Delegation to Independent Regulatory Agencies in Georgia –

How much independence becomes too much?

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LL.M. SHORT THESIS

COURSE: Separation of Powers: The Political Branches

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Table of Contents

Abstract

This thesis analyzes the level of formal independence granted to independent regulatory agencies in Georgia and draws parallels with the systems of the United States and the Great Britain. It demonstrates the pros and cons of independence of such agencies in Georgia in order to show that while IRAs might be an acceptable mode of regulating certain domains, unlimited formal independence, in itself, also poses considerable menace from the prospective of human rights and consumer protection, separation of power and democratic legitimacy. This thesis argues that granting unlimited formal independence to independent regulators always collides with principles of elective democracy and in this collision the latter should always be favored in order to restrain elected politicians from avoiding accountability.

INTRODUCTION. As one pundit once said "'things are never as good or as bad as they seem."[1] This expression is probably most compatible for the ongoing debate with regard to independent regulatory agencies (hereinafter – "the IRAs") as constitutional and/or proper mean for implementing state regulatory policies. First established in US in 1887[2] they gained much popularity during the presidency of Franklin D. Roosevelt. "The concept of a multimember, bipartisan, expert tribunal free from direct control by the legislative and executive branches of government was an appealing premise of the New Deal administrative state."[3]

In the modern world such agencies have become one of the most accepted and wide-spread means of regulating the domains of fundamental state importance like communications, transportation, trade, energy and so on. The structure and authorities of such commissions are diverse in various countries, but basically they tend to differ from classical executive agencies and thus, pose various problems from the point of view of public policy and administration, sociology, political studies and so on. Although being a fundamental part of the problem, researching all of the aforementioned aspects does not constitute the subject-matter of this study. The foregoing thesis primarily concentrates on constitutional and political aspects of delegating the rulemaking power to IRAs and correspondingly, the margin of discretion, entitlement of

[1] Alan B. Morrison, HOW INDEPENDENT ARE INDEPENDENT REGULATORY AGENCIES?, Symposium: The Independence of Independent Agencies, Duke Law Journal, April/June, 1988 (Citation Text: 1988 DUKELJ 252);

[2] William H. Hardie, THE INDEPENDENT AGENCY AFTER BOWSHER v. SYNAR--ALIVE AND KICKING, Vanderbilt Law Review, May 1987, (40 VNLR 903);

[3] Paul R. Verkuil, THE STATUS OF INDEPENDENT AGENCIES AFTER BOWSHER v. SYNAR, Duke Law Journal, November, 1986 (Citation Text: 1986 DUKELJ 779);

which can be constitutionally justified taking into consideration that "democratic legitimacy"[4] still remains a primary concern of basic constitutional systems in the modern world.

In Europe and the US the development of regulatory state and related factor of IRAs (and in general, unelected actors) can be characterized as one of the highly researched and disputed areas in legal studies, political science and public administration.[5] Frank Vibert considers unelected bodies so important that he suggests "that we should take the new bodies as a whole and view them as composing a new branch of government and forming the basis of a new separation of powers."[6] Fabrizio Gilardi argues that its wide acceptance is the one of the major causes of spreading IRAs in the world so rapidly[7] and that they have become "almost natural way to organize regulatory policies."[8] Such popularity of managerial governance in the modern world has given birth to a new term "administrative dominance"[9], which certainly is not welcomed by all. Michael P. Vandenbergh fears that decision-making by independent agencies renders

[4] Anne Joseph O'Connell, POLITICAL CYCLES OF RULEMAKING: AN EMPIRICAL PORTRAIT OF THE MODERN ADMINISTRATIVE STATE, Virginia Law Review, June 2008 (Citation Text: 94 VALR 889);

[5] See, for example: John D. Huber, Charles R. Shipan, "Deliberate Discretion : the Institutional Foundations of Bureaucratic Autonomy", New York : Cambridge University Press, 2002; Fabrizio Gilardi, "Delegation in the Regulatory State : Independent Regulatory Agencies in Western Europe", Northampton, MA : Edward Elgar, 2008; "Delegation in Contemporary Democracies", edited by Dietmar Braun and Fabrizio Gilardi, London ; New York : Routledge/ECPR, 2006; Frank Vibert, "The Rise of the Unelected : Democracy and the New Separation of Powers", Cambridge : Cambridge University Press, 2007 and et al.;

[6] Frank Vibert, "The Rise of the Unelected : Democracy and the New Separation of Powers", Cambridge : Cambridge University Press, 2007, p. 2;

[7] See Fabrizio Gilardi, "Delegation to Independent Regulatory Agencies in Western Europe – Credibility, Political Uncertainty and Diffusion" in "Delegation in Contemporary Democracies", edited by Dietmar Braun and Fabrizio Gilardi, London ; New York : Routledge/ECPR, 2006, p. 139;

[8] *Ibid.*;

[9] John D. Huber, Charles R. Shipan, "Deliberate Discretion: the Institutional Foundations of Bureaucratic Autonomy", New York : Cambridge University Press, 2002, p.21;

significant problems from the standpoint of accountability and sometimes, even efficiency.[10] Dodd and Schott find it problematic that over years bureaucrats have gone much further than just being an instrument of implementing policies set by the Congress. They point out that "administrative state… in many respects is a prodigal child. Although born of congressional intent, it has taken on a life of its own and has matured to a point where its muscle and brawn can be turned against its creator."[11]

The aforementioned illustration of the studies and literature around this subject-matter demonstrates the existing controversies. Nevertheless, in Georgia the mode of delegating the rulemaking power to IRAs and related legal or political dilemmas have not yet become subject of academic research, despite of the fact that IRAs in Georgia can be characterized as having maximum formal independence.[12] Whether these formal guarantees work and release these agencies from political control is a controversial issue and will not be a primary concern of this thesis. Although it shall be noted that over the last years it has been observed that the policy of IRAs tends to overlap with the position of the government thus demonstrating that institutional independence does not always serve as an absolute safeguard for de facto autonomous decision-making.

This thesis analyzes the pros and cons of unlimited formal independence of IRAs in Georgia in order to demonstrate that while IRAs might be an acceptable mode of regulating certain domains, unlimited formal independence, in itself, also poses considerable menace. The thesis will focus on the ways of amending the formal status of IRAs so as to sustain acceptable

[10] Michael P. Vandenbergh, INSIDE THE ADMINISTRATIVE STATE: A CRITICAL LOOK AT THE PRACTICE OF PRESIDENTIAL CONTROL, Michigan Law Review, October 2006, (Citation Text: 105 MILR 47);

[11] Lawrence Dodd and Richard L. Scott, "Congress and the Administrative State," New York : Macmillan 1986, p. 2;

[12] See Chapter II *infra*;

degree of autonomous decision-making via securing the consumer protection and constitutional structure of the country.

In the process of research parallels will be drawn to the status of IRAs in the US and the Great Britain. US is the country where IRAs originated from and has rich political and legal experience in dealing with non-majoritarian institutions, while UK, having a "purely majoritarian system"[13] and in the absence of any codified constitution, constitutes a powerful example of Georgia in order to illustrate that overall formal status might be of a less importance and what actually matters is the political culture in each given country.

This thesis is composed of two chapters. Chapter I clarifies number of specificities characteristic to IRAs and the modes of delegating power to them; in addition, this chapter concentrates on analyzing political reasons behind such delegation; Chapter II concentrates on the Georgian system, identifies basic status of IRAs and draws out the framework of formal independence, which is reflected in various aspects starting from financial independence to the wide discretion in rulemaking; this chapter, along analyzing current problems, will focus on suggesting future amendments aimed at establishing at least minimal formal accountability of IRAs in order to ensure that, if the legislature of the country decides to sustain the system of independent regulators, the relevant domains will be regulated in a responsible manner.

[13] Christopher Pollit, Colin Talbot, Janice Caulfield, Amanda Smullen, "Agencies : How Governments Do Things Through Semi-Autonomous Organizations", Hampshire : Palgrave Macmillan, 2004, p. 97;

CHAPTER I. INDEPENDENCE OF IRAs – reasons, myths and reality

Delegation to independent agencies is extremely interesting legal and political phenomenon for the following reasons : 1) delegation to IRAs primarily excludes application of classic "principle-agent theory"[14] and implies that via transferring the authorities the Principe (the Parliament) intends to establish a decision-making body, which will be free from any influence, even and primarily, free from government influence;[15] 2) in general, delegation means that "the Principle" chooses a person or entity closest to its own ideas and inspirations as an agent and controls its basic decisions. The latter also implies strict oversight and supervisory functions of "the Principle", which, as we will see below is not the case when it comes to delegation to IRAs. Via such delegation the politicians intent to give more credibility to their policy and thus, free "the agent" from accountability. While this may be a noble idea, it inevitably poses the question "who controls the IRAs"? Especially, if taken into consideration that such agencies regulate major field like telecommunication, gas and oil industry, transportation, trade and so on. In some countries (like Georgia) they have even their own budget and thus, the Parliament cannot control even the spending. It may freely be concluded that such agencies have gained enormous influence and independence. In conjunction with the fact that they are not directly elected, it has been argued that they create "democratic deficit"[16] and violate fundamental principles of democracy.

[14] See, for example, Fabrizio Gilardi, "Delegation in the Regulatory State : Independent Regulatory Agencies in Western Europe", Northampton, MA : Edward Elgar, 2008, p. 30;

[15] *Ibid.*, p. 28;

[16] Peter L. Lindseth, DEMOCRATIC LEGITIMACY AND THE ADMINISTRATIVE CHARACTER OF SUPRANATIONALISM: THE EXAMPLE OF THE EUROPEAN COMMUNITY, Columbia Law Review, April 1999, (Citation Text: 99 CLMLR 628), see FN 90;

This chapter identifies basic practical and theoretical challenges surrounding the issue of delegation to independent agencies.

i) Basic features, which distinguish IRAs from ordinary administrative (executive) agencies.

When it comes to defining the essence of independent regulatory agencies, it shall be kept in mind that the legislation does not suggest any specific definition of independent agencies neither in US, nor in Georgia or UK. Alan B. Morrison, being an American author and primarily writing based upon American reality, considers that an agency may be characterized as independent if "… [its] members may not be removed by the President except for cause, rather than simply because the President no longer wishes them to serve"[17] The similar approach is taken by Dominique Custos, who states that independent agencies constitute "a form of administrative government that is responsible to regulate human activities and is placed outside any cabinet department and under the leadership of a college of commissioners independent of the President."[18] The Law of Georgia on Independent Regulatory Agencies[19] (hereinafter – "the Law on Independent regulatory Agencies" or "the Law on IRAs") points out that a body can be considered to be an independent regulatory agency, if it meets the criteria and carries the features determined by the aforementioned legal act itself[20]. These elements can be found in subsequent

[17] See *supra* note 1;

[18] Dominique Custos, THE RULEMAKING POWER OF INDEPENDENT REGULATORY AGENCIES, American Journal of Comparative Law, Fall 2006 (54 AMJCL 615);

[19] The Law # 1666 of Georgia on Independent Regulatory Agencies adopted on September 13, 2002;

[20] Article 4.4 of the Law on Independent Regulatory Agencies;

provisions of the same legal act and entail financial autonomy,[21] wide discretionary power over delegated rulemaking,[22] absence of any political or legal subordination[23] and so on.

While it is extremely difficult to come up to a universal definition of an independent agency, which will be used in legislative acts, in scholarly works there are attempts to identify basic features distinguishing IRAs from ordinary executive agencies. Lisa S. Bressman concentrates on "features that affect political control, including limits on plenary presidential removal, bipartisan membership requirements, and fixed and staggered terms."[24] Fabrizio Gilardi suggests that "they can be defined as public organizations with regulatory powers that are neither elected by the people, nor directly managed by elected officials."[25] Based upon the latter definition we can observe two basic features of independent agency (not elected and not directly managed by elected officials), whereas both of them are related to the problematic issue of legitimacy (or absence of legitimacy) of independent agencies. The fact that two basic features comprising the definition are related to democratic legitimacy, once more emphasizes its importance in the process of crafting each and every model of policy-making system.

Difficulty with identifying the exact features of independent agencies is resembled in difficulty to establish precise differences among them and regular executive agencies. Moreover, in certain countries even though there are agencies having forma status of being "independent", they still remain under legal and/or political control of either or both political branches. In the US

[21] See *infra* Paragraph iii, Chapter II;

[22] See *infra* Paragraph iv, Chapter II;

[23] See *infra* Paragraphs i and ii, Chapter II;

[24] Lisa Schultz Bressman, PROCEDURES AS POLITICS IN ADMINISTRATIVE LAW, Columbia Law Review, December 2007 (107 CLMLR 1749);

[25] Thatcher, Mark and Alec Stone Sweet (2002), "Theory and Practice of delegation to non-majoritarian institutions," West European Politics, p. 25 in "Delegation in the Regulatory State : Independent Regulatory Agencies in Western Europe" by Fabrizio Gilardi, Northampton, MA : Edward Elgar, 2008, p. 22;

the distinction between ordinary executive agencies and independent regulatory agencies is faded by the influence mechanism retained by the President, similar to "the threat of removal, including appointments, budgetary control, and the promise of higher office."[26] While this is not entirely correct in case of in Georgia and the level of formal independence is much higher, in practice the distinction becomes minor due to *de facto* constitution of the country.

I consider that drafting a precise definition of independent agencies is impossible to the extent that nowadays they have adopted various forms and levels of formal and material independence in different countries. Notwithstanding the aforementioned, one universal feature can be still identified: panel members of independent agencies are usually free from any *direct* accountability and/or subordination of either political branch. This is what makes this phenomenon unique and troublesome in the process of identifying their place, role and function within the conventional understanding of separation of powers.

ii) The place of independent agencies within the conventional understanding of separation of powers.

Recent scientific literature has observed development of so called "functional" approach to the doctrine of separation of powers, based on which independent agencies constitute "veritable fourth branch of the government."[27] In *Humphrey's Executor v. United States*[28], the

[26] Geoffrey P. Miller, INTRODUCTION: THE DEBATE OVER INDEPENDENT AGENCIES IN LIGHT OF EMPIRICAL EVIDENCE, Symposium: The Independence of Independent Agencies, Duke Law Journal April/June, 1988, (Citation Text: 1988 DUKELJ 215);

[27] See, for example, Peter P. Swire, INCORPORATION OF INDEPENDENT AGENCIES INTO THE EXECUTIVE BRANCH, Yale Law Journal, June, 1985 (94 YLJ 1766); also *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) and et al.;

Supreme Court rendered a decision subsequent to which it was suggested that the independent agencies function outside direct presidential control to the extent that the President cannot dismiss its Chief Executives at will; nevertheless, this decision cannot be understood as legitimizing the constitutional status of such agencies, as far as the court has never concluded that they are compatible with the constitutional system of the country. In addition, the Court has admitted that place of independent agencies within conventional understanding of separation of powers "raise[s] a serious and substantial issue."[29]

Peter L. Strauss excludes the possibility of placing independent agencies within one of the branches of conventional understanding of separation of powers. Instead, he suggests that the core of the problem "lies in the formulation and specification of the controls that Congress, the Supreme Court and the President may exercise over administration and regulation."[30] While I completely agree that specific functions and influence mechanisms are rather important then simple labels of belonging to one or another branch, I also believe that these functions and veto players are significant also for the purpose of determining the place of such agencies within the doctrine of separation of powers. Another argument suggested by the same author - that the Parliament may create any body it wishes and that the Constitution was not determined to include all future developments[31] - is problematic due to several reasons: a) the statement itself that these agencies are creatures of legislative branch suggests that such bodies are "inferior" to the extent that no parliament has the authority to abolish executive branch and/or judiciary without changing the constitution. Such argument suggests certain layers among branches. Even if the

[28] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935);

[29] See *Ticor Tite Insurance Company, et al. v. Federal Trades Commission,* 625 F. Supp. 747, 751 (D.D.C. 1987)*;*

[30] Peter L. Strauss, THE PLACE OF AGENCIES IN GOVERNMENT: SEPARATION OF POWERS AND THE FOURTH BRANCH, Columbia Law Review, April 1984 (84 CLMLR 573);

[31] Ibid.

independent agencies are considered as "fourth branch"[32], they will never constitute a part of constitutional doctrine of separation of powers, because they are established by the legislature and not by the constitution itself; and b) while the founding father indeed could not have foreseen the development of modern administrative state, this is not the case in Georgia to the extent that the Constitution was adopted in 1995 and changed fundamentally in 2004 (when the independent agencies had been already created). And not only are the agencies not considered as a separate branch based upon the Constitution of Georgia[33], they are not even mentioned within the text of the Constitution.

As regards the UK, the primary constitutional principle of parliamentary supremacy in itself implies that the parliament may adopt any act it wishes[34] and in this regard it becomes even clearer how vulnerable independent agencies are in reality if the political branches of the country do not want them to function any more. This once more demonstrates that the argument on admitting non-elected bodies collectively as the fourth branch is impractical and outside the conventional theory of constitutionalism, moreover, it seems like a utopian idea.

Furthermore, in the US the development of recent case law indicates that the Supreme Court is more willing to take the formalist approach when it comes to interpreting the Constitution. The evidence of this is *INS v. Chadha*.[35] In this case the Court declared legislative veto unconstitutional and in support of strict formalistic understanding of separation of powers indicated that "with all the obvious flaws of delay, untidiness, and potential for abuse, we have

[32] See *supra* note 6;

[33] Hereinafter, unless otherwise specified, "Constitution of Georgia" implies the Constitutional Law of Georgia # 802 adopted on September 2, 1995 by the Parliament of Georgia, as amended on March 27, 2010;

[34] A.W. Bradely, K. D. Ewing, "Constitutional and Administrative Law", Fourteenth Edition, Pearson Education Limited 2007, p. 54-55;

[35] See *INS v Chadha*, 463 U.S. 919 (1983);

not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.'[36] Until that decision the legislative veto had been, in Justice White's words, "an important if not indispensable political invention that allowed the President and Congress to . . . assure the accountability of independent regulatory agencies, and preserve Congress's control over lawmaking."[37]

Another similar example may be found in plurality opinion in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*[38] Peter P. Swire explains such development with the argument that "the Court has lost faith in its ability to discover and guide political checks and balances … [or] the Court's earlier reliance on functionalism might have threatened to undermine the role of the Court as expounder of the Constitution."[39] This argument suggest an interesting dilemma: admitting independent agencies as legitimate fourth branch in itself means that they will have to "borrow" certain function from the rest of three branches to the extent that such agencies have some rulemaking, some executive and some judiciary functions. Needless to say that in this battle of ambitions existing branches will and do stream to maintain control. This is what happened during Reagan administration in the US, when the functions and influence of independent agencies have been significantly curtailed.[40]

[36] See *supra* note 35;

[37] *Ibid.*, Justice White dissenting;

[38] *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982);

[39] See *supra* note 27;

[40] See *supra* note 1;

iii) Why do governments choose to delegate to IRAs?

The reason why governments choose to delegate to independent actors, which are harder to control, is a complex issue. They range from "noble" causes to undercover political agendas, which become part of long-term and long-reaching political plans.

The most frequently discussed reason for delegating to IRAs is time-consistency of policies in the domains of fundamental social importance.[41] This implies that government and parties in force come and go, each of them have their own agenda, which may cause changing policy in these fields tremendously every time government changes. Therefore, regulating the domain by an independent actor is in the best interests of the regulated companies and the consumers. While this cause sounds righteous, there is a possibility of hidden agenda behind it. Establishing independent agencies is a way for previous governments to sort of "impose" their policies and decisions on a newly elected force. While, as it was discussed above, abolishing an IRA or changing the panel is always within the power of the central government, politically such steps would be unfavorable and might cause loosing number of votes.

Another important reason is establishing bodies, which will vary from traditional bureaucracy and be rather flexible and accessible to regulated companies and consumers. Frank Vibert calls it "the new public management"[42] and defines it as "achieving results through the means of more flexible organization structures in government instead of through traditional, highly centralized and hierarchical government departments."[43] This approach was highly criticized in Great Britain, where the Auditor-General doubted the efficiency of the US model

[41] See *supra* note 14, p. 31;

[42] See *supra* note 6, p. 36;

[43] Ibid.;

due to the threat of "the over-concentration of power in one pair of hands."[44] Moreover, I consider that the cure for rigid bureaucratic rules cannot be justified by adopting the system, which might be problematic from the standpoint of separation of powers, arbitrariness and consumer protection. In such cases reforming bureaucracy might suggest a less evil, than empowering independent unelected actors with extensive political power.

Technical and specific nature of the regulated domain, which calls for specialized regulators, is another aspect of general necessity of delegation, which has been particularly stressed with regard to delegating to IRAs.[45] Although, it is obvious that in order to incorporate professionals of the given field into a government agency with the purpose of efficient regulation, independence of the given agency is not of a major significance. In addition, simplifying certain procedures also has a disadvantage: delegation to independent agencies, to a certain extent, moves decision-making process behind the public eye and influence. Such authority "has the drawback that it is apt to be irresponsible, behind-the-scenes power, like that of Emperors' eunuchs and Kings' mistresses in former times."[46]

Apart from the aforementioned reasons, delegation, in general, is an effective mean for the elected government to avoid accountability. Such danger becomes even more intense when it comes to delegating to independent agencies for the following reason: due to rather extensive degree of discretion holding IRAs accountable is relatively difficult than it is in case of ordinary executive agencies. This risk may not be as obvious in countries like UK, where the independent

[44] See *supra* note 34, p. 311;

[45] Lisa Heinzerling, Mark V. Tushnet "The Regulatory and Administrative State : Materials, Cases, Comments," Oxford ; New York : Oxford University Press, 2006, p. 684;

[46] Bertrand Russell, "Top-Down and Bottom-Up Approaches to Implementation Research" in "Deliberate Discretion : the Institutional Foundations of Bureaucratic Autonomy", New York : Cambridge University Press, 2002, p. 21;

regulators are still associated with the ministry of a relevant field, the regulators are appointed by the ministers and therefore, they are accountable to them. Moreover, in case of any questions with regard to policy decisions made by the regulators, the parliament has the authority to question the relevant minister.[47] Georgia is a completely different case. The independence of Commissioners in this country somehow resembles the independence guarantees for judges. They cannot be held politically accountable and are subjected to only legal supervision.[48] In such case it becomes rather easy for the Parliament to avoid responsibility for failures within the corresponding domains.

It is a matter of common sense that members of parliament tend to have more responsibility towards the people due to the fact that they have been elected by their constituencies and have direct obligations to them, while this link significantly fades away in a chain-like system of population-parliament-independent agencies. It should not be surprising that absence of popular legitimacy implies that members of independent agency would not have that affiliation with the population. As justice Powell indicated within concurring opinion in *INS v. Chadha*[49] "Congress is most accountable politically when it prescribes rules of general applicability."[50] To me the threat of fading this responsibility away is the major risk associated with delegation to independent agencies.

[47] See *supra* note 34, p. 311-312;

[48] See *infra* Paragraphs i and ii, Chapter II;

[49] See *supra* note 35;

[50] *Ibid.*;

iv) How much difference does "independence" really make?

In the above paragraphs it has been illustrated that although the basic principle of creating independent agencies somehow resembles the American scheme of ""a single independent regulator for each industry, operating without undue bureaucracy and supported by a small staff,"[51] various countries have adopted the idea but not the exact scheme. Therefore, the answer with regard to the question how much difference does "independence" really make will actually vary from the experience of various states.

For American authors President has won the battle with Congress for the influence over regulation and as a lead policy-maker he "plays a key role in coordinating IRCs,"[52] which is not so much determined by the Constitutional Status of the President, then "political and sociological developments"[53] during the last few decades. Coupled with the budgetary dependence upon the Office of Management and Budget, restrictions upon litigating authority and close affiliation with the White House, it becomes evident that in reality independent agencies are less different from ordinary executive agencies to the level that "most of these so-called independent commissioners would not dream of doing anything independent of what the President wanted anyway".[54] The situation is the same in Georgia, where instead of being distanced from politics, the IRAs are as

[51] A Carlsberg (1992) 37 New York Law School Review 285 in A.W. Bradely, K. D. Ewing, "Constitutional and Administrative Law", Fourteenth Edition, Pearson Education Limited 2007, p. 311;

[52] Angel Manuel Moreno, PRESIDENTIAL COORDINATION OF THE INDEPENDENT REGULATORY PROCESS, Administrative Law Journal of The American University, Fall 1994 (Citation Text: 8 ADMLJAMU 461);

[53] *Ibid.*

[54] See *supra* note 1;

involved in it as one can be, in spite of the fact that as it will be demonstrated below, their formal independence is almost unlimited.[55]

The situation is rather different in the UK. Here the US model was rejected from the very beginning and the steps undertaken by the government can be named as "creeping autonomization".[56] The basic reason for this was that England, as a culture is suspicious of any innovations and was reluctant to destroy the system, which is purely ministerial character. Therefore, "in the opening stage… there was… very limited delegation to agencies of any real power over financial or personnel issues."[57] Although this is not the case anymore and since then they have gained significant autonomy to the extent that they can be characterized as one of the most independent in Western Europe,[58] and ministers are still formally responsible for their actions, UK agencies have come closer to population needs than in US or in Georgia. This is a result of "public identification of agency Chief Executives and their willingness to speak in public about agency's work and sometimes even contradict the government policy."[59]

How can this phenomenon be explained? I believe that the best answer can be found in historic, social and political mind-set of each country. If the officials understand that they are still accountable to the population despite of their formal-legal status, even the employees of an ordinary executive agency will be closer to implement the policy, which is best for the people than in case of independent agencies in Georgia or US. So does the formal status of independence really matter? My answer is no because IRAs are creatures of political will and every attempt to

[55] See Chapter II infra;

[56] See *supra* note 13, p. 109;

[57] *Ibid*;

[58] See supra note 14, p. 3;

[59] See *supra* note 13, p. 108;

segregate them from political system of the country will be artificial and vain. Implementing policy, which will ensure customer protection and also take into consideration the economic interest of investors, can be easily carried out by ordinary agencies under the conditions of relevant and supportive political will; for achieving most of the objectives often emphasized as a reason for establishing independent agencies, there is no necessity of creating IRAs. Especially, if considering the risk entailed by the very existence of such bodies. Jeopardy to treasury interests, human rights and arbitrariness due to lack of responsibility, which can become an effective mean for the politicians to avoid accountability before people and as a result peril to the overall system of modern democratic state is an extremely high price to pay for the possible convenience, which can be suggested by the existence of IRAs.

CHAPTER II. Level of Formal Independence of IRAs in Georgia – the Sword of Damocles over the Constitutional System

In Georgia IRAs were established by the Law of Georgia on Independent Regulatory Agencies (hereinafter – "the Law on Independent Regulatory Agencies") in 2002.[60] Initially, there were four such commissions.[61] As a consequence of policy reform executed in recent years only two commissions are left: Georgian National Communications Commission and Georgian National Energy and Water Supply Commission.[62] As an institution, they are "free from any improper influence and/or non-legal interference";[63] the same is applicable to individual

[60] The Law on Independent regulatory Agencies as amended October 15, 2002;

[61] *Ibid.*, as amended August 14, 2003;

[62] Article 2 of the Law on Independent Regulatory Agencies;

[63] *Ibid.*, Article 3 D;

Commissioners, which means that no political body/branch is entitled to intrude into the policy decisions made by the IRAs within the spheres of their competence.

The circumstance that the entire functions/authorities of IRAs are of a delegated nature and not original, is ascertained by the Constitution of Georgia, which sets that only the bodies of central government can regulate entire energy system, communications and natural resources.[64] The essence of delegated power implies that the "Principle", which in this case is the Parliament of Georgia, should be able to exercise some kind of control and/or supervision over propriety of implementing relevant delegated authorities.[65] It is suggested that such control would contradict the very purpose of creating the IRAs, which is setting up an independent regulator free from any political influence, thus legitimizing the decisions of the government itself.[66] While this might be true from the standpoint of public policy, it shall be born in mind that abuse of power still remains as a major threat and in addition, left without any supervision, several non-elected officials may pose more risk than elected representatives of the nation.

The foregoing chapter demonstrates how independent IRAs are from political accountability in Georgia; it also makes it obvious that while the Parliament retains certain legal mechanisms to exercise supervision, such means are deprived almost of any practical importance due to the level of discretion granted to IRAs by the legislation. Furthermore, in modern Georgia the Parliament does not need to exercise such accountability mechanisms due to enormous political influence of the governing party. This chapter also suggests some aspects of further legislative amendments, which will effectively bring accountability of IRAs in practice and ensure long-term efficiency of the system.

[64] Article 3 E and S of the Constitution of Georgia;

[65] See *supra* note 14, p. 29-30;

[66] Ibid.;

i) Means of Legal Responsibility

The Constitution of Georgia belongs to the line of constitutions, which are silent and do not set any specific pre-requisites for delegating the law-making authority. Although in practice the statutes conferring authority tend to be rather general and deprived of any specific instructions. This becomes self-evident when it comes to setting the IRAs up and transferring authorities to them. The Law of Georgia on Independent Regulatory Agencies, which constructs the essential legal framework for the IRAs of Georgia, directly states that the aim of this law is to "determine *basic principles* for creating, functioning and organizing the independent regulatory agencies."[67]

Initially, it shall be noted that it is prohibited to interfere within functioning of IRAs or request any report thereto unless directly determined by the legislation.[68] On the other hand, the legislation itself provides extremely exhaustive list of cases whereas such interference becomes possible: first, the IRAs report to the President and Parliament of Georgia twice a year.[69] The report shall contain the data and results with regard to corresponding field. Although, the law does not determine possible legal and/or political consequences of such reports. What happens if the positions of the Principle – the Parliament and the independent regulator fundamentally differ with regard to any specific aspect of regulated domain? The current Georgian legislation does not provide any specific answer. As a result, it seems that the aforementioned reports are purely informative and even in case of disapproval the Parliament and the President of the country are

[67] Article 1.2 of the Law on Independent Regulatory Agencies;

[68] *Ibid.*, Article 4.2

[69] *Ibid.*, Article 4.3 A

unable to undertake any effective and immediate steps. Second, the Parliament of Georgia has the authority to appoint an audit with regard to implementing the budget of IRAs.[70] By itself this may seem as an effective mechanism, but if we consider the fact that the IRAs have an autonomous budget, which is planned independently and funded basically by regulatory fee[71] and there are rather limited restrictions on spending authority of IRAs (for instance, the IRAs may not finance any enterprise and/or non-commercial entity or undertake any expenditures not directly corresponding to its authorities conferred by the legislation[72]), it becomes evident that significant issues, with regard to which any violations can be ascertained via such audit, are minimal.

Absence of any legal subordination, when it comes to the status of the IRAs in Georgia, is also demonstrated by the fact that the acts and decisions rendered by such commissions can be challenged only in the courts and no other body has the authority to review them.[73]

Naturally, actions of IRAs can be challenged in courts by third parties. But what can be done by the political branches? The organic Law on the Constitutional Court of Georgia states that its jurisdiction covers disputes between state organs.[74] Whether this implies only the bodies of central government and whether it includes IRAs is unclear from the language of the law and there has been no practice of the Constitutional Court with this regard. In addition, the Constitutional Court reviews the constitutionality of various acts and it would be able to review the actions executed by the IRAs for one simple reason: the Constitution does not even mention IRAs and they are the creatures of legislative lawmaking. Therefore, it seems that the only mean

[70] See *supra* note 67., Article 17

[71] Article 3 of the Law #1860 of Georgia on Regulatory Fee, adopted on July 1, 2005 (hereinafter – "the Law on Regulatory Fee");

[72] See *supra* note 67, Article 8.3

[73] Ibid., Article 18;

[74] Article 19.1.B of the Organic Law of Georgia #95 on the Constitutional Court of Georgia adopted on January 31, 1996 (hereinafter – "the Law on Constitutional Court);

left for the political branches is adopting a new law by the Parliament, which will amend the authorities of the IRAs and/or change the personnel within the panel. The aforementioned mechanisms can be characterized neither as efficient, nor as practicable. It seems that for the drafters of the current legislation with regard to legal status IRAs in Georgia, it was clear-cut that these bodies would not do anything not favored by the political branches.

ii) Political Accountability

Other than the aforementioned mechanisms, the legislation provides the opportunities for the legislature to influence the consistency and even the very existence of the IRAs. First, as it was mentioned above, the IRAs were established by the law passed by the Parliament of Georgia and of course, the legislative branch has the authority to abolish the IRAs via passing a new law with the relevant content. In fact this is an established practice in Georgia when the government finds functioning of certain IRA unnecessary and/or improper.[75] And second, being discontented by the policy of the IRAs the Parliament and the President have the power to change the personalities. For example, the GNCC consists of 5 members appointed for the term of 6 years.[76] Selecting the members constitutes to a lengthy procedure and is conducted in a form of a competition, but in the end it's up to the President to present at least 3 candidates on every vacant

[75] For instance, the National Transport Administration was abolished and the relevant functions were transferred to the Ministry of Economic Development as a result of the amendments incorporated within the Law on Independent Regulatory Agencies in June 5, 2007;

[76] The term of 6 years is symbolic. This is an accepted practice in the world symbolizing that the members are appointed for longer time-period then is the term of President and/or Parliament implying independence of the members from the politics;

place to the legislature and the Parliament makes the final decision.[77] Of course, exercising the aforementioned mechanism can be problematic for several reasons: (a) nobody is entitled to hold the Commissioners responsible for the decisions made by them unless on the ground of illegality;[78] (b) the Law on IRAs makes an exhaustive list of the grounds upon which the Commissioner may be dismissed. These grounds are: being convicted by the court, violation of ethical standards, incompletion of his/her duties within the time-frames determined by the legislation, being recognized as dead or missing by the court, losing the Georgian citizenship, resignation and death.[79] As it is evident, the Commissioner may not be dismissed on any grounds related to the content of the decision. In addition, if "regulators are deliberately made independent from politics"[80] in order to make the policy decisions more credible, it becomes apparent that the governments would tend to avoid discrediting themselves politically by confronting the bodies, which are known as independent regulators.

iii) Financial Autonomy

In Georgia the Parliament does not even retains the authority to determine the framework of IRAs' authority by planning the budget, the mechanisms often entirely or partially preserved by the legislatures[81] or, in extraordinary cases, by the President.[82] The Law of Georgia on

[77] Article 9 of the Law #780 of Georgia on Broadcasting adopted on December 23, 2004 (hereinafter – "the Law on Broadcasting);

[78] See *supra* note 67, Article 3.A;

[79] Ibid., Article 14;

[80] See *supra* note 14, p. 30

[81] Kathryn A. Watts, PROPOSING A PLACE FOR POLITICS IN ARBITRARY AND CAPRICIOUS REVIEW, Yale Law Journal, October, 2009 (Citation Text: 119 YLJ 2);

Regulatory Fees, which is the primary legislative acts regulating the extent of financial autonomy of IRAs, opens with the statement that "the law does not exclude existence of other sources for financing independent regulatory agencies."[83] However, the same law governs only regulatory fee and does not state what the aforementioned "other sources" can be; consequently, it seems that the IRAs are entitled to introduce additional fees, not directly envisioned by the legislation. This is exactly what happens in practice; for instance, in GNCC determining "prices" of various radio-spectral frequencies and/or licenses by the acts adopted by the commission itself is a well-established practice.[84]

The Regulatory fee shall not exceed 1% of the entire value of delivering regulated goods or providing regulated services.[85] This is probably the only part of this legislation, which somehow limits the authorities of the IRAs and sets at least some kind of upper boundary for establishing fees. Other than that, the IRAs have the power to determine exact amount of regulatory fee and the periodicity of relevant payments by the normative acts adopted by them;[86] in addition, they have the authority to introduce different fees for various regulatory activities.[87]

Nevertheless, the Constitutional language of the country leaves the room for argument with regard to unconstitutionality of scheme applied for financing functioning of IRAs. The

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[82] Mariana Mota Prado, THE CHALLENGES AND RISKS OF CREATING INDEPENDENT REGULATORY AGENCIES: A CAUTIONARY TALE FROM BRAZIL, Vanderbilt Journal of Transnational Law, March 2008, (Citation Text: 41 VNJTL 435);

[83] See *supra* note 67,Article 1.2

[84] See, for example, the Decision # 138/1 of the Georgina National Communications Commission adopted on March 19, 2010 on Issuing the Broadcasting License to Independent TV-Station "Meta TV" Ltd.; the Decision # 137/1 of the Georgina National Communications Commission adopted on March 19, 2010 on Issuing a License to "Stereo+" Ltd., for Using a Radio-Spectrum Frequency and et al.,

[85] See *supra* note 71, Article 5.1

[86] *Ibid.*, Article 3.2 and 6.2;

[87] *Ibid.*, Article 6.3;

Constitution of Georgia directly indicates that the structure and rules of introducing taxes and fees shall be established by the law.[88] I believe that in this case the term "law" shall be understood to imply only legal acts adopted by the Parliament, the only body in Georgia entitled to adopt laws.[89] Although the sub-legislative normative acts can be adopted by IRAs[90] and they constitute part of the legislation of Georgia, such normative acts still constitute to delegated rulemaking and they cannot be ranked as "laws". And of the utmost importance is the fact that the regulatory fees and other sources of financing are directly transferred to the IRAs' budgets and they are entirely isolated from the state treasury of the country.[91]

As an absolute minimum, I consider limiting the budgetary authorities of IRAs vital. The relevant fees and payments should be directly transferred to the central budget and the Parliament shall determine finances of the IRAs by the annual budget. Controlling funds will give the Parliament the Possibility to at least outline the framework of agenda of the IRAs and it will also introduce an element of political accountability.

iv) Control over the rulemaking power of the IRAs

Absence of any effective control over the delegated legislation by the Parliament of Georgia can be characterized as a crown of the level of independence of regulatory agencies. Not only they have the full authority to adopt any normative act related to the domain of regulation,[92] they also enjoy the privilege to be free from any Parliamentary supervision on an earlier or subsequent stage of drafting the legislation. This does not constitute a widely spread practice.

[88] Article 94.2 of the Constitution of Georgia;

[89] *Ibid.*, Article 48;

[90] See *supra* note 67, Article 9;

[91] See *supra* note 67, Article 6.1;

[92] See *supra* note 90;

While in US, the motherland of independent regulatory commissions, the possibility of exercising legislative veto has been disputed for more than half of a century,[93] and in Great Britain there are several forms of Parliamentary assent over delegated legislation based upon the importance of the issue concerned and these forms vary from simply "laying before parliament, with no further provision for control"[94] to passing an affirmative resolution,[95] in Georgia such necessity has not even become a subject of serious legal or political debate. There is a minimal supervision over the normative acts adopted by independent agencies and it is exercised by the Ministry of Justice of Georgia.[96] This procedure implies the following: before enlisting any normative act into the formal registry of normative acts, the relevant department of the Ministry of Justice checks correspondence of normative acts to the legislation having higher legal force (the Constitution of Georgia, Constitutional Concordat with the Orthodox Church of Georgia, international conventions and treaties ratified by the Parliament, organic laws and laws[97]). However, taking into consideration the aforementioned broad delegation clause and the absence of any direct Constitutional instructions with regard to independent regulatory agencies, it becomes quite evident that the procedure carried out by the Ministry of Justice carries purely formal character and in most cases, unless an obvious inaccuracy, such compliance will be guaranteed.

I do not intend to speculate that the Parliament is deprived of any possibility to influence rulemaking by independent agencies: of course, if it does not like the policy or specific rule adopted by the IRAs, the legislative branch can always adopt a new law contrary to the normative

[93] Geoffrey Stone, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet, Pamela S. Karan, "Constitutional Law", Boston : Aspen Publishers, c2005, fifth edition, p. 429;

[94] See *supra* note 34, p. 683;

[95] *Ibid.*

[96] Article 32.4 of the Law # 458 on Normative Acts of Georgia adopted on October 29, 1996 (hereinafter referenced as "the Law on Normative Acts);

[97] See Article 6 of the Constitution of Georgia, also Article 4. 1 of the Law on Normative Acts;

act of IRAs and automatically, all normative acts, which do not correspond to the law will be abolished.[98] Without any doubt, it is possible, but at the same time it is extremely impractical. If one of the basic arguments for delegating authority to independent agencies is busyness of legislature,[99] this solution becomes an anomaly to the extent that if the Parliament can legislate, let it do so. In addition, not all authors agree that the Parliaments in modern world are so busy that they do not have the time to do their basic job: make the laws. David Schoenbrod suggests that if people's representatives distribute their time to right priorities and legislate instead of campaigning for funds, communicating with the constituencies most part of the week, spend less time on budgetary matters and increase the functions and workload of the Committees, it could easily adopt more and rather detailed laws.[100]

Moreover, if in the process of considering a specific case any court of general jurisdiction finds that the normative act adopted by the regulatory agencies does not comply with the legislation, they do not have the right to declare the act (or relevant provision) null and void.[101] Only the Constitutional Court of Georgia has the authority to do so and only with regard to

[98] See *supra* note 97;

[99] Steven Pearse, ACCOUNTING FOR THE LACK OF ACCOUNTABILITY: THE GREAT DEPRESSION MEETS THE GREAT RECESSION, Hastings Constitutional Law Quarterly Winter 2010, (Citation text: 37 HSTCLQ 409);

[100] David "Schoenbrod, Power without Responsibility : How Congress Abuses the People Through Delegation", New Haven, Conn. : Yale University Press, c1993, p. 150-152;

[101] In such cases each court of general jurisdiction faces a dilemma: they can either suspend the proceedings and refer the question to the Constitutional Court in order to get clarifications with regard to Constitutionality of the relevant provision or if checking the constitutionality of given normative act does not fall within the jurisdiction of the Constitutional Court, they can decide the case themselves based upon the legal acts having higher legal force (See Article 6 of the Law # 1106 of Georgia on the Code of Civil Procedures adopted on November 14, 1997). Although it shall be mentioned that if the court of general jurisdiction decides to decide the case without the clarifications of the Constitutional court, reaching a just and well-reasoned decision will be difficult due to general nature of the laws with regard to IRAs and broad discretionary powers granted to them;

Constitutional petitions filed in relation to basic human rights and freedoms guaranteed by the Constitution of Georgia,[102] which once more emphasizes the importance warranted to regulatory agencies.

The legal personality of regulatory agencies is completed by the possibility to be independently represented in any national and/or international court,[103] unlike the US, where the litigating power of the agencies varies and only few of them (like the Federal Communications Commission) can represent their interests before the Supreme Court;[104] most of them cannot defend themselves or file a claim independently and "when they go to court, they must ask the Department of Justice, which is under the direct control of the President, to represent them".[105] In addition, in practice the agencies are in excellent relations with the Solicitor General and try to get his advice when litigating certain issue in order to ensure policy consistency.[106]

And finally, I deeply believe that true democracy more than anything is in need of "a law-making process that [is] democratically accountable, that safeguard[s] liberty and that allow[s] the government to protect the public effectively."[107] In order to answer the question whether the formal independence of IRAs in Georgia is on the edge of arbitrariness and needs to be limited, we need to answer the question whether the rulemaking of IRAs complies with the aforementioned principles of democracy. I believe that it does not. Letting several unelected

[102] See *supra* note 74, Article 19 Et;

[103] See *supra* note 73;

[104] George F. Fraley, III, IS THE FOX WATCHING THE HENHOUSE?: THE ADMINISTRATION'S CONTROL OF FEC LITIGATION THROUGH THE SOLICITOR GENERAL, Administrative Law Journal of The American University, Winter 1996, (Citation Text: 9 ADMLJAMU 1215);

[105] See *supra* note 1;

[106] See *supra* note 104;

[107] See *supra* note 100, p. 25;

officials to function without any political or legal accountability entails great danger to liberty and to human rights.

CONCLUSION. Independent agencies, as a form of policy-making, are neither good nor bad. It is up the political branches of each country to determine the modes and means of dealing with current economic developments. And with the intention to do so, they may establish independent regulators. However, granting the level of autonomy as IRAs have in Georgia is unjustifiable.

Gas, Oil, communications, trade and other domains usually regulated by IRAs are politically the "hottest" topics in each state. Trying to act as if any such actors can be isolated from politics is self-deception. While determining the necessity of independent agencies in the modern world, each policy-maker shall take into consideration that the economic rationalization of such existence will never disappear: parliaments will always be in need of delegation and a politically neutral rule-maker will always seem as a favorable solution. The question is: how much are we willing to give up along the way of meeting this necessity? Does the modern status of IRAs in Georgia guarantee meeting the goals it was created to reach without violating fundamental values of separation of powers taking into consideration that the doctrine of separation of powers is not just a fancy formula, over which the world is obsessed. Separation of powers serves as a fundamental mean for securing human rights and individual liberty. And from this standpoint my answer is negative. Modern scheme of IRAs in this country creates serious risks of the IRAs' cooperation with the companies it regulates. This is a risk always entailed by establishing such agencies, but in Georgia there is no safeguard like effective parliamentary oversight.

As it was mentioned above, the inconsistency of policy decisions made by the IRAs and by the central government has never been the case in Georgia yet; but laws and administrative systems are not and should not be created for short periods of time and having other political conjuncture in the country, such unlimited formal independence of the IRAs may and will become a problem. If indeed taking policy-decisions, which will be consistent even after the new political force comes to the government, is an essential reason for creating the IRAs, then the system shall be viable and functional. As for today, the extent of formal independence of IRAs in Georgia leaves the impression of demagogy and any neutral observer will realize that it is a way of coquetting before the foreign allies and that the government has other means of securing their loyalty.

The fact is that in Georgia establishing the IRAs has ended up to be a tool on playing on people's emotions. "By installing experts in independent regulatory agencies with which politicians cannot (easily) interfere and to which courts are obliged to defer"[108] the government has attempted to create an icon of neutral regulators, which makes it more intricate to accuse them in being biased.

I suggest that there is no single rational behind establishing the IRAs, which cannot be achieved by an ordinary executive agency if there is relevant political will. In the absence of such will their existence and independence turns into a formality and de facto they still become an instrument of implementing policy of central government, because in spite of the level of independence granted to them, every single of such "independent" regulators knows that their very existence is exclusively dependent upon the political will of the central government.

[108] Dan M. Kahan, TWO CONCEPTIONS OF EMOTION IN RISK REGULATION, University of Pennsylvania Law Review, January, 2008 (156 UPALR 741);

With the purpose of creating a functional and long-lasting system of IRAs in Georgia, the Parliament shall make relevant legislative changes in order to restrict their budgetary powers. Moreover, additional mechanism of legal responsibility and political accountability (approving the reports presented to the Parliament via an affirmative resolution; possibility to summon chief executives of IRAs to Parliament and present questions with regard to issues of major public interest and importance) shall be incorporated within the legislation in order to insure efficient means for resolving possible controversies between the political branches and independent regulators. One might argue that such means would curtail the independence of IRAs, but this is a matter of choice. Illusory independence should not be preferred over fundamental values of constitutionalism.

One might also argue that the representatives of political branches tend to be more politically biased and the decisions of IRAs might be closer to protecting consumer rights. I do not exclude such possibility. However, people can reelect the members of Parliament and/or the president, while there is no such mechanism with regard to independent regulators. Unlimited independence jeopardizes the basic principle of democracy: people should be able to directly hold the essential policy-makers politically accountable via elections, which is inconceivable in case of non-elected (or not directly elected) actors like IRAs. The biggest threat of unlimited discretion and broad delegation is that it might give the politicians a leeway for avoiding their share of responsibility. "We can refuse to reelect legislators who make laws we dislike. Delegation [and especially, a broad delegation clause] shortcircuits this democratic option by

allowing our elected lawmakers to hide behind unelected agency officials."[109] And when this happens, the entire system of democracy fails.

Streaming to simplify bureaucratic procedures and having specialized agencies with the intention of better and more efficient regulation is a noble cause for each policy-maker; nevertheless it should not be achieved by destroying the basic principles of democracy and separation of powers.

[109] See supra note 100, p. 14.

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