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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

SECOND REVISED 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 Herzog. 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. A preliminary draft opinion was prepared by the rapporteurs and was sent to the Georgian authorities on 31 July 2010 in view of the public discussion of the constitutional amendments which was launched in July.
9. On 16-17 September 2010, a delegation of the Venice Commission, composed of Mr Sergio Bartole and Ms Angelika Nussberger together with Mr Thomas Markert and Ms Simona Granata-Menghini, travelled to Tbilisi to meet with the State Constitutional Commission, with representatives of the parliament, including the opposition, with representatives of the extra-parliamentary opposition and with the civil society.
10. The preliminary draft opinion was subsequently revised and sent to the Georgian authorities on 28 September 2010.
11. On 24 September the draft amendments were adopted by the Georgian parliament in the first reading. On 1 October, they were adopted in the second reading. The text of the amendments as adopted in the second reading (CDL(2010)110) was sent to the Commission on 2 October for assessment.
12. *The present opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

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

13. 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).

III. The scope of this opinion

14. In 2004 the Venice Commission had recommended that the constitution of Georgia be revised so as to provide a better balance between the state powers, notably the powers of the President and those of parliament. A process of extensive constitutional amendments was only launched in 2009, and the Commission was required to assist in it by assessing first the draft chapter on local self-government (Opinion on the draft constitutional law on changes and amendments to the Constitution of Georgia - Chapter VII, Local Self-Government, CDL-AD(2010)008) and subsequently the proposed amendments, including the version adopted in the second reading.

15. The Venice Commission has confined itself, as requested by the Georgian authorities, to provide an expert assessment of the text which has been submitted to it.

16. As to the process of public discussion of these amendments, the Commission notes that it has been led by a constitutional commission headed by the Speaker of parliament and has consisted in 23 public meetings throughout the territory of Georgia over a period of one month and a half. All of these meetings were broadcasted on several TV channels. A website was dedicated to the reform. The opposition and the civil society have told the Venice Commission delegation in Tbilisi that this discussion has been insufficient, partly because it has taken place during summer and partly because the important issues have not been genuinely debated.

IV. Analysis of the draft amendments

a) Protection of property

17. 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 full and fair compensation *exempted from taxes, duties and fees (emphasis added)*.

18. The word “full and fair compensation” replacing “appropriate compensation” deserves approval. It should be clear that the interpretation of the clause has to be in line with the jurisprudence of the European Court of Human Rights. Article 1 Protocol No. 1 to the European Convention of Human Rights refers to the “general principles of international law” which, as a rule, require “prompt, adequate and effective” compensation generally related to the market value of the property.

19. 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.

20. 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

21. 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 or if granting them the citizenship is due to State interests. The new regulation thus targets only these very specific cases.

22. 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 the Georgian citizenship.

c) The removal of organic laws

23. While Article 1 § 3 of the draft constitutional law of May 2010 provided for the removal of the term "organic" everywhere in the constitution, and provision was 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", these amendments have not been accepted by parliament. The category of organic laws therefore remains.

24. The Venice Commission welcomes this development, which preserves the reinforced protection which important matters such as 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 and local self-government enjoy...

25. Under a new paragraph 3 of Article 30, labour law is added to the matters to be regulated by an organic law; this new provision deserves approval.

d) Establishment of parliamentary commissions

26. 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. Nevertheless, it must be stressed that the requirement of a

“resolution” cannot be interpreted as giving an arbitrary power to the majority in this process, which would undermine the right of the opposition. Otherwise the change of the text would be counter-productive to the aim of improving the status of the opposition in Parliament. The rules of procedure of parliament should not, therefore, add a hurdle to the setting up of parliamentary commission, once the relevant decision has been duly taken by one fifth of the MPs.

e) Issue of responsibility of individual ministers

27. 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, although it is possible under Article 81 to raise a motion of no confidence in the government, including with respect of actions of individual ministers. 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. Yet, it has to be seen in relation to the political responsibility of the Prime Minister. If the vote of no-confidence is defined in such a way as to make it nearly impossible to remove the Prime Minister (see para. 75 below), the enlargement of the competences of the Prime Minister in the appointment and dismissal of ministers is not justified.

f) Voting in parliament

28. Current paragraphs 3 and 4 of Article 60 will be replaced by a single paragraph 3 according to which “Voting at the plenary session of the parliament shall be open except in the case prescribed by the Constitution or the law”. The only substantial change seems to be that the minutes of parliament relating to non-secret matters will not be published in the Official Gazette.

g) Special sessions of the parliament

29. 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.

30. The possibility for the President to convene a special session of the parliament on his/her own initiative is removed, which deserves a positive assessment.

h) Impeachment of the President

31. 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.

i) Legislative initiative

32. The proposed paragraph 1 of Article 67 removes the power of legislative initiative of the President..

33 This amendment deserves approval, as it is more coherent with the new role of the President as (more) politically neutral institution.

j) Promulgation of laws – President’s veto

34. 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.

k) The role of the President of the Republic

35. The powers of the President of the Republic have generally been diminished. At the same time the powers of the Prime Minister have been enlarged. There have been allegations in Georgia that this change is motivated by reasons of personal power and not by a genuine desire for improving the machinery of government, as should be the case, as the Venice Commission has previously underlined.¹ It is not the task of the Venice Commission to speculate on the motivation for these changes. In its view, at any rate, in the light of the developments in the process of constitutional reform, it would seem unjustified to dismiss the draft as a mere attempt to circumvent the limitations of power under the present Constitution.

36. 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”. The President will continue to be directly elected by the people.

37. Article 69 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.

38. The President will represent Georgia in foreign relations (under current paragraph 3 of Article 69 he is “the supreme representative”). The Venice Commission interprets this provision as meaning that the representation functions of the President will be confined to symbolic ones. This aspect will be discussed in more detail below, in connection with the President’s powers.

l) The requirements for being President of the Republic

39. 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.

40. 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.

m) Termination of tenure of President upon election of a new President

41. This new provision indicates clearly that the tenure of the outgoing President ends with the official settling in of the newly elected one.

¹ See CDL(2010)001, Report on constitutional amendment, para. 145.

n) Incompatibilities of the President's office

42. New Article 72 provides for the incompatibility of the President's office with any other position, including in a political party, the conduct of any entrepreneurial activities and with any other activities for which a salary or any permanent remuneration is paid. These incompatibilities appear justified.

o) The powers of the President of the Republic

43. 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.

44. The reformulation of point a) (holding talks with foreign states, conclude international treaties) appears more problematic. The amendment adopted in the second reading (also when receiving accreditation from ambassadors and other diplomatic representatives the President will need the consent of the Government) does not eliminate the concerns. The delimitation of the competences between the President and the Government in the field of foreign affairs does not 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 "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 primarily 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.

45. 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.

46. The President's power under point f) (power to submit to parliament candidates for certain offices, appoint and dismiss them) is maintained.

47. The competences sub f) 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.

48. A new paragraph f1) has been added in second reading, concerning the submission by the President of candidates for chairman of the government of the Autonomous Republic of Adjara to the Supreme Council of the Autonomous Republic after consultations with the political parties represented in the Council. The Venice Commission recalls that it had examined a draft constitutional law which provided for the same power and had found inter alia that it was questionable that this proposal was within the discretion of the President of Georgia who was in no way bound to propose candidates likely to obtain the confidence of the majority of the

Supreme Council.² This particular remark seems to have been taken into account by providing for the need for the President to consult with the political parties represented in the Council. The Venice Commission, at any rate, considers that the level of interference of the Georgian state organs in the choice of the executive of the Autonomous Republic of Adjara is excessive.

49. 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 should not be exempted from the counter-signature by the Prime Minister (see Article 73.1 o)).

50. It is also proposed to abrogate Article 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.

51. The President maintains the power to appoint members of the National Security Council to appoint and dismiss the Chief of Staff of the armed forces and other military commanders (Article 73 § 4), but with the consent of the Government.

52. Article 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 Government (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.

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

54. The counter-signature of the Prime Minister is not required for acts issued under the state of war (Article 73.1 §1) and for other acts (Article 73.1 § 3). In previous versions of the draft amendments, the many acts exempted from counter-signature appeared to have the potential to interfere with the activity of the Government and enabled the President to establish 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 could be the source of conflicts between the supreme bodies of the State and which was not coherent with the role of impartial guarantor of the continuity of the constitutional order of the State and of its unity.

55. In a previous opinion prepared by the rapporteurs³, they underlined that a stringent legal ground for this exclusion of the countersignature did not appear evident for all of the cases listed in para. 3 of Article 73.1 and therefore recommended removing several of them from this list.

56. The Venice Commission is pleased to see that the parliament of Georgia has followed several recommendations and has indeed removed the exemption of counter-signature in relation to:

- the signing of the international treaties and agreements and their submission to parliament in cases provided for by the Constitution;

² CDL-AD(2004)018, para. 25.

³ CDL(2010)062rev, para. 51.

- the appointment of military leaders;
- the declaration or revocation of the state of emergency.

57. Only three problematic categories of acts remain exempted from counter-signature:

- Point h) - the granting and termination of citizenship: the President's powers connected to citizenship matters appear very extensive (see para. 19 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 j) - 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 k) - the declaration or revocation of the state of war: this could be justified only in exceptional cases, when communications among the top authorities of the State is not feasible.

58. 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.

59. The President loses, in line with the rapporteurs' previous recommendations, the power to call for a referendum on his own initiative.

p) Role and functions of the government

60. The new text of Article 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.

61. 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).

62. 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).

63. Little changes in Article 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.

64. 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.

65. 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.

q) Formation of the government

66. 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 ("election subject", which according to the explanations provided by the Georgian authorities means political party or electoral list) 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.

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

68. 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 by a greater number of MPs, or either candidate if the number is equal. After the Prime Minister 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.

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

70. The Venice Commission notes that this procedure has been improved in comparison with the previous proposal which had been submitted in May; in particular, the time-frames have been reduced and better defined, which is an improvement even if they remain quite long.

71. The Commission stresses however that it is not understandable why two votes on the same candidate and even on the same composition of government should be possible. It would be preferable and less time-consuming, while it would equally pursue political stability, to give the second chance to a candidate proposed by two-fifths of all MPs, the solution that is foreseen as third alternative only. The current proposal risks prolonging unduly the negotiations – including non transparent ones - between the political parties⁴.

72. 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.

r) Resignation or dissolution of the government

73. 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

⁴ 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).

subsequently is the same as for the formation of the government, and thus calls for the same remarks.

s) Motion of non-confidence in the government

74. 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.

75. If the motion is accepted, there follows a lengthy and complex procedure.

76. Between 20 and 25 days of the decision to vote on the confidence, the parliament must vote by two fifths on the submission to the President of one (or two) new candidate(s) for Prime Minister, presented by at least two fifths of MPs.

77. Within five days of the submission of the candidate(s), the President must decide as to whether officially nominate him or 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). If no candidate is submitted by parliament, the procedure is deemed to be abandoned.

78. If the President refuses to appoint the candidate, the parliament may decide – within 20 to 25 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.

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

80. In the Venice Commission's view, the rules on the motion of non-confidence should be reconsidered and revised. There does not appear to be any need for an initial vote to "launch" the procedure of non-confidence; there should be only one vote. The requirement under Article 81 paragraph 4 (second proposal by parliament of the same candidate with three-fifths of the votes) does not really fit into the general scheme of distribution of power. It is not logical to require the support of two fifths of the MPs for the Prime Minister, but to demand three fifths in order to overcome a Presidential veto raised in the no-confidence procedure. This gives too much power to the President and diminishes not only the power of parliament, but also the political responsibility of the Prime Minister that should be a corner stone in the new system.

81. The Venice Commission notes that in the second reading only one improvement has been made: the time-frame of the procedure has been reduced, which is a positive development although an insufficient one.

t) Question of confidence

82. Article 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.

83. 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.

84. The parliament's refusal to declare its confidence in the government opens the procedure of constructive confidence provided in Article 81. In this context, the real margin of manoeuvre of the parliament, faced with the threat of dissolution, can therefore be questioned.

u) Appointment of State Envoy-Governor

85. The appointment of the State Envoy – Governor will be done by the Government, which is a positive development.

v) Appointment of judges

86. Article 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.⁵

87. Yet, this does not seem to apply, at least in unequivocal terms, to the judges of the Supreme Court, who under Article 90 of the Constitution continue to be elected for "not less than 10 years". Whereas it is generally accepted to limit the tenure of Constitutional Court judges, this does not apply to Supreme Court judges. The Venice Commission therefore recommends extending life tenure, in unequivocal terms, to Supreme Court judges.

88. In this context it should also be mentioned that the requirement that all judges of the Supreme Court have to be proposed by the President does not seem to be a good mechanism with a view to guaranteeing their independence. It would be preferable to transfer the right to propose candidates to the High Judicial Council.

89. Article 86 § 2 further introduces a probationary period of "not more than 3 years". This proposal appears to be problematic.

90. 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."

91. 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

⁵ See CDL-AD(2010)004, Report on the independence of the judicial system – Part I, the Judges, § 35.

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.”⁶

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

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

93. 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.

x) Access to the Constitutional Court

94. The amendments to Article 89 §1 (sub-paragraphs f² and f³) 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.

95. 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.

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

y) Approval of the State budget

97. 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. Article 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.

98. 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.

99. 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 too 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.

100. 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.

⁶ CDL-AD(2010)004, Report on the independence of the judiciary, op. cit., § 37.

z) Local self-government

101. The Venice Commission has already assessed a previous set of proposed constitutional provisions aiming at regulating local self-government with some detail⁷. 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.”

102. 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.

103. 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.

104. 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.

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

106. 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.

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

⁷ See CDL-AD(2010)008.

aa) Revision of the Constitution

108. 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.

109. 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.

110. 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.

V. Conclusions

111. 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 [primarily] a guarantor of the continuity and national independence of the state and of the functioning of the democratic institutions. His role is that of a neutral arbitrator between the state institutions. The proposed constitutional amendments provide for several important improvements and significant steps in the right direction, which the Venice Commission welcomes.

112. The Commission considers nevertheless that it would be desirable to further strengthen the powers of parliament. In this respect, the provisions on the formation of the government and especially those on the motion of non-confidence, as well as those about the parliament's powers in budget matters, should be reconsidered.

113. The Venice Commission remains at the disposal of the State Constitutional Commission and of the Georgian authorities for further assistance. The Venice Commission would like to stress in this regard that, although several preliminary recommendations made by the rapporteurs during the preparation of this opinion appear to have been taken into account by the Georgian authorities, it appears as essential for a future and effective co-operation that the Georgian parliament should await the final opinion of the Venice Commission and take it into careful consideration before proceeding with the final adoption of the constitutional amendments under consideration