THE "EUROPEAN MODEL" OF JUDICIAL INSTITUTIONAL ARRANGEMENT:

Salvation or Obstacle to Successful Judicial Reform

Lessons for Georgia

SOCIAL JUSTICE CENTER

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Summary

30 years after the restoration of independence, a publicly trusted, independent and impartial judiciary remains a distant, vague dream for Georgian society. Over the years, public opinion has always been critical of the judiciary, although apart from fragmentary reflection on individual events, the systematic, in-depth assessment and consolidation of society has not been possible so far. Nevertheless, judicial reform remains one of the main topics on the political agenda, and the calls for fundamental judicial reform by international and local organizations are increasing.

Reforms in the Georgian judiciary over the past decade have largely stemmed from the actions taken to meet international obligations, the EU rapprochement process and the requirements set by it. An important role in this process is played by the legal standards co-developed by the Council of Europe and the relevant organizations of the European Union. Moreover, Georgia's experience in this regard is not unique. Most of the post-Soviet and post-communist states of Central and Eastern Europe operate with a similar background. For these countries, similarly to Georgia, in the process of rapprochement with the EU, the so-called "European model" of institutional arrangement of the judiciary was proposed as a framework for the reform process, which places particular emphasis on the institutional independence and autonomy of the judiciary and implies the existence of a powerful High Council of Justice, strictly isolated from the political government, which decides on all matters important to the court.

Despite the difficult and lengthy reform process, this issue is still relevant in most Central and Eastern European countries, as is in Georgia. Such results may indicate a problem with the path so far supported by European institutions and chosen by these countries. Therefore, taking into account the already accumulated knowledge on this issue, both the ongoing process in Georgia and the prevailing approach to this specific "European model" of judicial reform were critically analyzed, the initial results of which are not favorable in our country as well as in some European states.

The paper first discusses the origins of the "European model" of institutionalization of the judiciary and the historical, political or legal preceding implications that shaped the judicial systems in most Central and Eastern European countries, including Georgia. The decisive role in this process was played, on the one hand, by the legal standards developed by the European institutions and the enlargement policy, as amended by the European Union, and, on the other hand, by the common / similar past of the beneficiary countries.

The following chapters of the paper pertain to legal framework of the "European model" and its critical analysis from both a normative-legal point of view and the experience of specific countries - Slovakia, Romania and Georgia.

The observations developed in the paper show that the challenges in the Georgian judiciary are very similar to the experience of judicial reform in most Central and Eastern European countries with a communist

past and "satisfy" all the problematic aspects that are characteristic of the "European model" and largely dictate the scope of criticism of the approach that has been increasingly expanding. Namely,

a) There is no specific, consistent normative doctrine on the independence of the judiciary, which is reflected in the difference of approaches of states in its definition and implementation in practice. The definition of independence raises particular differences of opinion with regard to the principle of checks and balances between branches of government and the nature of the relationship between political and judicial power. This, in turn, is reflected in the different interrelationships between the principles of judicial independence and accountability, and leads to the existence of different models of institutional arrangement of the judiciary in different countries. Nevertheless, the institutions of the European Union and the Council of Europe have developed and proposed to the states in the process of democratic transition the so-called "European model" as the best practice of the institutional arrangement of the judiciary. However, such a model is not dominant even in Europe itself and suffers from a significant problem of legitimacy, as it was elaborated mainly by consultative bodies, in a closed format, in fact only with the participation of the judiciary and in the absence of extensive wider discussion and reasoning;

b) The "European model" of the institutional arrangement of the judiciary is based on the idea of a High Council of Justice equipped with strong levers of external independence, which decides independently on all important issues related to the career of judges. This model focuses on increasing institutional independence and efficiency, transparency and the quality of justice, and is based on the belief that judges are credible and bona fide "players" who are well aware of their responsibilities and are sufficiently competent to administer justice independently. However, this model of institutional arrangement leaves out no less important - the need for accountability. Also the approach does not adequately address the significant risks of hierarchy of power within the judiciary, corruption, and limited independence of individual judges;

c) In proposing a "European model" to the post-Soviet space and countries with a communist past, in the European integration process, the main focus was on freeing the judiciary from the formal-legal and factual influence of the executive branch, which was dictated by the harsh communist past, under which the courts were institutions subordinate to the executive and the party. However, other, no less important features and individual legal, social or cultural characteristics of these states' difficult past have not been properly analyzed;

d) The judiciary, empowered by, a high degree of independence and self-governance, may function effectively in well-established political environments and democracies, where high standards of judicial ethics and the longevity of their implementation in practice ensure that the judicial branch puts the interests of the judiciary and those of the state and the public above their personal pursuits. However, the integration of such a model of judiciary into countries under democratic transition where the previous, undemocratic regime experience prescribes alienation with the above-mentioned values and ethical standards and creates an unstable political environment often leads to premature and unacceptable results, especially in the absence of preceding real structural reforms, natural transition of the judicial corps, and a political and public consensus / readiness;

e) Georgia is another unfortunate example among the European states with a communist past, which, in the process of democratization, were less able to properly rethink their past experiences. The process of

judicial reform is still ongoing here, although so far neither the public nor the political class has agreed on what kind of judicial system is to be created, what steps to be taken and at what pace. The current processes have not been preceded by a needs and risk assessment and a proper analysis of past negative experiences. Such an approach, of course, naturally tempts us to mechanically copy the "best practices" of other states and bypasses the tedious process of identifying tailor-made ways for the real recuperation of the judiciary, which must duly change. Otherwise, there is a risk that without seeing the big picture, future changes in the judiciary will simply take the form of the next, fifth wave of reform. Given the current situation, it is unlikely that the next wave of the current reform will bring any tangible and decisive changes without a critical rethinking of the existing institutional arrangement itself.