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CONSTITUTIONAL REVISION BY A PLURALITY VOTE AND LEGITIMISATION OF CONSTITUTIONAL ORDER

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There are undemocratically adopted constitutions in the world,
but there are no authoritarian constitutions
adopted democratically!

John Elster[1]

Abstract. The practice of world constitutionalism clearly shows that a state that differentiates revision forms sets out different procedures of revision. Constitutional revision is a formidable task and is driven mainly by a political agenda. In turn, the supremacy and binding nature of a constitution do not require a political and moral justification. The measure of the legitimacy of constitutional amendments is not whether constitutional amendments were, or a new constitution was, adopted by a body with democratic legitimacy, but whether the process itself was open to all stakeholders, whether it was aimed at consensus building, etc. The issue of constitutional revision has always been topical when discussing the mechanisms of constitutional revision in Georgia. An interesting and large-scale innovation was the new form of constitutional revision established as a result of the constitutional reform of 2017 in Georgian constitutionalism. A state in transition to democracy is constantly undergoing a kind of transformation, therefore the supreme law of the state should keep pace with modern trends, and should

1. *Elster J.,* Ways of Constitution-making in: Democracy's Victory and Crisis, ed. Axel Hadenius, Cambridge University Press, 1997, 125.

inspire dynamism, however, at the same time, the constitution should be a „guarantee of permanence". The present study focuses on analysing these issues.

Keywords: Constitution, deliberation, legitimisation

Introduction

All fields of law, including constitutional law, are a set of legal norms with certain content, systematised in a certain manner. The norms of constitutional law have underlying features. According to internationally accepted law-making practice, a constitution in a formal and legal sense represents a single political and legal work as a whole[2]. Traditionally, a constitution consists of three parts: a preamble, substantive provisions and transitional provisions[3].

A revision mechanism for the supreme law of a state is a kind of key that opens a constitution. However, the frequency of constitutional revision cannot be seen as an indicator of the legitimacy of a country's supreme law. „Those who write constitutions for democracies being in the process of creation face many problems"[4]. To achieve legitimacy, the procedures for adopting and revising a constitution essentially seek to build consensus. However, adopting a constitution, on the one hand, and achieving legitimacy, on the other, are such complex issues that Max Weber himself used to say the notion of „legitimacy" should be abandoned, but the practice of constitutionalism *a priori* speaks against Weber[5].

Amendments to the Constitution of Georgia are distinguished by their authentic nature, which makes them highly individual. In general, the necessity to revise a constitution or adopt a new one is determined by various factors. For example, if we look at constitutional chronicles, the abrogation of the old and the adoption of the new becomes necessary against the background of revolutions and special social shifts, as well as with the emergence of a new state, etc. In addition, as a rule, the purpose of constitutional reform is enshrined in a constitution itself.

1. Deliberation as a legitimacy paradigm

„If there is a general social and political consensus, the technical difficulty of constitutional amendment is not a real obstacle"[6]. Consequently, one of the sources of

2. Group of authors, Introduction to Constitutional Law, under Dimitri Gegenava's editorship, Sulkhan-Saba Orbeliani University Press, Tbilisi, 2021, 72.
3. Ibid.
4. *Schwartz H.,* Steps Towards a Constitution, Constitutional Law Review, No 1, 2009, 7.
5. *Khubua G.,* Theory of Law, Tbilisi, 2003, 44.
6. *Sajo A.,* Limiting Government, An introduction to Constitutionalism, Foreword by Stephen Holmes, Central European University Press, 1999, 50.

legitimacy is deliberation. Bernard Manin, in his work „On Legitimacy and Political Deliberation", explains that „it is necessary to radically change the perspectives characteristic of both liberal and democratic thinking". The source of legitimacy is not the predetermined will of people but rather the process of reaching a legitimate decision, namely deliberation and discussion. A legitimate decision does not reflect the will of each individual, but it is the result of a universal discussion in which every citizen has the right to participate. The process of forming the will of all human beings is the one from which the result of legitimacy derives, and it is not the process of simply combining different pre-formed wills. Instead, „the deliberative principle is both individualistic and democratic... A legitimate law is based on universal deliberation, not on the expression of a common will"[7]. Andras Sajo says that it is necessary to institutionalise trust because „the exercise of power is built on trust, contagious trust"[8]. Therefore, during constitutional reform, the most important thing is to find the most effective ways of communicating with the public, because what matters most is the trust in the process, which is directly proportional to the trust in the final product[9]. In addition, two issues are important in the process of adopting a constitution: how democratic the procedure for drafting/adopting/revising a constitution is, and whether the latter is based on a broad and comprehensive deliberation, because, in addition to being democratic, the constitution must ensure the existence of sustainable and effective governance.

The supremacy and binding nature of a constitution do not require political and moral justification. The legitimacy of a constitution is either an implicit assumption[10] or is related to a random source of external legitimacy that may fully determine the content of the constitution, although its existence is not a necessary condition for the binding force of the constitution[11]. Modern literature on constitutional revision mainly focuses on the dualistic structure of the order and the legitimacy of the revision process[12]. Furthermore, the measure of the legitimacy of the constitutional amendment process is not only whether a constitutional amendment/new constitution was adopted by a body with democratic legitimacy, but also whether the process itself was open to all stakeholders,

7. *Manin B.*, On Legitimacy and Political Deliberation, Institute for Advanced Study (Princeton), Translated from French by Elly Stein and Jane Mansbridge, Sage Journals, Volume 15, Issue 3, 2016, see https://bit.ly/3QBTUos [13.01.2023].
8. *Sajo A.,* Limiting Government, An introduction to Constitutionalism, Foreword by Stephen Holmes, Central European University Press, 1999, 72.
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10. *Kelsen H.,* Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law, 1992, 59-62.
11. *Zedelashvili D.,* Revision of the Constitution in Georgia: Passions of the Majority and Constitutional Order, From Super-presidential to Parliamentary: Constitutional Amendments in Georgia, Compilation of Articles, Ilia State University Press, Tbilisi, 2013, 143.
12. *Elster J.,* Forces and Mechanisms in the Constitution-Making Process, Duke Law Journal, Vol. 45, N2, 1995, 364-396.

and whether it was intended to reach a consensus, etc[13]. According to Madison and Hamilton, the legislature, because of the importance of its functions, its proximity to the people and its great democratic legitimacy, was the most powerful body, and hence the most dangerous. Therefore, there was a legitimate rationale for limiting its powers, for which Madison advocated the introduction of a Senate. A Senate, on the other hand, is a body that could tame the passing passions of the representatives elected by the people[14].

2. Constitutional revision by a plurality vote

In post-Soviet states and societies, which have practically assimilated the Soviet experience and the totalitarian period at the level of skills, the perception of problems often acquires a monotonous character, since they see the constitution and the text of the constitution, rather than the people who are supposed to ensure its enforcement in practice, as the source of social, political or legal problems[15]. Therefore, when a constitution is fictitious, there is a gap between the text of a constitution and everyday life, and the values and norms it contains are designed for a different reality[16]. All this creates excessive expectations and further frustration among the population and political players, and may prompt them to revise the constitution[17]. A constitution should be effective and should not resemble an umbrella left at home in rainy weather.

„The constitution is the fundamental charter of a state", which is above all legal norms. So is a constitutional law, which is an integral part of the Constitution of Georgia. The Organic Law on Normative Acts mentions a constitutional law in one line next to the Constitution, which first of all indicates their equal importance and legal force[18]. At the same time, the Constitution[19] links, in an imperative form, the issue to be resolved by a constitutional law to the revision of the territorial organisation of Georgia. The hierarchical differentiation between a constitutional law of Georgia and other norms adopted in the legislative body of the state is most evident during the revision, which determines whether the Constitution is „flexible" or „rigid"[20]. Only an unwritten form of a constitution is completely flexible and soft. The emergence of a new source of constitutional importance develops such a constitution. A written, systematised constitution is more difficult to revise. Whereas, for

13. *Zedelashvili D.,* Revision of the Constitution in Georgia: Passions of the Majority and Constitutional Order, From Super-presidential to Parliamentary: Constitutional Amendments in Georgia, Compilation of Articles, Ilia State University Press, Tbilisi, 2013 155.
14. Ibid, 159.
15. *Gegenava D.,* Idea fixes of Georgian Constitutionalism: When the „Wind of Change" Blows, Avtandil Demetrashvili 75, Anniversary Edition, Davit Batonishvili Institute of Law, Tbilisi, 2017, 108.
16. For example, for a market economy, for civil society, for a different level of legal and political culture.
17. *Demetrashvili A., Demetrashvili S.,* Constitutional Law, Sulkhan-Saba Orbeliani University Press, Tbilisi, 2020, 37.
18. Organic Law of Georgia on Normative Acts, 09/11/2009, Article 7, paragraph 2, subparagraph (a).
19. Constitution of Georgia, 24/08/1995, Article 7, paragraph 3.
20. *Pactes P., Melen-Sukramanian F.*, Constitutional Law, Ivane Javakhishvili Tbilisi State University, Tbilisi, 2009, 107.

Hans Kelsen, the constitutional order of the Weimar Republic was identical exclusively to a written constitution[21]. Moreover, in some constitutions there are so-called „inviolable norms, immutable, permanent provisions"[22], the revision of which is totally unacceptable. For example, Article 114 of the Constitution of the Republic of Armenia establishes: „Articles 1,[23] 2[24] and 114[25] of the Constitution shall not be subject to revision". Also of interest is Article 79 of the French Constitution of 1958, which states that „the republican form of governance shall not be subject to revision"[26]. As far as Georgia is concerned, none of the „waves" of constitutional reform has touched upon the issue of the permanence of the norms of the Constitution and the internal hierarchy of the Constitution[27]. In general, as part of constitutional control, there is always a dilemma as to how and in what form constitutional control can be exercised over the norms of the Constitution, which has been repeatedly brought before the Constitutional Court, but the court has not subordinated its competence by exercising constitutional control over constitutional norms[28]. Moreover, the constitutional control of constitutional amendments is considered a vertical separation of powers, which implies that a body implementing the amendment must act within its authority, but the latter also requires an appropriate mechanism to determine whether the body implementing the amendment has exceeded its authority when adopting the amendments[29]. In general, there are two forms of constitutional control over constitutional revision: formal and content-specific. Formal revision includes the examination of the procedure for constitutional revision, whereas content-specific revision includes the establishment of compliance. In addition, the establishment of formal compliance is usually a mandatory component of constitutional revision, while content-specific revision is optional, which will only be initiated if a particular subject has disputed a specific provision of the amendment to the constitution[30].

21. *Kelsen H.,* Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law, Translated by Bonnie Litschewski Paulson and Stanley L. Paulson, Oxford University Press, 1992, 55-71.
22. *Demetrashvili A., Demetrashvili S.,* Constitutional Law, Sulkhan-Saba Orbeliani University Press, Tbilisi, 2020, 37.
23. Article 1: „The Republic of Armenia is a sovereign, democratic, social state governed by the rule of law".
24. Article 2: „In the Republic of Armenia, the power belongs to the people. The people shall exercise their power through free elections, referenda, as well as through state and local self-government bodies and officials provided for by the Constitution".
25. Group of authors, Introduction to Constitutional Law, under Dimitri Gegenava's editorship, Sulkhan-Saba Orbeliani University Press, Tbilisi, 2021, 71.
26. A prohibition with almost the same wording is established by the 1921 Constitution of Georgia.
27. *Luashvili G.,* Mechanism for Revising the Constitution of Georgia and the Constitutional Reform of 2017, Journal of Constitutional Law, Second Edition, Tbilisi, 2018, 90.
28. Decision No 1/1/549 of the Constitutional Court of Georgia of 5 February 2013 in the case "Citizens of Georgia Irma Inashvili, David Tarkhan-Mouravi and Ioseb Manjavidze v. the Parliament of Georgia". See also Ruling No 2/2/486 of the Constitutional Court of Georgia of 12 July 2010 in the case "Non-entrepreneurial (Non-commercial) Legal Entity "National League for Protection of the Constitution" v. the Parliament of Georgia", etc.
29. *Luashvili G.,* Mechanism for Revising the Constitution of Georgia and the Constitutional Reform of 2017, Journal of Constitutional Law, Second Edition, Tbilisi, 2018, 95.
30. Ibid. p. 97.

In most states, Parliament is involved in constitutional revision. In some places, only its final decision is enough for this[31], in other places it takes the form of a constituent body (in the USA – a conventus), and in others, its decision is not final and must be approved in a referendum (Romania, Latvia). In Kazakhstan, the President may either put a draft revision to a referendum or submit it to Parliament for adoption[32]. In Luxembourg[33] and the Netherlands[34], following a decision to revise the constitution, the parliaments of these countries must be dissolved, early parliamentary elections must be held and the decision to revise the Constitution made by the previous Parliament must be approved by a qualified majority of the newly elected Parliament. The practice of constitutional revision by a plurality vote is largely in place in Scandinavia, Benelux and other European countries. In some countries, different quorums are established for the approval of a constitution by the Parliament of the same convocation[35]. However, a qualified majority does not revise only so-called „unwritten constitutions", which require a standard majority to amend their constituent acts[36]. As for bicameral parliaments, constitutions are revised in these systems with the support of both Houses of Parliament. Interestingly, in some states, constitutional revision requires the approval of a respective draft law in a referendum[37]. However, there is a practice of constitutional revision by states[38] where a referendum is mandatory for the complete revision of the constitution[39].

Georgia has a strong constitution and its revision involves a complex procedure. In particular, according to Article 77 of the Constitution of Georgia, the Constitution is revised by a constitutional law, which may be submitted by:

a) more than half of the total number of the Members of Parliament, an initiator of a draft constitutional law being not Parliament, as a constitutional body, but a totality of the Members of Parliament[40].

b) 200 000 voters – a draft constitutional law is submitted to the Parliament of Georgia, and the latter promulgates it for open discussion[41]. In addition, the Parliament establishes a special organisational committee that schedules open discussions, holds meetings with the public and discusses materials related to the draft law, and comments and suggestions submitted to the Parliament in connection with the draft law. The Parliament starts to review the draft law within a month after its promulgation. When starting the review

31. Constitution of Greece, 09/06/1975, Article 110, See https://bit.ly/3iD1XoF [17.01.2023].
32. *Demetrashvili A., Demetrashvili S.,* Constitutional Law, Sulkhan-Saba Orbeliani University Press, Tbilisi, 2020, 38.
33. Constitution of Luxembourg, 17/10/1868, Article 114, see https://bit.ly/3XD5rpI [17.01.2023].
34. Constitution of the Netherlands, 17/10/1868, Article 137, see https://bit.ly/3COQ1XF [17.01.2023].
35. For example, a two-fifths majority in Estonia, a two-thirds majority in Germany, etc.
36. *Kobakhidze I.,* Constitutional Law, First Edition, Tbilisi, 2019, 289.
37. Ibid.
38. For example, Russia, Spain, etc.
39. *Kobakhidze I.,* Constitutional Law, First Edition, Tbilisi, 2019, 290.
40. In most states, a significant burden is on the Parliament in the process of constitutional revision.
41. Constitution of Georgia, 24/08/1995, Article 77.

of a draft law at a plenary session, the committee organising an open discussion informs the Parliament of the outcomes of the discussion. At a plenary session, a draft law is reviewed in three readings, and it is also possible to review a draft constitutional law in an accelerated or simplified manner[42]. The Constitution of Georgia is normally revised by a plurality, double vote. Accordingly, a constitutional law will be considered adopted if it is supported by at least a two-thirds majority of the total number of the Members of Parliament of two consecutive convocations. And the Parliament of the next convocation can support the latter in an unchanged form. As for the revision of the constitution by the Parliament of one convocation, this can be done only if the draft law is supported by at least three-fourths of the total number of the Members of Parliament[43].

As a result, the President of Georgia signs and promulgates a constitutional law in accordance with procedures established by the Constitution of Georgia. However, we should not forget that the President enjoys the right of veto, during which the head of state may use his/her exclusive right to veto a constitutional law adopted by a three-fourths majority. Whereas a constitutional law, which was approved by the Parliament of two convocations, as well as a constitutional law related to the restoration of territorial integrity, is signed and promulgated by the President of Georgia without the right to return it to the Parliament with comments[44].

It is undeniable that within the framework of the constitutional reform of 2017-2018, the procedure for the revision of the Constitution of Georgia has become more complicated, which is proportionally justified by the following main goals: the strength of a constitution should ensure the proper realisation of and adherence to the principles of self-restriction of a state governed by the rule of law and the government, as well as basic human rights. It is also clear that a stable constitution creates solid guarantees for democratic institutions and democratic social order. Furthermore, only with a strong constitution is it possible to properly realise the legal, political and ideological functions of the constitution, and to ensure the political and economic stability of the state. In turn, a stable constitution contributes to the strengthening of the legitimacy of constitutional order and the development of constitutional culture[45].

It is also important to consider the time limits for revising the Constitution, the existence of which, on the one hand, should ensure the reservation of a reasonable time limit for revising the Constitution and, on the other, the possibility of universal involvement in the revision of the Constitution[46].

42. Rules of Procedure of the Parliament of Georgia, Articles 117 and 118.
43. An exception is a draft constitutional law related to the restoration of territorial integrity, which is adopted by the Parliament of one convocation by at least a two-thirds majority of the total number of the Members of Parliament. In addition, if a state of emergency or martial law is declared, the review of a draft constitutional law is suspended until the state of emergency or martial law has been revoked.
44. *Kobakhidze I.,* Constitutional Law, First Edition, Tbilisi, 2019, 290.
45. Ibid, 291.
46. *Luashvili G.,* Mechanism for Revising the Constitution of Georgia and the Constitutional Reform of 2017, Journal of Constitutional Law, Second Edition, Tbilisi, 2018, 101.

Of interest is paragraph 1 of Article 105 of the Rules of Procedure of the Parliament of Georgia, according to which „a legislative proposal is a substantiated and duly registered application by a subject not entitled to legislative initiative, submitted to the Parliament in material or electronic form, on adopting a new law, introducing amendments to a law or on declaring a law invalid"[47]. According to paragraph 9 of the same article, „if the legislative proposal is adopted, the Leading Committee shall be considered as a subject having the right to legislative initiative", while according to paragraph 1 of Article 77 of the Constitution, a constitutional law may be initiated by a majority of the total number of the Members of Parliament or no less than 200 000 voters[48]. The Leading Committee of the Parliament cannot convert a legislative proposal into a legislative initiative if the legislative proposal concerns constitutional revision, as the Committee itself is not a subject initiating constitutional revision[49].

According to the recommendation of the Venice Commission, „in addition to guaranteeing constitutional and political stability, the provisions on qualified procedures for amending the constitution aim at securing broad consensus as well as the legitimacy of the constitution and, through it, the political system as a whole"[50].

Conclusion

Amendments to the Constitution of Georgia are distinguished by their authentic nature, which makes them highly individual. The constitution is the fundamental charter of a state, which is above all legal norms. So is a constitutional law, which is an integral part of the Constitution of Georgia. The supremacy and binding nature of a constitution do not require political and moral justification. Besides, if there is a general social and political consensus, the technical difficulty of constitutional amendment is not a real obstacle. In general, the measure of the legitimacy of the constitutional amendment process is not only whether the constitutional amendment/new constitution was adopted by a body with democratic legitimacy, but also whether the process itself was open to all stakeholders and whether it was intended to reach a consensus, etc.

The advantage of revising the Constitution by a plurality vote is manifested in two factors, namely, high legitimisation, which is expressed in its quasi-referendum character, and the implementation of amendments in case of urgent necessity. Plurality voting is a variety that involves holding elections between the amendments. On the other hand, a high decision-making quorum is related to the protection of minority interests. Obviously, an absolute restriction of the revision of the Constitution is unacceptable, although it would be interesting to see the so-called „permanent norms" and „guarantees of

47. Rules of Procedure of the Parliament Georgia, Article 105, paragraph 1.
48. Constitution of Georgia, 24/08/1995, Article 77.
49. *Luashvili G.,* Mechanism for Revising the Constitution of Georgia and the Constitutional Reform of 2017, Journal of Constitutional Law, Second Edition, Tbilisi, 2018, 107.
50. Venice Commission, Report on Constitutional Amendment Procedures, Strasbourg, 4 December 2009, 2009, 168.

permanence", which should relate to the most important provisions of the Constitution, such as sovereignty, a state governed by the rule of law, a social state, etc. In addition, when talking about a useful, real and effective model for revising the Constitution of Georgia, it is important to emphasise that „there is no common European, best model for amending the Constitution", therefore, the main task of the state is to establish a proper balance between the flexibility and strength of the Constitution.

The constitutional order is future-oriented and therefore should be open to changes; on the contrary, a state in transition to democracy is constantly undergoing a kind of transformation, so the supreme law of the state should keep pace with modern trends, and should inspire dynamism. However, at the same time, the constitution should be a „guarantee of permanence". It is therefore important that there are „permanent norms" which should not be subject to change, but these provisions, if properly formulated, should withstand time and space. Furthermore, the role of the Constitutional Court as a deferral mechanism should be strengthened. However, the meaning embedded in the norms should not change so much that it becomes difficult for the public to follow the changes and properly perceive and understand their essence.

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