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The Judiciary Reform in Georgia and its Significance for the Idea of European Integration

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Executive Summary

The policy brief examines the dynamics of judiciary reforms in Georgia and their implications for Georgia's european integration. It is argued that while recent waves of reforms did improve institutional quality of Georgia's justice system formally, main challenges of the system remain unsanswered. Judicial corporatism, lack of transparency and politicization keep undermining integrity of Georgia's justice system and ist overall democratic consolidation. While EU does not apply strict conditionality on Georgia for now, these challenges may become a major stumbling block for Georgia's next steps in the process of the European integration.

Key Words: Judiciary system, Georgia, European Union, judicial corporatism, waves of judicial reform.

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Introduction

The efficient functioning of the judiciary and justice system remains the Achilles' heel of Georgia's political system. While four recent waves of reforms have formally improved and refined the quality of the judiciary institutionally, these reforms have not influenced the efficiency and transparency of the judicial system in any practical sense. Nepotism, judicial corporatism, political bias and vulnerability to overreach and influence from the executive branch remain major challenges for the judicial system. Consequently, the waves of reforms carried out to date, to some extent, can be assessed as formally successful despite the lack of significant, all-encompassing results. Democratic consolidation and the process of building rule of law in Georgia cannot be completed without fundamental changes in the judiciary.

The smooth and transparent functioning of the judicial system is also of great significance for the relations between the European Union (EU) and Georgia as well as for Georgia's prospective European future. The text of the Association Agreement (AA) signed in 2014 outlines the necessity of judicial reform to ensure the independence and efficient functioning of the judiciary (Official Journal of the European Union 2014, 4). Judicial reform was also among those 20 goals included in the "20 deliverables for 2020" initiative (Georgian Institute of Politics 2020). According to various assessments, the goal indicated has been partially achieved (Georgian Institute of Politics 2020). Judicial reforms are also set out in the European Commission's new strategic document outlining the EU's future cooperation prospects with Eastern Partnership (EaP) countries after 2020. According to the document, the aim of judicial reform is to eventually bring the judiciary closer to European standards and through the close involvement of civil society and the business community develop a culture of law (European Commission 2020, 9).

However, on the other hand, the role of the EU itself in the process of judicial reform is ambivalent. The EU together with the international community has made efforts to provide financial and technical assistance, but, at the same time, has often refrained from using political conditionality towards the judiciary and executive bodies (Natsvlishvili 2016). In the absence of external pressure and domestic political will it is not at all surprising that in Georgia, as well as in other EaP Countries, the implementation of a comprehensive and effective judiciary reform has failed. While the multi-year reform process has formally improved and refined the judiciary in Georgia, fundamental problems persist and are resistant to change, despite signing the AA and implementing its initial phase.

Moreover, it should be noted that along with the EU's lack of substantial pressure on Georgia, the stagnation of judicial reforms jeopardizes the future prospect of deepening Georgia-EU ties. This as well contradicts the Georgian government's plan to join the EU - Roadmap2EU (Georgia Today 2019). Although the EU does not currently apply strict democratic conditionality to the EaP Countries, including the Associated Countries, considering the current situation in the judiciary, Georgia should not have the illusion that it will be able to meet the Copenhagen criteria needed for EU membership. At the same time, the EU itself has had negative experiences since the latest enlargement in a number of Eastern European countries (Romania, Bulgaria, Hungary) regarding insurmountable systemic problems and corruption in the judiciary. Therefore, it is expected that criteria relating to the judiciary will be further tightened for future candidate

countries. Against this background, in the medium and long term, a malfunctioning judiciary might become a major political, legal and technical obstacle for Georgia to join the EU.

This document reviews the dynamics of recent judicial reforms in Georgia together with their compliance with EU requirements. At the same time, it identifies key challenges and gives recommendations to improve the efficiency of the judiciary and raise the quality of democracy.

Four Stages (Waves) of Judiciary Reform: More Form, Less Content

Georgia is still considered a transitional democracy. The efficient and transparent functioning of state institutions pose a significant challenge. Although these problems equally applied to all the three branches of government at first, the reforms carried out over the last decade have significantly improved the institutional quality of legislative and executive bodies, whilst the judiciary has remained the same. As an example, recent legal reforms have somewhat improved the functions of legislative and executive bodies. This ensued as a result of the 2017/18 Constitutional Reform which made Georgia a classic parliamentary republic, thus significantly approaching it to the European standard of governance.[3] In contrast, over the last two decades the field of justice has become an almost inviolable space[4] with its problems consistently exposed in Georgia[5] (by the Public Defender, NGOs)[6] and beyond[7] (Venice Commission of Council of Europe[8], OSCE/ODIHR[9], the European Union.[10])

At the same time, formally, the process of reforming the judicial system is constantly underway in Georgia. The process took on a new spirit after the change of government in 2012 as the new government aimed at freeing the judiciary from political pressure and transforming it into an efficient institution. Out of the judiciary reforms implemented since the 2012 change of government, the four stages (2013-2020)[11] called "waves" are noteworthy to mention. The brief summary of the reforms is given in the table below.

[3] It is noteworthy that this reform also had problems. For example, postponing proportional electoral system to 2024; Restrictions on the constitutional control of elections and electoral law within electoral disputes for Constitutional Court together with enactment of a parliamentary republic standard in unicameral parliament.

[4] Regardless of the fact that in the scope of the last constitutional reform the High Council of Justice already is a constitutional body, its status and function being already defined at the constitutional level.

[5] See: (Menabde 2020)

[6] See recent year reports by public defender; see also: (Transparency International Georgia 2016a, 2020; Coalition for independent and transparent justice 2020; Maia Talakhadze and Kukava 2019; Ketevan Kukava, Maya Talakhadze, and Nino Nozadze 2020; Nozadze 2020).

[7] (U.S. Embassy in Georgia 2019).

[8] (European Commission for Democracy through Law (Venice Commission) 2020, 2019).

[9] (OSCE/ODIHR 2019, 2020).

[10] (European Parliament 2020).

Table 1: The Four Stages (Waves) of the Judiciary Reform in Georgia (2013-2019)

I Wave (2013)
• The rules to staff the Council of Justice changed • The role of the self-governing body of judges, i.e. the Conference of Judges, increased • The Disciplinary Board of the Court distanced from the High Council of Judges • The High School of Justice distanced from the President of the Supreme Court.
II Wave (2014)
• The general rule to appoint judges for life entered into force • Prior to the appointment of judges for life, the law defined the requirement for the appointment of all the judges for a three-year probationary period [12] • The rules to evaluate judges appointed for probation were defined in details and a new body, the Qualification Chamber of the Supreme Court, was established.
III Wave (2017)
• Introduction of an electronic rule of case distribution implying random distribution of cases and depriving court heads of interference in the process • The possibility to appeal against the refusal of the High Council of Justice to appoint a judge for a 3-year term • Resolving the issue of conflict of interest during the competition for judges • Improvement of the rule regarding business trips of judges and ensuring additional guarantees for them in this direction • Reducing the function of the Secretary of the High Council of Justice, e.g. introduction of an independent inspector and management department.
IV Wave (2019)
• Head of High Council of Justice is obliged to present an annual report about council activities to the conference of judges • Changes in rules of recruitment of High Council of justice • Steps taken to improve transparency of sessions of High Council of justice • Categorization of legal acts into individual and normative types.

In general, the four waves of reforms contained lots of positive elements. As a result, the Georgian judicial system has been formally improved and refined. However, the reforms failed to tackle the main challenges and transform the Georgian judiciary into an independent and transparent institution. Accordingly, despite a number of successful cosmetic reforms, the judicial system and justice still face many significant problems in Georgia. That is why, the complete implementation of the supremacy of law and establishment of rule of law was impossible.

[11] (Transparency international Georgia 2016b; Mariam Gobronidze, Ketevan Kukava, and Chkhaidze 2020).

[12] It should be noted that probationary appointment of judges deserved a negative assessment by domestic and international observers. This requires correction.

The three most important and closely related challenges are: judicial corporatism, politicization of the judiciary, dependence on political power as well as lack of institutional transparency. Judicial corporatism is one of the main challenges for the Georgian judicial system. It implies a disproportionate influence of an organized group of judges on the functioning of the judiciary. Through the use of various mechanisms the same group aims at "subduing the judicial system to the executive body and, thus carrying out political tasks" (Interpressnews 2019). Judicial corporatism also undermines the implementation of good governance and justice in the judicial system, thus promoting harmful values such as nepotism, conformism and a culture of secret deals (ibid). These dynamics reach all branches of the court. The appointment of two new judges from the judiciary in the Constitutional Court particularly strengthened judicial corporatism in common court systems within the Constitutional Court itself. Recent decisions regarding the case of Nikanor Melia, as well decisions regarding the Public Defender's lawsuits[13] addressing the issues of constitutionality of legal proceedings critically assessed by the Venice Commission and the OSCE/ODIHR on the appointment of Supreme Court judges, outline the evidence of tendentiousness and bias.[14] In order to eliminate judicial corporatism, it is necessary for the political authorities to demonstrate a strong will and bring about important institutional changes in the judiciary, including further reform of decision-making procedures and operation standards by the Council of Justice.

Politicization of the judiciary and institutional opacity are also problems directly related to judicial corporatism. Despite some institutional changes, the selection process for judges and other important members of the staff still remains problematic. In terms of compliance with the principle of democracy and rule of law, the legislation regulating procedures for the appointment of judges of the Supreme Court as well as relevant reform implemented in 2019-2020 turned out to be particularly problematic. Parliament only took superficial consideration of the remarks of the Venice Commission and the OSCE/ODIHR.

In some other "transitional" countries, judicial reform was stimulated by the introduction of so-called transitional justice mechanisms. Besides political institutional reforms, they imply the process of replacing old staff. The process should be led in a way that does not harm the prestige of the judicial system and its independence. However, unfortunately, the Georgian authorities, both old and new, have to this day avoided reflecting on the past and clearing the judiciary of corrupt and compromised judges.[15]

These challenges have a negative impact on the attitude of the Georgian population towards the judiciary. The judiciary occupies one of the last places in terms of public confidence. For instance, according to a social survey conducted in 2019 only 3% of the population have full trust in the court (Civil Georgia 2019). According to the same survey, only 25% of the population consider

[13] See dissenting opinions of the judges of the Constitutional Court of Georgia (Teimuraz Tughushi, Irine Imerlishvili, Giorgi Kverenchkhiladze and Tamaz Tsabutashvili) regarding the September 25, 2020 decision (#3/2/1473) of the Plenum of the Constitutional Court of Georgia (Nikanor Melia case).

[14] See dissenting opinions of the judges of the Constitutional Court of Georgia (Teimuraz Tughushi, Irine Imerlishvili, Giorgi Kverenchkhiladze and Tamaz Tsabutashvili) regarding the July 30, 2020 decision (#3/1/1459,1491) of the Plenum of the Constitutional Court of Georgia (Public Defender lawsuits. Dispute Subject: Constitutionality of the norms regulating the appointment of Supreme Court judges).

[15] Regarding the need for transitional mechanisms in the legislative field of Georgia, see: (Dolidze and de Waal 2012).

the judiciary to be "fair" and 53% believe that it is "under the influence of the ruling party" (ibid). Moreover, 94% of the respondents also reckon that members of the "clan of judges" should leave the judiciary (ibid). Such lack of trust in the judicial system makes the political system in Georgia particularly vulnerable to political crises. Typically, in democratic countries the judiciary in times of political crises acts as an impartial arbiter and helps defuse the situation. Therefore, political crises in Georgia can easily turn into a crisis of mistrust and legitimacy as the Georgian judicial system to a great extent has lost its function as an impartial arbiter.

Everything mentioned above significantly separate Georgia from the European legal space and, in the long term, hinder its integration with the European Union. Georgia has to take effective steps towards improving the judiciary. In order to ensure complete and guaranteed independence of the judiciary, correcting the mistakes made by previous authorities and current government is necessary, so that no inconsistencies remain with the Constitution of Georgia, the legislation of the European Union and generally accepted legal standards. At this stage, the independence of the judiciary (common courts and the Constitutional Court) is exceptionally low and deficient in Georgia.

The European Union and Judiciary Reform in Georgia

Not without reason, the EU is considered a major supporter of Georgia's democratic and institutional transformation process. As the EU has until recently been largely limited to technical assistance in the area of judicial reform, it has thus often neglected the political factors hindering the reform. Furthermore, in the process of drafting, ratifying and further implementing the AA, by ignoring the quality of reforms and delegating them to the local authorities, the EU has indirectly contributed to the inefficiency of the reforms.

However, Georgia is not the only exception in this regard. The EU's overall technical attitude towards judicial reform and other sensitive issues is often explained by the Union's emphasis on security and stability in relation to the third countries. Security issues (such as irregular migration, energy security, political stability) are frequently prioritized by the EU, whilst democratic reforms are neglected at their expense. The phenomenon is often referred to as the "stability-democratization dilemma" (Jünemann 2004; Börzel and Lebanidze 2017).

It is evident that the current approach of the European Union is unable to create a sufficient external push to facilitate successful judicial reform in Georgia. To increase efficiency, the EU must actively use levers of conditionality including a concrete roadmap of reforms to be implemented in Georgia and to introduce tight control mechanisms over its implementation. In this regard, adding an annex to the Association Agenda and other strategic documents would be ideal. The annex should go beyond general wording and instructions, thus giving specific instructions to the Georgian authorities regarding the reforms to be carried out.

In order to more efficiently monitor judicial reform in Georgia, the EU can also apply various tools at its disposal, that until recently have been actively used in the context of enlargement policy. Among them is the cooperation and verification mechanism used by the EU to monitor

judicial and anti-corruption reforms following the integration of Bulgaria and Romania with the EU. It is true that Georgia is still far from becoming a candidate state for EU membership, but, at the same time, it is still possible to adjust these instruments to the Association Agenda for the quality of the reforms implemented and ex post facto assessment of the commitments undertaken.

Main Findings and Recommendations

In conclusion, after the change of government in 2012, the degree of independence of the Georgian judiciary has increased to some extent. Concerning the legal framework, it has been refined and brought closer to the European standards. Nevertheless, old and new challenges such as the dominance of judicial corporatism, political bias and opacity still remain acute and unresolved in the judiciary, thus hampering the reforms carried out so far. Unfortunately, this kind of failure is mainly due to a lack of both political will and external pressure from countries and organizations considered friendly to Georgia.

Without eliminating the above-mentioned challenges, the judiciary is unable to form as an independent and impartial institution. This not only hinders the development of Georgian statehood and democratic consolidation, but a priori excludes Georgia's further integration with the EU. Below, a number of policy-oriented recommendations regarding the correction of certain drawbacks mentioned in the article are provided.

To the Government of Georgia, the Parliament and the Council of Justice:

- Improve the system of appointing judges in order to eliminate political and non-objective decisions made by the High Council of Justice of Georgia;
- Improve the selection procedure of the members of the High Council of Justice of Georgia based on the criteria regarding their honesty, decency, qualification and professionalism;
- Further refine software of the electronic system of case distribution in order to avoid manipulations.
- Improve the rules for selection and appointment of an independent inspector, especially in terms of transparency;
- Improve the procedure for selecting the Prosecutor General, in terms of a highly consensual rule in order to free the ruling party from political influence; replacement of the simple majority of votes required for the election of a prosecutor general with a qualified majority;
- Adopt a parliamentary resolution in order to expose judicial corporatism and ensure public recognition of these problems;
- Dismantle the current composition of the High Council of Justice in order to end the "culture" of judicial corporatism in the judiciary. This may require appropriate legislative/ constitutional changes;
- Introduce the norms of transitional law within the framework of judicial reform and, accordingly, significant renewal of staff in the judiciary.

To the European Union and its Member States:

- Switch from technical and financial support to political support in the field of law. This implies tightening the principles of political conditionality and demanding concrete reforms tailored to Georgian specificities;
- Replace general and ambivalent terminology in the official documents of the EU by a more specific and sophisticated system of evaluation of reforms in the Georgian judiciary. This may further serve as the basis for a more efficient application of the conditionality principle;
- Introduce an instrument similar to the "Cooperation and Verification Mechanism" with respect to Georgia and the EaP Countries for efficient ex post facto monitoring of the implemented judiciary reforms and their compliance with the Association Agreement and the Association Agenda;
- Use the tools such as the Cooperation and Verification Mechanism for ex ante assesment to find out to what extent Georgian legislation and practice in the field of justice meet the requirements for EU membership;
- Consider more carefully the opinions of local civil society and non-governmental organizations working in the field of law, as well as of independent experts in law while assessing the ongoing judicial reforms in Georgia;
- Develop educational programs for young (beginner) judges and judicial officers in order to gain European experience.

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