Georgia’s 2010 Constitution

THESIS

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Abstract

Since the collapse of the Soviet Union, the Republic of Georgia’s Constitution has been rewritten, amended, and reinterpreted many times, including major changes following the Rose Revolution that significantly strengthened the power of the presidency. Most recently, further changes to the Constitution were approved by Parliament on October 15, 2010. The 2010 amendments, which will come into effect in 2013 after the next Presidential election, constitute a major revision of the previous decision-making rules and significantly change state structures, such that the amended document is often referred to in the press and by the public as an entirely new constitution. In these amendments, the power of the President is decreased while the Prime Minister is empowered, bringing the structure of the Georgian government closer to that of a Western European parliamentary democracy. However, these changes open the door to criticism that the changes are intended to preserve President Saakashvili’s personal power after he leaves the Presidency by creating a strong Prime Ministerial position for him to fill. Moreover, the judiciary is given greater independence, the procedures of a no-confidence vote are changed, the requirements to hold government office are altered, and future Constitutional amendments will be procedurally more difficult.

The purpose of this thesis is to account for these changes of the Constitution. In doing so, the main framework employed focuses on the interests of the elites involved in
the constitutional process. These elites include parliamentarians, presidential appointees, and Western and Georgian experts. Their roles will be examined through their participation in the Constitutional Commission and Council of Europe Venice Commission, as well as in academic discussions and other venues. The data on which the analysis rests include the Constitution itself, official statements of government officials, opposition figures, and NGOs, academic discussions of the amendments, and press clippings from the Georgian and Western media.
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Chapter 1: Introduction

On October 15, 2010, the Parliament of the Republic of Georgia passed a series of Constitutional amendments which dramatically changed the structure of the Georgian political system. Such changes are nothing new to the Georgian people; since Georgia’s independence their Constitution has been in a state of near-constant flux. Though the Georgian political climate is a frequent topic of discussion for American scholars and journalists interested in the region, the Constitutional basis of Georgian politics is often ignored. In the turbulent 1990s, Georgia initially reinstated the independent 1921 Constitution until a new post-Soviet Constitution was approved in 1995. The 1995 document remains the basis of Georgian law today, though it has been amended many times, including major amendments in 2004 following the Rose Revolution, as well as the 2010 amendments which will be discussed here.

The 2010 amendments, which will not come into effect until 2013 following the next Presidential election, constitute a major revision of the previous decision-making rules and significantly change state structures, such that the amended document is often referred to in the press and by the public as an entirely new constitution. In these amendments, the power of the President is decreased while the Prime Minister is empowered, bringing the structure of the Georgian government closer to that of a Western European parliamentary democracy. However, these changes open the door to criticism that they are intended to preserve President Saakashvili’s personal power after
he leaves the Presidency by creating a strong Prime Ministerial position for him to fill. Moreover, the judiciary is given greater independence. The procedures of a no-confidence vote are changed, the requirements to hold government office are altered, and future Constitutional amendments will be procedurally more difficult.

The purpose of this thesis is to account for these changes to the Constitution. In doing so, the main framework I employ focuses on the interests of the elites involved in the constitutional process. I will use theoretical frameworks developed by scholars of the transitions from Communism to democracy in Eastern Europe, including Josep Colomer, Jon Elster, Timothy Frye, and Sergio Bartole.

The elites involved in the Constitutional process whose actions will be examined in this analysis include parliamentarians, presidential appointees, opposition leaders and Western and Georgian experts. Their roles will be examined through their participation in the Constitutional Commission and Council of Europe Venice Commission, as well as in academic and public discussions.

The sources used in this analysis include the amendments to the Constitution itself, as well as official statements released by government officials, Commission members, opposition figures, and civil society groups regarding the changes. Also providing data for the analysis are discussions of the amendments within the academic community, such as the Berlin Conference on the amendments, and press clippings of both news and opinion pieces from both the Georgian and the Western media, including such sources as Civil Georgia and Rustavi 2 as well as Radio Free Europe/ Radio Liberty and The Economist.
The interests of various Georgian elites account for the specifics of the changes to the structure of the Georgian government. This trend is particularly evident in the change from a strongly presidential to a strongly Prime-Ministerial system, but ultimately the new document is more democratic and advantageous to Georgia’s continued political development and future integration into Western structures.
Chapter 2: Historical Background

Georgia’s constitutional history began with the country’s brief independence between 1918 and 1921. During the period of the Democratic Republic of Georgia, the Mensheviks were the ruling party, and a Parliamentary republic was established. Thomas de Waal describes this system as “fairly democratic” (de Waal 64). The leader of the Democratic Republic, Noe Zhordania, “believed in ruling by consensus” and “was genuinely popular and earned the support of the peasantry” (de Waal 65). Despite its democratic features and many positive traits, this system was also marked by an antagonism toward Georgia’s national minorities and was built upon a foundation of strong ethnic-Georgian nationalism (de Waal 64-65). The 1921 Constitution which codified this system of government came into legal force only four days before the Bolshevik takeover of Georgia. According to this document:

The supreme body of the country was the Parliament; [a] representative body elected on the basis of universal, equal, direct, and proportional suffrage by the secret ballot. The executive branch was represented with the government [sic] and the head of the government elected by the Parliament. The Parliament was authorized to monitor the executive branch and the members of the government were individually responsible to the Parliament. According to the 1921 Constitution, the supreme executive branch was the Government of the Republic. The head of the Government was elected by the parliament for a term of one year (Kapanadze 6-7).

Though the 1921 Constitution did not serve as the legal basis for the government during Georgia’s previous period of independence, it continues to influence Georgia’s constitutional order to this day. The 1921 Constitution was used in the interim following
the collapse of the Soviet Union until the time that the 1995 Constitution was written and came into effect (Kapanadze 13). The 1995 document referred to Georgia’s legal history as established through the 1921 Constitution, and despite many amendments to the current document, the reference to 1921 is still present in the most recent Constitution. The preamble to the Constitution with the 2010 amendments reads, “…considering the centuries-old traditions of the Georgian statehood and the historical and legal heritage of Georgia’s 1921 Constitution, do proclaim this Constitution before God and the nation” (Draft Constitutional Law 2)¹

When the new, post-Soviet Constitution was written to replace the 1921 Constitution, President Eduard Shevardnadze was personally the head of the Constitutional Commission and therefore played a decisive role in the formation of Georgia’s new post-Soviet political order (Kapanadze 16). Not just in the Constitutional Commission, but in all aspects of Georgian political life, Shevardnadze was the chief decision-maker; even the reformists and opposition leaders were united under Shevardnadze’s leadership by the force of his personality (King 229). Shevardnadze did, however, have to compromise with the Parliament in the Constitution-making process, and the 1995 document established a strong Presidential system based on the American model, though the Parliament was not entirely powerless (Kapanadze 17). Levent Gönenç says that “Negotiations and compromises during the constitution-making

¹ All references to the 2010 Amendments to the Georgian Constitution in this text cite the Council of Europe Venice Commission’s publication of the draft amendments. The Georgian government has not yet released an updated English-language version of the Constitution as amended. The text supplied by the Constitutional Commission to the Council of Europe reflects the language of the changes officially adopted by Parliament.
imparted the Constitution with a consensual character” (Gönenç 187). Under Shevardnadze, decision-making was concentrated in the State Chancellery, which was responsible solely to the President (Kapanadze 18). Anna Kapanadze claims that this structure of highly-personalized Presidential power led to a lack of Presidential accountability and the Cabinet often took the blame for any mistakes made by the President (Kapanadze 17). Charles King notes that Shevardnadze’s style of governing was in some ways akin to the Soviet model and that, “Shevardnadze helped create a state in which the ruling party and the administrative system were fused, a style of politics borrowed from the Soviet era” (King 230). Georgian politics in the 1990s were de facto dominated by President Shevardnadze himself (with the support of members of his ruling party), though de jure the system did not give all powers to the President. The 1995 Shevardnadze-era Constitution remains the basis of the Georgian legal framework, though it has been subject to a series of amendments which have changed the decision-making structures.

Following Shevardnadze’s ouster in the 2003 Rose Revolution and Mikheil Saakashvili’s subsequent election as President, a series of significant amendments to the Constitution were passed in 2004. The details of these changes were influenced by the three leaders of the Rose Revolution: Mikheil Saakashvili, Zurab Zhvania and Nino Burjanadze. It was with the 2004 amendments that the post of Prime Minister was first established in Georgia. Anna Kapanadze credits the three leaders of the Rose Revolution with this development because it was necessary to divide power among all three. Mikheil Saakashvili assumed the post of President, Nino Burjanadze maintained her position as
Speaker of Parliament, and Zurab Zhvania filled the newly-created Prime Minister’s post (Kapanadze 19). This system of governance was allegedly based upon the French semi-presidential system, but Kapanadze believes it is more accurately referred to as a “parliamentary system with a double executive” (Kapanadze 23). Though designed as a system of power-sharing between multiple individuals within the executive branch, the system as it was designed in 2004 ultimately evolved into a super-presidential system with Saakashvili at the head (Kapanadze 26). Further amendments in 2006 and 2008 increased the Presidential powers vis-à-vis the Parliament (New Draft Constitution Unveiled). One of the major changes leading to the increased strength of the President in this new system was that the President had the right to appoint most of the key state officials without Parliamentary approval (Prime Minister, Minister of Defense, and Minister of Internal Affairs), which stripped Parliament of much of its power (de Waal 194). De Waal credits the super-presidentialization of Georgia with Saakashvili’s self-declared goal of strengthening the Georgian state, and his subsequent focus on the efficacy of executive power rather than democracy (de Waal 194).

Georgia’s post-Rose Revolution political environment is characterized by a fragmented party system and an opposition focused primarily on nationalism and personality rather than on a particular political agenda. Nino Burjanadze departed the Rose Revolution coalition and became a leader of the opposition while the third leader of the movement, Zurab Zhvania, died in February of 2005. Their departures from the ruling coalition left executive power highly personalized in Saakashvili’s hands, a fact which remains one of the major complaints of the opposition (de Waal 196). In fall 2007,
opposition protests against Saakashvili turned violent, and as an apology for his poor
decision to authorize the police to use force, Saakashvili called for early Presidential
elections. The opposition was unable to unite in order to field a credible candidate to run
against the incumbent Saakashvili, so he was reelected despite diminished faith in his
ability to lead the country (de Waal 207-208). With Saakashvili’s reelection, Presidential
power in Georgia has not yet been transferred through “free, fair, and boringly uneventful
elections” (King 231). The August 2008 war brought further challenges to Saakashvili’s
leadership, and further protests occurred in spring 2009.
Chapter 3: Theoretical Frameworks

After the fall of Communism in Eastern Europe and the Soviet Union, a series of new governments with new constitutions were formed throughout the region. This series of events allowed scholars the opportunity to witness the constitutional process first-hand in a variety of settings and conditions and develop theories about constitution-making based on this wealth of newly available data. One strand of theory that seeks to analyze these new constitutions sees them as a product of the interests of the players in the constitution-making process who attempt to create the rules of the game such that they will be more likely to retain political power under the future order. Another prominent strand of theory analyzes the emerging political structures as a product of each state’s culture and history.

**Interest-Based Frameworks:**

One of the scholars who focus on the roles of interests in transitions away from Communism, Josep Colomer, analyzes the game-theoretic elements of the change away from a nondemocratic regime in his book *Strategic Transitions: Game Theory and Democratization*. He states that in these transitions there are two possible outcomes: a civil war or a compromise between the two groups with differing preferences (Colomer 1). Colomer defines three different strategies that actors may prefer regarding the existing nondemocratic regime: continuity of the nondemocratic regime (N), intermediate reform to limited democracy or mixed economy (I) and democratic rupture
from the existing regime (D) (Colomer 35-36). Actors may hold one of six possible orders of preference of these strategies. Colomer defines the different actors based on their preferences, as illustrated in the chart below:\(^2\):

Table 1: Transition Actors' Strategies

<table>
<thead>
<tr>
<th>Opponents</th>
<th>Soft-liners</th>
<th>Hard-liners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Radical (Revolutionaries)</td>
<td>Moderate (Democratic Rupturists)</td>
</tr>
<tr>
<td>Most Preferred</td>
<td>D</td>
<td>D</td>
</tr>
<tr>
<td>Intermediate</td>
<td>N</td>
<td>I</td>
</tr>
<tr>
<td>Least Preferred</td>
<td>I</td>
<td>N</td>
</tr>
</tbody>
</table>

Colomer’s analysis from this point forward focuses on “agreement games” where actors have different preferences but can cooperate to produce an efficient equilibrium. He divides these into two types: mugging games and Prisoner’s Dilemmas (Colomer 50). Mugging games occur between either radical soft-liners and moderate hard-liners or between moderate opposition and moderate soft-liners, and will result in the outcome II, intermediate reform, as one party can push the other to compromise by threatening to deviate to the worst possible outcome (Colomer 53-56). The Prisoner’s Dilemma shows interactions between moderate opposition and moderate hard-liners. This Prisoner’s Dilemma differs from the traditional Prisoner’s Dilemma scenario in that in a transition situation offers can be retracted. This game differs from the mugging scenario because in

\(^2\) Adapted from Colomer 37, Figure 2.2
this case both actors have equal threat power. This game also results in the ultimate outcome II, because one actor will choose the second-best outcome, knowing that the other will do likewise in order to avoid violent conflict (Colomer 57-60).

Jon Elster analyzes Constitutional and transition processes through the process of deliberation, wherein the different actors bring their interests to the table when a new order is formulated. In his article “Deliberation and Constitution Making” he analyzes the role of the deliberation of elected delegates as part of the process of the adoption of a new Constitution (Elster 1998, 97), though he notes that deliberation is not always part of a Constitutional process. In his analysis, each actor’s policy preferences are based on their fundamental preferences and their beliefs about ends-means relations (Elster 1998, 100). He notes that in these deliberative contexts, interests must be at least disguised as public, rather than personal, interests (Elster 1998, 102). These interests are therefore constrained by what he terms the “imperfection constraint” which he says occurs because “a perfect coincidence between private interest or prejudice and impartial argument is suspicious” which may lead actors to argue against their self interests. Actors in these deliberative contexts are also constrained by the “consistency constraint” wherein an actor will be criticized as opportunistic for deviating from a policy position that previously served his interests once it is no longer to his benefit (Elster 1998, 104). He concludes with a list of recommendations which he feels will create optimal conditions for Constitutional deliberations, though he admits that some of them are impractical. His recommendations include using specially convened (non-legislative) bodies; excluding actors with a stake in the process such as the military, executive, and judiciary; using
elements of both secrecy and publicity in the process; using proportional rather than
majoritarian rule for elections to the assembly; not convening in the capital city;
ratification of the Constitution by popular referendum; and allowing a long delay
between the time when the Constitution is written and comes into force (Elster 1998,
117).

In his article “Knowledge and the Politics of Transition,” Elster analyzes the role of
beliefs which shape policy preferences throughout the process of establishing a new
economic and political system, and in particular the adoption of new Constitutions. He
divides the actors in this process into four categories: winners, losers, opponents, and
victims (which are not exclusive) (Elster 2001, 91-92), and their motivations into three
types: interest, passion, and reason (Elster 2001, 92). Given this set of actors and
motivations, Elster contends that the final policy will emerge through the processes of
arguing, voting and/or bargaining (Elster 2001, 93). He notes that the actors will not
have perfect knowledge, and defines “type A indeterminacy” as “aris[ing] from our
inability to predict which of several possible reactions will be triggered by a given set of
antecedents” (Elster 2001, 96) and “type B indeterminacy” as when an action will
increase the motivation for an activity while reducing the opportunity to engage in it,
making the net effect unpredictable (Elster 2001, 96). All these factors shape the
outcome of Constitutional debates. In his analysis, Elster focuses on the “machinery of
government” within the Constitution, rather than the bill of rights or amendment
procedures (Elster 2001, 97). While writing the Constitution, the writers are concerned
with the support they believe various parties will receive while also attempting to achieve
specific political or economic goals. Elster ultimately contends that Constitutions are designed to “give representatives an incentive to simulate virtue” (Elster 2001, 99).

In the article “The Role of Institutional Interest in East European Constitution-Making” Elster analyzes the consequences of government participation in the Constitutional process. He notes that “Institutional interest may… be an obstacle to impartiality” (Elster 1996, 63) because those in power are likely to use their role in the constitutional process to maintain or gain power for themselves and the institutions they represent under the new order. He notes that this trend may explain the favoring of Parliamentary systems in Central and Eastern Europe, as Parliamentarians were often involved in the constitution-making, and also notes that when the President is part of the process, he will advocate for an institutionally strong Presidency (Elster 1996, 64-65).

In his article “Bargaining over the Presidency” Elster notes that during Central and East European transitions to democracy, the role of the presidency was often designed with a particular individual in mind (generally the Communist or reform Communist leader), but the products of the deals during the Roundtable agreements made the office such that the person it had been designed for would not or could not hold it, and ultimately these bargaining situations empowered the opposition leaders through an institutionally strong presidency. He analyzes the examples of Poland, Hungary, and Bulgaria, and points out that in all these situations the bargaining process ultimately backfired on its participants.

Timothy Frye also examines presidencies under the new post-Communist regimes through what he terms an “electoral bargaining approach”. He assumes that the actors in
this process “seek to maximize their individual political power by securing office and by securing power” (Frye 532). He also assumes that “actors recognize and take into account the degree of electoral uncertainty when designing political institutions” (Frye 533). He concludes that the bargaining power of the electoral favorite and the degree of uncertainty regarding the election will determine the strength of the presidential powers under the constitution. Under conditions when both the bargaining power of the favorite is low and the degree of electoral uncertainty is low, the presidency will have few specific powers and constrained residual powers (the “power to make decisions ‘outside of the contract’” (Frye 526)); when bargaining power is low and electoral uncertainty is high it will result in few specific powers and very constrained residual powers; when the electoral favorite has significant bargaining power and electoral uncertainty is low, the presidency will have many specific powers and vague residual powers, whereas when both factors are in great supply, the presidency will have many specific powers and very constrained residual powers (Frye, 534). He measures the powers of the President on twenty-seven different dimensions, including the duties of the President, and the levels of checks and balances between the different branches (Frye 548). Through his analysis, he finds that there is great variation among the powers of the post-Communist presidents, with Estonia and the Czech Republic scoring very low on his scale of Presidential power, while Turkmenistan and Russia (under the 1993 Constitution) had very powerful Presidents (Frye 547).

In Richard A. Posner’s article “What Do Judges and Justices Maximize? (The Same Thing as Everybody Else Does)”, he applies a similar interest-based analysis to the
judicial branch. He notes that in the formation of legal frameworks “the whole thrust of the rules governing compensation and other terms and conditions of judicial employment is to divorce judicial action from incentives—to take away the carrots and sticks, the different benefits and costs associated with different behaviors, that determine human interaction in an economic model” (Posner 2). He argues that like other actors in political decision-making areas “judges are rational and…they can be viewed as composites of three types of rational maximizer” (Posner 3).

Sergio Bartole, who participated in the formation of Georgia’s 2010 Constitution as an expert consultant on the Venice Commission, focuses on the changes to the judicial branch during the transitions away from Communism. In his article “Organizing the Judiciary in Central and Eastern Europe”, he notes the ties the new judicial order in the region has to both the West and the Communist past. He uses both interests and history to explain the problems in reforming the judicial systems, and points in particular to the difficulty of replacing the old judicial personnel and recruiting new, trained judges and lawyers within the legal framework to explain this trend. He categorizes the primary types of judicial systems found under the new constitutional orders in three ways: 1) “judicial self-management”, where the judiciary enjoys great independence and chooses its own appointees. In this model a strong Prosecutor’s Office is often present and is often a relic of the Communist period (Bartole 65). 2) The “Autonomy of Magistracy” (Bartole 65) which he considers a mixed model where the absolute autonomy of the judiciary may be limited through input from the other branches of government in the appointment process, and variations on this model including competitive exams for
judicial positions. 3) Bartole describes the third type of system as that “in which the careers of judges are entrusted to top executive and legislative authorities place the management of those employed in the judicial sector at the same level of relations as those that obtain between the highest state bodies” (Bartole 67). In short, this system is marked by a system of checks and balances between the branches, and influence of the other branches of government on judicial appointments. He notes that this particular judicial structure demonstrates both the influence of American-style judicial systems, as well as Communist legacies. The persistence of Soviet-style institutions is a product not just of history and institutional legacy, but also of the interests of those in power in the existing institutions.

**Cultural and Historical Frameworks**

Georgia’s President Saakashvili himself has noted that he believes there is a cultural basis to the Constitutional changes, and believes that there is a cultural and historical reason why Georgia requires a strong executive. In an interview with *Civil Georgia*, he said “There have been recommendations to make the President like [the] Queen of England—that is unacceptable for us; the country, whose 20% of territory (sic) is occupied and which faces serious challenges should have [a] strong, effective head of state” (qtd. in Saakashvili on New Constitution). Though not all scholars may agree with Saakashvili’s conclusion, many scholars agree that a country’s culture and history will impact the final form of a Constitution or may constrain other factors in the Constitution-making process.
In A.E. Dick Howard’s chapter “How Rights Travel: Rights at Home and Abroad” he notes the influences of existing Western Constitutions and their Bills of Rights on the inclusion of Bills of Rights in Central and East European Constitutions. He believes that the fundamental principles defining Constitutional democracy, which are influenced by the history of Western Constitutions, are: consent of the governed, limited government, open society, human dignity and sanctity of the individual, and the rule of law (Howard 15). He notes, though, that many post-Communist countries both go further than most Western Constitutions, providing guarantees of fair working conditions and medical care (Howard 16) and restrict some freedoms given in the West by allowing some restrictions on freedoms, for example, in forbidding advocacy for fascism (Howard 17). He contends that the differences between the rights espoused in different Constitutions are the result of national cultures and histories, which must be taken into account in the Constitutional process.

In his book, Constitution-Making in the Region of Former Soviet Dominance, Rett R. Ludwikowski analyzes the post-Communist transitions of Eastern Europe and the Former Soviet Union “in the context of their political systems” (Ludwikowski 234). He looks at these documents as the result of the political history and culture of their countries, as well as the influences from the West (particularly from the American and French political systems). He writes that, “The final product is always a sum of the society, its constitutional experience, the activity of the judiciary, or the system of judicial enforcement of constitutional rights” (Ludwikowski 195). About the structure of the executive branch, he notes that based on their histories “the former Soviet republics
will end up with one of the systems based on strong individual leadership… [but] Given more stable geopolitical conditions and electorates relatively more experienced than in the CIS, the former European satellite countries of the Soviet Union may, and likely will, favor one of the forms of parliamentary democracy” (Ludwikowski 207). He believes that the primary historical legal influence will be a major determining factor in the structure of the judicial branch: those countries historically tied to the French legal system are more likely to develop “political rather than judicial review” (Ludwikowski 214) whereas the other countries in the region will be attracted to a German-inspired “‘mixed’ system, combining some elements of both concrete and abstract review” (Ludwikowski 214).

In his book *Prospects for Constitutionalism in Post-Communist Countries*, Levent Gönenç focuses on the idea of “political culture”, upon which the legitimacy of a legal order is based, as a tool to account for the constitutional changes in the post-Communist period (Gönenç 7). The elements of the political culture include religion, economics (in particular the role of the middle class), liberal-democratic political culture as demonstrated by the values of trust and tolerance (Gönenç 33-35) and how these elements of political culture played out in states’ prior political regimes. Gönenç analyzes post-Communist political culture and its effect on the Constitutions as “an amalgam of pre-communist, communist and post-communist elements. This analysis, in turn, will allow us, on the one hand, to find out whether post-communist constitutions reflect post-communist political culture; on the other, to investigate whether there is sufficient support for democratic norms and principles…” (Gönenç 35). Following this
methodology, Gönenç continues to analyze and compare each of the post-Communist constitutions.

Though many of these theoretical frameworks were designed to explain the initial transitions to democracy and their immediate effects, they still provide a helpful tool for the analysis of the 2010 amendments to the Georgian Constitution. Elster writes that “[transition] can mean the process of establishing a new economic and political equilibrium…transition in [this] sense may require years or even decades” (Elster 2001, 89). Although it has been twenty years since Georgia’s departure from the Soviet Union and its systems of law and governance, Georgia’s transition to democracy is still not complete; the new equilibrium has not yet been reached and the most recent changes are an important step in the transition process. Though the document has been amended many times, it is still the first post-Soviet Constitution which is being amended. The continuation of this Constitution with significant amendments is symbolic of the as-yet-incomplete transition to democracy. Moreover, Georgia has yet to have a peaceful transfer of presidential power: Shevardnadze and Saakashvili both came to power through coups; Shevardnadze was invited to fill the post after Gamsakhurdia was deposed, and Saakashvili was elected only after he and his partners forced Shevardnadze’s resignation. This lack of democratic transfer of executive power demonstrates Georgia’s still-transitory position. Anna Kapanadze also analyzes the 2010 Constitution as a transition document and writes that, “Georgia is a ‘new democracy’ trying to declare and legally confirm its existence, a country which could not stabilize its political situation [sic] after the fall of the Soviet regime and besides foreign affairs,
frequently faces internal critical political situation, a country, which has been in permanent transition for [the] last twenty years” (Kapanadze 2)
Chapter 4: The Establishment and Operation of the Constitutional Commission

The 2010 Constitutional Amendments were precipitated by political unrest. Anti-government protests had turned violent in autumn 2007, and the spring following the August 2008 Russia-Georgia war, the opposition organized a series of further demonstrations in protest of Saakashvili and his poor handling of the conflict. The protests called for Saakashvili’s removal from office and were scheduled to coincide with the symbolic date of April 9, when Georgians had demonstrated against the Soviet Union and later declared independence from the U.S.S.R. This series of protests lasted more than one hundred days and at their most active blocked access to the Georgian Parliament and other government administration buildings (Kapanadze 30). In response to this showing of popular support for reform and calls from the West, the providers of much financial support for the Georgian state, to offer some concessions to the opposition President Saakashvili agreed to establish the new Constitutional Commission on June 8, 2009.

This Constitutional Commission was intended to represent a wide swath of Georgian society, to provide a forum for the opposition to engage in constructive actions toward change, and to continue Saakashvili’s legacy of reform. To this end, invitations were extended to a wide variety of political actors to participate in the constitution-making process, including twenty political parties (both the Parliamentary and non-Parliamentary opposition in addition to the ruling party), nine of the most prominent non-governmental
organizations, legal experts, representatives of the Adjara Autonomous Republic and the Abkhazia and South Ossetia break-away regions’ governments-in-exile, the Presidential administration, Parliament, the Government, and other prominent state institutions such as the National Bank and Supreme Court. The former Chairman of the Constitutional Court Avtandil Demetrashvili was appointed Chairman of the Constitutional Commission (President Orders Commission on Constitutional Reform) ³. The opposition parties represented in Parliament (Christian Democratic Movement, National Democratic Party, On Our Own, Democratic Party of Georgia, and Georgia’s Troupe) all agreed to participate (Constitutional Commission Agrees on Decision-Making), as did the non-Parliamentary opposition party the European Democrats (K’omisiis Ts’evrebi). The majority of opposition parties boycotted participation in the Constitutional Commission because they believed that their participation would lend legitimacy to the amendment process, which they did not support (Constitutional Commission Agrees on Decision-Making).

Using Colomer’s classifications of actors’ preferences for the type of regime under the new Constitutional order (where in this case N=continuation of the existing constitutional regime, I=moderate Constitutional reform and D=complete change of the Constitutional order), those opposition parties which boycotted the process would be classified as Radical Opposition (preferences D, N, I), while the oppositionists who

³ References to English-language news stories are cited in the original English or as translated by the publisher (generally Civil Georgia or Georgian government bodies). The Georgian-language sources cited are my translations. In transliterating Georgian to English, I have followed the Georgian Academy of Sciences transliteration guide, with the exception of names of people and places, which appear in the transliteration most commonly used in the English-language media.
participated in the Constitutional Commission represent the Reformists (preferences I, D, N) and the members of Saakashvili’s ruling United National Movement are most likely moderate hard-liners (N, I, D) though their personal preferences may vary slightly. Given these series of actor preferences and the Radical Opposition’s refusal to participate, the outcome of moderate reforms is as expected, since the Reformists can pressure Saakashvili’s deputies to agree to intermediate reforms (their second preference) by threatening to join the Radical Opposition in a movement to rupture the political system if their preferences are not taken into consideration.

In order for the Constitutional Commission to present a new draft Constitution to the Parliament and the Georgian public, two-thirds of the members of the Commission had to vote to endorse a particular platform of amendments (Constitutional Commission Agrees on Decision-Making). The Constitutional Commission considered three different proposed platforms of reform; one series of amendments authored by Commission Chairman Demetrashvili and Commission Secretary Tengiz Sharmanashvili advocated a hybrid model of government combining a directly-elected president with a stronger Prime Minister, the second option was a new Constitution put forward by Levan Ramishvili of the Liberty Institute which advocated an American-style federal, presidential state, and the third, submitted by members of the Constitutional Commission representing the Ministry of Justice, established a Presidential system and introduced the office of Vice President (Kapanadze 31-33). An additional draft was written and publicized by the unofficial opposition-led Public Constitutional Commission, though it was not considered by the (official) Constitutional Commission (Sazogadoebrivma sak’onst’it’utsio
The Demetrashvili draft was chosen by the Commission, with thirty-one of the forty-one Commission members endorsing it over the other two options (Kapanadze 35). Ultimately, only three members of the Commission dissented from supporting this draft: M.P. Jondi Baghaturia of Georgia’s Troupe, Tamar Khidasheli of the Georgian Young Lawyers’ Association, and Levan Ramishvili of the Liberty Institute (EurasiaNet).

Following the Constitutional Commission’s presentation of the draft amendments, the Council of Europe’s Venice Commission on Democracy through Law was asked to review the document and provide their commentary. The Berlin Conference, sponsored by the German Development Organization DTZ, brought together Georgian and Western legal experts to discuss the amendments, and a series of public events were held throughout Georgia for the discussion of the amendments, though many including the Venice Commission criticized the public discussion as insufficient (Final Opinion 3-4).
Chapter 5: The 2010 Amendments

The 2010 Amendments, spurred by opposition protests to Saakashvili’s rule and written with the advice of the Council of Europe, together serve to move Georgia’s constitutional system closer into line to that of Western European democracies. These changes reduce the President’s monopoly over executive power and introduce more checks and balances into the Constitution, with the aim that no one individual will be able to dominate Georgian politics.

The most prominent and controversial change to the Constitution is that the Prime Minister becomes more powerful at the expense of the President. The President remains head of state and commander-in-chief, but is no longer the supreme representative of state power. Article 69 now reads: “The President of Georgia shall be the Head of State of Georgia, the guarantor of Georgia’s unity and national independence. Within the powers vested by the Constitution, the President shall secure the functioning of state organs…The President shall be the Commander-in-Chief of the Georgian armed forces…The President shall be the highest representative of Georgia in foreign relations” (Draft Constitutional Law 4). Though the president still retains significant power, the Prime Minister now has an important tool to control the President. Under the new amendments, legal acts issued by the President (with the exception of those declared during a period of martial law), “shall be countersigned by the Prime Minister” (Draft Constitutional Law 5).
As before, the Prime Minister remains appointed by the President, but the President’s choice is constitutionally constrained by the election results. The President will appoint the Prime Minister from the election faction with the best results. The candidate for Prime Minister will then select a Government with the approval of a majority of Parliament, whereas previously the President appointed the most powerful Government positions without Parliamentary approval (Draft Constitutional Law 8). Following this process of Government-formation, the Prime Minister is empowered as head of the executive, as Article 79 makes clear. It reads, “The Prime Minister shall be Head of Government…[and] shall direct the Government’s activities, organise its work, co-ordinate and control the work of Government members…The Prime Minister shall appoint and remove from office the other members of the Government” (Draft Constitutional Law 7).

In addition to the shifts in power between the Prime Minister and the President, the holders of these and other high government offices are now subject to stricter residency and citizenship requirements. Article 29 reads, “A citizen of Georgia who is also a citizen of a foreign country shall not be eligible to hold the office of President, Prime Minister, or Chairperson of Parliament” (Draft Constitutional Law 2). The requirements for the post of President are made even stricter with the 2010 amendments. In addition to the previous requirements of age, citizenship, and residency, the amendments add that a candidate for president “shall have resided in Georgia for at least fifteen years and for the last three years before the date when the election is called” (Draft Constitutional Law 4-5).
Another key change is in the process of judicial appointments. Article 86 has been amended such that “A judge shall be appointed for life until the legal retirement age. The law may provide for a trial period of not more than three years before the confirmation of a judge on a permanent basis. The selection, appointment and removal from office of judges shall be regulated by law” (Draft Constitutional Law 10). These changes make the judiciary more independent and add to the balance of power between the branches.

Procedurally, the 2010 amendments address the no-confidence vote and amendment process. With the changes to the vote of no-confidence the procedure remains complicated, but a Prime Minister and Government may be removed from office between elections by a Parliamentary vote of no-confidence, ensuring that the Prime Minister is accountable to other members of Parliament (Draft Constitutional Law 9-10). Future amendments changing the new political order will be more difficult to pass, with the goal of reducing the frequency with which Georgia amends the Constitution. Article 102 now states “A draft law concerning any constitutional revision shall be deemed to be passed if the draft is supported by the votes of not less than two-thirds of all members of Parliament in two consecutive parliamentary sessions with an interval of at least three months” (Draft Constitutional Law 12).
Chapter 6: Assessment of the Changes

**The Executive Branch**

Though President Saakashvili himself was not directly involved in the Constitutional Commission, it was he who created the commission and started the amendment process. A number of his loyal deputies were involved in the deliberations over the amendments. The changes diminishing the power of the President relative to the Prime Minister have been simultaneously praised as a move towards a European system of democracy, and criticized as a possible consolidation of Saakashvili’s personal power as many suspect that he will be the most likely candidate for the newly-strengthened Prime Minister’s post. One element of this skepticism towards the reforms is certainly Saakashvili’s personality and public persona. In a 1999 interview, long before the Rose Revolution in which Saakashvili came to power, American journalist Robert Kaplan met him and wrote about their encounter:

> Saakashvili, thirty, was the majority leader in parliament, the head of the Citizens Union party founded by President Shevardnadze. The westernized Saakashvili—he had a law degree from Columbia University—was among the reformers that… were not heroes because they had not killed and did not drink enough. I met Saakashvili, a tall man with stringy black hair and a dark suit, at his office in parliament at ten at night, working. He was not naïve, as I had feared, but cagily analytical. He had an ego—favorable articles about him covered the walls—and his manner was slightly sleazy: useful survival traits” (Kaplan 248)

This sense of self-preservation which Kaplan noticed in Saakashvili has led many to believe that the amendments strengthening the power of the Prime Minister are in fact a sign that Saakashvili aspires to preserve his political power and continue to lead the
country as Prime Minister following the end of his tenure as President. Saakashvili has, however, publicly denied this desire because he does not wish to expose himself to comparisons with Russian President-turned-Prime Minister Vladimir Putin (Associated Press). In an interview with *Le Monde*, he apparently affirmed that he would consider the position were the opportunity to arise, though opposition leader Nino Burjanadze has accused Saakashvili of multiple public statements claiming he aspires to the post. In a later interview, Saakashvili claimed that showing his hand regarding his plans for after he departs the Presidency would make him a “lame duck”, and jeopardize his agenda of reform and democratization (Saakashvili Noncommittal on Prime Ministerial Prospects).

*The Economist* noted that serving as Prime Minister would “destroy his legacy” of reform (Georgia’s Mental Revolution). The Venice Commission declined to comment on the possibility that the changes were motivated by personal gains rather than the good of the country, but did support the power shift, whatever its cause. They wrote that “in the light of the developments in the process of constitutional reform, it would seem unjustified to dismiss the draft as a mere attempt to circumvent the limitations of power under the present Constitution” (Final Opinion).

In addition to Saakashvili’s personality, there is a precedent which also raises suspicions about Saakashvili’s motivations for amending the constitution. The 2004 amendments which significantly increased the personal power of the president were made following the Rose Revolution and Saakashvili’s subsequent election to the Presidency. Anna Kapanadze argues that the changes in the system were made specifically for the personal power of the three leaders of the Rose Revolution: Mikheil Saakashvili, Zurab
Zhvania, and Nino Burjanadze (Kapanadze 19). Since many Georgians believe that Saakashvili has already changed the Constitution for his personal gain once, they have no problem believing that the sole motivation for the 2010 amendments is to do exactly the same again. Shorena Shaverdashvili, the editor of *Liberali* (a weekly newsmagazine), believes that the new constitutional amendments indicate that Saakashvili has become more interested in retaining power than in continuing to reform the Georgian political system (Georgia’s Mental Revolution).

Another interest which certainly played a role in the Constitutional amendments is President Saakashvili’s continued desire to further integrate Georgia with Europe and NATO. Saakashvili has long pushed for Georgian membership in NATO, and works to bring his country closer to Western Europe, even using such measures as flying E.U. and NATO flags at Georgian government buildings. President Saakashvili and his supporters are known as reformers and Westernizers, and this position constrains the available forms of government that the Constitutional amendments may advocate. Efforts to bring the constitutional distribution of power closer into line with that of the European states and following many of the recommendations of the Venice Commission are another symbol of Georgia’s move toward Europe, and are undeniably a step closer to meeting the democratic criteria necessary for closer political ties with the West. It is impossible to discern, however, to what extent these interests are a disguise of private interests with public benefit and to what extent they are truly intended for the public interest. In this regard, Saakashvili and his deputies in the United National Movement (UNM) who participated in the constitution-making process are subject to Elster’s “imperfection
constraint” and “consistency constraint”. After years of preaching further integration with Europe, the UNM must either continue to advocate this line of thinking and continue to push Europeanization, regardless of whether or not it is intended for personal gain, or change their policy to advocate something that is less beneficial to their personal power interests. It is possible that the perception of personal power as a motivator is but a side effect of a desire for further European integration for all of Georgia’s benefit. In this circumstance, they are held captive by the “consistency constraint”, where they cannot deviate from advocating further Europeanization despite the allegations that they are solely self-motivated and may be, as Elster calls it, “simulating virtue”. The imperfection constraint does not apply in these circumstances, because the actors from UNM have chosen to be constrained by consistency, rather than to advocate a position inconsistent with their interests, and have thus faced the criticisms that they are acting selfishly. Regardless of their motivations—for personal or public good, Saakashvili and his United National Movement Party certainly are the most likely candidates to control the government as a result of these changes, and therefore these criticisms cannot be ignored.

Elster points out that in systems where the constitution-making body is dominated by Parliamentarians, a system with a relatively strong parliament is likely to emerge from the deliberations. Though under the new amendments the President remains directly elected and has a great deal of clout in foreign policy matters, many of the current functions of the President, in particular the ability to appoint the government, are ceded to Parliament (Key Points of Newly Adopted Constitution). Heavy parliamentary participation was indeed the case in regard to the 2010 amendments to the Georgian
Constitution; eight members of the Commission currently sit in Parliament, and many other Commission members are former Parliamentarians (K’omisiis Ts’evrebi). It is also likely that other members of the Commission currently representing civil society or academia may hold Parliamentary aspirations. In particular, the Parliamentarians involved in the Commission who are members of Saakashvili’s party are likely to see their personal power increase under the new system, and probably envision themselves in a role in the newly strengthened cabinet, as the UNM is likely to once again win the majority in Parliamentary elections. The involvement of Parliamentarians in a constitutional process that strengthens that institution is an example of Elster’s institutional interests in constitution-making. In this case, although the changes to the executive structure may be the product of personal interests, it is not just Saakashvili’s interests, but also the interests of his Parliamentary deputies which explain the shift in power away from the Presidency and towards the Parliament.

Frye points out that the degree of certainty or uncertainty in the electoral climate will also affect the distribution of powers in the constitution-making process because the actors may be unsure of their ability to gain from the changes made. The case of the Parliamentarians involved in the 2010 amendment process offers an interesting mix of certainty and uncertainty for these actors. There are very few actors in Georgian politics who believe that any party other than the United National Movement has a chance of carrying the 2013 elections, but the high-ranking positions within the party are in near-constant flux. The shift in power to the Government, which will be comprised of Members of Parliament and the corresponding division of executive power between a
greater number of individuals in the Government, may be a way of “hedging their bets” (Frye 524). UNM MPs are more likely to obtain a role with some power, but their exact role in the new order is uncertain. They can assume with a high degree of certainty that their party will be in power though not if they personally will be among its leading members. In the process of amending the Constitution, Saakashvili’s deputies were given the opportunity to both strengthen the possible future position of their boss while also ensuring that their roles in Parliament remain powerful.

Parliamentary opposition figure Konstantine Gamsakhurdia, the son of Georgia’s first post-Soviet president, intends to use these changes for his benefit. Although he was not a member of the Constitutional Commission, Gamsakhurdia is one of the few oppositionists who see the amendments as a way to potentially increase his personal power. He said, “I intend to participate in the next presidential election which is included in the new constitution. I believe it is unreasonable to boycott that which I intend to fight for and must engage in a campaign for” (qtd. in P’arlament’arebi axal k’onst’tutsias dadebitad apaseben). It is important to remember that although the changes may have been motivated by a desire for personal power, it is not guaranteed that the institutions will benefit those who designed them, and may ultimately empower other groups, as Gamsakhurdia believes. His opinion regarding the Constitutional amendments is in a distinct minority; other opposition figures have not looked into the ways in which the changes in power structure may benefit them in a future political order. Gamsakhurdia may, like Elster (1993/1994), have noted that executive institutions designed for a
particular personality (as many accuse Saakashvili of doing) often backfire and ultimately empower the opposition rather than the incumbents.

Some members of the non-Parliamentary opposition (who were invited but, with the exception of Tengiz Sharmanashvili and his European Democrats, did not participate in the Constitutional Commission because they felt their participation would lend legitimacy to the process) suggested that the changes to the Constitution were acceptable to them as long as it was constitutionally guaranteed that Saakashvili would not be able to fill the post of Prime Minister. The Labor Party and Our Georgia—Free Democrats together supported an unsuccessful additional amendment banning Saakashvili personally from the post (one proposal was for a lifetime ban, another just for a five year suspension). Irakli Alasania, the leader of Our Georgia—Free Democrats, explained that although his party in principle supported a system with both a President and a Parliament, “We disapprove of the parliamentary model with a strong Prime Minister and support the strong joint Presidential model under strong parliamentary control. The difference is that the Government of Saakashvili has been trying to fit the constitutional changes to their interests over all of the last years in order to remain in power [sic]” (qtd. in Modebadze). Alasania and the opposition parties allied with him are opposed not to a strong Presidency, but to a strong Saakashvili.

Other opposition leaders, however, are even less amenable to the changes than Alasania. Nino Burjanadze, former leader of the Rose Revolution and current leader of the non-Parliamentary opposition party Democratic Movement—United Georgia, describes the structure which will result from the constitutional amendments as:
...the system of governance is transformed from a super-presidential republic to a “super-prime-ministerial” republic. Saakashvili openly expressed that he wants to become Prime Minister. These changes are vital for his regime, because he is afraid of political and criminal liability. The authorities are creating a “super-prime-ministerial” republic which will prolong non-democratic elections, in these conditions the people and the country will be subject to the prolonged authoritarian regime of Saakashvili indefinitely. This outcome is caused by an unbalanced relationship between the president and parliament, and an inadequate separation of powers. (Nino Burjanadzem k’onst’it’utsiis axali p’roekt’is shesaxeb “demok’rat’iuli modzraobis” mosazrebebi da p’olit’ik’uri shepasebebi gaaxmovana).

These oppositionists have not participated in the Constitutional Commission. Some of the spokespeople for the non-Parliamentary opposition and its supporters, including political analyst Soso Tsiskarishvili, believe that any oppositionists cooperating in the Constitutional process “just think it’s the shortest way to become close to the Government” (qtd. in Modebadze). Tsiskarishvili’s statement illustrates the widespread belief in Georgian political circles that by participating in the amendment process, one’s own interests and desires for power can be provided for under the new system. Ghia Nodia, a Georgian professor of philosophy and political thinker who served as an expert member of the Constitutional Commission, responded to the opposition’s refusal to participate in the amendment process and wrote in an opinion piece for Radio Free Europe/ Radio Liberty, “They [the opposition] had previously claimed that democracy in Georgia was hampered primarily by strong presidential powers; but now that they concluded that a parliamentary system might play into Saakashvili's hands, they became confused.” (Georgia Gets a More Democratic Constitution) Nodia overall argued that although the amendments were not perfect and will undeniably allow Saakashvili the
opportunity to retain power as Prime Minister, they are also a step towards democracy for Georgia and ultimately constitute a positive development for the country.

The Legislative Branch

Given the shift of power from the executive branch to the legislative branch, many of the changes to the legislature in the 2010 Amendments are tied to the changes in the executive branch. The increasing power of the Prime Minister and the Cabinet of Ministers, formed by Parliament, will greatly empower the legislative branch. The Venice Commission approved of these changes, in particular because they remove the President from the process of government-formation. In their Final Opinion, the Venice Commission stated that “[the] President’s consent is no longer needed for the appointment of the members of Government. This is in line with the new, mixed system of balance of powers.” (Final Opinion 10) Vakhtang Khmaladze, an expert independent from the Constitutional Commission, said in an interview with Civil Georgia newspaper “the parliament alone is responsible for forming the executive branch and it can dismiss the government by a statement of no confidence” (qtd. in New Draft Georgian Constitution Unveiled). Ghia Nodia, an expert and member of the Constitutional Commission, wrote that the changes shifting power to the Parliament will make the Georgian government more democratically accountable because, “the highest post is not fully free outside the election period—he [the Prime Minister] can be sacrificed to party politics” (Nabiji Demok'rat'iisk'en)

Despite the changes which further empower the Georgian Parliament, the new Constitutional model does not give Georgia a fully parliamentary system of government
since the President is still directly elected and remains the primary figure in foreign
relations and military matters. Many experts and participants in the Constitution-making
process have explained that a true Parliamentary system is currently impossible in
Georgia due to the weakness of the Georgian party system. As Ghia Nodia pointed out,
party politics within Parliament are important to ensuring the leadership’s accountability
to the people. Merab Basilaia, who represented the NGO “ALPE” on the Constitutional
Commission, stated in an interview that, “The main part of the opposition supported the
pure parliamentary model, however, I consider that in the country, where does not exist
political parties [sic] and they are represented only formally, the parliamentary republic
would have been damaging. With the present Draft the political parties will be given the
opportunity to develop” (qtd. in Parliament of Georgia). In a similar vein, Ghia Nodia
wrote:

The Parliamentary system (which we are getting closer to with these changes),
in fact, implies that the government is dependent on political parties. When
we have such parties as we have, it is sufficiently risky. On the one hand, we
can hope that when the parties are more mature, they will act more
responsibly. But since we cannot have this hope ‘til the end, the Commission
has instilled mechanisms in the constitutional model (the “constructive vote of
no-confidence” 4, and the presidential veto) which will challenge irresponsible
and destructive parties who might easily overturn the government if they are
not ready for a difficult alternative. (Nabiji Demok’ratiisk’en)

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4 The vote of no-confidence which Nodia refers to here is not actually a true constructive vote of no-
confidence. Under the 2010 amendments, the procedure of a no-confidence vote is begun at the request of
2/5 of the legislators, and will be set in motion if a majority of Parliament approves after 20 days but not
later than 25 days after the motion was presented. Between 20 and 25 days after this vote, 2/5 of the
legislators may propose a new candidate for Prime Minister. The President then must endorse or reject this
candidate within 5 days. Parliament may then nominate a new candidate in 15-20 days, or override the
Presidential veto with a 3/5 majority. If the veto is not overruled and a new candidate is not presented, the
President has a three-day window to dissolve Parliament and call new elections (Key Points of Newly
Adopted Constitution)
Opposition parties and the (unofficial) Public Constitutional Commission advocated a true Parliamentary system of government, but they did not participate in the constitution-making process. Their advocacy and absence together lend credence to the criticisms that the Opposition exerts insufficient influence to be a player in a Parliamentary system of government.

These procedural changes to which Nodia refers are the most significant changes under the new amendments which reform the legislative branch of government. The new Constitution makes changes to the procedures of a vote of no-confidence, the Presidential impeachment process, the Parliamentary override of a Presidential veto, and the procedure for future amendments to the Constitution. These changes combined shift many of Frye’s elements of executive power away from the President and to the Parliament or the Government, which illustrates the degree to which the power structure is changed under the new system.

The procedures of the no-confidence vote allow the Parliamentarians who are not members of the Government an instrument of recourse in the event that their interests are not being met by the leadership. Though the process of a no-confidence vote remains complicated, this mechanism allows for changes in the government outside of elections if the political situation so demands due to shifting coalitions or changing public opinion. This not only makes the Parliament more democratically accountable, but it is also in the interests of the Parliamentarians, both pro-government and opposition, who served on the Constitutional Commission, as it allows them a second chance to secure power and advocate their interests if the initial Government does not meet their expectations.
The process of impeaching the President is an important aspect of the balance of powers between the executive and legislative branches of government. The easier to remove the President from power, the stronger the legislative branch is relative to the executive. The 2010 amendments significantly simplify the impeachment process in Georgia. The Venice Commission explained: “The proposed Articles 63 and 75 render the procedure of impeachment less complicated. The Supreme Court is not involved any more. The impeachment can be based on a criminal charge as well as on the violation of the Constitution. Both changes are welcome” (Final Opinion 6). This shift of power, with the approval of the Venice Commission, indicates both a shift towards a more Western model of legislative control, as well as an increase in the power of the Members of Parliament, two demonstrated interests of members of the Constitutional Commission.

Unlike the process for Presidential impeachment, which is simplified under the new Constitutional order, the ability to override the President remains complicated. The Venice Commission described the process of a Parliamentary override of a Presidential veto as: “complex, requiring a first vote of the Parliament on the remarks of the President and a second vote about the adoption of the law if the remarks are rejected” (Final Opinion 7). The fact that a veto is still complicated may show a continued concern on the part of the Constitutional Commission for maintaining some checks and balances on Parliament, or it may be an example of institutional inertia, wherein no party’s interests were specifically served by making major changes to the process of overriding a veto, so the process remained similar to the preexisting one.
Now that the 2010 Amendments have been approved by Parliament and codified into law, future amendments will require the approval of “two-thirds of the members of Parliament in two consecutive parliamentary sessions with an interval of at least three months” (Draft Constitutional Law 12). This change plays to the interests of those involved in the 2010 Constitution-making process, as they have been able to enshrine their interests, to a greater or lesser degree, into the existing document. By making amendments more difficult they are able to preserve this beneficial framework for a longer period of time, at the expense of future rivals.

The changes to the legislative branch were one area in particular in which the Parliamentary Opposition was able to achieve concessions from the ruling party. Minor changes to the drafts regarding the timelines of government formation and the vote of no-confidence and other legislative procedures were changed between Parliamentary readings in response to the demands of the opposition (Parliament of Georgia). The Parliamentary Opposition’s efficacy in this regard illustrates that their interests and power are concentrated in the legislative branch.

**The Judicial Branch**

The changes to the judicial branch of government in the 2010 amendments to the Constitution are but one facet of a series of ongoing reforms to the Georgian legal system. The Constitutional changes occurred at the same time as changes to the criminal code and the criminal procedure code, which introduced (limited) jury trials to Georgia (Kakhidze et al). David DeVillers, the U.S. Department of Justice’s Resident Legal Advisor to the Republic of Georgia, has pointed out that these changes together
demonstrate the desire for an increased democratization of the Georgian legal system, putting more power in the hands of the Georgian people through participation in juries, and the improvement of the structure of the meritocracy for appointment to judicial positions (Kakhidze et al). These changes together aim to depoliticize the judiciary, increase its impartiality and improve the rule of law in Georgia.

The Constitutional changes are primarily concerned with the questions of the process of appointment and length of service of justices, though questions of jurisdiction were also briefly discussed by the Constitutional Commission. The members of the Constitutional Commission included many actors with backgrounds or vested interests in the judiciary. In addition to a number of professors of law and legal experts, the Minister of Justice was a member of the Commission, and one of President Saakashvili’s representatives was an official from the Ministry of Justice. Also represented on the Commission were the Prosecutor’s Office, the Public Defender’s Office, the Supreme Court of Law, the High Court of Justice, and the Georgian Young Lawyer’s Association (K’omisiis Ts’evrebi), a civil society association whose staff and members often go on to careers with the government and in particular with the Ministry of Justice (Kakhidze et al).

The Minister of Justice’s participation in the constitutional process presents an interesting case of the judiciary’s interests in the constitution, as Minister of Justice Zurab Adeishvili did not initially support the draft amendments as they were presented to the public, but rather the Ministry of Justice proposed its own new draft Constitution. This version of the Constitution advocated for a Georgian political system with a strong
Adeishvili’s support for a strong presidential model could stem from one of two factors. First, the institutional interests of the Ministry of Justice itself may have motivated Adeishvili to advocate for a strong Presidency. A strong President in charge of judicial appointments might increase the efficiency and prestige of the judicial branch. The second factor which may have affected his proposal is a desire for personal power based on historical precedent. As Minister of Justice, Adeishvili is a high-ranking member of Saakashvili’s United National Movement and is likely to be one of the contenders for the UNM candidacy for President following Saakashvili’s departure. Moreover, President Saakashvili served as Minister of Justice before he became President, so the office of Minister of Justice is perceived as a possible stepping stone to the Presidency. Despite any desires for personal power, when this draft constitution was not chosen by the Commission, Adeishvili supported the draft that the Commission chose and was ultimately the representative of the Commission who presented the changes to Parliament. This decision may serve to empower other members of the UNM under the new regime, and could still increase his personal power given another shuffling of the top positions within the United National Movement.

The new Constitution states in Paragraph 2, Article 86 “A judge shall be appointed for life until the legal retirement age. The law may provide for a trial period of not more than three years before confirmation of a judge on a permanent basis. The selection, appointment and removal from office of judges shall be regulated by law” (Draft Constitutional Law 10). The introduction of life tenure for judges is intended to, as Posner describes it, “take away the carrots and sticks, the different benefits and costs
associated with different behaviors” (Posner 2). The introduction of this provision into Georgian law demonstrates a desire for greater independence of the judiciary and an increased system of checks and balances between the branches of government, a democratic trait, as well as an influence of Western legal thought on the Georgian system. The Venice Commission welcomed this change, and has “consistently favoured judges’ tenure until retirement” (Final Opinion 13). Irakli Kobakhidze of the Open Society Georgia Foundation criticized this change due to its Western influences and lack of sensitivity to the particularities of Georgian political life. He worried that the Constitutional provisions on the life service of judges were alone insufficient to ensure the independence of the judiciary, and wrote:

In the western countries such practice plays a positive role in strengthening the independence and impartiality of the judiciary. However, in the opinion of certain Georgian experts, in the circumstances where the system of common courts enjoys very low public confidence, introduction of the lifetime appointment of judges could be assumed as [an] immature decision. Moreover, it should be mentioned that in the Georgian legislation there are certain alternative possibilities to have influence over judges. Unfortunately, regardless the experts’ recommendations, there are no special safeguards against such alternative mechanisms of influence guaranteed in the draft Constitution. (Kobakhidze 9)

Tamar Khidasheli, GYLA’s President and representative to the Constitutional Commission, raised similar concerns at the Berlin Conference on the amendments, worrying that judges could be coerced by being relocated to less desirable locations (Babeck 10). The Western experts at the Berlin Conference agreed that the Constitution should contain some such provision to safeguard judicial independence from this type of appropriation by other political actors (Babeck 10).
The introduction of the trial period to judicial appointments has also been subject to much debate and criticism. David DeVillers explained that this provision is due to the still-imperfect meritocracy in Georgia, and is designed as a method of ensuring judicial competence. This difficulty in recruiting and retaining quality legal professionals is a problem that Bartole pointed to in his academic writings and one which often accounts for the difficulties in reforming judiciaries in the region. Despite what may be the best of intentions for the public good of Georgia, this is another element of the amendments to the Constitution which is criticized as a power play for the benefit of Saakashvili and the UNM, as many experts fear that it will allow an element of political control over judges. The Venice Commission referred to the European Charter on the Statute of Judges and wrote that although there may be circumstances under which a system of performance evaluation for new judges is necessary, in general such provisions curtail the independence of the judiciary. The Venice Commission proceeded to criticize the proposal offered by the amendments as “problematic” (Final Opinion 13). These recommendations reflect Bartole’s third model of post-Communist judiciaries wherein the system of checks and balances is modeled upon Western democracies, whereas the Constitutional Commission’s recommendations lean more towards the intermediate model of reform. Irakli Kobakhidze offered a similar criticism to that of the Venice Commission and wrote, “that such period can be effectively instrumentalized by the executive authorities to exercise pressure on judges and infringe upon their independence” (Kobakhidze 9). These changes to the appointment of judges are a result of the competing interests of increasing the independence of the judiciary and moving
closer to a Western model of democracy while still ensuring that judges do not, through
malice or incompetence, threaten the interests of those in power who were responsible for
the drafting of the Constitution. At the Berlin Conference, the general consensus was that
Georgia must “find a proper balance of allowing for legitimate logistical challenges the
administration needs to overcome, but at the same time ensuring that those were not
politically motivated.” (Babeck 10).

The Timing of the Amendments

In addition to the discussion of the content of the amendments, the timing of the
amendments was the subject of intense debate. Initially the new amendments were slated
to come into effect on December 1, 2013, but this date was changed so that the
amendments will come into force following the next President’s inauguration, such that
President Saakashvili will not be subject to these changes (Key Points of Newly Adopted
Constitution). This change illustrates the Commission’s awareness of Saakashvili’s
interests, and their reluctance to advocate changes against them.

The speed with which the amendment process took place was also subject to popular
criticism. A group of prominent NGOs came together to petition Parliament to allow a
longer time for the public debates until 2011 “in order to endure an effective format for
review” (Appeal of Georgian Young Lawyers Association et al). The representatives of
the Parliamentary Assembly of the Council of Europe to Georgia also cautioned the
Parliament and Constitutional Commission not to rush the amendment process. They
told Civil Georgia that “Adopting these amendments before the final opinion of the
Venice Commission has been issued will only give rise to unnecessary criticism that the
constitution was changed in a hurry” (qtd. in Adoption of New Constitution Planned on Friday). Though Parliament technically waited until after the final opinion of the Venice Commission to vote on the final approval of the amendments, the two approvals occurred nearly simultaneously. During President Saakashvili’s press conference praising the Parliament for adopting the amendments, he allegedly received a text message from the Council of Europe alerting him of their final endorsement of the change (Saakashvili Hails Adoption of New Constitution).

Despite the criticisms that the speed of the process was used to slip the amendments past the Georgian people without sufficient debate, many support the pace at which the amendments occurred and believe that a slowing down of the process would also have led to rumors and conspiracy theories. Tengiz Sharmanashvili, the Secretary of the Constitutional Commission and co-author of the amendments, said that “any attempt to delay the vote is an attempt to ‘paralyze’ the reform” (qtd. in EurasiaNet). Speaker of Parliament David Bakradze also scoffed at the idea of further delay, saying “More than a year the Commission has worked…a large number of European experts managed to review [the draft Constitution] [addition in original], the members of the Venice Commission managed to review it, it turns out that only we have not had enough time to read it…I am sorry, but I think that is not serious” (qtd. in EurasiaNet). There were speculations made by members of both the opposition and the government that the timing of the amendment and discussion process was intended to discredit their position, but ultimately the amendments were passed with the (qualified) approval of the Venice Commission and the international community as a step in the right direction.
Chapter 7: Conclusions

The interests of various Georgian elites and their desires to retain political power account for the specifics of the changes to the structure of the Georgian government. This trend is particularly evident in the change from a strongly presidential to a strongly Prime-Ministerial system, wherein President Saakashvili’s pending retirement from the Presidency and the participation of Parliamentarians in the amendment process combined to shift power in the Georgian political system away from the President and to the Parliament. This change is also, however, ultimately in the public interest as it moves Georgia’s political system closer to a European model of Parliamentary democracy. Likewise, the legislature is further empowered through procedural changes which simplify Parliamentarians ability to change leadership outside of elections and to impeach the President. In the realm of the courts, the independence of the judicial branch is increased, but an element of possible political control is still present. Though the role of individual interests in the Constitution-making process may initially seem to be an undemocratic rigging of the game to allow the current elites to retain power indefinitely, the changes reached through the 2010 amendment process are in fact more democratic and beneficial for the Georgian state and people. Ultimately, the 2010 Constitution represents a positive, democratic change for Georgia and is advantageous to Georgia’s continued political development and future integration into Western structures. These changes are important not just in their representative power, but in their substance. As
one of the U.S.’s staunchest allies, the democratization of Georgia is ultimately not just in Georgia’s interest, but also in the interest of America and its other allies.
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A Step towards Democracy
Ghia Nodia

Georgia today is not a consolidated democracy: it is often styled a “hybrid regime”—either half a democracy or half an autocracy (the choice of which term is used depends on the individual’s taste). The reasons for this are twofold: first the Constitutional foundation, second - the political culture or the level of development of public institutions. If the Georgian Parliament essentially agrees with the Constitutional Commission’s program of change, which was approved on July 19, the first of these two reasons will no longer apply.

What are we missing?

Why can’t we have a modern constitutional model of democracy with different viewpoints? Indeed, does it not consider the people’s stewards? It goes without saying. It is true that in Georgia there are not proper elections, but as a rule, the people can choose the government which is more acceptable to them (when this isn’t allowed, a revolution is “uncorked”). But liberal democracy means that not only do people choose the government – the main thing is that the power of the chosen leader is limited; he is constrained. Neither the position itself nor the government institutions which were created in the name of the people should speak for the people without their support.

This is the only way the division of executive power and the mechanisms of mutual balance are created. Each institution should be sufficient to accomplish its function, but also sufficiently constrained. Authority without control is not profitable, and endangers the freedom of the citizen. The best guarantee of freedom has not yet been thought of. Our democratic deficit, as expressed in the current Constitution, is the
concentration of presidential power; speaking more generally—in the hands of the executive ruler. This makes our political system half authoritarian.

This model has its own plusses: the concentration of power simplifies decision-making and implementation. I think that without these conditions Mikheil Saakashvili would not have been able to successfully perform such radical reforms in a short time: the defeat of mass corruption, the abrupt increase in tax payment levels, the “cornering” of organized crime, essential changes to the education system, and so forth; all these changes painfully hit people’s concrete interests. In a more balanced democratic system these groups will be able to exert leverage which will at least moderate and delay the realization of reforms.

Why do we want democracy?

So, why must we change this system? Because the Europeans criticize us and are ashamed of us? No. International prestige is important, but it cannot be the primary reason. The main thing is to choose a model of administration which will help the development of the entire country. An half autocracy in the constitutional environment allows the leader to act, and expanded authority can be used to rush necessary reforms for the country’s sake, or it can be used in the service of his own group’s interests; it can be used to tolerate opposition and differences of opinion, or in the systematic repression of elections. My subjective evaluation is that Mikheil Saakashvili’s government is significantly closer to the first than the second. But if we look at other post-Soviet states, where the scheme of Constitutional rule resembles ours, we will see that the conditions of the half authoritarian model have a greater likelihood of a significantly less liberal and more corrupt regime.

The second problem with the existing system is instability. In 2007-2009 a situation developed which is now referred to as a political crisis; now that we can look back on the crisis, the risks of the concentration of power were demonstrated. When power is concentrated in one place, all the involved citizens who have no access to centralized power and are dissatisfied with the system will join together to fight against
the government. The political games are sustained by only one real prize—the post of 
President, (aspiring for too much, the players act on the principle—“everything or 
nothing”). This development means that political life is polarized and, accordingly, there 
is danger of periodic crisis.

In general, hybrid regimes are internally unstable. In these circumstances, either a 
radical and irresponsible opposition (such as the opposition to the regime) profits from 
existing democratic freedoms through provoking new and different crises, or an unstable 
importuned government abbreviates freedoms and with a “strong arm” actually 
establishes authoritarianism. Many countries (to be honest, in Latin America) develop 
cyclically: first anarchic freedom, then order restored by a dictator.

The last few years in Georgia, Saakashvili could, on the whole, assure stability; he 
and his party were politically able to stand head and shoulders above the opposition. 
Under a feebler leader and with a competent opposition, the outcome might have been 
different. But the opposition forced the government into a defensive position, and turned 
to some thoughtful reforms which were undertaken at a reasonable pace. The 
concentration of power is fundamentally justified—it is necessary for the ability to lead 
unpopular reforms—recently, this has no longer been an issue, that the leader’s 
compassion causes anxiety. So, the politician has exhausted the concentration of power 
for the sake of rapid and painful reform.

A New Balance

The new system raises two questions that are interconnected: how is it more 
democratic? And, what perils are connected to it?

Under the existing system the president could unconditionally appoint and dismiss 
all the important posts: some directly (Prime Minister, the governors), others through the 
party manager who is controlled by the President (Members of Parliament, regional 
\textit{gamgebelis})\(^1\). This system (which is found in all Georgian parties) wherein the party 
surrounds the leader, therefore the leader is able to keep power. By the way, the first

\(^1\) Chief executives of “lower-tier” municipalities
serious change to this system occurred on May 30: Tbilisi’s Mayor Gigi Ugulava, an important political figure, cannot be dismissed by the president. But this alone cannot change the political climate.

The new system is mixed; executive power is shared by the elected president and the Prime Minister approved by the majority of representatives in Parliament. According to the representative model it is obvious that the country’s most powerful political figure is the Prime Minister. Even though ultimately he does not have a direct mandate from the constituency, he is dependent on a parliamentary majority. The party manager or coalition can change [the Prime Minister] outside of elections. Therefore the highest post is not fully free outside the election period—he can be sacrificed to party politics.

On the other hand, the president has a direct mandate derived from the people, and is sacrosanct after the elections (the impeachment procedure is generally complicated, and we won’t consider it here). His authority is constrained, but his status is solid and the degree of legitimacy is high.

In short, the system no longer implies that there exists just one figure, around whom everything revolves. At least two political leaders will emerge, and this bifurcation saves us from the political maneuvering over positions; even if only one party is in government. Now these two leaders are dependent on Parliament, the most powerful organ.

Dangers

Of course, neither this (nor any other) constitution can, in itself, give us guarantees of sovereignty and stable democracy. Except, this creates new dangers. As I said, the democratic deficit is the second (possibly more radical) reason why I maintain institutions of political pluralism in Georgia. The first is the weakness of political parties. Each party’s leader is only supposedly powerful and loses authority as soon as they lose an election. It is absolutely possible that the National Movement has surpassed its predecessors—the UNM at least, will endure the change of leaders and loss of
authority. But until this occurs, we cannot say decidedly. The opposition parties are chronically irresponsible, changeful, and oriented to short-term success.

The Parliamentary system (which we are getting closer to with these changes), in fact, implies that the government is dependent on political parties. When we have such parties as we have, it is sufficiently risky. On the one hand, we can hope that when the parties are more mature, they will act more responsibly. But since we cannot have this hope ‘til the end, the Commission has instilled mechanisms in the constitutional model (the “constructive vote of no-confidence”, and the presidential veto) which will challenge irresponsible and destructive parties who might easily overturn the government if they are not ready for a difficult alternative.

Will the new system work well? I can say nothing with confidence; overall, I think that we will experience political stability, however I might be wrong. Only the future will tell. For one: in Georgia when they talk about the democratic deficit, the root of the problem will not be the Constitution. The Europeans at least will not be able to tell us that, because the Constitution will really be to their standard.

In any case, it would be good for us to remember Winston Churchill’s famous quotation: “It has been said that democracy is the worst form of government except all the others that have been tried”. We must look at the new constitutional model this way.

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