ARTICLES

Critical Analysis of the Constitutional Reform

OTAR MELKADZE*

Factual model constitutional reform performed by the Parliament of Georgia through the changes and amendments replaced the form of presidential governance by the mixed i.e. so called "semi-presidential" governance form. Numerous articles have been published on the legal nature of the different conceptual legal changes made to the Constitution. Different evaluations were stated in terms of legal assessment. Our purpose is to show the concept of the constitutional reform through the technique of article by article analysis.

It has to be mentioned from the very beginning that the new constitutional changes introduced a number of not fully developed ideas, incomplete rules and less sophisticated mechanism that were inorganically incorporated into the text of the current Constitution. We will review article by article the very changes that conditioned a numerous deficiencies in the Constitution, *inter alia*, in terms of imbalanced division of powers between the branches of authority that created the possibilities of the interference of the executive body and the head of state into the competencies of the other bodies.

Changes Provoking Questions

Added article 50 III[1] concerns the circumstances that may follow the dissolution of the Parliament by the President when the adoption of the decision by the representative body might be required before the first convocation of the newly elected Parliament: ..."from the enforcement of the order of the President on the dissolution of the Parliament the first convocation of the newly elected Parliament shall assemble only in case of declaration of a state of emergency or martial law by the President to decide on the issues on approval or/and prolongation of emergency or martial law. In case the Parliament is not assembled within 5 days or does not approve (prolong) the order of the President on the declaration (prolongation) of a state of emergency, the announced state of emergency shall be cancelled. In case the Parliament does not approve the order of the President on the declaration (prolongation) of a state of martial law within 48 hours, the state of martial law shall be cancelled. Convocation of the Parliament shall not result in restoration of the offices and salaries of the members of the Parliament. The Parliament shall terminate an activity upon the adoption of a decision on the above mentioned issues". All this mechanism due to the neglecting of several circumstances brings more ambiguity into the Constitution and so far creates more contradictions rather than regulates.

* Professor of the Tbilisi State University.

The above given quotation points out to the deficiencies of the constitutional orthography of the text of the hastily adopted constitutional changes. Besides, first of all, the given amendment does not foresee the possible circumstances stipulated by the norm provided in Para 3 of the same article. Extraordinary elections should be carried out within the period of 45-60 days from the enforcement of an order of the President. In particular, the legislator did not fully foresee the case when the President might have to call back the Parliament dissolved by him before the term as far as the declaration of a state of emergency and martial law is not excluded within the given period of time as well. In this case the following norm of the same Para shall apply, which states that if the date of holding of the elections coincides with a state of emergency or martial law, the elections shall be held not later than 60 days after the cancellation of this state and preterm dissolved Parliament shall remain at work not less than for 100 days more. This means the possible reoccurrence of the situation prevailing in 2003-2004. So far, in our opinion, the preterm convention of the first session of the newly elected Parliament upon the decision of the President would be more reasonable and certainly should have been reflected in the Constitution.

The part of misunderstandings is conditioned by the one-sided approach towards a state of emergency and martial law and review of their approval-prolongation in one context. To begin with, it is not clear how the issues concerning the necessity of prolongation and duration of a state of emergency and martial law are regulated. It is obvious that in case of disapproval of the order of the President on the declaration (prolongation) of a state of emergency by the Parliament, a state of emergency is cancelled, however the similar attitude towards the order of the President provokes questions in case of declaration of a martial law. According to Para g) of Article 73, the President of Georgia shall "declare a martial law in the case of armed attack on Georgia and submit the decision to the Parliament within 48 hours for approval". The Constitution "enriched" with new amendments resolves the issue quiet easily: "In case the Parliament does not approve the order of the President on the declaration (prolongation) of a state of martial law within 48 hours, the state of martial law shall be cancelled". I believe this mechanism requires improvement even by means of the mechanism of prior agreement with the Parliament. Otherwise initiation of a martial law on the basis of an armed attack definitely can not be "helped" by the refusal of the Parliament.

It is clear that the last part of the concerned Para regarding the need of "involvement" of the dissolved Parliament is a result of thoughtlessness. Yet, even if excluding the above described case, the functioning of the Parliament without "offices" i.e. chairperson of the convocation is not explicable even for the single occasion when the activity of the Parliament extends for months.

The imperfect norm of Article 50 IV:
"The authority of the Parliament shall be terminated upon the first convocation of the newly elected Parliament", which served as a base and argumentation of the Rose Revolution – instead of being improved by the legislator was multiplied in two versions in the whole text of the Constitution (Article 73 I (r)). It would be appropriate to withdraw this Para as far as Article 51 addresses the same issues.

Article 59
It can be said that this Article completely maintained deficiencies of the previous Constitution as far as interpellation was replaced by ambiguous mechanism and so-called "control mechanism" of the relations between the Parliament and Government still maintains informational character. From this view point not much shall be changed by the addition of third Para according to which "The Parliament shall be authorised to raise a question of official liability of a particular member of the Government before the Prime Minister. In case the Prime Minister does not dismiss a member of the Government, he/she shall submit his/her motivated decision to the Parliament within two weeks".

The Constitution recognizes one form of official liability – dismissal or resignation. As it seems the legislator is going to introduce such forms of the official liability in respect to the rule of authority and operational procedures of the Government as following: remark, warning, reprimand, otherwise what else could be meant under the "motivated decision"? It can be said that it is a Georgian novelty oriented on the disparity of the branches of authority in the constitutionalism, which may only turn into a factor provoking the conflict between the Government and the Parliament. The consideration that the "motivated decision" of the Prime Minister does not exclude the dispute on the reasonability of the motivation of the issue raised by the Parliament is all the more realistic. So far, the controlling authority of the Parliament is again being sacrificed for the enactment of a certain unjustified idea and irresponsibility is promoted behind so easily-obtainable mechanism of the protection of the members of the Government. And above all – the Prime Minister of the appointed Government once more becomes superior over the legitimate Parliament.

Article 67
The given article is an original creation and an attempt of establishing of one more novelty – this time the veiled form of pressure of the Government on the Parliament – in the Georgian legislative process. The list of subjects having the right to legislative initiative starts with the President, who can enjoy this right only in the exclusive cases (Article 67 I). However exclusivity of such cases is ambiguous if, of course, each initiative of the President should not be assigned to such category. Hereby, in Para 2 the legislator assigns to the Parliament function of chancellery as far as this time the Government together with the President may request the special discussion of its own draft law. So far, the initiative of Parliament and its portion in the legislative activity is put on the third place.

Para 3 of the same article assigns to the Government a special function being supervisory at first glance: "In case the Government does not submit the remarks with regard to a draft law considering in the Parliament within the term provided for by law, the draft law shall be deemed approved". However going into the root of the content of the norm, we will see that the "remark introduction" mechanism that was so easily offered can have the significance of veto in terms of its concept. That is why we have to clarify in depth what actions might follow the remarks of Government and even more so as the numerous following questions raised around this novelty remain unanswered: What does it mean when the law

is appreciated by the Government? How the content of the remark has to be understood? Is it obligatory to take it into consideration? To which stage of review is this mechanism connected? Whose proposed draft laws does it concern to? And whether it is meant to be a Governmental revision of the draft laws of the President and Parliament or just the right to push the draft law initiated by the Government to the end? The importance of the given changes can be evaluated just by answering these questions – whether it is a certain kind of support or this kind of interference shall gain the implication of Government veto against the deprived Parliament.

Competence of the President

Article 69
The President gave up a position of the head of the executive power by introduction of the institute of Government, maintaining the leading role in the internal and external affairs policy of the country, but divided its execution to the Government.

Article 70 surprises with its innovations. It is strange that these changes were executed upon the legislative initiative of the President who has pompously won the elections. Instead of taking as a reference point the "exposed" attitude of the electorate on the basis of the results of the Presidential elections, on contrary, the quota of majority of the total number of electors required for the election of the President vanished in Para 4. In Para 6 not only the one third of the total number of electors required for the authorisation to hold the second round has disappeared but the clause stating that the candidate who receives more votes shall be deemed to be elected – "but not less than one fifth on the total number of electors" as well. Generally speaking, the second round of the election shall be necessary to be held only in one case – when the two candidates having the best results shall gain exactly the same number of the votes, i.e. that practically the presidential elections are so simplified that the necessity of the second round is completely excluded. If it is foreseen to transpose the core point of the basic criteria of the presidential elections into the Election Code of Georgia then the transposition of the constitutional framework norms in it is undoubtedly improper.

Article 73
Many misunderstandings are raised by subparagraph "c" of the Para 1, which very vividly underlines the special right of the President "to dismiss the Ministers of Internal Affairs, Defense and State Security of Georgia", while the Prime Minister is authorised to dismiss the members of the Government (Article 79 V). It is not clear whether the three ministers mentioned remain under the double pressure or the right of the President protects them from the responsibility to the Prime Minister and the Parliament. However, on the whole, hereby the peculiar influence of the Russian constitution shows up and that's it!

Subparagraph "r" added to Para 1 of the same article established one unconstitutional mechanism. It states that under the circumstances defined in subparagraphs "a"-"d" of the added Article 51 – in case of non-declaration of confidence to the composition of the Government by the Parliament within a term established by the Constitution, the President is

entitled to appoint the Prime Minister and give him/her consent for the appointment of the ministers. Within a month from the end of the above-mentioned circumstances the President shall re-submit the composition of the Government to the Parliament for confidence.

The legislator provides for the right of the President to dissolve the Parliament and limited it to a certain factors in Article 51[1]. They include Article 63 as well, which foresees the whole mechanism of raising the question of the impeachment of the President, its proceeding and adoption of decision. As a result we received the following - the President involved in the impeachment process maintains authority – first to appoint the Prime Minister and then upon the consent of the latter to compose a new Government instead of no confidence.

Article 81
In the conditions of the clauses of subparagraphs "a"-"d" of Article 51[1], in case of declaration of the no confidence to the Government by the Parliament twice, the President has the special right to dismiss the Government or dissolve the Parliament and schedule extraordinary elections. Taking into account the above-mentioned conditions, it is obvious that the vacuum of power is not excluded in this case as well.

Besides, the constitutional changes violate the principle of the distribution of the power leading to the over-empowerment of the President of Georgia. Subparagraph "P" of Article 73 I is worthy of attention in this view: "The President of Georgia shall preside over the highest Council of Justice of Georgia, appoint and dismiss the judges in accordance with the Constitution and the procedure prescribed by the Organic law as well", under which the judicial power actually becomes constitutionally subordinated to the President and according to Para.3 the President assumes the functions of the Constitutional Court: "The President of Georgia shall be authorised to suspend or abrogate acts of the Government and bodies of the executive power , if they are in contradiction with the Constitution of Georgia, international treaties and agreements, laws and the normative acts of the President."

Article 76 II provides the list of the rights prescribed in Article 73 which should not be exercised by a person acting as the President. However, due to the fact that the legislator essentially changed the content of subparagraph "c" of Para 1 of the given Article, if before the changes a person acting as the President was not entitled to dismiss the ministers according to the edition of the subparagraph "c" of the current Constitution, he/she is not entitled to dismiss the Government completely and dismiss the Ministers of Internal Affairs, Defense and State Security separately. This means that foreseeing the new edition, the acting President of Georgia enjoys the right to dismiss the other ministers apart from the mentioned three ministers contrary to the common rule of constitutionalism.

The Government of Georgia

The first and the most difficult to guess rebus is related to the composition of the Government. Article 78 II states: "The Government shall be composed by the Prime Minister and the Ministers. The State Minister (the State Ministers) may be in the composition of the Government". According to Article 81^2 III "The State Minister shall be appointed in accordance with a procedure established by the Constitution with the view of fulfilling the state objects of exclusive importance". However there is no such rule in the Constitution and it is not mentioned in the authorities of the President (Article 73 I "b") as well. As it seems, the state ministers are foreseen under the other members of the Government in the whole text of the Constitution (Article 79 V), as far as such others are not pointed out at all. They are mentioned as "Ministers without portfolio" in the constitutionalism. However according to the same Article 78 II "The Prime Minister shall charge one of the members of the Government with the exercise of the responsibilities of the Vice Prime Minister" and in this case the state minister is not excluded either.

The mechanism of the Government formation and the system of rules regulating the interrelation of the Parliament and Government is the most complicated issue for the constitutionalism. By the way, because of this problem the Parliament replaced the model of mixed-governance foreseen in the draft of the Constitution of 1995 approved by the Constitutional Commission by the form of presidential governance. In our opinion, this very mechanism is most imperfect one among the amendments made to the Constitution. We think that it will be an apple of discord between the President and Parliament time and again, if the latter is not for ever predestinated to one-party majority, and between the Government and the Parliament depending on whose dismissal decides the President of Georgia and when, who in any case exercises the responsibilities of the head of the state only through the dismissal-dissolution from.

Article 78 IV
Plus to the above mentioned competence of the President, the latter "shall be authorised to convene and preside over the sittings of the Government with regard to the issues of exclusive state importance. Decision adopted at the sitting shall be formed by the act of the President". Hereby, for the purpose of demonstrating the implicit obedience of the Government before the President, we would like once again to bring up the wording of Article 73 III, according to which the President of Georgia is authorised to suspend or abrogate acts of the Government and the bodies of the executive power on the basis of various motivations. This already points to the role of the Government in the power structure, which is deformed version of the French model. In our opinion, Article 78 V requires certain editing, otherwise there is left an impression that during the possible frequent change of the governments each of them has to change the structure, authority and the rule of procedure.

Article 80 establishes the most complex mechanism of the government formation. The Prime Minister chosen by the President, the team of Government agreed among them and the Governmental Program are simultaneously submitted to the Parliament for gaining confidence. This procedure is not precisely provided. The approval of the members of the Government on the individual basis is maintained from the old Constitution; moreover the mecha-

nism of so-called recusal is absolutely unclear in the old version of the Constitution. The following provision introduced in the Constitution complicates the issue more: "The Parliament shall be entitled to declare no confidence to the composition of the Government and raise a question of recusal of a particular member of the Government in the same decision". Should the question of confidence and recusal raise at the same time and be resolved by the same proportion of the votes? Or what sense does it make to consider the given issues together? I believe such complicated mechanism should not have been introduced in the Constitution at all. It would be better to reassign it to a relevant law in term of a blanket rule.

Somehow or other, the executive power is distributed between the President and the Government and the interest of the President to a larger extent is demonstrated in terms of protection of the Government. This fact is one-sidedly outlined in Para 5: "In case a composition of the Government and the program of the Government thereof do not gain the confidence of the Parliament for three times, the President of Georgia shall nominate a new candidate of the Prime Minister within a term of 5 days or appoint the Prime Minister without consent of the Parliament, whereas the Prime Minister shall appoint the Ministers by the consent of the President of Georgia within a term of 5 days as well. In such a case the President of Georgia shall dissolve the Parliament and schedule extraordinary elections".

I do not know how much worthy is such "adherence to principal" for us and what is it aimed at. But one thing is clear that this kind of incorporate relations among the branches of power should bring no good to the country already experiencing the third transitional period or after the three times rejected government why is there an equation mark between two actions: "the President shall nominate a new candidate of the Prime Minister within a term of 5 days or appoint the Prime Minister without consent of the Parliament, whereas the Prime Minister shall appoint the Ministers by the consent of the President of Georgia within a term of 5 days as well. In such a case the President of Georgia shall dissolve the Parliament and schedule extraordinary elections".

It is quite possible, that such kind of three-times defeated fundamental "stubbornness" and the fourth self-willed action of the President would create the pre-election background favorable for bringing basically the same Parliament to the power. What happens than? In this case our Constitution is again aimed at the benefit of the President in difference from the practice of constitutionalism. It is bizarre but a fact that the new Parliament does not re-approve the Government in force. That's why the opposition may continue again after the six month.

As it seems, this issue with its further complications worried the authors of the amendment as well; that's why Para 6 appeared here: "It shall be impermissible to put the issue of dismissal of the President of Georgia in accordance with impeachment procedure during the procedures envisaged by this Article". Actually the only lever of the Parliament is blocked. By the virtue of the given rule the President will be protected during the proceedings but such non-state stubbornness in terms of the position of the legitimate Parliament may truly become the subject of impeachment.

Generally the mechanism of confidence and non-confidence between the Government and the Parliament is known as a lever of the strong Parliamentary control in constitutionalism. While our changes make the opposite impression and establish the Parliament subordinated to the control of the Government. Article 81 IV is exemplary in this view according to which the Prime Minister is entitled to put the question of confidence of the Government on the basic draft laws prepared by it and pre-agreed with the President – on the State Budget, Tax Code and a procedure of the structure, authority and activity of the Government. In this case the issue of perfection of the draft law losses the point as far as mechanically applied rule is enforced: in case the Parliament does not declare the confidence to the Government, the President of Georgia shall dismiss the Government or dissolve the Parliament within a week (so that the time for consideration is limited on purpose). It can be said that the chance for rescuing the Parliament is minimal as the two first laws from the mentioned ones are submitted to the Parliament after the pre-agreement with the President.

Article 81[1] creates one more threat for the Parliament. After the approval of the Government with its full composition in case of renewal of the government by not less than 5 members, the President shall submit a composition of the Government to the Parliament for confidence within a week and not just the group of the new candidates. This mechanism might bear a special meaning so that with this fill make questionable the issue of confidence of the whole composition of the Government leading to the dissolution of the Parliament.

Changes Made to the Chapter VI – "State Finances and Control"

Nor did Para 3 of Article 93 escaped from the shortcoming that in case of non-approval of the state budget by the Parliament within a term established by the Constitution, the President - even if the procedure of impeachment is initiated against him/her – approves the state budget by a decree. Para 4 of the same Article is one more proof of the fact that the Parliament is transformed into the legislative chancellery. If to the issue of putting the question of confidence on the draft law on State Budget by the Prime Minister in Article 81 IV will be added the provision stating that "it shall be impermissible to make any changes to the draft budget without the consent of the Government" than the consideration becomes pointless and the President shall not have to dismiss anyone within a week term.

The calendar of budget procedure is clearly defined in the Constitution (Article 93 II). The Parliament appears to be "protected" by Para 6 through the following term so typical for our budget technology: If the Parliament fails to adopt the submitted budget in three months, the President of Georgia shall dismiss the Government or dissolve the Parliament. As it seems, the zero function of the given Article has dropped out from the attention of the legislator as the Constitution includes above-mentioned Article 81 IV and actual circumstances described around it.

However, all these changes are accompanied by the following, clearly-defined, interest in relation to the budget in particular – to exclude the participation of the Parliament from the process of adoption of the budget. Consequently, the country will have the budget adopted by the Parliament, frightened to be dissolved, for the purpose of its own welfare but it is not excluded that the country will have the budget not approved by the Parliament.

Generally, the practice of constitutionalism shows that the vital lever of the Parliamentary control over the activity of the Government is its participation in the budget procedures – whether it will be the activity of the Chamber of Control at the Parliament or review and approval of the draft budget and its progress report at the Plenary Session of the Parliament.

In short, the pressure of the constitutional rules on the Parliament is so high that if the latter wants to survive it has to "manage" to approve the draft budget by all means. Its function of control over the fulfillment of the state budget is nominal as well. The last part of Para 2 of Article 93 of the Constitution states that "in case of non-fulfillment of the State Budget the Parliament does not approve a report on the fulfillment of the State Budget, the President of Georgia shall consider the issue of liability of the Government and inform the Parliament on his/her founded decision". Like Article 59, in this case too, the Government "protects" its members by means of the "motivated" and "founded" decision. If it can be understandable in terms of the previous case – when the Prime Minister protects the members of the Government – the latter, in the given case, will justify himself and maintain the office as well. As far as the text of such "founded" decision is, as a rule, prepared by the Prime Minister.

The Essence of the Changes: Grounds and Result

In our opinion, one thing is obvious on the basis of article by article analysis – the tendency of the changes, not only on the level of the reviewed articles, shows that the influence of the persons viewed in the future as a governing team of the executive power within the composition of the group preparing the draft turned out to be determinative. Political situation of the country at that time opened the green light corridor to the given initiative. The dishonest majority of the old composition of the Parliament could not and did not try to protect impartially the interests of the Parliament within its competencies.

Actually, as a result of the changes adopted without debates the super-presidential authorities of the head of the state established under the Constitution of 1995 and current legislation were enlarged. The law-enforcement and military structures became directly subordinated to the President. The latter has subordinated judiciary power and took over the authorities of the Constitutional Court as well. Unlike the previous case the equality has been established between the legal and actual constitutions as the above said has been constitutionally formalized. Newly established Government of Georgia take the form of the buffer body of the President and the authorities of the Parliament have been limited to such extent that in many cases it exercises its own legislative activities under the pressure of the Government.

Venice Lesson

We had an opportunity to get familiar with Opinion (No. 281/2004) on the Draft Amendments to the Constitution of Georgia presented by the European Commission for Democracy Trough Law (Venice Commission), adopted on the Plenary Session of the Venice Commission on March 12-13, 2004, registered in Strasburg on March 15, 2004.

The amendments and changes made to the Constitution of Georgia are accurately presented in the opinion when it is mentioned that the set "intention has not been fully realized" through the given amendments" and the critical appraisal is following: "The proposed amendments do not really correspond to this model but often retain stronger powers for the President, enabling him to appoint a Government never approved by Parliament or to keep a Government other than in a caretaker function although Parliament had expressed its lack of confidence in the Government".

Such conclusion is based on article by article review of the constitutional amendments and certain comments. The fact is that the most part of our comments corresponds with the comments, proposals and recommendations of the Venice Commission. However there are given the several different comments in our conclusion as well. Besides, the certain part of them is reviewed on the level of the possible procedural deficiencies revealing more vividly the serious shortcomings of the performed constitutional reform and its incompliance with the chosen model; or as it is underlined in the Venice Commission's conclusion: "the system established by the proposed amendments does not seem fully coherent".

Going trough the whole given material it is impossible not to share the opinion of the Venice Commission which "considers that considerable further discussion and the refinement of the amendments before their adoption would be advisable".

It's a pity that such discussion did not precede the procedure of the adoption of the changes and amendments. Time goes on… constitutional deficiencies apply though their improvement seems improbable.