

**ENSURING JUDICIAL INDEPENDENCE THROUGH APPOINTMENT OF JUDGES
BY COUNCIL FOR THE JUDICIARY: GEORGIA, FRANCE**

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Abstract

The thesis will illustrate the important role of the judicial independence within a state. It will concentrate on the system of appointment of judges – as one of the crucial components influencing autonomy of the judiciary. After determining one of the best ways of appointment of judges - through an independent body such as the Council for the Judiciary, the paper will answer the question whether such councils are in fact effective instruments in ensuring judicial independence.

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INTRODUCTION

The following thesis aims at illustrating the role of the judiciary and importance of its independence; discussing what factors can undermine the autonomy of the judiciary, focusing on the system of appointment of judges – as one of the key factors having impact on judicial independence;¹ and analyzing whether the council for the judiciary, with its primary function to appoint judges,² in many states established to guarantee independence within the judiciary,³ is in fact an effective mechanism in performing its task. In order to identify whether judicial councils effectively serve as mechanisms ensuring judicial independence by appointing judges, the paper will compare the French and Georgian jurisdictions. The reason for comparing these jurisdictions is that both of these states have established judicial councils within their domestic systems⁴ which among others is responsible for appointment of judges⁵ and while in France judicial independence is protected⁶, it has failed in Georgia.⁷ Thus, the comparison will lead to finding the reasons for failure of the council to guarantee judicial independence through appointment of judges and correspondingly, to the answer to the hypothesis.

In addition, there is no research made in this particular field - why the system of judicial appointments may operate successfully in one state while it can fail in another one comparing the Georgian and French jurisdictions. Although, several authors cover judicial independence and system of judicial appointments, the goal of this thesis is a bit different.

¹ Carlo Guarnieri, Patrizia Pederzoli, C.A. Thomas (English Editor), *The Power of Judges, A Comparative Study of Courts and Democracy*, Chapter One: Judges: Status, Career, and Activism, Oxford University Press, 2002, pp. 18-20.

² *Ibid*, pp.18-45.

³ *Ibid*, pp.18-68.

⁴ Article 64, Constitution of France, of October 4, 1958; Article 86(1) paragraph 1, Constitution of Georgia of August 24, 1995 .

⁵ Article 65, Constitution of France, of October 4, 1958; Article 86(1), paragraph 1, Constitution of Georgia of August 24, 1995..

⁶ Doris Marie Provine, Antoine Garapon, Chapter 9: The Selection of Judges in France: Searching for a New Legitimacy, Kate Malleson & Peter H. Russell, Editors, *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World*, University of Toronto Press, 2006, p.185.

⁷ Human Rights Report: Georgia, Bureau of democracy, Human Rights, and Labor, US Department of State, March 11, 2010, available at: <http://www.state.gov/j/drl/rls/hrrpt/2009/eur/136032.htm>.

Guarnieri and Pederzoli discuss the social and political significance of the judiciary, its role and the methods to protect its independence.⁸ The authors provide reasons and arguments recognized as crucial in building up a refined selection and appointment system, analyzing judicial councils – what factors are important to take into account for them to function effectively.⁹ Besides, they analyze and compare the practice of civil law, as well as of common law countries relating to the selection and appointment system.¹⁰ However, these analyses based on democratic states' approaches show that although in each of these systems judicial independence is not ideally guaranteed, nor selection or appointment system is fully satisfactory, in all of these jurisdictions autonomy of the judiciary is more or less protected.¹¹ Therefore, the book lacks practical analyses of those countries, e.g. transitional countries where the system of appointment and judicial independence needs to be built up or strengthened due to the permanent reforms and changes of legislation.

On the other hand, this gap is filled by the book – “Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World”,¹² which includes separate chapters: the first – containing several papers by different authors describing judicial appointment systems in established democracies;¹³ and the third chapter – also composed of papers by different authors discussing appointment in new democracies and transitional countries.¹⁴ However, the book does not make comparison of the appointment system between established democracies and transitional states. Each of the papers discusses and

⁸ Carlo Guarnieri, Patrizia Pederzoli, C.A. Thomas, (English Editor), *The Power of Judges, A Comparative Study of Courts and Democracy*, Chapter One: Judges: Status, Career, and Activism, Oxford University Press, 2002, pp. 18-68.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Doris Marie Provine, Antoine Garapon, *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World*, University of Toronto Press, 2006.

¹³ Doris Marie Provine, Antoine Garapon, *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World, Part One: Appointing Judges in Established Democracies*, University of Toronto Press, 2006, pp.13-213.

¹⁴ Doris Marie Provine, Antoine Garapon, *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World, University of Toronto Press, Part Three: Appointing Judges in New Democracies and Transitional States*, 2006, pp. 241-420.

analyses how the system is operating in one particular country. Thus, by comparing systems of, on the one hand, established democracy – France and on the other hand of a transitional state, Georgia, the thesis will be useful in better illustrating what reasons undermine judicial independence with regard to appointment of judges.

In order to accomplish the goal of the thesis, the first chapter will identify the role of the judiciary within the government and the society. With regard to this point, the Chapter will highlight the definition of judicial independence and discuss why it is important to ensure and maintain independence of this body. The Chapter will further focus on discussing factors threatening judicial independence. After the general overview of the aspects undermining autonomy of the judiciary, the discussion will be devoted to appointment of judges, in particular - whether appointment of judges may play a crucial role in ensuring judicial independence. Here the paper will analyze different approaches of the system of appointment of judges by using different examples, including France and Georgia as samples of establishing judicial councils for performing this function.

In addition, the Chapter will focus solely on the council for the judiciary, generally discussing how it operates when performing the appointment procedure and what the crucial issues are to be borne in mind with regard to its effective functioning, including its composition, the relationship with the other branches of government and so on. Again, Georgia and France will be used as examples.

After identifying the key elements of the discussion, the second Chapter will concentrate on its main problem – whether a Council for the Judiciary is an effective instrument for maintaining judicial independence in a state. The Chapter will analyze in details the system of appointment in France and Georgia, organization of judicial councils and their functions and what the main weaknesses or strengths of the councils are in both jurisdictions. Thus, finally identifying whether the council can have a crucial influence on

judicial independence and what the reasons are for its failure to perform its task effectively. The central issue of this Chapter is to illustrate the difference between these two jurisdictions – why the council for the judiciary can fail in Georgia, while it works in France with regard to appointment of judges.

The conclusion aims at summing up how crucial the role of appointment is in maintaining judicial independence, correspondingly, how negative or positive its influence can be on the autonomy of the judiciary. To this extent, the paper will conclude the role of the judicial councils in the appointment procedure and generally, in judicial independence. After summarizing reasons for failure or success of judicial councils to perform their functions effectively, some possible solutions and recommendations will be suggested in order to detect gaps affecting judicial independence.

1 JUDICIAL INDEPENDENCE AND ITS DIMENSIONS

1.1 Importance of Judicial Independence

Judicial independence is “the lifeblood of constitutionalism in democratic societies;”¹⁵ “there is no liberty, if the power of judging be not separated from the legislative and executive powers;”¹⁶ “the independency and uprightness of judges are essential ... and a great security to the rights and liberties of the people.”¹⁷ All these statements have reasonable grounds to believe that the autonomy of the judiciary is of a vital importance in any democracy which will be argued by the paper.

Above all, the need for judicial independence is not surprising if we consider the role of the judiciary itself within a state. As Shetreet defines in his chapter, the judiciary is an “...organ of government not forming part of the executive and legislative which is not subject to personal, substantive and collective controls and which performs the primary function of adjudication”.¹⁸

From this definition it can be concluded that the judiciary has a significant role within a government considering its power to adjudicate, that is to give the final judgment in dispute cases¹⁹. Besides, according to the definition, it is an autonomous body of government, free from any kind of control from the government. Thus, logically, if originally it is a separate organ of government, it should enjoy independence from any other branch.

Apart from that, the judiciary possesses power to review legislation and thus, interpret constitutional provisions which is recognized to be a crucial tool for protecting human rights,

¹⁵ *Beauregard v Canada* (1986) 2 S.C.R. 56 p.70.

¹⁶ The Federalist No. 78, (Alexander Hamilton), quoting 1 Baron De Montesquieu, *Spirit of the Laws* 181 (1748), *supra* note 2, p. 491.

¹⁷ Declaration of Rights and Fundamental Rules, (1776), § 22.

¹⁸ S. Shetreet and J. Deschenes, Editors, *Judicial Independence: the Contemporary Debate*, Part III: general Analysis, Chapter 52: Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, Martinus Nijhoff Publishers, P.O. Box 163, 3300 AD Dordrecht, The Netherlands, 1985, pp. 597-98

¹⁹ Black's Law Dictionary, “Adjudication”.

since judicial review “enables people to live in peace and social security under the rule of law and guarantees the citizens rights...”²⁰

Taking into account the significant role of the judiciary, its autonomy should be crucial, as well as in the sense that dependency on any factors might threaten the performance of its tasks in an effective way. As Barak states in his Chapter about protecting the constitution and democracy, the importance of judicial independence derives from the separation of powers, human rights protection points of view, as well as, from the fact that it is the central feature to the rule of law.²¹

1.1.1 Separation of Powers

While constructing a government, the key issue to be borne in mind is how to control it. The fact that it depends on people is one of the ways of controlling it, but considering the experience, the need for additional factors is obvious.²² It is obvious that a government is unable to control itself. Nelson Lund, discussing judicial independence, states that government institutions should control each other,²³ as e.g. in the US, for any law to be enacted, the Senate and the House of Representatives and usually the President are required to give consent;²⁴ there is a requirement also that both houses of Congress should authorize the President to perform his particular activities.²⁵

On the other hand, such a manner of controlling can raise difficulties, such as misuse of powers and intrusion into each other's capacity and thus, result in improper functioning of

²⁰ Raed S. A. Faqir, Muddather Abu- Karaki, *Judicial Review & the Visions for Establishing the Constitutional Court as a Tool for the Protection of Human Rights in Jordan* Legal and Political Study, *European Journal of Social Sciences* – Volume 24, Number 3, 2011, p. 340.

²¹ Abaron Barak, *The Judge in a Democracy*, Princeton and Oxford University Press, Chapter: Protecting the Constitution and Democracy, Section: Independence of the Judiciary, *democracy and Judicial Independence*, 2006, p.76.

²² *The Federalist* No.51, p. 322 (James Madison), (Clinton Rossiter ed., 1961).

²³ Nelson Lund, *Judicial Independence, Judicial Virtue and the Political Economy of the Constitution*. *Harvard Journal of Law & Public Policy*, Winter, 2012, Vol. 35 Issue 1, pp.47-48.

²⁴ Article I, The United States Constitution.

²⁵ Article II, The United States Constitution.

institutions. This is especially dangerous when it comes to the judiciary, because, as already mentioned, it is the branch which controls the government by e.g. challenging its acts, it is the body which is supposed to protect human rights while adjudicating. Correspondingly, the improper functioning of the judiciary can lead to the inappropriate functioning of the whole government. This is exactly what Simmons claims while discussing judicial independence in the Commonwealth Caribbean that the three branches of government – executive, legislative and judiciary should be separate.²⁶

Observance of such separation is in the interest of the branches of government themselves. Chief Justice of Victoria, Warren AC, while discussing what judiciary constitutes for people, for the government as a whole and for other forces existing within the government,²⁷ states that for the executive branch of the government, the judiciary is seen as an enforcement mechanism of a state while deciding cases involving citizens breaching the laws.²⁸ Besides, for the executive branch, the judiciary is a means for building up certainty within a state by resolving disputes.²⁹ The Chief Justice discusses further that for the legislature, the judiciary is a tool for interpreting laws enacted by it, while the judiciary is regarded as a citizens' protector and as a mechanism enforcing public will.³⁰ As for the judiciary itself, according to Kaufman, while writing about the essence of judicial independence,³¹ the doctrine of separation of powers gives possibility to it to perform its functions in a fair, effective and in a transparent way.³²

²⁶ David Simmons, Aspects of Judicial Independence and Accountability - Lessons for the Commonwealth Caribbean? *Commonwealth Law Bulletin*; Dec 2007, Vol. 33 Issue 4, pp.658-59.

²⁷ Marilyn, Warren AC, Chief Justice of Victoria, "Does Judicial Independence Matter?", Thursday 27 May 2010, *Victorian Bar News*, No.150, Summer 2011, pp.12-19.

²⁸ *Ibid*, p.18.

²⁹ Marilyn, Warren AC, Chief Justice of Victoria, "Does Judicial Independence Matter?", Thursday 27 May 2010, *Victorian Bar News*, No.150, Summer 2011, p.18.

³⁰ *Ibid*.

³¹ Irving R. Kaufman, The Essence of Judicial Independence *Columbia Law Review*, Vol. 80, No. 4, May, 1980, pp. 671-701.

³² *Ibid*, p.671.

Thus, before concluding that judicial independence is the core element of the doctrine of separation of powers, it should be highlighted that the doctrine itself is crucial to be respected within any democracy. Since it enables the branches of government to perform their functions independently without interfering in each other's functions, it leads to avoiding any undue influence within the government. Although there are counterarguments that absolute autonomy of the branches is impossible which will be discussed below, this section does not emphasize it. The important factor with regard to the doctrine of separation of powers is that, the judiciary should be independent in order to protect the doctrine.

1.1.2 Human Rights Protection

The crucial element of modern democracy is the protection of human rights.³³ Democracy cannot exist without human rights.³⁴ Since the judges are supposed to resolve disputes between individual, they are the figures who should ensure protection of individuals' rights.³⁵ Considering the power of the judiciary not only to resolve disputes between citizens, but also the power of judicial review, it is easy to conclude that the judiciary can serve as a key instrument for human rights protection.

However, it can serve vice versa, it can lead to violation of human rights if the judiciary lacks autonomy – in the case judges resolve disputes or interpret constitutional limitations under any influence from the government or other forces and not according to the law and their belief, it is likely that human rights will be infringed. Therefore, as the Chief Justice of Victoria, Warren believes, judicial independence is an essential instrument for

³³ Abaron Barak, *The Judge in a Democracy*, Princeton and Oxford University Press, 2006, Chapter Two: Protecting the Constitution and Democracy, Section: Independence of the Judiciary, democracy and Judicial Independence, p.81.

³⁴ *Ibid.*

³⁵ *Ibid.*, pp.81-82.

protecting citizens' rights against the state's actions so that without an impartial judiciary achieving human rights protection is impossible.³⁶

Apart from the fact that it is a protector of individual's rights, an independent judiciary is a tool for preserving the security of individuals especially in criminal cases.³⁷ In addition, according to the Chief Justice Warren, judicial independence is a human right itself considering the fact that by this right individuals can enjoy all other rights.³⁸

This is the reason why impartiality of judiciary is established in human rights protection instruments as a separate right and is required to be obeyed. For instance, Article 10 of the Universal Declaration of Human Rights (1948), Article 14 of the International Covenant on Civil and Political Rights, Article 6 of the European Convention on Human Rights (Right to a Fair Trial) and many others – all these Articles require the existence of an independent and impartial tribunal in order to determine individuals' right at the trial in a fair and transparent way. The Universal Declaration of Human Rights contains other provisions, as well requiring judicial independence, such as Article 7 – requiring equal treatment before the law, Article 8 – the right to an effective remedy, Article 11 – establishing presumption of innocence. Avoiding violation of all these rights and providing their protection is possible only by the independent judiciary.³⁹

³⁶ Marilyn, Warren AC, Chief Justice of Victoria, "Does Judicial Independence Matter?" Thursday 27 May 2010, Victorian Bar News, No.150, Summer 2011, p.13.

³⁷ Guidance for Promoting Judicial Independence and Impartiality, (Revised Edition), (PN-ACM-007), Technical Publication Series Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance U.S. Agency for International Development Washington, DC 20523-3100 January 2002, p.6.

³⁸ Marilyn, Warren AC, Chief Justice of Victoria, "Does Judicial Independence Matter?" Thursday 27 May 2010, Victorian Bar News, No.150, Summer 2011, p.13.

³⁹ Luu Tien Dung, Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.10.

1.1.3 Rule of Law

Protection of the rule of law is regarded to be of vital importance in any democracy.⁴⁰

As Hlmann and Kunz state while comparing independence and legitimacy of judicial systems,⁴¹ it is impossible for a democracy to exist without protection of the rule of law.⁴²

While speaking about the rule of law, it refers to two important aspects: 1. people should be governed by law and they should observe it; 2. the law should be capable of being observed.⁴³

Taking into account the fact that judges are bound by the rule of law, that is – they are obliged to decide cases in accordance with the law and the evidence presented to them,⁴⁴ the judiciary can be an effective tool in protecting and maintaining the rule of law. However, existence of the judiciary in a democracy does not automatically lead to the conclusion that the rule of law is ensured. According to a UNDP report, the judiciary is able to improve a bad law in the case it is independent, as well as, it is capable of making bad laws from good laws if it lacks autonomy.⁴⁵ Thus, as Préfontaine and Lee state, the crucial point in maintaining the rule of law in a democracy is to ensure that the judiciary is performing its functions impartially, without any influence, only in accordance with the facts and the law, is respecting and protecting the constitution and human rights.⁴⁶ Correspondingly, an independent judiciary is an essential instrument in building the rule of law within a society.⁴⁷

⁴⁰ Luu Tien Dung, Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.9.

⁴¹ Marc Buan Hlmann and Ruth Kunz, Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems, West European Politics, Vol. 34, No. 2, March 2011, pp. 317–345.

⁴² *Ibid*, p.318.

⁴³ Luu Tien Dung, Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.9.

⁴⁴ Daniel C. Préfontaine, Q.C. & Joanne Lee, The Rule of Law and the Independence of the Judiciary, The International Centre for Criminal Law Reform and Criminal Justice Policy, prepared for World Conference on the Universal Declaration of Human Rights, Montreal, December 7, 8, & 9, 1998, p.13.

⁴⁵ Luu Tien Dung, Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.9.

⁴⁶ Daniel C. Préfontaine, Q.C. & Joanne Lee, The Rule of Law and the Independence of the Judiciary, The International Centre for Criminal Law Reform and Criminal Justice Policy, prepared for World Conference on the Universal Declaration of Human Rights, Montreal, December 7, 8, & 9, 1998, p.2.

⁴⁷ *Ibid*, p.1.

In addition, the judiciary, while performing its task in an independent, efficient and effective way raises confidence in public and respect towards the rule of law.⁴⁸ If the judiciary fails to perform its functions in a proper way, this leads to the loss of the value of the rule of law.⁴⁹ As a UNDP report reveals, due to the common occurrence of corruption within the judiciary in many states, public confidence in the rule of law and justice has vanished.⁵⁰

Considering the discussion, it should be in the interest of the government and especially of the judiciary itself to maintain autonomy within it in order to have high value in a democratic society. This is exactly what the Chief Justice of Canada believes, that the value of judicial independence derives from its two main goals – to achieve and maintain public confidence in the transparency of the judiciary and to protect the rule of law.⁵¹

1.2 Factors Undermining Judicial Independence

1.2.1 General Overview

Judicial independence might be influenced by internal, as well as, by external factors.⁵² The former refers to judges' individual independence - to the judges' ability to adjudicate without any influence whether it would be from other judges themselves, or from outside forces.⁵³

⁴⁸ Guidance for Promoting Judicial Independence and Impartiality, (Revised Edition), (PN-ACM-007), Technical Publication Series Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance U.S. Agency for International Development Washington, DC 20523-3100 January 2002, p.158.

⁴⁹ Luu Tien Dung, Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.8.

⁵⁰ *Ibid*, pp.8-9.

⁵¹ Re Provincial Court Judges, (1997) 3 S.C.R. 3.

⁵² Peter H. Russell, Chapter: Toward a general Theory of Judicial Independence, Peter H. Russell, David M. O'Brien, Editors, Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series, University Press of Virginia, Charlottesville and London, 2001, p.11.

⁵³ Simmons, David, Aspects of Judicial Independence and Accountability - Lessons for the Commonwealth Caribbean? Commonwealth Law Bulletin; Dec2007, Vol. 33 Issue 4, p.659.

Internal factors threaten only the autonomy of an individual judge and not the judiciary as a whole institution itself,⁵⁴ e.g. senior judges having influence on individual judges' decisions being lower in the hierarchy by having administrative or personnel control over them.⁵⁵ In this sense, it should be considered that not any kind of influence on a judge is regarded to be a violation of judicial independence, for instance, when a higher court's decisions influence the lower court's judge, it should not be deemed as an infringement of autonomy of judiciary.⁵⁶

External factors refer to the doctrine of separation of powers in the sense that any forces outside the judiciary, such as – governmental or nongovernmental, public or private dimensions, might threaten judicial independence.⁵⁷ In this case, these dimensions might have an influence on the judiciary as a whole institution, as well as, on individual judges.⁵⁸

Gerangelos, while writing about separation of powers and interference in judicial process,⁵⁹ describes two circumstances when legislature interferes in judicial decisional independence – in “pending case scenario” and “final judgment scenario”.⁶⁰ The former refers to the interference by the legislature when it adopts new law or makes amendments to the law already applied by the courts in cases when they are pending – in the process of waiting for hearing for the first instance or final judgment.⁶¹ The latter arises when legislature adopts new law or amends it, which is already declared by the court in a case so that it does not change this decision between parties.⁶²

⁵⁴ Peter H. Russell, Chapter: Toward a general Theory of Judicial Independence, Peter H. Russell, David M. O'Brien, Editors, *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series*, University Press of Virginia, Charlottesville and London, 2001, pp.11-12.

⁵⁵ *Ibid*, p.7.

⁵⁶ *Ibid*, p.12.

⁵⁷ *Ibid*.p.11.

⁵⁸ *Ibid*, p.11.

⁵⁹ Peter A Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process, Constitutional Principles and Limitations*, Oxford and Portland, Oregon, 2009, pp.1-55.

⁶⁰ *Ibid*, p.3.

⁶¹ *Ibid*, pp.3-7.

⁶² *Ibid*, p.7.

According to the doctrine of separation of powers, discussed above, the arms of government should not interfere with each other's competences and as Simmons argues, institutional independence refers to the autonomy of the judiciary as a whole institution in the sense that there should be no other factor outside the judiciary that can have influence on the judiciary itself,⁶³ one may conclude that in both case scenarios the legislature interferes within the judiciary's decisional process and thus, undermines its independence.

However, according to Gerangelos, not all legislative interference within the judiciary violates the doctrine of separation of powers and independence of judiciary.⁶⁴ Rather, the legislature has the constitutional power either to establish laws or to amend the law, which does not contradict the doctrine of separation of powers.⁶⁵ But such interference should be assessed based on each case, since as Gerangelos admits, in certain cases legislative interference in the judiciary's decisional process might lead to the legislature's usurpations intrusion,⁶⁶ such as e.g. in the case of Acts of Attainder (Bill of Attainder).⁶⁷

Judicial independence is likely to be threatened by the executive branch, as well, since it can be dependent on the branch in several aspects. According to Steele, it is the executive in a state who decides whether to execute decisions of the judiciary or not, since judges are unable to self-execute their decisions.⁶⁸ Considering this fact, it undermines independence of the judiciary since in such cases judges might decide cases not according to the law and their own belief impartially, but considering certain aspects which they should not, such as thinking whether their decision will be satisfactory for the executive or not. Such a tendency

⁶³ David Simmons, Aspects of Judicial Independence and Accountability - Lessons for the Commonwealth Caribbean? *Commonwealth Law Bulletin*; Dec2007, Vol. 33 Issue 4, p.659.

⁶⁴ Peter A Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process, Constitutional Principles and Limitations*, Oxford and Portland, Oregon, 2009, p.4.

⁶⁵ *Ibid*, pp.4-7.

⁶⁶ *Ibid*, p.4.

⁶⁷ Black's Law Dictionary (Bill of Attainder) – acts of legislature, declaring a person guilty for a crime, such as treason, without any conviction according to the rules of judicial process.

⁶⁸ Myron T Steele, Judicial Independence, *Widener Law Journal*; 2009, Vol. 18 Issue 2, p.301.

is likely to occur especially when the judiciary is challenging acts of government that can be unsatisfactory for the government.

However, Russell, in his chapter on Judicial Independence, argues that judicial independence should not be equalized to the fact that judiciary is challenging acts of other branches very often.⁶⁹ According to him, judges may enjoy high level of independence from the government while challenging legislation, but they might be influenced by other nongovernmental forces, e.g. judges overruling government policy because of their political opposition view.⁷⁰ Indeed, there are numerous other factors having a negative influence on the autonomy of the judiciary. As Russell goes further in discussion, judicial independence both – collectively and individually, can be endangered at structural, personnel, administrative level, as well as, directly.⁷¹

At the structural level, the measures, such as creating or modifying judicial structure, changing system of appointment, removal, remuneration, so on, are likely to have an influence on the independence of the judiciary in the sense that such measures may restrict control over the judiciary.⁷² From the personnel point of view, appointment or removal, remuneration, discipline, training, evaluation of judges should be taken into account.⁷³ To this extent, autonomy of individual judges, as well as the whole judiciary, can be at risk.⁷⁴ Taking into account the fact that the judiciary provides public service, legislature, as well as the executive takes responsibility to check how the administration of the courts work and whether public service is provided in a satisfactory way.⁷⁵ While controlling administration of the judiciary, it is likely that its autonomy is threatened. In addition, examples such as bribery or

⁶⁹ Peter H. Russell, Chapter: Toward a general Theory of Judicial Independence, Peter H. Russell, David M. O'Brien, Editors, *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series*, University Press of Virginia, Charlottesville and London, 2001, p.7.

⁷⁰ *Ibid.*

⁷¹ *Ibid*, p.13.

⁷² *Ibid*, pp.13-14.

⁷³ *Ibid*, p.14.

⁷⁴ *Ibid*, pp.14-19.

⁷⁵ *Ibid*, pp.19-20.

threats to judges' or their families' personal safety, certain social events and media, can have a direct influence on judges' impartial decision-making process.⁷⁶

Taking into account all the factors undermining judicial independence, logically, it is quite unrealistic that the judiciary enjoys absolute autonomy in any democracy. Furthermore, according to some Anti-Federalists, e.g. judiciary's capacity to review legislation and acts of other branches of government, as well as, life tenure, can result in judicial usurpation of powers.⁷⁷ However, as Hamilton claims, it is necessary to have a body entitled with the power to interpret provisions of the constitution and, in his opinion, the judiciary is the one who should have such power.⁷⁸ He argues that the reason for entitling judiciary with such power is the existence of the impeachment procedure against judges, so that in case of misuse of their powers, judges can be impeached.⁷⁹ Furthermore, for Chief Justice Warren, judicial independence is the core element of democracy since e.g. while adjudicating not in a satisfactory way for the executive, or the legislature, this leads to the conclusion that democracy is respected within a state.⁸⁰

Thus, although there is a need to achieve and maintain judicial independence in a democratic society, as Simmons believes, absolute autonomy of the judiciary is not satisfactory, therefore, from time to time, there is a necessity of interaction between the executive and the judiciary.⁸¹ As already mentioned, it is unrealistic to avoid all factors influencing judiciary. Russell claims that independence of judiciary faces real risk only when

⁷⁶ Peter H. Russell, Chapter: Toward a general Theory of Judicial Independence, Peter H. Russell, David M. O'Brien, Editors, *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series*, University Press of Virginia, Charlottesville and London, 2001, pp.20-22.

⁷⁷ XV Essay of Brutus (Mar. 20, 1788), reprinted in *THE ANTIFEDERALIST PAPERS*, 304-09 (Ralph Ketcham ed. Signet Classics 2003); XI Essay of Brutus (Jan. 31, 1788), reprinted in *The Antifederalist Papers*, 293-98 (Ralph Ketcham ed. Signet Classics 2003).

⁷⁸ The federalist No. 81, *supra* note 1, (Alexander Hamilton), pp. 481-83.

⁷⁹ The federalist No. 81, *supra* note 1, (Alexander Hamilton), p. 485.

⁸⁰ Marilyn, Warren AC, Chief Justice of Victoria, "Does Judicial Independence Matter?", Thursday 27 May 2010, *Victorian Bar News*, No.150, Summer 2011, p. 19.

⁸¹ Simmons, David, *Aspects of Judicial Independence and Accountability - Lessons for the Commonwealth Caribbean?* *Commonwealth Law Bulletin*; Dec2007, Vol. 33 Issue 4, p.670.

the capacity of an individual judge to adjudicate is endangered by any kind of influence.⁸² There are certain factors that play a crucial role in avoiding influence on judges' adjudication process and one of them is building up a proper system of appointments which is discussed below.

1.2.2 Appointment of Judges

The European Court of Human Rights while determining whether a tribunal is independent or not considers the manner of judicial appointment as a crucial element ensuring independent tribunal.⁸³ The way judges are appointing varies from country to country.⁸⁴ There is no precise understanding what system should be recognized as the best model since appointment depends on many aspects such as which organ is responsible for appointment of judges, the term of office – how long judges are appointed, the way they are appointed and many others.⁸⁵ Before discussing the concrete examples - the Georgian and French jurisdictions in order to find out what aspects are crucial to regulate properly with regard to judicial appointments, the following subchapters will analyze generally acceptable methods and means of regulating appointments.

⁸² Peter H. Russell, Chapter: Toward a general Theory of Judicial Independence, Peter H. Russell, David M. O'Brien, Editors, *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series*, University Press of Virginia, Charlottesville and London, 2001, p.12.

⁸³ See e.g. *Campbell and Fell v. the United Kingdom*, 28 June, 1984, para.78.

⁸⁴ Stefan Trechsel, with the assistance of Sara J. Summers, Chapter 3: the Right to Independent and Impartial Tribunal, *Human Rights in Criminal Proceedings*, Academy of European Law, European University Institute, Oxford University Press, Volume XII/3, 2005, p. 54.

⁸⁵ David, Simmons, *Aspects of Judicial Independence and Accountability - Lessons for the Commonwealth Caribbean?* *Commonwealth Law Bulletin*; Dec2007, Vol. 33 Issue 4, pp. 657-670.

1.2.2.1 Bureaucratic and professional judiciaries

Bureaucratic system can be found mostly in civil law countries, like France, Spain, Italy⁸⁶, and so on. It is characterized with the selection of judges based on the examinations at a young age with little professional experience.⁸⁷ Training is conducting by the judiciary itself, during which judges are trained so that they can be capable to perform work in different areas such as adjudicate in criminal or civil law.⁸⁸ Appointment depends on judges' promotion to the higher positions.⁸⁹ In several transitional countries law degree was enough for a judge to be deemed to meet the professional requirement criteria. But in some of these countries (Romania, Viet Nam, Chile, Georgia⁹⁰) an additional criteria – training was established which has been regarded as a positive step towards strengthening professional skills of judges.⁹¹

Professional model is typical to the common law countries, Anglo-American judiciaries.⁹² In these jurisdictions only those judges can be appointed who have certain professional experience and unlike bureaucratic model where judges are recruited or a wide set of rules, here the judges are recruited for particular positions.⁹³ Having certain working experience in common law countries means that candidates have been practicing as advocates, attorneys or barristers such as in UK, US, Canada, Australia, New Zealand.⁹⁴ With regard to the first criteria, training, legal background and professional qualification play important role

⁸⁶ Carlo Guarnieri, Patrizia Pederzoli, C.A. Thomas, (English Editor), *The Power of Judges, A Comparative Study of Courts and Democracy*, Chapter One: Judges: Status, Career, and Activism, Oxford University Press, 2002, pp. 18-68.

⁸⁷ *Ibid*, p.66.

⁸⁸ *Ibid*, pp.66-67.

⁸⁹ *Ibid*, p.67.

⁹⁰ See: <http://hsoj.ge/index.php?m=741&lng=eng>

⁹¹ Luu Tien Dung, *Judicial independence in transitional countries*, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.24.

⁹² Carlo Guarnieri, Patrizia Pederzoli, C.A. Thomas, (English Editor), *The Power of Judges, A Comparative Study of Courts and Democracy*, Chapter One: Judges: Status, Career, and Activism, Oxford University Press, 2002, pp.67-68.

⁹³ *Ibid*, p.67.

⁹⁴ Luu Tien Dung, *Judicial independence in transitional countries*, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.25.

in judges' ability to fulfill their duties impartially since their professional confidence will help them to act independently, without referring to anyone.⁹⁵

It is difficult to say which model is better than the other. Both of them have advantages, as well as disadvantages. While in bureaucratic system judges are recruited within the judiciary, in professional model judges are selected according to their length of the professional experience that is indicator of less control within the judiciary.⁹⁶ On the other hand, recruitment within the judiciary and promotion leads to weakening independence since young judges having little experience are appointed on the low positions and they can be influenced by the judges holding higher positions.⁹⁷ While Buhlmann and Kunz believe that the crucial issue in order to avoid political influence on the judges' functions is that judges should be appointed by due to their professional qualifications,⁹⁸ O'Brian and Oshkoshi think that recruitment into a career judiciary can be less risky to judicial independence.⁹⁹ It has been recognized that in transitional countries "a judicial selection and appointment process which is objective, transparent and designed to recruit highly qualified, ethical jurists is probably the most fundamental reform"¹⁰⁰. On the other hand, UNDP report reveals that threat to be influenced by any force is less expected among professionally qualified judges.¹⁰¹

Thus, although, both systems have specific weaknesses and there is no precise practice which system is more refined, the assessment depends on concrete examples, whether a

⁹⁵ Luu Tien Dung, Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.23.

⁹⁶ Carlo Guarnieri, Patrizia Pederzoli, C.A. Thomas, (English Editor), *The Power of Judges, A Comparative Study of Courts and Democracy*, Chapter One: Judges: Status, Career, and Activism, Oxford University Press, 2002, pp.67-68.

⁹⁷ *Ibid.*

⁹⁸ Buhlmann, Marc and Kunz, Ruth 'Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems', *West European Politics*, 34:2, 317 — 345, Vol. 34, No. 2, March 2011, p.322.

⁹⁹ David M. O'Brian, Yasuo Oshkoshi, Chapter: Stifling Judicial Independence from within the Japanese Judiciary, Peter H. Russell, David M. O'Brien, Editors, *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series*, University Press of Virginia, Charlottesville and London, 2001, pp. 37-62.

¹⁰⁰ K. Henderson, V. Autheman, *Global Best Practices: a Model State of the Judiciary Report / A Strategic Tool for Promoting, Monitoring and Reporting on Judicial Integrity Reforms*. IFES Rule of Law White Paper Series, p.16.

¹⁰¹ Luu Tien Dung, Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.3.

particular state provides proper regulation of judicial appointment system. What can be concluded from the discussion is that for a judiciary to be regarded as independent it is important that judges are professionally qualified in order not to be depended on anyone or refer to anyone while performing their functions. This is precisely what the European Court of Human Rights stated in one of the cases that when a tribunal is composed of legally qualified judges it means that one of the main features ensuring judicial independence is observed.¹⁰² And the high level of legal qualification judges can gain both – from their own experience, as well as from the recruitment within the judiciary.

1.2.2.2 Different approaches of judicial appointments

Judicial appointments can vary from country to country.¹⁰³ There are three major models of appointment system: (a) election by people; (b) appointment by the politicians; (c) by an independent body, such as e.g. judicial council.¹⁰⁴ While, each country has its own regulation with regard to the judicial appointment system, e.g. France uses all the methods of appointing judges – nomination by the executive, election and appointment by an organ composed of judges and academics.¹⁰⁵

(a) Election by people

Generally, one may say that judges who are elected by people will serve them individuals in a more transparent and fair since their selection will be based only on people's choice and judges will enjoy absolute autonomy from any political authority in their appointment procedure. Furthermore, as Russell discusses in their chapter, the fact that people

¹⁰² *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, para. 57.

¹⁰³ Stefan Trechsel, with the assistance of Sara J. Summers, Chapter 3: the Right to Independent and Impartial Tribunal, Human Rights in Criminal Proceedings, Academy of European Law, European University Institute, Oxford University Press, Volume XII/3, 2005, p. 54.

¹⁰⁴ Tom Ginsburg, *Judicial Appointments and Judicial Independence*, United States Institute for Peace, January 2009, p. 2.

¹⁰⁵ John Bell, *Bell Paper*, 4 October 2003, *Judicial Appointments: Some European Experiences*, (Cambridge), p. 4.

elect judges raises democratic accountability.¹⁰⁶ On the other hand, O'Brian and Oshkoshi think that popular election of judges can serve as a serious threat to the judicial independence.¹⁰⁷ The danger is especially serious in case of existence of reelection procedure that can have influence on elected judges.¹⁰⁸ For Example, if elected judges willing to gain popularity votes to maintain their office, are likely to be influenced by this fact, for instance, while deciding cases concerning unpopular individuals or groups.¹⁰⁹ To this extent, according to the authors, considering the fact that judges striving to win popularity contests for maintaining their office, democratic accountability serves as a means of damaging judicial independence.¹¹⁰

(b) Appointment by politicians

In O'Brian and Oshkoshi's opinion, appointment by the politicians can be less risky to judicial independence rather than election by people.¹¹¹ On the other hand, Russell suggests that this method of appointment can endanger judicial independence. According to him, the main problem that threatens judicial independence with regard to appointment of judges by politicians is ideological conformity.¹¹² For instance, if assuming that the ideology of the US president is so obvious and the US Supreme Court is composed of the judges having similar

¹⁰⁶ Peter H. Russell, Chapter: Toward a general Theory of Judicial Independence, Peter H. Russell, David M. O'Brien, Editors, *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series*, University Press of Virginia, Charlottesville and London, 2001, p.16.

¹⁰⁷ David M. O'Brian, Yasuo Oshkoshi, Chapter: Stifling Judicial Independence from within the Japanese Judiciary, Peter H. Russell, David M. O'Brien, Editors, *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series*, University Press of Virginia, Charlottesville and London, 2001, pp. 37-62.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Peter H. Russell, Chapter: Toward a general Theory of Judicial Independence, Peter H. Russell, David M. O'Brien, Editors, *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series*, University Press of Virginia, Charlottesville and London, 2001, p.17.

ideology as the government party¹¹³ – it is obvious that such judges will be biased in their decision making.

Thus, the two ways of appointment of judges seem to include high threat to judicial autonomy. It seems that other method suggesting a system being much less dangerous for the judicial independence is necessary. To this extent, as Simmons believes, appointment by independent body – in this case by commission is the best way how to achieve transparency within judiciary with regard to appointments.¹¹⁴

(c) Appointment by an independent body

The Committee of Ministers of the Council of Europe has recommended that appointment and selection of judges should be in hands of the bodies independent from either the legislative or the executive branches of government.¹¹⁵

In England, after the reform in 2005 Judicial Appointment Commission was established which makes recommendation to the Lord Chancellor on the candidates who are supposed to be appointed to any judicial post in England and Wales except of lay magistrates.¹¹⁶ The Commission is an independent body, the Lord Chancellor can either accept, reject the Commission's recommended candidate or ask for the further reconsideration, but he/she is unable to appoint a candidate not proposed by the Commission.¹¹⁷ Simmons describes the way of appointing judges in the Commonwealth

¹¹³ Peter H. Russell, Chapter: Toward a general Theory of Judicial Independence, Peter H. Russell, David M. O'Brien, Editors, *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world, Constitutionalism and Democracy series*, University Press of Virginia, Charlottesville and London, 2001, p.17.

¹¹⁴ David Simmons, *Aspects of Judicial Independence and Accountability - Lessons for the Commonwealth Caribbean?* *Commonwealth Law Bulletin*; Dec2007, Vol. 33 Issue 4, p.660.

¹¹⁵ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para 46.

¹¹⁶ Carlo Guarnieri, *Do Judicial Councils further Judicial Independence? Some Lessons from Europe*, (University of Bologna), Ankara, May 27th 2011, p.7.

¹¹⁷ *Ibid.*

Caribbean where Judicial Commissions are established, as well.¹¹⁸ In this area e.g. in Trinidad and Tobago, the President appoints judges on the recommendation of the Judicial and Legal Service Commission, which is an independent body.¹¹⁹

Trechsel believes that it is the Council for the Judiciary that should be entitled to appoint judges by making binding proposals to the head of a state or the minister of justice.¹²⁰ Judicial councils are mostly common in civil law countries, with the authority to appoint judges, such as France, Spain, Italy,¹²¹ as well as in transitional countries, such as e.g. in Georgia.¹²² In order to guarantee independence of the judiciary, composition and the scope of functions of the judicial councils are essential.¹²³ Their main goal – to ensure judicial independence is likely to fail in case the executive has control over councils' composition, operating systems and structure.¹²⁴ According to Garoupa and Ginsburg, council for the judiciary can be much stronger and independent if its members represent the judicial majority, rather than if it is composed of non-judges.¹²⁵ On the other hand, in this case certain risks may occur, such as e.g. self-protection, perception of self-interest.¹²⁶ Therefore, to achieve fair balance, other members other than judges should also be included among the members of the councils.¹²⁷

¹¹⁸ David Simmons, Aspects of Judicial Independence and Accountability - Lessons for the Commonwealth Caribbean? *Commonwealth Law Bulletin*; Dec2007, Vol. 33 Issue 4, pp.659-60.

¹¹⁹ *Ibid*, p. 660.

¹²⁰ Stefan Trechsel, with the assistance of Sara J. Summers, Chapter 3: the Right to Independent and Impartial Tribunal, *Human Rights in Criminal Proceedings*, Academy of European Law, European University Institute, Oxford University Press, Volume XII/3, 2005, p. 55.

¹²¹ Carlo Guarnieri, Patrizia Pederzoli, C.A. Thomas, (English Editor), *The Power of Judges, A Comparative Study of Courts and Democracy*, Chapter One: Judges: Status, Career, and Activism, Oxford University Press, 2002, pp. 18-68.

¹²² Article 86(1), paragraph 1, The Constitution of Georgia of August 24, 1995.

¹²³ Judicial Councils reforms for an Independent judiciary, Examples from Egypt, Jordan, Lebanon, Morocco and Palestine, International Federation for Human Rights, n°523a, May 2009, p. 5.

¹²⁴ *Ibid*, p. 9.

¹²⁵ Nuno Garoupa, Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, University of Chicago Law School, Univ. of Chicago, Olin Law and Economics Program, Research Paper Series, U of Chicago Law & Economics, Olin Working Paper No. 444, *American Journal of Comparative Law*, Forthcoming, November 18, 2008, pp. 22-23.

¹²⁶ Judicial Councils reforms for an Independent judiciary, Examples from Egypt, Jordan, Lebanon, Morocco and Palestine, International Federation for Human Rights, n°523a, May 2009, p. 20.

¹²⁷ *Ibid*.

There is no precise framework how the independent bodies such as the Commission or the Council for the Judiciary should operate. General idea of these bodies is that they are established in order to guarantee judicial independence by their impartial functioning with the duties such as appointment of judges. However, to this extent, an important question can arise – despite the fact that a lot of countries have established these organs within their national systems, whether they serve effectively the reasons for their creation or not? The Chapter Two is devoted to answer this question by analyzing the Council for the Judiciary in two jurisdictions – in France and Georgia.

2 SYSTEM OF APPOINTMENT IN FRANCE AND GEORGIA

Article 64 of the Constitution of France declares the President of the Republic “the guarantor of the independence of the Judicial Authority” with the assistance of the High Council of the Judiciary. The Constitution of Georgia also provides the basic level of guarantee of judicial independence within the state: “A judge shall be independent in his/her activity and shall be subject only to the Constitution and law. Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law.”¹²⁸

Apart from the legal basis ensuring judicial independence, the 1958 Constitution of France established the Council for the Judiciary - “Conseil Supérieur de la magistrature” (CSM) in order to guarantee independence within the judiciary.¹²⁹ After the 2008 constitutional Amendment the Council is an autonomous body.¹³⁰ For the promotion of independence of the judiciary, in 1997, Georgia established the Supreme Council of Justice with the authority to appoint and dismiss judges, as well.¹³¹ However, establishment only of the basic level rules of protecting judicial independence or of Council for the Judiciary does not automatically mean that judicial independence should be guaranteed at the high level. The way the councils themselves and the system of appointment are regulated is of vital importance.

France is regarded as providing a high level of protection of judges from political influence.¹³² However, the independence of the judiciary from political interference has been

¹²⁸ Article 84, The Constitution of Georgia of August 24, 1995.

¹²⁹ Doris Marie Provine, Antoine Garapon, Chapter 9: The Selection of Judges in France: Searching for a New Legitimacy, Kate Malleson & Peter H. Russell, Editors, *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World*, University of Toronto Press, 2006, p.184.

¹³⁰ Carlo Guarnieri, *Do Judicial Councils further Judicial Independence? Some Lessons from Europe*, (University of Bologna) Ankara, May 27th 2011, p.20.

¹³¹ Article 86(1), paragraph 1, The Constitution of Georgia of August 24, 1995.

¹³² Doris Marie Provine, Antoine Garapon, Chapter 9: The Selection of Judges in France: Searching for a New Legitimacy, Kate Malleson & Peter H. Russell, Editors, *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World*, University of Toronto Press, 2006, p.185.

weakened by the creation of the CSM with its function to appoint judges.¹³³ While Georgia, despite the fact that the judicial reform within is a priority of the state, still faces certain problems in relation to independence.¹³⁴ The Human Rights Report made in 2009 reveals that judges are not performing their tasks independently, the system of appointment of judges lacks transparency and much of the public views the judiciary as the country's most corrupt institution.¹³⁵

The analysis of the French and Georgian legislation with regard to regulation of the system of judicial appointments will lead to the identification of the advantages of the French system and the problems within the Georgian system.

2.1 Term of Office

The Constitution of Georgia sets general requirement that judges should be appointed “not less than ten years.”¹³⁶ While according to the French Constitution, judges are appointed for life in their positions.¹³⁷ Which system is providing better guarantee of judicial independence is arguable since there are different opinions among scholars and judges on the term of office. According to the ECHR case law, for a judge to be independent it does not necessarily require that he or she should enjoy life tenure.¹³⁸ What is important is that a judge should be guaranteed certain stability during their term of office, so that no other force can have any influence on them in performing their duties.¹³⁹ Correspondingly, it can be said that neither Georgian nor French systems seem to be problematic in relation to the term of office of judges since in both systems judges can enjoy stability that leads to their independence. It

¹³³ John Bell, *Judiciaries within Europe*, A Comparative Review, Cambridge University Press, 2006, p.67.

¹³⁴ Public Defender of Georgia, *Parliamentary Reports of 2009-2010*, available at: <http://www.ombudsman.ge/index.php?page=21&lang=1&n=0&id=0>.

¹³⁵ Human Rights Report: Georgia, Bureau of democracy, Human Rights, and Labor, US Department of State, March 11, 2010, available at: <http://www.state.gov/j/drl/rls/hrrpt/2009/eur/136032.htm>.

¹³⁶ Article 86, paragraph 2, The Constitution of Georgia of August 24, 1995.

¹³⁷ Article 64, The Constitution of France of October 4, 1958.

¹³⁸ See e.g. *Sutter v. Switzerland*, 8209/78, 1 March 1979, DR16, 166.

¹³⁹ *Ibid.*

is obvious in the case of France as judges are appointed for life. As for Georgia, because the legislation provides certain term of office, the important factor to be carried in mind is whether judges can be reelected or not. As Herron and Randazzo claim, judges expecting to be reappointed, are fulfilling their function in favor of the government rather than those not expecting reappointment¹⁴⁰ since in the fear of appointed again or not, judges are likely to make decisions that will satisfy the government and thus, guarantee their reappointment. According to this, the fact that in Georgia judges are not reelected¹⁴¹ and are appointed for fixed terms indicates that judges enjoy stability.

On the other hand, as a UNDP work reveals, judicial independence is less likely to be endangered in the case of life tenure or long term office.¹⁴² Obviously, Georgia has taken into account this opinion as by the 15.10.2010 Amendment to the Constitution, that will come into force in October 2013, judges should be appointed for life.¹⁴³ This provision indicates that Georgian legislation made a step towards providing better guarantees for judges' autonomy and, like in France, there is nothing problematic with regard to this provision.

However, the provision loses its effect if considering the next provision in the Constitution following it. The same Amendment sets a probation period of not more than three years before a candidate becomes a judge for life.¹⁴⁴ As the Venice Commission in one of the opinions admits, probationary periods are likely to create serious problems with regard to the independence of judges due to the pressure to decide cases in a particular way.¹⁴⁵ Setting a probationary period is even worse than establishing a reelection requirement. While in the case of expecting reelection there is a possibility that judges will act in a way to satisfy

¹⁴⁰ Erick S. Herron and Kirk A. Randazzo, *Judicial Institutions and the Evolution of Independent Courts in New Democracies*.

¹⁴¹ There is no indication neither in the Constitution of Georgia, nor in the Organic Law regulating appointment and dismissal of judges on the reelection of judges, the Constitution only provides that judges should be appointed for the period of ten years.

¹⁴² Luu Tien Dung, *Judicial independence in transitional countries*, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, January 2003, p.18.

¹⁴³ 15.10.2010 Amendment, Article 86, paragraph 2, The Constitution of Georgia of August 24, 1995.

¹⁴⁴ *Ibid.*

¹⁴⁵ CDL-AD(2010)004, Report on the independence of the judiciary, op. cit., para. 37.

government, such a possibility must be much higher in the case of a probation period since judges will try to undergo this period in favor of government in order to maintain their office.

The Venice Commission recommended to remove this provision requiring a probationary period from the Constitution¹⁴⁶ but it was not considered. Although setting probationary periods can be seen as an advantage in order to find out whether a judge is capable of fulfilling his or her obligations while appointing them for life, it can cause much more damage than favor within the judiciary. It is worth mentioning that whether judges will be under pressure to perform their tasks properly within the probation period depends also on the fact whether other branches of government are involved in appointing judges for life. This is because if such competence is solely in the hands of judiciary then there is no reason that judges during the probationary period will act in favor of other branches of government since it is only the judiciary which decides their appointment issue. However, considering the case of Georgia, where the decision making process in relation to appointment is highly dependent on executive opinion, setting probationary period constitutes a major problem¹⁴⁷ In addition, setting a probationary period is more unacceptable if we consider that the problem of determining whether a judge is capable of performing his or her duties can be solved by other means that will not endanger the independence of the judiciary, e.g. by building up a proper and effective career and promotion system within the judiciary where judges will undergo permanent evolution and their gradual promotion will lead to the formation of professional judges who must be capable of performing their tasks efficiently.

¹⁴⁶ CDL-AD(2010)028, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, para. 91.

¹⁴⁷ See sub chapter 2.4.

2.2 Nomination and Appointment

According to the French legislation, students at the age of 24-25, holding a Masters degree in law are capable to enter Ecole Nationale de la magistrature (ENM), established in 1970 with the function to recruit and train judges where they are supposed to undergo special training.¹⁴⁸ After finishing a one-year preparatory course, the candidates should pass a competitive examination both - written and oral, after which they should go also a training course for two years.¹⁴⁹ The candidates completing all the mandatory courses have possibility to be appointed to the vacant positions that can be possible only if the CSM gives positive opinion on the nomination of a particular candidate.¹⁵⁰ There is the possibility for lateral entry to the ENM as well for those having more than 5 years experience of legal service working in the public sector and more than 10 years legal experience for those working in the private sector.¹⁵¹ These candidates undergo the same training course as it is regulated for the students and in this case the opinion of the CSM on the nomination is also necessary.¹⁵²

The CSM does not participate in the appointment process of the administrative judges. French legislation differently regulates their appointment procedure – students can enter the ENA and then undergo special training and be appointed based on the examination evaluation.¹⁵³ The rules regulating ordinary judges' lateral entry apply in the case of administrative judges as well, but the difference is that they are appointed based on exam results after taking the training course without opinion of the CSM.¹⁵⁴ The Ministry of Justice nominates for lower judicial and prosecutorial posts. Promotion is performed by the committee composed of judges who are elected from each tier of court and the candidates are

¹⁴⁸ Doris Marie Provine, Antoine Garapon, Chapter 9: The Selection of Judges in France: Searching for a New Legitimacy, Kate Malleson & Peter H. Russell, Editors, *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World*, University of Toronto Press, 2006, pp.183-184.

¹⁴⁹ Bell Paper, 4 October 2003, *Judicial Appointments: Some European Experiences* John Bell (Cambridge), p.7.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ John Bell, Bell Paper, 4 October 2003, *Judicial Appointments: Some European Experiences* (Cambridge), p.7.

capable of applying for the vacancies.¹⁵⁵ In this case the Minister of Justice is bound by the advice of the CSM to review the nominations of the lower sitting judges.¹⁵⁶ While in the case of prosecutors, the opinion of the CSM does not bind the Minister since senior prosecutorial posts do not fall under the subject of the CSM. However, in the judicial chamber the CSM nominates the judges, upon which the President appoints them formally.

In Georgia, a person can be appointed as a judge after they will pass the qualification exams.¹⁵⁷ It is the Supreme Council of Justice that regulates the rules of exams – announces vacancies, arranges competition, assesses the results of the examination and finally appoints the successful candidates.¹⁵⁸ These rules apply only to the judges of Regional (City) Courts and judges of Appellate Courts, including administrative judges, who, unlike the French legislation, are treated similarly as the Regional Court judges and Appellate Court judges.¹⁵⁹

At first glance, the appointment procedure is well regulated since in both states it is an independent body that makes decisions on judicial appointments (except for administrative judges in France) and thus, it can be said that to this extent, independence of the judiciary is ensured. Although in France, the president is capable of refusing to appoint the proposed candidate by the CSM, it is in fact a theoretical occurrence rather than a real one since he is limited in appointing the nominated candidate.¹⁶⁰ In Georgia, despite the fact that it is the authority of the Supreme Council of Justice to appoint judges, the Constitution does not provide any guarantee that the President is bound by the nomination proposed by the Council. The Venice Commission suggested on this point that for strengthening the guarantees of judicial independence the Constitution should indicate that the President is limited to

¹⁵⁵ John Bell, Bell Paper, 4 October 2003, *Judicial Appointments: Some European Experiences* (Cambridge), p.7.

¹⁵⁶ *Guidance for Promoting Independence and Impartiality*, Technical Publication Series Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance U.S. Agency for International Development Washington, DC 20523-3100, Revised Edition, January 2002, p.74.

¹⁵⁷ Article 47, Organic Law on Common Courts of Georgia.

¹⁵⁸ Article 47, Organic Law on Common Courts of Georgia.

¹⁵⁹ Articles 46-47, Organic Law on Common Courts of Georgia.

¹⁶⁰ *Guidance for Promoting Judicial Independence and Impartiality*, Technical Publication Series Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance U.S. Agency for International Development Washington, DC 20523-3100, Revised Edition, January 2002, p.74.

appointing candidates proposed by the Supreme Council of Justice which was not taken into account.¹⁶¹

With regard to the higher ranks, the system of appointment is differently regulated in both jurisdictions. In France, the most important power of the CSM is its authority to appoint judges at the highest level – judges of the Cour de cassation, the first president of the Court of Appeals and the presidents of the major trial courts - Tribunaux de grande instance.¹⁶² The president nominates all of these judges proposed by the CSM.¹⁶³ Georgia provides different regulation e.g. for the Supreme Court judges. According to the Constitution of Georgia, the President of Georgia nominates the President and the judges of the Supreme Court and the Parliament elects them.¹⁶⁴ Considering the fact that the higher the instance of the court the more important cases it has to deal with, as well as the fact that the Supreme Court's decision is final, the guarantee of independence of this court should be much more protected than the lower courts. On the other hand, the ECHR in one of the cases ruled that that Article 6 of the Convention – the Right to a Fair Trial - is not violated automatically by the fact that the executive appoint some members of a tribunal.¹⁶⁵ According to the Court, for the violation of Article 6, it is required to be shown that the manner of appointment was unsatisfactory, as a whole or the tribunal was influenced by certain factors while deciding a case.¹⁶⁶ However, if Georgian legislation establishes the autonomous body – the Supreme Council of Justice in order to appoint Regional Court judges and Appellate Court Judges, there is no reason why the power to appoint Supreme Court's judges is vested in the President.

¹⁶¹ CDL-AD(2005)003, Joint opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia, para. 110.

¹⁶² Doris Marie Provine, Antoine Garapon, Chapter 9: The Selection of Judges in France: Searching for a New Legitimacy, Kate Malleson & Peter H. Russell, Editors, *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World*, University of Toronto Press, 2006, pp.184-185.

¹⁶³ Guidance for Promoting Judicial Independence and Impartiality, Technical Publication Series Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance U.S. Agency for International Development Washington, DC 20523-3100, Revised Edition, January 2002, p.74.

¹⁶⁴ Article 90, paragraph 2, Constitution of Georgia of 24 August, 1995.

¹⁶⁵ *Campbell and Fell v. the United Kingdom*, 28 June 1984, para. 79.

¹⁶⁶ *Zand v. Austria*, 15 DR 70, para. 77.

Both jurisdictions have a similar approach in relation to the Constitutional judges. In France, nomination of the Constitutional Court judges is the authority of the president and the presidents of both Chambers of Parliament.¹⁶⁷ In Georgia, the judges of the Constitutional Court are selected as follows: three members are elected by the President, three – by Parliament and three by the Supreme Court of Georgia.

Political involvement in the nomination of the Constitutional Court judges in France, as well as, in Georgia is obvious.¹⁶⁸ However, in the case of France, the balance is kept by the fact that the members are appointed for nine year terms with a non-renewable requirement and therefore, there is no direct possibility of the politicians to influence the appointment procedure.¹⁶⁹ In addition, the fact that judges' individual opinions cannot be identified in their decisions is an indicator of avoiding any influence from the political or other forces.¹⁷⁰ Furthermore, as is often seen, politicians express criticism on decisions of the Constitutional Council through the media or in the political debates.¹⁷¹ This cannot be said in the case of the Constitutional Court of Georgia, which is still deemed to face difficulties with regard to ensuring independence. This is obvious if taking into account permanent recommendations e.g. of the Venice Commission, reports of the Ombudsman of Georgia and so on, all these documents reveal that Georgia needs further steps in order to provide a better level of protection of judicial independence. In addition, considering its power in judicial review, the Constitutional Court should be given a high level of guarantees that it will perform its functions in a transparent and impartial way. For this it is important that political influence is weakened upon the Constitutional Court.

¹⁶⁷ John Bell, Bell Paper, 4 October 2003, Judicial Appointments: Some European Experiences (Cambridge), p.3.

¹⁶⁸ John Bell, *Judiciaries within Europe, A Comparative Review*, Cambridge University Press, 2006, p. 68.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

2.3 Composition of the Councils for the Judiciary

The French Judicial Council is composed of fifteen members: a councillor of State elected by peers; a lawyer; six lay members, among them two are appointed by the President of the Republic, another two – by the President of the Senate, and the last two by the President of the Chamber of Deputies; and seven magistrates.¹⁷² The magistrates vary according to their rank who are elected by their peers.¹⁷³ The CSM is chaired by the President, who is formally involved in the chairing of this body and the Vice President is the minister of justice, being its acting head.¹⁷⁴ According to the Organic Law No. 2010-830 of 22 July 2010, until the entry into force of the amended Article 65 of the Constitution of France on 23 January 2011, the CSM consists of a majority of five judges in the chamber of judges and a majority of five prosecutors in the chamber of prosecutors – standing judges. By the amendment, six “qualified personalities” from civil society are added to each of the chambers.

In Georgia, the Supreme Council of Justice is composed of 15 members who are appointed on the basis of the doctrine of separation of powers – all three branches of government are involved in the composition of the Council.¹⁷⁵ The President of Georgia is represented in the Council by two members appointed by him.¹⁷⁶ The Parliament of Georgia is represented in the Council by four members – three of them are elected by Parliament and one of them should be the member of those parties which do not constitute a majority within the Parliament.¹⁷⁷ The fourth member is the Chairperson of the Parliamentary Committee of

¹⁷² Carlo Guarnieri, Do Judicial Councils further Judicial Independence? Some Lessons from Europe, (University of Bologna) Ankara, May 27th 2011, pp.20-21.

¹⁷³ *Ibid*, p.21.

¹⁷⁴ Doris Marie Provine, Antoine Garapon, Chapter 9: The Selection of Judges in France: Searching for a New Legitimacy, Kate Malleson & Peter H. Russell, Editors, Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World, University of Toronto Press, 2006, p.184.

¹⁷⁵ Article 60, paragraph 2, Organic Law on Common Courts of Georgia.

¹⁷⁶ Article 60, paragraph 5, Organic Law on Common Courts of Georgia.

¹⁷⁷ Article 60, paragraph 4, Organic Law on Common Courts of Georgia.

Legal Issues, who is an *ex officio* member of the Council.¹⁷⁸ Common Courts are represented in the Council by the chairman of the Supreme Court of Justice and eight members elected by the Conference of Judges after the referral of the chairman of the Supreme Court of Georgia. A member elected by the by the Conference of Judges should be only the judge of common courts.¹⁷⁹ More than half of the members of the Supreme Council are members elected by self-government bodies of judges of common courts.¹⁸⁰ The Supreme Council of Justice is chaired by the Chairperson of the Supreme Court of Georgia.¹⁸¹

At first glance, the composition of the Supreme Council gives no reasons for criticism as it consists of the members from all the three branches and thus, ensures balance between accountability and independence. However, deep analysis reveals serious problems.

First of all, the problem relates to the members of the Council represented by the judiciary. The Chairperson of the Supreme Court is an *ex officio* member of the Council. He or she nominates the other eight members from the judiciary who are then appointed by the self-government body of common courts. Unlike the French system, where in the CSM the judges from the lower courts dominate,¹⁸² in the case of Georgia, other judges whether from the lower ranks or higher do not have the possibility to nominate their own or their colleagues candidates. According to the Georgian Young Lawyers' Association, this fact gives doubts about the transparency of the judiciary since it raises the possibility of influence within the judiciary.¹⁸³ This derives from the understanding that every judge should have the possibility to participate in the functioning of the judiciary.¹⁸⁴

¹⁷⁸ *Ibid.*

¹⁷⁹ Article 60, paragraph 6, Organic Law on Common Courts of Georgia

¹⁸⁰ Article 60, paragraph 3, Organic Law on Common Courts of Georgia..

¹⁸¹ Article 60, paragraph 2, Organic Law on Common Courts of Georgia.

¹⁸² Nuno Garoupa Tom Ginsburg, Guarding the Guardians: Judicial Councils and Judicial Independence, University of Chicago Law School, Univ. of Chicago, Olin Law and Economics Program, Research Paper Series, U of Chicago Law & Economics, Olin Working Paper No. 444, American Journal of Comparative Law, Forthcoming, November 18, 2008, p.25.

¹⁸³ Justice in Georgia, Georgian Young Lawyers' Association, National Endowment for Democracy, 2010, p.7.

¹⁸⁴ *Ibid.*

Apart from that, the work made by the Georgian Young Lawyers' Association reveals that members of the Supreme council of Justice represented by the judiciary are not judges in fact. They are persons who determine policy within the judiciary, perform administrative work and have no connection with the functions of the judges.¹⁸⁵ This constitutes the major problem, since as the paper makes clear in the first Chapter, the crucial point for a Council for the Judiciary to operate effectively is judicial dominance, in the sense that the members should be highly qualified judges. As already discussed, this is the opinion of various scholars discussed above and the ECHR practice also suggests the same.

Thus, while the CSM is regarded to be a strong non-hierarchical judicial council where the judges from the lower courts dominate,¹⁸⁶ it cannot be said about Georgia. Rather, the composition of the Supreme Council of Justice constitutes a real threat to the independence of the judiciary due to its non-qualified members, as well as non-involvement of the ordinary judges in the composition.

In addition, the President of Georgia is entitled to appoint two members of the Council. While appointing the members the President does not consult with any other body and has discretionary power to appoint the members. Besides, the President has the power to dismiss the two members without any reasoning¹⁸⁷ By this power, the President is given the perfect possibility to control the decision making process of the Council, since it is likely that in fear being dismissed, the two members appointed will act in favor of the President. Although it depends on the way the whole decision making process of the Council is regulated and if the two members appointed by the President cannot have decisive votes the

¹⁸⁵ See "Justice in Georgia", Georgian Young Lawyers' Association, National Endowment for Democracy, 2010.

¹⁸⁶ Guarding the Guardians: Judicial Councils and Judicial Independence, Nuno Garoupa Tom Ginsburg, University of Chicago Law School, Univ. of Chicago, Olin Law and Economics Program, Research Paper Series, U of Chicago Law & Economics, Olin Working Paper No. 444, American Journal of Comparative Law, Forthcoming, November 18, 2008, p.25.

¹⁸⁷ See the subchapter 2.4.

regulation does not constitute a big problem, if we have a look at the next subchapter, it is obvious that the President has real power to have political influence on the Council.

2.4 Balancing independence and accountability of the judiciary or controlling it?

As already discussed in the Chapter One, the reason for composing a Council for the Judiciary of the members representing all the three branches of government is to ensure balance between independence and accountability. While for guaranteeing independence it is important to weaken any interference from other branches, composition of the Council may lead to self-administration within the judiciary. Therefore, according to Simmons, discussed in the Chapter One, interaction between the branches of government is important when needed. In France, the aim for establishing the Council for the Judiciary serves exactly this purpose to achieve a fair balance between judicial independence and accountability in order to avoid self-administration.¹⁸⁸

Different picture is in Georgia if considering the decision making process within the Supreme Council of Justice. The Council makes the decision on the appointment of judges by the majority of votes.¹⁸⁹ However, while selecting a judge, together with this requirement the consent of all members appointed by all three branches of government is necessary.¹⁹⁰ For instance, a judge will not be appointed if the members represented by the Parliament do not support the candidate, despite the other eleven votes supporting the candidate. The same situation exists if the two members appointed by the President won't support a candidate.

¹⁸⁸ United States Institute of Peace, *Judicial Appointments and Judicial Independence*, 2009, p. 5.

¹⁸⁹ Article 50, paragraph 2, Organic Law on Common Courts of Georgia.

¹⁹⁰ 19.0.2007 Amendment to the Organic Law on common Courts of Georgia.

Correspondingly, the President, as well as Parliament, have the power to block a candidate they do not wish to appoint.¹⁹¹

Thus, considering the fact that the President and Parliament are political authorities, the candidates for a judge can be blocked because of certain political reasons. Furthermore, such regulation of voting suggests that there is no use that the judiciary dominates within the Council when the judges' decision has no effect if any other branch contradicts their decision. Representation from other branches of government does not serve the purpose to balance independence and accountability of judges, rather, such regulation leads to the direct control and influence of the political authorities on the rules of appointing judges. Correspondingly, it is obvious that with such regulation judicial appointment system not only does not provide guarantee of judicial independence but also constitutes the major obstacle endangering autonomy of the judiciary.

¹⁹¹ Article 50, paragraph 3, Organic Law on Common Courts of Georgia.

CONCLUSION

In conclusion, judicial independence plays the crucial role in protecting the doctrine of separation of powers, human rights and the rule of law that are fundamental values for a democracy to exist within a state. Therefore, in order to maintain democracy in any government, it is indispensable to guarantee the judicial independence at the highest level. However, protecting autonomy of the judiciary is not an easy task since a lot of factors can undermine its impartiality. One of the key factors is the way the system of judicial appointments is regulated because its wrong regulation is likely to damage the judicial independence. It is regarded that the autonomous bodies, such as the Councils for the Judiciary should have the authority to select and appoint judges that leads to achievement of transparency of judges.

However, in practice the Council for the Judiciary not always operates effectively in the sense that in some countries such as Georgia it fails to ensure judicial independence through appointment of judges. Composition, the scope of the powers of the judicial councils needs attention while determining whether the Council for the Judiciary can be an effective mechanism of guaranteeing independence of the judiciary or not. If the Council itself does not enjoy autonomy from any influence, it is quite logical that it should be unable to ensure independence of another body. Judicial dominance is the best option for the Councils to maintain independence within it however, members representing of the other branches of government is also essential to avoid self-administration of judges. To this extent, it is important to consider the scope of the powers of the members – non-judges. Only judicial majority in a Council is not necessary to avoid undue influences on the decision of appointment of judges if the minority representing other branches of government has excessive powers as it is in case of Georgia.

In addition, considering the fact that for the councils to perform their task successfully they should be given wide range of powers in judges' appointing procedure so that no other forces should have influence on their decision making. However, as already discussed, the fact that executive participates in the appointment procedure does not automatically lead to the conclusion that judicial independence is at risk. Involvement of the other branches of government except of the judiciary in the appointment procedure is even desirable in order to avoid self-administration, self-protection of the judiciary. The crucial thing is that Council for the Judiciary should not be used as a means of giving the authority to the other branches of government to have direct control on the judiciary as it happens in Georgia.

In France, the executive branch, together with the judiciary still participates in the appointment process and the level of its influence on this process is not very low considering e.g. appointment of the Constitutional Court judges. However, the purpose of involvement of the executive branch in this procedure is not to weaken judicial independence. Rather, such interaction of the judiciary with other branches of government keeps a proportional balance between the independence of the judiciary and its accountability. In addition, considering the issues affecting directly the judges' autonomy personally, such as the term of office, is of vital importance, as well. Thus, the reason for the failure of the Council for the Judiciary does not relate only to it as a mechanism itself, judges' personal autonomy should be also guaranteed in order to maintain judicial independence. Lastly, the fact that the Council operates successfully in France leads to the conclusion that a Council for the Judiciary can be regarded as an effective instrument in ensuring judicial independence only in case its scope of powers, its composition is regulated according to the reasons it is created for.

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