

The Local Self-Government Code of Georgia, the Issue of Self-Organization, and the Concept of Self-Government According to the European Charter of Local Self-Government

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Abstract: The purpose of this article is the comparison of the concept of self-government provided in the European Charter, and the definition of it given in the Local Self-Government Code of Georgia, to demonstrate main differences which lead to a misinterpretation of the essence of self-government, and to answer the following questions:

1. What is the goal of self-government- to merely solve local issues or to solve these issues considering the interests of local population?
2. Which problems may arise as a result of the attempt to define in detail the powers of self-governing units and a procedure for exercising these powers?

In response to the above questions, the following conclusions have been drawn in this article:

1. The differences definitions exert and their actual influence on the activity of local authorities; and
2. It is the scope of powers of self-government, not a procedure for exercising these powers that shall be prescribed by law.

Self-government means the regulation of public affairs by members of that public, independently, and under their own responsibility. Therefore, the exercise of self-government is directly related to the existence of a citizens' self-organizing union which aims to jointly solve issues of common interest. These common interests which encourage the local population to become self-organized and to form a local community ("Eroba" in Georgian) constitute one of the major signs which distinguishes local self-government from the government of a state. Obviously, powers are also an important issue because they separate the state and the self-government from each other. According to the Constitution of Georgia, Article 101.1, "The powers of local self-government shall be separated from the powers of public authorities." However, the powers are subject to changes; by the legislation of one country, any specific power may constitute a self-governing unit's own power, whilst, by the legislation of another country, the same power may be considered the competence of the state. It is the reason behind determining the directions of the exercise of a power that matters, not the power itself.

For public authorities, the state and related departmental interests should be decisive on matters relating to the exercise of powers, whilst, it is the interests of the local population which determine the direction of exercise of a self-governing entity's powers. This is why, when defining the concept of self-government, the European Charter of Local Self-Government, Article 3.1, points out that

local self-government considers the management and regulation of a big portion of public affairs “according to the interests of local population.” It is regrettable and surprising at the same time that in the definition of local self-government in the Local Self-Government Code of Georgia, this major sign is missing. As Article 3.1 reads, “Local Self-government shall be the right and opportunity of the citizens of Georgia registered in a self-governing unit to solve local issues through the local authorities they elect, based on the legislation of Georgia.” Thus, the Organic Law of Georgia does not determine the interests of the local population as a decisive factor for the exercise of local self-government. This issue could be deemed a formal flaw (even more that the European Charter of Local Self-government as an international treaty ratified by the Parliament of Georgia takes a precedence over the Organic Law); however, the amendments concerning citizens’ participation in the exercise of local self-government made to the Local Self-Government Code of Georgia have clearly demonstrated the essentially wrong attitude towards the self-organization of population.

Article 85.1 of the Self-Government Code determines that “the General Meeting of a settlement shall be a form of self-organization of the population of a village/small town/town, and of citizens’ participation in the exercise of local self-government.” This is a relevant definition. It is undoubtedly true that the General Meeting of inhabitants of a settlement is one of the forms of manifestation of self-organization. However, as one looks in the detailed description of the powers of the General Meeting and of the regulations for its convening and work in four articles of the Code, it becomes clear that the wording expressly contradicts the self-organization issue, and the definitions of “organization” and “self-organization” are confused with one another.

Self-government and, in particular, self-organization, is a process whereby a decisive importance is attached to initiatives, creative approaches, and unconventional solutions. If these processes are regulated legislatively, self-government becomes government that leaves no room for the freedom of action and for independent responsibility. It is noteworthy that when defining the concept of self-government, the Local Self-Government Code of Georgia, unlike the concept of self-government proposed by the European Charter, no longer refers not only to the compliance of self-government with the interests of local population but also to its own, independent responsibility. With respect to this, the definition given in Article 1.a of the Organic Law of Georgia on Local Self-Government that was applicable before adopting the Code, according to which, “local self-government shall be the right and opportunity of citizens of Georgia to regulate and manage local issues through local authorities, according to the legislation of Georgia, under their own responsibility, and taking into account the interests of local population” is more relevant to the concept of the European Charter of Local Self-Government than to the definition of self-government given in the Local Self-Government Code that is valid today.

Article 15.2 of the Local Self-Government Code, similar to Article 101.2 of the Constitution of Georgia, defines that “a municipality’s own power shall be the power determined by this Law which the municipality shall exercise independently and under its responsibility”; however, the question is whether this concept provides sufficient grounds to ensure the independence of self-government? Alexander Solzhenitsyn (1998) once remarked that “on the one hand, a law on local self-government establishes the autonomy and independence of self-governing entities while, on the other side, it provides such detailed description of their powers and activities that it would be a great achievement if they retain even 5% of autonomy. However, in this case, we are dealing with a mere extension of the

government of the state, not with self-government" (p. 187). Under the current legislation of Georgia, the degree of autonomy that local authorities can retain depends on the actual meaning of the phrase "procedure for exercising a power", as, according to Article 16.1 of the Local Self-Government Code, "the scope (extents) of a municipality's own power and a procedure for its exercise may be determined only by a legislative act, except when this law directly points out to the possibility to regulate the exercise of own powers according to the legislation of Georgia". Thus, not only the scope of powers of a self-governing entity, but also, what is even more important, a procedure for their exercise may be prescribed only by law, and if the law directly refers to- by the legislation of Georgia.

According to Article 7.1 of the Law of Georgia on Statutory Acts, the legislation of Georgia consists of legislative and subordinate acts of Georgia. A statutory act of a self-governing unit does not constitute either a subordinate, and or, moreover, a legislative act of Georgia. Respectively, a procedure of a self-governing unit for exercising its own powers by shall be prescribed either by a law, or by a subordinate act of Georgia (e.g., decree of the President of Georgia, resolution of the Parliament of Georgia, resolution of the Government of Georgia, a statutory act of a minister). Therefore, a self-governing unit may not determine a procedure for exercising its own powers based on the provision of Article 16.1. of the Code. This is one more antinomy because, under the same Local Self-Government Code, a procedure for exercising individual powers of a municipality shall be determined not by the legislation of Georgia, but by a statutory act of a self-governing unit, the examples of which include, *inter alia*, the determination of procedures for holding domestic animals, for introducing and granting honorary titles and awards of a municipality, etc.

Under the legislation of Georgia, the procedure for exercising a power itself has a broad connotation that is not limited only to the determination of procedures for the drafting, taking, publication of, and control over the execution of decisions which shall be regulated by the General Administrative Code of Georgia.

A procedure for exercising a power is wider in its scope and includes the principles and criteria for the exercise of powers, the forms and expedience of activities and action, the mechanisms and means for their implementation, etc. Thus, the procedure implies all major or minor issues related to the exercise of powers, which may consequently lead to a full restriction of the freedom of action. For instance, a municipality's power regarding the drafting, adoption, and execution of a budget, apart from the Local Self-Government Code, is also determined by the Budgetary Code of Georgia and by a few statutory acts of the Minister of Finance of Georgia ("Methodology for Drafting a Program Budget", "Instructions for the Accounting of the Organizations of a Self-Governing Unit Financed from its Budget", etc.). A municipality's power concerning the management of the municipal-owned property are determined by the Resolution of the Government of Georgia on the Procedures for the Privatization, Use and Transfer with the Right of Management of the Municipal Property, for the Determination of that Property's Initial Cost for Privatization, Rent Cost, Initial Rent Cost, and on the Procedures of Payment. A municipality's power regarding giving names to the objects located in its territory are determined by the Resolution of the Government of Georgia on the Procedure for Giving Names to the Geographical Objects Located within the Administrative Boundaries of Municipality, etc.

In addition to the above, a positive form of a provision, according to which, a power shall be exercised in the manner prescribed by legislation, implies that, unless such procedures for the exercise

of any power has been determined, the power cannot be exercised. This contradicts both the Constitution of Georgia as well as one of the basic principles recognized under the European Charter and the Local Self-Government Code which states that a self-governing entity shall be “authorized to solve, at its initiative, any issue that, under the legislation of Georgia, is not the power of any other governmental body, and is not prohibited by law.”¹ According on this principle, a self-governing unit shall be authorized to exercise the powers determined by law as well as all the powers which have not been determined by law, but which, however, are not prohibited and do not fall within the scope of powers of any other governmental body. And yet, under the legislation of Georgia, for a self-governing unit to exercise any power, a procedure for exercising that power shall be prescribed by a law or by a subordinate act issued based on the law. This is practically impossible to do as a law is not capable of determining such powers in a positive form because such powers constitute the so-called “remaining powers.”

On the other hand, it is obvious that the activities of a self-governing unit shall not be in conflict with the legislation. This can be illustrated by the concept of self-government proposed by the European Charter, Article 2.1, that states that local self-government means “the power and opportunity to regulate and manage, according to a law, a major portion of public affairs under own responsibility and taking into account the interests of local population.”

Thus, under the European Charter, a law shall determine a scope of powers of a self-governing unit instead of prescribing a procedure for their exercise. As we can see, the European Charter applies a negative form of definition. A law shall determine the scope that may not be breached by a self-governing unit; however, at the same time, the self-governing unit shall be entitled to full freedom of action within the established framework. Under the legislation of Georgia, this issue has been defined in a positive form: a law prescribes not only a scope of powers but also a procedure for their exercise that contradicts the principles of the European Charter and restricts the freedom of action of a self-governing unit. According to the Charter, Article 4.5, in the case of exercise of not only own but also of the delegated powers, a self-governing unit shall have “the freedom to exercise the delegated powers by adjusting them to local conditions.”

The freedom of action is a decisive, major factor for self-governing units as it ensures the solution of local issues taking into consideration the interests of local population, and provides grounds for the participation of population in the exercise of local self-government. However, a legislative framework for freedom shall be provided not by prescribing a scope of action, but by determining the scope that establishes not the limits of the freedom of action, but the limits of action regulated by law.

Regrettably, the Local Self-Government Code of Georgia provides an essentially different approach. The existing practice of maximum regulation of the activities of a self-governing unit based on a law is rather an attempt to “legitimate” self-government. However, “regardless of the high significance of the legal grounds, none of the statutory acts or administrative decisions can contribute to the formation of a local community out of a local population, including local self-government. Social values play a key role with this respect. Lack of appreciation by the government of the social grounds of

¹ Constitution of Georgia, in Article 4.2. of the European Charter of Local Self-Government and in Article 16.3. of the Local Self-Government Code of Georgia.

local self-government results in transforming the latter into local government or into local executives" (Antipev, 2013, p. 5-6). In fact, we have achieved an outcome marked by having local executives instead of genuine self-government.

The establishment of self-government in a post-Soviet, centralized country is an exceedingly complex process which involves the undertaking of an initiative and a reform "from the top." However, for the reform to be successful, we need to take into consideration the fact that local authorities are not only formalized institutions prescribed by the state by law, but also the institutions which have been formed by a local community in order to accomplish its interests. This last aspect is that major sign that determines the essence of self-government. The purpose of self-government shall be not only to solve local issues, but also to prioritize and solve these issues according to the interests of local community. This is impossible achieve without freedom of action and without a self-organization of local population.

The freedom of action, as noted above, shall be ensured by legislation that shall prescribe the boundaries of the government of state which separate the latter from self-government. A more careful attitude needs to be taken with respect to self-organization in order to avoid an administrative organization instead of forming self-organization, as it worked out with regard to the General Meetings of a settlement.

First of all, we shall take into consideration the fact that "social processes of any scale cannot be managed using administrative means. The solution of this task stands closer to the occupation of a gardener or a governess than to the action of an engineer" (Khytsenko, 1993, p. 66). On the other hand, self-organization is a natural social process that cannot be planned in advance; nor can it be created arranged from the outside. The order formed as a result of self-organization does not require providing a legislative framework and legislative regulation. "There exists an order in society that has not been preliminarily designed by human beings, but that order is a consequence of unconscious actions of these human beings which aim to establish such an order" (Hayek, 2016, p. 247).

"Self-organization" and "organization" have long been a subject of scientific discussions. A. I. Prigozhin, one of the founders of the sociology of organization, even though not neglecting the role of self-organization, considered that this mechanism starts operating when there arise such areas which have not been covered by purposeful organizational activities. "The absence of organization does not mean a complete absence of management. In this case, a mechanism of management shall be based on the interaction of spontaneous regulators which constitute a natural product of functioning of a social system" (Prigozhin, 1995, p. 356). It can be concluded from this statement that self-organization stands in the background and steps forward only if there is left a place free of management.

In her article on managing self-organization, Syrova (1997) expresses an even more radical opinion by arguing that the success of self-organization depends on how seriously a leader takes this idea, and whether that leader is engaged in its implementation. Thus, we can conclude that self-organization depends on how correctly it is undertaken. Such an approach substantially contradicts the essence of self-organization.

According to a general worldview, self-organization is a natural process, an endless movement of matter from the chaos to the order, from the simple to the complex, from a primitive to a highly-

organized, self-developing system. While defining self-organization, Haken (1991) the founder of synergetics said that “we can consider a system to be self-organizing, if it is able to acquire any spatial or time-specific structure without a specific external interference. By the latter, we mean such an action that imposes on the system a structure, and which ensures its functioning. In the case of self-organization, a system is exposed only to a non-specific outside influence” (p. 28-29). Such specific interference is exerted by legislation that prescribes a procedure for the organization and work of the General Meeting. Therefore, the General Meeting determined by the Local Self-Government Code may not be considered a form of self-organization of population.

Self-government may not be formed without a local community as a self-organizing unit. “Unless there exists a local community, there exists also no social base for local self-government” (Babichev, 2007, p. 24-30). However, for the formation of such units it is necessary only to have “a non-specific external interference”, i.e. the support to the development of the processes which, by granting freedom at local level, encourages the formation of common interests in local population, and provides the opportunity for the accomplishment of these interests. The local self-government legislation should be improved in this direction and the major goal of this improvement should be to comprehensively reflect and enshrine in the legislation of Georgia the concept of self-government defined by the European Charter of Local Self-Government.

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