article 101-2 § 4, in case of delegation of competences, but also in case of transfer of competences.

90. The Venice Commission notes in addition that new Article 89(1)f[2] will provide for the possibility for the representatives of local self-government to apply to the Constitutional Court, which is a very positive development.

x) Revision of the Constitution

91. Pursuant to new Article 102 paragraph 3, a proposal for constitutional amendment must be adopted by a 2/3 majority of all MPs in two subsequent sessions with a three-month interval.

92. In the Venice Commission's opinion, it is necessary to provide for a more rigid manner of amending the constitution than is currently foreseen (a vote by 2/3 majority of the total number of MPs). However, an appropriate balance must be found between constitutional stability and the sufficient flexibility which will allow the constitution of Georgia to be adapted to future, new developments.

93. The current proposal provides limited protection of constitutional stability by requiring two subsequent votes after a cooling off period of three months. This represents nevertheless a step forward, which is probably the best possible option at this stage.

IV. Conclusions

94. The constitutional reform which is pending in Georgia aims to move from a rather presidential system of government to a mixed system where the executive power is in the hands of the government which is accountable to the parliament. The President loses his role of leader of foreign and domestic policy, and becomes a guarantor of the continuity and national independence of the state and of the functioning of the democratic institutions. His role is supposed to be that of a neutral arbitrator between the state institutions. The proposed constitutional amendments provide for several important improvements and significant steps in the good direction.

95. However, notwithstanding the enlargement of the powers of the Government, the President retains important powers, notably in the field of the international relations, the armed forces and the situations of emergency. He or she is in the position of establishing a direct relation with the Parliament, by-passing the Government in cases which affect the unity of the State and the correct functioning of the state institutions. There is thus a concrete risk of conflicts with the other institutions, which is enhanced by the fact that the President is directly elected and that the Government may be the expression of a parliamentary majority different from that which supported the election of the President, with parliamentary elections occurring every four years while presidential elections every five years. In addition, and importantly, the President plays a political role, which is not coherent with the role of impartial guarantor of the continuity of the constitutional order of the State and of its unity.

96. The Venice Commission considers therefore that certain amendments should be made to the draft constitutional law under examination before its adoption.

97. The Venice Commission remains at the disposal of the State Constitutional Commission and of the Georgian authorities for further assistance.