
STUDENTS FORUM

On Some Institutional Deficiencies of Judicial Reform

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The new Georgian Constitution accepted the centuries standing theoretical and practical experience and declared judicial power as an independent branch of the state power triad. The acknowledgement of the principle of distribution of powers made the process of court reform inevitable and irreversible. It ruined Soviet stereotypes where courts were a structural addition of the Communist party and the mechanism of authoritarian control served the state and its “masters” – the party dictators.

It is scientifically proved that the democratic administration of justice depends on civilisation and particularly a legal culture, created by the state concerned for centuries. When in some countries animals (e.g. in Russia butting goat was punished) and things (e.g. a church bell was deprived of its eye) were punished, the Book of Law of Vakhtang VI stated that a judge was to be “a great finder, a bright mind, investigator, painstaking, calm, intelligent, good listener to appeals, analyser... impartial, god-fearing”.¹ Therefore any democratic institution finds fertile ground in Georgia given its historical legal culture.

Even today legal scholars intensively argue whether the judiciary is a law enforcement body, i.e. are the courts (general, constitutional, arbitration, etc) part of the framework of the law enforcement infrastructure. This is of utmost importance not only from a theoretical, but also practical point of view.² Although the main function of a court is priority protection of human rights, a number of lawyers still do not consider it as a law enforcement body and believe its main task is to fight against crime within the system.³ In their opinion courts are only arbitrators between two opposed parties pursuant to the principle of competition and make a decision in favour of one of them. Furthermore, the majority of Georgian lawyers consider it within the framework of the law enforcement bodies. However, one thing is beyond doubt: in the long run, judiciary plays a major role in the development of a state⁴ (protection of human rights, stabilisation, social progress, economic growth, democracy, etc.). It is a well-known fact that the judiciary greatly contributes to the interpretation of law and the removal of its gaps, no matter, which judge made it.⁵ Thus, after regaining independence, Georgia faced a serious issue of judicial reform. The court reform was implemented given the efforts of Georgian lawyers. International organisa-

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¹ *Surguladze*, Monuments of Georgian Law, Tbilisi, 2000.

² *Gabisonia*, The Status of Prosecutor's Office Abroad and in Georgia, Tbilisi (Favoriti), 1999, 71.

³ *Ibid.*

⁴ *Melkadze*, Discourse on Georgian Constitution, Tbilisi (Upleba), 1996, 154.

⁵ *Chanturia*, Introduction to the General Part of the Civil Law of Georgia, Tbilisi (Samartali), 1997, 124.

tions positively evaluated the reform and acknowledged it as the most successful within the CIS. However, this reform is not and could not be ideal. It is natural, that there are still ongoing debates about its deficiencies, what can only contribute to their successful removal.

Setting up the Council of Justice, delegated with wide powers, definitely was a step forward. This body elaborated a number of progressive and vital for our legislation acts.⁶ However, the model of the Council of Justice of Georgia does not conform to the Constitution, as nothing is said about it in this fundamental act. This jeopardises the exercise of the principles of democracy and the independence of judges. It should be mentioned that in foreign countries the status of similar bodies is generally provided for in details in their constitutions (e.g. in Spain, Italy, France, Germany, Portugal, etc.).⁷ In Georgia, the status of the Council is stipulated by the Organic Law of Georgia on the Courts of General Jurisdiction, according to which it is the co-ordinator of judicial reform, deliberative body of the President, which plays a crucial role in securing the efficient performance of the judiciary. However, it should as well be said, that some of the aspects of arrangement of the Council of Justice is still debated by Georgian lawyers, as it enjoys the right to “intervene” in the administration of justice at a certain level.

Much uncertainty was caused by the introduction of political figures (the President, members of Parliament, the Minister of Justice) in the composition of the Council, what may result in politization of this body. Namely, this model enables political power to select and appoint the desirable candidates of judges with the help of the Council staffed by them and exert further influence over them, as the Council of Justice is delegated with the function of disciplinary persecution of judges. However some reformers believe that this is an optimum variant and staffing the Council with “ordinary” people would make it easier to exert influence. They refer to the examples of Italy, Germany and Spain,⁸ where as if there is such a rule. However, in fact the legislations of none of these countries provide for similar rules for staffing councils. Moreover, Italian Constitution prohibits the appointment of members of Parliament or the Circuit Council or the Constitutional courts, ministers and their deputies.⁹ In Germany the members of such councils are only the representatives of the judges’ community.¹⁰ Twelve members of the Spanish General Counsel of the Judiciary (consisting of twenty members) are judges and magistrates of all judicial categories and eight members are elected by Parliament (4 of them are elected by the Senate and 4 by the Congress, chosen amongst lawyers and other jurists of acknowledged competence with more than fifteen years of professional practice).¹¹ In France, the President appoints all nine members of the Conseil Supérieur de la Magistrature. The French Constitution says nothing about the introduction of the members of Parliament

⁶ *Gotsiridze*, From the Acknowledgement of Rights till Their Actual Implementation, Samartali, Tbilisi, 1999, No. 4, 12.

⁷ For details see: *Melkadze et al*, Legal Systems of the World Countries, Tbilisi, 2001.

⁸ *Saakashvili*, Judicial Reform is More Fair for Georgia, Sakartvelos Respubika, 4 September 1997, 3.

⁹ *Bezhitashvili/Melkadze*, The State System of Italy, Tbilisi (Upleba), 1997, 131.

¹⁰ *Melkadze et al*, Legal Systems of the World Countries, Tbilisi, 2002, 139.

¹¹ *Meishvilil*, Council of Justice of Georgia and General Council for the Judiciary of Spain, Martlmsajulebis Matsne, 1998, No. 1.

and other political figures into the composition of the Conseil Supérieur de la Magistrature.¹² In general, as mentioned above, in leading countries participation of politicians in such bodies is minimised.

Establishment of age requirement for membership of the Council of Justice – 25 years – should be considered as an inconsistent approach to the issue. A person of 25 years participates in the selection of judges, who are of at least 30 years of age, have higher education in jurisprudence and have passed qualification examinations for judges; They also participate in the assessment of liability of judges. Just to compare, in Spain, a candidate for a member of council should have at least fifteen years of practice in the legal field, or should be elected from among judges or prosecutors.¹³ Although the president, the chairman of the court of cassation, the general public prosecutor are members of the superior council of the judiciary of Italy, 20 members of the council are elected from among the ordinary judges, by parliament in joint session, 10 members from among full professors of law and lawyers with at least fifteen years of practice.¹⁴ As it seems apparent in many civilised countries similar councils are staffed with judges, either practitioners or theorists, having major practice in the area. Against such a background our legislator's approach to the issue, different from those of the above-mentioned countries, could be considered as not justified.

In a number of European countries similar councils enjoy quite a wide range of powers (submission of the candidates for a general prosecutor, members of the Supreme Court, active participation in the formation of law enforcement bodies, etc.).¹⁵ Although the Organic Law of Georgia on the Courts of General Jurisdiction does not provide for additional (non-judiciary) functions of the Council of Justice, its participation in the formation of the Prosecutor's Office and bar agencies becomes ever more intensive (It is a well-known fact, that the qualification examinations in this field were held by the Council of Justice). This is a progressive phenomenon, though not with regard to the lawyers at the bar, as far as the latter are not state persons. They carry out their activities as individual entrepreneurs, are not financed by the state and do not pay income tax. Their appointment should not be dependent on a state body, though the functions of the Council of Justice should be expanded at the expense of the formation of state bodies. According to the Law of Georgia on the Bar, the Council of Justice is the body who will carry out the testing of lawyers at the bar before the creation of a bar association. It would be reasonable for the Council of Justice to implement similar measures with regard to every law enforcement body and become the executor of judicial reform in the country (in its wide sense), a politically neutral body. In such a case it is necessary to create two chambers of the Council of Justice: one responsible for judges, and the other – for prosecutors, investigators and the other representatives of law enforcement bodies.

It is also necessary that the Council of Justice of Georgia becomes a common and centralised body for every court (judge) of Georgia as is the case in Spain. There it consists of

¹² *Kverenchkhiladze/Melkadze*, *The State System of France*, Tbilisi (Upleba), 1997, 129-130.

¹³ *Meishvili*, *Council of Justice of Georgia and General Council for the Judiciary of Spain*, *Martlmsajulebis Matsne*, 1998, No. 1.

¹⁴ *Melkadze (ed.)*, *Constitutional Law of Foreign Countries*, Tbilisi (Merani), 1999, 223.

¹⁵ *Meishvili*, *Council of Justice of Georgia and General Council for the Judiciary of Spain*, *Martlmsajulebis Matsne*, 1998, No. 1.

17 autonomous units, but the General Council of the Judiciary is the only body in the country.¹⁶ In Georgia both of the Autonomous Republics have their own Councils of Justice. Furthermore, for greater independence of the members of the Council of Justice it is necessary to increase their three-year term of office (in certain foreign countries they are appointed for a lifetime, e.g. in Germany the issues of disciplinary liability of judges are considered by the Constitutional Court i.e. it is delegated with the functions of the Council of Justice), the members of which are appointed for a lifetime.¹⁷ In some countries they are appointed for not less than four years, e.g. in France, Italy and Spain).

Thus the establishment of the Council of Justice, in the long run, could be considered as an indispensable and at a certain extent progressive move, though it seems, that the legislator could have been more democratic and efficient upon the regulation of the institutional issues related with this body.

The problem of introduction of the institution of jury is still a pressing one for Georgia, and it is quite natural, as the composition of the court considering a case is of particular importance for the efficient administration of justice. There are two types of jury in the world: a) Anglo-Saxon system (where, usually 12 jurors deliver a verdict on the culpability of an accused, while a judge decides on the penalty) and b) the so-called “*schöff*en” court¹⁸ which is common in Germany, France, Italy, where the jurors and a judge make up one (single) panel and the sentence is delivered by simple majority. In Italy they are called “*Assisi*” and they enjoy fewer rights than jurors.¹⁹

This institution has been playing a major role in the legislature of many countries for centuries now, such as: the United Kingdom, where it originated in 1066, and then it became popular in its colonies and later in a number of countries (USA, Sweden, Italy, France, Canada, etc.). Under the influence of the United Kingdom this institution was first introduced in Tsarist Russia, then in the Soviet Union (including Soviet Georgia), where the Soviet variety of the so-called “*schöff*en” functioned. It should as well be mentioned that the institution of jury gradually lost its popularity and resulted in the minimum amount of cases considered by them. E.g. even in the United Kingdom they consider only 4% of criminal and only 1% of civil cases. The tendency to reduce the number of jurors and their terms of reference is also apparent.²⁰ All the above said is conditioned by the fact that it has more negative features than positive. Some scholars consider that their participation in the consideration of cases, which involve death punishment, is still necessary.²¹

¹⁶ *Meishvili*, Council of Justice of Georgia and General Council for the Judiciary of Spain, *Martlmsajulebis Matsne*, 1998, No. 1.

¹⁷ *Melkadze/Ramishvili*, Constitutional Law of Germany, Tbilisi, 1999, 145.

¹⁸ *Paliashvili*, The aspects of Improvement of Judicial Reform and Procedure Law, *Samartali*, 1999, No. 3-4.

¹⁹ *Chachua*, A judge is only the Mouth of Law, *Akhalgazrda Iuristi*, May 2001, 8.

²⁰ *Paliashvili*, The aspects of Improvement of Judicial Reform and Procedure Law, *Samartali*, 1999, No. 3-4.

²¹ *Paliashvili*, The aspects of Improvement of Judicial Reform and Procedure Law, *Samartali*, 1999, No. 3-4.

The positive features of the institution of jury are as follows: 1) It has been the symbol of democracy from the very outset and greatly contributed to the establishment of democracy in many countries; 2) It is considered to be a humane institution, as a juror is an ordinary citizen and does not suffer from pedantry like lawyers; 3) Jurors apply so-called “amateur methods”, which in many cases are more efficient for the establishment of truth, than lawyers’ logic; 4) When a case is decided collegially there is a greater probability of establishing objective reality; 5) Democratic principles of self-governance are being exercised, as the jurors are elected by bodies of local self-government; 6) It enhances the independence of judges, as in the case of a non-favourite judgement, when a judge is strongly criticised, the jurors maintain anonymity and are not subject to any danger;²² 7) Participation of the society (in the person of jury) in the delivery of a sentence makes enforcement easier, etc.

As for negative features, they are more substantial: 1) The institution of jury already had had its day and its authority is gradually decreasing in the world; 2) Participation of jurors complicates the procedure and justice becomes non-efficient and inflexible; 3) This institution is very expensive (e.g. in USA one hour of court proceeding with the participation of jurors costs USD 250); 4) Their participation makes the procedure very prolonged, as the appearance of all twelve jurors often seems impossible or rather difficult, what results in endless suspension and the delay in the administration of justice; 5) the job of lawyers at the bar becomes more complicated as they have to explain everything in a more detailed manner to laymen jurors (and the standards of listening of the latter is sometimes very low) 6) They often ignore law and sometimes acquit downright law-breakers under the pretence of adherence to the principles of justice and humanity; 7) Jurors restrict the freedom of judges as far as judges often have to give up their point in favour of jurors’ wishes; 8) Jurors are not able to be completely bound to the principle of impartiality (moreover, if we take account of Georgian nature, giving preference to one’s relatives, friends and acquaintances; in the case of introduction of this institution the fairness of judiciary would be considerably jeopardised);²³ 9) A court, which delivers a judgement in the name of a state sometimes decides the issue of life or death of individuals, administration of justice being a complicated, time-consuming and vital task, which should be exercised by a professional judge based on the facts and deep analysis of law, while “legal ignoramus” jurors would not have been able to do the above; 10) A juror is a passive listener – he never questions (cannot question) the parties personally and consequently Georgian judge makes an individual decision (however, the active participation of jurors in this process would have been detrimental to justice).²⁴ The list of deficiencies of this institution could be made longer, though even these arguments are sufficient to draw the following conclusion. Jurors have fulfilled their mission in past centuries but they would do no good to Georgia in the twenty first century.

²² *Melkadze/Dvali*, *Judicial Power in Foreign Countries*, Tbilisi (Merani-3), 2001, 154.

²³ *Akubardia*, *Georgian Judiciary*, Tbilisi, 2001, 57.

²⁴ *Chachua*, *A judge is only the Mouth of Law*, Akhlagazrda Iuristi, May 2001, 8.

Against this background attention is drawn to the inconsistency of a legislator. Namely, the Organic Law of Georgia on the Courts of General Jurisdiction (13 June 1997) cancelled the institution of jury, what was considered a great achievement, though the Organic Law of Georgia on the Supreme Court (15 May 1999) allowed for their participation in the Supreme Court Panel for Criminal Matters, what is illogical and unjustified: a panel of lower level – of circuit court examines a case of first instance consisting of three professional judges, while the Supreme Court Panel for Criminal Matters considers more complicated cases under the same instance, composed of one judge and two jurors. Accordingly, it is necessary that jurors be substituted by professional judges at this instance as well.

The term of office of judges caused particular interest. Pursuant to decision No. 1/1/138, 171, 179, 209 (26 February 2003) of the Supreme Court of Georgia the impartiality and sometimes the competence of judges depends on their term of office. A highly educated lawyer may become a professional judge only after good practice. Furthermore, the longer is the term of office of a judge, the higher is the degree of impartiality, while a judge appointed only for a short period tries his best not to offend in order to be re-appointed. This jeopardises his impartiality. Reform has partially upheld this opinion and introduced a ten-year term of office for judges instead five-years (The draft law of Georgia on the Courts of General Jurisdiction provided for lifetime appointment of a judge after the expiration of three-year probation period,²⁵ but later on this provision was rejected, as it would have cut access for young lawyers).²⁶ However a ten-year period is not an optimal solution itself, as in an ideal case a judge is appointed to his office for a lifetime period, as confirmed by judicial practice of some of the foreign countries:

According to the German Constitution after a complicated procedure, a candidate is appointed to the office of a judge for a life, although at a certain age he must retire.²⁷ In Russia a term of office of a judge is not limited (except of a judge-mediator – 5 years);²⁸ Under the USA Constitution a judge is appointed for life and can be relieved of his position only on the grounds of an impeachment procedure. In the United Kingdom a judge holds his office until he is 72 years old. Nearly the same rule is applied in Canada, Belgium, Portugal, Sweden, India, Iran, Greece, Egypt, Israel, etc.²⁹ A different practice is employed in Japan where a judge is appointed every 10 years (together with the election of the Lower Chamber of the Parliament), and in the Ukraine, where the term office of a judge at an initial appointment is 5 years, then they are appointed for a lifetime period (until they reach the age of 65). The same rule is effective in Bulgaria, only with one difference; the term of initial appointment does not exceed three years.³⁰

As it is apparent from the above, judges in many foreign countries are appointed for life, thus it would be reasonable to increase the ten-year term of office of judges, introduced

²⁵ *Ninidze*, Basic Trends of Judicial Reform, Samartali, 1996, No. 1-2.

²⁶ *Saakashvili*, Taking the Route of Democratic Processes, Samartali, 1996, No. 5-6, 5.

²⁷ *Melkadze/Ramishvili*, Constitutional Law of Germany, Tbilisi, 1999, 148.

²⁸ *Melkadze/Kurashvili*, Russian State System, Tbilisi, 1998, 145.

²⁹ *Melkadze et al*, Legal Systems of the World Countries, Tbilisi, 2001.

³⁰ *Melkadze/Dvali*, Judicial Power in Foreign Countries, 204.

by judicial reform or the term of office of our judges to last until their pension age and their career not to be dependant on the change of political power in the country, i.e. they would enjoy better guarantees of independence. Unfortunately, Georgia faces an opposite trend that resulted in the introduction of changes to the Organic Law of Georgia on the Courts of General Jurisdiction. Namely, Part 1 of Article 85² established the so-called “exercise of judicial powers”. The latter empowered the President to appoint any person, who passed the qualification examination or attestation for judges for a period of eighteen months. The Supreme Court First Panel found a sole correct solution and cancelled the above provision.³¹

Thus, judicial reform left open a number of institutional deficiencies, though the question “Has judicial reform been implemented in Georgia?” should be answered in the positive (however the majority of participants of the scientific conference held in March 2001 under the aegis of the Ombudsman answered this question in the negative). It should be said, that the reform is a time-consuming, complicated, and a gradual process and is still ongoing in our country.

³¹ See: Decision No. 1/1/138, 171, 179, 209 (26 February 2003) of the First Panel of the Supreme Court of Georgia.