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TOWARDS SUBSTANTIVE AND PROCEDURAL MODUS OPERANDI — WHY DID CONSTITUTIONAL REFORM FAIL IN GEORGIA?

‘Thoughts without concepts are empty, intuitions without concepts are blind’
*Immanuel Kant, Critique of Pure Reason*¹

PRELIMINARY INSIGHTS

On February 12, 2016 held the fifth and concluding meeting of the Working Group on the Issues of the Parliament, the President, and the Government of Georgia. The working group was one of the central units of Georgia’s third State Commission for Constitutional Reform. The other foundational or core working groupings of the Commission included the Working Group on the Issues of General Provisions and Revision of the Constitution of Georgia; the Working Group on the Issues of Human Rights and Freedoms, the Judiciary, and Prosecuting Institutions; the Working Group on the Issues of Independent Constitutional Institutions; and the Working Group on the Issues of Territorial Arrangements and Local Self-Government.²

The first such kind of quasi-constituent body or assembly worked during 1993-1995 and the second one accomplished its mandate throughout 2009-2010.³ The outcome of this work was

¹ See Seyla Benhabib (2016). The new Sovereignism and Transnational Law: Legal Utopianism, Democratic Skepticism and Statist Realism *Global Constitutionalism*, 5, pp. 109-144

² See Official web page of the State Constitutional Commission of Georgia <http://constcommission.ge/en/about/Details> for legal background and other formal issues (last visited June 26, 2016)

³ See Parliamentary Assembly of the Council of Europe. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) Honouring of obligations and commitments by Georgia, Information note by the co-rapporteurs on their fact-finding visit to Tbilisi (22-24 March 2010) Co-rapporteurs: Mr. Kastriot ISLAMI, Albania, Socialist group, and Mr. Michael Aastrup JENSEN, Denmark, Alliance of Liberals and Democrats for Europe Chapter II – Constitutional Reform, Available At http://assembly.coe.int/CommitteeDocs/2010/20100624_amondoc24rev_2010.pdf (last visited June 26, 2016)

the second Constitution of Georgia, adopted on 24th of August 1995. The second was the major revision of the supreme politico-legal act on October 15, 2010. At this date, the Parliament of Georgia passed a bill including all of the constitutional amendments after working with the Venice Commission of the Council of Europe and other international actors and stakeholders. These amendments and addenda entered into legal force and were implemented after the inauguration of the fourth elected president of the Georgian polity on November 17, 2013.⁴

As regards the first Constitution of Georgia, it embraced on February 21, 1921 and was one the first European Constitution, which guaranteed and implemented the Social Democratic Republic in practice.⁵ As foreign and Georgian scholars and officials elucidated, the first Constitution of Georgia eloquently empowered its citizenry with the equal franchise and endorsed a concept of naïve secularism that was inspired by the French notion of *laïcité* or *laïque* (state neutrality for religion).⁶ Overall, it formulated a progressive narrative of human rights within twentieth-century constitutionalism.⁷

The first significant amendments to the second 1995 Georgian Constitution occurred on February 6, 2004 just after two months after Georgia's Rose Revolution. In purely constitutional terms, this was a vivid demonstration of the so-called instrumental use or instrumentalization of the constitution from the new post-revolutionary leadership.⁸

⁴ See Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia. Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010) [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)028-e) See also OSCE Review Conference – Human Dimension Session, Georgia: Constitutional Reform June 2009 – October 2010, Information Note – Distributed by the Delegation of Georgia, Warsaw, 30 September – 8 October 2010, Working Session 1 available at <http://www.osce.org/home/71611?download=true> (last visited June 26, 2016).

⁵ See Papuashvili George. A Retrospective on the 1921 Constitution of the Democratic Republic of Georgia Engage Volume 13, Issue 1, March 2012 <http://www.fed-soc.org/publications/detail/a-retrospective-on-the-1921-constitution-of-the-democratic-republic-of-georgia> (last visited June 26, 2016).

⁶ See more respecting 'laic-republican legacy' and its dimensions in the contemporary French constitutional discourse. Daniel Augenstein (2013). Normative Fault-lines of Trans-national Human Rights Jurisprudence: National Pride and Religious Prejudice in the European Legal Space *Global Constitutionalism*, 2, pp. 475-479

⁷ Ibid, Papuashvili George (2012) See also Godoladze Karlo (2015). Constitutional Theocracy in Context: The Paradigm of Georgia, *Humanities and Social Sciences Review, State-Church historical Relationships and Soviet Legacy*, pp. 200-202 Available at <http://universitypublications.net/hssr/0402/pdf/E5X76.pdf> (last visited June 26, 2016).

⁸ See Meladze Giorgi & Godoladze Karlo. Instrumentalization of the Constitution: Story of post-revolutionary constitution-making Accepted Research Paper for the 9th International Congress of Constitutional Law (Oslo, Norway) <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws11/w11-meladze&godoladze.pdf> (last visited June 26, 2016).

Between the first alteration to the Constitution of Georgia on July 20, 1999 and the entire package of constitutional amendments which entered into force on November 17, 2013, there was an indisputable pattern of ‘malleable constitutionalism’.⁹ Notably, as some scholars argue, the very term firmly illustrates *the politico-legal bedrock in the politics, where the ruling political party or coalition unilaterally captured and thoroughly dominated*, both procedurally and substantively, in the field of constitution-making or revision. Furthermore, constitutional changes passed without bipartisan support or the general public’s *consultation* or acceptance.¹⁰

The substantive content of constitutional amendments adopted in 2010 covered a wide range of institutional and substantive issues and made an across-the-board impact. *Inter alia* reformulated the institutional framework of Governmental institutions; developed the checks and balances system among the branches of Government; and enhanced and strengthened the independence of the judiciary (by proposing tenure appointments of judges for probationary periods, maximum three years).¹¹

Constitutional reform redefined the constitutional clauses for private property, created a new constitutional chapter on local self-government, affirmed the European subsidiarity principle and advanced the role of political parties in decision-making in order to encourage inclusiveness and responsiveness within the wider institutional framework. At the same time, critics pointed to the inter-institutional relationships between executive and legislative branches and the *sui generis* arrangements of confidence, no confidence and constructive vote of no confidence constitutional clauses.¹²

Immediately after the Working Group on the Issues of the Parliament, the President, and the Government completed its work, the chairperson and head of the Legal Affairs Committee of the Parliament of Georgia delivered a statement articulating the challenges confronting the future of the State Commission for Constitutional Reform. The statement further elucidated the divisions between the governing coalition and the opposition regarding specific constitutional issues and, given this context, emphasized that there was no likelihood of achieving the procedural quorum and political reconciliation necessary to reform the constitution.

⁹ Originally, see Po Jen Yap (2015). The Conundrum of Unconstitutional Constitutional Amendments Global Constitutionalism, 4, pp. 114-136. See more for local Georgian context - Godoladze Karlo. Constitutional Reform or Walking Along a Beaten Path Tabula Magazine; available at <http://www.tabula.ge/en/story/73713-constitutional-reform-or-walking-along-a-beaten-path> (last visited June 26, 2016)

¹⁰ Ibid, Po Jen Yap. pp. 116, 132, 136

¹¹ See The Constitution of Georgia. Chapter Five, Judicial Authority - Articles 82-90 Available at https://www.constituteproject.org/constitution/Georgia_2013?lang=en (last visited June 26, 2016)

¹² See Godoladze Karlo (2013). Constitutional Changes in Georgia: Political and Legal Aspects Humanities and Social Sciences Review, 2 (3) pp. 443-460. Available at <http://universitypublications.net/hssr/0203/pdf/P3G106.pdf> (last visited June 26, 2016)

The presiding officer of the supreme legislative body of Georgia conveyed similar concerns. Additionally, Parliament's presiding officer and one of the leaders of Georgia's incumbent governing political coalition emphasized the productiveness of the staff and the members of the constitutional commission, particularly constitutional law experts and political scientists. As he argued, the State Commission for Constitutional Reform was unable to elaborate the draft law of the Constitution for these reasons, but it nonetheless drafted 97-98 concrete proposals covering virtually every key constitutional issue. It is important to note that members of the leading parliamentary majority employed the same justifications. In political science terms, it was the *lingua franca* of both the ruling political elite and leadership.

The fourth and final activity of the Plenary Session of the State Commission for Constitutional Reform took place on February 28, 2016. The commission included 58 representatives from academia, civil society organizations (CSOs and NGOs), and political parties and core state institutions. However, only 21 members took part in the concluding plenary meeting of the commission. The speaker of Parliament outlined why the constitutional commission should conclude its work.

As the chief legislator argued, the State Commission for Constitutional Reform was a victim of the uncooperative political environment created following the Georgian parliamentary elections on October 1, 2012. The political divisions between the opposition and leading coalition completely damaged the entire telos and procedural side of the reform initiative. The speaker of parliament emphasized the same argument at the third plenary meeting of the commission. On March 28, 2015, he put it succinctly: 'we did not want and did not implement fast changes; we did not want and did not implement domination of issues initiated by the Government. To the contrary, the task was to allow everyone express their own positions, offer their own views on the constitutional institutions, norms or mechanisms to be implemented. This is the principle of our activity.'¹³

It seems clear that firstly, the chairperson of Georgia's legislative body conceptualized and focused primarily substantive issues or accented the 'fundamentals of the political constitutionalism'¹⁴ and his conclusive argument was pure procedural by its connotation. He specified that the quorum that is necessary to revise the constitution is one of the highest thresholds and formidable

¹³ See The Third Enlarged Sitting of the Constitutional Commission of Georgia. Official web page of the Parliament of Georgia <http://www.parliament.ge/en/media/axali-ambebi/the-third-enlarged-sitting-of-the-constitutional-commission.page> (last visited June 26, 2016).

¹⁴ See Richard Bellamy, "The Fundamental Constitutional Narratives Respecting Dichotomy between Legal and Political Schools of Thought of Contemporary Constitutionalism," in *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007). Available at <http://www.cambridge.org/us/academic/subjects/politics-international-relations/political-theory/political-constitutionalism-republican-defence-constitutionality-democracy#bookPeople> (last visited June 26, 2016).

obstacles existed in the contemporary constitutional texts worldwide. According to article 102, paragraph 3 of the Georgian Constitution, a draft law revising the constitution shall be deemed adopted if it is supported by not less than three-fourths of the total number of MPs of Georgia at two successive sessions of the Parliament of Georgia after an interval of at least three months.¹⁵

Based on this line of reasoning and justification this contribution attempts to understand Georgia's particular politico-legal road map in the prism of modern constitution building, particularly through its context and procedures.¹⁶ In order to become aware of the failures and gaps of recent constitutional reform efforts and assess the future of Georgian constitution-making.¹⁷

CONTEXTUAL LANDSCAPE AND THEORETIC-DOCTRINAL DIMENSION

“October 1, 2012, was the real turning point in the current history of Georgian polity and statehood, the parliamentary elections saw a change of power through the fundamental instrument of democracy for the first time in the history of Georgian republicanism,” I previously argued.¹⁸ ‘It was not only local Georgian success but it also had regional dimension by the side of practical implementation of the rule of law paradigm and genuine constitutionalism in South Caucasus region.’¹⁹

Right after the peaceful electoral transition, the newly elected majority coalition of six political parties initiated a new political discourse regarding the necessity of the constitutional amendments. The main justification was connected to the dysfunctional construction of legislative-execu-

¹⁵ See Constitution of Georgia. Article 102, paragraph 3 Electronically available at https://www.constituteproject.org/constitution/Georgia_2013?lang=ento (last visited June 26, 2016).

¹⁶ See the equivalent spirit and perception. Constitution Building: A Global Review (2013) Edited by Sumit Bysaria. International IDEA Resources on constitution building, International Institute for Democracy and Electoral Assistance 2014, Foreword by Nicholas Hysom pg. v. available at <http://www.idea.int/publications/constitution-building-a-global-review/loader.cfm?csModule=security/getfile&pageid=65189> See more respecting Constitution Building as the part of Global Politico-legal agenda, discourse and ‘common occurrence’, by Yves Leterme Secretary-General of International IDEA. *Ibid.*, pp vi-vii (last visited June 26, 2016).

¹⁷ See Godoladze Karlo (2015). Absence of Constitution Building: Lessons learned from 20 years of Constitution making in Georgia. Accepted Conference Paper for the Regional Conference - Constitutional Challenges and Constitution-Making, Hosted by the Center for Constitutional Studies at Ilia State University, School of Law Available at Researchgate https://www.researchgate.net/publication/278071615_Absence_of_Constitution_Building_Lessons_Learned_From_20_Years_of_Constitution-making_in_Georgia (last visited June 26, 2016).

¹⁸ See Godoladze Karlo (2013). Georgian Electoral Dilemma; *Tabula Magazine* Available at <http://www.tabula.ge/en/story/74511-the-georgian-electoral-dilemma> (last visited June 26, 2016).

¹⁹ See Godoladze Karlo (2015). Constitutional Theocracy in Context: The Paradigm of Georgia *Supra* note 6; pg. 202.

tive constitutional arrangements and excessive powers of the head of state, the President of Georgia.²⁰ It is noteworthy to indicate that from 2012 to 2013, the Georgian body politic included turbulent relations between the Head of State and the Head of Government (the Prime Minister).²¹

At the end of January 2013, the President of the Council of Europe's advisory body regarding constitutional matters, the Venice Commission, visited Georgia and met the highest authorities of the country. According to the official release, 'while the President understood the need for the new majority to deliver results to the voters, he warned against the danger of hasty reforms and recalled the need for broad consensus, notably as concerns constitutional amendments. An in-depth constitutional reform was necessary in order to introduce the necessary check and balances on presidential powers. Such constitutional reform would need to be carried out after a thorough reflection and with due consultation of all the political forces and the civil society. Only in this way would it be possible to achieve the ultimate aim of the process, which was a constitution which unites the Georgian people, not one that divides it.'²²

The President of the Venice Commission emphasized welcomed the Georgian Parliament decision to appoint a liaison officer to promote effective cooperation with the Commission. Simultaneously, he noted: 'I understand that for the sake of stability of the government and the Parliament after the last parliamentary elections it is necessary to change the constitution, in order to limit powers of the head of state [the President] to dismiss the government and appoint a new government without the authorization of the Parliament.'²³ Indeed, the primary product of the aforementioned deliberations was clear and visible. As the speaker of parliament delineated, Georgia would definitely implement and acknowledge the key recommendations of the Venice Commission.²⁴

²⁰ See Georgia needs new constitution. The Messenger Online – Georgia's Leading English-language daily Newspaper. Available at http://www.messenger.com.ge/issues/2713_october_12_2012/2713_edit.html (last visited June 26, 2016).

²¹ See Nakashidze Malkhaz. *The Changing Face of Semi-presidentialism in Georgia* (2014) Available at <http://presidential-power.com/?p=2385> (last visited June 26, 2016) See more about the Phenomenon of the Divided Government, *Divided Government in Comparative Perspective* edited by Robert Elgie, First published by Oxford University Press 2001.

²² See Venice Commission and Georgia agree to co-operate on Constitutional Revision and Legislative Reforms. Available at <http://www.venice.coe.int/webforms/events/?id=1655> For Democracy through Law – The Venice Commission of the Council of Europe (last visited June 26, 2016).

²³ See Venice Commission President Sums Up Georgia Visit. Civil.ge – Daily News Online Available at <http://www.civil.ge/eng/article.php?id=25701> (last visited June 26, 2016)

²⁴ See Georgia to listen more COE Advice when changing Laws. Democracy & Freedom Watch – Reporting on the State of Georgian Democracy. Available at <http://dfwatch.net/georgia-to-listen-more-to-coe-advice-when-changing-laws-32895-17371> (last visited June 26, 2016).

Right after the clear messages by the Council of Europe and particularly the Venice Commission, the struggle regarding constitutional amendments entered into a new intensive phase. In February-March 2013, there were extensive negotiations and deliberations, political bargaining, and challenging discussions between two divided political camps of Georgian political elite, the governing coalition (GD - Georgian Dream) and United National Movement (UNM) opposition. At the very beginning the process faltered, but in time the political actors reached a last minute consensus regarding the content of new constitutional provisions that curtailed the presidential discretionary power to dismiss the executive government.²⁵

In pure constitutional terms, according to renowned Irish scholar Robert Elgie, ‘President-parliamentarism is a form of semi-presidentialism where the prime minister and cabinet are collectively responsible to both the legislature and the president’.²⁶ As he indicated, Georgian constitutional system functioned as President-parliamentarism from 2004 until the parliamentary election of 2012.

As Elgie put it: ‘following 2004 constitutional amendments and explicitly article 73(1 c) of the Constitution of Georgia states that the president is “entitled, on his/her own initiative or in other cases envisaged by the Constitution, to dissolve the Government...” Additionally, article 78 (1) definitely states that “The Government shall be responsible to the President and the Parliament of Georgia.” In this doctrinal insight, the distinguished academic concluded that ‘this is a very clear statement of President-parliamentarism.’²⁷

This President-parliamentarism form of semi-presidentialism ended after the first-ever peaceful electoral transfer of power in Georgia. Thus, the aforementioned amendments and consensual agreement between political forces of Georgia clearly contributed to a new modality or subtype: Premier-presidentialism (Elgie) Georgian constitutionalism. According to the Irish scholar, Premier-presidentialism is based on the premise that ‘the prime minister and cabinet are collectively responsible solely to the legislature.’²⁸

²⁵ See Georgian tug of war on Constitution ends Compromise. Democracy & Freedom Watch – Reporting on the State of Georgian Democracy. Available at <http://dfwatch.net/georgian-tug-of-war-on-constitution-ends-in-compromise-38634-18886> (last visited June 26, 2016).

²⁶ See Elgie Robert. *Semi-Presidentialism Sub-Types and Democratic Performance*, Oxford Comparative Politics, OUP – Oxford University Press 2011; pg. 28.

²⁷ *Ibid.*, pp. 28-29.

²⁸ See supra note 26; pg. 28.

The essential feature of a parliamentary régime in classical (Westminster) or rationalized (constrained) parliamentary systems is the accountability of the executive government.²⁹ In this paradigmatic prism, the proposed subtype is more parliamentary by its definitional spirits and origins.³⁰

In the Georgian constitutional context, this theoretical puzzle within the constitutional narrative is actualized alongside the Venice Commission. In its Opinion on three draft Constitutional laws amending two constitutional laws amending the Constitution of Georgia, the commission's experts and rapporteurs specified that 'the 2010 constitutional reform made the Georgian system evolve from a semi-presidential system towards a more parliamentary one.'³¹

This author reasonably believes that despite those definitional conundrums and deficiencies, the current constitutional framework of Georgia, which relies 'solely on the wording of the Constitution,'³² doctrinally fits the prism of Premier-presidentialism.

The implementation of Constitutional Law of Georgia No 496 of 25 March 2013 changed and explicitly defined the cases in which the Head of State has the competence (Article 51¹) to dis-

²⁹ See Respecting Monism and Dualism in pure Parliamentary regimes – Lauvaux Philippe, *Le parlementarisme*, Paris, P.U.F. 1997 Delegation and Accountability in Parliamentary Democracies, Edited by Kaare Strøm, Wolfgang C. Müller and Torbjörn Bergman, Chapter 1, *Parliamentary Democracy: Promise and Problems* pp. 3-33, Oxford University Press 2003. See also regarding definitional conundrum – José Antonio Cheibub, Zachary Elkins and Tom Ginsburg (2014). *Beyond Presidentialism and Parliamentarism* *British Journal of Political Science*, 44, pp. 515-544. *The Oxford Handbook of Comparative Constitutional Law* edited by Michel Rosenfeld and András Sajó. Part IV Architecture Chapter 30 – Parliamentarism, Anthony W. Bradley and Cesare Pinelli, Oxford and Rome, pp. 650-671 OUP – Oxford University Press 2012. *Semi-Presidentialism and Democracy*, edited by Robert Elgie, Sophia Moestrup and Yu-Shan Wu, Chapter 6 – Semi-Presidentialism under Post-Communism by Oleh Protsyk First published 2011 by Palgrave Macmillan.

³⁰ See more respecting definitional and practical dimensions of the above-mentioned controversial issues in pure European context. Jan Herman Reestman (2006). *Presidential Elements in Government*, Introduction, *European Constitutional Law Review*, 2; pp. 54-59 Miroslaw Wyrzykowski and Agnieszka Cielen (2006). *Presidential Elements in Government Poland - Semi-presidentialism or 'Rationalised Parliamentarism'?* *European Constitutional Law Review*, 2, pp. 253-267 Vlad Constantinesco and Stéphane Pierré-Caps (2006). *Presidential Elements in Government France: The Quest for Political Responsibility of the President in the Fifth Republic* *European Constitutional Law Review*, 2, pp. 341-357 See also *Semi-Presidentialism in Europe*, edited by Robert Elgie. First published by Oxford University Press 1999.

³¹ See Opinion on Three Draft Constitutional Laws amending two Constitutional Laws amending the Constitution of Georgia. Adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013) on the basis of comments by Mr. Jean-Claude Scholsem (Substitute Member, Belgium) and Mr. Evgeni Tanchev (Member, Bulgaria) available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)029-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)029-e) (last visited June 26, 2016).

³² See the Paradigmatic case respecting Bulgarian Constitution. According to Elgie 'Bulgaria is unequivocally Semi-presidential (Premier-presidentialism)', the same constitutional logic is authentic in the genuine Georgian context. *Supra* note 26, pp. 22-25.

solve the national legislative assembly of Georgia. At the same time, the law revised Article 73 of the Georgian Constitution which regulated the competencies and powers of the President.³³

Before the final confirmation of the constitutional amendments and just after their unanimous adoption following first reading, Georgia's influential western partner and strategic ally, the United States, delivered an official statement via its Embassy in Tbilisi lauding 'the important step' that 'displayed statesmanship on all sides and paves the way for consolidation of Georgian democracy.'³⁴

Following this endorsement of the constitutional amendments, the High Representative of the European Union for Foreign Affairs and the Commissioner for Enlargement and European Neighbourhood Policy released a joint statement highlighting 'the cross-party consensus that underpins this agreement demonstrates the commitment of all sides in Georgian politics to good governance in the national interest. The constitutional amendment, which confirms the role of the democratically-elected parliament in approving the appointment of a new government, consolidates Georgia's democracy and sets an important precedent for co-operation between all parties in Georgian politics.' As well, the High Representative and European Commissioner called all Georgian stakeholders to continue their joint work in this 'constructive spirit' for the best interest of the Georgian people.³⁵

As regarding sociological dimension of the aforementioned amendment,³⁶ a survey carried out for NDI National Democratic Institute by CRRC Caucasus Resource Research Centers strongly confirmed that majority of respondents (54 percent) supported reducing Presidential powers to dissolve the government without parliamentary authorization (POS question 24).³⁷ Indeed, in this context, the mindsets of the people – *vox populi* – and of the basic political stakeholders went hand in hand and

³³ See Constitutional Law of Georgia No 496 of 25 March 2013 – website, 27.3.2013 The Legislative Herald of Georgia. Available at <https://matsne.gov.ge/en/document/view/30346> (last visited June 26, 2016).

³⁴ See U.S. Embassy Statement on Constitutional Agreement (March 21, 2013). Available at <http://georgia.usembassy.gov/latest-news/statements2013/constitution.html> See also Parliament passes the first reading of draft Constitutional Amendment Tabula Magazine. Available at <http://www.tabula.ge/en/story/70808-parliament-passes-the-first-reading-of-draft-constitutional-amendment> (last visited June 26, 2016).

³⁵ See Joint Statement by the spokespersons of High Representatives Catherine Ashton and Commissioner Štefan Füle on the unanimous adoption of an amendment to Georgia's Constitution, Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/136579.pdf (last visited June 26, 2016).

³⁶ See Chris Tornhill. *A Sociology of Constitutions, Constitutions and State Legitimacy in Historical-Sociological Perspective*, Cambridge University Press 2011.

³⁷ See Public Attitudes in Georgia: Results of a March 2013 Survey carried out for NDI by CRRC. Funded by the Swedish International Development Cooperation Agency (SIDA) Available at <http://www.civil.ge/files/files/2013/NDI-Poll-March-2013.pdf> (last visited June 26, 2016).

gave socio-politico-legal legitimacy to the implemented constitutional amendments. In proper constitutional terms, this demonstrated the so-called ‘consociational’ or power-sharing constitutionalism.

Subsequently, the first consensual collaboration between the leading oppositional bloc and ruling majority Georgia’s occurred and the constitutional odyssey entered into a new phase. The governing majority continued its established discourse narratives and at this time justified modifications to the robust prime ministerial power. Despite the hostile political landscape, political proponents finally attained a verbal compromise respecting the establishment of the third State Commission for Constitutional Reform on the eve of July 2013. As the leader of the parliamentary minority and former speaker of Parliament of Georgia explained ‘the Commission will have [include] the members of the United National Movement, other political actors, NGO’s and expert community... Unquestionably, its primary intention and aim will be to prepare a model of the Constitution which is optimal for the next 10-15 years for Georgia in [a] peaceful, calm process through consensus.’³⁸

It is essential to emphasize that ‘the language of inclusion’ and the genuine constitutional ‘consensus-building mechanisms and toolkits’ were scarce after the ‘sacral electoral transition’ in Georgia. To the author’s best knowledge, there were three paradigmatic cases related to the reconciliation of the main Georgian political stakeholders. The first case was thoroughly scrutinized above and was linked to the so-called ‘Grand Agreement or Compromise’ in relation to the curtailment of the presidential power, formally implemented by the unanimous endorsement of the parliamentary majority and minority on March 25, 2013. The second case emerged following the completion of negotiations between the leadership of the governing political coalition and minority opposition in Parliament on July 7, 2013 to initiate the third State Commission for Constitutional Reform, which included a wide spectrum of societal groups.³⁹ The final case is tied to the last constitutional amendment (October 4, 2013) to the supreme social contract (the constitution) of Georgia.⁴⁰ On the same day, the Parliament of Georgia issued the decree ‘On the Establishment of the State Constitutional Commission’.⁴¹

³⁸ See Government to form Constitutional Commission and stop court cases. Democracy & Freedom Watch – Reporting on the State of Georgian Democracy. Available at <http://dfwatch.net/government-to-form-constitutional-commission-and-stop-court-cases-25288-21124> (last visited June 26, 2016).

³⁹ See Inter-party discussion of Constitutional Amendments in Ureki. The Messenger Online, available at http://www.messenger.com.ge/issues/2898_july_8_2013/2898_ani.html (last visited June 26, 2016) See also Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Translated by Gareth Norbury, First published by Oxford University Press 2012.

⁴⁰ According to the Legislative Herald of Georgia, there are 33 amendments to the Georgian Constitution. See last one. Constitution of Georgia, Constitutional Law of Georgia – 1456 -Is- Website, 16/10/2013. Available At <https://matsne.gov.ge/en/document/view/30346> (last visited June 26, 2016).

⁴¹ See supra note 2. The formal legal backgrounds for the third State Commission for Constitutional Reform, See also New Constitutional Commission to be established, available at http://www.messenger.com.ge/issues/2962_october_7_2013/2962_edit.html Georgian State Commission works on Constitutional Reform, The Messenger Online – Georgia’s Leading English-language daily Newspaper, Available at http://www.messenger.com.ge/issues/3066_march_5_2014/3066_tatia.html (last visited June 26, 2016).

Constitutionally, the summer time of 2013 was very contentious. At this time, the incumbent leading coalition initiated another set of constitutional amendments and there were intensive public deliberations and consultations respecting the merits and weakness of the constitutional proposals. On the last day of July, Georgian authorities asked the Venice Commission to state its position regarding the validity of the constitutional reforms.⁴² The commission briefly summarized key points from its comprehensive analysis of Georgia's constitutional reform package from 2010. The Venice Commission repeated its concerns regarding the budgetary autonomy of Parliament and the ambiguity of the proposed constitutional clauses. Simultaneously, the rapporteurs encouraged the Georgian authorities to seek 'an appropriate balance' between constitutional flexibility and rigidity in order to find the pertinent formula for the constitutional revision.⁴³

The entire constitutional landscape was thoroughly characterized by deep-seated cleavages between the central political players of Georgia. There was no incentive for political actors, especially the political minority or the leading oppositional bloc to extensively engage in the constitutional reform process; as shall see, this scrupulously destroyed both procedural and substantial dynamic of the State Commission for Constitutional Reform. As the respected authors of the Trends in Constitution Building 2013 solidly articulated 'experiences demonstrated that for participatory and representative constitution making to succeed, it is essential to have the buy-in of the powerful elites.'⁴⁴

Simultaneously, the coalitional majority was lacking a discourse of inclusivity; in other words, they did not manage to find common ground for comprehensive constitutional reform. Based on the outset, it was not surprising that the third State Commission for Constitutional Reform failed to define an inclusive forum for reasonable deliberation, continuing the 'Georgian Pattern' in the field of constitution making. Thus the process was missing representatives from minority groups, women (or a gender-inclusive approach)⁴⁵ or youth.⁴⁶

⁴² See supra note 31. pp. 2-8.

⁴³ See the Precise Approach by the Venice Commission respecting constitutional amendments. Report on Constitutional Amendment. Adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009) Available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e) (last visited June 26, 2016).

⁴⁴ See supra note 16. Constitution Building: A Global Review (2013) Edited by Sumit Bysaria. International IDEA Resources on constitution building, International Institute for Democracy and Electoral Assistance 2014 Electronically available at <http://www.idea.int/publications/constitution-building-a-global-review/loader.cfm?csModule=security/getfile&pageid=65189> (last visited June 26, 2016).

⁴⁵ See more as regards to the notion of Feminist Constitutionalism in the modern Global Discourse. Feminist Constitutionalism Global Perspectives Edited by Beverly Baines, Daphne Barak-Erez and Tsvi Kahana, Foreword by Catharine A. Mackinnon See also supra note 40. Chapter 3: Women and constitution building in 2013 by Melanie Allen pp. 16-25.

⁴⁶ See Giorgi Meladze & Karlo Godoladze, Constitution for "All" or for "Chosen Few" – Problems of Constitution-making in Georgia, *Constitutional Law Review (CLR)* July 2015 N8 pp. 23-30 Published by the Constitutional Court of Georgia in partnership with Ilia State University. Available at <http://www.constcourt.ge/en/publications/journals/constitutional-law-review-viii.page> (last visited June 26, 2016).

THE THIRD STATE COMMISSION FOR CONSTITUTIONAL REFORM AND ITS CONTROVERSIAL 'LEGACY'

As mentioned, the composition of the third State Constitutional Commission organically preserved and firmly maintained the arrangements of the past practice.⁴⁷ The aforementioned quasi-constituent assembly was comprised of political parties and institutional leadership from state bodies. It covered legislative, executive, judicial and so-called fourth branch institutions (such as *inter alia* the Ombudsman or Public Defender of Georgia). The assembly represented some voices from civil society, but their overall impact on decision-making was modest.

It is important to note that since the creation of the first State Commission for Constitutional Reform there have been no clear-cut criteria for the selection of representatives and the total number of members.⁴⁸ Consequently, the aforementioned process was strongly characterized by governmental voluntarism or the Government's discretion.

The starting point was the selection of the commission members occurred behind closed doors. It was only at the end of the year, particularly December 27, 2013 that the Georgian legislative assembly shed light on the process and formally endorsed two legal documents. The first decree determined the statutory framework or blueprint and second one discussed how to determine the institution's composition.⁴⁹ Thus in terms of procedural clarity, 'questions of who participates' and 'how they participate'⁵⁰ were decided without any cross-community involvement or dialogue. Overall, it was noticeable that the 'founders' or 'framers' of the institutional settings and arrangements essentially bypassed both the integrative, consultative approaches of modern constitution building and the other contemporary trends in constitutionalism.⁵¹

⁴⁷ Ibid., pp. 28-29.

⁴⁸ For comparison, there were almost identical total numbers of representatives in the Second and Third State Commissions for Constitutional Reform, respectively 56 and 58. By way of contrast, there were 118 members in the first State Commission for Constitutional Reform. If we correlate it to the compositional portrayal of other post-soviet countries, particularly Ukraine and keep in mind the diversity of its societal configuration and territory, only 55 members were presented in the Ukrainian institutional counterpart. See Democracy Reporting International. Constitutional Reforms in Ukraine: An update on recent developments and debates Briefing Paper 56, June 2015 Available at http://democracy-reporting.org/files/update_on_constitution_making_en.pdf (last visited June 26, 2016).

⁴⁹ See Legal Bases of the Constitutional Commission. Decree of the Parliament of Georgia "On the Approval of Statute of the State Constitutional Commission"; Decree of the Parliament of Georgia "On the Approval of the Composition of the State Constitutional Commission"; December 27, 2013. Available at <http://constcommission.ge/en/about> (last visited June 26, 2016).

⁵⁰ See *supra* note 16. Foreword by Nicholas Hysom, pg. v.

⁵¹ See James Tully, Jeffrey L. Dunoff, Anthony F. Lang, Jr., Mattias Kumm and Antje Wiener (2016) *Introducing Global Integral Constitutionalism*, *Global Constitutionalism*, 5, pp. 1-15. See more *Constitution Building: A Global Review* (2013) Edited by Sumit Bysaria. *Supra* note 44, Chapter 2, National Dialogues in 2013, pp. 11-16.

As we emphasized at the beginning of this paper, the labour in the Constitutional Commission was coordinated into five working groups, thus, the primary aim and task of those units was to formulate the basic constitutional narratives, and present it via the Editorial Council of the institution to the Plenary Session of the State Commission for Constitutional Reform for the final approval. The Speaker of Parliament headed the Editorial Council and its membership covered the chairpersons of five working groups and the Secretary of the commission.⁵² In practice, the commission's staff members already attended the Editorial Council meetings.⁵³ The Editorial Council was responsible for conducting thorough deliberations with members and representatives of the Working Groups and the ultimate wording of the Draft Constitutional Law.

The commission membership was oriented towards *pro bono* participation; no one received salaries or honorariums for the job he or she fulfilled. Nevertheless, with this clarification in mind, critics connected the salaries of commission staff members to the absence of a final product, a draft version of constitutional law.⁵⁴ Membership attendance was another key problem that arose during the commission's activities and severely damaged public confidence and trust in the institution. Based on comparative constitutional studies, such problems are particularly visible in so-called fragile, immature or transitional democracies where authoritarian pathologies and institutional nihilism are familiar patterns of social behavior.⁵⁵

In purely statistical terms, according to official recordings of attendance in all five working groups and Plenary Sessions of the Commission, there were multiple cases when the necessary quorum was not met. In order to understand why, it was worth noting that there were the total absence of quorum in the following working groups: on the Issues of the Parliament, the President, and the

⁵² There were nine staff members in the Third State Commission for Constitutional Reform. Each Working Group was served by one Legal Adviser who was responsible for the formal articulation of the group workings, and the analysis of the recent developments in the comparative constitutional law in order to equip the members with newest approaches and studies, other staff members were responsible for the technical functioning or logistics, public (PR) or international relations (IR) and the running of the web page of the Constitutional Commission.

⁵³ See The working meeting of David Usupashvili with the Editorial Group of the Constitutional Commission. available at <http://www.parliament.ge/en/media/axali-ambebi/the-working-meeting-of-david-usupashvili-with-the-editorial-group-of-the-constitutional-commission.page> (last visited June 26, 2016).

⁵⁴ See President's Advisor criticizes State Constitutional Commission. The Messenger Online – Georgia's leading English-language daily Newspaper. Available at http://www.messenger.com.ge/issues/3575_march_1_2016/3575_edit.html (last visited June 26, 2016).

⁵⁵ See *The Politics of Transition in Central Asia and the Caucasus. Enduring Legacies and Emerging Challenges*. Edited by Amanda E. Wooden and Christoph H. Stefes Chapter 4, *State Power and Autocratic Stability, Armenia and Georgia compared*, by Lucan Way, pp. 103-124; first published 2009 by Routledge. See also *Constitutionalism & Democracy. Transitions in the Contemporary World*, The American Councils of Learned Societies, *Comparative Constitutionalism papers*, Edited by Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero and Steven C. Wheatley; Oxford University Press 1993.

Government of Georgia, on the Issues of Independent Constitutional Institutions and on the Issues of Territorial Arrangement and Local Self-Government. On one occasion, the quorum was met in the Working Group on the Issues of Human Rights and Freedoms, the Judiciary and Prosecuting Institutions. As respecting Working Group on the Issues of General Provisions and Revision of the Constitution of Georgia, it was the only unit which managed and reached the quorum three times.⁵⁶

In terms of substance, it was clear that specific viewpoints and perceptions about the conceptual contours of the ongoing constitutional reform were scarce amongst the members of the commission. Furthermore, the notional clarification was the Achilles heel of the commission's activity and unquestionably perpetuated the very 'conventional pattern' of Georgian constitution making. According to 'conventional wisdom' entrenched from the very beginning of the first State Commission for Constitutional Reform, the idea is to formulate governmental narratives as the basis for the future constitutional deliberations.⁵⁷

During the formal meetings of the commission, many members focused on understanding and clarifying the position of the governmental authorities, which would then help shape their own decisions, performance, and behavior; this is keeping with trends in other developing, fragile democracies. What's more, such a pattern is an indisputable *Modus Vivendi* of the complete constitution-making operation in Georgia.

⁵⁶ The particular statistics of the group workings were the following: Working Group on the Issues of General Provisions and Revision of the Constitution of Georgia – 12 official meetings (twice failed); Working Group on the Issues of the Parliament, the President, and the Government of Georgia – 5 meetings; Working Group on the Issues of Human Rights and Freedoms, the Judiciary and Prosecuting Institutions – 12 meetings; Working Group on the Issues of Independent Constitutional Institutions – 8 meetings; Working Group on the Issues of Territorial Arrangement and Local Self-Government – 10 meetings, Plenary Session of the Constitutional Commission was held four times, The attendance quorum was reached in the first and second meetings, See short Overview of the aforementioned plenary sessions at <http://constcommission.ge/en-23> (March 3, 2014) and <http://constcommission.ge/en-24> (March 29, 2014) See also Constitutional Commission gets to work, The Messenger Online – Georgia's leading English-language daily Newspaper. Available at http://www.messenger.com.ge/issues/3067_march_6_2014/3067_edit.html (last visited June 26, 2016).

⁵⁷ See Wolfgang Babeck. Drafting and Adoption of the Constitution of Georgia; IRIS Georgia; Tbilisi 2002, In particular, the phenomenon of the second President of Georgia and his personal impact on the whole constitution-making operation during 1993 -1995. The conventional pattern of 'governmental narratives' unchallengeable preserved in the Second State Commission for Constitutional Reform (2009-2010). It was one of the primary reasons why non-parliamentary political forces boycotted the process and questioned the legitimacy of the institution See also Wolfgang Babeck, Steven Fish, and Zeno Reichenbecher. Rewriting a Constitution: Georgia's shift towards Europe With an introduction by Avtandil Demetrashvili, Chairman of the State Constitutional Commission; Nomos Publishing; Baden-Baden; 2012.

Before we arrived at the discursive components of the commission's disputes and scrutinize the outcomes of the working groups, it seems desirable to understand the peculiarities of international involvement in the operating phases of constitution making. As some contemporary authors argue, modern constitution making is not merely sovereign; instead, it has amalgamated post-sovereign dimensions.⁵⁸ This paper briefly sketched the participatory pattern of the internal Georgian civil actors and stakeholders in order to grasp well both internal and external dynamics of the constitutional reform.⁵⁹

From the early beginnings of the commission's workings, international actors and stakeholders actively engaged in the process. Council of Europe via its office in Georgia as well as Venice Commission for democracy through law vigorously assisted and empowered State Commission for Constitutional Reform both technically and substantially. Deutsche Gesellschaft für Internationale Zusammenarbeit or German Technical Cooperation (hereafter GIZ) also collaborated with State Constitutional Commission and ensured the creation numerous of reports and research papers respecting controversial and constitutional issues.⁶⁰ At the same time, GIZ was actively involved in the promotion of education and awareness regarding ongoing constitutional reform and organized a special workshop for leading media outlets operating in Georgia.⁶¹

The Parliamentary Assembly of the Council of Europe (PACE) scrutinized the political developments in Georgia and released its resolutions, which covered *inter alia* constitutional reform.⁶²

⁵⁸ See Andrew Arato. *Post Sovereign Constitution Making Learning and Legitimacy*. Oxford Constitutional Theory, OUP 2016 See also Annual Review of Constitution Building Processes: 2014. International IDEA resources on constitution building processes, International Institute for Democracy and Electoral Assistance 2015 Available at <http://www.idea.int/publications/annual-review-of-cbp-2014/index.cfm?css=new2013> (last visited June 26, 2016).

⁵⁹ The author of this paper argued that such a peculiar synthesis of sovereign and post-sovereign constitution building may be defined under an umbrella term - 'glocal constitution building'.

⁶⁰ See Dr. Matthias Mähring. *Public Financial Management in the South Caucasus, The Budgetary Powers of Parliaments a Comparative Analysis with particular reference to the Georgian context*, GIZ Advisory Services Bonn, 14 July 2015; *Parliamentary and External Financial Oversight, Analysis of the Constitutional and legislative framework*, Bonn, 1 November 2014; Prof. Dr. Peter Häberle *Legal Opinion for the State Commission for Constitutional Reform with regards reform on fundamental, basic rights* See also The meeting with the working group of the State Constitutional Commission on Budgetary Authority of the Parliaments Available at <http://parliament.ge/en/saparlamento-saqmianoba/komitetebi/iuridiul-sakitxta-komiteti-146/axali-ambebi-iuridiuli/parlamentebis-sabiudjeto-uflebamobilebis-sakitxebtan-dakavshirebit-saxelmwifo-sakonstitucio-komisiis-samushao-djguftan-shexvedra-gaimarta.page> (last visited June 26, 2016)

⁶¹ See Within the Framework of the Joint Project of EMC, GIZ and the State Commission for Constitutional Reform the Seminar was held for journalists on December 19-21, 2014 available at <http://constcommission.ge/news-19-21/12> (last visited June 26, 2016).

⁶² See the Functioning of Democratic Institutions in Georgia. Assembly debate on 1 October 2014 (32nd and 33rd Sittings) available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21275&lang=en#> See also official web page of the State Commission for Constitutional Reform <http://constcommission.ge/en-27> (last visited June 26, 2016).

Furthermore, the representatives and rapporteurs of the Parliamentary Assembly visited Georgia and negotiated with the members of the Constitutional Commission.⁶³

On January 16-17 2014, Venice Commission envoys including the President and the Secretary visited Georgia and had high-ranking meetings with the basic Georgian stakeholders, *inter alia* with the Speaker of Parliament. One of the topics discussed within the framework of the delegation was the practical challenge of constitutional reform and possibilities for future assistance and cooperation from the Venice Commission. Finally, the Speaker of the Georgian Parliament and the President of the Commission summarized the meetings for the specially organized press conference.⁶⁴ The head of the Venice Commission forcefully called on all Georgian stakeholders to ensure and promote the 'inclusive spirit of cooperation' to ensure the constitutional reform's success.⁶⁵

On May 22, 2014 the Venice Commission, including members from Croatia, Malta, Romania and Switzerland, as well as the head of the delegation, the Secretary of the commission, held working sessions with members from all five working groups of the Georgian constitutional commission and deliberated a myriad of overarching constitutional issues. As the Secretary of the Venice Commission, Mr. Thomas Markert put it accurately: 'the Venice Commission is pleased to contribute the constitutional reform in Georgia. We assess the process positively. It based on an intention to reach consensus. Several sets of constitutional amendments adopted in the past. Georgia needs more stability. From my point of view, we are standing in the right way in the context of finding the outcome that is mutually agreeable to every major political force.'⁶⁶

The Venice Commission's 98th, 99th and 100th Plenary Sessions in 2014 were oriented towards informational exchanges and updates regarding constitutional reform in Georgia. Representatives

⁶³ See PACE monitor calls for further reforms in Georgia. Available at <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5348&lang=2&cat> See also Editorial Council of the State Commission for Constitutional Reform held the meeting with the delegation of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) on December 4, 2014, Available at <http://constcommission.ge/news-04/12> (last visited June 26, 2016).

⁶⁴ See the video mainstream of the joint Press Conference of the Speaker of Parliament and the President of the Venice Commission. Available at https://www.youtube.com/watch?v=GF_e13q0uhM (last visited June 26, 2016).

⁶⁵ See Venice Commission says Georgian Constitution should meet Political and Social Requirements. The Messenger Online – Georgia's leading English-language daily Newspaper. Available at http://www.messenger.com.ge/issues/3034_january_20_2014/3034_ani.html (last visited June 26, 2016).

⁶⁶ See Georgia – Meeting with the Georgian Constitutional Reform Commission. Available at <http://www.venice.coe.int/webforms/events/?id=1861> <http://constcommission.ge/en-22> The Visit of Venice Commission in Georgia <http://www.parliament.ge/en/parlamentarebi/tavmdjdomare-1125/tavmdjdomaris-axali-ambebi/veneciis-komisiis-viziti-saqartveloshi.page> (last visited June 26, 2016).

of Georgian authorities systematically presented and tabled the developments before the Plenary Session of the Venice Commission. In its 100th Plenary Session, the Speaker of the Georgian Parliament delivered a comprehensive speech on the progress of the Constitutional reforms.⁶⁷

The same trends of cooperation and collaborative continued in 2015. On May 21-22, 2015 within the framework of the Council of Europe’s project “Strengthening the Independence and Efficiency of the Justice System in Georgia” organized a roundtable discussion, “On Independence of the Judiciary, full Individual Access to Constitutional Court and Prosecution Service Constitutional Settings”.⁶⁸ Subject experts invited by the Council of Europe and representatives of the Venice Commission shared and explored contemporary international and pan-European standards and paradigms with regards to judicial independence and impartiality as the ultimate values in any constitutional democracy.

The second part of the meeting was oriented towards constitutional justice and, in particular, additional constitutional remedies to enhance and foster the protection of fundamental human rights in the light of European approaches and Croatian constitutional jurisprudence and case law. Concurrently, based on reference documents from the Venice Commission, the speakers gave overviews of best practices and European conceptions of prosecution, along with its place classical tripartite constitutional government.⁶⁹ Finally, in its 103rd Plenary Session (June 19-20, 2015), the Venice Commission was informed about the progress of constitutional reform in Georgia.⁷⁰

⁶⁷ See 98th Plenary Session of the Venice Commission – <http://www.venice.coe.int/webforms/events/?id=1766>; 99th Plenary Session of the Commission – <http://www.venice.coe.int/webforms/events/?id=1767>; 100th Plenary Session of the Commission – <http://www.venice.coe.int/webforms/events/?id=1768> (last visited June 26, 2016).

⁶⁸ See Georgia – Constitutional reform. <http://www.venice.coe.int/webforms/events/default.aspx?id=2017> See also European Commission for Democracy through Law (Venice Commission) in co-operation with the State Constitutional Commission of Georgia. Working Group on Human Rights and Fundamental Freedoms, Judiciary and Prosecution Service, Roundtable Discussion on Independence of the Judiciary, Full Individual Access to Constitutional Court and Prosecution Service Constitutional Setting, Report “Full Individual Access to the Constitutional Court as an Effective Remedy for Human Rights Protection” by Ms. Slavica Banić (Justice, Constitutional Court of Croatia, former Substitute Member of the Venice Commission) available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2015\)011-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2015)011-e) Gudauri, Georgia 21-22 May 2015 (last visited June 26, 2016).

⁶⁹ See more respecting meeting peculiarities. Available at <http://www.parliament.ge/en/media/axali-ambebi/manana-kobakhidze-participated-in-the-working-meeting-of-the-state-constitutional-commission.page> (last visited June 26, 2016).

⁷⁰ See 103rd Plenary Session of the Venice Commission of the Council of Europe. Venice, June 19-20, 2015. All official information available at <http://www.venice.coe.int/webforms/events/default.aspx?id=1914> (last visited June 26, 2016).

Georgian civil society was also involved in this process: Georgian think tanks and non-governmental organizations provided extensive input and proposals to the State Commission for Constitutional Reform. Based on their capacities and expertise, the Georgian civil sector initiated a number of concrete conceptual narratives and constitutional clauses with respect human rights, the electoral system, constitutional arrangements of the Prosecutorial Service, institutional changes to the Public Defender office of Georgia, suggestions and recommendations regarding the Judiciary, and a comprehensive concept paper and strategy local-self governmental definitions and arrangements.⁷¹

To conclude this chapter, we focus on the most challenging constitutional issues and debates in the constitutional commission. In terms of deliberation, the Working Group on the Issues of Human Rights and Freedoms, the Judiciary, and Prosecuting Institutions ensured a dynamic and productive environment. This group maintained a work-friendly environment and background until the end of 2015.

Despite the absence of quorum (achieved once over the course of 12 meetings), there were lively discussions and conceptual debates regarding foundational constitutional issues, in particular, the institutional design or arrangements of judicial authority. During the actual operation of the State Commission for Constitutional Reform, the working group discussed only the peculiar arrangements and institutional refinement of the judiciary, the other two important realms being Prosecution Service settings, Basic Human Rights and Freedoms went unchanged and were excluded from the discourse agenda.⁷²

A pivotal issue raised in the working process was judicial appointments, particularly the tenure appointments of justices in the constitutional system. Proponents and opponents spoke at length to emphasize their arguments, recommendations, and constitutional proposals. On December 15, 2014, vigorous deliberations centered on lifetime appointments. Proponents reflected the comparative constitutional studies *inter alia* approach of the Venice Commission and focused on entrenched tenure appointments, while opponents highlighted the peculiar context of Georgian

⁷¹ See the general overview of the International and local organizations involvement in the process of constitution making, comprehensive speech respecting mentioned issues by the side of the Secretary of the State Commission for Constitutional Reform, the third Plenary Meeting of the SCC of Georgia (March 28, 2015) Available at <http://www.parliament.ge/en/media/axali-ambebi/the-third-enlarged-sitting-of-the-constitutional-commission.page> (last visited June 26, 2016).

⁷² The only exception from this pattern was the official roundtable discussion with the Venice Commission in which one of the topics covered by the foreign experts was the arrangements of the Prosecutorial Service in the European constitutional spaces, See *supra* note 62.

judicial design and arrangements. During the timeframe of the State Commission for Constitutional Reform, the membership of this working unit did not manage to develop a conclusive constitutional formula in connection to the fundamentals of the Judiciary.⁷³

By way of contrast, in practical terms, the Working Group on the Issues of the Parliament, the President, and the Government of Georgia was the most unproductive. During the two years, it was the only commission unit that handled only five working meetings. Early meetings of the working group were oriented around clarifying procedural and technical issues; disputes respecting governmental institutional frameworks exclusively took place at third and fourth working conventions of the working group, on May 5 and 12, 2014. Since then, the working unit assembled only once, at the very end of the formal mandate of the State Commission for Constitutional Reform (February 12, 2016).

The key debates regarding the formulation of the constitutional design of the executive and legislative branches as well as the role and the function of the head of the state were held on May 12, 2014. This was the final discourse of this working group, according to the decision of the chairperson of the working unit the session held behind closed doors. The presiding person of the working unit presented the basic project respecting the constitutional design and domains of the executive-legislative arrangements and institutional affiliations. Members of the Working Group discussed the very formation of the executive government, so-called investiture procedure, and the confidence no-confidence modalities in the contemporary constitutional jurisdictions. Throughout the meeting, some prominent academics discussed the peculiarities of the modern forms of governance and explored the substantial nature of the semi-presidential and parliamentary regimes relevant to the Georgian constitutional context.⁷⁴

The Working Group on the Issues of Independent Constitutional Institutions was primarily oriented towards the refinement of the constitutional framework of the Ombudsman's Office of Georgia, Independent Agency institutions *inter alia* State Audit Office of Georgia, National Bank of Georgia, National Security Council of Georgia etc. Some members of the working unit argued about the necessity of formulating a separate constitutional chapter, which covered all independent institutional actors. It is important to note that because of the non-political nature of the issues and

⁷³ See Working Group on the Issues of Human Rights and Freedoms, the Judiciary and Prosecuting Institutions held a Meeting on December 15, 2014. Available at <http://constcommission.ge/news-08/11> (last visited June 26, 2016).

⁷⁴ See the State Commission for Constitutional Reform holds closed meeting, The Messenger Online – Georgia's Leading English language daily Newspaper. Available at http://www.messenger.com.ge/issues/3114_may_13_2014/3114_ani.html (last visited June 26, 2016).

topics deliberated by the group members it was more probable to find final agreement about the formulation of the constitutional clauses. Despite these cooperative environments, the overall functioning and dynamic of the State Commission for Constitutional Reform adversely affected on the productiveness of this working group.

One of the crucial topics discussed in the process of the Working Group on the Issues of General Provisions and Revision of the Constitution of Georgia was the so-called revision clause and the appropriate formula for the Georgian Constitution. This issue was forcefully actualized just after the electoral transition in Georgia and as we indicated earlier, the Georgian political leadership argued against the very excessive rigidity of the revision clause in the Georgian constitutional context. The Georgian non-governmental sector and leading constitutional lawyers group initiated so-called Scandinavian approach (plurality vote mechanism) towards this line also presented and tabled constitutional proposal respecting the 'eternity clauses' formulation in Georgia's supreme social contract. The working group also scrutinized the possibility of the involvement of the Constitutional Court in the revision process, as recommended by the Venice Commission. Concurrently, the working unit disputed the direction of the territorial arrangements and more particularly the status of Georgia's breakaway regions.⁷⁵

The Working Group on the Issues of Territorial Arrangement and Local Self-Government examined the definitional blueprint of the local self-government and its constitutional entrenchment. The members of the working group initiated a couple of constitutional proposals respecting financial and institutional guarantees of Local Self-Governmental entities. In addition, the members of the working group proposed and originated the constitutional clause according to all fundamentals that essentially related the functioning of the local self-government, defined and regulated by the organic laws of Georgian polity. Finally, one of the topics deliberated within the working of the mentioned working unit was expanding the circle of the subjects of the constitutional complaints before the Constitutional Court of Georgia regarding the issues related the local self-government.⁷⁶

Overall, the ultimate product of the State Commission for Constitutional Reform was nearly 100 conceptual proposals, which covered the basic constitutional and institutional issues. The likelihood that those conceptual proposals will be used by the new political elites or leadership seems

⁷⁵ One of the members of the working unit initiated to introduce constitutional agreements for the breakaway Regions of Georgia but the majority of the members rejected it.

⁷⁶ All constitutional proposals and narratives formulated on Georgian, thus, the very errors and gaps of the translation belong to the author of the present paper.

small, however. This feature led to solid feedback from critics of the State Commission for Constitutional Reform and triggered controversial perceptions respecting the ‘legacy’ of Georgia’s third constitutional reform and its institutional vehicle.

CONSTITUTION AS AN IMAGO POLITICO

‘In late antiquity, Blessed Augustine had built his theory of society or polity on the very idea that every person is an *imago dei*.⁷⁷ If we perceive the wisdom of this medieval political theology, which was the foundation or bedrock of the modern grammar and conceptual framework of the contemporary public law and constitutional studies, we must understand constitution-making as the product of politics, or as an *Imago Politico*. Contemporary scholars and practitioners similarly argue that contemporary constitution-building processes are inherently political due to their *nature* and procedural dimensions’.⁷⁸

Georgia’s attempt to revise its fundamental social contract suggests the following conclusions: in the absence of the culture of participatory constitutionalism, it is impossible to construe genuine legitimacy for the polity’s fundamental law. Secondly, as Jon Elster once eloquently wrote, ‘working in the shadow of conflict, low levels of trust, and fundamental disagreements regarding both the constitutional process and design, are not conducive to the cooperation and compromise required for successful constitution-building’.⁷⁹ Finally, without the *bona fide* incentivization and engagement of political elites in the constitution making process, the practical implementation of the constitutional changes seems hopeless, unreasonable and implausible.

Future framers or constitution-makers of the Georgia’s constitutional fundamentals should reconsider *context-relevant essential virtue*. To paraphrase the renowned American public intellectual

⁷⁷ See Matthias Goldman (2016). A Matter of Perspective: Global Governance and the Distinction Between Public and Private Authority (and not law) *Global Constitutionalism*, 5, pp. 48-84.

⁷⁸ See A Practical Guide to Constitution Building Markus Böckenförde, Nora Hedling, and Winluck Wahiu. International Institute for Democracy and Electoral Assistance (International IDEA), 2011 Electronically available at <http://www.constitutionnet.org/files/cb-handbook-all-chapters-050112.pdf> See also Constitution-making and Reform, Options for the Process, Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan, Interpeace Publisher, 2011 Electronically available at <http://www.constitutionmakingforpeace.org/sites/default/files/handbooks/Constitution-Making-Handbook-English.pdf> (last visited June 26, 2016).

⁷⁹ See Interim Constitutions Peacekeeping and Democracy-Building Tools. Lead author Kimana Zulueta-Fülscher, International Institute for Democracy and Electoral Assistance 2015, pp. 5-6 Electronically available at <http://www.constitutionnet.org/files/interim-constitutions-peacekeeping-and-democracy-building-tools.pdf> (last visited June 26, 2016).

and theologian Karl Paul Reinhold Niebuhr's famous declaration, 'change what you cannot accept, accept what you cannot change.'⁸⁰

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⁸⁰ See Reinhold Niebuhr and *Contemporary Politics. God and Power* Edited by Richard Harries and Stephen Platten. Oxford University Press 2010 This passage is the restatement of Niebuhr's famous quotation: "God grant me the serenity to accept the things I cannot change, courage to change the things I can, and the wisdom to know the difference."