John Khetsuriani

Corresponding Member of Georgian
National Academy of Sciences, Academician

CONSTITUTIONAL REFORM IN GEORGIA (2017) AND THE CONSTITUTIONAL COURT

ABSTRACT

Constitutional reform undertaken in 2017, which ended the transformation of the country into the parliamentary republic, also affected the Constitutional Court. The norms providing the constitutional basis for the Court were amended. The article discusses the content of amendments, their appropriateness and relevance; it demonstrates the experience of relevant regulations from other countries. The constitutional amendments regarding the formation of the Constitutional Court and appointment of judges, as well as specifying the scope of authorities the Court holds are assessed positively in this paper. However, considering the substantial reduction of competences of the Court, specifically, removal of four competences altogether, including the formal control of the provisions, further limitation of the competence of overseeing the constitutionality of elections, etc., the constitutional reform in these regards cannot be declared as a step forward.

.

INTRODUCTION

Georgia saw yet another constitutional reform in 2017. Although the constitution has been partially amended permanently since 1999, constitutional reform causing general revision of the Basic Law took place only twice prior to 2017 – in 2004 and in 2010.

All three constitutional reforms (2004, 2010 and 2017) aimed at establishing new system of governance or substantial improvement of the existing model. It seems the political elite of the country saw the incorrect choice of state governance model as a main reason of failure. In fact, the idea of establishing a democratic and rule of law state is certainly not linked with any particular type of state governance. The idea of a democratic and rule of law state can be successfully executed in a constitutional monarchy, just like in a presidential, semi-presidential and parliamentary republic. Such examples are vivid and multiple in the modern world. It is essential that the power is separated pursuant to the famous triad and simultaneously, there must be efficient mechanisms for checks and balances in place, while fundamental human rights and freedoms are sufficiently protected and guaranteed.

While searching for new type of state governance, the presidential republic set as its first in 1995 was formally replaced by the semi-presidential system by the constitutional reform of

2004. A new executive body – the Government, - was introduced, however the mechanisms for checks and balances were selected in a way, that in reality offered the so called super-presidential governance,[1] the eradication of negative socio-political and socio-economic results of which are still ongoing.

The constitutional reform of 2010 was also dictated by the political goals. The desire of the ruling force to remain in power was well met by the parliamentary republic, which, in case of success in parliamentary elections, would allow maintaining power infinitely in the executive branch. Thus the choice was made in favour for it, more precisely, for the rationalised parliamentarism, the main goal of which is ensuring the stability of the Government.[2] However, the main tool of this system of governance – constructive vote of no confidence, providing for the balance between the parliament and the government, was construed within the Constitution in such a complicated manner, that it was practically impossible to be used. The status and the authorities of the President were not completely understood either, which became apparent right after the amendments of 2010 went into force and served as the basis for conflict between the constitutional bodies.

Since the acting Constitution provided "faulty parliamentary system", the main task of the constitutional reform in 2017 was ensuring the Constitution fully conformed with the fundamental constitutional law principles characteristic to the parliamentary republic.[3] How well this task was fulfilled by the State Constitutional Commission and the Parliament of Georgia is well demonstrated by the final assessment of the Venice Commission, provided in its final report regarding the 2017 constitutional reform. Specifically, it states: "the constitutional reform process completes the evolution of Georgia's political system towards a parliamentary system and constitutes a positive step towards the consolidation and improvement of the country's constitutional order, based on the principles of democracy, the rule of law and the protection of fundamental rights".[4]

The Venice Commission, together with this general positive assessment, has provided for specific comments and recommendations in its report, including in relation to the authority of the Constitutional Court with regards to the elections. The Parliament of Georgia decided these comments and recommendations were appropriate to be carried out, even though the amendments were already adopted on the second reading of the Parliament, which excluded making substantial changes in the amendments. Accepting the recommendations caused the

[1] I Arakeliani et al, *The Process of Constitutional-Political Reform in Georgia: Political Elite and the Voices of the People* (IDEA, CIPDD 2005). 21.

[2] On rationalised parliamentarism see E Tanchiev, 'Rationalised Parliamentarism' in O Melkadze (ed), *Republic: Parliamentary or Presidential* (Upleba 1996). 38-44.

[3] "It is necessary to transform current inaccurate parliamentary system of governance into meticulous parliamentary governance system. This was […] fundamental task set before the Commission and the State Constitutional Commission worked according to this very […] fundamental task". <http://www.parliament.ge/ge/parlamentarebi/chairman/chairmannews/irakli-kobaxidze-sakonstitucio-cvlilebebis-mizania-demokratiuli-ganvitarebis-konstituciuri-garantiebis-sheqmna.page accessed 1 June 2018.

[4] European Commission for Democracy through Law (Venice Commission), 'Opinion on the Draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017'. CDL – AD (2017)023, 51.

initiation of a new wave of constitutional amendments within the recently adopted constitutional law, which allowed the reform process to continue in 2018 as well.

This was not the first time, when the constitutional reform concerned the Constitutional Court. This body of constitutional review, established by the Constitution of 1995 has been substantially revised both through the process of constitutional reforms and legal amendments. For instance, in 2002 the law regulating the Constitutional Court was significantly changed.[5] The scope of competences of the Court widened. The formal and concrete control of provisions was added to its powers, the circle of persons authorised to address the Court widened and the constitutional proceedings became more flexible and efficient. However, in 2004, the government established after the revolutionary wave first attempted to abolish the Constitutional Court through merging it with the Supreme Court, and then, on December 17, 2004 it published for public discussions the draft constitutional law initiated by the President, which established the Constitutional Court outside the judicial branch, the early termination of all justices of the Constitutional Court and the Supreme Court (with the exception of newly elected President of the Supreme Court), the removal of a member of the Constitutional Court was allowed through the procedures of impeachment, the age census for the appointment to the Court was to be decreased, the rules on the formation of the Constitutional Court were to be amended – all members were to be elected by the Parliament through the proposal of the President, the Court would not be allowed to rule on the constitutionality of the elections any more, the circle of normative acts the appeal of which could be made by the citizens to the Constitutional Court was to be narrowed etc.[6]

These possible amendments to the Constitution of Georgia were met with severe negativity both within and outside the country, as a result of which the government refrained from adopting the draft. However, some provisions, which, for instance, limited the authority of the Constitutional Court, reduced the age census for the appointment of judges and others, were still adopted later on.[7]

Imposing limitations on the authorities of the Constitutional Court was attempted in 2016 as well, however, as a result of veto by the President of Georgia, large part of suspicious amendments planned to be included in the laws governing the Constitutional Court was avoided.[8]

The constitutional reform of 2017 caused several significant changes in the provisions establishing constitutional foundations of the Constitutional Court. The foregoing article discusses the content of these amendments, their appropriateness and conformity with the general principles of the constitutional law.

---

[5] Article 14, 12 February 2001, სსმ 4, Organic Law of Georgia on Constitutional Court of Georgia (*საქართველოს საკონსტიტუციო სასამართლოს შესახებ*); See also J Khetsuriani, 'Novelties in the Legislation of the Constitutional Court of Georgia' (2002) Human and Constitution, 9-18.

[6] 9 December 2004, სსმ 148, Ordinance of the Parliament of Georgia on Publishing Draft Constitutional Law 'On Amendments to the Constitution of Georgia' and Creation of Organising Commission of its General Public Discussions.

[7] J Khetsuriani, *From Independence to Rule of Law State* (Cezanne 2006). 67-69.

[8] On this topic see J Khetsuriani, *The Authority of the Constitutional Court of Georgia* (Favorite Style 2016). 278-282.

THE PLACE OF THE CONSTITUTIONAL COURT WITHIN THE SYSTEM OF SEPARATION OF POWERS

As a result of constitutional reform the place of the Constitutional Court within the system of separation of powers has not changed. The main law still recognises the Court as an institution of the judicial branch. The chapter six of the new version of the Constitution of Georgia – "Judicial Authority and Prosecutor's Office", - states, that the judicial authority is exercised by the Constitutional Court of Georgia and the general courts of Georgia (paragraph one of article 59). As for the Prosecutor's Office, although in certain states it is an institution of the judiciary (Belgium, Spain, Romania, Latvia and Croatia),[9] however in Georgian reality, merging this Office with the Judiciary in one chapter is extremely conditional. When deciding on a place of the Prosecutor's Office in the new Constitution the legislator, as it seems, took into account the significant role the Prosecutor holds in adjudication, however, the same logic dictates that the Bar of defence lawyers should have been in the chapter of the Judiciary as well.[10] Despite the Prosecutor's Office of Georgia being one of the constitutional bodies of the state, the main law of the country does not define its competences, which, in our opinion, is a significant flaw and allows for wide margin of defining authorities by the legislator. If we take into consideration the rule of formation of the Prosecutor's Office of Georgia and its accountability towards the Parliament (article 65 of the new version of the Constitution of Georgia), it is more associated with the legislature, rather than the judiciary or even the executive branch, as it was in the original version of the Constitution in 1995 and is in the current Constitution as a result of 2004 reform.[11]

Unlike the new version, the acting Constitution does not only state the institutions of the judiciary in its chapter regarding the judicial branch, but also the forms of executing judicial authorities. Specifically, it states: "Judicial authority shall be exercised through constitutional control, justice, and other forms determined by law" (paragraph 1, article 82). The possibility to exercise judicial authority through "other forms determined by law" is removed in the new version of the Constitution.

The judicial branch and adjudication (including, of course, constitutional adjudication) are not identical notions. Exercising judicial authority is wider notion, including adjudication, constitutional control (constitutional adjudication) and, at the same time, the activities, which cannot be considered either adjudication or constitutional control. For instance, when the Constitutional Court decides on early termination of office of its member, it cannot be considered as exercising its power of constitutional control, or the work of the High Council of Justice, another institution set by the Constitution within the judicial branch; it certainly

[9] O Melkadze, B Dvali, *Judiciary in the Foreign States* (Merani-3 2000). 209-225.

[10] The indication to the advocacy in the new version of the Constitution of Georgia is given in the chapter on Human Rights (article 31, paragraph 3). In this regard it is noteworthy, that advocacy together with the Prosecutor's Office is included in the chapter on Judiciary in the Constitution of Bulgaria, while the Constitutional Court is separated from the Judiciary and has its own dedicated chapter (see V Gonashvili (ed) *Constitutions of Foreign States* Part IV (2007). 222, 224).

[11] In the original 1995 version of the Constitution of Georgia the Prosecutor's Office was considered an institution of the Judiciary and its powers were envisaged within the same chapter (article 91, while as a results of constitutional reform of 2004 the indication on the Prosecutor's Office was completely removed from the Basic Law and it became an institution of the Executive Branch.

does not represent adjudication. However, both instances are forms of exercising judicial powers set by the Constitution or law. Therefore, amending the mentioned provision in the Constitution was not appropriate.

Exercising justice and constitutional control (constitutional justice) are main functions, major directions of the work for the two institutions within the judiciary – general courts and the Constitutional Court – demonstrating their internal specific nature and distinguishing them from other bodies of the state. No other state institution may exercise justice or constitutional control. Although, these institutions also undertake other, non-major functions, such functions do not have independent meaning and serve the efficiency of the main functions. Legal scholarship rightfully states regarding this issue: "Adjudication, as a main, major function of the judiciary is the one defining its specificity and its place within the state functioning system".[12] We could also add that this major function ensures the belonging of these two institutions to the judiciary.

It is expressed in the legal scholarship, that the Constitutional Court is both judicial body of exercising politics and a political body exercising judicial powers. It includes significant elements characteristic to both and exercises the so called "mixed" – political adjudication.[13] Derived from this specific political-legal nature, the Constitutional Court is viewed as an independent one of the highest state institution, separate from judicial system. In their view, this is why in the constitutions of some countries, the Constitutional Court rightfully has dedicated separate chapter (Austria, Spain and Bulgaria) and it is not necessary to include the relevant provisions in the chapter of the judiciary.[14]

In our opinion, the Constitutional Court cannot be a political institution, since such bodies decide on issues based on their initiative and appropriateness. While the Constitutional Court, when addressed (and not with its own initiative) decides only on legal issues – whether a particular provision of the law or an act is in conformity with the Constitution.[15] These issues, at the same time, may carry significant political relevance, just as the criminal, civil or administrative cases within the general courts, but in both instances the court decides only on legal and not political issue. Since the court judgments may have political relevance and, therefore, affect the political life of the country, the illusion that the Court is also a political institution is created, which surely is not accurate.

The Constitutional Court is one of the highest constitutional institutions of the state exercising its judicial powers through adjudication and other means set by the law. Thus its place is within the judicial branch and, therefore, this issue is properly decided in the Constitution of Georgia.

[12] O Melkadze, B Dvali, *Judiciary in the Foreign States* (n.9). 16.
[13] D Gegenava, 'The Nature of the Constitutional Court and its Place in the Concept of Separation of Powers' in G Kverenchkhiladze, D Gegenava (eds), *Modern Constitutional Law* Book I (2012). 99.
[14] НВ Витрук, *Конституционное правосудие. Судебно-конституционное право и процесс* (Юрист М., 2005). 161.
[15] G Khubua, J Ch Traut, *Constitutional Justice in Germany* (2001). 18.

THE COMPOSITION AND FORMATION OF THE CONSTITUTIONAL COURT

Main aspects of the composition and formation of the Constitutional Court has been subject to constitutional regulations both before and after the reform, envisaging the issues of personal composition, method and procedures of appointment of judges, requirements set for candidates of judges and the bodies involved in formation of the court.

It should be primarily stated, that before the constitutional reform of 2017, the Basic Law of Georgia used two notions interchangeably regarding the personal composition of the Court: "Judge of the Constitutional Court" and "Member of the Constitutional Court" (paragraph 2 of article 88). The new version of the Constitution of Georgia utilises only one notion in this regard: "Judge of the Constitutional Court", which, in our opinion, expresses the legal status of this position more precisely.

The number of judges in the Constitutional Court varies in different countries. This number is mainly defined based on the authorities and possible cases the Court should deal, also by other factors.[16] The Constitutional Court of Georgia comprises of nine judges. Since the adoption of the Constitution of Georgia, this amount has not changed. Although, there has been a proposal of increasing the number of judges, however, only in case the Constitutional Court would be granted the authority to conduct real constitutional control, which, obviously, would cause the severe increase of number of cases.[17] However, since this proposal was not adopted, the number of personal composition of the Court has remained unchanged. On the other hand, the requirements set for the candidate of the judge of the Constitutional Court have somewhat changed. In the original version of the Constitution three mandatory conditions were set. The candidate of the judge should have been the citizen of Georgia aged at least 35 and holding higher legal education (paragraph 4 of article 88). With amendments of 2005,[18] the age requirement has decreased from 35 to 30, which, in our opinion, was unjustified. It is relevant, that compared to other countries, Georgia had set minimal age requirements already and decreasing them further negatively affected the qualification of the judges, especially, when the Constitution did not prescribe the requirement of having work experience with the specialty.[19] The professionality and high experience of the personal composition of the Constitutional Court is achieved in other countries through setting high age requirement and the condition of extensive work experience with the specialty. For instance, in Germany and Slovakia, minimal age for appointment of the judge of the Constitutional Court is 40, in Hungary – 45, while the requirement of minimal work experience in professional field is 10 years in Austria, 15 years in Spain, etc. Even in those countries, where the minimal age is not set for appointment of judges (Lithuania, Latvia,

[16] The fewest number of judges is in the Constitutional Court of Andorra (four judges), while the largest number is in the Constitutional Court of Russia (19 judges).
[17] Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8), 148-154.
[18] Article 2 of the Constitutional Law no.2496 - ᲡᲐᲥ I, no.1, 27 December 2005.
[19] It is noteworthy that unlike the candidates of the Constitutional Court, the Basic Law set the same criterion for the candidate of judgeship of the general court. Namely, the candidate of judgeship in the general courts was required among others, to have at least 5 years of work experience within the specialty (article 86, paragraph 1).

etc.), the candidate of the judge has the duty to hold such work experience, that a person can become a judge only above the age of 35.[20]

In legal literature the system of criteria set for the appointment of judges of the Constitutional Court, which does not conform to the high status of the judge of the Constitutional Court, is quite justifiably criticised.[21] As a result of constitutional reform, the requirements set for the candidate of a judge of the Constitutional Court have significantly increased and are set in the following manner: a candidate shall be a citizen of Georgia, who has attained the age of 35 years, has higher legal education, no fewer than ten years of experience in the practice of law and distinguished professional qualifications (article 60, paragraph 2). It is obvious, that minimal age requirement has returned to the original condition and, simultaneously, which is of course welcomed, new criteria are added, specifically the condition of having no less than 10 years of work experience with the specialty and distinguished professional qualification. These criteria collectively, in our opinion, ensure that the Constitutional Court will be composed of experienced and highly qualified lawyers.

The rules of selecting and appointing judges in the Constitutional Court are no less relevant, which are not unequivocally decided abroad. However, in all instances the desire of the lawmaker to set rules of formation of the Court ensures the independence of this utmost relevant institution of constitutional control from other branches and party influences. This trend is well demonstrated in the rule of composition of the Constitutional Court, which envisages the involvement of all three branches of power equally in the process (Bulgaria, Spain, Italy, Ukraine, etc.).[22] This very system of formation of the Constitutional Court was set by the original version of the Constitution. The Basic Law of the country (article 88, paragraph 2) prescribed the following: three members of the Court were appointed by the President of Georgia (the President was the head of State and executive branch then), three members were elected by the Parliament (legislative branch) and three members were appointed by the Supreme Court (judicial branch).

Legal scholarship has highlighted that this rule of formation of the Constitutional Court, considering the entities engaged in the process, although has remained the same, as a result of the constitutional reform of 2004, the status of one entity, the President of Georgia, was amended. The President was not seen as a leader of executive branch, which, in the opinion of legal scholars, excluded the executive branch from the formation of the Constitutional Court. Therefore, the idea of ensuring the full parity principle was expressed, which envisioned the Government of Georgia proposing a candidate for a member of the Court to the President.[23] We consider such approach appropriate, however, this necessity arose not after the reform of 2004, but after the constitutional reform of 2010, when the Government of

[20] В В Маклаков (Ред), *Конституционный контроль в зарубежных странах* (Норма, М., 2007). 42-43; Н В Витрук, *Конституционное правосудие. Судебно-конституционное право и процесс* (Юрист, М., 2005). 180-181.
[21] See G Kakhiani, *Constitutional Control in Georgia. Theory and Legal Analysis* (Meridiani 2011). 149-150.
[22] Article 147, Constitution of Bulgaria. 12 July 1991 (Държавен Вестник, No.56, 13.07.1991);
Article 159, Constitution of Spain. 13 October 1978 (Boletín Oficial del Estado 29.12.1978);
Article 135, Constitution of Italy. 22 December 1947 (Gazzetta Ufficiale No. 298, 27.12.1947);
Article 148, Constitution of Ukraine, 28 June 1996 (Відомості Верховної Ради України (ВВР), 1996, № 30)
[23] See Kakhiani, *Constitutional Control in Georgia* (n.21). 135-136.

Georgia become the highest body of executive branch, while the main executive functions were removed from the President of Georgia. Before that, since the reform of 2004 until 2013, the President of Georgia was although no longer the leader of the executive branch, the Government of Georgia was not seen as the highest body of the executive either. The President of Georgia shared the executive powers with the Government, specifically, the Government of Georgia was accountable to the Parliament and the President, the President was authorised to remove the Government at his own discretion, remove certain Ministers from their posts, cease or annul the acts of the Government and the bodies of the executive branch, etc. Considering these, the appointment of a judge of the Constitutional Court by the President of Georgia could still be seen as a participation of the executive branch in the formation process of the Court.

Although the constitutional reform of 2017 has almost completely removed the President of Georgia from the executive branch and only left the status of a head of state for the President characteristic to the parliamentary republic, the authority to single-handedly appoint one third of the Constitutional Court was maintained. If the lawmaker were loyal to the principle, that all three branches of power are equally engaged in the process of forming the Constitutional Court of Georgia, then it is unclear how the executive branch participates in the process within the new constitutional reality. After the constitutional reform the President of Georgia does not represent any of the well-known triad of power. Based on all these, this issue should in future be solved in a way proposed above or by introducing the endorsement (countersigning) of the Prime-Minister on the appointment of the judge of the Constitutional Court by the President.[24]

In the new version of the Constitution of Georgia the procedure of electing judges of the Constitutional Court by the Parliament is amended. Under the current Basic Law, three members of the Constitutional Court is elected through majority of the full list of the Parliament, while according to the new version of the Constitution it has to be no less than three fifth of the total number of the Members of the Parliament (article 60, paragraph 2). It is noteworthy that pursuant to the original Constitution of Georgia, three fifth of the full list of the Parliament was necessary for the election of a judge of the Constitutional Court (article 88, paragraph 2). The new version replaced “full list” with the “total number”, while “three fifth” replaced the word “majority”. When appointing a judge of the Constitutional Court increasing the quorum significantly, in our opinion, will support the participation of the parliamentary minority and protect members from the influence of the parliamentary majority.

As for the term of the judge of the Constitutional Court, in our opinion, the judge should be appointed either for a life or for a fixed term, however without the ability of re-appointment (re-electing). The Constitution of Georgia has originally set 10-year term for the judge of the Constitutional Court and the prohibition of the re-appointment. None of the constitutional reforms has amended these provisions and will be in force in the new version of the Constitution, indicating the right approach of the lawmaker.

[24] For instance, the President of Italy appoints one third (five judges) of the Constitutional Court without the Government proposing the candidates to the President, however, the Decree of the President on appointing a judge needs countersigning from the Chairman of the Government (see В В Маклаков (Ред), *Конституционный контроль в зарубежных странах* (Норма М., 2007). 315-316).

The election of the President of the Constitutional Court can be viewed within the same context as well. The President of the Court exercises representative, organisational and certain procedural authorities, which distinguishes him/her from other judges. Two methods of appointing (electing) the President of the Constitutional Court is known: the President is elected by the Court (e.g. Belgium, Italy, Latvia, etc.) or the President is appointed (elected) by another state institution (e.g. Germany, Austria, Spain, etc.).[25] Legal scholarship considers election by the Court members more appropriate, as it significantly decreases the possibility of politicising the election (appointment) procedure and creates certain guarantees for equality of the judges and independence of the Court.[26]

In the original version of the Constitution of Georgia the President of the Constitutional Court was elected by the Constitutional Court from its members for a 5-year term. Additionally, the same person could not be elected twice (paragraph 2, article 88). This model of electing the President of the Constitutional Court has survived all constitutional reforms and remained unchanged; however, the provision of prohibiting re-election has been amended. Specifically, since 2010 re-electing same person as a President of the Court became possible, this took place in practice in 2011.[27] The reform of 2017 has reinstated the original condition and in the new version of the Constitution of Georgia, re-electing same person for the Presidency of the Court is again prohibited (article 60, paragraph 3).

With regards to this issue it is not insignificant to state one fact, although it is not related to the Basic Law of the State, but to the subject regulated by the organic law on the Constitutional Court. Specifically, the issue concerns the proposal of the candidacy for the President of the Constitutional Court. Prior to 2016 the candidate of the Presidency of the Court was nominated through the agreed proposition of the President of Georgia, Chairman of the Parliament of Georgia and the President of the Supreme Court of Georgia (article 10, paragraph 3 of the Organic Law). As a result of the amendments to the Organic Law of Georgia "On the Constitutional Court of Georgia" the candidate for the Presidency of the Court can only be nominated by three judges of the Constitutional Court.[28] Thus the candidate of the President of the Constitutional Court is nominated by the judges themselves

[25] Article 32, Organic Law of Belgium Special Act of January 6, 1989 On Constitutional Court, Official English translation available here: <http://www.const-court.be/en/basic_text/Organic_legislation_SACC.pdf> accessed 1 June 2018;
Article 135, Constitution of Italy 22 December 1947 (Gazzetta Ufficiale No. 298, 27.12.1947);
Article 12, Law of Latvia on Constitutional Court 14 June 1996, official English translation available here: <http://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/> accessed 1 June 2018;
Article 9, Law of Germany on Federal Constitutional Court 12 March 1951, official English translation available here <http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=10> accessed 1 June 2018;
Article 147, Constitution of Austria 1 October 1920 (Federal Law Gazette No. 1/1930 (StF: BGBl. Nr. 1/1930 (WV));
Article 160, Constitution of Spain 31 October 1978 (Boletín Oficial del Estado 29.12.1978).

[26] Н В Витрук, *Конституционное правосудие. Судебно-конституционное право и процесс*. (Юрист, М., 2005). 195.

[27] Article 379 Constitutional Law of Georgia 15 October 2010 no.3710-ს\ბმ I, no.62, 05.11.2010.

[28] Organic Law of Georgia 3 June 2016 (webpage 04.06.2016).

and they are the ones electing the President at the same time. In our view, this will further strengthen the autonomy of this institution of the constitutional control.

THE AUTHORITY OF THE CONSTITUTIONAL COURT AND THE SUBJECTS EMPOWERED TO PETITION THE CONSTITUTIONAL COURT

Major changes were brought to the foundational constitutional provisions of the authorities of the Constitutional Court of Georgia. If pursuant to the current Basic Law the authorities of the Constitutional Court is defined by the Constitution and the Organic law, after the amendments to the Constitution the only source of authorities of the Constitutional Court is the Constitution. The provision of the new version of the Constitution, which provides the authorities of the Constitutional Court, also establishes that the Constitutional Court "exercises other authorities envisaged by the Constitution" (article 60, paragraph 4, subparagraph "j"). Therefore, the authorities of the Constitutional Court are comprehensively defined only by the Constitution and it is prohibited to increase the amount of these authorities by, for instance, the Organic Law.

The above mentioned provision of the new version of the Constitution of Georgia provides for nine authorities of the Constitutional Court: protection of human rights, abstract norm control, real norm control, deciding upon disputes of competence, constitutional review of the international agreements, constitutional control of the political parties, constitutional control of elections and referenda, protection of the rights of the local self-government. This list does not include the authority of exercising impeachment procedure. It is indicated in the article 48 of the new version of the Constitution, which is already named "Impeachment". Thus the Constitutional Court is represented with ten types of authorities in new version of the Constitution. Constitution currently in force and the Organic Law of Georgia "On Constitutional Court of Georgia" provides for fourteen authorities, thus, more by four compared to the new version. The authors of the constitutional reform rejected the authorities such as: formal norm control, deciding the disputes on violation of the status of the Autonomous Republic, control over normative acts of the Autonomous Republic and protection of the constitutional foundations of the judiciary. As we see, the competence of the Constitutional Court, which is established by the unity of its authorities, is significantly reduced. This is so based on the quantitative approach. Below we will provide in-depth discussion on the authorities of the Constitutional Court that are either removed or have been amended to a certain extent.

One of the authorities removed from the Constitutional Court is formal norm control. The Constitutional Court adjudicated and decided on the adoption/issuance, signature, publication and entry into force of legal acts of Georgia and parliamentary regulations with regards to the Constitution of Georgia within this authority. Therefore, the subject to the constitutional review was not the content of the mentioned normative acts, not the material part thereof, but the formal aspects in the view of the Constitution. Formal constitutional control covered only parliamentary normative acts and aimed at ensuring the legislative process established by the Constitution for the legislative branch was followed. Formal constitutional control had such a high significance, that, although it was independent type of authority of the Constitutional

Court, simultaneously, the Organic Law of Georgia "On Constitutional Court of Georgia" also prescribed it as an authority that could have been used by the Court on its own initiative (article 26, paragraph 2) and was mandatory in case the Constitutional Court was exercising norm control within other authorities (which is exceptional for Georgian constitutional justice). The lawmaker, obviously, was considering the general rule of validity of normative acts, according to which, the normative act has no force not only when it contradicts the Constitution, but also when the procedures established by the Constitution for its adoption and entry into force is violated. Based on this, after the new version of the Constitution comes into force, a situation could emerge, when a legal act or normative regulation adopted by the Parliament does not contradict the Constitution, however, the rules of its adoption or entry into force provided by the Constitution may be heavily violated. Unfortunately the control mechanism of the Constitutional Court will not exist for such instances and restraining the Parliament from violating the Constitution will be impossible. Thus removing this authority from the Constitutional Court was not appropriate.

The following two authorities of the Constitutional Court covered the Autonomous Republic of Ajara and aimed at deciding the cases of constitutional claims between the bodies of central state government and of the regional one. The Constitutional Court was authorised to adjudicate and decide on claims of violation of the Constitutional Law "On the Status of the Autonomous Republic of Ajara", as well as the issues of conformity of the normative acts of the Supreme Council of Ajara Autonomous Republic with the normative acts of Georgia. After such authority is removed, the constitutional review over the normative acts of the Supreme Council of Ajara Autonomous Republic will be placed on other authorities of the Constitutional Court (for instance, abstract norm control, protection of human rights, etc.), however the norm control will not be as efficient as it was within the special authority. The issue here is that within the currently abolished authority of the Constitutional Court, the acceptance of the constitutional referral of the Parliament of Georgia for consideration by the Constitutional Court caused suspension of the operation of the respective normative act of the Supreme Council of the Autonomous Republic of Ajara until the final judgement was delivered on the case. Additionally, the disputed normative act could be reviewed with regards to both, their constitutionality and their legality.[29] These possibilities of constitutional control shall not exist after the constitutional reform.

As for the second authority related to the Autonomous Republic, since the violation of the Constitutional Law "On the Status of Autonomous Republic of Ajara" was possible by both central and Autonomous Republic Government bodies, the right to submit claims on this issue was given to the institutions of both level of government: the President of Georgia, the Government of Georgia, no less than one fifth of the Members of Parliament and the Supreme Council of Autonomous Republic of Ajara.[30] Currently, pursuant to the new version of the Constitution of Georgia (article 60, paragraph 4, subparagraph "d") the highest representative or executive body of the Autonomous Republic of Ajara is entitle to address the Constitutional Court only if it considers that its competence established by the

[29] See Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8). 253-263.

[30] Article 41[1] Organic Law of Georgia on Constitutional Court of Georgia (საქართველოს საკონსტიტუციო სასამართლოს შესახებ), (პარლამენტის უწყებანი, # 45, 21.11.1997, p. 54).

Constitution of Georgia is violated, which, obviously includes the issues of much narrower circle that the topics regulated by the Constitutional Law of Georgia.

The next authority removed from the Constitutional Court, which aimed at protection of the constitutional foundations of the judiciary, could, in our opinion be replaced by the authority of deciding competence disputes, since the function of ensuring the independence and efficiency of the general courts, pursuant to the Basic Law of the State, is the competence of the High Council of Justice (article 64, paragraph 1). Therefore the normative act contradicting the constitutional provisions regarding the general courts is linked with the competences of the High Council of Justice and, thus, this institution, hopefully will have the right to file a referral to the Constitutional Court requesting constitutional revision of such normative act.

The amendment was made to the authority of abstract norm control of the Constitutional Court. Prior to the reform it had quite limited character, specifically the Constitution (article 89, paragraph 1, subparagraph "a") and the Organic Law of Georgia "On Constitutional Court of Georgia" (article 19, paragraph 1, subparagraph "a") precisely defined the normative acts, which could be subject to constitutional control through this authority. After the constitutional reform the abstract norm control adopted universal quality and any normative act falls within its scope. The expansion of the area of constitutional control should of course be assessed positively, if this does not cause overload of the Constitutional Court. In our opinion this authority of the Court is one of the most important tools for checks and balances between the branches of power and thus, it would be more appropriate, if it covered only the normative acts adopted by the supreme state authorities.

The legal definition of the authority of the Constitutional Court regarding the adjudication of the disputes on competences between the state bodies is amended. Pursuant to the new version of the Constitution of Georgia new subjects are allowed to participate in such disputes, specifically: the Council of the National Bank, Auditor General, Prosecutor General and the executive bodies of the Ajara Autonomous Republic (article 60, paragraph 1, subparagraph "d"). Additionally the courts are removed from the entities entitled to address the Court. We should assume that in case the competences of the judiciary are violated, the right to address the Constitutional Court will be granted to the High Council of Justice by the Organic Law, as it was mentioned above. Generally it should be noted that the Organic Law on the Constitutional Court shall specify not just this issue, but also the right of certain state entities (e.g. the President of Georgia, The Parliament of Georgia, the High Council of Justice) to address the Constitutional Court regarding the violation of their competences and of other state entities as well.[31] In any case the provision of the new version of the Constitution establishes that the Constitutional Court is authorised to "consider disputes on the authority of an appropriate body" does not give precise guidelines for establishing the scope of referrals to the Court by specific entities and requires further specification in the Organic Law.

[31] Pursuant to the Organic Law of Georgia on Constitutional Court of Georgia (საქართველოს საკონსტიტუციო სასამართლოს შესახებ) article 34, paragraph 1, the President of Georgia and the Parliament of Georgia are entitled to refer to the Constitutional Court not only when they consider their own competence violated, but also when the scope of competences of other state institutions are violated as well.

In the new version of the Constitution of Georgia the authority of the Constitutional Court regarding the constitutional control over the political parties is established differently. Prior to the constitutional reform both the issues of constitutionality of the formation and activities of political entities of citizens fell within the scope of authorities of the Court. After the reform the competence of the Constitutional Court only covers the constitutionality of the activities of the political parties. As for the constitutionality of their formation, it is beyond the jurisdiction of the Constitutional Court. The issue here is that the Basic Law of the State establishes the list of prohibitions regarding both the activities and the formation of the political parties. For instance, the new version of the Constitution states that "the formation of a political party according to territorial affiliation shall be impermissible" (article 23, paragraph 3). If we consider the instance, when a political party was established based on territorial affiliation, but at the same time its activities do not contradict other requirements of the Constitution, such Party cannot be prohibited by the Constitutional Court. Its prohibition is not permitted by any other entity either, since the Constitution provides that the political party can be prohibited exclusively by the Constitutional Court (article 23, paragraph 4).

Another amendment was made to the following authority of the Constitutional Court, however with regards to its expansion. Specifically, the Constitutional Court, when prohibiting a political party, shall now be authorised to decide the termination of the member of a representative body elected through this party. It should be noted that Georgian legal scholarship had already proposed reasoned suggestions on this issue, similar legal experience is seen in other countries and it is welcomed, that as a result of the constitutional reform this topic was positively decided.[32]

New provision was added to the authority of the Constitutional Court regarding the constitutional control of the elections. Specifically, pursuant to the new version of the Constitution of Georgia, it is prohibited to declare regulations governing elections as unconstitutional during the respective election year, unless these regulations were adopted during 15 months before the month of respective elections (article 60, paragraph 6). As for the constitutional definition of the current authority of constitutional control of the elections, it has remained the same and despite the critical comments, the disputes on the constitutionality of regulations governing elections (referenda), and disputes on the constitutionality of elections (referenda) shall be decided in unity by the Constitutional Court. The shortcoming of such legislation, in our opinion, is following – if constitutionality of the regulations governing elections or referenda is not under doubt, but the elections or referenda were held in violation of these regulations and the Constitution, the constitutionality of such elections (referenda) does not fall within the jurisdiction of the Constitutional Court.[33] The above mentioned new provision of the Constitution of Georgia has further limited the authority of the Constitutional Court in deciding the constitutionality of the elections. In case the election law faces no amendment within the last 15 months prior to elections, i.e. no new law regulating elections is adopted, the Constitutional Court cannot adjudicate over the constitutionality of elections held or to be held within that election year. In other words, one of the most relevant authorities of the Constitutional Court will be paralysed. In our opinion in order to ensure the legitimacy of the state government and to legally resolve the political

[32] Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8). 94-97.
[33] Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8). 102-103.

crises, the role of the judiciary in forming the state government through elections should be further strengthened, not diminished. Unfortunately, since 2005, the constitutional reforms, including that of 2017 the law of Georgia sees development in the latter direction.

We have partially addressed the issue of the subjects entitled to address the Constitutional Court when discussing the amendments of the authorities of the Court. Hereby we will only state, that as a result of the constitutional reform the circle of such subjects has significantly widened. Eleven subjects were entitled to address the Constitutional Court prior to the reform, while as a result of it this number has increased to 16. Additionally, new subjects, as mentioned above, can address the Constitutional Court for deciding on the disputes of competences.

The constitutional provision regulating the legal outcome of the judgment of the Constitutional Court has been partially amended. Pursuant to the current Constitution "a normative act or part of it recognised as unconstitutional shall cease to have legal effect as soon as the respective judgement of the Constitutional Court is published" (article 89, paragraph 2). In the new version of the Constitution following sentence was added to this provision: "unless a different, later period of **invalidation** of the act or part of it is established by the respective judgment [emphasis added]" (article 60, paragraph 5). It should be noted that the Organic Law of Georgia "On Constitutional Court of Georgia" establishes the same legal outcomes of the judgment of the Constitutional Court (article 25, paragraph 2), however it was not used in practice, since it did not conform with the Basic Law, establishing imperatively the invalidation of the unconstitutional act at the moment of the publication of the judgment and did not allow for the discretion of the Constitutional Court to define other date for invalidation. However such need was obvious for exercising certain authorities, particularly when exercising the authority of constitutional control of the acting international agreements.[34]

Currently this issue is decided and as a result of the constitutional reform, the mentioned provision of the Organic Law has gained the constitutional status. Using this provision in the practice of the Constitutional Court, in our opinion, will avoid possible conflict between the principles of the national and international law and will be a relevant tool for ensuring the legal security.

CONCLUSION

The constitutional reform that took place in Georgia in 2017 has completed the transformation of Georgian political system to the Parliamentary system and removed the errors made during the previous constitutional reform (in 2010).

The constitutional reform, which partially continued in 2018, has touched upon the provisions defining the foundations of the Constitutional Court, however, did not change the place of the Constitutional Court within the system of separation of powers. Pursuant to the new version

[34] On this issue see Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8). 186-188.

of the Constitution, it is still be institute of the judicial branch and is a judicial entity of the constitutional control.

As a result of the constitutional reform the requirements set for the candidate of the judge of the Constitutional Court have significantly increased, as well as the quorum for electing a judge by the Parliament; additionally the possibility of electing the President of the Constitutional Court for a second term was also removed, the circle of persons entitled to address to the Constitutional Court has widened, just as the scope of abstract norm control and constitutional control of the political parties; the Constitutional Court has been granted the power to decide the period, when an unconstitutional normative act will be invalidated.

Together with these positive changes, as a result of the reform the authorities of the Constitutional Court have significantly decreased. Four authorities, including formal norm control, were removed. The authority of deciding constitutionality of the elections has further diminished. Additionally, increasing or specifying the authorities of the Constitutional Court in the future is only possible through constitutional amendments, which is an extremely difficult process.

Derived from the above mentioned, if we are guided by the idea that the role and relevance of the Constitutional Court, as well as of any other state authority, is primarily decided based on its scope of competences, whereby the new version of the Constitution has significantly diminished the authorities of the Constitutional Court, the constitutional reform of 2017 cannot be considered as a step forward in this regard.