Analytical Review of Critical Remarks on the Constitutional Amendments

On October 15, 2010 the Parliament of Georgia adopted the draft Constitutional Law elaborated by the State Constitutional Commission. The amendments introduce considerable changes to the existing model of the state arrangement. Several analytical conclusions and comments have been published in the Georgian print press as well as on the official websites of the Georgian Parliament and Venice Commission.

It should be stressed that the number of critical remarks is rather high, and the criticism is often supported by strong scientific and logical arguments. Remarks have been addressed to almost all articles of the draft Constitutional Law. Special criticism was devoted to the system of government to be introduced by the constitutional amendments.

The present report reflects the basic remarks expressed by Georgian and international experts, politicians, as well as representatives of the civil society,[1] with particular emphasis on the conclusions of the Venice Commission.

1. Constitutional changes and the new model of state arrangement

Prior to analyzing particular norms designed to establish a new system of government, it seems important to clarify how this system fits with the general patterns of the government forms. This exercise has not only theoretical, but also essential practical importance. The model of the government system shall be taken into careful consideration in order to ensure adequate division of competencies among the state bodies – Parliament, President and Government/Prime Minister.

Several authors of conclusions on the Constitutional Law believe that the amendments are designed to establish a mixed system of government. Some authors call it a 'semi-presidential model',[2] 'semi-parliamentary system'[3] or 'mixed system complemented with several elements of

[1] The following publications were applied for the preparation of the present analytical review: CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the constitution of Georgia – Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010); CDL(2010)062 Draft Opinion on the Draft Constitutional Law on the changes and amendments to the Constitution of Georgia (S. Bartole, A. Nussberger, J.-C. Scholsem, J. S. Sorensen, R. Hertzog); CDL-AD(2010)008 Opinion on the Draft Constitutional Law on changes and amendments to the Constitution of Georgia (Chapter VII - Local Self-Government) adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010); Venice Commission: Second revised draft opinion on the draft constitutional law on amendments and changes to the constitution of Georgia (http://www.venice.coe.int/docs/2010/CDL(2010)062rev2-e.asp); Venice Commission: Preliminary comments of the group of experts working on the baseline draft Constitutional Law on Amendments and Supplements to the Constitution of Georgia adopted at the plenary session of the State Constitutional Commission of Georgia on 11 May 2010 (as of 5 July 2010); Georgian Young Lawyers' Association, Comments on the draft Constitutional Law (http://gyla.ge/attachments/808_File1676.PDF); Prof Dr. Wolfgang Babek, Summary of the Berlin Conference on the Constitutional Reform in Georgia (http://www.parliament.ge/publicdebates/articles.html); Wolfgang Babeck, Third volume of Comments to the Revision of the Georgian Constitution and the work of the State Constitutional Commission of Georgia, 23 June 2010; Gia Nodia, A Step Towards Democracy (http://www.parliament.ge/publicdebates/articles.html); George Kakhiani, Opinion on Several Issues of the Draft Constitutional Law (http://www.parliament.ge/publicdebates/articles.html); Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law (http://www.parliament.ge/publicdebates/articles.html).

[2] Levan Bodzashvili, Presidential Competence as of a Supreme Representative of the State in Foreign Relations According to the Draft Constitutional Law (http://www.parliament.ge/publicdebates/articles.html).

the parliamentary model.'[4] It has been stated during the public debate that the draft Constitutional Law 'provides establishment of a mixed system of government, as it comprises elements of, both, presidential and parliamentary models.' Such conclusion cannot be accepted, as the mixed system is not a simple compilation of the elements of presidential and parliamentary models: it is an independent system, which is characterized by its unique internal structure and institutional features.

Relevance of the discussion makes it clear that the constitutional amendments provide for establishment of an unusual government system. Generally, it seems difficult to share the opinion of those authors who consider the new system of state arrangement as a mixed model. As widely known, the theory of constitutional law acknowledges three classical models of state governance – presidential republic, semi-presidential (mixed) republic and parliamentary republic. The general analysis of the **Constitutional Law shows that it is not focused on establishing the semi-presidential (mixed) republic in Georgia**: in the context, where the President is not considered as a leader (or one of the leaders) of the executive power, the new constitutional arrangement may not be considered semi-presidential (mixed) model as such. As the Prime-Minister is to take a personal leadership on executive authorities acting as its exclusive leader, the present model is not characterised by the key feature of the semi-presidential system – dualism of the executive powers.[5]

Considering the fact that the Constitutional Law essentially limits the competencies of the president and executive authorities are exclusively vested in the government to be formed by the parliament, the new system is most similar to the parliamentary republic. However, ***the constitutional amendments have certain peculiarities that are unusual for a classical model of the parliamentary republic.*** In particular, the role of the Parliament is extremely diminished in controlling the activities of the Prime Minister and the Government. Instead, political positions of the Prime Minister are inadequately strengthened.

Considering these facts, Georgian experts and politicians quite often use the terms such as 'prime-ministerial republic" or "super-prime-ministerial republic" to describe the new system of government.[6] These terms are aimed to effectively highlight the imbalance between the Parliament and Prime Minister under the constitutional amendments.

In the following chapters specific critical remarks on the status and competencies of the President and Government and the procedures of the vote of confidence and no-confidence will be analysed. These remarks are thought to confirm the imbalance and inadequate distribution of competencies among different bodies of state authorities.

2. Status and competences of the Prime Minister and President

---

[3] George Kakhiani, Opinion on Several Issues of the Draft Constitutional Law.

[4] Such statements were made by the members of the State Constitutional Commission and other speakers at the meetings held in the framework of the Public Debate.

[5] See M.S. Shugart, Semi-Presidential Systems: Dual Executive and Mixed Authority Patterns, 2005; J. Blondel, Dual Leadership in the Contemporary World: A Step Towards Regime Stability? In Comparative Government and Politics: Essays in Honor of S.E. Finer, ed by Dennis Kavanagh and Gillian Peele. Boulder, Col.: Westview Press, 1984.

[6] Such statements were made by the leaders of Our Georgia – Free Democrats, Democratic Movement – United Georgia and other political parties.

As mentioned above, the constitutional amendments are to establish the (quasi)parliamentary model of the state governance. Accordingly, the ***status and authorities of the Prime-Minister will be considerably strengthened under the new amendments:***

- The Prime-Minister is the head of executive power and the political leader of the state;
- The Prime-Minister, solely, without consent of the President can appoint and dismiss the members of the Government. After receiving the vote of confidence, the appointment and dismissal of the ministers are not the subject to the Parliament's approval;[7]
- Raising the issue on responsibility of a Minister by the Parliament does not oblige the Prime Minister to dismiss that particular member of the Government from his/her office;
- The Prime Minister is authorized to request the Parliament to ensure unscheduled discussion of the draft laws initiated by the Government;
- In several cases the acts issued by the President need the countersignature of the Prime Minister. At the same time, the countersigning of the acts by the Prime Minister does not require the Government's consent.

Under the new model, **the President does not enjoy the constitutional status and competencies of a political leader of the state**:

- The President is no longer a part of executive power, and he/she is basically equipped with competencies, which are usual for the heads of parliamentary republics;
- The role of the President in forming the government is rather formal;
- The bodies of the executive power are not subordinated to the President;
- The President is not equipped with the right to perform legal supervision over the legal acts issued by the Government and other executive agencies;
- There is no need for Government to obtain President's consent for submitting the draft budget law to the Parliament;
- The President exercises only those authorities that are prescribed by the Constitution (and not by the Constitution and law).

On the other hand, **the President is granted certain authorities, which are rather unusual for the heads of parliamentary republics.** Incompliance of the Presidential responsibilities with the new system of government have lead to critical remarks expressed by the Venice Commission on the President's competencies in the field of foreign relations:[8]

- **According to the amendments to be made to Article 73/1/a of the Constitution, the President shall "negotiate with foreign states and conclude international conventions and agreements with the consent of the Government."** Firstly it should be mentioned that, generally speaking, the presidents of the parliamentary republics have no wide authorities in conducting negotiations with foreign states and concluding international

[7] For critical remarks see Georgian Young Lawyers' Association, Comments on the draft Constitutional Law; Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

[8] See CDL(2010)062 Draft Opinion on the Draft Constitutional Law on the changes and amendments to the Constitution of Georgia (S. Bartole, A. Nussberger, J.-C. Scholsem, J. S. Sorensen, R. Hertzog); CDL-AD(2010)008 Opinion on the Draft Constitutional Law on changes and amendments to the Constitution of Georgia (Chapter VII - Local Self-Government) adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010); Venice Commission: Preliminary comments of the group of experts working on the baseline draft Constitutional Law on Amendments and Supplements to the Constitution of Georgia adopted at the plenary session of the State Constitutional Commission of Georgia on 11 May 2010 (as of 5 July 2010).

conventions and agreements on the basis of such negotiations. The head of state, having neither direct, nor indirect authority over the Ministry of Foreign Affairs, is not capable to lead effective negotiations with foreign states. The President will not be able to assign certain tasks to the aforementioned governmental agency, and in such situation the need to grant the President's administration inadequate administrative resources will definitely emerge. Furthermore, Article 73/1 strengthens exclusive authorities of the President. Therefore, assigning the President to negotiate with foreign states and sign international conventions and agreements automatically deprives the government from this particular competence. It becomes rather vague how the government may be considered responsible for implementation of the state's foreign policy in the given context (see Article 78/1). Bearing in mind the effective authorities of the President in the field of foreign affairs another provisions of the constitutional amendments can be found problematic, according to which "the President of Georgia represents Georgia in foreign relations" and "Prime Minister and Ministers represent Georgia in foreign relations within the scope of their competence." The Constitution is not precise to show who (the President or the Prime Minister) shall represent Georgia in such forums as, for example, the summit of the European Union (due to ambiguity of the constitutional norms this issue had become the subject of serious confrontation between the President and the Prime Minister in Poland). In order to prevent possible conflicts, this issue must be clearly regulated under the Constitution.

Such mismatch of competencies provides a breeding ground for conflicts between the President and the Prime Minister. Considering this fact, it seems highly reasonable that the Venice Commission recommends providing adequate and clear separation of their competencies in the field of foreign relations.

It should be stated that the authors of the draft Constitutional Law as well as representatives of the Georgian government quite often incorrectly interpreted respective recommendations of the Venice Commission experts. They frequently mentioned that the commission suggested to weaken the strong president's institute to be established by the constitutional amendments. In reality, the Venice Commission recommended to dispense the president from those responsibilities, which he/she cannot exercise with his/her own responsibility either. Consequently, the Venice Commission did not aim to weaken the president's authorities, but it recommended to bring his/her competencies in compliance with the (quasi-parliamentary) system of government to be established under the constitutional amendments.

3. The procedure for the vote of confidence to the Government

Georgian and international experts expressed critical remarks on the procedure for the vote of confidence to the Government. Particular attention was paid to particular problematic aspects of this procedure:

- ***The terms of procedure for the vote of confidence are questionable***.[9] According to the amendments this procedure may last 102 days thus encouraging serious threats of political

[9] Georgian Young Lawyers' Association, Comments on the draft Constitutional Law.

crises.[10] The candidate to the position of the Prime Minister, who failed to get the vote of confidence for the composition of the Government submitted by him/her, is entitled to submit the same or the new composition of the Government to the Parliament for getting the vote of confidence within 30 days, and the number of such attempts is not limited. The President is authorized to nominate a new candidate to the Prime Minister only after expiration of the 30-day term. In order to simplify the procedure for the vote of confidence it is necessary to introduce certain restrictions to the date of submission of the Government's composition by the Prime Minister, and also to fix the maximum number of submissions. It's worth mentioning that such long term for the procedure for the vote of confidence is not provided for under any constitution of the democratic states;

- ***The norm of the Constitutional Law, which states that first the President shall nominate a candidate for the Prime Minister's position proposed by the political group with the best results in the parliamentary elections, raises particular concerns.*** The following hypothetical case is the best illustration of the problem which may emerge from the said norm: *one party got 40 per cent of votes in the parliamentary election achieving the best results, but its political orientation is not acceptable for other political forces that got the seats in the Parliament. At the same time the parties that obtained the second and the third best results together possess 60 percent of mandates, and they agreed upon announcement of the election results to set up parliamentary majority and nominate the joint candidate for the Prime Minister's position. In such case, although it is clear from the very beginning who will become the Prime Minister, the parliamentary majority shall wait about a month and a half for the procedure for the vote of confidence for the candidate nominated by the party with the best results, even so this candidate is deemed to failure.* It is not clear why the Government approved by the Parliament of a previous convocation shall perform its duties during a month and a half, when a simple procedure of a few days may secure formation of the new Government;

- ***The wording – "political group with the best results" – lays the ground to the dual interpretation.*** It is not clear which electoral subject should be considered as such group – the group which has shown the best results in the elections by proportional system or the group that obtained the greatest number of the mandates in proportional and majoritarian elections. In case of collision it may become the subject of dispute;

- ***Unlimited competencies of the prime minister with regard to dismissal and appointment of the government members raises particular concerns of the Venice Commission, Georgian experts and politicians.***[11] Given the context, where the Prime Minister is authorized to dismiss and appoint the new ministers at any time without the Parliament's consent, the procedure of voting for confidence to the Government lacks reasonable grounds (in case the Prime Minister is granted full freedom in recomposing the government, logically, the parliament shall express confidence to the Prime Minister, and not to the government). It would be worth to retain in the Constitution the current norm, according to which in case of renewal of the composition of the Government by one third,

[10] See CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the constitution of Georgia – Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010); Georgian Young Lawyers' Association, Comments on the draft Constitutional Law.

[11] See CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the constitution of Georgia – Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010); Georgian Young Lawyers' Association, Comments on the draft Constitutional Law; Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

but not less than 5 members of the Government, the latter needs the vote of confidence by the Parliament. In such case, further legal consequences of the procedure shall be clearly defined.

4. The Procedure for declaring no-confidence to the Government by the Parliament

Particular criticism of the Venice Commission as well as Georgian experts and politicians was addressed to the extremely complicated procedure for declaring no-confidence to the Government,[12] which enormously strengthens the Prime Minister's positions. Authors of critical remarks pay special attention to the following aspects of the said procedure:

- ***According to the amendments, the question of declaration of no-confidence shall be raised by 2/5 of the total number of the members of the Parliament.*** It should be mentioned that this norm has no analogue, as 1/4 of the members of the Parliament is the highest requirement in the Constitutions of the states with traditional democracy (Spain, Italy – 1/10; Slovenia – 10 MPs out of 90; Greece – 1/6; Austria, France, Bulgaria, Estonia, Slovakia, Hungary – 1/5; Germany, Romania – 1/4; none of democratic countries have higher requirement; Belgium, Denmark, Japan, Lithuania and Sweden have no such requirement in their Constitutions at all).

- ***It is not clear why raising the issue of no-confidence needs separate voting***.[13] Such needless component of the procedure may not be found in the Constitutions of any state with traditional democracies;

- **The terms of procedure for declaring no-confidence raise particular concerns of the Venice Commission, experts and politicians**.[14] Completion of the no-confidence procedure requires at least 40 days that is inconsistent with the logics of the constitutional law. Such long terms are not required by the Constitutions of the democratic states (according to the Spanish Constitution not less than 5 days shall pass from the date of raising the issue to the date of final voting; in Italian, Hungarian and Romanian Constitutions this term amounts 3 days; in the constitutions of Germany, Belgium, Estonia, Greece and Slovenia– 2 days; in the constitutions of Austria, Bulgaria, Denmark, Japan, Lithuania, Slovakia and Sweden such terms are not determined at all; the longer terms are not established by any of the constitutions of the traditional democratic states). The 50-day term provides the Prime Minister with the possibility to make mercantile deals in order to retain his/her position. The Constitution should be aimed to prevent such practices instead

[12] See CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the constitution of Georgia – Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010); Georgian Young Lawyers' Association, Comments on the draft Constitutional Law; Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

[13] See CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the constitution of Georgia – Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010); Wolfgang Babeck, Third volume of Comments to the Revision of the Georgian Constitution and the work of the State Constitutional Commission of Georgia, 23 June 2010.

[14] See CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the constitution of Georgia – Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010); Wolfgang Babeck, Third volume of Comments to the Revision of the Georgian Constitution and the work of the State Constitutional Commission of Georgia, 23 June 2010; Georgian Young Lawyers' Association, Comments on the draft Constitutional Law; Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

of encouraging them. ***Justified irony is expressed in the statement of Prof. Wolfgang Babeck, speaker of the Berlin Conference, who mentioned while analyzing the procedural terms that 'the provision like the draft article 81 must not have the objective to protect the Prime Minister; it has instead the aim to protect Georgia' (!!!);***[15]

- According to the constitutional law ***the procedure on declaring no-confidence to the Government is carried out on the basis of the so called constructive vote of no-confidence***, i.e. together with declaring no-confidence to the current composition, the Parliament grants the confidence to the new composition of the Government. However, it should be mentioned that the proposed procedure does not comply with the traditional model of the constructive vote of no-confidence: a) ***within the context of the constructive vote of no-confidence the candidate of the new Prime Minister should be nominated by the initiator of the no-confidence procedure***. However, according to the amendments the candidate shall be nominated by the 2/5 of the members of the Parliament, which even gives the possibility to nominate two different candidates; b) ***declaring no-confidence to the Government and declaring the confidence to the new composition of the Government (and not to the new candidate to the Prime Minister's position) shall be an unified procedure, and this decision shall be taken through the single voting***. Unfortunately the authors of the constitutional law do not take into account this requirement of the established formula of the constructive vote of no-confidence either; c) ***the only result of declaration of the no-confidence must be the resignation of the Government***;

- ***The Constitutional Law envisages the possibility of applying the right to "veto" to the constructive vote of no-confidence***, which has no analogue in the constitutional practice of the western democratic countries.[16] It should be taken into consideration that the rules applied for a certain decision and those applied for the opposite one shall be one and the same. According to this axiomatic rule of jurisprudence, in case the Parliament expresses confidence to the government independently, without active participation of the president, also the no-confidence shall be purely parliamentary decision, without President's intervention. The principle of 'parliamentary government', a characteristic of parliamentary republics, calls for such solution of this issue;

- Another improper norm is that ***3/5 of the parliament members shall vote for the no-confidence in order to overrode the President's veto***. Declaring the confidence or no-confidence to the Government is a decision, which shall be adopted by the parliamentary majority and it always finds reflection in the absolute majority of the votes!!![17] Solution proposed in the Constitutional Law is in a clear confrontation with the principles and the logics of the constitutional law;

- ***The problem with regard to terms is important also after the implementation of the President's veto right***. Completion of the said procedure is possible at least within 15 days. Accordingly, in case of application of the veto right by the President, the procedure of no-

[15] Wolfgang Babeck, Third volume of Comments to the Revision of the Georgian Constitution and the work of the State Constitutional Commission of Georgia, 23 June 2010.

[16] For critial remarks see Wolfgang Babeck, Third volume of Comments to the Revision of the Georgian Constitution and the work of the State Constitutional Commission of Georgia, 23 June 2010.

[17] See Michael Sachs (Hrsg.), Grundgesetz: Kommentar, 5. Aufl., München 2009, S. 1465. See also Constitutions of Germany, France, Spain, Italy, Greece, Austria, Sweden, Denmark, Finland, Belgium, Estonia, Lithuania, Hungary, Romania, Bulgaria, Slovakia, Slovenia and Japan.

confidence will last not less than two months, which may turn the parliamentary process into severe political crisis.

It's worth to mention that the simple procedure for declaring no-confidence to the Government is a compulsory element of the parliamentary republic. Otherwise the imbalance will emerge between the Parliament and the Government, thus compromising the constitutional principle of the division of power.

Finally, it has to be underlined that the proposed model of the vote of no-confidence is formulated in violation of the recognized doctrines and principles of constitutional law and it is inadmissible to introduce it in the present shape into the text of the Constitution!

In its final conclusion on the draft Constitutional Law the Venice Commission has strictly criticised the procedure of no-confidence and underlined that respective provisions of the draft amendments contradict to the fundamental constitutional principle of the division of powers. Following this conclusion, the Venice Commission called for substantial improvement of the procedure: ***"The vote of no-confidence is defined in such a way as to make it nearly impossible to remove the Prime Minister [...] In the Venice Commission's view, the rules on the motion of no-confidence should be reconsidered and revised. There does not appear to be any need for an initial vote to "launch" the procedure of no-confidence; there should be only one vote. The requirement under Article 81 paragraph 4 (second proposal by parliament of the same candidate with three-fifths of the votes) does not really fit into the general scheme of division of power. It is not logical to require the support of two fifths of the MPs for the Prime Minister, but to demand three fifths in order to overcome a Presidential veto raised in the no-confidence procedure. This gives too much power to the President and diminishes not only the power of parliament, but also the political responsibility of the Prime Minister that should be a corner stone in the new system. The Venice Commission notes that in the second reading only one improvement has been made: the time-frame of the procedure has been reduced, which is a positive development although an insufficient one."***[18]

5. Declaring no-confidence to the Government in relation to the draft law initiated by the Government

According to the Constitutional law, the Prime Minister is entitled to raise before the parliament the question of confidence to the Government in relation to the draft law initiated by the Government. The Parliament shall discuss the question of confidence to the Government on the basis of one hearing within 14 days after the question has been raised. In case the Parliament fails to adopt the draft law, it faces a serious threat to be dissolved.

This norm of the amendments raises serious concerns of the experts and politicians.[19] With exercising this procedure ***the Prime Minister grossly violates the Parliament's domain thus compromising the fundamental constitutional principle of the division of powers***.

[18] CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the constitution of Georgia – Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010).

[19] See Georgian Young Lawyers' Association, Comments on the draft Constitutional Law; Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

It is interesting that in the course of this procedure, ***in order to avoid adoption of undesirable law the Parliament is obliged first to vote for confidence, and then declare the no-confidence – which seems absolutely irrational and unreasonable***.

As mentioned above, upon request of the Government the Parliament shall discuss the draft law within 14 days, through one hearing. **Discussion of the draft law within a limited timeframe and through the one-step procedure deprives the Parliament from the possibility of proper consideration, which also should be assumed as unjustified restriction of the legislative competence of the Parliament**.

It should be mentioned that according to the Constitutional Law the Prime Minister is entitled to link the question of confidence to any draft law initiated by the Government, including the law on the state budget. **It is absolutely unreasonable to adopt the law on the state budget within the timeframe of 14 days**.

Finally, the last paragraph implies the norm, which is absolutely inconsistent with the rule of law principle. Namely, ***in case of not declaring no-confidence to the Government, the draft law shall be deemed to be adopted. The given norm is compromising the legislative authorities of the parliament and grossly violates the fundamental requirements of the principle of the division of powers***.

In general, ***when analyzing this procedure it should be underlined that similar procedure cannot be found in any Constitution of the democratic states***. In the countries where the Government is entitled to establish direct link between the draft law and the question of confidence, the only outcome of non-adoption of the law is the resignation of the Government (Estonia, Slovenia; in Slovakia the President can dissolve the Parliament only if less than three months have passed since the voting for confidence to the Government; in Germany there is a very simple procedure for avoiding the dissolution of Bundestag – the parliament shall elect the new Prime Minister). Such approach is dictated by the need to protect the legislative authorities of the Parliament and guarantee the principle of the division of powers.

6. Changes related to the judiciary

The Constitutional Law provides lifetime appointment of judges at the common courts. In the western countries such practice plays a positive role in strengthening the independence and impartiality of the judiciary. However, in the opinion of certain Georgian experts, in the circumstances where the system of common courts enjoys very low public confidence, introduction of the lifetime appointment of judges could be assumed as immature decision.[20] Moreover, it should be mentioned that in the Georgian legislation there are certain alternative possibilities to have influence over judges.[21] Unfortunately, regardless the experts' recommendations, there are no special safeguards against such alternative mechanisms of influence guaranteed in the Constitution.

[20] Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.
[21] Georgian Young Lawyers' Association, Comments on the draft Constitutional Law.

Georgian and foreign experts criticized the 3-year probationary period for judges.[22] It is stated in the conclusions of the Venice Commission and Georgian experts that such period can be effectively used by the executive authorities to exercise pressure on judges and infringe upon their independence.

Besides, Venice Commission and Georgian experts criticized the amended rule for electing the President of the Constitutional Court.[23] Under the Constitution in force the President of the Constitutional Court may not be re-elected after his/her term in office has expired. Such restriction is an effective mechanism to make the position of the President of the Constitutional Court free from the political burden to the maximum extend. Unfortunately, such restriction will be removed from the Constitution through the constitutional amendments.

7. Critical notes about other norms of the Constitutional Law

Experts and politicians have paid particular attention to several other problematic norms of the constitutional amendments:

Although ***some positive changes have been introduced to Article 21 of the Constitution***, unfortunately it is not defined that deprivation of property is admissible only with appropriate compensation relevant to the market price.[24] The wording – "fair reimbursement" leaves room for ambiguous interpretation, which raises reasonable concerns of experts and politicians. Furthermore, the norm stating that restriction of the right to property shall be permissible "so that the nature of the property right is not infringed" is rather unclear. Infringement of the nature of the right is the most extensive violation of a human right. Restriction shall be considered unjustified in any case, when the principle of proportionality is violated;

According to the first version of the draft, ***persons with double-citizenship were not allowed to hold the state-political position***. However, ***after changing the said norm, such restriction extends only to the President, Prime-Minister and Chairman of the Parliament***. Authors of critical remarks consider that the aforementioned list shall be extended and the persons with double citizenship may not hold the position of the member of the Government as well as other important state-political offices;[25]

Georgian experts and politicians are concerned about the fact that negative amendment touched the Article 56/2.[26] ***According to the amendment, the decision on establishment of the investigation or other temporary commissions shall be adopted not directly at the request of one fourth of the parliament members as envisaged by the initial version of the Constitution, but by the***

[22] See Wolfgang Babeck, Third volume of Comments to the Revision of the Georgian Constitution and the work of the State Constitutional Commission of Georgia, 23 June 2010; Georgian Young Lawyers' Association, Comments on the draft Constitutional Law.

[23] See Wolfgang Babeck, Third volume of Comments to the Revision of the Georgian Constitution and the work of the State Constitutional Commission of Georgia, 23 June 2010.

[24] See Wolfgang Babeck, Third volume of Comments to the Revision of the Georgian Constitution and the work of the State Constitutional Commission of Georgia, 23 June 2010; Georgian Young Lawyers' Association, Comments on the draft Constitutional Law; Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

[25] See Georgian Young Lawyers' Association, Comments on the draft Constitutional Law; Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

[26] See Georgian Young Lawyers' Association, Comments on the draft Constitutional Law; Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

parliamentary resolution, i.e. by majority of the parliament members. This which negatively affects the rights of the parliamentary minority;

The norms regulating the President's competences have several substantial confrontations with the new status of the President: a) it's hard to understand why the new President shall make a programme speech before taking up office when he/she is not equipped with the executive authorities (see Article 71/1); b) it is not justified for the President to submit to the Parliament annual report on the most important state issues. The President, as a neutral arbiter, shall not assess the state of the country as the said report is actually assessment of the Parliament's and the Government's activities (see Article 73/5); c) several experts and politicians consider that it shall be inadmissible for the President with the function of an arbiter to be the member of a political party (see Article 72);[27]

Constitutional amendments determine additional requirements to the candidates to be elected as the President (Article 70/2). Namely, a person may run in Presidential elections if he/she has resided in Georgia for 3 years for the election day. It's rather confusing why the persons who, for instance, worked in the diplomatic mission of Georgia in abroad should be deprived the right to participate in the presidential election as a candidate. It should be noted that the Georgian Electoral Code gives the strict distinction to the notions of 'living' and of 'registered at the consulate'. This is clear evidence that the said norm of the amendments provides the possibility to make at least a dual interpretation of this provision;

While speaking about the political role of the Prime Minister, attention should be paid to the norm, which provides the ***President with the authority to request the consideration of certain issues by the Government and to participate in its sitting.*** It should be underlined that the Government sitting attended by the President will be chaired by the Prime Minister. Proceeding from the aforementioned there is a real threat that the Prime Minister may use this event for demonstrating the secondary political role of the President. Therefore, the said provision of the constitutional law requires considerable modification;

According to the amendments, ***in case of pre-term termination of the Prime Minister's office, before formation of the new Government, the President assigns the task of the Government to the Government of the previous composition*** (Article $80^1/2$). It is vague how the previous Government may fulfil the tasks of the Government if, for instance, the Prime Minister died and the Deputy Prime Minister hadn't been nominated by him/her. The Government cannot operate without the head of the Government – the Prime Minister;

Attention should be paid to another shortcoming of the constitutional law, which is related to the status of the Prime Minister. According to Article 76 of the Constitution, in ***case of pre-term termination of the President's office, the Chairperson of the Parliament shall exercise the responsibilities of the President of Georgia, whereas in case of the Chairperson of the Parliament is unable to discharge the authority of the President of Georgia, as well as if the Parliament is dissolved the Prime Minister shall exercise the responsibilities of the President***. It is not reasonable for the head of executive power to be kept away from exercising his/her own executive competences for conducting rather modest duties of the acting President. Such approach is not consistent with the new model to be introduced by the constitutional law;

[27] See Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

Although constitutional amendments provide for introduction of a special chapter on local self-government, the Venice Commission and Georgian experts expressed their dissatisfaction with the fact that respective amendments ***do not provide effective guarantees for the protection of the principle of local self-government in Georgia***.[28]

According to the Constitutional Law ***the executive branch is represented by State Envoy – Governor in the administrative-territorial units of Georgia***. On the basis of this provision the Governor may be understood as an official authority similar to the French Prefect, whose competence extends over the specific administrative-territorial units. Given this fact for the purposes of better clarity the different definition for the status of the Governor would have to be elaborated in the Constitution. Unfortunately ***the Constitutional Law contains no determination of the major competencies of the Governors***.[29] It is inadmissible to keep the authorities of the government officials, which are *de facto* exercising effective de-concentrated governance in the regions, outside of the constitutional regulation. Taking into account the aforementioned, the given article deserves serious criticism.

Several critical remarks have been addressed to the norms regulating the budgetary issues (Article 93 and 94): 1) Article 93 states, that: ***the bill that may entail increase of expenditure of the state budget, decrease of revenues or new financial undertakings may be adopted by the Parliament only with the consent of the Government***. This norm gives the rise to questions. This kind of preventive veto by the Government runs counter to the constitutional principle of the division of powers (in addition, it should be stated that the legal nature of 'consent' is rather unclear). It would be reasonable for the Government to use alternative tools and link the bill with the vote of confidence (see above); 2) Clarification is necessary for another provision, according to which: ***if the Parliament fails to approve the presented budget within 3 months, the last year budget shall cover the expenses necessary to carry out the Government's obligations undertaken earlier***. The provision similar to the valid norm from the Budget Code should be reflected in the Constitution, according to which the spending institutions – in case of non-approval of the budget – shall receive allocation in the amount of 1/12 of the last year budget on a monthly basis; 3) In the Constitution Article 94/3 is removed, which ***allowed to bear the costs from the state treasury only in the cases prescribed by law***. Although the current norm of the constitution has certain shortcoming, its full deletion from the Constitution is not appropriate. The constitution should determine that bearing the costs from the state treasury shall be permissible only on the basis of the law on the State Budget; 4) Last, international experts stated that it would be reasonable to broaden the budgetary competencies of the Georgian Parliament and entrust the legislative body with the responsibility to make amendments to the draft budget law.[30]

8. Restriction of former President's right to become the Prime Minister

[28] See CDL(2010)017 Draft Constitutional Law on changes and amendments to the Constitution of Georgia -Chapter VII Local Self-Government; CDL-AD(2010)028 Final opinion on the draft constitutional law on amendments and changes to the constitution of Georgia – Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010); Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

[29] See Vakhtang Khmaladze, Zurab Jibgashvili, Commentary on the Amendments and Supplements to the Draft Constitutional Law.

[30] See Prof Dr. Wolfgang Babek, Summary of the Berlin Conference on the Constitutional Reform in Georgia.

On the proposal of one of the Georgian political parties, the issue of restriction of the former President's right to become the Prime Minister has been discussed.[31] It should be mentioned that introduction of such restriction would not violate any legal principles. ***After transforming the presidential system into a parliamentary republic the president would become the Prime Minister only in a country, where the political majority suffers under an essential lack of the political culture*** (Prof. Wolfgang Babeck mentioned at the Berlin Conference that he had 'the utmost confidence in the current President and his/her responsibility not to run immediately for the office of the Prime Minster.' This statement can be understood as an implication of his strictly negative attitude to such possible 'move'). It would be reasonable and justified to ensure protection of the Georgian people from negative effects of such possible lack of culture by an effective constitutional provision.

9. Enactment of the Constitution

According to the Constitutional Law, the constitutional changes ***will come into effect after the presidential elections of October 2013***, except provisions with regard of preamble, local self-government, fundamental rights, parliamentary commissions and judicial power. As the constitutional amendments essentially affect the competencies of the President, Parliament and Government, and taking into consideration the requirements of the popular mandate, it would be reasonable to provide their enactment along with holding simultaneous parliamentary and presidential elections. For this purpose, ***enactment of the amendments had to be linked with the parliamentary elections of 2012, and the presidential elections had to be held at the same date***. It should be taken into consideration that the Parliament was not in the position to shorten the term of the mandate granted to the President by the people; however, the president could show respective political will and sign the draft constitutional law, which would ensure easy solution of this legal problem.

10. Critical remarks on the process of elaboration and adoption of the constitutional amendments

The process of elaboration and adoption of the constitutional amendments became the subject of criticism of the Georgian opposition parties, Georgian Young Lawyers' Association, other non-governmental organizations and the Venice Commission. The criticism concerned with the activities of the State Constitutional Commission, the process of the public debate and the parliamentary hearings of the draft law.

Special criticism was addressed to the public debate, which took place in August, which is the politically most passive period of year. Politicians and experts expressed their discontent also with regard to the structure and content of the public debate. Majority of meetings organized in the framework of this procedure were lead by the Chairman of the Parliament, and they were not conducted in a sufficiently interactive manner. Particular participants of the meetings were granted an opportunity to express a single opinion or ask a single question during the events. Such format failed to create suitable environment for productive debate on the constitutional amendments.

[31] This initiative has been discussed at the Berlin Conference. See Prof Dr. Wolfgang Babek, Summary of the Berlin Conference on the Constitutional Reform in Georgia.

The Venice Commission, Georgian experts and opposition parties expressed their particular concerns regarding the fact that the Parliament passed the draft amendments by the third hearing on the same day, when the final conclusion of the Venice Commission was proclaimed. It was completely incomprehensible for the opponents why the Parliament was seeking for rapid adoption of the draft law, the basic norms of which were intended to be enacted in autumn 2013. The experts and opposition parties reasonably doubted that the government accelerated the process in order to avoid reflection of the Venice Commission's essential critical remarks in the amendments.

It should be noted that after holding the public debate and consultations with the Venice Commission the parliament reflected several critical remarks in the draft constitutional law passed by the second hearing:

- The norm regulating the right to property has been partially improved;
- President's right to hold a position in a political party has been eliminated;
- President's right to initiate bills has been eliminated;
- Several competencies in the field of foreign policy and defense have been dispensed from the President;
- References on the Organic Laws were maintained in the Constitution;
- The norm depriving the parliament members of the right to apply with a question to the executive authorities of territorial units has been removed from the draft Constitutional Law;
- The terms of the no-confidence procedure have been slightly revised.

Unfortunately, these limited improvements cannot provide solution of the key problems accentuated by the Venice Commission, Georgian experts and politicians.

On the day of adoption of the constitutional amendments, the President of Georgia made the following statement to journalists: "Now I have received SMS on my mobile phone. I will translate it for you now. The Secretary General of the Venice Comission – I want to say this for the information of some internal Unbelieving Thomas – Mr. Markert stated that especially after having carried out a comprehensive review by the Venice Commission, the Commission is ready to state that the new wording of the Constitution of Georgia fully, again – fully complies with the European tradition. This is the conclusion. Now they can say what they want." It is questionable why Mr. Markert confirmed the full compliance of the draft amendments to the democratic standards, whereas the new model of government established under the constitutional amendments was essentially criticized in the final conclusion of the Venice Commission later on. Unfortunately, the Venice Commission has not commented on the above statement of the Georgian President.

While analyzing the process of elaboration and adoption of the constitutional amendments, attention should be paid to the procedural irregularities that were to be identified during and after the parliamentary hearings. According to the Georgian legislation, any legislative act shall be adopted by three hearings. After the second hearing only the editorial changes can be made to the draft. The Parliament heavily violated this requirement of the legislation while adopting the constitutional amendments. After the second hearing:

- Parliament decided to cancel the norm of the draft amendments, according to which the current expenditure for the President of Georgia in the State Budget comparatively to the amount of budgetary means of the previous year was allowed to be reduced only by the President's consent. By removing this guarantee, the legislative body reduced the autonomy of the President to the minimum and essentially diminished President's opportunity to effectively balance the power of the Prime Minister;

- the citizenship and residence qualifications for the candidates to the President's office were simplified;
- the norm providing the Government with the opportunity to step back on its initiative was removed from the Constitution;
- amendment was made to the draft, according to which the proposal of the Parliament, Government or 200 thousand voters does not require the President to call referendum;
- competencies of the National Bank of Georgia were essentially revised.

Furthermore, attention should be paid to the fact that the draft adopted by the Parliament of Georgia on 15 October was promulgated only on 5 November 2010. According to the Georgian Constitution, the adopted legislative draft shall be submitted to the President within 7 calendar days after its adoption, and the President shall sign and promulgate it within 10 calendar days. Consequently, the draft law had to be promulgated on 1 November 2010 at the latest.

It should be stressed, that according to the Georgian legislation the legal acts adopted with procedural irregularities are invalid. In general, such heavy violation of the procedures while adopting the constitutional amendments can be considered as a consequence of indifferent attitude of the government towards the phenomenon of constitution.

Last, attention should be paid to the fact that the draft constitutional law, which provided essential revision of the present form of government, was submitted along with a three-page explanatory note to the Parliament. The note failed to provide any valuable information about the goals and aims of the constitutional amendments, and it did not explain the meaning of particular norms and new legal institutes established under the amendments (for example, the explanatory note did not explain the meaning of countersignature, which leaves a room for multiple interpretation of this legal institute). Also this fact can be evaluated as another consequence of indifferent approach of the legislative body towards the constitution.

11. Crucial remarks reflection of which is crucial for the protection of the principles of democracy, rule of law and division of powers

After having reviewed all essential remarks addressed to particular provisions, the following recommendations of crucial importance can be highlighted, which should necessarily (!!!) be reflected in the constitutional amendments in order to avoid violation of the fundamental constitutional principles of democracy, rule of law and division of powers:

The imbalanced system of government should be revised and transformed into one of the classical models of state arrangement (presidential, semi-presidential or parliamentary). In general, it should be mentioned that introduction of a non-classical, controversial system of government is the biggest threat to the democracy. ***The control competences of the Parliament need to be strengthened*** in order to make the presented parliamentary model fit to the classical pattern and to eradicate imbalanced relations between the different branches of power. The parliamentary model with such a weak parliament bears the serious risk of establishing long-term authoritarian regime in the country. ***The constitutional amendments introduce an unusual government system characterized by a weak Parliament, weak President and powerful Prime Minister.*** The new model established by the constitutional amendments is to certain extent similar to the current semi-presidential form of government, under which the weak Parliament and weak Government are not in the position to effectively balance the power concentrated under the President's office. There is

only one difference: under the new model the centre of power moves to the Prime Minister's office. In general, it is not clear why the authors of the draft Constitutional Law made preference of the parliamentary model if they had foreseen the risk of destabilization in the strengthened parliament.

In order to reconcile the procedure on no-confidence to the Government with the principles of the constitutional law, the following norms of the amended Constitution have to be revised:

- Support of (no more than) 1/4 of the parliament members shall be determined as requirement for raising the question of no-confidence to the Government;
- The separate voting for raising the question of no-confidence shall be eliminated;
- The terms of the no-confidence procedure shall be revised. This procedure may not last more than several days;
- The unusual model of the constructive vote of no-confidence should be replaced with the traditional formula. In particular, while raising the question of no-confidence the new candidate to the Prime Minister's position shall be nominated by the authors of the said initiative, and the decision on no-confidence to the old Government and declaration of the confidence to the new one should be adopted by a single voting;
- The President may not exercise the right to "veto" with regard to the vote of no-confidence;
- The decision on declaring no-confidence shall be adopted by the absolute majority of the votes.

The present norm of the Constitution shall be retained according to which in case of renewal of the composition of the Government by one third, but not less than 5 members of the Government the latter needs the vote of confidence by the Parliament. Alternatively, the Constitution shall define that the vote of confidence has to be declared to the Prime Minister instead of the Government. Such alternative solution would essentially simplify the procedures related to, both, vote of confidence and no-confidence.

The procedure on the vote of confidence in relation to the draft law may not be retained in its current shape. In case of connecting the question of confidence to the draft law, declaration of no-confidence shall entail unconditional resignation of the Government. Such solution would ensure effective protection of the legislative competencies of the Parliament and guarantee the principle of the division of powers.

The above recommendations have to be taken into consideration in order to ensure that the constitutional amendments do not introduce a proauthoritarian system of government. The current model contains the risk to create breeding grounds for establishment of a long-term undemocratic regime under the leadership of Prime Minister in the state. Constitution shall be primarily aimed at avoiding such consequences instead of encouraging them.