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The Politicization of the Judiciary and Lawmaking

Abstract

The main aim of the paper is to find effective mechanisms to strengthen democracy and increase public participation. This research analyzes issues of coordinated activities of the legislature, the executive and the judiciary branches; Discusses the attitude of the judiciary towards politics; criticizes the participation of political forces in the staffing of the judiciary. It is stated an opinion that the judiciary should be an elective body and it should be elected by the citizens. The body exercising constitutional control should be a judiciary independent of the government bodies. By substantiated reasoning, it is reasoned that a judge should be more actively involved in lawmaking activities than is the case in the present situation. The paper, along with the normative material, analyzes the results of secondary research, scientific papers and studies of international organizations.

The research question is divided into several sub-questions; Based on their synthesis, after presenting them in unity, conclusions are drawn. The study identified questions that were answered step by step. First of all, the content and main task of the coordinated activities of the government bodies were discussed. The question that must be answered is whether the judiciary is a political body? Subsequently, there has been a debate on how to free judiciary from the influence of politics and interference from other branches of the government. And finally, based on the summary of the issues discussed, a conclusion has been made as to whether the judge carries out lawmaking and in what his this authority is reflected.

Judiciary and coordinated activities of government branches

Since a democratic state has separated the power into three branches and divided it among the parliament, the government and the judiciary, the question often arises as to whether any of them is given primacy and whether any of them is dependent to and subordinate to another. The peculiarity of democratic governance lies in the fact that the government bodies act in coordination with each other and thus exercise the governance of the state. Any kind of dominance or primacy among them is not considered in the legislation of modern states or in scientific views (of course, we mean democratic states).[67]

The separation of power among state branches is caused by the fact that one person or one particular body does not seize all the power. This is achieved if the government obeys certain rules and any of its actions are limited by specific conditions. These conditions are reflected in the legislation created by the government itself, mainly the legislature. The legislature, in turn, is bound by objective reality, and determination by public life is its immanent characteristic. It is absurd to claim that the government creates law and tyrannical rule only in accordance with its own views and ideology, always tends to ignore public aspirations. No matter how tyrannical the government may be, it still has to take into account the will of the society. The difference is in the degree of consideration of the will of the people, only. Democracies maximally try to protect it, while non-democratic regimes do that minimally.

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[67] Consultative Council of European Judjes (CCJE) Opinion No.18., 2015, II, 9. <16807481a1 (coe.int)>, [28.07.2021].

It is wrong to think of the state and law as transcendental beings. They do not exist in nature. Both are created by society to achieve their own goals. Therefore, the true state is a democratic state, which is created on the basis of the existing conditions of social reality and presupposes the necessity characteristic of the current events in the society, while tyranny and totalitarianism are a distorted manifestations of the state; Therefore, the article only discusses democratic governance.

In modern democracies, the actions and relations of the three branches of government are seen as a combination of complementary actions, where none of them is "superior" to the other, and they perform their functions harmoniously on the basis of checks and balances.[68] This is an issue that, in the light of the demands of the twenty-first century and the need to preserve democracy, requires a more detailed study in order to then be analyzed and understood in a new manner.

Today, among the both civil and common law lawyers, legal doctrine requires judges to follow the law in good faith.[69] The separation of powers is a necessary characteristic of democracy, otherwise democratic governance cannot exist. Separation of powers into absolutely homogeneous subjects is impossible and it makes no sense either. Government branches should be different in terms of functions and powers. The main thing is that neither should be allowed to dominate the other, however, they should have mechanisms to control each other's activities.

The idea of the separation of powers and its main purpose were best stated by *Fuller* in his "The Case of the Speluncean Explorers"[70], invented by him and well known in the philosophy of law. One of *Fuller's* hypothetical judges believes that scientists who committed cannibalism in a cave and, in order to save themselves, ate their colleague, should be punished in order not to violate the law requiring the punishment of those who committed premeditated murder; [71] However, the judge also considers the need for justice and the special situation in which the speleologists committed the crime and, therefore, considers that the harsh sentence against them must not be enforced. To do this, they must apply to the executive branch, which, unlike the court, has the power to pardon and it will pardon the scientists. By doing so, as *Fuller's* hypothetical judge points out, justice will be done without any violation. Neither the formal side of the law nor the spirit of the law will be violated[72].

Fuller correctly points out that the branches exercising government powers should act in a coordinated manner. When one of them, due to objective or subjective circumstances, makes a mistake, or a defect is observed in its action, the defect must be corrected by another body. It is in this way that their coordinated relationship is possible, which enables the harmonious management of current events in the state.

In the process of harmonious governance, the branches of the government make political decisions based on the ideology of a particular time, but they are significantly limited by the will[73], aspirations and worldview of the society. The will of the people always outweighs the ideology of the government, because it is the fruit of the creative activity of the state society and not of politics.

The main aim of the state and law is to regulate and manage public relations. In order to achieve this aim, the legislature and the executive branch, within the framework of the legislative and executive-regulatory activities, lay the foundation for legal order. The legal order should not be perceived only as the fruit of the activities of these two branches, because the rules established by the government should meet the expectations that the society has regarding the law. And if the

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[68] Ibid.

[69] *Bickel, A. M.,* The Least Dangerous Branch: The Supreme Court at the Bar of Politics, Cambridge University Press, Indianapolis, New York, 1963, 9.

[70] See *Fuller, L. L.*, The Case of the Speluncean Explorers. Harvard Law Review, Vol. 62, No. 4, 1949, 616-645.

[71] Ibid, 619.

[72] Ibid.

[73] See supra note 2, 9.

order achieved by the force of law is violated, it must be restored. In this case, the judiciary intervenes in the process of exercising power and it restores it.

The judiciary is distinguished from the government branches by the fact that it supervises the observance of the law. It does not make legislation, it does not enforce them, but if the law is violated, it restores the violated legal order. This is where the question arises: Does the judiciary have the power to interfere in the work of the legislature and make changes to the policy developed by the legislature?

The legislature has the most important role in the country, it plans domestic and foreign policy and it can be said that it creates the political climate in the state. Since the public has acknowledged its existence by delegating power and legitimizing the government, it is clear that the legislature must be given the opportunity to carry out its activities independently. The Constitution imperatively prohibits the appropriation of power and assigns the regulation of the most important issues to the special regulatory mandate of the highest state bodies.[74] Therefore, there is an impression that no one has the right to interfere in the activities of the Parliament. Parliament is sometimes equated with the public because it is a representative body of the people.[75] Lord *Blackstone* pointed out that legislative power in a free state should belong to the broad masses of society, as was the case in the less-populated Greek poleis of antiquity and in the early Roman Empire.[76] Proponents of parliamentarism have so exaggerated view of the legislature and its functions that they consider it unimaginable to limit its powers.[77] Such an approach and fetishizing of the legislature at the "sacral" level is wrong. Regardless of the type of representative body, and no matter how powers are distributed to the government branches, it should still be subject to control. All three branches of government in a democratic state act not in their own interests but in the interests of the people [78] - no one but the people themselves can exercise control. The society would not have created a state if it had been able to implement any organized activity together. The fact is that the broad masses of people can not do the work together. Also in this case, control over state branches should again be exercised by a subject established in an organized manner. At the same time, it is important that the oversight body should be part of the branchs exercising government in order to be able to actually carry out this assigned function and not be influenced by the superior authorities.

The control mechanism on the part of the executive branch can be seen in the president's veto when he can block a bill passed by parliament whose entry and enactment is unacceptable to the president, but it is still not enough. The legislations of modern states provides the president with only a suspensive veto power, and at the same time, parliament can override the veto.

Legislative activity can be controlled according to different models (e.g. French, American and German). The important thing is which of them will be built on more correct principles and which of them will perform the assigned functions more effectively. It is crucial that none of the branches of government remain out of control. Power often makes individuals forget the interests and existence of others. A careful study of democracies in force from the nineteenth century to the present (not to mention undemocratic regimes) can lead to the conclusion that any branch of

[74] №786 Law of Georgia the Constitution of Georgia of 1995, Article 3, Paragraph 3 and Article 7, Paragraph 1. Available at <https://matsne.gov.ge/ka/document/view/30346?publication=36>.

[75] *Sajó, A.,* Limiting Government: An Introduction to Constitutionalism, Translated by *Ninidze, T.*, Iris Georgia, Tbilisi, 2003, 136.

[76] *Sir Blackstone, W.*, Commentaries on the Laws of England in Four Books, Vol. 1, 1753, 114. Available at <http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf>.

[77] *Sajó, A.*, supra note 10, 132.

[78] See supra note 2, II, 6.

government has always sought to seize absolute power. This seems to be an immanent sign of government. That is why it is necessary to control the government under any regime.

Holmes found it inconceivable for the system to work without judicial oversight of state actions.[79] Nevertheless, the judiciary is often seen as the weakest link in government.[80] The legislature must be controlled and this must be exercised by the judiciary. The judiciary will exercise control most effectively because it is an independent body and is not accountable to anyone but the people. As the Consultative Council of European Judges notes in its Opinion, the accountability of the judiciary does not imply its liability or subordination to any branch of government.[81]

The legislation of modern democracies provides for the mechanisms of control of the legislature, referred to as constitutional control. The problem is that the body exercising such control is again staffed by the bodies it is supposed to control. In many cases this is the reason for the inefficiency of its activities.

The activities of a body formulated by the executive, as well as by the legislature, or by their joint decision, lack real results as the example of France has shown, too. The French Constitutional Council consisting of nine members, that are appointed by the president and the chairperson of each chamber of the parliament[82], has failed to resist President *Sarkozy*'s political ambitions. The President of France has instructed his government apparatus to draft a bill on the Armenian Genocide[83], and the Senate has approved this controversial bill.[84] Although in France the Constitutional Council has the power to exercise preventive constitutional control[85], it still failed to take timely measures to protect freedom of speech and only after some time managed to free itself from the influence of the President's political aspirations by declaring a particular norm unconstitutional. The French Constitutional Council is sometimes considered as a court,[86] although its such status is controversial under the French Constitution itself, where the Constitutional Council is nowhere referred to as a judicial body and its rights and duties are governed by Chapter Seven of the Constitution, while the next chapter, Chapter Eight is dedicated directly to the judiciary.[87]

Coordinated actions by the government branches does not preclude indirect control by one branch over another. The judiciary cannot interfere in the activities of the executive branch and cannot request it to submit a report. This function is performed by the parliament, but the parliament itself remains out of control. The existence of an entity free from control is contrary to democratic principles. Therefore, the activities of the parliament should be controlled by the judiciary. This case does not imply constitutional control alone. The law may not be unconstitutional, but its use may be unjustified. In such a case, the court should act not within the framework of the current policy, but in accordance with the requirements of justice. Under current

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[79] *Holmes, O.*, Collected Legal Papers, 1920, 295 – 296. Cited from Kauper*, P. G.*, The Supreme Court: Hybrid Organ of State, Southwestern Law Journal, Vol. 21, 1967, 585.

[80] Ibid, 590.

[81] See supra note 2, V (A), 20.

[82] Constitution of October 4, 1958. Article 56, Article 561. Available at <https://www.conseil-constitution nel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf>, [28.07.2021].

[83] *Nicolas Sarkozy* Orders New Armenian Genocide Law, The Telegraph. The materal is available at <https://www.telegraph.co.uk/news/worldnews/europe/armenia/9112129/Nicolas-Sarkozy-orders-new-Armenian-genocide-law.html>, [28.07.2021].

[84] French Senate Passes Armenian Genocide Law, BBC News. The materal is available at <https://www.bbc.com /news/world-europe-16677986> [28.07.2021].

[85] Conseil Constitutionnel <https://www.conseil-constitutionnel.fr/en/general-overview>, [28.07.2021].

[86] Constitutional Council, I. Available at <http://www.codices.coe.int/NXT/gateway.dll/CODICES/ Descriptions/ENG/EUR/FRA?f=templates$fn=document-frameset.htm$q=$uq=$x=$up=1>, [28.07.2021].

[87] See supra 17.

Georgian legislation, a judge is restricted from this right by the Civil Code of Georgia[88] [for example]. According to its Article 4(2), a judge cannot refuse to apply a law on the grounds that "in his opinion a norm of the law is unjust or immoral." This means that unjust and immoral norms should be used in a same way as moral and just ones. By this logic, any law in force must be enforced. To put it mildly, this is the beginning of tyranny.

Chanturia tries to find a solution to such cases. In his view, if the injustice of the law and the inconsistency with morality call into question the conformity with the constitutional rights, then the judge will use the "right to make constitutional submission"[89]. Clearly, this will happen if the law is anticonstitutional, but if such a contradiction is not apparent but is still unacceptable to apply the law, then there will be a legalization of an unjust legal order. If the constitution is the fruit of a wrong political course and the unjust and immoral law is in line with the same constitution, the judge is no longer allowed to administer fair justice. In such a case, the best solution is for the court to interpret the norm.

Why should the judiciary exercise control over the legislature?

The judiciary is the ring that establishes the link between justice and positive law. Its most important function is to protect justice in law. It is not a discovery for anyone that there are cases when the legislature goes beyond the limits of justice when creates laws. In such cases, the damage is done not only to the addressee of the norm, who, while enforcing the law, has a sense of injustice, but also to the legal order as a whole. This problem must be solved by the judiciary. The most effective mechanism for the protection of justice that the judiciary has is the interpretation of the norm and, ultimately, its particular method *contra legem*. Even *Kelsen*, who considered the norm of law to be the only source of law, acknowledged that a judge is not only endowed with the power to interpret the law, but also has a duty to do so.[90] The interpretation of the norm is the most important function of the judiciary; In many cases, this corrects the shortcomings that the legislature has made during its lawmaking activity. Adoption of the law is not enough in the process of regulating legal relationships. Enforcing legal order requires the application of norms. At this point, determining its content is essential to get a fair result.[91]

Sometimes, the use of the exact content of the norm may be unjustified, as there are cases when the legislature is so entangled in political aspirations that he loses his sense of reality and forgets the demands and worldview of the society and in general, its existence. In some cases, the situation is such that, in general, a fair and well-formulated norm provides for an unfair result. In such a case, the solution is only in the power of the court to carry out a correct and sensible interpretation of the norm. If necessary, the court must act contrary to the law. The best example of this is the decision rendered by Judge *Robert Earl* in *Riggs v. Palmer*[92]. The decision was made by a majority of the judges of the New York Court of Appeals, however it caused diversity of opinions. [93] The division of views into two parts was caused by the fact that all lawyers acknowledge: the judge is restricted by the law in force and must obey it. In this particular case, when the grandson

[88] №786 Law of Georgia of 1997– Civil Code of Georgia. Available at <https://matsne.gov.ge/ka/document/view/31702?publication=115>.

[89] *Chanturia, L.*, Commentary on Article 4, Commentary on the Civil Code, Book I, C*hanturia, L.*, ed.,Tbilisi, 2017, 29.

[90] *Kelsen, H.*, General Theory of Law and State*, Wedberg, A.* transl., Cambridge, Massachusetts. Harvard University Press, 1949, 145.

[91] *Loria, G.*, Problematic Issues with Hermeneutics in Law, Caucasus Journal of Social Sciences,Vol. 11, 2018, 129.

[92] *Riggs* v. *Palmer*. 115 NY 506. Court of Appeals of New York. Decided October 8, 1889. Available at <https://nycourts.gov/reporter/archives/riggs_palmer.htm>, [28.07.2021].

[93] See *Meyer, W. B.*, The Background to *Riggs* v. *Palmer*, American Journal of Legal History, Vol. 60, Issue 1, March 2020, 48–75.

Elmer killed the decedent grandfather in order to receive his estate, there was no legal basis to refuse Elmer the right to inherit, because the will was written by the grandfather for benefit of *Elmer* and according to the norms of applicable positive law in New York, the requirement of the will executed in accordance with the law had to be fulfilled – the testamentary heir was to receive the estate.[94] Nevertheless, the court ruled against the requirement in the text of the norm on the basis of the interpretation of the law. The court gave precedence not to the rule but the principles and, based on them, rendered a decision[95]. In this case, judges gave priority to fairness, values in society, and the purpose of the existence of the state and law; they refused to comply with the requirements of the laws and the most important and supreme norm - the Constitution. This was the case when ethics and the social moral were given precedence over the text of the law.

During his tenure as Minister of Justice of the Weimar Republic, *Gustav Radbruch* clearly expressed his sympathies for the positivist theory, but when the government changed and power in Germany was taken over by the Nazi regime, he challenged that regime as well as its law. The former Minister of Justice condemned the positivist approach to law and said that, a judge could not administer justice based on laws that are unjust and criminal.[96] The history of justice remembers also many other cases where obeying the law was more evil than acting against it.

"Leaving the legislature alone" in the lawmaking process is not justified. The adoption of the law should not be understood only as a statement of a political decision. This is a rather difficult and sensitive issue, as lawmaking involves establishing mandatory rules of conduct for thousands and sometimes millions of people. The rules are heteronomously set not by the addressees of the norm, but by a different subject - the legislator. Because the law must be applied by the court, it knows better how it corresponds to a particular legal relationship. Democracy will be implemented when enforcement of f law is not an end in itself for the legislature, but a necessity caused by the situation. Laws must pass the filter of justice to be just, appropriate, and binding.

The legislature obeys the laws passed by it just like the rest. It has not gained the power to pass the law itself, and this does not stem from his existence, but this power is bestowed by the people. That is why its activities must be controlled and it must be carried out by the people. Since society itself cannot act, the control must be entrusted to a body endowed with the trust of the people. Moreover, a body that will be the executor of the highest authority and will not be under the influence of the executive and legislative powers. Such a body is a judiciary in a state based on modern democratic principles.

Is the judiciary a political body?

Government bodies are the representative of the state in public relations. They exercise the powers conferred by law. Since the state is a political union, which exercises government within the powers vested to it, its representative bodies should also be considered as political bodies. No one disputes the politicization of the legislature and the executive, but the issue of the politicization of the judiciary needs to be clarified. According to the first paragraph of Article 59 of the Constitution of Georgia, the judiciary is declared an independent body. Independence does not directly imply apoliticality, but neither does it imply politicization. Anglo-American doctrine often emphasizes the independence and impartiality of the judiciary, that a judge acts in accordance with the

[94] *Maki, L. J., Kaplan, A. M.,* Elmer's Case Revisited: The Problem of The Murdering Heir, Ohio State Law Journal, Vol. 41. 905.

[95] See *Meyer, W. B.*, Supra note 28, 48–75.

[96] *Radbruch, G.*, Statutory Lawlessness and Supra-Statutory Law, Translated by *Gegenava, D.*, Journal of Law, №2, 2012, 320. Regarding enforcement of unjust law, this paper discusses in details an interesting case concerning whether the requirements of unjust and immoral laws should be enforced.

requirements of the law, and that his decisions are based on law, not on ideology or politics. [97] This makes a clear indication that the judiciary is not a political body. The legal doctrine also expresses the view that the Constitution should not be bound by the political ideologies of a particular epoch.[98] Obviously, it should be so, because the Constitution is the only law that is declared by the people, on behalf of the people and serves the interests of the society. As in the Constitution of Georgia, the preamble to the Constitution of almost all democracies states that it is declared by the people of the country. This means that, regardless of the political and ideological spirit, the constitution is designed in the interests of the people and not based on the ideology of any political party. However, the assessment of the Constitution in terms of political or apolitical act is not within the scope of this study and therefore further detailing of this issue would go beyond the scope of the paper.

Political decision-making is not the function of the judiciary. It must restore the violated legal order. In making its decision, it uses the legislation in force. The legal order is enforcement of the requirements of the laws in force at a particular time and place. Legislation is created by a political body, which bases all these mandatory rules on the ideology developed by it. This is why, often, the impression is created that the judiciary is a dual-purpose body combining political and judicial functions.[99]

If the judiciary, like the legislature and the executive branches, is to be considered as a political body, then its function must be limited to the mechanical application of the law. Such activities could be easily carried out by the parliament itself, because it would be the parliament who could most easily understand its own laws. In this situation, the judiciary would turn out to be an extra link and its existence would be, logically, meaningless. Speaking of the functions of a judge, according to *Aaron Barak*, he, as a judge, has no political agenda, he is not engaged in party politics or any other policy other than judicial policy.[100]

Judicial decisions are sometimes seen as political decisions and, on this basis, it is said that along with other branches of government, the judiciary is involved in the implementation of the political regime and therefore, it is a political body.[101] Such views are largely expressed about the American court.[102]

The function of the judiciary is not only to protect the law, but also protection of justice is as obligatory as protection of the law. The role of the judiciary is not limited to the implementation of policy in the state. Its important function is to refrain from making political decisions as much as possible and to protect law from politics; Therefore, the judiciary should not be a political body.

As already mentioned, the state is a political union. Consequently, if it is one whole political entity, then its parts must also be political, because part of the whole must qualitatively correspond to the whole. Therefore, the judiciary should be a political body. At first glance, it really seems so, especially since the judge obeys the law and the law is a rule adopted as a result of political activity, but it should not be overlooked who creates the state. The state is an association created by the people. The power that the state possesses, is obtained from the people. People are not a political subject. And, if an apolitical subject can create a political subject, then why should it be impossible for one part of a political subject to be apolitical? In addition, the state is empowered to establish both political bodies and apolitical entities, such as an enterprise. Both political and apolitical

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[97] Court. Judicial Legitimacy, Britanica, the materal is available at <https://www.britannica.com/topic/court-law> [28.07.2021].

[98] *Kauper, P. G.*, supra note 14, 585.

[99] Ibid, 590.

[100] *Barak, A.,* A Judge on Judging: The role of a Democracy, Harvard Law Review, Vol. 116 (1), 2002, 23.

[101] *Pozner, R. A.*, The Rise and Fall of Judicial Self-Restraint, California Law Review. Vol. 100, No. 3, 2012, 520.

[102] On the politicization of the American Judiciary, see *Allen, J.,* Political Judging and Judicial Restraint: The Case of Learned and Augustus Hand, American Journal of Legal History, Vol. 60, Issue 2, June 2020, 169-191.

subjects are encompassed in the content of the state. The existence of the state itself implies for an apolitical subject, i.e. for the people, to make political decisions in order for this apolitical subject to achieve its goals. The state is a socio-political union that unites both political and apolitical units. The state does not mean only the government, but also the territory, the legislation and the people. Therefore, it is possible that only two of the three branches of government to be political, and the third, the judiciary, to be the link between the will of the people, justice and government.

There is no universally accepted definition of politics as well as definitions of state and law. Simply put, politics is the art of governing a society based on a certain ideology. Politics refers to public activities, i.e., it includes actions taken for the public. In this sense, the judiciary also exercises public power, but in the state, there may be subjects that pursue public interests but are not political subjects. Satisfying the public interest is not always related to implementation of politics. Thus, it is possible that the judiciary is not a body of power bearing a political character.

According to *Bacon*, in order to acquire knowledge, the mind must be freed from idols. Science must be free from ideology and superstition.[103] It is not necessary for a view that has been recognized for centuries to remain unchanged for many centuries to come. Society should always strive to perfect the state and government. The ways of perfection must be varied and rational. The state and society will not suffer damage if the judiciary is removed from the political arena and takes its place in the form of an apolitical link in the ranks of the branches of state government.

The judiciary is the branch exercising the government. The government is characterized only by a political nature. This gives the impression that the judiciary should also be a political body, and this is acceptable to the state government, but insufficient for democracy. Clearly, a state that is bound by the will of the people will not be able to make independent decisions about what is good and what is bad for society. The most important issues must be resolved with the consent of the people. The referendum is a clear example of this.

It is the right of the people whether they want to live in the political regime or not. Once society decides to exist under the conditions of state, the way for action is also opened to the government. In order for any body or bodies of the government not to abuse power, control is necessary. If the person exercising the highest level of control is a political subject, it must also have political control mechanisms. Controlling political decision-making through political mechanisms will be like moving around a closed circle. This would lead to the absurdity. Therefore, the subject endowed with supreme control powers should not have a political character.

Politics involves the management of society. Theoretically, like Marxists, we might form illusory-utopian models of communism and idyllic coexistence, but history has shown that politics is, in practice, the implementation of a certain group's ideologies. It is related to the acquisition and exercise of power by a certain stratum or class. [104] In order for democracy and law not to be sacrificed to the narrow, party-related interests of any group, an apolitical body must also have place in government. Such a body would protect constitutional and universal values from narrow, party-related political aspirations. These values have not changed and have not been abandoned by society over the centuries.

In the states of parliamentary model, the judiciary becomes generally weak because the other two branches of government are under the hegemony of one strong political party. Ultimately, the appointment of judges is still carried out by these two governments, and there is a danger of replacing democratic governance with a totalitarian regime. In the event of a multi-party parliament

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[103] *Bacon, F.*, Stanford Encyclopedia of Philosophy, First published in 2003; substantive revision in 2012. Available at <https://plato.stanford.edu/entries/francis-bacon/>, [08.08.2021].

[104] *Gogatishvili, M.*, Lectures on the Theory of Political Power, Science, Tbilisi, (2003), 10.

and coalition government, the likelihood of achieving democracy is greater. However, this is not always the case, and instability and chaos may ensue.[105]

To protect itself from such problems, the society needs effective measures to prevent the government from being tempted by arbitrariness. It is therefore essential that one of the branches of government not to be a political body and not to be limited by ideological influences. Two centuries of experience in democratic governance has shown that in order to ensure ability of society to protect itself from the governance and to ensure its control, the separation of powers between political bodies is insufficient. It is necessary that, out of the three branches of government, only two be political subjects, and the third - apolitical. The judiciary should be equipped with such powers that it should not be difficult for the judiciary to control the rest branches. This will only be possible if the controlling body is so different from the subjects to be controlled that it will not be determined by those characteristics which determines other branches.

In order for the judiciary to be able to control the activities of the legislature, to have real results, and not to become a legal-political formality, the judiciary must be an absolutely independent body from politics and any government. This depends on the rules of its formation.

Rules for the formation of the judiciary

The content of the judiciary, its aims, functions and requirements are presented differently in different legal systems. This is affected by how the judiciary system is formed and by whom judges are appointed. Modern democratic regimes try to achieve the independence of the judiciary in various ways. Nowadays, the judges are elected as well as appointed.

In the US, federal judges are appointed by the joint efforts of the President and the Senate: With the advice of the President and with the consent of the Senate. The candidate is often recommended by a senator, a member of the party represented by the president. The fact is that the Federal Judiciary, the Judicial Conference of the United States, and Administrative Office of the United States Courts have no role to play in the submission and confirmation process.[106] Therefore, it is not surprising that the U.S. judiciary system is viewed in close connection with politics.

In the United Kingdom, the rules for the appointment of judges have changed since April 2006. Earlier judges were appointed on the recommendation of Lord Chancellor. Although the British considered this to be a fairly effective rule and thought that the system worked quite well, the way of such selection was still the subject of constant criticism.[107] At present, the appointment of judges is the prerogative of an independent commission.[108]

In general, in the legislations of the most modern democracies, the rules for the appointment of judges apply. Their appointment is entrusted to the executive and legislative branches. In rare cases, judges are also elected, but this, again is done by the legislature and the executive. Under such models, elected or appointed judges still cannot escape accountability to the voters or appointer. The judiciary will still be influenced by political instructions to some extent, and the will of the other two branches of government will prevail in decisions.

To avoid this, the judiciary must be absolutely free from political aspirations and accountability must be felt before the people, not the state authorities. This will be possible if the

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[105] *Magstadt, T. M.*, Understanding Politics: Ideas, Institutions, and Issues, *Ilia* State University Press, Tbilisi, 2010, 163.

[106] Federal Judges. The materal is available at <https://www.uscourts.gov/faqs-federal-judges#faq-Who-appoints-federal-judges?>, [28.07.2021].

[107] Judical appointments. Courts and Tribunals Judiciary. Available at <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/jud-appts/>, [28.07.2021].

[108] Ibid.

judges are elected by the people and their dismissal will depend on the will of the people and the violations committed by them.

The rule of electing judges was in force in the Soviet Union.[109] According to Article 152 of the 1977 Constitution of the Soviet Union, judges of district (city) people's courts were elected by the citizens of the district (city) on the basis of universal, equal and direct suffrage by secret ballot.[110] Clearly, the Soviet Union was never distinguished by caring for the people, and any regulations based on democratic principles were just fake and fictitious. The point is that the Soviet state was well aware of what was democratic and what was not, and also how to disguise the political will in its own legislation in such way that someone, even only very naïve one, would think it as the truth that the Soviet Union was a beacon of democracy.

The election of judges by the people is most consistent with democratic principles and it is the most correct decision among the existing models. If the court is to be staffed by judges elected by the people, there will no longer be a danger that any branch of government will influence it. Lord *Acton* rightly remarked that *Solon*'s work in Athens was an outstanding epoch in world history. According to *Acton*, since no one can be fully trusted, Solon placed those in power under the vigilant control of the part of society for which they were acting.[111]

It is not necessary to directly copy the European or American model. These models are acceptable to those countries because it is considered that they are effective there. Georgia has the right, by synthesizing the positive elements of different models and its own experience, to create a model tailored to the local society that will be effective for this post-Soviet space. Nor consideration of the experience of ancient Athens will be deemed as a violation. Today, all developed countries demand involvement of the public in democratic governance processes, and if the members of the judiciary are elected by the public, this system of inclusion may work. The Consultative Council of European Judges also focuses on the oversight role of the judiciary in the development of democracy in post-Soviet states.[112]

The opinion of the Consultative Council of European Judges states that the branches of government should be complementary, and supremacy and dominance between them is not permitted[113], because not the aspirations of any state body, but the will of people is supreme in the state and the subject of sovereignty is society[114]. In the modern world, from the different methods of appointing judges, in all cases where they are appointed by an independent body, or by the judicial council, or even by the legislature and the executive, according to the Consultative Council of European Judges, certain shortcomings are observed. The appointment of judges by parliament, or moreover by the executive government, poses the threat of politicization and dependence on the mentioned branches of government.[115] The Council recommends that judges be elected by democratically elected representatives, who will act as an independent body and activities of the judges will not be influenced by the change of government.[116]

Taking into account the recommendations of the Consultative Council of European Judges, the election of judges by the people can be considered as the best model. In such a case, the status of judges will also raised and the change of government will not affect their activities at all.

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[109] Constitution (Fundamental Law) USSR, Article 152. Available at <http://www.hist.msu.ru/E R/Etext/ cnst1977.htm>.
[110] Ibid.
[111] *Acton, J. E. E. D.,* The History of Freedom and other Essays, Macmilan and Co. London, 1907, 7.
[112] Consultative Council of European Judges (CCJE), Opinion No. 3, A. 11. Strasbourg, 19 November 2002.
[113] Supra note 2, II, 9.
[114] Ibid.
[115] Supra note 2, II, 9.
[116] Ibid.

Does the judiciary carry out lawmaking?

After discussing the relationship between justice and politics, it should be determined whether the judiciary engages in law-making activities and how we should imagine the judiciary as a lawmaker.

The judge must apply the law to the given reality, to the legal relationship, regulation of which he, as a person administering justice, is obliged to make. In this process he always uses the interpretation of the norm[117]. As already mentioned, sometimes, the interpretation goes so far that, if necessary, radically deviates from the textual content of the norm, although the judge is required to do more. When filling the gaps, when applying the analogy of law, the judge faces with a quite difficult problem. Dworkin called the judge in this situation "Hercules" [118].

When a judge corrects a legislative gap by analogy of law, he makes a decision not in accordance with the law but with the principles of law; Therefore, the free area for the judge to act is quite wide. In this regard, a small number of lawyers think that the analogy of law implies the creation of a new norm by a judge. [119] A large number of them are of the opposite opinion.[120] They believe that, in such a case, the judge does not create a new norm, but finds vague assessments in positive law[121]; At such times, he does not even carry out lawmaking, but explains an already existing rule.[122]

As already noted, hierarchy and dominance between governments are out of the question in a democratic state. Involvement of high-ranking officials of the executive bodies in the organizational activities of courts and tribunals is also inappropriate.[123] This means that the court must act independently to remedy the shortcomings. The judge is a professional lawyer. The highest-level professionals among the three branches of government are in the judiciary. Their area of operation is very important because they apply the norm not directly and mechanically, but on the basis of explanation and interpretation. In addition, within the framework of the constitutional submission, the judge has the right to question the constitutionality of a specific law and to apply to the Constitutional Court.

Kelsen attributed special functions to the judiciary. He recognized the judge not only as a lawmaker, but also as a legislator. In *Kelsen*'s view, in cases where there is no norm of substantive law that a judge can apply, he is empowered to create a norm of substantive law for a particular case that he deems appropriate and fair; In this case, the court acts as the legislature. [124]

According to *Kelsen*, when a judge uses a general norm (here he generally refers to norms of substantive law), he is forced to adapt the rule to a specific case, the elements of which are predetermined and in some cases, completely, it can be even determined. Therefore *Kelsen* concludes that a judge is a legislator in the sense that the content of his decision will never be fully defined by a general norm[125] and he will have to act independently.

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[117] *Barak, A.,* Hermeneutics and Constitutional Interpretation, Translated by *Javakhishvili, P.*, Methods of Law №1. 2017, 5.

[118] *Dworkin, R.*, Law's Empire, Harward University Press, Cambridge, Massachusetts, London, England, 1986, 239.

[119] *Heck, P.*, Das Problem der Rechtsgewinnung, Gesetzesauslegung und Interessenjurisprudenz, Begriffsbildung und Interessenjurisprudenz, 1932, 13, 14. Cited from *Berekashvili, D., Todua, M., Chachava, S., Dzlierishvili, Z.,* Methodology of Case Study in Civil Law, Tbilisi, 2015, 27.

[120] *Dimock, S.*, Classic Readings and Cases in Philosophy of Law, Routledge, Taylor & Francis Group, London, New York, 2016, 47.

[121] *Khubua, G.*, Theory of Law, Meridiani, Tbilisi, 2015, 219.

[122] *Dworkin, R.,* Is the Law a System of Rules, The Philosophy of Law, *Dworkin, R.* Ed., *Ilia* State University Press, 2010, 52.

[123] Supra note 2, VIII, 14.

[124] *Kelsen, H.*, supra note 26, 145.

[125] Ibid, 146.

The interpretation of the norms by the judiciary clearly indicates that it has the power to "review" the political views developed by the legislature. *Barak* assigns the judge the function of defending democracy.[126] This is impossible without controlling the power of the legislature. Barack attaches so much importance to the judiciary that he modestly but still allows for the possibility that, in the 1930s, if the judges of the German Supreme Court were to firmly defend democracy, *Hitler* might not even have come to power.[127] *Barak* contradicts the idea that a judge only declares the law and does not create it, and he calls such an opinion a "childish approach". He believes that the judge sometimes creates the law.[128]

Bickel rightly notes that the judiciary is the body that can give uniformity and national authority to the interpretation and application of federal laws.[129] Law must be flexible and the laws must correspond to the public relations. *Brennan* observes that the genius of the Constitution is not its static meaning, which is a thing of the past, but its ability to adapt to modern problems.[130]

The creation of a law is the prerogative of the legislature and the judge is not endowed with this power. He merely establishes a rule of individual conduct which is either based on the law and derived from it, or is contrary to its adequate meaning (when a judge uses the *contra legem* interpretation), or, when law exists, it is generated by a judge based on morality and fairness. Therefore, the judge carries out lawmaking, but not legislative activity.

Conclusion

Law changes over time. It changes depending on how public relations develop. The public worldview is changing and forcing the law to adapt to it. A positive law that fails to do so will not last long and will either cease to exist together with a stubborn government, or will have to make compromise. Law must always be considered in correlation with society and evolve with it. The formalization of law poses a certain problem for the development of law and its adaptation to public demands. The legislative process does not allow for easy implementation of changes. However, the society demands immediate changes. The society can not tolerate with being bound by procedural norms, and people demand a fair result. The rules for achieving the result are secondary for the society. Formalism is a necessary characteristic for positive law. Otherwise, the law will no longer exist and the grounds on which the decision is based will be removed. Therefore, the state and law can never abandon formalism. When a problem cannot be overcome by the legislature, it must be assisted by the judiciary.

According to Article 59 of the Constitution of Georgia, the authority of the judiciary includes not only the administration of justice, but also constitutional control. Justice is administered by common courts, while constitutional control is exercised by the Constitutional Court, which is separated from the hierarchy of common courts. The Organic Law of Georgia on the Constitutional Court[131] stipulates that the Constitutional Court ensures the supremacy of the Constitution and constitutional legality. These functions cannot be exercised if two-thirds of the judges of the Constitutional Court are staffed by political bodies. Exemption from political influence will only be possible if judges are not appointed, but elected by the public, and the entire body of

[126] *Barak, A.*, The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism, Faculty Scholarship Serie, Yale Law School Faculty Scholarship, 1-1-2003, 125.

[127] Ibid.

[128] *Barak, A.*, supra note 37, 23.

[129] *Bickel, A. M.,* supra note 4, 10.

[130] *Brennan, W. J.,* Constitutional Adjudication, 40 Notre Dame Law Review, No. 6.Vol. XL, 1965, 568.

[131] №95 Law of Georgia of 1996, Article 1, Paragraph 1. Available at <https://matsne.gov.ge/ka/document/view/32944%23?publication=29>.

the judiciary is freed from ideological influence. In such a case, in confronting the political links of the government, judges will always have the hope of public support and will be more confident in accepting specific political aspirations, even undesirable but fair decisions. Only such a judiciary will be able to protect the supremacy of the Constitution and legality based on constitutional principles.

Politics has recently taken a very big place in public life. The government sometimes abuses it to appease the public. They explain the unjust and irrational decisions of the government with the expediency of a political course and convince the public that politics is above their wishes. Clearly, putting politics above public aspirations is wrong. It is true that politics and law govern public life in harmony, but, in case of conflict between them, precedence should be given to law that serves justice. Since the state is a means to achieve an aim, its planned politics cannot be considered as more important than the aim. The aim should not serve the means, but rather the opposite.

When correcting legislative deficiencies, a judge will not be able to correct the deficiencies if he fails to exercise maximum powers and does not go beyond the requirements of the text of the positive legislation. In such a case, he will lose the opportunity of teleological interpretation and removed from power will easily find himself under the influence of not only the legislative, but also the executive branch. This will be the beginning of the collapse of democracy.

Increasing the power of the judiciary will raise the degree of independence of the court and leave no room for other branches of government to interfere in its activities. This will increase the motivation of judges to make impartial and fair decisions. Therefore, the judge must be an active figure who, like society, will have an indirect but significant impact on the lawmaking process.

The decision of a judge is individual, but it is still binding. It does not have multiple uses, but sets the rules of conduct for the subjects involved in the legal relationship. Thus, there are two types of binding rules in the state: specific rules created, according to the implemented relationship, and hypothetical regulation of the imaginary relationship. The first one is created by the judiciary, while the second one by the other two branches of government. If all three branches of government are equal in a democratic state, then the rules established by the judiciary should not be viewed beyond the law and should be considered as part of it. If the judge does not carry out lawmaking, then what gives binding force to the court decision? In a democratic state, giving the binding force to the will of a particular person is done on basis of law and, not only, according to his will. Nor a claim that is unlawful can assert validity. When a judge administers justice within the analogy of law, his decision must be supported by the law; it must conform to its spirit, requirements and principles. That is why court decisions are part of the law and ensure the protection of legal order.

The analogy of law requires quite great erudition on the part of the judge. It can make decisions based on the principles of law and morality; If this is not enough, he will use the decision of a judge of another country that is in line with his own legal order and, finally, he will formulate the decision based on his own inner conviction and sense of justice to get a legal result. If all this is not necessary for lawmaking, then the legislature will be left with only positive formalism and will soon relinquish its authority, for example, to artificial intelligence.

The decisions of the judge, as a professional lawyer with significant powers, should be a source of thought for the legislature. The decisions of the judge, his position and the assessment of the fairness and expediency of the norm should be taken into account by the legislature when establishing the rules. A judge is a lawyer who connects theory and practice to each other. He makes decisions based on theoretical knowledge and empirical experience. A decision formulated in such way of synthesis should be a source for the legislature to be taken into account. That is why the judge should also take an active part in lawmaking activity along with the legislature and the public.

The judge sees the public demands, the feelings of the subjects with legal rights and their attitude towards the legislation much better than the legislature. Proximity to the facts allows him to correctly identify the aspirations of the society. By observing and taking into account the case law, the Parliament will be able to adopt laws that will be adapted to the demands of the society and the development of events. And if the election of judges will depend on the public, it will give the court even more opportunity to avoid biased decisions, reduce corruption, and prolong existence of democratic governance.

Bibliography

1. *Acton, J. E. E. D.,* The History of Freedom and other Essays, Macmilan and Co. London, 1907;
2. *Allen, J.,* Political Judging and Judicial Restraint: The Case of Learned and Augustus Hand, American Journal of Legal History, Vol. 60, Issue 2, June 2020;
3. *Bacon, F.,* Stanford Encyclopedia of Philosophy, First published in 2003; substantive revision in 2012; <https://plato.stanford.edu/entries/francis-bacon/>;
4. *Barak, A.,* A Judge on Judging: The role of a Democracy, Harvard Law Review, Vol. 116 (1), 2002;
5. *Barak, A.,* The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism, Faculty Scholarship Serie, Yale Law School Faculty Scholarship, 1-1-2003;
6. *Bickel, A. M.,* The Least Dangerous Branch: The Supreme Court at the Bar of Politics, Cambridge University Press, Indianapolis, New York, 1963;
7. *Brennan, W. J.,* Constitutional Adjudication, 40 Notre Dame Law Review, No. 6.Vol. XL, 1965;
8. Conseil Constitutionnel. <https://www.conseil-constitutionnel.fr/en/general-overview>;
9. Constitutiona Council, I. <http://www.codices.coe.int/NXT/gateway.dll/CODICES/Descriptions/ENG/EUR/FRA?f= templates$fn=document-frameset.htm$q=$uq=$x=$up=1>;
10. Consultative Council of European Judges (CCJE), Opinion No. 3, A. 11. Strasbourg, 19 November 2002;
11. Consultative Council of European Judjes (CCJE) Opinion No.18., 2015;
12. Court. Judicial Legitimacy, Britanica, <https://www.britannica.com/topic/court-law>;
13. *Dimock, S.,* Classic Readings and Cases in Philosophy of Law, Routledge, Taylor & Francis Group, London, New York, 2016;
14. *Dworkin, R.,* Law's Empire, Harward University Press, Cambridge, Massachusetts, London, England, 1986;
15. Federal Judges. <https://www.uscourts.gov/faqs-federal-judges#faq-Who-appoints-federal-judges?>.
16. French Senate Passes Armenian Genocide Law, BBC News. <https://www.bbc.com /news/world-europe-16677986>;
17. *Fuller, L. L.,* The Case of the Speluncean Explorers. Harvard Law Review, Vol. 62, No. 4, 1949;
18. *Heck, P.,* Das Problem der Rechtsgewinnung, Gesetzesauslegung und Interessenjurisprudenz, Begriffsbildung und Interessenjurisprudenz, 1932;
19. *Holmes, O.,* Collected Legal Papers, 1920;

20. Judicial appointments. Courts and Tribunals Judiciary. <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/jud-appts/>;
21. *Kauper, P. G.*, The Supreme Court: Hybrid Organ of State, Southwestern Law Journal, Vol. 21, 1967;
22. *Kelsen, H.*, General Theory of Law and State, *Wedberg, A.* transl., Cambridge, Massachusetts. Harvard University Press, 1949;
23. *Loria, G.*, Problematic Issues with Hermeneutics in Law, Caucasus Journal of Social Sciences,Vol. 11, 2018;
24. *Maki, L. J., Kaplan, A. M.*, Elmer's Case Revisited: The Problem of The Murdering Heir, Ohio State Law Journal, Vol. 41. 905.
25. *Meyer, W. B.*, The Background to *Riggs* v. *Palmer*, American Journal of Legal History, Vol. 60, Issue 1, March 2020, 48–75.
26. *Nicolas Sarkozy* Orders New Armenian Genocide Law, The Telegraph. <https://www.telegraph.co.uk/news/worldnews/europe/armenia/9112129/Nicolas-Sarkozy-orders-new-Armenian-genocide-law.html>;
27. *Pozner, R. A.*, The Rise and Fall of Judicial Self-Restraint, California Law Review. Vol. 100, No. 3, 2012;
28. *Riggs* v. *Palmer*. 115 NY 506. Court of Appeals of New York. Decided October 8, 1889. <https://nycourts.gov/reporter/archives/riggs_palmer.htm>
29. *Sir Blackstone, W.*, Commentaries on the Laws of England in Four Books, Vol. 1, 1753;
30. *Barak, A.*, Hermeneutics and Constitutional Interpretation, Translated by *Javakhishvili, P.*, Methods of Law №1; 2017;
31. *Berekashvili, D., Todua, M., Chachava, S., Dzlierishvili, Z.*, Methodology of Case Study in Civil Law, Tbilisi, 2015;
32. *Gogatishvili, M.*, Lectures on the Theory of Political Power, Science, *Tbilisi*, 2003;
33. *Dworkin, R.*, Is the Law a System of Rules, The Philosophy of Law, *Dworkin, R.* Ed., *Ilia* State University Press, 2010, 52.
34. *Magstadt, T. M.*, Understanding Politics: Ideas, Institutions, and Issues, *Ilia* State University Press, Tbilisi, 2010;
35. *Radbruch, G.*, Statutory Lawlessness and Supra-Statutory Law, Translated by *Gegenava, D.*, Journal of Law, №2, 2012;
36. *Sajó, A.*, Limiting Government: An Introduction to Constitutionalism, Translated by *Ninidze, T.*, Iris Georgia, Tbilisi, 2003;
37. *Chanturia, L.*, Commentary on Article 4, Commentary on the Civil Code, Book I, *Chanturia, L.*, ed., Tbilisi, 2017;
38. *Khubua, G.*, Theory of Law, Meridiani, Tbilisi, 2015;