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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

GEORGIA

OPINION

ON

THE DRAFT CONSTITUTIONAL LAW ON PROTECTING FAMILY VALUES AND MINORS

Adopted by the Venice Commission at its 139th Plenary Session (Venice, 21-22 June 2024)

On the basis of comments by

Ms Regina KIENER (Member, Switzerland)
Mr Tim OTTY (Member, United Kingdom)
Mr Jan VELAERS (Member, Belgium)

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I. Introduction

1. By letter of 16 April 2024, Ms. Zanda Kalniņa-Lukaševica, the President of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on the draft Constitutional Law on protecting family values and minors (CDL-REF(2024)020, hereinafter, the "draft Constitutional Law").

2. Ms Regina Kiener, Mr Tim Otty and Mr Jan Velaers acted as rapporteurs for this opinion.

3. On 13, 14 and 22 May 2024, Ms Kiener and Mr Otty, together with Ms Martina Silvestri and Ms Anna Kacmarikova from the Secretariat, held online meetings with the Minister of Education, Science and Youth, the First Deputy Public Defender, representatives of the majority and the opposition in the Parliament, and members of the diplomatic community as well as with some representatives of civil society and international organisations. The Commission is grateful to the Georgian authorities for the excellent organisation of these online meetings.

4. This opinion was prepared in reliance on the English translation of the draft Constitutional Law on protecting family values and minors. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 13, 14 and 22 May 2024. The draft opinion was examined at the meeting of the Sub-Commission on Fundamental Rights and on Non-Discrimination on Thursday 20 June 2024. It was adopted by the Venice Commission at its 139th Plenary Session (Venice, 21-22 June 2024).

II. Background and context

6. The draft Constitutional Law was registered in Parliament on 3rd April 2024 by a group of 83 parliamentarians (the "initiators of the law",[1] according to the explanatory note).[2] Although this is not a legislative initiative of the government, it appears that all the initiators/authors are members of the government coalition and that the group encompasses nearly all parliamentarians belonging to the parties in the government coalition, including the Speaker of the Parliament and the main party leaders.

7. On the same day, the leader of the ruling Georgian Dream party, Mr Mamuka Mdinaradze, who is one of the initiators/authors of the draft Constitutional Law, announced the reintroduction of the Law on Transparency of Foreign Influence into the Parliament, which attracted strong criticism at national and international level and triggered long-lasting mass protests. The Venice Commission issued an urgent Opinion on this law[3] and is preparing two other Opinions on electoral amendments, that the national authorities adopted in view of the elections scheduled for the end of October 2024.

8. The introduction of the draft Constitutional Law raised concerns across the international community. In a statement[4] published on 27 March 2024, the Commissioner for Human Rights of the Council of Europe ("the Commissioner") expressed concern about this legislative initiative

[1] 81 of them are also listed as "authors of the law", in the explanatory note.
[2] The Venice Commission has relied upon a non-official translation of the explanatory note accompanying the draft Constitutional Law.
[3] See Venice Commission, Georgia, CDL-PI(2024)013, Urgent Opinion on the Law of Georgia on Transparency of Foreign Influence.
[4] Georgia: political manipulation and harassment of LGBTI people and human rights defenders have no place in a democratic society - Commissioner for Human Rights (coe.int)

and its potential to perpetuate harmful stereotypes and prejudice against LGBTI people. She also condemned the political manipulation of LGBTI-phobia in the run-up to elections.

9. In its resolution of 25 April 2024 on attempts to reintroduce a foreign agent law in Georgia and its restrictions on civil society, the European Parliament urged "the Georgian Dream majority to withdraw its proposed constitutional legislation curtailing LGBTI rights, which represent an attack not only on the LGBTI community, but also on freedom of speech and a free civil society".[5]

10. During the online meetings held on 13-14 May 2024, several interlocutors suggested that this draft Constitutional Law was part of an overall strategy to attack so-called foreign influence also reflected in the Law on Transparency, to distract the electorate from more pressing social issues and to stir up homophobic feelings in the Georgian traditional society.

11. From a general perspective, the ECRI 2023 report on Georgia as well as the 2022 Commissioner's report following her visit to Georgia, found that in recent years hate speech, including incitement to discrimination and violence against LGBTI persons, has been growing online, on privately-owned media outlets, among some members of the Georgian Orthodox Church clergy, politicians and public officials.[6]

III. Analysis

A. Scope

12. The draft Constitutional Law consists of two articles. The second simply sets forth the entry into force of the draft Constitutional Law upon publication, the first covers various substantive issues, all of which have implications for legal relationships other than those between an assigned man at birth ("genetically male") and an assigned woman at birth ("genetically female"), the right to adoption or foster care of single persons and all gender identities other than those of a biological woman and a biological man.

13. The draft Constitutional Law is accompanied by a constitutional amendment to Article 30 of the Constitution which would add the following paragraph: "The protection of family values and minors is ensured by the Constitutional Law of Georgia, which is an integral part of the Constitution". Currently, Article 30 reads as follows: "1. Marriage, as a union of a woman and a man for the purpose of founding a family, shall be based on the equality of rights and the free will of spouses. 2 The rights of mothers and children shall be protected by law".

14. The scope of the Venice Commission's opinion is to assess the compatibility of the draft Constitutional Law with the relevant Council of Europe and international standards including by reference to applicable margins of appreciation enjoyed by individual States. In line with its established practice, the Venice Commission will not comment on the constitutionality of the draft law as a matter of domestic law.

B. The law-making process

15. On 22nd April 2024, the process of public consultation on the draft Constitutional Law was launched and a series of meetings took place both in the capital and the regions of Georgia. The Summary Minutes of the Organising Commission for the Universal Public Review of Draft Constitutional Laws of Georgia (hereinafter, "the Summary Minutes"[7]) state that the consultation

[5] European Parliament, Resolution of 25 April 2024 on attempts to reintroduce a foreign agent law in Georgia and its restrictions on civil society (2024/2703(RSP)), para. 18.
[6] ECRI, 2023 Report on Georgia, sixth monitoring cycle, 28 March 2023, paras. 33-35; and Commissioner for Human Rights of the Council of Europe, Report following her visit to Georgia from 21 to 24 February 2022, 15 July 2022, para. 22.
[7] The Venice Commission relied upon a non-official translation of the text provided by the national authorities.

"was done in accordance with Article 125 of the Rules of Procedure of the Parliament of Georgia, taking into account the principle of population involvement." During the online meetings on 13 and 14 May, some interlocutors pointed to the fact that the organisation of the public debates did not follow the reglementary procedure, as the notice period to inform the public about the specific events were often not respected.

16. Moreover, the Summary Minutes report that the "members of the organising commission, members of the Parliament of Georgia, representatives of academic circles, the professional community, civil society, various state agencies, and other interested persons participated in the meetings". There does not seem to be any specific mention of the participation of the representatives of sexual and gender minorities.

17. The Summary Minutes also state that the "absolute majority of the participants in the meetings held within the framework of the general public discussion positively evaluated the draft constitutional laws from the perspective of protecting family values and the interests of minors", but the document does not report any figures relating to the actual participation to the meetings and it does not provide any explanation of how the "absolute majority" was calculated.

18. In addition, the explanatory note of the draft Constitutional Law contains a specific section concerning the consultations received during the preparation of the text where it appears that no state, non-state and/or international organisation/institution, expert, or working group participated in the drafting process, that no evaluation was conducted, and that no review of the experience of other countries in the field of implementation of laws similar to the draft Constitutional Law was prepared.

19. The explanatory note includes also two queries regarding the impact assessment on the legal status of the child and on the state of gender equality. In this respect, it is stated that the draft Constitutional Law will strengthen mechanisms for protecting the best interests of minors related to family values based on the union of men and women, without any negative impact for gender equality. However, no evidence is provided to substantiate such declaration, nor is any analysis set out to identify the actual impact of the draft Constitutional Law.

20. Furthermore, in the relevant sections concerning the relationship of the draft Constitutional Law to the international obligations of Georgia, the explanatory note affirms that the draft Constitutional Law is not in conflict with EU law, does not contravene the obligations related to Georgia's membership in international organisations and is in accordance with the bilateral and multilateral treaties and agreements of Georgia. Again, these generalised statements are not substantiated with any legal analysis of the draft provisions against the relevant international commitments.

21. During the online meetings, some representatives of the parliamentary majority explained that an impact assessment was carried out, but it was part of an "intra-committee inquiry" and could not be made public. It was however stated that this internal analysis assessed the draft Constitutional Law against previous Venice Commission recommendations, notably in the Opinions on Hungary,[8] and the European Court of Human Rights (hereinafter, the "ECtHR") case-law, namely with respect to the case of Bayev and Others v. Russia.[9]

22. The Venice Commission recalls the importance of the procedural element for the quality of the legislative process and, in particular, refers to principle II/A/5 of the Rule of Law Checklist ("lawmaking procedures"), according to which, the process for enacting law should be

[8] Presumably, this refers to Venice Commission, Hungary, CDL-AD(2021)050, Opinion on the compatibility with international human rights standards of Act LXXIX amending certain Acts for the protection of children and CDL-AD(2021)029, Opinion on the constitutional amendments adopted by the Hungarian parliament in December 2020.
[9] ECtHR, Bayev and Others v. Russia, application nos. 67667/09, 44092/12 and 56717/12, 20 June 2017.

transparent, accountable, inclusive, and democratic. Notably, the public – and in particular the groups primarily affected - should have a meaningful opportunity to provide input and, where appropriate, impact assessments should be made before adopting legislation.[10]

23. This requirement should be even more stringent when it comes to constitutional amendments,[11] as the draft Constitutional Law is in fact aimed at integrating the Constitution and it is combined with a constitutional amendment to Article 30 (Right to marry, rights of mothers and children) of the Constitution. As the Venice Commission highlighted in the Report on constitutional amendments, "to the extent that a society is formed by its written constitution, the procedure for changing this document becomes in itself an issue of great importance".[12] Amending the Constitution is a complex process that usually requires a reinforced majority, as it is the case in Georgia,[13] precisely because a broad consensus on the new provisions must be ensured.

24. The Venice Commission, therefore, recommends carrying out a thorough and well-substantiated analysis of the impact of the new provisions on the national system, prior to their adoption, involving all segments of society and especially the representatives of sexual and gender minorities, as well as experts and professionals in the relevant sectors (law, health, education, social care, etc.). Such analysis should be made public.

25. The Venice Commission also invites the national authorities to carry out and publish this analysis at a time to facilitate meaningful and substantive consultation so as to allow for balanced, thorough and impartial assessment of the issues at stake.

26. The following sections will analyse in succession the eight paragraphs of article 1 of the draft Constitutional Law.

1. The legislation shall regulate only such marriage-like relationship that envisages ties between one genetically male and one genetically female of at least 18 years old.

27. Article 1.1 of the draft reserves the right to a "marriage-like relationship" to heterosexual couples, where the two individuals must be a "genetically male" and genetically female". Two issues arise, namely, on the one hand, what is a marriage-like relationship and what kind of regulation applies to same-sex couples, and, on the other hand, how is the relationship between individuals that underwent gender transition regulated.

a. The "marriage-like relationship" and the same-sex couples

28. Insofar as the provision aims at restricting marriage to the union between a man and a woman, thus prohibiting marriages of same-sex couples, it is in line with European human rights standards, notably, Article 12 ECHR. The Venice Commission has already addressed this issue in a previous opinion,[14] where it recalled the European Court of Human Rights ("ECtHR") case-law on the matter. The ECtHR has recognised that the institution of marriage had undergone

[10] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, principle II/A/5/iv and v, as well as related footnotes 32-33.
[11] Venice Commission, Iceland, CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland, para. 17; Hungary, CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, para. 18.
[12] Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, paras. 5-6.
[13] Article 46 of the Constitution of Georgia.
[14] Venice Commission, CDL-AD(2021)029, *op. cit.*, para. 17

major social changes since the adoption of the Convention but did not go so far as to impose an obligation on the States to grant a same-sex couple access to marriage.[15]

29. However, the term "marriage-like relationship" is not defined and appears broader than the simple "marriage"; thus, it seems to refer to other sorts of relationships, such as a civil partnership. During the online meetings, the interlocutors reported that no other relationship than marriage is regulated in the Georgian legislation, either for heterosexual or homosexual couples. Likewise, in its 2023 report on Georgia, ECRI held that "the authorities have so far not reviewed existing legislation with a view to identifying gaps in order to assess in particular where same-sex couples, for which there is no legal possibility to register same-sex partnerships in Georgia, face problems in their day-to-day life (such as family law, property and contractual law, inheritance rules, as well as health-related issues)".[16]

30. Hence, there is no legal recognition of couples that are not married. The Venice Commission recalls that the ECtHR established a positive obligation upon member states under Article 8 ECHR to provide legal recognition for same-sex couples,[17] allowing same-sex couples to be granted adequate recognition and protection of their relationship.[18] In this respect, ECRI already recommended "that the authorities carry out a review of existing legislation in order to assess where same-sex couples, as a result of the absence of recognised same-sex partnerships, face problems in their day-to-day life with a view to addressing the identified problems in line with the Recommendation CM/Rec(2010)5 of the Council of Europe's Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity and the case-law of the European Court of Human Rights".[19]

31. In addition, if this provision is intended to open the way for legal recognition of different-sex unmarried couples, the Venice Commission highlights that the exclusion of same-sex couples from registering a civil union would entail a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 8 ECHR (right to respect for private and family life),[20] as the difference in treatment with different-sex couples would amount to unjustified discrimination.[21] On a more general note, differences based solely on considerations of sexual orientation are unacceptable under the Convention.[22]

32. The Venice Commission therefore recommends modifying the text in a way that allows for the legal recognition of same-sex couples.

b. **The union between one genetically male and one genetically female**

33. The draft Constitutional Law reserves the right to marry to a couple consisting in a "genetically" male and "genetically" female. If this implies that only persons whose gender identity as man or woman aligns with the sex assigned at birth, excluding persons that underwent a gender transition, the issue of compliance with Article 12 ECHR arises.

34. The Venice Commission recalls that the ECtHR considered that it could no longer be assumed that the terms "man" and "woman" in Article 12 ECHR must refer to a determination of

[15] ECtHR, Schalk and Kopf v. Austria, 24 June 2010, application no. 30141/04, paras. 61-63; Chapin and Charpentier v France, 9 June 2016, application no. 40183/07, para. 48.
[16] ECRI, *op. cit.*, para. 22.
[17] ECtHR, Oliari and Others v Italy, 21 July 2015, application nos. 18766/11 and 36030/11, para. 177.
[18] ECtHR, Fedotova and Others v. Russia ([GC], 17 January 2023, application nos. 40792/10, 30538/14 and 43439/14, paras. 165 and 178.
[19] ECRI, *ibid.*, para. 23.
[20] ECtHR, Vallianatos and Others v Greece, 7 November 2013, application nos. 29381/09 and 32684/09, para. 92.
[21] ECtHR, Maymulakhin and Markiv v. Ukraine, 1 June 2023, application no. 75135/14, para. 80.
[22] ECtHR, Macatė v. Lithuania [GC], 23 January 2023, application no. 61435/19, para. 209; and Maymulakhin and Markin v. Ukraine, *op. cit.*, para. 62.

gender by purely biological criteria.[23] The Court added that it was for the State to determine the conditions and formalities of transgender marriages but that it found no justification for barring the transsexuals from enjoying the right to marry under all circumstances.[24]

35. The Venice Commission therefore recommends removing the words “genetically” in Article 1.1. of the draft.

2. Adoption or foster care of a minor shall be allowed only for married spouses as defined by the Constitution of Georgia and the Georgian legislation or a heterosexual person.

36. This provision allows adoption or foster care either for married couples or single heterosexual individuals. Consequently, unmarried couples or single gay, lesbian or bisexual individuals are not allowed to adopt or foster children.

37. The Venice Commission recalls that Article 8 ECHR does not entail a right to adoption.[25] If a state however grants such right, Article 14 ECHR (prohibition of discrimination) applies.[26]

38. As far as unmarried couples are concerned, the ECtHR has already established that the Convention does not oblige States to extend the right to second-parent adoption to unmarried couples.[27]

39. Conversely, if a single person is entitled to adopt or foster children, the general principle, already highlighted above, applies. Hence, if a difference in treatment is based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention.[28]

40. During the online meetings, national interlocutors clarified that currently Georgian law does not allow adoption or foster case for unmarried couples, but it allows it for individual persons, irrespectively of their sexual orientation. The constitutional provision at stake, would therefore require subsequent modifications of the current legislation in a restrictive manner that would be contrary to European standards.

41. The Venice Commission therefore recommends replacing the word “heterosexual” with the term “single” or “individual” in Article 1.2 of the draft Constitutional Law.

3. Any medical intervention aimed at changing sex shall be forbidden.

42. Article 1.3 of the draft Constitutional Law prohibits medical gender reassignment surgeries. Neither the draft Constitutional Law nor the explanatory note provide any explanation of what is meant by the term “forbidden”.

43. During the online meetings, the representatives of the parliamentary majority, each of them signatories of the draft Constitutional Law, explained that this provision would be accompanied by statutory legislation providing for criminal offences and related penalties for contravening to this prohibition.

44. Several other interlocutors referred to the fact that, at the moment, medical interventions for gender reassignment are neither forbidden nor explicitly regulated in Georgia. Hence, they follow

[23] ECtHR, Christine Goodwin v. the United Kingdom, 11 July 2002, application no. 28957/95, para. 100.
[24] ECtHR, Christine Goodwin v. the United Kingdom, *ibid.*, para. 103.
[25] ECtHR, E.B. v. France [GC], 22 January 2008, application no. 43546/02, para. 41.
[26] ECtHR, E.B. v. France [GC], *ibid.*, para. 48.
[27] ECtHR, X and Others v. Austria [GC], 19 February 2013, application no. 19010/07, para. 136.
[28] ECtHR, E.B. v. France [GC], *ibid.*, para. 93.

the general regulation for medical surgeries, but only few doctors practice them. Some interlocutors warned that, even without introducing any ban in the statutory regulation, the constitutional provision *per se* would have a chilling effect on the few doctors currently practicing this kind of interventions and could affect, in a restrictive manner, the judicial interpretation of the regulation on medical surgeries by ordinary courts.

45. As the Venice Commission has already underlined in a previous opinion,[29] under international human rights law, individuals have a "right to a self-identity" based not only on their "sex at birth" but also on their "gender". In this regard, many international human rights covenants recognise that self-identity is also shaped by gender, the socially constructed characteristics and roles for women and men. [30] Under the ECHR, gender identity is recognised as a component of personal identity, falling under the right to respect for private life.[31]

46. The Venice Commission recalls that the ECtHR has found that the lack of a law regulating full gender reassignment surgery constitutes a violation of Article 8 ECHR, inasmuch as it creates a situation of distressing uncertainty with regard to an individual's private life and the recognition of his/her true identity.[32] *A fortiori*, an absolute prohibition ("any medical intervention") of such surgery cannot be seen as compatible with Article 8 ECHR. The ECtHR has also dealt with the conditions for access to such surgery.[33]

47. Against this background, the prohibition set forth in the provision, as well as any ordinary legislation that would introduce an absolute barrier to the right to undergo a gender reassignment intervention would result in a violation of Article 8 ECHR.

48. The Venice Commission thus recommends deleting Article 1.3 of the draft Constitutional Law. For the avoidance of doubt the Commission is not contending that a legislature may never restrict gender reassignment surgery whether by reference to age or otherwise. It is instead making the point that it is inappropriate for a constitutional instrument to impose an *absolute* ban on such surgery in all circumstances as is currently proposed.

4. In compliance with genetic data, either male or female sex shall be indicated in the documents issued by state or local self-government.

49. Article 1.4. of the draft imposes an obligation to the state and local self-governments to only indicate the female or male sex that corresponds to genetic data. In light of the exchanges during online meetings the Venice Commission understands that the wording "compliance with genetic

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[29] Venice Commission, CDL-AD(2021)029, *op. cit.*, para. 36.

[30] On the basis of Article 2 of the Convention on the Rights of the Child (CRC), the CRC Committee stressed that States parties must address discrimination against vulnerable or marginalised groups of children including children who are lesbian, gay, transgender or transsexual (CRC, General Comment No. 13, The right of the child to freedom from all forms of violence, paras. 60 and 72(g)). On the basis of Article 5 and 2 (f) of the Convention on the Elimination of Discrimination against Women (CEDAW), the CEDAW Committee recognised that discrimination suffered by women is "inextricably linked" with other factors that affect women including gender identity (General Recommendation No. 27, Older women and protection of their human rights, para. 13; General Recommendation No. 28, The core obligations of States parties under article 2 CEDAW, para. 18). On the basis of Article 2 CESCR, CESCR Committee explicitly recognised that a person's gender identity is among the prohibited grounds of discrimination enshrined in Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (General Comment No. 20 Article 2 (2), Non-discrimination in economic, social and cultural rights, para. 32). For more details, see *Born free and equal*, *Sexual Orientation and Gender identity in International Human Rights Law*, United Nations, Office of the High Commissioner for Human Rights, New York and Geneva, 2012, available at: https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf.

[31] At European level, ECtHR, Van Kück v. Germany, 12 June 2003, application no. 35968/97; A.P., Garçon and Nicot v. France, 6 April 2017, application nos. 79885/12, 52471/13 and 52596/13, paras. 95-96. European Court of Justice (ECJ), P v S and Cornwall County Council, 30 April 1996.

[32] ECtHR, L. v. Lithuania, 11 September 2007, application no. 27527/03, para. 56-57.

[33] Among others, ECtHR, Van Kück v. Germany, *op. cit.,* paras. 59 et seq.; ECtHR, L. v. Lithuania, *op. cit.,* para. 59; *Schlumpf v.Switzerland*, 5 June 2009, application no. 29002/06, para.107.

data" refers to the male or female identity established in the birth certificate (biological sex) of an individual.

50. This would imply that transgender, intersex and non-binary persons cannot obtain legal recognition of the gender transition they have undergone, with or without undergoing trans specific healthcare, by having the sex of their choice mentioned in official documents issued by the state or local self-government authorities.

51. The Venice Commission notes that in its 2023 Report on Georgia, ECRI reiterated its recommendation "that the authorities clearly regulate the conditions for official recognition of a person's new sex. Such rules should be in conformity with the case-law of the European Court of Human Rights".[34]

52. As long ago as 2002, and consistently in its subsequent case-law,[35] the ECtHR considered that the respect for private life, guaranteed in Article 8 ECHR implies a positive obligation for the States to give legal recognition of gender transition, both for people who have undergone gender reassignment surgery[36] and those who do not wish to undergo such surgery.[37]

53. In this respect, the Venice Commission draws the attention to the fact that in A.D. and Others v. Georgia,[38] the ECtHR noted that although the right to change one's gender in civil status records had existed in Georgia since 1998, it did not appear to have been applied in practice. The imprecision of the current domestic legislation undermined the availability of legal gender recognition in practice, and the lack of a clear legal framework left domestic authorities with excessive discretionary powers that could lead to arbitrary decisions in the examination of applications. Such a situation was fundamentally at odds with the respondent State's obligation to provide expeditious, transparent and accessible procedures for legal gender recognition.[39]

54. Article 1.4 of the draft Constitutional Law is accordingly directly inconsistent with what the ECtHR has required in this recent judgment, making it clear that legal gender recognition is not only unavailable, but is to be legally prohibited.

55. Moreover, as already stated in its previous opinion,[40] the Venice Commission notes with concern that the non-recognition of the change of sex may result in discrimination on the basis of sexual orientation and gender identity, in violation of applicable international human rights norms, notably the non-discrimination clause of Article 14 of the ECHR, Protocol 12 to the Convention, Articles 2, 3, 24 (3) CRC, Article 5 and 2 (f) CEDAW, Article 2 CESCR, Article 2 ICCPR. In this respect, the ECtHR has developed a consistent line of jurisprudence, which allows applicants subjected to discrimination based on their sexual orientation and/or gender identity to claim a violation of Article 14 ECHR in conjunction with another substantive right of the ECHR. [41]

56. The Venice Commission therefore recommends deleting the first phrase (in compliance with genetic data) of Article 1.4. of the draft Constitutional Law and establishing a sufficiently detailed and precise law, providing expeditious, transparent and accessible procedures for changing the registered sex marker of transgender people.

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[34] ECRI, *op. cit.*, para. 26.
[35] ECtHR, Christine Goodwin v. the United Kingdom, *op. cit.*. See also Opinion Venice Commission, CDL-AD(2021)050, *op. cit.*, paras. 32-33; and, CDL-AD(2021)029, *op. cit.,* 36-38.
[36] See among others, ECtHR, Hämäläinen v.Finland [GC], 16 July 2014, application no. 37359/09, para. 68.
[37] ECtHR, A.P., Garçon and Nicot v. France, *op. cit.*, paras. 95-96. See also, ECtHR, A.D. and Others v. Georgia, 1 December 2022, applications nos. 57864/17, 79087/17 and 55353/19, ECtHR, X and Y v. Romania, 19 January 2021, applications nos. 2145/16 and 20607/16.
[38] ECtHR, A.D. and Others v. Georgia, *op. cit*.
[39] ECtHR, A.D. and Others v. Georgia, *op. cit.*, paras. 73-76.
[40] Venice Commission, CDL-AD(2021)050, *op. cit.,* paras. 34 and 36; and CDL-AD(2021)029, paras. 39 and 41.
[41] ECtHR, X and Others v. Austria [GC], *op. cit.*; ECtHR, Taddeucci and McCall v. Italy, 30 June 2016, application no. 51362/09; ECtHR, Sousa Goucha v. Portugal, 22 March 2016, application no. 70434/12.

5. Any decision of a public authority or a private person that directly or indirectly restricts the use of concepts defined by sex is invalid.

57. The Venice Commission has encountered some difficulties in understanding the meaning of this provision. In particular, it is not clear, first, what is the meaning of the phrase "directly or indirectly restricts the use of concepts defined by sex"; second, what would be the legal consequences of the provision, i.e., who would declare the invalidity of the decision and what would happen to the public authority or private person who contravened this provision; and third, what is the scope of this provision and, in particular, how would this provision apply to a private person.

58. As to the first point, on the basis of the information gathered during the online meetings and some elements included in the explanatory note, it seems that the initiators/authors draw their inspiration from recent employee guidance documents of the United States State Department which refrain employees "from using terms such as "guys", "ladies and gentlemen", "mom/father", "Son/daughter", "Husband/wife", and instead of these words impose the use of gender-neutral words "everyone", "people", "you all", "parent", "child", spouse", "partner".

59. It therefore appears that this provision does not prohibit the use of gender-neutral or gender-inclusive words in itself, but intends to prevent the adoption of guidelines, instructions, or more generally policies aiming at encouraging the use of a gender-neutral or gender-inclusive language.

60. As to the second point, the text does not clarify whether the invalidity of the decisions would be automatic, or if it would have to be declared through a certain procedure. The text does not specify either what legal consequences would be incurred by any public authority or private person that contravenes this provision, i.e. adopts a decision to restrict the use of gender-neutral or gender-inclusive language. During the online meetings, representatives of the initiators/authors of the draft Constitutional Law explained that, with the only exception of Article 1.3 that would constitute criminal offence, any contravention of this provision, or others, in the draft Constitutional Law would be sanctioned with an administrative fine to be determined by statutory Law in due course.

61. As to the third point, the provision seems to have a very broad scope, by addressing not only public authorities but also any private person, presumably referring both to natural persons and enterprises.

62. The Venice Commission reiterates that laws are to be written in an intelligible manner and that the principle of foreseeability of the law requires that they must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with them.[42] While the necessary degree of foreseeability depends on the nature of the law, and can be considered to be more flexible as far as constitutional provisions are concerned, the rule of law implies that the principle of foreseeability is not set aside.[43] The provision under consideration should therefore be clarified in its meaning, consequences and scope. While the consequences and the scope of the provision could be detailed in statutory legislation, considering that the provisions at stake are of a constitutional nature, a clarification of the meaning of this obscure sentence would benefit the understanding of the constitutional text and is therefore recommended. Greater precision would also facilitate more meaningful consultation of the kind referenced above.

[42] Venice Commission, CDL-AD(2016)007, *op. cit.,* para. 58; and ECtHR, The Sunday Times v. the United Kingdom, 26 April 1979, application no. 6538/74, para. 49.
[43] Venice Commission, CDL-AD(2016)007, *op. cit.,* para. 59.

63. The Venice Commission notes at the outset that the use of (specific) language, grammar or spelling within the state administration is the responsibility of the state. States are not legally obliged to use or to impose the use of gender-neutral language. In this respect, it is however worth noting that the Committee of Ministers of the Council of Europe adopted a recommendation on preventing and combating sexism,[44] specifically requesting that member states "undertake a systematic review of all laws, regulations, policies, etc., for sexist language and reliance on gendered assumptions and stereotypes with a view to replacing them with gender-sensitive terminology. Good practice includes the preparation of practical guides for language and communication that are non-sexist and without gender stereotypes for use in public administration documents." The provision appears to be at odds with this recommendation; it appears to be at least questionable whether a prohibition of this kind is properly the subject of constitutional provision at all. It should be either deleted or the Georgian authorities should be invited to rephrase the provision so as to comply with principles of non-discrimination.

64. When it comes to private persons (or entities), the question arises whether the restriction on using gender-neutral language amounts to an infringement of human rights. The Convention does not guarantee linguistic freedom as such.[45] Yet, if the aim of the provision is to restrict/prohibit the use of gender-neutral language by private individuals, this would constitute an interference with the right to freedom of expression (Article 10 ECHR) and would need to be justified accordingly. The interference should be prescribed by law in a clear, precise, accessible and foreseeable manner, it should be pursuing a legitimate aim and be necessary in a democratic society. In this specific case, the first requirement is clearly not met and, even assuming that statutory legislation would clarify the provision, it is difficult to see what legitimate aim this unclear provision would pursue and in what way this could be necessary in a democratic society. The compliance of this provision with Article 10 ECHR is accordingly highly questionable.

65. For similar reasons, to the extent that the provision could prevent entities, groups and associations from pursuing a gender-neutral policy, or promoting the use of gender-inclusive language, it can be considered to involve an interference with the freedom of association, which would fail to be justified in the light of the requirements of Articles 11 ECHR (prescribed by law in a clear, precise, accessible and foreseeable manner, pursuing a legitimate aim, necessary in a democratic society). Again, it is difficult to see that such justification could be established.

66. In light of the above considerations, the Venice Commission recommends deleting the provision or rephrasing it having had regard to principles of non-discrimination.

[44] Council of Europe, Recommendation CM/Rec(2019)1 of the Committee of Ministers to member states on preventing and combating sexism, 27 March 2019.
[45] ECtHR, Igors Dmitrijevs v. Latvia, 30 November 2006, application no. 61638/00, para. 85; European Commission of Human Rights (Eur.Com.HR) decision Pahor v. Italy, 29 June 1994, application no. 19927/92; Eur.Com.HR decision, Association "Andecha Astur" v. Spain, 7 July 1997, application no. 34184/96; Eur.Com.HR decision Fryske Nasjonale Partij and Others v. the Netherlands, 12 December 1985, application no. 11100/84; Eur.Com.HR decision Isop v. Austria, 8 March 1962, application no. 808/60.

6. The gathering is forbidden, if it aims to popularise single-sex family or intimate relationship, incest, adoption or foster care of a minor by same-sex family or non-heterosexual person, changing sex by medical intervention or non-use of concepts defined by sex.

AND

Distribution of production, program or any other material is forbidden, if it aims to popularize single-sex family or intimate relationship, incest, adoption or foster care of a minor by same-sex family or non-heterosexual person, changing sex by medical intervention or non-use of concepts defined by sex.

67. Paragraph 6 prohibits meetings aimed at "popularising" specific content related to sexual orientation, gender identity and, more generally, gender related issues, as well as incest. Paragraph 7 prohibits the distribution of materials popularising specific content related to the same matters. As the problems relating to legitimate restrictions are largely identical, the two provisions will be discussed together.

a. **Preliminary remarks**

68. The provision lists together concepts related to sexual orientation and gender identity with incest, as if they were part of the same group. It should be recalled that incest is usually understood as the sexual intercourse between persons so closely related that they are forbidden by law to marry, such as a parent, child, sibling, grandchild, etc., and it is often treated as a crime with a strongly negative connotation. In the Commission's view this has nothing in common with the concepts of sexual orientation and gender identity, which are recognised as prohibited grounds for discrimination.

69. The Venice Commission has already noted, in previous opinions with respect to paedophilia,[46] that this kind of legislation "insinuates that sexual orientation and gender identity are associated with the violation of children's rights. Both are degrading, stigmatizing and discriminatory". It seems that the amendments start from the underlying premise that "homosexuality" and diverse gender identity are something that corrupt youth, undermine society and the state and should therefore be resisted, and that consequently, "propagation of homosexuality or divergence from self-identity corresponding to sex" needs to be prohibited and limited."[47] In this respect, the ECtHR in its Bayev v. Russia judgement held that attempts to draw parallels between homosexuality and paedophilia are "unacceptable".[48]

70. The same reasoning applies to the provision in issue here, as the term "paedophilia" has a similar negative connotation and seriousness as the term "incest". Therefore, the Venice Commission recommends deleting the term incest from the text and regulating this behaviour separately, under criminal law.

71. By forbidding "gatherings", paragraph 6 is a restriction of the right to freedom of assembly and association (Article 11 ECHR) and, as far as private premises are concerned, of the right to respect for private life (Article 8 ECHR). In addition, both paragraphs 6 and 7, by forbidding gatherings and distribution of materials with the aim to popularise certain concepts, constitute

[46] Venice Commission, CDL-AD(2021)050, *op. cit.*, paras. 25-26; See also, Venice Commission, CDL-AD(2013)022, *op. cit.*, Opinion on the issues of the prohibition of so-called "propaganda of homosexuality" in the light of recent legislation in some member States of the Council of Europe, para.23.
[47] Venice Commission, *ibid*.
[48] See ECtHR, Bayev and Others v. Russia, *op. cit.*, para. 69; See also European Parliament resolution of 8 July 2021, para. 17: "*Conflation of sexual orientation and gender identity with paedophilia or attacks on children's rights displays a clear attempt to instrumentalise human rights language in order to enact discriminatory policies; considers this to be contrary to international human rights principles and norms*".

restrictions on the right to freedom of expression and the right to receive and impart information and ideas without interference by public authorities regardless of frontiers (Article 10 ECHR). All restrictions must be "prescribed by law", pursue one of the legitimate aims identified in an exhaustive manner in the second paragraph of respectively Article 11, 8 and 10 of the ECHR and must be "necessary in a democratic society".

72. Prior to the analysis of these requirements, the Venice Commission emphasises that, although the subject matter may be linked to sensitive moral or ethical issues, national authorities have a narrow margin of appreciation because the issue concerns freedom of expression on a matter of public interest[49] and because the ECtHR has expressly found that there is a clear European consensus on the recognition of the right of individuals to identify openly as gay, lesbian or any other sexual minority and to promote their own rights and freedoms.[50]

b. **Prescribed by law**

73. As regards the first requirement, both provisions contain broad and imprecise wording.

- In paragraph 6, the term "gathering", covers all sorts of assemblies, whether they take place in the public sphere, in the semi-public sphere (such as shopping centres or railway stations) or in private premises. The size of the gathering is also not specified, it could potentially include a meeting of two people up to several thousands.

- In paragraph 7, the formula is also open and vague. It covers all productions, programs or any other material, such as books, newspapers, magazines, leaflets, radio and television programmes, blogs or online pages, songs, works of art, films, documentaries, performances, etc.

- Both paragraphs refer to the aim of "popularising" certain content, which is also open-ended. Neither the draft Constitutional Law itself, nor the explanatory note, contains a precise definition of this term. During the online meetings, several interlocutors referred to the fact that there is no well-established case law of Georgian courts defining this notion. The meaning of this word could possibly be equated to the term "promote", already used by similar (draft) legislation on the prohibition of the so-called "propaganda of homosexuality" in other countries (Russia, Hungary, Ukraine, Republic of Moldova).[51] It is not clear whether this term has to be interpreted restrictively or whether it covers any information or opinion in favour of same-sex family or intimate relationships, any attempt to change the hostile attitude of a part of the population towards LGBTI people, any attempt to counterbalance the sometimes deeply rooted prejudices, by disseminating unbiassed and factual information of LGBTI issues.[52] These provisions seem instead to have a blanket nature.

- The meaning of "forbidding" and the consequences of non-compliance with the prohibitions remain unclear. During the online meetings, some of the initiators/authors explained that the non-compliance would be sanctioned with an administrative fine to be established by statutory law.

74. In order to be in compliance with the condition that the limitation has to be "prescribed by law" the provision has to be, according to well-established case law of the ECtHR, formulated with sufficient precision to enable the citizens to regulate their conduct: they must be able – if

[49] ECtHR, Stoll v. Switzerland [GC], 10 December 2007, application no. 69698/01, para. 106; ECtHR, Castells v. Spain, 23 April 1992, application no. 11798/85, para. 43; ECtHR, Wingrove v. the United Kingdom, 25 November 1996, application no. 17419/90, para. 58.
[50] ECtHR, Bayev and Others v. Russia*, op. cit.,* para. 66.
[51] See, Venice Commission, CDL-AD(2013)022, *op. cit.*
[52] See also, Venice Commission, CDL-AD(2013)022, *op. cit.,* para. 34.

need be with appropriate advice – to foresee to a degree that is reasonable in the circumstances, the consequences of a given action.

75. The Venice Commission has stressed on numerous occasions that overly broad and potentially ambiguous terms or concepts lack precision, which is essential for legal texts, and that they may lead to different and potentially diverging interpretations. Furthermore, such terms risk being used to disproportionately restrict the rights to free expression and assembly and are incompatible with international standards for restrictions of freedom of expression.[53]

76. The provisions at stake are therefore not sufficient by themselves to fulfil the first requirement of the three-step test for compatibility with Article 10 and 11 ECHR. However, considering that these are constitutional provisions that could be further defined by statutory law, as the national authorities mentioned during the online meeting, the Venice Commission will proceed to analyse whether they fulfil the further requirements identified above.

c. **Legitimate aim / necessary in a democratic society**

77. The legitimate aim declared in the title of the draft law, reiterated also in the explanatory note, is the protection of family values and minors. While this aim in abstract could be considered a legitimate one, as falling under the scope of the protection of morals and the protection of the rights of others, the draft law and its explanatory note fail to explain in what way the prohibitions at stake would serve that aim.

78. In the case of Bayev and Others v. Russia,[54] quoted above, the ECtHR held that a legislative prohibition on propaganda of non-traditional sexual relations aimed at minors is harmful to children, discriminatory and violates Article 10 ECHR and Article 14 in conjunction with Article 10 ECHR.[55] The ECtHR relied heavily on, and quoted extensively from, the Venice Commission's Opinion on the question of the prohibition of so-called "propaganda of homosexuality".[56]

79. With regard to justification on the grounds of morals, the ECtHR has held that there is no reason to consider that the preservation of family values as the foundation of society and the recognition of the social acceptability of homosexuality are incompatible, particularly in view of the growing general tendency to include relationships between same-sex couples within the concept of "family life".[57] The ECtHR also held that negative social attitudes, references to traditions or general assumptions in a particular country could not in themselves be regarded as sufficient justification for the difference in treatment, any more than similar negative attitudes towards persons of a different race, origin or colour.[58]

80. In this sense, Articles 1.6 and 1.7 of the draft Constitutional Law would also be inconsistent with Article 1 of Protocol 12, as well as Article 14 joined with the Articles 8, 10 and 11 ECHR, as the provisions treat differently the promotion of homosexuality and transgender identity on the one hand and the promotion of heterosexuality on the other hand, without a convincing justification. As the ECtHR has consistently held where a difference in treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow.[59]

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[53] Venice Commission, CDL-AD(2021)050, *op. cit.,* para. 48. See also, Venice Commission, CDL-AD(2016)025, Joint Opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, para. 31; and Venice Commission, CDL-AD(2018)002, Joint Opinion on the Draft Law amending the Law on Freedom of Conscience and on Religious Organisations of Armenia, para. 44.
[54] ECtHR, Bayev and Others v. Russia, *op. cit.*
[55] See also, ECtHR, Alekseyev v. Russia, 21 October 2010, applications nos. 4916/07 25924/08 14599/09.
[56] Venice Commission, CDL-AD(2013)022, *op. cit.*
[57] ECtHR, Bayev and Others v. Russia, *op. cit.*, para. 67.
[58] ECtHR, Bayev and Others v. Russia, *ibid.*, para. 68.
[59] ECtHR, X v. Poland, 16 September 2021, application no. 20741/10, para. 70.

81. The fact that certain sections of the Georgian population may have a negative attitude towards LGBTI people as some interlocutors suggested cannot determine the answer to the question whether the draft Constitutional law is compatible with international standards. The ECtHR has consistently stated that it would be incompatible with the values underlying the Convention to make the exercise of Convention rights by a minority group conditional on their acceptance by the majority. If this were the case, the rights of a minority group to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.[60] In the same way the Venice Commission has stated that "the negative attitude of even a large part of the public opinion towards homosexuality as such, can neither justify a restriction on the right to respect for the private life of gays and lesbians, nor on their freedom to be true to their sexual orientation in public, to advocate for positive ideas in relation to homosexuality and to promote tolerance towards homosexuals".[61] In this regard, the Venice Commission recalls that "in its Recommendation CM/Rec(2010)5, the Committee of Ministers of the Council of Europe considered that neither cultural, traditional nor religious values, nor the rules of a "dominant culture" can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity."[62]

82. On the contrary, the Venice Commission recalls that according to the well-established case law of the ECtHR, authorities have to take positive measures to ensure that demonstrations for the promotion of LGBTI people's rights and equality can be held peacefully by sufficiently containing homophobic and violent counterdemonstrators.[63]

83. In these circumstances the Venice Commission considers that by adopting the draft Constitutional Law the authorities would risk reinforcing stigma and prejudice and encouraging homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.[64] A plethora of European standards reiterate this stance.[65]

84. Also, with regard to justification on the grounds of protection of minors, the scope of the law is overinclusive as the provisions under consideration are not limited to obscenities or to provocative incitements to intimate relations between persons of the same sex, but they also seem to apply to the dissemination of mere information or ideas, advocating a more positive attitude towards same-sex relationships and different gender identities. The Venice Commission refers to the ECtHR assessment that there is no scientific evidence or sociological data suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or "vulnerable adults" and it is, instead, only through fair and public debate that society may address such complex issues.[66]

85. In the same vein, the UN Human Rights Committee, in the case of Fedotova, duly distinguished "actions aimed at involving minors in any particular sexual activity" from "giving

[60] ECtHR, X v. Poland, 16 September 2021, *ibid.*, para. 70.
[61] Venice Commission, CDL-AD(2013)022, *op. cit.*, para. 56. See also, Venice Commission, CDL-AD(2021)050, *op. cit.*, 56.
[62] Venice Commission, CDL-AD(2013)022, *op. cit.*, para. 56. See also, Venice Commission, CDL-AD(2021)050, *op. cit.*, 56.
[63] ECtHR, Identoba and Others v. Georgia, 12 May 2015, application no. 73235/12; ECtHR, Alekseyev and Others v. Russia, *op. cit.*; ECtHR, Berkman v. Russia, 1 December 2020, application no. 46712/15.
[64] ECtHR, Bayev and Others v. Russia, *op. cit.*, para. 83.
[65] See also the PACE Resolution 1948(2013) adopted on 27 June 2013, "Tackling discrimination on the grounds of sexual orientation and gender identity", and the Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010; the Recommendation covers a wide range of areas where LGBTI persons may encounter discrimination; it also deals with the requirement that states respect the freedom to receive and impart information on subjects dealing with sexual orientation and gender identity.
[66] ECtHR, Alekseyev and Others v. Russia, *op. cit.,* para. 86.

expression to [one's] sexual identity" and "seeking understanding for it".[67] The Venice Commission reiterates that it cannot be deemed to be in the interest of minors that they be shielded from relevant and appropriate information on sexuality, including homosexuality."[68] Again, for the avoidance of doubt, this aspect of the Opinion does not prevent Georgian authorities from ensuring that material presented to children is appropriate to their age and development. What is objectionable from an international law perspective is a blanket prohibition of the kind proposed without any evidenced justification.

86. Last but not least, consideration should be given to the chilling effect of the legislation in question, as the prohibition of the "popularisation" of non-traditional sexual relations among minors will arguably interfere with the activities in which they may personally wish to engage, especially if they are LGBTI activists. The ECtHR has held that the introduction of laws sanctioning, censoring or even outlawing speech concerning sexual orientation and gender identity with the purported aim of protecting children. It has found that such restrictions not only impacted freedom of expression through the inevitable chilling effect which they triggered, but that they also stigmatised LGBTI persons regardless of their age, limited the right of parents to ensure the upbringing of their children according to their convictions, and restricted the rights of children to receive comprehensive and age / development appropriate information on sexuality and sexual and reproductive health.[69]

87. The title of the amendment - on family values and the protection of minors - and the content of its provisions suggest that family life and protection of minors are threatened by persons who do not conform to traditional forms of gender identification and whose sexual relations may differ from the traditional understanding. This combination poses a real and immediate risk of further reinforcing attitudes that consider non-heterosexual relationships to be inferior and that will (further) fuel a hostile and stigmatising atmosphere against LGBTI people in Georgia.

88. The Venice Commission therefore concludes that Articles 1.6 and 1.7 do not serve a legitimate aim and they are therefore not necessary in a democratic society, without any further need for assessing the proportionality of the restrictions. The Commission thus recommends deleting these provisions. In circumstances where they do not apparently serve any legitimate aim questions of rephrasing or modification do not arise.

7. Providing the information during an education process in public or private educational institution is forbidden, if it aims to popularize single-sex family or intimate relationship, incest, adoption or foster care of a minor by same-sex family or non-heterosexual person, changing sex by medical intervention or non-use of concepts defined by sex.

89. Article 1.8 of the draft Constitutional Law prohibits information on sexual orientation, gender identity and, more generally, gender related issues, as well as incest, in the educational process, which, according to the explanatory note, extends from kindergarten to secondary school, in both public and private schools, with the aim of preserving family values and serving the best interests of children.

90. As far as the inclusion of incest is concerned, the Venice Commission reiterates the considerations made in the previous section and recommends regulating this type of offence separately.

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[67] United Nations Human Rights Committee, Fedotova v. Russian Federation, Communication no. 1932/2010, views adopted by the Committee at its 106th session (15 October-2 November 2012), UN doc. CCCPR/C/106/D/1932/2010 (30 November 2012, para. 10.8).
[68] Venice Commission, CDL-AD(2013)022, *op. cit.*, paras. 60-65. See also, Venice Commission, CDL-AD(2021)050, *op. cit.*, paras. 59-61.
[69] ECtHR, Macatė v. Lithuania, *op. cit.*, para. 182.

91. As to the prescriptions related to gender issues, the provision is to be analysed in light of Article 2 of Protocol No. 1 to the ECHR (Right to education), also in conjunction with Article 14 ECHR and Article 1 of the Protocol 12 of the Convention.

92. Once again, the key elements of the provision ("provide information" and "aim to popularise") are worded openly, leaving an unacceptably wide margin for interpretation. Furthermore, there is no provision on the consequences (for teachers, for school administrators, etc.) of violating the prohibition. In order to meet the requirements of foreseeability and predictability, the law should be further detailed. As reported by some initiators/authors of the draft Constitutional Law during the online meetings, the provisions are to be considered as general constitutional principles to be developed in statutory legislation and any related sanction would be limited to an administrative fine.

93. Although the Venice Commission has already stated that there is no hard law guaranteeing a right of children to receive information on subjects dealing with sexual orientation and gender identity, the Commission has also stressed that where such information is provided, this must be done in an objective, critical and pluralistic manner, avoiding indoctrination and in compliance with the principle of non-discrimination, including on the grounds of sexual orientation and gender identity.[70] In addition, the Commission notes that the ECtHR has stressed that one of the objectives of State education is to prepare children for social realities, and this could justify the sexual education of very young children attending kindergarten or primary school.[71] Again as pointed out above the Commission's opinion in this regard does not preclude Georgian authorities from ensuring that material presented to children is appropriate to their age and development.

94. In its previous opinions, the Venice Commission observed that "discrimination based on sexual orientation and gender identity can be reinforced by excluding objective information about different forms of sexual orientation, gender identity, gender expression and sex characteristics from the curriculum on sex education, thus creating an unsafe and unfriendly environment where LGBTI children can be subject to bullying, harassment and even health related risks."[72]

95. In addition, the Venice Commission observed that international human rights standards, especially in light of Article 2 of the Convention on the Rights of the Child (CRC), and related practice support the right to receive age-appropriate information concerning sexuality, in a non-discriminatory manner.[73]

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[70] Venice Commission, CDL-AD(2021)050, *op. cit.*, para. 39; and Venice Commission, CDL-AD(2021)029, *op. cit.*, paras. 48 and 50.
[71] ECtHR, A.R. and L.R. v. Switzerland, 19 December 2017, application no. 22338/15, para. 44.
[72] Venice Commission, CDL-AD(2021)050, *op. cit.*, paras. 78-80; and Venice Commission, CDL-AD(2021)029, *op. cit.*, paras. 49-50.
[73] Under the right to non-discrimination according to Article 2 of the Convention on the Rights of the Child (CRC), States Parties shall respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (para. 1). States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members (para. 2).
The grounds set out in Article 2 (1) CRC also cover adolescents' *sexual orientation and health status.* Adolescents who are subject to discrimination are more vulnerable to abuse, other types of violence and exploitation, and their health and development are put at greater risk. They are therefore entitled to special attention and protection from all segments of society (see CRC, General Comment no. 4 [2003], Adolescent health and development in the context of the Convention on the Rights of the Child, para. 2). States parties are therefore urged (a) to develop effective prevention programmes, including measures aimed at changing cultural views about adolescents' need for contraception and STD prevention and addressing cultural and other taboos surrounding adolescent sexuality (CRC, GC no. 4 (2003), at para. 26).
Not least, Article 29 CRC reads as follows:
(1) States Parties agree that the education of the child shall be directed to:
(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

96. Inasmuch as the provision at stake categorically deprives pupils of access to comprehensive age / development appropriate sex education and objective information about different forms of sexual orientation, gender identity, gender expression and sex characteristics, it has to be considered at odds with the right to education enshrined in Article 2 of Protocol No. 1 to the ECHR and other international human rights standards, notably Article 2 CRC.

97. Moreover, to the extent that the provision treats differently the information aimed at popularising same sex family or intimate relationships and the information aimed at popularising heterosexual family or intimate relationships, it is to be considered discriminatory and thus in violation of Article 1 of Protocol 12 of the Convention and Article 14 joined with Article 2 of Protocol No. 1 to the ECHR.

98. The Venice Commission therefore recommends deleting this provision. Again, as before the Commission is not contending that restrictions may never be imposed. It is making the point that international standards show there should not be an absolute ban on sex education and that where such education is provided it must be provided in a non-discriminatory manner albeit that this does not preclude authorities from ensuring that material is appropriate to age and development.

IV. Conclusion

99. At the request of the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, the Venice Commission assessed the draft Constitutional Law of Georgia on protecting family values and minors.

100. The draft Constitutional Law consists of two articles, where the second simply sets forth the entry into force of the draft Constitutional Law upon publication, and the first covers various issues, all of which seek to restrict legal relationships other than those between an assigned man at birth ("genetically male") and an assigned female at birth ("genetically female"), the right to adoption or foster care of single persons and all gender identities other than those of a (biological) woman and a (biological) man. The text also prohibits acts, gatherings and the dissemination of information or products that challenge this concept or promote incest.

101. The draft Constitutional Law is accompanied by a constitutional amendment to Article 30 of the Constitution which would add the following paragraph: “The protection of family values and minors is ensured by the Constitutional Law of Georgia, which is an integral part of the

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; “(e) The development of respect for the natural environment.
According to CRC, General Comment No. 1 (2001): Article 29 (1): The Aims of Education, Article 29 (1) the “States parties agree that education should be directed to a wide range of values. This agreement overcomes the boundaries of religion, nation and culture built across many parts of the world. At first sight, some of the diverse values expressed in article 29 (1) might be thought to be in conflict with one another in certain situations. Thus, efforts to promote understanding, tolerance and friendship among all peoples, to which paragraph (1) (d) refers, might not always be automatically compatible with policies designed, in accordance with paragraph (1) (c), to develop respect for the child’s own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own. But in fact, part of the importance of this provision lies precisely in its recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference. Moreover, children are capable of playing a unique role in bridging many of the differences that have historically separated groups of people from one another” (para. 4).

Constitution". Currently, Article 30 reads as follows: "1. Marriage, as a union of a woman and a man for the purpose of founding a family, shall be based on the equality of rights and the free will of spouses. 2 The rights of mothers and children shall be protected by law".

102. In the first place, the Venice Commission regrets that a legislative initiative aimed at integrating the Georgian Constitution and touching upon highly sensitive issues is launched in a period of time characterised by vigorous and prolonged mass protests and strong political and societal tensions, all the more so in circumstances where this is happening only a matter of months before the elections, disregarding the concerns raised by several international observers.

103. The Venice Commission, further, recommends carrying out a thorough and well-substantiated analysis of the impact of the new provisions on the national system, prior to their adoption, involving all segments of society and especially the representatives of sexual and gender minorities, as well as experts and professionals in the relevant sectors (law, health, education, social care, etc.). Such analysis should be made public and be carried out in a period of time that is propitious for a genuine and unbiased consultation, allowing for an honest and impartial assessment of the issues at stake.

104. As to the legal assessment of the draft Constitutional Law, in light of the well-established ECtHR case-law on the matter and previous Venice Commission opinions, the Commission considers that the compliance of the provisions at stake with European and international standards cannot be established for the reasons set out above and the mere proposal of adopting this text risks to (further) fuel a hostile and stigmatising atmosphere against LGBTI people in Georgia. The Commission thus recommends the Georgian authorities to reconsider this legislative proposal entirely and to not proceed with its adoption.

105. However, if the draft Constitutional Law were maintained, the Venice Commission recommends:

- modifying Article 1.1 of the draft Constitutional Law in a way that allows for the legal recognition of same-sex couples.
- repealing the words "genetically" in Article 1.1. of the draft.
- replacing the word "heterosexual" with the term "single" or "individual" in Article 1.2 of the draft Constitutional Law.
- deleting Article 1.3 of the draft Constitutional Law.
- deleting the first phrase (in compliance with genetic data) of Article 1.4. of the draft Constitutional Law and establishing a sufficiently detailed and precise law, providing quick, transparent and accessible procedures for changing the registered sex marker of transgender people.
- deleting Article 1.5 of the draft Constitutional Law or rephrasing it to ensure compliance with standards of non-discrimination.
- deleting Articles 1.6, 1.7 and 1.8 of the draft Constitutional Law, while regulating incest separately, under criminal law.

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