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METHODOLOGY OF COMPARATIVE LAW IN PRACTICE

THE DISTRIBUTION OF POWERS BETWEEN THE PRESIDENT AND THE PRIME MINISTER OF GEORGIA COMPARED TO FRANCE AND GERMANY

An international conference dealing with the new Georgian constitutional system was held on the 22nd of October 2014 in Tbilisi. The main goal of the conference was to establish how the constitutional reform of 2010 could be classified in terms of constitutional theory and its practical application and furthermore to clarify what roles and responsibilities are henceforth bestowed upon the Georgian president. The following will first provide an overview of the methodology of comparative law (I.) and then focus on the current situation in Georgia (II.). Furthermore, the distribution of powers in France will be described comprehensively (III.), bearing in mind its Georgian counterpart and drawing conclusions from this system. This article will then conclude with a comparison to the German constitution (IV.) after which the research results will be summarised in several theses (V.).

I. METHODOLOGICAL BASICS

When comparing different legal systems the first step is to decide on a methodological approach[1]. This is not only desirable because the comparison should have a logical structure; it is also important to achieve at least a certain degree of congruence with methods other authors have used (or are using) since otherwise the process of comparative legal research could not even compare the results within itself.

Taking this into consideration, this article is based on the principle of functionality which throughout scientific discourse has proven to be the preferred method used in *comparative law* [2]. This means that as long as legal forms or creations fulfil the same function in law, they are *prima facie* comparable[3]. In other

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1 In the following "comparative law" is understood as the discipline aiming at describing foreign law from a national point of view bearing in mind a national recipient; see *v. Hoecke*, EUI Working Paper LAW no. 2002/13, p. 1.

2 Voicing criticism in this regard: *Platsas*, Electronic Journal of Comparative Law, vol. 12.3 (December 2008).

3 *Zweigert/Kötz*, Einführung in die Rechtsvergleichung, Tübingen, Mohr Siebeck, 3rd ed., 1996, pp. 33.

words, the focus under functionality is on how foreign law operates with respect to the specific area of law in question; in this context, the formal (legal) requirements of the different legal systems become less important.

One main question – especially in the field of constitutional law – that usually arises is whether aside from the legal aspects other parameters, such as the historical, political, sociological, cultural and economic background, should be taken into consideration[4]. In the authors' opinion such an approach is imperative for a true understanding of the foreign legal order in spite of epistemological hurdles that naturally arise for a lawyer acting in an interdisciplinary field[5].

This approach will be taken into account in the following by making reference to sources of political sciences and taking these into consideration in the overall assessment.

II. DEVELOPMENTS AND INITIAL POSITION IN GEORGIA

From a constitutionally historical point of view it is relevant not only to take the wording of the Constitution itself into consideration, but to remember that throughout the past quarter of a century the Georgian President took an active role in state policy rather than act as a neutral arbiter[6]. The Constitution[7] that entered into force in 2013 undoubtedly aimed at generating a shift from the president's monopoly of power to strengthening the political powers of parliament and the government[8]. This conclusion will be kept in mind throughout the following interpretation (the constitution's genesis being one of the sources of interpretation).

Nonetheless, the question arises how far-reaching this shift in powers was meant to be. Even amongst high-ranking functionaries of the new constitutional system opinions differ in this regard. Views vary concerning the exact interpretation of competencies in general and in their practical application as well as concerning the overarching question how the Georgian system should be qualified – as a parliamentarian, semi-presidential system or as a mixture of both systems. Most importantly though, apart from the actual wording of the Constitution, is to establish the practical application of the reformed Georgian Constitution. The Constitution in itself is naturally incomplete in this regard and thus covenants and gentlemen's agreement

4 For further reference see: *Smith*, Bond Law Review, Vol. 15 (2003), Iss. 2, Art. 5, p. 20, 21.

5 One example for legal norms that can only truly be understood in an economic context is that of the banking regulations that were instated in the aftermath of the recent worldwide financial and government debt crisis; for such criteria see: *Babeck*, Forum Recht, 4/2002; *Gaul*, in: Christian Boulanger (ed.), Recht in der Transformation. Rechts- und Verfassungswandel in Mittel- und Osteuropa, Wiss.-Verl., 2002, pp. 63-84.

6 *Kobakhidze*, Challenging Aspects of Georgia's New Constitutional System, as stated at the conference in Tbilisi on the 22nd of October 2014.

7 For further information on the reform process: *Babeck/Fish/Reichenbecher*, Rewriting a Constitution: Georgias's shift towards Europe, 2012.

8 Explicitly in this regard: *Kobakhidze*, Challenging Aspects of Georgia's New Constitutional System.

will be consulted to fill in the gaps. The implementation will require a constructive dialog between the responsible constitutional bodies[9].

The following legal comparison will try to answer these questions. For the purpose of comparison the French and German constitutional systems were chosen, thus a semi-presidential as well as a parliamentary system. The Georgian Constitution can be placed somewhere between these two. The practical application of the French Constitution reveals that at times it even deviates from the express wording of the Constitution. In making reference to the French approach we in no means aim at encouraging Constitutional breaches in Georgia. Nonetheless, a look into the evolution of the French Constitution might provide ideas for how the responsible constitutional bodies in Georgia together can reach a beneficial and efficient interpretation of the Georgian Constitution without having to consult the Constitutional Court. The latter can result in a time-consuming and lengthy process paired with legal uncertainty.

The comparison of the respective Constitutions will take the following approach: First of all, the particularities of the French and then the German distribution of powers will be highlighted. Then, functionally similar provisions of the Georgian Constitution will be elaborated upon. The reader can find the comparison in *italics* at the end of each section.

III. THE FRENCH SEMI-PRESIDENTIAL SYSTEM

1. Preliminary Notes and Outline of the Constitutional Structure

The 3rd and 4th Republic in France were both parliamentary systems whereas the current political system of the 5th Republic – from 1958 – is an example for a "semi-presidential" and "rationalised-parliamentary" system. Thus, the Prime Minister as head of state is not elected by parliament, but rather is elected and appointed directly by the people. The government as such can be held accountable vis-à-vis the directly democratically legitimised parliament. The president on the other hand cannot be held accountable by the national assembly; his actions cannot be the object of scrutiny of the Constitutional Court.

The delimitation of competences between the president and the prime minister is often difficult[10]. This is in part due to the fact that some constitutional articles' wording are ambiguous. Furthermore, the French Constitution takes the approach of abstractly circumscribing the different functions which makes a clear legal deduction hard. Quite to the contrary, this rather emphasises a certain political philosophy[11]. This is paired with the fact that the actual practical application of the Constitution often varies greatly from the explicit wording of the Constitution.

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9 *Babeck,* Lessons from Georgia. A role model for constitutional reform?, p. 73 in *Babeck/Fish/Reichenbecher*, Rewriting a Constitution: Georgia's shift toward Europe.

10 *Knapp/Wright*, The Government and Politics of France, Oxon, 5th ed. 2006, p. 136: "institutionalised tension".

11 *Grote*, Das Regierungssystem der V. französischen Republik – Verfassungstheorie und -praxis, Baden-Baden, 1995, p. 321.

Indisputably the French president in general has a considerably strong constitutional role within the government and effectively has the decisive position[12]. At the same time the executive power is considered to be headed by a dual leadership, formally a special hierarchy doesn't exist[13].

In principal it is important to differentiate whether the president and the prime minister are members of the same party or not. Before the constitutional reform of 2012 France's semi-presidential system had a dynamic component to it: the distribution of powers between the president and the prime minister depended on the parliament's majority. The prime minister was not directly democratically legitimised, but the fact that the shift in powers followed the parliament's majority made the legitimacy "fresher" (more up-to-date)[14]. Thus, usually the president *de facto* was the "chief of the parliamentary majority", whereas in times of *cohabitation* the prime minister was in charge as well. These circumstances were usually not explicitly mentioned publically since the expectation existed that the president have a larger influence than the political parties[15].

- In times of *non-cohabitation* (homogenous majorities) the distribution of responsibilities followed a practical approach whereas the president was responsible for setting the principle guidelines of foreign and internal affairs as well as deciding on the person of the prime minister. Naturally conflicts of interest hardly occurred. The president was free to decide which issues of day-to-day politics were important enough to ask for his attention[16]. Since the constitutional reform of 2012 these situations have become quite rare.
- In times of political *cohabitation* (heterogeneous majorities) the president's powers were limited to matters of foreign affairs and defence policy. The prime minister on the other hand was responsible for internal affairs, economic policy as well as the decisions on day-to-day politics. The president often reinstated a homogenous distribution of party majorities by dissolving the national assembly whenever the possibility arose to do so.
- Historically speaking the *Gaullist* approach stating that the president in general was in charge of setting the general political guidelines and the prime minister was in charge of day-to-day politics did not strictly correspond to reality. Moreover, the decisive factor[17] whether the president was *de facto* able to expand his powers and able to place "larger" issues on the political agenda lay within the national assembly's party majority[18].

The constitutional reform of 2002 limited the president's term of office to five years and two terms. This alignment to the parliamentary session immensely decreased the possibilities for *cohabitation*[19]. For the purpose of this article, in the following the situation of *non-cohabitation* will thus be referred to as the norm.

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12 *Hartmann*, Westliche Regierungssysteme, Parlamentarismus, präsidentielles und semi-präsidentielles Regierungssystem, Wiesbaden, 2nd ed. 2005, p. 181.
13 *Grote*, p. 322.
14 *Knapp/Wright*, p. 96.
15 *Grote*, p. 319.
16 *Grote*, p. 326, 328.
17 To this end explicitly: *Grote*, pp. 319; as well as *Knapp/Wright*, p. 109
18 Formerly the president and the prime minister always belonged to the same (Gaullist) party. Only in 1986 the first situation of *cohabitation* occurred when president *Mitterand* lost the majority in the national assembly.
19 See *Kempf*, Das politische System Frankreichs, Wiesbaden, 4th ed. 2007, p. 33

2. The Distribution of Competencies between the President and the Prime Minister

Due to his democratic legitimisation the president in France is considered to play a central role under Constitution ("republican monarch")[20].

> *Georgia: The Georgian President is directly elected by the people as well (Art. 70). This can be seen as an indication for extensive political competencies. It must be noted, however, that direct democratic legitimacy does not always imply this consequence. This is exemplified by the fact that in 25 EU member states the president is freely elected*[21] *in which, however, the president is not always accorded a prominent position namely regarding executive powers.*

According to article 20 of the Constitution the prime minister as head of government has his own administration. The president on the other hand does not have an equivalent apparatus to implement his decisions. He is only supported by a staff of political and administrative advisors whose functions are not determined by the Constitution and whose numbers vary according to the functionary in office[22].

Under the 5th Republic the prime minister "only" is the "first minister" of or under[23] the president. He is not anymore the *Président du Conseil*. In this function he acts as arbiter between the president and the cabinet on the one hand and between the president and the majority faction on the other hand. Even though he is formally equal to the president he is usually subordinate to the president in practical terms[24].

The most important government functions and some of the premier's competencies are entrenched in articles 20 to 23 of the constitution. At first glance the constitutional provisions grant the prime minister extensive powers. This implies at least an equal distribution of powers between the president and the government, including the prime minister[25].

Because traditionally the president and prime minister have kept an open and regular discourse in areas relating to the prime minister's more formal rights, e.g. the right of proposal and the consultation rights, so far no conflicts of interest have come up in these areas.

Aside from this however the practical application of the Constitution since *de Gaulle* has "stood in stark contrast to the Constitution"[26].[27] Methodologically the varying practical application is based on "customary constitutional law"[28].

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20 *Schild*, Der französische Präsident, Verkörperung einer zentralistischen politischen Macht, 2013.

21 See *Kobakhidze*, Challenging Aspects of Georgia's New Constitutional System.

22 *Grote*, p. 218.

23 This is the expression used by *Kempf*, p. 50; p. 85: "a medieval relationship"; Grote, p. 302: "the second man in the state and the first man in government"

24 *Grote*, p. 326: "Similar to military command structures.".

25 *Grote*, p. 323 et. seq. even seems to infer a prerogative of the prime minister to set the political guidelines when just analysing the semantics of the constitutional provisions.

26 *Grote*, p. 325.

27 For further reading on the competencies in particular: *Kempf*, p. 88 et seq..; *Tümmers*, Das politische System Frankreichs, Eine Einführung, Munich 2006, pp. 90.

28 *Grote*, p. 334.

Georgia: The core provision for the role of the prime minister within the governmental system is article 79. In paragraph 1 it is clearly stated that the prime minister is the head of government. The government in turn is the highest organ of the executive branch according to art. 78 (1). The prime minister is thus granted the role as political leader.

a) Exercising General Political Influence

The aforementioned strong role of the President in France does not only result from the direct democratic legitimisation but also from a systematic interpretation of the Constitution's wording itself. While under the 5th republic the parliament was the first institution to be mentioned in the Constitution, now it is the President who is named before all of the other government bodies.

Georgia: From a systematic point of view the Georgian Constitution takes a substantially different approach than the French Constitution in first of all mentioningthe parliament as a constitutional body followed by a description of the president's functions. This is nonetheless no systematic indication for the fact that the president in Georgia does not have a similarly strong role to play. The Georgian Constitution of 1995 and the unmodified succeeding Constitutions undoubtedly took a presidential approach even though the parliament was mentioned right at the beginning.

The French president's functions are not restricted to such of representation. Moreover, the Constitution also grants the president core executive competencies.

Article 5[29] is the main provision relating to the president's position within the state stating in general terms the president's main responsibilities and circumscribing his role within the state bodies. This provision exemplifies the founding fathers' endeavours to prevent limiting the president to a mere moral authority as it was the case under the 3rd and 4th Republic[30].

The president's role is much more extensive than the wording of article 5 might suggest, according to which the president is responsible for ensuring that the Constitution is respected and doesn't entail a mere supervisory function. Article 5 does not merely encompass the president's competencies, but extends to a provision determining the general guidelines the president has to respect in exercising the functions granted to him according to article 5 et seq.[31] Thus article 5 from a formal point of view does not provide the president with a predominant role in the political decision-making process. According to article 5 the president is responsible for ensuring the constitution is respected and in so far is also bound by the constitution. Thus this provision cannot be used to change the constitutional order or the government's

29 "*The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. He shall be the guarantor of national independence, territorial integrity and due respect for Treaties.*"

30 *Grote,* p. 223.

31 *Grote,* p. 228.

responsibilities for establishing the political guidelines and conducting political affairs as foreseen in article 20[32].

Apart from the constitution's wording and the fact that the president is directly democratically legitimised through direct vote by the people, the president's prominent position stems from the constitutional application under *de Gaulle* which was subsequently continued and was much more extensive than the constitutional provisions.

> *Georgia: Article 69 of the Georgian constitution, like article 5 of the French constitution, first of all delimits the president's role and responsibilities in general terms. Pursuant to article 69 the president is responsible as head of state for ensuring the functionality of the state bodies and is commander-in-chief. Article 73 contains the main provisions for the allocation of competencies to the president.*

Article 20 in conjunction with article 21 (1) sentence 1 provides for the president's competence for setting the general political guidelines. According to these provisions the prime minister is in charge of coordinating and ensuring the coherency of government activities and issuing necessary directives to the ministers. However these directives are only "politically binding" and are not of a legal-administrative nature[33].

Contrary to the wording of article 21 in reality it is usually the president who issues the "political guidelines[34]". He is in charge of presiding over the council of ministers (article 9) which even in times of *non-cohabitation* has practical functions.

aa) The Majority in the National Assembly as a Decisive Factor

The exact distribution of powers depends on the parliamentary majorities. The prime minister's role was stronger in times in which the parliament was less cooperative, especially in times of *cohabitation*. In these times his power to issue the political guidelines was almost similar to the president's and in some areas even surmounted his capabilities[35]. However, this did not hold true for the entire political spectrum. For instance in theory it was possible that the prime minister had the ability to successfully contradict the president in the important field of internal affairs[36]. In this regard the president was *de facto* demoted to a sort of "opposition"[37]. At the same time the governmental system still was a semi-presidential system. Contrary to the prime minister in times of a homogenous distribution of party majorities the president always played a vital role within the executive branch[38]. To this end the president had the possibility of dissolving the parliament in hopes of obtaining a favourable parliamentary majority[39]. A call for re-elections did not

32 *Grote,* p. 228.
33 *Grote,* p. 312.
34 *Kempf*, p. 71; *Knapp/Wright*, p. 109.
35 *Hartmann*, p. 183; *Kempf*, p. 86; *Knapp/Wright*, p. 107.
36 See *Kempf*, p. 90.
37 *Vogel*, Charakteristika des politischen Systems, 2005; *Grote*, p. 342 also speaks of a: "privileged role of opposition".
38 Explicitly: *Knapp/Wright*, p. 121.
39 *Tümmers*, p. 85 et seq.

require a petition with the government[40]. The "solution" of re-elections was often used in the past, even though it was not always successful. Another option seemed to be to discharge the president from his functions[41]. In any case the president remained in charge (at least in form of participation) within his *domaine réservé*[42]. Since a lot of the president's acts – and pursuant to article 21(1) sentence 3 their implementation – depended on the prime minister's countersignature, the efficiency of the entire executive branch relied on their willingsness to cooperate with each other. This is exempified by the obligation of countersignature contained in article 19[43].

The developments since the constitutional reform of 2002 have shown that the situation of *cohabitation* since then have been quite rare.

bb) Continuous Prerogatives in the Areas of Foreign Affairs and Defence Policy

The main responsibilities of the president fall within the so-called *"domaine réservé"*. This term is used to describe the president's prerogatives. The constitution itself merely provides slight indications of this role. It would be feasible to deduce an overarching responsibility in the areas of foreign affairs and security policy from the president's role as *guarantor of national independence, territorial integrity and due respect for international treaties* (article 5) as well as his role as *commander-in-chief of the armed forces* (article 15). Moreover, article 52 makes the president responsible for negotiating and ratifying international treaties. Nonetheless, this interpretation is put into perspective by provisions containing explicit competencies of the government, especially of the prime minister. It should be noted that the right to ratify treaties for example, is reserved for the parliament in very important areas, such as trade agreements and treaties regarding international organisations, which according to article 53 require a law passed by parliament[44]. Even the role as commander-in-chief can be regarded as having more of a symbolic nature. The actual decision-making authority lies within the responsibility of the government. Pursuant to article 20 the government is responsible for conducting and determining the policy of the nation which encompasses the responsibility for the country's defence policy. Furthermore, in terms of the constitution's pure wording, article 21 clarifies that the prime minister is in charge of national defence and is responsible for the armed forces (article 20 (2) in conjunction with article 21 (1) sentence 2).

In spite of the ambivalent wording of the constitution, in reality the president plays a prominent role in the decision-making process concerning matters of foreign affairs and defence policy. For example, the president is the one who represents France at international conferences and economic summits[45]. Furthermore, pursuant to article 9, the president presides over the council of ministers that negotiates and decides on the principle guidelines of France's defence policy[46]. Against this background article 21 in

40 *Hartmann*, p. 181.
41 See the following remarks.
42 *Grote*, p. 354.
43 This is highlighted by *Kempf*, p. 71.
44 *Grote,* p. 239.
45 *Grote,* p. 240.
46 *Grote,* p. 241.

conjunction with article 15 sentence 2 must be understood as containing the president's prerogatives only insofar as the *implementation* of already existing decisions in the areas of military and defence policies are concerned. Thus, the president only plays a minor role in the deployment of French military forces. The president's actual decision-making monopoly in a conflict concerns military matters and such of defence policy, whereas the prime minister's responsibilities are limited to managing the conflict's impact on internal affairs.

In any case the presidential prerogative in this area depends to a large extent on the government's and the parliament's willingness to abstain from exercising their own constitutional rights. This naturally requires a homogenous situation, in which the president as well as the majority of the national assembly belong to the same political party, which has been the case since the constitutional reform of 2002 and which will be the case in the future.

However, even in times of *cohabitation* the president remained a prominent political figure in his *domaine réservé*[47]. Dogmatically this constitutional approach[48], which can be traced back to the era of *de Gaulle,* is based on the constitutional provisions making the president commander-in-chief (article 15) and granting him a powerful position in the areas of security policy and foreign affairs (see articles 5, 52).

Georgia: Compared to the French constitution in its "material" application (meaning the way in which the constitution is applied in reality), its Georgian counterpart only vests the president with very limited competencies in the areas of foreign affairs and defence policy. Quite to the contrary, the main responsibilities in these areas fall within the ambit of parliament (article 48), whereas the government is responsible for the implementation (article 78 (1)).

Pursuant to article 69 the president externally represents Georgia in matters of foreign affairs. The Georgian constitution explicitly stipulates the president's prerogative in the area of foreign affairs contrary to the French constitution which only indirectly making this provision. However, the role as foreign representative cannot be equated to having a general responsibility for foreign affairs. Moreover, according to article 48 the parliament is responsible for determining the principle directions of foreign and defence policy. The government as the highest executive organ is responsible for their implementation according to article 78 (1). Pursuant to article 78 (4) the prime minister and the ministers externally represent Georgia within their areas of responsibilities. The president's representative functions in the area of foreign affairs in article 69 are thus especially limited to conducting negotiations with other countries/international organisations and concluding international treaties pursuant to the prime minister's countersignature (see article 73(1)(a)). It is contested, whether this responsibility of signing international treaties leads to an exclusive responsibility in this domain or whether the prime minister can act in this field as well (the wording of article 65(1): "(…) if the treaty is signed by the

47 See *Kempf*, p. 66 et seq.: Even though this is not foreseen by the Constitution, a "constitutional cross-party consensus" exists on this matter.

48 *Vogel*, Charakteristika des politischen Systems, 2005.

President" leaves room for interpretation and can be interpreted meaning that cases exist in which the prime minister and not the president acts as signatory. Naturally this is not a mandatory interpretation). The president cannot act autonomously in the area of foreign affairs because of the existing obligation of a preceding countersignature. This interpretation is highlighted by the aforementioned fact[49] *that the constitutional reform generally had the limitation of the president's powers in mind*[50]*.*

In the area of defence policy the question who the "true" commander-in-chief is still needs to be clarified. The president's description as "commander-in-chief" does not necessarily entail that he has this role in actual fact. Moreover, in light of the genesis of the constitution it is more likely to assume that this role is bestowed upon the prime minister or the defence minister. Especially the role of the "national security council" as set out by the constitution and is presided over by the president is still quite unclear. However towards the end of 2014 the so-called "State Security and Crisis Management Council" within the government's purview was established.

b) **Further Responsibilities**

Apart from the responsibilities in the area of the *domaine réservé* the president has numerous explicit competencies some of which can be exercised without the prime minister's or another minister's countersignature (see article 19). These include appointing the prime minister (article 8), dissolving the national assembly (article 12) and exercising emergency powers (article 16). All other official acts depend on the prime minister's or the government's countersignature. The question whether the countersignature is a mere formality or actually requires the prime minister's substantive review, depends mainly on the majority within the national assembly. Since 2002 this prerogative has been diminished to a mere formality.

aa) Appointing the Prime Minister

The prime minister is appointed by the president who is generally not bound by any legal constraints (see article 8). Even in times of *cohabitation* it was conceivable that the president had a certain amount of discretion mainly regarding the question *which person* he would appoint from the opposite political camp as prime minister[51]. Even though the prime minister – contrary to the president – is not elected by the parliament, he can be held directly accountable since the national assembly has the ability to issue a vote of no confidence (this has only happened once in 1962).

Because of the president's sole responsibility for appointing the prime minister, the latter almost exclusively relies on this confidence bestowed upon him which is not dependent on the parliament's confidence. This is the reason why in the past some prime ministers have waited a long time before asking for a vote of

49 See II. above.

50 In the aforementioned conference on the new constitutional system Wolfgang Babeck used the term of Georgia's "super ambassador" for the role in foreign affairs.

51 *Kempf*, p. 48.

confidence[52]. Yet, in times of *cohabitation* – becoming highly unlikely due to the reform of 2002 –the parliament's majority approval is decisive[53].

Georgia: Even though both the French (article 8) and the Georgian Constitution (article 73, paragraph 1, subparagraph (c)) stipulate the president's responsibility for appointing the prime minister, this prerogative is merely formal because the president is bound by the parliamentary decision (article 80). Contrary to this the French president is merely bound politically and not constitutionally.

bb) Dismissing the Prime Minister

A huge discrepancy between the Constitution's wording and its actual application exists regarding the prime minister's dismissal. Even though article 8 limits the situation of dismissal to the case the prime minister offers his resignation (or pursuant to the national assembly's vote of no confidence, articles 49, 50), in reality the French prime ministers resign after having been prompted by the president. In their resignation they even make reference to the president's request [54]. In actual practice refusing a request of resignation appears to defy the Constitution's spirit. The presidents probably deduced the *de facto* possibility of "dismissal" from a sort of *actus contrarius* argumentation in light of the competence of appointing the prime minister. In times of *cohabitation* a resignation could not be expected as long as the prime minister was backed up by a parliamentary majority[55].

Georgia: According to the Georgian Constitution the president does not have the right to dismiss the prime minister. Pursuant to article 81 the prime minister can only be removed from office through a vote of no confidence.

cc) The Cabinet

The prime minister proposes and appoints the ministers. At the same time he takes into account the president's proposals if he belongs to the same political party. Should this not be the case (*cohabitation*) the president's proposal – contrary to the wording of articles 20(1), (2) in conjunction with article 21 (1) – takes precedent at least concerning the foreign minister and the defense minister[56]. Thus, contrary to the wording of article 8, appointing the members of the French cabinet is not a formal act. Moreover, the president has a direct influence on the government's composition and has the power to refuse candidates he doesn't wish to become members of the cabinet.

Georgia: Pursuant to article 79(5) the prime minister being the highest member of the executive branch has the power to appoint and dismiss the members of the government. This is a significant difference compared to the French Constitution.

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52 *Kempf*, p. 48.
53 *Grote*, p. 298.
54 *Grote,* p. 246; *Tümmers,* p. 69; *Kempf*, p. 54.
55 *Kempf*, p. 54; *Grote,* p. 246.
56 *Kempf*, p. 85 calls it an "idiosyncratic interpretation of the constitution" or "a clear deviation from the constitutional norms".

dd) Dissolving the Parliament

According to article 12 the president can dissolve the national assembly after having consulted with the prime minister and the presidents of the houses of parliament. According to the clear provision of article 19 the prime minister's countersignature is not needed for this act. The preceding necessary consultations stipulated in article 12 also do not limit the president in his right to dissolve the parliament. The statements are solely non-binding in nature[57]. The only limitation is contained in article 12(4) according to which the parliament cannot be dissolve a second time within a year following the early elections.

The president has the possibility of using his extensive competence of dissolving the parliament in a tactical and political manner. The dissolution of the national assembly is legally even possible in times of *cohabitation* with the aim of obtaining a favorable parliamentary majority through early elections. Success of course depends on the will of the people. Thus, so far not every dissolution has reached its aim[58].

Georgia: At this point a further great difference between the compared constitutions has become evident. From a constitutional perspective the French president has much more leeway concerning the dissolution of parliament. The Georgian president can only dissolve the parliament on his own accord in the situations described in article 73, paragraph 1, subparagraph (p).

According to article 80(7) he for example has to dissolve the parliament if the newly elected parliament is not able to appoint a government within the constitutional timeframe. Pursuant to article 80(2) the same holds true if this situation occurs after the government's resignation. Furthermore the parliament can be dissolved according to article 81(4) if the parliament is unable to generate a vote of no confidence. Similar to the French provisions a dissolution is not possible for a certain amount of time following early elections (see article 51). According to article 73(1) dissolution always requires the prime minister's countersignature.

ee) Emergency powers

Article 16 gives the French president extensive powers in a state of emergency. A state of emergency is understood as a situation in which the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted. The president has the *sole* authority of assessing whether these criteria are met[59]. The consultations with the prime minister and the presidents of the houses of parliament foreseen in article 16 are merely non-binding[60].

Thus, unless a case of treason exists, there is no truly effective constitutional protection in place preventing the misuse of these *de facto* infinite powers of emergency. However the constitutional council's report

57 *Kempf*, p. 58; *Tümmers*, p. 69.
58 *Kempf*, pp. 58; *Tümmers*, pp. 70.
59 *Grote*, p. 230.
60 *Kempf*, p. 63; *Tümmers*, p. 78.

that is published and contains elaborate explanations has a significant binding effect in practical terms. In so far it would be hard to envision a situation in which the president pursued action according to article 16 against the council's advice[61]. The main trajectory of emergency powers issued pursuant to article 16 always has to be to reinstate the constitutional order. Even though the president obtains both legislative and executive powers in a state of emergency and takes over the parliament's and the government's functions, he is barred from changing the constitutional division of powers[62].

Georgia: According to article 73, paragraph 1, subparagraph (g) and (h) the president can declare a state of emergency or war, whereas the declaration of a state of emergency requires the prime minister's countersignature. The requirement of countersignature is more than a mere obligation to consult. Thus, the Georgian president has less influence. In a state of emergency the president also has the possibility of issuing decrees with legislative powers (pursuant to the prime minister's countersignature).

ff) Further Competencies to Appoint Personnel

The president has the competence to appoint a number of high-ranking statesmen. According to article 56 he is for example responsible for appointing three of the nine members of the constitutional council, one of which is its president. This grants the president a large amount of influence on this institution since the president of the constitutional council has the decisive vote in a situation of an equal division of votes[63]. The president automatically becomes a member of the constitutional council after he has left office. In spite of the principle of separation of powers the president surprisingly presides over the supreme council for the judiciary and the prosecution as well. Following a proposal by the council he appoints the judges of the court of cassation, the president of the courts of appeal as well as judges of several courts of first instance.

Georgia: The Georgian president is responsible for appointing the commander of the unified corps of the armed forces mirroring his position as commander-in-chief. Furthermore, he nominates one member for the supreme council of justice (article 73, paragraph 1, subparagraph (e)) as well as three of the nine judges of the Georgian Constitutional Court (article 88(2)). Regarding the judges of the Supreme Court he only has the right of proposal (article 90(2)).

gg) Influence on Legislation

Article 10(1) provides that the president promulgates the laws within 15 days after they have been passed by parliament. According to article 61(2) the president has the opportunity of asking the constitutional council to review the law in terms of constitutionality before the time limit has expired. In this case the time allotted for promulgation is suspended (para. 4). Pursuant to article 10 (2) he can furthermore ask to reopen the debate on the act or any sections thereof. This reopening cannot be refused by the national assembly. However, this possibility does not grant the president the right to veto a law since he remains obligated to promulgate the law in question after this debate[64].

61 *Grote,* p. 265.
62 *Grote,* p. 266.
63 *Kempf,* p. 65.
64 *Tümmers,* p. 72.

Georgia: According to article 67(1) the President does not have the right to legislative initiative. He is only responsible for signing and promulgating laws that have been passed by parliament according to article 73(1)(l). If the president fails to promulgate the law within ten days, the president of parliament is responsible for signing and promulgating said law. According to the Constitution's wording the president is not granted a veto right in the strict sense[65]. This right could at most be concluded from the provision of article 69(1) in the case of an immediate threat to the constitutional order. However, this interpretation is quite difficult to make since article 68(2) contains a particular rule regarding the president's wish to make changes. According to this provision instead of promulgating the law within the ten day period, the president can make remarks on the law and then pass it on to parliament. Parliament then decides on the proposals made to change the law by a vote of simple majority (see article 68(3) in conjunction with article 6). The president's intervention proves fruitless if the parliamentary majority rejects the proposed changes.

hh) The President's Influence on Ordinances and Decrees

The situation is quite different concerning ordinances and decrees. The prime minister and the president have the power to issue regulations. Although it is primarily the prime minister who, according to article 21(1), has this power, with the exception of the areas named in article 13. Pursuant to article 13, the president is in turn in charge of signing ordinances and decrees that have been deliberated in the council of ministers. The president has discretionary powers concerning the decision of signing. In case the president permissibly refuses his signature the provision can only take effect by passing a law in parliament containing the respective content[66].

Within the government the prime minister has the primary right to make regulations according to article 21(1), sentence 4, which not only entails acts implementing laws but also autonomous acts, e.g. averting danger[67]. These prerogatives are one of the most influential veto rights the president has. The same holds true for issuing rules implementing formal parliamentary laws. Only ordinances and decrees passed by the council of ministers – which are more important compared to the acts issued by the prime minister – need to be signed by the president and thus also require a consensus between the president and the government.

Georgia: Article 73(1)(k) gives the president the power of issuing decrees and orders within the ambit of his competencies. In general, however, the president's decisions are subject to the prime minister's countersignature (see article 73(1)) with exception to such acts that are issued in times of war and those provided for in article 73(2)-(4).

ii) Referendum

Article 11 is another important provision that gives the president the right to submit laws to a referendum dealing with the organization of the public authorities, or with reforms relating to the economic, social

65 *Kobakhidze*, Challenging Aspects of Georgia's New Constitutional System, talks about a "weakened" right to veto.
66 *Tümmers*, p. 72.
67 *Grote*, p. 314 et seq.

or environmental policy of the nation or which provide for authorization to ratify a treaty which affects the functioning of the institutions. Regardless of article 19, that does not make this decision subject to countersignature, article 11 requires a preceding governmental or parliamentary initiative. The Constitution thus firstly requires the government's or the parliament's initiative and then the president's discretionary decision, which is not subject to countersignature, whether to follow the initiative for a referendum or not. The president does not have the power to initiate a referendum on his own. However, the practical application of the Constitution has shown that in times of non-cohabitation the required governmental initiative was only issued after the president's decision, thus, overriding the Constitution's wording[68]. In times of cohabitation however, in which the president and the premier belonged to different political camps, the mechanism contained in article 11 was obstructed unless no consensus could be reached beforehand[69].

Georgia: According to article 74(1) the president has the power to initiate a referendum pursuant to a preceding initiative by parliament, the government or a specific electoral quorum. However, according to article 74(2) passing draft laws cannot be subject to referendum. This underlines the parliament's primary function as legislator.

jj) Council of Ministers

Article 9 of the French Constitution stipulates that the president presides over the council of ministers. Other than the aforementioned competencies attending council meetings is key in exercising potential presidential influence on government politics. The council of ministers is responsible for coordinating government policies within the cabinet. Aside from the president and the prime ministers all ministers, in charge of specific areas, are members of the council.

The prime minister is bound by the council's decisions and adapts government activities to its decisions. The president can entrust the prime minister with presiding over certain committees and councils including the council of ministers (see article 9). However, concerning the latter only pursuant to an exact laid-out agenda (which has been quite rare in the past). Contrary to ordonnances and decrees, the laws drafted by the council of ministers are not signed by the president, but by the prime minister. This is due to the fact that he is responsible vis-à-vis parliament for these acts[70].

Georgia: The Georgian Constitution does not contain a similar function of the Georgian president, which can be seen as a huge difference in the practical application of the constitutions in both countries. The Georgian president does not have any influence on the cabinet and its decisions.

kk) Countersignature and other Rights of Participation

There are hardly any decisions the president can take without the prime minister's consent or at least with his cognizance even if ultimately the president is the state's central institution. Article 19 is an important

68 *Kempf*, p. 61 et seq.
69 *Grote*, p. 253.
70 *Kempf*, pp. 70.

norm in this context. The prime minister's countersignature proves that the president has stayed within his domain and that the prime minister takes political responsibility for his actions. Initially this seems like a mere formality. However, in times of cohabitation the requirement of countersignature is elevated to a political instrument of power because the prime minister is in no way legally obligated to sign the act in questions. Thus, its implementation required a preceding political consensus.

The president's actions that do not depend on the prime minister's countersignature as provided by article 19 are, first of all, mainly not exclusive prerogatives (e.g. summoning the council of ministers according to articles 54, 61) and secondly, are mostly of minor importance (for example the power to convey a message to the parliamentary chambers, article 18). Articles 11, 12, and 16 which contain substantial provisions always require the prime minister's participation (in different forms). For a referendum (article 11) the government's (or national assembly's) initiative is needed. Even though the prime minister's opinion regarding the dissolution of parliament is non-binding (article 12), it can have a huge political influence.

Only the provisions stipulated by article 8 are not subject to participation making the president free in his decision.

In the case that the president thinks about dissolving the parliament and making use of any emergency powers (article 16), the prime minister has the right to be heard.

Furthermore he has the (formal) right of proposal concerning the appointment of ministers and regarding any constitutional changes.

> *Georgia: In general the prime minister has vast powers to countersign the president's acts. Pursuant to article 73[1](5) actions that have been pursued without his countersignature are deemed legally non-binding and void. The government is responsible for any of the president's acts that have been countersigned by the prime minister according to article 73[1](6).*

3. Summary of the Legal Comparison of France and Georgia

The comparison has revealed that the French president's competencies are much more extensive than those of his Georgian counterpart. Thus, Georgia is quite far from a semi-presidential system.

This finding cannot be undermined by the fact that the French approach in comparison to other semi-presidential systems is quite far-reaching, for instance regarding the president's prerogatives in foreign affairs as well as his exceptionally powerful position in the council of ministers[71]. What most signifies a semi-presidential system is that the president's position is very prominent (including in terms of executive powers). This threshold is not met under the Georgian constitution.

[71] This results in a cursory assessment of the Polish (articles 133-136; 154), Portuguese (articles 133; 200-201), Finish (para. 58-66) and Romanian (articles 80-81; 87; 91-92) constitutions.

IV. THE GERMAN PARLIAMENTARY SYSTEM[72]

1. Introduction

Regarding the direct constitutional powers, the German president is a prime example of a non-autonomous head of state. He mainly has a "state-notarial" function. In comparison to the former *Reichspräsident* influential powers such as the position as commander-in-chief and emergency powers have completely vanished from the German *Grundgesetz* (Basic Law) and the right to dissolve the parliament as well as the competencies regarding appointment and dismissal have been reduced to the bare minimum. Important to note is that in Germany the president is not directly elected by the people (article 54(1)). The executive powers undoubtedly are reserved completely for the government under the leadership of the German chancellor.

Georgia: The Georgian president on the other hand is directly democratically legitimized, which in any case entails a greater position of power.

2. "Powers of Command"; State of Emergency

The German constitution clearly gives the government the powers of command (articles 65a, 115b). This can be concluded (in part) from constitutional provisions on orders given to administration in this field such as provided in articles 84(2) and (5), 85(2) and (3), 86 sentence 1, 108(3) and (7). The president does not have any emergency powers, apart from the powers in the highly rare case of a "legislative emergency".

Georgia: Contrary to the German president the Georgian president is commander-in-chief (article 69(2). Pursuant to article 99 the Georgian president is (together with the parliament) responsible for deciding whether armed foreign military forces can enter Georgian territory. Furthermore, the Georgian president is vested with certain emergency powers (article 73(1)(g),(h),(i)). Thus his competencies are more extensive in this area.

3. Responsibility for Matters of Foreign Affairs

Pursuant to article 59(1) the president plays the main role in the external representation of Germany. However this provision is merely fragmentary in nature. The focus on the president's role therein, also with regards to treaties, excludes main aspects of foreign affairs, for example it does not make reference to the government's eminent role.

The powers of representation enshrined in article 59(1) are, according to general understanding, more of a formal, rather than a substantive nature. The German president does not have the power to autonomously decide on foreign policies. Article 65 sentence 1 vests the German chancellor with the responsible for

[72] Text passages that cannot be deduced from the wording of the Constitution itself are mainly based on Beck'scher OnlineKommentar, GG, as of 1st of June 2014.

setting the general political guidelines. These in turn are independently implemented by the foreign minister; the president is merely in charge of proclaiming foreign policies[73].

In any case it is important to keep parliamentary rights of participation in foreign affairs in mind (see article 59(2)). The parliament has recently started to play a larger role in main questions of foreign affairs, especially in domains traditionally falling within the purview of the government. Consequently, exercising powers in the field of foreign affairs has become more and more dependent on the parliament's involvement[74].

In the past German presidents have often taken a different stance regarding foreign policies vis-à-vis the government, for instance on human rights issues. They have set their own foci on certain topics, for example in raising general awareness for a specific international problem. In this regard the president is not generally excluded from making political statements and these are not subject to the chancellor's countersignature (article 58). Traditionally official international visits are coordinated with the government. However, they are not formally authorized by the government. This approach can be qualified as "behavior loyal to the Constitution" (*verfassungsorgantreues Verhalten*).

This principle influences the relationship between the president and the government in so far as the president, as part of the executive branch, should not openly contradict the government in matters of foreign affairs. On the other hand, the government should involve the president (at least in main) decisions relating to foreign affairs.

Georgia: The Georgian constitutional provisions yield similar results. The main powers lie within the parliament (article 48), the government is responsible for implementation (article 78(1)). The president's power of representation is more of a formal nature (article 69)[75].

4. The President's Countersignature

Article 58 does not regulate which acts of public authority require the president's signature.

Generally, the president is *obligated* to sign other state organ's acts requiring his countersignature. In the case of legislative acts this can be inferred directly from the wording of article 82(1) sentence 1, which provides that "laws enacted in accordance with the provisions of this Basic Law *are*" certified by

73 This is also expressed by a judgment of the Federal Constitutional Court, NJW 1985 , 603.
74 BVerfGE 90, 286; BVerfGE 123, 267.
75 See above III.2.a.bb.

the president after his countersignature and promulgated in the Federal Law Gazette. Further provision of the Constitution furthermore clarify that the president is *obligated* to countersign (see e.g. articles 63(2) sentence 2 and (3) sentence 2, 64(1), 67(1) sentence 2).

However, even if the president is constitutionally obligated to countersign the government's and parliament's public acts, he is not exempt from making *informal* proposals. Yet, he does not have the power to issue a public act or to formally introduce his suggestions to the government concerning his decision to sign a certain act.

In most cases the *Bundestag* (German parliament) and the *Bundesrat* (Federal Council composed of the *Länder*) are responsible for deciding on federal laws. In this domain the president is merely a "state notary". However, if the act is an executive act requiring the president's signature according to the Constitution or an ordinary law, the actual decision lies with the government and not with the president.

Nonetheless, the president at least has a substantive right to review laws. This can be deduced on the one hand from the wording of article 82(1) sentence 1 and on the other hand directly from article 20(3)[76]. Thus this right is not limited to legislative acts, but encompasses all public acts necessitating the president's countersignature. Pursuant to this right the president has the power to revise all of the federal laws and other public acts brought before him concerning their constitutionality and legality.

Georgia: In Georgia the president has a legislative right to veto that can only be overcome by a parliamentary majority (articles 68(3) and (4)). Such a veto right is much more extensive than the German president's right to substantive revision.

5. Mirrored: The Government's Right to Countersign

Pursuant to sentence 1 of article 58 orders or directions[77] are principally subject to the chancellor's or the competent minister's countersignature. The same holds true for the president's certification of draft laws (article 82(1) sentence 1).

Aside from the non-exhaustive enumeration in sentence two of article 58 (appointment and dismissal of the chancellor, dissolution of the German parliament according to article 63 and a request made under

[76] According to this provision the legislature is bound by the constitutional order, the executive power and the judiciary are bound by law and justice.

[77] In practical terms it is sufficient to use these two terms conjunctively and interpret them as meaning any presidential acts aimed at having a legally binding character, but not including instructions given within the presidential office.

article 69(3)) the Constitution provides for at least two further exceptional situations that do not require a countersignature: the president's request to convene the *Bundestag* (article 39(3) sentence 3), the proposal concerning the person of chancellor (article 63(1)), initiating a complaint concerning the competencies of supreme federal bodies before the Constitutional Court (article 93(1) number 1).

The members of government have the same right to substantive review as the president when countersigning the president's public decisions (see article 20(3)). The most important example in this regard is the certification of federal laws that is subject to countersignature according to article 82(1) sentence 1 (not article 58 sentence 1). Further examples are appointments the president has to make pursuant to an ordinary law and according to an initiative of the *Bundestag* or the *Bundesrat*, such as the nomination of the judges of the federal Constitutional Court (article 94(1) sentence 2) and the federal supreme courts (article 95(2)).

All acts entailing appointment or dismissal enacted by the president pursuant to article 60(1) warrant a prior countersignature according to article 58 sentence 1. Article 60(1) does not give the president the unlimited (not even the general) power of appointing or dismissing personnel.

Georgia: The prime minister has an extensive right to countersignature concerning presidential acts. The president's acts enacted without the required countersignature are void (article 73).

6. **"Requirement of Moderation" (**Mäβigungsgebot**)**

The German president is required to exercise moderation in voicing political opinions and is especially obligated to avoid even creating the mere impression of being biased towards a certain political party. This is due to the fact that the German Constitution consciously took the approach of making the *Bundestag* and the government and not the president responsible for "making politics".

Georgia: Such a requirement of moderation can neither be deduced from the Constitution's wording nor from the constitutional history or the genesis of the reformed Constitution. Moreover, it can be assumed that the Georgian president "may" be much more "active" in daily politics in comparison to his German counterpart.

7. **Dissolution of Parliament**

The president only has the power to dissolve parliament in the case provided for by article 68(1). According to this provision the president can dissolve the *Bundestag* within twenty-one days following the chancellor's

proposal pursuant to the case that the chancellor's motion for a vote of confidence is not supported by a parliamentary majority.

Georgia: The Georgian president's powers of dissolution are limited as well (article 73(1)(b)). However, they are more extensive than the German president's powers.

8. **Main Conclusions Concerning the Comparison to Germany**

- It can be noted that the Georgian president has more extensive competencies than the German president and hence in the situation of a "typical" parliamentary system.
- The Georgian President has various important "substantive" rights that the German president does not have (commander-in-chief; right to participation in the presence of foreign armed forces; right to veto regarding legislation; dissolution of parliament).
- In summary, the Georgian constitutional order cannot be classified as a parliamentary system even if the differences seem to be smaller compared to those of the French constitutional order.

V. MAIN RESULTS

- The Georgian constitutional system is similar to a parliamentary democracy. However, various presidential prerogatives have to be kept in mind that are not typical for a parliamentary democracy.
- At the same time the president's rights are not so extensive to equate the Georgian constitutional order to a semi-presidential system.
- Thus, the Georgian system can be placed somewhere between the two systems.
- In conclusion, it is feasible to speak of a "mixed system"[78] with strong tendencies towards a parliamentary approach[79]. A constructive internal dialogue between the president and the prime minister is imperative due to the fact that the Constitution exemplifies an approach of "checks and balances" between the two state organs. The practical application in other countries can be referred to and the dialogue should take place once a month.
- Undoubtedly, long-lasting institutional discrepancies between the two institutions would be detrimental to the development of the Georgian democratic system[80].

78 As the *Venice Commission* primarily concluded in its final report; *Venice Commission, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia*, no. 110 (Conclusion), 2010.

79 Contradicting opinion on this matter: *Kobakhidze*, Challenging Aspects of Georgia's New Constitutional System: "should not be considered as a mixed but as an essentially parliamentary system".

80 See concurring *Kobakhidze*, Challenging Aspects of Georgia's New Constitutional System.

- Generally, the president has representative functions. His responsibilities in the area of the executive are strongly limited, even if he still has various powers in this domain.
- The most important functions are however reserved for parliament or the government and thus lie with the prime minister. This holds mainly true for the area of foreign affairs, in which the prime minister has the decisive powers of decision-making. The president has more extensive powers in the domain of defense policies. At the same time the government is in charge of daily politics in this area.