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DEMISE OF POLITICS

SELECTION OF THE COMPOSITION OF THE SUPREME COURT ON THE EXISTING NOTIONS OF STATUS QUO AND PROSPECTS OF THE REFORM

"I don't want politics. I want impartiality,
order and propriety"

Thomas Mann
"Reflections of a Nonpolitical Man"

Constitutionalism transcends law; it implicates something beyond the grasp of law. It has always been a sort of embarrassment induced by the synonymous words: – "Constitutionalism" and "Constitutional Law"; and the word "law", has really something to do with this fact.

The point is that, law and politics contradict each other within constitutionalism. This process could be seen quite explicitly through the analysis of such institutions as impeachment, state of emergency and appointment to a position; an attempt by law to restrict freedom of notions within the politics, by its criteria, is the most obvious in the latter case. The twists and turns of the election of the Chairman of the Supreme Court of Georgia in late 2014 and early 2015 is the manifestation of this. This text demonstrates our endeavor to canvass all of these processes.

1. WHAT IS A LAW?

Among other non exact sciences, law has the most ambition to address the facing problems unequivocally and obtain the answers to those problems through the specific method based on normative data. This is called norm ratio, or subsumption (Latin. subs mpti n). The Digest of Justinian begins with the assertion that lawyers, as law priests, can and should strive for the truth[1]. There is no doubt, this process of subs mpti n is not exempted from interpretations; however, there are always a limited number of them, which rarely goes beyond two-to-three options.

The famous expression "two lawyers, three opinions", despite the intention to underline an importance of the non-scientific nature of law, indicates that the law tries to answer the questions as accurately as possi-

[1] The Digest of Justinian, book I, Tit. 1., (1)

ble, and the number of these responses, even in the case of two lawyers, does not exceed three. (These figures are as figurative as the maxim). Nevertheless, the most important feature is the possibility – to reduce their quantity to the sole legitimate interpretation in a particular jurisdiction, which shall be determined by the final decision of the court.

Law is characterized by the potential possibility to insure the final response to all questions. So as – neither all the questions have been posed up to now, nor the answers given to them – this is the purpose of law. *Inter alia*, the principle proceeding from Roman law, indicates the same. This principle still maintains its relevance and even in the absence of specific regulations, does not exempt a judge from the obligation of a dispute settlement, based on similar regulations[2] or general principles of law[3]. This institution is called *Iura novit curia*. The analogy is applicable to such cases. As we can read in the same digest; "**Whenever anything has been introduced by law there is a good opportunity for extending it by interpretation or certain construction to other matters, where the same principle is involved**[4]."

Thus, even in theory there is no case, when the law is silent and when the final court verdict is not embodied in the operative part of the decision; It is also proved by other prescriptions, proceeding from the same Roman law; e.g., *da mihi factum, dabo tibi ius* ("give me the facts and I shall give you the law").

The response of law is conditionally accurate alongside with the potential response. First of all, this is due to the fact, that the law is universal, in a concrete jurisdiction, and not in general. Secondly, the law was defined at random, by the subjective judgments of the court's concrete composition. For this reason, the response of law to the question is not accurate in itself; it is conditionally accurate. Nevertheless, the tone of law is absolute. It tries to fully and totally encompass social relationships. It imposes and defines law and by doing this, employs a specific formula called the method.

Potential conditional accuracy is a characteristic for all branches of law except for constitutionalism. Obviously, there are a lot of questions which require to be answered by the constitutional justice but in the entire legal space it is the only place, where the questions, without authoritarian answers, could arise. Thus, constitutionalism consists of two parts and the law is one of them. Law is a mandatory rule of conduct and failure to keep these norms causes the annulment of an opposite action and continues until its final implementation. Consequently, law is involved in making constant comparisons between actual reality and normative standard and therefore, becomes as a measure of reality, a sort of universal scale of assessment. From this standpoint, law attempts to modify the reality. By penetrating into the depth of it, the law abolishes the present and reconstructs the future. Therefore, law is a phenomenon of ought. Law operates, when it is not enforced; it is mandatory, even in case of violation, and it is the reality when it is not proved empirically.

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2 If there are no regulations (Regulatory standards) for arranging the particular relationship, then the closest regulatory standard has to be used (law analogy).

3 If an officer, who imposes the law, cannot use the analogy of law due to the absence of norms regulating such relations; the relations must be regulated based on the general principles of law (law analogy).

4 The Digest of Justinian, book I, Tit. 3., 13.

Law is established by state institutions; it is essentially operated by the state law and is reflected in justice. A state becomes tangible through the law. State power is executed exclusively by law. Law designates the boundaries of social behavior and sets the criteria. In this way, it integrates social reality with itself. In this sense, law is inside the state system. A state is always able to delegitimize the concrete conduct due to the discrepancy with law, which is its own creation.

2. WHAT IS CONSTITUTIONALISM?

Constitutionalism comprises two parts: one regulates relations between the citizens and the state institutions, and the other, between the state institutions. First of all, the principles and complementary norms, such as the primacy of human rights, legal and social state, and so on, will be arranged. Then, the horizontal and vertical separation of powers, including the mechanism of checks and balances, will be established. This second part of constitutionalism is the focus of the current essay.

We have already discussed the legal part of constitutionalism. However, it has another body as well, which has also been mentioned, which differentiates it from other domains of law, placing it on the edge of legal science. It is the political nature of constitutionalism. Nowhere else in the fields of law, does politics penetrates as deep as in constitutionalism. As politics strikes at the legal foundation of a number of institutions, it cedes freedom of action to the individual approaches. That is why politics is considered to be out of the state system. Politics is based on an extensive evaluation of the domain. It is admittedly exercised within the state or through its institutions, nevertheless is being formed beyond its borders. Law is also the creation of politics in its initial manifestation and determination, although afterwards makes itself distant from politics, and even confronts politics.

Constitutionalism seeks to coordinate these two views – political and legal standards. In fact, it is aiming to confine the infinite discretion of popular sovereignty. Nevertheless, constitutionalism is a guarantee, that there will be something, which will not be subject to standardization. The whole history of the modern state represents the absolute sovereignty and the gradual standardization of history of its owner's free discretion; and decisions made within the absolute discretion, through the law but within the actual paradigm; there is a dead-line for constitutionalism and it lies on politics. The people and their representatives should be given the opportunity of actualizing politics. State, first of all, a political formation, which implies the existence of law, but the function of law is to ensure concerted fundamental political values and not to exclude politics from social life.

The aim of law is to establish the rule of law, where the law jurisdiction should be applied. However, there are political enclaves, where the law cannot interfere. This is a spontaneous area, where legislative predictions will not come true, where the law with its nature of ought will not provide adequate answers to the existing challenges. Of course, political freedom creates a danger of usurpation of power, which is reduced by the law to a certain extent "but no matter how much the state's activities are bound by law, constitutional freedom is not the result. Where everything is done according to government prescriptions,

the rigidity and predictable restrictions make life unbearable."[5] That is why, constitutionalism is striving for reasonable balance between law and politics. It is a very intimate subject and in all political communities is defined differently. For this reason, there are only principles, objectives in constitutionalism, we should aspire to and none of the specific ways, through which those objectives can be achieved, contrary to human rights law, which is largely determined by a uniform standard.

3. POLITICS IN CONSTITUTIONALISM

In 1982 the Chancellor of Germany – Helmut Josef Michael Kohl, was dismissed by the legislative body of the Federal Republic of Germany. The existing parties in the Parliament agreed that they would not nominate a new candidate, and that is why President Karl Carstens called new elections. Although this action was contrary to the constitution, the German Federal Constitutional Court upheld the Act. The president's motivation was indicative of the consensus between the political players. At that time, the court actually stated, that political expediency can stand above the constitution, as a legal standard, especially in the case of consensus[6].

This and similar cases make us to direct our vision to the outset, where the constitution is born. The tradition of constitutionalism teaches us one lesson: law has political foundations.

The aim of a state, in accordance with demos, is to rule the state. The political power of the majority of the society is confined with legal procedures and standards and, first of all, with the rule of law in order to avoid some anarchy and chaos. However, it does not change the aim of political society; it just sets the framework of this aim in some cases to protect the minority and help them to survive political devastation and to take reins in its hands some day in the future. But if such conflict between the majority and the minority does not exist, then the law, as a regulatory force of this conflict, steps aside and pure politics goes into action[7]. Thus, politics represents the rule of social relations in a state and law is an exception, which goes into action in some extraordinary cases. According to András Sajó "In democracies, social problems are usually resolved in election booths and not in courts[8]." However, as it was described above, the Court often tailors the law to political circumstances. This is not in the least the dark side of the law, as one may think. The reason is that: at the moment, while solving the actual challenges, public consent is more preferential than the once-established law, which may not be able to respond adequately to the given conditions. Law is an instrument for the implementation of politics; it is a mechanism of mediation, which in some cases, gives way to a pure politics. So it should not happen, that goals can be absorbed by instruments. This is contrary to common sense. Absolutization of instruments is very dangerous, so far as it transforms politics

5 András Sajó. Limiting Government: An Introduction to Constitutionalism. pg. 208.
6 Ibid., pg. 127.
7 Pure politics implicates the self-fulfilling or indirect Act of popular sovereignty, according to which, the decision is based on absolute discretion area and is not limited by the criteria. The pure politics opposes the law and excludes the evaluation of the decision, made by the criteria of material, contextual legality.
8 Ibid., pg. 242

and democracy into a technocracy where the aim is not to understand social relations but mechanical ratio of standards, which will gradually fail to hit the reality, and eventually turn against him.

What should be basis for the cognition of social relationships? Reinhold Zippelius starts his introduction to "Juristische Methodenlehre" (the10th Revised Publication) by indicating the consensus and then this theme recurs many times throughout the book, as if he wants to reduce the whole method of law interpretation to this postulate. At first, he writes, that the task of law is "to propose consensus-based decisions" But what happens when the rule does not provide a direct answer? How to read the law? What method is needed for interpretation? Zippelius has the same answer to those questions: he says, that "the purpose of an interpretation is to express the opinions of a legislator in the form, that has an ability in making consensus." He links this to a democratic legitimacy, which gives us a double interpretation and not two kinds of opportunities. This, on the one hand, implies the identification of a legislator's will through an interpretation, because creating norms is assigned to him by popular sovereignty, and on the other hand, taking into account public legal awareness in the given situation. It is fully consistent with the classical theory of Carl von Savigny about the interpretation, according to which, the interpreter repeats the legislator, who is inspired by the spirit of people[11]. Here, also we can see explicitly how law is determined by politics and its subordinate character. It makes us think, whenever politics is used for standardization of law, the situation and relation between an instrument and a goal should be evaluated carefully, not to assume each other's mission improperly.

In case of accurate observation, we can find extra-legal mechanisms within the constitution. These institutions seem to be managed by legal frameworks, but one thing distinguishes them from other constitutional institutions: their material and legal assessment is impossible. In other words, they cannot be standardized. At this time the sovereignty operates with a political expediency. Below is the overview of some of them. There is a constitutional institution: a state of emergency and martial law. It is declared, when the nation's life is in danger. At this time, all the power is transferred to one person, and in fact, he becomes the sole ruler of the country. According to the Constitution, in case of war, mass disorder, encroachment of territorial integrity, a military coup d'etat, armed insurrection, ecological disasters and epidemics, or in other cases, when state bodies are unable to normally exercise their constitutional powers, the president declares a state of emergency[12]or martial law[13] in the whole territory or in some parts of a country[14].

This Act shall be submitted to Parliament without delay, which on the basis of an absolute majority[15], accepts or rejects this vision[16].

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9 *Reinhold Zippelius,* Juristische Methodenlehre, *Munich, C.H. Beck, tenth edition, 2006, pg. 5*

10 Ibid., pg. 52, 54

11 Ibid., pg. 52

12 The Prime Minister countersigns a declaration of a state of emergency, as well as decrees, issued during the state of emergency.

13 The Martial Law Act and decrees issued under Martial Law are exempt from countersigning.

14 Constitution of Georgia, Article 73, paragraph 1, subparagraph 'h'/ Article 73. 1(h)

15 The full composition of the majority is called "absolute majority", when the number of attendees is not taken into account and a quorum is calculated on the total composition.

16 Constitution of Georgia, Article 62.

Under these circumstances, the president issues decrees having the force of law, which run until they are cancelled[17]. At this time a number of human rights, including freedom of expression, the right to liberty, the right to privacy, the right to property, and so forth, may be circumscribed, which means that people can not enjoy these rights[18]. Despite the intensity of the interference with freedom so much, despite the fact that the constitutional order is changing substantially and the danger of usurpation is increasing enormously, there is no mechanism that could lawfully check the legality of a state of emergency or martial law or the decrees issued at this time (especially in the material and legal aspect). As Carl Schmitt notes, the idea of the absolute sovereign can be seen at this very moment. The political power, the president (the government in a state of emergency) and the parliament are involved in this process. This decision, which is entirely political in its essence, excludes verification; law and its defender – the court – completely disappear[19]. It is a paradox, but in a state of emergency, people take power in their hands with the direct help of the president. The pure politics is implemented without its balancing and counterbalancing law.

Another occasion, where politics prevails over law is **the impeachment process**[20]. According to the Georgian Constitution, MPs have the right to demand the impeachment of concrete officials. Then the issue shall be referred to the Constitutional Court of Georgia for decision. If, in its decision, the court does not confirm the existence of components of criminal violations, or the breach of the constitution, the process shall be terminated. In case of confirmation, one more step is needed to complete the necessary procedures and to remove an official from office via impeachment. Before taking this step, the procedure is purely legal; the court's decision is based on legal standards. Law is responsible for determination the conformity with constitution, as well as approval-disapproval of components of criminal offenses. However, if the court gives a positive response to the question (violation of constitution or existence of components of a crime is confirmed), why is the issue not considered exhausted? In principle, we have the answer: law unequivocally indicates the existence of components of a crime or constitutional violations. Why is one more step needed on this background? Moreover, does not this additional step mean neglecting the law? After a positive decision of court, the procedure is as follows: Parliament votes for the removal of officials via impeachment. Regarding the president, two thirds of the total number of MPs is necessary[21], whilst for other officials – an absolute majority[22]. It is obvious, despite the court's approval, parliament cannot declare impeachment. In fact, it is a proposal of a legislative body, which does not consider the court's decision as a sufficient reason to accomplish the impeachment procedure in the political process. In addition, the decision has a single-use and not judge-made meaning. It can be used only in this particular case. Today the legislature may conduct an impeachment process for less significant violation and tomorrow for the essential violation of the supreme law, it can declare, that the same sort of responsibility is unacceptable in the present political situation. It is impossible to oblige the parliament to any standard in this case. Constitutionalism is not familiar with any of the command, which could be applicable to restrict the legislature's discretion. Here

17 Constitution of Georgia, Article 73, paragraph 1, subparagraph "i"/ Article 73. 1(i)
18 Constitution of Georgia, Article 46, paragraph 1/ Article 46. 1
19 Carl Schmitt, "Definition of Sovereignty" from Political Theology: Four Chapters on the Concept of Sovereignty, trans. George Schwab. Cambridge, MA: MIT Press, 1986, pp. 5-15.
20 Articles 63, 64 and 75 of the Georgian Constitution regulate the impeachment procedures.
21 Constitution of Georgia, Article 63, paragraph 3/Article 63.3
22 Constitution of Georgia, Article 64, paragraph 1/Article 64.1

comes the pure politics again as an extralegal mechanism for expressing the popular sovereignty. This also is the case, when the argument of political expediency outweighs the legal one.

But all these procedures are only required in special cases and once in a blue moon. It may take decades, so that political noise cannot reach these dormant norms of the constitution. That is why this manifestation of pure politics is less problematic in the countries of stable democracies, where it seldom becomes a barrier to the law. Consequently, an attempt of its restriction is very rare.

The time of pure politics inevitably comes at least once in every four-to-five years. After the elections, which in its turn, is the manifestation of popular sovereignty and a form of direct democracy, appointment of ministers will be placed in the forefront of an agenda. In parliamentary and dualistic republic the trust and distrust procedure is a very clear example, which from the material point of view, is totally a matter of political expediency and so represents the best manifestation of pure politics. Here and right here, law moves to the background and concedes its place to politics. In view of the fact, that the institution of trust and distrust is the cornerstone of constitutionalism, as the system, it cannot be standardized by law, as long as this system exists.

In everyday constitutional life politics is best revealed through personnel management. Officials' posting is the sphere, where also law standards were not applicable.

However, as time goes on, this space becomes more and more constricted for the benefit of standards. Today, in the executive branch, political appointments mostly occur on the level of ministers and deputy ministers (as well as the heads of other institutions). In all other spheres standards are valid, regarding qualification or contest results, which, surely, means the restriction of political discretion, although it still does not mean to upset the balance in favor of law.

When Max Weber talks about the establishment of modern bureaucracy in his famous text "Politics as a vocation", he focuses on one peculiarity. It points to the position of a political officer. Weber notes, that "party leaders used to appoint their henchmen/stooges at various positions to the secretariat of the parties, in this or that community or state. The final goals are not the only reason for desperate fight between the parties but, first of all, it is a fight for gaining office patronage[24]". After that, an extensive review takes place in the text regarding the situation on both sides of the ocean, which once again empirically proves the propriety of the quoted argument. Thus, according to the original reality, at the dawn of bureaucracy, the issues of human resources are distributed according to political interest, as a result of later reforms, which is also discussed by Max Weber. Professionalism is brought to the forefront as a criterion and appointment of government officers falls in the sphere of law.

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[23] Another distinctive feature between politics and law is the judge-made character of the latter one. Law believes, that what is good for one occasion, is applicable to other similar cases too, but for politics such cases do not actually exist.

[24] Max Weber, Politics as a Vocation, Tbilisi, 1994, pg. 26

Modern constitutions and acts adopted on their basis[25], only the highest posts absolve from the law and leave them within politics. However, there are still some qualifications and as time goes on, these qualifications are proliferating fast. This is in direct proportion to the reduction of the political share in these acts. Nevertheless, there is still a certain amount of freedom in the issues of human resources. The current constitutionalism sets objective and subjective criteria for appointing the officials. Objective criteria are, for example, age and education, and the subjective ones – reputation etc. Subjective criteria are invaluable. It is believed, that it is the responsibility of decision-makers; it is essentially a matter for assessment, where the wrong step will affect the political dividends.

From some of above listed pure politics' manifestations, such as state of emergency and martial law, impeachment, including trust and distrust, appointment to the post and the latter is the target for the law. It aims to deliver an attack on it and strives to objectify subjective criteria. Undoubtedly, first of all, it will start from the position, where politics is the weakest. It will target at the posts, on which requirement of neutrality and keeping politics at a distance would be the most natural, in the vulgar sense of this word and It is the system of justice. Therefore, an observation on politics and law necessarily at this point of their confrontation front, will give us the results of the most reliable and modern trends.

4. LAW WITHIN CONSTITUTIONALISM

"Previously the Patrician claimed that plebiscites are not mandatory for them, because they had been adopted without their consent, but later […] it was established, that the plebiscites are obligatory for all people and thus, the plebiscites were equal to laws [26]." This is how Gaius describes a successful attempt by the plebs to determine their own advantage with reference to Patricians within the institutions. Prior to this, the only rule they used to publish was obligatory for both parts of the people, though from now on, the plebiscite becomes mandatory for both of them. From here begins the decline of the elite in the Roman law which, in the end, led to the surrender of the state power in the modern state, with the exception of court. This was written by Gaius in the 2nd century B.C.

It's known, that "in the I-II centuries B.C. in Old Rome, the knowledge of justice was a privilege for honorable layers of the society only – senators and later on, judges[27]". Such knowledge was considered sacred but heritable. The principle "communisopinioniuris", indicates that primarily the elite formulate not only justice, but its understanding as well. The prevailing view in justice is formulated by those who come from the elite. However, initially, plebs strove to restrict the Patrician gradually through integration within itself and become the only master of the power. Despite that the Patricians are not able to control the establishment of law; the law's interpretation is still within their power.

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25 For the purpose of saving time, on all other occasions, regulations are set by constitution; however, it is implicated, that this regulation cannot be imposed immediately by constitutional act, but just to be a part of the constitutional order.

26 Gaius, Institutions, Book 1, §3. Tbilisi, Publication by the Tbilisi State University. 2011. Pg.10.

27 Giorgi Khubua, Theory of Justice, Tbilisi, Meridiani, 2004, pg.136.

Based on the vision of a modern state, the source of power is the people and not justice, and these people should be given the possibility to organize their social environment. A notion, "people" by itself, does not imply only majority, and that is why the only function of the law is to limit the majority and defend the interests of relative minorities [28]. As for what is happening beyond it, it is a policy, which does not exclude its standardization itself and we have already witnessed this process. However, this standardization is finite with national constitutional order on the one hand, while on the other hand, there is a universal agreement beyond of which the policy enjoys full freedom.

Such an understanding of a law assigns an elite component to it and leads to the confrontation between it and democracy. This may sound controversial as the law is a result of people's sovereignty, but here the issue is the law, considered as a criterion for the assessment of action, which limits itself and is interpreted by the court, which, at the same time, confronts the policy not as a standardized one, but as a balance of powers existed in certain situations and expedience-based action formula. The political act is not subject to judicial control. A simple dissociation is as follows: what is passed through the court is a justice and what is free from it, is a policy. Drawing up a constitution based on this opinion, at least at the stage of its establishment, is a political act and not a judicial one.

Based on the classical theory of separation of powers, two out of three branches existing on a horizontal level are political powers, where no one can oppose a representative body for supremacy. The third one is a relatively non-political branch of the judiciary. The latter was singled out as a separate subject by Montesquieu. It is quite possible to say, that the court is defined by justice (as an evaluation scope) in comparison with those two other ones. Certainly, this does not mean that the court acts exclusively through justice and that the executive or a legislative body is free from justice, but clearly indicates the unsteady distribution of policy and justice in everyday activities of these bodies.

Zippelius distributes the allocation of law and policy between the powers within their activities. "Justice should not go beyond the bounds, established based on the objectives and expediencies of the law [...], only the legislator is assigned to make legal-political decisions and not a court"[29]. From Zippelius's point of view, it is a result of awareness and mechanisms of democratic control[30], where a special emphasis should be put on the last argument. In fact, the court is not subject to democratic control.

Constitutionalism recognizes that the re-appointment of a judge, assigned to the position, is not advisable and, thus, there are not even indirect mechanisms to exercise any kind of political influence on him/her. Consequently, he/she is strictly bounded by standards in order to be held responsible in case of their substantial violation. Non-existence of a political responsibility substantially excludes the possibility of assignment of

[28] The minority is never stable. Even if we agree upon the existence of stable idealities, the minority is always relative. A same person has to be in several minorities and majorities at the same time. Thereby, there is no group under a common and absolute name – minority. There is no absolute identity, which determines a person independently or isolated from other identities. The identity wakes up inside a person depending how much the surrounding world concerns him/her. Hence, an individual, as well as a group, is a relative minority.

[29] Reinhold Zippelius, namedwork, pg.63

[30] Ibid.

freedom of political discretion. In the situation provided it becomes uncontrollable in contrast to a legislative body which is responsible for unacceptable actions in the course of periodical elections. Thus, the court is almost unable to make decisions free from politics, and if it has a certain area, it is just because that, as a branch of government and considering certain political reasons[31], it does not constitute a direct threat to democracy.

These observations made it clear that a court, in comparison with other players, is the most conservative of all. In most cases, the scenario is as follows: in case of conventional democracy, after the consensus has been achieved, the court, as one of the latest political players, takes a step and justifies the fact, which has already been agreed in a social life. In contrast to a popular opinion, essential protection of human rights and development do not occur within the court in the case of developed democracies. It simply acts as a notary and confirms the fact for which there were decades of continuous struggle.

However, it does not discredit a role of the court. It is the most significant function, which finds its origin in the confrontation between the plebs and patricians and which, in some respect, turned back after the late medieval centuries. The elite had to resign a leading political role considering increasing perspectives of people's power and agreed to have a deterrent function. Thus, the court and law, by themselves, keep an elite nature. Having relinquished the executive authority, it remains as a last bastion to promote the elite's interests. Incredulity, towards this branch of authority during the French Revolution or in the course of formulation of US Constitution, was quite obvious considering this very ground. However, in England, the House of Lords directly exercised the functions of the Supreme Court until recently.

Only after the reform in 2005, authorities and responsibilities were essentially delivered from it in this respect. Against the background that this institute, in fact, was no longer involved in legislative activities since the beginning of last year, it is bizarre to maintain judicial authority for almost a century longer. This may be stipulated by two reasons. Firstly, the mentioned authority did not constitute a great threat in terms of power and the second, judicial function was much more authentic for the House of Lords, as an elite body, rather than the legislative one. The elite no more possessed the main weapon, a freedom of political discretion, and was not considered dangerous within a standardized justice.

As it turns out, the court is an authority with a single function to set the policy within the framework of justice. The court fights against the politics, because, as a mechanism to curb the popular sovereignty, it is a backbone against people's power. The elite club, which works with formulas that minimally defend its positions, follow a vindicator agreement which has methods to find the truth and establish a reality on it.

Such a situation works in favor of a constitutionalism. When we divide the constitutionalism into political and legal segments considering their relation as one of the expressions of balance, it is always implied, that a court is a bastion of law to protect the exact part the standardization of which is appropriate. The area, where the court has been removed from and where it cannot implement policy standardization using Procrustean bed is considered "pure" politics.

[31] For instance, as an executive power, it does not have the army or has no direct legitimacy of people as a legislative authority.

5. APPOINTMENT OF JUDGES AND POLITICS

According the hypothesis, raised above, the procedure for appointment on the positions in the system of Justice and its content will be the place where a conflict line will pass between policy and justice. The present text covers only one aspect of it. The entire constitutionalism has an attempt of integral law like a red line alongside it, which means the limitation of the policy in the course of decision-making regarding personnel administration and leave this field of decision making for itself. In fact, all positions are subject to citizenship qualification, age groups more and more increase and there is not even a single country left, where educational and seniority qualifications have not been taken into account. In the course of court staffing process more and more criteria appear, the first of which is such an assessment that is subject to objective grounds.

"The selection procedure of judges is the point, where justice and policy intersect[32]". A judicial power is a branch and the participation in it requires professional specialization, where the sovereignty is restricted by justice and where the rationalization is concentrated which Weber writes about in his works[33].

Bringing in rationality within the activities of constitutional institutes is entirely a part of justice. At this time, the process entirely is oriented on formulas, which are called legal syllogisms. These syllogisms operate with a simple structure "if...then", "this is...", "then it is ...[34]", which leads the system to automatism and reduces a share of responsibility, during decision-making process, to minimum.

In principle, such logic excludes a choice by value[35]. Here, especially in the course of court composition (personnel administration), the contradictions between law and politics become evident. What Herbert Kritzer once said regarding USA, is present in numerous jurisdictions throughout the world: "We face a fundamental contradiction regarding a role of justice in politics and a role of politics in justice and it becomes evident through our ambivalent attitude to a fact how we select and employ judges[36]". Georgia is a fine example to see this ambivalence.

The first wave of judicial reform was spoken about following the parliamentary elections even in 2012 and which was followed by the changes implemented in 2013. Last year the second wave of the reform was already known which is expected to be implemented this year. Before that, the Parliament introduced a number of innovations in legislation in order to regulate annual assessment of the judges appointed on probation terms.

Simultaneously, the Supreme Council of Justice defined a new rule for the appointment of judges based on the Act of Regulation for Appointment procedures of judges which follows western recommendations and is based on modern tendencies and thus, it contains significant information.

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32 Antonina Peri, Judicial Independence versus Judicial Accountability, a comparative analysis of models for selection of judges at constitutional courts, a journal of the Constitutional Court of Georgia, #VI, 2013, pg. 107.

33 Max Weber, mentioned work

34 Giorgi Khubua, Theory of Justice, Publishing House "Merani", 2004, pg.194

35 Sim. Pg.118

36 cit.The work by Antonina Peri ,Kritzer, H. "Law is the mere continuation of politics by different means: American judicial selection in the twenty-first century"), cit., 423.

As for final remark, at the turn of the year 2014 and beginning of 2015, the position of the Chairman of the Supreme Court became popular. In late February the term of the current Chairman expired and a discussion was held with reference to the criteria which should be met by a person nominated by the President.

Thereby, just for now, the situation has reached the very point when the main strategic operations are being played out within the confrontation between justice and politics. The foregoing analysis is precisely addressed to this and after the analysis has been more or less overcome at the level of principles, it is possible to analyze the Georgian Constitutional System.

The required conditions for the appointment of judges within the Georgian constitutionalism are regulated by the Supreme and organic laws on General Courts of the country, as well as by the Acts of the Supreme Council of Justice. The procedures and criteria for the appointment of judges of the Supreme Court and lower instances are separated from each other, where there can be found common and distinguishing marks within the criteria.

5.1. Criteria

5.1.1. General Criteria for all Instances

The criteria that are common for all judges include the following requirements[37]:

- Minimum age of 30 years in Georgia;
- Higher professional education;
- 5 years of work experience by profession;

In addition there are requirements defined within the organic law[38]:

- Legal capacity;
- Master's Degree or equivalent;
- Knowledge of the State language;
- Absence of criminal records;
- Non-dismissal as a judge for disciplinary violations;

There are also incompatibilities defined which include[39]:

- Any other position;
- Any other paid activity with the exception of pedagogical and scientific activities;
- Membership of any political party;
- Participation in political activities.

These are the requirements which are presented to the judges of the General Court despite instances. After that there comes a certain differentiation.

37 Paragraph 1, Article 86 of the Georgian Constitution.
38 The Organic Law of Georgia on Common Courts, Article 34, Paragraph 1, 2.
39 The Georgian Constitution, Article 86, Paragraph 3.

5.1.2. Criteria for lower instances

The judges of lower instance courts will be appointed to the positions in two stages. For the first time there is a three-year term which is followed by a term for lifetime. There are some additional requirements to be met[40]:

- Pass a judicial qualification exam;
- Take a full training course of the High Judicial School and be included in the qualification list of listeners of justice[41].

Following the decision, made by the Supreme Council of Justice of Georgia, the candidate shall be invited to the session[42]. The facts, which will be taken into account in the course of decision making regarding the appointment of a judge, are:

- A number assigned within the qualification list of listeners[43];
- The assessment by the Independent Council of High Judicial School[44].

The Supreme Council of Justice shall define conditions of the contest and criteria for selections of judges based on its decision[45].

Based on the decision by the Council, the assessment of a candidate of a judge, in case of three-year probation period, is implemented according to two criteria – honesty and competency[46]. The first criterion has four peculiarities and the second one – six[47]. Each characteristic, in total, consists of comprehensive list[48] of sub-criteria divided into about 70 categories starting from sincerity, temperance and ending with family conflicts and office culture[49].

40 The Organic Law of Georgia on Common Courts, Article 34, Paragraph 2

41 Sim. According to Article 34, Paragraph 2: a former judge, who has passed a judicial qualification examination and has been appointed on the position of judge in the Supreme Court or regional (Civil) Court or Court of Appeals through a competition and has no less than 18 years of working experience, is free from learning at the High School of Justice. A person, who has completed a full academic course of the High School of Justice and was enlisted in the qualification list of listeners, in order to occupy a position of a judge, is free from learning at the High School of Justice despite how long he has held this position or if he was appointed on this position after the completion of the academic course of High School of Justice. Besides, based on the Organic Law of Georgia on Common Courts (Article 34, Paragraph 5): a former judge of the Common Courts, whose authority has been terminated, is free from passing the judicial qualification examination within 7 years from the termination of his/her authority. In addition, according to the Organic Law of Georgia on Common Courts (Article 34, Paragraph 6), current members of the Georgian Constitutional Court, as well as former ones, are free from the qualification examinations and academic course at the High School of Justice.

42 The Organic Law of Georgia on Common Courts, Article 35, Paragraph 1.

43 Ibid.

44 Ibid.

45 Ibid.

46 Article 8 (Paragraph 1) of the decision №1/86, September 24, 2014, promulgated by the Supreme Court of Justice of Georgia on the approval of regulations regarding the selection of candidates for judge.

47 Sim. Article 8, Paragraph 2, 3

48 Sim. Article 9

49 Ibid.

In the course of the assessment of the candidate the information is usually obtained from 3 sources: 1) the documentation submitted by the candidate; 2) data retrieved by the Supreme Council of Justice and 3) the results of the interview with the candidate[50].

It should be noted, that three years later, the Council confide in approximately the same criteria during the assessment of the judge, when determining whether to appoint him/her on the position or not until his/her retirement. The goal of a judge assessment procedure is to select a worthy, qualified and honest judge [51] while the criteria are the same – honesty and competency[52]. The first criterion includes 10 characteristics allocated within five blocks, and the second one has nine characteristics allocated in seven blocks. Each of the characteristics consists of sub-criteria and in most cases comprises a non-comprehensive list[53].

The honesty criterion is evaluated in a threefold manner by the appraiser: is not satisfactory (four such assessments out of six automatically exclude an appointment for lifetime[54]); satisfactory and completely satisfactory[55]. The competency criterion is assessed with 100 point system (four assessments out of six lower than 70 points automatically exclude a lifetime appointment[56]), where seven characteristics have own share each[57]. Following this assessment, the Supreme Council of Justice conducts an open voting and appoints the judge for lifetime with 2/3 of the majority[58]. Otherwise, each member of the Supreme Council of Justice is obliged to substantiate his/her own, positive or negative position[59].

5.1.3. Criteria of the Supreme Court

The candidacies of judges of the Supreme Court, including the Chairman, are not required to study at the High School of Justice and pass the qualification exam[60].

Instead, the President of Georgia is obliged to nominate such a candidate whose professional experience of shall be appropriate for the high status of a Supreme Court Member[61].

5.1.4. Criteria analysis

All the aforementioned criteria are either impartial or subjective by their content, but their individualization is made possible through the assessment instrument. In fact, the preconditions for the appointment of judges

50 Sim. Article 10.
51 The Organic Law of Georgia on Common Courts, Article 36 [1], Paragraph 1.
52 Sim. Article 36 [2].
53 Sim. Article 36 [3].
54 Sim. Article 36 [4], Paragraph 13.
55 Sim. Article 36 [4], Paragraph 7.
56 Sim. Article 36 [4], Paragraph 13.
57 Sim. Article 36 [4], Paragraph 7.
58 Sim. Article 36 [4], Paragraph 20.
59 Ibid.
60 Sim. Article 34, Paragraph 3, 4.
61 Sim. Article 34, Paragraph 4.

of low instances exclude a subjective decision. It is confirmed by a point-based assessment system and the possibility to appeal in the court, which is almost impossible in the case of "pure" politics.

As for a subjective criterion for the Supreme Court, it does not limit the Parliament, but on the contrary, shows its freedom indicating the high level of subjectivity of a legislative organ and significantly heightens its political responsibility.

As it turned out above, according to instances, there are general as well as distinguishing criteria in the requirements regarding the candidates. As for the procedure of the appointment, here we have a completely different situation.

5.2. The procedure

5.2.1. Lower instance courts-appointment for a specific term

Appointment procedures are absolutely different for the lower instance courts and the Supreme Court.

According to the Constitution, all the judges, except the members[62] of the Supreme Court, are appointed by the Supreme Council of Justice[63] with the consent of 10 members[64] (2/3) of a full composition through secret balloting[65]. The voting is based on the assessment of a candidate by a member of the Council. The members of the Supreme Council of Justice assess a candidate individually, after the interview, based on the main criterion of honesty or competency. In case of a negative assessment, the member of the Supreme Council of Justice is authorized to make a negative decision[66].

5.2.2. Lower instance courts – appointment of judges for lifetime[67].

Three years later, the Council of Justice will still have to discuss the issue of the judge, primarily appointed on the position for three-year-term in order to appoint the same candidate for lifetime, which is preceded by the aforementioned assessment procedure. If a minimum standard of the assessment has been overcome, then the consent of 2/3 of the full composition of the Council is required through open voting. In case of rejection, it should be substantiated. The judge, having been rejected after a probation period, has the right, with limited grounds, to appeal against the decision made to the Cassation Chamber of the

62 According to Article 86 (Paragraph 2) of the Georgian Constitution: "Prior to an appointment of a judge for a lifetime, the Law may envisage an appointment of judge for a specific term, but no more than 3 years". The Organic Law scrutinizes every aspect of this issue, however, this issue is not essential for the objectives of the presented research, consequently, it has not been reviewed.

63 Sim. Article 86 [1], Paragraph 1.

64 Article 50, Paragraph 4, of the Organic Law of Georgia on Common Courts.

65 Ibid.

66 Article 12 [7] (Paragraph 5) of the decision №1/86, September 24, 2014, promulgated by the Supreme Court of Justice of Georgia on the approval of regulations regarding the selection of candidates for judge.

67 While this system of assessment deserves essential criticism fundamentally as well as technically, the presented article does not aim to evaluate it.

Supreme Court[68], which is entitled to return the case for further consideration to the Supreme Council of Justice [69]; and in case of a similar decision, it is possible to repeat the same procedure[70].

5.2.3. Analysis regarding the appointment of lower instances

Judges hold positions after they get support from the Supreme Council of Justice. The Supreme Council of Justice itself consists of 15 members, nine of them are judges, eight- are elected by the conference of judges of the judicial authority and one is the Chief Justice, as an ex officio official. Out of the remaining six members, one is appointed by the President and five others are appointed by the Parliament[71]. Election quorum for the Parliament is 2/3, which seems as if the majority (which is not able to control 100 mandates) is forced to make concessions to the minority, to seek the politically acceptable nominee for everyone; however, this chance is eliminated by the record, according to which, if an appropriate number of votes is not collected at the first ballot, then it is possible to appoint maximum four members out of five by the repeated balloting [72]. Thus, the system conceived as oriented on political consensus (after the first obstacle on the way to agreement) becomes a system oriented on the power of the majority, which eventually makes enthusiasm for reconciliation of a general nominee fade. There is a high chance for at least four members to express interests of specific political group. Thus, eight impartial judges, elected chairman (after political agreement between the branches of the government), appointed according to the interests of the President, four members expressing interests of the political party and one member elected through the political consensus will determine the lower court judges. It is not difficult to imagine the variety of ongoing political processes in the High Council of Justice, when it refers to the appointment of a judge. The appointment system based on the criteria of assessment is trying to neutralize it. It may have two sides. The first one is the introduction of above-mentioned balance into the politicalprocess; however, balance is held not between the political forces (it is guaranteed in the rules of composition and quorum), rather between the legal and political motives existed in the basis of their action. The second is the purpose of political balance. Through the introduction of assessment criteria, a political consensus is directed not towards the certain nominee and the representatives of relevant governmental branches confirm not the fact how much the nominee is accepted, but the fact how much the nominee corresponds with the criteria. The consensus is achieved in compliance with criteria and not with a person and of course it is essentially different (in fact, in the case of lifetime appointment of judges the situation is the same).

5.2.4. Supreme Court

According to the constitution, a different rule is established for the appointment of the judges of the Supreme Court and the Chairmen[73]. The head of the state nominates members of the Supreme Court to the

68 Article 36[5] of the Organic Law of Georgia on Common Courts.
69 Sim. Article 36[6].
70 Sim. Article 36[7].
71 Sim.Article 47, paragraph II.
72 Sim.Article 47, paragraph VII.
73 Article 217, paragraph IV by the Parliament of Georgia establishes two peculiarities regarding the chairman of rule of procedure:
1. Seemingly, the President is capable to nominate not one but few candidates on the position of Chief Justice;
2. The limit for nomination of the same candidate is one.

legislature[74]. It is important that the incumbent chairman has the right to nominate the candidate for a position of judge of the Supreme Court to the President[75]; however this is not obstacle at all. In order to analyze the appointment of judges of the Supreme Court, it is significant to discuss the procedure in details.Initially-,the discussion of candidateis held in the appropriate committee[76]. The committee discusses the information related to the candidate[77]. This information must include at least a notification regarding biography, working experience and professional knowledge[78] of the candidates. On the grounds of received information, the committee will draw the conclusion about their consent regarding their choice[79]. The Conclusion will be drawn through ballot voting by the majority of attendants[80], which will be submitted to the bureau. The latter will submit it to the President and the Parliament[81], afterwards the bureau nominates the candidate to the plenary session[82]. If there are several vacant positions to be occupied simultaneously, the Parliament takes a vote of all vacant positions separately[83]. The absolute majority is required for the election. The tenure of appointment lasts for 10 years[84].

To become a member of the Supreme Court, the same candidate can be nominated only twice[85]. The chairman of the court is the exception, as the president is not able to nominate a once- rejected person for the second time[86].

In the rules of election, the relation between the constitutional institutions and political process can be seen through the ballot. "How the judges are employed is not only the administrative descriptor which affects only the social and professional composition of the court, it also represents the element which affects the relationship with other political players, first of all with people and political institutions[87]" established by the judicial system. In political terms, the composition of the Supreme Court is the mechanism for the legislative and executive power to balance discretionary legislative power. These two branches of the government have no efficient mechanism of retention and balance in the system against the court; the appointment is a rare fact that enables political parts of the government to introduce political leverages in the case of balance of powers. The Georgian mechanism precisely points to the same fact, when the President is free

74 Article 90th, paragraph II, the Constitution of Georgia.
75 Article 36, paragraph II, the Organic Law of Georgia regarding the Common Courts of Georgia.
76 Article 217, paragraph II, rule of procedure of the Parliament of Georgia.
77 Attention should be paid to the fact, that a vote of confidence to the Parliament and discussion of candidates of various public officials, as well as members of Supreme Court, are implemented through the same procedures based on the Rules of Procedures of Parliament (Article 46, paragraph I).This once again indicates that aforementioned process has a political character and allows such wide discretion as absolutely political appointment of the Parliament. There is no more significant act by the Parliament than a vote of confidence.
78 Article 47, paragraph I, rule of procedure, the Parliament of Georgia.
79 "The conclusion regarding the consent of election" implies both positive and negative conclusion, which does not impede approval of candidate for plenary session.
80 Article 46, paragraph II, rule of procedure, the Parliament of Georgia.
81 ibid. Article 46, paragraph IV.
82 Ibid. Article 217, paragraph II.
83 Ibid. Article 217, paragraph I.
84 Article 90th, paragraph II, the Constitution of Georgia.
85 Article 35, paragraph III, the Organic Law of Georgia regarding the Common Courts of Georgia.
86 Article 217, paragraph IV, the rule of procedure the Parliament of Georgia.
87 Antonina Pery, namedwork, pg. 87-88.

in selection of a candidate; except for a few qualifications, it is true that during the committee hearing certain information is discussed, nevertheless it is only a matter of political debates, after all everything is still decided how much the candidate is politically accepted.

5.2.5. Constitutional limits of legislative discretion

If the constitution does not leave the issue of the appointment of judges open and still regulates it, this indicates a high political significance of this process, which is under the spotlight of the document, constitution, reflecting public consensus and not under the law drawn up according to the tastes of any majority. In the 5th chapter of the constitution there is an interesting detail regarding the judicial authority. It makes so slight difference in the determination of rules regarding the appointment made by the judges of the Supreme Court and lower authority courts for the legislature in discretion that it might be left out of consideration. However, each word in the constitution has decisive significance for its interpretation.

When the Supreme Law speaks regarding the first and second instance judges of regular Courts, it obligates the Organic Law to determine the rules regarding (1) selection, (2)appointment and (3)dismissal of judges[88].

In the same paragraph, the constitution regulates the above-mentioned fact after setting the lifetime appointment and three-year probation period for judges, where, it is clear that the lower instances of the court are concerned. It is paragraph II, Article 86. In this Article paragraph 1 (qualification) and paragraph 3 (official incompatibility) refer to the common judicial system including all three instances, while paragraph 2 refers to all of them except the Supreme Court. It is also confirmed that similarly to the norm discussed below (paragraph III, Article 90) this norm also refers to the determination of the rules regarding the dismissal through the Organic Law; while there is no necessity for the same rules to be set with two provisions in one normative act, moreover, in one chapter.

Thus, in case of first and second instances the constitution demands from the Organic Law to regulate:

- Selection of judges which means setting standards for the candidate of judicial selection
- Appointment of judges, which means appointment one of the candidates on the position of a judge;
- The dismissal which includes the definition of appropriate conditions for dismissal of judges.

In Article 90 of the Constitution of Georgia, which refers to the Supreme Court exclusively, the following is indicated; the rule regarding the termination of the authority for the members of the Supreme Court ahead of time is determined through the Organic Law; and prior to this, the case is, that the same normative act should regulate the authority, organization and activity of the Supreme Court[89].

Based on the three issues mentioned above, the constitution entrusts the parliament only the last issue regarding the regulation of dismissal in case of members of Supreme Court, while it considers existed regulations, within its

88 Article 86, paragraph II, the Constitution of Georgia.
89 Article 90th, paragraph III, The Constitution of Georgia.

own text, sufficient. It means that it is better for the legislature not to determine the regulation, which will refer to the rule for selection-appointment of judges of the Supreme Court. There are several reasons for it:

Firstly, it is impermissibility of digression from the intentions of the constitution, especially when it refers to the mechanism of influence between two branches of the government. The pending issue is related to the uppermost subject regarding the containment and equilibrium between the President, the Parliament and the judicial authority and to the composition of Supreme Court. Thus, the legislature cannot establish more criteria for the President than it is considered in the constitution.

Secondly, these are the interests of the minority, which are against such self-restraint. Establishment of more criteria for the candidates of the Supreme Court than it is determined by the constitution, narrows discretionary decision-making area for the parliamentarians and restricts their mandate, unlike the President that affects only himself by self-restraint.

The third one represents the human rights, the rights of those who want to hold a post of a judge. The criteria of restriction of rights as well as the criteria of restriction of rights to hold the state position provided within Article 29 of the Constitution of Georgia are determined by the Supreme Law. Thus, it is possible to introduce only those conditions which emanate from the constitution. For example: such as the condition regarding the knowledge of state language, which is not directly indicated in the constitution, provided within Article 8,by which the state language is determined, as well as within Article 85 paragraph II, where it is stated that legal proceeding is conducted in state language. However, it would not be right to minimize the process regarding the determination of admissibility to introduce criteria through the test of proportionality of human rights considered by the law, as here participates the adequate balance of principles of power in the constitution, they participate between the branches of the government, the law and the politics as well. Obviously, it is not considered by the constitution, but as it was mentioned above, the Organic Law envisages that professional experience of the judge of the Supreme Court must be appropriate for his/her high status. How much does this regulation meet the constitution? The answer is affirmative, as the Organic Law does not envisage objective assessment criteria, depending on which deputies must conform the above-mentioned requirements to certain candidate. It does not limit the policy, it only gives the direction, from which the case of digress will not be followed by the legal aftermath. Neither the law nor the constitution states anything regarding the impartiality of the candidate; however there is an indirect record which prohibits him/her from political activity during his/her position; all this is the indication for the elected representatives to find out not only existent undergoing relationships of the candidate, but general political relationships and their determinacy. Herewith, they must find out not only incompatible activity prohibited by the constitution at present, but other business contacts, connections with the law enforcement system, etc. However, here is the main consideration; none of the above-mentioned criteria is absolute. They may have only optional importance and they can be neglected.

5.2.6. Proposals regarding the election of chairman of the Supreme Court

"It is a wrong approach that the Chairman of the Supreme Court must not have political background[90]". Tea Tsulukiani, the Justice Ministry stated while making comments about the candidates of chairman of the

Supreme Court. Based on her comment, she implied not any member of political group, but a candidate's participation in public policy[91]. The words pronounced by the ministry were followed by the official statement published by the coalition "for independent and transparent justice[92], which put forward its own view regarding the election process for the chairman of the Supreme Court[93]. Everything started with the fact, that the president called the interested parties for the consultation with him to select "the best candidate"[94]. The position of the speaker of parliament was as follows: "We need a very normal, very honest and very professional person"[95].

There are a few conditions in the written document put forward by the coalition:

- Transparency of the criteria;
  "Explain positions of the parliamentary fraction and separate deputies regarding the nominated candidate to the public". It is known what arguments will be accepted and what are "professional qualities of the nominee".

- Transparency of the procedure;
  On the one hand, it means the involvement of impartial expert circles by the president; while on the other hand it means neutral process, which is free from the influence by the political groups.

This statement leaves no doubt, that it is dictated with motives of the law. It is expressed in the substantiation requirement of fixed position, in stating professional qualities as the only criterion, in transferring interests of parties (supposedly, according to this view arguments regarding the ideology of the nominee would not be accepted). In the procedure, even the requirement for the president to consult with impartial persons, serves to the disregard of political interests and reinforcement of professional component. This view also extends to the Parliament for its purpose.

One more offer, which has been proposed to the President by the coalition, is a temporary advisory council, which primarily will establish the criteria that the Chief Justice should meet. Afterwards, they will speak

90 Tea Tsulukiani-It is a wrong discretion that the judicial candidate of the Supreme Court must not have political background. http://interpressnews.ge/ge/samartali/313239-thea-tsulukiani-arastsoria-saubari-imaze-rom-uzenaesi-sasamarthlos-thavmjdomareobis-kandidats-politikuri-tsarsuli-ar-unda-hqondes.html. Verified: 18.01.15.

91 "If we want a person, who has had nothing to do with political processes, such person will not be voted by the Majority, as this person must be familiar to them. The Majority does not know the person, who has never been on the position, has never been in relationship with the public sector and political processes". Ibid.

92 The coalition established for the Independent and Transparent Justice on April 29, 2011 consists of more than 30 NGOs. The purpose for creation the organization in the process of advocating for monitoring of ongoing court reforms and for independent and transparent court is the unification of efforts of professional juridical associations, NGOs working in the field of legal rights, business and professional associations.

93 The statement made by the coalition regarding the selection of a new Chief Justice http://bit.ly/1Gb8H0v Verified: 18.01.15

94 The President is ready to select the candidate of the Chief Justice through the consultation http://www.epn.ge/?id=432. Verified: 18.01.15

95 Davit Usupashvili – Chief Justice must not be found in the form of director of justice. http://www.interpressnews.ge/ge/politika/313238-davith-usufashvili-uzenaesi-sasamarthlos-thavmjdomaris-sakhith-marthlmsajulebis-direqtori-ar-unda-iyos-modzebnili.htm. Verified: 18.01.15

regarding the nominees[96]. Obviously, the decision made by the advisory council would not be mandatory for the President in legal terms, but politically he is not able to avert the conclusion made by the agency, which was created for this purpose by him. This road passes through the restriction policy, yet it does not mean that the balance has been violated on behalf of law. It is significant what goals will the council set: will it determine minimal standards, which will exclude the most unworthy nominee or will seek for the ideal nominee to which will be appointed by them.

In contrast, the attitude of the coalition towards the Parliament is comparatively clear. In itself there is nothing special to oblige the deputy to explain his/her decision to the voters. It is the natural and necessary part of the political accountability. However, in this statement circumscription of reliable situations for substantiation and absolutization of professional qualities draws attention. This position will bring more distanced allusion of mood from the political processes regarding composition of lower courts. Actually there is a request from the Parliament to make a resolution based on objective criteria, which will be acceptable for the court. At the outset the political process which is so essential in case of the Supreme Court is foreclosed. Obviously, it is the least politicized constitutional institution, but it would be a mistake to imagine it as a voided from political importance body, to hold-up political interests of other governmental branches in the process of its composition. There must be a confidence in the nominee; however, this confidence must be brought into the political process through the political agreement and not through the mathematical ratio of criteria.

In addition, from this point of view, the selection cannot be helpful to exclude policy. For example: according to the official information, the policy of selection is minimized in the Constitutional Court of Italy[97]; 10-15 percent of judges have a political or administrative background: 66.7% (2/3)[98].

Thus, if the comment by the ministry is extended, the following can be stated: to feel protected from the political or other kinds of influences the Chief Justice must be an influential political figure[99] himself/herself... We are talking regarding a political figure, which may be symbolic guarantee of an independent and impartial court. He should earn his/her credibility through political positioning and not through the satisfaction of mechanical criteria.

6. CONSENSUAL WAY FOR COMPOSITION OF THE COURT

Karl Schmitt, in his text Constitutional Law (Verfassungslehre), talks about the rules of composition in the court. He discusses two cases. The first is parity composition, where contending parties appoint their mem-

96 Will be the interim Advisory Council created to select the candidate of Chief Justice for the Supreme Court? http://rustavi2.com/ka/news/7524. Verified: 18.01.15

97 Antonina Pery, named work, pg. 102

98 Antonina Peri, the same, pg.95

99 There is no talk regarding the persons engaged in party politics, but regarding the persons actively involved in public policy, who are known to the society, and whose past actions, ideology and aspirations are not a task for the society.

bers quoted and equally. Schmitt states, that "During similar quoted representation of litigants the resolution can be made only when some of the members fail to comply with the terms of his/her appointment in the conciliator body"[100]. This procedure is unhelpful, as it implies the tactic of wrestling and will doom the members of the court to direct pressure.

The second one is the case, when the members of the body do not depend on the person who is responsible for the composition. "If the mechanism for formation of a conciliation instance is such mechanism, where the represented members do not depend on the interests of litigants, such body will be sovereign itself and therefore, it will represent not judicial but existent and respectively the government focused only on its self-preservation"[101]. Precisely it matches the assessment based on the criteria of appointment. In this case there is no personal relation at all. The nominee is assessed on paperand not the nominee himself/herself. Hereby the latter derives the government itself with its original interests, which collides with the interests of contending parties and as Schmitt mentioned "It is impossible to solve political conflict in this manner, no matter how clever or wise people participate in the process of settlement of the arguement"[102]. The reason of it is the rule of resourcing, which is not based on consensus or the integration; it is based on the distance and separation.

The rule if election oriented on the consensus is much more convenient. In this case the functioning of the body is oriented on the conciliation and solution of the problem. It watches itself in process and not outside the process.

7. WHAT POLITICAL ACCOUNTABILITY IMPLIES

Constitutionalism segregates accountability and responsibility. Accountability is the mechanism through which the official is obliged to explain his/her actions to the person by whose grace the certain person was appointed to this position. It is the part of pure policy. Responsibility implies removal of the official from the position by the discontented employee with the accountability.

The court would not be accountable to anyone; it has only the responsibility, in disciplinary and criminal terms. Therefore, accountable even symbolically must be the one who appointed him/her at this position. When we introduce objective criteria the accountability is entrusted with these criteria and separated from the politicians and political institutions. Politics is not possible without accountability. The main weapon of the legislature, which makes the constitutionalism work, is that, that with its help all branches of government are bound to people and are responsible to them.

The Parliament, as the direct authority carrying public sovereignty, and Parliamentarism, as the form of the government based on the supremacy of power, are the democratic ideal of the state, where democracy is

[100] Giorgi Khubua, federalism as the normative principle and political order, edition by Georgian Young Lawyers' Association, Tbilisi, 2000, with the help of Schmitt, C., Verfassungslehre, 1955, S. 371.
[101] Ibid.
[102] Ibid.

implemented and by which democracy is implemented. The Parliament is the only place where the voices of people should be clearly heard through the walls of the Parliament[103]. The talk in the Supreme Law starts with this issue. It is mentioned in the Constitution of Georgia that the legislature is the body which determines the policy, to wit, major directions of foreign and home policy[104]; in this process it is not limited by anything and here, it is able to implement pure policy and the law as the restrictive standard is not seen.

The deputy, as the owner of the free mandate, is free from the law. On the basis of the law, she/he is not obliged to determine his/her own decision; the only thing that makes the deputy speak is the policy system. If the legislation (the desire of what is seen in the above-mentioned process) obligates it to substantiate a certain decision, then political accountability, which is established on the constitutionalism, disappears and it is replaced by the legal responsibility. The law excludes the opportunity to impose political responsibility; the specific decision is lawful or unlawful; if it is unlawful there are appropriate mechanisms for it. However, there are questions that are assessed with pure expedience, it is not against the law; it will pass formulas, tests and other plans freely, though still leaves a feeling of dissatisfaction. It seems as if everything is in order; however, it seems as if it is not still in order. This is the moment, when expression of dissatisfaction on the basis of this vague feeling becomes inevitable, which obviously is not irrational dissatisfaction; however, it cannot reach the limits of illegality. This is what we call politics, from where the political responsibility is derived. It is the requirement of democracy for people to require a response from the government for their specific activity (according to their political taste). Precisely, still here the old Greek idea of democracy is emanating, where Demos implements a bare power. Through legal standardization the democracy disappears and it is replaced by the technocracy. The law dominates the policy. Political elite dominates people. The law turns the policy into the accounting.

In the unstable democracies, where the government was only once transmitted through the elections, no wonder that there is mistrust towards the political processes. The society, where the policy is the part of the democratic tradition, would be bolder in terms of granting freedom to policy than the society where the tradition is corruptive and authoritarian ruling through the backstage bargain. It is clear that the contexts of consolidated and transitional democracies differ from each other; they face different challenges and need different responses to the questions; however we should gaze at future, vision and values; we may have to make concessions on the ways going to the goals. However, we should take care of this road not to be swallowed by the technocracy, in order not to forget how the policy is made. If we say that we are not ready for the democracy yet and with this reason we would stay away from it, we would be never ready for it. We should make a decision within our privacy context. It is exceptionally venturesome way, very vague edge, where the choice between the politics and the law must be made carefully.

[103] It is true that with the reinforcement of party vertical, executive power is increasing and the legislature is decreasing, however the constitutionalism is trying to restore primordial balance by using the mechanism of distribution of power and distribution of power within the government, which has always existed between the government and the Parliament. However, it is another subject of discussion.

[104] Article 48, the Constitution of Georgia.