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Definition of the Role of Arbitration of the President of Georgia and Some of its Features

The article discusses the arbitration phenomena of the Head of the State, as the authority to carry out actions for detaining and balancing the powers by the Head of the State, to mitigate the risks of society disintegration.

Under the above context, the work discusses the formally defined relationships of the President of Georgia with the power branches and their mobility in terms of simultaneous existence of meta-legal factors, the unity of which defines the practical effectiveness of President's arbitration activities.

Key Words: *Arbitration (of the head of the state), guarantor, discredit to the government, semi-presidential republic (systems), president, prime-minister, head of the state presidential republic, ensuring, suspension-enforcement veto.*

1. Introduction

According to the major principles of the Constitutional Law of Georgia "on making changes and amendments to the Constitution of Georgia"[1], dated October 15, 2010, in line with the establishment of innovative system for the governance directed towards the parliamentary system, the article 69, defining the role of the President, has been established in a new way. This wording declares the President only as the Head of the State and expresses the arbitration function of the President, already dominated in post-socialistic constitutionalism, in this norm-principle, in of functioning of the state bodies. In accordance with the Constitution of 1995, under the conditions of distancing of the President of Georgia from executive authority for the first time, the analysis of legal basis, defining arbitration and the picture of political relationships implemented within this framework, causes great scientific interest.

2. Cognition of the President – as the Arbitration of Head of the State

The arbitration doctrine of the President, which is founded on the semi-presidential republics, was reflected normatively, highlighted in modernity, in post-socialistic constitutionalism. The arbitration of the Head of the State represents the normatively regulated (predominantly negative – deterrent and balancing, sometimes for influencing purposes, positive – supported by the interventional mediatory rights) capability to evaluate political situation and to make the appropriate decision. Arbitration authorities objectively represent the opportunity of influencing the activities of constitutional bodies, but subjectively – the capability for the above. The effectiveness of arbitration function of the President, among precisely defined, not in one but several (mainly two) alternatives, according to evaluation of situation (and its development among them), is expressed in the right of discretional choice, but not (always) only in formalization by the precisely determined procedure of agreement of parties. The monistic parliamentary system of governance

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[1] Constitution of Georgia, <https://matsne.gov.ge/ka/document/view/30346>.

does not consider the legally solid and separative condition of arbitration of the Head of the State. It often runs down to the institutional mechanism, required for formalization of will of the government (which is dictated by its parliamentary representation and prevision of its own perspective for new parliamentary elections, or moreover, prevision of their perspectives – in case of agreement of parties on the appointment of early elections).

Considering the president's arbitration rights separately - there is nothing. The President, as the representative of united society of the state, shall minimize the possible risks of disintegration of this society, proceeding from their activities, under the specific rights towards the different branches of the government. The unity of the state, together with the unity of society, means the social unity and continuity of state authorities. Therefore, the arbitration authorities of the Head of the State, represents the unity of measures of facilitation of this continuity and institutional embodiment of its unity. The primary nature of arbitration authorities of the President should be of preventive nature and shall be directed towards the prevention of development of processes leading to the conflict; only after this, other specific rights shall include the response mechanisms for conflicts, failed to be prevented.

The practical effectiveness of arbitration role of the Head of the State essentially depends on the formally defined legal inter-relationships with the branches of state authority and the political art of using such relationships in different political configurations.

Two tendencies have been distinguished in Georgian constitutional science:

1. According to the first position, the President "shall hold the capabilities strictly regulated by the Constitution, for participation in the implementation of executive, as well as legislative authorities".[2]
2. The President shall have the influence over the branches of power, if required, and mechanisms for influence, but not the authorities of these branches of the government. These are two different issues, which are of particular importance for the fulfillment of the role of arbitrator by the President ".[3]

The first position, which implies involvement of the President in activities of these branches, in my view, unambiguously goes beyond the deterrent nature of arbitration and considers the expansion of President's authorities at the expense of intervention of the state authority in activities of two independent branches. The "watershed" here is the understanding of function of constitutional arbitration, that it is not the co-participant and divider in activities of government bodies, but capable of retaining and balancing their activity, if any one of them poses a threat to the balance preserved by the constitution. Therefore, the intention of establishment of efficient arbitration of President requires its functional distancing-independence from branches of power. With its arbitration function the President should be the efficient instrument of protection from infringement of this balance, but not the interested "player", that would make the President capable to react on the changes of the balance. Belonging of President to one of the branches of power, exactly makes him not the impartial arbitrator, but pushes him to be actively interested player in political "games", as well as responsible participant of such debates. Therefore, the presidential institutions (US, Brazil, Mexico and the Philippines) indentified with executive authority, are not considered as arbitrators in constitutional terms. One branch of the power cannot be objective judge between itself and

[2] *Eremadze K.,* Problems of Inter-Relationship of Legislative and Executive Government in Georgia, the Dissertation for Receiving of Science Degree of Candidate of Legal Sciences, Tbilisi, 2003, 145-146; *Nakashidze M.,* In Doctoral Thesis: Peculiarities of President's Relationships to the Branches of the Government in Semi-Presidential Systems of Governance (by the example of Republic of Azerbaijan, Georgia and Republic of Armenia), 50, <https://www.tsu.ge/data/file - db/faculty-law-public/Malkhaz%20Nakashidze.pdf>.

[3] *Nakashidze M.,* In Doctoral Thesis: Peculiarities of President's Relationships to the Branches of the Government in Semi-Presidential Systems of Governance (by the example of Republic of Azerbaijan, Georgia and Republic of Armenia), 50, <https://www.tsu.ge/data/file - db/faculty-law-public/Malkhaz%20Nakashidze.pdf>.

a political competitor. However, it is a fact that original proximity of functions of the Head of the State to executive nature excludes its complete separation from the executive authority. Also, it is a fact that distinguishing/further development of arbitration role of the President has caused the weak and (sometimes, with counter-assignation) balanced permeability of the President in some executive functions. The major limit to be observed here is that the President not to be essentially involved in the governance activities, not to become the second subject of executive authority, who actually would separate the government – supreme body bearing the executive authority – from this constitutional status and would transform from the arbitrator to the competitor of the Prime Minister by the way of turning into the interested "player" in the political processes. The perception of arbitration role of the President is variable according to the systems of governance, and the appropriate legal constitutional concept of the President also varies according to the dependence upon the systems of governance. In semi-presidential systems the arbitration authorities are mixed up with executive authority, which is expressed by active participation in government's activities – inviting and chairmanship of sessions, in addition, registration of results of government sessions by the Act of President and active participation in executive authority. Therefore, number of scientists believes - idea that, allegedly, the President of semi-presidential republic acts as neutral arbitrator is an illusion.[4]

Resulting effectiveness of arbitration itself, not as formal basis for these authorities but as practical realization of these rights – material event, is revealed in their effective application, with the consideration of time and given political situation. Exactly in this given situation, the President, under the balance prescribed by the Constitution, may facilitate the strengthening of one political group (all the more if it is part of it), by this or other particular arbitration right, or hinder the growing tendency for any of them, or in case of its improper use towards the political situation and time, contrary to its intention – unintentionally facilitate the growth tendency. However, in all cases, its intention shall be inviolability of protected balance.

Post-socialist constitutionalism considers the understanding of President as arbitrator, as the essential constituent element of status of the Head of the State. In this regard, post-socialist constitutions are relatively expressive. The President of Belarus is "the guarantor… of Constitution… of the Republic of Belarus and provides… the heredity and interaction of state governmental bodies, implements mediation between state governmental bodies" (article 79);[5] the President of Poland is "the guarantor of continuity of implementation of state authority (paragraph 1, article 126);[6] "the President of Romania supervises the observance of the Constitution and proper operation of public authority. For this purpose the President carries out mediator's function between the branches of power of the country, in addition – between the state and the society" (paragraph 2, article 80);[7] "the President of the state of Hungary… protects the democratic operation of state structures" (section (1), article 9)[8]; "the President of Republic of Croatia provides the normal and harmonic operation and stability of state governance" (paragraph 2, article 94);[9] In accordance with the first paragraph, article 69 of the Constitution of Georgia, "the President of Georgia shall ensure the operation of state bodies, within the powers vested to him/her by the Constitution".[10] The philosophy of ar-

[4] *Veser E.,* Semi-Presidentialism – Duverger's Concept – A New Political System Model, Department of Political Science, School of Education, University of Cologna, 1977, 55-56, See *Nakashidze M.,* In doctoral thesis: Peculiarities of President's Relationships to the Branches of the Government in Semi-Presidential Systems of Governance (by the example of Republic of Azerbaijan, Georgia and Republic of Armenia).

[5] Constitution of The Republic of Belarus, see <http://kodeksy-by.com/konstitutsiya - rb.htm>.

[6] Constitution of The Republic of Poland, see <http://www.wipo.int/wipolex/en/text.jsp?file - id=194980>.

[7] Constitution of Romania, see <http://www.wipo.int/wipolex/en/text.jsp?file - id=129513.

[8] The Fundamental Law of Hungary, see <http://www.wipo.int/wipolex/en/text.jsp?file - id=325825>.

[9] The Constitution of the Republic of Croatia, see <http://www.wipo.int/wipolex/en/text.jsp?file - id=246241>.

[10] Constitution of Georgia, see <https://matsne.gov.ge/ka/document/view/30346>.

bitration function of the President is exactly expressed in these provisions, which are distributed in various specific authorities. In these definitions all kind of approaches can be met – beginning with ones oriented (Croatia, Georgia, Hungary, Poland) towards the system with possibly harmonious / less crisis condition of state authority of arbitration, before the announcement of it as a party (R.Ph., Belarus). Proceeding from the arbitration nature of the Head of the State – ability to prevent the conflict situations or further respond and protect the society from infringement of unity, through deterrent-balancing and mediatory influences over the different branches of state authority, there is a requirement for protection of President from binding by specific narrow political interests. In case of active belonging to specific party, the President cannot be equipped with such freedom. And this is one of the essential reasons of skepticism of perception of the President as neutral arbitrator in semi-presidential republics.

The content and volume of arbitration powers faces total deformation in deformed semi-presidential republics, in these systems, the scale of President's– as the arbitrator's – authorities are increasing so much that, actually, the status of its impartial arbitrator is lost and it becomes active and interested participant of everyday political anxiety. The impartial authority of dissolution of parliament changes the character and is transformed from crisis handling mechanism into "punishment" mechanism for refractory parliament, and the government, as we already noted, is responsible for its activities not only before the parliament, but before the President too. In this case, the presidential arbitration is essentially transformed into a full-power "presidential government".

But the authors of a number of positions, as opposed to our views, see the political justification even in such relationships of president-parliament-government. And accordingly, dramatically differently perceive the role and status of arbitration of the President, for example, while characterizing the arbitration nature of the President of Kazakhstan, we understand that: "as the President represents the "arbitrator" in the system of state bodies, he/she holds quite effective state-legal institutions. First of all, he/she enjoys the right to dismiss the Parliament in cases prescribed by the Constitution, the government's responsibility before the Head of the State. The relations between the President and government institutions provide solidity of presidential authority in Kazakhstan, as well as permanence of State leadership and heredity, political stability. The provisions, defining relationship of government with President facilitates avoidance of executive authority from dualism, in addition, includes serious preconditions of political integrity of the President of Republic of Kazakhstan and the government".[11]

The actual regulation of the role of President – as the arbitrator – is implemented by not only the system of formal-constitutional norms, but, together with it, political, including party, system. In many cases, mostly, under not so solid party system, and when the situation is brought to the crisis or on the edge of crisis, effective enforcement of arbitration authorities at President's disposal and implementation of stabilizing influence over the processes, becomes critical.

Hence, viability of arbitration authorities, beyond their objective formal-normative basis, essentially depends upon the given subjective-material situation. The latter considers the opportunities of use of formal rights in given political situation – to what extent the political configuration allows the President to frequently enjoy his/her rights. For example, broad and not solid coalitions often are not happy with negative-restrictive activities of the President, and, in some cases, the need of positive interventions may arise for mediation purposes; that is why, the President will allow himself to enjoy such rights. In addition, the degree of sustainability of public powers together with the political powers, play essential role. The

[11] Institute of presidentship and its influence on world politics, see <http://www.e-ng.ru/mezhdunarodnye - otnosheniya - i - mirovaya/institut - prezidentstva - i - ego - vliyanie - na.html>.

status of one governing party or small size and solid coalition abolishes the need of such activities of the President and his/her political activity loses its reasonable grounds. These authorities were many times directed towards the resolution of governmental crisis in the Eastern European countries. The best examples took place in Romania, where, under the situation created following the announcement of election results for Chamber of Members, during 1991-1992, 1992-1996, 1999-2000, 2012 and 2015 years, the Presidents, taking into consideration the impossibility to create the majority, have managed the consolidation of diverse members of Chamber of Members around the non-party candidacies for Prime-Minister. In addition, the President of Lithuania, has significantly influenced the process in 2009, during resignation of the Prime Minister, and parliamentary consensus around the new candidacy. By this measure, the Presidents, as the political leaders of the process, essentially conditioned adoption of the presidential governments.

If, generally, it is clear for constitutionalism, what are outcomes the arbitration is carried out for, as it is evident from the above discussed, according to the governance system, it always requires clarification, what are the forms representing the fulfillment of this function in the system. According to the current wording of the Constitution of Georgia, similar to various countries, the arbitration "arsenal", includes the rights of dissolution (in basics, as well as in time) of parliament, typical for rationalized parliamentary system, calling of strictly regulated extraordinary meeting of parliament and session, appointment of the referendum, constitutional claim, request for the discussion of issue at the government meeting (together with the right to participate in appropriate meeting), as well as "delay-executive veto" for protection of government.

In Georgia the state power was almost always (among them, formally, in mostly divided governance systems of authority - even in the presidential republic) concentrated and the system of relationship of state branches was mostly characterized by the collaboration and - the elements of balances, deterring and competition were less.[12] Even under conditions of system based on major principles of parliamentary republic (where the unity of government shall be demonstrated), the principle of distribution of powers has become perceptive for the first time, with all its features, including such features as competition and discussion on competition.[13]

In accordance with the Constitution, the President has twice requested to discuss the particular issue at the government meeting, which was not followed by counter positive will from the government. The request of the President, which at the same time does not obligate the government for fulfillment, is the opportunity to influence but not interfere in the activities. In the meantime, we think that several rights in configuration, submitted by the President contain certain vagueness and relevant risks. In this particular system we will attempt to essentially review the major arbitration constitutional accents introduced as a result of changes of October 10, 2015, with the intention to be oriented on future effectiveness of arbitration authorities of the President.[14]

3. Superlative Definitions in the Area of Arbitration

Ensuring operation of the state bodies by the President of Georgia is determined by the framework of authorities awarded by the Constitution. Accordingly, it is clear that the President cannot call for other right additionally, but what consequences he/she "ensures" for? Or how much do the President's possible

[12] Which was mainly explained by an inadequacy of multi-party system and this was generating only uni-influential (pro-presidential) party.

[13] Which was essentially conditioned by coalition nature of governance and burden.

[14] Constitution of georgia, see <https://matsne.gov.ge/ka/document/view/30346>.

actions correspond to the objective - ensuring? Will the mentioned rights be transformed into guarantee for ensuring? We are of the view that other problem is created here; in particular, shall the President ensure the activity of each body individually? If yes, it shall be considered as integral part of such bodies separately body, by which the system of distribution of authority would be violated, if the President would interfere in carrying out of particular governmental function and empower himself to ensure implementation of activities by each body?! This, on the one hand, would equip him/her, as the President, with full power; on the other hand, the "space" of appealing on "implied" rights is revealing here, for which it seems it does not leave the place - "within the powers envisaged by the Constitution for the President" - the President is not granted with such functions. The interpretation of this norm will become the source of conflict, or its viability will come into question. It is noteworthy that the Head of the State objectively does not have the opportunity to (ensurance of as necessary consequence) operation of the state bodies, due to impossibility to be supported by specific rights. Such type of abstract norm, directed towards the President, cannot have direct action, due to impossibility of specification. The "ensuring", not "nourished" via the specific rights, cannot be the liability of non-governing President and independent component of its arbitration. Even is skeptical about this obligatory normative definition; however, in terms of functional collision to Constitutional Court, he notes that "this guarantee is provided by the Constitutional Court of Georgia".[15]

However, one of the authors of this reform - the Chairman of the State Constitutional Commission of that time, Mr. develops the opposite position: according to new wording of article 69 of the Constitution of Georgia, the President of Georgia shall fulfill the obligations of guarantor for "unity of country and national independence", he/she shall ensure functioning of the state bodies. Although the President, according to the constitution, allegedly does not enjoy the necessary and sufficient powers for proper implementation of high status and per se highly busy functions, careful reading of new wording makes clear that the President, as the first person of the State, has the proper competences".[16] Such authorities belong to the rights of dissolution of the Parliament, proclamation of martial law without counter-assignation of the Prime Minister, solution of issues related to citizenship and granting pardons to convicts, in addition, statement to the nation and submission of report before the parliament. Sense of insufficiency of rights required for proper implementation of this role is linked with the analysis made on the basis of comparison of institutions of President existing on the day when it was equipped with extra powers.[17] Undoubtedly, and as mentioned above, each of this specific rights represents the mechanism for implementation of presidential arbitration; however, our thoughts are directed towards the following: how much the objective of is incontrovertibly achieved through these rights.

4. The President of Georgia – Conductor or Interventionist of Confidence-Non – Confidence?

In the governance system established since 2010, the President is authorized to oppose declaration of non-confidence to the government by majority of listed composition of the parliament, by "delayed-enforcement veto". For overriding the veto of President, no less than 3/5 votes of the listed composition (in case of full composition – 90 members of the Parliament) are required. By this authority the President (more pre-

[15] *Babeck W., Pish S., Raihenbeher Ts.,* Revision of Constitution - the Road of Georgia to Europe. Wolfgang Babeck. Lessons from Georgia: Good Example of Constitutional Reform? Tbilisi, 2012. 130.

[16] *Demetrashvili A.,* Constitutional Chronicles of Georgia. Constitutional Reform of 2009/2010 in Georgia, Tbilisi, Batumi, 2012, 25.

[17] *Demetrashvili A.,* Constitutional Chronicles of Georgia. Constitutional Reform of 2009/2010 in Georgia, Tbilisi, Batumi, 25-26.

cisely, the Prime Minister [if they represent one political force], via the President, as the President will make decision on hindering [with the right of veto and dismissal] of procedure of vote of no confidence, of course, under the dictation of current Prime Minister) intrudes into the competence of parliament in the system of distribution of authority and deprives it of the classical function - the right of control over the government. The President, with its right of influence over the natural ability of parliament - to dismiss the government by vote of no confidence, is given the opportunity to interfere in the solution of vote of no confidence to the government, to have the artificial impact - to maintain the government with lost confidence from the Parliament, by which it violates the principle of distribution of authority - infringes the right of the parliament, to be the permanent and continuous sole supreme source for formation and support of executive power.

Formally, this rule empowers the President and, in the meantime, together with parliament authority, reduces the political responsibility of the Prime Minister. "The strong rights of the Prime Minister are reasonable until the Prime Minister remains under the control of the Parliament and in case if the Parliament has the opportunity, to vote no confidence and easily appoint a new Prime Minister".[18] I am afraid that by means of leverages available for the government, direction of President's political subjectivism in favor of the government, is not in compliance with the President's objective arbitration authorities. The right of President - to maintain the government with lost confidence from the parliament, violates the boundaries of distribution of authority - infringes the right of the Parliament to be the permanent and sole supreme source for formation and support of executive authority, which means denial of supremacy principle of the Parliament; setting up of higher parliamentary barrier of protection strengthens the Prime Minister not compatible for the system, which already represents the deformation developed to percussion of conception of parliamentary system. Therefore, we think that, for the President, the right of maintaining the government with lost confidence from the Parliament, is not the measure oriented towards the strengthening of effectiveness of the President's arbitration nature, but mainly represents a tool available for the government - technical right to be protected by the Prime Minister, the fair and rational provision of responsibility procedures of which shall be the cornerstone of the system. This subjective authority of the President, to protect the Prime Minister, is not compatible with the objective arbitration status of the President. The arbitrator President, who is also responsible for public consolidation function, becomes predestined for political subjectivism, which undoubtedly causes the loss of power of political morale and morale authority, which he/she shall have before each political group.

Development of procedure typical for parliamentary governance – vote of no confidence, even in terms of increase of presidential powers, causes such deformation of parliamentary system that removes it from this system of governance and, finally, will become painful for Parliament-President-government relationship system. Given option of vote of no confidence dramatically reduces the controlling powers of the Parliament, and, moreover, gives the opportunity to the President to use it against the parliament, as well as the government with the same success. The President, which, in particular political circumstances - as the arbitrator, has the legal-political leverage to be applied effectively, and which observes the variation of balance of political forces in the Parliament, can easily provoke the process of vote of no confidence. After that, it depends only on President's will, whether to allow the parliament to dismiss the government or not. Therefore, given procedure of vote of no confidence may facilitate confrontations within the government.

[18] Venice Commission, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia CDL(2010) 028, № 110, CDL-AD (2010)028 Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), see <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)028-e>.

The veto of President on the decision of Parliament to vote for no confidence to the government cannot remain as the normative category apart from the political factors - uncontrolled discretion of the President. Frequency and expediency of its application will be essentially regulated by the real political factors, among them:

1. General political inter-disposition and sympathies of the President and parliamentary majority (accordingly, the government);
2. Preliminary consultations and achieved agreement with governing and oppositional political forces;
3. Increasing rating of the political party voting for no confidence. This will be directly linked with the opportunity of discussed extraordinary elections for both cases: is the President considered as supporter of a new possible coalition, and accordingly, may the President be reviewed as the power encouraging this process or fully resisting the decision of no-confidence of parliament.

The President, by the right of "delayed-enforcement veto", may temporarily maintain the government without legitimacy and hinder signing of a new will, already formed, but this contradiction in implementation of distribution of power is not favorable for the President; does not transform him/her into independent player - effective arbitrator. Notwithstanding the fact whether the President and Prime Minister are representing one political force, in procedure of confidence-non-confidence, only the Prime Minister may get the benefit by rights of the President. The right of "delayed-enforcement veto" of the President, aiming at protecting the government, will be applied informally, but, most probably, via the consultations with Prime Minister. On these grounds, political "divorce" is inevitable between them, or, in addition, the President should be under the control of the Prime Minister, by which it will suppress the mechanisms of political activity, awarded to the President - mechanisms of deterrent influence on activity of government. The latter will be followed by political negligence of the President, which, will contain the risk of losing the institutional authority (among them, as an arbitrator) of the President.

In general, existing scheme of vote of no confidence, together with essential reduction of controlling authorities of the Parliament, gives the opportunity to the President, according to given political situation, to successfully use it against the Parliament, as well as government, is given the right to allow the Parliament to dismiss the government, or (by enjoying the rights [accordingly, right of veto and dismissal] envisaged under paragraphs 3 and 6 of the article 81 of the Constitution) oppose such intention. But, as we already noted, taking into consideration the leverages available for the government, the political subjectivism of the President could be mostly in favor of the government, which does not comply with the objective essence of arbitration authorities of the President.

5. Conclusion

For the purpose of maximum clearness of relationships normatively easily predictable and constitutional institutions in the system of power, taking into consideration the argumentation presented in discussion, during future constitutional reforms, we consider desirable:

1. to edit the norm of article 69 of the Constitution of Georgia, which imposes less real burden of ensuring the functioning of state bodies to the President. For this purpose, I consider that the term "ensuring" requires replacement;
2. in addition, if ensuring is still intended not for control of fulfillment of their function, but for facilitation of each branch of the authority (and that is how it must be), this is not readable. Arbitral constitutional rights shall not be used by the President for granting the right of ensuring the individual functioning of

any state body to the President (which would violate the principle of distribution of power), but shall be focused on their political communion relationship. And if so, presumably, this sentence requires to be filled in with appropriate word (which could be:" rectified"," according to the Constitution"," mutually agreed" or any other);

3. For the implementation of representational and arbitration functions, the President shall be free from party belonging. By his/her status, he is superior over the branches of state power, formed with the party sign and in delaying relationship with them, it is desirable for the resident to be free from burden of party belonging, which in future would reduce the basis for demanding political subjectivism and accusations towards him/her from the side of various political groups.
4. Eradication of interventional authorities in confidence-non-confidence matters, in order to ensure the continuity of confidence-non-confidence of the government, and to avoid separation of unity of source of support for the formation and activity of the government.