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# **SPECULATIONS ON THE CONSTITUTIONAL WORDING - “SHALL AUTHORIZE THE SAME GOVERNMENT TO PERFORM ITS DUTIES”**

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## **FOREWORD**

A new wording of the Constitution has revised a role for the Georgian Government in state design and declared it the supreme body of the executive branch<sup>1</sup>. Its high constitutional status is secured by appropriate powers.

The questions regarding the quality of the legitimacy of the Government in a situation where it has a status of a provisional government drew attention during the course of constitutional reform back in 2009-2010<sup>2</sup>. The questions became even more current after the adoption of a Constitutional Law of Georgia on (and?) the Amendments and Changes to the Constitution of Georgia by the Parliament on 25 March, 2013<sup>3</sup>. The new law revised six paragraphs of three different articles, however, almost all of them are linked directly or indirectly to the issue of a provisional government and focus on the element that the ‘old’ government should perform its duties and responsibilities until a new government is appointed. This law is temporary and is in force until the moment when a

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<sup>1</sup> Constitution of Georgia, Article 78 (pa 1). English version of the Constitution of Georgia: [http://www.Parliament.ge/files/68\\_1944\\_951190\\_CONSTIT\\_27\\_12.06.pdf](http://www.Parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf)

<sup>2</sup> More thoroughly on these problems see Tinatin Erkvania, Specifics of Relations between Branches of Powers against the Background of 2010 Constitutional Changes: Essential Problems. Volume of Articles: From Super- Presidential to Parliamentary, Constitutional Changes in Georgia. Tbilisi, 2013, pg. 38-67.

<sup>3</sup> See, sakanonmdeblo matsne (Legislative Bulletin)

newly elected President in 2013 takes the oath and, as some scholars observe, it aimed at avoiding a political crisis<sup>4</sup>. However, the fact that the current majority of the Parliament has not even tried to improve the institution of the acting government shows that the Parliament's majority, like most of the constitutionalists, do not see the risks, political and legal errors and a possible stalemate. Furthermore, they accept that level of legitimacy of the provisional government which has been determined by the current norms regulating the institution.

The Government is the most important constitutional institution, with exclusive functions to coerce and apply physical resources and control their application<sup>5</sup>. Consequently, there are doubts about whether a provisional government, which many observers note does not possess legitimacy or enjoy low level of it, may act at its will while coercing or applying resources. The Georgian legislation should remove all doubts about these issues<sup>6</sup>. The present paper will examine the legal foundations for terminating the current (regular) government's authorities, a procedure for the formation of an acting government and its conditions, and also the issues concerning the possibility for the forming of an acting government, its reasonableness and level of legitimacy.

## **1. LEGAL FACT OF TERMINATION OF CURRENT GOVERNMENT'S POWERS, AS A LEGAL FOUNDATION FOR THE FORMATION OF A PROVISIONAL GOVERNMENT**

On a theoretical level of generalization, a legal basis for the formation and existence of an acting government is the termination of powers of a current government, as a state cannot operate without its main 'hard working section', that is, a supreme body of the executive branch - government, until a new government is appointed, which may take some time. The Georgian legislation links the termination of the current government's powers and, consequently, the formation of a provisional government to the following legal conditions: the resignation of a Prime Minister, his/her removal from office through impeachment, and recognition of the authority of a newly elected Parliament<sup>7</sup>. There is one more circumstance which is not specified in the legislation, this is a death of a Prime Minister.

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<sup>4</sup> See, for example comments by Irakli Kobakhidze on: [www.constitution.ge](http://www.constitution.ge)

<sup>5</sup> Andras Sajó, *Limiting Government. An Introduction to Constitutionalism*. Tbilisi, 2003, pg. 212

<sup>6</sup> Constitution of Georgia, Law of Georgia on Structure, Authorities and Activity of the Government of Georgia, Rules of Procedure of the Parliament of Georgia.

<sup>7</sup> As an exception Constitutional Law adopted on 15 October, 2010 decides that formation of a new government and consequently its existence is necessary from the moment a newly elected President takes the oath in 2013 Presidential elections.

## 1.1 Death of a Prime Minister.

Death brings a natural termination of the Prime Ministerial powers<sup>8</sup>. According to the joint responsibility (solidarity) principle of the cabinet (government) stipulated by the Constitution of Georgia, 'Resignation of the Prime Minister or termination of his/her authority shall result in termination of authority of other members of the Government'<sup>9</sup>. In this situation, according to the Constitution of Georgia, the President should entrust the same composition of the government to perform its duties until a new government is formed<sup>10</sup>.

## 1.2 Removal of a Prime Minister from the office through impeachment.

The Georgian Constitution establishes legal and political responsibilities for the Prime Minister and other members of the government because of great political importance of their positions. The Parliament is entitled to impeach the members of the government, including the Prime Minister<sup>11</sup> for violation of the Constitution and/or committing a criminal act<sup>12</sup>. The removal of a Prime Minister from office means termination of his/her duties and responsibilities, which should entail termination of the governmental powers, due to the above mentioned solidarity principle. In addition, it requires the President to authorize the outgoing government to perform its duties until a new government is formed<sup>13</sup>.

## 1.3 Resignation of a Prime Minister.

Georgian legislation does not specify the grounds for resignation of the Prime Minister; it is his/her sovereign decision and should be followed by termination of the cabinet's powers, due to the joint responsibility principle and the President's directive, instructing the outgoing government to perform its duties until a new government is formed<sup>14</sup>.

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<sup>8</sup> Confirmed by a corresponding legal act.

<sup>9</sup> Constitution of Georgia, Article 79(pa 7).

<sup>10</sup> Constitution of Georgia, Article 80(1), (pa 3).

<sup>11</sup> See the rules for impeachment: Constitution of Georgia, Article 63 and 64, also a Law on Impeachment.

<sup>12</sup> That a Prime Minister is a member of the government stems even from the text of the paragraph 5 of the Article 79 of the constitution which states that ' a Prime Minister appoints and dismisses other members(underlined by us).

<sup>13</sup> Constitution of Georgia Article 80 (1), paragraphs 1 and 3.

<sup>14</sup> Constitution of Georgia Article 80 (1), paragraphs 1 and 3.

## 1.4 Recognition of a newly elected Parliament's authorities.

The upper limit of a constitutional term of every government is connected with the constitutional terms of the Parliament's authorities, consequently; immediately after recognition of the 2/3 of a newly elected Parliament's composition<sup>15</sup>, the powers of the Cabinet is considered terminated (its authorities are terminated) and the President authorizes it to carry out its duties until formation of a new government as stipulated by the constitution.

## 1.5 The newly elected President taking the oath.

Constitutional changes adopted on 15 October<sup>16</sup> 2010 stipulate that the formation of a new government and, consequently, the emergence of an acting government should follow the moment of the newly elected President taking the oath in the 2013 general Presidential election. In this situation, like in all the above described circumstances, the President entrusts the outgoing government to perform its duties<sup>17</sup>.

**2. What happens after the government's authorities are terminated?** After the government resigns, or after it is dismissed or its authorities are otherwise terminated, a new government must be formed. However, it may take too long time, according to the norms of the Constitution of Georgia<sup>18</sup>. Since a state cannot operate without a government, the governmental functions should be carried out by a provisional government. In all circumstances of termination of the governmental powers described above, the President of Georgia grants "it" (outgoing government)<sup>19</sup> - "the same composition of the government"<sup>20</sup> the same responsibilities until appointment of a new composition. It means that the President entrusts that government, whose authorities have been terminated, with similar, temporary powers.

**3. How much time is needed for the formation of a new government,** that is, for how long will an acting government remain in control in Georgia? The Georgian Constitution specifies the following procedures and terms for the formation of a government<sup>21</sup>:

1. The President of Georgia shall within 7 days present a Prime Ministerial candidate who has been selected by the electoral bloc or party with the best electoral results;

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<sup>15</sup> Constitution of Georgia Article 51.

<sup>16</sup> Article 2 (pa. 4). See the text of the constitutional law in Avtandil Demetrashvili. 2009-2010 constitutional reforms in Georgia; Batumi, 2012; pg. 156-174.

<sup>17</sup> After general Presidential elections held on 27 October, 2013, in existing political configuration of supreme state bodies formation of a new government completed in 4 days.

<sup>18</sup> Constitution of Georgia, Article 80

<sup>19</sup> Constitution of Georgia, Article 80 (pa. 1).

<sup>20</sup> Constitution of Georgia, Article 80 (1) (pa. 1 and 3).

<sup>21</sup> Constitution of Georgia, Article 80. (See English version on: [http://www.Parliament.ge/files/68\\_1944\\_951190\\_CONSTIT\\_27\\_12.06.pdf](http://www.Parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf)).

2. A Prime Ministerial candidate shall within 7 days select the members of government and submit the composition of the Government to the Parliament along with a governmental program for a vote of confidence;
3. The Parliament shall decide on the vote of confidence in the government within 7 days;
4. If the government receives Parliamentary confirmation, the President shall appoint a Prime Minister within two days, and the Prime Minister on his part shall appoint the members of the cabinet within the same period of time, two days.

***In such uncomplicated circumstances the process will be finished in 25 days. It means that, when taking holidays into account, the state will be governed by a provisional government for a maximum period of one month.***<sup>22</sup>

5. In case a new government does not receive a vote of confidence, a voting on the same or revised composition of the government shall be repeated within 30 days after the first vote;
6. If the government receives a vote of confidence, the President shall appoint a Prime Minister within two days and the Prime Minister shall, in his/her turn, appoint the other members of the government within the same period of time, or two days.

***In this less problematic situation the procedure of formation of Government will be finished in 55 days and, taking holidays into account, it means that the state will have an acting government for almost two months.***

7. In case a Prime Ministerial candidate is not presented or a government does not receive a vote of confidence in the repeated voting in the period said above (30 days), the President shall nominate a Prime Minister from among the candidates proposed by two fifths of the Parliament's composition;
8. A candidate for Prime Minister shall select the members of the government within 7 days and shall appear before the Parliament for its confidence along with the government's program;
9. The Parliament shall decide on a vote of confidence in the government within 7 days;
10. If the Parliament grants its confidence to the government, the President shall appoint a Prime Minister within two days and the Prime Minister in his/her turn shall appoint other members of the government within the same period of time, or two days.

***This very problematic formation of a new government (a minority government is being formed) will take 72 days and, taking holidays into account, it means that the state will be governed by an acting government for almost 3 months.***

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<sup>22</sup> Here, as in the remaining part of the text the terms are calculated by the highest limits. These maximum limits may not necessarily be used in formation of a new government since it depends on configuration of political powers in the bodies of a central system.

11. If the Parliament does not grant its confidence to this composition of the government, the President shall dissolve the Parliament and within three days call for an extraordinary election;
12. The issue of the forming of a new government's will again become relevant after the Parliamentary elections<sup>23</sup> and the procedure set out in the Article 80 will be repeated.

***An acting government will function through the whole election cycle (nearly 70 days); thus in the case of an unproblematic formation it will function for about 100 days; in the case of less problematic circumstances it will remain effective for about 110 days and in a problematic situation – for about 130 days.***

Let's remember these numbers, the state can be governed by the provisional government for more than four months, and decide on how reasonable the imperative norms of the Constitution are, which require the President to authorize the "old/same government" with its duties and responsibilities<sup>24</sup>.

#### **4. EXISTENCE OF THE ACTING GOVERNMENT, ITS REASONABLENESS AND LEVELS OF LEGITIMACY IN DIFFERENT LEGAL SPACES**

**4.1** In the first place, we will focus on the contexts when it will be merely impossible to charge the government, which has been stripped of its powers, with governmental duties and responsibilities. The first situation occurs in the case of a ***Prime Minister's death*** when, consequently, the cabinet's authorities are terminated. It would be physically impossible to confer governmental duties upon a dead person. The second situation is related to a ***prime-minister who resigns willingly***. As we have noted above, the Georgian legislation does not specify the reasons for voluntary resignation (and most likely it is impossible), although such reasons may be related to private life, poor health, family problems or political motives. Most likely, in these circumstances, this person either will not want to or be able to return to the office of a Prime Minister. This situation will necessitate the creation of a new government and, like in the above described circumstances, it would be impossible to charge the government that has resigned, or "the same composition of the government", with identical duties. Both situations lead to a stalemate when the existence of an acting government, as the imperative norms of the Constitution require even for a short period, would be improbable.

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<sup>23</sup> In this case, the President will be required to charge an acting government with responsibilities once again (?!)

<sup>24</sup> Surprisingly enough a well-known constitutionalist Irakli Kobakhidze believes that "the President's power not to authorize the dismissed or resigned government with duties should be curtailed" See: [www.constitution.ge](http://www.constitution.ge)

## 4.2. Dismissal of a Prime Minister through impeachment.

This process must be followed by a termination of the government's authorities. Conferring governmental responsibilities upon a government run by a Head of Government under impeachment would present an unprecedented situation in the world's constitutional theory, legislation and practice. The duties and responsibilities are imposed on a government, which has lost its trustworthiness and credibility during a nearly one month long impeachment procedure, with the head of government having been impeached. It's hard to imagine even a low level of legitimacy for this government; it's hard to believe that Georgian population shall have confidence in the government, the head of which, according to the decision adopted by the Constitutional Court and resolution passed by the Parliament of Georgia, has been incriminated through either violation of the Constitution or through other elements of crime in his/her action, or he/she is charged with both violation of the Constitution and with the commission of a criminal offence.

Unlike the two previous instances, the existence of the acting government is not ruled out here, but how reasonable is its existence? How legitimate are its activities and the decisions adopted? If the government is a body of the so-called 'secondary legitimacy'<sup>25</sup> what level of legitimacy shall be enjoyed by a provisional government in general, and especially by that government whose head or all members<sup>26</sup> are dismissed by the Parliament through impeachment? Accordingly, what kind of subordinate horizontal relations will be there between the provisional government and the Parliament? The answers to these questions are hardly very difficult.

## 4.3. The recognition of powers of a newly elected Parliament.

As for the issue of legitimacy, a provisional government will raise fewer questions when supported by a solid majority of the Parliament through being created by the electoral subject from a political specter of this government. In this situation a provisional government enjoys the same kind of credibility enjoyed by the winner in the elections. Relations between the Parliament and government are substantially unproblematic and consequently the government will be formed swiftly and easily. Foreseeing or analyzing the situation where the outgoing (current) government, which must be charged with fulfilling responsibilities deriving from the imperative nature of the constitutional norm, does not belong to the political specter of a newly formed Parliamentary majority or is opposed to those political powers is not an easy task. The Fifth Republic of France experienced similar situations several times<sup>27</sup> and it also happened in Georgia in 2012. The level of legitimacy of this provisional government will definitely not be in accordance with the popular will and its relations

<sup>25</sup> The Parliament is elected by people, the Parliament forms a government.

<sup>26</sup> Difficult to believe, although theoretically it is possible that the Parliament would intend to dismiss all the members through impeachment procedure.

<sup>27</sup> See in detail, Pierre Pakte, Ferdinand mellen-Sukramian. Constitutional Law. Ed. Avtandil Demetrashvili, Publishing House of TSU, 2012; pg. 555-661.

with a Parliamentary majority should move to a temporary co-habitation regime which will not be trouble-free in a state with fragile democratic traditions.

## **5. CONCLUDING OPINIONS**

Even an observation of the provisional government as simple and general as this paper, enables us to conclude that:

- a) The formation/setting up of a provisional government in the case of the Prime Minister's death is absolutely impossible;
- b) The possibility of forming an acting government should be ruled out in case of the Prime Minister's voluntary resignation;
- c) It is not justifiable to confer the government (including a Prime Minister) with official duties when the Head of Government is impeached.
- d) It is not reasonable to charge the government with official duties when its political specter is in opposition to a newly elected Parliament majority's political direction or is not in accordance with it;
- e) It would be unproblematic and legitimate to confer the government with official duties when its political orientation is close to that of a newly elected Parliament's majority.

Therefore, taking into account that in some cases (death of a Prime Minister, his/her voluntary resignation) the existence of an acting government is impossible, and that in other cases (impeachment of a Prime Minister, emergence of the majority in the newly elected Parliament from the political specter which opposes current government's political orientation) it would be absolutely unacceptable and unjustifiable to form an acting government because of its lack of or lessened legitimacy, the following changes should be made to the Constitution of Georgia:

### **1. The first paragraph of Article 80 of the Constitution of Georgia should be worded as follows:**

"1. At the moment when a newly elected Parliament's authorities have been recognized/approved, the government shall be considered dismissed and the President of Georgia shall be empowered to charge/authorize the same government to perform its duties until a new government is formed".



## **2. The third paragraph of Article 80 (1) of the Constitution of Georgia should be worded as follows:**

“3. In the case of such circumstances as stipulated by the first paragraph of this Article, the President of Georgia shall be empowered to authorize the same composition of the government to continue to perform its duties until a newly composed government is formed”.

After these changes enter into force, the law of Georgia on Structure, Authorities and Rules for Carrying Out its Activities should be revised, along with relevant norms of the Rules of Procedure of the Parliament of Georgia.