

'CHECK AND BALANCE' SYSTEM IN BRANCHES OF STATE POWER (Georgia)

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The work of researchers from post-communist states indicates that in the majority of post-Soviet states, including Georgia, so-called '*hybrid regimes*' are being formed, which are neither fully totalitarian nor fully democratic. The hybrid regimes are referred to in different terms by different authors: 'partial democracies' (Epstein et al.), 'semi consolidated authoritarian regimes' (Freedom House), 'defective democracies' (Croissant and Merkel), 'electoral democracies' (Diamond), 'illiberal democracies' (Zakaria), 'competitive authoritarianisms' (Levitsky and Way), 'semi-authoritarianisms' (Ottaway), and 'electoral authoritarianisms' (Schedler).

It can be assumed that the prospects for democratic development in a country with a hybrid regime are rather vague. In a transitional society, the weakening of various systems is followed by a need to transform and institutionalise social practices and institutions. One of the most important components of democratic transformation is the introduction of effective balancing mechanisms between different branches of state government (Legislative, Executive and Judicial); i.e. the precise definition and identification of the rights, obligations and responsibilities at all levels of government. It is equally important to develop an organised institutional system. The formation of strong Legislative and Judicial branches will provide a framework for the Executive branch, i.e. administration; this will facilitate planned development of democratic processes in the society, enabling it to control and regulate those processes.

As a rule, hybrid regimes cannot create mechanisms able to balance power within the system. According to the concepts of pluralism and polyarchy, the development of state institutions has crucial importance in achieving democracy. From this perspective, democracy is not perfect but real. Transformation of the political system - i.e. transition from a hybrid regime to democracy - in the near future entails its popularisation and 'polyarchy-isation' (Dahl, 1953). Western scholars often refer to European and American political systems not as democracies but as polyarchies. 'Polyarchy' means pluralism, where the power is not concentrated in the centre. This is a realistic theory of democracy - a 'real democracy'.

The main aim of the article is to study the theory of the division of power and 'Check and Balance' concept, to describe management strategies within the Judicial and Executive branches of government and to reveal and analyse factors which support or interfere with the formation of a new 'Check and Balance' system of government. A sociological approach to the subject under study involves the analysis of such systems in the context of the transforming Georgian state and society. In this article the sociological study of the institutionalisation of Check and Balance principles will be based on systemic and situational approaches.

‘Check and Balance’ between different branches of government, their structure and principles of formation are influenced by a number of historical, cultural, economic and political factors. State government forms and institutionalises the functions and tasks of state institutions and machinery at all stages of social history. The essence of the power of state institutions in democratic, jural states and society is the ability to guarantee the protection of human rights and liberties and the security of individuals, as well as of society as a whole.

In the modern world, distribution of state power is a recognised feature of a democratic, jural state. Separation of powers is, first of all, a legal form of democracy.

The theory of separation of powers was developed as a result of centuries of state development and the search for the most efficient ways to combat despotism against society. The theory was created by several political researchers: the idea was expressed by Aristotle, John Locke developed and proved it (1632-1704), Charles Louis Montesquieu gave it the classical form (1689-1755) and Alexander Hamilton, James Madison and John Jay shaped it into its current form.

Principal theses of the theory of separation of powers are as follows: separation of powers is supported by the constitution; according to the constitution, the government is distributed among different people and institutions; all the three branches of government are equal and autonomous; none of the branches of government can exercise the power of the other two branches; the judiciary are independent of political influence.

The principle of separation of powers does not interfere with the principle of unity of power. On the contrary, it creates a balance between independent branches of government exercising their powers. Distribution of state power in practice exists first of all on the level of a direct or indirect public government. The power is distributed among legislative, executive and judicial institutions through the execution of their constitutional functions, as well as mutual control, interaction and ‘check and balance’ amongst them (Rukhadze, 2011).

The theory of separation of powers in a state aims to justify state order which precludes the usurping of power by any state institution. Initially it was aimed at justifying limitation of royal power; more recently it has been used as a theoretical and ideological argument against any form of dictatorship, the threat of which is a permanent social reality.

The principle of separation of powers is viewed as the theory and practice for any democratic state. In Georgia, among them, ‘State authority shall be exercised on the basis of the principle of separation of powers.’ (The Constitution of Georgia, Article 5, Section 4). On the basis of the principle of separation of powers, the Georgian constitution recognises three branches: Legislative, Executive and Judicial.

The principle of separation of powers, and its inherent system of control and balance, determines the form of government of a country and its respective political regime.

While exercising its power, a branch should not be able to interfere in the remit of the other branches. In order to ensure this, the institution of separation of powers has a system of check and balance.

One of the most important indicators of democratic development of the state in Georgia is the extent to which the distribution of powers among these branches of political government corresponds to the principle of ‘separation of powers’ mentioned in Article 5 of the Constitution.

The principle of separation of powers acting within state machinery implies mutual influence and restriction of the institutions of this machinery. Hence, exercising this principle implies the existence of a system of check and balance in the state machinery. Separation of powers is not restricted to distributing functions among state institutions. It invariably contains a system for interconnecting and balancing state institutions, which guarantees the independence of the branches of government, and enables them to influence one another.

The most important balancing role in the system of separation of powers is the Judicial power. The Constitution of Georgia recognises the independence of Judicial power within this principle. Article 82 of the constitution stipulates the guarantees of its independence from other branches of government: 'The judiciary shall be independent and exercised exclusively by courts. A court shall adopt a judgement in the name of Georgia.' According to the above mentioned article, judiciary is exercised with the help of constitutional control, organic law and other methods determined by the law. While exercising this function the acts adopted by the courts are imperative for all state institutions and persons in the whole territory of the country.

In the context of the theory of separation of powers and the principles of the 'check and balance' concept, the Georgia case study provides an opportunity to draw important conclusions.

Implementation of the main principles of modern democratic distribution of power - a new *Check and Balance* system and *new public management* - is vitally important. In a democratic system this is directly connected with the existence of at least two sufficiently powerful and mutually independent centres. The Judicial branch has substantial powers to supervise the Executive branch of government. Since it would be interesting to know how commonly these powers are exercised in Georgia? how effectively the Judicial branch supervises the Executive branch of government/public service?

After the 2003 *Rose Revolution* reformation of many state institutions started in Georgia. The reform of public institutions is one of the most important for insuring efficiency of the state. All social groups are interested in making public services more affective, active and transparent. Despite the ongoing changes, public service institutions still retain, in their form and essence, qualities of autocratic management characteristic of 'Soviet' institutions. This is extremely damaging – especially in the present situation, when state institutions are being formed – and it is necessary to create modern structures, use non-traditional methods of management, and take appropriate decisions.

According to some experts: 'Despite the fact that the "body" of democratic government in Georgia developed in the form of state institutions, the way in which state institution regard themselves is still problematic. The shortcoming of the Georgian government system is the unrestricted nature of the Executive branch of government, expressed by a lack of "Check and Balance" in Judicial and Executive institutions. The courts take the side of the state in lawsuits filed by citizens or organisations against public services and ministries. They condone unlawful decisions made by the ministries.' (The World Bank, 1999-2011).

In modern theoretical sociology there is consensus on the following: the Executive Branch of government by its nature strives towards independence and freedom from control. This is facilitated by reliance on 'loyal' bureaucratic offices created by it. These are responsible for confronting representative bodies in order to retain power by any means or method of violence available to them, e.g. by falsifying information to achieve the desired result, etc.

Political, legal and social experts believe that a major problem with New Public Management in the Georgian state is a lack of balance in the system of state power, expressed as a *"weakness of the key factor of real democracy - the separation of powers"*. The separation of powers is not based exclusively on constitutional division of state powers. Although it is one of the key factors, the actual separation of powers is largely dependent on the existence of pluralism in society and in the political elite.

"In the last few years we have obviously stayed behind in this sense. At present there are fewer balancing factors in the state power than there were eight years ago. The Executive power is much stronger than any other branch of government, both on national and local

levels. There is a lack of balance of power in the society as well. There are few developed interest groups and social agents who could balance the state government." (Nodia, 2010)

A 2011 Georgia National Integrity System (NIS) analysis shows the imbalance between the branches of state power. According to their conclusions, the executive branch is much stronger when compared with other branches. Shortcomings in the independence of parliament and the judiciary, and their inability to supervise the executive branch, point to serious problems with the check and balance system. Non-state institutions (media, political parties and civil society), which are meant to monitor the actions of the government, according to the Georgia National Integrity System, are the weakest institutions in the country. As a result there is still a possibility of abuse of power.

In 2013 the model of government in Georgia is changing to a parliamentary system, which first of all implies an adequate reflection of the principle of separation of powers in the Constitution, through extending and strengthening the role of Parliament. The parliamentary system provides a balance between the legislative and executive authorities and accountability of the government to Parliament. Non-governmental organisations are positive about any changes that will ensure the formation of a balanced model of government, through adequate reflection of the principles of separation of powers and check and balance in the Constitution of Georgia (Human Rights Centre, 2013).

The formation of the fair court system is one of the most important challenges for the new government. In his speech at the Council of Europe Parliamentary Assembly, the Prime Minister of Georgia Bidzina Ivanishvili said: "I believe in the possibility of formation of a truly independent judiciary in Georgia, free of the executive branch or any other kind of political influence. The goal of the Georgian government is not to waste this chance." After the elections in 2012, there is a real opportunity to strengthen the independence of the judiciary and judges. It is important that the changes become part of a long-term strategy, which will aim to establish an impartial and independent court. In Georgia, undergoing post-Soviet transformation, 'New Public Management' (Greenwood, Wilson, 2002 etc.) is facing a challenge: to be transformed into a healthy system based on Check and Balance principles, or to find alternative ways of functioning, which will hinder its development into an open, democratic system.

One of the most important social indicators measuring the level of democracy in a state is public confidence in the judicial system, and particularly in the independence of the judiciary. According to recent studies, which refer to the fairness of the courts, Georgia had 4.75 out of 7 points (on a scale where 1 indicated that the court is fair and 7 unfair). Many participants in the research pointed to shortcomings in the Georgian legal system, such as the unlimited power of the Executive branch (Kachkachishvili, 2011). In Georgia, the independence of the court and of judges is endangered by constant attempts by senior civil servants and politicians using their power to manipulate the judges. However, the independence of judges is influenced not only by "external" persons but also by judiciary officials. One of the problems is the inability or unwillingness of judges to resist this influence. All this deprives the court of the ability to make legal decisions and to control other branches of government.

In Georgia, the practical implementation of the principle of separation of powers faces serious difficulties, which to some extent can be explained by the long period of totalitarian regime. Georgia has not had experience in separation of powers and still preserves a tendency to autocracy. The situation is aggravated by a number of other negative factors, which are a legacy of the past. Such factors are: despotism and serfdom; the almightiness of the state and a lack of public rights; the widespread tradition of legal nihilism lasting for years; lack of experience with freedom, law, self-government, democracy, constitutionalism, and political

and legal culture; the subordinate position of society to state government; etc. All this greatly hinders the process of liberalization and democratization of public opinion and the development of new legal and political values. These factors make choosing the correct route for the state between the past and the present extremely difficult. Constitutional separation of powers does not automatically lead to order in the state, and the struggle for leadership within the three branches puts society in political chaos.

Obviously, the attempt to establish democracy and the supremacy of law in Georgia will be futile unless it is supported by strong judicial and legislative systems. Hence, starting legal reform in Georgia by reforming the judicial system and prioritising the tackling of corruption has been a justifiable course of action. Even more so, as corruption in the judicial authority has considerably damaged public trust in the courts of law.

Effectiveness of social institutions in jural state depends greatly on formal norms, on the one hand, and on mutual correspondence of norms and real practice on the other. In a society with high legal literacy, laws and norms are seen by most citizens as fair and are thus widely respected. In transitional, transforming societies, and among them in Georgia, a lengthy weakening of institutional systems is followed by stabilization of illegal social practices that are deviant from formal norms. In this case the independence of the judicial system is especially important, for overcoming these kinds of (criminal and non-criminal) social practices and improving trust in the courts of law.

ლიტერატურა
Literature
Литература

1. ადამიანის უფლებათა ცენტრი. (2013) მოსაზრებები 2013 წლის ივნისში ინიცირებულ საკონსტიტუციო ცვლილებებთან დაკავშირებით.
2. კაჭკაჭიშვილი ი. (2011) "დემოკრატიზაციის პროცესი და „ჰიბრიდული რეჟიმები“.წ. (ივლისი-სექტემბერი).სოციალური კვლევისა და ანალიზის ინსტიტუტი ISSA.
3. ნოდია გ. ჰიბრიდული რეჟიმის თვისებები. სოლიდარობა 2010 №3(36)
4. რუხაძე ზ. (2011) საქართველოს კონსტიტუციური სამართალი. თავი 20. ხელისუფლების განმტოებათა შორის კონტროლისა და ბალანსის მექანიზმი.
5. Dahl, Robert A. (1998) On Democracy, Yale University Press.
6. Epstein, David L., Robert Bates, Jack Goldstone, Ida Kristensen, and Sharyn O'Halloran. 2006. Democratic Transitions. American Journal of Political Science 50 (3):551-569.
7. Freedom House. (2011) Nations in Transit Ratings and Averaged Scores. The World Bank, World Development Indicators 1999-2011.
8. Gelman V. (1999) Regime Transition, Uncertainty, and Prospects for Democratization: The Politics of Russia's Regions in a Comparative Perspective. Wissenschaftszentrum Berlin fur Sozialforschung Papers.
9. Giddens, Anthony. (1990). The Consequences of Modernity. Cornwall.
10. Levitsky S., Way A.L. (August 16, 2010). Competitive Authoritarianism: Hybrid Regimes after the Cold War (Problems of International Politics). Cambridge University Press; 1 edition.

11. Ottaway M. Getting to Pluralism: Political Actors in the Arab World. Carnegie Endowment for International Peace (July 20, 2009).
12. Zakaria F. (1997) 'The Rise of Illiberal Democracy'. Foreign Affairs N6.
13. Schedler A. Electoral Authoritarianism: The Dynamics of Unfree Competition. Lynne Rienner Pub (May 30, 2006).

რ ე ზ უ მ ე

**"კონტროლისა და ბალანსის" სისტემა სახელმწიფო კალაუფლების
შტოეპში**

ანა ჯელიძე, თამარ ჩარკვიანი

სტატიის ძირითადი მიზანი სასამართლოს და აღმასრულებელი ინსტიტუტების მართვის სტრატეგიების აღწერა და კონტროლისა და ბალანსის სისტემის ანალიზია. დემოკრატიული ტრანსფორმაციის სივრცის ერთ-ერთი მნიშვნელოვანი ნაწილია სახელმწიფო ხელისუფლების შტოებს შორის ეფექტური დამაბალანსებელი მექანიზმების შემოღება ანუ მათ უფლებათა, მოვალეობათა და პასუხისმგებლობათა რელიეფური გამოკვეთა და გამიჯვნა სახელმწიფო მართვის ყველა დონეზე. პოსტსაბჭოთა, ტრანსფორმაციის პროცესში მყოფ საქართველოში „ახალი სახელმწიფო მართვა“ დგას გამოწვევის წინაშე – გარდაიქმნას ჯანსაღ კონტროლისა და ბალანსის პრინციპებზე დაფუძნებულ სისტემად ან მოძებნოს ფუნქციონირების ალტერნატიული მექანიზმები, რომლებიც შეაფერხებენ მის, როგორც ღია, დემოკრატიულ სისტემად ჩამოყალიბებას.

S U M M A R Y

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The main aim of the article is to describe management strategies within the Judicial and Executive branches of government, and to analyse the formation of a new 'Check and Balance' system of government. One of the most important components of democratic transformation is the introduction of effective balancing mechanisms between different branches of state government; i.e. the precise definition and identification of the rights, obligations and responsibilities at all levels of government. In Georgia, undergoing post-Soviet transformation, 'New Public Management' is facing a challenge: to be transformed into a healthy system based on Check and Balance principles, or to find alternative ways of functioning, which will hinder its development into an open, democratic system.

Р Е З Ю М Е

СИСТЕМА "КОНТРОЛЯ И БАЛАНСА" В ВЕТВЯХ ГОСУДАРСТВЕННОЙ ВЛАСТИ

АНА ЧЕЛИДЗЕ, ТАМАР ЧАРКВИАНИ

Основной целью статьи является описание стратегий управления в судебной и исполнительной ветвях власти, а также анализ их системы 'контроля и баланса'. Одним из наиболее важных компонентов демократической трансформаций является развитие эффективных механизмов баланса между различными ветвями государственной власти, т.е. определение и разделение прав, обязанностей и ответственности на всех уровнях государственного правления. В постсоветской Грузии, которая находится в процессе трансформации, "новое государственное управление" стоит перед выбором: преобразоваться в здоровую систему основанную на принципах 'контроля и баланса', или найти альтернативные способы функционирования, которые будут препятствовать его развитию в открытую, демократическую систему.