

The Constitution-making Politics in Georgia

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Submitted to

Central European University

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In partial fulfillment of the requirements for the degree of Master of Arts

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Budapest, Hungary

(2010)

Abstract

My thesis is about the constitution-making politics in Georgia - 1995, 2004, 2010. In the thesis the Georgian Constitution and the constitution-making process are discussed in terms of the separation of powers and the chapters and articles of the Georgian constitution (constitutions) concerning governance are examined. I analyze the consequences of political changes in Georgia: fall of the regime, 'revolution', war, economic and political crisis and how the amendments of the Constitution serve to maybe identifiable group of people. In the first three chapters of the thesis the theoretical and historical overview of the constitution-making process on the one hand and the Georgian constitutionalism history on the other are provided. Following chapters are concentrated on the period since 1995 and discuss articles of the Georgian constitution concerning separation of powers. In these latter four chapters three main 'constitutional waves' in Georgia are discussed: the first constitution after the fall of the Soviet Union, main amendments in terms of separation of powers after the 'Rose Revolution' and the ongoing situation and the National Constitutional Commission working on several drafts of a new type of arrangement of the government in Georgia. The pre-concluding chapter offers general assumptions and expectations about the 'new Constitution of Georgia'. My general finding is that the Georgian constitution-making process is heavily influenced by the agents' interests and consequently the particular articles of the Constitution of Georgia always reflect these interests.

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“Power and law are polar opposites... no government operates (or, as far as one knows, has operated) either entirely through power or entirely through law”.

G.Q. Walker¹

“The power to make a constitution is the power to create a political order ex nihilo”.

U.K. Preuss²

“Constitutionalism... enshrines respect for human worth and dignity as its central principle. To protect that value... government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will”

Walter F. Murphy³

Introduction

“Generally speaking, we may think of the constitution-making process as shaped by two forces: *arguing* and *bargaining*” (Elster 1995).⁴ In order to figure out how these two forces

¹ G. Q. Walker, *The Rule of Law. Foundation of Constitutional Democracy*, Melbourne: Melbourne University Press, 1988, p. 15

² U. Preuss “Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution”, in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham and London: Duke University Press, 1994), p. 143

³ Walter F. Murphy ‘Constitutions, Constitutionalism, and Democracy’, ed. Douglas Greenberg and others ‘Constitutionalism and Democracy Transitions in the Contemporary World’, Oxford University Press, 1993, p. 3

⁴ Jon Elster, Claus Offe, and Ulrich K. Preuss *Institutional Design in Post-communist Societies – Rebuilding the Ship at Sea*, Cambridge University Press, 1998, p. 77

interact in the Georgian case and how they shape the Georgian constitutional history and characteristics, my research question is to identify how agencies matter in the constitution-making process. My answer can be summarized as the argument that agents and agencies matter and, that political actors have a great influence in the constitution-making process. In order to check this statement I describe the immediate political situation before adopting a new Constitution or amending the current one, discuss the concrete articles and analyze the linkage between the political background, agents' and agencies interests and the constitutional order offered by the adopted document.

The topic seems relevant to me, because the “Constitutions as foundations are created so that a nation in a new condition can declare to its own citizenry, as well as to the rest of the world, that it exists”.⁵ Georgia is a ‘new democracy’, trying to declare and legally confirm its existence, a country which could not stabilize its political situation after the fall of the Soviet regime and besides foreign affairs, frequently faces internal critical political situation, a country, which has been in permanent transition for last twenty years. This kind of unstable development, in my point of view, is directly reflected in the Georgian Constitution and tendencies of the Georgian constitution-making politics. Besides that the Georgian case seems interesting and relevant to me, as in this case we can observe ‘three main waves’ of the constitution-making caused by different reasons in a short period of time.

There are numerous legal and political articles and books written about the issue, but the particular case – Georgia is understudied. So, I decided to research the concrete problem in the concrete case – political interests influencing the constitution-making process in Georgia, which is not researched yet.

⁵ Andras Sajó *Limiting Government – An Introduction to Constitutionalism*, Budapest, CEU press, 1999, p. 16

It is important to note here that I will not cover the issues of global political situation and concentrate my research on internal affairs and interests in Georgia. The topic about how the international politics and political order or the different global interests coincide in the region and how does this reflect ongoing processes within the country is very broad and I believe not to have direct influence on the constitution-making politics in Georgia, although, these interests determine the main political course of the country.

“New constitutions are empirically instituted on the ruins of an order which has collapsed after a revolution, a lost war, or a similar catastrophic event”⁶. What were the Constitutions of Georgia instituted on at the various time periods? I will analyze political background for adopting the Constitution in 1995, the first constitution of Georgia after the fall of the Soviet Union, the main amendments in 2004 and the National Constitutional Commission working on the draft of a new Constitution or the new amendments in 2009-2010. In this thesis I will not cover the very first Constitution of Georgia adopted in 1921 when the Georgian republic adopted the first, “four day long” Constitution and the period from 1921 to 1989, when Georgia was part of the Soviet Union and Soviet Constitutions were in force. Because this is undoubtedly a very interesting topic, but it does not highlight the specific features of political challenges of the Georgian transition and political dynamics after Georgia became independent.

One main similarity we can observe in the Constitutions of Georgia at different times and during different regimes is that it still stays flexible both in legal and political terms⁷ and leaves room for new leaders, groups considering themselves bearers of the constituent

⁶ U. Preuss “Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution”, in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham and London: Duke University Press, 1994), p. 143

⁷ I would even claim, based on the currency and manner the Constitution of Georgia has been changed, that each political force being in charge, refused to amend constitution in a way to make it legally rigid one because of the political interests and interest groups, actors’ preferences to have permanent tool of keeping constitutional and, simultaneously, political situation under control.

authority, to change it according to their own will. The observed politics of the constitution-making in Georgia tends to narrow down the idea of the Constitution itself. I would identify this kind of politics as “inflation of Constitution”, when the Constitution loses its initial principle idea and becomes a tool in the hands of officials in charge to reshape the legal order in the country in order to protect their own positions and preferences. My aim is to learn what caused these tendencies in the constitution-making politics in Georgia.

Discussing and analyzing the above stated research question, I found out that the Georgian constitution-making history heavily depends on personalities and personal self interests, actors’ preferences which can be excused and can work for the transitional period but will cause fatal results for democracy, especially for a ‘new democracy’ as such countries as Georgia are often called.

I observed the Georgian constitutional history after the fall of the Soviet Union to determine the main tendencies and streams influencing the process. All three choices (1995 constitution, 2004 amendments and 2009-2010 constitutional commission working on a new draft or main amendments)⁸ were highly influenced if not caused by political crisis as it often happens in the constitution-making history. If we look at the constitution-making process of different countries, we observe the close relationship and correlation between these two variables. The Constitution is not a ‘simple’ legal document - it is also a political concept. The whole system is based on this single document and derives from it. Consequently, the constitution-making process is an interplay between political constraints and actors’ preferences.

So, what is interesting here is to see the way the particular political situation (for instance regime change, revolution, political or economic crisis, war) reflects on the actors’

⁸ During the addressed period (1995-2010) numbers of constitutional amendments were adopted by Georgian parliament concerning different issues and constitutional principles, but for my current research I have chosen the ones I think fully illustrate the posed question – whether authority, in charge of making Constitution has the personal influence on the whole process and whether political process is reflected in the Georgian Constitution more boldly than it is known and accepted in the theory.

preferences, and how results in producing the Constitution. Can we claim that the choice of presidential model in 1995 was influenced by the political figure, seen as a savior at that time and believed to put an end to ongoing civil wars? Is it true that the complicated political situation leaves room and even pushes or at least makes it possible for one person to become an ‘almighty leader’ and reshape the model according to his or her own taste? Or can one see the shadow of main revolutionary actors’ number in the changed political order in 2004? Is it possible that political leaders, willing to come to power absolutely ignore or control law and legal requirements? Do they ignore one of the main principles of democracy – the government to be bound by the constitution?⁹ According to my research the answer to all these questions is ‘Yes’.

I have examined what kind of political issues cause the constitution-making process in Georgia and how the political situation is connected to this process. It is interesting to discuss what kind of political crisis or circumstances influence the constitution-making process in general, which of them are typical of the Georgian political reality and which political process causes or is the basis of which constitutional change. I will try to observe what consequences Georgia has gained from processes heavily influenced by politics and politicians and form my opinion about what we should expect from the new amendments / draft.

As a method of research I have chosen content analysis, as I plan to work on one particular case (Georgia) and on basis of analyzing amendments made to the Constitution of Georgia during different political periods and as a result of various events, answer the question about connections and influences of different political events on particular amendments. After reviewing the theoretical literature about the issues (like problem of the constitution-making

⁹ or we can call this principle – Rule of Law or ‘government under law’ as Walker calls it (see G. Q. Walker, *The Rule of Law. Foundation of Constitutional Democracy*, Melbourne: Melbourne University Press, 1988, p. 2)

time, procedures, etc.), I have analyzed the content of the Constitution of Georgia in 1995, particular amendments of 2004 and offered drafts of 2010 in terms of separation and division of power between the legislative and executive branches.

Chapter 1: The Georgian constitution-making history

This chapter describes in brief the Georgian constitution-making history. Its aim is to provide a background of the Georgian constitutional dynamics after 1995. This brief historic overview is given here in sake of the whole development of the Georgian constitutionalism to be fully captured and analyzed.

“Writing a constitution is a symbolic event in the life of a people or country”¹⁰, but what does the Georgian case symbolize?

The Georgian constitutional history begins in 1921, during the first Georgian republic (1918-1921) when the very first Constitution was adopted. It is difficult to discuss and evaluate this constitution, given that it was adopted literally four days before Georgia’s annexation by the Red Army. This constitution was adopted on the bases of debates and considerations during 1918-1921¹¹.

According to the First Constitution Georgia was declared as a republic. The supreme body of the country was the Parliament; representative body elected on the basis of universal, equal, direct, and proportional suffrage by the secret ballot. The executive branch was represented with the government and the head of the government elected by the Parliament. The

¹⁰ Constitution making in Eastern Europe ed. A. E. Dick Howard, The Woodrow Wilson Center Press, 1993, p.1

¹¹ Malkhaz Matsaberidze, publications *The Idea of Constitution in 1918-1921 years Georgian society* <http://constcommis.gov.ge/index.php?do=resource/view&id=57> and *In search of Georgian model of democracy* <http://constcommis.gov.ge/index.php?do=resource/view&id=60>

Parliament was authorized to monitor the executive branch and the members of the government were individually responsible to the Parliament. According to the 1921 Constitution, the supreme executive branch was the Government of the Republic. The head of the Government was elected by the Parliament for a term of one year.¹²

In consequence of historical developments, this Constitution was *de-jure* in force for four days and *de-facto* never worked.

During the time period of 1921-1991 Georgia was a member state, part of the USSR. In this period four constitutions were adopted in Georgia following the Soviet Constitutions. First of them was in 1922 on the basis of 1918 first Soviet Constitution, which was followed by 1924, 1936 and 1977 constitutions of the Soviet Republic of Georgia.

As my aim for this thesis is to discuss Georgia's current constitution-making politics, I will not analyze the first, 1921 Constitution. Also, the discussion of the Constitutions of the Soviet Republic of Georgia cannot be interesting in these terms, as in this case we observe radically different process and the soviet constitutions cannot be discussed according to the democratic institutions or separation of powers, for instance, also this type of the constitution-making process is not significant and characteristic for Georgia, which is my aim to study.

Chapter 2: The Constitution-making Process (theoretical overview)

Before discussing the Georgian case I would like to offer the theoretical framework I will follow in my research. The constitution-making process is an interesting field of study for

¹² The 1921 Constitution of Georgia
<http://www.nplg.gov.ge/dlibrary/collect/0001/000299/konstitucia%20kart.pdf>

both lawyers and political scientists since it covers and combines specific issues of both scientific fields. This process is specific and interesting in procedural terms as well as its principles and symbolic concept. The constitution-making politics can be researched and discussed in several terms. For my research I have chosen to discuss this process in one particular aspect: the way interests and preferences of various actors influence the constitution-making politics. Consequently, this chapter is meant to cover the theoretical concept of the constitution-making process only in these terms and is mainly concentrated on and following Jon Elster's works, namely *Deliberation and Democracy*, *Forces and Mechanisms in the Constitution-making Process* and *Institutional Design in Post-Communist Societies – Rebuilding the Ship at Sea*.

Hereby, I will discuss what main tendencies are underlined in the theory to serve as an immediate political background for drafting a new Constitution and how do various agencies, having their own interests, play their role in this whole process.

While discussing deliberation and the constitution making process, Jon Elster characterizes modern¹³ constitutions as a written set of laws, underlines its following features: “(a) The document is referred to as ‘the constitution’ or some equivalent phrase. (b) It is adopted as a whole document rather than piecemeal. (c) It regulates the most fundamental aspects of political life. (d) It is more difficult to amend the constitution than enact ordinary legislation. (e) The constitution takes precedence in case of a conflict with ordinary legislation” and adds that the very process of the constitution-making varies widely and ‘not all involve deliberation, nor are all adopted by democratic procedures’.¹⁴

As a rule, drafting a new Constitution differs from ordinary legislative process. First of all, “[t]he starting point for any constitutional system is, necessarily, a political fact – a political

¹³ since 1776

¹⁴ ‘Deliberation and Democracy’, ed. Jon Elster Cambridge University Press 1998, p.p. 97-98

decision”¹⁵, while normally, drafting any other type of legal act is the normal routine of any legislative body. Besides, there are usually more complicated mechanisms meant for making or amending a constitution, than changing an ordinary or other type of law.¹⁶

According to Jon Elster since late eighteenth century there have been seven constitution-making waves to be observed. The first wave occurred in 1780-1791 creating constitutions of United States, other American States, Poland and France. The second wave began with 1848 revolutions in Europe and was followed by German, Italian and tens of other European constitutions. The third wave occurred after the First World War when the new world order imposed new constitutions in recreated Poland and Czechoslovakia and famous Weimar Constitutions in defeated Germany. Logically the next wave was after the Second World War with the same scenario, when defeated nations – Japan, Germany and Italy – adopted new constitutions. The fifth wave of the constitution-making is linked to the colonial politics of French and Great Britain and took place in 1940-1960. Constitutions of India, Pakistan, Ivory Coast, Ghana, Nigeria and etc were adopted in between this time period. The next, sixth wave is connected to the regime change in the Southern Europe and took place between 1974-1978 when new democratic constitutions were adopted in Portugal, Greece and Spain. The final wave is adoption of dozens of new constitutions in Eastern and Central Europe after the fall of communism in 1989¹⁷. Identifying and analyzing these seven waves author gives seven political background situations for the constitution-making process to be started. These

¹⁵ Edward McWhinney “Constitution-making. Principles, Process, Practice”, University of Toronto Press, 1981, p. 12

¹⁶ *A bill to amend the Constitution may be submitted by ... at least one fifth of the statutory number of Deputies* – The Constitution of the Republic of Poland, article 235, paragraph 1 (Constitution-making process ed. Mirosław Wyrzykowski, Institute of Public Affairs, Center for Constitutionalism and Legal Culture, Warsaw 1998, p. 321); *The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution* – Constitution of the United States of America, article V (Edward McWhinney “Constitution-making. Principles, Process, Practice”, University of Toronto Press, 1981, p. 147); *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 (The Constitution of Georgia http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf).

¹⁷ I would rather add here, to this final wave, the constitutions adopted after the fall of the Soviet Union in the former member countries as well.

political backgrounds are: social and economic crisis, revolution, regime collapse, fear of regime collapse, defeat in war, reconstruction after war and the creation of a new state.¹⁸

Of course, every country is specific and processes in each of them are provoked and led with number of different reasons, but analyzing all the various examples, set of reasons for the constitution-making are summarized and provided by different authors. For example:

“[C]onstitutions are ‘made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time’”¹⁹

“Great crisis – revolution, civil war, political upheaval, fundamental changes in regime – tend to trigger the making of a constitution”.²⁰

All the named circumstances have one thing in common; they are all related to one or other kind of emotional condition leading and determining decisions made. The constitution-making process “occur[s] in or immediately after a period of great public excitement and resultant public euphoria when it is relatively easy to build... during and after great political crises – victory in a great war... a great political or social revolution... successful assertions of national self-determination and independence”.²¹

To sum up, the most general timing for the constitution-making is immediately or shortly after the regime change. This tendency can be observed in post-communist and post-soviet countries, adopting constitutions between period of 1989-1995, after the fall of the regime and the Soviet Union. If we look at the history of constitutionalism, among those reasons,

¹⁸ Jon Elster “Forces and Mechanisms in the Constitution-making Process”, *Duke Law Review*, Vol. 45, 1995-1996, p. p. 368-373

¹⁹ Edmund Burke in U. Preuss “Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution”, in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham and London: Duke University Press, 1994), p. 143

²⁰ Constitution making in Eastern Europe ed. A. E. Dick Howard, The Woodrow Wilson Center Press, 1993, p.1

²¹ Edward McWhinney “Constitution-making. Principles, Process, Practice”, University of Toronto Press, 1981, p. 15

causing the constitutional changes or the constitution-making process we can see different kinds of political background.

So, “[t]he fact is that new constitutions almost always are written in the wake of a crisis or exceptional circumstances of some sort”²² but what is interesting for me here is not only emotions similar to ‘public excitement’ but also the emotions and passions behind the political decision of making a new Constitution.

Jon Elster claims that framers of a new Constitution are always led by motivations and motivational assumptions and discussing them distinguishes between different types of interest, namely personal interest, group interest and institutional interest. To describe each of them separately he highlights most common examples. As an example of personal interest in the constitution-making process Jon Elster remembers creation of Bulgarian and Romanian constitutions, when former Communists desired to escape criminal prosecution and influenced on forming concerning articles in the way they desired. To describe group interests author refers to French and modern assemblies’ example and claims for the nobility and clergy interests in the former one and large party interests in the latter for voting mechanism. For highlighting institutional interests in the constitution-making process he Polish and French examples of 1921 and 1946 when the parliament participating in the process increased its role on behalf of reducing the role of executive in both cases.²³

This classification of main assumptions having influence on the constitution-making process seems reasonable and very interesting, but also difficult to specify. Even in given examples it is not always possible to put the demarcation line among which is in fact the personal interest and which is not. In general terms, I would say that the personal interest underlines every

²² Peter Russel in Jon Elster “Forces and Mechanisms in the Constitution-making Process”, Duke Law Review, Vol. 45, 1995-1996, p. 370

²³ Jon Elster “Forces and Mechanisms in the Constitution-making Process”, Duke Law Review, Vol. 45, 1995-1996 p.p. 377-382

action and it can be found behind any group or institution, but even if we generalize these terms it is hard to distinguish whether former the Communists participating in the Romanian or Bulgarian constitution-making process were acting as individuals or as a group; or the concrete group of people, representing the parliament in the assembly or the constitution-making commission, votes and decides influenced by institutional or group interests. This kind of discussion can continue endlessly, but the main point here for me is not to specify between several types of interests and try to find the slight differences between them, but to find out if interests in general, personal, group- or institution interests have influence on the Georgian constitution-making politics and how are they reflected in different articles of the Constitution of Georgia. I also consider different agencies, combining various personal, group or even institutional interests, to have influence on the constitution-making process and my aim is to identify the role of agencies or in other words interests' portion in this process.

This is the summary of theoretical framework used for this particular research. According to the general assumptions and characteristics of the constitution-making process discussed and overviewed above I will talk about the Georgian case in several following chapters and highlight the similarities and anomalies being significant for one particular country.

Chapter 3: The Transition Period

The fourth chapter *Transition period before the 1995 Constitution* will cover the period after the fall of the Soviet Union till the first Constitution of Georgia – 1995 to demonstrate how

the state was governed and will highlight the political situation immediately before the adoption of the Constitution the research is concentrated on.²⁴

In spring 1989, in order to restore independence peaceful demonstrations took place in Georgia. The demonstrations were followed by Russian army raiding demonstrators. Tens of people died. "9 April 1989 was a defining moment in the history of modern Georgia and henceforth became a recurrent theme in Georgian nationalist discourse".²⁵ This was a great impulse for the Georgian society to finally restore independence. In 1990 first multi-party elections in Georgia were won by the 'national forces', pro-independence parties of Georgia. Zviad Gamsakhurdia became Head of the state. The new government was nominally still the government of a member state of Soviet Union, but national forces were streaming to restore independence and in 1991 a referendum was held on the whole territory of Georgia, including the autonomous entities, Abkhazia and Tskhinvali regions as well. The question of the referendum was 'Do you support the restoration of the independence of Georgia in accordance with the Act of Declaration of Independence of Georgia of May 26, 1918?'²⁶ With a 98, 9% approval the independence of the Republic of Georgia was restored.

What is significant about the Georgian transition is the fact that independence was not declared but restored in Georgia. The 9 April 1991 Act of Restoration of State Independence of Georgia is based on the Act of Independence of Georgia of 1918 and refers to the first - 1921 constitution as the supreme law of the state, while as it is stated in the act, the Republic of Georgia and its government in 1918-1921 never signed any act of capitulation or agreement on joining the Soviet Union. So, the Act of Independence of Georgia of 1918 and

²⁴ In spite of most important amendments made to the Georgian Constitution the whole text was never changed and it might happen that the consequence of constitutional commission working today will offer new package of amendment (maybe even changing the model of government) but it will still be named as Constitution of Georgia, 1995.

²⁵ Jonathan Wheatley "Georgia from National Awakening to Rose Revolution. Delayed Transition in the Former Soviet Union", Ashgate 2005, p. 41

²⁶ <http://www.geotimes.ge/index.php?m=home&newsid=21084>

the 1921 Constitution have legal force.²⁷ This way independent Georgia declared itself as the legatee of the First Republic of Georgia, which had the symbolic aim on one hand – underlining the continuity of the Georgian statehood and declaring the Soviet regime illegitimate on Georgia on the other.

According to the 1921 Constitution Gamsakhurdia, as the Head of the Government was to be elected from the Parliament and therefore was accountable before the Parliament. Institutionally he was not an independent and strong Head of the State. But “One of Gamsakhurdia’s first priorities was to try to concentrate as much power as possible in his own hands. In December 1990 he managed to persuade Parliament to make him ... president”.²⁸ In 1991 Zviad Gamsakhurdia was elected as the first president of the country.

After the collapse of the Soviet Union and declaring independence Georgia entered the condition of grave social and political crisis. The first sign of a big crisis was the war over the so called South Ossetia (Tskhinvali Region) after the declaration of independence of South Ossetia by the regional government and abolition of the region’s autonomous status by the government of Georgia.²⁹ The same situation was maturing in Abkhazia and the opposition was getting stronger. The National Guard and *Mkhedrioni* - armed forces of the country, having the support of Prime Minister Tengiz Sigua opposed the President, the consequence of which was the armed conflict, the civil war, the so called Tbilisi War in the capital of Georgia. The first president was forced to leave the country in January 1992. The state was governed by the Military Council composed of ex- Prime-Minister Sigua, ex-Minister of

²⁷ Act of Restoration of State Independence of Georgia, April 9, 1991
http://www.parliament.ge/index.php?lang_id=GEO&sec_id=776

²⁸ Jonathan Wheatley “Georgia from National Awakening to Rose Revolution. Delayed Transition in the Former Soviet Union”, Ashgate 2005, p. 54

²⁹ <http://www.globalsecurity.org/military/world/war/south-ossetia-3.htm> and
<http://www.harrimaninstitute.org/MEDIA/01396.pdf>

Defense Kitovani and the leader of *Mkhedrioni* Ioseliani, who invited Eduard Shevardnadze back to Georgia.³⁰

This is a summary of the transitional context against which the dynamics of the Georgian constitution-making process would take place in the coming years. After the short historical and theoretical overview of the constitution-making tendencies I will concentrate on describing the concrete political background in the country and articles and principles of the Constitution which in my view reflect concrete political events.

Chapter 4: The 1995 Constitution

In this chapter I will broadly discuss the political situation pressuring the constitution commission working on a new constitutional framework for the country suffering from different problems. Specifically, I will focus on the articles I consider direct outcomes of the particular political events. I will also draw the picture of what kind of governmental system Georgia received according to this Constitution. For this, in the 4th chapter I will use the first text of the 1995 Constitution and analyze the particular role of separate institutions (president, parliament) and balance between them.

Unlike the period 1989-91, when events seemed to conform more or less to a predetermined sequence that had been set in motion by the tragedy of 9 April, the period 1992-95 more resembles a kind of multi-player chess game in which the outcome depended on the skills and strategies of the players. Like in any game of chess, there were key moments in which the moves of each player would prove decisive and eventually lead to either victory or defeat. In the end victory was claimed by the master tactician Eduard Shevardnadze.³¹

³⁰ <http://www.tavisupleba.org/content/article/1561046.html>

³¹ Jonathan Wheatley "Georgia from National Awakening to Rose Revolution. Delayed Transition in the Former Soviet Union", Ashgate 2005, p. 67

Eduard Shevardnadze was former First Secretary of Georgia in 1972-1985 and Minister of Foreign Affairs of the Soviet Union in 1985-1991. In March 1992 he accepted the invitation of the Military Council and returned to his homeland as the Head of State during the transition period.

The political situation was getting worse. After three civil wars (war over South Ossetia, over Abkhazia and Tbilisi war) the country has lost big parts of its territory, also the economy was in ruins.

In spring 1993 the Constitutional Commission began to draft a new Constitution for Georgia. This commission was headed by Eduard Shevardnadze himself. The Commission was working on different projects and because they could not agree on one or another model the process continued till the summer 1995, when the Constitution was adopted. The main disagreement in the commission was about the state arrangement form and accordingly two main drafts were present – establishing Georgia as a parliamentary republic or the French, semi-presidential model. The Constitutional Commission agreed upon so called ‘Chicago model’³², but it was refused by Shevardnadze himself. The Head of State ordered a new draft to be prepared, mobilized all supporting members at the commission meeting and the constitutional commission adopted the Russian model of the Constitution. This draft was accepted with the majority of two voices to the parliamentary model draft, but neither of them was adopted by the parliament.³³ Shevardnadze was trying to gain supporters in Parliament by using all his power and influence but in the end it seemed he had to compromise and Parliament adopted the new Constitution, Georgia was established as a US-type presidential

³² The name used among the Constitutional Commission (1993-1995) members for the draft combining the characteristics of both the parliamentary and the presidential models.

³³ Interview with deputy head of constitutional commission Vakhtang Khmaladze
<http://internet.ge/index.php?action=news&category=3&news=54183>

republic with the president as head of the executive branch but with no responsibilities as he could always hold Cabinet³⁴ responsible for his own mistakes.³⁵

According to the 1995 Constitution Georgia was declared as a presidential system. In his 'Comparative Constitutional Engineering' G. Sartori outlines three defining criteria for a presidential system, namely:

direct or direct-like popular election of the head of state for a fixed time span... it is the president that discretionally appoints or discharges the cabinet members... pure presidential system does not allow for any kind of 'dual authority'... line of authority is neatly streamlined from the president down...president directs the executive³⁶

In the text of the 1995 Constitution of Georgia we read that the President of Georgia is elected on the basis of universal, equal, and direct suffrage by secret ballot for a term of five years (article 70, paragraph 1) He or she is a head of the state of Georgia as well as head of the government (article 69, paragraph 1). He or she upon the approval of the parliament appoints the members of the government – ministers (article 73, paragraph 1, sentence b), is entitled to remove the ministers (article 73, paragraph 1, sentence c), accepts the resignation of ministers or other officials as determined by the law, is entitled to require the ministers to perform their official duties until the composition of a new government (article 73, paragraph 1, sentence d), submits the project of the state budget to the parliament (article 73, paragraph 1, sentence e). The President is authorized to abolish acts of the state executive bodies (article 73, paragraph 3). The President of Georgia enjoys personal immunity, but in cases as determined by the law Parliament is authorized to dismiss the President (article 76). Members of the government are responsible to the President (article 79, paragraph 1) a member of the

³⁴ The author uses the name 'Cabinet' for the organ which is named as 'Government' in the Constitution of Georgia and is completed by the President, by choosing and assigning different Ministers.

³⁵ Jonathan Wheatley "Georgia from National Awakening to Rose Revolution. Delayed Transition in the Former Soviet Union", Ashgate 2005, p. 94

³⁶ G. Sartori "Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes", Houndmills: Macmillan Press 1994, p.p. 83-84

government is the State Minister, who leads the state chancellery and accomplishes other duties on the instruction of the President (article 81, paragraph 3).³⁷

On the other hand the parliament of Georgia is the supreme representative body of the state which exercises legislative power and other responsibilities determined by the Constitution (article 48) and in the cases determined by the Constitution not less than one third of the total number of the members of parliament are entitled to raise the question of dismissal of the President in accordance with the impeachment procedure (article 63, paragraph 1).³⁸

So, Georgia was undoubtedly established as a presidential state, where the President was dividing his power with Parliament but was head of the government and could discharge the Ministers. The main decision-making process was concentrated in the State Chancellery, the head of which would be a person responsible only to the president. The only mechanism to keep the President accountable for his or her actions was the complicated impeachment procedure which has never even begun in the history of Georgia. By that time the majority in the Parliament was composed of Shevardnadze's party which led to 'mutual understanding' and co-existence of the two branches of government.

"The Constitution was born out of a political deal in which the subjective preferences and calculations of all main players ... played a decisive role in the final document that emerged".³⁹

³⁷ Constitution of Georgia (informal translation)

http://www.parliament.ge/index.php?lang_id=GEO&sec_id=69&kan_det=det&kan_id=23

³⁸ Constitution of Georgia http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf

³⁹ Jonathan Wheatley "Georgia from National Awakening to Rose Revolution. Delayed Transition in the Former Soviet Union", Ashgate 2005, p. 225

Chapter 5: The 'Rose Revolution' and Vital Amendments to the Georgian Constitution - Change of the governmental system

The main amendments concerning governance were made to the Constitution of Georgia in 2004 after the so called 'Rose Revolution' so in the sixth chapter *Rose revolution and vital amendments to the Georgian Constitution* I will discuss the revolutionary situation prior to the amendments and the amended articles I see as consequence of particular personal interests or political issues. The main question of this chapter might be named the question whether changing governmental model from presidential republic to semi-presidential one and creating prime-ministers post in Georgia was caused by the number of 'authors' of the Georgian revolution and contemporary necessity of dividing power between three people. If the 'triple face' of the authors and main actors of the Georgian 'Rose Revolution' has caused the rearrangement of the Georgian governmental system in the way to have three main and ruling positions in the head of the state (president, newly added prime-minister and head of the parliament).

By the end of 2001 the ruling force of Georgia began to fall into parts. In the ruling party *Citizens' Union of Georgia* a new grouping was to be observed. This was a group of young politicians, so called 'reformers'. These people were holding different positions in the government and the party but at one point they began to step down. First was young Minister of Justice of Georgia Mikheil Saakashvili, followed by the head of the Parliament Zurab Zhvania. Meanwhile, by that time a neutral figure – Nino Burjanadze was elected as the head of the Parliament, but with the support of ex-chairperson - Zhvania's team. Leading party of the country was divided into 'reformists' and 'conservative' groupings. During these critical events Shevardnadze could still control the situation and balance various diverse interests until 2003.

On November 2, 2003 parliamentary elections were held in which former ‘reformists’ camp of Shevardnadze’s party was participating as two opposing movements – National Movement lead by Saakashvili and alliance ‘Burjanadze-Democrats’ – lead by Burjanadze and Zhvania. The elections were evaluated negatively. It was obvious that the governmental authorities would falsify the vote count. Opposition began to mobilize their supporters. On 20 November official results of the elections proved this. The crowd in the streets of the capital, in front of the building of the Parliament was increasing. On November 23, 2003, when Shevardnadze was beginning his speech to open the new Parliament, opposition with number of supporters, led by Mikheil Saakashvili burst in. The President was forced to leave the building. He returned to his residence and declared the state of emergency. Nino Burjanadze on the other hand declared herself as the head of the state. Armed forces declared their loyalty to Nino Burjanadze. Late the same evening a closed meeting between the revolutionary triple and Shevardnadze was held after which Eduard Shevardnadze declared his resignation.⁴⁰

“[R]elationship between revolution and constitution is extremely ambivalent...the leading forces of the revolution endeavor... the new distribution of political power”⁴¹. It was clear who the leading forces and the main figures of the Georgian revolution were, but what kind of distribution of political power would they agree upon? The question was to be answered and as soon as possible.

In the days immediately after the ‘Rose Revolution’, Shevardnadze’s resignation was followed by those of his most trusted ministers and it soon became clear how the top posts were to be distributed amongst the leaders of the former opposition. On 26 November, acting President Nino Burjanadze announced that the National Movement and the bloc ‘Burjanadze-Democrats’ had agreed to support a single candidate, Mikheil Saakashvili, in the forthcoming presidential elections... Presidential

⁴⁰ Jonathan Wheatley “Georgia from National Awakening to Rose Revolution. Delayed Transition in the Former Soviet Union”, Ashgate 2005, p. p. 171-185

⁴¹ U. Preuss “Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution”, in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham and London: Duke University Press, 1994), p. 144

elections were held on 4 January. Saakashvili won 96.24 per cent of the vote.⁴²

So, the two main actors of the revolution stepped back and gave the room to the young leader Mikheil Saakashvili to become the President, but it was obvious that the authors of the revolution could not agree with the fact that one of them would become the figure with only responsibilities and not accountable to the others, especially when ‘the young reformers’ have continuously criticized Shevardnadze for the usurpation of the presidential power.

“As early as 29 January 2004, Mikheil Saakashvili argued that the Georgian constitution should be amended as to allow a complete overhaul of the entire system of governance. On 5 February, already as president, he urged legislators to pass the necessary constitutional changes as soon as possible”.⁴³

The declared reason for proposed amendments was to transform the existing governmental system into a new and more democratic one, while the “[r]evolution becomes a legal right only if it succeeds and transforms revolutionaries into founders”.⁴⁴

The Georgian revolutionary forces as well declared their aim to achieve the democratic government which they were fighting for. “The aim of the amendments is to change the system of government, replacing the present purely presidential system of the present Constitution by a semi-presidential system in accordance with the French model. This intention brings Georgia closer to the usual European practice and can only be welcomed. However, this intention has not been fully realised”.⁴⁵

⁴² Jonathan Wheatley “Georgia from National Awakening to Rose Revolution. Delayed Transition in the Former Soviet Union”, Ashgate 2005, p. p. 193-194

⁴³ *No Country for Old Men* http://www.esiweb.org/index.php?lang=en&id=322&debate_ID=3&slide_ID=12

⁴⁴ Walter F. Murphy ‘Constitutions, Constitutionalism, and Democracy’, ed. Douglas Greenberg and others ‘Constitutionalism and Democracy Transitions in the Contemporary World’, Oxford University Press, 1993, p. 9

⁴⁵ Opinion on the Draft Amendments to the Constitution of Georgia, European Commission for Democracy through Law (Venice Commission) [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)008-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)008-e.asp)

But what were the hidden intentions behind the declared aims and goals? How would the revolutionary forces divide the gained power among the three of them?

The question was still in force and none of them was going to limit his or her power. ““I am not going to be a President, who has no functions”, Saakashvili said on January 29...Nino Burjanadze, the Parliamentary Chairperson said on January 22 that she will not be a speaker of “weak Parliament”... State Minister Zurab Zhvania also said on January 28 that he supports the model, which will enable the executive authorities ‘to dissolve the inefficient parliament’”.⁴⁶

The will of ‘the three’ was to be clearly seen. All three of them were supporting the model which would give them enough power to rule and to be independent of one another. It was not ‘one team’ fighting for the holy goal any more. Saakashvili, Zhvania and Burjanadze were separately trying to grab the power. But they could not yet play independently. It seemed the semi-presidential model would be the remedy in this case.

Defining semi-presidential model G. Sartori emphasizes main characteristics of this kind of ‘mixed solution’. These characteristics are as follows: first - a popular elected president or, at a minimum, a president that is *not* elected in and by parliament, second – as this type of system is based on the power sharing principle, the presidential power must be shared with a prime minister and the last – a dual authority structure, a two-headed configuration between a president, the head of state, and a prime minister that heads the government.⁴⁷

⁴⁶ <http://civil.ge/eng/article.php?id=6140&search=Saakashvili>

⁴⁷ G. Sartori “Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes”, Houndmills: Macmillan Press 1994, p.p. 121-122

The semi-presidential system is in fact a parliamentary system with a double executive, President and Government, and the possibility for the President to arbitrate in case of a conflict between the Government and Parliament by means of dissolving parliament.⁴⁸

According to the amendments to the Constitution of Georgia in 2004 the President is the head of the state (article 69, paragraph 1) the head of the government is the Prime Minister, appointed by the President (articles 79, paragraph 1 and 73, paragraph 1, sentence b), which is responsible both before the President and the Parliament (article 79, paragraph 2). President is entitled to dismiss the government or so called ‘force ministers’ – the Minister of Internal Affairs, the Minister of Defense, the Minister of State Security (article 73, paragraph 1, sentence c). The President can dissolve the Parliament as well (article 73, paragraph 1, sentence o). Reasons when and why the Parliament can be dissolved are always connected with the appointment of the government. The government is responsible before the President and the Parliament (article 78, paragraph 1). The Prime Minister is entitled to appoint other members of the government. (article 79, paragraph 5). The resignation of the Prime Minister or the termination of his or her authority causes the collective responsibility and termination of the other members’ authority (article 79, paragraph 7). In case of appointing the new government the President shall submit the new composition of the government to the Parliament for the vote of confidence. In case if the composition of a new government or a governmental program cannot gain the vote of confidence from the Parliament three times in a row, the President is entitled to appoint the Prime Minister without the confidence vote, which appoints the ministers with the contest of President and in such case the President shall dissolve the Parliament. (article 80 paragraphs 2 and 5). The Parliament is entitled to declare non-confidence to the government and in this case again if the President does not agree with the Parliament he or she shall dissolve the Parliament (article 81, paragraph 1). The Prime

⁴⁸ Opinion on the Draft Amendments to the Constitution of Georgia, European Commission for Democracy through Law (Venice Commission) [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)008-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)008-e.asp)

Minister is entitled to put the question of confidence of the government on several draft laws and in case the Parliament does not declare confidence to the government and the draft at the same time, the President shall dismiss the government or dissolve the Parliament (article 81, paragraph 4). There are only four cases when the Parliament cannot be dissolved. These circumstances are: during the state of emergency, when the procedure of impeachment is held, within the first six months after the parliamentary elections and last six month of the President's term (article 51¹) in these cases and when the Parliament does not declare the vote of confidence to the government the President is entitled to appoint the Prime Minister and give his or her contest for appointing other ministers and within a month after the special circumstances re-submit the composition of the government to the Parliament (article 73, paragraph 1, sentence r).⁴⁹

The proposed amendments and the system itself look quite complicated. It is difficult to distinguish which post is more important and how the ruling power is really distributed among the President, the Head of the Parliament and the Prime Minister.

According to the opinion of European Commission for Democracy through Law (Venice Commission) expressed about the draft of the abovementioned amendments shortly before adopting them “the drafters seem torn between the main aim of the amendments, to increase the powers of the Government, and a desire to keep a very strong President. The system established by the proposed amendments does not seem fully coherent. On some occasions the President may ignore the clearly expressed will of the Parliament or interfere in governmental affairs, on other occasions Parliament has too much say as to the composition of Government”.⁵⁰

⁴⁹ The Law on Amending the Constitution of Georgia February 6, 2004
http://www.parliament.ge/index.php?lang_id=GEO&sec_id=69&kan_det=det&kan_id=1217
⁵⁰ [http://www.venice.coe.int/docs/2004/CDL\(2004\)004-e.asp](http://www.venice.coe.int/docs/2004/CDL(2004)004-e.asp)

The amendments were heavily criticized, especially the interaction of government and the Parliament.

Under the new system, the prime-minister – a newly created post in its own right – was to be appointed by the president. The power of the parliament was seriously curtailed. From now on, even parliamentary majorities could neither reject the president's choice of prime minister nor his proposed budget without risking the Parliament's dissolution (whereby the president could still impose his prime minister and his budget by decree). Even in cases where the Parliament adopted a vote of no confidence, the President could dissolve the legislature and retain his government. The so-called "power ministries" (interior and defence) were made directly subordinate to the president, not the prime minister.⁵¹

These events were evaluated and named by different political forces as 'raping the Constitution', but the ongoing processes in the country were still wrapped in the revolutionary covering and the critique was less heard.

Number of supporters and political leaders left the revolutionary camp and "criticized the amendments as undemocratic and slammed the new leaders for pushing private and party interests at the expense of state interests".⁵²

The Venice Commission was as well indicating on the problems the draft had, prior to its adoption. The main problem was the determination of the power of the President to dissolve the Parliament: In a semi-presidential system the Government is responsible to Parliament: this means that, if Parliament expresses its lack of confidence in the Government, the resignation of the Government cannot be left to the discretion of the President. By contrast, the President may in this case dissolve Parliament without being obliged to do so. If he does dissolve Parliament, the Government may remain in office to deal with day-to-day matters until the elections and must resign following these elections as provided in the new Article 80.1. If there is a conflict

⁵¹ *No Country for Old Men* http://www.esiweb.org/index.php?lang=en&id=322&debate_ID=3&slide_ID=12

⁵² Jonathan Wheatley "Georgia from National Awakening to Rose Revolution. Delayed Transition in the Former Soviet Union", Ashgate 2005, p. 194

between Government and Parliament, the President may dissolve Parliament; this is a right of the President and not an obligation. He may exercise this right according to his discretion (as in the French Constitution), or if the Government fails to get the confidence of Parliament three times (as provided for in the new Art. 80.6).⁵³

Despite the critique and remarks “[p]arliament approved them with almost no debate. By the time renewed parliamentary elections arrived in March 2004, Georgia had a super-presidential system”.⁵⁴ Officially the new model was declared as the semi-presidential one, but “[t]he proposed Amendments do not really correspond to this model but often retain stronger powers for the President”⁵⁵ who appoints the Prime Minister on one hand while controlling the main force of his cabinet – the so called ‘power ministers’ and on the other hand has all the instruments to dissolve the Parliament in case his or her favored cabinet or draft is not passed.

As a typical feature for all modern revolutions U. Preuss names the transformation of revolutionary forces into parties willing to use revolution as a “device which guarantees the permanent rule of revolutionary elites”⁵⁶ and it happened in the Georgian case as well “[t]hese amendments provoked criticism... for apparently tailoring the Constitution for three individuals: Saakashvili, Zhvania and Burjanadze”.⁵⁷ All three actors were declaring their

⁵³ Opinion on the Draft Amendments to the Constitution of Georgia, European Commission for Democracy through Law (Venice Commission) [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)008-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)008-e.asp)

⁵⁴ *No Country for Old Men* http://www.esiweb.org/index.php?lang=en&id=322&debate_ID=3&slide_ID=12

⁵⁵ Opinion on the Draft Amendments to the Constitution of Georgia, European Commission for Democracy through Law (Venice Commission) [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)008-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)008-e.asp)

⁵⁶ U. Preuss “Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution”, in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham and London: Duke University Press, 1994), p. 145

⁵⁷ Jonathan Wheatley “Georgia from National Awakening to Rose Revolution. Delayed Transition in the Former Soviet Union”, Ashgate 2005, p. 194

will to be the powerful leader, but finally “[i]n Saakashvili's Georgia the presidential office was to be the absolute centre of power – even more so than under Shevardnadze”.⁵⁸

Chapter 6: After war or after crisis? Causes of Assigning Constitutional Commission and Its Work

In the following chapter *Causes of assigning constitutional commission and its work* I will concentrate on political disorder taking place in Georgia from 2007 increased after the war in 2008 and ended with political crisis in 2009 with thousands of people in the streets of Georgia and main streets blocked for 100 days, considering abovementioned as main cause of assigning constitutional commission working on new amendments to the Constitution of Georgia. For the current amendments and drafts I will analyze the official documents given on official web-page of national constitutional commission⁵⁹ (including the drafts applied to the commission from NGOs or alternative public constitutional commission) to offer the probable picture we may observe in Georgia after adoption of these amendments. Comparing the main differences between the drafts I will receive the whole picture which amendments to expect, but the main issue here to me seems the draft of National Constitutional Commission itself while it acts on behalf of authorities in charge and their opinion could be discussed in terms of state policy in this field and could answer one of main questions in constitutionalism: who is the constitution-making/creating authority? And how does the nature of this authority relate to the level of democracy in the country and tendencies observed in the particular field of my current interest.

⁵⁸ *No Country for Old Men* http://www.esiweb.org/index.php?lang=en&id=322&debate_ID=3&slide_ID=12

⁵⁹ <http://constcommis.gov.ge/?&lng=eng&lng=eng&lng=geo>

The first real critical and most significant movements against the government in Georgia began in four years after the 'Rose Revolution'. November was politically hot in 2007 in Georgia. In the capital of the country, Tbilisi opposition mobilized more than 50 000 protesting people, asking for parliamentary elections. On 7th of November, on the fifth day of permanent protest the Georgian government used force against demonstrators and "riot police broke up opposition protests in central Tbilisi...police had used water cannon, tear gas and batons to break up opposition protests outside parliament"⁶⁰. In the evening of the same day these events were followed by police entering private TV station "Imedi" "Later that evening, hundreds of special forces troops armed with machine guns and other weapons entered the Imedi television studios. They forced journalists and other staff members to the floor and pointed guns at their heads. They forced Imedi off the air, after news anchors managed to describe the raid to viewers in the final minutes of broadcasting"⁶¹ and later Prime-minister declaring state of emergency. "Imedi TV... stopped broadcasting on Wednesday, after riot police entered its premises"⁶². These events were widely discussed by international media as well as international organizations - "It's high time for the US and EU to confront Georgia on its shaky human rights record and insist on accountability for the November 7 events."⁶³ The President had to find the solution and outcome from created critical situation and "Saakashvili appeared to offer a concession to his political opponents. He announced he would schedule early presidential elections, moving his vote from next autumn to January 5, 2008. In addition he said there would be a parallel referendum to ask the public whether they would prefer subsequent

⁶⁰ Article "Georgia under State of Emergency", <http://news.bbc.co.uk/2/hi/europe/7083911.stm>

⁶¹ "Georgia: Government Used Excessive Force on Protesters", December 17, 2007, <http://www.hrw.org/en/news/2007/12/17/georgia-government-used-excessive-force-protesters>

⁶² Article "Georgia under State of Emergency", <http://news.bbc.co.uk/2/hi/europe/7083911.stm>

⁶³ Holly Cartner, Europe and Central Asia director at Human Rights Watch, <http://www.hrw.org/en/news/2007/12/17/georgia-government-used-excessive-force-protesters>

parliamentary polls to be held in fall as scheduled or spring next year, as protesters had demanded”.⁶⁴

Both presidential elections in January and the parliamentary one in May 2008 were won by Mikheil Saakashvili and his National Movement. The most significant about these elections is the fact that in the parliamentary elections the National Movement gathered seats enough for competent majority for amending the Constitution. Citizens of the country and especially its capital - Tbilisi were protesting the elections, but both elections were recognized as valid by the international community.

But the most vital was the problem with Georgia's territorial integrity, which was the main message of President Saakashvili's campaigns as well as his public speeches. And, in fact, the so called 'frozen conflicts' began to melt but not in a way Georgia would favor.

In August 2008 critical situation in Tskhinvali Region, so called South Ossetia, matured since 1990-s burst into the war between Russia and Georgia. In this '5 day war' Georgia lost more than hundreds of Georgian villages, almost up to 20% of the whole territory, received 26 000 refugees, Russian armed forces dislocated in 40 kilometers from the capital not only in the zones of conflict but in so called 'buffer zones' – neighboring villages beyond Abkhazian and Tskhinvalian administrative borders, which have never been involved in conflicts themselves. In late August 2008 Russia officially recognized the independence of Abkhazia and South Ossetia.

In early spring 2009 the Georgian opposition declared the preparation for the critical phase. The symbolic date April 9 was chosen. Opposition mobilized tens of thousands of their supporters. They demanded resignation of the President Saakashvili. The government had the lesson of November 2007, so they would not use armed forces and police riots against the

⁶⁴ Claire Bigg and Daisy Sindelar “Georgia: After Crackdown on Protests, President Calls Early Polls”
<http://www.rferl.org/content/article/1079100.html>

protesters. The government chose a role 'not to pay attention'. Main stream of the protest was in front of the building of the Parliament of Georgia, but protesters tried to bloc entrances of main administrative buildings of the country. In answer to this the Parliament and Government of Georgia began to gather in different cities, parliamentary committees were working in the buildings of various Ministries. The protest continued for more than three months, 100 days. Two main avenues of the capital were blocked, administrative institutions were not functioning properly, but the government was pretending as if nothing was going on. This tactic gained its fruit. Less and less people were turning out in the streets.

Meanwhile international community was insisting on the necessity of dialogue between the parties. The main consequence of this dialogue was the proposal and promise of President Saakashvili to create the commission working on amending the Constitution of Georgia.

On June 8, 2009 President Saakashvili issued an order creating the National Constitutional Commission⁶⁵ and determining the composition of the Commission. The act itself and the future work of the Commission seemed problematic. First of all the order has no descriptive part which would emphasize the reasons of creating the Commission – the political crisis it followed and the international obligations requiring balanced interaction of different branches of the government. Deadline for adoption of the amendments is not determined, which gives room for doubts whether this constitutional amendments will be adopted till the end of President Saakashvili's presidency or not. Also, there seems not to be any kind of guarantee for any draft to be adopted, even if it will be supported by plebiscite (as it was declared). The composition of the Commission was questioned as well, while the opposition initially refused

⁶⁵ <http://constcommis.gov.ge/index.php?do=resource/view&id=5&lng=geo>

to participate in the work of Commission and the threat of unbalanced or controlled Commission was quite tangible.⁶⁶

The same threat is indicated in Professor Wolfgang Babeck's conclusion: "National Constitutional Commission should not be manipulated by other forces of the country – no matters the Parliament or the Government – to dismiss their arguments without commenting it properly".⁶⁷

The Commission is divided into nine different working groups, working on various articles and chapters of the Constitution. After the long and hard work the National Constitutional Commission summarized main drafts. First of which is the draft of the Commission itself, authored by the Head of the Commission – constitutionalist Avtandil Demetrashvili. The second draft is proposed by the NGO 'Liberty Institute', known as an ideological base and supporter of the current government. Unexpectedly, before the main debates about the drafts had begun, one of the members of the Commission - official of the Ministry of Justice of Georgia proposed the third draft. At the same time the alternative public commission is as well working on a new draft.

After analyzing the immediate political situation before assigning the National Constitutional Commission, I will give an overview of each draft proposed.

The first draft i.e. Demetrashvili draft offers a 'hybrid' model of governance which is a 'semi-presidential model, where elements of parliamentary model prevail'.⁶⁸ According to this draft the Government is formed by the Parliament and the President is distanced from the executive. Head of the Government is the Prime Minister. The Government is the supreme

⁶⁶ Tengiz Pkhaldze "The National Constitutional Commission – outcome from the crisis, or...?" <http://www.icgs.ge/saxelmcifo-sakonstitucio-komisija.html>

⁶⁷ The Conclusion of Professor Wolfgang Babeck <http://constcommis.gov.ge/uploads/files/daskvna%20babeki.pdf>

⁶⁸ <http://www.tavisupleba.org/content/article/2038596.html>

organ of the executive branch and is accountable before the Parliament. Any legal act issued by the President should be countersigned by the Prime Minister and the Government becomes responsible for these legal acts. In cases of crisis, when a conflict between the Parliament and the Government arises the President is entitled to dissolve the Parliament or dismiss the Government. Parliament had the right to begin the procedure of impeachment against the President or other state officials. The Parliament has left the mechanism of declaring vote of confidence or non-confidence to the government according to the procedure prescribed in the Constitution.⁶⁹

This draft was evaluated by the Constitutionalist Professor of Humboldt University Wolfgang Babeck, who submitted his conclusion to the Commission. Main recommendation for the National Commission is to discuss some constitutional instruments in details in order to ensure the balance among different branches of the government. These instruments among others should be: impeachment, right to dissolve the Parliament, procedure to declare non-confidence.⁷⁰

The 'Liberty Institute', represented by Levan Ramishvili, offered not a draft of amendments and changes to the existing Constitution of Georgia but a draft of a new Constitution, based on an U.S. model and according to which Georgia should become a federal, presidential state. In this model the President is a unanimous, governor. The legislative branch is represented with the two-chamber Parliament. The executive branch is represented by the President, the Governor and the Major and is strictly vertical.⁷¹ The head of the Commission was arguing

⁶⁹ <http://constcommis.gov.ge/uploads/files/konstitucia%20-%20cvlilebebi.pdf>

⁷⁰ The Conclusion of Professor Wolfgang Babeck
<http://constcommis.gov.ge/uploads/files/daskvna%20babeki.pdf>

⁷¹ <http://constcommis.gov.ge/uploads/files/Levan%20Ramishvili.pdf>

that proposing the draft of a new Constitution was against the President's order and it had no perspective,⁷² but this draft was still presented for the voting.

The third, so called unexpected draft, named after the authors as Gonashvili-Bodzashvili draft, offers presidential model of the governance. According to this draft the President is the head of the state and the government as well. The President is not entitled to dissolve the Parliament and the Parliament on the other hand has no control on the Government, which is headed and controlled by the President. The Government is accountable only before the President. The chapter concerning Government is abolished. The President executes his responsibilities together with the Vice President who is elected together with the President on the same bases and with the same term. He or she is also entitled to exercises President's responsibilities in case of earlier termination of President's term. It is also interesting that a person can be elected as a Vice President only two times in a row and as a President also two times in a row, except the case when he or she was exercising the President's responsibilities for more than two years.⁷³

The alternative commission, also called as a public commission is working on the draft according to which Georgia will become a parliamentary republic. The Commission was created on the public bases month prior to the National Commission. On their official web-page it is declared that ongoing political crisis (spring 2009) was a consequence of the amendments made to the Constitution of Georgia in 2004, so group of lawyers decided to work on the draft of the Constitution of Georgia in order to reach the balance among different branches of the government.⁷⁴

⁷² http://www.resonancedaily.com/index.php?id_rub=2&id_artc=1436

⁷³ <http://constcommis.gov.ge/uploads/files/proeqti%20bodzashvili%20gonashvili.pdf>

⁷⁴ http://konstitucia.ge/index.php?option=com_content&view=category&layout=blog&id=44&Itemid=94&lang=ka

The Alternative Commissions concept is based on assumption according to the twenty year experience of Georgia that presidential or semi-presidential model in the country with civil society is weak and the social-economic situation – heavy, will always end up with the political crisis and be the eternal source of destabilization. The Commission supports the parliamentary model in which the Parliament is the supreme representative organ of the state and the Government – the executive one. The President is the Head of the State, detached from both branches and acting as an arbiter between them. He or she should be elected on the basis of indirect elections by the qualified majority of the Parliament. The President is not allowed to be a member of any political party. He or she should be politically neutral. Any legal act signed by the President should be countersigned. On the other hand the President is entitled to the suspensive veto right. Head of the Government is the Prime Minister, elected by the Parliament. The Government is accountable before the Parliament. The vote of non-confidence is limited to one for the Members of the Parliament. The President has the right to dissolve the Parliament and the Parliament has the right to impeach the President. According to this concept the Parliament of Georgia should consist of one Chamber.⁷⁵

This is the short overview of the available drafts of amendments to the Constitution of Georgia and the draft of a new Constitution itself. In this overview I tried to concentrate on and highlight the main points concerning the government model and distribution of authority between the executive and legislative branches of the government. As we have seen the main picture looks like two drafts tend to support the stronger President, one of which is a new Constitution itself and two of them supporting stronger Parliament (the only main difference between these last two drafts is the mechanism of electing the President).

⁷⁵ <http://konstitucia.ge/index.php?lang=en>

On May 11, 2010 the National Constitutional Commission voted and with 31 voices out of 41 chose the so called Demetrashvili draft as the basic document to be polished and proposed to the Parliament.

The Alternative Public Commission is going to gather the citizens' signatures in order to initiate their draft on public basis.

Chapter 7: General Assumptions about the 'New Constitution' of Georgia

In the chapter *General assumptions about the 'new Constitution' of Georgia* I will underline the probable outcomes of using constitution as political tool in the concrete case for overlapping political crisis or effort of present government to keep the power by changing governmental model, for instance, while “[t]he pressure to disguise self-interest as public interest will be stronger when the process is under public scrutiny”.⁷⁶ Here I will discuss all available materials about the ongoing constitution-making process. In the pre-concluding part I will try to make predictions about what challenges the Georgian constitutional history or even democracy faces today and on the basis of all discussed in previous chapters how it can be reflected in the constitution.

As Jon Elster concludes, while judging the forces and mechanisms of the constitution-making, “two basic paradoxes of constitution-making [are]... The first paradox arises from the fact that the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making... The second paradox stems from the fact that public will to make major constitutional change is unlikely to be present unless a crisis is

⁷⁶ Jon Elster, Claus Offe, and Ulrich K. Preuss *Institutional Design in Post-communist Societies – Rebuilding the Ship at Sea*, Cambridge University Press, 1998, p. 77

impending”.⁷⁷ The first one is a more general claim and is related to the nature of the Constitution itself. The second one, as we have seen, is significant to almost all constitutions in the universe.

As we have seen from the previous chapters in the Georgian case the second paradox took place and the assignation of the National Constitutional Commission as well as formation of the public will to create the so called Alternative Commission⁷⁸ was in a close relationship and immediate consequence of the emerged political crisis.

It is interesting to pay attention to one thing - At the first glance the political crisis in 2009 was the ‘normal’ background and pre-condition known in theory of the constitution-making process for initiating Constitutional amendments, but only if we look at this situation without context. In the short historical context it seems weird and vague what was the hidden impulse to assign the Constitutional Commission, while after police riot of the peaceful demonstrators and taking an independent TV station off the air in 2007 the protesting impulse was far higher in the citizens of Georgia, but the President did not initiate the Constitutional amendments in order to balance the situation. These events were followed by the war in less than a year. Georgia faced the threat of losing independence, the capital was under attack, hundreds of villages were lost and tens of thousands of refugees added to those, still having no own property after the armed conflict in Abkhazia and Tskhinvali Region in early 1990s. The lost war was added to the political unstable situation and if any kind of remedy could be found it had to be found, but the Constitutional amendments were not even mentioned.

Of course, the idealistic attitude that the approaching end of President Saakashvili’s second term of presidency has to do nothing with abovementioned decision and it is only taken as the

⁷⁷ Jon Elster “Forces and Mechanisms in the Constitution-making Process”, *Duke Law Review*, Vol. 45, 1995-1996, p. 394

⁷⁸ I refer to the Alternative Commission ‘so called’, while in fact it was the first commission created in order to amend the Constitution, but after assigning the National Constitutional Commission it became the alternative one.

very last step in order to balance the emerged situation with the opposition, is as well valid. But I choose to offer a slightly different view of how Saakashvili's personal interests can be reflected in the currently ongoing constitution-making process.

As I have already analyzed and mentioned the Constitution of Georgia being in force today, although it was claimed to put limitations to the presidential authority, in some aspects gives the central role to the President which can assign the Prime Minister and dissolve the Parliament if his candidate is not elected and manipulate with the Prime Minister himself or herself by having under personal control – unanimously dismissing the so called ‘force Ministers’ i.e. Minister of Defense, Minister of Internal Affairs and Minister of Justice.⁷⁹ The President has the mechanism to control the Parliament's legislative activity with putting the issue of confidence for the Government together with the draft, which is more likely to fail. In this case, the Parliament, willing to fail the draft has to give the vote of non-confidence to the Government and hereby face the threat of being dissolved.

If we follow the line of this analyzes, after 2013, when the second term of presidency for Mikheil Saakashvili ends, a young, energetic, charismatic politician and leader has to step back from the politics, while he cannot be elected as a first person of the country, as a Prime Minister he will always be under control of the ‘created for himself’ President and as a party leader he can become the Head of the Parliament, which is always under the threat to be dissolved.

He might not want to step down.

What do the proposed drafts offer him? The official draft, which is chosen as a basic document of National Constitutional Commission limits the authority of the President in the Constitution of Georgia and balances it with stronger Prime Minister as an absolutely

⁷⁹ Which according to the amendments made to the Constitution in 10.10.2008 is the Prosecutor General as well (see <http://constcommis.gov.ge/index.php?do=menu&id=5>)

independent head of the executive branch. The author has principle position about his draft and two days before the ballot was considering stepping down from the post of the head of the Commission in case his draft was not supported. Of course, the scholar refuses to have tailed the draft on personalities and his main argument is that he supported the same model and position in 1993-1995 when the Constitution of Georgia was being prepared.⁸⁰ And indeed, his position was clear from the beginning, when he was assigned as the Head of the National Constitutional Commission and very easy to foresee. This draft will be discussed by the Parliament.

At the first glance, the 'Liberty Institute' draft is unprofitable for the current President, while it supports the strong President and Saakashvili has no other opportunity to be elected as a President, but if this draft, which is the draft of a new Constitution and not amendments will be adopted it will bring the new system of chronology and if will not be prescribed in addition, any person will be able to ballot himself or herself as a President, regardless to his or her previous terms.

The third draft, so called Gonashvili-Bodzashvili draft is claimed to support the balanced system and divides the authority of the President with the Vice President, who can be elected as a Vice President twice, with the President for 5 years each term and twice after, as a President, again for 5 years each term. This model much looks like the current Russian political order, when the ex-president Putin became a powerful Prime Minister. Saakashvili might desire to run the same scenario in Georgia and become the Vice President if this draft is supported. This draft has chance to be initiated from the executive branch as one of the authors is the official in the Ministry of Justice of Georgia.⁸¹

⁸⁰ The interview with Avtandil Demetrashvili <http://www.tavisupleba.org/content/article/2033176.html>

⁸¹ <http://constcommis.gov.ge/index.php?do=static&mid=29&lng=eng&lng=geo>

It seems that less favorable draft in this case would be the alternative one – proposing the parliamentary model. Of course, one can follow my own logic and claim about Saakashvili's interest in stronger Parliament in order to stay in the Georgian politics as a party leader, but it seems unreasonable to me from the person guided by the interests to become a unanimous leader as it was proved with the 2004 amendments.

Taking into the consideration the fact that Mikheil Saakashvili's political party National Movement has the competent majority for amending the Constitution in the Parliament I can only predict that any of the three drafts favored by the President will be adopted. It is only the question of technique, which one will be chosen.

Conclusion

As we have seen while discussing the Georgian case, almost all the events known as a political background for beginning the constitution-making process were present at different times. The very first Constitution, which is not fully discussed in my research, was created in 1921 after transforming the country into a state, after gaining independence from the Russian empire (in 1918). During the 70 years of the Soviet regime, the constitution-making process was not significant and characteristic of the Georgian politics. It was the Soviet constitution-making politics dictated to each member country without any kind of distinction.

The first Constitution after the Soviet era was adopted in August 1995. As a political background for this Constitution there is the fall of the regime as well as three civil wars and the political crisis in 1991-1995. In that period the political figure– Eduard Shevardnadze was invited to Georgia to become the head of the state. He was openly supporting the presidential system of governance and did his best to adopt this type of the Constitution.

Fundamental amendments to the Constitution of Georgia were made in 2004 after the so called ‘Rose Revolution’ and as it is significant to every revolution, revolutionary forces divided the power. The problem was that the main actors of the Georgian Velvet Revolution were three: Mikheil Saakashvili, Zurab Zhvania and Nino Burjanadze and the highest official posts according to the Constitution of Georgia were two – the Head of the Parliament and the Head of the State being the Head of the Government at the same time. According to the 2004 amendments, Georgia switched to the semi-presidential model, where the executive power is divided into two: the Head of the State and the Head of the Government. Hereby, Mikheil Saakashvili became the Head of the State, Nino Burjanadze – the Head of the Parliament and Zurab Zhvania – the Head of the Government, the first Prime Minister of Georgia.

Since 2007 Georgia has faced several waves of political crisis and war and the global financial crisis is to be taken into consideration which in addition to the war had affected the Georgian economy quite strongly. Consequently, there was more than one reason serving as the political background for assigning the National Constitutional Commission in 2009, but according to the analyze of the offered drafts, as the immediate reason for ongoing events I would choose the fear of regime collapse from Jon Elster’s classification⁸².

So, according to the theoretical framework the following political backgrounds were observed in the Georgian case: creation of a new state, regime collapse, political crisis, revolution and social and economic crisis, war and fear of regime collapse at the same time.

Now, how shall I answer my initial question - do the agencies matter in the constitution-making process and how do the political actors influence this process. According to the hypothesis I offered in the beginning of the research, political actors have a great and direct influence on the constitution-making process in Georgia. After researching three main phases

⁸² Jon Elster “Forces and Mechanisms in the Constitution-making Process”, Duke Law Review, Vol. 45, 1995-1996, p. p. 368-373

of the constitution-making in Georgia - 1995, 2004, 2010 and analyzing concrete articles of the Constitution concerning the separation of powers between the executive and legislative branches or among the executive branch itself, I can conclude that each model adopted was directly reflecting the immediate political background and the interests of actors being present on the political arena. It happened in 1995 when Shevardnadze's interests created the presidential model of governance, in 2004 – when the revolutionary triple had to distribute the power among themselves and is likely to happen in 2010 (or later, as the deadline for the adoption of the draft is not declared), when the acting President is facing the political retirement and tries to avoid it.

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⁸³ All the internet sources are last checked on 02.06.2010
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