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To: the European Commission for Democracy through Law / the Venice Commission

Joint Assessment of the Work of the State Constitutional Commission of Georgia

May 8, 2017

Index

I. INTRODUCTION.....	2
II. ASSESSMENT OF THE PROCESS AND FORMAT OF THE STATE CONSTITUTIONAL COMMISSION.....	3
III. ASSESSMENT OF SOME OF THE KEY AMENDMENTS PROPOSED IN THE CONSTITUTIONAL DRAFT	5
A. ELECTORAL SYSTEM	6
B. ELECTION OF PRESIDENT	9
C. DEFINITION OF MARRIAGE AND LGBT RIGHTS	11
D. APPEALING TO THE CONSTITUTIONAL COURT	12

I. Introduction

Following the 2016 Parliamentary Elections in Georgia, after the preliminary results by the Central Election Commission (CEC) showed the ruling Georgian Dream (GD) party set to receive the constitutional majority in the Parliament, the Prime Minister Kvirikashvili rushed to announce plans for the constitutional reform¹.

The new Parliament moved ahead with plans for constitutional reform rather swiftly, announcing that a fundamental revision of the constitution would take place through a Constitutional Commission² inclusive of representatives of the President's and government, judiciary, political parties, civil society and experts. Ruling party did not table any particular deficiencies with the constitution, stating instead that all chapters and articles of the constitution would be open for discussion in the Commission. However, three issues were identified on the agenda of the ruling majority: a) move from the direct Presidential elections by popular vote to an indirect one by the Parliament; b) relocating the Parliament from Kutaisi to Tbilisi; c) definition of marriage in the constitution as "union between a woman and a man". On the other hand, the most anticipated constitutional change by the civil society and political parties was the change of the electoral system of the Parliament, given the multi-year ongoing discussions regarding the shortcomings of the mixed majoritarian-proportional electoral system. Notably, the necessity of changing the electoral system was also acknowledged by the Georgian Dream in 2016, when it proposed draft amendments to move to the fully proportional system by 2020.

The International Society for Fair Elections and Democracy (ISFED), Transparency International – Georgia, Georgian Young Lawyers' Association, and the Open Society Foundation – Georgia (OSGF) were members of the State Constitutional Commission. This document is a joint assessment of the work of the Commission by these organizations.

¹ PM on Electoral System Reform, Planned Constitutional Amendments, Civil Georgia, Tbilisi, 30 Oct. 2016, <http://www.civil.ge/eng/article.php?id=29578>

² Parliament Plans to Set Up Constitutional Reform Commission, Civil Georgia, Tbilisi, 9 Dec. 2016, <http://civil.ge/eng/article.php?id=29684>

II. Assessment of the Process and Format of the State Constitutional Commission

The State Constitutional Commission was composed on December 23, 2016 by the decision of the Chairman of the Parliament and the inaugural session was held on December 24, 2016³. The Chairman of the Parliament, also acting as the Chairman of the Commission, set April 30, 2017 as the deadline for the Commission to prepare a draft of the constitutional amendments. Four thematic working groups were defined within the Commission:

- WG 1 – human rights, judiciary, preamble to the constitution, general and transitional provisions;
- WG 2 – Parliament, finances and control, constitutional revision;
- WG 3 – President, Government, defense issues;
- WG 4 – administrative-territorial arrangement and local self-governance.

Composition

The Commission was set up with 73 members. Overall, the composition of the commission was rather inclusive, unifying representatives of the President's administration, government, judiciary, other constitutional bodies, political parties, several civil society organizations (CSOs) and experts. Along with the parliamentary political parties, non-parliamentary parties/blocs⁴ that crossed 3% threshold in the 2016 parliamentary elections were invited to work in the Commission. Although the civil society participation was ensured, the criteria used for selection of experts was not clear, leaving impression that some of the independent experts were either affiliated with the ruling party or had views similar to those of the ruling party representatives. Business associations, trade unions and CSOs working on environmental issues have not been invited.

President was represented in the Commission with three members: Head of the President's Administration, National Security Council Secretary and the Parliamentary Secretary of the President. However, even before the Commission was approved, the President's administration announced about their decision to boycott the constitutional reform citing "lack of political trust and political legitimization"⁵. The boycott came after the disagreement over the format of the Commission. President Margvelashvili's earlier proposal for the Commission to be set up with co-chairmanship of the President, Prime Minister and the Chairman of the Parliament, was rejected by the ruling party. **While timely consultations by the parliamentary majority with the President over the format of the Commission were desired, President's decision to boycott the Constitutional Commission did not contribute to constructive and qualified discussion of certain issues, including about the functions of the President and the presidential election system.**

Timeframe and Scheduling

The ruling party announced that the Commission was to be composed before the end of 2016 and mandated a period of four months to prepare constitutional amendments. The CSOs repeatedly pointed out the short timeframe for the work of the Constitutional Commission as insufficient and unreasonable for fundamental revision of the entire constitution. Setting of such restricted timeframe had several negative effects. To large extent, it prevented involvement of the wider public in the work of the Commission. In case of more reasonable deadline it would have been possible to hold consultations with a broader group of CSOs, experts and other interested stakeholders at all stages of the discussions. **Although the Chairman has indicated that set deadlines and timeframes contributed to effectiveness of the Commission, it is unclear what was the rationale behind rushed and hastily organized process to prepare constitutional amendments.**

The short timeline also had its impact on the working group meeting schedule and the working process. In some cases, members of the Commission were informed about the meetings on a rather short notice. While it was

³ State Constitutional Commission Composed, Civil Georgia, Tbilisi, 23 Dec. 2016, <http://civil.ge/eng/article.php?id=29719>

⁴ Blocs were represented by the parties that were number one in the list of the electoral bloc as registered for the Parliamentary Elections.

⁵ President's Administration Boycotts Planned Constitutional Reform Commission, Civil Georgia, Tbilisi, 12 Dec. 2016, <http://civil.ge/eng/article.php?id=29687>

evident that discussing substantial volume of issues in one meeting would be impossible for most working groups, follow-up meetings were not foreseen ahead of time and were scheduled later, in some cases on the next working day. Lack of ability to foresee schedule of working group meetings when particular articles would be discussed undermined Commission members' ability to plan properly for the discussions. Besides, draft amendments were often sent to the members one or two days prior to the working group meeting leaving not enough time for proper deliberation and for preparing alternatives to the provisions.

Given the importance of the constitutional reform and meaningful discussions in the process, the Commission members should have been given a realistic schedule of working group meetings, foreseeing follow-up meetings and with a clear agenda for each meeting indicating the Chapters and Articles to be discussed, up to a month in advance. This would facilitate proper planning and better engagement of the Commission members. Additionally, the draft amendment proposals should have been provided at least several working days prior to the meeting.

Working environment

Commission members had the ability to freely attend working group meetings and participate in discussions. Furthermore, the working group meetings were also open to non-members. Several CSOs, who were not members of the Commission attended the working group meetings, and in some cases, contributed to the discussions. Representatives of international organizations also attended the meetings and monitored the process.

However, working environment within the Commission working groups was not always constructive. Some commission members, at times including the Chairman, were aggressive and intolerant towards different or critical opinions, namely, those of opposition parties and civil society. In some cases, **CSO representatives evidenced offensive remarks from the expert members of the Commission, which were not effectively prevented by the Chairman. This type of attitude had a negative effect on the working environment in the Commission.**

Decision-making process

During the whole process of the Commission's work the decision making process lacked clarity and foreseeability. While various proposed alternatives were discussed in the working groups, the voting was held only once on a single issue. Accordingly it was unclear how the working groups decided which alternatives were supported by the working group to be reflected in the draft of the amendments.

Final session and voting

The final session of the Commission was scheduled on April 22, 2017 with three day advance notification to the Commission members. The members did not have clear information about the voting procedures until the final session of the Commission, when the Chairman explained the procedures before start of the voting. This once again proves that the **whole process was conducted in a hasty regime at all stages lacking the clarity regarding the voting or generally decision-making process.**

Shortly before its final session, opposition political parties left the Commission in protest. Based on this, the Decree of the Chairman of the Parliament on the Constitutional Commission was amended and its composition decreased from 73 to 60. This amendment had a direct effect on the quorum for adopting constitutional amendments at the final session of the Commission. The Commission members were not informed in advance about this amendment and it only became known at the final session in the process of voting. Although this does not affect the legality of the amendment to the Decree, it shows uncooperative and superficial attitude towards Commission members. The Commission members should have been informed about such an important amendment to the Decree.

III. Assessment of Some of the Key Amendments Proposed in the Constitutional Draft

Number of important positive clauses have been included in the draft of the Constitution as a result of the discussions, and in some cases due to the efforts of the CSOs. Namely,

- **The provision on integration in European and Euro-Atlantic structures has been added** - the constitutional bodies within their mandate commit to take all necessary actions to ensure full integration of Georgia in the European Union and the North Atlantic Treaty Organization.
- **The provision on substantive gender equality has been reflected in the amendments** - the State undertakes to provide special measures to ensure essential equality for men and women and to eliminate inequalities that exist today.
- **The right to access to the internet** will be expressly stated in the Constitution.
- **Guarantees of constitutional independence for a number of institutions have increased or emerged, such as:**
 - Public Broadcaster* – The constitution will guarantee the independence of the Public Broadcaster from state agencies as well as from political and substantial commercial influences.
 - Prosecutor's Office* - The Prosecutor's Office is defined as a body independent from the executive authority.
 - Judiciary* – The fundamental direction of the work of the High Council of Justice has been defined - ensuring the independence and effectiveness of the courts, and that its rule of conduct shall be determined by an organic law.
- **The parliamentary oversight mechanism has been relatively enhanced through Investigative Commission** - In contrast to the current legislation, lower quorum required for the establishment of an investigative commission has been established, in particular the decision shall be made with the support of one third of the total number of the Parliament members.

However, some proposed amendments envisioned by the constitutional draft cast shadow over the number of positive changes also included in the document.

A. Electoral System

Electoral system for the parliament has long been an issue of debate in Georgia. The current mixed majoritarian-proportional system has been criticized for producing disproportion between the votes and mandates received by the political parties. The experience of over twenty years has shown that this disproportion almost always favors ruling parties as the majoritarian component of the system allows them to receive considerably more mandates the legislature in percentage than the actual support it received in elections. For instance, in 2008 and 2016 parliamentary elections this disproportion amounted to 20% or more advantage in mandates obtained by the majority parties at the time⁶. This is one of the reasons why CSOs and political parties alike have been calling for abandoning majoritarian system and moving to a proportional one.

The proposal submitted by the CSOs to the Constitutional Commission on the electoral system was based on a broad consensus of 14 political parties and 8 CSOs achieved with facilitation by the President⁷. The proposal would introduce a proportional system in which 75 mandates would be distributed through national proportional and another 75 through regional proportional vote. This proposal was not supported by the ruling party favoring introduction of fully national-proportional system.

Accordingly, the constitutional draft envisages abolishment of majoritarian system and election of 150 MPs through single national proportional list. While this electoral system does not guarantee regional representation, scrapping off the majoritarian component is definitely a welcomed step forward. **However, the proposal also includes some negative provisions that outweigh the positive aspects of abolishing the majoritarian elections. Particularly problematic is the rule of allocation of the undistributed mandates along with prohibition of election blocs.**

Undistributed Mandates

According to the proposed amendments, all parliamentary mandates left undistributed due to votes cast to the parties that could not clear the threshold will be allocated to the party which received the most votes. As explained by the Chairman of the Parliament, the purpose of such allocation is to ensure stable majority and ability to form a government by the party that received the most votes.

This clause effectively creates a bonus to the ruling party similar to the one under the mixed majoritarian-proportional system. Allocation of all undistributed mandates to a single party will substantially increase the risks of unfair disproportion between the percentages of votes actually gained by the party and seats that it would receive in the legislature. As the practice shows, with the 5% threshold, undistributed seats may amount to a sizeable percentage of total seats. In the 2016 parliamentary elections the number of undistributed seats constituted 20% of total number of mandates. Such a large bonus can in no way be justified with the argument of stability. The proposed abolishment of the majoritarian elections is welcomed because the majoritarian component leads to a disproportion between the share of seats and votes gained by political parties in elections. **If the proportional electoral system results in the same outcome of disproportionate distribution of mandates through the bonus, the electoral system will still be perceived as unfair and against the logic of the reform.**

⁶ In 2008 Parliamentary Elections, United National Movement received 59 % of the votes in the proportional race (The CEC Summary Protocol of Parliamentary Elections of 21 May 2008, Tbilisi, 5 June 2008, <http://cesko.ge/res/old/other/8/8722.pdf>) but obtained 79% of (118 out of 150) mandates as a result of the majoritarian elections. Similarly, Georgian Dream received 49% support (The CEC Summary Protocol on the Final Results of 8 October 2016 Parliamentary Elections of Georgia, Tbilisi, 16 November 2016, <http://cesko.ge/res/docs/shemajamebelieng.pdf>) but gained 77% of the seats (115 out of 150) in the Parliament as a result of the majoritarian elections.

⁷ Address of CSOs and Political Parties to the Parliament of Georgia on the Electoral System Reform, Tbilisi, 30 May 2015, <http://www.isfed.ge/main/904/eng/>

It should be also considered that undistributed mandates are the votes cast in favor of smaller parties who were not able to cross the threshold. In other words these are the votes cast against the ruling party. Taking this into account, it is unfair and unreasonable to grant all undistributed mandates to only ruling party.

While the motivation to ensure stability is understandable, using such extreme means to this end is unjustified and unfair. Besides, it should be noted that the issue of instable majority has never been the problem in Georgia. On the contrary, since the independence, Georgia has seen its government and parliament controlled by strong and influential ruling parties effectively limiting the political competition and resulting in several waves of public discontent. The 2016 parliamentary elections yet again resulted in concentration of power in a single party with the ruling Georgian Dream obtaining a constitutional majority.

The problem that needs to be addressed in Georgia's political reality is the lack of pluralism. This is largely due to the electoral system, which limits the ability of smaller political parties to receive mandates or to have real influence on the decision-making process even if they manage to overcome the threshold and get into the parliament. Granting all undistributed mandates only to one party will keep other parties in a disadvantaged position further reducing possibilities for strengthening of small parties and promoting pluralism in the parliament.

One specific feature of the proposed bonus system is that it does not establish any thresholds to the parties for gaining such bonus or any limits to how much such bonus can be. While some electoral systems in Europe allow bonuses to the party that received the most votes, there are additional mechanisms that regulate how this bonus is granted. For example, after the Constitutional Court of Italy has ruled unlimited bonuses unconstitutional, a 40% minimum threshold for the assignment of the bonus has been established in Italy. The Armenian electoral system also has features of bonuses, however the bonus of additional seats is awarded to give the winning party 54% of the total mandates to form a government⁸.

During the final session of the Commission, member CSOs together with some experts have proposed decreasing the election threshold from 5 to 3 percent and two alternative options for allocating the undistributed mandates:

- i) Allocation of undistributed mandates through the D'Hont method;
- ii) Granting the party with the most votes a bonus by allocating undistributed mandates until the total number of mandates received by the party reaches 80, after which the undistributed mandates are allocated to all other parties proportionally.

None of the alternatives were supported by the ruling party during the final session.

Recommendations:

The undersigning CSOs believe that the proposed amendment does not adequately address the problem related with the electoral system.

- Along with transitioning from the current mixed majoritarian-proportional system to a fully proportional one, the undistributed mandates should be allocated between all parties that cleared the threshold in proportion to votes they received.
- Alternatively, the mandates should be allocated based on the formula not producing undistributed mandates.

⁸ OSCE/ODIHR Needs Assessment Mission Report, Warsaw, 12 January 2017, <http://www.osce.org/odihr/elections/armenia/293546?download=true>

Abolishment of Electoral Blocs

Constitutional amendments propose prohibition to the political parties to create electoral blocs with the purpose of joining forces for elections. The Chairman of the Parliament states that removal of such possibility will support development and reinforcement of political parties.

CSOs believe that this regulation is unreasonably strict and inadvisable⁹. Such measure will be especially unacceptable if the existing 5% threshold is maintained and the proposed rule of distribution of mandates is approved.

Generally, based on the practice established in Georgia, creation of blocs are motivated by three factors: a) funding from state budget; b) benefits determined by the law such as the free political advertisement, appointment of election commission members, etc; c) political interests such as winning elections through a joint platform. It should also be noted that often electoral blocs are created for financial or other material or non-material gains, which is clearly a negative fact. To address such practice and rule out any illegitimate manipulations, the NGOs have recommended amending applicable legislation. Such approach will ensure that parties are no longer focused on creating a bloc for financial gains, which will help strengthen political parties in a long-term perspective; on the other hand, if parties still decide to set up an electoral bloc, such decision will be motivated purely by political interests and the desire to win elections, which is a valid justification for political blocs.

Abolishing blocs in parallel with maintaining 5% threshold and granting all undistributed mandates to one political party will not contribute to strengthening small political parties or increasing pluralism. It will have quite an opposite effect causing the disappearance of small parties or rendering them uncompetitive in elections. After the 2016 parliamentary elections Georgia's political field witnessed serious changes in political parties¹⁰ that have mostly weakened political parties. Taking into consideration the changes on the political landscape, abolishing political blocs will most likely have a negative effect on the election environment in the country. Given that after gaining the independence, ruling parties in Georgia have only changed through opposition uniting in political blocs, the attempt to abolish possibility of creating blocs leaves an impression that the purpose of this move is to minimize potential risks of upsetting the current ruling party's dominance.

Recommendations:

- The ability for political parties to unite in political blocs with political interests should be maintained. Financial incentives and other gains should be regulated through the relevant laws so that they take away the incentives for political parties' to create political blocs for financial or other benefits.
- If the blocs are still abolished, in order to contribute to political party strengthening and ensuring pluralism either the threshold should be lowered or the amendments should enter into force after at least two parliamentary elections so that parties will have reasonable time for internal party building and development.

⁹ Opinion about Constitutional Amendments Relating to the Electoral System, Tbilisi, 16 March 2017, <http://www.isfed.ge/main/1205/eng/>

¹⁰ Leading Members Quit the Republican Party, Civil Georgia, Tbilisi, 1 Nov. 2016 <http://civil.ge/eng/article.php?id=29588>; Five Top Figures Quit Free Democrats Opposition Party, Agenda.Ge, Tbilisi, 12 Oct. 2016, <http://agenda.ge/news/67695/eng>; Leader of National Forum Quits Party, Civil Georgia, Tbilisi, 11 Nov. 2016, <http://civil.ge/eng/article.php?id=29614>; Burchuladze Quits Politics, Civil Georgia, Tbilisi, 15 Dec. 2016, <http://civil.ge/eng/article.php?id=29694>; Georgia's Main Opposition Party Splits, Reuters, 12 Jan. 2017, http://uk.reuters.com/article/uk-georgia-politics-idUKKBN14W27E?utm_source=34553&utm_medium=partner

B. Election of President

The constitutional amendments propose abolishing direct elections of president and introduce indirect elections by the electoral collegium/college. The limited powers of president in the parliamentary model is given as the major argument in support of indirect election of the president.

However, there are number of European countries with parliamentary model and limited presidential powers practicing direct election of the president¹¹. Therefore, the parliamentary model does not necessarily require indirect election of the president.

From constitutional and legal point of view, the president is a stand-alone figure that does not belong to any of the branches of the government, with the role of an arbiter, which is especially important for any possible confrontation between the government and the parliament. In order for the leader of the nation to be able to fulfill the function of an arbiter during a political crisis it must be the public support that provides his/her legitimacy. In view of the minimal rights, losing direct legitimization from the people would turn the president into a nominal figure unable to realize functions of an arbiter. Besides that, it will also reduce the political weight of the leader of the country and a symbol of Georgia's unity.

Direct and universal suffrage guarantees that the elected official – the leader of the nation – will be the president of the whole country, not just a representative of a specific political force/party.

President's independence deriving from direct elections is especially important for exercising important powers like vetoing legislative acts, judicial appointments, dissolving the parliament and selecting candidacies for public offices.

Elections are the most important form of direct democracy, allowing voters to participate in political processes in a direct manner, express their free will and influence the decision-making process. The president is the only official directly legitimized by the people and elected on the basis of direct, universal suffrage. Therefore, stripping the people, who are the source of power, of their right to directly elect the president will be a step backwards on the road to solidifying democracy. This will reduce citizens' perception of their power and will lead to their frustration and alienation from political processes. To improve political culture in the country it is important to maintain direct election, as an additional basis for debates, discussions, direct citizen engagement and accountability of political subjects.

Naturally, none of these rules are a panacea and the Constitution of a specific country should take into account the local context and experience, and should be responsive to local challenges and needs. Georgia doesn't have a rich democratic experience, political/legal culture of voters is developing, while democratic institutions are not strong enough and there is lack of trust towards public institutions in the country. In view of all this, any steps made towards weakening democracy (abolishing direct election) is risky and not desirable. Considering the development of democracy at this stage in Georgia, and voters' best interests, the undersigning CSOs believe that the president should be elected by direct popular vote.

The move from the direct to an indirect election of the president was viewed by many as a personal retribution of the ruling party against the current president. In response to this, it was proposed by the ruling party that the change of the rule of the election of the president would not affect the upcoming presidential elections of 2018 and would be introduced only in the next elections (2023). This is a positive step, as this allows the constitutional amendment to be free of political undertones and not be perceived as a decision made because of certain individuals. However, following the criticism of the change of the direct elections from the President, the Chairman of the Parliament warned that in response to the criticism, the ruling party could consider early

¹¹ Austria, Bulgaria, Croatia, Czech Republic, Finland, Ireland, Iceland, Lithuania, Macedonia, Moldova, Montenegro, Poland, Portugal, Serbia, Slovakia, Slovenia. Arguments in Favor of the Directly Elected President, ISFED, April 2017, <http://www.isfed.ge/main/1214/eng/>

introduction of the indirect elections in 2018¹². Even after the final session of the Constitutional Commission some ruling party representatives indicated that the indirect election could be introduced as early as 2018. Such statements in no way contribute to dispersing perceptions about the personal reasons behind the amendments. If indirect presidential elections are introduced, it is crucial for the change not to affect the 2018 Presidential elections, since the current parliament was not elected with a clear mandate by the voters for it to elect the president. Additionally, the mixed majoritarian-proportional electoral system through which the current parliament was elected is an issue of a heated debate with many contesting that the constitutional majority obtained by the Georgian Dream does not represent the real attitudes of the citizens of Georgia, as the share of votes received by the ruling party at the elections is significantly lower than its share of mandates in the parliament.

An important positive aspect of the proposed indirect election is that the president will be elected by the election collegiums instead of the simple majority of the parliament as it was in the initial draft. Collegium/college will be composed of all MPs and members of representative bodies of autonomous republics of Adjara and Abkhazia, representatives of local government bodies. This model may ensure that different political groups will be involved in the election of the president ensuring that diverse political opinions are represented. However this is not guaranteed, because according to the Georgian practice the same party dominates the Parliament and local self-government representative bodies. This reality stems from the deficiencies in the local self-government electoral system that allows the ruling party to have more mandates than it deserves based on voters' support leading to monopolization of power by one party.

Recommendations:

- CSOs support preserving direct elections of president;
- In case the indirect elections are introduced, it should only enter into force after the 2018 presidential elections, which should be held through a direct popular vote.

¹² President, Parliamentary Chairman Clash over Constitution Reform, Civil Georgia, Tbilisi, 29 Apr. 2017, <http://civil.ge/eng/article.php?id=30063>

C. Definition of Marriage and LGBT Rights

The constitutional draft introduces the definition of marriage as “union between a woman and a man”. The proposed formulation carries homophobic connotation and can potentially foster negative attitudes towards LGBT citizens. Such amendment to the Constitution will have a chilling effect on the human rights situation in Georgia.

Over the recent years, different political groups have actively exploited the issue of prohibition of the same-sex marriage for populist reasons. In attempts to score political points they appealed to homophobic public sentiments and under the pledge of preserving traditions artificially fueled discussions on the topic. Regrettably, the Georgian Dream also chose to exploit the issue of same-sex marriage during their pre-election campaign for the 2016 elections and even pushed for a referendum to define marriage in the constitution as union of a man and woman.¹³ The pre-election promise to define marriage was also the only argument brought as justification of the amendment during the Commission working group meetings. This reasoning emboldens a dangerous precedent of government sacrificing the rights of minority groups to gain political benefits by nurturing discriminatory attitudes of dominant majority.

The initiative to ban same-sex marriage in the constitution is particularly unreasonable considering that legal prohibition of same-sex marriage already exists, while marriage equality has never been demanded by the LGBT groups. On the background of frequent homophobic and transphobic crimes in Georgia¹⁴ and lack of effective investigation of hate crimes, placement of a stiff restriction on rights of LGBT people will directly encourage homophobia and deteriorate the human rights situation of LGBT groups.

Over the recent years, a trend of improvement of legal recognition of same-sex couples has been evident in most European countries¹⁵. Although marriage equality is not a common European standard, the European Court of Human Rights jurisprudence (*Vallianatos and Others v. Greece*, also *Oliari and Others v. Italy*) demonstrates the trend of legal recognition of same-sex couples. In 2015, the European Court held that lack of legal norms necessary for recognition of homosexual couples amounts to a violation of Article 8 of the Convention – Right to respect for private and family life¹⁶. By prohibiting theoretical possibility of marriage equality without having any form of legal recognition of same-sex couples, Georgia will contradict the ECHR standard.

If the constitutional amendment about marriage is adopted, the Constitution must also guarantee civil partnership for same-sex couples. The Constitutional Commission member CSOs together with the LGBT and equality rights organizations have proposed that the following sentence should be added to the Constitutional provision about marriage: “*other forms of cohabitation shall be regulated by the law.*”¹⁷ By setting a framework for civil partnership, constitutional prohibition of same-sex marriage will no longer be viewed as a restriction of rights of LGBT people and the legislation will provide space to provide important legal guarantees to the same-sex couples (inheritance rights, property rights, spousal support, right to visit a hospitalized partner, right to visit an imprisoned partner, etc.). In a joint statement, the 13 organizations referred to Croatia as an example of a country where the constitutional prohibition of the same-sex marriage was introduced followed by adoption of the law on civil partnership of same-sex couples. However, the CSO proposal was rejected at the Commission working group meeting.

¹³ PM Vows to Renew Push for Defining Marriage in Constitution After Elections, Civil Georgia, Tbilisi, 24 Aug. 2016, <http://civil.ge/eng/article.php?id=29392>

¹⁴ Govt Called to Tackle Hate Crimes After Transgender Woman Stabbed in Tbilisi, Civil Georgia, Tbilisi, 16 Oct. 2016, <http://www.civil.ge/eng/article.php?id=29543>

¹⁵ Defining the Notion of Marriage: European Standards and Georgian Challenges, ISFED, Tbilisi, 7 Apr. 2017, <http://www.isfed.ge/main/1212/eng/>

¹⁶ *Oliari and Others v. Italy*

¹⁷ Joint statement of 13 NGOs, Opinion about Constitutional Amendments Related to Marriage, Tbilisi, 10 Apr. 2017, <http://www.isfed.ge/main/1213/eng/>

In addition to the issue of marriage, to ensure meaningful equality it is important that Article 11 (Article 14 in the current Constitution) in the constitutional draft explicitly states sexual orientation and gender identity as basis for nondiscrimination. The Chairman of the Parliament has been opposing expanding the list of the nondiscrimination factors to include these features arguing that inclusion of sexual orientation and gender identity would spark speculations from some groups in the society. This argument is ill-founded and unacceptable as the primary focus of the amendments should be ensuring protection of every citizen of Georgia, including LGBT individuals which are one of the groups facing discrimination the most.

Recommendations:

- The constitution should not include amendments motivated by homophobic attitudes and therefore a definition of marriage that explicitly bans same-sex marriage should not be introduced;
- The constitution should guarantee rights for same-sex couples and heterosexual couples that are not married. Therefore, the constitution should create space for civil partnership.
- Article 11 of the constitutional draft should be expanded to include sexual orientation and gender identity as the basis for nondiscrimination.

D. Appealing to the Constitutional Court

According to the constitutional draft, it is prohibited to file a complaint to the Constitutional Court regarding the unconstitutionality of the legal norms regulating elections during the election year, unless this norm has been adopted one year prior to the respective election. It is also prohibited to declare a by-law regulating elections unconstitutional 60 days before the election. Therefore, during the pre-election period there will be no possibility to address the Constitutional Court with the aim of disputing constitutionality of a normative act that may be significantly affecting electoral process.

The right to appeal to the Constitutional Court is a very important right. It ensures that an election will not be conducted based on unconstitutional norms. It is unclear why this restriction became necessary and what risks would be avoided by introduction of this prohibition.