

Instrumentalization of the Constitution: Story of Post-Revolutionary Constitution-Making

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Introduction

Georgia's democratic state already saw every possible challenge that young democracy can face in theory.³ Being thrown into civil war first and territorial conflict with Russia next in early 90's Georgian government got a very weak starting position. Torn by civil war and first war with Russia, Georgia was left with more than 200 000 refugees, political and economic crisis and paramilitary groups trying to control government. Centrally organized political institutions during the Soviet Union had difficulty to function independently after the breakup and their underperformance was producing miserable results politically and economically. Numerous political parties competed on the arena, around 300 in first elections. Besides lack of political consolidation, political environment was fragmented and split between armed groups, former soviet nomenclature and newly emerging "Independence Activists" causing democracy malfunction. This very reality was the "cooking pot" for the new Constitution and elections in 1995 where 54 political parties competed and only 3 managed to get into parliament.

Besides political crisis Georgia was affected by economic crisis. Economic collapse was visible.

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³ Ghia Nodia, "Georgia's Identity Crisis", Journal of Democracy Vol. 6/1, January 1995.

Georgia's GDP in 2004 was equal to 50% of its GDP as it was 15 years earlier. As European Stability Initiative puts in its research (*Reinventing Georgia: The story of the Libertarian Revolution*, 2010) comparing data between 1991 and 2004 shows total destruction of main spheres of economy. Industry performed at 10% capacity, 1% capacity left out of food processing facilities, 3% left from tea industry, less than 1% left from meat and wine industry. World Bank analysis suggests that nowhere else in the former Soviet Union was the collapse of agriculture as severe as in Georgia.⁴

Sectarian violence became widespread in late 90's.⁵ Radical groups attacking non-traditional believers, "New Comers" became organized and received support from law enforcement institutions. Around 800 facts of physical attack and property destruction were documented between years 1999 and 2002.⁶

Corruption became another major, inherited problem from Soviet Union, carried and developed along the independence years affecting Georgian state and society. Georgia turned into a country with 68% of shadow economy and ranking in top five with the highest level of corruption by 2002.⁷ Corruption was endemic penetrating every branch of government and every sphere of political, social and economic life. The negative effect of corruption was even greater when combined with organized crime. Organized crime had deep roots into soviet system. After breakup of the Soviet Union organized crime became another major challenge affecting not only social but also political processes.⁸

Not surprisingly Georgia was called a "grey zone"⁹ state and it would sound as a logical continuation if state remained in a "grey zone" or moved back to neighboring Russia's "partnership", "Eurasian Union" etc. and became a failed state.

⁴ World Bank, "Georgia: Reform in the Food and Agriculture Sector ", 1996.

⁵ Pierre Vischioni, *Religious Minorities in Georgia*, REPORT, 2006

⁶ Liberty Institute Human Right Report, 2002

⁷ Friedrich Schneider , *Shadow Economies and Corruption All Over the World: What Do We Really Know?*, Discussion Paper No. 2315, 2006

⁸ Louise Shelley , *Georgian organized crime*, (Published in: *Organized crime and corruption in Georgia*, Edited by

Louise Shelley, Erik R. Scott and Anthony Latta, 2007)

⁹ Carothers, Thomas, *The End of the Transition Paradigm*. *Journal of Democracy* 13:1 (2002)

However Georgia's democracy was luckier and people power made it possible to peacefully change government, remain within the frames of the constitution and make significant progress politically, economically and most importantly socially.

The question we will be exploring in this brief paper is whether political elite saw any role for Constitution in post – revolutionary period and how fundamental document was instrumentalized to tackle main challenges in state building.

Tradition of Constitutionalism

The process of strengthening the principles of constitutionalism and separation of powers has been very problematic and controversial in the post-Soviet Georgia. Russian and later Soviet occupation blocked Georgia's integration with the west and did not allow for the development of civic values or formulating public demand for democratic state institutions. Independence movement consolidated in early 80's. As prof. Ghia Nodia writes in his study the movement concentrated more on the idea of "Independent Georgia" and unfortunately ignored issues of democratic governance. Discussion of basic principles of constitutionalism was alien to even educated circles of Georgian society, the question how state should be governed deserved very little attention and the expectation was that everything will work itself.¹⁰

In early 90's terms like "Democracy" and "Constitutionalism" were very new to the society and every time they were pointed out as a mission to be achieved, one could observe trend to "sound western" rather to "act western".

"Many terms and concepts, among them 'binding the government and the people with the constitution' and 'the separation of powers' became buzzwords in the speech of well-educated Georgians without acquiring real meaning. The meanings of these terms had no value for the citizens and they became useless, meaningless rhetoric of the new Georgia which served only to prove that the speaker belongs to the intellectual elite, along with other phrases such as "The Universal Declaration of Human Rights" or "leasing".¹¹

¹⁰ Ghia Nodia, Alvaro Pinto Scholtbach, *The Political Landscape in Georgia*, 2006

¹¹ Avtandil Demetrashvili, Zurab Jibgashvili, Vakhtang Khmaladze, Alexander Nalbandov, Levan Ramishvili, Davit Usupashvili, *Government of Georgia on the Central Level: The Balance between its Branches*, 2004, pg. 6

Terms “Historical process”, “Historical Mission” dominated debates on governance reform and the excitement followed after collapse of Soviet Union totally ignored the importance of institution building through constitutionalism, which would guarantee the strength and longevity of the processes. Rather expectation was to find “leader” who can lead country out of the crisis.

The search for leader is still continuing and the fact that constitution is very young makes it vulnerable and “direct victim” or political processes. Before the Soviet Union, in brief period of independence, Georgia managed and adopted one of the most progressive Constitutions in Europe. The first Constitution in 1921 was in-line with the contemporary tradition of constitutionalism and was one of the first to emphasize on equality and social issues.¹² Soviet occupation and mass murders of the educated part of the society erased completely the traces of those debates from public memory.

Since that period until the breakup of the Soviet Union Georgia had four constitutions and the last one was modified to serve as a first Constitution of independent Georgia. In 1992 commission was created to elaborate draft of the new Constitution.

New Constitution was adopted in 1995. The leading constitutional actor of the state was President, who also headed the government. The model was framed by the strong influence of the U.S. Constitution. According to the Constitution two independently elected institutions Parliament and President shared political power. Nevertheless in political reality the “Head” of state always had the strong parliamentary majority, which ensured the effective presidential rule in the polity. Thus by the perception of constitutional experience it is quite clear that Georgian model is more presidential than parliamentary one. But it was not classical presidential system by the sense of American paradigm. There was no clear and strict separation of powers which is organic part of classical presidentialism. After 1995 until 2004 only few amendments were made to the Constitution and neither of them affected separation of powers.

¹² George Papuashvili, A Retrospective on the 1921 Constitution of the Democratic Republic of Georgia Engage Volume 13, Issue 1, 2012

Rose Revolution and new wave of Reforms

Democracy is defined as the government by the people. According to the main principle of democracy, government should be administered through the consent of the people. And this very principle served as a basis of peaceful change after fraudulent elections held by Shevardnadze's government.

After revolution government faced several challenges at once. There was a very urgent need to carry out social, political and economic reforms simultaneously. At the same time attempt had to be made to minimise the harmful effects of these transformations in terms of economic collapse and civil and ethnic conflicts. It was argued that this last argument led to a desire to create a strong executive in the form of a strong presidency.

Peculiarities of the process of constitutional amendments made between January-February 2004 were the following: amendments were drafted behind the scenes and adopted very speedily; a new model of governance was developed and defined by only three future leaders of branches of power (speaker of the parliament, prime minister and president); other political forces were unable to stop the process or change its direction. The government's arguments and rhetoric were geared towards justifying such rapid and actually thoughtless changes. One such argument was that if the country experiences a serious crisis, consequently, a new government team must have corresponding authority to enable it to pull the country out of the quagmire rapidly.¹³

The abovementioned problems made the threat of instrumentalizing the Constitution for political ends clear. The only means to avoid this threat would be political will of the government to act within the limits of the Constitution alone, and in case of drafting a new constitution or making essential changes to it, to act in accordance with the idea of a democratic constitution which is expressed in the restriction of government. In this context the key was politics, or to be more precise the will of government to tailor the key legal act of the country to their contemporary tasks. No doubt that the constitution was, in reality, an instrument in the hands of a strong government for the achievement of its political aims.

¹³ Godoladze, Karlo. Constitutional Changes in Georgia: Political and Legal Aspects. *Humanities and Social Sciences Review*; (2013) pg. 447

It is obvious that there was a consensus on that inside the ruling team and only a few figures that had political weight placed emphasis on constitutional ideals and fundamental Amendments of 2004 led to essential change of the model of the separation of powers and, correspondingly, the central governance system in Georgia.

The main outcome of this change was a significant enhancement of presidential powers, significant weakening of parliament, construction of a new executive body of the government, and separation of the system of prosecution from the judiciary.

Main Points of Debate around Post-Revolutionary Constitutional Order

The 1789 Declaration of the Rights of Man and of the Citizen states that "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all".

Separation of powers can be imposed through Constitution, however not so easily exercised. The absence of the culture of constitutionalism can be easily "utilized" by power-holders directed in a manner that supports them to exercise power arbitrarily without respect for the law. This tendency can degenerate into presidential dictatorship. The validity of this statement can be easily tested by analysis of post – soviet states. States in which the Constitution supports strong presidency (the Russian Federation, Belarus, Azerbaijan, Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan and Turkmenistan) are most authoritarian republics in the former Soviet Union.

Georgia faced similar risks as Constitution provided very wide powers to the executive and for the reasons we mentioned above culture of constitutionalism was very weak to oppose the threat. While explaining his motives President Saakashvili made following statement: "Shevardnadze and his clan" are blamed for the former weakness of the state, while the current efforts to establish order base themselves on the delineation of the "people" on the one hand and "criminals" and "corrupt individuals" on the other. "All those who created this corrupt system should be held strictly accountable." "Order should be established. Shevardnadze and his accomplices have taken everything home; the treasury has been looted" - (Mikheil Saakashvili, Davos, 21 January 2004)

Constitution was seen as an instrument for creating strong government to overcome systemic problems, like: corruption, poverty, organized crime. There was no plan to see Constitution as an instrument for consolidation of democracy. As one of the thinkers Mr. Ramishvili put it: "The philosophy of the executive branch of government does not imply representativeness. It should be effective". (Levan Ramishvili, *24 Hours*, 16 January, 2004). The idea of strong executive was accepted by all leaders of the "Rose Revolution". "Let us adopt these changes as presented and let the new government team design and start implementing vigorous steps toward leading the country out of the crisis" (Mikheil Saakashvili, 4 February). "Under the circumstances, when the president and the Prime Minister consider this is the only chance for the country to get on its feet, then it is natural that a model that will function and be effective should be adopted" (Nino Burjanadze, 2 February, 2004).

It was argued that strong governance was needed to successfully tackle the transitional period. The good example would be the draft law which was sent to Parliament together with the draft constitution and granted increased powers to president's representatives in local governance institutions. "We cannot accept in a transitory period governing the country's region using Shevardnadze's cadres." (Zurab Adeishvili, *24 Hours*, 4 February 2004).¹⁴ This reform was also carried out as a temporary measure.

Opposition groups criticized amendments but decision-makers largely ignored the criticism. Leaders of the revolutionary government never considered the newly created model as permanent: "The changes that we introduce are the beginning of the constitutional reforms; they are not the model that should guide Georgia for decades." (Zurab Zhvania, *24 Hours*, 24 January, 2004).

Authors of the article decided to use term "pocket constitution" to better describe attitude of the policy makers.¹⁵ And if we look back to years 2004 – 2006 it will be evident that politicians paid attention to everything except Constitutional model of separation of powers. Constitution turned into the least discussed pieces of legislation.

¹⁴ Process of Constitutional and Political Reform in Georgia: Political Elite and Vox Populi, Tbilisi, 2005. pg. 81.

¹⁵ We do understand that the term is derogatory; however the attitude towards the document in transitional period can be best described by this term than any other.

The key factor in analyzing the post-revolution amendments of February 2004 is the constitutional status of the president the parliament and their interrelation. In order to better understand the conceptual issue involved, it is necessary to perceive the theoretical and doctrinal concept of semi-presidential model. The authors of the amendments and addenda in 2004 identified a new model as semi-presidential (mixed) system.

A general constitutional analysis of the president's powers makes it clear that after the amendments, the president, as a subject with a constitutional status, is actually the only source of executive power even though the parliament has a formal right to declare a vote of confidence to the government. This legal procedure is formal by its essence because even if the legislature did not approve the government the president still could appoint the prime minister and dissolve the parliament.

The government was entirely under the control of the president. A new government was formed after the election of the president, not the parliament, and the government was in fact accountable to the president (although, formally, the government was accountable to the president and the parliament) and could not be disbanded until it lost the president's trust.¹⁶ The only exception was when the parliament with the majority of its entire composition did not give its vote of confidence to the government. This, however, was possible only if three fifths of the parliament members were from the political opposition.¹⁷

It is also noteworthy that the president's authority was also significantly strengthened in the law-making sphere. At the initial stage the Head of State had two significant competences: the legislative initiative and Suspensive Veto authority. According to the Article 67 of the Constitution of Georgia: "The President of Georgia only in the exclusive cases shall have the right to legislative initiative." It is clear that, the existence of above-mentioned constitutional mechanisms in hand of a President has practically weakened the discrete authority of Parliament at the sphere of legislative policy area.

There were serious concerns that powers of parliament were seriously weakened even to the point when it could lose the status of supreme lawmaker.

¹⁶ Process of Constitutional and Political Reform in Georgia: Political Elite and Vox Populi, Tbilisi, 2005, pg. 20.

¹⁷ Ibid; pg. 26.

Executive branches presence in law making process was so intense that any draft could be opposed by government on the bases of "costs" which was a formal argument with the potential to be interpreted broadly.¹⁸

"Effective Governance" and Problems of Legitimizing and De-Legitimizing Political Process

"We need changes that would enable us to govern the country effectively" (Mikheil Saakashvili, 29 January, Channel 1, 2004). New government not only was able to overcome the political crises but also managed to effectively fight corruption and initiated multi-layer economic reforms which put Georgia #1 reformer on World Bank Doing Business Index. It is clear that Constitutional process was not effective to question decisions of the executive and President had "green light" to perform without proper mechanism of checks and balances.

The whole process of debating the draft constitution, as it had been represented in public, can be described as a contest of legitimacy. The authorities often made appeals to effective governance, the transitional period, extreme conditions, the need for strong government in order to overcome the crisis, the execution of the people's will and the need to be realistic.

Opponents, in their criticism, highlight such concepts as limiting democracy, creating a road to dictatorship, tyrannical governance, monarchy, the Russian model, "Turkmenization" etc. The above list illustrates that the levels at which the proponents and opponents of the draft law lead discourse were mismatched. The proponents put a positivist spin on effective governance while the opponents express normative concern over limiting constitutionalism.¹⁹

It is difficult to find direct correlations between constitutional model and reforms that were carried out in first three years after 2003.

¹⁸ Godoladze, Karlo. Constitutional Changes in Georgia: Political and Legal Aspects. Humanities and Social Sciences Review; (2013) pg. 451

¹⁹ Process of Constitutional and Political Reform in Georgia: Political Elite and Vox Populi, Tbilisi, 2005. pg. 116

However if we look at the post-revolution path, we will understand that a whole series of reforms, which the country and its commander-in-chief boast about, were implemented owing to the amendments. But the issue of consolidation of democracy is still problematic in the Georgian socio-political reality.

Concluding Remarks

To go back to the question we asked initially the answer would be clear “yes” on whether political elite saw any role for the constitution in post-revolutionary period. Otherwise we would not have such a fundamental reform in 2004. As for how government instrumentalized the document the evidence shows that it was done by ignoring classical principles of constitutionalism. The harm was done to the main principles of separation of powers and system of checks and balances.

The debate showed that decision had to be made either in favor of respecting principles of constitutionalism or “effective governance”. The risk in the first case could be little or no delivery on the promises given to the public before “Rose Revolution” or failing with the democratic consolidation and democracy development (in second case). It is also evident that in a culture with no tradition of constitutionalism the debate did not get enough attention from wider public and remained isolated in small circle of political elite, which seriously damaged its legitimacy afterwards.