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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

GEORGIA

OPINION

ON THE DRAFT REVISED CONSTITUTION

Adopted by the Venice Commission
at its 111th Plenary Session
(Venice, 16-17 June 2017)

on the basis of comments by:

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I. Introduction

1. By a Resolution of 15 December 2016, the Parliament of Georgia set up a State Constitutional Commission with the task of preparing amendments to the Constitution of Georgia.

2. On 20 January 2017, in the framework of the planned constitutional reform, Mr Gianni Buquicchio, President of the Venice Commission, accompanied by Mr Thomas Markert, Secretary of the Venice Commission, visited Tbilisi and held meetings with the President of Georgia, the Chairperson of the Parliament, the First Deputy Chairperson, the Minister of Justice, the Permanent Representative to the Council of Europe, representatives of NGOs and experts. During the visit, the delegation of the Venice Commission was informed about the intention of the Georgian authorities to fully involve the Venice Commission in the constitutional reform and concrete modalities of co-operation were agreed. During the same visit, the Chairperson of the Parliament, Mr Irakli Kobakhidze, requested the Venice Commission to prepare an opinion on the Draft revised Constitution of Georgia.

3. The Commission invited Mr Nicos C. Alivizatos, Mr Josep Maria Castella Andreu, Mr Michael Frendo and Ms Regina Kiener to act as rapporteurs for this opinion.

4. On 30 March 2017, a delegation of the Venice Commission, composed of Mr Nicos C. Alivizatos, Mr Josep Maria Castella Andreu and Mr Michael Frendo, accompanied by Mr Thomas Markert, Secretary of the Venice Commission and Mr Ziya Caga Tanyar, legal officer at the Secretariat, visited Tbilisi and met with the Chairperson of the Parliament, the First Deputy Chairperson and the working groups of the State Constitutional Commission. The delegation is grateful to the Georgian authorities for their excellent cooperation during the visit.

5. On 8 May 2017, the Georgian authorities sent the English translation of the draft revised Constitution to the Venice Commission for assessment, as well as an "Explanatory note to the Constitutional Bill Amending the Constitution of Georgia" (hereinafter, "Explanatory note") (CDL-REF(2017)27). A large number of NGOs and political parties from Georgia provided written comments on aspects of the draft.

6. On 22-23 May 2017, a conference on "Constitutional reform in Georgia", organised by the Georgian authorities and the German Corporation for International Cooperation (GIZ), took place in Berlin. Ms Kiener accompanied by the Secretariat, participated in the conference, as well as several members of the State Constitutional Commission, including the Chairperson and the First Deputy Chairperson of the Parliament and representatives of different state authorities, NGOs and a number of international experts.

7. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of the English translation of the draft Revised Constitution. Inaccuracies may occur in this opinion as a result of incorrect translations.

8. This opinion was adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017).

II. Preliminary remarks

9. In 2010, a comprehensive constitutional reform was already carried out in co-operation with the Venice Commission. At the time the Venice Commission welcomed the move from a rather presidential to a mixed system but pointed to a number of remaining problems in the text.[1] Following the 2016 October parliamentary elections, the parliamentary majority initiated a process of comprehensive constitutional amendments. The parliamentary resolution of 15 December 2016 established the State Constitutional Commission (hereinafter, "SCC") with the task of preparing a draft law providing for full compliance of the Constitution with fundamental constitutional law principles, and to establish a refined parliamentary system for the country's long term democratic development.

10. Chaired by the Chairperson of the Parliament and composed of 73 members, the SCC consisted of four working groups: 1. The Working group on the issues of Fundamental Human Rights, Judiciary, Preamble and the General and transitional provisions; 2. The Working group on the Issues of the Parliament, Finances and Control, revision of the constitution; 3. The Working group on the Issues of the President, the Government, and the Defence; 4. The Working group on the Issues of Administrative-territorial arrangement and Local self-governance. The Working groups were tasked with a comprehensive review of each article of the constitution to which changes are suggested.

11. The SCC's aim was to operate based on the principles of transparency and inclusiveness, engaging, among others, parliamentary majority and the minority as well as non-parliamentary parties/blocks, the judiciary, the presidential administration, the Ministry of Justice, chairpersons of high courts, chairpersons of the supreme councils and governments of the autonomous republics and a wide circle of society in the working process.

12. Criticism was raised by some NGOs and opposition parties that in the composition of the SCC, the representatives of the civil society were unilaterally selected by the Commission Chair (the Speaker of the Parliament) or that the criteria used for selection of experts were not clear and as a result, some NGOs and experts specialised in specific fields could not participate in the SCC's work. Criticism was also voiced that business associations, trade unions and NGOs working on environmental issues have not been involved in the work of the SCC. Short timeframe was another point of concern as the SCC was provided with a period of four months to prepare the constitutional amendments, considered as insufficient to prepare a fundamental revision of the Constitution.[2]

13. The President of Georgia together with three representatives of the presidential administration did not participate in the work of the SCC as a gesture of protest, apparently, after the refusal by the majoritarian party of his proposal for the SCC to be co-chaired by the President, Prime Minister and the Speaker. This is regrettable as important constitutional amendments relate to the powers of the President and the presidential election system. However, the President stated that he would join the nationwide public discussions on the draft constitutional amendments. In this context, the Commission underlines that any major constitutional reform should seek to obtain the widest possible consensus.

14. The representatives of the opposition parties did not participate in the final session of the SCC scheduled for 22 April 2017 and in the final adoption of the draft amendments. The draft package of amendments was adopted by representatives of the majority (Georgian Dream – Democratic Georgia GDDG) only and did not obtain the support of the opposition parties, the

[1] CDL-AD (2010)028, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, adopted by the Venice Commission at its 84th Plenary Session (15-16 October 2010).

[2] ISFED, Transparency International, GYLA, OSGF, Joint Assessment of the Work of the State Constitutional Commission of Georgia, 8 May 2017, p. 3.

majority of the NGOs and the public defender, largely because of lack of agreement on a number of crucial issues such as the electoral system and the presidential election and authority.

15. The parliament of Georgia actively cooperated with the Venice Commission in the process of preparation of the draft law on the revision of the constitution of Georgia, and the Speaker of the Parliament repeatedly confirmed the commitment of the Georgian authorities not to adopt any amendment which would be negatively assessed by the Venice Commission. The Commission notes this commitment with satisfaction.

16. Procedurally, the draft law revising the Constitution was already submitted to the Parliament, which submitted the document to public debate. The Parliament can initiate a plenary debate on the draft amendments after one month from the opening of the public discussion. The draft has to go through three parliamentary readings during at least 2 consecutive sessions with a 3 month interval in between. The amendments to the constitution need the support of at least 3/4 of the total number of MPs (i.e. 113 votes). It should be noted that the majority Georgian Dream Party on its own disposes the required majority. The President of Georgia has to sign and promulgate the amendments within 10 days from their adoption. The President has the option to return the draft to the Parliament with justified comments. If the Parliament rejects the President's observations, the initial version of the draft law shall be put to a vote. Parliament will need the same number of 113 votes to override the Presidential veto. The President then has the option to either sign the adopted amendments within 7 days or the Speaker of the Parliament will do so. The amendments enter into force on the 15th day from their official promulgation unless another date is specified. No referendum is foreseen after the final adoption of the constitutional amendments by the parliament, as according to the current constitution, constitutional referendums are only to be held after the reintegration of the breakaway regions.

III. Analysis

17. 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[3].

18. In its 2010 Opinion on the draft constitutional law on amendments and changes to the constitution of Georgia[4], the Venice Commission held that "*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.*"

19. In the conclusions to the same opinion, the Venice Commission considered 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.*"

20. The purpose of the current constitutional reform, according to the Explanatory note provided by the authorities, is to review and amend the Constitution from both substantive and technical

[3] See CDL-AD(2010)028, para.14.
[4] CDL-AD(2010)028, para. 110.

points of view as a series of constitutional provisions conflict with the fundamental principles of "division of powers" and contain contradictions in terms of proper distribution and clear separation of competences among various constitutional bodies. Thus, the incoherent system of parliamentary governance provided by the Constitution should be revised.

21. As explained in the Explanatory note, the Constitutional reform proposes changes in most of the constitutional provisions and touches upon various important issues, not only substantial but also structural and introduces technical improvements in individual articles. The Venice Commission's assessment is focused on the most important and relevant issues which are the balance between the state powers on the one hand, and the parliamentary and presidential electoral systems on the other hand. Attention will also be given to a number of provisions within the human rights chapter and the judiciary.

A. CHAPTER III: Parliament of Georgia

1. Overview

22. Under the current constitution, the Parliament of Georgia is a single chamber parliament, with 77 out of its 150 members elected by a proportional voting system and 73 members elected by a majoritarian voting system (Article 49 para. 1). Article 4 states that after appropriate conditions have been created a *two-chamber parliament* shall be set up, the Council of the Republic and the Senate. The Council of Republic shall be composed of members elected under the principle of proportionality, the Senate shall be composed of members elected from the Autonomous Republic of Abkhazia, the Autonomous Republic of Adjara, and other territorial units of Georgia and five members appointed by the President of Georgia (same provision in Article 37 para. 1 of the draft amendments).

23. Draft Article 37(2) replace the current proportional/majoritarian mixed system by a proportional election system. According to this provision, until the necessary institutional changes are in place, 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. Thus, the current system which is a mix of proportional and majoritarian election systems is replaced by a system according to which all 150 members of Parliament are elected through the proportional system. The Venice Commission welcomes this change since in practice in Georgia the mixed system tended to lead to overwhelming majorities of the governing parties in parliament.

24. This positive move towards a proportional electoral system is relativized by three major mechanisms: firstly draft Article 37(6) maintains the 5% threshold rule in legislative elections provided by Article 50(2) of the Constitution in force. 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. With the purpose of determining the number of mandates received by a political party, the number of votes received by this party shall be multiplied by 150 and divided by the total number of votes received by all political parties. The resulting number is the number of mandates received by the political party.

25. The second mechanism concerns 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.*

26. Thirdly, electoral coalitions (party blocks), which allow the smaller parties to form electoral blocks to be able to clear the 5% electoral threshold, are abolished.

2. Proportional electoral system

27. The change from a partly majoritarian to a *fully proportional electoral system* (Article 37 paragraph 2) or to a regional proportional system corresponds to a long-time request of the Parliamentary Assembly of the Council of Europe and the Venice Commission as well as of Georgian civil society and most of the political parties, and is to be welcomed.

3. 5% threshold

28. According to the Explanatory note, the aim of an electoral threshold is a legal guarantee for the stable functioning of the democratic system. For the Venice Commission, taken separately, the 5% threshold is not to be criticised: such barriers are common in many European states[5]. By keeping out small parties, electoral thresholds aim at avoiding fragmentation, thus rendering the political system more stable and facilitating the formation of a government majority.

29. The Venice Commission in its 2010 "Report on thresholds and other features of electoral systems which bar parties from access to parliament" held that "the fact that the electoral system may tend to simplify the party system is not in itself a fault"[6].

30. In its 2007 resolution on the state of human rights and democracy in Europe, the CoE's *Parliamentary Assembly* opted for a 3% threshold for parliamentary elections in "well-established democracies"[7].

31. The European Court on Human Rights (hereinafter, "ECtHR") has not seen in election thresholds as such, a violation of the rights set out in Article 3 of Protocol No. 1 (right to free elections). In the case of *Yumak and Sadak v. Turkey,* the applicants alleged that the electoral threshold of 10% imposed nationally for parliamentary elections interfered with the free expression of the opinion of the people in the choice of the legislature. In its assessment, the ECtHR considered that the electoral threshold of 10% imposed nationally for the representation of political parties in Parliament constituted *interference* with the applicants' electoral rights. The threshold pursued the *legitimate aim* of avoiding excessive and debilitating parliamentary fragmentation and thus of strengthening governmental stability. The Court noted, however, that the effects of an electoral threshold could differ from one country to another and that the role played by thresholds varied in accordance with the level at which they were set and the party system in each country. The Court therefore considered that it should examine the *correctives and other safeguards* in place in the Turkish system in order to assess their effects. In the case at hand, the ECtHR was not persuaded that, having regard to the specific political context of the elections in question, and to the correctives which had limited its effects in practice (notably: possibility of standing as an *independent candidate* which permitted the election of a number of members of parliament from the Kurdish party; the possibility to form an *electoral coalition* with

[5] In its *Yumak and Sadak v. Turkey* case, the ECtHR observed that a national 10% threshold was the highest of all the thresholds applied in the member States of the Council of Europe; only three other member States had opted for high thresholds (7% or 8%), a third of the States imposed a 5% threshold and 13 of them had chosen a lower figure, see ECtHR, *Yumak and Sadak v. Turkey* [GC], no. 10226/03. See also the Venice Commission Report on thresholds and other features of electoral systems which bar parties from access to parliament (II), CDL-AD(2010)007, paras. 20-23.

[6] CDL-AD(2010)007, *Report on Thresholds and other features of electoral systems which bar parties from access to Parliament*, para. 32.

[7] Resolution 1547 (2007), State of human rights and democracy in Europe, para. 58: *In well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections. It should thus be possible to express a maximum number of opinions. Excluding numerous groups of people from the right to be represented is detrimental to a democratic system. In well-established democracies, a balance has to be found between fair representation of views in the community and effectiveness in parliament and government.*

other political groups; the role of the *constitutional court*), the impugned 10% threshold had had the effect of impairing the essence of the applicants' rights under Article 3 of Protocol No. 1[8].

32. In its Report on Thresholds and other features of electoral systems which bar parties from access to parliament, the Venice Commission considered that "*at all events, there is no point in seeking a uniform electoral system for all the countries of the Council of Europe. The answer may be to set limits, bearing in mind what has been said earlier, and leave it to each country to decide what arrangements are best suited to its particular circumstances, having regard to its history and party system, and best able to strike a satisfactory balance between the two potentially conflicting requirements of representativeness and governability.*"[9]

33. Consequently, the 5% threshold set out in Article 37 (6) of the draft amendment is in line with Council of Europe standards as long as there are sufficient safeguards and correctives to counterbalance its potential negative effects.

4. Abolishment of electoral coalitions (party blocs)

34. Under the current Constitution (art. 50(2), parties may form blocs *(electoral coalitions)* upon their convenience. This option shall be abolished under the draft amendments. The SCC in its explanatory note to the constitutional bill explains the reason for this change as follows: "*For the last two decades, this model has been a major obstacle to the development of the party system in Georgia. An institutionalized party system has not yet formed in the country. Nowadays, 20 political parties have the status of the so-called qualified parties despite the fact that a majority of these parties are not meeting minimum requirements to be called political parties and some of them are even fictitious. Apart from that, the notion of political blocs allows political parties to manipulate to artificially gain additional privileges (such as additional State funding, additional free-of-charge advertisement time, additional members and representatives at all levels of electoral administration, etc.) All of these reasons have made it clear that the notion of electoral blocs plays a negative role in the sense of development of party system in Georgia and it is not prudent to keep it alive. Political subjects and, accordingly, electoral subjects must be political parties – something that corresponds to best European practices in the area of functioning political systems;"*

35. Whatever the reasons for the abolishment of political blocs, this amendment will prevent small parties from overcoming the 5% party threshold and risks increasing the number of lost votes.

5. 5% threshold in combination with the prohibition of electoral blocs and the allocation of seats to the winning party

36. Article 37(6) of the draft amendments sets out the rule that undistributed mandates shall be given to a political party which has received the most votes.

37. It is questionable whether this mechanism is in line with the voter's right to equal suffrage in general and the principle of electoral equality in particular.[10] The principle of electoral equality has, among others, two important components: On the one hand, this principle requires that all citizens who fulfil the formal voting requirements must be assigned equal voting power and, hence, that their vote must count once ("arithmetical equality"). On the other hand, it entails

[8] ECtHR (GC), *Yumak and Sadak v. Turkey,* paras. 147-148.
[9] CDL-AD(2010)007, para. 72.
[10] The right to universal and equal suffrage is enshrined the Universal Declaration of Human Rights (Article 21 paragraph 3), in the International Covenant on Civil and Political Rights (Article 25b) and in Protocol No. 1 to the ECHR, however with a somewhat narrower scope (Article 1), and not least in the Constitution of Georgia, although not explicitly (Article 24 in conjunction with Article 11 of the draft amendments).

that, at least in principle, votes must have equal effect upon the allocation of seats in representative bodies ("equality of effect")[11]. It is widely recognised that in practice, the principle of equality of vote effect can hardly be fulfilled completely. For example, the ECtHR as well as the Venice Commission deem election thresholds acceptable, arguing that a balance has to be found between fair representation of views in the community and effectiveness in parliament and government (see paragraphs 31-32 above). Nevertheless such mechanisms deviating from the principle of equality require justification.

38. The aim of ensuring government stability may justify specific electoral mechanisms and countries such as Italy – a country well known for its short-lived governments – and Greece have introduced premiums for the biggest party. However, in a democracy, governmental stability should not be equated with pursuance of one-party parliamentary majority by all means and under any circumstances.[12] In any case, the critical limit is set by the requirement, inherent in the democratic principle, that "minorities should be adequately represented".[13]

39. When discussing the justification of the measure, it should be noted that in the previous parliamentary elections in 2016, the share of unattributed votes amounted to 19.82%, the average being 12.85% in five elections held between 1999 and 2016. Combined with the envisaged prohibition of party blocks, this number risks to increase further, raising serious concerns regarding the principle of equality of vote effect. It can well be argued that the prohibition of blocks will further reduce the chances for small parties' voters to be represented in Parliament.

40. In the current context, the principle according to which the "winner takes all (unallocated mandates)" runs in part contrary to the proportional election system introduced by Article 37 para. 2 of the draft amendments, and relativizes its effects to the detriment of smaller parties, as the disproportion of the received votes and mandates would remain. It also forces voters into changing their original preference for smaller parties, which do not seem to have a chance to gain parliamentary majority or even parliamentary seats.[14] Also, such electoral system perpetuates the logics of the 'wasted vote' always to the detriment of the same parties, even when the latter's appeal onto the electorate has significantly increased (though not to an extent as high as to override the barriers of the electoral system).[15] Therefore, it is questionable whether the objective of political pluralism is ensured. The specific design of this premium for the biggest party implies that votes cast for parties with a completely different political orientation will directly benefit this party. The will of these voters will not be respected. If there is the intention to introduce a premium for the strongest party, for instance, the Constitution could provide that 9/10th of the Parliament seats (i.e. 135 out of 150) shall be distributed to the parties that have received more than 5% of the votes according to the principles of proportional representation, while the remaining 15 seats will be given to the winning party (or the winning party and the second party) as premium.

41. In addition, it should be noted that parliamentary elections in Georgia are also the means whereby the people indirectly appoint (and impeach) all other state organs which are appointed (or impeached) by the Parliament: the President, the Prime Minister, the Supreme Court judges; the Prosecutor General; the members of the Board of the National Bank, the General Auditor, and – partly – the members of the High Council of Justice and - to one third – the

[11] See, among many others, Kostas Chryssogonos and Costas Stratilatis, *Limits of Electoral Equality and Political Representation*, European Constitutional Law Review, 8: 9–32, 2012, at p. 15. See also, Venice Commission, Code of Good Practice in Electoral Matters, p. 10-11.
[12] Chryssogonos and Costas Stratilatis, p. 28.
[13] John Stuart Mill, *Considerations in Representative Government*, in J.S. Mill, On Liberty and Other Essays (Oxford University Press 1991) p. 203 at p. 307.
[14] Chryssogonos and Costas Stratilatis, supra no. 11, p. 24.
[15] *Ibid.* p. 25.

members of the Constitutional Court. Not least, Article 3 paragraph 5 of the draft amendments mentions party equality as one of the fundamental principles of the law on political parties.

42. Taken together, these factors lead to a serious infringement of the principle of equality of effect. Against this background, it is strongly recommended that other options of allocating undistributed mandates than the one suggested by the draft amendments are taken into consideration, such as proportional allocation either to all political parties passing the 5% threshold or setting up of a ceiling to the number of wasted votes that is to be allocated to the winning party so that the latter has a workable but not an overwhelming parliamentary majority, and/or reduction of the threshold to 2% or 3%, thus applying the proportional system also to the distribution of leftover mandates.

6. Senate

43. As explained above, the Senate will only be construed "after appropriate conditions have been created throughout the territory of Georgia" and its operation is delayed *sine die* in Article 4 of the Constitution and Article 37(1) of the draft amendments. The absence of a functional Senate which could counter-balance the lower Chamber's powers, is coupled with the lack of any prospect in the constitutional amendments of setting up -by a transitional provision- of a temporary substitute for the Senate (or the creation of a Senate without full composition), including in its composition representatives of territorial units of Georgia. Although the Venice Commission is aware of the difficulties encountered by Georgia in setting-up the upper chamber of the Parliament at the present stage, this situation leaves the country with a constitutional system where the main counter-balance to a strong government with an overwhelming parliamentary majority is the Office of the President, through the exercise of his/her *supra partes* powers.

7. Public financing and control

State budget

44. In its 2010 Final Opinion on draft constitutional amendments the Venice Commission considered that the role of the parliament in budget matters was too limited. "*Indeed, only the government has legislative initiative in budget matters (art. 93 § 1), the parliament cannot change the draft budget and increased public spending, reduced revenues or additional financial obligations vis-à-vis the current budget need to be approved by the government. It would seem appropriate that the parliament be more significantly involved in budget matters."*

45. Article 66(2) of the draft amendments does not really address these concerns According to this draft provision only the Government shall have the right to present a draft State budget to the Parliament after it has examined the Basic Data and Directions with the committees of Parliament. Moreover, according to paragraph 3 of the same draft provision, amendments to a draft State Budget may only be made with the consent of the Government. For the Venice Commission, the fact that *any* amendment to the Draft State budget needs governmental approval is an excessive restriction of the Parliament's powers in budget matters. If the specific purpose of these provisions is to discourage clientelistic amendments to the State budget, a requirement of qualified majority in Parliament in order to introduce amendments to the draft State budget proposed by the Government would also be an appropriate alternative to the system proposed by the draft amendments. The Commission thus reiterates its previous recommendation in the 2010 Final Opinion that the Parliament should be more significantly involved in budget matters.

Taxes and fees, economic policy

46. Under Article 67(2) of the draft amendments, imposing 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 tax

may only possible through referendum, except for cases provided for by Organic Law. In addition, the same provision clarifies that the right to initiate such referendum belongs to the Government only.

47. A Referendum on taxes is a very rare figure in comparative law and it seems that the draft provision transforms the principle "no taxation without representation" into "no taxation without referendum". Having said this, according to the draft provisions, the referendum in this matter may only be initiated by the Government and here as well, the Parliament appears to be completely excluded from the process of imposition of a new type of common tax etc. The Venice Commission considers it preferable that in the first instance it is up to parliament to decide on the introduction of new taxes. The decision of parliament could then be submitted to the people for their approval or disapproval, either by parliament itself or by the President.

8. Vote of no confidence

48. The very complex procedure for the vote of no confidence and the excessive weight of the President in this procedure, provided for by the 2010 constitutional reform was strongly criticised by the Venice Commission at the time[16]. The procedure proposed by the draft amendments is a clear improvement as the proposed system is less complex and the role of the President in this procedure is quite limited in conformity with his/her role *supra partes.*

B. CHAPTER IV: President of Georgia

49. According to Article 70 of the current constitution, the President of Georgia shall be *elected through universal, equal, and direct suffrage* by secret ballot for a term of five years.

50. Pursuant to Article 50 of the draft amendments, the President of Georgia shall be *elected by the Election Board*, without debates, through secret ballot for 5 years (paragraph 1). The Election Board shall consist of 300 voters, including all [150] members of the Parliament of Georgia and the supreme representative bodies of the autonomous republics of Abkhazia and Adjara. Other voters shall be nominated by respective political parties from the composition of the representative bodies of local self-governments in accordance with Organic Law, in compliance with the principle of proportional geographical representation and on the basis of quotas defined by the Central Election Commission of Georgia in accordance with the results of elections of local self-governments held under the proportional system. Composition of the Election Board shall be approved by the Central Election Commission of Georgia (para. 2).

51. Direct election of the President by popular vote is thus abolished and replaced by a system of indirect election through an electoral college. As the draft amendments shall enter into force upon the oath of the President of Georgia elected after the next presidential elections (Article 2 section 2 of the transitional provisions), the new electoral system will come into effect in 2023, that is, *after the next presidential elections* scheduled in 2018. This delay is to be welcomed.

52. In democratic states, there are different models for the election of the president. In Germany, for instance, the President (Bundespräsident) is elected by the Federal Assembly (Article 54 German Grundgesetz), whereas in France, the President of the French Republic is elected by popular vote (Article 7 of the Constitution). The appropriate model for the presidential election is to be defined with regard to the overall system of checks and balances within a specific constitutional order.

53. According to the draft amendments, the President of Georgia will neither be elected by Parliament alone nor solely by popular vote, but by the newly created Election Board. This

[16] CDL-AD (2010)028, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, paras. 73-80.

system corresponds with the neutral arbiter role attributed to the President under the draft revised constitution. Election takes place by secret ballot. In Greece election of the President by secret ballot was abolished and this step is now welcomed by all stakeholders as a step towards more transparency.

54. However, on one hand, the draft amendments do not try to reach a greater consensus in the Election Board by requiring qualified majority (2/3 or 3/5) in the first round of election of the President by the Board (art. 50(4)). Also, it must be considered that half of the Election Board consists of the members of the Parliament. If the 5% threshold in combination with the prohibition of electoral blocs and the allocation of seats to the winning party is upheld for the parliamentary elections, the President will most likely be the candidate of the parliamentary majority. This outcome risks jeopardising the (restricted) role of the President as a neutral arbitrator between the state institutions and weakening the system of checks and balances set up under the draft amendments.

55. In conclusion, although there are no objections in principle to the passage to the proposed system of indirect election of the President as from 2023, a qualified majority should be required in the first round(s) and measures in order to better guarantee the pluralism in the Parliament (and consequently in the Election Board) such as those contained in the recommendations under the precedent heading concerning the *proportional allocation* of unallocated mandates and/or *reduction of the threshold* gain even more importance.

C. National Security Council

56. The draft revised Constitution unlike the current Constitution does not refer to the National Security Council. The Venice Commission considers that the Georgian authorities are best placed to decide on whether or not the National Security Council should be referred to in the Constitution and thus be a constitutional body.

D. CHAPTER II: Fundamental Human Rights

1. General principles for ensuring fundamental rights

57. It is recommended to mention expressly the principle of proportionality in draft art. 34 on General Principles for ensuring fundamental rights. It is preferable to have a clear mention of this principle in the constitutional provision.

58. The reference to the organic law (instead of the law) in many provisions in Chapter II-Fundamental Rights on matters regarding the limitation of rights and freedom and their implementation (Draft art. 22(2) Freedom of Association; Draft art. 23(4) Freedom of Parties, Draft art. 26(2) Right to establish and join trade unions), reinforces the relevance of the right in question by requiring a greater majority in Parliament and is welcome.

2. Right to marriage

59. Articles 30 of the draft amendments defines the 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 as guaranteed under the current Art. 36(1) which provides that “Marriage shall be based on equality of rights and free will of spouses” without implying that marriage can be agreed only between opposite sexes.

60. With regard to the right to marry in particular, the Venice Commission in its opinion on the constitutional reforms of Armenia held that the provisions of the equality of marriage should not be interpreted to exclude the recognition of the union of persons with the same sex[17].

61. The Committee on Economic, Social, and Cultural Rights of the United Nations calls upon member states to legally recognize the relationships between same-sex partners[18]. Likewise, the ECtHR has held that the European Convention on Human Rights (ECHR) requires member states to *provide legal recognition for same sex couples;* non-recognition of the legal status of relationships between same-sex partners appears to amount to a violation of Article 8 and Article 14 ECHR[19]. In the case of *Schalk and Knopf v. Austria,* the European Court, after having observed that marriage has deep rooted social and cultural connotations which may differ largely from one society to another, it reiterated that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond the needs of society[20].

62. As of March 2017, thirteen European countries legally recognize and perform same-sex *marriage*, namely Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. An additional fourteen European countries legally recognize some form of *civil union*, namely Andorra, Austria, Croatia, Cyprus, the Czech Republic, Estonia, Germany, Greece, Hungary, Italy, Liechtenstein, Malta, Slovenia, and Switzerland[21].

63. Under the current Constitution of Georgia, the introduction of same-sex marriage by law (or by constitutional interpretation) would comply with the Constitution. This solution – to let the ordinary legislator decide – is satisfactory and preferable in that it leaves more room for future developments in this matter. If the draft amendments now explicitly exclude same-sex marriage, it should be clarified that this does not apply to same-sex partnerships. Georgia like any other CoE member state is obliged to comply with ECHR standards and therefore *must provide legal recognition (such as civil unions or registered partnerships for same sex couples).* The wording of Article 30 (1) of the draft amendments does not exclude the introduction of civil partnership (for same sex couples and for mixed sex couples) under the Georgian Civil Code, and should in no case be interpreted as prohibiting same sex partnership.

3. *Right to voting*

64. Draft Article 24 paragraph 2 (*right to voting*) states that a citizen "recognised as a support recipient by a court decision and admitted to inpatient care establishment shall have no right to participate in elections and referendum". This blanket ban is in contradiction with common European and International standards[22].

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[17] First opinion on the draft amendments to the Constitution (chapters 1 to 7 and 10) of the Republic of Armenia, CDL-AD 2015(037), para. 46. See also, CDL-AD(2014)026 Opinion on the Seven Amendments to the Constitution of « The former Yugoslav Republic of Macedonia » concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones.

[18] E/C.12/BGR/CO/4-5, paragraph 17; E/C.12/SVK/CO/2, paragraph 10

[19] ECtHR, *Oliari and Others v Italy*, 21 July 2015 ; see also Vallianatos and Others v Greece (7 November 2013).

[20] ECtHR, *Schalk and Knopf v. Austria*, no. 30141/04, 24 June 2010.

[21] For the comparative law material, see *Oliari and Others v Italy*, paras. 53 et s.

[22] See, *Alajos Kiss v. Hungary*, application no. 38832/06, 20 May 2010, In this case, the Court held that there had been a violation of Article 3 of Protocol No. 1 to the Convention. After accepting that the withdrawal of the right to vote pursued a legitimate aim, namely to ensure that only citizens capable of assessing the consequences of their decisions could take part in public affairs, the Court emphasised that it could not accept a blanket ban on the right to vote affecting all persons under protection regardless of their actual mental faculties. See also UN Human Rights Committee, General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) (1996), para. 4 and Concluding

65. According to draft Article 3(3) *in fine* "participation in elections and referenda is a duty for every citizen of Georgia". The term "duty" should not be understood as creating a legal obligation entailing legal consequences. During the Berlin conference on 22-33 May, the authorities confirmed this approach.

4. Right to equality – Draft art. 11

66. It is commendable that the list of -prohibited- discrimination grounds in Article 11 of the draft amendments, unlike current Article 14 (which contains a closed-list of grounds), includes also an open clause at the end: "or any other ground". This would allow courts and laws to adapt the prohibition of discrimination to the concrete situations in each case. Moreover, grounds such as sexual orientation which are not specifically listed in the provision may be covered as a prohibited ground for discrimination on the basis of the open clause.[23]

5. Right to property – Draft art. 19(4)

67. The clause that "land may only be owned by Georgian citizens" in the first version of the draft amendments submitted to the delegation of the Venice Commission during its visit in Tbilisi on March 30th, has disappeared in the final version of the draft amendments. The final version (art. 19(4)) provides that the right to property over the land as a significant resource shall be regulated by Organic Law. This is a laudable third way between the current regulation in Art. 21 of the Constitution (no limitation) and the provision in the first version of the draft.

6. Freedom of Belief and conscience – Draft art. 16

68. An explicit recognition of the freedom of religion, one of the oldest rights recognized in the Charters of human rights and present in the majority in the constitutions of Europe. Belief is a general right that may include divers content. A specification of the freedom of religion could clarify the guarantees of the right. Paragraph 3 of draft Article 16 allows restrictions of manifestations of the freedom of belief and conscience only if these manifestations violate the rights of others. This seems too narrow. This creates the risk that, in order to achieve an adequate balance between the right to freedom of belief and conscience and competitive interests, the scope of this right will be interpreted too narrowly or the restriction ground "violation of the rights of others" will be interpreted (too) broadly. The inclusion of other legitimate aims of restriction of the right to freedom of belief and conscience, such as those contained in Article 9 ECHR and Article 18 ICCPR (public safety, protection of public order, health and morals) is recommended.

7. Freedoms of assembly and association

69. The restriction clauses in Draft Art. 21 (Freedom of Assembly) and Draft Art. 22 (Freedom of Association) are formulated in too broad terms. Art. 21(3) suggests that every restriction is allowed when it is laid down in a legal rule. According to Draft Art. 22(3), an association may be liquidated on whatever ground, provided that it is prescribed by Organic Law and Art. 23(1) makes formation of and participation in a political party dependent on an Organic Law. The Venice Commission recommends to bring these clauses in line with Article 11(2) ECHR and in line with other limitation clauses in the Draft Revised Constitution such as, e.g. Draft Art. 17(5).

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observations on the third periodic report of Hong Kong, China, UN Doc. CCPR/C/CHN-HKG/CO/3 (2013), para. 24 (persons with intellectual disabilities may not be denied the right to vote "on bases that are disproportionate or that have no reasonable and objective relation to their ability to vote").

[23] See, Article 14 ECHR; Articles 2(1), 26 ICCPR.

8. Freedom of parties – Draft art. 23

70. The prohibition of "creation of political party on territorial grounds" (Draft art. 23(3) *in fine*) is not justified.

71. With regard to the wording used in Draft art. 23(3) to design extremist parties which could be prohibited by the Constitutional Court, the Venice Commission recalls the position taken in its Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures[24]: "*dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby abolishing the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution*."

9. Citizenship of Georgia

72. Unlike Art. 12(2) of the Constitution which in principle prohibits dual citizenship for citizens of Georgia, Draft art. 32(2) refers the issue of "compiling citizenship of another state by a citizen of Georgia" to the Organic law, which appears as a better option.

10. Children's rights

73. In its 2014 Report on the Protection of Children's Rights[25], the Commission observed that the standard setting activity that has been undertaking more recently by the Council of Europe has inevitably increased awareness among member States about the importance of the *constitutional expression of the children's rights* and recommended that the member states provide, according to their constitutional system, constitutional guarantees for the recognition and protection of children's rights. Although Draft art. 30(2) sates briefly that "the rights of mothers and children shall be protected by law", it is advisable that this right be formulated in a separate constitutional provision.

E. CHAPTER VI: Judiciary and prosecutor's office

1. Constitutional Court

74. Three judges of the Constitutional Court (9 judges in total) shall be elected by a majority of the total members of Parliament. It would be advisable if the draft would provide for the inclusion of a broad political spectrum in the nominating procedure. It is recommended to provide for a qualified majority for the appointment of the three judges elected by Parliament. A suitable dead-lock breaking mechanism could also be introduced in the appointment procedure of constitutional judges by the Parliament. The procedure before the election has to be as transparent as possible in order to ensure a high professional level of the constitutional judges.

75. Draft art. 60(6) prevents the Constitutional Court to declare unconstitutional legal norms regulating elections during the election year, unless this norm has been adopted one year prior to the respective election. It is equally prohibited to declare unconstitutional a subordinate law (bylaws) regulating elections within 60 days before the respective elections. The explanatory note explains that these regulations are aimed at preventing the Constitutional Court's undue intervention in the political process.

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[24] CDL-INF(2000)1 Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures (Venice, 10-11 December 1999).

[25] CDL-AD(2016)005 Report on the protection of Children's Rights: International Standards and Domestic Constitution, adopted by the Venice Commission at its 98th Plenary Session (21-22 march 2014).

76. As legitimate as may be the aim of preventing manipulations of the electoral process, the Constitutional Court as a constitutional organ should be trusted to play its role in a correct manner. The need to safeguard the stability of electoral law may justify excluding that such judgments are taken in the pre-electoral period. But no rules should be completely exempt from the control of constitutionality. If this provision is to be maintained at all, regarding legislation it will have to be modified to ensure that the Constitutional Court be able to review legislation adopted just before the 12 months deadline. The exclusion of the control of normative acts issued by the Central Election Commission within 60 days prior to the election should be reconsidered.

77. A judge of the Constitutional Court may be a citizen of Georgia "from the age of 35 years" (Draft art. 60(2)) which is a rather a young age for an important post in the highest court. A longer legal experience would be preferable.

2. Supreme Court

78. Draft art. 61 sets the minimum number of Supreme Court judges at 28, whereas current art. 90 of the Constitution is silent on the number of Supreme Court judges. At the time of the adoption of the 2014 Joint Opinion on draft amendments to the Organic Law on General Courts, the Organic Law conferred on the plenum of the Supreme Court the authority to determine the number of judges. In the 2014 Joint Opinion[26], the Commission considered that the appropriate body to make the ultimate assessment on the number of Supreme Court judges and of the need for more judges is usually the legislator or the High Council of Justice, given that the choice depends, inter alia, on the available budgetary means, which cannot be determined by the Supreme Court judges. The determination of a minimum number of Supreme Court judges in the Constitution constitutes visibly a further guarantee for the independence of this high court.

79. The Supreme Court judges, according to Draft art. 61(2) are appointed for not less than 10 years (same provision in Article 90 of the current Constitution). Thus, the principle of appointment for life (until the retirement age) which applies to all judges (Draft art. 63(6)), does not apply, by virtue of Draft art. 61(2), to the judges of the Supreme Court. Criticizing the same provision in Article 90 of the current Constitution in its 2010 Final Opinion on the draft constitutional law, the Commission considered that whereas it is generally accepted to limit the tenure of Constitutional Court judges, this does not apply to Supreme Court judges. It therefore recommended extending life tenure, in unequivocal terms, to Supreme Court judges.[27] The same recommendation is also valid in the current context.

80. According to Draft art. 61(2) Supreme Court judges are elected by the Parliament upon submission of the High Council of Justice, and not by the President as in the current art. 90(2) of the Constitution. Criticizing art. 90(2) of the Constitution in its 2010 Final Opinion, the Venice Commission considered that it would be preferable to transfer the right to propose candidates to the High Council of Justice. [28] In this sense, this amendment appears to follow the previous recommendation of the Venice Commission. In the current context, however, the Commission recalls that as a general rule, in the appointment of judges, including judges of the Supreme Court, the judicial council should have a decisive influence[29] In its Report on the independence of judicial system, the Venice Commission considered that : "*Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a*

[26] CDL-AD(2014)031 Joint Opinion on the draft law on amendments to the Organic Law on General Courts, para. 19.
[27] CDL-AD(2010)028 Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, para . 86.
[28] CDL-AD(2010)028, para. 87.
[29] See CDL-AD(2007)028, Report on Judicial Appointments, para 25.

candidate cannot be excluded. An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy. Such a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them."[30]

81. The Venice Commission is conscious that the current High Council is subject to a lot of criticism in Georgia. This should, however, not prevent it from playing its role also as regards the nomination of Supreme Court judges but rather be a reason to reform the legislation on the Council. Consequently, the Venice Commission recommends that Draft art. 61(2) be amended so as to give the High Judicial Council the power to appoint Supreme Court judges with a view to fully guaranteeing their independence, or, having regard to the new more restricted role of the President in the Draft constitution, give to the President as the Head of State the power to appoint judges upon the proposal of the High Council of Justice.

3. Prosecutor's office

82. According to Draft art. 65(3), the Prosecutor's Office shall be accountable to the Parliament. Like any state authority, the prosecutor's office needs to be accountable to the public and in many systems, there is accountability to Parliament. However, in such a situation the risk of politicisation should be avoided. As the Venice Commission considered in its Report on the Prosecution Service: "*Not only is there a risk of populist pressure being taken into account in relation to particular cases raised in the Parliament but parliamentary accountability may also put indirect pressure on a prosecutor to avoid taking unpopular decisions and to take decisions which will be known to be popular with the legislature*." Consequently, accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out. In case the accountability leads to a dismissal procedure, a fair hearing should be guaranteed[31].

83. According to Article 65(2) of the draft revised Constitution, the Prosecutor General is elected for a six years term by a majority of the total members of the Parliament. The requirement of a qualified majority in Parliament for the election of the Prosecutor General is recommended.

4. Probationary periods

84. Draft art. 63(6) introduces a probationary period for three years. The authorities explained the necessity of this reservation by the lack of sufficient resources for the High School of Justice to graduate properly trained and experienced personnel for judicial appointments.

85. The Commission reiterates that "*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*."[32]

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[30] CDL-AD(2010)004, Report on the Independence of the judicial System, Part I: The Independence of judges, para. 31 et s.

[31] CDL-AD(2010)040 Report on European Standards as Regards the Independence of the Judicial System: Part II- The Prosecution Service, para.42.

[32] CDL-AD(2010)004, Report on the independence of the judicial system – Part I: the Independence of Judges, para. 37.

86. The Venice Commission reiterates its previous recommendation in the 2010 Final opinion to remove this proposal for a trial period for judges. It welcomes the proposal made by the Speaker of Parliament to amend draft Art. 63(6) in order that the probationary period be applied only until 2025. According to the explanations provided by the Speaker, by 2025 the reform of the High School of Justice should be terminated and the latter will have full capacity to graduate properly trained judicial personnel.

5. High Council of Justice

87. A number of members of the High Council of Justice are elected by the Parliament by a majority of its total members (Article 64(2) of the draft amendments). It is recommended that those members are elected by a qualified majority in Parliament in order to prevent the domination of the majority in the election of the members of the Judicial Council in order to better guarantee the independence of the judiciary. A suitable dead-lock breaking mechanism could also be introduced in this appointment procedure.

F. Public Defender

88. Draft art. 35(1) in fine prohibits the re-election of the Public Defender who may only serve one term. This provision is welcomed as the prohibition aims at guaranteeing the independence of the institution and preventing any risk that the independent action of the person holding the post is compromised by considerations of future re-election.

89. The Public Defender shall be elected for a five-year term by a majority of total members of Parliament (Draft art. 35(1)). For the Venice Commission, for the appointment of the Public Defender, whose main characteristic is the independence from the Government and Parliament, a requirement of qualified majority would be advisable in order to ensure consensus in Parliament and a wide agreement with the opposition parties given the importance of Public Defender's role in the constitution as supervisor and protector of human rights within the territory of Georgia. For the same reasons, although five years term for the Public Defender is in line with the European Standards, it seems preferable in view of the newly introduced prohibition of his or her re-election, that he/she serves a longer term.[33]

IV. Conclusion

90. In general, the proposed reform deserves a positive assessment. It completes the evolution of Georgia's political system towards a parliamentary system started by the 2010 constitutional reform and constitutes a positive step forward to consolidate and improve the country's constitutional order, based on the principles of democracy, the rule of law and the protection of fundamental rights. In its 2010 opinion the Venice Commission recommended to further strengthen the powers of parliament and to reconsider in particular the procedure for the vote of no confidence. The proposed reform achieves these aims and the Venice Commission cannot but welcome the current process of constitutional revision. As regards the process, the Venice Commission underlines that all stakeholders should seek to reach the widest possible consensus for this major constitutional reform.

91. This being said, Georgia remains a fairly centralised country with a parliament which will remain unicameral for the foreseeable future. It lacks a longstanding tradition of judicial independence. Under such circumstances there is a risk of domination by the majority in

[33] See, for instance, CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §45

parliament and consideration should be given in the future to the possibility of strengthening checks and balances, for example by the introduction of a second chamber and strengthening the role of the opposition in parliament.

92. The replacement of the current proportional/majoritarian election system by a proportional election system is, without doubt, a positive step forward aiming at increasing pluralism in Parliament. However, this positive step forward is limited by three mechanisms: the 5% threshold rule in legislative elections is maintained; the undistributed votes below the 5% threshold are allocated to the winning party and, electoral coalitions (party blocks) are abolished.

93. While the 5% threshold is perfectly in line with European standards and does not as such expose itself to criticism, taken together, these three mechanisms limit the effects of the proportional system to the detriment of smaller parties and pluralism and deviate from the principles of fair representation and electoral equality to a larger extent than seems justified by the need to ensure stability.

94. Against this background, the Venice Commission recommends that *other options* of allocating undistributed mandates than the one suggested by the draft amendments are taken into consideration, such as:

- *proportional allocation* either to *all* political parties passing the 5% threshold; or

- setting up of a ceiling to the number of wasted votes that is to be allocated to the winning party (premium);

- and/or *reduction of the threshold* to 2% or 3%, thus applying the proportional system also to the distribution of leftover mandates.

95. Introduction of indirect election system for the President is as such in line with the European standards. It is welcome that the new system will not be applicable at next year's election but only from 2023. It should however be borne in mind that, also in the absence of a functioning senate, the main counterbalance to a strong government with an overwhelming parliamentary majority in the Georgian constitutional system is the President. Consequently, 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. Measures in order to better guarantee the pluralism in the Parliament (and consequently in the Election Board) and the principle of checks and balances are thus necessary. The Venice Commission reiterates its recommendation concerning the *proportional allocation* of unallocated mandates and/or *reduction of the threshold* under the precedent paragraph. In addition, it is also recommendable to require a qualified majority in the first round of the election of the President by the Election Board.

96. Regarding the budget, the Venice Commission reiterates its recommendation to strengthen the role of the parliament. The provision that any amendment to a draft State budget requires the consent of the government should be reconsidered.

97. Under the Chapter Fundamental Rights:

- Article 30 of the draft amendments should in no case be interpreted as prohibiting same sex partnership;

- An explicit recognition of the "freedom of religion" in Draft Article 16 is recommended; the inclusion of other legitimate aims of restriction of the right to freedom of belief and conscience, such as those contained in Article 9 ECHR and Article 18 ICCPR is recommended.

- The prohibition of “creation of political party on territorial grounds” (Draft art. 23(3) *in fine*) should be removed.

- It is advisable that children’s rights be formulated in a separate constitutional provision.

98. Under the Chapter Judiciary:

- life tenure for judges should be extended, in unequivocal terms, to Supreme Court judges and their election by parliament is best replaced by their appointment by the High Council of Justice or by the President upon the proposal of the High Council;

- accountability of the Public prosecutor to Parliament in individual cases of prosecution or non-prosecution should be explicitly ruled out. In case the accountability leads to a dismissal procedure, a fair hearing should be guaranteed;

- it is recommended to provide for a requirement of qualified majority for the election of those judges of the Constitutional Court and members of the High Council of Justice which are elected by Parliament as well as for the election of the Prosecutor General;

- the prohibition to the Constitutional Court to declare unconstitutional legal norms regulating elections during the election year (unless this norm has been adopted one year prior to the respective election) disproportionately limits the power of the Constitutional Court to review the constitutionality of legislation regarding the election.

99. Public Defender:

- it is recommended to provide for a requirement of qualified majority in Parliament for the appointment of the Public Defender;

- five years’ term for the Public Defender is in line with the European Standards. It might however be preferable for the sake of independence that he/she serves a longer term.

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