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CONSTITUTIONAL COURT BETWEEN LAW AND POLITICS

I. INTRODUCTION

Political neutrality and impartiality of the Constitutional Court is a fundamental principle of a legal state. It is unacceptable for judiciary to exercise its functions under the direction of a government or with political sympathies and antipathies towards the parliamentary majority or the opposition. In this case, it is impossible to talk about "justice", because we are dealing not with an independent judicial process, but with pure"politics".[1]

"Political justice" leads only to bad associations. Therefore, the Constitutional Court attempts to prove that its decisions do not have anything to do with politics. Representatives of political authorities are constantly trying to demonstrate that no one exerts influence on a court. The public also likes judiciary image, which is far from politics. At the same time, the research of regularity between politics and law requires a sober and pragmatic approach in order to be fully protected from relapses/ recidivism of political justice.

Political neutrality of the Constitutional Court cannot be formed only with the help of the "myth", according to which, "judiciary is a far cry from politics/judiciary is distant from politics". The more

[1] Kirchheimer, O., Politische Justiz. Verwandlung juristischer Verfahrensmöglichkeiten zu politischen Zwecken. Neuausgabe, 198, Quote: Ooyen, R., „Volksdemokratie" und nationalliberaler Etatismus. Das Bundesverfassungsgericht aus Sicht der politischen Theorie am Beispil von Richter-Vorverständnissen (Böckenförde und Kirchhof), in: Van Ooyen, Möllers, M. (Hrsg.), Handbuch Bundesverfassungsgericht im politischen System, 2. Auflage, Wiesbaden, 2006, S. 199.

especially as "political" content of justice should not be seen as only the persecution, or vice versa, some kind of "armor" from the protection of legal accountability/liability/responsibility.

A legal state also requires protection. That is why "political justice" is considered as an indispensable, but on the other hand, the "dark side" of the legal state. Liberal democracy also recognizes civilized methods of fighting against its "adversaries" in the form of political justice – the so called "McCarthy" era in the US or anticommunist political justice in Germany.[2]

Each justice has a political character, whether it is admtted (by justice) or not. In such circumstances, the crucial factor is that a judge should be aware of political nature of his activities.[3] Justice, in a sense, is always political due to the fact that a judge cannot be "neutral". It is hard to imagine that just by throwing a judicial robe on himself, a judge can isolate himself from his world outlook - family and professional social environment, (already established) normative beliefs, religious or ideological (liberal and /or conservative) orientations, scientific views (community of different scientific "schools") and others. Judges can feel political orientation, at least, "under their skin".[4]

The study of politics and law has a long tradition and still falls within one of the pressing problems of legal science. To what extent is a constitutional court involved in politics? Is it possible that all the activities of the constitutional court to be constrained within the pure legal categories? How much does a judge's decision give the possibility of rational verification? Are there any guarantees that judges will be loyal to a constitution and will not abuse their power? How big are the risks of instrumentalization of a constitutional court from politics and what are their neutralization mechanisms? This is an incomplete list of issues, which is still under active discussion in the sphere of contemporary science.

II. "POLITICAL QUESTION" DOCTRINE

The "political question" doctrine is a "child of American Law[5], according to which, the US Supreme Court may refuse to discuss the case on the grounds that "the issue is political." Practice shows that the Supreme Court basically refuses to discuss foreign policy topics[6]. In addition, rules for the

2 Van Ooyen, Möllers, M. (Hrsg.), Handbuch Bundesverfassungsgericht im politischen System, 2. Auflage, Wiesbaden, 2006, S. 96.

3 Van Ooyen, R., Bundesverfassungsgericht und politische Theorie. Ein Forschungsansatz zur Politologie der Verfassungsgerichtsbarkeit, Springer, 2015, S. 147.

4 Van Ooyen, Machtpolitik, Persönlichkeit, Staatsverständnis und zeitgeschichtlicher Kontext: wenig beachtete Faktoren bei der Analyse des Bundesverfassungsgerichts, in: IJZG, 2008/2009 (Bd. 10), S. 249 ff.

5 Lechner H., Zuck, R., Bundesverfassungsgerichtsgesetz. Kommentar. 7. Neu bearbeitete und erweiterte Auflage, 2015, S.115.

6 Van Ooyen, Das Bundesverfassunggericht im politischen System, S. 302.

amendment of the Constitution, impeachment, guarantees for a republican form of government and so forth, are also regarded, as political questions[7].

American "political question" doctrine is less prevalent in Germany and other Continental European countries[8]. The Federal Constitutional Court of Germany has developed its own political question doctrine[9]. The Federal Constitutional Court of Germany does not differentiate on the issues, which due to their political contents, are not subject to legal proceedings. At the same time, the Federal Constitutional Court of Germany does not avoid the politically important questions, which may have a great impact on the political system[10]. We could say that the Federal Constitutional Court of Germany has become an important ruling factor in political life. Decisions of the Constitutional Court, determine the framework of the state authority, not only for individual cases but for the whole politics, and not too rarely it affects the content of the politics[11].

German doctrine is not keen on the protection from the judiciary "expansionist" aspirations, when the "third" power is trying to actively intervene in the activities of political power. According to the German approach, the Court applies existing norms, with non-political and justice-oriented approach[12]. The German doctrine stresses that the "third power" has less interest in politics. Accordingly, the Constitutional Court is seen as a "neutral power[13]." Most scientists agree that the assessment of politics by a constitutional court will bring harm to justice, so that, this time, even politics itself, "will not benefit[14]."

The Federal Constitutional Court of Germany believes that an assessment and solution of both, foreign policy and defense issues, is mainly a matter of the government[15].The Federal Constitutional Court differentiates the topics, within the jurisdiction of the Court, on the basis of several criteria.

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7 Ibid.

8 Piazolo, M., Verfassungsgerichtsbarkeit und Politische Fragen. Die political Question Doktrin im Verfahren vor dem Bundesverfassungsgericht und dem Supreme Court der USA. München, 1994.Massing, O., Politik als Recht – Recht als Politik. Studien zu einer Theorie der Verfassungsgerichtsbarkeit, Baden-Baden, 2005.

9 Lechner/Zuck, Bundesverfasungsgerichtsgesetz. Kommentar, 7. Neu bearbeitet und erweiterte Auflage, 2015, S. 115;

10 Eberl, M., Verfassung und Richterspruch. Rechtsphilosophische Grundlegungen zur Souverenität, Justiziabilität und Legitimität der Verfassungsgerichtsbarkeit, Berlin, 2006, S. 33. See as well: Scharpf, W., Grenzen richterlicher Verantwortung. Die „political question" -Doktrin in der Rechtssprechung des amerikanischen Supreme Court, Karlsruhe, 1965.

11 Benda/Klein, Verfassungsprozessrecht. Ein Lehr- und Handbuch, 3. Völlig neu bearbeitete Auflage, 2012. S. 4 ff.

12 Massing, O., Politik als Recht – Recht als Politik. Studien zu einer Theorie der Verfassungsgerichtsbarkeit, S. 46.

13 Sodan, H., Staat und Verfassunggerichtsbarkeit, 2010, S. 18.

14 Leibholz, G., Die Stellung des Bundesverfassungsgerichts im Rahmen des Bonner Grundgesetzes, in: Politische Vierteljahresschrift, 3. Jg., 1962, S. 16. quote.: Massing, O., Politik als Recht – Recht als Politik., S.47.

15 BVerfGE (the decisions of the Federal Constitutional Court of Germany), 68, 1 (2). Ooyen, R., Das Bundesverfassungsgericht als außen- und sicherheitspolitischer Akteur. Etatistische Regierungsdomänen a la Hobbes/Locke und „kalte" Verfassungsänderungen beim Aus- und (in)Inlandeinsatz der Bundeswehr, in.: Van Ooyen, Möllers, M. (Hrsg.), Handbuch Bundesverfassungsgericht im politischen System, 2. Auflage, Wiesbaden, 2006, S. 665 ff.

We should set the criteria of "rationality" and "practicality" apart from them. A court may refuse to discuss certain issues; if these issues do not allow to assessing a situation adequately or the court considers that it is more reasonable if the question is tackled by another state body (this especially concerns foreign policy affairs, possible encroachment on state interests, major of infringement state capacity or citizens security).[16] At the same time, a constitutional court, proceeding from its functions, is more inclined to protect individual rights and freedoms, than legal order.[17]

The Federal Constitutional Court of Germany does not consider itself as an entity "against" the government or parliamentary majority ("anti-government"). Constitutional court, also, cannot be "the opposition-oriented court[18]." A constitutional court is thought to be the leverage for management stability and increasing legitimation of a state system[19]. A court provides legitimation of decisions made by majority in a political process and their protection from public pressure or from administrative (bureaucratic) resistance ("blockade").[20]

German scientists are in favor of the view that the Constitutional Court should not consider "political questions".[21] On the other hand, the Federal Constitutional Court cannot refuse to discuss the case because of the "political question", or on the grounds that it is better to discuss the issue with other political institutions, or if the court does not want to assume the responsibility.[22] The case must be considered in all respects, if there is a constitutional norm, under which the court can make a decision.[23]

Constitutional court cannot "escape" to make a decision, no matter how challenging this decision could be. A constitutional court has statutory powers, which give the court not only the rights, but the obligations as well.[24] The constitutional court will go beyond its commission, if it refuses to make a decision (if decision-making authority is granted to a court by law).[25]

16 Eberl, M., Verfassung und Richterspruch, p. 34.
17 Ibid.
18 Stüwe, Die Opposition im Bundestag und das Bundesverfassungsgericht , Baden-Baden, 1997.
19 Ooyen, Das Bundesverfassunggericht im politischen System S. 154.
20 Grigoleit,Kl., Bundesverfassungsgericht und deutsche Frage: eine dogmatische und historische Untersuchung zum judikativen Anteil an der Staatsleitung , Tübingen, 2004, S.367.
21 Iibid.
22 Stern, Kl., Verfassungsgerichtsbarkeit zwischen Recht und Politik, 2013, S. 32.
23 Ibid.
24 Sodan, H., Staat und Verfassungsgerichtsbarkeit, S. 49.
25 Heun, Die Verfassungsordnung der Bundesrepublik Deutschland, S. 215, ციტ.: Schlaich, K., Korioth, St., Das Bundesverfassungsgericht. Stellung, Verfahren, Entscheidungen. Ein Studienbuch, 10. Neu bearbeitete Auflage, 2015. S. 359., Hillgruber, Chr., Goos, Chr. Verfassungsprozessrecht, 3. Neu bearbeitete Auflage, 2011. S. 17.

III. JURIDICALIZATION OF POLITICS AND POLITICIZATION OF LAW

1. What is considered "political"?

Posing "political" importance on any issues by constitutional courts should not be done arbitrarily. However, the main complexity of drawing a demarcation line between law and politics is related to the specification of "political" matter. Typically, the term "political" incorporates relations, connected with an executive power. At the same time, we often talk about family and job "policy".

Law and politics do not cohabit in full harmony but they are not mutually exclusive either. Nevertheless, law cannot be established in a space, void of politics. For its part, political process flows in the course of legal framework in compliance with "game rules", prescribed by law.

How we should identify "political" questions? It is much easier to differentiate issues under constitutional justice not in order of public relations or their importance, but with the help of "normative scale". In this sense, the issue should be regarded as "political", if there is no normative scale of its assessment, laid down in a constitution. Only an absence of a normative scale, gives the basis to recognize the issue as "political" one.[26]

2. Constitutional Political Science

Legal science is becoming more intensively engaged in doing research for aspects of political science of law. In this regard, the American scientific traditions are the most noteworthy. This approach was spread relatively late to Continental Europe, where during the 70s of the 20th century "the theory of political law" was formed. The first textbook on "political science of law" was published in Germany, in 1985.[27] Constitutional Political science has been considered as an independent trend[28], which is engaged in political analysis of law.

Law and politics contradict each other in constitutionalism[29]. The process of political analysis of this particular attitude and the law in general, is carried out under a different perspective. Polity-Aspect examines the political structures or forms of law. Policy-Aspect studies political functions and content of law, while Politics-Aspect – the issues of lawmaking, adjudication of justice and interpretation of law.[30]

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26 Ibid.

27 Görlitz, A., Voigt, R., Rechtspolitologie. Eine Einführung. Opladen, 1985.

28 Van Ooyen, Schale, Fr., Kritische Verfassungspolitologie, Baden-Baden, 2011.

29 Vakhtang Menabde, „Demise of Politics. Selection of the Composition of the Supreme Court on the Existing Notions of Status Quo and Prospects of the Reform." Constitutional Law review, VIII, p. 46.

30 Voigt, R., Das Bundesverfassungsgericht in rechtspolitologischer Sicht, S. 73.

According to American scholar, Theodore Lowi's so-called „Arenas of Power", we can distinguish „legislative arena", "implementation arena" and "judicial arena."[31] A constitutional court should be attributed to the judicial arena. However, the Constitutional Court, can also „appear" on the legislative arena.

Constitutional law, itself, has some outstanding features too. Constitutional law is a political law[32], as far as the subject of Constitution has political nature[33]. The study of aspects of political science of constitutional law allows us not to limit ourselves only to the pure normative, dogmatic analysis of law. In this regard, it is particularly important for the Georgian political science to become more active in the direction of constitutional justice research. Active use of political science research methods will profoundly help us in terms of understanding how the social, psychological, cultural aspects can influence a court's decision. Analysis of a link between a constitutional court and politics is to become one of the main directions.

3. Characteristics of Constitutional Interpretation

Characteristics of constitutional construction have a tremendous influence on "political" aspect of a constitutional court's activity. In interpreting the constitution, the constitutional court is bound by classic methods of interpretation. At the same time, a construction of a constitution differs from those constructions, which are made by judges of General/Common Court.

Each norm of a constitution is, essentially, a general principle of law, which offers an opportunity for constant updating of their contents. In addition, the open character of constitutional norms is typical for constitutions of both – Common law and Continental/Civil law countries. The text of a constitution can be seen as a framework or basic plan of the policy.[34] It is not accidental that the US Supreme Court is considered as a permanent (continuous) Constitutional Constituent Assembly (Wilson).

The last instance of constitutional interpretation is only a constitutional court. It is not able to formally change a constitution but its content can be adjusted through constructions. It also needs to be taken into account, that it is often quite problematic to draw with precision the line between lawmaking and a norm interpretation.

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31 Ibid., p. 74.

32 Wintrich, J., Aufgaben, Wesen und Grenzen der Verfassungsgerichtsbarkeit. In: Festschrift für Hans Nawiasky, München 1956, S. 191 ff. ციტ. Voigt, R., Das Bundesverfassungsgericht in rechtspolitologischer Sicht, in: Van Ooyen, Möllers, M. (Hrsg.), Handbuch Bundesverfassungsgericht im politischen System, 2. Auflage, Wiesbaden, 2015, S. 69.

33 Isensee, Handbuch für Statsrecht VII, 1992, §162 Rn 21.

34 Vakhtang Natsvlishvili, „Amending Without Amendments. A Challenge to the American Constitutionalism." Constitutional Law review, VIII, p. 30.

If a constitutional court has the power of interpretation ("Deutungsmacht"), this means that the court has political power too. Political power entails the results of a decision, and not its prerequisites.[35] Constitutional justice is not mere implementation of a judicial power or mere interpretation of constitutional norms.[36]

IV. DOES A CONSTITUTIONAL COURT IMPLICATE THE FOURTH POWER?

1. Place of the Constitutional Court in the system of constitutional bodies

Legally a constitutional court is not an independent body but it is a part of judicial power. Pursuant to the Constitution of Georgia, the Constitutional Court of Georgia shall be the judicial body of Constitutional review (Article 83, Paragraph 1). The Constitutional Court is formed as organizational-legal court and also makes decisions through legal procedures.

Each branch of a government represents the various branches[37] of the unified government as the unified function, while the Constitutional Court holds a different place than the judiciary in the system of constitutional bodies. The relationship between the Constitution and the legislative power is also different. The Constitutional Court acts as an governmental factor, alongside the traditional political government.[38]

The Constitutional Court does not belong to the classical judicial authorities. It shall not be empowered to enforce justice (Paragraph 2, Article 83, of the Constitution of Georgia). All branches of government, including legislators, are constrained by the Constitutional Court's decision. We can say that the Constitutional Court is the sui generis the fourth power. Only the Constitutional Court can change one of its own decisions (if the Constitutional Court considers later that it does not agree on its earlier decision). The Constitutional Court's decision stands as a peremptory interpretation of the Constitution, which can be altered only when there is a change in the Constitution or the Constitutional Court, which deemed it necessary to revise its own interpretation.

35 Bundesverfassungsgerichtsgesetz. Kommentar von Lechner, H., Zück, R., 7., neu bearbeitete und erweiterte Auflage, 2015, S. 26.

36 Ibid.

37 Besarion Zoidze, "Problems with the Verification of Constitutional Norms and Constitutionality". Constitutional Law review, VIII p. 14.

38 Tomuschat, Ch., Das Bundesverfassungsgericht im Kreise anderer nationaler Verfassungsgerichte, in: Peter Badura/ Horst Dreier (Hrsg.), Festschrift 50 Jahre Bundesverfassungsgericht, Bd. 1., 2001, S. 245. quote: Sodan, H., Staat und Verfassungsgerichtsbarkeit, S. 18.

A court's Interpretation of a constitution does not recognize any form of legal control, especially from a political instance. The decision of the constitutional court can become the subject of fierce criticism from the standpoint of politics, society or science. However, this criticism cannot change compulsiveness of a decision or its legal nature.

Intensity of a constitutional court's influence on politics depends neither on the amount of constitutional complaints, nor the issues that are being appealed to the court. Even the existence of the constitutional court changes the balance of forces between the government and the parliament, the majority and minority in the parliament. The court affects legislative practice by its judgments when it recognizes a norm as unconstitutional and therefore, annuls it. The court's judgments can have an influence on the process of an election too. (For example, the Georgian Constitutional Court's judgment on designation of electoral districts entails political consequences, when the constitutional claim (registration N547) was upheld ("Georgian Citizens Ucha Nanuashvili and Mikheil Sharashidze against the Georgian Parliament").[39]

2. The Means of Political Impact on the Constitutional Court

Politics holds various ways to affect a constitutional court. Parliament can amend the Organic Law on the Constitutional Court. Theoretically, Articles of the Constitution that define the authority of the Constitutional Court, the number of members and so forth., can be ammended by the parliament as well. There is a possibility of political influence on the process of electing or appointing of judges (however, it is difficult to predict how the judges „live up to expectations" after thier elections and appointments, or how loyal they will be to the electing or appointing bodies in the future).

Despite these theoretical possibilities, the legislature has always been reluctant to use them and it is a legal state's fundamental requirement. The United States legislature, throughout ist two-hundred-year history, has managed to „beat" the Supreme Court only four times by vertue of purposeful constitutional amendments. Germany did not attempt to „move" the Constitutional Court through legislative initiative on to the desired „tracks" of legislative body, or the government. Nevertheless, there was a successful implementation precedent in Austria.[40]

In addition to constitutional changes, politics sometimes exerts enfluence on a constitutional court through „intimidation". In the 1930s of the 20th century, President Roosevelt wanted to increase the number of members of the US Supreme Court from nine to fifteen. The president was able to change

[39] http://humanrights.ge/index.php?a=archive&catid=18&lang=eng&year=2015.
[40] Benda/Klein,Verfassungsprozessrecht. Ein Lehr- und Handbuch, S. 9.

the balance of power in the Supreme Court, through constitutional changes, where conservative judges were in majority, who recognized reformatory laws of New-Deal as unconstitutional. It turned out later that there was no necessity for Roosevelt to realize this plan since the judges of the Supreme Court gave up thier position.[41]

Recently, there was something of a „covert threat" toward the Constitutional Court in the speech of Minister of Justice, when she noted that „... (Constitutional) Court shall require recovery in terms of reforming or something else."[42] However, the minister did not specify how the reforms would have been implemented. The Constitutional Court responded very sharply to the statement of the Minister of Justice, which labeled it as "politically motivated criticism", „an attemt to influence the final decision of the Court", „defamation of judges of the Constitutional Court", „misleading the public."[43]

Despite the heated rhetoric, it is unlikely that the Georgian Parliament is willing to make legislative changes with regard to the Constitutional Court. Legislator, as a rule, deliberately refrains from changes, related to the Constitutional Court's authorities, Because it's seen as a violation of the principle of the supremacy of the Constitution and fundamental principles of putting restrictions on the Government by law.

In political practice, only a constitutional court is allowed to exercise the principle of government restrictions. No other body is able to exercise control over the legislature, as the constitutional court[44]. Consequently, the parliament will bring discredit upon itself, if it tries to restrict the powers of a cnstitutional court in the form of legislative amendments. In all likelihood, this could even lead to a state or a constitutional crisis. A constitutional court, for ist part, should not interfere with the activities of the legislative body (including, an interpretation of the constitution numbers). Some kind of "self-restraint" is required on the part of a constitutional court. The constitutional court judges are not the legislators, but they interpret the law. Lawmaking process is a political function. A judge should not fancy himself in the role of a lawmaker and a politician, accordingly. The principle of separation of powers, as a cornerstone of democracy, requires that it is impossible for the same branch, to excersise lawmaking and the process of interpreting the law. If a constitutional court also „assumes" the function of a lawmaker, it will administer politics instead of justice[45].

41 D.P. Currie, The Constitution in the Supreme Court: The First Hundred Years. 1789-1888 (1985), S. 205 ff. quot.: Benda/Klein,Verfassungsprozessrecht. Ein Lehr – und Handbuch, S. 9.

42 http://www.interpressnews.ge/ge/politika/356811-thea-tsulukiani-sakonstitucio-sasamarthlos-kolegia-mikerdzoebulia-da-reformis-dargshi-mnishvnelovani-nabijis-gadadgmas-vapireb.html?ar=A

43 http://www.constcourt.ge/ge/news/saqartvelos-sakonstitucio-sasamartlos-gancxadeba,p.5.

44 Ibid.

45 Benda/Klein, Verfassungsprozessrecht, S. 5.

In a legal state all of the governments are bound by law. Constitutional Court is bound by a constitution too. A constitutional court cannot go beyond the limits of a constitution and cannot make a decision in terms of political expediency or other, illegal scale. The constitutional court's decision is a legal act (an act of applying the law) and not the law. Nevertheless, who is obliged to check whether a judge, per se, is faithful to the constitution? As the judge of the US Supreme Court noted, "We, as judges, are bound by the Constitution too." However, what is written in the Constitution, is determined by us (the judges)." There is no formal mechanism to control a constitutional court. Judicial "self-restraint" remains as the only form of control. Personal and professional changes of judges are of great significance in realization of principle of judicial "self-restraint".

A constitutional court should not have the ambition to declare: "I am the Constitution" or "final decision falls upon us." German scientific literature specifically singled out the risks of such an approach. The risks of such an approach are particularly singled out in German scientific literature. As an alternative, the following structure was proposed: "Constitutional Court determines the direction of the political process".[46] This construction somewhat limits the ambitions of the Constitutional Court. At the same time, it does not formulate effective, institutional safeguards of judicial commitment to the Constitution and still rest all its hope on judges.

V. LAW AND POLITICS IN THE PRACTICE OF CONSTITUTIONAL JUSTICE

1. Conflict between Law and Politics

A constitutional court cannot avoid conflict with the politics. The likelihood of conflict between constitutional justice and the legislative body is already being conditioned due to the fact that the law can be declared unconstitutional upon its adoption. The conflict with politics is programmed beforehand, because a constitutional court has to protect human rights, democracy and the principles of a legal state. When the constitutional court attempts to put politics in the legal framework, this is already thought to be the conflict with politics. Constitutional Court's decision may call into question the authority of political institution and upset the balance between the authorities (if the court is instrumentalised by any political entity).

It is also quite high probability of conflict in the reform process, when the "conservative" Constitutional Court can suspend or block the reform process.

[46] Lang, Wider die Metapher vom letzten Wort: Verfassungsgerichte als Wegweiser. in 53. Assistententagung öffentliches Recht, 2013, 15 (19 ff).

A constitutional court would not be necessary, if political process was functioning flawlessly.[47] Politics, including the legislative process, is often irrational. The constitutional Court can make a significant contribution to improving the quality of political decisions in the political process by correcting mistakes.[48]

2. Constitutional Court as a Constitutional Body

A constitutional court, by its very nature, is essentially different from politics. The constitutional court, unlike Political authorities, cannot be active.[49] Law is static by nature, whilst politics is dynamic. A court may only react to the decisions that have already been made and revise them with respect to a constitution. The essence of the politics is, on the contrary, in creation of something new and in making changes.

The scope of judicial review is bound by complaint. On the other hand, politics does not know any boundaries. A constitutional court is not allowed to hear a case on its own initiative. The constitutional court always depends on "external initiatives" and the trial will not start on its own initiative. In politics, on the contrary, the initiative is inevitably profitable. Voters always welcome an active and motivated politics.[50]

Free area for the activities of politics is indispensable. Constitutional Court has to consider this fact and must leave a free space for actions to the participants of political process. Otherwise, the constitutional court's decision can even assume some form of political blockade.

A judge of a constitutional court is not politically responsible for his/her decision.[51]Accordingly, there is not such a tremendous pressure on the constitutional court from vested interests, as we can see in the sphere of politics.[52] A politician is aware of upcoming elections and after the election period he will have to fight for the votes.

The judges have another advantage compared to other politicians. A judge has more extra information than a legislator during the law-making. A court exercises ex post review. Accordingly, judges

47 Petersen, N., Verhältnismäßigkeit als Rationalitätskontrolle. Eine rechtsempirische Studie verfassungsrechtlicher Rechtssprechung zu den Freiheitsgrundrechten, Tübingen, 2015, S. 32.

48 Ibid.

49 Friesenhahn, E., Verfassungsgerichtsbarkeit, Jura 1982, S. 505, quote: Sodan, H., Staat und Verfassungsgerichtsbarkeit, S. 19.

50 Christoph Engel/Adrienne Heritier (Hrsg.). Linking Politics and Law, Baden-Baden, S. 296.

51 Eberl, Verfassung und Richterspruch, 2006, S. 343.

52 Petersen, N., Verhältnismäßigkeit als Rationalitätskontrolle. Eine rechtsempirische Studie verfassungsrechtlicher Rechtssprechung zu den Freiheitsgrundrechten, S. 28., Eberl, Verfassung und Richterspruch, 2006, S. 343.

have the information about the practice of law implementation and know how the law was operating in such atypical relations, which the legislator could not have envisaged.[53]

Politicians have more opportunities to take into account concomitant effects of a decision. The outlook of a judge is objectively constricted with a claim. In addition, the lawyers do not have the necessary skills in order to assess the political, social, economic, cultural and other results. A politician can also correct the wrong decisions made by him. A judge of a constitutional court does not have such opportunity. Decisions in political process are made not on the grounds of pre-existing principles, but, as a rule, implying the balance and the narrow-party interests between political forces. The horizon of a politician is usually circumscribed by the period of the election. Decisions made by politicians can be opportunist and short-sighted, when long-term prospects for the development of society are not provided. The decision of a politician could be related not to the common interests of the public, but to the realization of their own privileges and preferences. A recurrence of the abuse of power is not excluded as well. Considering all this, the political process requires legal control, which can be effectively implemented only by the constitutional court.

Judges of the Constitutional Court are much more protected from the influence of the vested interests, rather than a politician.[54] The constitutional court is not a "participant" of the legislative process, it is a "controller" instead.[55]

Unlike politicians, the issue is to be considered by a constitutional court, on the basis of pre-established, reasoned constitutional principles and make a rational decision. Rules of rational logic play the decisive role in the court's decision, rather than a vested interest. The decision, which is more reasoned, is thought to be correct. On the other hand, a court's decision cannot be based only on the purely formal rules of the logic. A constitutional court's decision is a legal, not a political act. A constitutional court cannot assess the political expediency. The court does not ascertain whether a legislator's decision is appropriate or correct. The constitutional court has to control only the conformity between a norm and a constitution. The function of a constitutional court is an adjustment of the wrong, incorrect development of political process.[56] Parliament operates as a representative body. However, this does not rule out some errors in decisions, made by the majority. A constitutional court enjoys some kind of superiority, despite the relatively weak degree of legitimacy and the fact

[53] Petersen, N., Verhältnismäßigkeit als Rationalitätskontrolle. Eine rechtsempirische Studie verfassungsrechtlicher Rechtssprechung zu den Freiheitsgrundrechten, p. 28.

[54] Engel/Heritier (Hrsg.), Politics and Law, 2003, 285. ციტ.: Petersen, N., Verhältnismäßigkeit als Rationalitätskontrolle. Eine rechtsempirische Studie verfassungsrechtlicher Rechtssprechung zu den Freiheitsgrundrechten, p. 51.

[55] Schlaich, K., Korioth, St., Das Bundesverfassungsgericht, S. 362.

[56] Petersen. N., Verhältnismäßigkeit als Rationalitätskontrolle. Eine rechtsempirische Studie verfassungsrechtlicher Rechtssprechung zu den Freiheitsgrundrechten, S. 29.

that the court is not directly accountable before citizens. Both of these abovementioned situations should be considered as an advantage of a court, as far as errors correction is performed not by typical political mechanisms, but by the independence of judges.[57]

Compared to a legislative body, the degree of legitimacy of a constitutional court is more limited. Parliament enjoys a direct mandate from people. At the same time, the direct legitimacy of the parliament does not put the legislature before other constitutional bodies. Each constitutional body is equal to one another in its sense. A constitution does not establish a hierarchy of constitutional bodies. Each constitutional body operates within its competence.

VI. CONCLUSION

Constitutional court ensures the stability of political system, pacifies the political process and defuses conflicts. The Court is accountable for judicial processes and not political ones. It is true that the constitutional court discusses political questions, but it does not take political decisions.

A constitutional court's decision could assume some political significance, but the court do not have to "enter into" an active politics. The constitutional court is neither an alternate lawmaker, nor a "supra-legislator". Delegitimation of a constitutional court begins with an encroachment on these very limits. Only a legislative body has the mandate to „make" politics.

Constitutional court must always remain within the limits of a constitution. The constitutional court should confer its patronage on the constitution, yet under no circumstances should it apply to politically sensitive questions and do not get involved in political discussion.

There are no other mecchanisms of legal restrictions, that can be applied to a constitutional court, except self-constraint. However, in the absence of institutional mechanism of self-constraint of the constitutional court, special emphasis is given to a judge's personality and an improvement of his/her appointment procedures. This provides the selection of judges on the basis of high professional standrads and personal criteria.

[57] Ibid; p.30.