
Irine Imerlishvili
Judge of the Constitutional Court of Georgia;
Associate Professor of International Black Sea University;

Zurab Jibghashvili
Associate Professor of Caucasus University;
Associate Professor of International Black Sea University.

Some theses for the relationship between law and politics

I. Introduction

In the Georgian legal space, the issue of the relationship between law and politics, including equilibrium, is less elaborated. From the future scientific-practical point of view of constitutional law, the definition of this relationship, identification of problems and ways of solving them are of great importance. Law and politics, taking into account the extent and effectiveness of their intersection and influence, are formed as an independent institution. Discussing the relationship between law and politics will always be incomplete and inexhaustible as the space of their mutual influence is infinite.

In the system of separation of powers, the struggle between law and politics, starting from law-making, manifests itself in many directions and produces various results. Accordingly, the present publication will not have the ambition to fully explore these relationships. We will try to touch on several fundamental theses in order to find out what is the purpose and result of their interaction and impact; Where can their limit of interrelation reach? For this purpose, we will use comparative legal, empirical and analytical, as well as teleological research methods.

II. The Foundational Dilemma: Constitution Between Law and Politics

Human development gave rise to the demand for justice in public relations, which was the result of the rejection of injustice. Therefore, justice, like the establishment of the state, is a political decision. Therefore, politics and law coexist and what is disputed, is the boundary between the two. The political branches of the government have their own political interest in relation to the activities of the court, starting with its formation and continued with powers. «The intention of legality in public affairs (which is directly related to the development of the idea of constitutionalism and the rule of law) is a political compromise in itself and it cannot be devoid of politics; On the other hand, politics separated from law would be unjust.»¹

The existing mixed model of the formation of the Constitutional Court in Georgia includes a political component. In particular, it envisages the parity involvement of different branches of the state government (as, for example, in Italy and Ukraine), thereby adhering to the principle of pluralism. Protection of this component «reduces the risks of the Constitutional Court being influenced by the centralized political will.»² The legal-political compromise embodied in the Constitution makes it clear that law exists within the framework of politics, with the function of protecting freedom from force. The freedom to create politics is limited by justice, politics must be fair. In this sense, law has «predominant power over

¹ ჯიბღაშვილი ზ., ჯავახიშვილი პ. ხელისუფლების დანაწილების პრინციპისა და საკონსტიტუციო სასამართლოს ფორმირების ურთიერთმიმართების საკითხი. ჟურნ. სამართლის აქტუალური სკიტები. #1. 2022. 41.

² იქვე. 52.

politics».³ On the other hand, law without political will does not contain concrete decisions. In both cases, the state would be essentially abstracted from a human and would not be able to justify its purpose.

Due to the close connection between law and politics, the concept of the rule of law implies their mutual autonomy, but not their separation. The government of the state is politics, and the state is beyond the law, a fiction and in reality – a force/power. In the dynamic and evolutionary struggle of politics and law, the absolutization of the state, its management mechanism (power) with the political will, as a fair alternative, required the spatial fettering of human freedom. **This struggle is dynamic, it is characterized by competition from law to politics (politicization of law) and from politics to law (restricting politics with law).**

Law and politics coexist and develop together. The natural conflict of politics and law, within the framework of separation of powers, requires regulation in the constitutional bed with minimal political losses. The need for the balance of their relationship gives rise to the principle of binding politics with law, fixes the balance between them and adds the legal essence to the state. In the concept of a modern legal state, the binding of political creation by law and the division of power⁴ is a constitutional principle, but if politics is integrated into law without limits - without restraining factors, then the experiences of feudalism, early capitalism or Bolshevism, theocracy, or modern Russia have shown us that law under the guise of positivism is only political (It will not be a tool of coexistence, but of coercion), as a «tool for the formation of political will».⁵

From this point of view, in the assessment made according to his belief, there is nothing to argue, when V. Lenin stated that law is only a tool for the protection-dominance⁶ of that political regime, which has decided to dominate one space independently of compromise. Even in modern non-democratic regimes, law is politically instrumentalized. The democratic constitution structures political relations; It defines the structure and procedure of formation of political will,⁷ which cannot be opposed to law even in the form of popular sovereignty.

If this happened, then the rational balance between private and public interests, as well as between the government and the rights of its subjects, would be violated. In the conditions of democracy, the political procedures determined by the constitution establish the balance conditions between the will of the majority and the rights of the minority. Appealing to popular sovereignty by the will of the majority would justify not only the totalitarian regimes of the past, but also the contemporary regimes of Khomeini, the Taliban, and the Russian nationalistic regimes.

Constitutionalism tames the unlimited, absolutized (justified only by popular will) democracy, because the objective protection of the minority, political justice is necessary. Therefore, for the sake of political justice, the Constitution «restricts political actions»⁸ within its (legal values) scope - it establishes the normative limits of political activity, thereby subjecting the political process to inexorable justice. Law is the limit for politics, over which the political will coming from the sovereignty of the people cannot dominate.

3 ლემბკე. ო. ვ. კონსტიტუციონალიზმი თანამედროვე საზოგადოებებში - პოლიტიკისა და სამართლის ურთიერთობის სურათი. კრებულში: კონსტიტუციონალიზმი. მიღწევები და გამოწვევები. კონსტიტუციონალიზმის ტრილოგია. ტომი I. თბილისი. 2019. 432.

4 ამის შესახებ საუბრობს საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეთა ნაწილიც და აღნიშნავს: „ალოგიკურია იმის თქმა, რომ ხელისუფლების დანაწილება თვითმიზანია და არ ემსახურება ადამიანის ძირითადი უფლებების დაცვას გადამეტებული ძალაუფლებისა და ხელისუფლების უზურპაციისაგან. კონსტიტუციის ძირითადი ღირებულება, მისი სარგებლიანობის მასშტაბი სწორედ იმაში გამოიხატება, რომ თითოეული კონსტიტუციური გადაწყვეტა, პირდაპირ თუ ირიბად, ადამიანის ფუნდამენტური უფლებების სრულყოფილ რეალიზაციას ისახავს მიზნად.“ იხ. საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების - თეიმურაზ ტულუშის, ირინე იმერლიშვილის, გიორგი კვერენჩილაძის და თამაზ ცაბუტაშვილის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2020 წლის 25 სექტემბრის N93/2/1473 გადაწყვეტილებასთან დაკავშირებით. <https://www.constcourt.ge/ka/judicial-acts?legal=10143>(შემოწმებულია 09.02.2023)

5 ლემბკე. ო. ვ. დას. ნაშ. 2019. 422.

6 დაწვრილებით იხ.:Federal Broadcast Information Service FBIS-SOV-92-011, 16 იანვარი, 1992. 38.

7 იხ. გრიმი დ. რა არის პოლიტიკური საკონსტიტუციო მართლმსაჯულებაში? კრებულში: კონსტიტუციონალიზმი. მიღწევები და გამოწვევები. კონსტიტუციონალიზმის ტრილოგია. ტომი I. თბილისი. 2019. 175. ლემბკე. ო. ვ. დას. ნაშ. 439.

8 გრიმი დ. დას. ნაშ. 175.

Contemporary democratic constitutions, in order to protect political creation from possible arbitrariness and disproportionate interference⁹ in freedoms, make it within the framework of the principle of separation of powers. That is why the formation of political will is structured in constitutions. The Constitution, within its framework (unity of legal values), «restricts political actions»¹⁰ for this very purpose - «establishes the normative limits for possibilities of politics.»¹¹ Only through the justice can any type of politics ensure the protection of human freedom and, on the other hand, achieve the public integration and development. In this sense, law has «predominant power over politics».¹² The constitution provides the possibility of defining policy by legislation (within this framework, the freedom of political institutions), on the other hand, it defines the scope of human freedom, which is protected from the penetration of political will.

Overall, Constitution provides the ability to determine policy through legislation and at the same time (by defining the scope of interference with liberty), protects individual freedom from interference by political will. The justice of politics should not be abstracted from a person, it should be implemented in reality by observing the constitution. Based on this principle, the constitution acts as a deterrent. It has long been unimaginable for the state machinery to function outside of judicial control.¹³ By interpreting the Constitution, the Constitutional Court will «establish the framework that the Constitution provides for the political process.»¹⁴

A constitution, like a state, is a political decision/convention. Thus, the constitution is a kind of statement of consent of the people of the corresponding state («We, the citizens of Georgia... declare this constitution»¹⁵), a normative declaration, even an ambition. Even in the rule of revision of the constitution (universal-public review of the constitutional law amendment) there is an obligation to take into account the will of the people. Therefore, the constitution is a compromise contract concluded between political forces, beyond which political decisions are declared inadmissible in a society. It is not a development plan, but determining what is not allowed, regardless of political will (neutral); it is a limit to political activity. Since the constitution structures the conduct of politics, it also lays the foundation for the friction between law and politics, it establishes the rules of the friction (puts it within the rules/boundaries). Therefore, the state is a decision of a political essence, but a legal category in its form.

Within the state, law and politics are two independent but not mutually sterile categories. They co-exist with each other, because the parliament establishes legislation through a political measure - by passing a law, and the law is a form of policy determination. In a material sense, the law is a political decision, it has a political content. However, the law is not a mere means of packaging the content (political decision). Therefore, politics alone is not the creator of law. On the contrary, it is a subject to the notion of justice. That is why the law is not a simple means of packaging the content (political decision), but an instrument and limit for the implementation of a fair policy.

In the space of law, and in this case – a public law, we cannot ignore the fundamental component of the relationship between the law and morality. The genesis of justice obviously originates from morality. «Ancient and medieval systems are structurally characterized by a close connection between law, politics and morality.»¹⁶ According to some opinions, «a democratic legal state with a positive boundary between legality and morality departs from the pre-modern state of justice, for which law and morality

9 ამის შესახებ საუბრობს საკონსტიტუციო სასამართლოს მოსამართლეთა ნაწილიც. იხ: საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების - თეიმურაზ ტულუშის, ირინე იმერლიშვილის, გიორგი კვერენჩილაძის და თამაზ ცაბუტაშვილის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2020 წლის 25 სექტემბრის №93/2/1473 გადაწყვეტილებასთან დაკავშირებით. <https://www.constcourt.ge/ka/judicial-acts?legal=10143>(შემოწმებულია 09.02.2023)

10 გრიმი დ. დას. ნაშ. 175.

11 დას. ნაშ. 42.

12 ლემბკე. ო. ვ. დას. ნაშ. 432.

13 დაწვრილებით შევიძლიათ იხ: Kouper. P. G., The Supreme Court:Hybrid Organ Of State, Southwestern Law Journal, Vol. 21, 1967. 585.; შტარკი ქ., ხელისუფლების დანაწილების პრინციპი და საკონსტიტუციო მართლმსაჯულება. კრებული: პირველი ქართული კონსტიტუციის 100 წელი. თბ. 2021. 372-386.

შტარკი ქ. ხელისუფლების დანაწილების პრინციპი და საკონსტიტუციო მართლმსაჯულება. კრებული: პირველი ქართული კონსტიტუციის 100 წელი. თბ. 2021. 372-386.

14 იხ: შტარკი ქ. დას. ნაშ. 384.

15 საქართველოს კონსტიტუციის პრეამბულა. იხ: <https://matsne.gov.ge/ka/document/view/30346?publication=36> (შემოწმებულია: 09.02.2023)

16 ლემბკე. ო. ვ. 421.

were still the same.»¹⁷ However, we consider, that in the contemporary legal state, morality has been integrated into law. Human rights did not replace justice,¹⁸ it developed with integration in the right addressee. The addressee of the law is a person with an inalienable right to its realization and well-being. That is why even today, something morally unjustified, cannot be legally justified.

Especially in the period after the Second World War, it was in a kind of struggle between politics and law that the «influence of moral decisions on judicial justifications» increased¹⁹. The members of the Constitutional Court of Georgia - Irine Imerlishvili, Giorgi Kverenchkhiladze, Maya Kopaleishvili and Tamaz Tsabutashvili - discussed this issue at the Plenum of the Constitutional Court of Georgia on the December 29th of 2017, regarding the decision N3/7/679 (LLC Broadcasting Company Rustavi 2 and LLC «TV Georgia» against the Parliament of Georgia): «The Constitution establishes the rule and standard of fair behavior, ensures that a specific norm will not be applied arbitrarily, should not create the possibility of the law enforcer limiting the right protected by the constitution on the basis of his/her personal views on justice or morality.»²⁰ That is, morality should be considered as a solid category developed (established) in the public domain. Therefore, the court also noted that «in order to assess the immorality of an action, it is first necessary to determine whether a particular action is contrary to the fundamental principles and values that society has recognized as binding by enshrining them in the Constitution and other fundamental laws.»²¹

As we mentioned, politics is a product of creativity/activity. Creativity is decision based on intelligence and information, as a matter of taste/choice. Therefore, law does not have the function of evaluating a taste/choice. It can cancel/stop a political decision only on the edge of injustice. Therefore, the politically subjective and (by appealing to the protection of major national values) manipulative integration of morality into law is a tool for the creation and protection of a non-democratic regime. This is how the state penetrates the freedom of an individual.

Therefore, we cannot agree with the position that «a politically desirable case is also legally permissible». This is a case of instrumentalization of law to serve political purpose. Therefore, «political rule is justified only when its claim is democratically legitimated and legally limited.» Law and justice are interdependent. The norm of law justifies its existence morally with the idea of justice.

Therefore, we cannot agree with a proposition that «something politically desirable is also legally permissible».²² This is a case of instrumentalization of law to serve political purpose. Thus, «political rule is justified only when its claim is democratically legitimated and legally limited.»²³ Law and justice are interdependent. The norm of law justifies its existence morally with the idea of justice.²⁴

The burden of justice is too much for one particular institution of a government. Under conditions of separation, in the scheme of mutual control and restraint, measures of political justice are manifested in specific powers. «Mechanisms of checks and balances exist to tame the political authorities, however, they are also a powerful tool in the hands of Constitutional Courts against the political powers.

17 იხ: იზენზუე ი. სამართლიანობა – მარადიული იდეა თანამედროვე კონსტიტუციურ სახელმწიფოში. კრებულში: კრებულში: კონსტიტუციონალიზმი. მიღწევები და გამოწვევები. კონსტიტუციონალიზმის ტრილოგია. ტომი I. თბილისი. 2019. 98.

18 შეადარე იქვე.

19 დუორკინი რ. მოსამართლის ახალი როლი: პირადი შეხედულებები მნიშვნელოვანია? პ. ჯავახიშვილის თარგმანი. გიორგი კვერენჩხილაძე 50. საიუბილეო კრებული. თბ. 2002. 202.

20 საქართველოს საკონსტიტუციო სასამართლოს წევრების - ირინე იმერლიშვილის, გიორგი კვერენჩხილაძის, მაია კოპალეიშვილის და თამაზ ცაბუტაშვილის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2017 წლის 29 დეკემბრის N3/7/679 გადაწყვეტილებაზე. პუნქტი 25. იხ: <https://constcourt.ge/ka/judicial-acts?legal=1042> (შემწმენბულია: 09.02.2023)

21 საქართველოს საკონსტიტუციო სასამართლოს წევრების - ირინე იმერლიშვილის, გიორგი კვერენჩხილაძის, მაია კოპალეიშვილის და თამაზ ცაბუტაშვილის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2017 წლის 29 დეკემბრის N3/7/679 გადაწყვეტილებაზე. პუნქტი 48. იხ: <https://constcourt.ge/ka/judicial-acts?legal=1042> (შემწმენბულია: 09.02.2023)

22 გრიმი დ. რა არის პოლიტიკური საკონსტიტუციო მართლმსაჯულებაში? კრებულში: კონსტიტუციონალიზმი. მიღწევები და გამოწვევები. კონსტიტუციონალიზმის ტრილოგია. ტომი I. თბილისი. 2019. 178.

23 ლემბკე. ო. ვ. 423.

24 იზენზუე ი. დას. ნაშ. 85

Political and legal aspects are essential for the mechanism of deterrence.»²⁵ That is, in the system of division of power, both political and legal components coexist with the deterrence function, where the motivation between them cannot be mutually sterile. So, for example, apart from the veto, the power to dismiss is not purely political. In this case, what should a political position devoid of a sense of justice mean? Doesn't the impossibility of creating a government by the parliament create a sense of lack of legality in citizens? This is what gives us the reason to think that law and politics are organically always connected with each other; It is impossible to separate them sterily by demarcation lines, in any case. Simply, the constitutional mechanisms should create democratic opportunities to prevent injustice from being introduced into politics (with expedient justification).

III. The influence of politics on institutional choice

The fact that politics is characterized by a tendency for intervention in law is also demonstrated by the constant struggle regarding the specific variations of the distribution of power and the extent (balance) of the distribution. This severity characterized the entire post-socialist constitutional processes, where unity was sharply contrasted with efforts to aspire to one-man rule and, on the other hand, endeavors of its avoidance.

The dynamics of the power division models also played a role in the development of the concept of restriction of politics by the law. Overall, in this dynamic, since the second half of the 20th century, covering the risks of the fragility of the parliamentary system, the dominance of the executive power was highlighted. However, it has reached a high point in various forms. Not only the vicissitudes of the creation of the Fifth French Republic, but also the essential re-formation of the post-socialist countries from the end of the 20th century is the evidence that the «clogged» parliamentarism, based on real or speculative fear, widened the way for presidential power - starting with the Turkmenbashi constitution including the authorization of the Georgian budget (2004- 2013). The foundation of the Vth French Republic itself was the establishment of the dominance of the executive power, which resulted in limiting of the Parliaments authority.

From the last quarter of the 20th century, approaches were not uniform in determining the form of transformation from totalitarianism to democratization. The relationship between the specific share of the society and the state in the democratic transaction and general state governance was a dividing line. In this regard, two worldviews were opposed to each other,²⁶ it was «a conflict between the two basic values of the transition period - democracy and maintaining stability».²⁷ Therefore, the institutional choice took place within the struggle between the demands of collegial (parliamentary) and one-person governance.

Both of them had their own political origins. A. Shayo consistently defends the position that the legal essence of liberal constitutionalism lies in the self-limitation of the government, and the intervention of state institutions in the democratic transaction is not effective.²⁸ As a result of this ideological struggle, in accordance with the vision of the role of the state in social-political processes in post totalitarian democracies, «the central issue was the struggle between the defenders of the presidential system and parliamentarism».²⁹ «According to the liberal view, the state is neutral as a whole [...] it should not interfere in daily relations or the formation of the economy and should not define the goals of the nation.»³⁰ S. Holmes considers the active interventionist role of the state through regulatory measures to be the guarantor of the stability of the liberal democratic regime.³¹ According to his position, democracy must

25 ქანთარია ბ. „Pouvoir neutre“ კონსტიტუციონალიზმის დოქტრინაში: საკონსტიტუციო რეალობა თუ ილუზია? კრებულში: კონსტიტუციონალიზმი. მიღწევები და გამოწვევები. კონსტიტუციონალიზმის ტრილოგია. ტომი I. თბ. 2019. 673.

26 დაწვრილებით: А. Медушевский. Теория Конституционных циклов. М. 2005. Стр. 265.

27 Медушевский А. Президент и правительство: как стабилизировать дуалистическую систему. Русский Журнал. Май. 2008. 73.

28 შაიო ა. ხელისუფლების თვითშეზღუდვა. კონსტიტუციონალიზმის შესავალი, მ. მაისურაძის თარგმანი, თ. წინიძის რედაქტორობით. თბ. 2003. 11-129.

29 იქვე, 267.

30 იქვე. 36-48.

31 დაწვრილებით: St. Holmes The Evolving Presidency in Eastern Europe: The Postcommunist Presidency. East European Constitutional Review. 1993-1994. Vol. 1-4.

be regulated by the state in order for it to be effective.³² This is better ensured by a stable personalized government than by a collegial (parliamentary) government full of stability risks. A. Shayo, on the contrary, believes that state interventionism, even for the noble purpose of liberal transformations, is a threat to those changes, because the state government naturally and objectively always strives to increase its role. He considers such approaches incompatible with the values of liberal constitutionalism. The first approach implied the need for minimal state intervention in human freedom and the organization of society, and the second implied the need for deeper intervention.³³

In accordance with the vision of the role of the state and government in social and political processes in young post-totalitarian democracies, «in all transitional situations, the central issue was the struggle between the defenders of the presidential system and parliamentarism.»³⁴ The «strong» presidential government, explained by institutional stability, also required the promptness of reforms. This struggle sometimes ended with an intermediate consensus, and we got mixed governments of different variations. However, in the post-Soviet mentality based on the phenomenon of «strict power», there was still a strong tendency towards centralism of the government. This led to the fact that in many places in post-communism «the tendency of the absolute priority of the presidential power was dominant».³⁵

The personalization of government was mostly the choice of former communist officials (Azerbaijan, Russian Federation, Georgia, Ukraine and all five Central Asian republics). The current dominant political elites of these states considered a «strong» presidential republic as a necessary prerequisite for a potentially successful state, and a parliamentary system as a synonym for a weak state. In post-communist countries of the West, the choice of liberal parliamentarism was more stable. However, in some cases, the communist nomenclature considered collegial parliamentary governance as the best option for gaining the power again. Overall, due to the growing position of the executive bodies, its relationship with the legislature was not always balanced and in fragile democracies, super-presidential governments killed healthy competitive political processes. In some countries, this has had its role in the unrestrictedness of politics, which also meant the transformation of the judiciary from controlling to subservient. In order to ensure the policy, constitutional changes inconsistent with the principles of constitutionalism were actively established. In this direction, the courts also played their role.

Providing V. Putin with 3rd and 4th presidential terms in Russia is an example of this trend. At the beginning of 2020, the draft constitutional law on the abolition of presidential terms was initiated. According to this project, with regard to V. Putin, his previous presidential terms would be canceled.³⁶ According to the President, he would agree to the changes only if the Constitutional Court would establish their constitutionality.³⁷ The court issued a 52-page decision within 2 days of receiving the president's request, allowing him to remain in office regardless of the expired presidential terms.³⁸ In the end, this decision was justified by appealing to the will of the people. At the referendum, 76.24% of voters supported this constitutional bill.³⁹

In different cultures, value bases also precluded uniformity of institutional choices. On the whole, it was difficult for democracy to penetrate into the consciousness burdened by totalitarian socialism, so a large part of the countries of this space took the path of forming into post-totalitarian quasi-democratic, authoritarian regimes. In addition, these regimes from time to time «used democratic methods to varying

32 Holmes S. The Evolving Presidency in Eastern Europe: The Post communist Presidency. East European Constitutional Review. Vol.1-4, 1993-1994.

33 იბ: Медушевский А. Теория Конституционных Циклов, Москва. 2005. 265.

34 Медушевский А. Теория Конституционных циклов. М. 2005. 267.

35 Медушевский А. Президент и правительство: как стабилизировать дуалистическую систему. Русский Журнал. Май. 2008. 72.

36 Russia's parliament opens way for Putin to stay in power beyond 2024, ABC News, available at: <https://abcnews.go.com/International/russias-parliament-opens-putin-power-2024/story?id=69504478>, (შემოწმებულია: 10.02.2023).

37 Russia's constitutional court clears proposal to let Putin stay in power beyond term limits, ABC News, available at: <https://abcnews.go.com/International/russias-constitutional-court-clears-proposal-putin-stay-power/story?id=69620319> (შემოწმებულია: 10.02.2023).

38 იქვე.

39 Russian voters overwhelmingly back a ploy by President Vladimir Putin to rule until 2036, CNN, available at: <https://edition.cnn.com/2020/07/01/europe/russia-referendum-putin-power-2036-intl/index.html>, (შემოწმებულია: 10.02.2023).

extents.»⁴⁰ In modern super-presidential republics, unjust policies were successfully «legalized» in various forms. These trends show that the process of breaking the totalitarian regime was so painful that its withering effect spread over time. The formation of the new Europe today is the result of this.

IV. Does politics affect the real face of the constitution?

Due to its essence, the constitution is legalization of the political compromise, it is bringing the system of political relations into the legal framework and setting the belts. It is the political content wrapped in a legal package - bringing the political content of the state into the framework of the law, which allows us to visualize the forms of the state. Whereas the politics is dynamic. Thus, it cannot be statically fixed in the rules of law. It moves and pushes for development the system of measures against injustice – the law.

A constitution in a legal state is both a form of political consensus and, on the other hand, a form of «voice of the supreme law».⁴¹ The constitution, as a product of political compromise, cannot be untouched by further political processes. Their interaction provokes the constant development and expansion of law. Therefore, the constitution maneuvers, adapts, develops and grows in the footsteps of social relations. The adoption of a new constitution or its significant revision is the reaction of constitutionalism to major social changes. Therefore, the policy is enshrined in the constitution as soon as it is adopted. Its material essence is in the relationship of people with the state. Thus, the constitution is a product of politics. Under the conditions of constitutionalism, this product represents a compromise.

Political passions within the framework of using law as an instrument often lead to assigning the function of extending power to the constitution. In such cases, the constitution legislates the abuse of power by the dominant political group, thus exceeding its real function. In the conditions of the dominance of one political force, the constitution becomes a tool for authoritarian goals, as it was, for example, in the form of the amendments of February 6, 2004, Georgia. Authoritarianism is served by the constitution of all modern non-democratic regimes, whereas „Constitutional“ means „based on people’s participation“.⁴² In the conditions where the constitution is not a compromise of the main socio-political groups, it cannot justify itself. Therefore, “the Constitution deserves its name only under the conditions of a legal state”.⁴³ The constitution, as a bulwark of the government, must resist and restrain political arbitrariness. It is due to the struggle with politics that the constitution actually “becomes what it makes its life.”⁴⁴ At the same time, empirical observations reveal that the goal of power expansion does not achieve the final result - it cannot protect the regime to an absolute degree. On the contrary, it always brings bad results. Today, Russia’s widespread neo-imperialist aggression over the years is an external manifestation of the protection-development of injustice within the country, exactly as it happened in fascist Germany and the Bolshevik USSR. Constitutional development should not lag behind the development of society, it should not become a servant, otherwise it will always become an instrument of political power. It is in itself a totality of values. That is why it should be ahead of political processes and set public value (and not specific economic) goals. These bilateral relations are manifested both in political relations and in contradiction between those relations at a judicial level. The conflict of politics and law is inevitable in the context of the dynamics of social relations. Otherwise, both would be at odds with each other and the goal of promoting the possibility of human well-being. Modern constitutionalism and the legal state within its framework are the result of the constant coexistence and development of conflict between the aspiration to political arbitrariness and the principle of its justice. It is the balance between them that “belongs to the foundations of the legal state”.⁴⁵ “The connection between liberalism (individual freedom rights) and democracy (people’s self-determination) is an essential characteristic of modern constitutionalism.”⁴⁶

40 МачкувЕ. Конституционный процесс и демократия при посттоталитаризме.; Конституционное Право: Восточноевропейское Обозрение. Журн. №4(25) 1998/№1(26) 1999.15.

41 ჯიბღაშვილი ზ. პრეზიდენტის პოსტსოციალისტური ინსტიტუციური მოდელები: ქართული ვარიაცია - სრული უარყოფიდან სრულ ძალაუფლებამდე... და შემდეგ? ავთანდილ დემეტრაშვილი80. საიუბილეო კრებული. თბ. 2021. 276

42 Учебник Государственного права; Профессора В.В. Ивановскаго. Казань. 1909. 149-150.

43 Sartori Giovanni. Comparative Constitutional Engineering. Hound-mills u.a. 1997. 197.

44 შაიოა. დას. ნაშ. 18.

45 ლემბკე. ო. ვ. დას. ნაშ. 440.

46 იქვე. 431.

The matching of the system of governance and, accordingly, the scope of government, control of public authorities, elements of direct democracy with the system of governance, introduction of institutional mechanisms for territorial arrangement and human rights protection represents the biggest political compromise. In order to protect these values, the mechanism of mutual restraint and balance puts content in the system of division of power; It is this mosaic of interactions that gives life to the dynamism of politics, among them, not only cooperation, but also competition, often including conflicts. That is why the function of the constitution is not to allow conflicts between political branches and institutions on political grounds. It allows the conflict in the political process, but establishes the mechanisms of effective solution - with minor political losses. In the system of separation of powers, "only drawing the demarcation lines of powers is not enough."⁴⁷ The political essence nourishes the separation of powers and vice versa, politics needs rationalization. The right protected by the separation of powers is not an end in itself. Freedom again serves the highest goal of human realization. In this goal, politics and law coexist and nurture each other through competition and cooperation.

V. Tools of legality of politics

Political will and justice are in legitimate conflict with each other. However, depending on the goals of the state, they also need a harmonized coexistence. Therefore, the task of regulating their relationship is manifested in a number of social and political relationships structured by the constitution. Our reasoning cannot reach its full scope. Therefore, in this chapter, we will consider the relationship between politics and law in some forms and procedures of relationships, with a focus on the purpose of the subject and for accurate conclusions.

1. Constitutional justice in politics and politics in constitutional justice

If it weren't for the powerful resource of politics and the corresponding risks, the human mind would not be able to find justice. This would leave the person without any means of protection. Thus, the fundamental social function of law is to protect the individual from any coercion by being in a just environment. This determines the principle of subordination of politics to justice. However, this principle will be ephemeral and abstracted from people if the instruments of political justice are not institutionalized by the constitution, including the mechanisms of its protection. At the same time, the dynamic struggle between politics and law has always revealed a vital political interest in gaining superiority over law. As we have indicated, based on the mentioned principle, the constitution stands before politics, in the form of the supreme law system, with a restraining function. However, with the rights of the government established by the constitution, the mechanisms of chaining and mutual restraint of the branches of the government cannot be self-regulating and self-enforcing. The constitution and the whole system of constitutional law are not sufficient to restrain politics, they cannot be realized by themselves. Due to the natural tendency of the government to self-expansion, the temptation to disproportionately encroach on rights for political reasons is natural, but not justified and acceptable. Therefore, in order to achieve the goal of the restrictions set by the Constitution, it "needs an executor".⁴⁸ The institutional means of achieving this goal is the Constitutional Court, which discusses the legitimacy, usefulness and proportionality of those restrictions. If the ruling majority violated the principle of neutrality of the Constitution and integrated its own political views into the Constitution by ideologising them (within the framework of its own political will, as for example in the totalitarian USSR), then even the Constitutional Court will become powerless in terms of restraining political force. The Constitutional Court, as the defender of the constitutional system, "will establish the framework that the Constitution envisages for the political process".⁴⁹ It has long been unimaginable for the state machinery to function outside of judicial control. Within this framework, the Constitutional Court examines the compatibility of politics with justice, it "fixes the balance to be protected between political-ideological freedom and the impact of politics on rights."⁵⁰

47 შაიო ა. დას. ნაშ. 89.

48 ლემბკე, ო. ვ. კონსტიტუციონალიზმი თანამედროვე საზოგადოებებში - პოლიტიკისა და სამართლის ურთიერთობის სურათი. კრებულში: კონსტიტუციონალიზმი. მიღწევები და გამოწვევები. კონსტიტუციონალიზმის ტრილოგია. ტომი I. თბილისი. 2019. 441.

49 იხ: შტარკი ქ. დას. ნაშ. 384.

50 ჯიბლაშვილი ზ., ჯავახიშვილი პ. დას. ნაშ. 41.

Bilaterally - the court must protect rights from politics and the space of freedom of political possibilities. From this point of view, the latest practice of the Constitutional Court of Georgia is interesting. For example, judge Eva Gotsiridze noted in a dissenting opinion on the acceptance of constitutional lawsuits #1565, 1568 and 1569 for review on the merits: «Constitutional control could have been carried out in the light of constitutional values and spirit, if not many obstacles - the political nature of the issue, which makes the court's intervention unjustified.»⁵¹ Thus, the main reasons why the Constitutional Court should have refused to accept the claims of the plaintiffs are related to the political nature of the issue and the unreasonableness of the court's intervention in it. The judge, in her dissenting opinion, uses in one of her arguments the decision of the US Supreme Court on the case of Nixon v. United States, (506 U.S. 224 (1993)), when it declined to review the constitutionality of the U.S. Senate's impeachment verdict against Nixon as the case was political, in essence. The Court held that the question was political because it required an assessment of what was more appropriate - removing or leaving Nixon in office. Accordingly, since there was no possibility of evaluating it by legal standards convenient for the court, the court had to stand aside, because the exercise of judicial control over the verdict of the Senate, in the given case, would violate the principle of separation of powers.⁵² Therefore, if these lawsuits were not accepted, we think that the law in the form of a court would directly bow to political will and expediency. With this approach, politics will become uncontrollable, thus it will reach the legalization of force. As we mentioned, the determination of politics can only be controlled by the law. Accordingly, in the part of accepting the lawsuit, the court shared the position of the plaintiffs that the court should accept rejoinder "according to the assessment of how correctly the Parliament of Georgia used specific provisions of Article 39, Clause 5 of the Constitution, which was the basis for the adoption of the disputed resolution."⁵³

It is extremely important to keep in mind that the Constitutional Court as a whole will deal with a number of issues of political importance and content. These powers clearly demonstrate the role of the Constitutional Court as a policy judge. In addition, there is no mechanism for revising the decision of the Constitutional Court in another instance. Only the Constitutional Court itself is authorized to change the standards of approach within the scope of consideration of other specific cases. And this is taking into account the dynamics of law. Therefore, the effectiveness of the protection of rights neutralizes the risks of negative influence of the policy, and is also the minimum fundamental prerequisite of a good policy; Where the policy is successful - the right is protected as much as possible, while court is an instrument of this balance.

In the political process of state management, the natural and legitimate conflict of political will and its legality manifests itself in the activity of the court as well. This includes the use of the possibilities of legal influence on the institutional mechanism of restraining the political governance. At the same time, without the function of limitation, law would lose its function, and without this burden, The Constitutional Court would exceed its role. That is why the practical operation of the principle of separation of powers is in a kind of "dialogue mode" with the Constitutional Court; The Constitutional Court is based on the philosophy of protecting the principle of separation of powers⁵⁴. Therefore, the Constitutional Court, in the name of the justice, should not disproportionately restrict the legislator, should not assume the role of a direct positive legislator and should not absorb the space of freedom of political activity. The powers of checking and limiting the constitutionality of the forms of policy creation (law, international agreements, etc.) and political relations (including more abstract control), as well as the protection of human rights and the constitutional principle of separation of powers, give the Constitutional Court a special power to influence politics. Therefore, law and politics cannot be mutually sterile - "Constitutional courts play an important political role when they decide on the constitutionality of political actions."⁵⁵ Therefore, in order to accurately measure the role of the influence of the Constitutional Court in the formation of the political action, the extent of this influence must be determined. There is an opinion "that constitutional justice is politics wrapped in a legal form".⁵⁶ There are also balanced positions, which are based on an

51 საქართველოს საკონსტიტუციო სასამართლოს წევრის ევა გოცირიძის განხილული აზრი საქართველოს საკონსტიტუციო სასამართლოს 2021 წლის 5 აპრილის N3/5/1565,1568,1569 საოქმო ჩანაწერთან დაკავშირებით. იხ: <https://constcourt.ge/ka/judicial-acts?legal=11049> შემოწმებულია: 9.02.2023.

52 იხილეთ იქვე.

53 ზურაბ გირჩი ჯაფარიძე, თამარ კორძია და ელენე ხოშტარია საქართველოს პარლამენტის წინააღმდეგ. საოქმო ჩანაწერი. იხ: <https://constcourt.ge/ka/judicial-acts?legal=11048> შემოწმებულია: 9.02.2023.

54 ჯიბღაშვილი ზ., ჯავახიშვილი პ. დას. ნაშ. 43.

55 გრიმი დ. დას. ნაშ. 175.

56 იქვე. 174.

understanding of law and politics as the foundation of the activity of the Constitutional Court. D. Grimm sees the court's connection with politics in the following manner: "those constitutional courts, whose competence is limited to the control of norms, constantly deal with political issues."⁵⁷ One more position is that the Constitutional Court is a body of politics and law.⁵⁸ "With the effective use of its powers, the Constitutional Court plays an important role in the separation of powers, realization of the principles of the supremacy of the Constitution and the protection of basic human rights."⁵⁹ However, it is a fact, that these opinions unequivocally demonstrate the growth of the role of the Constitutional Court in terms of restraining influence on politics, oriented towards the goal, by defining the norm (by changing the meaning of the words,⁶⁰ changing the Constitution itself), practically to changing the Constitution and even participating in politics. That is why we believe that constitutional justice is political justice.

In the functions of the Constitutional Court of Georgia, we should single out cases when it has taken the side of political expediency. As a result of the expedient influence of politics on law, we would highlight two decisions in particular. Although the court has not yet made a decision on the cases of Zurab Girchi Japaridze, Tamar Kordzaia and Elene Khoshtaria, it has made a decision on the termination of Shalva Natelashvili's mandate as a member of the Parliament of Georgia - decision on case N1/7/1688 (Shalva Natelashvili vs. Parliament of Georgia).⁶¹ According to the Constitutional Court: "The previous resolutions, during which the plaintiff (together with other persons elected to the Parliament) were refused the early termination of the parliamentary powers (February 2, 2021 and July 18, 2021) as part of a collective appeal, were adopted by the Parliament in a radically different political reality and in an extraordinary situation, when approximately 1/3 of the elected members of the parliament, in fact the entire oppositional wing, publicly refused to enter and work in the parliament, demanding re-election, due to which the parliament and the pluralistic representative government in Georgia faced an existential threat. While at the time of termination of authority for the plaintiff (on February 15, 2022), such a threat had completely disappeared."⁶² In this case, the court made law an instrument of political reality. The conflict of interests between the law and politics appeared in another ongoing case. In particular, in the constitutional submission to the Tbilisi Court of Appeals regarding the constitutionality of Article 54, Clause 1, Clause 1, Article 57, Clause 2 of Article 59, and Clause 2 of Article 59 of the Local Self-Government Code of Georgia, it is noted that the normative content of the norms "probably violates the right to hold public office protected by the Constitution of Georgia."⁶³ In this submission, the court speaks about the inadmissibility of regulating the public service entirely by political will. In this sense, "in the opinion of the Appeals Chamber, the performance of the mentioned functions at the local level requires professional competence, stability and cannot be considered as an entirely political position."⁶⁴ The court also relies on the reasoning of the Constitutional Court of Georgia⁶⁵ that the freedom to hold a position in the public service "protects the right of a citizen to have free access to the state service, and at the same time, it implies the constitutional guarantees related to the position of a person employed in the public service - not to be dismissed without justification, to be protected from any external interference."⁶⁶ The latter also implies only political expediency.

57 იქვე. 175.

58 Kommers D., P., Miller R. A., Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court,

59 ხეცურიანი ი., საქართველოს საკონსტიტუციო სასამართლოს უფლებამოსილება, თბილისი, 2016, 8-9.

60 სამართალწარმოებაში სიტყვის მნიშვნელობის შესახებ დაწვრილებით იხ: ციპელიუსი რ. იურიდიული მეთოდების მოძღვრება. მიუნხენი 2006. ქართულ ენაზე. თბილისი. 2009. 55-90.

61 საქართველოს საკონსტიტუციო სასამართლოს გადაწყვეტილება საქმეზე შალვა ნათელაშვილი საქართველოს პარლამენტის წინააღმდეგ <https://constcourt.ge/ka/judicial-acts?legal=14358> შემოწმებულია: 9.02.2023

62 საქართველოს საკონსტიტუციო სასამართლოს გადაწყვეტილება საქმეზე შალვა ნათელაშვილი საქართველოს პარლამენტის წინააღმდეგ. იხ: <https://constcourt.ge/ka/judicial-acts?legal=14358> შემოწმებულია: 9.02.2023

63 იქვე.

64 იქვე.

65 საკონსტიტუციო სასამართლოს 2014 წლის 23 მაისის #3/1/574 გადაწყვეტილებაში გიორგი უგულავა საქართველოს პარლამენტის წინააღმდეგ. მე-19 პუნქტი. იხ: <https://constcourt.ge/ka/judicial-acts?legal=1032> (შემოწმებულია: 09.02.2023)

66 საქართველოს საკონსტიტუციო სასამართლოს გადაწყვეტილება #574 საქმეზე „საქართველოს მოქალაქე გიორგი უგულავა საქართველოს პარლამენტის წინააღმდეგ“. იხ: <https://constcourt.ge/ka/judicial-acts?legal=1032> (შემოწმებულია: 09.02.2023)

Considering all the above mentioned, the appellate court's decision is based on Article 25, Paragraph 1 of the Constitution of Georgia, Article 54, Paragraph 1, Sub-paragraph "A.C"), Article 57, Paragraph 1, and Article 59, Paragraph 1 of the Local Self-Government Code - violation of the constitutionality of the normative content of paragraph 2, according to which, while using the mentioned norms, the mayor of the municipality can, without proper justification and reason, only by political expediency, before the expiration of the term of office, dismiss the deputy mayor from his/her position. In this particular case, the question of the fairness of the political system arose. Can political expediency determine the legal order? If yes, then will such a solution to the issue be fair?

We think that considering the sensitivity of the principle of political fairness, the Constitutional Court cannot flirt with the political branches of the government. In the context of political expediency, the Constitutional Court cannot follow the principle of political fairness, and the arbiter of the fight between politics and law turns into a political party. With the disproportionate influence of the court on politics and being in the role of a positive legislator, the court itself would become uncontrollable and absorb the separation of powers. This, with its speculative appeal to justice, would narrow the development and implementation of politics as a development mechanism and would be a common injustice. The integration of the Constitutional Court with the will of the political government in any direction will make it lose its role as an independent monitor, which is incompatible with the principle of neutrality of the Constitution.⁶⁷ It is the constitution, that must protect the line of influencing politics by law and participation in politics. In the opposite case, it will find itself in a kind of subordinate position and will lose the function of controlling and restraining politics.

In addition to the functions of rights protection and abstract control, taking into account its results, we should also highlight the powers of submission to the court and recognition of the normative content of the norm as unconstitutional⁶⁸. The plenum of the Constitutional Court, on the basis of the presentation of the General Court, will consider the issue of the constitutionality of the normative act, which should be used by the General Court in considering a specific case and which, according to its reasonable assumption, may contradict the Constitution of Georgia.⁶⁹ This rule applies in many other countries as well - Austria, Belgium, Lithuania, Croatia, etc. Constitutional submissions to the courts are rightly considered a «mechanism for the protection of individuals».⁷⁰

The presentation of the General Court is an instrument of cooperation of various institutions of judicial power, the result of which can be the restraint of possible legal-political autonomy of the Parliament. Although the discussion of the issue is not of a contradictory nature (it is not subject to the principle of competition between the parties), it does not take a typical inquisitorial form either. Although it is a fact, considering the constitutionality of a norm in relation to a specific (and not only) case increases the legitimate possibilities of the Constitutional Court in terms of influencing the determination of policy direction in a specific field. Thus, on the basis of the submission of the Supreme Court, in relation to the principle of mitigating retroactivity, subsection "c" of Article 269-5 of the Criminal Procedure Code of Georgia was declared unconstitutional, according to which, if the new law abolished the criminality of the act at the time of the sentencing, the court had to accept a guilty verdict by imposing a sentence.⁷¹ Obviously, this decision had a fundamental impact in the direction of easing the repressive policy of criminal law. By ruling on the retroactive effect of the law in this section, the Court had an impact on the implementation of the entire criminal justice policy.

The authority to recognize the normative content of the norm as unconstitutional does not directly

67 შაიო ა. დას. ნაშ. 36-48.

68 ეს უკანასკნელი არ არის საკონსტიტუციო სასამართლოს პირდაპირ გათვალისწინებული უფლებამოსილება, ის სასამართლომ თავად გამოიმუშავა და უაკვირდება საქმეს გიორგიუგულავას საქართველოს პარლამენტის წინააღმდეგ. საკონსტიტუციო სასამართლოს გადაწყვეტილება. 2014 წლის 23 მაისის #3/1/574. იხ: <https://constcourt.ge/ka/judicial-acts?legal=1032> (შემოწმებულია: 09.02.2023).

69 საქართველოს ორგანული კანონის საქართველოს საკონსტიტუციო სასამართლოს შესახებ მე-19 მუხლის მე-2 პუნქტი და 21-ე მუხლის პირველი პუნქტი. იხ: <https://matsne.gov.ge/ka/document/view/32944?publication=33>

70 დავითური გ. დავითაშვილი გ. საერთო სასამართლოს კონსტიტუციური წარდგინების ინსტრუმენტის გამოყენების პრაქტიკული სახელმძღვანელო. თბილისი. 2021. 34.

71 საქართველოს უზენაესი სასამართლოს კონსტიტუციური წარდგინება საქართველოს სისხლის სამართლის საპროცესო კოდექსის 269-ე მუხლის მე-5 ნაწილის "გ" ქვეპუნქტის კონსტიტუციურობის თაობაზე და საქართველოს უზენაესი სასამართლოს კონსტიტუციური წარდგინება საქართველოს სისხლის სამართლის საპროცესო კოდექსის 306-ე მუხლის მე-4 ნაწილის და 269-ე მუხლის მე-5 ნაწილის "გ" ქვეპუნქტის კონსტიტუციურობის თაობაზე. იხ: <https://constcourt.ge/ka/judicial-acts?legal=1105> (შემოწმებულია: 10.02.2023)

derive from the powers of the Constitutional Court. The Constitutional Court of Georgia earned it, one may argue. This is one of the most important steps in the evolution of the court. Here, a balance was put between the prevention of violation of the right by the arbitrary interpretation of the norm by the administrative body and the irrational harassment of the legislator. The court shifted the burden to the misinterpretation of the norm, to its controlling, thereby protecting the legislative power in terms of defining the policy within the framework of the general norm. The court took into account the individualization of cases and the real impossibility of the legislative authority to over-regulate the general norm of the law. We think that the court thus protected the legislative sovereignty of the Parliament. In this case, the starting point for the Constitutional Court is the normative content of the norm, as read by the relevant subject, how this norm is interpreted.

2. Veto: political ambition or the word of law?

Before judging the fairness of politics, it passes through the filter of another subject of the system of division of power - the head of state. Variations of the head of state's veto on the law are not uniform, however, the result is the same: the head of state, by delaying the implementation of the law, has the right to have a «negative - restraining»⁷² (rejecting) influence on the policy determination by the parliament. The possibility of a passive veto by a head of state of any status undoubtedly «closely binds the president and the parliament».⁷³ So much so that there is an intervention in the legislative function of the Parliament. But is this interference in itself a violation of the separation of powers? This possibility of intervention is a result of the gradual withdrawal of the monarch from the legislative sphere. But does the veto power have a legitimate purpose and function, or is it simply a relic of the monarchy? If it was a relic, then over time it should have been reduced to a symbolic function (as it actually happened in Great Britain). But this authority was left to the head of state as a neutral arbiter, who is a political figure representing the unity of the nation. Therefore, both under the monarchy and then under the republic, this authority of a neutral deterrent arbitration function was preserved. This functional explanation of the right of veto removes from the agenda the following dispute - is the intrusion into the legislative functions with the power of veto a violation of the separation of powers? With the autonomy of the branches, in this case they would be separated from the common goal - which is why it is divided. If there was no influence on individual functions, the mechanism of division of power could not function. Therefore, the veto power is clearly one of the specific instruments of mutual deterrence. There is also a second, no less important issue: is veto only a legal or a legal-political instrument?

The functional intersection of the head of state with the legislative authority has an essential purpose - the ability to restrain the legislator for the purpose of public consensus. «This is an additional security measure that should prevent the legislature from introducing unsound laws.»⁷⁴ In this way, «the president shares the legislative function»⁷⁵ - both the ability to influence and the responsibility to determine policy. Actually, politics is (predominantly) a law-making measure; On the other hand, politics (with both legislative and judicial functions) is created by law, that is, there is a mutual connection between them. That is why the presidential veto is always like a wedge between law and politics. Because of this constant presence in the middle, the veto in the system of separation of powers has traditionally «equally expressed the joy of one side and the indignation of the other.»⁷⁶ That is, it is an instrument of political competition. The head of state cannot ignore the possibility of reacting to the policy-determining law, which at first sight may seem unconstitutional, and on the other hand, appeals to justice only can limit the assessment of political expediency, in which the head of state should not get involved. As an arbitrator, he/she has the function of restraining politics. The policy itself is undoubtedly an activity, which is subject to appropriateness assessment. The attempt of the president to restrain a policy negatively considered by him/her is not abstract, and it should be manifested in the concrete authority of the political veto.

72 ჯიბლაშვილი ზ. პრეზიდენტის პოსტსოციალისტური ინსტიტუციური მოდელები და მათი განვითარების ძირითადი ტენდენციები. კრებულში: კონსტიტუციონალიზმი. მიღწევები და გამოწვევები. კონსტიტუციონალიზმის ტრილოგია. ტომი I. თბილისი. 2019. 589.

73 Окуньков/Л., роцин В. вето президента. Москва. 1999. 9.

74 ფედერალისტური წერილები. ჰამილტონი ა. #73. თბ. 2008. 412.

75 შვარცი ჰ. ამერიკისკონსტიტუცია (კრიტიკულიანალიზი). კრებულში: კონსტიტუციონალიზმი. მიღწევები და გამოწვევები. კონსტიტუციონალიზმის ტრილოგია. ტომი I. თბილისი. 2019. 22.

76 Young, Andrew W. American Statesman: A Political History Exhibiting the Origin, Nature & Practical Operation of Constitutional Government in the United States; the Rise & Progress of Parties; & the Views of Distinguished Statesmen on Questions of Foreign & Domestic Policy; with an Appendix, Containing Explanatory Notes, Political Essays, Statistical Information, & Other Useful Matter (1856). 780.

That is why, in the case of specific vetoes, the political evaluative approach and the cases of unfair consideration of the policy often overlap. For example, all vetoes related to the right to monitor private communications were substantiated by the motivation of disproportionate interference in the right to private life and communication protected by the Constitution of Georgia. However, this does not completely mean that protecting the right was not the political intention of the president. If we divided the functions of law and politics in this way, then law would exceed its social function. Protecting people's privacy and communication rights from excessive police interference is precisely the political intent. The veto of the president on the laws adopted regarding changes in the legislation related to the constitutional court concerned 3 important issues. Among them, determining the quorum of 2/3 of the attendees necessary for the decision of the court plenum. The right to a fair trial is directly related to the simplicity of court procedures. Accordingly, the President considered that such a quorum increase created opportunities for exercising political will in the work of the court, and the veto was a reaction to this. Also, one member of the judicial panel was given the authority to refer the issue to the plenary for consideration. 2/3 of the votes of the plenum was required to reject the discussion by the plenum. This too was an instrument of political will to influence the decision of the case in different directions. The desire to protect the court from political influence led to the coexistence of legal and political values in the veto. In the constitutional amendments of October 13, 2017, the distribution of residual mandates through the "bonus system" directly affected the fairness of citizens' representation. There was no agreement between the parties regarding such a political solution to the issue.⁷⁷ The coexistence of law and politics was also best demonstrated in the President's veto in relation to the amendments made to the "Georgian Election Code", "Local Self-Government Code", "On Political Unions of Citizens", "Referendum" organic laws and "On State Procurement" law of the June 30, 2017.⁷⁸ The package of these changes was related to the formation of the CEC and the manner in which election results are taken into account in this process. "In case the members appointed by the party fail to elect the chairman, he/she is elected by the Parliament of Georgia... In the event that the highest head of the election administration is elected by two-thirds of the CEC, the influence of the ruling party on the election process will increase, which will reduce the legitimacy of the results"⁷⁹ Obviously, the president's complaint here was the injustice of politics. The intertwining of politics and law (including the veto) was clearly seen in President Salome Zurbishvili's first veto on the Georgian law "On Amendments to the Criminal Procedure Code of Georgia".⁸⁰ (related to the deadlines for the continuation of undercover investigative activities.) "This is more of a political veto than a legal one, because it is impossible to pass such a law in Georgia these days that further restricts human rights."⁸¹ President Salome Zurbishvili linked the political decision with rights, that is, justice, and vice versa, considered a specific legal decision (the standard proposed by the law on protection of rights) as a product of bad politics. Therefore, even this "political" veto could not be dismissed from the law. According to the position of the president, the important task of protecting the state and public security "should not lead to the violation of basic human rights guaranteed by the constitution. It is the responsibility of the government to find a way that will make it possible to protect both the state security and the fundamental rights of human privacy and free development."⁸²

In the general concept of political justice, «the President of Georgia is authorized to control the constitutionality of the law within the limits of the veto».⁸³ According to another opinion, «the use of the veto is a political... aspect of deterrence.»⁸⁴ For instance, the Czech president «sometimes exercises the power to veto laws on constitutional grounds, but usually these decisions are an expression of the government's political choices.»⁸⁵ This demonstrates, on the one hand, the political attitude of the president towards the government (due to the bicameral nature of the parliament and the upper chamber's veto power) and, on the other hand, the possibility of her reaction on political grounds. Both are finally reflected in the instrumental nature of one veto as a negative-restraining complicity in the politics of the

77 იხ: <https://info.parliament.ge/file/1/BillPackageContent/4532>

78 იხ: <https://info.parliament.ge/file/1/BillPackageContent/3327>

79 იხ: <https://info.parliament.ge/file/1/BillPackageContent/3327>

80 იხ: <https://info.parliament.ge/file/1/BillReviewContent/303727>

81 სალომე ზურაბიშვილიმა მოსმენებთან დაკავშირებულ კანონპროექტს ვეტო დაადო - ეს არის უფრო პოლიტიკური, ვიდრე სამართლებრივი ვეტო. <https://bit.ly/3HKk7wZ> (შემოწმებულია. 09.02.2023).

82 იხ: <https://info.parliament.ge/file/1/BillReviewContent/303727>

83 ლოლაძე ბ., მაჭარაძე ზ., ფირცხალაშვილი ა. საკონსტიტუციო მართლმსაჯულება. თბ. 2021. 5.

84 ქანთარია ბ. დას. ნაშ. 673.

85 Jan Herman Reestman. Presidential Elements in Government Introduction. 2 EuConst 54 (2006). 57-58.

president. Leaving the head of state in the power of veto only in the legal-constitutional motive would make it a kind of quasi-judicial body, forcing the politician to sometimes artificially search for the frame of justice and would lose the natural institutional authority to influence the policy. The coexistence of law and politics seems to be the basis of the veto power. Therefore, this also answers the dispute about the nature of the veto - it is a legally and politically motivated power. That is why the law established the possibility of this political reaction of the highest political official - the head of state.

We should also pay attention to the influence of the government on the essence of the veto. From the initial drafting, there were many similarities between the constitutions of Slovakia⁸⁶ and the Czech Republic,⁸⁷ with the essential difference that the Slovak National Council embodies an unicameral parliament. The original version of Article 87 of the Constitution provided for the veto power of the President only at the request of the government, which clearly shows the political importance and passion of the veto power. However, this regulation particularly narrowed and limited the restraining arbitration powers of the president because the law-maker, unlike in the Czech Republic, was a unicameral parliament standing behind the government. Such dependence of the president on the political will of the government, when the real decision-making authority remained with the government, was regarded the function of a "postman" by P. Hollander.⁸⁸ It should be noted here that the coexistence of veto legislative initiative and veto powers (in the hands of the president or the government) creates conditions for a monopoly on the legislative process and thus breaks the balance in relation to the legislative authority.⁸⁹ Therefore, rational models of separation of powers refuse their coexistence.

In general, preliminary constitutional control is considered to be an intervention in the politics of the Constitutional Court. "President de Gaulle tried to limit the power of the National Assembly by establishing the Constitutional Council... In addition, the official duty of the Council is the preliminary control of organic laws... In the original idea, the Constitutional Council was supposed to be a bellwether aimed at the legislator. During de Gaulle's presidency, he always considered his and his government's views constitutional."⁹⁰ Preliminary constitutional normative control increases the risk of narrowing the area of judgment of justice and dependence of its decisions on narrow political goals and intentions. In science, its shortcomings are often attributed to the fact that it creates the threat of inevitable intrusion of constitutional control bodies into the legislative process. And this would undoubtedly violate the principle of separation of powers,⁹¹ because in cases of abstract and even more so preliminary control, "the court, without a doubt, decides political issues."⁹² This obviously increases the risk of influence on the policy in terms of assessment of expediency by the Constitutional Council, that is why de Gaulle's decisions were justified at the initial stage. Prior control is also a kind of conflict with internal control in the sense that its binding force pre-establishes the political will on the constitutionality of the law. And this, during further control, in the form of pre-judicial force, results in a higher burden on the claimant to prove the illegitimacy or disproportionality of the norm.

In relation to the veto function in the constitutional system of Georgia, we should also note that the first qualified veto override rule was simplified by the amendments of October 13, 2017. However, the modern - weak variation of the veto is not at all an ordinal feature of parliamentarism. In order to overcome the veto, determining the number of votes necessary for the adoption of the relevant law, especially when the monolithic majority in the unicameral parliament does not feel the threat of the veto, loses its effective deterrent function, and the arbitration opportunity of the president denied by those changes is reduced to the ability of speech/critique.

86 სლოვაკეთის კონსტიტუცია. მიღებულია 1992 წლის 1 სექტემბერს.
იხ: <https://www.prezident.sk/upload-files/46422.pdf>

87 ჩეხეთის რესპუბლიკის კონსტიტუცია. მიღებულია 1992 წლის 16 დეკემბერს.
იხ: <https://public.psp.cz/en/docs/laws/constitution.html>

88 Хёлландер П., Словакия: Критический анализ Конституции" Журн. Конституционное Право: Восточноевропейское Обозрение; №2(1); Зима; 1993. 25.

89 იხილეთ ასევე: კანდელაკი ვ., ლოსაბერიძე დ., რუხაძე ზ., ხმაღაძე ვ., ტაბუცაძე ი., ჯიბლაშვილი ზ. კონსტიტუციური სისტემები და კონსტიტუციური პროცესი საქართველოში (1995-2009 წ.წ.), მისი განვითარების პერსპექტივა. თბილისი. 2009. 36, 40. <https://bit.ly/3K3Fwnl>

90 შაიო.დას. ნაშ. 289

91 Шайо А. Конституционализм и конституционный контроль в посткоммунистической Европе. Журн. Конституционное право: Восточноевропейское обозрение, №3. 1999. 78.

92 შაიოა. ხელისუფლების თვითშეზღუდვა. კონსტიტუციონალიზმის შესავალი, მ. მაისურაძის თარგმანი, თ. ნინიძის რედაქტორობით. თბ. 2003.291.

VI. Summary - Politics Vs Law. A matter of balance

As we have seen, the close coexistence of law and politics is purposeful and manifests itself in a number of components in the mechanism of the division of power. Freedom is not a detached concept from a man. As we mentioned, it is a means of achieving the goal for a person. This goal requires the coexistence of politics and law in the form of a just policy. This equilibrium is the responsibility of the state. From this point of view, the state is a multi-layered construction. Within the framework of a proper state, its complex and deterrence-oriented institutional mix must enable the coexistence of politics and justice—the justice of politics.

Law and politics are correlated and they are the forms and measures of creating one another. Justice, through various forms of state machinery, should stop political activity at the gates of injustice. It is finally done by the court, after the political influence measures, where the individual role of the judge is increasing. At the same time, the role of the judge in controlling the fair conduct of politics has been increasing since the post-World War II period. This role has risen to an important level in post-socialist democracies, where fledgling courts have often been successful in challenging pragmatic political interests in fragile democracies to protect democracy.

Since the constitution itself is between law and politics, practically no constitutional legal relationship can be devoid of any of them - only by political expediency, unfairly decided, or on the contrary, without political motivation, only by appealing to justice. This last approach would alienate a person from justice. This kind of abstraction of law would make it lose its social function. The goal of politics and law, in both cases equally, is a person and their union - society (state). This inseparable conflict and coexistence of law and politics is formed as the principle of political justice. For this purpose, the constitutional court, by measuring the justice of the policy, is the watchdog of legal protection within the scope of the possibilities of realization of an individual (the creation of the conditions of which is the task of politics).