

Human Rights Education and Monitoring Centre - EMC's opinion on the

Draft Law on Prosecutor's Office

In the process of harmonization of the legal framework with the constitutional reform, it is important to create legal mechanisms for organization, accountability and work format of the prosecution, which will be able to achieve the goals of the constitutional reform and facilitate the establishment of an independent and politically neutral prosecution system. We believe that the initiated version of the Organic Law on Prosecutor's Office requires substantial revision to achieve this goal. It is important that the process of management of the Prosecutor's Office, as well as the procedure for the selection of the Chief Prosecutor, must be free from the political influence, which the present draft law cannot provide.

Below, we present a detailed analysis, legal remarks and opinions on the draft law and we express our readiness to participate in the improvement of the draft law.

1. Prosecutorial Council – composition and scope of authority

Under the implemented constitutional reform, the Prosecutorial Council is being established as an organ with constitutional status which should ensure the independence, effectiveness and transparency of the entire system. The constitutional provision essentially changes the role of the Prosecutorial Council and it is transformed into a managerial authority in the Prosecution system. The legitimacy of the Council, acting in its capacity, is largely dependent on whether the procedure for staffing the Prosecutorial Council is democratic and politically neutral.

According to the draft version initiated by the parliament, the composition procedure is essentially not different from the current regulation. In the draft version, the members of the Parliament remain in the composition of the Council, which creates risks of politicization in the Council, and hence in the management of the Prosecutor's Office. As for the maintaining the party quota system (the appointment of majority and minority representatives in the Council), this model is considered one of the most undesirable models by the Venice Commission.¹

Although the proposed version does not directly provide for the involvement of the Minister of Justice, the mandate of the Minister of Justice is maintained by the proposed changes in the Council's work. The draft law grants the Minister of Justice the authority to nominate one member of the Council.

¹ Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), Par:42-43 <https://www.venice.coe.int/webforms/documents/?opinion=811&year=all>

Considering that the Prosecutor's Office is fully separated from the Ministry of Justice and the Ministerial Cabinet, it is unclear as to why the Ministry of Justice should necessarily be involved in the Prosecutorial Council, especially when the Minister of Justice will not be even be responsible for defining criminal justice policy.

With the judges and practicing lawyers as members of the council, together with the threats of political influence, the proposed version includes the risk of conflict of interest,.

The proposed version of composition of the Prosecutorial Council cannot honor the spirit of constitutional reform and the idea that the independence of the Prosecutor's System must be ensured by the Prosecutorial Council, which is staffed on professional basis.

In this regard, international experience² and recommendations clearly indicate that the main idea behind forming the Prosecutorial Council is to depoliticize the Prosecutor's Office and ensure its independence from the governmental branches,³ which cannot be achieved under the current composition procedure of the Council.

In order for the Prosecutorial Council to be able to respond to the goals of constitutional reform and reduce the threats of unilateral political decision-making in the system of the Prosecutor's Office, it is in our opinion that the rule of staffing of the Prosecutorial Council should be substantially changed in proposed version of the law:

- Organic law should create such a regulation by which the membership of Prosecutorial council will be based on professional criteria. Participation of political subjects (including members of parliament, person defined by the Minister of Justice) should be excluded from the composition of the Council and the role of professional / social groups should be strengthened;
- Electing the majority of the Prosecutorial Council (8 members of the Prosecutorial Council) by the Prosecutors' Conference shall ensure the internal legitimacy of this body, however, it is also important that the changes apply to the procedure for selection of the prosecutors by the Conference. We believe that all prosecutors (and not only a 30-member group of prosecutors) should have the right to nominate a candidate;
- As for non-prosecutor members, we believe that the Parliament should choose non-prosecutor members (4 non-prosecutors) not from its composition, but through an open competition, based on the

² For detailed information see: „Prosecution System Reform“ Human Rights Education and Monitoring Center (EMC), Tbilisi, 2018. Available at : <https://emc.org.ge/uploads/products/pdf>

³Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD\(2015\)039-e&lang=fr](https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD(2015)039-e&lang=fr)

principle of political consensus. Right to appoint three additional non-prosecutor members of the Council should be granted to the Public Defender of Georgia, through the competition;

- In order to elect the non-prosecutor members, it is advisable that the Parliamentary regulations define the deadlines for submission of candidatures and the process of review of submitted documents. Also, it is necessary to write the rules of open committee hearings for the candidates and provide for the possibility of asking questions.

2. Powers of the Prosecutorial Council

Along with the composition of the Prosecutorial Council, the initiated draft law almost does not change the powers of the Council and is limited to the general and technical changes.

In this model, the Prosecutorial Council remains in the system of the Prosecutor's Office as a temporary body whose functional role in the system is considerably weakened, under the constitutional reform. Unlike the current edition⁴, according to the proposed version, the Prosecutorial Council only meets once a year, except for the case envisaged by law and it weakens the control functions over the Prosecutor's Office. If according to the current edition, the Prosecutorial Council has the right to hear the Chief Prosecutor or his / her deputy report on the policy against crime, statistical indicators, priority indicators of the activities of the Prosecutor's Office and etc. at least once in six months, according to the proposed version the reporting period increases to one year. Which means that the Prosecutorial Council is not a strongly integrated body of collegial governance in the system of Prosecutor's Office, and is further distanced and excluded from the entire system.

The constitutional reform clearly defines the functioning role of the Prosecutorial Council in the Prosecutor's system, which is not limited to the appointment of the Chief Prosecutor. If this were the logic of the constitutional reform, the constitutional provision would not appear, according to which the role of the Prosecutorial Council is linked with the independence, effectiveness and transparency of the Prosecutor's system.

Although the Council retains the authority to ensure the provision of disciplinary liability to the specific subjects, the authority to present recommendations to the Chief Prosecutor, the proposed version only calls for active involvement of the Council in the process of appointment of the Chief Prosecutor. In this situation it is difficult to imagine that the Prosecutorial Council can fulfill its obligations on the constitutional level.

⁴ According to the current edition, the Prosecutorial Council meets at least once in 6 months. "Law on the Prosecutor's Office", Article 8¹

For the purpose of achieving the goals of the constitutional reform by the Prosecutorial Council, it is important to review the powers defined by the initiated draft law. Specifically:

- Considering such an arrangement of the Prosecutor's Office and the current country experience, Prosecutorial Council should be established as a permanent collegial body with some sort of managerial authority in the Prosecution;
- Considering the existing international experience, it is important that the authority of the Council should be determined in such a way that the organ has the power to make decisions on the general staff policy, as well as on disciplinary liability issues;
- Such arrangement of the functioning of the Council shall be significantly reflected on the role of the Chief Prosecutor in the body. In this model, the Chief Prosecutor will be exempt from additional administrative functions and will be directed to effective and thorough implementation of criminal law policies in the country. Such redistribution of powers will preserve the principle of procedural hierarchy and will make the Chief Prosecutor a major figure in the country, conducting criminal prosecution with strong independence.

3. Appointment of the Chief Prosecutor

The procedure for appointing the Chief Prosecutor under the initiated project does not change significantly. The novelty in the proposed version is that the power granted to the Minister of Justice, by the current regulation is passed on to the Prosecutorial Council and this process is implemented independently from the Government. The main procedure for selecting a candidate is unchanged.

In this regulation, the question of justifying the selection of the candidate for the Chief Prosecutor remains problematic. As a matter of fact, the law does not oblige to justify the taken decision, and make it clear to the public, except for the general legislative requirements, based on which criteria or through what procedural stages was the concrete candidate chosen for the position of the Chief Prosecutor.

Under the proposed model of the draft law, the issue regarding the term of office of the Chief Prosecutor remains problematic. In this model, as well as in the current edition, the same person may be selected on the position of the Chief Prosecutor for only two consecutive terms.

With respect to the term of office of the Chief Prosecutor, internationally accepted approaches unanimously support by the possibility of appointment of the person at this position only for one term.⁵

⁵ For detailed information see: „Prosecution System Reform“ Human Rights Education and Monitoring Center (EMC), Tbilisi, 2018. Available: <https://emc.org.ge/uploads/products/pdf>

The Venice Commission regards such regulation as a guarantee of the Chief Prosecutor's independence and political impartiality⁶.

The independence of the whole system of Prosecution largely depends on the degree of independence of its head. Taking into consideration the status and the role of the Chief Prosecutor, it is important to review the norms regulating the appointment of the Chief Prosecutor in the presented draft. More specifically:

- The one-month consultation procedure for the selection of the Chief Prosecutor should be replaced by the Open Competition procedure and decision-making within the Prosecutorial Council should be based on the several-stage open procedures.
- All interested persons, who will satisfy the qualification requirements set by the law, should be able to participate in the competition. In addition, the Prosecutorial Council should conduct interviews with all candidates satisfying the formal criteria, at the open hearing of the Council;
- Considering that the Chief Prosecutor is elected by the majority of the total composition of the Parliament it is important that legislation provides additional guarantees for the legitimacy of the process at the time of the decision-making at the Prosecutorial Council. The Council should submit to Parliament the best candidate, according to the criteria and provide a written explanation regarding the taken decision on the nominated candidate;
- It is also important to ensure the public committee hearing of the candidate of Chief Prosecutor, before the final decision is made during the Parliamentary hearing of the selection of a candidate for the Chief Prosecutor.
- To ensure the independence and political impartiality of the Chief Prosecutor, it is important to remove the provision from the initiated version that provides the possibility of re-election of the Chief Prosecutor.

4. Parliamentary control over the activities of the Prosecutor's Office

Parliamentary supervision over the activities of the Prosecutor's Office is an important process in the draft law, and deals with almost all the mechanisms of parliamentary control adopted by the Parliamentary Regulation project.

In general, it should be noted that the existence of a strong parliamentary control mechanism is important in the country, especially with regards to the organs with independent constitutional status. As it is one of the most effective mechanisms for control of these bodies. It should be positively assessed

⁶ See: 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) Par:VIII

that the draft took into account the inadmissibility of the report on individual criminal cases. This is an important guarantee for the independence of the Prosecutor's Office and non-interference in its activities. However, in this regard, it will be important to focus on several factors. specifically:

- It would be better if the issues related to the parliamentary accountability and supervision of the Prosecutor's Office are regulated by the Parliamentary Regulations. In the Organic Law on Prosecutor's Office, only the general norm should remain, which will establish that the parliamentary supervision and reporting issues are regulated by the Parliamentary Regulations.
- It is important for the Law to specify that the Chief Prosecutor shall present the annual report and the deputy Chief Prosecutor can also have the possibility to communicate through other parliamentary control procedures (such as interpellation) in the relevant format.
- The law should define the scope of accountability in detail. More specifically, the annual report, together with the data provided in the law, should also include the results of the implementation of criminal law policy, assessing the general crime related situation in the country (where there will be information regarding the quantitative analysis of crime), types of crime and their intensity. It is also important to assess the results of the Victimological Survey of the country in order to define the strategy of the Prosecutor's Office and its future priorities.

5. Other issues regulated by the Law

- The initiated project, together with other issues, determines the possibility of creating a specialized Prosecutor's office in the system. However, the law is quite general in this direction. The draft does not reveal in which particular cases there will be a possibility to create a specialized Prosecutor's Office. It is also vague which principle of specialization will be the basis for the decision;
- The proposed project, as well as the current law, contains many of the norms which are subject of the regulation under the criminal law process. For example, issues related to prosecutorial acts/decrees. It would be better if the law, in relation to similar topics, indicates that these issues are regulated by the Criminal Procedure Code;
- It is important to note that in the Organic Law on Prosecutor's Office, as well as in the Code of Criminal Procedure and other legislative acts, the criminal policy is defined not by the Chief Prosecutor, but by the parliament. What type of document is the rules for coordination of fight against crime needs to be specified on the legislative level. According to the current edition of

the law, as well as the presented draft, the rule is approved by the government of Georgia. Under the context that the Prosecutor's Office is no longer a body within the executive branch, it is important to review whether, considering the current status of the Prosecutor's office, the said documents should be approved by the Georgian Government.

- Investigative and territorial investigative authority is determined by the Chief Prosecutor under the Criminal Procedural Code and the Law of Georgia on Prosecutor's Office. In practice, the singlehanded solution of this issue may cause important problems. Therefore, the investigative and territorial investigative authority should be directly defined by the law and it should not be dependent on the sole decision of the Chief Prosecutor.

- The proposed draft law envisages the existence of other collegiate bodies in the system of prosecution, in parallel to the Prosecutorial Council. For example, the Permanent Advisory Board of the Chief Prosecutor, whose primary authority is to provide career management, and ethical deliberation, according to the proposed version of the draft law. It is important that the decision regarding the issues in the system will not be taken singlehandedly and in most cases this authority will be distributed on the collegiate level. However, we think that the issue of functioning of these bodies in parallel with the Prosecutorial Council needs additional review. Considering the current practice and international experience, we believe that such issues as determining and implementing personnel policies, disciplinary liability, should be directly under the competence of the Prosecutorial Council.

- The legislative package also provides for changes in the Law of Georgia on Police and the Law of Georgia on State Security. In both laws, the amendment refers to the articles that determine the referral of the general inspection inquiry. More specifically, it obliges the General Inspection to share the information with the Prosecutor's Office for the purpose of reacting to the crime (Article 57(5) of the Law of Georgia on Police, Article 50(5) of the Law of Georgia on State Security Service of Georgia). It is noteworthy that amendments were made in accordance with the law of July 21, 2018, based on the Law of Georgia on State Inspector Service, which will come into force from January 1, 2019. According to July, 2018 amendments, based on the General Inspection inquiry, in case of the identification of the offense in the action of relevant persons, the information shall be provided to the Prosecutor's Office or State Inspector's Office. It is in our opinion, that the said provisions in both laws should remain unchanged.