Strasbourg, 9 October 2017 **CDL-AD(2017)023**

Opinion 876 / 2017 Or. Engl

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

GEORGIA

OPINION

ON THE DRAFT REVISED CONSTITUTION AS ADOPTED BY THE PARLIAMENT OF GEORGIA AT THE SECOND READING ON 23 JUNE 2017

Adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017)

on the basis of comments by:

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I. Introduction

1. During its 111th Plenary Session (Venice, 16-17 June 2017), the Venice Commission adopted, at the request of the Chairperson of the Parliament of Georgia, Mr Irakli Kobakhidze, an Opinion on the draft revised Constitution of Georgia, prepared on the basis of comments by Mr Alivizatos, Mr Castella Andreu, Mr Frendo and Ms Kiener.[1]

2. Following the adoption of this Opinion, an amended version of the draft revised Constitution was submitted to the Parliament of Georgia, which adopted it at the second hearing on 23 June 2017.

3. By a letter of 6 September 2017, the Permanent Representative of Georgia to the Council of Europe requested the opinion of the Venice Commission on the "draft Constitutional Law of Georgia on Amending the Constitution of Georgia, as adopted by Parliament at the second hearing on 23 June 2017." By the same letter, the Permanent Representative sent the English translation of the draft revised Constitution (adopted on 23 June 2017 at the second reading) to the Venice Commission, for assessment.[2]

4. According to the information available to the Venice Commission, the draft revised Constitution will be submitted to the Parliament of Georgia for the third and final hearing at the end of September 2017, i.e. between the issuing of the present draft opinion and its adoption by the Venice Commission during its October Plenary Session. It was therefore agreed with the Georgian authorities that the present Opinion be made public before its consideration by the Venice Commission at its plenary session, so as to allow the opposition parties as well as the majority to discuss the draft revised Constitution on the basis of the draft Opinion.

5. By a letter of 20 September 2017, the First Deputy Speaker of Parliament, Ms Tamar Chugoshvili, informed the Venice Commission that the parliamentary majority is ready to consider introducing two important changes to the draft revised Constitution concerning the electoral system for Parliament, requested by the opposition. The following analysis concerns, firstly, the provisions of the draft revised Constitution, as adopted by the Parliament of Georgia at the second hearing on 23 June 2017. However, the new amendments the Georgian authorities committed themselves to consider in their letter to the Venice Commission of 20 September 2017, will also be taken into account.

6. On 20 September 2017, the Venice Commission received a position paper by the President of Georgia and 20 political parties with concrete proposals for amendments to the text of the draft Constitution. On 5 October 2017, the presidential administration submitted to the Venice Commission a list of suggestions to the ruling party agreed by the President and the opposition parties, softening the suggestions in the initial position paper of 20 September and focusing on points where consensus in their view could be possible.

7. The present Opinion was prepared on the basis of contributions made by the rapporteurs and on the basis of the English translation submitted by the authorities. Inaccuracies may occur as a result of incorrect translations.

8. This Opinion was adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017).

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[1] CDL-AD(2017)013 Opinion on the Draft Revised Constitution, Adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017).

[2] CDL-REF(2017)039 Draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017.

II. Preliminary Remarks

A. Previous Opinion of the Venice Commission

9. In its Opinion CDL-AD(2017)013 on the draft revised Constitution, adopted at the 111th Plenary Session on 16-17 June 2017, the Venice Commission's assessment focused on the most important and relevant issues, notably the balance between state powers on the one hand, and the parliamentary and presidential electoral systems, on the other. The Venice Commission, in particular, welcomed that draft Article 37(2) replaced the proportional/majoritarian mixed system in the current Constitution by a proportional election system (""[the]150 members of Parliament [shall be] elected in a unified multi-mandate election district for a four-year term by a proportional system on the basis of universal, equal and direct suffrage through secret ballot"). Experience shows that, in Georgia, the mixed electoral system leads to an overwhelming majority of a single party, which is prejudicial to pluralism in Parliament.

10. The effect of this positive move towards a proportional electoral system was, however, limited by three major mechanisms: first, draft Article 37(6) maintained the 5% threshold rule in legislative elections provided by Article 50(2) of the Constitution in force.[3] The second limitation concerned the distribution of unallocated mandates for not having cleared the 5% threshold to the political party which has received the highest number of votes: according to draft Article 37 (6) *in fine*, if the total number of mandates received by political parties is less than 150, *undistributed mandates shall be given to a political party which has received the most votes.* The third mechanism concerned the prohibition of electoral coalitions (party blocs) that allow the smaller parties to form electoral blocks in order to be able to clear the 5% electoral threshold.

11. Although the Venice Commission, in its Opinion CDL-AD(2017)013, welcomed the replacement of the current mixed election system by a proportional election system and considered this a positive step in the aim of increasing pluralism in Parliament, it also concluded that, taken together, the three mechanisms limited the effects of the proportional system to the detriment of smaller parties, and pluralism. It also deviated from the principles of fair representation and electoral equality to a larger extent than seemed justified by the need to ensure stability. Consequently, the Commission recommended that other options of allocating undistributed mandates than the one suggested by the draft amendments be taken into consideration, such as proportional allocation either to all political parties passing the 5% threshold; or setting a ceiling for the number of wasted votes that are to be allocated to the winning party (premium); and/or reduction of the threshold to 2% or 3%.

12. The introduction of an indirect election system for the President under draft Article 50 was considered to be in line with European standards. The Commission particularly welcomed that the new system of indirect election by the *Election Board* will not be applicable at next year's election (2018), but only from 2023. However, as half the Election Board consists of members of Parliament, the Commission considered that the 5% threshold in parliamentary elections, in combination with the prohibition of electoral blocks and the allocation of undistributed mandates to the winning party, may result in the constant and exclusive election of the candidate presented by the parliamentary majority as President. The Commission thus reiterated its recommendation concerning the proportional allocation of unallocated mandates and/or the reduction of the 5% threshold (see previous paragraph), in order to better guarantee pluralism in Parliament and thus, in the Electoral Board.

[3] According to Draft Article 37(6) mandates shall be distributed only to those political parties which receive at least 5 percent of votes cast in the elections.

13. In the same Opinion, the Commission formulated a number of recommendations with regard to the role of Parliament concerning the budget, to the chapters on fundamental rights, the judiciary and on the Public Defender.[4]

B. Remarks on the constitutional process

14. In its Opinion CDL-AD(2017)013, the Venice Commission placed special emphasis on the need for all stakeholders in Georgia to seek to reach the widest possible consensus for this major constitutional reform.

15. However, following the adoption of the Venice Commission Opinion in June 2017, the Georgian political forces neither reached a consensus nor engaged in negotiations on the most important aspects of the constitutional reform. In particular, after the adoption of the Opinion by the Venice Commission, the parliamentary majority decided to postpone the entry into force of the proportional election system (which is the most important aspect of the constitutional reform) to the parliamentary elections in 2024. This step was denounced by all opposition parties, the President and NGOs and led to the rejection of the constitutional reform by these actors.

16. In a statement of 25 July 2017, the President of the Venice Commission, Mr Gianni Buquicchio, also declared that a solution must be found through dialogue with the aim of reaching the broadest possible consensus. Negotiations between the majority and the opposition did, however, not bring any results. In a joint statement of 4 September 2017, the Georgian opposition parties stressed that the responsibility for the lack of a consensus on constitutional reform rests entirely with the Government, while the majority blamed the opposition for its excessive demands. Consequently, a meeting in Strasbourg on 6 September 2017 offered by the Venice Commission to all Georgian parliamentary political parties in order to discuss all important issues pertaining to the constitutional reform had to be cancelled. The Venice Commission regrets this outcome and reiterates its previous position that any major constitutional reform must reach the widest possible consensus.

C. The new changes announced in the letter of 20 September 2017

17. In their letter of 20 September 2017 to the Venice Commission, the parliamentary majority committed to consider two changes to the draft, which correspond to requests by the opposition:

- Electoral blocs will be allowed at the 2020 parliamentary elections, which will otherwise be carried out as indicated in the draft according to the mixed election system with an election threshold of 3%.

- For the 2024 (and subsequent) elections, the bonus system foreseen in the draft will be abolished and the unallocated mandates due to votes for parties not having cleared the 5% threshold will be distributed proportionally to all political parties represented in Parliament. Otherwise the system will remain as it is in the draft, including the prohibition of electoral coalitions (party blocks), but there will be no bonus system.

III. Analysis

A. Parliament of Georgia: election system and financial powers

18. The draft revised Constitution, which was adopted at the second hearing by the Parliament of Georgia on 23 June 2017, introduced important amendments to the election system in the

[4] See, paras. 96-100 of the Opinion CDL-AD(2017)013 on the Draft Revised Constitution.

first version of the draft revised Constitution, which was assessed by the Venice Commission in its Opinion adopted at its June 2017 Plenary Session. These amendments concern, on the one hand, the postponement of the entry into force of the proportional election system to October 2024 and the preservation of the current proportional/majoritarian mixed system until that date, and on the other hand, the system of distribution of unallocated mandates in the proportional election system, which will be applied as from the 2024 elections.

19. The 5% electoral threshold is maintained in draft Article 37(6) (except for the elections which will take place in 2020, where a 3% election threshold will be applied according to transitional provision 2(9)). The new draft revised Constitution, as the previous version, does not maintain the possibility given to the small political parties to form electoral blocks under Article 50(2) of the current Constitution. This option shall be abolished under the draft amendments. However, according to the letter of 20 September 2017, party blocks will be authorised as an exception at the 2020 election. This is welcomed.

1. Postponement of the entry into force of the proportional system

20. According to draft transitional Article 2(9), the Parliament elected at the next parliamentary elections (…) shall consist of 77 members elected through a proportional system and 73 members elected through a majoritarian system by secret ballot for a term of 4 years. The draft provision therefore sets out that the current majoritarian/proportional mixed system will be maintained during the next election, which will take place in October 2020, and that the proportional system under draft Article 37(2) will only enter into force as from the October 2024 elections. As a temporary exception, a 3% threshold (and not 5 %) shall be applied to the elections of the 77 members of Parliament elected through a proportional system during the next elections (2020). This is a "one-shot" provision, since Article 37(6) of the new draft revised Constitution, in principle, maintains the 5% threshold established in the previous draft.

21. The postponement of the entry into force of the proportional election system to October 2024 is undoubtedly highly regrettable, as the change to the proportional election system is the most important aspect of the reform and the key to reaching consensus. It is true, however, that the amendments proposed by the authorities in their letter of 20 September 2017 concerning the authorisation of election coalitions (party blocks) together with the already foreseen 3% election threshold, are factors that may alleviate, to a certain extent, the negative effects of the postponement of the entry into force of the full proportional election system until 2024. It is essential that a solution be found through dialogue with the aim of reaching the broadest possible consensus on issues of such importance. The Commission echoes the above remarks of its President on the constitutional process.

2. Distribution of unallocated mandates

22. In the draft revised Constitution, as adopted by Parliament at the second reading on 23 June 2017, the previous system of distribution of unallocated mandates is replaced by an extremely complex system of distribution of so-called wasted mandates.

23. Draft Article 37(6) *in fine* maintains the principle of distribution of unallocated mandates to the political party which has received the highest number of votes: "*If the total amount of mandates received by political parties is fewer than 150, undistributed mandates shall be given to the political party, which has received the most votes*." The new draft Constitution introduces two types of ceiling to the wasted mandates to be allocated to the winning party in its Article 37(7) and 37(8). The ceiling set up under Article 37(7) concerns the percentage of wasted votes that is to be allocated to the winning party to the total number of distributed mandates: "*[t]he amount of undistributed mandates received by the party in accordance with paragraph six of this Article may not exceed 35 percent of basic mandates obtained (…)"*. The second ceiling set up by Article 37(8) concerns the number of undistributed mandates that is to be allocated to the

winning party: "*Under the rule set forth in paragraphs 6 and 7 of this Article, the party shall not receive more than 89 mandates* (…)".

24. Nevertheless, the new draft also introduces an important exception to the entire system of allocation of undistributed mandates to the winning party, including the two types of ceiling respectively in percentage and in number. Thus, if the winning party receives more than 35% of the distributed mandates under a proportional distribution system, then the principle under Article 37(6) that the unallocated mandates should be given to the winning party, including the limitation of 35% under Article 37(7), is not applied. In this case, according to Article 37(7) *in fine*, the proportional distribution system shall apply and the winning party can receive more than 35% of the unallocated mandates. This exception is only valid if the winning party can obtain more than 35% of the unallocated mandates in a proportional distribution. If, however, the application of proportional distribution system does not result in the allocation of more than 35% of the unallocated mandates to the wining party, then the principle that the unallocated mandates are entirely given to the winning party, with the limitation of 35%, should be applied without exception.

25. A similar exception has also been set under draft Article 37(8). According to this draft provision, "the [winning] party shall not receive more than 89 mandates *except when it receives more than 89 mandates under proportional distribution of undistributed mandates*". Therefore, the number of unallocated mandates that is to be allocated to the winning party may not exceed 89 mandates; however, if, the party is able to receive more than 89 mandates under a proportional distribution of unallocated mandates, then the distribution should be made proportionally and the party shall be allowed to receive more than 89 unallocated mandates. Again, in this last case, the principle that all unallocated mandates should be given to the winning party with the ceiling of 89 mandates is not applied: the distribution is made proportionally without any ceiling.

26. Article 37(9) brings an additional exception to the principle of allocation of wasted mandates to the winning party. According to this provision, if the party fails to receive more than 75 mandates under the above-mentioned rules, then all undistributed mandates shall be allocated proportionally to all parties represented in Parliament.

27. The criticism of the Venice Commission in its last Opinion concerning the previous version of the draft revised Constitution was focused on the combination of the three mechanisms, which limited the effect of the proportional election system: the 5% threshold rule in legislative elections, the prohibition of party blocks and the allocation of undistributed mandates to the winning party. This last element appeared to be the most problematic one and the Venice Commission recommended to either abolish or at least to reduce the bonus.

28. The proposed system may be considered an improvement over the first draft, which provided the allocation of all "wasted votes" to the winning party and it complies with the recommendation of the Commission to reduce the bonus. Nevertheless, the justification of any bonus system in a country, where there has been no problem of instability of parliamentary majorities, but where parliamentary majorities tend to be overwhelming, is questionable. The bonus system is also a major obstacle to reaching consensus on the constitutional reform. The best solution is clearly to abolish this system completely.

29. The Venice Commission can therefore only welcome the commitment of the parliamentary majority in its letter of 20 September 2017 to consider abandoning the bonus system. The resulting electoral system, as from 2024, would be in full conformity with its recommendations and contribute to the formation of a stronger parliamentary opposition to counterbalance a *strong government with an overwhelming parliamentary majority.*

3. Senate

30. Draft Article 37(1) maintains the provision that the Senate will only be established "after appropriate conditions have been created throughout the entire territory of Georgia," delaying *sine die* its operation. The new draft transitional provisions do not provide for the establishment of a temporary substitute for the Senate or a Senate without full composition. The Commission reiterates its previous observation that this situation deprives the country of a main potential counter-balance to a strong government with an overwhelming parliamentary majority and of the representation of local interests at national level.

4. Public financing and control

31. The provisions criticized in the previous opinion for excessively limiting the role of Parliament in budget matters are introduced without any substantial changes in the new draft revised Constitution: according to draft Article 66 (2), only the Government shall have the right to present a draft State Budget to Parliament after it has examined the Basic Data and Directions with the committees of Parliament, and amendments to the State Budget shall not be admissible without the consent of the Government (para.3 of Article 66). The Commission reiterates its previous recommendation that Parliament be more significantly involved in budget matters.

32. The deletion of the second paragraph of Article 67 (taxes and fees, economic policy) of the former draft, according to which imposing a new type of common state tax, or increasing the upper limit of the current rate by the type of common tax may only be possible through a referendum initiated by the Government, is a welcome improvement. With this change, the introduction of new taxes becomes a legislative competence following the previous recommendation. However, it appears that this constitutional rule will be applied only as from the 13th year after the enactment of the revised Constitution, since, according to Article 2(7) of the transitional provisions "*for the duration of 12 years after the enactment of this law, introduction of a new type of common state tax, except for excise tax, or increasing the upper limit of the current rate by the type of common state tax may only be possible through a referendum* (…)" and "*only the Government shall have the right to initiate a referendum*."

B. President of Georgia

33. The new draft constitutional provisions, as the previous ones, provide for the indirect election of the President by an Election Board, which shall consist of 300 voters, including all members of Parliament and the supreme representative bodies of the autonomous republics of Abkhazia and Adjara, with other voters nominated by respective political parties from the composition of the representative bodies of local self-governments (draft Article 50). This new system will, however, not enter into force for the next presidential election, but only for the subsequent election. This delay was already contained in the previous draft and welcomed by the Commission. Under Articles 2(10) of the transitional provisions, the term of office of the President to be elected in 2018 will exceptionally be for 6 years. The first indirect elections of a President should therefore take place in 2024 by the first parliament to be elected according to the proportional system. This is also a positive step.

34. Two important amendments have been introduced in the indirect-election system in the new draft following a recommendation of the Venice Commission in the previous Opinion. First, the requirement of a qualified majority of two-thirds of votes of the total number of electors in the Election Board has been introduced. A deadlock breaking mechanism is also set up: if the President is not elected in the first round, a second round shall be held between the two candidates with the most votes obtained in the first round. This follows the previous

recommendation of the Venice Commission, which aims at ensuring pluralism in the Election Board.

35. Another novelty of the new draft is the replacement of the secret ballot voting in the Election Board, by an open ballot system. In the previous opinion, without criticising the secret ballot system, the Venice Commission noted that, in Greece, the abolishment of the election of the President by secret ballot was welcomed as a step towards more transparency. The introduction of an open ballot system in the new draft follows the Commission's remark and is welcome in terms of transparency.

36. As the Venice Commission considered in its previous Opinion, it is essential that the passage to an indirect- election system should not result in the constant and exclusive election of the candidate presented by the parliamentary majority as President. Pluralism in Parliament (and consequently in the Election Board) therefore becomes crucial in order to ensure that the election system of the President better corresponds to his/her role of neutral arbiter under the draft revised Constitution. Consequently, the commitment by the parliamentary majority in their letter of 20 September 2017 to consider amending the draft revised Constitution in order to introduce the full proportional distribution of unallocated mandates as from 2024, is a welcome positive step, also in view of ensuring pluralism in the Election Board.

C. Fundamental Human Rights

37. Draft Article 34(3) has been amended so as to include an explicit mention of the principle of proportionality. According to the new provision, "the restriction of fundamental human right must be *commensurate* of the significance of the legitimate aim, which it serves". The term "proportionate" is preferred to "commensurate", but this is a translation issue. Moreover, the reference, in former draft Article 22(2), to organic law concerning the conditions of liquidation of an association has been removed in the new version of the draft provision, whereas, in Article 23 (freedom of parties) or in Article 26 (freedom of labour, trade union, right to strike, freedom to enterprise) the conditions under which the respective right may be restricted is/continues to be a matter of organic law. Unless this is a translation issue, the same protection should also be guaranteed for the procedure of liquidation of associations under draft Article 22(2), freedom of association being an essential prerequisite for other fundamental freedoms.[5]

38. Draft Article 30, as the previous version, defines marriage explicitly as "a union between a woman and a man (…) based on equality of rights and free will of spouses" and narrows the scope of the right to marriage under the current Article 36(1), by implying that marriage can be agreed only between opposite sexes. The Venice Commission reiterates its previous recommendation that the new provision should in no case be interpreted as prohibiting same-sex partnerships.

39. A number of important amendments have also been made to draft Article 16 on the freedom of belief and conscience. First, the term belief is replaced by "faith, confession" in response to the previous recommendation that the "freedom of religion" should be specified in draft Article 16. Following another recommendation on extending legitimate aims of restriction of freedom of belief and conscience to those provided for example in paragraph 2 of Article 9 ECHR, a number of new legitimate aims have been added to draft Article 16 (3), namely national security and public safety necessary for the existence of a democratic society, preventing crime, administering justice or protecting the rights of others. National security or administering justice are not legitimate aims in the sense of paragraph 2 of Article 9 ECHR, which is to be strictly interpreted, meaning that the legitimate aims in the second paragraph of Article 9 ECHR may not be extended by way of interpretation to other notions. Concerning

[5] Venice Commission/OSCE/ODIHR, Guidelines on Freedom of Association, p. 11.

specifically the national security issue, in its case of *Nolan and K. v. Russia*[6], the European Court of Human Rights considered that the State cannot use the need to protect national security as the sole basis for restricting the exercise of the right of a person or a group of persons to manifest their religion. Moreover, some other important legitimate aims under Article 9(2) ECHR are not included in the new draft text such as "health and morals" and "public order". Considering that the grounds for restriction are subjected to a strict and limitative interpretation, it is recommended to redraft Article 16 (3) in the light of the second paragraph of Article 9 ECHR.

40. It is regrettable that the previous recommendations of the Venice Commission in the fields of freedoms of assembly (draft Article 21), association (draft Article 22) and of parties (draft Article 23) and the recommendation under the right to vote (draft Article 24(2) are not taken into consideration in the new draft. Thus, the blanket ban on voting rights of persons recognised as a support recipient by a court decision and admitted to an inpatient care establishment is maintained. The grounds for the limitation of the rights of freedom of association and assembly are still absent in the draft and left to be regulated by law, weakening the protection provided for those freedoms.

41. The prohibition of the creation of political parties on territorial principle, considered previously by the Venice Commission as "not justified", is also maintained in the new draft in Article 23(3).

42. Finally, the issue of ownership of the land seems to be one of the most controversial provisions of the constitutional reform. In an early draft of the draft revised Constitution submitted to the Venice Commission in March 2017, draft Article 19 prohibited the land ownership of non-citizens by stating that "land may only be owned by Georgian citizens". In the version submitted in June 2017, however, this clause disappeared and former draft Article 19(4) examined by the Venice Commission in its June 2017 Plenary Session provided that the right to property over land as a significant resource shall be regulated by Organic Law. This was acknowledged by the Venice Commission, in the light of explanations by the authorities, as a laudable third way between the current Constitution (no limitation) and constitutional prohibition. However, the current draft Article 19 returns to the former system, i.e. prohibition of land ownership of non-citizens, but provides that exceptions may be determined by the organic law, adopted by two-thirds of the full composition of Parliament. The Venice Commission considers that the solution provided for by the previous draft allowed for more flexibility in adapting the rule to changing economic and political circumstances.

D. Judiciary and prosecutor's office

1. Constitutional Court

43. Draft 60(2), following the previous recommendation, introduces the requirement of a qualified majority in the election of three constitutional judges by Parliament: "*three judges shall be elected by the Parliament with three-fifths majority of its full composition* (…)". This is welcome.

44. The prohibition for the Constitutional Court to declare unconstitutional legal norms regulating elections during the election year, unless this norm has been adopted within one year before the respective election, is maintained in new draft Article 60(6). This complete exemption from the control of constitutionality of the electoral laws within the year of election - unless this norm has been adopted within one year before the respective election-was criticised in the previous opinion on the ground that, although the aim of preventing interference with the electoral process justifies a number of limited measures in the pre-electoral period, the

[6] *Nolan and K. v. Russia*, application no. 2512/04, 12 February 2009.

proposed system, by excluding any control of constitutionality of the electoral laws within the reference period, appears to be disproportionate. The Georgian authorities explained that in view of the fact that the elections in Georgia take place in October, the Constitutional Court will be able to decide on electoral legislation –introduced prior to this one year period- in a time span of three months between October and December of the year preceding the election year. It seems legitimate to prevent decisions of the Constitutional Court to be taken in the period required for the preparation of the elections. However, it is recommended that the period during which the Constitutional Court is unable to decide on electoral legislation is reduced. In addition, new draft Article 60(6) introduces two additional limitations by requiring full consensus of the plenum of the Constitutional Court, when delivering judgment on the unconstitutionality of conducted elections and the delivery of the judgment of the Constitutional Court no later than 7 days from the date of official publication of election results. The requirement of full consensus of the plenum of the Constitutional Court when deciding on constitutionality of the conducted elections is problematic and should be replaced by a requirement of ordinary majority.

2. Supreme Court

45. Draft Article 61 establishes the principle of lifetime appointment of the Supreme Court judges, following an important previous recommendation and is welcomed. However, their election by Parliament upon nomination by the High Council of justice is maintained. The Commission considers that the appointment of supreme court judges directly by the High Council of Justice without the involvement of Parliament, or their appointment by the President (who has otherwise limited powers in the proposed parliamentary system) upon proposal by the High Council of Justice, would better guarantee the independence of those judges.

3. Prosecutor's office

46. According to Article 65(4) the Prosecutor's office shall submit the report on its activities to Parliament on an annual basis. The former provision, which generally stated the principle of the accountability of the Prosecutor's office before Parliament and which triggered the warning of the Commission that accountability to Parliament should be ruled out in individual cases of prosecution or non-prosecution, is thus replaced by a more specific annual reporting obligation to Parliament.

47. The recommendation of a qualified majority in Parliament for the election of the Prosecutor General was not followed. The new draft Article 65 (2) still provides for an election by a majority of full composition of Parliament.

4. Probationary periods

48. Draft Article 63(6) sets forth the rule of lifetime appointment of judges of common courts until they reach the age determined by law. The lifetime appointment however, in view of draft transitional Article 2(4), is postponed until 31 December 2024 (*In case of the first appointment, before the appointment for an indefinite period, a judge may be appointed for a trial period of three years, until 31 December 2024).* According to the explanation provided by the speaker of Parliament, by 2025 the reform of the High School of Justice should be finalised and it will have full capacity to allow the graduation of properly trained personnel in which case the life time appointments will be possible. The Commission welcomes this proposal.

5. High Council of Justice

49. A qualified majority requirement is introduced concerning the election of a number of members of the Judicial Council by Parliament. This follows the Commission's previous recommendation.

E. Public Defender

50. Both recommendations made by the Commission in its previous Opinion are followed: the Public Defender is elected for a longer term (six years instead of five) and by a three-fifths majority of the full composition of Parliament (and not by simple majority of the full members of Parliament as in the former version of draft Article 35). Both amendments are welcome.

IV. Conclusion

51. The Venice Commission reiterates its previous positive assessment, notably that the constitutional reform process completes the evolution of Georgia's political system towards a parliamentary system and constitutes a positive step towards the consolidation and improvement of the country's constitutional order, based on the principles of democracy, the rule of law and the protection of fundamental rights.

52. The postponement of the entry into force of the proportional election system to October 2024 is highly regrettable and a major obstacle to reaching consensus. However, the commitment of the parliamentary majority in the letter of 20 September 2017 to consider allowing party blocks, together with the reduction of the election threshold to 3% at the 2020 elections is to be welcomed, since those amendments aim to alleviate the negative effects of the postponement of the entry into force of the proportional election system to 2024.

53. The positive assessment made by the Venice Commission in its previous Opinion concerning, in particular, the replacement of the current mixed proportional/majoritarian election system by a fully proportional election system was accompanied by its criticism of three mechanisms, which unduly limited the effect of the proportional election system: the 5% threshold rule in legislative elections, the prohibition of party blocks and the allocation of undistributed mandates to the winning party. In order to limit the detrimental effects of this system to smaller parties and to pluralism, the Commission recommended proportional allocation either to all political parties passing the 5% threshold; or setting a ceiling to the number of votes to be allocated to the winning party; and/or reducing the threshold to 2% or 3%.

54. Whereas the new draft revised Constitution submitted to the Venice Commission's examination maintains the 5% threshold for elections as from 2024 and the prohibition of party blocks, it replaces the previously envisaged system of distribution of unallocated mandates by a complex new system, which maintains but limits the bonus for the winning party. While this new system responds to the previous recommendation of the Venice Commission to at least reduce the effects of the bonus system, it still very much favours the strongest party in a country with a tradition of overwhelming majorities for the strongest party. The bonus system is also a main obstacle to the acceptance of the Constitution by opposition parties and civil society.

55. The Venice Commission therefore strongly welcomes the commitment of the parliamentary majority in the letter of 20 September 2017, to consider abandoning the bonus system and adopting the full proportional distribution system of unallocated mandates to all political parties which clear the 5% election threshold. Such a system would favour pluralism in Parliament and be fully in line with European standards. The Venice Commission expects that this step will not only be considered, but immediately adopted. The Venice Commission welcomes the commitment of the Georgian authorities to submit by 25 October the required amendments to Parliament, together with the amendment allowing electoral blocs at the parliamentary elections in 2020, and to finally adopt these amendments by March 2018.

56. With respect to the other amendments made to the previous draft, the Commission welcomes, in particular:

- the introduction of the requirement of a qualified majority of two-thirds of the votes of the total number of electors in the Election Board in a presidential election;
- the explicit mention of the principle of proportionality in draft Article 34(3);
- the requirement of a qualified majority in the election of three judges of the Constitutional Court and a number of members of the High Judicial Council by Parliament;
- the lifetime appointment for the judges of the Supreme Court;
- the abolition of probationary periods for judges as from 31 December 2024;
- the election of the Public Defender for a longer term (6 years instead of 5) by a qualified majority in parliament;
- the explicit mention of children's rights in the title of draft Article 30.

57. The following additional recommendations are made:

Fundamental Rights:

- the legitimate aims of restrictions of the freedom of faith, confession and conscience should be redrafted in the light of the second paragraph of Article 9 ECHR;
- the prohibition of "creation of political parties on territorial grounds" (draft Article 23(3) should be removed;

Judiciary:

- the requirement of full consensus of the plenum of the Constitutional Court when deciding on constitutionality of the conducted elections is problematic and should be replaced by a requirement of ordinary majority;

- the appointment of Supreme Court judges directly by the High Council of Justice without the involvement of Parliament, or their appointment by the President upon proposal by the High Council of Justice, would better guarantee the independence of those judges.

58. The Venice Commission remains at the disposal of the Georgian authorities for further assistance in this matter.