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# JURIDIFICATION OF POLITICS – CONTRADICTORY RESULTS OF THE JUSTICE SECTOR REFORMS IN GEORGIA

*"Juridification is an ugly word -*

*as ugly as the reality which it describes"*[1]

## ABSTRACT

The interrelation between the law and politics permeates contemporary discussions of constitutional and statehood issues. Law and legal formalism have penetrated many areas, which were traditionally considered political, which has created a trend of juridification of politics globally. Juridification at the expense of reducing the role of political institutions, is provided by strengthening formal-legal systems. The struggle and change of balance between the "political" and the "legal" are characterized by a number of complex and contradictory outcomes.

The aim of the presented work is to investigate the trend of juridification in Georgia in the light of the reform of the justice sector. For this purpose, the paper examines changes implemented in the judicial and prosecution systems within the framework of the 2017-2018 constitutional reform. The paper tries to answer two main questions: whether the constitutional reform strengthened juridification trend in Georgia, and what problematic/contradictory results may be associated with such a reform strategy.

## I. INTRODUCTION

The search for balance between the individual and the collective, the legal and the political, the sovereign and the global, remains an unresolved issue in discussions of political law. The law significantly invaded social and political life, and „the political agenda was completely subjected to judicial control".[2] Such a trend can be observed both at the local and international levels, which is accompanied by the increasing legal regulation of domestic, regional and international issues andassignment of new functions to judicial or quasi-judicial bodies.[3] This is not surprising, nor is it unique

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[1] Gunther Teubner (ed), Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law (De Gruyter 1987) 3.

[2] Ran Hirschl, The Judicialization of Politics (The Oxford Handbook of Political Science 2011) 262.

[3] Daniel Kelemen, 'Eurolegalism and Democracy' (2012) 50 Journal of Common Market Studies 55, 57.

to any one country, as this trend is generally associated with the dominant discourse of „economic liberalization“.[4] “Courts, lawyers and “justice” are taking over and not going anywhere”[5], and this affects the wider political, socio-economic and constitutional context.

The expansion of legal structures and the increase of the legalistic discourse can have different forms and effects at national and international levels. If at the national level this may translate into an increase in the role of legal, judicial and quasi-judicial bodies in the decision-making process, at the international level it may lead to the restriction of sovereign power and recognition of the dominant role of international regulation and international tribunals.[6] The reasons for the expansion of legal regulation vary. When applying this approach within the country, there may be an expectation that the growing legal structures will be able to respond and neutralize various political and social problems caused by “distrust towards state power”.[7] At the international level, regulation may aim at establishing uniform and consistent practices, which are well-established in specific countries and creation of common legal, economic or security zones.[8] In any case, the expansion of legal methods and structures, i.e., juridification, is related to the restriction of political power. Instead of political deliberation and inclusive public reflection, legal discourse dominates the debate. Political discretion is replaced by legal formalism, judges, lawyers and bureaucrats replace political representatives, and elected bodies transfer their power to unelected institutions. As a result, such juridification causes a significant change in the balance of law and politics, weakens the political process and strengthens the primacy of the law.

This is a complex issue because the increase of juridification does not always lead to uniform results, since “once it is initiated, it develops a rhythm and effects that are not easy to contain” [9]. The main question that needs to be answered is what is the “price of juridification” and what limitations or contradictions are associated with such a trend.”[10]

The presented paper analyzes the controversial nature and consequences of juridification in Georgia’s justice sector. More specifically, the purpose of this paper is to discuss the impact of juridification trends on justice in the light of the large-scale

[4] ibid.

[5] David Levi-Faur, ‘The Political Economy of Legal Globalization: Juridification, Adversarial Legalism, and Responsive Regulation. A Comment’ (2005) 59 International Organization 458.

[6] Anne-Mette Magnussen and Anna Banasiak, ‘Juridification: Disrupting the Relationship between Law and Politics?’ (2013) 19 European Law Journal 325, 334.

[7] Lars Trägårdh and Oñati International Institute for the Sociology of Law (eds), After National Democracy: Rights, Law and Power in America and the New Europe (Hart 2004) 51.

[8] ibid, 42.

[9] Davina Cooper, ‘Local Government Legal Consciousness in the Shadow of Juridification’ (1995) 22 Journal of Law and Society 506, 508.

[10] Teubner, supra note 1, 25.

constitutional reform of 2017-2018.[11] The paper is built around two main issues: 1. Has the constitutional reform strengthened the trend of juridification in the justice system of Georgia. 2. What important difficulties and controversial issues are connected with this process.

The studies on the Georgian justice system contain a number of noteworthy findings that point to factors hindering the independence of the system.[12] Despite extensive and valuable research in this area, the effects of juridification generally remain unnoticed or are insufficiently discussed in the literature.[13] In addition, the dominant discourse and approach in the conducted studies is the issue of institutional depoliticization of justice at the expense of further expansion of legal regulation. The present paper attempts to change the dominant research framework on the justice sector. To this end, the paper shifts the traditional focus of research from the discourse of regulation to the controversial consequences of excessive legal regulation.

It should be noted here that this paper does not consider the policy of "deregulation" as a feasible alternative to increasing juridification. As Teubner points out, the critique of these historical processes "should not make us forget the libertarian function that juridification has[14]." Teubner emphasizes that the juridification process cannot be reversed or modified through deregulation or other radical processes.[15] The importance of its rethinking lies in "dealing only with the dysfunctional consequences of juridification".[16]

This paper assesses the reforms implemented in the justice sector of Georgia, in particular, in the judicial and prosecution systems. The assessment is based on the 2017-2018 constitutional reform, as it represents one of the most visible cases of changing the balance between the law and politics in the justice sector. Taking into consideration, that the mentioned constitutional reform encompasses many dimensions, this paper is limited to the research of only those aspects that are essential for the analysis of the

[11] Resolution of the Parliament of Georgia "On Creation of the State Constitutional Commission and Approval of the Statute of the State Constitutional Commission" <https://www.matsne.gov.ge/ka/document/view/3472813?publication=0> (in Georgian) [last accessed on 10 February 2023].

[12] Coalition for an Independent and Transparent Judiciary, "Judicial System: Reforms and Perspectives" (2017) <http://www.coalition.ge/index.php?article_id=150&clang=0> (in Georgian) [last accessed on 10 February 2023].

[13] ibid; Human Rights Education and Monitoring Center (EMC), "Prosecution System Reform" (2018) <https://socialjustice.org.ge/ka/products/prokuraturis-sistemis-reforma> (in Georgian) [last accessed on 10 February 2023]; Georgian Young Lawyers Association and Transparency International - Georgia, "Monitoring Report of the High Council of Justice N5" (2017) <https://www.transparency.ge/sites/default/files/iusticiis_umaglesi_sabchos_monitoringis_mexute_angarishi.pdf> (in Georgian) [last accessed on 10 February 2023].

[14] Teubner, supra note 1, 13.

[15] ibid, 27.

[16] ibid.

change in the balance between the law and the politics. It should be emphasized here, that the purpose of this study is not to assess which system of balance between the law and the politics is better for Georgia, the one in force before the constitutional reform, or the one introduced after the constitutional reform. Answering this question is beyond the scope of this study. The main task of the presented paper is only to describe the logic of the reform carried out in the justice system and to connect it with the juridification paradigm.

## II. "JURIDIFICATION"- A USEFUL PARADIGM FOR RESEARCH

This chapter aims to present the most appropriate definition of the research paradigm - the concept of "juridification" and its essential elements. Since the concept itself is broad and rather ambivalent, it is important to offer an interpretation of certain complex aspects of the term. In order to better understand the juridification trend, it is also important to analyze other legal, social or political developments that may have contributed to the elaboration of juridification approach, both at the global and local levels. This chapter does not limit itself to a simple definition of terms but aims at explaining why and how the concept of juridification can be used to study important legal and political transformations.

### 1. ELEMENTS OF JURIDIFICATION

The term "juridification" is used to describe various political, social and legal events and processes, which are characterized by the invasion and dominance of the legal in the political sphere. It also explains the relationship between the two fundamental elements of the constitutional system – the legal and the political.

Juridification can be defined as "legalization of social and political life".[17] It is also used to analyze the extension of a court's jurisdiction or legal rights and duties. It is possible to describe important institutional transformations with this concept. In other words, it can explain the relationship between various state institutions, governance processes and public policy issues, and describe how this process affects the balance between political and legal spheres. In this regard, all types of legal regulations cannot be considered as juridification, as they may not cause substantial changes in the "nature of the relationship"[18]. This paper uses the term "juridification" to analyze significant changes in institutional and governance processes.

There are other similar concepts, that to some extent, describe similar trends. For example, such a term is "judicial jurisdiction over politics". This term describes a system

[17] Levi-Faur, supra note 5, 452.

[18] Martin Loughlin, Legality and Locality: The Role of Law in Central-Local Government Relations (Oxford University Press 1996) 365.

in which 'some of the most pressing and polemical political disputes characteristic of a democratic state are referred to the courts."[19] Hirschl describes three main features of such judicialization, which may be relevant in the case of juridification as well.[20] Firstly, it is an extension of legalistic or legal discourse to essentially political issues; secondly, the application of judicial review procedures to public policy issues, and finally, "judicial jurisdiction over megapolitics"[21], i.e., subjecting to judicial jurisdiction those areas, that shape organized society or the state as a political entity. Although the concept of "juridification" and "judicialization of politics" have a lot in common, the latter is focused on the involvement of judicial or quasi-judicial bodies in solving political issues. Therefore, this paper chooses to use "juridification" as a broader term, which does not necessarily imply the involvement of courts and judicial bodies in political matters but indicates to a more general trend of legal regulation of political processes.

Juridification, to some extent, has the same meaning as "depoliticization". However, on the other hand, the term "depoliticization" also requires additional clarification, as it can be used in different ways.[22] On the one hand, institutional "depoliticization" may have a broad positive connotation in the sense of the creation of "a kind of buffer zone between politicians and certain policy areas", that excludes political instrumentalization of the public service or judiciary[23]. This may mean the process of eliminating the political vertical and mechanisms of inappropriate political control over the activities of judicial bodies and other independent institutions.

However, juridification may have more in common with another meaning of "depoliticization", which has a negative connotation. Depoliticization may well describe the process of erosion of politics through various legal, institutional and structural decisions, "by which politicians try to move to a relationship of indirect rule and/or to convince the demos that they are no longer considered responsible for certain problems".[24] Thus, essential issues of public life may disappear from the spheres of democratic public discussions and direct political responsibility of elected politicians. They can be transferred to professionalized, bureaucratic and exclusive formats.

This paper considers "juridification" as a term similar to this kind of "depoliticization". More precisely, "juridification" describes, in a way, fundamental changes between the political and the legal, while "depoliticization" refers to the consequences of this process.[25]

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[19] Hirschl, supra note 2, 254.
[20] ibid.
[21] ibid, 256.
[22] Matthew Flinders and Jim Buller, 'Depoliticisation: Principles, Tactics and Tools' (2006) 1 British Politics 293, 294.
[23] ibid, 297.
[24] ibid, 295.
[25] Teubner, supra note 1, 10.

## 2. AMBIVALENCE OF THE CONCEPT OF JURIDIFICATION

Gunter Teubner, when using the concept of juridification in the context of labor law, identified three areas, including legal, sociological and political, through which juridification can be studied.[26] In his study, Teubner emphasizes one of the most important aspects of juridification - the ambivalence of this concept, which is best expressed in its ability to "ensure freedom in parallel to taking it away".[27]

This aspect of juridification is particularly important in the context of "protection of vulnerable groups", as they can benefit from institutionalization and regulation of the state's social obligations.[28] Here it is important to distinguish between, on the one hand, the juridification of individual and collective rights, and on the other hand, the juridification of institutions and political processes. When analyzing juridification in a welfare state, Magnussen and Nielsen provide a necessary insight into the interrelation between social, civil and political citizenship.[29]

The purpose of this paper is not to analyze the issue of juridification in relation to the discourse of the rights. The paper agrees with the idea developed by Magnussen and Nielsen that "juridification of social policy provides individuals with a resource base for action."[30] Taking into consideration this position, it is important to note that the problems of one type of juridification do not necessarily and to the same degree apply to all types of juridification.

In other words, not all forms of juridification can be considered negative for democratic governance and decision-making processes.[31] Magnussen and Banasiak have developed a useful classification of legal and political relations. Based on these four clusters, they propose the following four versions of interrelations, that strengthen or weaken the balance between the law and politics:

The authors suggest that in some areas, such as the health sector, expansion of regulation and individual rights can improve access to information and resources, which in the end of the day, are of critical importance for the democratic process.[32] This type of interrelation is referred to as "political juridification".[33] In this scenario, both politics and law seem equally empowered[34]. Conversely, the authors also propose another

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[26] Teubner, supra note 1.
[27] ibid, 9.
[28] Anne-Mette Magnussen and Even Nilssen, 'Juridification and the Construction of Social Citizenship' (2013) 40 Journal of Law and Society 228, 238.
[29] Magnussen and Nilssen, supra note 28.
[30] ibid, 240.
[31] Magnussen and Banasiak, supra note 6.
[32] ibid, 332.
[33] ibid, 330.
[34] ibid.

cluster – "juridification of the political", in which the balance is tipped in favor of the law.[35] This is best expressed in cases, where matters of political importance are reduced to legal regulation, or in other words, "social reality [...] is reduced to legal reality."[36] The authors conclude that "expansion of individual rights may gradually reduce the space, in which collective bodies and institutions can implement policy, and thus lead to depoliticization of public debate".[37] A third version of the interrelation between law and politics can lead to the "politicization of law", which envisages strengthening politics by weakening the law.[38] Although it is quite similar to political instrumentalization, this type of interrelation differs from such form of politicization of the justice sector, in which judicial decisions are made according to political instructions. In case of "politicization of the law", the law itself becomes broader and more general. Consequently, the use of legal instruments varies according to the social and political context and public attitudes.[39] The last interesting direction of the interrelation is called "privatization"[40]. This concept describes a situation, where neither law nor politics play a leading role anymore. There are "other systems of knowledge" that dominate[41], for example, the logic of the market economy equally opposes the classical understanding of the political and the legal and introduces a new system of social organization. Taking into consideration these four types of possible developments, the second cluster of interrelations, which is referred to as "juridification of the political", is the most relevant for the purposes of this paper.

Blichner and Molander also offer interesting classifications. They distinguished five aspects of juridification and focused on the stages of the juridification process.[42] The first aspect is the constitutive element of law that forms the basis of the legal order and formal legalistic framework (constitutive juridification).[43] The second form describes the process of spreading legal regulation to new areas, as well as the increase of regulation of differentiated social relations.[44] The authors highlight an interesting aspect of the process and its dual nature, as sometimes juridification and de-juridification happen at the local or international level at the same time.[45] The next form of juridification is expressed in the application of the law in order to resolve a conflict[46]. This type of

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[35] ibid, 332.
[36] Youri Hildebrand, 'Freer markets, more court rulings?' (Utrecht University Repository 2010) 31 <https://dspace.library.uu.nl/handle/1874/44578> [last accessed on 10 February 2023].
[37] Magnussen and Banasiak, supra note 6, 333.
[38] ibid, 335.
[39] ibid.
[40] ibid, 337.
[41] ibid.
[42] Anders Molander and Lars Chr Blichner, 'Mapping Juridification' (2008) 14 European Law Journal 36.
[43] ibid, 39.
[44] ibid, 42.
[45] ibid, 43.
[46] ibid, 44.

juridification can be implemented within, or outside the court system. Another form describes an extension of judicial power, especially when legal norms are vague and require clear interpretation by the court.[47] And finally, the authors describe a general extension of legal thinking, that can replace any other opinion prevailing in the society. The authors describe this phenomenon as follows: "Society develops a legal culture that extends beyond or even replaces other background cultures".[48]

An overview of these clusters also reveals that some forms of juridification are crucial for the establishment of political citizenship and the formation of a proper state apparatus. However, over-expansion of the legal system can be dangerous. It can reduce the complex social reality to a single legal case. Thus, juridification is a complex phenomenon and an ambivalent term, that requires careful consideration.

## 3. THE SPREAD OF THE JURIDIFICATION TREND

In discussing the spread of juridification, several contributing factors are considered, including "the spread of the rights discourse".[49] Juridification can be used to alleviate political crisis and social tension, as well as to maintain the influence of various power groups. This phenomenon is sometimes explained by deep distrust or alienation between political and social groups, a long history of rivalry between different classes of society, or internal conflicts within the country.[50] For example, juridification can be seen as a way of solving a problem, when there is no longer any entity with sufficient legitimacy to make decisions on fundamental political issues. In such case, increasing legal formalism may be a strategic decision for the purpose of creating a peaceful basis for the coexistence of different social groups.

The trend of juridification is also related to the discourse of economic liberalization[51] and the process of "transition from state governance to market governance".[52] The idea of modern "economic society" produces the dominance of legal paradigms over democracy[53]. While "republicanism" promotes the idea of a collective existence of political society, "liberalism" is formed in the context of individualistic, negative rights.[54]

The spread of the juridification trend can be connected to different reasons at the same

[47] ibid, 45.
[48] ibid, 47.
[49] Hirschl, supra note 2, 254.
[50] ibid, 262.
[51] Hildebrand, supra note 36, 10.
[52] ibid, 13.
[53] Jürgen Habermas, Ciaran Cronin and Pablo De Greiff, The Inclusion of the Other: Studies in Political Theory (Cambridge: MIT 1998) 261.
[54] ibid, 258.

time because they are not necessarily contradictory to each other. Hirschl identifies three power actors who benefit from the expansion of "Judicialization", which is also relevant for juridification process. These actors are: "endangered political elites", "economic elites" and "judicial elites".[55] All these groups have their own interest in expanding the legal discourse. For economic elites, this benefit is manifested in the strengthening of the free market and competition, which is provided by the expansion of the established limits of state intervention.[56] For court elites, this benefit is related to increasing their influence over political and social life.[57] As for the political elites, their benefit lies in maintaining dominance and hegemony, which they achieve by transferring decision-making authority on controversial issues to unelected bodies[58]. This confirms, that the trend of spreading juridification can serve several interests at the same time.

It may sound contradictory, but economic deregulation may lead to increased regulation of political and social life. Hildebrand explains this interrelation between economic deregulation and expanded legal regulation by examining four economic dimensions. The author links this phenomenon to the need for creation of risk reduction institutions in economic systems, where state intervention has been limited[59]. In other words, legal systems are taking on a new role of risk reduction and conflict resolution, which was previously performed by the state.

According to Hildebrand, juridification can be considered as desired or unintended result of two aspects of liberalization, i.e., expansion of competition and commercialization of public sectors in detriment to public interests.[60] Competition, as a direct result of economic liberalization and deregulation, generates new disputes, thus requiring new legal forms of dispute resolution. As for the second aspect – commercialization, here the power of intervention is transferred from the state to private, profit-oriented organizations, which, in case of conflict, increases the risk of putting the interests of consumers above the public interests.

As discussed above, the dominant discourse of economic deregulation and the concept of a small state play an important role in the expansion of juridification. The issues of economic liberalization and juridification supported by such policies may prove to be particularly sensitive in countries such as Georgia, as they seek to comply with the logic of international financial aid schemes[61]. In this process, they are required to implement the policy of deregulation.[62]

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[55] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Pbk ed, Cambridge, Mass; Harvard University Press 2007) 12.

[56] ibid.

[57] ibid.

[58] ibid.

[59] Hildebrand, supra note 36, 29.

[60] ibid, 267-268.

[61] ibid, 20.

[62] James Tully, 'The Imperialism of Modern Constitutional Democracy' in Martin Loughlin and Neil

## 4. JURIDIFICATION AND LIBERAL LEGALISM

As mentioned above, the juridification trend is dictated by the growing competition and the idea of a limited state. The important question here is: What might economic deregulation mean for the legal system and how does it affect the role of law in modern society? The legal system is not isolated from other areas of statehood. Thus, the logic of legal development, to a large extent, reflects the system of other structures, including the economy. The law affects other structures and is itself influenced by them. Cooper describes juridification as "the increasingly central role of the law in structuring social, political, cultural, and economic life."[63]

In this context, the rule of law is presented as a necessary precondition for creating a predictable and favorable legal environment for investments and economic growth.[64] According to Kelemen liberal, constitutional democracies operate under the concept of the rule of law because they respect human rights and limit political power to the discourse of individual rights.[65] However, an important aspect of liberal democracy that may not be sufficiently represented in this definition, is the idea of a limited state. Liberal democracy promotes individual autonomy and less intervention of a state in people's lives.[66] This is significantly related to the concept of liberal legalism. As Levinson noted, "liberal legalism views the rule of law as a means of resolving the inevitable conflicts between atomized individuals living in a liberal society."[67]

This is a necessary insight because it highlights how deeply rooted social conflicts are in the concept of a limited state, which no longer plays a key role and transfers its functions to the private sphere. According to this logic, a limited state, in favor of a market economy, becomes an essentially conflicting form of organization of society. It is based on the logic of competition. Thus, it still produces conflicts, disputes, and more conflicts because it reduces the chances of social and political consensus.

It is interesting to analyze how such a conflicting system achieves stability and what role juridification and liberal legalism have in this process. Describing the concept of "juridification," Teubner says that "juridification is [...] the expropriation of a conflict."[68] This definition brings a key point to the discussion. By casting away politics, juridification limits the possibilities of a fundamental transformation of social life.

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Walker (eds), The Paradox of Constitutionalism: Constituent Power and Constitutional Form (Oxford University Press 2008) 316.

[63] Cooper, supra note 9, 507.

[64] Martin Loughlin, 'The Apotheosis of the Rule of Law' (2018) 89 The Political Quarterly 659, 665.

[65] Kelemen, supra note 3, 64.

[66] Wilfried Hinsch, 'Global Distributive Justice' [2001] Global Distributive Justice 22, 60.

[67] Sanford Levinson, 'Escaping Liberalism: Easier Said than Done' (1983) 96 Harvard Law Review 1466, 1467.

[68] Teubner, supra note 1, 8.

Deep-rooted social conflicts, caused by structural reasons, are limited and defined as individual cases, which must also be individually resolved through formal, legal approaches. At this point, there is no room left for broad public deliberation. It is in the interest of this dominant system to reduce problems to individual cases. As Teubner states, "[juridification] defaces social conflicts, reduces them to legal cases, and thus excludes the possibility of an adequate, future-oriented, socially useful solution."[69]

This can be explained by the assumption that the law is, by its very nature, individualistic. Individualism is an important concept for this discussion because it can be "best explained by the triumph of a market society, that favors the individual both politically and economically."[70] Relevant legal structures use this concept in their own way and create legal formalities that leave no space for collective, democratic determination. Or as Teubner points out, the repressive nature of juridification tends to depoliticize social conflicts."[71]

The form of reducing conflicts to legal disputes is largely related to the idea of procedural justice. As Hirschl puts it, "the expansion of legalistic discourse and procedures must reflect the widespread practice of translating fundamental justice into procedural justice."[72] In this sense, the role of the law is fragmented and not comprehensive. Procedural fairness is undoubtedly important, but it can only be fair if the litigants are otherwise equal. Otherwise, it may create justice only in legal disputes, courtrooms and dispute resolution contexts, but substantial inequalities and differences will persist. This fragmented view of the law hinders the radical transformation of the system. This demonstrates how juridification helps depoliticize, thus becoming a tool for achieving stability in a conflictual form of social organization.

As noted here, although the role of judicial authorities and their level of involvement increases in the case of juridification, it is still more related to procedural justice than substantive issues.[73] Therefore, such engagement cannot directly translate into the strengthening of democracy and fundamental human rights. Moreover, juridification can be used to shift attention from systemic problems to individual legal disputes.

## III. THE IMPACT OF JURIDIFICATION ON GEORGIAN JUSTICE

The recent experience of Georgia reveals the special role of legislative regulation and the strong narrative of "depoliticization" in justice sector reforms. Based on the concepts discussed in the previous chapter, this chapter aims to discuss to what extent

[69] ibid.
[70] Trägårdh and Oñati International Institute for the Sociology of Law, supra note 7, 43.
[71] Teubner, supra note 1, 9.
[72] Hirschl, supra note 2, 255.
[73] ibid.

the constitutional reform of 2017-2018 has strengthened juridification in the justice sector of Georgia and what impact these reforms may have on changing the balance between the political and the legal. To achieve this goal, the following parts of the paper analyze the sixth chapter of the Constitution of Georgia, which regulates issues related to the justice sector, including the judicial and prosecutorial systems.[74]

## 1. A COMPLEX CONTEXT AND A STRONG DISCOURSE OF DEPOLITICIZATION

After 1995, when the Constitution of Georgia defined the justice system, the institutional framework regulating this sphere was fundamentally changed several times. At different times, the country faced different challenges: systemic corruption and bribery;[75] weak legal and institutional arrangement of the justice sector;[76] total control of the judiciary by the country's political leadership and executive power;[77] disproportionately stringent and inhumane criminal justice system and sanctions;[78] lack of independence of justice bodies and political instrumentalization.[79] The reformist steps taken in response to these challenges have had direct, indirect and, quite often, controversial consequences for both the judiciary and the general democratic environment in the country.

For example, the fight against "endemic corruption" in the judicial system was successful.[80] However, the highly problematic legal and political mechanisms used for this purpose created new challenges in the system.[81] The dismissal of acting judges and appointment of new judges created ground for their manipulation and strengthening of the political vertical over the court. Later, the new government's fragmented vision regarding justice system reform, inconsistent political will, and intent to instrumentalize

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[74] Chapter 6, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].

[75] Human Rights Education and Monitoring Center (EMC), Georgian Young Lawyers' Association and Transparency International - Georgia, "Analysis of the judicial liability system" (2014) 9 <http://coalition.ge/files/analysis_of_the_judicial_liability_system_ge.pdf> (in Georgian) [last accessed on 10 February 2023].

[76] Coalition for an Independent and Transparent Judiciary, "Justice System in Georgia" (2012) 33-34 <http://www.coalition.ge/index.php?article_id=55&clang=0> (in Georgian) [last accessed on 10 February 2023].

[77] Thomas Hammarberg, 'Georgia in Transition' (2013) 9 <https://www.gov.ge/files/38298_38298_595238_georgia_in_transition-hammarberg1.pdf> [last accessed on 10 February 2023].

[78] ibid, 11.

[79] Human Rights Education and Monitoring Center (EMC), "The Politics of Invisible Power" (2015) 4-5 <https://socialjustice.org.ge/ka/products/ukhilavi-dzalauflebis-politika-kvlevis-mokle-mimokhilva> (in Georgian) [last accessed on 10 February 2023].

[80] Hammarberg, supra note 77, 5.

[81] Human Rights Education and Monitoring Center (EMC), Georgian Young Lawyers' Association and Transparency International – Georgia, supra note 75, 10.

the system[82] resulted in the reappointment and legitimization of judges whose integrity was negatively assessed by non-governmental organizations.[83]

Reforms of the justice sector were influenced by various subjective and objective political, social and ideological factors operating at different times. One of the interesting features of these reforms was the change in the interrelation between the political and legal dimensions. Over a certain period of time, the involvement of politics and the political vertical in the justice sector has intensified. This was evident even at the legislative level[84]. Later, the influence of organized politics on the justice sector was formally reduced. However, this did not cause the actual political influence to disappear.[85]

The extremely negative experience of consolidated political power, which undermines the institutional autonomy of independent bodies, created a solid basis for the retreat of the political and the advancement of the legal as a more legitimate system of organizing state institutions in Georgia. Such experience has contributed to a powerful discourse of "depoliticization" and the discussions have largely been dominated by the narrative of juridification.[86]

In 2017-2018 Georgia carried out a constitutional reform, which significantly changed the constitutional arrangement of the justice sector, institutional order and strengthened the narrative of "depoliticization". This paper does not aim to assess the benefits of the constitutional system, chosen for the organization of the justice sector of Georgia. Nor is the purpose of this paper to criticize the idea of legal reforms in general. This is a complex issue, especially due to the dual nature of juridification, which at different times may have different results, positive as well as negative.[87] Instead, this paper attempts to analyze the logic of the 2017-2018 constitutional reform, the impact of juridification on this process, and describe the change in the balance between the political and the legal in the justice sector.

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[82] Coalition for an Independent and Transparent Judiciary, supra note 12, 10.

[83] Coalition for an independent and transparent judiciary, "The coalition negatively assesses the processes ongoing in the court" <http://www.coalition.ge/index.php?article_id=151&clang=0> (in Georgian) [last accessed on 10 February 2023].

[84] Human Rights Education and Monitoring Center, supra note 79, 10; Coalition for an Independent and Transparent Judiciary, supra note 76, 13.

[85] Human Rights Education and Monitoring Center, supra note 13, 11-12; Also, Georgian Young Lawyers' Association, "Reform of the Justice System in Georgia, 2013-2021", (2021) <https://gyla.ge/files/news/ფონდი/2021/GetFileAttachment-4.pdf> (in Georgian) [last accessed on 10 February 2023].

[86] ibid.

[87] Magnussen and Banasiak, supra note 6, 330.

## 2. THE IMPACT OF JURIDIFICATION ON THE CONSTITUTIONAL REFORM

This paper claims, that the constitutional reform of 2017-2018 strengthened the juridification trends in the justice sector of Georgia. Once again, juridification can be defined as: the "distribution of more power, for example to judicial institutions or dissemination of the methods of legal reasoning".[88] This chapter analyzes the constitutional changes in the justice sector and shows the dominance of legalistic systems at the expense of replacing political ones.

Relevant to this discussion is Hirschl's question – "What is the political?"[89] In this regard, his own answer is noteworthy, emphasizing the difference between the political and the legal by referring to "deep moral and political dilemmas"[90], i.e., indicating to such dilemmas, that ultimately fall under the political and not the legal sphere. Such systems and institutions that make up the state and the organized body politic, should be the subject of political deliberation. The interrelation between law and politics, more specifically, the balance between the legal and the political, is important in every way, because it affects the nature of organization and functioning of state institutions, and social and political life.[91]

The justice sector, by its very nature, is the kind of system in which the dominance of the "political" is the least acceptable. This is related to the fundamental reservation that "the judiciary is neither functionally a pluralistic representative chamber, nor structurally a party government."[92] The justice sector, including the judiciary and prosecutor's office, should be distanced from politics to ensure independent and impartial administration of justice. The idea of independence primarily refers to the "concrete cases" under consideration[93]. As for the establishment and formation of the justice sector, this is less the private affair of specific knowledge systems or bureaucratic institutions. The process of formation of state institutions largely determines the degree of their legitimacy and trust in the eyes of the public.

## 3. GENERAL PROSECUTOR'S OFFICE OF GEORGIA

The title of Chapter 6 of the Constitution of Georgia is "Judiciary and Prosecutor's Office". It is important to note that today the prosecutor's office, together with the judicial system, is included in one chapter of the Constitution, which emphasizes the

[88] ibid, 332.
[89] Hirschl, supra note 2, 257.
[90] ibid.
[91] ibid, 256.
[92] Pierre Rosanvallon, Democratic Legitimacy: Impartiality, Reflexivity, Proximity (Princeton University Press 2011) 160.
[93] Martin Shapiro, 'Judicial Independence: New Challenges in Established Nations' (2013) 20 Indiana Journal of Global Legal Studies 253, 268.

important transformation of the constitutional logic. From 2008 to 2018, the Prosecutor's Office was part of the Ministry of Justice. Naturally, such institutional framework contained a number of risks, including the possibility of political instrumentalization of criminal prosecution.[94] This does not entail only analytical reasoning or hypothetical risk. The Prosecutor's Office was an extremely politicized institution that was involved in a number of high-profile political cases.[95] Criticism of such a system has sparked a discussion about a new and appropriate place for the Prosecutor's Office in the constitutional system. This led to a series of prosecutorial reforms in 2013, 2015 and 2017-2018. Despite these changes, the institutional place and arrangement of the Prosecutor's Office remained a matter of debate.[96]

The 2017-2018 constitutional reform created a new constitutional framework, according to which the Prosecutor's Office is no longer part of the government cabinet. It is headed by the General Prosecutor, who is nominated by the Prosecutorial Council and elected by the full majority of the Parliament.[97]

The Constitution defined the accountability of the Prosecutor's Office to the Parliament in the form of submitting annual reports[98]. Also, the impeachment mechanism was introduced as the only way to remove the General Prosecutor from the office[99]. According to the Constitution of Georgia, impeachment can be used only in case of committing a crime or violation of the Constitution[100]. The Constitution left the regulation of other issues to the organic law.[101]

The new constitutional framework of the prosecution system consists of three important aspects, that are crucial when considering the degree of juridification in constitutional reform:

**The first** concerns the new constitutional place of the Prosecutor's Office. In the past, the Prosecutor's Office was a part of the Cabinet of the Government, and a corresponding provision was included in the same chapter of the Constitution, that regulated the work of the Cabinet of Ministers.[102] From 2018, at the level of the Constitution, the Prosecutor's Office is considered together with the judicial system[103]. This change demonstrates the

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[94] Human Rights Education and Monitoring Center, supra note 13, 9.
[95] Hammarberg, supra note 77, 14.
[96] Human Rights Education and Monitoring Center, supra note 13, 9-10.
[97] Article 65, paragraph 2, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].
[98] ibid, article 65, paragraph 4.
[99] ibid, article 48, paragraph 1.
[100] ibid.
[101] ibid, article 65, paragraph 5.
[102] Article 814, Constitution of Georgia (edition valid until 2017) <https://www.matsne.gov.ge/ka/document/view/30346?publication=33> [last accessed on 10 February 2023].
[103] Article 65, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?

logic of the reform, which aimed at the separation of the Prosecutor's Office from the government and its placement alongside the justice system. Taken separately, this change could be considered as a legitimate goal of giving more autonomy to the Prosecutor's Office, which, according to the authors of the reform, could be achieved by distancing it from the Cabinet of the Government. However, below will be presented reasoning, that points to the persisting problem of political autonomy of the Prosecutor's Office in the same constitutional framework;

**The second issue** concerns reference to the collegial body - the Prosecutorial Council - in the text of the Constitution and its consideration as a guarantor of the depoliticized selection of the Prosecutor General. This change also indicates the intention of increasing the role of collegial bodies instead of political bodies. Before the constitutional reform of 2017-2018 selection and nomination of the Prosecutor General was the competence of the Minister of Justice.[104] After a month of consultations with lawyers, the Minister had the right to select and nominate at least three possible candidates.[105] Later, these candidates were reviewed by the Prosecutorial Council and a list of selected candidates was drawn up, from which the final candidate was supported by the Cabinet of Ministers and elected by the Parliament.[106] After the 2017-2018 constitutional amendments, the Minister of Justice no longer participates in the process of selection of candidates. The selection and nomination of a candidate became the exclusive authority of the Prosecutorial Council. According to the new legal framework, it is the Prosecutorial Council that initiates the consultations to select candidates.[107] The Cabinet of Ministers no longer participates in the process and the nominated candidate is directly presented to the Parliament for election. This change, at first glance, may seem to exclude excessive participation of the executive power, and in this way, strengthen the principle of depoliticized selection. However, even in this case, the contradictions that remained even after this reform and that prevented the institutional independence of the Prosecutor's Office should be taken into account. In this discussion, the manner of formation of the Prosecutorial Council as a body with the central role in the selection is particularly noteworthy. The non-prosecutor members of the Prosecutorial Council are elected by the Parliament with the majority of the full composition, and the degree of political influence in this process is clear.[108]

**The third issue** is related to the election of the Prosecutor General in the Parliament by the majority of the full composition. This is the most important aspect in this discussion because it can show more clearly the logic of the constitutional reform. The new

publication=36> [last accessed on 10 February 2023].

[104] Article 91, Law of Georgia on Prosecutor's Office (annulled from December 16, 2018) <https://www.matsne.gov.ge/ka/document/view/19090?publication=19> [last accessed on 10 February 2023].

[105] ibid, article 91, paragraph 1.

[106] ibid.

[107] ibid, article 16, paragraph 4.

[108] Article 19, paragraph 2, the Organic Law of Georgia on Prosecutor's Office <https://matsne.gov.ge/ka/document/view/4382740?publication=9> [last accessed on 10 February 2023].

constitutional framework preserved the previously existing balance of power between political groups, as it retained the tradition of election of the General Prosecutor by a majority vote of the Parliament.[109] Although depoliticization of the system was defined as the key argument of the constitutional reform[110], the 2017-2018 reform maintained dominance of the parliamentary majority and failed to introduce a new constitutional mechanism to promote broad political participation in the process, which would have "insured the system against the appointment of a candidate on a political basis"[111]. The argument mentioned above should be taken into account in the discussion here, namely, that the influence of the parliamentary majority on the formation of the Prosecutorial Council itself, which presents the selected candidate to the Parliament, is high.

## 4. THE SUPREME COURT OF GEORGIA

Another example of juridification is the change in the way judges of the Supreme Court are nominated. Before the constitutional amendments, the candidates for the Supreme Court judges were nominated by the President and elected by the Parliament. In this case too, based on the argument of depoliticization, the Constitutional Commission presented a new version of the process of selection of judges. According to the new constitutional framework, candidates for the Supreme Court justices are nominated by the Supreme Council of Justice and elected by the Parliament by a majority of the full composition[112]. As a result of the constitutional reform, judges are appointed for life instead of a 10-year term.

Before the constitutional changes of 2018, the Supreme Court was the only court in the system of common courts, which was formed by a different procedure, based on the participation of the President and the Parliament. Unlike the Supreme Court, the judges of the courts of the first and second instances (except for some differences in the transitional period) were appointed for life by the High Council of Justice.[113]

The model operating in the lower instances provided to the Constitutional Commission and the Parliament as a whole with sufficient information to evaluate the system dominated by the Supreme Council of Justice, and accordingly, to make a decision on the further expansion of its mandate. Despite the strong opposition to the transfer of

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[109] Article 91, paragraph 4, Law of Georgia on Prosecutor's Office (annulled from December 16, 2018) <https://www.matsne.gov.ge/ka/document/view/19090?publication=19> [last accessed on 10 February 2023].
[110] Human Rights Education and Monitoring Center, supra note 13, 12.
[111] ibid, 13.
[112] Article 61, paragraph 2, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].
[113] Article 36, paragraph 4, Organic Law of Georgia on Common Courts <https://www.matsne.gov.ge/ka/document/view/90676?publication=47> [last accessed on 10 February 2023].

the right to nominate candidates for membership of the Supreme Court to the Supreme Council of Justice[114], the argument of “depoliticization” won in this case as well.

Systemic and fundamental flaws in the context of the selection and appointment of judges in lower courts were broadly documented and discussed by observers[115]. An opinion was expressed that the Supreme Council of Justice could not ensure the selection of candidates in a transparent, impartial and objective manner, and the Council’s decisions did not contain proper reasoning.[116] According to NGOs, some judges were promoted without sufficient justification, while others were dismissed from the judiciary, allegedly for insubordination[117]. Their monitoring groups emphasized the power of a group of influential judges operating in the Georgian judicial system[118]. Although similar opinion already existed during the constitutional reform, the reform strengthened the role of the widely criticized High Council of Justice.

As with the election of the Prosecutor General, the constitutional reform preserved the sole influence of the parliamentary majority in regard to judges as well[119]. On the one hand, the exclusive right to nominate candidates was transferred to the Supreme Council of Justice, and on the other hand, the power to make the final decision was retained by the parliamentary majority, without the need to reach a consensus with the political opposition. The only balancing factor, which is important to note in the context of the 2017-2018 reform, is related to the increase of the number of votes required for the election of non-judge members of the Supreme Council of Justice by the Parliament. Differently from the election of non-prosecutor members of the Prosecutorial Council, where the dominance of the parliamentary majority is evident, the non-judge members of the Supreme Council of Justice are elected by the Parliament with a majority of at least three-fifths of the full composition[120]. This increases the role of the parliamentary minority in the process of formation of the Supreme Council of Justice, although the role of the minority remains neglected in the case of the selection of judges of the Supreme Court and the Prosecutor General.

The examples discussed in this chapter reveal the connection between the changes made in the justice sector during the constitutional reform of 2017-2018 and the trend

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[114] Coalition for an Independent and Transparent Judiciary, “Opinion of the Coalition on the new draft of the Constitution of Georgia” (2017) <http://www.coalition.ge/index.php?article_id=153&clang=1> (in Georgian) [last accessed on 10 February 2023].

[115] Coalition for an Independent and Transparent Judiciary, supra note 12, 40.

[116] Georgian Young Lawyers’ Association and Transparency International - Georgia, “Three-year summary report of the monitoring of the High Council of Justice (2012-2014)“, (2015) 8 <https://gyla.ge/files/news/იუსტიციის%20უმაღლესი%20საბჭოს%20მონიტორინგის%20სამწლიანი%20ანგარიში.pdf> (in Georgian) [last accessed on 10 February 2023]; Georgian Young Lawyers’ Association and Transparency International - Georgia, supra note 13, 24.

[117] Coalition for an Independent and Transparent Judiciary, supra note 12, 13.

[118] ibid.

[119] Article 61, paragraph 2, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].

[120] ibid, Article 64, paragraph 2.

of juridification. The next part of the paper will analyze what risks may be associated with such a trend in the country.

## 5. WHAT CHALLENGES ARE ASSOCIATED WITH JURIDIFICATION IN GEORGIA?

Juridification is associated with certain limitations and problems that must be taken into account. The failure of legislative regulation is broadly viewed by Teubner as a natural consequence of the complex nature of the juridification process[121]. This process is accompanied by weaknesses and problems, characteristic to it, and there is an opinion that "the biggest problem with juridification is that it weakens the democratic process."[122] This part of the study analyzes possible contradictory results of the 2017-2018 constitutional reform in Georgia. In particular, in the present paper, we try to analyze what challenges can be created as a result of focusing on legal formalism and transferring significant power to collegial, non-elected bodies without seeking consensus among political forces in decision-making.

The reforms described above subordinated important issues to formalized and professionalized systems, and in this way, weakened political responsibility for important processes. Tushnet discusses an important aspect of interrelation between the political power and judicial bodies, noting that the delegation of power from elected government officials to unelected bodies (i.e., "judicial elites") "may be particularly attractive when political elites believe that they share the views of judicial elites on this issue".[123]

The juridification trend enhanced by the constitutional reform has had significant side effects that need to be addressed. In case of the Georgian justice system, weak democratic legitimacy of the justice sector and depoliticization of systemic problems can be considered as such side effects. Both issues will be discussed below.

## 6. WEAK DEMOCRATIC LEGITIMACY

In a broad sense, legitimacy can be defined as "the right to rule and recognition of this right by the ruled."[124] Legitimacy cannot be reduced only to legal rules and norms, more precisely, "legality is a visible element of legitimacy, although it cannot exhaust it."[125]

[121] Teubner, supra note 1, 24.

[122] Fergal Davis, 'The Human Rights Act and Juridification: Saving Democracy from Law' (2010) 30 Politics 91, 95.

[123] Mark Tushnet, 'Political Power and Judicial Power: Some Observations on Their Relation' (2006) 75 Fordham Law Review 755, 761.

[124] Mike Hough and Stefano Maffei, 'Trust in Justice: Thinking about Legitimacy' (2013) 12 Criminology in Europe: Newsletter of the European Society of Criminology 4, 5.

[125] David Beetham, The Legitimation of Power (Basingstoke: Macmillan Education UK 1991) 4.

The institutional legitimacy of the justice sector can be evaluated by "normative" and "empirical", i.e., objective and subjective criteria.[126] From a normative point of view, the justice system can be considered legitimate if it corresponds to the objective criteria defined in advance.[127] However, this is only one part of legitimacy, as it does not measure actual or "perceived legitimacy,"[128] which represents the extent to which people recognize the legitimacy of power in real life.

Among several aspects of institutional legitimacy are procedural justice and fair treatment, effectiveness, "moral authority," or the belief, that state institutions respect and reinforce the same moral standards as society.[129] There is an opinion, that there is a significant correlation between procedural justice and the legitimacy of state institutions.[130] A particularly important aspect of the legitimacy of courts is the appointment of judges.[131] While discussing the connection between legitimacy and direct election of judges, Rosanvallon considered it necessary to rethink such connection in regard to "institutions of justice".[132] In his opinion, for the purposes of legitimacy, a "certain unanimity" between political parties should be ensured in regard to appointment of judges.[133]

For the purposes of this paper, it is important to assess what impact did juridification, encouraged by the 2017-2018 reforms can have on the legitimacy of the justice sector, which does not have an "autonomous source of legitimacy". [134]Again, it should be noted that legitimacy is not limited to "legal validity"[135] or to comply with pre-existing legal norms.

As mentioned in the previous chapter, the constitutional reform strengthened the legal elements and increased the special role of the non-elective collegial bodies in the process of appointing the judges of the Supreme Court and the Prosecutor General. The changes limited the role and discretion of political subjects. With the legitimate argument of depoliticizing the justice system, legal procedures replaced political processes, although, as stated previously, constitutional reform, in both cases, preserved the dominance of the parliamentary majority over the final decision-making process.

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[126] Hough and Maffei, supra note 124, 5.
[127] Mike Hough and others, 'Procedural Justice, Trust, and Institutional Legitimacy' (2010) 4 Policing: Journal of Policy and Practice 203, 204.
[128] ibid.
[129] ibid, 205.
[130] Hough and Maffei, supra note 124, 7.
[131] Rosanvallon, supra note 92, 155.
[132] ibid, 161.
[133] ibid, 163.
[134] Trägårdh and Oñati International Institute for the Sociology of Law, supra note 7, 47.
[135] Beetham, supra note 125, 4.

How does this relate to the issue of legitimacy more broadly? Naturally, there is not just one legitimate way of shaping justice institutions, or just one kind of instruction as a response to the "independence-accountability paradox" of judicial institutions.[136]

As mentioned above, "unanimity" or political consensus is a crucial aspect of the legitimacy of judicial institutions. This idea is shared by Kelemen, who emphasizes the importance of the selection procedure for the democratic legitimacy of courts, noting that "higher courts are not created to represent the current majority (that is the task of the parliament)." [137]

In contrast, the Supreme Court judges and the Prosecutor General are elected by the Parliament by a full majority. This strengthens the concentration of power in the hands of the ruling majority. In this way, the Constitution paves the way for one-party appointments and rejects the idea of consensus necessary for legitimacy. As Menabde points out, candidates can gain the necessary trust through "political agreement, not mathematical rationing of criteria," which was completely ignored during the constitutional reform.[138]

It is very important to find a proper balance between the law and politics in the process of formation of judicial bodies. "Legal Standardization" may swallow democracy and lead to "technocracy".[139] A proper balance between law and politics should ensure, that the bureaucratization of important aspects of public life does not weaken the idea of political participation[140]. A democratic system must first of all be seen as a system, that enjoys collective trust and legitimacy because it represents all groups in society. Consensus-oriented decision-making can be considered a crucial element of such system. This issue is even more relevant in the modern era, when the "distance between institutions and the population" is more evident and governance is becoming more technocratic.[141] Under these conditions, juridification tends to further reduce the role of consensus, as it itself feeds on conflicting interests. Therefore, this approach reduces "the number of people, sitting at the negotiating table for the purpose of reaching of a consensual decision".[142]

The 2017-2018 constitutional reform left the election to the most important positions in the judiciary and Prosecutor's Office in the hands of the parliamentary majority and ignored the idea of multilateral political consensus.

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[136] Shapiro, supra note 93, 264.
[137] Kelemen, supra note 3, 65.
[138] Vakhtang Menabde, 'Demise of Politics - Selection of the Composition of the Supreme Court on the Existing Notions of Status Quo and Prospects of the Reform' (2015) 8 European Constitutional Law Review 46, 66.
[139] ibid, 68.
[140] Magnussen and Banasiak, supra note 6, 333.
[141] Loughlin, supra note 18, 372.
[142] Kelemen, supra note 3, 67.

## 7. DEPOLITICIZATION OF SYSTEMIC PROBLEMS

In some jurisdictions, legislative reforms not only fail to achieve their goals, but also create new threats that require careful consideration. Teubner called this phenomenon a "legal irritants"[143] and emphasized how legal initiatives lead to autonomous or unintended processes in the system, in which they are introduced. As David Levi-Faur points out, "subsystems have the capacity to be cognitively open but normatively closed."[144] These considerations may explain why seemingly positive legal reforms (for example, the institutional separation of political and judicial power) can cause contradictory results in specific contexts.

This is particularly problematic in complex political contexts, where political power is concentrated in the hands of a single political group and democratic institutions remain weak. An important aspect of such a regime is the manipulation with legislative changes to disguise the concentration of political power and the absence of democratic accountability. The authorities can implement various positively evaluated legislative reforms without any real motivation to achieve substantial changes in reality.

In case of Georgia, depoliticization of political issues and reduction of political accountability of the ruling elite can be considered as another result of juridification. As a result of the constitutional reform formation of the justice sector has become more bureaucratic, and thus a legal, rather than a political issue. The constitutional framework blurred the boundaries of political responsibility and made these issues largely a matter of professional and legal discussion.

The intrusion of the legal into politics is largely the result of the strategic decision of political actors, who in this way can deliberately create a "labyrinth" to avoid political responsibility[145]. To some extent, Tushnet describes a similar approach in regard to the interrelation between the court and elected officials.[146] Tushnet notes that sometimes "isolation of a particular issue from politics" is a solution for political leaders who want to avoid political unrest[147]. Hirschl argues that the tendency to transfer political issues from representative bodies to non-elected institutions is due to the desire of elite groups to preserve the hegemonic order from periodic changes that popular, democratic processes lead to.[148]

As a result of analyzing the constitutional reform of 2017-2018 from this perspective, it can be noted that the political burden of the ruling party has been alleviated to some

[143] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 The Modern Law Review 11, 12.
[144] Levi-Faur, supra note 5, 460.
[145] Hirschl, supra note 2, 269.
[146] Tushnet, supra note 123.
[147] ibid, 760.
[148] Hirschl, supra note 55, 16.

extent. This is especially noticeable in case of the Prosecutor's Office, which is no longer part of the Cabinet of the government. Combining the constitutional provisions on the Prosecutor's Office and the court in one chapter may indicate a political intention of separating the Prosecutor's Office from institutionalized politics in order to create a "risk management defensive technique"[149] in case of public dissatisfaction with the prosecutor's system.

As mentioned above, the problem of politicization did not really disappear by separating the Prosecutor's Office from the Cabinet or by introducing new ways of selecting judges and the Prosecutor General. The lack of political consensus and concentration of power in the hands of the ruling majority, as the main source of the problem, is still present. Therefore, the separation of the Prosecutor's Office and the Cabinet or strengthening of professional entities instead of political ones in the process of selection of judges and the Prosecutor General cannot be considered as an effective mechanism for ensuring the political neutrality of the justice system.

The interest of the political group in power towards such an institutional arrangement can be explained by several reasons: based on the new constitutional design, the political authorities can no longer be formally and directly identified with the problems arising in the justice system. Hence, the government can avoid significant political upheaval or paying high political costs by distancing these issues from politics. The weakening of political accountability is largely the result of the process of juridification in the justice sector. As Hirschl argues, "handing over of controversial political "hot potato" to justice sector is a convenient way for politicians, who are unwilling or unable to resolve public disputes in the political sphere."[150] Changes in the justice sector can be seen as an attempt by politicians to avoid such issues.

By "depoliticizing" political issues, the legal narrative reduces not only the political responsibility of the ruling elite, but also the possibility of collective reflection on the part of the society. Issues of organizing the justice sector are transferred to specific knowledge systems and subjected to bureaucratic procedures. Discussions on these issues become less accessible to the public, as the process involves formalized procedures, criteria, legal details and complex professional justifications. More importantly, if things go wrong, politicians can easily distance themselves and insist that specific issues are within the responsibility of non-elected institutions. In this way, essentially political and institutional problems can be positioned as simple, individual flaws that do not represent a systemic political challenge. As discussed in the second chapter, with such a presentation of the situation, collective political activity is significantly neutralized, which also makes it difficult to "form political units with common goals."[151]

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[149] Flinders and Buller, supra note 22, 297.
[150] Hirschl, supra note 2, 17.
[151] Loughlin, supra note 18, 373.

## IV. CONCLUSION

The aim of this paper was to describe and evaluate the juridification trends in the justice sector of Georgia. For this purpose, the constitutional reform of 2017-2018 was analyzed, which significantly changed the balance between the legal and the political and shifted crucial issues from politics to legal and professional spheres.

The constitutional reform separated the Prosecutor's Office from the Cabinet of the government, while in the process of electing Supreme Court judges and the General Prosecutor, political entities were replaced by collegial bodies. In this way, the powers of the non-elected bodies, i.e., the Supreme Council of Justice and the Prosecutor's Council were increased. Instead of political entities, the selection and nomination of candidates became the exclusive authority of collegial bodies, through the use of formal legal procedures and criteria.

As noted in the research, the new interrelation between the political and the legal, resulting in the increase of formal legal procedures and regulation, as well as the transfer of the burden from political subjects to non-elected bodies, and disregarding of the idea of political consensus is not only unsuccessful for achieving the primary goal of depoliticizing justice, but also generates significant contradictions and side effects.

The new constitutional design could not identify the main reason for the politicization of the justice sector, which lies in the logic of the organization of political power in Georgia, and thus, could not give an answer to it. Although significant authority in the formation of judicial bodies was transferred to collegial, professional bodies, the authority of reaching of decision regarding nominated candidates remained in the hands of the parliamentary majority. The constitutional reform, which ostensibly aimed to ensure depoliticization of the judiciary, actually disregarded this idea by preserving the sole power of the majority.

Constitutional reform chose to opt towards juridification instead of a consensus-based system. Juridification is a tendency characteristic to the dominant system of liberal legalism, where important public issues are privatized by bureaucratic institutions and formal procedures. Important public issues are reduced to legal cases, systemic problems are translated into individual responsibilities, and the political field is largely depoliticized. As mentioned, juridification is a means of creating a "labyrinth" to avoid political responsibility[152]. The constitutional reform of 2017-2018 showed the intention of the creation of exactly such labyrinths through juridification.

Despite numerous contradictory outcomes of juridification, the transition from regulation to deregulation cannot be seen as an appropriate and worthwhile solution. Deregulation is still based on the primacy of competition and ignores the important

[152] Hirschl, supra note 2, 269.

idea of law, which ensures "coordinating with each other the sectoral rationality of different self-regulatory systems".[153] It is worth considering here the historical role of juridification in limiting majoritarianism after the Second World War.[154] It should also be noted, that in the past and in the present, non-democratic regimes, in the name of strengthening democracy, opted towards marginalization of the law, individual rights and restrictions on political power. Such regimes claim to represent the real people and fight against elite politics, when in reality they weaken democracy and destroy the basic democratic framework[155]. With this in mind, questioning the nature of juridification should not be seen as an automatic rejection of the progressive idea behind the law.

This paper does not have the ambition to propose specific alternatives to juridification, although it does attempt to present the faint outlines of future research in this direction. For example, instead of radical deregulation, more subtle forms of regulation need to be explored.[156] In an environment of highly differentiated and conflicting interests, the function of legal regulation should be establishing of basic framework for reaching a multilateral agreement, rather than dictating the agreement itself. The law must fulfill its crucial function and ensure fair conditions of negotiations by imposing necessary restrictions on the dominant and powerful parties. In case of the justice sector, such regulation may facilitate consensus-based political deliberation by increasing the role of different social and political groups. In this case, the legislative framework will not be a substitute for policy, but rather an enhancer of actual policy.

[153] Teubner, supra note 1, 32.
[154] Trägårdh and Oñati International Institute for the Sociology of Law, supra note 7, 50.
[155] David Landau, 'Abusive Constitutionalism' (2013) 47 U.C. Davis Law Review 189, 191; David Prendergast, 'The Judicial Role in Protecting Democracy from Populism' (2019) 20 German Law Journal 245, 246.
[156] Teubner, supra note 1, 34.