LAW AND REVOLUTION: FORMATION OF THE NEW LEGAL TRADITION IN GEORGIA

This essay aims at broadening the scope of the debate about the independence of the judiciary in Georgia while contextualizing it in the light of the ongoing transformation of the country. While the logic behind the judicial reform and its achievements to date is outlined, it is argued that protection of the citizen from excessive state interference remains a challenge for the reform process. Positive prospects regarding the possibility of striking a balance between the executive, legislature and judiciary branches, particularly in the aftermath of the upcoming elections, are expressed.

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Since the Rose Revolution, the debate on the independence of judiciary has been both influencing and shaping political debate on Georgia's future not only within the country but also amongst the observers of Georgia, both friends and foes. The complexity of the issue has rarely been explored in the debate, with most of the analysis on the subject being rather superficial, without understanding the essence of the reform and the philosophical underpinnings of change. This study aims to broaden the scope of the debate and contextualize it in the light of the ongoing transformation.

Recent political turmoil once again demonstrated Georgia's main challenge: the creation of stable political institutions. However, without complex reforms and rapid modernization, Georgia might lose its balance on the narrow and slippery path leading to liberal democracy. The process of modernization, which started in the 1970's, was degraded due to the painful transition and civil wars in early 1990's. Compared to the 1989 data, GDP decreased by 78 percent in 1994. Migration to rural areas increased and Georgia's current rural population is five times that of Poland and three times that of Romania. Presently, eight times more people are employed in agriculture than in industry although the latter produces ten times more, which shows that the reformers faced the challenge of modernization. Once again, legal transformation appeared at the heart of the reform process with the judiciary being in the forefront.

Post revolutionary transformation was characterized with an intense reform agenda. Rapid and drastic change was driven by the desire to build a state on the one hand and catch up with the time lost during the first 15 years of independence from the communist regime, on the other. With 23 percent of the population living below the poverty level and 15 percent unemployed, the state faced a real challenge to ensure economic growth and build institutions to sustain growth and secure civil liberties and property rights. To effectively address the reform agenda however, the government had to make radical decisions and identify the core problems that should be solved first. The main target for reformers became the legal system, which was inadequate to respond to the main challenges the country faced. The assumption that the legal system was ineffective was shared widely among decision-makers. Firstly, it was unable to resolve the political crises of 2003. Instead of finding a political solution to the election problems, as is the case in many democracies, the country had to go through a painful process of revolution, which fortunately ended peacefully and without the collapse of the state. Secondly, the legal system failed numerous times to respond to the challenges of protecting basic rights and was ineffective in ensuring economic stability. Reformers faced two alternatives: to maintain and develop the system that already existed or to change it substantially. Either way, a lot of energy and political capital was required. Yet, building a new system would have the advantage of having more credibility among society and of being a 'fresh start.'

Before describing the system, the roots and the philosophical basis of the reform should be explored. The government had to choose between two models of modernization: the 'etatist model' and the 'limited government model'. Georgia had experienced the etatist approach with its former president. After the collapse of the Soviet Union, the country went through years of political turmoil, economic crisis, degradation of state institutions and civil war, which resulted in two territorial conflicts. Consequently, the country, without functioning political and economic institutions, appeared on the verge of total collapse. This is when Eduard Shevardnadze, the former Soviet foreign minister and an old communist "apparatchik" was invited to govern the country. He quickly realized that he had to choose between the coalition of nationalistic and criminal forces or the old Soviet nomenclature, which invited him. He decided in favor of the old nomenclature, which not only had experience in governance, but also brought the Soviet style governance. The corrupted elite

structure of the government isolated the society from the state institutions, especially since the legal system was not built for several years after the collapse of the communist regime. But the same process that isolated people from governance also created political space and enabled political processes.

Douglas North and Barry Weingast make an argument on how political tensions between executive and legislative branches affected independence of the courts in seventeenth century England.[1] They argue that only after having achieved a balance between executive and legislative branches did it become possible to secure the private sphere from executive interference. And the precondition for such a balance was political pluralism. Political pluralism affected the legal reforms in Georgia in the same way, particularly the reform of the judiciary which was one of the most radical reforms in the post-Soviet region.

It was also obvious that without the creation of state institutions and a sound legal framework, it would be impossible to maintain political stability and further development. In order to ensure rapid development, policy-makers looked at the Romano-German model, which had several attractive features. First of all, it offered ready-made laws that could easily be copied. Secondly, main policy makers were very well accustomed to the socialist law, which was similar in style to the Romano-German model. Thirdly, the academia people who participated in the legal reform process mainly had German influence through various German schools, which they studied in the late 1980's and early 1990's. But the Romano-German model also had impediments, such as a heavy regulatory approach and the expansion of state intervention.

Soon after the intensive implementation of the continental legal system, it became apparent that laws that exist on paper do not work in reality. The legal culture in Georgia, heavily influenced by the notion that laws are imposed by external powers, did not absorb the new tradition that was enforced from the top. Starting from the Russian annexation in 1801 and continuing with the communist takeover, the Georgian society did not enjoy any opportunity to develop independently and create a legal culture.

During the Russian occupation, Georgia adopted civil law traditions. Even though the government tried to change the path and adapt the legal system according to the needs of the state during the first republic in 1918, the agenda was not completed due to communist intervention and loss of independence three years later. The communist regime brought with itself the Marxist doctrine and socialist law, which did not value basic human rights or respect private ownership.

Courts had difficulty in enforcing the complex legislation adopted during the 1990s; citizens did not understand the essence of law and distanced themselves from the legal system. This was furthered by the inconsistent interpretation of law, which created a fertile ground for lawyers to use it for their own benefits. In fact, courts turned out to be a perfect arena for the illicit influence and activities of law enforcement agencies. Additionally, all the players including judges, prosecutors, investigators and attorneys who were frequently playing the role of a mediator or communicator between the prosecutor and the defendant (accused of bribery) had reciprocal interests to make illegal profits. A World Bank survey showed that by the end of 1990s the Georgian judiciary was one of the most corrupted institutions.

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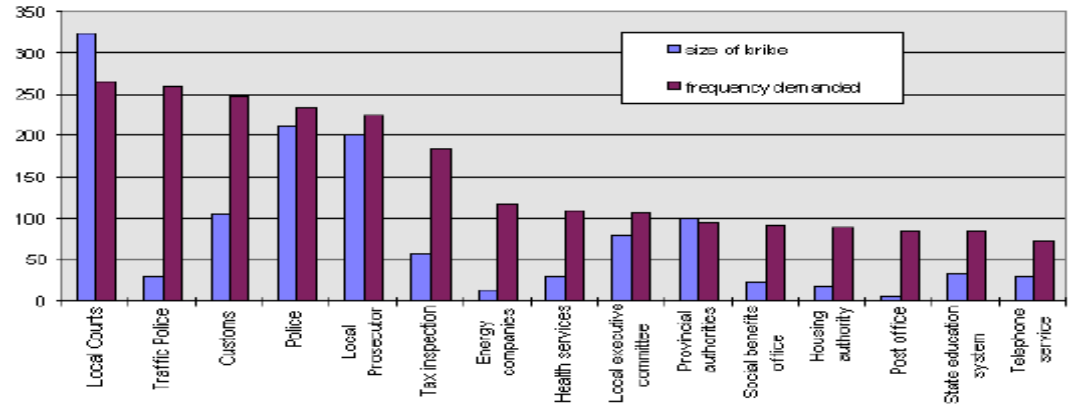
[1] Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England Douglass C. North; Barry R. Weingast, *The Journal of Economic History*, Vol.49, No.4. (Dec., 1989), pp.803-32.

Frequency of payment demanded and average size of payment
(frequency, scale of 1-350, where 1=never and 350=always size of payment in lari)
based on respondents who had contact in the last year



Source: USAID, World Bank

It became evident that without reforming the system, the risk of collapse was inevitable. Substantial changes were also unacceptable however, because they would cause a major reshuffle of political balance, which was very important for the government to maintain. Therefore, a decision to reform only one branch of the system was made: the courts. The rest of the institutions such as the police, the prosecutor's office and the legal framework were left untouched or were subject only to superficial changes. The reform targeted four main areas: recruitment of new judges, separation of the courts from executive control, unification of the court system under one institution and improvement of the working conditions for judges.

When the reform was designed and implemented, it had very high political exposure and involvement. Its supporters in the government and civil society created wide public awareness. The society was intact with the developments in the judiciary and in responding to the positive messages. The reform received good responses due to the new judges and renovated buildings. The judicial exams were aired live on TV, which created an image of fair selection and appointment of judges. As a result, the credibility of the institution grew and the number of petitions increased dramatically. The impression was that the judiciary was gaining strength and becoming an independent institution. But there was no continuing political support for the reform and the temptation to regain influence was high among the executive officials. Thus, the reform slowly slipped back into corruption. Independent experts point to several reasons in explaining this phenomenon. Firstly, the legal system was not reformed and judges had to operate under a very complex legal environment, which created lots of space for misinterpretation and misuse of law. Secondly, the transformation of the judiciary did not include reforms in police and prosecution, leaving the judiciary surrounded with old-fashioned institutions. Thirdly, there was no political will and commitment to sustain the reforms. Hence, the issue of the independence of the judiciary remained a top priority for civil society organizations as well as for the opposition movement during the Rose Revolution.

The Rose Revolution and Second Wave of Reform

The Fraudulent parliamentary elections in 2003 resulted in mass protest and the government was forced to leave the office after one month of non-violent civic campaign. As a result of the new elections, opposition parties leading the campaign came to power and a new stage of reforms began.

Reformers had learned their lesson in that focusing only on one area of law would not result in an effective change and without a complex approach, there was a risk of failure, as was the case in the late 1990s. Therefore, the decision was made to elaborate on a complex strategy that would focus on strengthening legal institutions and reforming the legal framework. It was

also obvious that, in the Georgian context, the etatist approach had created a gap between society and the government and enabled corruption. Therefore, the new reform should aim to minimize the role of state and enable more private participation so that the government is involved only as far as there is necessity of regulating and moderating conflict. The rest would be developed from the bottom through participation. The legal reform was considered within this framework and the government attempted to implement this new assumption with regard to the role of the individual and the state. Thus the system moved to common law tradition, which Hayek believed was associated with fewer government restrictions on economic and other liberties.[2] The reformers believed that limited government would be the best solution for making the state effective and also for supporting the development of private entrepreneurship.

The reform strategy for law concentrated on criminal justice and administrative regulations affecting private entrepreneurship. Parliament started to work on new criminal procedural legislation, but as a parallel process, new institutions were installed for the functioning of the procedural code. The major change was the introduction of jury trials in the Constitution and the plea bargaining system in the criminal procedural code.

The Constitutional amendments of 2004 decided upon the introduction of the jury system, which will be fully implemented after the new criminal procedural code enters into force.[3] The idea is the direct involvement of ordinary citizens in the administration of justice, which will enhance the independence of the judiciary, increase public confidence in it, and promote fair and prompt justice. The jury system is designed not only to provide effective functioning of the criminal justice system, but also to increase legal awareness of the public in general. Plea bargaining system effectively decreased the workload in courts. In 2007, the number of cases decided through plea-bargaining reached 50 percent, which was 19 percent in 2006.

Other reforms that were introduced in the existing code affected the rights of a fair trial and the equality of arms. The system was changed from inquisitorial to adversarial and provided sides with the right to independent examination of a case and investigation of evidences during court hearings. The guilty plea on pre-trial stage was excluded as evidence, thus limiting the state's ability to influence the case.

Intensive reforms were carried out in the field of administrative law, limiting state intervention in private deals and strengthening rights of ownership. The World Bank instrument of "Doing Business" was used to assess the country profile. Through the reforms, the country made a gigantic step forward and moved higher on the ranking by rising from the 105th place to 18th in 2007. Licensing regulations were limited, international trade regulations were simplified, and the labor legislation saw greater liberalization.[4] These changes was paralleled by economic growth, increase in GDP and a quadruple increase in FDI.[5]

A series of reforms were carried out to improve the legislation, which affected human rights. The Freedom of Speech and Expression Law was enacted in 2004. The law was received very favorably by international observers and was recognized as a model for the whole post-Soviet region.[6] Freedom of religion was secured by legal amendments granting the right to legal

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[2] Friedrich **A.** Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (1973).

[3] The draft of the criminal procedural code has already been created and is subject of consideration by political and civil society groups.

[4] http://www.doingbusiness.org/Documents/CountryProfiles/GEO.pdf

[5] http://www.geplac.org/eng/trends.php

[6] http://www.article19.org/pdfs/analysis/georgia-foe-guide-april-2005.pdf

registration of religious organizations. The European Framework Convention on Minorities was ratified and the first assessment was carried out in this regard.

The reform also concentrated on institutional changes to strengthen the capacity and independence of the judiciary. The reform responded to the major criticism that the local and international observers expressed concerning the state of the judiciary. The main problems identified by observers were the influence of the Prosecutor's Office over the courts, the independence of the courts, the weakness of the courts in overcoming political pressure,[7] corruption and frequent use of pre-trial detention, the problems related to the disciplinary proceedings, the absence of a clearly defined selection criteria, the ineffective execution of the court decisions, scarce funding, et cetera.[8] To enhance judicial capacity, complex reform was designed for targeting multiple areas.

After the legislative amendments in December 2004, the Council of Justice has been transformed from a consultative body to the Presidency to an independent organ with a constitutional status.[9] The council has been depoliticized by changing its composition in accordance with the requirements of the European Charter on the Status of Judges. The President, the Prosecutor General and the Justice Minister lost their membership to the council. The number of judges increased to more than half its previous size.

In order to protect judges from unlawful pressures, disciplinary proceedings and disciplinary committee were reformed. The number of judges in the committee increased and procedures were detailed in such a manner as to provide more clarity in defining unlawful behavior and sanctions.[10] Repealing the provision of the Criminal Code, which indicated penalty for "unlawful verdict or other decision of the court" was an important step towards enhancing the independence of the judges. The provision was subject to broad interpretation, thus it was a source of "chilling effect" and could be used as a tool of pressure.

Judicial appointments were another area that saw improvement. Due to the reorganization of the courts, judges were dismissed and new judges were recruited. The process was criticized by observers as harming the independence and not being clear in the selection of new candidates. Therefore the criteria for selection were elaborated and transparent selection procedures were installed, which included the public examination of candidates. The process of selection is still carried out due to the lack of qualified staff. Nearly 100 vacancies are still not occupied, which increases the workload of existing courts and prevents quick processing.

The improvement of the technical capacity in courts and the raise in the salaries of judges are the other areas that saw progress. Salaries tripled and will see an average of 10 percent increase next year. The technical capacity of courts will also be improved and audio recording of proceedings will be carried out (audio recording is effective in Supreme Court since 2007). To improve communication between courts and society, the court speaker's position was introduced and several TV programs were launched to describe the court proceedings. But TV cameras were banned from court rooms and now, only court cameras are allowed to film the process, although audio recording was not prohibited and can be carried out with the permission of the judge.

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[7] Freedom House, Freedom in The World, 2006, http://www.freedomhouse.org/template.cfm?page=22&country=7181&year=2007

[8] Judicial Reform Index for Georgia, 2005, ABA, http://www.abanet.org/rol/publications/georgia-jri-2005-eng.pdf

[9] Constitutional of Georgia: Law of Georgia on the Common Courts

[10] Law of Georgia on the Disciplinary Liability of Judges of Common Courts and Disciplinary Proceedings

The reforms were carried out to limit ex parte communication with judges and secure the order in courtrooms. Court marshals were recruited and court contempt rules were introduced. As stated above, one of the main criticisms was the influence of the prosecutor's office, which resulted in a higher number of detentions on the pre-trial stage and a higher number of guilty pleas, as well as use of imprisonment in the majority of cases. The recent evaluation of the court's performance shows significant improvement in this area. The number of bails increased from 35 percent in 2006 to 55 percent in 2007. Non-custodial sentences increased from 36 percent in 2006 to 48 percent in 2007. The performance of courts in the area of disputes between private individuals and the state is also balanced with 48 percent of cases having been decided in favor of private individuals in the Supreme court.

Conclusion

The issue of checks and balances was always a driving argument in understanding the role of the judiciary in Georgia, while other important aspects were neglected. This essay is an attempt to present a wider picture of the reform in the context of the ongoing reform effort. Although the effectiveness of the judiciary is largely expressed in mediating private conflicts, protection of the citizen from excessive state interference is also crucial and remains a challenge for the reform process. However, we should not isolate this issue from the wider context and overlook the influence of the balance between the executive and the legislature on effectiveness of the third branch. Achieving this balance is a primary goal, which will ensure that all reforms that create a solid foundation for independence of the third branch yield good results. The recent political developments in the country signal a higher probability that such a balance will be achieved with the new parliament and by positively affecting the legal culture and the state of main judiciary institutions.