

The Third Fundamental Revision of the Constitution of Georgia**

1. Introduction

Since its original adoption, 33 amendments have been made to the Constitution of Georgia (the “Constitution”). Of those amendments, the constitutional model was substantially changed in 2004 and 2010,¹ initially from a presidential to a presidential-parliamentary subtype of the semi-presidential model, and afterwards to a prime-minister-president subtype of the semi-presidential model.² The supreme law of Georgia has never been totally free of heretical deviations from the principles of constitutionalism, neither during its adoption nor after reforms. However, the supreme law was often

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¹ On constitutional changes in Georgia see V. Menabde (Head and Academic Editor), T. Papashvili, N. Kashakashvili, G. Kekenadze, and A. Beridze, *Twenty Years without Parliamentary Oversight: Oversight of the Ministry of Internal Affairs, the State Security Service and the Intelligence Service of Georgia by the Supreme Representative Body* (Tbilisi: Cezanne, 2017), 24. Available online at: https://www.academia.edu/32218360/TWENTY_YEARS_WITHOUT_PARLIAMENTARY_OVERSIGHT.

² For the classification see *ibid*, pp. 20-21.

not what the ruling powers sought to change. The reasons for this lie in the lack of legitimacy of the present Constitution.³ No matter how intense the doctrinal criticism of the 2010 constitutional reform, initiation of large-scale revision of the Constitution was made possible by the current Constitution's lack of political legitimacy. This is clearly demonstrated by the attitude of the current government, which holds that the previous reform was motivated by the then-president's desire to maintain power and thus current model is illegitimate.

In accordance with established practice in Georgia, large-scale revision of the Constitution is preceded by the creation of a constitutional commission, the purpose of which is to ensure the representational involvement of the public in preparing the draft amendments. The case of 2004 is an exception; in that case, reform was carried out by the government that came to power as a result of the Rose Revolution.⁴

The current State Constitutional Commission of Georgia (the "Commission") is the fourth in the country's history. The Commission was created by the Parliament of Georgia⁵ on 15 December 2016 and tasked with preparing a draft revision of the Constitution that will "ensure the full compliance of the Constitution with the fundamental principles of the constitutional law and establishment of the constitutional system corresponding to the long-term democratic development interests of the country."⁶ The Commission finalized its work and on 22 April 2017 approved the draft Constitution with 43 votes to 8. The present article addresses the current document, which at the time of writing is not final and might be changed following Parliamentary hearings.

³ On the needs of legitimacy of the constitution see V. Menabde – Revision of the Constitution of Georgia – What Ensures the Legitimacy of the Supreme Law. Compilation of Articles: from super-presidential to the parliamentary. Constitutional Amendments in Georgia, Ilia State University Publication, Tbilisi, 2013, pp. 116-120. <http://constitution.parliament.ge/uploads/masalebi/bibliography/supersaprezidentodan-saparlamentomde.pdf>, Updated on: 03.04.2017.

⁴ About the assessment of the 2004 reform process, see V. Menabde, Revision of the Constitution of Georgia – What Ensures the Legitimacy of the Supreme Law, pp. 129-131.

⁵ Decree of the Parliament of Georgia on the Establishment of the State Constitutional Commission and on the Approval of the Statute of the State Constitutional Commission, Kutaisi, 15 December 2016, N65-Is, <https://matsne.gov.ge/ka/document/view/3472813>, last visited on 01.04.2017.

⁶ *Ibid*, Article 2.

The purpose of this article is to review the constitutional reform process and the organization of the Commission and its work, to briefly describe the political context in which the draft Constitution was prepared and to analyze the main aspects of the draft Constitution.

The author of this article is honored to have served as a member of the Constitutional Commission by the quota allocated to the academic community. Consequently, the views presented in this article are the conclusions of an internal observer and participant in the process. This is an advantage – to be at the center of events and aware of all aspects of the process which are not recorded in formal documents. On the other hand, it could be considered a shortcoming: the author’s perception of the constitutional reform process might lack the analytical distance with which to describe the existing situation without any impediments.

2. State Constitutional Commission

Creation of the Commission was important for legitimizing the constitutional amendment process. How the process would unfold depended significantly on the composition of the Commission, its working schedule and other organizational issues. The present chapter discusses these topics.

The composition of the Commission was determined by decree of the Parliament of Georgia.⁷ The main gap in the relevant decree was the fact that the number of Commission members was left open. It defined in detail the quotas for members of political parties (both parliamentary and non-parliamentary) and constitutional bodies. However, the decree did not regulate quotas for representatives of non-governmental organizations and the academic community, the discretion of which was left up to the Parliament speaker. According to the speaker’s decision, the Commission was ultimately composed of 73 individuals:⁸

⁷ The above-mentioned decree of the Parliament of Georgia, Article 3.

⁸ Order #253/3 of the Chairman of the Parliament of Georgia dated 23 December 2016 on the Approval of the Composition of the State Constitutional Commission. Available online at: <http://www.parliament.ge/ge/parlamentarebi/chairman/brdzanebebi/253-3.page>.

- From parliament – 35 members (the largest number);
- From the non-parliamentary parties which failed to pass the election threshold but received at least 3% of votes – 4 members;
- From the constitutional bodies – 14 members;
- From non-governmental organizations – 7 members; and
- From the academic community – 13 members.

The ruling Georgian Dream (GD) party formally controlled 30 mandates⁹ in the Commission and thus held the bulk of decision-making power. Additionally, one thing was obvious from the initial sessions: the Commission was composed in such a way that the majority of its members agreed mutually with GD on most of the principal issues, including: the classical parliamentary model of governance, the proposed parliamentary electoral system, the rights of parliamentary minorities and the procedures for indirect election of the president.

The Commission was divided into four working groups each devoted to thematic issues,¹⁰ as follows: 1. On issues related to basic human rights and freedoms, the judiciary, the preamble to the Constitution of Georgia and general and transitional provisions; 2. On the Parliament of Georgia, finances and control and revision of the Constitution of Georgia; 3. On issues of the president of Georgia, the government of Georgia and national defense; and 4. On issues of administrative-territorial arrangement and local self-government. Each Commission member was obliged to join at least one working group. However, each additionally requested participation in an additional group. Exceptionally, representatives of the non-parliamentary opposition were allowed to participate in all four groups.

The legislative body named the speaker of Parliament as chair of the Commission, who in turn appointed the first vice-speaker of Parliament as secretary of the Commission. Every meeting of the Commission and each working group was personally chaired by the speaker of Parliament.

⁹ Later, the number of the Commission members was reduced to 60, however, Georgian Dream did not have a formal majority even under such conditions.

¹⁰ The above-mentioned decree of the Parliament of Georgia, Article 8.

Parliament designated 30 April as the Commission's last working day.¹¹ Nevertheless, the speaker of Parliament noted in the very first session that in case of need, the term could be extended. However, it was obvious from the outset that the working plan and pace of the Commission was firmly established. The Commission finalized its work on 22 April with adoption of the draft constitutional law. On the day before the final vote, the chairman of the Commission made a politically and legally controversial decision to terminate the membership of 13 opposition members.¹² Boycotting of the Commission's sessions was named as grounds for the termination. Seven political parties protested the termination and refused to continue involvement in the work of the Commission. Members of these parties publicly expressed the view that the proposed draft was intended to strengthen the power of the ruling party.¹³

The working group sessions were carried out in three rounds. In certain cases, a given round took several days, as each working group discussed the issues under its competence in detail. In the first round, the working groups discussed the initiatives proposed by each member on the level of principle. In the second round, taking these preliminary discussions into consideration, the secretariat prepared an initial document containing the consensus-backed initiatives discussed during the first round. However, this process did not grant the Commission members the right to propose ideas that were not reflected in the document.

Prior to the third round, the chairman and secretary of the Commission held meetings with representatives of the non-governmental sector, business sector¹⁴, diplomatic corps and heads of international organizations.¹⁵

¹¹ The above-mentioned decree of the Parliament of Georgia.

¹² Order #146/3 of the speaker of the Parliament of Georgia dated 21 April 2017 on the amendments to the Order #253/3 of the Chairman of the Parliament of Georgia dated 23 December 2016 on the Approval of the Composition of the State Constitutional Commission <http://www.parliament.ge/ge/parlamentarebi/chairman/brdzanebebi/146-3>, page, last visited on 18.05.2017.

¹³ Opposition parties oppose constitutional amendments and boycott the commission <http://www.civil.ge/geo/article.php?id=31218>, last visited on 18.05.2017.

¹⁴ Irakli Kobakhidze met with representatives of the business sector, <http://constitution.parliament.ge/news-30-3/03>, updated on 03.04.2017.

¹⁵ Irakli Kobakhidze and Tamar Chugoshvili met with the representatives of the diplomatic corps and international organizations, <http://constitution.parliament.ge/news-30-5/03>, updated on 03.04.2017.

Commission members also held meetings with delegations of the Council of Europe Parliamentary Assembly¹⁶ and the Council of Europe Venice Commission.¹⁷ These discussions outlined the main issues that will be reflected in the basic project which will be distributed at the third round of the working groups, where members of the Commission will be able to reiterate their positions on each issue. The issues on which consensus was reached after four months of work will be elucidated. At the end of April, at its own session, the Commission will make a decision by voting on issues on which consensus has not been reached.¹⁸

3. Political Context

The Commission has had to carry out its activities in a divided political context. The president of Georgia and members of the opposition parties met the reform process with criticism from the very beginning. The present chapter discusses these aspects.

GD won a majority in parliamentary elections on 8 October 2016 and now holds a total of 115 seats. The number of mandates is sufficient to amend the Constitution of Georgia, a process which requires three-fourths of the full composition, or 113 MPs.¹⁹ After the election results were announced it became clear that the ruling party would use this favorable situation to enact constitutional reform.

On 19 October 2016, Prime Minister of Georgia Giorgi Kvirikashvili announced at a government session the initiative to implement constitutional

¹⁶ Irakli Kobakhidze met with members of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, <http://constitution.parliament.ge/news-28/03/17>, updated on 03.04.2017.

¹⁷ Visit of the Venice Commission Delegation to Georgia, <http://constitution.parliament.ge/news-30/03>, updated on 03.04.2017.

¹⁸ The above-mentioned Decree of the Parliament of Georgia, Article 9. The Commission makes a decision with the full composition; i.e., with 36 votes.

¹⁹ “The draft law on the revision of the Constitution shall be deemed to be adopted if it is supported by at least two thirds of the total number of the members of the Parliament of Georgia.” The Constitution of Georgia, Article 102 paragraph 3, <https://matsne.gov.ge/ka/document/view/30346>, updated on 03.04.2017.

reform.²⁰ President of Georgia Giorgi Margvelashvili responded to a statement by the speaker of Parliament on the same day, offering a concrete proposal to the public. He proposed that the constitutional commission have three co-chairs – the president, the prime minister and the speaker of Parliament.²¹ The idea was rejected with the argument that “in the legal and practical terms, it is much more useful if the proposed format is implemented.”²² Ultimately, the president refused to participate in the work of the Commission. Therefore, at the time of writing the Commission has worked without the participation of three important figures (the head of the president’s administration, the parliamentary secretary of the president and the secretary of the national security council).²³ The president launched campaign on 10 March 2017 called “The Constitution Belongs to Everyone.” The purpose of the campaign has been to inform the public about the reforms to the Constitution of Georgia.²⁴ Launch of the campaign was met with criticism from the speaker of Parliament, who accused the president of pursuing narrow political interests and disrespecting constitutional institutions.²⁵ Nevertheless, the process announced by President Giorgi Margvelashvili went into motion and meetings have been held in regions across Georgia.

²⁰ The statement of the prime minister on the constitutional majority http://gov.ge/index.php?lang_id=GEO&sec_id=434&info_id=58019, updated on 02.04.2017.

²¹ The President is willing to create a group for preparation of the constitutional amendments <http://www.tabula.ge/ge/story/113574-prezidenti-mzadaa-konstituciashi-shebatani-cvliilebebis-mosamzadeblad-jgufi-sheqmnas>, updated on 02.04.2017.

²² On the session of the legal issues committee, Irakli Kobakhidze’s legislative initiative was discussed <http://www.parliament.ge/ge/saparlamento-saqmianoba/komitetebi/iuridiul-sakitxta-komiteti-146/axali-ambebi-iuridiuli/iuridiul-sakitxta-komitetis-sxdomaze-irakli-kobaxidzis-sakanonmdeblo-iniciativa-ganixiles.page>, updated on 02.04.2017.

²³ Giorgi Abashishvili – the president and the representatives of the president will refrain from participation in the Constitutional Commission, <https://www.president.gov.ge/ka-GE/administraciis-siakhleebi-aq/giorgi-abashishvili-prezidenti-da-prezidentis-carm.aspx>, updated on 02.04.2017.

²⁴ The president of Georgia has launched the campaign “The Constitution Belongs to Everyone” <https://www.president.gov.ge/ka-GE/pressamsakhuri/siakhleebi/saqartvelos-prezidentma-kampania-konstitucia-yvela.aspx>, updated on 02.04.2017.

²⁵ <http://www.parliament.ge/ge/parlamentarebi/chairman/chairmannews/saqartvelos-parlamentis-tavmdjdomaris-irakli-kobaxidzis-gancxadeba.page>, განახლებულია: 02.04.2017.

Another criticism of the composition of the State Constitutional Commission focused on quotas for members of opposition parties. According to the statute, the right to representation was granted to independent parties and the first parties of electoral blocks failing to overcome the electoral threshold but receiving at least 3% of the votes.²⁶ According to these criteria, 13 parties qualified for state funding were shut out of the Commission, a fact that was protested by the opposition. Those protests did not bear fruit. Ultimately, 14 representatives from seven opposition parties participated in the Commission.

Widespread dissatisfaction was also caused by the fact that the Commission's working term was scheduled to be less than months. Members of the Commission were given just one month to provide initial drafts.

The work of the Commission was met with criticism from opponents, as well. In order to neutralize this criticism, the government made one promise from the very beginning, which it has continued to reiterate. At the beginning of work, the speaker of Parliament stated clearly that the parliamentary majority will not adopt any amendments that are negatively assessed by the Venice Commission.²⁷ This statement indicates the government's interest in deflecting internal criticism and seeking external sources of legitimization for the draft Constitution.

In terms of reform of the Constitution, the sequence of events was the following: after approval of the final draft by the Constitutional Commission, the document will be subject to general public discussion and sent to the Venice Commission for review. The final draft will be produced by the beginning of June, and the Venice Commission's conclusion will be issued in mid-June. At the end of June, the draft Constitution will be approved with by Parliament in the second hearing. The final vote will take place three months later, during the fall session.

²⁶ The above-mentioned decree of the Parliament of Georgia, Article 3 paragraph 2 (c).

²⁷ Joint statement by Irakli Kobakhidze and President of the Venice Commission Gianni Buquicchio for the press, <https://www.youtube.com/watch?v=9mwieyEWRgA>, updated on 03.04.2017.

4. Prospects of the Constitutional Reform

During the Commission's inaugural session, the speaker of Parliament stated that the only issue on which the ruling majority had theretofore formed a clear opinion, was the desired form of government – classical parliamentary republic.²⁸ This indicated that GD, while not excluding some kind of compromise on the part of the Commission, had already determined the main direction of the constitutional reform. However, this direction was somewhat general. As later turned out to be the case, the members of the Commission did not all understand the meaning of the concept in the same way. They were unable to reach agreement during assessment of the existing model; one group referred to it as a parliamentary model, and another group – a semi-presidential model. This is not surprising, given there is heated discussion within the field of constitutionalism on the different models of governance and the forms they take.

The main topic of discussion in this regard have been issues related to the institution of the presidency, which can be divided into two aspects. The first concerns procedures for electing the head of the state, and the other, presidential powers. After heated discussions during the first round, the majority of members of the Commission's working group came to the conclusion that direct election of the president should be abolished. In the second round, the Commission submitted the following draft amendment: the next presidential elections should be conducted via popular vote and by 2023 the president should be elected indirectly. Finally, compromise was achieved, according to which the president will be elected by an electoral college consisting of 150 delegates from municipal councils in addition to 150 MPs.

At this stage, the most important changes to the powers of the president are related to the president's competences as the supreme commander-in-chief. The draft Constitution envisages the abolition of the National Security Council and creation of a Defense Council in its stead, which will be active only in wartime. The prime minister will be granted powers of op-

²⁸ Irakli Kobakhidze: the Parliamentary ruling will not change, <http://itv.ge/ge/news/view/145591.html>, updated on 03.04.2017.

erational management during wartime. The president's competences with regards to foreign relations will also be reduced. The president will no longer have the right to veto international treaties which address territorial issues and membership in military alliances and international organizations. As for powers of complectation, the transfer of power to nominate Supreme Court judges to the Parliament is the most important.

The most important issue in the draft Constitution is the electoral system for the Parliament of Georgia. That system is the cornerstone of the proposed separation of powers. The election system will essentially determine the logic of separation of powers in Georgia. Creation of a pluralistic and consensus-oriented system is possible by getting the electoral system right. According to the proposed amendments, all 150 MPs will be elected through a uniform proportional system. The threshold will be 5%, only parties will have the right to participate in elections (blocks will be banned from running), and the rule of distribution of mandates will be as follows: the votes going to parties which surpass the threshold are multiplied by 150 and divided by the number of real votes. The undistributed mandates are taken by the party receiving the most total votes.²⁹

Another issue is related to confidence and non-confidence. According to the proposed Constitution, the procedures for announcing confidence may take a maximum of one month. Parliament will have two attempts to form a government, after which the president will have the power to dismiss it. The vote of non-confidence is also addressed. It covers one ballot for a maximum duration of two weeks, and the sufficient number of votes is 76. The draft also stipulates that the maximum term of execution of the vote of non-confidence is one month and may result in the dissolution of Parliament by the declaration of confidence in a new government.

The constitutional amendments also foresee ensuring the Prosecutor's Office independence from the cabinet. The chief prosecutor will be elected by Parliament upon the nomination of the Prosecutorial Council. Moreover, the first chapter of the Constitution will include three new articles on the reg-

²⁹ According to this formula, the undistributed mandates would have reached 30 in the most recent election.

ulation of principles of democracy, the constitutional state and social state and, lastly, the principle of electoral pluralism. According to the last principle, support of 2/3 of the Parliament will be needed to amend the Constitution.

5. Conclusions

This article discusses three aspects of constitutional reform: the work of the State Constitutional Reform Commission, the political context surrounding the reform and the most essential aspects of the draft Constitution. The purpose of the article is not to assess the merits of the constitutional reform but to relate facts about it. At this stage, it is difficult to predict with accuracy the final results of the reform, which will largely depend on the political situation and the opinion of the Venice Commission. While the government has a constitutional majority, and thus has the possibility to carry out effective measures, the current arrangement includes an aspect of inconvenience. That inconvenience comes from excessive power, as the ruling party can alone decide the fate of the Supreme Law of the country. However, the ruling party understands perfectly that a constitution adopted by the principle of handover cannot be legitimate, and it will eventually suffer the same fate as its predecessors. The Commission thus should have reached consensus to the maximum extent possible (which has not happened, as demonstrated by the most recent developments in the Commission). The assessment of the Venice Commission is another important condition.

It is difficult to predict the potential consequences, especially of the last aspect. The government may have the intention to change the Constitution in a particular direction, but the importance given to the Venice Commission's conclusion makes the outcome dependent on external expertise. One thing is clear, at least in the coming months: discussions on constitutional issues will not quieten. Hopefully, these discussions will support the strengthening of constitutional institutions that can ensure the establishment of a political system in Georgia where access to politics is not restricted only to the elite.

