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Flawed Reforms of the Georgian Judiciary and the Need for Systemic Changes

Policy Brief

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Introduction

Over the last decade, the Georgian judiciary has experienced several waves of reforms. Regardless of these efforts, judicial institutions are still subject to internal and external influences. A lack of transparency and accountability creates risks for individual judges' independence and undermines the system of real self-governance. This does not mean, however, that the reforms carried out during this period were in vain and had zero effect. Legislative changes have had some positive effects, though the changes were not systemic in nature and lacked an understanding of the specific context within the court. Fundamental problems in the courts, such as internal corporatism, threats of external influence, and politicisation, remain unresolved. No wave of reform was directed at their solution and specific steps to tackle these challenges are still needed. Namely, future reform strategies should focus on reforming the High Council of Justice in a comprehensive manner and diffusing its power, strengthening individual judges, and increasing judicial accountability.

Reform of the judicial system in Georgia was one of the key priority tasks in institutional development and good governance defined in the 2017-2020 Agenda of the EU-Georgia Association Agreement.¹ Namely, according to the Association Agenda, crucial reforms had to ensure the complete independence of judges, strengthening the court system's accountability, impartiality, effectiveness, integrity, and professionalism. Development and gradual implementation of

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the Judicial Strategy and its Action Plan were identified as priority objectives to achieve these goals.

Based on these requirements, on 29 May 2017, after nearly a year of work, the High Council of Justice of Georgia (from now on – “the Council”) approved the 2017-2021 Judicial Strategy and its Implementation Action Plan for 2017-2018 for the first time in Georgia’s history. Through the participation of all three branches of government and civil society, it was possible to develop and unanimously agree upon the long-term reform strategy, specify directions for future reform based on the flaws identified in the system, and design actions to address the challenges. Consequently, the adoption of these documents was a significant step forward in establishing a unified vision for judicial reform.²

Implementation of the 2017- 2021 Judicial Strategy and its Action Plan for 2017-2018

The tasks outlined in the Strategy and Action Plan of the judicial system, as of 2017, largely reflected the challenges facing the judiciary at the time. The document practically covered all key issues needed to ensure an independent and transparent justice system.³

Five months after the approval of the Strategy and the Action Plan, the Council adopted the instructions for implementation of these documents by decree.⁴ Based on the decision, the Council was mandated to authorise the composition of the workgroups and the Secretariat. Notably, the document was adopted behind closed doors, and its contents became known to the stakeholders only on the day of its approval.⁵ Moreover, a closer look at the Strategy and Action Plan implementation revealed that the document and its working process were flawed and problematic. Namely, a) operation of workgroups was unsystematic from the beginning; b) the Council instructions stripped representatives of civil society organisations of workgroup membership status and allowed their participation in sessions only by decision of the workgroup members. Despite the protest and requests submitted by the civil society to the Council, it refused to revise the decision; c) the working process of these groups lacked transparency, so stakeholders were unable to receive information about meetings with reasonable advance notice; d) dates for publishing implementation reports were not consistent and, in the end, the Council decided to submit such reports once a year.⁶

The first and so far, the last annual report was presented by the Council as part of the Conference of Judges, held on 25 July 2018.⁷ In the summer of 2019, the Second Progress Report of the Action Plan and the 2019-2020 Draft Action Plan were prepared and submitted to interested parties for their comments and opinions.⁸ Regrettably, neither of these documents have been approved or published. Despite

¹ Association Agenda between the European Union and Georgia 2017-2020 (Available at: <https://bit.ly/3ej1aqd>; Accessed on: 5 September 2022).

² Social Justice Center (former EMC), Institution for Development of Freedom of Information, “Implementation of the Judicial Strategy and the Action Plan” (First Shadow Report), 2018, p. 7 (Available at: <https://bit.ly/3D6Qxku>; Accessed on: 5 September 2022).

³ Social Justice Center (former EMC), Institution for Development of Freedom of Information, “Implementation of the Judicial Strategy and the Action Plan” (Second Shadow Report), 2020, p. 10 (Available at: <https://bit.ly/3TKRCog>; Accessed on: 5 September 2022).

⁴ N1/260 Decision of the High Council of Justice, 16 October 2017 (Available at: <https://bit.ly/3CYRHyl>; Accessed on: 5 September 2022).

⁵ Social Justice Center (former EMC), Institution for Development of Freedom of Information, “Implementation of the Judicial Strategy and the Action Plan” (First Shadow Report), 2018, p. 18.

⁶ Ibid. at p. 19-21.

⁷ Ibid. at p. 21.

⁸ Social Justice Center (former EMC), Institution for Development of Freedom of Information, “Implementation of the Judicial Strategy and the Action Plan” (Second Shadow Report), 2020, p. 9.

multiple requests by CSOs, the Council did not indicate the reasons for the delay of the proceedings, nor did they specify the tentative date of approval/publication of these documents.⁹

As for the implementation of the 2017- 2021 Judicial Strategy and its Action Plan for 2017-2018, two shadow reports were presented by CSOs from October 2017 to February 2020.¹⁰ The reports assessed those directions that were essential to strengthening the institutional capacity of the judicial system and increasing the independence of individual judges and concerned the most fundamental and debated areas of judicial reform. As the monitoring process revealed:

- The 2017-2018 Action Plan did not entail a range of substantial and crucial issues;
- From October 2017 to February 2020, out of 92 activities reviewed in both reporting periods, 35 were marked as fulfilled, 31 were partially fulfilled, and 26 were unfulfilled;¹¹
- The workgroups met only 11 times within a year after the adoption of the organisational instruction for implementing the Strategy and the Action Plan¹² and only three times in the subsequent year and a half.¹³
- The draft Second Progress Report, as well as the one-year Progress Report presented to the public by the Council, was largely technical in nature and did not contain comprehensive information on the implementation status of the activities;¹⁴
- Activities that were fulfilled or partially fulfilled also were mostly technical in nature, and how their implementation affected the judiciary needs further assessment.

Consequently, after 2019, no significant effort in implementing the 2017-2021 Judicial Strategy and its Action Plan for 2017-2018 has been made, and the Action Plan for subsequent years has not been approved. Therefore, as the results indicate, issues envisaged in the Judicial Strategy and their effective and full implementation has not been a priority for the Council as well as for other branches of government. Systemic problems prevalent in the judiciary for years have led to a low level of public trust and criticism from professional circles. According to public opinion surveys, for the last 10 years, no more than 20% of the general public has been satisfied with the courts' performance and since 2014 the numbers have been steadily going down.¹⁵ Moreover, the courts enjoy far less confidence and trust from the public than the police or political branches of the government.¹⁶ In this context, the working format created for implementing the Strategy and Action Plan was an important opportunity to take effective steps with the involvement of professional groups and the use of international expertise for genuine improvements in the administration of justice. Unfortunately, the Council has not paid

⁹ Ibid. at p. 11.

¹⁰ The First Shadow Report, monitoring period was from October 2017 to October 2018 - Social Justice Center (former EMC), Institution for Development of Freedom of Information, "Implementation of the Judicial Strategy and the Action Plan" (First Shadow Report), 2018; the Second Shadow Report monitoring period covered period from November 2018 to March 2020 - .

¹¹ Social Justice Center (former EMC), Institution for Development of Freedom of Information, "Implementation of the Judicial Strategy and the Action Plan" (Second Shadow Report), 2020, p. 12.

¹² Social Justice Center (former EMC), Institution for Development of Freedom of Information, "Implementation of the Judicial Strategy and the Action Plan" (First Shadow Report), 2018, p. 12.

¹³ However, the information received from the High Council of Justice noted, several internal organisational meetings of working groups were held in a closed format during that period, however detailed information on their progress was not provided – Social Justice Center (former EMC), Institution for Development of Freedom of Information, "Implementation of the Judicial Strategy and the Action Plan" (Second Shadow Report), 2020, p.11.

¹⁴ Ibid. at p. 11.

¹⁵ According to Results of December 2020 Public Opinion Polls in Georgia, carried out for NDI by CRRG Georgia, for 2020, the courts' performance was rated as "good" – by only 10%, "average" – by 29% and "bad" – by 45 %, reaching a historically low point for the past 10 years, Poll Results, p. 50 (Available at: <https://bit.ly/3BERsXo>; Accessed on: 5 September 2022).

¹⁶ According to the Public Opinion Survey, of Residents of Georgia, carried out by International Republican Institute (IRI), on March 2022, 38% of the public has a favourable opinion of the Courts, while this number is 63% for the Police and ranges between 44-61% for the political branches (officials) of the government (Survey results are available at: <https://bit.ly/3S1yiBX>; Accessed on 5 September 2022).

sufficient attention to thoroughly implementing the Strategy and the Action Plan, and often, concrete activities have only been formally fulfilled. At the same time, the substantive mission of the Strategy and the Action Plan – qualitative improvement of the administration of justice, remained beyond interest of the agencies responsible for their implementation.¹⁷

What Went Wrong - Recent Developments of Judicial Reforms in Georgia

Despite four waves of judicial reforms implemented in recent years and a number of positive changes, significant systemic challenges remain. The reforms have mainly addressed procedural issues while leaving untouched the “system of influence”¹⁸ that weakens the judicial system from within and maintains the existence of an influential group of judges (called the “clan”). It points to the necessity of the new, profound, effective, and timely systemic reform of the judiciary.

One such opportunity was the April 19 agreement¹⁹ (mediated by EU representatives and signed by main political actors to defuse the ongoing political crisis) under which Georgian authorities committed themselves to assessing the effectiveness of previous waves of judicial reform and adopting an ambitious new reform strategy to increase the independence, accountability, and quality of the judicial system. This reform was supposed to be carried out through an inclusive, cross-party working process and the agreement presented the prospect of a substantive improvement of the judiciary.²⁰ However, the ruling party did not show the will to reform the judiciary and removed the issue of creating politically neutral institutions from the political agenda indefinitely.

Moreover, three parallel competitions for 11 seats on the Supreme Court were opened later. Additionally, the Conference of Judges appointed a total of six judge members to the High Council of Justice on 26 May and 31 October 2021, respectively.²¹ Meanwhile, the longstanding vacancies for five non-judge members of the High Council of Justice remain unfilled.

The competition for seats on the Supreme Court was conducted in a fast and non-transparent manner and was heavily criticised by local CSOs,²² OSCE/ODHIR,²³ the EU²⁴ and the US delegations in Georgia.²⁵ According to the assessment of the European Parliament²⁶ and the European Commission,²⁷ these processes were in clear breach of the April 19 agreement and were done in a hasty manner, without prior announcement and the required scrutiny.

The European Union has made sharp assessments and expressed dissatisfaction with the results of judicial reform in Georgia and has

¹⁷ Ibid. at p. 10.

¹⁸ Sopo Verdzeuli, “Judicial System Reform in Georgia (2013-2021)”, Georgian Young Lawyers’ Association (GYLA), p. 5 (Available at: <https://bit.ly/3AHeAUw>; Accessed on: 5 September 2022).

¹⁹ A Way Ahead for Georgia, paragraph 3. Rule of Law /Judicial Reform, p. 5-6, (the full text of the agreement available at: <https://bit.ly/3APbqy3>; Accessed on: 5 September 2022).

²⁰ Mariam Gobronidze, “April 19 Agreement – Another Untapped Opportunity for Justice Reform”, Social Justice Center, 2021, p. 4 (Available at: <https://bit.ly/3TLQhh1>; Accessed on: 5 September 2022).

²¹ The Coalition for an Independent and Transparent Judiciary Reacts to the Planned Judicial Conference, 29. 10.2021 (Available at: <https://bit.ly/3RUUpWM3>; Accessed on: 5 September 2022).

²² The Selection of Candidates for the Supreme Court Judges is Arbitrary and Unfair, Coalition for an Independent and Transparent Judiciary, 24.06.2021 (Available at: <https://bit.ly/3KPnQdH>; Accessed on: 5 September 2022).

²³ Third Report on the Nomination and Appointment of Supreme Court Judges in Georgia, December 2020 – June 2021, OSCE/ODIHR Report (Available at: <https://bit.ly/3wXnnAt>; Accessed on: 5 September 2022); Also, Final report on the Nomination and Appointment of Supreme Court Judges in Georgia, August 2021, OSCE/ODIHR Report (Available at: <https://bit.ly/3em2okv>; Accessed on: 5 September 2022).

²⁴ Georgia: Statement by the Spokesperson on the appointments of Supreme Court judges, 14.07.2021 (Available at: <https://bit.ly/3QbXZxO>; Accessed on: 05.09.2021)

²⁵ US Secretary Antony Blinken, 16.07.2021 (Available at: <https://bit.ly/3cIMiRH>; Accessed on: 5 September 2022).

²⁶ European Parliament, “Association agreement between the EU and Georgia – European Implementation Assessment”, March 2022, p. 39 (Available at: <https://bit.ly/3TJynLz>; Accessed on: 5 September 2022).

²⁷ European Commission, “Association Implementation Report on Georgia”, 10.8.2022, p.6 (Available at: <https://bit.ly/3AR8dON>; Accessed on: 5 September 2022).

repeatedly warned the Government of Georgia that it would suspend its next tranche of € 75 million due to non-compliance with the terms of macro-financial assistance, including its failed commitment to the judicial reform.²⁸ In late August, the Georgian Prime Minister officially refused the tranche. However, the EU declared that Georgia would no longer receive another round of macro-financial assistance because the necessary conditions for receiving these funds had not been met.²⁹

Instead of accepting objective criticism and making concrete steps towards improving the situation in various ways, at the end of the past year, the parliament adopted legislative amendments to the Organic Law of Georgia on Common Courts, in an expedited manner, without public involvement and consultations. The amendments addressed many sensitive issues: it strengthened the position of the High Council of Justice, weakened individual judges, created the possibility to transfer them against their will, created new grounds for disciplinary proceedings, and as a result, strengthened intra-corporatism and clan influences.³⁰ The Venice Commission, in its opinion³¹ requested by the Parliamentary Assembly of the Council of Europe, expressed concerns regarding the excessive haste, lack of inclusive and effective consultations, and lack of transparency on the motives of these amendments, which may have negatively impacted internal judicial independence. Moreover, two constitutional complaints were filed against these 2021 Amendments at the beginning of 2022: one by the Public Defender's Office and the other by five sitting judges.³²

Overall, past reforms in the Georgian judiciary can be characterised as an incomplete attempt at an institutional modernisation of the judiciary, ultimately creating an imitation of a positive transformation instead of a real and systemic change. The lack of political will and fragmented legislative initiatives in the last nine years have failed to meet the most critical challenge pertinent to the Georgian context. In particular, the reform did not affect the existing concentration of power and de facto influential groups in the judiciary. Reforms especially stalled over the past years and significantly regressed in important areas,³³ which means that Georgia experienced significant setbacks in fulfilling the Association Agreement and its implementation Agenda for 2017-2020.

What is Needed - a Road ahead for Future Reforms of the Georgian Judiciary

Since the frustration with the outcomes of the judicial reforms is evident, Georgian civil society organisations and human rights defenders have been advocating for radically changing the reform strategy, which should be aimed at consensus-based management of the judiciary and creating solid obstacles to the concentration of power.

²⁸ European Parliament, "Association agreement between the EU and Georgia – European Implementation Assessment", March 2022, p. 40-41.

²⁹ Ibid. at p. 41.

³⁰ Mariam Gobronidze, "Another step back in judicial reform - Analysis of legislative changes adopted on December 30, 2021", Social Justice Center, 2022 (Available at: <https://bit.ly/3THmvdC>; Accessed on: 5 September 2022).

³¹ CDL-AD(2022)010-e, Georgia - Opinion on the December 2021 amendments to the organic Law on Common Courts, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022) (Available at: <https://bit.ly/3RjaYz8>; Accessed on: 5 September 2022).

³² Constitutional Claim (N1693), registered on 11.04.2022 as well as a Constitutional Claim from the Public Defender of Georgia (N1700) registered on 21.04.2022.

³³ European Commission, Association Implementation Report on Georgia, 10.8.2022, p.6.

In June 2021, the Coalition for Independent and Transparent Judiciary presented a new perspective on judicial reform,³⁴ which included the necessity of the political assessment by the parliament of the existing challenges in the judiciary. Precisely, a temporary parliamentary commission should be set up based on which Parliament will adopt a resolution on the legislative and practical/informal problems in the judiciary. According to the Rules of Procedure of the Parliament of Georgia, a temporary commission is created to carry out non-permanent tasks of the state and/or public importance, the fulfillment of which requires collegial consideration and resolution of the issue presented.³⁵ It is an effective and flexible tool for parliamentary oversight with high political legitimacy. It works transparently according to a strict schedule and has special levers for gathering all necessary information.³⁶ Moreover, as the CSOs stressed, the commission's primary purpose should be a systemic evaluation of the legislation and an assessment of the problems in practice and informal influences that exist in the judicial system of Georgia.

Only after such a comprehensive and convincing assessment is it possible to move to the next stage and adopt and implement an ambitious, transparent, and effective judicial reform strategy post-2021 based on a broad, inclusive, and cross-party reform process. It is one of the key priorities regarding democracy, human rights, and good governance of both the Association Agenda of 2021-2027³⁷ and the European Commission's recommendations to Georgia for membership of the European Union.³⁸ Moreover, as CSOs presented in their action plan³⁹ for implementing both documents, a new judicial reform strategy and action plan must be drafted by the working group established on an inclusive and cross-party basis. Representatives from civil society and the Public Defender must be included. Finally, the judicial reform strategy must be approved with broad support from all actors. It must be focused on the elimination of informal influences and on strengthening individual judges as well as accountability and political neutrality of the whole judiciary.

Conclusions and Recommendations:

The 2017-2021 Judicial Strategy and its Action Plan for 2017-2018 have not been implemented fully and in good faith because the High Council of Justice as well as other branches of government did not prioritise the meaningful and effective transformation of the current judicial system. Moreover, the vision of the judicial reforms was non-systemic and lacked proper contextual analysis. The rather technical essence of the Action Plan for 2017-2018 did not provide appropriate tools for substantive assessment of the problems in the judiciary or the real impact of the activities envisaged by the document. Therefore, to effectively fulfil the critical priorities of the Association Agenda of 2021-2027

³⁴ A New Perspective on Judicial Reform, 21.06.2021 (Available at: <https://bit.ly/3qa0JkP>; Accessed on: 5 September 2022).

³⁵ The Rules of Procedure of the Parliament of Georgia, Article 72, section 1.

³⁶ Ibid. Articles 61-74.

³⁷ Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the Association Council established under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, on the adoption of the EU-Georgia Association Agenda, COM/2022/103 final (Available at: <https://bit.ly/3AWr1fs>; Accessed on: 5 September 2022).

³⁸ European Commission, Opinion on Georgia's application for membership of the European Union, 17 June 2022 (Available at: <https://bit.ly/3Bfxt2k>; Accessed on: 5 September 2022).

³⁹ 12 Steps towards EU Candidacy, 03 July, 2022 (Available at: <https://bit.ly/3qdgBfr>; Accessed on: 5 September 2022).

and recommendations of the European Commission, namely, to adopt and implement an ambitious, transparent, and effective judicial reform strategy post-2021 based on a broad, inclusive, and cross-party reform process, the responsible agencies should carry out the following activities:

- A systemic and comprehensive evaluation of the legislation as well as an assessment of the problems in practice and informal influences that exist in the judicial system of Georgia;
- Based on the analysis of the problems in the judiciary, develop a new reform strategy that will be focused on creating a court system free from political and intra-corporate influences;
- The reforms envisaged by the new judicial reform strategy should be focused on strengthening individual judges as well as systemic reform and diffusion of power in the court management system, especially in the High Council of Justice;
- Following the new reform strategy, develop an action plan where all necessary activities will be precisely outlined, and all relevant bodies will take responsibility for its full and faithful implementation.

