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Instrumentalization of the Constitutional Order as a Tool of Political Control in the Post-Soviet Space. The Case of the Republic of Georgia

Keywords: Georgia, constitution, the rule of law, state of law, political system
Słowa kluczowe: Gruzja, konstytucja, idea praworządności, państwo prawa, system polityczny

Abstract

Georgia is one of the most democratized states in the post-Soviet space. This article presents the mechanisms of instrumentalization and ideologization of the Georgian constitution and its political and social context. The absence of a consolidated state of the law was found to have four causes: 1) colonial experiences of the Enlightenment; 2) heritage of Soviet legislation; 3) rapid Westernization of the legal system; 4) political actors and parties manipulating the constitution in the name of particularistic interests.

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Streszczenie

Instrumentalizacja porządku konstytucyjnego jako narzędzie kontroli politycznej w przestrzeni postsowieckiej. Przypadek Republiki Gruzji

Gruzja jest jednym z najbardziej zdemokratyzowanych państw w regionie Kaukazu Południowego i Azji Centralnej. Celem artykułu jest przedstawienie mechanizmów instrumentalizacji i ideologizowania konstytucji w bieżącej walce politycznej oraz wskazanie kontekstu politycznego i społecznego. Wyróżniono cztery zasadnicze przyczyny braku skonsolidowanego państwa prawa: 1) kolonialne doświadczenia oświecenia, 2) dziedzictwo sowieckiego prawodawstwa, 3) szybka westernizacjia systemu prawnego, oraz 4) manipulowanie konstytucją przez graczy i partie polityczne dla realizacji partykularnych celów i interesów.

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I. Introduction

Thirty years after the USSR's collapse, the states emerged from the ruins of that empire exemplify different transformation experiences and levels of democracy. These extremes seem to be linked by the political instrumentalization of the constitutional order. This paper aims to show how the constitution is instrumentalized and ideologized in current political struggles and identify contextual causes. Using the case of Georgia, a country perceived as a leader in democratic and pro-Western change, the instrumentalization of the constitution as a fundamental legal act and the resulting discrediting of the rule of law, in its Western sense, is examined. The article thus seeks to answer: what are the most important structures and mechanisms influencing the lack of respect for the rule of law and the instrumental use of the constitution in post-Soviet states using Georgia's case, and what mechanism plays a dominant role in the process of the legal order's political instrumentalization? One can distinguish four basic reasons for the lack of the consolidated rule of law and the constitution's instrumentalization: no experience of the Enlightenment ('alien' concept), the Soviet legal order's legacy, imposed West-

ernization of law, and political players' abuse/misuse of the constitutional order on a social level resulting from a poor understanding of the rule of law.

Methodologically, we use process tracing of instrumentalization mechanisms combined with content analysis of official documents. The basic data analyzed are referenda and constitutional changes in Georgia after 2003 and public reaction to changes. The study covers the process of the constitution's instrumentalization from the Rose Revolution (2003) to the last parliamentary elections in Georgia (2020).

In a broader research scope, presenting a case study of Georgia may contribute to the comparative analysis of similar systems of instrumentalization in the South Caucasus and Central Asian states.

II. The (Lack of) Experience of the Enlightenment

The experience of Western Europe in creating the idea of state and law reached Georgia with a good delay. Significantly, European ontology and epistemology of social order were transferred from the imperial center – Russia, to a colonial periphery (Russia itself was deeply Orientalized by Enlightenment and then Romantic Western writers[4]). As in any colonial relationship, this occurred with the complicity of the subordinated. For the 19th c. Georgian elite, studying in St. Petersburg was an opportunity to learn the West's legal and political mechanisms. Known as *tergdaleulebi*, their name indicated they were both Other (bringing different values) and Georgian. The notion of the nation being enlightened by foreign-educated elites is still present in Georgian discourse in the claim of imposed order contradicting traditional local values. Modernity as a result of the Enlightenment is considered a foreign concept, despite Georgia's 'Europeanness' being firmly rooted in mythological references to Colchian-Greek contacts.

This Enlightenment absence and the complicated, multidimensional relationship with Russia as the civilizing center has another important consequence for the legal order's contemporary perception and its political instrumentalization: the lack of understanding of the modern state's secular nature

[4] L. Wolff, *Inventing Eastern Europe: The map of civilization on the mind of the Enlightenment*, Stanford 1994.

and separating the throne from the altar. Thus, political order and the rule of law are significantly instrumentalized according to Byzantine models. It gradually transformed the liberal democracy formed after the Rose Revolution into an illiberal sovereign democracy based on informal rule by powerful individuals and interest groups[5].

III. Legacy of the Soviet Legal Order

The federalist constitutional system of the USSR had a key influence on the political and legal transition after 1991. One fatal way of instrumentalizing conflict to maintain and consolidate power over the periphery was through constitutional changes to the status of the Georgian SSR's administrative units. Abkhazia's autonomy changed with the introduction of the Stalinist constitution in 1936. This arbitrary change, via Stalin and Beria's fiat, led to the armed conflict in the 1990s[6]. The issue around South Ossetia's autonomous status was similarly regulated[7].

Another significant space of disagreement exploited by central authorities was discussing official statuses of local languages and defining and cataloging individual ethnic groups. Manipulation of status served particular political goals, thus leading to conflicts[8], and continues today. It is a tool of Russia's influence on Georgia, and similar mechanisms are used in Georgian policy towards ethnic minorities[9].

The above exemplifies the myriad of ways to interpret constitutional order in now-independent Georgia. As Charles H. Fairbanks Jr. stated: "[Soviet] law was not an impartial force above individuals and parties, but a mask for class

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[5] H. Aliyev, *Post-Soviet informality: towards theory-building*, "International Journal of Sociology and Social Policy" 2015, No. 35 (3/4).

[6] T.K. Blauvelt, *The establishment of soviet power in Abkhazia: Ethnicity, contestation and clientelism in the revolutionary periphery*, "Revolutionary Russia" 2014, No. 27 (1).

[7] E. Souleimanov, *Understanding ethnopolitical conflict: Karabakh, South Ossetia, and Abkhazia wars reconsidered*, London 2013, pp. 112–126.

[8] A. Saparov, *From conflict to autonomy in the Caucasus: The Soviet Union and the making of Abkhazia, South Ossetia and Nagorno Karabakh*, London & New York 2014, pp. 140–168.

[9] M. Shavtvaladze, *The State and Ethnic Minorities: The Case of Georgia*, "Region" 2018, No. 7 (1).

domination"[10]. The Soviet approach to law and the constitution was ignoring the rule of law. The systemic transformation introduced dynamically since the Rose Revolution, which presupposes implementation of the rule of law under conditions of liberal democracy, is thus severely limited. Like in other post-Soviet states, there is simply no universal understanding of the "rule of law" in Georgia. Soviet-style politics practiced from a position of strength implies that without the rule of law, lack of power equals political and economic marginalization[11]. The legacy of these instrumentalizations and their pattern is evident in contemporary Georgian politics.

IV. Westernization of the Legal Order

Westernization of the legal order should be considered in the broader context of how democratic processes, including civil rights and economic freedoms, are perceived by society. According to December 2020 opinion polls, just 45% of respondents declared that Georgia was a democracy, 42% had the opposite opinion, and 12% did not know[12]. To understand the discrepancy between perception and understanding of democracy in legal terms, one should recall the post-Rose Revolution transformation. M. Saakashvili's rule radically changed Georgia. However, the new administration's biggest mistake was not understanding the relation between Western economic liberalism and the rule of law: "imported neoliberal and materialistic ideology was alien to the most basic aspects of Georgian identity"[13]. Thus, the introduced reforms were not tangible to most of society and had a high social cost. This discrepancy between Western ideas and their implementation should also be seen as a factor in issues around legal reform. These were necessary to put Georgia on a 'Western' track but became a government tool shaping a "favorable" state. Accusations against Saakashvili regarding his authoritarian aspirations were thus justi-

[10] C.H. Fairbanks Jr, *Twenty Years of Postcommunism: Georgia's Soviet Legacy*, "Journal of Democracy" 2010, 21 (1), p. 148.

[11] Ibidem, pp. 148–151.

[12] Public Attitudes in Georgia. Results of December 2020 telephone Survey Carried Out for NDI and CRRC Georgia, https://www.ndi.org/sites/default/files/NDI%20Georgia_December%202020%20Poll_ENG_FINAL.pdf (30.04.2021).

[13] P. Gahrton, *Georgia. Pawn in the New Great Game*, London 2010, p. 171.

fied. It did not change significantly after the Georgian Dream (GD) won parliamentary elections in 2012. Amendments to the electoral code and constitution represent actions motivated by particular political interests.

Crucially, Georgian society does not understand the basic mechanisms resulting from the legal system. The gap between those in power and society is deepening. In a culture where a USSR-era mindset persists, introducing constitutional reforms should be undertaken carefully thought out. The period of E. Shevardnadze's rule did not fundamentally alter the area of lawmaking. Importantly, "there [was] an awareness in the country that the unifying nature of globalization and impact of Westernization are fraught with assimilation and the loss of specific ethnic characteristics"[14]. The situation, despite the authorities' declarations, did not change significantly after the resignation of Shevardnadze. Political activities were rather determined by the NATO integration paradigm pushed by Saakashvili. Norms and standards were thus, in a way, imposed by NATO.

After the war in 2008, the EU became the main point of reference in place of NATO. Despite the successive steps and required legislative changes taken within EU-Georgia integration, it seems new legal regulations have been somewhat "forced", especially around socially sensitive topics. The EU is the driver behind the reforms, even if proposed regulations are not well-supported in ruling circles and society. Paradoxically, when speaking about democracy and European integration, the political elites consider these two the same[15]. Georgian decision-makers forget, however, that in both cases, success requires the rule of law. Unfortunately, this does not translate into new legislation of a high standard but rather the creation of law per the rulers' needs.

V. Using the State's Constitutional Framework While Circumventing the Rule of Law

Georgia is considered the most democratic state in the South Caucasus and Central Asia region. However, it is debatable whether Georgian politicians

[14] G. Svanidze, *Globalization-Westernization: Difficulties of Transition in Georgia*, "The Caucasus & Globalization" 2007, vol. 1 (3), p. 92.

[15] J. Brodowski, *Gruzja po rewolucji róż. Obraz przemian polityczno-społecznych w latach 2003–2018*, Kraków 2019, p. 221.

properly understand the concept of the rule of law. It raises doubts about the quality of legal solutions and the intent and aim of their adoption. There are several cases in which profound changes were made to the constitution to serve particularistic goals and interests. It is uncertain whether exploitative manipulation of this foundational document results from a misunderstanding of the idea of the rule of law or politicians' and political parties' intentional actions. Crucially, society remains unaware to a large degree that the constitution is being manipulated[16].

Georgia's constitution was approved by parliament on August 24, 1995 under Shevardnadze. Significantly, the preamble evoked the constitution of 1921 as recognition of Georgia's democratic heritage and reference to the history of her statehood and independence[17]. Following the Rose Revolution and Saakashvili's victory in the presidential election on February 6, 2004, a significant change was adopted regarding the systemic status of the president vis-a-vis the prime minister and other cabinet members. What underpinned the changes was not only the altruistic desire to strengthen the president's position and transform the system towards a French model but also the power struggle between the revolution's leaders: Saakashvili, who became president; Z. Zhvania, who became prime minister; and N. Burjanadze, who became speaker of parliament. The amendments gave the president the right to nominate prime ministers and dissolve parliament[18]. Saakashvili thus became able to directly influence the position of Zhvania and Burjanadze. In time, Saakashvili pushed out the revolution's other figures into the background of the political arena, concentrating all power around himself and his United National Movement (UNM) party.

Six years later, another significant change to the system was introduced: presidential prerogatives were limited, with the center of executive power moving from the president to the prime minister-led government and parliament. The changes adopted on October 15, 2010 ensured systemic transfor-

[16] G. Kandelaki, *The democratic Republic of Georgia: Forgotten lessons for our democracy*, [in:] *The Making of Modern Georgia, 1918–2012*, ed. S.F. Jones, London & New York 2014.

[17] Constitution of Georgia, 1995, https://matsne.gov.ge/en/document/view/30346?publication=36 (10.07.2021).

[18] H. Aliyev, *The effects of the Saakashvili era reforms on informal practices in the Republic of Georgia*, "Studies of Transition States and Societies" 2014, No. 6 (1), pp. 19–33.

mation from a presidential to parliamentary-cabinet model. It involved a serious political crisis, forcing Saakashvili to deal with the consequences of the Russo-Georgian War of 2008, the loss of territorial integrity, and the looming end of his presidential tenure. The planned change was to enter into force not on the date of its promulgation but after the presidential election scheduled for 2013, a clear sign that Saakashvili wanted to remain in power and transition smoothly from the president to prime minister while maintaining executive powers. It was also an attempt to maintain the current direction of the state's development. However, the election was won by GD, led by controversial businessman B. Ivanishvili, who became prime minister.

Another important change was made in 2013 as a result of political struggles between UNM and GD. The adopted amendments limited presidential powers, with acceptance by a parliamentary majority now being required to form a government[19]. G. Margvelashvili replacing Saakashvili as president, gave over full power to Ivanishvili and GD.

The last significant systemic change was the amendment of the electoral code and the abandonment of direct presidential elections. According to the amendments adopted on March 21, 2018, from 2024, the president will be elected by a 300-person electoral college. Thus, Salome Zourabichvili is the last president elected in a direct election. Limiting the president's role in real and symbolic dimensions seems to consolidate Georgia's political system into a parliamentary one. However, it leads to a winner-takes-all situation, with the winner independently deciding the shape of the state[20]. The rule of law would demand that systemic changes serve the state, not the interests of particular political actors[21]. Nonetheless, the Venice Commission and the US have expressed their approval for the introduced amendments. Whether what matters more is the effect (i.e., the shape of the political system and legal solutions) or rather the intent behind changes and if they are widely understood by society is an open question.

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[19] N. Borisov, *From presidentialism to parliamentarism: parliamentarization of government systems in Kyrgyzstan, Georgia and Armenia*, "Central Asia and the Caucasus" 2018, No. 19 (4), pp. 35–46.

[20] G. Goradze, *Separation of Powers According to the New Amendments to the Constitution of Georgia – Problems and Prospects*, "Bratislava Law Review" 2019, No. 3 (1), pp. 81–91.

[21] D. Aprasidze, D.S. Siroky, *Technocratic populism in hybrid regimes: Georgia on my mind and in my pocket*, "Politics and Governance" 2020, No. 8 (4), pp. 580–589.

VI. Conclusions

Over the last two decades, the exploitation of the Georgian constitution and the introduction of systemic changes for political gain has occurred several times. Which of the four listed factors has had the strongest impact on the legal system is unclear? Together, they paint a picture of imperfect democracy and an unconsolidated state of law. To properly grasp Georgia's understanding of the Western idea of the rule of law, one must consider the colonial experience of the Enlightenment, the heritage of Soviet legislation, the legal system's rapid Westernization, and political actors manipulating the constitution.

Despite all these drawbacks, the Georgian legal system is still the most advanced and closest to liberal democracy in the region. The transition from authoritarianism to democracy in nearby states has followed different courses, often leading to a consolidated authoritarian-democratic hybrid with permanent features of both systems. It should be noted how easily Georgian society accepted subsequent systemic changes – the establishing of the presidential system in 2004, the change from presidential to a parliamentary-cabinet system in 2010, and the abandonment of direct presidential elections in 2018, which shifted the center of power to the parliament. Possible reasons include society's low legislative awareness and misunderstanding of the actual consequences of profound systemic changes.

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