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CONSTITUTION FOR “ALL” OR FOR “CHOSEN FEW” — PROBLEMS OF CONSTITUTION-MAKING IN GEORGIA

ABSTRACT

Constitution-making is a rather complex process of intertwining interests leading towards creating general framework for the state as well as for the society. On the one hand as Dixon and Ginsburg put it “...legislators may seek to inject policy or partisan concerns into the deliberations or constitutional text itself.”¹ On the other hand there is a need to gain legitimacy for the constitution in wider society, which pushes the process to be more open for wider and not only expert participation.²

Balancing between these two interests can be regarded as an art of participatory constitution-making. Georgian scholars understood importance of meaningful participation and the few policy papers and opinion articles on this subject point on one hand to the difficulty of constitution-making process in a state with little experience in constitutionalism³ while on the other hand indicate importance of popular participation that would turn constitution from an elite project into a popular project.⁴

Article analyzes failures of constitution-making process in Georgia which, as authors argue, contribute to the “instability” of Georgian Constitution.

INTRODUCTION

Georgia’s young democracy, turning 25 years in 2015, has already went through a dramatic transition process involving two civil wars, international war with Russia, peaceful revolution, economic collapse,

¹ Comparative Constitutional Law; Edited by Tom Ginsburg and Rosalind Dixon; Research Handbooks in Comparative Law; Participation in Constitutional Design; pg. 44; Edward Elgar Publishing; 2011.

² See Constitution-making and Reform Options for the process; Michele Brandt, Jill Cottrell, YashGhai, Anthony Regan, Publisher Interpeace; Constitutions as contracts among people or peoples; pg. 14; 2011.

³ Ghia Getsadze, Ghia Nodia; Building Democracy in Georgia; The Constitutional System in Georgia; Discussion Paper 2; International Idea; pg. 14; May 2003.

⁴ Ghia Getsadze, Ghia Nodia; Building Democracy in Georgia; The Constitutional System in Georgia; Discussion Paper 2; International Idea; pg. 12-13; May 2003.

religious extremism, etc. A nation of approx. 4,5 million is composed of: Georgian – 83.8%; Abkhaz 0.1%; Ossetian 0.9%; Russian 1.5%; Ukrainian 0.2%; Azerbaijanian 6.5%; Armenian 5.7%; Jewish 0.1%; Greek 0.3%; Kurd 0.5%; and Other ethnic groups 0.4.1%. 55% of the population is female and proportion between rural/urban residents is nearly 50/50 with 35% of the total population living below the poverty line.⁵

Organizing a participatory constitution-making process in such a society is a significant challenge. However, the participatory approach has never been neglected by supporters of the “liberal project” and the formal procedure of amendment of the constitution does include the obligation of public deliberation. The question remains though whether the spirit of the law has ever been realized in practice.

In 2013 Parliament created the so called third Constitutional Commission (the first was created in 1993, the second in 2009) to prepare a package of constitutional reforms. Considering the fact that the previous major reform was carried out three years earlier, the creation of another commission after democratic transfer of power does point to the serious problem of consensus and inclusiveness when it comes to the elaboration of the project for the future development. This leads us to argue that a more open and inclusive approach to constitutional reform can be one way to soot “the appetite” of those involved in power games and create stability for the system.

THEORETICAL FRAMEWORK

It has become increasingly popular to argue that the history of constitution-making behind closed doors has come to an end.⁶ Political and legal elites have an important role in decision-making process; however modern constitution-making can no longer be limited to small circle of legal experts and politicians.⁷ Participation is seen as a legal obligation which derives not only from the local legal order but also has roots in international mechanisms.⁸ It is frequently mentioned that if the participation process is well managed during constitution-making the resulting constitutional order has higher probability to be well accepted by societies.⁹

Wider public participation is an important part of constitution-making, but skeptics would point to the difficulties associated with such a process. According to the skeptical position “participatory process” sounds

⁵ See Statistical Yearbook of Georgia: 2013/National Statistics Office of Georgia; Tbilisi, 2013. 274 pg.

⁶ See Mark Tushnet; Constitution-making: An Introduction; Texas Law Review; 1983; <http://www.texasrev.com/wp-content/uploads/Tushnet.pdf>.

⁷ Constitution-making and Reform Options for the process; Michele Brandt; Jill Cottrell; YashGhai; and Anthony Regan; Publisher Interpeace; pg. 17; November 2011.

⁸ See The International Covenant on Civil and Political Rights (ICCPR); Article 25; “Every citizen shall have the right and the opportunity without any of the distinctions mentioned in article 2 and without unreasonable restrictions: to take part in the conduct of public affairs, directly or through freely chosen representatives...”

⁹ Democracy Reporting International; Lessons Learned From Constitution-Making: Process With Broad Based Public Participation; Briefing Paper No. 20; pg. 4; November 2011.

“just” and “ideal”, however it is frequently said but rarely done.¹⁰ It can be argued that specific legal knowledge is required to understand the doctrines provided by the constitution and this can limit meaningful deliberations to small circle of professionals, as the constitution itself is a legal document.¹¹

Secondly, society itself is pluralistic and if various groups – ethnic, religious, cultural etc. are involved, it will undoubtedly make it more difficult to reach consensus.¹² Skeptics also point to the increased costs of constitution-making process.¹³

Thirdly, participation can be abused by radical groups who will use it as an open invitation to sabotage the process and noble plan of democratic deliberations can become endless process without clear path and solutions.¹⁴ Theorists associating themselves with public choice theory would question the willingness of the wider public to participate, as costs associated with the meaningful participation might outweigh the benefits that individual members of society gain directly from the process.¹⁵

“Optimists” point to the positive sides of the participatory process, which is educating citizens about their government and other issues of public importance,¹⁶ promoting democratic values,¹⁷ supporting national unity and ensuring sustainability of the constitution.¹⁸ According to the “optimistic” argument participation improves the quality of the deliberated information, makes it more reliable, thus contributing to the higher quality of resulting policies.¹⁹ The risks were there but this did not prevent various participation mechanisms from becoming more and more popular in past decades.²⁰

There is no one recipe how to make the participation process effective. Theorists working to understand the participatory process point towards two different lines of development. The first is associated with the elaboration of the text and the second with the promulgation of the final document. Haberfeld and Benomar point towards the procedural side of the participatory constitution-making and argue that clarity about the process and its various levels, ways of involvement of various stakeholders, can build trust and

¹⁰ See Towards a Participatory Constitution Making Process in Turkey: Assoc. Prof. Dr. Levent Gönenç; TEPAV Policy Note; pg. 5; January 2011.

¹¹ Towards a Participatory Constitution Making Process in Turkey; Ibid., pg. 9; TEPAV Policy Note; January 2011.

¹² Constitution-making and Reform Options for the Process; Michele Brandt; Jill Cottrell; Yash Ghai; and Anthony Regan; Publisher Interpeace; Sequencing the process; pg. 23; November 2011.

¹³ See Tom Ginsburg, Justin Blount & Zachary Elkins, “The Citizen as Founder: Public Participation in Constitutional Approval,” pg. 371, 81 Temple Law Review 361 (2008).

¹⁴ Wolfgang Babeck; Drafting and Adoption of Constitution in Georgia; Iris Georgia; pg. 26-29; Tbilisi 2002.

¹⁵ See Tom Ginsburg, Justin Blount & Zachary Elkins, The Citizen as Founder: Public Participation in Constitutional Approval; pg. 368-369; 81 Temple Law Review; 361 (2008).

¹⁶ Comparative Constitutional Law; Edited by Tom Ginsburg and Rosalind Dixon; Research Handbooks in Comparative Law; Participation in Constitutional Design; pg. 39; Edward Elgar publishing; 2011.

¹⁷ Ibid., pg. 39.

¹⁸ Ibid., pg. 39.

¹⁹ See supra note 14; pg. 367.

²⁰ Constitution-making and Reform Options for the Process; Michele Brandt; Jill Cottrell; Yash Ghai; and Anthony Regan; Publisher Interpeace; Impacts to adherence to guiding principles; pg. 16-17; November 2011.

credibility towards the whole process²¹. On the other hand proposals are made to focus on stakeholders and extend opportunities of participation to as many groups as possible²². As authors argue “...constitutional design is more participatory if the mass public has more opportunities by which to both oversee and engage in the process²³.”

EXPERIENCE OF CONSTITUTION-MAKING IN GEORGIA AND PROBLEMS OF PARTICIPATION

The participatory process in constitution making has special significance for Georgia. It has been mentioned frequently by various scholars that Georgia, as a young democracy, faces the challenge of legitimization of the legal system of which the constitution is a major pillar²⁴. There is no need to point additionally to the multicultural nature of the Georgian society where minority groups still have difficulties to escape oppressive, Soviet period stereotypes and integrate fully in social, economic and political life.

Constitutional reform in Georgia can be split in five major stages. The first stage covers the period between the declaration of independence and the adoption of the first “Minor Constitution” in 1992. The “Minor Constitution” was drafted in *ad hoc* manner to replace the amended Soviet Constitution from 1978 and functioned for nearly two years. It was quickly drafted after the break-up of the Soviet Union with the view to organize the transition.

The second period covers the years from 1992 to 1995, when the Constitution of independent Georgia was elaborated. The commission elaborating the draft was created in 1993 and held 118 members; including members from academia, independent members (experts) and representatives of judicial and other government bodies²⁵.

Despite the large number of the commission members, the drafts were not widely available for deliberations and group of experts largely carried out discussions within a small circle of lawyers and small group of students²⁶. The process lasted nearly three years and upon completion the draft was sent to decision-makers. As a matter of fact, the submitted draft, the product of more than two years work, went through significant changes overnight and little was left from the original version. This has exposed serious problems of miscommunication between the working group and decision-makers²⁷.

²¹ What is the title of the chapter of the mentioned authors? Comparative Constitutional Law; Edited by Tom Ginsburg and Rosalind Dixon; Research Handbooks in Comparative Law; Participation in constitutional design; pg. 38; Edward Elgar Publishing; 2011.

²² Constitution-making and Reform Options for the Process; Michele Brandt; Jill Cottrell; Yash Ghai; and Anthony Regan; Publisher Interpeace; Impacts to adherence to guiding principles; pg. 16-17; November 2011.

²³ See supra note 14; pg. 363.

²⁴ See Constitutional/Political Reform Process in Georgia, in Armenia and Azerbaijan: Political Elite and Voices of the People; International Idea and Caucasus Institute for Peace, Democracy and Development; Government of Georgia on the Central Level: The Balance between its branches; Policy paper by Avtandil Demetrashvili, Zurab Jibgashvili, Vakhtang Khmaladze, Alexander Nalbandov, Levan Ramishvili & David Usupashvili; pg. 6-23; Tbilisi; 2005.

²⁵ See Wolfgang Babaev; Drafting and Adoption of Constitution in Georgia; Iris Georgia; pg. 13-20; Tbilisi; 2002.

²⁶ See supra note 25; pg. 13-20.

²⁷ Ibid., pg. 70-89.

Since the adoption of the Constitution in 1995 until 2004 several changes were adopted. All of relevant proposals were published one month prior to their deliberation, as prescribed by Constitution, however no comments were ever received neither from wider public nor from experts in the field²⁸. It has to be mentioned separately that the issue of downsizing the number of MPs from 235 to 150 was voted in a plebiscite which ran as a parallel process to post-revolutionary elections in 2004. This case stands as an exception.

The third period covers the year 2004 when a major reform of the Constitution was carried out by new government following the Rose Revolution. The draft was introduced and adopted in a very short period of time. Deliberations again included only small circle of decision-makers and experts. Despite the fact that the proposed amendments significantly changed the separation of powers and checks and balances, only very limited time was allocated for wider deliberations and process was not inclusive, leaving comments, suggestions and protests unanswered²⁹.

Several amendments were introduced between 2004 and 2010, which significantly changed constitutional order. None of those amendments were sufficiently deliberated by the time of legal reform. Opponents claimed that not sufficient time was allocated to debate amendments³⁰. Several reforms such as those of judiciary, the introduction of jury trials appeared in public debate as early as 2000. The government took it as an argument and justified the speedy amendment process with the argument that all main ideas introduced into the Constitution have already been debated sufficiently. Constitutional reforms of 2004-10 showed that understanding of participatory approach could be sufficiently broad reflecting on processes scattered in time.

This brings important dimension to the dilemma of inclusiveness and participation. Should we consider participation to be a temporary process leading to a decision or is it broader in essence feeding permanently from public debates to later result in legal or policy initiatives?

The drafting process was better organized in 2009. President Saakashvili appointed the chair of the constitutional commission and members of the commission from nominees of political parties and his representatives. Every major political party represented in parliament or outside the legislative body had a quota. Despite this fact major opposition parties boycotted the process. Commission worked for one year and four alternate versions of the constitution were discussed. Meetings of the commission were public and information was being constantly updated on commission's web site³¹. It has to be mentioned that unfor-

²⁸ See Godoladze, Karlo; *Constitutional Changes in Georgia: Political and Legal Aspects*; Humanities and Social Sciences Review; pg. 443-460; 2013; See also *Constitutional/Political Reform Process in Georgia, in Armenia and Azerbaijan: Political Elite and Voices of the People*; pg. 6-23; Tbilisi; 2005.

²⁹ See Godoladze Karlo; *Constitutional Changes in Georgia: Political and Legal Aspects*; Humanities and Social Sciences Review; pg. 447; 2013; See also *Constitutional/Political Reform Process in Georgia, in Armenia and Azerbaijan: Political Elite and Voices of the People*; pg. 75-76; 2005.

³⁰ See Godoladze Karlo; *ibid.*, pg. 443-460; See also regarding this issue European Commission for Democracy Through Law (Venice Commission); *Final Opinion on the Draft Constitutional Law on amendments and changes to the Constitution of Georgia*; Strasbourg, 15 October 2010; Opinion no. 543/2009; pg. 4; paragraph 16.

³¹ See Wolfgang Babeck, Steven Fish, Zeno Reichenbecher; *Rewriting a Constitution: Georgia's shift towards Europe*; With an introduction by Avtandil Demetrashvili, Chairman of the State Constitutional Commission; Nomos Publishing; Baden-Baden; 2012.

Unfortunately all materials were removed from internet and sent to the national archive upon completion of the work making them less accessible.

The drafting process and work of the commission in 2009 did intend to popularize the idea of constitutional reform and the various interested stakeholders had the opportunity to participate and contribute. Several methods of participatory constitution-making were utilized in 2009, including face to face meetings and social media. The deliberation process was positively assessed by international observers³².

However, it has been rarely mentioned that the working groups and commissions working on constitution have never had inclusive nature. As mentioned above, Georgia is a multicultural society with various ethnic, religious and cultural minority groups. There is no example that representatives of minority groups were invited to join constitutional commission. Moreover, the percentage of female members of the commission below 15³³.

One might argue that nobody was ever restricted to express opinion publicly, but as a matter of fact, the State Constitutional Commission is the only formalized participatory process. Excluding minorities, women and representatives of the regions does indicate negative trend of making important decisions behind closed doors.

We would like to argue that it was elitist nature of constitution-making which deprived fundamental law of popular legitimacy and contributed to the culture of “pocket constitutionalism”³⁴.

PARTICIPATION REMAINS A CHALLENGE: CONSTITUTION FOR “ALL” OR FOR “CHOSEN FEW”

On October 4th, 2013, the Chair of the Parliament announced creation of the third Constitutional commission. According to the decree “On the Establishment of the State Constitutional Commission” members were appointed³⁵. Members were selected from the nominees of political parties and independent members.

Commission was organized into five groups, namely: Working Group on the Issues of General Provisions and Revision of the Constitution of Georgia; Working Group on the Issues of the Parliament; the President

³² See regarding participation and also whole constitutional reform the opinion of the Venice Commission; European Commission for Democracy Through Law (Venice Commission); Final opinion; On The Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia; Adopted by the 84th Plenary Session; Venice, 15-16 October; 2010.

³³ There were 56 members at the Second State Constitutional Commission (2009-2010 year) and only 8 women were in its composition, there was no minority, youth and other segment of society representatives; Practically the same picture remained to the current working Third State Constitutional Commission (Since 2014) there were 58 members and only 9 women represented, similarly to the picture of the second commission there was no minority and other segment of society representation.

³⁴ See more the phenomenon of so-called “pocket constitution” in Georgian context; Instrumentalization of the Constitution: Story of post-revolutionary constitution-making; Accepted research paper for the 9th International Congress of Constitutional Law; <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws11/w11-meladze&godoladze.pdf> Oslo, Norway June 16-20; 2014.

³⁵ See about the current State Constitutional Commission on official web page <http://constcommission.ge/en/aboutDetails> for the legal background and other formal issues.

and the Government of Georgia; Working Group on the Issues of Human Rights and Freedoms, the Judiciary and Prosecuting Institutions; Working Group on the Issues of Independent Constitutional Institutions and Working Group on the Issues of Territorial Arrangement and Local Self-Government³⁶.

It has been 6 months since commission started to work³⁷. Commission already has staff and runs a web site where relevant information is updated. However questions remain open regarding effective participation of various stakeholders.

The composition of the commission still fails to be inclusive, focusing on representatives of political parties, academia and few members of civil society organizations. Commission excludes representatives of minority groups and has only nine female members; it fails to integrate youth and representatives of different regions. Therefore it's difficult to say whether the working draft will reflect concerns of any of the mentioned group. It has becoming obvious that without wider approval Georgia's constitution risks to remain distant from society and lose popular support which has already happened numerous times and resulted in fundamental revisions.

CONCLUDING REMARKS

Georgia's recent history teaches us that there is always a risk that executive branch will try to influence the constitutional amendment process. A good example of this is the process in the early 90's when constitution was changed overnight by former president Shevardnadze, totally ignoring previous deliberations³⁸. Wider participation is one of the means to keep process not only open and transparent but also accountable, where radical interventions will not happen without political cost for “intruders”.

The elections of 2012 marked new reality for Georgian democracy. The first peaceful transition of power brought a new government and new majority in Parliament. The absence of a participatory decision-making process was frequently cited as a failure of the previous government. Without serious revision of the procedural side of the reform, new government risks to repeat mistakes from the past. As the process is still in a very early stage, it is still possible to revise the concept of participation and integrate it as an integral part of reform agenda. Otherwise it will be difficult to speak about constitution which is for “All” residing in Georgia.

³⁶ See Ibid., about members and working groups of the State Constitutional Commission of Georgia.

³⁷ Real working process by the format of group meetings and editorial sittings began on March 3, 2014 when firstly occurred editorial council meeting of the commission <?> See Wolfgang Babeck; Drafting and Adoption of Constitution in Georgia; IRIS Georgia; Tbilisi; 2002.

³⁸ See Wolfgang Babeck; Drafting and Adoption of Constitution in Georgia; IRIS Georgia; Tbilisi; 2002.