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Referendum on Tax Legislation of Georgia

Abstract: Democracy is the only form of governance, which historically gives people the opportunity to participate in state-run activities from the time of its immediate implementation. Article 5 of the Constitution of Georgia explains that people are the source of state power in Georgia and they exercise their power through a referendum, other forms of democracy and its representatives. The referendum in Georgia has a contemporary history, however, it should be mentioned, that its practical use is not systemic. From 2013, Article 94 of the Constitution of Georgia has made it possible to conduct a referendum regarding the issue of the introduction of taxation. Namely, according to Paragraph 4 of Article 94 of the Constitution of Georgia, “the introduction of a new type of state tax, except for excise or the increase in the upper limit of the existing rate in accordance with the type of general taxes, is possible only through a referendum, except for the cases envisaged by the Organic Law”. The purpose of the referendum issue is to promote greater involvement in public administration in Georgia, especially in terms of improvement of tax legislation.

Keywords: referendum, tax legislation, Constitution of Georgia

Introduction

The appointment of a referendum on taxation is quite rare in jurisprudence. The history of a referendum in general is also rare for Georgia. During the referendum it is necessary to take into account the fact that the society should be informed about the tax issues discussed in a referendum. This function is performed by LEPL Revenue Service, the part of the Ministry of Finance that gives information about any changes in respect of Georgian economy and taxes, although, Article 94 of the Constitution has not yet come into force. The involvement of such a form in a lawmaking process is obviously a democratic process of state governance, however, it may also have a negative side – a possible reduction of the legislative function, what was stated by

the Venice Commission in its conclusion, when the current government presented a package of constitutional amendments.

Although, the government did not make constitutional amendments related to Article 94 of the Constitution, the Venice Commission, while discussing the other amendments, devoted an entire chapter in the conclusion on constitutional amendments, explaining that this Article transforms the principle of “taxation inadmissibility”¹ without representatives into the principle of “taxation inadmissibility without a referendum”. Moreover, the appointment of a referendum on these issues can be initiated only by the Government, and the Parliament again appears to be totally excluded from the process of the establishment of a new type of tax and the upper threshold of existing taxes. The Venice Commission believes that it would be better if the Parliament first decided to introduce a new tax or raise the upper limit of existing taxes, and only after that the Parliament’s decision should be presented to the population. The referendum may be appointed by the Parliament or the President.

The goal of the research is to cover the history of referendum in Georgia and analyze the prospects of holding referendum in respect of tax legislation.

The hypothesis of research is the following – to find out how practical it will be to hold a referendum on tax law in Georgia and degrades it or not the main function of the parliament – lawmaking. Due to the topic of the article, the historical facts related to referendum and analysis of legislative material are mainly used as the research methods.

1. History of referendum

State governance systems are constantly facing new challenges and tasks in the rapidly and dynamically changing world of XXI century. The modern state management is impossible without such categories and institutions as democracy, recognition of rights and freedom, election system, public governance, referendum, etc. Every innovation passes through one of the most important parameters – the protection of human rights and freedom and the promotion of human welfare. Therefore, the present topic itself includes a wide range of relationships.

A large part of modern society is actively involved in state management both in direct and indirect forms. Democracy, as the best form of governance, has found universal recognition. The management mechanism of democracy is based on the principles of public administration. The main task of our article deals with the discussion of one of the most important events in public administration – a referendum, which is also regarded as an important freedom of people’s will expression.

1 The Conclusion of the Venice Commission On the Need For Referendum On Tax Increases, <http://tbl.ge/2dh6> (access 26.10.2018).

Article 5 of the Constitution of Georgia explains that people are the source of state power in Georgia and they exercise their power through a referendum, other forms of democracy and its representatives.

A referendum (Referendum – „something to be referred“) implies a universal-popular vote (voters poll) on any serious issue in state or public opinion. If we begin to consider the referendum in a direct democracy prism, it can be attributed to the type of “semi-direct” democracy. Such an opinion is shared, for example, by a Russian scientist V. Maklakov in his work “Voting Rights and Systems in the Bourgeois and Developed Countries”, where the author refers to a referendum as an intermediate system that exists between the direct and representative governance democratic systems².

Democracy is the only form of governance, which historically gives people the opportunity to participate in state-run activities from the time of its immediate implementation. A French educator Jean-Jacques Rousseau noted in his treatise “Public Agreement” that democracy is necessary for a society; the law-abiding by a society is possible when people are involved in the lawmaking process themselves, what, in its turn, implies the existence of a law as a politically free phenomenon³.

Today in XXI century, the state administration is mostly based on solid democratic institutions, as a result of which the public has an opportunity to actively participate in state administration. From this point of view, the elections and electoral politics are the most obvious and direct means of expressing the sovereign will of people. At the same time, there is another effective option that is very important for the opinions and views of the public. This is a referendum.

The referendum, as the form of active and special participation in the public management process, is not a new phenomenon, and it has long been tested in different countries. For example, a referendum was held in France after the Great Revolution.

The “homeland” of referendum is considered to be Switzerland, where Public Governance has already existed in the period of the country unification in cantons on such ancient lands as Appenzell-Auseroden and Inorden in the cantons of Urs, Schwyz, Obwalden and Nidwalden and Glarus. Virtually, the full implementation of the Public Governance proceeded there. This form of governance was limited only by the power of the German Emperor, but this restriction was insignificant and became fictitious later.

Since XIII-XIV centuries, the residents of these cantons had been adopting their laws at the peaceful meetings. The First World Assembly took place in Schwyz in

2 V.V. Maklakov, Suffrage and electoral systems of bourgeois and developing countries; M., 1987, p. 56.

3 D. Lachubidze-Khoperia, Jean-Jacques Rousseau “Public Contract” Tb. CIPDD 1997 Caucasian Institute of Peace, Democracy and Development.

1294⁴. Based on the authority of the Emperor's family, the Assembly made important decisions. According to these decisions, nobody sold their property to monasteries and foreigners because of the fear of high taxes. The Schwyz Assembly tried to protect its society from pressure of the nobility and clergy. In general, peacekeeping associations functioned in two forms: planned and unplanned (emergency). Bills were initiated by both the Cantonese Council and a certain number of citizens.

The first referendum in the world was held in the Canton of Bern in 1449. When France conquered Switzerland in 1798, a new Swiss Constitution was adopted, which, along with other restrictions, imposed the ones on public participation in legislative processes. The Swiss politicians tried to explain this action by the fact that it is easy to impose a specific idea to people and make them interested in it, and therefore, such a mass can be easily manipulated, while the legislature provides a comprehensive study and analysis of this problem through its activity, on the basis of which the best option of its legitimization is selected. The population cannot perform such a function, so it should be done by a delegated board or other similar institutions⁵.

A similar idea was shared by a well-known educator of the time, Welt, who believed that it is necessary to objectively and critically evaluate the ability of the institution, which makes claims about lawmaking, to implement this idea in the best way.

In the United States, a referendum was transformed into the Constitutional Act during XIX-XX centuries. Although the first referendum in the United States took place in 1640, the institution of the referendum, as a direct legislative initiative, became a part of real political life in a few states only in 1898⁶.

Despite some cases of direct democracy, the referendum, as an institution, has entered Europe since 1918, in particular, after the First World War, when the wave of democratization (the women's involvement in elections, the implementation of proportional suffrage in several countries, etc.) affected other forms of direct democracy, namely a referendum, a popular initiative. The law on referendum was constitutionally adopted in Austria and Czechoslovakia in 1920, in Greece – in 1927, in Latvia – in 1922, etc⁷.

Therefore, it is clear that a referendum is the most important institution of democratic governance, although, some of the researchers, in contrast to this opinion, believe, that people do not represent the necessary contingent that can be engaged

4 F. Kurti, *History of national legislation and democracy in Switzerland*: Trans. Fro Germ. by Lvovich G.F. SPb., 1900. p. 186.

5 Mounier., *Archives parlementaires*. Paris, 1875. C. 154.

6 S.Y. Danilov, *Referendums in the modern world: a comparative analysis of objects and consequences*, *Modern Law* 2012. № 8. C. 53-56. <http://www.hse.ru/pubs/share/direct/document/77248317> (access 24.10.2018).

7 M. Gallagher, P.V. Uleri, *The Referendum Experience in Europe*, 1996, 1, www.tcd.ie/Political_Science/staff/michael_gallagher/ReferendumExperience96.pdf (access 26.10.2018).

in the lawmaking process, since the members of referendum are not competent individuals with a relevant education to discuss the given issues⁸.

The referendum in Georgia has a contemporary history, however, it should be mentioned, that its practical use is not systemic. A referendum in the Constitution of Georgia is mentioned in the first article, namely, the recognition of the independence of Georgia is confirmed on March 31, 1991, on the whole territory of the country, including the Abkhazian ASSR and the former South Ossetian autonomous district. 90 percent of the population participated in the referendum and 88 percent (3.295.493 people out of 3.326.100) answered positively to the question: "Would you like to restore the statehood of Georgia on the basis of the Independence Act of 26 May 1918?" It was the first referendum in the history of independent Georgia.

The second part of Article 5 of the Constitution of Georgia recognizes democracy as public governance, particularly, people exercise their power through a referendum, other forms of direct democracy and their representatives.

A referendum is legalized at the legislative level, and the relevant law on the rule of conducting a referendum is adopted by the legislative body of Georgia. However, a referendum was held in Georgia only several times. The first referendum, as noted above, was held on March 31, 1991, the second one was convened on November 2, 2003 in parallel with the parliamentary elections.

The referendum question was: "Would you, the Georgian citizens, like to reduce the number of the Georgian Parliament members from 235 to 150?" The majority of referendum participants answered to the question positively.

For the third time, a referendum was appointed to determine the date for early parliamentary elections in parallel with the presidential election on 5 January 2008. The question of the referendum was as follows: "Do you agree that the next parliamentary elections of Georgia should be held in spring 2008?" The majority of voters (79.17%) gave a positive answer. In 2008 a plebiscite was also held. The majority of voters (77%) answered positively to the question: "Do you support the entry of Georgia in the North Atlantic Treaty Organization (NATO)?"⁹

2. Referendum and tax legislation of Georgia

In terms of referendums, the history of Georgia is limited only by these few dates. From 2013, Article 94 of the Constitution of Georgia has made it possible to conduct

8 V.N. Mamichev, Referendum in the legislation of foreign countries and Russia: historical and legal research. Stavropol, 2000, p. 37.

9 Referendum – Main Institution of Direct Democracy, Research Department, Analytical Department, Parliament of Georgia” <http://www.parliament.ge/ge/saparlamento-saqmianoba/aparati-9/kvlevebiblioteka/parlamentis-aparatis-kvleviti-departmentis-shehexeb> (access 25.10.2018).

a referendum regarding the issue of the introduction of taxation. Namely, according to Paragraph 4 of Article 94 of the Constitution of Georgia, “the introduction of a new type of state tax, except for excise or the increase in the upper limit of the existing rate in accordance with the type of general taxes, is possible only through the referendum, except for the cases envisaged by the Organic Law”¹⁰. This regulation came into force after the presidential elections in October 2013 and was called the Act of Economic Freedom.

According to the first section of Article 1 of the Organic Law of Georgia on “Economic Freedom”, the state taxes envisaged by the Tax Code of Georgia are: income tax, profit tax, value added tax (VAT), import tax and excise. Section 6 of the same Article defines that “the Government of Georgia has the right to request temporary increase of taxes for a period not exceeding 3 years. In this case a referendum is not held.” The analysis of these norms reveals that by the initiative of the executive government it is possible to hold a referendum on the introduction of taxation.

In many European countries, the convening of a referendum on taxes is contrary to constitutional principles of the power distribution. The introduction, cancellation, amendment and/or determination of marginal tax rates in these countries are within the exclusive and inalienable competence of the Parliament, based on the constitutional and legal status of the highest legislative body, and they are prohibited from holding a referendum. For instance, according to Article 73 of the Latvian Constitution, taxes are not subject to consideration in a referendum. Another example is Section 6, Article 42 (6) of the Danish Constitutional Law, according to which, taxation (direct and indirect) cannot be subject of referendum. Paragraph “b”, Section 4, Article 115 of the Portuguese Constitution states that a referendum cannot be conducted on budget, tax or financial issues. According to Article 108 of the Constitution of Serbia, a referendum cannot be convened over budgetary or other financial laws. The convening of a referendum in Italy is prohibited with the aim of repealing/ratifying laws or international treaties related to finances. The law on referendum of the Russian Federation prohibits the introduction and abolition of taxes and fees, as well as the consideration of issues of exemption from the payment of taxes in a referendum. In Estonia, a referendum in regard to taxes is not held at all.

Therefore, in the case of Georgia, it is necessary to investigate whether the introduction of a tax referendum violates the competence of the Parliament of Georgia in the field of taxation and contradicts the ideas of parliamentarism. Thus, the introduction of a tax referendum led to different opinions among scientists and other members of the public.

A part of the society believes that the positive side of the tax referendum introduction is that it represents the right of citizens to participate in the establishment

10 Organic Law of Georgia “On Amendments to the Organic Law of Georgia on Referendum”, Tb. 2013 Registration code 010180000.04.001.016085.

of common state taxes and the citizens of Georgia will use this right in such a form of democracy as a referendum.

The former president of Georgia in one of the newspaper publications stated that “the introduction of any tax or tax rate increase should be possible by convening a referendum as an exception. The Government should not have the right to increase tax or introduce a new one without the consent of people”.

On September 6, 2013 the Parliament of Georgia adopted the Organic Law of Georgia “On Referendum” N1018-I on amending the Organic Law of Georgia. The adoption of the above law was preceded by the statement of the then Finance Minister Kakha Baindurashvili: “The purpose of the new initiative is to make the economy liberal, to minimize the interference of the state power, even to prohibit it in some sectors, and to make the ongoing and implemented reforms irreversible”. In his opinion, one of the main things in the new initiative was that people got the right to decide on tax increases or to establish new tax rates.

Some scholars call holding a tax referendum the constitutional revolution. Besides the economic freedom, it gives people economic motivation and power and the sense of economic stability in the long run. The principle of supporting the increase of taxes by the referendum, actually, has limited the power of the government and increased the rights of taxpayers¹¹.

The core value and spirit of the Constitution of Georgia is certainly the fact that the source of power is the people, who exercise power through a referendum, other forms of direct democracy and their representatives. Despite the fact that people represent a source of power for a democratic state, they can exercise their direct authority only within the framework of the constitution.

It is crucial that the government should be under the effective control of the society, what can be achieved by the functioning of the power distribution and balancing system. The introduction and determination of taxes is historically a prerogative of the Parliament, as an institute of the people’s representatives.

It should also be noted that the society will never support taxes, even if they are related to the necessary economic needs of the country. The discussion of such an issue in a referendum is essentially useless. On the other hand, the economic policy is constantly changing and we cannot predict what measures in terms of economic security should be taken.

The economic policy of a country is a rapidly developing mechanism that requires timely and immediate interference by the state. Holding a referendum on taxes, which requires a long time, may even be detrimental to the economic policy of a country. The probability that the society will be for the increase in taxes in a referendum is below zero. In such a case, the economic policy cannot be elastic.

11 S. Putkaradze, Tax System Georgia and Issues of Its Improvement at the present stage, Batumi 2012, https://bsu.edu.ge/text_files/en_file_3293_1.pdf (access 22.10.2018)

However, there may be cases when taxes are increased or new taxes are introduced. In this sense, the ability of the government to conduct adequate economic policies is reduced. It should also be taken into account that a certain part of the population cannot be properly informed about the topic of the referendum - in the given case, the need to increase or change taxes in order to make the right decision about whether to increase taxes.

According to Article 94 of the Constitution of Georgia, establishing a tax does not mean just naming it. The tax liability cannot be fulfilled in case if an obliging person, the volume of tax liability and its enforcement procedures are unknown. The tax determination includes all the essential and constituent elements of its legal composition: taxpayer, tax object, subject, tax period, etc.

In terms of a tax referendum, Switzerland is an exception. A referendum plays an important role in its political life. Referendums are held both on the federal and the canton and municipality levels. An optional referendum may be held regarding to any federal law, together with some other federal regulations, a permanent international agreement (which is not subject to subsequent consideration) or in connection with joining an international organization - if it is required by a petition of 50.000 citizens or eight cantons.

The referendum phenomenon is an important part of the political process in Europe. This type of public vote is most often used in many countries as part of the decision-making process. Sometimes referendums interfere with governments, parliaments and political parties, sometimes they represent practical tools which solve difficulties that the authorities cannot cope with. However, it should be noted that in most countries the constitution prohibits to hold a referendum on taxation.

According to Article 28 of the Organic Law of Georgia "On Referendum", the decision, made by the referendum, comes into force from the date of its publication, has the legal force and is final. The results of the referendum have direct force. The Legislative and Executive Authorities of Georgia are obliged to comply with Georgian legislation and other acts within one month following the results of the referendum. The Constitutional Court of Georgia has the right to invalidate the referendum results in accordance with the procedure established by the law of the Constitutional Court.

Consequently, the conclusion is that the holding of a referendum does not imply a direct, unconditional legislative action. The Constitutional Court reserves the right to declare it invalid in case of violation and non-compliance with the relevant conditions.

Thus, the appointment of a referendum on taxation is quite rare in jurisprudence. The history of a referendum in general is also rare for Georgia. During the referendum it is necessary to take into account the fact that the society should be informed about the tax issues discussed in a referendum. This function is performed by LEPL Revenue Service, the part of the Ministry of Finance that gives information about any change in respect of Georgian economy and taxes, although, Article 94 of the Constitution

has not yet come into force. The involvement of such a form in a lawmaking process is obviously a democratic process of state governance, however, it may also have a negative side – a possible reduction of the legislative function, what was stated by the Venice Commission in its conclusion, when the current government presented a package of constitutional amendments.

Conclusion

Thus, the purpose of the article concerning the coverage of the referendum history in Georgia, we have reviewed all the referendums, that have been conducted. We can conclude that Georgia does not belong to a number of countries that often refer to referendums. As to the another goal, namely, to analyze the prospects of holding a referendum in respect of tax legislation, as a result, it can be said that the more frequent the public participation in legislative processes in relation to the taxes are, the more sophisticated the legislative space will be, of course without degradation or weakness of the functions of legislative authorities.

As far as the hypothesis conclusion is considered, the government did not make constitutional amendments related to Article 94 of the Constitution, the Venice Commission, while discussing the other amendments, devoted an entire chapter in the conclusion on constitutional amendments, explaining that this Article transforms the principle of “taxation inadmissibility” without representatives into the principle of “taxation inadmissibility without a referendum”. Moreover, the appointment of a referendum on these issues can be initiated only by the Government, and the Parliament again appears to be totally excluded from the process of establishment of a new type of tax and the upper threshold of existing taxes. The Venice Commission believes that it would be better if the Parliament first decided to introduce a new tax or raise the upper limit of existing taxes, and only after that the Parliament’s decision should be presented to the population. The referendum may be appointed by the Parliament or the President.

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REVIEWS

