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## Reform of Prosecutor's Office in Georgia: Is the Glass Half Full or Half Empty?

### POLICY BRIEF

#### Introduction

A 55-year-old taxi driver from Kutaisi died on 17 June 2015. In his wife's words, he had been taken to the police station for a urine drug test and given three diuretic pills in order to increase his body's production of urine. After the test showed no presence of drugs in his system, he was released. Back at home, he told his wife he did not feel well because of medications. After some time passed, he died. The Kutaisi Regional Prosecutor's Office had not yet recognised the victim's wife as a legal successor/assignee, thus she remains a witness in the case. The investigation is still underway. This and other cases are described in GYLA's report on crimes committed by law enforcement. It is an example of the continuing problems associated with the independence of the Prosecutor's Office and efficient protection of victims' rights.<sup>1</sup>

In October 2015, the Government carried out the reform of the Prosecutor's Office. It announced that the reforms were complete and there was no need to focus further attention on the Prosecutor's Office in the 2016 Action Plan for the Implementation of the EU-Georgia Association Agreement.<sup>2</sup> Taking into consideration the context, the changes introduced in 2015 surely are notable. During the Soviet period, the Prosecutor's Office had served as an instrument through which political elites could wield influence. This continued even after Georgia's independence, with the Prosecutor's Office remaining resistant to reform.

After the recent reforms, the question is now about the impact of the changes on the culture and practice within the Prosecutor's Office. In particular, the Georgian public remains concerned about the investigation of both crimes allegedly committed by law enforcement officials and high profile political cases.<sup>3</sup>

Interestingly, the position of the Government of Georgia concerning the need for the continuation of the reforms is not clear. When comparing the EU-Georgia Association Agenda with the action plans for the Human Rights Strategy, it is clear

that the Government does not have a consistent approach to the development of the Prosecutor's Office. In the absence of a unified position concerning the fundamental issues in the above-mentioned action plans, it is difficult to make any conclusions about their implementation in practice.

Given this lack of clarity, it is important to assess the 2015 reform and, in particular, what impact the new changes have made toward achieving the objective set out in the Association Agreement of creating of an independent, effective and politically neutral Prosecutor's Office. To this end, this policy document studies the content of the 2015 reform and evaluates the performance of the entities created as a result of the reform, namely the Prosecutorial Council and the Conference of Prosecutors (since the latter was involved in a selection process of the Council). Finally, the document presents the areas that are still in need of reform.

## **Importance of an Independent, Effective and Politically Neutral Prosecutor's Office**

The function of the state to investigate crime, carry out criminal prosecutions and punish criminals is an issue of public interest that differs from the other functions of the state.<sup>4</sup> Consequently, it is necessary that the Prosecutor's Office be independent in its activities from political or other influences and remain neutral in the investigation and prosecution of crimes. In Georgia, this has been a challenge for the prosecution system so far.<sup>5</sup>

## **Reforms in 2015**

The amendments introduced in October 2015 changed the procedure for the selection/appointment and dismissal of the chief prosecutor. As a result, the selection process has become more inclusive. An independent and collegial body, known as the Prosecutorial Council, was established in Georgia for the first time. The Council aims at guaranteeing the independence, transparency and effectiveness of the system.<sup>6</sup> While the creation of the Council was a positive step, local NGOs<sup>7</sup> and the Venice Commission<sup>8</sup> noted that the proposed legislative amendments do not ensure the Council's independence or its political neutrality.

## **Significant Functions of the Prosecutorial Council**

The document developed by the Venice Commission regarding the independence of the Prosecutor's Office states that wherever they operate, prosecutorial councils generally are granted the powers to discipline and dismiss prosecutors.<sup>9</sup> According to Georgia's current legislation, the Council's functions pertain only to the chief prosecutor and a deputy chief prosecutors. The law does not empower

the Council to consider the cases of, or make decisions regarding, other prosecutors working within the system. Thus, the Chief Prosecutor, who works under the Minister of Justice, retains the authority to appoint, dismiss and discipline other prosecutors for misconduct.

A prosecutor working on a specific case takes the decision to initiate or not initiate an investigation, as well as the decision not to terminate a case and bring it to the court, etc. In order to limit the possibility of instructing a prosecutor inappropriately (particularly in politically sensitive investigations), legislative guarantees for enabling a prosecutor to remain neutral should be in place. One such guarantee is removing the power to dismiss a prosecutor from the chief prosecutor and entrusting this power with an independent body like a prosecutorial council. The Prosecutorial Council of Georgia does not have such authority.

## Effectiveness of the Prosecutorial Council

According to the legislation, the Prosecutorial Council convenes once every six months to hear a report filed by the Chief Prosecutor of Georgia on the activities of prosecutorial bodies. The report should cover the following issues: policy on the fight against crime, protection of human rights and freedoms during legal proceedings, cases of high public interest, priority directions of the activities of the prosecution, etc. On the basis of the report, the Prosecutorial Council develops recommendations and submits them to the Chief Prosecutor.

Furthermore, the Prosecutorial Council should submit recommendations to the Chief Prosecutor on criminal justice policy and on legal issues of great importance for the development of law and uniform practice.

According to the information provided on the website of the Prosecutorial Council and in an official letter of the Ministry of Justice,<sup>10</sup> the Prosecutorial Council has convened three times since its creation in October 2015 – on 2 and 19 November 2015 and 30 May 2016. The first two meetings were dedicated to the approval and appointment of the chief prosecutor. At the meeting held on 30 May 2016, its participants heard the chief prosecutor's report.

However, as the information on the official website of the Prosecutorial Council makes it clear, the Council had not developed and submitted recommendations to the chief prosecutor, as it is required by subparagraph 'g' of paragraph 6 of Article 81 of the Law of Georgia on the Prosecutor's Office. Recommendations were not made during the Council's meeting. The corresponding minutes of the meeting demonstrate that the Council's members listened to the chief prosecutor's report, asked him a number of questions and listened to his answers. They did not consider the issue of developing recommendations.<sup>11</sup>

The information and the minutes of the meeting on the same website also reveal that the Council did not make any recommendations on criminal justice policy or any other important issues as required by subparagraph 'h' of paragraph 6 of Article 81 of the Law of Georgia on the Prosecutor's Office.

## Transparency of the Meetings of the Prosecutorial Council

The Prosecutorial Council is an administrative body. Although its meetings are open to the public and the Law on the Prosecutor's Office does not stipulate that sessions may be closed, the Minister of Justice established by her order that meetings should be closed. Under the Law, the Minister of Justice approves the Council's charter which is on the lower level in the hierarchy of normative acts and thus cannot go against the norms of the General Administrative Code or Law on the Prosecutor's Office. Despite this, an entry introduced in the charter states that the meetings should be closed.<sup>12</sup>

In addition, acquiring public information from the Prosecutorial Council about its activities has proven to be difficult. A response to GYLA's request for information sent to the Prosecutorial Council on 5 September 2016 was received as late as 3 October 2016.<sup>13</sup>

## Composition of the Prosecutorial Council and Rules for Election of its Members

The eight members of the Prosecutorial Council are elected by the Conference of Prosecutors, which is comprised of all prosecutors in the system and investigators. Under the Law, the candidates for Council membership are proposed by the initiative groups of prosecutors and investigators. The Law does not define the process of nominating candidates by initiative groups.

The first Conference of Prosecutors and the election of the Council's members were organised without determining any procedures for the elections, e.g. rules for creating initiative groups of prosecutors and investigators, procedures for nominating candidates and definition of the terms of membership. As a result, we observed only the voting process for the 16 candidates who were selected in advance to fill the eight seats. Hence, it is not clear to what extent the process of nominating candidates was conducted democratically and fairly.<sup>14</sup>

## Need for Reducing the Role of the Minister of Justice

The Prosecutorial Council is headed by the Minister of Justice. Although the Constitution of Georgia stipulates that prosecution bodies should be run by the Minister of Justice, the Venice Commission's recommendation says that the Minister's prominent role in the Prosecutorial Council can and should be reduced.<sup>15</sup> According to the Law on the Prosecutor's Office, the Minister chairs the sessions of the Council, individually nominates a candidate for the position of Chief Prosecutor and votes for his/her approval as a member of the Council, etc.

After the Venice Commission submitted its observations, the changes to the Law on the Prosecutor's Office obliged the Minister of Justice to hold formal discussions concerning the candidates for membership and substantiate his/her choice.<sup>16</sup> However, these changes do not respond to the advice of the Venice Commission on reducing the Minister's significant power in the nominating process, which is discretionary at present. In view of the Venice Commission, the process should become more transparent. Despite the obligation of the Minister under a new rule to hold discussions/consultations concerning the candidates and substantiate her choice, it did not make the process transparent and did not restrict the Minister's discretion with the criteria of impartiality and professionalism.

As for the authority of the Minister of Justice to lead the Prosecutorial Council and other powers, the Law has not been amended based on the Venice Commission's recommendations. According to the Venice Commission assessment, the fact that the Minister of Justice directs the Prosecutorial Council makes its independence questionable. Therefore the Venice Commission recommended that the Council's members elect a head of the Council from their ranks, which could not be the Minister of Justice.<sup>17</sup>

### The Issues Bypassed by the Reforms

The priorities for further reforms should be the creation of legislative and institutional guarantees to strengthen the Prosecutorial Council and ensure its independence in reality. Future reforms should also address some significant issues that were not taken into consideration by the 2015 changes, namely:

### Defining the Constitutional Position of the Prosecutorial Council

On the one hand, the Prosecutorial Council is created as an independent body and, on the other hand, it operates under the supervision of the Ministry of Justice. This fact proves that institutional reforms should continue and the constitutional position of the Council within the state system should be correctly defined.

The concept of the reform for the Prosecutor's Office developed by the Ministry of Justice from the outset called for the implementation of reform without changing the existing constitutional framework,<sup>18</sup> leaving the Prosecutor's Office under the Ministry of Justice. Reforms started and important amendments were introduced to the legislation (Conference of Prosecutors and Prosecutorial Council with significant powers were created, etc.) without properly examining, understanding and planning the constitutional position of the system of the Prosecutor's Office and whether to place it under the Ministry of Justice or create an independent body separate from all other branches of state power.

## Creation of Guarantees for an Individual Prosecutor's

### Political Neutrality

An individual prosecutor does not have any legislative guarantees at present for being neutral and impartial while carrying out criminal proceedings. The prosecution system is strictly centralised. It is fully built on the principle of subordination: all prosecutors are subordinates of the Chief Prosecutor.<sup>19</sup> The process of appointing the Chief Prosecutor remains politicised. It is necessary to create legislative guarantees to ensure the fair appointment of an individual prosecutor and assessment of his/her activity, while also instituting a predictable and clear mechanism for disciplining and dismissing, when appropriate.

### Conclusion

The review of the amendments introduced into the Law on the Prosecutor's Office and an assessment of the function of the new rules in practice show that institutionally and realistically the Prosecutor's Office remains under great political influence. Therefore, the 2015 reform cannot be described as having achieved its goal of establishing an independent and politically neutral Prosecutor's Office. The reform should be continued in at least two directions: strengthening guarantees for the Prosecutorial Council's independence and creating guarantees for the political neutrality of individual prosecutors.

### Recommendations:

The reform in the Prosecutor's Office should continue in the following directions:

- Work towards defining the constitutional framework of the system of the Prosecutor's Office should be started;
- The Prosecutorial Council should be granted the power to discipline and dismiss all prosecutors working in the prosecutorial bodies and investigators of the Prosecutor's Office;
- Sessions of the Prosecutorial Council should be open, as prescribed by the Law;
- Clear and predictable criteria for disciplining a prosecutor should be developed and an objective and transparent process of disciplining should be established;
- Transparent rules for the election of the Prosecutorial Council members should be developed;
- The role of the Minister of Justice in the Prosecutorial Council should be reduced and its members should be allowed to elect its chair who will not be a Minister of Justice;
- The criteria for the selection of candidates for the position of Chief Prosecutor should be defined; selection of candidates should be based on professionalism and impartial criteria related to work experience;
- The process of appointing an individual prosecutor should be reformed and the entity responsible for the supervision and evaluation of performance and dismissal should be changed.

## Reform of Prosecutor's Office in Georgia: Is the Glass Half Full or Half Empty?

- <sup>1</sup> Crimes allegedly committed by law enforcement officials and the response of the State. Analysis of cases being litigated by Georgian Young Lawyers' Association, Tbilisi, 2016. Available on the GYLA website: [www.gyla.ge](http://www.gyla.ge).
- <sup>2</sup> See the 2016 National Action Plan for the Implementation of the EU-Georgia Association Agreement, available at <http://www.eu-nato.gov.ge/en/eu/association-agreement>.
- <sup>3</sup> GYLA statement of 16 May 2016: 'The court delivered the unlawful, unfair and unjustified judgment on the so called Cables Case'. Available at the GYLA website: <https://gyla.ge/ge/post/saia-ets-kabelebis-saqmeze-sasamartlom-ukanono-usamartlo-da-dausabutebeli-ganacheni-ga-moitana>.
- <sup>4</sup> Venice Commission Report on European Standards as regards the Independence of the Judicial System: The Prosecution Service, para. 71. A distinction needs to be made between the interests of the holders of state power and the public interest. The assumption that the two are the same runs through quite a number of European systems. Ideally the exercise of public interest functions (including criminal prosecution) should not be combined or confused with the function of protecting the interests of the current Government, the interests of other institutions of state or even the interests of a political party. In many countries the function of asserting public interest, outside the field of criminal prosecution, would rest with an ombudsman or with an official such as the Chancellor of Justice in Finland. There are a number of democracies where the two functions of defending state interest and public interest are combined, as in the Attorney General model in some common law countries. The functioning of such a system however depends on legal culture, and especially in younger democracies, where there is a history of abuse of prosecution for political goals, special precautions are needed. [http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic\\_reform/europeanStandards\\_en.pdf](http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf).
- <sup>5</sup> The reports of numerous local and international organisations contain information about the gross violation of human rights in the process of investigating crimes in Georgia, the inefficiency of the investigation of crimes committed by law enforcement officials and those against prisoners, illegal arrests made by police, possible political interests in the process of investigating cases of former officials or other high profile cases, etc. These reports include: 2015 Report of the Public Defender of Georgia, The Situation of Human Rights and Freedoms in Georgia, Tbilisi, 'Independent, Effective and Impartial Investigation', from page 402; US Department of State, Country Report on Human Rights Practices for 2015, Georgia, paras 'c-d', etc.; Crimes allegedly committed by law enforcement officials and the response of the State. Analysis of cases being litigated by Georgian Young Lawyers' Association, Tbilisi, 2016. Available at the GYLA website: [www.gyla.ge](http://www.gyla.ge).
- <sup>6</sup> The concept document of the reform of the Prosecutor's Office developed by the Ministry of Justice stated: 'In order to make it possible to implement a reform of the Prosecutor's Office of Georgia rapidly (in this year) and efficiently, without a constitutional amendment, it is proposed that the general management of the Prosecutor's Office, as a subordinate body under the system of the Ministry of Justice, be implemented by the Minister of Justice through the Prosecutorial Council.'
- <sup>7</sup> Statement of the Coalition for Independent and Transparent Judiciary 'Reflections regarding the concept of the Prosecutor's Office reform', [http://coalition.ge/index.php?article\\_id=60&clang=0](http://coalition.ge/index.php?article_id=60&clang=0); Statement of the Coalition for Independent and Transparent Judiciary 'Regarding the preliminary conclusion of the Venice Commission on the reform of the Prosecutor's Office'. [http://coalition.ge/index.php?article\\_id=64&clang=0](http://coalition.ge/index.php?article_id=64&clang=0)
- <sup>8</sup> European Commission for Democracy through Law (Venice Commission) Consultative Council of European Prosecutors (CCPE) OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Joint Opinion on the Draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, para. 4. 'The Venice Commission, OSCE/ODIHR and CCPE/DGI appreciate the constructive approach taken by the Georgian authorities and encourage them to take additional steps to further depoliticize the prosecution service in Georgia.' See also the European Commission for Democracy through Law CDL-AD (2010)040. Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service. Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010). Para. 65. 'If they are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they often also play a role in discipline including the removal of prosecutors.'



## Reform of Prosecutor's Office in Georgia: Is the Glass Half Full or Half Empty?

- <sup>9</sup> European Commission for Democracy through Law CDL-AD (2010)040. Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service. Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010). Para. 65.
- <sup>10</sup> Letter of the Ministry of Justice No. 6480 dated 3 October 2016.
- <sup>11</sup> Minutes of Meeting No. 3 of the Prosecutorial Council of Georgia held on 30 May 2016 available at the Prosecutorial Council official website: [www.pc.gov.ge](http://www.pc.gov.ge).
- <sup>12</sup> Order of the Minister of Justice of Georgia No. 105 dated 24 October 2015 'On the Approval of the Charter of the Prosecutorial Council'.
- <sup>13</sup> Letter of the Georgian Young Lawyers' Association No. 01/14854 dated 4 September 2016 regarding the request of information on the activity of the Prosecutorial Council and the letter of reply of the Ministry of Justice No. 6480 dated 3 October 2016.
- <sup>14</sup> Statement of the Coalition for Independent and Transparent Judiciary regarding holding the first Conference of Prosecutors, <https://gyla.ge/ge/post/koalicia-prokurorta-pirveli-konferenci-is-chatarebas-ekhmaureba-72>
- <sup>15</sup> European Commission for Democracy through Law, Consultative Council of European Prosecutors, OSCE Office for Democratic Institutions and Human Rights, Joint Opinion on the Draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039 4 November 2015. Para. 37-41.
- <sup>16</sup> Pursuant to Article 91, Para. 1 of the Law of Georgia on the Prosecutor's Office, 'At least six months before the term of office of the Chief Prosecutor expires, or in the case of termination of powers of the Chief Prosecutor – without delay, the Minister of Justice shall start consultations with academic circles, members of civil society and law specialists to select candidates for the position of the Chief Prosecutor. The consultations shall be conducted during one month. Based on the consultations, the Minister shall select and present to the Prosecutorial Council for approval at least three candidates for the Chief Prosecutor's position where at least one third has to be of a different gender. The recommendation concerning the candidates for the Chief Prosecutor's position shall be well-reasoned.
- <sup>17</sup> European Commission for Democracy through Law, Consultative Council of European Prosecutors, OSCE Office for Democratic Institutions and Human Rights, Joint Opinion on the Draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039 4 November 2015. Para. 40.
- <sup>18</sup> Pursuant to article 814 of the Constitution of Georgia, bodies of the Prosecutor's Office are under the system of the Ministry of Justice and the Minister of Justice shall provide general management for their operations.
- <sup>19</sup> Pursuant to Article 4, sub-paragraph 'e' of the Law of Georgia on the Prosecutor's Office, the principle of activity of the Prosecutor's Office is 'unity and centralisation, subordination of all subordinate prosecutors and other officers of the Prosecutor's Office to the Chief Prosecutor.'