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(VENICE COMMISSION)

GEORGIA

OPINION

**ON THE DRAFT CONSTITUTIONAL AMENDMENTS ADOPTED
ON 15 DECEMBER 2017 AT THE SECOND READING BY THE
PARLIAMENT OF GEORGIA**

**Adopted by the Venice Commission
at its 114th Plenary Session
(Venice, 16-17 March 2018)**

On the basis of comments by:

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I. Introduction

1. By letter of 31 January 2018, the Chairperson of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe of the Parliamentary Assembly requested the Venice Commission to prepare an opinion on the draft constitutional amendments adopted by the Parliament of Georgia at the second reading on 15 December 2017 (CDL-REF(2018)010). The third reading is scheduled to take place on 22 March 2018.
2. The Commission invited Mr Josep Maria Castella Andreu, Mr Michael Frenedo and Ms Regina Kiener to act as rapporteurs for this opinion.
3. On 15 February 2018, a delegation of the Commission composed of Mr Josep Maria Castella Andreu, accompanied by Mr Ziya Caga Tanyar, legal officer at the Secretariat, visited Tbilisi and met with the Speaker and the Deputy Speaker of Parliament, representatives of opposition parties and of civil society organisations. The Venice Commission is grateful to the Georgian authorities for the excellent organisation of the visit in what was a relatively short period of time.
4. The present opinion was prepared on the basis of contributions from the rapporteurs and on the basis of an official translation of the draft constitutional amendments. Inaccuracies may occur in this opinion as a result of incorrect translations.
5. Following an exchange of views with Ms Tamar Khulordava, Chair of the EU Integration Committee of the Parliament of Georgia, this opinion was adopted by the Venice Commission at its 114th Plenary Session (Venice, 16-17 March 2018).

II. Constitutional reform process in Georgia and previous opinions of the Venice Commission

6. 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 with the task of preparing a draft law providing for full compliance of the Constitution with fundamental constitutional law principles.
7. During the visit of the President of the Venice Commission, Mr Gianni Buquicchio, to Tbilisi in January 2017, concrete modalities of co-operation with the Venice Commission during the constitutional reform process were agreed. The Speaker of Parliament confirmed the Georgian authorities' commitment not to adopt any amendment which would be negatively assessed by the Venice Commission.
8. The final draft, which was agreed by the State Constitutional Commission during its final session that took place on 22 April 2017¹, was examined by the Venice Commission in an Opinion adopted during its 111th Plenary Session (16-17 June 2017).² The Commission's assessment was focused on the most important and relevant issues of the constitutional reform, notably the balance between state powers and the parliamentary and presidential electoral systems.

¹ CDL-REF(2017)27 Draft Revised Constitution and draft constitutional law on the autonomous Republic of Adjara and Explanatory memorandum on the draft constitutional amendments.

² CDL-AD(2017)013, Opinion on the Draft Revised Constitution of Georgia, adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017).

9. In this Opinion, the Venice Commission considered that the proposed reform deserves a positive assessment, as it completes the evolution of Georgia's political system towards a parliamentary system and constitutes a positive step towards consolidating and improving the country's constitutional order. In particular, it welcomed that draft Article 37(2) replaced the proportional/majoritarian mixed system in the current Constitution by a proportional election system³ as it considered that in Georgia, experience showed that the mixed electoral system tends to lead to an overwhelming majority of a single party, which is prejudicial to pluralism in Parliament.

10. The effect of this positive amendment was, however, limited by three major mechanisms: first, draft Article 37(6) maintained the 5% threshold rule in legislative elections provided in Article 50(2) of the Constitution in force. The second limitation concerned the distribution of unallocated mandates that have not cleared the 5% threshold, to the political party which has received the highest number of votes. The third mechanism concerned the prohibition of electoral coalitions (party blocks) that allow smaller parties to form electoral blocks, in order to be able to clear the 5% threshold. The Commission considered that, taken together, the three mechanisms limited the effect of the proportional system to the detriment of smaller parties, and pluralism. It therefore 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 up a ceiling for the number of wasted votes that are to be allocated to the winning party (premium); or the reduction of the threshold to 2% or 3%. A number of other recommendations were also made, in particular in the fields of fundamental rights and the judiciary. Moreover, after having observed the lack of consensus among stakeholders concerning the most crucial points of the constitutional reform, the Commission underlined that all stakeholders should seek to reach the widest possible consensus for this constitutional reform.

11. After the adoption of the Venice Commission Opinion in June 2017, the parliamentary majority decided to postpone the entry into force of the proportional election system to the parliamentary elections in 2024. On 23 June 2017, an amended version of the draft revised Constitution was adopted by the Parliament of Georgia, at the second reading.⁴ The amended version of the amendments was examined by the Venice Commission in an Opinion adopted during its October 2017 Plenary Session.⁵

12. In this Opinion, the Venice Commission reiterated its previous general positive assessment about the constitutional reform, but regretted the postponement of the entry into force of the proportional election system to October 2024, which it considered a major obstacle to reaching consensus among all the stakeholders in Georgia's constitutional reform. The draft revised Constitution, as adopted at the second reading on 23 June 2017, maintained the 5% threshold for elections as from 2024 and the prohibition of party blocks, but replaced the previously envisaged system of distribution of unallocated mandates by a complex new system, which maintained but limited the bonus for the winning party. This new system was criticised in the Opinion of the Venice Commission adopted in October 2017, as it still very much favoured the strongest party in Parliament.⁶

³ "[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".

⁴ CDL-REF(2017)039 Draft Revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017.

⁵ CDL-AD(2017)023 Opinion on the Draft Revised Constitution as adopted by the Parliament of Georgia, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6, 7 October 2017).

⁶ See paragraphs 22-29 of the Opinion CDL-AD(2017)023.

13. In the meantime, in their letter of 20 September 2017 to the Venice Commission, the parliamentary majority committed itself to considering two changes to the draft, which corresponded to requests by the opposition: 1. Electoral blocks 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%; 2. For the 2024 (and subsequent) elections, the bonus system foreseen in the draft will be abolished and the unallocated mandates due to the votes for parties not having cleared the 5% threshold will be distributed proportionally to all political parties represented in Parliament. The prohibition on electoral blocks will be maintained during the 2024 and subsequent elections.

14. The Venice Commission welcomed this commitment, as it favours pluralism in Parliament, and expressed its hope that this step will not only be considered, but immediately adopted. It welcomed the commitment of the authorities to submit those additional amendments to Parliament by 25 October 2017 and to finally adopt them by March 2018. In its Opinion adopted in October 2017, the Venice Commission also noted with satisfaction that a number of previous recommendations, made in the Opinion adopted in June 2017, were taken into consideration by the Georgian authorities. It welcomed, 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 for the first round; the explicit mention of the principle of proportionality in draft Article 34(3); the requirement of a qualified majority of three fifths 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 of 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 (six years instead of five) by a qualified majority of three fifths in Parliament; the explicit mention of children's rights in the title of draft Article 30.

15. The Commission recommended, in the field of fundamental rights, that 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 and that the prohibition of the "creation of political parties on territorial grounds" (draft Article 23(3)) should be removed. It recommended, concerning the judiciary, that the requirement of full consensus of the plenum of the Constitutional Court when deciding on the constitutionality of the conducted elections, be replaced by a requirement of ordinary majority and that the appointment of Supreme Court judges be made 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, in order to better guarantee their independence. As the draft revised Constitution was to be submitted to the Parliament of Georgia for the third and final reading at the end of September 2017, it was agreed with the authorities that the draft opinion be made public before its consideration by the Venice Commission at the plenary session in October 2017.

16. On 26 September 2017, the Parliament of Georgia adopted at the third reading the draft revised Constitution. On 10 October 2017, the President of the Republic vetoed the constitutional bill and asked for the introduction of a fully proportional election system in 2020 and not in 2024, the abolition of the bonus system and to allow election blocks. On 13 October, Parliament overrode the presidential veto by 117 votes from the majority and adopted the constitutional amendments.

17. The additional constitutional amendments subject of this opinion were initiated by 116 members of the Parliament of Georgia and according to an explanatory note on the draft constitutional law⁷, the purpose of these amendments was to reflect the previous recommendations made by the Venice Commission in the new edition of the Constitution of Georgia. In November and December 2017, three meetings had been organised by the Parliament of Georgia within the framework of nationwide public discussions with the

⁷ <https://info.parliament.ge/file/1/BillReviewContent/162584?>

participation of academics, civil society and media representatives and different constitutional bodies, including the Ministry of Justice. However, due to the lack of a consensus on the constitutional reform particularly because of the postponement to 2024 of the entry into force of the proportional election system, neither the Presidential administration nor the opposition parties participated in the discussions during those meetings. The representatives of the opposition parties also informed the delegation of the Venice Commission during the meetings in Tbilisi that they will not participate in the voting at the third reading of the draft amendments in March 2018.

18. The Venice Commission reiterates its regret concerning the lack of agreement on the most crucial constitutional issues in Georgia and underlines, once again, that any major constitutional reform should seek to obtain the widest possible consensus. A wide consensus for the approval of constitutions and for substantial reforms (as the current constitutional reform which addresses issues as important as the electoral system for the election of Parliament or the election of the President, a number of fundamental rights, or the election and terms of the main independent institutions) means a strong legitimation for the Constitution and a guarantee for its stability.⁸ Although, procedurally, no substantial amendments may be introduced during the third reading of the constitutional amendments, the Venice Commission encourages all political actors to make a final attempt to search for ways of achieving a consensus on the approval of the Constitution.

III. Analysis

19. The declared purpose of the last set of draft constitutional amendments adopted by the Parliament of Georgia on 15 December 2017 at the second reading is to incorporate the previous Venice Commission recommendations in the draft revised Constitution. The postponement of the entry into force of the proportional election system to 2024 is maintained. However, important amendments have been introduced concerning, in particular, the distribution of unallocated mandates to political parties not having cleared the 5% threshold (the bonus system is removed) and the authorisation of electoral blocks during the 2020 parliamentary elections, which will be carried out according to the mixed election system with an election threshold of 3%. Other important amendments concerning the fundamental rights and the powers of the Constitutional Court, as well as technical improvements to several provisions have also been introduced in the text of the draft revised Constitution. The Venice Commission will examine those additional amendments in the light of its previous recommendations in the two opinions adopted in June and October 2017.

A. Parliamentary Election System

20. The supplementary draft constitutional amendments adopted by the Parliament of Georgia at the second reading on 15 December 2017, maintain the mixed election system for the 2020

⁸ As the Venice Commission said regarding the amendment of the Hungarian Constitution “The Constitution of a country should provide a sense of constitutionalism in society, a sense that it truly is a fundamental document and not simply an incidental political declaration. Hence, both the manner in which it is adopted and the way in which it is implemented must create in the society the conviction that, by its very nature, the constitution is a stable act, not subject to easy change at the whim of the majority of the day. A constitution’s permanence may not be based solely on arithmetical considerations stemming from the relationship between the numerical strength of the ruling and opposition parties in parliament. Constitutional and ordinary politics need to be clearly separated because the constitution is not part of the ‘political game’, but sets the rules for this game. Therefore, a constitution should set neutral and generally accepted rules for the political process. For its adoption and amendment, a wide consensus needs to be sought.” (Opinion on the fourth amendment to the fundamental law of Hungary, CDL-AD (2013)012, par. 137).

parliamentary elections and the postponement of the entry into force of the full proportional election system to the October 2024 elections. Therefore, according to Transitional Article 2, paragraph 9, the Parliament elected at the next parliamentary elections [i.e. the 2020 parliamentary elections] based on universal, free, equal and direct suffrage shall consist of 77 members elected through a proportional system and 73 members elected through a majoritarian system by secret ballot for the term of four years.

21. However, the newly introduced draft Transitional Article 2, paragraph 9, provides that “as a result of proportionally held elections [i.e. concerning the 77 members of Parliament elected through a proportional system in the mixed election system of the 2020 elections], mandates of members of Parliament shall be distributed to those political parties *and electoral blocks of political parties* which receive *at least 3 % of electoral votes*”. Consequently, with this “one shot” provision, exclusively for the 2020 parliamentary elections, which will be held according to the mixed election system, the possibility for smaller parties to form electoral coalitions (party blocks) will be preserved and the election threshold will be reduced to 3%. During the October 2024 elections, which will be held according to the full proportional election system, however, the prohibition of forming electoral coalitions will be maintained and the election threshold will be 5%. The Venice Commission reiterates its regret concerning the postponement of the entry into force of the proportional election system to October 2024, as this is a major obstacle to reaching a consensus in the country. However, these specific amendments concerning exclusively the 2020 elections which are not in breach of basic international standards on electoral matters aim to alleviate the detrimental effects of the postponement of the entry into force of the proportional election system for smaller parties to a certain extent and, in this context, are therefore welcome.

22. Concerning the distribution of unallocated mandates, initially, draft Article 37(6) which was examined by the Venice Commission during the June 2017 Plenary Session, set out the rule that undistributed mandates shall be given to the political party which has received the most votes. In its Opinion CDL-AD(2017)013, the Venice Commission considered that this “winner takes all” approach runs in part counter to the proportional election system introduced by the draft amendments and relativizes its effect to the disadvantage of smaller parties. Therefore, it was questionable whether the objective of political pluralism in parliament was ensured. Consequently, it strongly 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 up a ceiling to the number of wasted votes that is to be allocated to the winning party, and/or reduction of the threshold to 2% or 3%.

23. The Draft Revised Constitution adopted by the Parliament of Georgia at the second reading on 23 June 2017 and examined by the Venice Commission during the October 2017 Plenary Session, replaced the previously envisaged system of distribution of unallocated mandates by a complex new system, which maintained but limited the bonus for the winning party.⁹ In its Opinion adopted during October 2017 Plenary Session, the Venice Commission concluded that, while this new system responded to the previous recommendation of the Commission to at least reduce the effects of the bonus system, it still very much favoured the strongest party in a country with a tradition of overwhelming majorities for the strongest party. It recommended to consider abandoning the bonus system and adopting the full proportional system of distribution of unallocated mandates to all political parties which clear the 5% threshold.¹⁰

24. In the supplementary draft constitutional amendments, as adopted by the Parliament of Georgia at the second reading on 15 December 2017, the previous complex system of distribution of so-called wasted mandates is replaced by a system of “equal distribution”.

⁹ CDL-AD(2017)023 Opinion on the Draft Revised Constitution, paras. 22-29.

¹⁰ *Ibid.*, paras. 54 and 55.

According to the new draft Article 37(6) *in fine* “(...) *undistributed mandates shall be given in successive manner to the political parties with best results*”. According to this system and in the light of the explanations given by the authorities, the unallocated mandates shall be distributed individually to all the political parties represented in Parliament. The distribution should start with the political party having received the highest mandate and work its way down to the party having received the lowest mandate, until the unallocated mandates have been depleted. This new system is a clear improvement over the previous systems and, even compared to a system of proportional distribution of unallocated mandates, is in favour of smaller parties represented in Parliament. The Venice Commission welcomes the new draft Article 37(6), which it considers in line with the objective of political pluralism in the specific political circumstances in Georgia.

25. As stated earlier, since the new proportional election system will apply for the first time during the October 2024 legislative elections, the rules for the 2020 elections maintain a majoritarian-proportional mixed election system. Consequently, under draft transitional Article 2(9), 77 members of Parliament will be elected through a proportional election system during the 2020 elections and the Electoral legislation should define important issues regarding the distribution of mandates. According to the opposition parties' representatives met during the visit to Tbilisi, the key for more proportional results in 2020 depends on the distribution of 73 members elected through the majoritarian system. According to them, instead of constituencies of one MP as in the current electoral legislation, constituencies of three MPs would guarantee a representation of the opposition and consequently a more proportional composition of Parliament, and would mean the beginning of a dialogue culture for the 2024 elections, under a full proportional system.¹¹

B. Judiciary

1. Constitutional Court

26. Draft Article 60(6) in the Draft Revised Constitution as adopted by Parliament at the second reading on 23 June 2017 and examined by the Venice Commission during the October 2017 Plenary Session, contained a 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. In the Opinion CDL-AD(2017)023, adopted in October 2017, the Venice Commission criticised this prohibition on the ground that, although the aim of preventing interference with the electoral process justifies a number of measures in the pre-electoral period, the proposed system, by excluding any control of constitutionality of the electoral laws within the reference period, appeared to be disproportionate. The Commission therefore recommended that the Constitutional Court be able to review legislation adopted just before the 12-month deadline.¹²

27. The same draft provision, in its version previously submitted to the Venice Commission, contained an additional limitation by requiring full consensus of the Plenum of the Constitutional Court, when delivering judgment on the unconstitutionality of conducted elections. The Commission found this provision problematic and recommended that the requirement of full

¹¹ In this respect, the Venice Commission stressed in its Opinion CDL-AD(2011)016 on the New Constitution of Hungary (adopted at the 87th Plenary Session on 17-18 June 2011), that “the adoption of the new Constitution in April 2011 appears to be, as confirmed by the text, only the beginning of a longer process of establishment of a comprehensive and coherent new constitutional order. This implies adoption or amendment of numerous pieces of legislation, new institutional arrangements and other related measures. To be fully successful, these processes should be based on the largest consensus possible within the Hungarian society.” The Venice Commission considers that electoral rules are one of these important laws.

¹² See CDL-AD(2017)013, Opinion on the Draft Revised Constitution of Georgia, para. 76.

consensus of the plenum of the Constitutional Court in this provision be replaced by a requirement of an ordinary majority.

28. The Venice Commission welcomes that both recommendations have been taken into consideration by the Georgian authorities: the new draft Article 60(6), though it maintains the prohibition for the Constitutional Court to declare unconstitutional legal norms regulating elections within the respective election year, makes an exception for legislation adopted within 15 months (instead of 12 months) prior to the respective election, thus allowing the Constitutional Court to review such legislation if so requested. In addition, the requirement of full consensus of the Plenum of the Constitutional Court, when delivering judgment on the unconstitutionality of conducted elections, has been deleted. This is welcome.

2. High Council of Justice

29. Under draft Article 64(2), the members of the High Council of Justice are appointed for four years, which is the same term as the Legislature. According to the Speaker of Parliament, this will not create a problem in practice, since the terms of the mandates of different members of the High Council do not coincide. However, longer mandates for the members of the High Council of Justice could be considered. This is important, particularly for the members appointed by Parliament.

C. Fundamental Rights

30. Following a previous recommendation, draft Article 16 concerning the Freedom of Faith, Confession and Conscience has been amended and the legitimate grounds for restriction mentioned in the previous version of the draft provision such as “national security”, “preventing crime” and “administering justice” which are not legitimate aims in the sense of the second paragraph of Article 9 ECHR have been deleted. In the current draft Article 16(2), the only legitimate grounds for restricting this right are “public safety” and “protection of health or the rights of others”. The amendment is welcome. Considering that the legitimate aims in the second paragraph of Article 9 may not be extended by way of interpretation to other notions, it would be advisable to introduce, in draft Article 16(2), other legitimate aims for restriction, such as the protection of public order and morals, which are mentioned under Article 9(2) ECHR. Those are the usual legitimate aims for the restriction of that right in comparative constitutional law (e.g. Article 10 of the French Declaration of Rights of 1789; Article 19 of the Italian Constitution or Article 16 of the Spanish Constitution).

31. The mention of State’s duty to take care for environmental protection and rational use of natural resources under the new draft Article 5(5) and of the principle of the autonomy of higher educational institutions under the new draft Article 27(3) are welcome.

32. New amendments have been introduced in the provisions of draft Article 18 concerning the right to access to public information. Draft Article 18, in its initial version, regulated in its paragraph 2 the right to get familiarised with information and official documents “about him or her (...)” unless they contain state, commercial, professional or personal secrets of other individual and in its third paragraph, the general right to get familiarized with any information, “unless they contain state, commercial or professional secrets”. The amended latest version of the draft provision under its second paragraph currently regulates, in a general manner, the right to get familiarised “with information about him/her or other information”. More importantly, the limitation grounds concerning the right to access to information [i.e. “unless they contain state, commercial, professional or personal secrets”] have been detailed and refined. In the second paragraph of the draft provision, the right may be restricted if the information “*contains commercial or professional secret, or is acknowledged as a state secret by law or by rule established by law which are necessary in a democratic society for ensuring national security or public safety or protecting interests of legal proceedings.*” During the meetings in Tbilisi, the

authorities explained that, under Georgian law, information may be considered a state secret in two different situations: either the law classifies information as a state secret (state secret by law), or the law indicates which authorities are entitled to decide which information should be considered a state secret (state secret by rule established by law).

33. Civil society organisations underlined that by introducing a new ground for restriction in the draft provision (“protecting interests of legal proceedings”), the amendment widened the scope of restriction on accessing public information and substantially worsened the opportunities for accessing such information. They claimed that this legitimate aim may be interpreted broadly in practice as providing wider restriction to that right than is required to ensure secrecy of criminal investigations. The Venice Commission reminds that maintaining the authority and impartiality of the judiciary is a legitimate aim for restriction under the second paragraph of Article 10 ECHR and as long as the restriction for maintaining the impartiality and authority of the judiciary is prescribed by law and necessary in a democratic society and proportionate, the new provision does not appear to be problematic as such. It recalls, however, that the legitimate aims for the restriction of rights and freedoms should be narrowly interpreted and that the authorities should not benefit from wide or unlimited discretion in the implementation of those legitimate aims on such sensitive issues.

34. During the meetings in Tbilisi, the delegation was informed by representatives of civil society organisations that the amendment introduced to draft Article 18 originated from a proposal of the Ministry of Justice during a consultative meeting organised in November-December 2017 with constitutional bodies and that prior to this meeting such an amendment was not discussed at all during the constitutional reform process among the stakeholders. The Venice Commission recalls that the constitutional reform process started as early as December 2016, with the establishment of the State Constitutional Commission and despite the lack of a genuine consensus, several issues concerning the constitutional reform had been discussed in the working groups of this commission and several draft amendments had been prepared and assessed by the Venice Commission in successive Opinions. In their observations on the present draft opinion, the Georgian authorities indicated that the amendment introduced to Article 18 was first voiced and discussed in June 2017 during the meeting of the working group on fundamental rights and was subsequently rejected. The proposal was once again raised during the consultative meeting in November-December 2017. In any case, for the Venice Commission, it is preferable that all issues within the framework of a constitutional reform are discussed adequately during the reform process. Introducing additional amendments into the agenda of the constitutional reform without giving the stakeholders the opportunity to have an in-depth discussion during the reform process is not an appropriate method for allowing the stakeholders and the public in general to have adequate time and opportunity to understand the issues at hand in the constitutional reform.

D. Non-Addressed Recommendations

35. The Venice Commission notes that a number of recommendations made in its previous opinions adopted in June and October 2017 have not been addressed:

36. The provisions criticised in the previous opinions for excessively limiting the role of Parliament in budget matters are maintained without any 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 (66(3)). The Commission reiterates its previous recommendations that Parliament be more significantly involved in budget matters.

37. Draft Article 61, as in the previous version, maintains the election of Supreme Court judges by Parliament upon their nomination by the High Council of Justice. In the Opinion

CDL-AD(2017)023, adopted in October 2017, the Venice Commission considered 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 upon proposal by the High Council of Justice, would be a better guarantee for their independence. Although a previous recommendation that Supreme Court judges should be elected for lifetime¹³ has been followed by the new draft provision, it is regrettable that the draft provision provides for the strong involvement of Parliament in the election process of Supreme Court judges.

38. The previous recommendation concerning the requirement of a qualified majority in Parliament for the election of the Prosecutor General was not followed. The draft Article 65(2) still provides for an election of the Prosecutor General by a majority of the full composition of Parliament. A qualified majority could contribute to prevent the politicisation of this institution.

39. Draft Article 60(2) maintains that a judge of the Constitutional Court must be a citizen of Georgia and must be at least of “the age of 35 years”. The Commission reiterates that 35 years of age is young for an important post in the highest court. A longer experience would be preferable.

40. It is regrettable that the previous recommendations of the Venice Commission concerning the freedom of assembly (Article 21), association (Article 22) and of political parties (Article 23) and the recommendation under the right to vote (Article 24(2)) are not taken into consideration in the new draft. 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 limitation for the rights of freedom of association and assembly are still absent in the draft and left to be regulated by law (not even by organic law), weakening the protection provided for those freedoms. The new draft Article 23(3) maintains the prohibition of creation of political parties on territorial principle, a prohibition, which though scarcely criticised in Georgia in view of the special circumstances of the country, remains unjustified. Other less intrusive measures into this right may be considered.

41. Draft Article 24(2), which provides for a ban on voting rights for citizens who are serving a sentence for a “particularly grave intended crime” was amended. The term “intended” disappeared from the new draft and the ban on voting rights in the draft revised Constitution currently concerns citizens who are serving a sentence for a “particularly grave crime”. During the meetings in Tbilisi, the authorities explained that the provision does not cover “grave negligence” and that in view of definitions provided in the Criminal Code, a “grave crime” may only be an “intended crime”. This explanation is satisfactory. It appears thus that the new amendment introduced to draft Article 24(2) is a rather technical amendment, which does not extend the scope of ban on voting rights provided in the initial version of this draft provision.

IV. Conclusion

42. The Venice Commission reiterates its previous positive assessment 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 principles of democracy, the rule of law and the protection of fundamental rights. The new amendments further improve the text of the Constitution. Before the Commission adopted its second opinion on the new Constitution in October 2017, the Georgian authorities promised to make some further amendments to the text. The draft amendments include these promised changes and are largely based on the previous recommendations of the Commission.

¹³ *Ibid.*, para. 79.

43. Nevertheless, as was previously stated, 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 which is necessary for strong legitimation for the Constitution, including the supplementary amendments, and a guarantee for its stability.

44. However, the specific amendments concerning exclusively the 2020 elections, which will be held according to the mixed system, concerning the possibility of political parties (in particular smaller ones) to form electoral coalitions (party blocks) and the reduction of election threshold to 3% (exclusively for the 2020 elections) are factors which alleviate, if only to a certain extent, the detrimental effects of the postponement of the entry into force of the proportional election system for smaller parties and are therefore welcome.

45. Moreover, the new system of equal distribution of unallocated mandates, which will apply after the elections of 2024 to be held according to the full proportional system, is equally welcome under the specific circumstances in Georgia. This new system is in favour of smaller parties represented in Parliament.

46. The Venice Commission also welcomes a number of positive amendments in the field of fundamental rights, such as the amendment of draft Article 16 concerning the Freedom of Faith, Confession and Conscience, despite room for further improvement, and also in the field of constitutional justice, such as the repeal of the requirement of full consensus of the Plenum of the Constitutional Court when delivering judgment on the unconstitutionality of conducted elections or the new draft provision of Article 60(6) which allows the Constitutional Court to review legislation regulating elections within the election year in case the respective legislation is adopted within 15 months (instead of 12 months) prior to the respective election.

47. The new draft amendments introduced in Article 18 on the right to access to public information aim at refining and detailing the limitation grounds for the right to access to information and in substance, do not appear to be problematic. The Commission underlines however that the legitimate aims for the restriction of rights and freedoms should be narrowly interpreted and that the authorities should not benefit from wide or unlimited discretion in the implementation of those legitimate aims on such sensitive issues. At the same time, considering that this constitutional amendment was introduced in the agenda of the constitutional reform at the last moment at the request of the Ministry of Justice, the Venice Commission stresses that all issues within the framework of a constitutional reform should be discussed adequately during the reform process in order to give the stakeholders the opportunity to have an in-depth discussion during the reform process.

48. The Commission notes that a number of its previous recommendations were not taken into account in the new Draft Revised Constitution, including:

- 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 should be considered;
- The requirement of a qualified majority in Parliament for the election of the Prosecutor General should be considered;
- The prohibition of the creation of political parties on territorial principle is not justified and should be deleted or other less intrusive measures into this right may be considered;

49. The Commission further reiterates that all stakeholders should seek to reach the widest possible consensus for this constitutional reform.

50. The Venice Commission remains at the disposal of the Georgian authorities and the Parliamentary Assembly for any further assistance in this matter.