

The Model of State Governance in Georgia

after the constitutional amendments of February 2004

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On February 6, 2004, the Parliament of Georgia substantially revised the Georgian Constitution. The declared purpose of the revisions was to establish a new system for the division of powers between the Legislative and Executive Branches and to reorganize the internal structure of the government. Political leaders advocating the amendments were saying that this is a shift away from the American presidential model to a mixed semi-presidential system of government. However it appeared to be a shift from the American presidential model of separated and independent legislative and executive powers, to a peculiar hybrid system containing elements of both the parliamentary and presidential systems but leaving the President in virtually full control.

This presentation outlines the major aspects of the organization of the central government and interrelation among branches of government under the mentioned constitutional amendments. The presentation does not address the procedural violations that occurred during the introduction of the amendments, which included the failure to publish the proposed amendments for public discussion a month prior to their adoption by the parliament.

1. The Parliament

(a) Legislative function

The amendments considerably limit the legislative functions of the Parliament. The first stage of the lawmaking process is the initiation of legislation. Although the right to initiate legislation was retained by parliamentary factions, committees and MPs, a new Paragraph 3 was added to Article 67 of the Constitution, which states that “if within the term set by a law the Government fails to provide its remarks concerning a draft law to be considered by the Parliament, the draft law shall be deemed to be endorsed by the Government.” Introduction of such a norm into the Constitution necessitated the creation of specific mechanisms for the government’s obligatory involvement in the lawmaking activities of the Parliament. It is difficult to predict what types of mechanisms will be prescribed by the law(s) indicated in the above-referenced norm, what time periods (a week? a month?) will be given to the government for its conclusion by these laws and what will be the starting point of that period (the moment of initiation of a draft by an MP? the moment of inclusion of a draft into the agenda of the parliament? the moment of the first voting on principles of a draft?). Generally it is highly desirable if the government provides its opinions on every draft laws initiated or discussed in the parliament and the government had all the possibilities under its discretion to do so without the above-mentioned constitutional amendment. What this amendment changes is that government’s conclusion on a draft law becomes obligatory component of lawmaking and the parliament must delay legislative process for certain period of time

even if the government does not consider its involvement in the process at all. This mechanism contradicts widely accepted general rule of legislative function of the parliament according to which the parliament is free from the government in initiating and adopting laws and the government may provide its opinions at any stage of the law making but may block a law by the veto power of the president only.

It becomes obvious that the mentioned norm, ostensibly designed to simplify the lawmaking activities of the Parliament (failure to provide an opinion on a draft law equals its endorsement), in fact increases the Government's role in this process and complicates legislative work of the parliament.

Another revision that places a burden on the Parliament is in Paragraph 8 of Article 93, whereby "any draft law, which proposes an increase of expenditure, decrease of revenue, or undertaking of new financial responsibilities by the state with regard to the state budget for the current year, shall be adopted by the Parliament only with the consent of the Government. The draft law proposing the same changes with regards to the state budget for the next year shall be adopted by the Parliament within the scope of the main parameters of the state budget, as agreed to by the Government." This new mechanism leads to two important conclusions: a) All draft laws must be sent to the government, which should conclude whether this law will require additional expenditures or will result in decreased revenues; b) The government may successfully block any unfavorable law by simply sighting that it requires additional spending (or decreases revenues), which the government is not willing to take. If a draft law objectively does not lead to the mentioned financial consequences, the Parliament still has to rely on the Government's opinion, since the final word on whether a proposed draft law causes these consequences rests with the Government. This situation raises the question of what would happen if a draft law does not propose an increase of expenditure or meet the other requirements, but the Government claims that it does because it does not favor the law? In this instance, what recourse would the Parliament have? Theoretically such a dispute between the legislature and executive branches could be solved by the constitutional court but currently Georgian court does not have such jurisdiction. Remembering that the Government may tie the draft laws concerning the state budget, the Tax Code and the Government's authority to the issue of a confidence vote (Article 81), and thereby coerce the Parliament under the threat of dismissal to agree with its opinion; and considering the fact that the President retains a strong mechanism of veto, it becomes clear that the Parliament shall either adjust to the Government's dominance in the lawmaking process or it could find itself under the threat of dismissal. .

(b) Control powers

After close examination of the powers of control over the Government that are conferred to the Parliament under the constitutional amendments, it becomes obvious that although the Parliament is authorized to dismiss the Government (unlike in the previous version of the Constitution), its oversight power over the government still appears weak.

Unconditional dismissal of the Government

According to the amendments, the Parliament may directly and unconditionally (without the President's consent) dismiss the Government only when it unconditionally raises the matter of liability of the Government, supported by three-fifths of the MPs (The term "unconditionally" is introduced by the amendments and in this context means no discretion for the President about dismissal of the Government or the Parliament. In case of an "unconditional no-confidence vote," the President must dismiss the Government, while in the case of an ordinary no-confidence vote, the President may dismiss the Government or the Parliament). In addition to the fact that in this case the quorum required is quite high (141 MPs out of 235), the procedures for raising and considering these matters are complicated. According to Paragraph 2 of Article 81 of the Constitution, the Parliament may initially pass a decree raising the matter of an unconditional no-confidence vote in the Government by no fewer than 79 MPs. Subsequently, from 15 to 20 days after the adoption of such a decision, the Parliament must vote no confidence in the Government with a three-fifths majority. Establishment of such strict procedures and short deadlines for the adoption of a decision by the Parliament is clearly within the interests of the Government.

In addition to the above-referenced factors, the possibility of Parliament exercising this power is questionable, because according to Article 81 of the Constitution, the Prime Minister may raise the matter of confidence in the Government in regards to a specific draft law, and voting concerning this matter shall be held within 15 days after the matter is raised. This may lead to a very interesting situation: the Parliament may raise the matter of an unconditional no-confidence vote of the Government, but it may only actually vote after 15 days after the matter is raised. In such case, during the same day or the next day the Prime Minister may raise the matter of confidence in the Government, which must be voted on within 15 days. In fact, the matter of a confidence vote will be discussed in the Parliament earlier than that of a no-confidence vote. If the Parliament does not pass a vote of confidence, the President may dismiss the Government, or (more likely) dismiss the Parliament and therefore avoid unconditional dismissal of the Government with a three-fifths majority. If the Parliament passes a vote of confidence for the Government, it will find itself in a difficult situation after 2-3 days when voting for unconditional no-confidence. Theoretically it is possible that anti-government forces in the parliament first deliberately vote for confidence (in order to avoid the threat of dismissal) and then after 2-3 days vote for unconditional no-confidence. However, in such a game between the prime-minister, on the one hand, and anti-government parliamentary coalition, on the other hand, the prime-minister will have important advantages. Anti-government parliamentary coalition (uniting 3/5 of the MPs) will hardly have sufficient discipline and organizational unity for taking the mentioned two contradictory collective actions during 2-3 days (first voting for confidence and then for no-confidence). This is true at least for Georgian politicians and their coalitions. It is evident that even though the Parliament theoretically can directly and unconditionally dismiss the Government without the President's consent, the Prime Minister could impose to the parliament considerable difficulties in exercising this power.

A vote of no confidence in the Government

Other instances in which the Parliament may dismiss the Government also have serious drawbacks in favor of the Government. For example, according to Paragraph 1 of Article 81 of the Constitution, the Parliament may vote no confidence in the Government if the matter is raised by no less than one-third of the full Parliament (79 MPs). The vote of no confidence shall then be valid if supported by the majority of the full Parliament (118 MPs). However, in the event that this occurs, the President has the discretion to either dismiss the Government or to disregard the Parliament's decision. If the Parliament again votes no confidence in the Government no sooner than 90 days but no later than 100 days after the initial vote, the President shall dismiss the Government or again disregard the Parliament's position and dismiss the Parliament. The purpose of the two-stage mechanism of voting no confidence is unclear, particularly since the decision made at any stage lacks obligatory power. The fact that the amendments impose a 90-day "ban" on the Parliament in order to restrict repeated voting, and only grant 10 days for decision-making, places the Parliament in a very unfavorable situation.

Failure to implement the state budget

Another occasion when the Parliament may raise the matter of liability of the Government, occurs when it refuses to approve the state budget implementation report. According to Paragraph 2 of Article 93 of the Constitution, "if the Parliament, in the event of failure of implementation of the state budget by the Government, does not approve the budget implementation report, the President shall consider the matter of liability (dismissal) of the Government and inform his/her decision to the Parliament within one month". Again, the Parliament's position lacks obligatory power and the future of the Government depends on the President.

The amendments create other mechanisms that weaken the Parliament vis-à-vis the Government if the latter fails to implement the state budget. According to the amendments, the Parliament may not approve the state budget implementation report only "in the event of failure of implementation of the state budget by the Government." It has recently become customary in Georgia to have a significant budget deficit at the end of each year, which has included the failure to mobilize funds and to make necessary expenditures. Therefore, at the end of each year the Government has submitted a draft law to the Parliament concerning amendments to the budget. The amendments proposed to replace the affected articles of the budget, so that the budget would match actual expenditures. After the adoption of such amendments, the deficit was eliminated (from a legal standpoint). Now, according to the constitutional amendments, the Government may raise the matter of confidence in the Government over a draft law related to the budget generally, and about the above-mentioned adjustment particularly. If the Parliament refuses to hold a vote of confidence in the Government, the President will dismiss either the Parliament or the Government. According to this mechanism, in the event of a deficit in the budget, the Government may propose amendments to the budget at the end of the year. Through these amendments the Government may attempt to legalize the deficit and to link the matter of confidence with these amendments. It is quite

possible that, under the threat of dismissal, the Parliament will vote for confidence in the Government and adopt the proposed amendments to the budget. Thus, there will not be a discrepancy in the budget because it will be brought into conformity with reality. Therefore the Parliament will not have even theoretical grounds to refuse approval of the budget implementation report and raise the matter of liability of the Government, because there will be no constitutional basis (Government's failure to implement the budget) to do so.

2. The Government

(a) The President

General executive power

Although according to the new version of Paragraph 1 of Article 69 of the Constitution, the President is no longer the head of the Executive Branch (formally), paragraph 2 of the same article says that the President shall "direct and implement internal and foreign policy of the state." In view of these and other constitutional powers (convening and directing government sessions, issuing regulations superior to governmental regulations, approving ministerial candidates, approving draft state budgets and initiating legislation), the President remains the *de facto* head of the Executive Branch, with significant additional (compared to the old version of the constitution) powers regarding the Parliament. On the other hand, the President's responsibility over government operations is largely limited; this responsibility is shifted to the Prime Minister.

Appointments in the Government

The President retains a leading role in appointing members of the Government. He/she shall select a Prime Minister after having consulted with parliamentary factions, and the Prime Minister shall select members of the Government in agreement with the President. It is clear that in this process the final decision rests with the President, as the Prime Minister selects the candidates that are favored (approved) by the President. At the same time, the Prime Minister formally remains responsible for the composition of the Government.

While appointing members of the Government, the President may critically influence the Parliament as well. Here, resemblance to the Russian constitutional model is obvious. After the composition of the Government has been decided, the matter is presented, together with the government program, to the Parliament for a confidence vote. If the Parliament does not vote for confidence in the composition of the Government, the President may present the same names or a revised list of ministers to the Parliament up to three times. If the Parliament still does not support the proposed composition of the Government, the President may present a new candidate for the position of prime minister or appoint the prime minister without the Parliament's consent and together with him/her staff the Government. In such case, the President shall dismiss the Parliament

and call ad-hoc elections. Basically, the President is able to completely disregard the Parliament's opinion concerning the Government's composition, unilaterally appoint members of the Government and punish the Parliament for obstinacy.

Dismissal of the Government or specific ministers

According to Subparagraph (c) of Paragraph 1 of Article 73 of the Constitution, the President "is authorized to dismiss the Government and the Ministers of Interior, Defense and State Security at his/her discretion or in the events prescribed by the Constitution." Thus, the President, who is not formally the head of the Executive Branch, may, without formal cause, dismiss the three law-enforcement ministers or the entire government at his/her discretion. The fact that the three law-enforcement ministers are singled out from the entire composition of the Government indicates that the President intends to undertake a special role in those areas, but the purpose is unknown. It is also worth noting that the Prime Minister is free to interfere in these areas and he/she can unilaterally dismiss the same ministers as well. In democratic countries, where the President is not the head of the Executive Branch, but the head of the state, he/she is tasked with playing the role of arbiter among branches of government. He/she may dismiss the Parliament or the Government only in the event of a government crisis, as prescribed by the Constitution, but not at his/her own discretion.

Budget matters

The President possesses crucial powers in budget-related matters as well. According to Article 93 of the Constitution, only the Government shall be authorized to submit a draft state budget to the Parliament with the consent of the President. The Parliament may not amend the draft budget without the Government's consent. If the Parliament fails to approve the state budget within three months, the President shall dismiss the Government (which is less likely, because the draft budget submitted by the Government to the Parliament is already agreed to and approved by the President) or dismiss the Parliament. Furthermore, after dismissing the Parliament, the President shall approve the state budget by his/her own decree. Consequently, according to the new model, the Parliament may not initiate, modify (without the Government's consent) or drop (under the threat of dismissal) the budget, while the President may unilaterally adopt the new budget by his/her decree.

The mechanism set by the amendments for adoption of the budget is complicated and unclear also. The fate of the budget after the assembly of a new Parliament is uncertain, because the Constitution only says that the President should submit it to the Parliament for approval within one month after the assembly of the new Parliament. If such an event is regulated by the general procedure for the approval of a presidential decree by the Parliament (the decree becomes invalid if the newly-elected Parliament does not approve it within one month – Subparagraph (q) of Paragraph 1 of Article 73), it is unclear what happens with the budget if the Parliament does not then approve the presidential decree. Using these general procedures in the discussed event is questionable though: the general procedures suggest that presidential decrees will expire automatically if the newly elected

Parliament does not approve them within a month after assembly; while the mechanism set for Presidential decree on the budget suggests that one month period after the assembly of the Parliament is set for the President who must submit the decree (or the budget?) within this time period. Difference between these two mechanisms is obvious, as well as, huge ambiguity left by the constitution in these matters. If a presidential decree reducing VAT tax, for example, is not approved by the newly elected Parliament within one month, the tax reduction would simply lose its force and the fate of the tax system after this event is more or less certain and predictable. But what happens with the budget if the Parliament does not approve presidential decree? It is the presidential decree approving the budget, disputed by the old parliament, submitted to the new Parliament within one month or it is a new draft budget created by the government after considering results of the elections? If it is the new draft budget, what are the terms and procedures for the new Parliament for discussing and adopting this new draft budget (keeping in mind that it could be already 4th or 5th month of the fiscal year)? Based on what should the government make expenditures till the new budget is approved (if after one month from assembly of the new parliament the presidential decree would expire)? There could be several possible answers on these questions – the fact, which demonstrates once again about ambiguity of the new models established by the amendments.

Lawmaking powers

The President possesses vast powers in the area of lawmaking as well. He/she retains the right to veto laws adopted by the Parliament, which may be overridden by a three-fifths majority of MPs. The President's power to initiate legislation was ostensibly limited – the Constitution provides that he/she can resort to this power only in “special events” (Article 67). However, it is unclear what is meant by “special events” and who defines such events. Since it is difficult to imagine that the Parliament will at its own discretion define such events in a special law (the Constitution does not refer to such a law, which means that the President could easily overturn such a law through the Constitutional Court) or that the President will propose a self-limiting law. It will most likely be the case that the President will define such events in each specific case. In other words, the President possesses unlimited power to initiate legislation. Although the Government has a similar power, it is clear that in all cases, when the President decides to initiate a draft law, the Government will avoid presenting an alternative initiative. However, it is less likely that this mechanism will work similarly in vice-versa: Government will never initiate a draft law unfavorable to the President and even if it does so, the President would not hesitate to overrule it by presenting an alternative draft to the Parliament. It becomes clear that, despite the camouflage – “special events” – used in the Article 67, the President has a dominant and unlimited power visa-vi the Government in initiation draft laws, which considerably increases his influence over the Parliament as well (keeping in mind that he holds strong veto power also).

Repeal of Government acts

According to Paragraph 3 of Article 73 of the Constitution, “the President may suspend or repeal the acts of the Government or agencies of the Executive, if such acts contravene the Constitution of Georgia, international agreements, laws and regulations issued by the President.” This norm raises a number of questions, such as why the President is authorized to repeal the acts of the agencies of the Executive Branch and the Government, when he/she is not the head of the Executive Branch. In addition there is a question of whether the right to repeal the acts due to their non-conformity with the Constitution and international agreements can be qualified as interference with the authority of the Constitutional Court. It is clear that whenever necessary the President will resort to this right to repeal all unfavorable acts of the Government based on various reasons.

Presidential partisanship

Under the constitutional amendments, the President is authorized to hold a partisan position (Article 72). Noting that Georgia is a country in transition, it is unacceptable that the President, who is the *de facto* head of the state and of the Executive Branch, and possesses significant powers with regard to the Parliament, be authorized to act as chairman of a party. It is less likely that the system inherited from the Communist regime and modified during President Shevardnadze’s tenure will be dismantled under such circumstances. Under this system, the ruling party was fused with the state agencies and it was difficult to determine whether public servants were performing their official duties or partisan responsibilities.

Presidential succession

In the event that the President’s authority is prematurely terminated, the proper solution to the matter of succession is very important for the stability and security of the country (which became clear during the November 2003 events in Georgia). According to Article 76 of the Constitution, in the event of premature termination of the President’s authority, his/her office shall be succeeded by the Chair of the Parliament. In order to avoid concentration of power in one person and usurpation of authority by the successor, and to enable fair and impartial elections, the Constitution prohibits the successor from: a) dismissing the Government and the Ministers of Interior, Defense and State Security at his/her discretion or in other events prescribed by the Constitution, b) suspending operations of self-government agencies or other representative bodies of territorial units, and c) dismissing the Parliament. This is a suitable norm for avoiding usurpation of power, when in fact the President is succeeded by the Chair of the Parliament.

Problems arise, however, under Paragraph 3¹ of Article 50, whereby the Parliament shall cease operation upon entry into force of a presidential order concerning dismissal of the Parliament, and may convene only to approve a presidential order proclaiming a state of emergency or martial law. The same paragraph specifies that the convening of the Parliament shall not result in the restoration of parliamentary positions of MPs. This means that upon dismissal of the Parliament, the Chair of the Parliament loses his/her job, and the President’s office is succeeded by the Prime Minister, if there is a such necessity.

Under such circumstances the Prime Minister becomes a unilateral and powerful administrator. His/her office is taken over by the Vice Prime Minister, who traditionally serves as the Prime Minister's ally. Therefore, the above-mentioned restraints imposed on the successor with regard to the Government will no longer work. Although the successor will not be able to dismiss ministers, the Vice Prime Minister can easily carry this out while acting as the Prime Minister. The Constitution does not contain provisions for restraining the appointment of new ministers. All of the above factors create a serious threat of violent overthrow of the President by the supporters of the Prime Minister or enables the President to directly bequeath his/her office to a desirable prime minister without any fair elections.

In addition, the recent constitutional amendments failed to resolve the matter of who should verify the event (resignation or inability of the President to perform his/her duties) that results in the succession of the president's office. The November 2003 events in Georgia proved that it is an important issue and may play a crucial role in critical situations (on November 23, 2003 former President Shevardnadze only verbally announced his resignation. In order to legitimize his successor, the leaders of the revolution and legal experts had to look for various indirect ways).

(b) The Government of Georgia

Regarding the Government of Georgia, the major innovation of the constitutional amendments is the introduction of the Office of the Prime Minister and the Cabinet of Ministers. However, the proposed model differs greatly from parliamentary and semi-presidential systems existing in democratic countries.

Presidential confidence in the Government

First, it is noteworthy that, according to the amendments, the Government shall relinquish its authority only before the newly elected President and that election of a new Parliament shall not result in the termination of the Government's authority. Unlike European models of governance, the Georgian Constitution's primary principle in this regard is existence of the President's (but not Parliament's) confidence in the Government. All important matters within the governing triangle of the President, Government and Parliament are solved based upon this principle. Dismissal of the Parliament by the President does not automatically mean dismissal of the Government as well (which would temporarily operate until the new Parliament approves the new Government). Thus the new Parliament (regardless of election results) will still have to face the old Government. If the new parliamentary majority holds lingering resentments towards the old Government, the Parliament should still initiate the process of a no-confidence vote, with any of the ensuing consequences.

The Prime Minister

It would seem a first glance that the Prime Minister is the most vulnerable figure, and at the same time faces the highest degree of responsibility. But after analyzing the changes introduced by the recent amendments, we see that the Prime Minister is quite a powerful figure as long as he/she enjoys the President's confidence. Although the Prime Minister appoints ministers in agreement with the President, he/she does not need anyone's consent to dismiss them (including Ministers of Interior, Defense and State Security). Such authority makes the Prime Minister a very influential figure with regard to members of the Government. Resignation of the Prime Minister results in all of the Ministers losing their positions, which makes them heavily dependent on the Prime Minister.

The Prime Minister possesses powerful levers to influence and control the Parliament. As already noted in the analysis of the lawmaking process directed by the Parliament, the Parliament cannot commence adoption of a law without the Government's consent. This is a considerable tool in the hands of the Prime Minister with which to control the Parliament. In addition, the Prime Minister may tie the matter of confidence in the Government to a draft law, and the Parliament's refusal to vote for confidence in the Government equals dismissal of the Parliament. For the Parliament, the matter of confidence in the Government serves as the Damocles sword in the hands of the Prime Minister. With this tool, the Prime Minister may keep the Parliament under the constant fear of dismissal and control it effectively. If noted that the Parliament in fact cannot dismiss the Government when it enjoys the confidence of the President (most likely, in such cases the President will dismiss the Parliament itself), the Prime Minister emerges as a notably influential figure.

Ministers

The new model places ministers in the very difficult position of dual subordination. According to the Constitution, both the President and the Prime Minister exercise executive powers without any division of functions or areas of governance, but the Prime Minister is responsible before the President for Government operations. The Prime Minister also coordinates activities for members of the Government and chairs government sessions (except when the President wishes to do so). Under such circumstances, ministers have to work under the direction of the Prime Minister, while at the same time carefully monitoring the mood and opinions of the President (and relevant officials of his/her administration); if the President is not happy with the ministers' work, he/she may overrule their decisions, convene government sessions and correct certain ministers' policies or dismiss the Government altogether. Under such circumstances, ministers will have to obtain consent from both administrators every time they make an important decision, which often will not be possible or will protract decision-making. At the same time, given the President's dominant position in relation to the Prime Minister, even an instruction given by the President at a press conference will often be more compelling for a minister than an alternative decision made on the same subject at the government session chaired by the Prime Minister.

Conclusion

The amendments that were hastily made to the Constitution of Georgia on February 6, 2004, considerably violated the principles of division of power and checks and balances. The Parliament was recognizably weakened; it will face difficulties both in lawmaking and in effective supervision of the Executive Branch. The Executive Branch suffers from the dual governance of the President and the Prime Minister, leaving many questions unanswered and leading to a high risk of internal conflicts. The President retained a dominant position in the Executive Branch and acquired additional important tools with regard to the Parliament and the ruling political party. This is an opportunity for a skilled, strong president to implement energetic and effective policy, but on the other hand, it significantly increases the possibility of mistakes on the part of the President, with all the negative consequences.