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INCLUSIVENESS OF CREATION PROCESS OF CONSTITUTION IN GEORGIA

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Summary

It is very difficult and practically impossible to create the best and most complete constitution. The Constitution is a document created by humans and not by the gods, and just like its creators, this document itself cannot be perfect. There are undemocratically adopted constitutions in the world, but there are no authoritarian constitutions adopted democratically. However, the conditions for drafting and adopting the Constitution can have a great impact on the content of the Constitution.

Constitution is a legal act or set of legal acts adopted by a supreme body of state power or through a referendum, has the highest legal force and regulates the foundations of the organization of society and the state, the basic principles of the relationship between the individual and the state. Both the concept of the Constitution and the history of its development clearly show its special importance in the preservation and development of the state and society.

The aim of the presented article is to review the process of creation of Constitution in Georgia, to study the main specifics and obstacles during the process and to analyze the results which has a direct influence on Political, Economic and Social development of State.

The main methodology used during the research is desk research using historical and legal analysis of the given situation in1990s in Georgia, the challenges that Georgia has after the independence and the main basis and fundamentals for further development of Georgian Constitutionalism.

Based on research study, authors have identified the main issues that were left out from the content of constitution, that are not only important for democratic states, but has the main influence on creation of democratic governance in country. One of the mentioned issues is the defining of Territorial Structure, which is of vital importance for Georgia. The final part of the article is concentrated on the steps that should be taken for the discussion of issues concerning territorial structure, including the different ethnic groups in the debate for solving current left out, but important issues within the constitution.

Key words: Georgia, constitution, administrative division of state, transitional democracy, developing countries.

1. Introduction

The constitution is a living organism. It is a future-oriented document based on past experience, but focused on regulating the present. The Constitution is the supreme law of the country and, unlike ordinary legislation, it embodies the fundamental choice of the country and its people, the basis of political and social life.

The Constitution is the business card of the state, it clearly reflects the image of each state. The constitution reflects the internal organization of the country and specific cultural peculiarities. The twentieth and the beginning of the twenty-first centuries are undoubtedly an exceptional period of Georgia's short history. Historically speaking, in a relatively short period of time,

Georgia acquired and lost its independence, was a quasi-subject of the Soviet Union's quasi-federation for 70 years, managed to escape the socialist regime and restore its independence. Then, Georgia suffered indirect and unconcealed attacks by Russia and occupation of its territories, endured a military coup, civil war and violent internal conflicts with separatists regimes. The Constitution is the starting point of any legal system and the last, decisive document ... The supremacy of the Constitution as a legal norm must be guaranteed by legal, technical means. As Walter Clark says, The Constitution did not fall from heaven to become the object of fetish and worship (Clark, 1898, p.12). Creating a constitution is an experiment, a test, the result of which will always be different from what was intended and what was expected.

State constitutions are best understood with reference to their historical roots. A review of the history of Georgia's constitutions provides a synopsis of the political, economic, and social history of the state. Georgia's constitutional history also illustrates the various methods by which a constitution may be written or revised.

The first edition of constitution adopted in 1995 consisted of a preamble, 9 chapters and 109 articles. The preamble emphasises the new constitution's high respect for «Georgian nation's centuries-old state traditions and the basic principles of the 1921 Constitution» (Jikia, 2015, p. 19). It can be stated that despite the legal inheritance from the Constitution of the first Republic of Georgia, there are number of alterations made in the 1995 Constitution. Some of the changes took place due to the reality of that period and some due to certain dominant political powers and ideology (Jikia, 2015, p. 20).

Since 1995, Constitution of Georgia was amended several times and all the changes were made after the new Political Power came into force. Therefore, it can be concluded that most changes were made based on Political motives rather than legal perspectives. In this article we will focus on the elaboration and adoption of the Constitution of Georgia.

2. Preconditions for creating the Constitution of Georgia

After Georgia regained its independence, the country operated without constitutional law for several years. (The revised constitution of 1978 was in force during the rule of Zviad Gamsakhurdia), after that the constitution of 1921 was restored, formally the legislation was in force until August 24, 1995, provided that they did not contradict the principles of the constitution of 1921. However, Opinions and interests were influential, while existing contexts and focus on the needs of citizens (or groups of citizens) were hardly heard. The declared position of the government created after the coup to restore the 1921 Constitution was a practically unattainable goal. This was undoubtedly a lucrative political move, however, it was impossible to implement. The 1921 constitution provided a different state arrangement, which is why the decision to create a new constitution was finally made. At the same time, the 1995 constitution was drafted largely under the influence of Eduard Shevardnadze. In the process of drafting the constitution, «the constitution was written and we studied the constitution together, both students and professors». Consequently, the sharing of international experiences played a crucial role. In the process of working on the 1995 constitution, constitutionalists often made direct connections with academia in different countries to take into account the assessments of international experts on the draft constitution. The positive assessments of the international community were crucial in the aftermath of the constitutional reforms.

The process of working on the basic law of the Georgia started in 1993 and took almost two years. The State Constitutional Commission, established in 1993 (Resolution N65 of March 23, 1993), consisted of 118 members, including lawyers as well as public and political figures and, of course, members of parliament. In compiling the list of members of the commission, attention was paid to the fact that the members of the commission included representatives of all factions, territorial units and national minorities. As a result, the State Constitutional Commission consisted of persons with and without a title. This period was going on in an unquenchable wind-fire, there was a turmoil of passions as well. Since the end of March 1993, a large-scale attack was carried out on the capital of Abkhazia, Sukhumi, by our occupying country – Russia. As a result, Sukhumi fell in September 1993 (Babek, 2001, p. 20). Since that, and as a result of the collapse of the Soviet Union, our country is in transition. A common Challenge in developing and transition countries is legal reform which requires good knowledge of legal, political, social and economic conditions of the recipient country. But legal reform alone can do nothing if legal norms are not enforced in practice.

The current Constitution of Georgia was adopted on August 24, 1995. Its adoption can be confidently attributed to the authoritative influence of Andras Sajo, who helped overcome the «Constitutionalism of fear» (Babek, 2012, p. 13). In the 90s, Georgia faced many challenges. It was a period when the sense of the rule of law and consequently the sense of the usefulness of the main law, the constitution, was suppressed and eroded in society when the machine gun and the gunman decided [political] issues and not the constitution and constitutional records. This event showed the public that you can have a constitution that would be turned upside down. Consequently, the Constitution itself is just a

simple sheet of paper. It is crucial that the Constitution is recognized and enforced equally by all citizens today and in the future, which naturally takes a long time.

The process of constructing a free and democratic, European-style system of government founded upon the Rule of Law, began in Georgia during the time of the Democratic Republic (1918–1921). This was embodied through the Constitution of 1921 which, for the first time, recognized certain inalienable human rights and freedoms, including: equality before the law; the abolition of capital punishment; the right to privacy; women's suffrage; the freedoms of expression and assembly; and the rights of ethnic minorities. Additionally, the Constitution ensured other universally recognized rights that were not expressly defined within the text, but could nevertheless be derived from the wide-reaching principles recognized within the constitutional framework. It is precisely these principles that the current Constitution (in effect since 1995) continues to build upon, in order to «recognize and protect universally recognized human rights and freedoms as eternal and supreme values» and ensure «the people and the state shall be bound by these rights and freedoms as directly acting law» (Babek, 2011, p. 24).

The path of independence is the unwavering will of the Georgian people leading to establish a democratic, free state (National Strategy for the Projection of Human Rights in Georgia, 2014–2020). It is also undeniable that the principle of democracy and the rule of law does not have a tradition similar to that of the Western constitutional states in post-communist countries, which is certainly welcome.

Various conferences, seminars were organized by the Secretariat of the Commission in 1993–1995 to study the problems in depth and take into account the experience of other states, and received effective assistance from well-known foreign specialists and the Venice Commission. By the end of 1994, there were 13 drafts of the Constitution of Georgia (Republic of Georgia) in the Constitutional Commission (Lawrence, 1994, p. 21). In addition to the projects prepared by the commission, the following were presented:

- The political organization «Voice of the Nation»;
- National Independence Party of Georgia;
- Tbilisi State University, International Law and Young Constitutionalists of the Faculty of International Relations The group;
- The Republican Party of Georgia;
- Society for the Protection of Workers Interests;
- People's Party of Georgia;
- Georgian Young Front Association Young Lawyers;
- Commercial Bank of Georgia «Aisi»;
- Communist Party of Georgia;
- Union of the Children of God of Georgia;
- Alexander Shushanashvili (initiative project);
- Union of Citizens of Georgia (The beginnings of the constitutional history of Georgia).

The Constitutional Commission (and later the Parliament) worked constructively and coordinated on issues related to constitutional principles, fundamental rights, judicial issues and some other issues, but the debate became heated, sometimes confrontational and irreconcilable when the issue was horizontal (form of government) and Referred to vertical (form of territorial arrangement). On July 2, 1995, by 64 votes versus 4, the State Constitutional Commission adopted the draft constitution, and on June 3, 1995, it decided to submit it to Parliament, thus completing its historic mission. Both forms of state power enacted by the Constitutional Commission proved unacceptable to parliament: first Georgia's territorial «federal principles» were removed from the draft, then (at the suggestion of the Georgian Reformers' Union). At 5:50 pm, the Parliament of Georgia adopted the Constitution of Georgia by 159 votes to 8 (10 deputies did not take part in the voting) in the so-called Imeli building (Adoption, promulgation and amendments of Constitution of Georgia, FAOLEX Database).

On August 29, 1995, when the adoption of the Constitution should have been noted, a loud explosion rocked the area around the Imeli building in central Tbilisi. On this day, Eduard Shevardnadze escaped the first terrorist act against him (Arakelian, Nodia, 2005, p. 8). Despite all the above, on September 17, 1995, members of the State Constitutional Commission and the Parliament of the Republic of Georgia signed the official text of the Constitution in the hall of the Government Palace, where in 1991 the Supreme Council of the Republic of Georgia proclaimed the Act of Restoration of Independence (The beginnings of the constitutional history of Georgia).

3. Confrontational and irreconcilable problems related to the Constitutional principles for the arrangement of the Government

The separation of powers is a set of guidelines for the arrangement and functioning of the state which rules out arbitrariness on the part of the rulers and anarchy on the part of the governed (Demetrashvili, Jibgashvili, Khmaladze, Nalbandov, Ramishvili, Usupashvili, 2005, p. 6). Specific aspects of the doctrine of the separation of powers were much discussed as early as the times of the Greek philosophers. John Locke and Charles Montesquieu developed the notion further, while the legal formalization and institutionalization of the idea is connected to the era of the great revolutions. Since then, almost all non-communist constitutions see the separation of powers as the main principle for arranging the government, though the constitutions of different countries use different versions of this principle. Under the classical model of the separation of powers, power is divided between three branches of government – legislative, executive and judicial. The classical model of separation of pow-

ers, as well as its practical application have undergone certain structural and content-related changes over time. As Andras Sajo said: «There are many different forms of the separation of powers and the formation of the government. Each of them has the right to existence, provided that the ways of limiting freedom are rules out or avoided» (Sajo, 2020).

The main Characteristics of Georgia's government are defined by the Constitution adopted in 1995, namely by:

– The preamble were the people of Georgia express their strong will to establish a democratic social order, economic independence, a social and legal state, to guarantee universally recognized human rights and freedoms;

– The form of political order of Georgia is a democratic republic (Constitution of Georgia, Article 1, 1995);

– The people are the sole source of state power in Georgia. State power is only exercised within the framework of the Constitution. Power is exercised by the people through referenda, through their representatives and through other forms of direct democracy. No individual or group of individuals has the right to seize or unlawfully take state power. State power is exercised and based upon legal state principles;

– The state recognizes and defends universally recognized human rights and freedoms as eternal and supreme values. The people and the state are bound by these rights and freedoms as well as by current legislation for the exercise of state power.

Dozens of articles, dedicated to the implementation of these fundamental provisions, define the model of the government and enable to discuss the branches of the government, the extent of the division and separation of powers and the types and effectiveness of checks and balances.

4. Issues left out

Apart from the issue of territorial arrangement in the 1995 Constitution, there was no issue left out of consideration. The omission of this issue in the constitution was caused by the current situation in the country. While adopting the Constitution in 1995, it was impossible to determine the territorial arrangement and its regulation was postponed for future. Georgia managed to adopt the new Constitution on the 24th of August, 1995 which greatly contributed to the stability of the country. But the Constitution failed to determine the territorial structure of the state. The new Constitution was limited to only a general phrase about this important issue and postponed its regulation for the future. The major reason for this postponement in the future was the situation of that period in the country and the necessity for the adoption of the Constitution. Such decision was the optimal solution to this situation as the new Georgian State was established, the reform process under the Constitution began and at the same time status quo was maintained. The determination of the territorial structure of the state extended for a longer period, which emerged the difficulties in the Country's public and political life. That is why it is essential to start this process in respect to Abkhazia, and generally, the adoption of the substantiated concept on the territorial arrangement by the Government (Lezhava, 2020, p. 457). Nowadays, it is inevitable for the Government of Georgia to determine its position for the problem of Abkhazia as well as the significant question of the future territorial arrangement of the Country. The Constitution of Georgia made the decision in favor of decentralized federation state. This means that the conception of the future territorial arrangement of Georgia shall be based on the principles of the territorial decentralization of the state. On the first stage of decentralization it is recommended to grant the status of administrative territorial units to the regions of Georgia; Abkhazia, as it is the only homeland of the Abkhaz, who have important contribution to the establishment of the Georgian state, should have some special status, different from all others. At the same time, we should take into consideration the experience of other states. The constitutional and legal definition of any territorial model of the state is based on the history, and the political and legal development of this state (Lezhava, 2020, p. 459).

Constitutional law also recognizes a decentralized and centralized federation. The federation can be both symmetrical and asymmetrical also. The subjects of the symmetrical federation enjoy equal rights in relations with the federal government; however, equality is not absolute. In the countries of asymmetric federalism, its subjects have a different constitutional-legal status. In addition to federation subjects (units) with equal rights, there are other territorial units in the Asymmetric Federation. In any case, when choosing a future model of territorial arrangement of Georgia, I consider it inevitable to establish the principle of asymmetry (Gogiashvili, 2020).

Therefore, by taking into consideration the current territorial, ethnic and political problems in Georgia and in regard with the analysis of Articles 3 and 4 of the Constitution, one of the real ways and methods for the problem resolution I consider it inevitable for Georgia to establish the asymmetric principle and should be excluded the typical unitary form from the perspective versions of territorial arrangement of the country (Lezhava, 2020, p. 449).

By starting the discussions on federalism Georgia will start negotiations and find a compromise with regions supporting the decentralization. All this will greatly encourage the negotiation process and support the solution of the problem of our country's territorial integrity (Kublashvili, 2004).

Unfortunately, since 1993, in almost all state constitutional commissions, discussions on issues such as the territorial arrangement of the state, the idea of a bicameral parliament in Georgia, the perspectives of local self-government, etc., have been mercilessly cut short.

The important component of the problem of the general optimal organization of the power is the issue of territorial self-government. The local self-government is based on the subsidiarity principle: the power shall be exercised on that level of authority which is the closest to the citizens. The existence of real self-government requires availability of three main elements:

- Administrative decentralization – transfer to the self-government as much power as it can implement;
- Political decentralization – election of local self-government bodies and granting them the right of independent decision-making within their own terms of reference;
- Fiscal decentralization – providing to the self-government the financial resources necessary for implementation of its authority (Demetrashvili, Demetrashvili, 2021, p. 276).

Historically, the administrative-territorial division of Georgia has represented two levels: first, local level (city, town, village, settlement) and second, regional level (area, district). After disintegration of the Soviet Union, despite radical changes that had place in many spheres of public life of Georgia, the soviet administrative-territorial system has not been practically changed.

As a result, today we have written in the Constitution that we are a united, indivisible state. But we have two autonomies:

– Adjara – based on the national territorial system and self-government principles Adjara shall obtain the powers attributed to the autonomy which shall be – special, delegated by the state, or provided by a separate law.

– Abkhazia and Tskhinvali Region – Abkhazia and former South Ossetian autonomous district shall have special statuses which shall be determined in the process of political solution of the existing problem along with their names.

The issue of active political participation of minorities, including an in-depth discussion of the issue of Adjara autonomy, was associated with separatism and threats. Even the issue of minority political participation has raised fears in both majorities and minorities.

5. Conclusion

Countries around the world have undergone a transformation and emerged as a state governed by the rule of law, with a high legal culture and governed by the rule of law. Despite some progress, this process is quite painful and not infrequently unsuccessful in Georgia. The essential and primary goal of drafting constitutions and political reforms is, for the most part, to seize power, establish inclusive and deliberative mechanisms, and uphold high human rights standards. Unfortunately, however, over the last 30 years, constitutional and political reforms in Georgia have had a greater interest in the redistribution and retention of power by the ruling parties.

Explanations to stay out of the political spotlight often contribute to the rarity of in-depth and thorough discussions in academia and public spaces. In the rarity of such discussions, however, there is a narrow consensus among experts that special and positive mechanisms for the political participation of non-dominant groups are acceptable only in post-war and post-conflict countries. In fact, various studies have shown that the use of such mechanisms is often an essential and proven method of eliminating sharp power asymmetries, inequalities and injustices, regardless of whether there has been any experience of war or conflict in the country.

It is clear that long and inclusive discussions on this issue, including the involvement of non-dominant ethnic groups, would better illustrate the goals of constitutional and political reform on the one hand, and the new dimensions of the challenges of non-dominant groups on the other. However, in parallel with the expulsion of the interests and needs of the majority of the population from the process of political and constitutional reform, the problem of double exclusion of non-dominant ethnic groups is obvious.

To summarize, to date, since the acquisition of independence, a substantial rethinking of the political participation of non-dominant ethnic groups in Georgia has not taken place, despite the formal record of equality in the Constitution. These often reinforce the exclusion of non-dominant ethnic groups in Georgia in the wake of policies of expulsion of the state language and minority languages into administrative administration at all levels of public life, policies of sharply poor and unequal education for non-Georgian students, and divisive discourses.

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ІНКЛЮЗИВНІСТЬ ПРОЦЕСУ СТВОРЕННЯ КОНСТИТУЦІЇ В ГРУЗІЇ

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Анотація

Створити найкращу і найповнішу конституцію дуже важко і практично неможливо. Конституція – це документ, створений людьми, а не богами, і як і його творці, сам цей документ не може бути ідеальним. У світі є конституції, які прийнято недемократично, але немає авторитарних конституцій, прийнятих демократично. Однак умови розробки та прийняття Конституції можуть мати великий вплив на зміст Конституції.

Конституція – правовий акт або сукупність правових актів, прийнятих вищим органом державної влади або шляхом референдуму, має вищу юридичну силу і регулює основи організації суспільства і держави, основні принципи взаємовідносин особи, і держава. І сама концепція Конституції, і історія її розвитку яскраво свідчать про її особливе значення у збереженні та розвитку держави і суспільства.

Метою представленої статті є огляд процесу створення Конституції в Грузії, дослідження основних особливостей і перешкод під час процесу та аналіз результатів, які безпосередньо впливають на політичний, економічний і соціальний розвиток держави.

Основна методологія, яка використовується під час дослідження, – це доктринальне дослідження з використанням історичного та правового аналізу ситуації в 1990-х роках у Грузії, викликів, які постали перед Грузією після здобуття незалежності, а також фундаментальної основи та умов для подальшого розвитку грузинського конституціоналізму.

На основі дослідження автори визначили основні питання, які залишилися поза увагою змісту конституції, які є не лише важливими для демократичних держав, а й мають основний вплив на формування демократичного врядування в країні. Одним із згаданих питань є визначення територіального устрою, що є життєво важливим для Грузії. Заключна частина статті зосереджена на кроках, які слід вжити для обговорення питань, що стосуються територіальної структури, включаючи різні етнічні групи в дебатах для вирішення поточних питань, які залишаються поза увагою, але які є важливими в рамках конституції.

Ключові слова: Грузія, конституція, адміністративний поділ держави, перехідна демократія, країни, що розвиваються.