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THE MECHANISM FOR REVISING THE CONSTITUTION OF GEORGIA AND THE CONSTITUTIONAL REFORM OF 2017

ABSTRACT

The purpose of the discussion in the present paper was to assess the dependence of the reform of the Constitution of Georgia regarding the Constitution Revision mechanism. The study revealed the main positive and negative trends that characterize the new mechanism for revising the basic act.

Within the scope of the research, the new method of revising the constitution was evaluated in the retrospective context, which led to the conclusion that the mechanism of revision of the constitution becomes more robust. The research assessed positive and negative sides of the Scandinavian model selected for the revision of the constitution and the conclusion indicated that the Scandinavian, quasi-referendum model may have a lot of negative characteristics, but as an expression of direct democracy and an important mechanism of stability was recognized as a positive step in the final assessment. Also, critical assessment was made on the revision and accelerated mechanism of adoption of the Constitution, which in fact opposed the existence of a Scandinavian model.

The paper discusses the attitude of the constitution revision mechanism to the constitutional control and the perspective of existence of entrenched clauses, which resulted in specific recommendations and tools for their implementation in the Constitution of Georgia. The paper also expresses the views on the better formation of several procedural issues in revising the constitution.

Finally, the constitutional reform of the 2017 regarding the constitutional revision should be assessed as a step forward, but it must be noted that there are important shortcomings in the existing mechanism and it is impossible to say that the mechanism of revision of the Constitution of Georgia is perfect and flawless.

1. INTRODUCTION

The mechanism for constitutional revision is the key to interpreting the constitution and correct regulation of it is highly significant for efficiency of the constitution and the political life of the country. In 2017, a reform of the Georgian constitution was carried out, which

substantially covered the constitution revision rules, as a result of which a completely new mechanism was established.

The aim of the present paper is to discuss and assess the constitution revision mechanism formed by the 2017 reform. Within the scope of this research, we will touch upon the relation of the constitution revision mechanism with the existence of entrenched clauses, the possibility of constitutional control in the process of revision, the circle of constitution revision initiators; we will also discuss the attitude of the reform towards the issues of partial and general revision, constitution revision dates, positive and negative aspects of the beginnings of the new model of constitution revision; we will, moreover, look into some procedural issues of the constitution revision model, correct development of which has high significance for the final efficiency of the new method.

Consideration of the issues listed in the above paragraph will help us assess the effectiveness of the new constitution revision mechanism established as a result of the 2017 constitutional reform and, also, reveal positive and negative sides of this mechanism.

The paper utilizes the following research methods – descriptive, comparative, analytic, systemic, logical analysis, statistical and historical methods. The paper, alongside the analysis of legal norms, relies on the historical experience of the country and examples from global practice.

2. National Experience of Constitution Revision Mechanisms

It is necessary to refer briefly to the national experience of revising the Constitution of Georgia, whose general and descriptive review will clearly demonstrate the government's aspirations, wishes and the challenges Georgian legislator faces. A brief overview will illustrate the diagram of the constitution revision, which varies between the hard and flexible revision.

The Georgian Act of Independence is considered the starting and founding document of Georgian constitutionalism, though it did not contain the rules and conditions for adoption of the constitution. The Rules of the Founding Council did not provide for the adoption of the Constitution, either.[1] In 1920 the founding council adopted "The Rule of the Constitutional Review".[2] According to this Rule, the constitution should have been adopted by the Founding Council itself (the Founding Council was the subject that presented the constitutional draft), first the basic grounds of the constitution were discussed, next the Council moved on to chapter review, after the successful completion of which, the Constitution was moved for

[1] M Matsaberidze, *The 1921 Constitution of Georgia, Development and Adoption Thereof* (Part 2 Political Science Institute Press 1993) 2.
[2] V Sharashenidze (ed.), The Rules adopted by the Founding Council of Georgia on 16 November 1920 on Consideration of the Constitution, Collection of Legal Acts of the Democratic Republic of Georgia 1918-1921 (Publishing House Iverta Mkhare 1990) 442.

a vote.[3] During the adoption of the Constitution of 1921, the idea of adoption of the first Constitution through referendum was actively discussed (moreover, article 147 of the Constitution of 1921 envisaged the rule of the constitution revision by referendum), however, the expected Soviet occupation suppressed this desire, as it was evident that no referendum could be held in the country at war.[4] In spite of such a force majeure, the Georgian nation still managed to create a constitution that became a step forward in the legal and state thinking of the world.[5]

When considering the revision mechanism of the 1921 Constitution, the legislator chose a hard model of revision,[6] according to which half of the MPs and 50,000 voters were subjects for revising the Constitution.[7] Revision was made by a 2/3 majority of the Members of Parliament and the prerequisite of its implementation was to approve the amendments by a referendum.[8] The six-month deadline was set for the commencement of consideration of the revision, which meant that within six months of the initiative, the legislator should have thought about constitutional amendments.[9] The 1921 edition of the Constitution did not envisage a special rule for the adoption of a new constitution, although the text of the basic law was familiar with the "general and partial revision concepts".[10]

In the adoption of the Constitution of 1995, Georgian legislator chose a simple mechanism for revising the Constitution in which the initiators were President, more than half of the total number of MPs and 200,000 voters.[11] The initiative was supposed to be taken to the general public discussion and would be considered adopted if two-third of the Parliament supported it.[12] The reform of 2004 did not handle this article, but the next two constitutional reforms did. In 2010, the constitutional revision mechanism became relatively stable, the president left the circle of initiators of revision and the support of the three-quarters of the full parliament on two consecutive sessions with three months interval between them became necessary. Public involvement in the adoption of the constitution remained the same.[13] As a result of the reform of 2017, the text of basic law enhanced the involvement of the people

[3] Varshanidze, (n 2) 443.
[4] Matsaberidze (n 1) 32.
[5] T Nemsitsveridze and Z Kordzadze, Legal Discussions and Adoption of the Constitution of 1921, Chronicles of Georgian Constitutionalism (Zviad Kordzadze Publishing 2016) 12.
[6] T Papashvili and D Gegenava, The Georgian Model of Revision of the Constitution - Deficiencies of Normative Regulation and Perspectives (Publishing of David Batonishvili Institute of Law 2015) 17.
[7] Article 145, paragraphs "a" and "b", the Constitution of Georgia of 21 February 1921.
[8] ibid article 147.
[9] ibid article 146.
[10] ibid article 145.
[11] G Davituri, 'Mechanism for Revision of the Constitution of Georgia in 1921 - Perspectives of Constitutional Reform', in Collection of Articles Democratic Republic of Georgia and the 1921 Constitution (Publishing House of David Batonishvili Institute of Law 2010) 161.
[12] Article 102, the Constitution of Georgia, Legislative Herald of Georgia, original edition of 24.08.1995, Legislative Herald of Georgia.
[13] ibid article 105, edition as a result of 15.10.2010 Constitutional Reform.

and a quasi-referendum model emerged, according to which the amendments initiated during one parliament cohort would require approval by the next one.[14]

The above review of the experiments of the creation of the National Constitution clearly indicates that the Georgian legislator appraises gradually the relevance of sustainability and stability of the Constitution and progressively returns to the hard model of the Constitution revision adopted by the Founding Council of 1921.[15] The constitutional amendments of 2010 and 2017 on the revision of constitution indicate precisely this. We move towards a stricter procedure for constitutional revision and towards a higher engagement of the people. Our goal is to analyze these trends and the norms proposed by the new regulation.

3. ENTRENCHED CLAUSES FORGOTTEN BY THE CONSTITUTIONAL REFORM

None of the "waves" of the Georgian Constitution reforms have handled the issue of the permanence of constitutional norms and the internal hierarchy of the Constitution, also rejected by the Constitution reform of 2017.

The entrenched clauses in world constitutionalism are a common practice (Japan, Germany, Greece, Italy, Armenia),[16] the most striking example of which is the Japanese Constitution, in which the public sovereignty, basic rights and pacifism cannot be modified by constitutional amendments.[17] Granting the immunity against amendments to the constitutional provisions for the protection of democratic governance and human dignity is even more widespread.[18]

Entrenched clauses, in “world constitutional chest”,[19] are not a homogeneous experience, many researchers favor their existence, and many are against it. The following main arguments are on the side of such clauses: 1. the basic principles of the Constitution (which are usually assigned the immunity of permanence) must endure generations and there will be no need to change them; 2. the unalterable provisions envisage "hermetic protection", thus avoiding violations of certain basic constitutional principles by "temporary" majority." “Therefore, they reflect the idea that the identity of the nation and the constitutional narrative should not be subject to the capital of the majority";[20] 3. The creators of the Constitution

[14] Constitution of Georgia (n 12), article 77, edition as a result of 13.10.2017 Constitutional Reform.
[15] See B Kantaria, Fundamental Principles of Constitution and Legal Nature of the Form of Administration in the First Georgian Constitution (Publishing House Justice 2013) 333.
[16] Papashvili and Gegenava (n 6) 84.
[17] The Constitution of Japan, available here: <https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html> accessed on March 13, 2018.
[18] Y Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers (London School of Economics and Political Science, LSE Press 2014) 23.
[19] A Sajo, *Limiting Government: An Introduction to Constitutionalism*, Georgian translation by M Maisuradze, T Ninidze (ed) (Sezanne Print 2003) 19.
[20] Sh Weintal, *'Eternity Clauses' in a Constitution: The Strict Normative Standard in Operating the 'Constituent Power'* (LL.D Thesis, Supervisor: Prof. Eyal Benvenisti, Faculty of Law, Tel-Aviv University. 2005) 28.

shall establish such constitutional provisions, which will ensure the continuity of the state tradition and culture and will be protected from harm by the ordinary, daily political processes.[21] In favor of these arguments, we must add that the Constitution, as the core document of the values of society and nation, should necessarily contain values that will never be revised (because society and state are built around solid values),[22] in the Constitution, just like in humans, there are certain concepts that have not changed since the earliest consciousness of human beings and are not likely to change. Consequently, such high-end values must have the immunity of constant status granted at the level of the Constitution which will not be revised. In addition, we should definitely consider one fact - a major challenge to contemporary constitutionalism is the self-restraint of the government, and in the 21st century, the main purpose and task of the legal, democratic (i.e. self-restricted) state is to protect the minority from the vast majority. In carrying out this goal, the entrenched provisions of the Constitution will certainly be able to tame the majority and protect the rights of minorities. There is also an argument under which the eternal clauses and hard revision should protect the constitution from the populist political forces and the good example of this (from the point of view of hard revision) is the United States.[23]

Against the arguments contained in the previous paragraph, there is an argument of self-determination of generations, according to which one generation adopting the Constitution should not restrict subsequent generations from the possibility to revise it. The previous generation should not force further generations to change the regulatory arrangement established by its entrenched clauses through the revolution. Through the revolution, which will not be subject to any sanction and will create new order. Under this argument, future generations should not be forced into the revolutions, directed towards denying constant legal principles.[24] The constitution can take into account the constant provisions of the constitution, but the people (future generation) still retains the right to final decision. The example of revolutionary constitutions also shows that restrictions on the creation of people's constitutions in the pre-set legal order are not efficient.[25]

"The advantage of entrenched provisions lies in the so-called 'beacon' function - to indicate the direction of the amendments after the adoption of the Constitution. The guarantees of permanence are a type of assessment measures that ensure the stability of constitutional values and do not allow the ruling majority to substantially change the social contract. This

[21] CR Sunstein, 'Constitutionalism, Prosperity, Democracy' [1991] 2 Constitutional Political Economy 371, 385.
[22] An entrenched clause can be revised in case of destruction of a specific political order, e.g. the big revolutions resulted in the people rejecting the current political order and the document regulating this order - the constitution.
[23] A Hamilton, 'Paper N15' in *Federalist Papers* (01.12.1787), for Georgian see <http://federalistpapers.ge/index.php> accessed on September 10, 2018.
[24] F Mélin-Soucramanien and P Pactet, *Droit Constitutionnel* (28th edn), Georgian Translation by G Kalatozishvili, scientific edition by A Demetrashvili (Tbilisi State University Press 2014) 104.
[25] A Sajo and C Klein, 'Constitution Making: Process and Substance' in A Sajo and M Rosenfeld (eds.) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

is not a problem for responding to the challenges of social progress, since such changes require centuries, necessitating the amendments to the foundational principles."[26]

From the above-mentioned, we claim that in the framework of the Constitutional Reform of 2017, relevant persons should have thought about the entrenched clauses, particularly the Preamble to the Constitution of Georgia and paragraph 2 of article 1, which states that "[t]he political structure of the State of Georgia is a democratic republic" and about granting the immunity of permanence to article 17 of the Constitution (human honor and dignity shall be inviolable). I believe that the constitutional principles should be granted the immunity of stability, by which they will become the so-called "beacon" for further revision of the constitution.

In the framework of the 2017 reform, the reason for rejecting this approach should be the fact that the entrenched clauses are a kind of incitement to constitutional control over the constitutional provisions and the 2017 reform is obviously against the latter.

4. CONSTITUTIONAL CONTROL AND CONSTITUTIONAL REVISION

There is always a dilemma within the constitutional control, how and in what form it is possible to implement constitutional control over the constitution norms. This issue was raised before the Constitutional Court of Georgia in several cases ("Alliance of Patriots Case",[27] "Geronti Ashordia Case",[28] "National League of Constitutional Protection Case"[29] and "Shalva Ramishvili Case"[30]), but the Court did not find it within its competence to exercise constitutional control over the clauses of Constitution. It is not the goal of this paper to evaluate the above-mentioned case-law of the Constitutional Court of Georgia, but to discuss the possibility of preventive constitutional control over revision of the Constitution and its suitability.

James Madison, in the "Federalist Papers", focuses on the efficiency of the principle of hard division of power, but he nonetheless believed that people would never refuse to act on private interests, thus they would form groups of interests and use government institutions for their own purposes. According to Madison, it was impossible to eradicate the causes for these as we cannot change human nature. As for the outcome, Madison was more hopeful of

[26] V Menabde, 'The Revision of the Constitution of Georgia - What Ensures the Legitimacy of the Supreme Law of Georgia' [2013] Journal 'From Presidential to Parliamentary, Constitutional Amendments in Georgia' (Ilia State University Press) 127.
[27] Citizens of Georgia Irma Inashvili, David Tarkhan-Mouravi and Ioseb Manjavidze v. the Parliament of Georgia Decision №1/1/549, the Constitutional Court of Georgia, February 5, 2013.
[28] *Geronti Ashordia v. the Parliament of Georgia* Decision N1/3/523, the Constitutional Court of Georgia, October 24, 2012.
[29] Non-Entrepreneurial (Non-Commercial) Legal Entity 'National League for Constitutional Protection' v. the Parliament of Georgia Decision N2/1/431, the Constitutional Court of Georgia, July 10, 2010.
[30] *Citizen of Georgia Shalva Ramishvili v. the Parliament of Georgia* Decision №2/1/431, the Constitutional Court of Georgia, March 31, 2008.

the control thereof.[31] The governmental powers must be separated not by strict boundaries, but by checks and balances principles. Only confrontation of ambitions with ambitions could devise such a system of government, wherein no one ambition would win out fully. Restricting the most powerful branch by equipping the weaker one more means of defense from the first. Such a branch may only be the highest representative body, which directly legitimizes the power source, especially in the parliamentary republic, when no level of legitimacy of any other branch counterweighs it. According to Madison and Hamilton, the legislative body was the most powerful and, hence, most dangerous because of its function, the proximity to the people and the great democratic legitimacy. This was the reason for its particular restriction. Madison considered that: "there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn."[32] Hamilton, in contrast to these fears, supported the constitutional control of the judiciary power – "In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next."[33]

From the point of view of the aforementioned, the Founding Fathers of the United States Constitution, it is clear, that even then, there was discussions over exercising preventive constitutional control of constitutional amendments. Granting such authority to a body carrying out constitutional control can be a legal stage with a highest legitimacy in the revision procedure; it is true that through this the revision becomes a more complicated mechanism, but establishing such a stage, as a legal component in the highly political process of revision, will set the latter process in the frames of legal rationality and constitutionality, which will certainly bring benefits.

Constitutional control of constitutional amendments is regarded as vertical separation of power.[34] This implies that the amendment body (legislative body) shall act within its competence, but it also requires the mechanism to determine whether the amendment body has exceeded its authority in making these revisions. And, the judiciary power is primarily regarded as the executor of amendments,[35] except, when a specialized body of constitutional control exists. This is considered to be a judicial legitimation of the constitutional amend-

[31] D Zedelashvili, 'The Revision of the Constitution in Georgia: The Passion of the Majority and the Constitutional Order' [2013] Journal 'From Presidential to Parliamentary, Constitutional Amendments in Georgia' (Ilia State University Press) 157.
[32] J Medison, 'Paper N63' in *Federalist Papers* (01.03.1788), for Georgian see <http://federalistpapers.ge/index.php> accessed on September 10, 2018.
[33] Zedelashvili (n 31) citing Hamilton 'Paper N63' (n 32) 158.
[34] SH Guha and M Tundawala, 'Constitution: Amended it Stands?' [2008] 1 NUJS L. Rev., 554.
[35] Weintal (n 20) 289.

ments (unlike moral or sociological legitimacy). There are two forms of constitutional control on the revision of the constitution, formal and substantial, the first one inspects the procedures of the constitution revision (Romania,[36] Kyrgyzstan,[37] Kosovo,[38] Turkey[39]), and the second implies identifying the conformity of the amendments with the constitution (Ukraine[40]). Formal compliance is usually a compulsory component of revision of the constitution, but substantial is optional, which only begins when a special subject disputes a specific constitutional amendment.

I believe that the constitutional control of the revision of the constitution must necessarily be a simultaneous process in constitutional changes. In the course of our country's constitutional reforms, concerns of constitutionality of the revisions have been put forward by both the internal opposition political forces as well as the international community. There have been complaints about the formalities of procedures of the revision itself, of which the constitutional reform of 2004 was a clear example,[41] and, also regarding the constitutionality of specific clauses, the clear example of which is the 2017 constitutional reform, in the scope of which, the case-law of the Constitutional Court of Georgia was practically overruled by "reincarnating" the norms declared unconstitutional by imprinting them into the basic law.[42] The history of revision of the Constitution of Georgia clearly shows that constitutional revision procedure necessitates the involvement of constitutional control, both formal and substantial.

Under the revision of the constitution, it is necessary to contain preemptive constitutional control within which the formal preventive control will be mandatory, and the constitutional control on material grounds – optional.[43] Implementation of mandatory constitutional control on material grounds is impossible due to the massive nature of the reform, as it is ineffective to carry out a "mechanical" constitutional control of the entire text of the reform, besides, constitutional control will take too much time, which in itself is a problem. We believe that special political subjects should have the right to constitutional claims on material grounds, specifically the right to submit constitutional submission should belong to the President, the Government, and the number of MPs, which would allow the opposition forces to actually use this mechanism.

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[36] Constitution of Romania <http://www.cdep.ro/pls/dic/site.page?id=371> accessed September 11, 2018.
[37] Constitution of the Kyrgyz Republic <http://www.wipo.int/wipolex/en/text.jsp?file_id=458383> accessed September 11, 2018.
[38] Constitution of the Republic of Kosovo <http://www.kuvendikosoves.org/?cid=2,1058> accessed September 11, 2018.
[39] Constitution of the Republic of Turkey <http://www.hri.org/docs/turkey/> accessed September 11, 2018.
[40] Constitution of Ukraine <http://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/constitution_14.pdf> accessed September 11, 2018.
[41] W Babeck, S Fish and Z Reichenbecher, *Rewriting a Constitution: Georgia's shift towards Europe*, (Nomos Verlagsgesellschaft 2012) 92.
[42] *Citizen of Denmark Heike Kronqvist v. the Parliament of Georgia* Judgment N 3/1/512 of the Constitutional Court of Georgia, June 26, 2012 and *Citizen of Austria Mathias Huter v. the Parliament of Georgia* Decision 1/2/563 of the Constitutional Court of Georgia, June 24, 2014.
[43] G Kakhiani, Institute of Constitutional Control and Its Problems in Georgia: Analysis of Law and Practice (Tbilisi State University Press 2008) 31.

In my view, it is necessary to include constitutional control in the revision mechanism of the constitution; this procedure will transform a highly political and destructive atmosphere onto legal, constructive paths. The basis for this opinion is the experience of constitutional revision in our country. The use of this mechanism will also end the not-so-positive tendency of giving exclusive right of revision to the ruling majority.

5. CONSTITUTION REVISION INITIATORS

As a result of the reform of the Constitution in 2017, more than half of the total number of MPs and 200,000 voters were prescribed as initiators of revision of the basic act. In this regard, the circle of initiators of the revision of the Constitution as a result of the 2010 reform has been maintained. Until 2010, the President of Georgia also had the right to unconditionally present draft law of amendments. Within the framework of the constitutional reform of 2010, s/he was deprived of this right, based on the change of the form of governance, as a result of the reduction of the President's authority and this was positively assessed both at domestic and international levels.[44]

There is a large variety of experience in the world constitutionalism in relation to the initiators of constitutional revision, including the models, where the initiators of ordinary law and constitutional law do not differ (e.g. Italy, Spain, Finland, Norway).[45] I do not consider this approach appropriate - specific minor subjects (such as a member of the Parliament or a small number of MPs) should not be authorized to initiate constitutional law, as initiating the revision of the basic act should not turn into a storm in a teacup. The initiative of the constitutional amendments should be viable from the very beginning, and therefore, as a rule, the highest qualified majority of MPs are equipped with this right (Albania -1/5, Bulgaria - 1/4, Turkey - 1/3, Argentina - 2/3, or a specific number, Serbia - 20 MPs, Azerbaijan - 63 MPs),[46] Georgia belongs in this list since 1921 and this approach had not been rejected by the 2017 reform. The majority of the total members of the Parliament is the optimal number that should initiate and, in case of consolidating the opposition forces, can make the initiative viable.

The government's inclusion in the initiators list of the revision of the constitution is also an accepted practice, although the 2017 reform has rejected it. In my opinion, this should be assessed as a correct choice, since within the context of parliamentary life in Georgia the government carries a big role as it is, and this is expressed in the right to legislative initiative of the government and in practice, where most of the legislative initiatives come from the government. We think that the constitutional amendment should commence from the Parliament. As the supreme representative body of the country, it should be the origination of such fundamental reforms; such initiatives should be borne in the Parliament from the very begin-

[44] Papashvili and Gegenava (n 6) 33.
[45] ibid, p.34.
[46] ibid.

ning; the strive towards the Parliamentary Republic is an additional argument for this, where such rights are the ones strengthening the primacy of the Parliament among its equals. In addition, the parliament is the determinant of domestic and foreign policies of the country and the privilege of revising the Constitution should be in its hands (except for the general public initiative).

The basic acts of almost all countries grants the right to a revision to the electorate, which is understandable because people are the source of power and such authorities are considered a mechanism for engaging the people in democratic processes. People, as supreme sovereigns, should necessarily be among the initiators of the revision of the constitution, especially when the constitution is revised inside the parliament rather than through a referendum. Since 1921, the Constitution of Georgia shares this approach, according to which 200,000 voters have the right to initiate constitutional amendment (by the Constitution of 1921, 50,000 voters). Determining the number of voters considered as the initiator is a separate issue, is it a high number or not? There are 3,700,000 voters registered in Georgia, 5.4% of this is 200,000 voters. We think that this number is reasonable and quite enough to generate a viable constitutional initiative, and even the most viable, since consolidating 200,000 voters is a serious factor in the initiative of constitutional amendment for gaining the support of the political forces in power and capable of doing many things to grant the revision of the constitution viability.

The constitution also effects a vertical balance of power (this is especially relevant in federal republics), the constitution is often a "treaty"[47] between territorial entities or even territorial entities and the center, and it is natural that the parties to the treaty need to be involved in revision of such a treaty. There is an opinion according to which granting such competences to autonomous entities is unnecessary for unitary countries and is more expedient for federal states,[48] but I hardly share this opinion. The territorial unit, which has the power of autonomy, deserves the right to initiate the constitutional revision. Assigning such a right will underline the significance of the autonomy and the perception that the constitution belongs to all, including the people living in the autonomous unit; this approach suppresses the feeling that the constitution is written by others and pressed down to the autonomous units; anything and especially the Constitution is a document, where the ability of participating in its creation/amendment increases the quality of trust and national perception. Besides that, the constitution is a political document that unites people, especially, ethnic minority populations with the people of the “centre”.

The constitutional reform of 2017 should be assessed positively in terms of defining the initiators of the revision of the constitution. The qualified majority of MPs and the number of voters is within the constitutional logic, rejection to involve the President and the Government in the circle is also rightful. As for determining a territorial unit as the subject, so long as the Constitution includes the clause “[t]he state territorial arrangement of Georgia shall be

[47] F Martin, The Constitution as Treaty – The International Legal, Constitutionalist Approach to the U.S. Constitution (Cambridge University Press 2007) 4.
[48] Papashvili and Gegenava (n 6) 36.

revised by a constitutional law of Georgia […] after the complete restoration of the jurisdiction of Georgia over the entire territory of the country" (paragraph 3, article 7 of new version of the basic law), the inclusion of such subjects is unacceptable; after the disappearance of the text of this entry and the restoration of territorial integrity, we could really consider prescribing the territorial entity as the initiator of the revision of the constitution. The reason for this is that the countries with territorial concerns refuse to activate territorial issues, as such issues are politically sensitive. A clear example of this is the approach of the Constitution of Georgia that refuses to establish a territorial arrangement until full jurisdiction is restored on the entire territory of Georgia. Consequently, we consider that any issue, including the right to initiate revision of the constitution, regarding the territorial units of Georgia, shall be determined only after the territorial integrity of Georgia is restored.

6. Partial and General Revision of the Constitution

The general and partial revision of the constitution was always relevant when discussing the mechanism of revision of the Constitution of Georgia. The constitutional reform of 2017 also touched upon this issue; therefore I consider the discussion of this issue and the assessment of the correctness of the position expressed by the 2017 reform significant.

The seventeenth chapter of the 1921 Constitution distinguished between two forms of constitutional revision, the general and partial revisions. This approach was also adopted by the Constitution of 1995 too and the right to general or partial constitutional revision was established. Part of the Georgian constitutionalists link general revision of the constitution to the adoption of a new Constitution and partial to making changes in the existing text.[49] This difference would be acceptable if the appropriate procedure was placed behind a form of revision. Since such mechanisms are not found within the Constitution, it is difficult to take this difference as anything more than etymological.

One cannot find a record anywhere in the world on partial or general revision without them being backed by different procedures for each.[50] The practice of world constitutionalism clearly shows that a state that differentiates the revision forms, sets out the different procedures for each of them, such as Bulgaria[51] and Switzerland[52]. The Venice Commission Reports also point to this approach.[53] Our reality clearly demonstrates that in the Constitutions of 1921 and 1995 these approaches were rejected, which led to the confusion in the basic

[49] A Demetrashvili and I Kobakhidze *Constitutional Law* (Publishing House Innovation 2008) 65.
[50] ibid, 29.
[51] Chapter 9, Constitution of The Republic of Bulgaria <http://www.parliament.bg/en/const> accessed on July 13, 2018.
[52] Article 192, Federal Constitution of the Swiss Confederation <https://www.admin.ch/opc/en/classified-compilation/19995395/201801010000/101.pdf> accessed on July 13, 2018.
[53] *Report on Constitutional Amendment*, European Commission for Democracy Through Law (Venice Commission), CDL-AD(2010)001 (Strasburg, 19.01.2010) 56.

law,[54] the solution to which is given orally by those directly involved in the creation process of the 1995 Constitution.

It is interesting to know what was the reason that gave rise to the partial and general revision forms, first in the 1921 Constitution and then in the 1995 Constitution. It is known that the Founding Council of the 1921 Constitution actively used the experience of world constitutionalism.[55] The Constitution of Switzerland had a great impact on the Georgian constitutional process and the latter differentiates two forms of revision, for which it sets out different procedures (the distinction is seen in the quality of engagement of people). Georgian researchers express an assumption, which I share, that the above mentioned precisely might have been the goal of the founding council, however, because of singular kind of force majeure circumstances of 1921, the issue could not be fully processed and the forms of revision were prescribed without corresponding procedures.[56] In 1995, when the Constitution was developed, the 1921 Constitution's entry was directly transmitted without its adequate analysis, which resulted in the preservation of the text in the basic law to date.

The Constitutional Reform of 2017, unlike previous reforms, has settled this issue and got rid of any notion on partial or general revision of the Constitution in the text of article 77 of the Constitution. This approach of the reform must be assessed positively. This amendment has once and for all put an end to the possibility of speculation and misunderstanding.

7. TIMEFRAME OF CONSTITUTIONAL REVISION

The term of revision of the constitution is an important issue in the development of revising mechanism. The existence of deadlines should provide a reasonable timeframe for revising the Constitution, on the one hand, and, on the other hand, the possibility of universal engagement in revising the basic law. Despite this argument, such a practice in world constitutionalism does not have much support, but there are still separate cases, such as the South Korean Constitution, which states that the Parliament should make a decision within 60 days after the publication of the project,[57] and the Bulgarian Constitution setting the minimal and maximal terms for deliberation.[58]

According to article 102 paragraph 2 of the Constitution of Georgia, the draft law shall be reviewed by the Parliament within a month after its publication. This approach was shared by the constitutional reform of 2017. According to article 146 of the 1921 Constitution, "the general or partial revision of the Constitution shall be laid on the agenda of the Parliament

[54] Davituri (n 11) 154.
[55] R Arsenidze, *Democratic Republic* (publishing house of David Batonishvili Institute of Law 2014) 6.
[56] Davituri (n 11) 154.
[57] Article 129, Constitution of The Republic of Korea <https://www.wipo.int/edocs/lexdocs/laws/en/kr/kr061en.pdf> accessed November 20, 2018.
[58] Article 154, Constitution of The Republic of Bulgaria <http://www.parliament.bg/en/const> accessed July 13, 2018.

not earlier than six months."[59] This record clearly shows that the founders of the Constitution of 1921 wanted to have a vigorous term determined by the Constitution, during which the members of the society would have reasonable opportunity to get engaged in constitutional processes, to develop critical analysis of the draft and to research the best international practice. This period also allowed the political process to be properly conducted during the consideration of the Constitution. This "cooling" period established by the Constitution of 1921 facilitated the proper implementation of political processes and the proper engagement of the civil society.

This timeframe set by the Constitution of 1921 is a reasonable period during which the significant constitutional processes mentioned in the previous paragraph can be conducted. The existence of similar terms in the text of the Constitution contributes to the suppression of the tendency of "adjusting" the constitution and undoubtedly makes the process healthier. It is possible to say that in the "force majeure" situations such timeframes are redundant, the argument which is unacceptable for me, since the revision of the Constitution should not be done in a "force majeure" manner and in such situations the rapid revision of the Constitution has never brought any good.

Considering the arguments developed in this chapter, it would have been welcomed if the constitutional reform of 2017 had taken into consideration the existence of such a period of time between initiation and consideration of a constitutional amendment.

8. Lobbying And Constitutional Revision

The issue of lobbying is a common and familiar phenomenon for law, its roots come from the United States and has found the development in the legislative domain of Georgia – within the Law "On Lobbying Activity" regulating the rule and scope of lobbying.

Clearly, lobbying activity is a rational way to involve interest groups in the processes, ensuring the "taming" of the interests and making the process more transparent, but the admission of lobbyists to constitutional changes, in my opinion, will cause deformation of the political processes and promote speculations. Here it should be noted, that the interest groups will try to introduce their interests into the Constitution in any case, the possibility of which they are given already in the scope of civic engagement, but a person with a lobbyist license should not wander the halls of legislative bodies creating a perception, according to which the more powerful interest groups are effecting an unlawful, hidden influence over the process of constitution revision. Lobbying activity is a form of civic engagement in the legislative process; its existence is required and necessary from this perspective, also; in the legislature, lobbying is an ideal opportunity for the interested person to get engaged in law-making discussions, to look into its development and to provide the legislative body with relevant information and arguments in favor of or against a specific draft. In the revision of the con-

[59] Collection of Legal Acts of the Democratic Republic of Georgia, 1918-1921 (n 2).

stitution the level of civil engagement is higher; unlike the draft law, the constitutional draft goes through general public discussions; it is in this way that interested people can have an impact on the revision of the Constitution through healthy discussions. Involvement in this process would be the most public and transparent way of lobbying, when all will see the declared interests of relevant groups. As the revision of the constitution has a high standard of public engagement, based on all above mentioned, the necessity of lobbying activities is no longer in place; in contrast to ordinary legislative process, public discussions of a constitutional draft substitutes and entails the lobbyist form of community's engagement (through high standard of transparency).

There is a prevailing view that lobbying is limited to certain boundaries, for example lobbyism is considered inadmissible in judiciary.[60] According to paragraph 2 of article 1 of the Law of Georgia “On Lobbying Activity", lobbying is also inadmissible on the procedures of the decree of the President of Georgia and the order of Commander-in-Chief. We believe that such a restriction should be made on the prohibition of lobbying in the constitutional revision procedure as well. This prohibition is not in the text of the Constitution, but the constitutional reform of 2017 and specifically article 77 require further implementation in the subordinate legislation. This reservation should be prescribed within the Law of Georgia "On Lobbying Activity".

9. Scandinavian Model of Constitution Revision in Georgia

The Scandinavian Model of revising the constitution implies the involvement of elections in the process of revision, which gives the revision process a "quasi-referendum" character and the parliamentary elections decide the fate of the amendments. If the electorate supports the political party initiating the revision, naturally, the initiatives become constitutional changes. As a result of the constitutional reform of 2017, article 77 paragraph 3 states that the constitutional draft shall be considered adopted if it is supported by at least two thirds of the total number of the Members of Parliament. The constitutional law shall be handed over to the President of Georgia by the next convocation of the Parliament within 10 days after its consideration by one hearing and its unchanged approval by no less than two-thirds of the total number. With the introduction of this regulation, the form of revision of the Constitution of Georgia has moved on to the Scandinavian Model. The Scandinavian Model actually entails higher political temperature for constitutional amendments and engagement of more politics in the revision. In this chapter I would like to argue, how correct the reception of the Scandinavian Model is, which in its essence means development of quasi-referendum approaches. While discussing "quasi-referendum" issues, one cannot ignore a little overview of its essence. Referendum, including "quasi-referendum”, is primarily an appeal to the electorate by the government to understand the attitude of the public on topical issues. The referendum is considered the most efficient means of granting legitimacy. The referendum, in its essence,

[60] C Gogiberidze, Lobbyism and Legal Aspects of Its Regulation (Universal 2012) 48.

is as political as it is legal. The referendum is considered by the blind fans of democracy as the highest expression of the sovereignty of community, but subjects with a comparatively right ideology are somewhat suspicious of it.[61] In the governing circles of some countries, the referendum institution implies a certain danger for parliamentarism of substituting the "civilized" parliamentary government with the "government of ignorant masses".[62] And the spirit of the nation, expressed in the referendum, can often be saturated by conservatism and radicalism promoted by demagogues.[63]

It is necessary to remove the poison and illusion from the referendum and "quasi-referendum" measures, according to which the people are sovereign and unmistakable here, because the referendum expresses their unmediated will. No matter how attractive the referendum looks with the background of democratic slogans, in reality, it does not always bring positive results. It is mainly certain interest groups, who resort to public initiatives for their own corporate interests. People's initiative is the last refuge for the marginalized political groups and movements that want to attract public attention.[64] A person is not always at the height of their dignity within the crowd and examples from history illustrate this: Hitler used the referendum three times, among them to approve Anschluss and the issue of all three referendums was sanctioned by the decisive majority; people approved "Brezhnev's Constitution" by the referendum;[65] president Nayazov in Turkmenistan and president Karimov in Uzbekistan[66] extended their presidential terms by general public vote. These examples show that people are not sovereign and unmistakable.

The above criticism of the referendum and the "quasi-referendum" measures should not be understood as a claim that the referendum is an unacceptable and negative phenomenon, it is a form of democracy and its existence is validated in this format and it is undoubtedly the highest legitimating event. Thus, the introduction of a referendum-like format in the constitutional revision procedure is a step forward, this mechanism increases the legitimacy of the constitution and adds stability to the constitutional revision procedure, which was undoubtedly lacking in the existing revision mechanism. It is also acceptable to choose the "quasi-referendum" approach, as it would be impossible to hold a referendum directly due to its very essence, since the referendum should be held throughout the whole territory of Georgia and the territorial integrity of Georgia is currently violated by the Russian occupation.[67]

Involvement of parliamentary elections in the revision of the constitution makes the process of revising more solid, which was definitely absent from the Constitution of Georgia; in addition, the "quasi-referendum" model is correctly chosen as the referendum, due to the

[61] Sajo (n 19) 81.
[62] *Referendum - the Main Institution of Direct Democracy*, Research Department of the Parliament of Georgia, Analytical Division. 5.
[63] Sajo (n 19). 80.
[64] ibid 82.
[65] RG Gidadhubli, 'The Brezhnev Constitution' [1977] *Economic and Political Weekly*, Vol. 12 No48, 1982.
[66] A Luhn 'Islam Karimovre-elected Uzbekistan's president in predicted landslide' *The Guardian* (March 30 2015).
[67] According to paragraph 1 of article 1 of the Organic Law of Georgia on Referendum, referendum is a general-public survey and, according to paragraph 3, referendum is held on the whole territory of the country.

reality, which somewhat reduces the legitimacy issue as the population of Abkhazia and Samachablo (South Ossetia) would not be able to participate. This fact is of great importance from a political and legal point of view. In addition, with this amendment, the revision of the constitution takes on an extremely heated political character. The fate of the revision of the constitution will depend on the political sympathies of the electorate and not directly on the constitution's modification (unless the change touches on some sensitive issues for the public, such as same sex marriage). This circumstance further requires that the Constitutional Court of Georgia be involved for preventive constitutional control in the revision process.

10. Simplified Rule of Constitutional Revision

The Constitutional Reform of 2017 introduced an entry in article 77, paragraph 4 of the Constitution according to which "[i]f supported by at least three fourths of the total number of the Members of Parliament, the constitutional law shall be submitted to the President of Georgia for signature within the time frame established by article 46 of the Constitution" Based on this entry, the simplified rule of revision is established, according to which the draft law of the Constitution is adopted by the same convocation and is sent directly to the President for signature. Such an approach is not unfamiliar to world constitutionalism and a similar model is known by the Constitutions of Finland and Estonia.[68]

The existence of the simplified rule can be explained by the possible extenuating circumstance, but in my view, this argument is not relevant for Georgian reality. No less than three quarters of the Members of Parliament is the quorum, which is easily obtainable on the evidence of the electoral system and the historical approaches of the electorate. There is a danger that an exceptional rule existing in paragraph 4 of article 77 of the Constitution may become the primary rule if the majority has 113 seats in the Parliament. In addition, the exceptional case does not account for a mechanism of considering the constitutional draft on two consecutive sessions, with three-month interval; this circumstance leaves the stability of constitutional revision solely in the hands of the quorum, which is unacceptable and makes factual revision mechanism unacceptably flexible.

I find the simplified rule of the constitution revision unjustifiable, as it makes the "Scandinavian Model" meaningless. The Scandinavian Model becomes a façade by the existence of the simplified rule of the adoption of the constitution, the only purpose of which is to overshadow the degeneracy of the exceptional rule. The simplified rule of revising the constitution is not justified by the argument of the existence of a possible exceptional situation either, since the only possible exception is already reflected in article 77, paragraph 5 of the Constitution, which states that "constitutional law related to the restoration of territorial integrity shall be adopted by a majority of at least two thirds of the total number of the Members of Parliament and shall be submitted to the President of Georgia for signature within the time frame established by article 46 of the Constitution". This exception is undoubtedly an extenuating cir-

[68] Papashvili and Gegenava (n 6) 82.

cumstance, where the constitutional law is required to be approved in a timely manner; the justification of the simplified rule of revising the Constitution by other possible exceptional cases is an intolerable argument.

11. Definitions of the Rules of Procedures of the Parliament of Georgia on Revision of the Constitution

11.1. The Issue of Sequence of Legislative Hearings

In this chapter I shall discuss the procedural issues of the regulations of the Parliament of Georgia, which essentially manage and specify revision mechanisms existing in the Georgian Constitution. One of such issues is the implementation of parliamentary hearings during the revision of the constitution. The clause in article 102, paragraph 3 of the current Constitution on review of a draft constitution on two sessions is defined by article 176, paragraph 8 of the parliamentary regulation of Georgia, as follows – "draft law on general or partial revision of Georgian constitutional law is reviewed and adopted by three hearings, according to the rule on review and adoption of law determined by this regulation. Moreover, the draft law will be discussed and adopted by the first and second hearings at the same session, and the third hearing will be held only at the next session of Parliament, no later than 3 months after the second hearing." And articles 157, 159 and 160 of the Rules of Procedure of the Parliament of Georgia prescribe the process for the first, second and third hearings, according to which the issues discussed at the previous hearings should no longer be considered on the following hearings.

In my opinion, the normative reality set forth in the previous paragraph should no longer continue to hold as the article 77 set by the 2017 constitutional reform established the rule of review of the draft law by two convocations of the Parliament. The Parliament of the next convocation should vote for a new constitution and no longer have the right to make any amendments in its text. The reason for this position is that article 77 of the Constitution establishes a quasi-referendum procedure of revision, which implies that the Parliament of the next convocation should be a sort of a "voter" who answers a question put forward by the referendum by yea or nay. If the parliament of the new convocation had a right to introduce any amendments into the draft constitution, it would be able to reject the existing draft and adopt a completely new constitution, which will neglect the concept and principle of article 77 of the Constitution of Georgia.

11.2. Legislative Proposal And the Initiative of Revising the Constitution

According to the Paragraph 1 of article 150 of the Rules of Procedures of the Parliament of Georgia, "the legislative proposal is a formal, substantiated appeal to the Parliament by a person unauthorized to submit an initiative, to make a new law, to make amendments to a law or declare a law void", it is a form of public engagement in the legislative process. It is

interesting what will happen if a person addresses to the parliament in the form of a legislative proposal and the object of the proposal is a constitutional provision. In such a case, we shall be guided by paragraph 9 of article 150 of the Rules of Procedures according to which "the Leading Committee shall be considered as a subject of legislative initiative in case the legislative proposal is accepted for consideration" and paragraph 1 of article 102 of the Constitution (paragraph 1 of article 77 in the new edition), envisaging that the majority of the parliament and no less than 200,000 voters have the right to initiate a constitutional law. This normative reality demonstrates, that the legislative proposal cannot be transformed into a legislative initiative by the leading committee if the proposal refers to the revision of the constitution, as the Committee itself is not the initiator of the revision of the Constitution.

This issue was put on the agenda of the previous convocation of the Parliament and was decided by the above-mentioned clauses. We believe that the regulation of this issue is necessary in the context of constitutional reform, not at the constitutional level, of course, but at the level of the Rules of Procedure of Parliament; the legislative proposal should not necessitate a revision of the Constitution.

12. Conclusion

In this work the mechanism of revision of the constitution established through the reform of the Constitution of Georgia implemented in 2017 was discussed.

Within the scope of the research, we reviewed and assessed the attitude of the new mechanism of revision of the constitution to the existence of entrenched clauses, the possibility of constitutional control in the revision of the constitution, the circle of initiators of revision of the constitution; we also discussed the attitude of the reform regarding the partial and general revision of the Constitution, the timeframe of revision of the constitution was also deliberated, the positive and negative aspects of the new model of revision of the constitution were discussed and in the course of the work, the procedural issues of the new mechanism of revision of the constitution, which are of great importance for the final efficiency of the revision mechanism was also looked into. Here, we present a conclusion that will summarize the efficacy of the new form of revision of the constitution.

- I believe that within the constitutional reform of 2017, proper attention should have been paid to establishing entrenched clauses in the Constitution of Georgia, I think, the entrenched clauses in the Constitution of Georgia can create a kind of "beacon" that will bear an important declaratory and legal functions;

- It is necessary to involve constitutional control in the revision mechanism of the constitution, this procedure will transform a highly political and destructive atmosphere of revision into legal and constructive one, given the national experience, it is clear that the Constitution of Georgia needs the latter;

• The reform of 2017, unlike previous ones, resolved the incomprehensible issue of partial and general revision of the constitution, the text of the Constitution no longer envisages the revision forms. This approach of reform must be assessed positively, as it has once and for all got rid of the possibility of speculation and misunderstanding;

• The existence of timeframe between the initiation and the commencement of the discussion in the text of the Constitution contributes to the suppression of the "fitting" tendency of the constitution and undoubtedly makes the process enhanced. I believe it is necessary to have reasonable time (for example, five months) before parliamentary discussions on the constitutional amendment begins;

• Involvement of parliamentary elections in the middle of the revision of the constitution gives an appropriate strength to revision of the Constitution that has been lacking in the Constitution of Georgia, and with this amendment, the revision of the Constitution takes on extremely sharp political character. The fate of the revision of the constitution will depend on the political sympathies of the electorate and not directly on the constitution's modification (unless the changes are more sensitive for the public, such as the same sex marriage, tax issues, etc.). This circumstance further requires that the Constitutional Court of Georgia be involved for preventive constitutional control in the revision process;

• We find the simplified rule of the constitution revision unjustifiable, as it makes the "Scandinavian Model" meaningless. The simplified rule of revising the constitution is not justified by the argument of the existence of a possible exceptional situation either, since the only possible exception is already reflected in of the Constitution, relating to the restoration of territorial integrity.

• The issue of considering the draft law of the Constitution of Georgia by the old and new convocation parliaments should be correctly regulated. I believe, that the Parliament of the new convocation should either adopt or reject the draft constitutional law, without the right to amend it.

According to the above conclusions, the new form of revision of the constitution, which was created as a result of the constitutional reform of 2017, is truly a novelty of a wide scope in Georgian constitutionalism, but it cannot be evaluated positively. Although there is a lot of positive and welcoming clauses in a new form of revision of the constitution, the existence of a "simplified revision" mechanism (para.4 of article 77) neglects everything else. This means that the Constitution of Georgia is left vulnerable against the passions of the majority and the existence of a high quorum alone cannot guarantee the constitutional stability.

Despite the position expressed in the previous paragraph, I believe that the new form of revision of the constitution, which has been created as a result of the constitutional reform of 2017, can be improved and will give us an ordered, balanced and fair mechanism for revision.