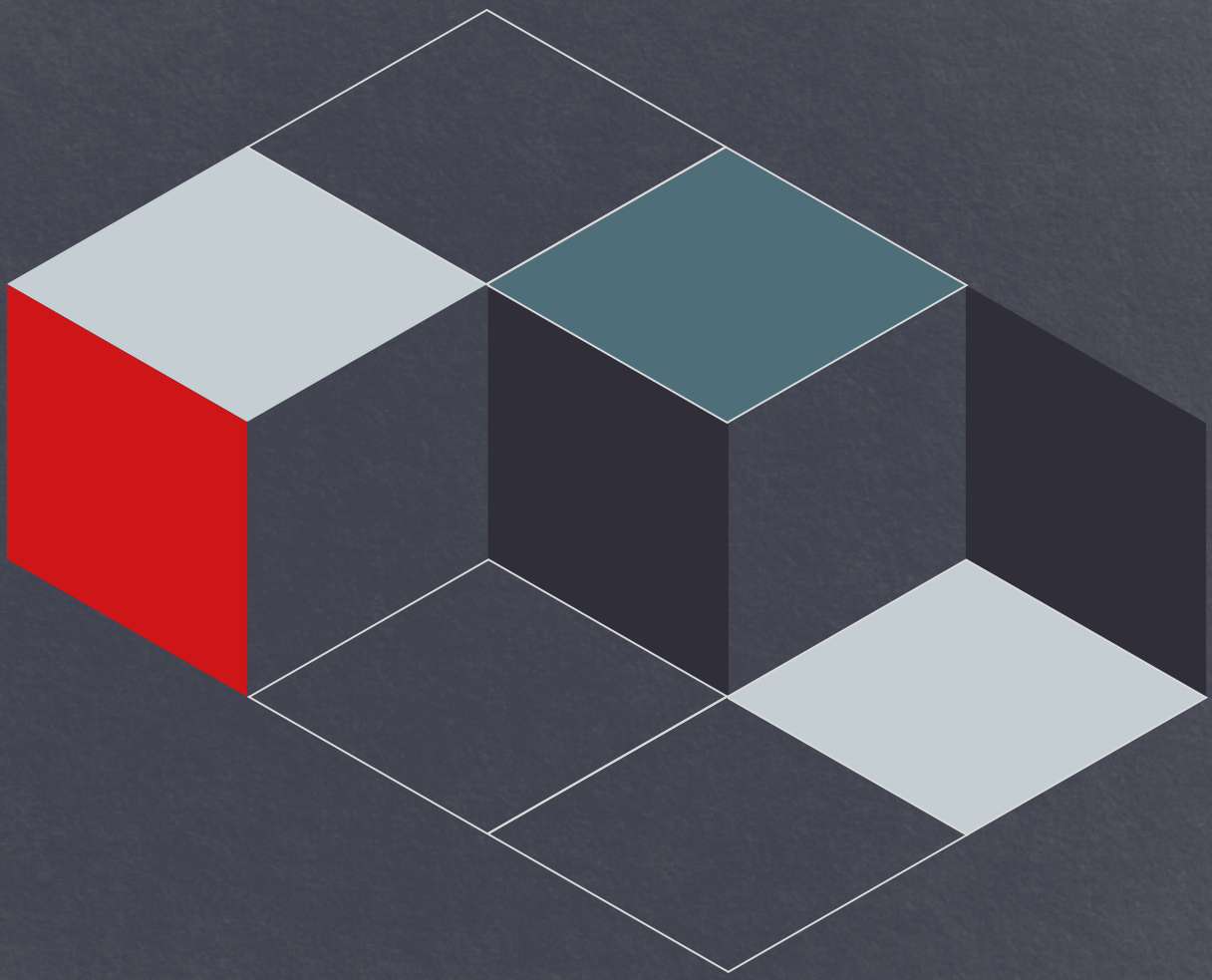
REFORM OF THE PROSECUTION SYSTEM



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Reform of the Prosecution System

(Harmonization of the legislation with constitutional amendments)

Human Rights Education and Monitoring Center (EMC)
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EMC

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Part I

Introduction

Constitutional position, as well as rules for arrangement and functioning of the Prosecutor's Office significantly influence the quality of democracy in the country. Reforms to be implemented in the prosecution system should serve the execution of criminal justice without any political, economic or other improper influences. The rule of law, as well as the process of exercising fair, impartial and qualified justice, requires the prosecution system to achieve substantial independence.

Since the adoption of the Constitution of Georgia, legislation regulating prosecution system has been substantially changed several times. However, despite radical legislative amendments, the Prosecutor's Office is still not perceived as a body of solid institutional and functional independence.

On the background of existing challenges, the state has made a decision on another substantial change in the process of constitutional reform of 2017 and has significantly changed the constitutional framework regulating the status, authority and working order of the Prosecution Service.

Political decision expressed in constitutional amendments indicates that the management of the prosecution system is largely transferred to the collegial body; this should create more guarantees for the independence and openness of the system. In addition, sole decisions of the Chief Prosecutor on the management of the system, should be replaced by decisions discussed and adopted at the sessions of the collegial body. However, the content of constitutional amendments also indicates that the prosecution system practically becomes entirely separated from the governmental cabinet and from the spheres of supervision of specific political figures. Such radical transformation is important for the purposes of depoliticization of the prosecution system. However, for this model to work properly and not to create a body even less accountable and more alienated from the society, it is necessary to reflect constitutional amendments in legislative acts with particular caution.

The process of harmonization of the legislation with the constitutional reform should ensure the staffing of the Prosecutor's Council – the main governing body of the Prosecutor's Office, by the means of high political consensus. Under the new constitutional framework, the composition of the Prosecutor's Council and its working order is crucial in determining to what extent will the new model of the prosecution system work in Georgian reality. Another important challenge to the harmonization process is proper regulation of accountability of the prosecution system. This matter requires even more caution, given the fact that the

Prosecutor General is not a representative of a specific political team, or a member of the governmental cabinet and, thus, is not a subject of political liability mechanisms. The experience of accountability and usage of parliamentary control mechanisms over similar bodies is scarce. In addition, when determining accountability, it is important to keep the balance so that the society receives necessary information on the activities of the Prosecutor's Office; this is directly related to the changeability of public trust and attitudes towards this institution. However, the accountability before the Parliament should not create a risk of influence over specific criminal cases.

The next stage of the reform is the adoption of the organic law on the Prosecutor's Office and reflection of constitutional amendments in relevant legislative acts. As noted previously, specifying constitutional amendments on legislative level is an opportunity for the State to create such legislative order that will actually ensure the independence of Prosecutor's Office and will protect it from the risks of political influences.

The purpose of this document is not to consider the process of the constitutional reform or discussions of the Constitutional Commission about the prosecution system, neither do authors intend to review all possible models of arrangement of the prosecution system. The authors of the report are restricted to the givens created in the country by the recent constitutional amendments.

Thus, this document aims at supporting thorough and appropriate reflection of the content and purposes of the constitutional reform in the legislation and at minimizing the risks that may accompany the process of fundamental change of the prosecution system. The purpose of this document is to formulate basic proposals and recommendations, taking into consideration international standards and current best practices, in order to create a legislative base for achieving the goals of constitutional reform, to convert the Prosecutors Office into a depoliticized, highly legitimate body, where the principles of independence and accountability will be equally protected.

The document was developed with the support of Open Society Georgia Foundation. In order to consider the best international practice and other countries' experiences, in the process of formation of legislative proposals the project team was assisted by the lead researcher of the legal faculty at the Lund University, senior adviser to the Chief Public Prosecutor of Denmark, Dr. Rasmul H. Wandall. In particular, for this purpose, the expert has worked on main jurisdictions that are close to Georgia's experience by historical and political development and arrangement of State institutions. Among them, the experience of Portugal, Albania, Serbia and Croatia were analized. Practice of Ireland, England and wales, and South Africa were analized for comperative purposes. Detailed methodology of comparative research is described in the second part of the document.

1. Pre-reform Situation and Major Challenges

1.1 Institutional Subordination

The issue of subordination of the Prosecutor's Office has changed several times within the frames of current constitution. Initially, by the constitution of 1995, the Prosecutor's Office acted as a single centralized institution within the judiciary. In this model, the Chief Prosecutor was elected by the Parliament on the nomination of the President, while dismissal was regulated by impeachment.[1]

The Prosecutor's Office came under the power of executive government by the legislative amendment of 2008, by which the prosecutor's Office was defined as an agency within the system of the Ministry of Justice and general authority over it was given to the political official, the Minister of Justice.[2]

Including the agency under the power of the Ministry of Justice, naturally increased the mandate of the Minister of Justice in relation to the Prosecutor's Office. Moreover, with this legislative order, the Minister was considered as a high ranking Prosecutor and was directly entitled for criminal prosecution against certain officials, such as the President and the Prime-Minister. The Procedure for appointing the Chief Prosecutor was also changed. In particular, the Chief Prosecutor was appointed by the President on the nomination of the Minister of Justice.[3]

Scope of general leadership of the prosecutor's Office was at some extent changed by 2013 amendment to the Law of Georgia on the Prosecutor's Office. With this regulation, the authority of criminal prosecution against different officials (including the President, and the Prime-Minister) was transferred to the Chief Prosecutor who was also granted various organizational functions, that before the amendment were the competence of the Minister of Justice. However, the transfer of powers between the Chief Prosecutor and the Minister of Justice was mainly a formality, as the Minister of Justice was still authorized to issue normative acts regulating the activities of the Prosecutor's Office. She was directly authorized to approve guidelines of the criminal policy, on the nomination of the Prosecutor's Office.[4]

1 The Constitution of Georgia, 1995 edition, articles: 64, 91.

2 Constitutional law of Georgia of 10 October 2008, №344 – სსმ, №27, 27.10. 2008., article.168

3 The Law of Georgia on the Prosecutor's Office as of 27/10.2008, articles 8-9.

4 The Law of Georgia on the Prosecutor's Office as of 2013.

Despite the amendments, guarantees of political independence of the Prosecutor's Office on institutional as well as on managerial levels were weak in this model. Including the Prosecutor's Office under the power of the executive government and maintaining dominant role of the Minister of Justice created risks of political bias.

1.2. Procedure for Appointment and Dismissal of the Chief Prosecutor

The changing of subordination itself caused a change in the rule of appointment of the head of the agency. As noted in the Constitution of 1995, the Chief Prosecutor was elected by the Parliament following the President's nomination.[5] Following the amendment in the law made in 2008, the Chief Prosecutor was appointed by the President following the nomination by the Minister of Justice.[6]

With the reform of 2013, procedures for appointing the Chief Prosecutor were not substantially changed. The executive branch, namely political officials – the Minister of Justice and the Prime Minister, still has the right to participate in the process. The exclusion of the Parliament of Georgia from this process maintained the existing situation when the decision was made by a single political team and it did not take into consideration the possibility of discussion in the parliamentary format. By such a change, the political instruments of the parliamentary minority to influence the processes have been excluded. In addition, the decision-making authority was given to the leader of the ruling political team with the involvement of a member of the government, the Minister of Justice.[7]

The appointment of the Chief Prosecutor by political officials using non-transparent procedures, understandably, was not a solid guarantee to achieve the neutrality of a prosecution body. These conditions made it necessary to create maximum distance for the prosecution from the governmental cabinet.

Against the background of existing challenges, the State started the reform of the prosecution service, and the declared goal was to depoliticize the prosecution system. The reform primarily focused on the rule of appointment and dismissal of a Chief Prosecutor. The independent collegial body – Prosecutor's Council – was established with the Ministry of Justice

5 See the Constitution of Georgia, 1995 edition, Article 91.

6 The Law of Georgia on Prosecutor's Office, Article 9, edition of October 27, 2008.

7 "The politics of invisible power" (EMC), 2015, p:12 available at: https://emc.org.ge/ka/products/ukhilavi-dzalauflebis-politika-kvlevis-moklemimokhilva

for the efficient implementation of its functions and for guaranteeing the independence and transparency of the Prosecution Service. The approval of the candidate of a Chief Prosecutor was defined as one of the main authorities of the Council.[8]

As for the procedures for the appointment of the Chief Prosecutor, the complex rule was established by the law. The main idea of the amended procedure was to minimize one-sided political decision, by the way of involvement of different persons in the process. In order to select a candidate, at the first stage, the Minister of Justice was obliged to consult with the academic circles, civil society members and law professionals, and submit 3 candidates for approval to the Prosecutor's Council. The second stage of the appointment of the Chief Prosecutor was – submitting the candidate approved by the Prosecutor's Council to the Government of Georgia. The Parliament of Georgia was considered as the ultimate decision-making body in this process, which selected a candidate by a simple majority of votes.

The amendment did include the simultaneous participation of the various entities in the process of appointment of the Chief Prosecutor, and the final decision-making power of the Parliament, however, the rule did not provide full balance and the "political element" remained as the significant part of the process of appointment.[9] At the level of the law, the procedure for the constitution of consultation groups, the consultation procedures, and the criteria for the selection of candidates as a result of consultations, have not been regulated. The law did not request any substantial reasoning for the selection of the candidate from a Minister of Justice.

Noticeably, with this situation, the reform did not create a mechanism that would exclude the possibility of selecting the candidate acceptable only for a particular political team. In spite of the existing recommendations regarding the reforms,[10] the legislation failed to regulate the appointment of the Chief Prosecutor, taking into consideration professional criteria, political consensus, professional circles and representatives of the society.

In 2015, the main rule for the dismissal of a Chief Prosecutor before the end of her/his term was completely changed. The aim of the amendment was to set up regulations to ensure methods for the dismissal that would be open and objective and free from political pressure. For this purposes, the law established the Institute of Special (ad hoc) Prosecutor. This

8 The Law of Georgia on Prosecutor's Office, Article 9[1]

9 see: Preliminary joint opinion on the draft amendments to the Law on the Prosecutor's Office of Georgia, *available at*:http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)039-e

10 see: "Another Assessment of the Coalition on Adoption of the Law on Prosecutor's Office"*available at*:https://emc.org.ge/ka/products/koalitsiis-kidev-erti-shefaseba-prokuraturis-kanonshi-tsvlilebebis-mighebastan-dakavshirebit

change seemed to imply the effect of impartial process, with the condition of an independent person thoroughly and the objectively studying the circumstances of the case. However, the proposed version of appointing a prosecutor and his activities has created significant risks for the process of dismissal from the Chief Prosecutor. The law did not clearly define the status of the ad hoc prosecutor, his or her authority,[11] and the specific criteria required for the selection of a special prosecutor. The reform did not explicitly determine the procedures of a case proceeding and the legal nature of the decision taken by the Special Prosecutor. Most importantly, the Chief Prosecutor's legal protection guarantees have not been provided in this process, excluding a court's involvement in the proceedings.[12]

It can be said that by defining the mandate of the Prosecutor's Council by the legislation, the introduction of new procedures for selection/appointment of a Chief Prosecutor and ensuing amendments to the legislation, significant reform has been implemented within the Prosecutor's Office. However, in the executive branch, with a strong governmental mandate and unbalanced distribution of power, the given measures proved to be insufficient to achieve full independence and political neutrality of the Prosecutor's Office. The important challenge of the Prosecutor's Office remains the clear risks of political influence on the selection/appointment of the Chief Prosecutor, the institutional status of the Prosecutor's Council and its compatibility with the functions established by the law, the role of the Minister of Justice and the quality of influence on the Prosecutor's Office. Against this background, the necessity of constitutional change became even more evident.

2. Content of the Constitutional Reform

Considering the challenges of the independent functioning of the prosecution system, the reform of the Prosecutor's Office became part of the constitutional amendment. The constitutional reform was aimed at ensuring maximum depoliticization of the Prosecutor's Office.

The constitutional reform of 2017 created completely new legal conditions, on which the reform of the prosecution system must be based. In the conditions of a new constitutional order, the place and status of the Prosecutor's Office will fundamentally change. The Prosecution System is completely separated from the Ministry of Justice and the Cabinet, which requires creating entirely different regulations in the legislation of the following issues:

11 see: Preliminary joint opinion on the draft amendments to the Law on the Prosecutor's Office of Georgia, para:69. available at:http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)039-e

12 see: Coalition for Independent and Transparent Judiciary: "Adoption of the amendments to the Georgian Law on Prosecution Service in the third hearing. *available at*:http://coalition.ge/index.php?article_id=66&clang=0

- Rules for the appointment and dismissal of the Prosecutor General;
- Principles of formation and activities of the Prosecutor's Council;
- Forms of parliamentary accountability of the Prosecution Service.

The Constitution defined the term of office of the Prosecutor General for 6 years and established the general rule for appointment. The authority to elect the Prosecutor General was distributed between the Prosecutor's Council and the Parliament. According to the new edition of the constitution, the Prosecutor General is elected by the Parliament following to the nomination of the Prosecutor's Council. As a result of the reform, the Prosecutor's Council is a body with the constitutional status that should ensure transparency, independence, and effectiveness of the Prosecutor's Office. The new edition of the Constitution provides a general reference on the accountability of the Prosecutor's Office and determines that the Prosecutor's Office submits an annual report to the Parliament of Georgia.

While working on the reform, the Constitutional Commission did not consider the recommendation of the Venice Commission regarding the qualified voting system for the election of a Prosecutor General by the Parliament.[13] Consequently, according to the constitutional project, the decision is still made by a majority, which does not ensure the necessity of a consensus among the political groups; this in turn, would ensure against the appointment of the candidate on political grounds.[14] The Constitutional Commission did not consider the nomination initiative by the President of a Prosecutor General. However, with the constitutional reform, the Prosecutor General's legal protection guarantees have been enhanced. The amendment has imposed impeachment rules for the dismissal of a Chief Prosecutor. The threats to politicize the dismissal of the Chief Prosecutor have been reduced by this provision in the current legislation.

At this stage, it is important that the legislation includes a detailed procedure for the organization and activities of the Prosecutor's Office so as not to weaken the constitutional guarantees. The legislation should pay particular attention to the procedure for staffing and functioning of the Prosecutor's Council, selection criteria and procedures for the candidate of the Prosecutor

13 see: Draft opinion on the draft revised constitution, european commission for democracy through law, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL(2017)019-e, also: opinion on the draft constitutional amendments adopted on 15 december 2017 at the second reading by the parliament of georgia, european commission for democracy through law (venice commission) available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)005-e

14 EMC's views on the draft law on the revision of the constitution (social rights, the concept of marriage, relations between the state and the Orthodox Church of Georgia, justice, law enforcement agencies), 2017. available at:https://emcrights.files.wordpress.com/2017/05/e183a1e183a3e1839ae18390e183aee18390e1839ae18398.pdf

General, as well as the accountability of the Prosecutor's Office. In the constitutional order, where the Prosecutor's Office is not a part of judiciary system or an executive branch and exists as an independent agency, it is essential for the legislation to establish an effective system of accountability. Consequently, the legislation should pay significant attention to the issues of determining the scope of the agency's accountability and parliamentary supervision.

3. Composition and authorities of the Prosecutor's Council

The constitutional amendments of 2017 further strengthen the role and importance of the Prosecutorial Council in the Prosecutor's system. In addition, the constitutional reform establishes certain principles concerning the composition and the authority of the Prosecutorial Council, in particular:

- The Council of Prosecutors is established to ensure the independence, transparency and effectiveness of the Prosecutor's Office;
- The Council of Prosecutors consists of 15 members;
- The Chairperson of the Council of Prosecutors is elected by the Council itself for a term of 2 years;
- The Prosecutor General's candidature shall be nominated to the Parliament by the Council of Prosecutors.

Although the contents of the constitutional amendments make quite general references on the formulation and work of the Prosecutor's Council, in light of the international standards, other countries experiences and the local context, it is possible to define such a legislative framework that will facilitate creation of an independent Prosecutor's Council, free from political interventions.

3.1. International Standards for the formation of the collegial organs

From the international standards in relation to the composition and functioning of a collegial body in the system of prosecution, it is important to focus on several of them. specifically:

- The majority of the Prosecutor's Council should be the prosecutors, who are directly elected by the prosecutors, but it is important to include the experts in the field of law and the academics.[15]

- If the legislation envisages the selection of specific members of the Prosecutor's Council by the Parliament, it is important that the Parliament make this decision by a qualified majority vote.[16]

- All of the Prosecutors of the Council shall be selected by taking into consideration the professional qualifications, experience and culture of independence.[17]

- Any decision of the Prosecutor's Council should be superiorobligatory and not of a recommendatory character.

3.2. A brief overview of other countries experiences

International practice defines two different models of functioning of the collegial body in the Prosecution and judicial systems. In some jurisdictions [18] one collegial body works jointly on the issues related to the Prosecutor's Office and judicial authorities,[19] and in other legal systems their authority is separated.[20] For the purposes of this overview, the focus will be made on the countries that are more or less closer to the proposed model of the constitutional reform.

The high Council of the Prosecution Service is a collegial body in Portugal [21]. The Council consists of 16 members in total, majority of which are prosecutors of different levels. The Council consists of five members of the parliamentary mandate and two representatives of

15 Rec(2010)12, paras 26-29; the CCJE Opinions No. 1(2001), para 45, and No. 10(2007), the Venice Commission' Report on the Independence of the Judicial System, Part I: the Independence of Judges (para 32), adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), recommend the establishment of such Councils

16 Vienna Commission for Democracy through Law, report on European Standards as regards the independence of the judicial system: Part II – The Prosecution Service (CDL-AD(2010)040), Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2Top of Form)

17 See: the CCJE Opinion No. 10(2007), para 21.

18 Such regulation is primarily characteristic of the Roman-German law countries, the classic example of this model is Germany.

19 Such jurisdictions are Itali, France, Belgium and Spain.

20 Example of such separation of powers are Albenia, Serbia, Croatia, Porugal.

21 See more: The Statute of the Public Prosecution Service of Portugal

the Ministry of Justice. The prosecutor members of the Council are elected for a period of three years and the representatives of the Parliament and the Ministry of Justice for the term of their office. Prosecutor members' participation in the Council is not of voluntary nature, it is a professional responsibility. In contrast to the practice of other countries, the law does not regulate the early termination of the council membership. The main authority of the Council is to elaborate and implement personnel policies in the system of the Prosecutor's Office.[22] The Council is authorized to approve the procedure of the Chief Prosecutor's office and draft budget proposal. The Council may submit to the Chief Prosecutor the obligatory acts for approval and address the Minister of Justice, through the Chief Prosecutor, to amend the legislative acts determining the activity of the Prosecution Service. The Council makes a decision through the majority vote, where the Chief Prosecutor has the right to decisive vote. The disciplinary section is established within the Council, composed of the Chief Prosecutor, their deputy and five prosecutors of different levels and one representative of the Ministry of Justice. The Minister of Justice has the right to attend sessions at will.

In the high Council, the majority of members are represented by the Prosecutor's Office in Albania.[23] Of the eleven members of the council, six are prosecutors, and 5 members are elected by the Parliament based on the competition, and should be lawyers by profession. Two of the five members elected by the Parliament should be lawyers by training, two should be law professors, and one should be civil society representative. The main authority of the Council is to nominate a candidate for the Chief Prosecutor and submit the candidature to the Parliament. The Council is involved in this process from the initial stage. Specifically, it announces the competition for the selection of candidates, selects candidates and submits three candidates with the best result to the Parliament. Same as with Portugal, in this model, the high Council has the authority to assign different level prosecutors on the basis of the competition, determine and carry out the staff policy of the Prosecutor's Office and make decisions on disciplinary measures. In this model, the legislation provides the detailed bases for termination of the powers of the Prosecutor Council members.

The State Prosecutor's Council exercises sharp control in Serbia. The composition of the Prosecutor's Council is maximally balanced in this model. Ex officio members of the Council are the Chief Prosecutor, the Minister of Justice and the Chairman of the relevant Parliamentary Committee. Majority of the members in this model are prosecutors of various levels, these are the permanent members. Representatives of civil society are also included.[24]

22 The Council's authority in relation to selecting the Chief Prosecutors will be discussed below.

23 See: Law No. 97/2016 on the Organization and Functioning of the Prosecution in the Republic of Albania

24 A member of the council must be a person with 15 years of professional experience. From this sector, the law faculty member can be part of the Council.

Members of the Council, except for ex officio members and prosecutors, are elected by Parliament. Prosecutor members are elected directly by prosecutors. In this model, the General Prosecutor is directly elected by the Parliament. The Council is entitled to directly select the deputy prosecutor of the different levels as specified by law. The Council has a significant authority in terms of dismissal of prosecutors. The Council directly establishes the grounds for dismissal of public prosecutors and their deputies. In spite of the fact that the Council does not directly participate in the appointment of the Chief Prosecutor, it has the authority to designate the acting Chief Prosecutor, if the Parliament adopts the decision of the dismissal of the Chief Prosecutor. The characteristic of this model is that the Council exercises the authority to review the complaint of subordinate prosecutors in relation to the Chief Prosecutor's decisions, and to suspend the decision as non-mandatory. Similarly to other reviewed countries, it is in the authority of the Prosecutor's Council to define and implement personnel policies. The Council also has the right to conduct disciplinary proceedings and to create sub-committees for this purpose. The State Prosecutor's Council approves the Code of Ethics and establishes the standards according to which professional assessment criteria must be determined.

3.3. Proposals on the composition and authorities of the Prosecutor's Council

Contents of the new edition of the Constitution of Georgia and the context of the elaboration of the amendments indicate that the Prosecutor's Council should be a professional body of management of the Prosecution Service, which will be exempt from political representation and its composition will be representative and balanced.

According to constitutional changes, the Prosecutor's Council is created to ensure the independence, transparency and effectiveness of the Prosecutor's Office, indicating that the Council needs to become even more effective, enhance its functions, human and financial resources.

Taking into consideration the international standards and experiences of other countries:

- It is important that the Organic Law on Prosecutor's Office ensures the reasonably balanced representation of different circles in the Prosecutor's Council. The Minister of Justice, the Members of Parliament and the representatives of the judiciary should no longer be included in the Prosecutor's Council;

- It is advisable that the prosecutors of different levels make up the majority of the Council, and that these prosecutors are directly elected by the Conference of Prosecutors with

a secret ballot. Gender, territorial and hierarchical representation should be taken into consideration;

- The Prosecutors' Conference should choose 8 applicable prosecutors, one of which may be the Prosecutor General. Any member of the Conference of Prosecutors should have the right to nominate a candidate;

- The Prosecutor General may participate in the meetings of the Prosecutor's Council without the right to vote;

- The Council should also include representatives of the legal academics and civil society (7 non-prosecutor members), 4 of which should be selected through the open competition by the Parliament with a qualified majority and 3 members by the Public Defender of Georgia, in accordance with the procedure established by the Law of Georgia on Legal Aid;

- Four non-prosecutor members must be elected by the Parliament in a way that the legislation requires the necessity of a political consensus between the parliamentary majority and the minority. For this purpose, separate polling procedures must be defined in the majority and minority and those candidates, who receive support from both parties, will be considered as elected;

- For the election of the non-prosecutor, the parliamentary regulations should determine the terms of submission of candidatures and the process of inspection of the documents. Also, it is necessary to write the rules of open committee hearings and ensure the possibility of asking questions;

- The law should establish a specific term for each member and define the grounds and rules for early termination of the authority of the Prosecutor's Council members. The authority of the Council may, among other things, be terminated by the appointment of a position incompatible with the membership of the Council or in the choice of such a position, entry into force of the guilty verdict and in case of systemically failing their duties. The decision of early termination of authority to the members of the Council shall be adopted in accordance with the person / body who directly elected a particular member;

- Restriction of re-election of the same person in the Prosecutor's Council should be determined by law;

- After the amendment, it is advisable to review existing composition of the Prosecutor's Council.

With regards to the Prosecutor Council's authority, we consider that, in light of a new constitutional order, the Prosecutorial Council should be defining the main policy, as well as the recruitment and organization related matters of the Prosecutor System. Thus, it is necessary to expand the powers of the Prosecutor's Council on the legal level, in particular:

- The activities of the Prosecutor's Council must be conducted transparently, sessions of the Prosecutor's Council should be open;

- It is advisable that the Council elects the deputy general prosecutors, nominated by the Prosecutor General, with 2/3 majority of the entire membership;

- It is recommended that the Prosecutor's Council appoints prosecutors of the Autonomous Republics of Abkhazia and Adjara, as well as Tbilisi and district prosecutors, nominated by the Chief Prosecutor;

- It is also recommended that the Council also has the right to appoint any other prosecutor and investigator of the Prosecution Service, based on the open competition;

- The Prosecutor's Council should have the authority to determine the recruitment policy of the Prosecutor's Office;

- It is advisable that the Council has an authority to decide on the use of disciplinary measures on the basis of General Inspection's inquiry. In order to achieve these objectives, the Council should be able to create working groups, sub-committees;[25]

- Based on the initiative of the Chief Prosecutor or the Council member, the Council should be entitled to hear the report /statement of the Chief Prosecutor. The Organic Law should define the limits of accountability, individual cases of prosecution or non-prosecution should be ruled out;

- The Council should have the right to recommend to the relevant authorities about the amendments in relation to the legislative acts defining the work of the Prosecutor's office and other relevant acts;

- The Council must be able to develop and approve different types of individual and normative acts;

25 The law shall ensure the possibility to appeal the decision made by the Council within the scope of disciplinary proceedings.

- The following authority of the Minister of Justice should be transferred to the Prosecutor's Council: as nominated by the Chief Prosecutor, the Council should approve legal acts and regulations of the Prosecutor's organs and its structural units regarding creating and dismantling of the Prosecutor's organs and their structural units, as well as their territorial scope and competence;

- The Council should have the power to elaborate and approve the procedure for internship at the Prosecutor's Office, the amount of remuneration of employees of the Prosecution, proposals on financing of the Prosecutor's Office and providing its material-technical support. The Council, in coordination with the Chief Prosecutor, should draft the budget proposal;

- It is recommended that the Prosecutor's Council adopts decision on the issues of appointment / dismissal and disciplinary responsibilities with 2/3 of the full composition;

- Since under the constitutional reform the powers of the Prosecutor's Council are significantly increased, it is important that work is permanent and paid in the Prosecutor's Council. It is important to specify in the law that, in order to effectively implement its activities, the aparatus will be created within the Council. The Council, in accordance with its internal regulations, should provide the staff with the qualified personnel;

- The law should directly define that the budget is the source of funding for the Council and the state provides the appropriate funds for its functioning;

- In parallel to the organic law, the relevant amendments should be reflected in the Code of Criminal Procedure, specifically that the Minister of Justice should not be authorized to approve the criminal policy. The criminal law policy should be adopted by the Parliament on the proposal of the Government. The Chief Prosecutor should be able to develop and issue relevant orders and instructions based on the criminal policy document;

- The law should define the rules of conflict of interests in the Prosecutor's Council activities, rules for decision making and appealing the decisions.

4. Appointment and dismissal of the Prosecutor General

The constitutional reform has changed the rule of Chief Prosecutor's appointment and dismissal. The authority to appoint was distributed between the Prosecutor's Council and the Parliament, while the dismissal is regulated by special rules. Namely:

- The Prosecutor's Council selects and submits the candidate of the Chief Prosecutor to the Parliament of Georgia;
- The Parliament of Georgia elects the Chief Prosecutor with the majority of the full composition, on the basis of the Prosecutor's Council proposal;
- On the grounds of a violation of the Constitution or criminal activity, the Parliament shall raise the issue of dismissal of the Chief Prosecutor with at least one-third of the full composition.

Although, the reform only provided general guidelines in relation to these the issues of the reform, however in this framework, taking into consideration the existing international standards and practices, through organic law it is possible to form such regulations, that appointment and dismissal of the Chief Prosecutor the cannot be based on the one-sided political will and this issue is resolved by consensus.

4.1. International standards on the appointment and dismissal of the Prosecutor General

Several important international standards can be distinguished when speaking about appointment and premature dismissal of the Chief Prosecutor. More specifically:

- Objective, professional and non-political examination shall be ensured in the process of selecting the candidate for the Chief Prosecutor.[26]

26 Vienna Commission for Democracy through Law, report on European Standards as regards the independence of the judicial system: Part II – The Prosecution Service (CDL-AD(2010)040), Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2)

- The decision making body/individual shall obtain advice on candidate's professional qualifications from the relevant body, professional representatives (including prosecutors) and members of the Civil Society.[27]

- Decision on selecting the candidate shall be made in a collegial body by a qualified majority.[28]

- The law shall not allow the possibility of re-election on the position of the Chief Prosecutor. The term of the office shall be determined in a way to ensure official stability of the candidate.[29]

- Bases for premature dismissal of the Chief Prosecutor shall be detailed in the legislation. In this process, receiving relevant assessment from independent experts shall be ensured in order to establish the existence of bases for premature dismissal.[30]

- In any case, when considering early release of the Chief Prosecutor, Fair hearing shall be ensured, including in the parliament.[31]

4.2. A Brief overview of other countries' experiences

Procedure for appointing and dismissing the Chief Prosecutor significantly determines the level of independence of the entire structure. Although international practice in this direction is different, it has been unanimously agreed that in the process of selecting the candidate, an individual selected as a result of consensus between different parties shall be nominated to the relevant body in order to make the final decision.

According to ***Albanian*** legislation**,** the Parliament is entitled to appoint the Chief Prosecutor nominated by the Council of Prosecutors. In this model, the legislation specifies the criteria on the bases of which the high Council shall make its decision. The Council is legally bound

27 Ibid: Paragraph 35.

28 Ibid: Paragraph 36.

29 CCPE Opinion No. 9(2014), para 56, referring to the Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, 3 January 2011, § 37. Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/20/19, 7 June 2012, § 65

30 Vienna Commission for Democracy through Law, report on European Standards as regards the independence of the judicial system: Part II – The Prosecution Service (CDL-AD(2010)040), Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010)

31 Ibid

to ensure the transparency of the process. In order to select the candidate, the Council announces a competition and determines competition requirements. Within the scope of the competition, the Council organizes hearing of candidates and nominates three best candidates to the Parliament. Each nomination shall be justified by the reasonable decision of the Council. In case the Parliament does not select the Chief Prosecutor from the nominated candidates within 30 days, the Candidate with the highest assessment by the Council automatically becomes the Chief prosecutor. When appointed to the position, the Chief Prosecutor shall give the oath.

In ***Serbia,*** the Council of Prosecutors nominates one or more candidates to the Government and the Government then nominates candidates to the Parliament for the final decision. If only one candidate is nominated, the Government may return the proposal back to the Council and reinitiate the procedure.

Not much is included in terms of procedural details regarding the appointment of the Chief Prosecutor in the legislation of ***Portugal***. According to the legislation, the Chief prosecutor is appointed and dismissed by the President on the nomination of the Government. The constitution defines the term of the office of the Chief Prosecutor as 6 years.

Different procedure is in force in ***Ireland***. In the Irish Model, the Chief Prosecutor is appointed by the Government. He then acts as a civil person who is independent in his activities. The legislation establishes basic minimum qualification requirements that a candidate should meet. The Candidate is selected and nominated to the Government for approval by the special committee, created with the participation of the Chairman of the Supreme Court, the Chairman of the Advisory Board of Ireland, the Secretary of State and other individuals. The Government is not entitled to appoint an individual who was not nominated by the Committee.

Different jurisdictions use different procedure for the dismissal of the Chief Prosecutor. In most of the cases, the body/individual who appointed the Prosecutor is entitled to dismiss him. In ***Albania***, for example, the issue of dismissal may arise in case of deliberate offense of the constitution or violation of the law when exercising the power or in case of significant professional or ethical misconduct. The Constitutional Court shall confirm the existence of such components in actions of the Chief Prosecutor. Deterioration of physical or mental health, as well as the behaviour of the Prosecutor that significantly degrades the activities and reputation of the Prosecution Service is also bases for the dismissal. In any case, the decision on the dismissal shall be confirmed by the Council of Prosecutors.

In Serbia, the Parliament is entitled to make a decision on premature dismissal of the Chief Prosecutor. This decision may be made on the bases of the nomination of the Government. The legislation defines the procedure and basis for making the decision. More specifically, Public Prosecutor and his deputies may become a subject of premature dismissal in case of improper execution of duties, severe disciplinary misconduct or a conviction of such offense, which imposes a penalty of at least 6 months of imprisonment. Any individual is entitled to raise this issue. The Council of Prosecutors will review the facts and the procedure for decision making at the closed session. The Council is obliged to make a decision within 45 days and apply to the Government with reasonable proposal. The final decision is made by the Parliament on the basis of the recommendation from the Government. This decision may be appealed to the Constitutional Court.

In ***Ireland*** final decision on the dismissal of the Director of Public Prosecution Service is made by the Government. However, the Governments' decision is based on the report of the Committee established especially for this purpose. The special committee is established if requested by the Government and is composed of the Chairman of the Supreme Court, the Judge of the Supreme Court nominated by the Chiarman of the Supreme Court, and the Chief Prosecutor. The Committee is authorized to conduct inquiry and Investigation, including the assessment of health, physical and mental condition of the director of Public Prosecutor's Office.

Among all the discussed practices, the Ireland represents an example of a country where all the stakeholders are involved in the decision making process, ensuring the balance between the independence of the activities of Prosecutor's Office, political legitimacy and the rule of law.

It is recommended in every model to ensure the right of fair hearing for the Chief Prosecutor in the process of decision making, including in the parliament[32].

4.3.Proposals on the appointments and dismissal of the Prosecutor General

The constitutional amendment established the basic principles under which the organic law should define the issues related to the Chief Prosecutor's appointment and dismissal. Taking into account the general Constitutional framework, the current experience in the country and the international practice:

- It is important that the Organic Law elaborates exhaustive qualification requirements for the candidate to satisfy;

32 European commission for democracy through law (venice commission) european standards as regards the independence of the judicial system: part ii – the prosecution service, available at: https://rm.coe.int/1680700a60

- The Prosecutor's Council selects the candidate based on the competition;

- The Organic Law defines deadlines and stages for selection of the candidate of the Chief Prosecutor, including the forms of searching / verifying the information on nominated candidates. Any person or organization should be able to provide information regarding the candidates to the Prosecutor's Council;

- In addition to the submitted documents and information received by the Prosecutor's Council, the decision shall be made on the basis of an interview held at an open sitting with all the candidates who have passed the preliminary formal selection phase;

- In the situations where the constitutional reform cannot completely depoliticize the election of the candidate by the parliament,[33] it is important that this process should be balanced in the framework of the Prosecutor's Council. The Prosecutor's Council should evaluate the candidates according to established criteria with the score system;

- The Prosecutor's Council should present the candidate with three best results for the Parliament to consider. While nominating a candidate, the Council should ensure the gender balance. The Council should submit the decision regarding each nominated candidate in writing;

- It is important that the law ensures transparency of the oral hearing of the nominated candidates in the relevant committee (s) and openness of the process where the members of the public will have the opportunity to ask questions to the candidates directly;

- The Organic Law should specify that a person can not be re-elected as a Chief Prosecutor.

As to the issue of dismissal of the Chief Prosecutor before its due term, the law should elaborate the procedure for initiation of the issue and the impeachment decision. Namely:

- In the impeachment procedure, the right to a fair and open hearing of the Chief Prosecutor should be unequivocally secured in the Parliament;

- The law should also define other grounds for early dismissal of the Chief Prosecutor. For example: a personal statement, incompatibility with a position, the court establishing a legal capacity restriction, termination of Georgian citizenship, commiting a corruptionmisconducts, etc. On the basis of these grounds, the Council should submit to the Parliament the request of the Chief Prosecutor to be dismissed and the Parliament should note the proposal of the Prosecutor's Council.

33 According to the constitutional amendment, Parliament approves the selection of the Chief Prosecutor with simle majority

5. Accountability issues of the Prosecutor's Office

Together with other key topics, the constitutional reform has covered the issue of accountability of the Prosecutor's Office. However, it should be taken into consideration that the Constitution is especially general in this regard. By the regulation adopted under the amendment, the Prosecutor's Office is obliged to submit annual activity report to the Parliament.

Taking such a background into consideration, detailed regulation of the accountability of the Prosecutor's Office shall be managed by the organic law. However, this shall happen in such a way to manage effective control of the activities of the Prosecutor's Office without endangering the functional independence of the body.

5.1. International standards of the accountability of the Prosecutor's Office

Standards of the accountability of the Prosecutor's Office, established by various international tools, mainly re-confirm the principle of non-interference in prosecutorial activities:

- Parliamentary Report of the Chief Prosecutor shall be public;
- The report on the activities of the Prosecutor's Office shall not include information on discretional authority of the Prosecutor, so that the law can ensure professional independence of prosecutors and non-interference in their activities;[34]
- None of the state authorities, including the Parliament, are authorized to request a report on specific criminal cases from the Prosecutor's Office;[35]
- In systems where the general criminal prosecution policy is defined by the involvement of the Parliament or the Ministry of Justice, prosecutorial report may include information on practical implementation of this policy.[36]

34 IAP Professional Standards for Prosecutors (1999)

35 The Bordeaux Declaration of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on "Judges and Prosecutors in a Democratic Society"

36 European commission for democracy through law (venice commission) european standards as regards the independence of the judicial system: part ii – the prosecution service, par: viii, subp: b. available at: https://rm.coe.int/1680700a60

5.2. A brief overview of other countries' practice

The international practice is not familiar with the uniform format of accountability and parliamentary control over prosecutorial activities. There are basically two different models across the international practice – direct and non-direct parliamentary control. However, it should be noted that such jurisdictions mainly involve annual reporting system of the Prosecutor's Office including information on planned activities and directions, as well as the summary of annual results of the activities.

Legislative framework in ***Portugal*** does not define general rules of accountability. There is no special obligation of reporting to the Parliament. However, Once every three years, the Prosecutor General's Office (Ministerio Publico) presents a draft statute for the Assembly to agree to the strategy and priorities of the prosecution service for the coming three years.[37] The Law defines the priorities for the Public Prosecution Service for the three years.[38] The Prosecutor General appears before the Assembly to report the outcome of the strategy. In this model, the Prosecutor's Office has an obligation of public accountability. In particular, it annually publishes the report on its activities and future plans. In addition, on the ad hoc bases, it also publishes policies developed in relation to specific crimes. Transparency of prosecutorial activities is an important component of public accountability in Portugal and it is ensured at the legislative level.

Unlike Portugal, the Chief Prosecutor in ***Albania*** has an obligation of direct accountability to the legislative body. In this model, the Chief Prosecutor periodically (at least once a year) presents a report on the criminal situation in the country to the Parliament. The report should include quantitative indicators of crime, types of common crimes, intensity and territory of crime. The Chief Prosecutor also presents a report to the parliament on the effectiveness of criminal prosecution and filing cases to the court. The law explicitly states that the report should not touch individual cases and their content except the exceptional cases that were sent to the Prosecutor's Office by the decision of the Parliament[39]. The Prosecutor's Office is also obliged to submit periodical reports to the Council of Ministers. This report should include the results of implementation of main recommendations given to the Prosecutor's Office by the Council of Ministers.

In ***Serbia,*** the role of the Parliament in the accountability of the Prosecutor's Office is more distinct. In this system, the Chief Prosecutor is directly accountable to the Parliament for his

37 See for example Lei Politico Criminal No 72, 20 July, 2015 setting out the strategy for 2015-2017 (https://dre.pt/application/conteudo/69839459) (accessed June 10).

38 See also the ensuing strategy of the Prosecutor General (http://www.ministeriopublico.pt/sites/default/files/documentos/pdf/proposta_de_diretiva_lpc_2015_final.pdf) (accessed June 10, 2018).

39 Law No. 97/2016, art. 104

own activities and for the activities of the Prosecutor's Office. The Chief Prosecutor reports to the parliament on annual bases. Unlike other models, this model does not ensure the direct hearing of the Chief prosecutor in the parliament.[40]

South African legislation is relatively different. The Chief Prosecutor here has to annually report to the Parliament and to also submit his report in a written format. In addition, the Parliamentary Committee of Justice and Constitutional Development has a direct obligation to supervise the activities of the Prosecutor's Office and is, therefore, authorized to request written, as well as oral reports from the Prosecutor's Office.

The obligation of oral hearing of the Supervisor of Prosecutor's Office is imposed by the legislations of ***England and Wales*** as well, where the relevant committee is authorized to invite the Chief Prosecutor for oral hearing.

Despite different regulations, basic principle of accountability is common to most of the discussed jurisdictions – individual criminal cases should not become subject to parliamentary control, and reference to specific cases should be eliminated.[41] However, the volume of the report, main components is should include and topics it should cover are not clearly defined. In ***Australia***, for instance, the Chief Prosecutor along with the annual report, publicly publishes the annual budget as well.[42] In ***Canada***, the Annual report 2017 of the prosecutor's Office included topics such as: General review of the Prosecutor's Office, annual review with thematic details, legal proceedings on the cases filed to the Supreme Court, trainings, staffing and financial issues. Similar information was included in the 2017 Annual Prosecutorial Report in ***England and Wales***. More specifically, the later referred to general performance, budget estimates and financial matters.

5.3.Proposals on the accountability of the Prosecutors Office

Although the constitutional amendment still has not achieved the detailed regulation of the accountability of the Prosecutor's Office, taking into consideration the constitutional framework, relevant international standards and practices of different countries, it becomes possible to determine the basic principals on the basis of which the organic law shall regulate the issue of accountability:

40 The Law on Prosecution Service, article 3.

41 Ibid

42 See also: https://www.cdpp.gov.au/publications?field_publication_type_tid%5B0%5D=21

- In order to ensure effective public accountability of the Prosecutor's Office, transparency shall be defined as one of the main principals of its activities;

- Annual report on the activities of the Prosecutor's Office shall be submitted to the Parliament by the Chief Prosecutor;

- The legislation shall define the basic topics to be included in the report, such as information on criminal justice policy, and on the execution of orders/instructions issued on the basis of this policy, general assessment of crime condition, main challenges, and future plans, results of victimology survey, quantitative indicators of crime, types of common crime, intensity, territory of crime, future strategy for combating crime, data on the transparency of prosecution activities issues of access to public information. The report should also include the assessment of the annual organizational arrangement of the Prosecutor's Office, personnel issues, educational programs for enhancing prosecutors' qualification, the practice of using internal and external tools for this purpose, data on disciplinary liability, financial matters. The report should equally cover all levels of prosecutorial system, including regional offices and existing situation there, and assessment of the activities of the Council of Prosecutors;

- Together with annual accountability defined by the Constitution, the Parliament shall be authorized to demand extraordinary report from the Chief Prosecutor, in exceptional cases;[43]

- The law shall define the form of accountability as well. It is important to ensure the provision of oral report as well as publishing it publicly in writing;

- Along with the annual report of the Chief Prosecutor, it is important to publish detailed report on the activities of the Council of Prosecutors.

43 This model operates in Montenegro legislation. See also: The Law of Montenegro on State Prosecution Service, article 104, Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2008)023-e

Part II

Questions Pertaining to the Independent functioning of prosecution services

Descriptive Comparative Report
June 2018

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Introduction

In accordance with the ECM assignment, the aim of this report is to describe the legal framework of other jurisdictions with a view to build a comparative understanding of potential practices to be applied in Georgia. The legal frameworks pertain to:

1. The Role and Functions of the collegial bodies within the Prosecutor's Office. Rule of composition of Collegial bodies and attributed power,
2. Rules of appointment and dismissal of the Prosecutor General,
3. Accountability of the Prosecutor's office before the Parliament.

In this section one, the report outlines the main international ideals pertaining to independent prosecution. Section two presents the main comparative models of ensuring independent prosecution. The section presents the comparative methodological challenges and limitations that follows and explains the selection of jurisdictions for the comparative descriptive. Section three describes selected jurisdictions' legal frameworks of collegial bodies and their functions and powers. Section four turns to the appointment, tenure and dismissal of the Prosecutor General. Section five describes selected legal frameworks pertaining to parliamentary and public accountability. The emphasis in the descriptions is on the collegial bodies and the parliamentary accountability.

International standards

Prosecution as an exercise of the rule of law independent from political, economic and other undue influence has increasingly manifested itself as a principle of international recognition over the last 30 years. The promulgation of the UN Guidelines on the Role of Prosecutors (1990) – the Havana Guidelines – and the IAP Professional Standards for Prosecutors (1999) were both significant steps towards creating an awareness and to bring prosecutors together across borders in support of a shared professional identity: independent and accountable prosecution. The UN Guidelines proscribes that states:

> *"shall ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."*[44]

44 UN Guidelines (1990), par. 4.

In the IAP Standards of Professional responsibility and Statement of the Essential Duties and Rights of Prosecutors, section 2 is headlined "Independence" and states that:

> *"The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference."*

Regionally, the Council of Europe Recommendation Rec(2000)19 of the Committee of Ministers and a series of later reports have established independent prosecution as a firm professional ideal. But more importantly, independent prosecution has become an integral part of constitutional reforms and amended prosecution acts in recent years in domestic jurisdictions on all continents.

On a principled level, all CoE jurisdictions base their prosecution services on the ideal of Rule of Law. Council of Europe Rec (2000) 19 states that:

> *"States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. […]".*[45]

Institutional independence is essential to achieve this end. A number of Council of Europe instruments, recommendations and reports, develop recommendations of how institutionally to arrange according to this idea. The essential documents are:[46]

- Recommendation Rec(2000)19 of the Committee of Minister of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System.

- The Bordeaux Declaration of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on "Judges and Prosecutors in a Democratic Society."

- The European Guidelines on Ethics and Conduct for Public Prosecutors (Council of Europe, "Budapest Guidelines", 2005).

- Vienna Commission for Democracy through Law, report on European Standards as regards the independence of the judicial system: Part II – The Prosecution Service (CDL-AD(2010)040), Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010)

45 Council of Europe Rec (2000) 19, par. 11.

46 See also *Prosecution independence and accountability: Principles, challenges and recommendations*, Paper by the Commonwealth Secretariat, October 2016 with a focus on Common law jurisdictions.

- European Norms and Principles Concerning Prosecutors, Opinion no. 9 (2014), Adopted by the Consultative Council of European Prosecutors.

- Challenges for judicial independence and impartiality in the member states of the Council of Europe Report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe as a follow-up to his 2015 report entitled "State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe" March 2016 (SG/Inf(2016)3rev).

- Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017, Prepared by the Bureau of the CCPE following the proposal of the Secretary General of the Council of Europe. Strasbourg 2018 (CCPE-BU(2017)6).

In a number of judgments, the European Court of Human Rights has emphasized the need in democratic societies to ensure investigation and prosecution independent from political pressure. The Court has emphasized the need for functional independence of prosecution services to ensure protection from "undue influence" in their hierarchy and in the control of their decision-making. The court has indicated a number of characteristics of importance to institutionalize independent prosecution services: The procedures of appointment, guarantees against undue pressures on individual prosecutors, the actual appearance of independence, impact of the executive on appointment and career development of prosecutors, as well as instructions by the ministry of justice to the prosecution service.[47]

Comparative perspective

The legal framework of prosecution services and the structures to ensure their independence and accountability depend not only on legislative or constitutional arrangements. The individual criminal justice regime, the legal culture and political history of the jurisdiction and its international presence has a strong bearing.[48] It follows that it is not possible to categorise jurisdictions by way of their model of prosecution services. The differences between the legal cultures, the crimi-

47 Moulin v. France (Application no. 37104/06), Judgment, 23 November 2010; Medvedyev and others v. France (Application no. 3394/03), Judgment, 29 March 2010; Kolevi v. Bulgaria (Application no. 1108/02), Judgment, 5 November 2009, the European Court of Human Rights indicated characteristics of independence: appointment and guarantees against undue pressures, appearance of independence, impact of the executive on appointment and career development, instructions by the ministry of justice.

48 Damaska, M. R., *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process,* Yale University Press, New Haven, 1986; Nelken, D., "Can Prosecutors be too Independent?" in Daems, T, Zyl Smnit, D. van and Snacken, S., *European Penology,* Hart Publishing, Oxford, 2013, p. 249; Wandall, R. "Comparative Courts and Sentencing", in G.J.N. Bruinsma, D.L. Weisburd (eds.), *Encyclopedia of Criminology and Criminal Justice*, Springer, 2014.

nal procedures and criminal justice systems are too many and too deep. From a comparative legal perspective the claim could be further advanced that no two solutions are alike.[49] This is indeed also what the Venice Commission argued in their report on the matter.[50] However, with some reservations, it is possible to describe the distinct statutory legal frameworks and legal practices organized under individual legal and political cultures in different jurisdictions. Furthermore, it is possible to draw on experiences from different jurisdictions to identify possible institutions, tools and procedures, and to develop a strong basis for designing specific and fitting legal frameworks and procedures for one's own jurisdiction; in this case Georgia.

Some analytical distinctions between different models of law, procedure and prosecution services serve well to organize further descriptions. First, the prevailing model of prosecution services in Germanic civil legal cultures (see for example Germany, Austria, Sweden, Denmark) in which the prosecution service is part of the executive and in which independence is maintained through an 'arms length principle' between the prosecution and the ministry of justice. Under this model, ideals of institutional independence give some way to a stronger focus on Rule of Law. Under this model, public interest is typically associated with the state and democratic accountability (ideally) ensured through the democratic legitimacy of the state authorities. Second, the prosecution model prevailing in Anglo-legal cultures, in which the Prosecution service is indeed organized as part of the executive branch, but remains independent by way of appointing an Attorney General to keep a distance between the parliament and the politicians on the one hand, and the director of public prosecutions on the other. In this model, reflecting Anglo legal culture, public interest runs deeper and is not associated with state authorities as in the executive model of civil law tradition. Hong Kong, Ireland, Australia, and England and Wales are good examples. Third, the judicial model dominant in Roman civil law traditions (see for example France, Italy, Belgium, Spain or Portugal) in which the prosecution service remains safeguarded under the institutional independence of the judiciary, or enjoys a status similar to the judiciary. Regardless that prosecutors in some of these jurisdictions are part of the hierarchical order in state authorities, their status remain judicial. Prosecutors are magistrates, and considered of judicial quality and level. Fourth, the public prosecution service is in some jurisdictions institutionally organized as an independent entity. While this is certainly not only a recent phenomenon, it is most often seen in jurisdictions, which have transitioned from a former political and legal regime to a new one, and which confront significant challenges of public lack of confidence combined with comparatively high levels of corruption. Examples include Albania, Croatia, Serbia, Moldova, Zimbabwe, South Africa to name some of the more pronounced examples.

49 See also Open Society Institute, *Promoting Prosecutorial Accountability, Independence and Effectiveness. Comparative Research*. Open Society Institute. Sofia. 2008.

50 Venice Commission for Democracy through Law, report on European Standards as regards the independence of the judicial system: Part II – The Prosecution Service (CDL-AD(2010)040), Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) (Hereafter The Venice Commission Report).

Some international surveys and reports focus on whether jurisdictions regulate their prosecution services on a constitutional level or not. Examples of countries include Italy, France, Serbia, Albania, Portugal, and South Africa. Functionally, the choice of statutory framework may have serious consequences for the stability of the solution and for independence vis a vis interests controlled by the legislative power.

It is not possible to place Georgia in any one of these models. What we can say is that in developing a strong legal institutional framework in a jurisdiction with the legal and political history of Georgia, comparable examples from where inspiration can be observed, are found in jurisdictions in which institutional independence from political control have been approached by the establishment of collegial bodies and by institutional arrangements that relief the prosecution from control of the executive by way of increased parliamentary accountability. Moreover, jurisdictions with statutory legal traditions come closest in comparison.

The report draws primarily on examples from jurisdictions in which the Prosecution service is regulated on a Constitutional level. Jurisdictions are included to ensure an instructive variation of collegial bodies, a variety of parliamentary accountability and a varying degree of regulation of the process of appointing and terminating the term of the Prosecutor General, and finally jurisdictions in which prosecutorial reform has had to deal specifically with the challenge of political undue influence. Key jurisdictions are France, Portugal, Serbia and Albania.

There are important limitations in what inferences can be made from the descriptions in the report. The descriptions serve as comparative examples. Furthermore, the report focuses on the statutory frameworks primarily and does not explore the organizational and political culture for better understanding the legal practices surrounding independent prosecution. Further analysis of which practices could work well in Georgia is beyond the scope of this report.

1. Collegial Bodies

Collegial bodies are used in many jurisdictions to govern judicial and prosecutorial branches. They typically come in two different shapes: In jurisdictions with civil law traditions and a strong reliance on inquisitorial procedural arrangements, the main approach is to associate prosecutors to the ranks of judges (magistrates) and secure institutional independence through a judicial council. The key examples are Italy, France, Belgium and Spain. Other examples include Bosnia and Herzegovina, Bulgaria and Turkey. In some jurisdictions, the preferred collegial body is one restricted to prosecution service and thus distinguished from the judicial branch also. Examples include Albania, Serbia, Croatia and Portugal.

The idea behind the collegial bodies is to create an institutional framework that bars prosecution from political and executive undue influence and provides the necessary organizational framework to secure a professional prosecution service. The collegial body has been a preferred method of professionalization of prosecution services in countries in strong political control of the executive branch.[51] Given its collegial form, it is also characteristic that collegial bodies incorporate – with varying degrees of success – the interests needed to secure legitimacy required to practice public prosecution in the interest of the state and in the interest of the public.

Collegial bodies of prosecution services remain relatively undescribed in the recent academic literature. Some reports of international organizations and non-governmental organizations provide some basic descriptions. The best examples include the Venice Commission report on Judicial Independence – Part II and the recent report of the CCPE and the CCJE entitled *Challenges for judicial independence and impartiality in the member states of the Council of Europe*.[52] In the following, examples from different countries are presented with a view to demonstrate some of the key distinctions and characteristics of the collegial bodies.

France is one of the major models of collegial bodies. In France, the prosecutor – *le procureur* – distinguishes him or herself from the inquisitorially inspired *judge d'instruction*. The latter still maintains investigative power in some cases, but the vast majority of cases are investigated and presented to court by prosecutors. Constitutionally, the two belong to different blocs in the separation of powers. The judge d'instruction belongs to the judicial branch while the prosecutor belongs to the executive branch and is subjected to the rule of law and criminal policies of the government represented by the Minister of Justice. The prosecutor belongs to a bureaucratic hierarchy.[53]

51 See Federico, Guiseppe Di, "Prosecutorial Independence and the Democractic Requirement of Accountability" in *British Journal of Criminology*, 38 (3) 371-387) about the origins of Italian organization of independent prosecution. It is also a method applied for specific purposes to ensure legitimacy with a wide range of interest groups. See for example the Committee that prepares the appointments in the Irish Prosecution Service.

52 Vienna Commission for Democracy through Law, report on European Standards as regards the independence of the judicial system: Part II – The Prosecution Service (CDL-AD(2010)040), Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010); Report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe *as a follow-up to his 2015 report entitled "State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe"*Challenges for judicial independence and impartiality in the member states of the Council of Europe. January 2016.

53 See also Hodgson, J., "The French Prosecutor in Question" in *Washington and Lee Law* Review, 67, p 1361-1411; *ibid.* "The Democratic Accountability of Prosecutors in England and Wales and France: Independence, Discretion and Managerialism" in Langer, M. and Sklansky, D. A. *Prosecutors and Democracy*, *A Cross-National Study*, Cambridge University Press, 2017, p 76-108, with further references.

The collegial body with authority over prosecutors in France is referred to as *le Conseil Superieur du Magistrat* – hereafter the High Council. It is the key institution to install a counter-weight to the executive control over the prosecution service enjoyed by the Ministry of Justice. By constitutional mandate, the independent functioning of the prosecution service is under the responsibility of the President of the Republic. He or she shall be assisted by the High Council of the Judiciary.[54] The High Council works in two sections. One for the judiciary and one for the prosecutors.[55] The collegial body of the Judicial High Council controls the status of prosecutors, who do enjoy membership of the Judiciary. However, unlike judges, prosecutors are ordered hierarchically and ultimately subjected to the hierarchical order of the prosecution service and ultimately the authority of the Minister of Justice. The organization frames the connection between implementing criminal policy – *politique pénale*, hierarchical order and career management of individual prosecutors. Earlier the executive authority extended to giving instructions to prosecutors in individual cases, but today, the Minister is barred from giving instructions in individual cases. The Minister remains the authority for policy and general directions for the prosecution.

The section of the High Counsel with jurisdiction over the prosecutors is chaired by the Prosecutor General of the *Cour de Cassation*. The section also comprises five public prosecutors, and one judge, as well as the *Conseiller d'État* and the barrister, together with the six qualified, prominent citizens who are not members of Parliament, of the Judiciary or of the administration.

As to the powers of the High Council, the Constitution further proscribes that:

> *"The section of the High Council of the Judiciary with jurisdiction over public prosecutors shall give its opinion on the appointment of public prosecutors."*[56]

Furthermore, it acts in capacity as disciplinary tribunal:

> *"The section of the High Council of the Judiciary with jurisdiction over public prosecutors shall give its opinion on disciplinary measures regarding public prosecutors. When acting in such capacity, it shall comprise, in addition to the members mentioned in paragraph three, the public prosecutor belonging to the section with jurisdiction over judges."*[57]

54 Constitution du 4 octobre 1958, art. 64. The Council is further regulated in Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature.

55 Constitution, art. 65.

56 Constitution, art. 65.

57 Constitution, art. 65.

In its plenary capacity, the council:

> *"comprises three of the five judges mentioned in the second paragraph, three of the five prosecutors mentioned in the third paragraph as well as the Conseiller d'État, the barrister and the six qualified, prominent citizens referred to in the second paragraph. It is presided over by the Chief President of the Cour de cassation who may be substituted by the Chief Public Prosecutor of this court. The Minister of Justice may participate in all the sittings of the sections of the High Council of the Judiciary except those concerning disciplinary matters."*

As the regulation makes clear, the High Council gives its opinion – it does not decide on matters pertaining to the prosecutors.

In Portugal, independent prosecution in Portugal is ensured by an elaborate construction with the High Council of the Public Prosecution – *Conselho Superior do Ministério Público* – in a central position. The Council brings together stakeholders in a collegial body that has authority over the central resource of the prosecution service – the individual prosecutors, their status, their discipline, their career and curriculum.[58] The High Council is composed of 16 members:

> *"the Prosecutor General, the District Deputy Prosecutors General, a Deputy Prosecutor General elected from and among the Deputy Prosecutors General, two District Prosecutors, elected from and among the district prosecutors, four Deputy District Prosecutors, one per each judicial district, five members elected by the Assembly of the Republic, two persons of recognized merits, designated by the Minister of Justice."*[59]

Accordingly, the majority of the council is represented by prosecutors and ensures internal control and accountability. Five members ensures balance with the Assembly of the Republic and two persons the influence of the Ministry of Justice. The members elected by the Assembly are ordinarily lawyers with high profile political positions in the past.

The Estatuto do Ministério Público – hereafter EMP – contains detailed rules about the eligibility and election of the prosecutorial members of the Council.[60] To the public prosecutors elected to the High Counsil, there is no voluntary status. Participation is a professional duty.[61] The electoral collage of prosecutors is represented by the public prosecutors of all ranks

58 Constituição da República Portuguesa, art. 220, sec. 2.

59 Estatuto do Ministério Público – hereafter EMP, art. 15.

60 EMP, art. 16-24.

61 EMP, art 15, sec. 3.

in tenure. The voting is secret. The observance of election rules and final counting of votes is overseen by the election committee comprised by the Prosecutor General and the Deputy District Prosecutors General.[62]

Ordinary members of the Council are elected for three years. The Prosecutor General and the Deputy Prosecutor General are members ex officio. Tenure of council members elected by the Minister of Justice and by the Assembly respectively, follow the tenure of those offices.[63] There are no rules stipulating access to dismiss council members prior to the termination of their term.

Parallel to France and in Italy, the High Council has mandate to:

> *"appoint, assign, transfer, promote, dismiss or remove from office, consider the professional merit, take disciplinary action and carry out, in general, all acts of an identical nature with regard to members of the Public Prosecution Service, the only exception being the Prosecutor General."*[64]

The Council's decisions in these matters are binding. The Council also approves the electoral regulations and rules of procedure of the Prosecutor General's Office, regulations in the draft budget, issues directives regarding international organization and member list management. Furthermore, the Council proposes to the Prosecutor General the issuing of binding directives on the Public Prosecution Service and proposes to the Minister of Justice – through the Prosecutor General – legislative measures concerning the Public Prosecution Service.

The Council decides by simple majority with the Prosecutor General having the decisive vote. There must be a minimum of 13 members present and in sections at least 7 members present. The Council may convene in sections when handling matters of *"evaluating professional merit"* and when handling matters of *"disciplinary action"*.[65] The former proceeds according to the Rules of Procedure of the Prosecutor General. Further rules and procedures about the handling of disciplinary cases are statutorily defined in the EMP. Accordingly, the disciplinary section is composed on the Prosecutor General, five representatives of the different ranks of the public prosecution services, the deputy prosecutor general, three representatives elected by the Assembly, and one member elected by the Minister of Justice.[66]

62 EMP, art. 21.

63 EMP, art 25.

64 EMP, art. 27. About the Prosecutor General, see below.

65 EMP, art. 29.

66 EMP, art. 29, sec. 3.

The Office of the Prosecutor General and its entities are not subjected to the Ministry of Justice. It is therefore worth noting the Ministry may attend the meetings whenever he or she considers it to be appropriate, *"for purposes of imparting information and of demanding or providing clarifications*.[67]

The more recent collegial body of the Prosecution Service in Albania, the High Council of Prosecutors, is constructed as a central body in the prosecution service in the Constitution and in Law No 97/2016 on the organization and functioning of the prosecution office in the Republic of Albania. The Constitution art. 149 stipulates:

1. *The High Prosecutorial Council shall guarantee the independence, accountability, discipline, status and career of Prosecutors in the Republic of Albania.*

2. *The High Prosecutorial Council shall be composed of 11 members, six of which are elected by the prosecutors of all levels of the Prosecution Office and five members are elected by the Assembly among jurists who are non-prosecutors.*

3. *The prosecutor members shall be selected from prosecutors of high moral and professional integrity in accordance with an open and transparent procedure that ensures a fair representation of all levels of the prosecution system. The lay member shall be selected among highly qualified jurist, with no less than 15 years of professional experience, of high moral and professional integrity. The lay member shall not have held a political post in the public administration or a leadership position in a political party in the last past 10 years before becoming candidate. Further criteria and the procedure for selecting and ranking the candidates are provided by law.*

4. *Two lay members shall be elected from the advocates, two from the corps of law professors and the School of Magistrates and one shall be from civil society. The Secretary General of the Assembly, based on an open call and transparent procedure, shall announce the vacancies in accordance with the law.*

5. *The Secretary General of the Assembly, not later than 10 days from the presentation of the applications, shall verify if the candidates fulfill the criteria foreseen in the Constitution and the law and assess the professional and moral criteria to be a member of the High Prosecutorial Council. In case the candidates do not fulfill the criteria to be elected, the Secretary General of the Assembly deletes candidates from the list.*

6. *The Secretary General of the Assembly, upon completions of the verification sends immediately to the parliamentary committee under paragraph 7 of this article the list of candidates who fulfill the formal criteria.*

67 EMP, art. 32

7. *The parliamentary committee responsible for legal issues establishes a subcommittee for the further assessment and selection of candidates not later than three days from the submission of the list. The subcommittee is composed of five members of the Assembly, three members nominated by the parliamentary majority and two by the opposition. The subcommittee may with at least four votes include a candidate who was previously removed from the list by the Secretary General of the Assembly. The subcommittee selects the candidates supported by 4 members. In case the majority cannot be reached the candidate shall be selected by lot.*

8. *The selections from the subcommittee are consolidated into one list and sent to the Chairman of the Assembly. Within ten days, the Assembly may reject the entire list of candidates as a block by a majority of two-thirds. If the list is rejected, the procedure shall be repeated by the subcommittee under paragraph 7 of this article, no more than two times. If the Assembly after the competition of the procedure for the third time, has not approved the presented list, the candidates of this list shall be deemed elected. Detailed procedures shall be regulated by law.*

9. *The Chairperson of the High Prosecutorial Council is elected by its members from the ranks of the lay members in accordance with the law.*

10. *Members of the High Prosecutorial Council shall practice their duty full-time for a period of five years without the right of immediate re-appointment. At the end of the term, the prosecutor members return to their previous working positions. The mandate of the special prosecutor shall be suspended during the period of time of the exercise of the duties as member of High Prosecutorial Council. The lay members who before the appointment worked full time in the public sector shall return to the previous working positions or, if not possible, to positions equivalent to them.*

The High Council is awarded a main role in the guarantee of independence in prosecution and derives its authority from the organization of prosecutors and from the Assembly. The majority of the council are prosecutors who represent all levels of the prosecution service. The Constitution's art. 149-a continues about the competences of the High Council:

1. The High Prosecutorial Council shall exercise the following powers:
a. appoints, evaluates, promotes and transfers all prosecutors of all levels;
b. decides on disciplinary measures against all prosecutors of all levels;
c. proposes to the Assembly candidates for Prosecutor General in accordance with the law;
ç. adopts rules of ethics for prosecutors and supervises their observance;
d. proposes and administers its own budget;
dh. informs the public and the Assembly on the state of the Prosecution Office; and
e. exercises other responsibilities as regulated by law.

2. The law shall provide for the establishment of decision-making sub-bodies of the High Prosecutorial Council.

The Council maintains a central role in managing the appointments, evaluations and promotions of all prosecutors. Furthermore, the Council develops the rules of ethics and oversee their implementation. The Council has a central function in the appointment of the Prosecutor General and also advise the Prosecutor General on organizational questions.[68] Furthermore, the Council has a Constitutional obligation to inform both the Assembly and the public on the affairs of the Prosecution Office.

In Serbia, the collegial prosecutorial body, the State Prosecutors Council is regulated on a constitutional level:

Status, constitution and election of the State Prosecutors Council

Art. 164

The State Prosecutors Council is an autonomous body which shall provide for and guarantee the autonomy of Public Prosecutors and Deputy Public Prosecutors, in accordance with the Law. The State Prosecutors Council shall have 11 members. The State Prosecutors Council shall be constituted of the Republic Public Prosecutor, the Minister responsible for justice and the President of the authorized committee of the National Assembly as members ex officio and eight electoral members elected by the National Assembly, in accordance with the Law. Electoral members shall include sex Public Prosecutors or Deputy Public Prosecutors holding permanent posts, of which one shall be from the territory of autonomous provinces, and two respected and prominent lawyers who have at least 15 years of professional experience, of which one shall be a solicitor, and the other a professor at the law faculty. Tenure of office of the State Prosecutors Council's members shall last five years, except for the members appointed ex officio. A member of the State Prosecutors Council shall enjoy immunity as a Public Prosecutor.

68 See for example Law No 97/2016, art. 18-19.

Jurisdiction of the State Prosecutors Council

Article 165

The State Prosecutors Council shall propose to the National Assembly the candidates for the first election of a Deputy Public Prosecutor, elect Deputy Public Prosecutors to permanently perform that function, elect Deputy Public Prosecutors holding permanent posts as Deputy Public Prosecutors in other Public Prosecutor's Office, decide in the proceedings of termination of Deputy Public Prosecutors' tenure of office in the manner stipulated by the Constitution and the Law, and perform other duties specified in the Law."

As in other countries of similar historical development, the Council is used to ensure an organizational framework for autonomous prosecution and simultaneously the necessary political and public legitimacy in the operations of the prosecution service. Characteristic of the Serbian Council, the Council is strongly influenced by the National Assembly and its political constellation. As for the prosecutorial members, these are elected by their peers and the National Assembly is bound by the election. The tenure of Council members is five years and the members enjoy immunity as public prosecutors.

The council does not appoint the Republican Public Prosecutor, who is appointed directly by the National Assembly. However, as art. 165 stipulates, the Council plays a pivotal role in the firs and permanent appointment of the Deputy Public Prosecutors.

In the context of termination of offices, the Council administrates an important authority. This is stipulated in the Law on Public Prosecution. Significantly, the Council has to establish the grounds for dismissal of Public Prosecutors and Deputy Public Prosecutors.[69] It is also the Council that hears appeals from Public Prosecutors as to the decisions of the Republican Public Prosecutor to suspend non-mandatorily.[70] Furthermore, it is also the Council who decides on the suspension of the Republican Public Prosecutor.[71] While it is the National Assembly that appoints the Republican Public Prosecutor, it is the Council that appoints the acting Republican Public Prosecutor, in the event of pre-term termination of the Republican Public Prosecutor.[72]

69 Law on Public Prosecution, art. 94, sec. 3. It is the National Assembly who finally decides on the termination of office.

70 Law on Public Prosecution, art. 60.

71 Law on Public Prosecution, art. 59.

72 Law on Public Prosecution, art. 36.

Parallel to other countries with collective bodies, the council manages the careers, the advancements, and has the disciplinary authority over Public Prosecutors. The State Prosecutorial Council established the Disciplinary Commission and appoints it members from the ranks of Public Prosecutors and Deputy Public Prosecutors.[73] It is the Council who develops the regulatory framework applied in disciplinary cases.

The State Prosecutorial Council also issues the Code of Ethics and develops the standards on which performance evaluation is made.

Discussion

The above examples demonstrate several important characteristics and distinctions. Most importantly, the roles and functions of the collegial body vary with the institutional structure of the prosecution service, the judiciary and the executive branch. The role and function of the collegial body is bound to be profoundly influenced by the concrete context of the jurisdiction in question. At the same time, some distinctions and characteristics are good to observe.

First, in line with international recommendations, regulating the powers and functions of the collegial body on the level of the Constitution increases the institutional independence from a formal point of view and does secure the necessary legitimacy from a diverse range of stakeholders by elevating the role of the collegial body. At the same time, it brings the collegial body on a level of constitutional politics that requires political power to maintain institutional independence.

Second, the examples also show a variety in the extend of statutory regulation of the collegial bodies and their functions. The Collegial bodies oftentimes operate across other agencies and across bureaucratic organisations and have to assert their authority. As such detailed description of their competences, both binding and advisory, can be an advantage.

Third, there is variation as to the advisory and binding nature of the collegial bodies. It depends on the role ascribed to the collegial bodies and their particular functions.

Fourth, as to the composition of the councils, there is significant variation as to the number of members, who members are and what interests they represent, and how they are elected. There is no final answer as to what good practice is when it comes to the number of council members. Each of the cases represent examples of a balance between

73 Law on Public Prosecution, art. 106.

a functional size and enough members to represent the interests deemed relevant. Who the members are and what interests they represent is a different matter. Representation from three different entities is the normal and predictable solution to provide a balanced council: the professional group of prosecutors from different ranks and regions, members elected by the parliament, and finally members representing the Ministry of Justice. The Venice Commission recommends excluding political bodies from the composition of the collegial body. If political representation is included, it is worth bearing in mind the Croatian model, in which one of the two parliamentary members must be appointed by the opposition.[74]

At the same time, or alternatively, it is also good practice to have representation of the civil society. The Venice Commission has stated:

> *"Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority."*[75]

How the respective groups are elected depends on the political culture. Portugal and Serbia both show, each in their way, the indirect political influence resulting from leaving the appointment of civil society representatives in the hands of the Parliament. Other jurisdictions enjoy other models. For example, in Ireland, it is a committee consisting of the Chief Justice, the heads of the barristers and solicitors professions in Ireland, the permanent secretary to the Government and the permanent head of the Attorney General's Office, that puts forward a list of those persons considered suitable for appointment as Director of Public Prosecutions by the Government.[76] The challenge seems to be that in countries such as Portugal, France, Serbia, Croatia, Albania and other countries influenced by similar legal traditions, it may be difficult to uphold the assumption that the interests represented by parliament and state are in fact also the interests of the public.

There is no doubt that strong internal representation of the prosecution service itself is important for upholding a functional independence and for securing an internal legitimacy of the collegial body. The examples show different modes of selecting representatives. At the same time, collegial bodies that only represent the internal organization of prosecution services will lack the necessary involvement of the public and civil society to ensure confidence in the administration of the prosecution service.

74 Constitition of Croatia, art. 125.

75 Venice Commission Report.

76 Prosecution of Offences Act 1974 (republic of Ireland), art. 2, sec. 7, litra a)-d).

Fifth, as to the functions of the councils, the examples show a common approach in the collegial body asserting control of the human resources of the prosecution service, with Portugal as the clearest example. Another feature, which can be seen in some of the examples, is placing the continued education programmes under the authority of the council.

2. Appointment, tenure and dismissal of the Prosecutor General

The rules and practices about the appointment and the dismissal of the prosecutor general plays has an important function to ensure an institutionally independent prosecution service accountable to the law. The Consultative Council of the Prosecutors of Europe (CCPE) illustratively states:

> *"The manner in which the Prosecutor General is appointed and dismissed plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office."*[77]

The Venice Commission similarly states that the procedure must be such as to secure the confidence of the prosecution service, the government, the public, the legal profession and the judiciary:

> *"It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government."*

The Commission further states:

> *"No single, categorical principle can be formulated as to who – the president or Parliament – should appoint the Prosecutor General in a situation when he is not subordinated to the Government. The matter is variously resolved in different countries. Acceptance of the principle of cooperation amongst state organs seems a good solution as it makes it possible to avoid unilateral political nominations. In such cases, a consensus should be reached. In any case, the right of nominating candidates should be clearly defined. Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society."*[78]

77 CCPE Opinion 9(2014) para 55.

78 Venice Commission Report, § 34-35.

The Commission advises that there is a known risk of politizing the appointment of the Prosecutor General in countries where he or she is elected by the Parliament. Various mechanisms, such as delegation to a committee with external representation or the use of qualified majority to ensure consensus on the appointment.

Turning to examples from domestic jurisdictions, Albania provides an example of an appointment process, in which the collegial body and the Parliament is involved in a well-regulated formally transparent procedure. The Constitution prescribes:

"1. The Prosecutor General is appointed by three-fifths of the members of Assembly among three candidates proposed by the High Prosecutorial Council, for a seven-year, non-renewable mandate.

2. The High Prosecutorial Council shall select and rank the three most qualified candidates, based on an open and transparent procedure and forwards them to the Assembly, in accordance with the law.

3. The Prosecutor General shall be selected among highly qualified jurists, with no less than 15 years of professional experience as jurists, of high moral and professional integrity, that have graduated from the School of Magistrates or academic degree in law. He or she shall not have held a political post in the public administration or a leadership position in a political party in the last past 10 years before becoming candidate.

4. If the Assembly cannot elect the Prosecutor General within 30 days of receiving the proposals from the High Prosecutorial Council, the highest ranking candidate is automatically appointed…"[79]

The more detailed procedure and how the High Council of Prosecutors manages the procedure, is regulated in Law 97/2016. The statute describes the legal requirements candidates must meet and the criteria by which the qualified candidates are evaluated and ranked.[80] It follows that the High Council shall select the candidates for Prosecutor General among those candidates who meet the requirements defined in the law. It is the Council that announces the call for submission of interest to the position. The High Council sets up a committee under the High Council to verify the legal requirements of candidates, to prepare the ranking and submit this to the Council.[81] The Council organizes a hearing and submits a proposal to the Assembly to appoint one of the three top

79 Constitution of Albania, art. 148-a.

80 Law No. 97/2016, art. 22-37.

81 No further information is available on the formation of the committee.

candidates on the list. Importantly, the proposal shall include the reasoned decision of the High Council. When appointed, the new Prosecutor General takes an oath before the Assembly.

Serbia provides an example of a more powerful role of the Parliament. The Public Prosecutor of the Republic is elected by the National Assembly after the nomination of the Government and after obtaining the opinion of the Judicial, Public Administration and Local Self-Government Committee under the National Assembly. The Law on Public Prosecution sets out the general rules for the procedure:

> *Fundamental Rules for Election of Public Prosecutor*
>
> *Article 74*
>
> *The Republican Public Prosecutor is elected, at the nomination of the Government, by the National Assembly to a term of six years, and may be reelected. The Government shall obtain the opinion of the competent committee of the National Assembly on the nominated candidates.*
>
> *The Government proposes one or more candidates to the National Assembly for the office of the Republican Public Prosecutor.*
>
> *The Government proposes candidates from paragraph 2 of this Article from the list of candidates determined by the State Prosecutorial Council. The State Prosecutorial Council proposes to the Government a list of one or more candidates for the election to office of public prosecutor. If the State Prosecutorial Council proposes only one candidate to the Government, the Government may return the proposal to the State Prosecutorial Council. If the Republican Public Prosecutor is not reelected to the same office after the expiry of the term in office, or if his/her office is terminated at personal request, he/she shall continue work as a Deputy Republican Public Prosecutor. The State Prosecutorial Council shall take a decision on election. If a public prosecutor is not reelected to same office following the expiry of the term of office, or if his/her office is terminated at personal request, he/she shall continue work as a deputy prosecutor in terms of Article 55 paragraph 2 of this Law.*

As the excerpts describe, the procedure ensures that both the State Prosecutorial Council and the Government has an influence on the selection of candidates. However, as described in the previous section, the State Prosecutorial Council also includes a significant element of Governmental and Parliamentary representation.

In Portugal, the Constitution provides very little detail on the procedure:

> *"In relation to other entities and organs the President of the Republic has the competences:*

[…]

> *m) Upon a proposal from the Government, to appoint the President of the Court of Auditors and the Attorney General and discharge them from office;"*[82]

The Constitution further prescribes:

> *"3. Without prejudice to the provisions of Article 133(m), the Attorney General's term of office is six years."*[83]

It is worth making a reference to the jurisdiction of Ireland. The difference in legal tradition and the difference in state bureaucratic structure disregarded, the process of appointing a Director of Public Prosecution serves as an example of good practice. Accordingly, in Ireland, the Director of Public Prosecution is appointed by the Government. He or she serves as a civil servant, but is independent in the performance of his or her functions. The relationship with the political system is maintained by a regular consultation with the Attorney General. In the process of appointment, the Prosecution of Offences Act 1974 stipulates certain minimum requirements a candidate must meet and describes the further process. Accordingly, a committee consisting of the Chief Justice, the Chairman of the General Council of the bar of Ireland, the President of the Incorporated Law Society, the Secretary to the Government and the Senior Legal Assistant in the Office of the Attorney General, is set up to evaluate the candidate and put forward a proposal to the Government.[84] The Government cannot appoint a candidate who was not put forward by the Committee.

Discussion

It remains a challenge everywhere to organize an appointment procedure that avoids undue influence and at the same time ensures the necessary legitimacy with important stakeholders. In the countries with the Minister of Justice as the highest authority – Germany, Austria, Denmark, Norway – it is the Minister of Justice who effectively appoints the Prosecutor General and the process of the appointment and termination of office, which installs these qualities. With little or no public hearings, it is the level of public confidence in the justice system and its procedures

82 Constitution, art. 133.

83 Constitution, art. 220.

84 Prosecution of Offences Act 1974, art. 2, sec. 1-7.

that determines the legitimacy of the appointment. The cases described in this section illustrate different approaches to the challenge. They turn to the parliament, the Office of the President, the Government – or a combination – to ensure public legitimacy in the appointment procedure and the leadership of the Public Prosecution Service. The cases vary significantly as to the level of formal regulation. While not implemented everywhere, transparency, public hearing and presentation to parliament is commonplace as good practice. It is striking in the cases that they do not involve the wider spectrum of stakeholders that can ensure public and professional confidence in the selection procedure. Only Ireland serves to illustrate as an example. Differences in legal traditions serve to explain some of this, but it remains a problematic characteristic and at odds with international recommendations that the political system maintains a profound control of the hiring process with little counter-balance from the public and civil society.

It is also worth observing the wide disparity as to the detailed regulation of the process, the comparison between the different jurisdictions illustrates. Albania illustrates a good model of formalizing the process further and ensures a central role of the Council in developing the list of candidates and performing the evaluation and proposing relevant candidates. The formalization even outlines the criteria for evaluation and ranking of candidates and provides the public and professional communities with transparent standards of performance of the Prosecutor General appointed.

There is a specific issue as to the role of parliamentary consent to the appointment of the Prosecutor General. In the examples provided, appointment decisions are made by simple majority. The Venice Commission suggests that, if the decision of the Parliament is the method of appointment, it would install a better consensus and minimize the risk of a political control, if the decision was by a qualified majority. As mentioned by some critics, this does allow for a minority to bloc the election. However, that is the point of seeking consensus-democratic solutions.

Tenure of office and Dismissal

The jurisdictions described provide different solutions to the length of tenure. The length of term of office and the eligibility for reappointment is of particular interest because of the potential political pressure on the Prosecutor General associated with reappointment prospects and because of the lack of accountability that may follow from life tenure or very long tenures. The Venice Commission has identified this as a key question. The Commission emphasizes the consequences of eligibility of re-appointment by a parliamentary or executive body. The candidate will behave in a manner that to obtain re-appointment – or at least it will be perceived as such. The Commission report advises relatively long periods of appointment without the possibility of renewal. The period should not coincide with those of the Parliament. The Commission or others pay little attention to the pressure and allegiance that may

develop from the Prosecutor General's desire to obtain appointments to other positions under the control of the main stakeholders. Accordingly, similar consideration should be made, if the Prosecutor General has the possibility of appointment to another position, which the President, the Parliament, or the Government has control over.

There is a strong variation as to how Prosecutor Generals' terms may be terminated. In Portugal, the basic construction is a political one in which the Prosecutor General must maintain the confidence of the President and the political system. In its construction, it comes very close to the executive models we know from Germany, Austria and Denmark.

Albania represents an example of higher degree of regulation. On a constitutional level, limitations are installed so to give some access to the Council to practically respond to conditional changes and to allow only the Constitutional Court to carry out the procedures necessary for the Council to terminate the mandate of the Prosecutor General:

"*1. The mandate of the Prosecutor General ends when:*
a. reaches the retirement age;
b. expiry of the 7 year mandate;
c. his or her resignation;
ç. dismissal according to a procedure provided in article 149-c;
d. establishing the conditions of inelectibility and incompatibility;
dh. establishing the incapacity to exercise the duties;

2. The termination of the mandate of the Prosecutor General is declared by decision of the High Prosecutorial Council.[85]

The Constitution continues:

"*1. The Prosecutor General and member of the High Prosecutorial Council shall be disciplinarily liable in accordance with the law.*
2. The Prosecutor General and member shall be dismissed upon decision of the Constitutional Court if he or she:

a. commits serious professional or ethical misconduct;
b. is convicted with final court decision for commission of a crime.

3. The Prosecutor General and member is suspended from its duty upon decision of the Constitutional Court when:

85 Constitution art. 148-c

a. against him or her the personal security measure of predetention or home arrest is given for commission of a criminal offence; or
b. he or she is accused for a serious crime committed with intention.
c. upon initiation of the disciplinary proceedings in accordance with the law..”[86]

In Serbia the Constitution stipulates that the National Assembly has the final decision-making authority to relief the Republic Public Prosecutor of his or her duties:

> *“…Upon relief of duty for reasons stipulated by Law. The decision on termination of tenure of office of the Republic Public Prosecutor, shall be adopted by the National Assembly, in accordance with the Law, bearing in mind that it shall pass a decision on relief of duty on the Government Proposal.”*[87]

The Law on Public Prosecution provides further rules on the grounds for dismissal and the procedure applied. As the following excerpt illustrates, the State prosecutorial Council has an important role:

> *Determination of grounds for Dismissal*
>
> *Grounds for Dismissal*
>
> *Article 92*
>
> *A public prosecutor and deputy public prosecutor are dismissed when sentenced by a final judgement for a criminal offence to a prison sentence of not less than six months, or for a punishable offence making them unworthy of office, or when incompetently discharging their function, or for a committed grave disciplinary offence.*
>
> *Competence and Initiation of Dismissal Procedure*
>
> *Article 94*
>
> *Everyone is entitled to file an initiative for the dismissal of a public prosecutor and/or deputy public prosecutor.*
>
> *Dismisall procedure is initiated by the public prosecutor, directly superior public prosecutor, Republican Public Prosecutor, Minister in charge of the judiciary, authorities competent for performance evaluation and the Disciplinary Commission.*

86 Constitution of Albania, art. 149-c.

87 Constitution of Serbia, art. 158, sec. 4 and 5.

Grounds for dismissal are established by the State Prosecutorial Council.

Procedure Before the State Prosecutorial Council

Article 95

The State Prosecutorial Council establishes facts and decides in proceedings that are closed to the public.

The State Prosecutorial Council is required to conduct proceedings and pass a decision within 45 days from the day of being served the act that initiated the proceedings.

The decision of the State Prosecutorial Council must be reasoned.

The decision of the State Prosecutorial Council that determines reasons for the dismissal of a public prosecutor shall be forwarded to the Government.

Status of Public Prosecutor and/or Deputy Public Prosecutor in Dismissal

Procedure

Article 96

A public prosecutor and deputy public prosecutor are entitled to be notified immediately on the reasons for initiating procedure, to be informed of the case and supporting documentation, the course of the procedure and and to directly, or through authorised representative, extend explanations and proof for their assertions.

A public prosecutor and/or deputy public prosecutor is entitled to present his/her assertions orally before the State Prosecutorial Council.

3. Decision on termination of Office

Decision Taking

Article 97

The National Assembly decides on the termination of office of a public prosecutor, and shall take the decision on the dismissal at the recommendation of the Government.

The Government proposes the dismissal of a public prosecutor, based on reasons for dismissal determined by the State Prosecutorial Council.

The State Prosecutorial Council decides on the termination of office of a deputy public prosecutor.

Prosecutorial office shall cease on the day specified in the decision of the National Assembly and/or the State Prosecutorial Council, except in cases from Article 88, paragraph 4, and Article 89 Paragraph 1 of this Article.

The decision on the termination of office is published in the "Official Gazette of the Republic of Serbia."

Complaint to the Constitutional Court

Article 98

Public prosecutor and/or deputy public prosecutor is entitled to file an appeal to the Constitutional Court against the decision on termination of office passed by the National Assembly and/or the State Prosecutorial Council, within 30 days from being served the decision.

The Constitutional Court may deny the appeal, or uphold the appeal and annul the decision on the termination of office. Decision of the Constitutional Court is final.

It is unlikely that the State Prosecutorial Council will serve the intended function given the Republican Public Prosecutor is the Chair of the Council. The procedure has never been applied in practice in connection with the Republican Public Prosecutor and it is unknown how it will be handled in practice. At the same time, the excerpted statute does illustrate how to ensure the State Prosecutorial Council a key role, how to provide all involved with a well-described and transparent procedure, and how to incorporate standards of due process.

Again, the case of Ireland serves an illustrative purpose. Accordingly, parallel to the appointment procedure, the Prosecution of Offences Act 1974 provides detailed rules on dismissal of the Director of Public Prosecution. It is the Government who has the final decision on dismissing the Director. However, the Government can only act on a report by a committee established for this purpose. Accordingly:

> *"Whenever the Government so request, a committee appointed by them and consisting of the Chief Justice, a Judge of the High Court nominated by the Chief Justice, and the Attorney General shall*
>
> *investigate the condition of health, either physical or mental, of the Director, or*
>
> *inquire into the conduct (whether in the execution of his office or otherwise) of the Director, either generally or on a particular occasion,*
>
> *and, in either case, with particular reference to such matters as may be mentioned in the request and the committee may conduct the investigation or inquiry in such manner as it thinks proper, whether by examination of witnesses or otherwise, and in particular may conduct any proceedings in camera and for this purpose shall have all such powers, rights and privileges as are vested in a Judge of the High Court on the occasion of an action and, upon the conclusion of the investigation or inquiry, the committee shall report the result thereof to the Government."*[88]

Again, Ireland presents an example where the main stakeholders including the judiciary are involved and a procedure for the handling of the matter is described to ensure a balance between political legitimacy, functional independence of the prosecution, and the rule of law.

88 Prosecution of Offences Act 1974, art. 9.

Discussion

Around the world, Prosecutor Generals and Directors of Public Prosecution Services live under the constant pressure of political power and with dismissal as the unspoken threat. Even in northern Europe, with the highest levels of public confidence and lowest levels of corruption, two positions have been terminated in recent years with disputed or no explanations given and both made by the Minister of Justice.[89]

It is for that reason that the Venice Commission report states about the dismissal that the law and preferably the Constitution should contain criteria for dismissal and that there should be a legal procedure by which an expert body has to give an opinion as to the presence of sufficient criteria for pre-term dismissal. Most importantly, the Commission states:

> *"Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament".*[90]

There is an extensive variation as to the formalization of procedure and the role played by the different agencies, in the cases described in this section. It is only the case of Ireland that examplifies how to ensure an expert body removed sufficiently from political influence, to investigate and establish the necessary grounds for dismissal. What remains is a difficult balancing act between ensuring a transparent rule of law based procedure and accepting that some level of legitimacy is required from the political governing bodies and from the public. Stipulation of criteria and of formal transparent procedures is known to limit a politization and abuse of the procedure. At the same time, the optimal balance and organizational solution will rely on the political culture of the particular jurisdiction in question.

3. Accountability to the Parliament

As the UN guidelines for prosecutors stipulate, public prosecution is to be practiced in the public interest.[91] Pursuant to this ideal, domestic legal arrangements install a variety of measures to ensure public prosecution is guided by the public interest. Different legal traditions respond differently. In jurisdictions with civil law traditions and strong state authorities, an assumption exists that state authorities through the democratic mandate of the government do in fact represent public interest. Jurisdictions with common law traditions have a more limited tendency

89 The termination of the office of the Federal Prosecutor General of Germany, Harald Range, in 2015 and the unexplained resignation of the Danish Director of Public Prosecutions, Ole Hasselgård, in 2018.

90 Venice Commission Report, § 40.

91 Un Guidelines on the Role of Prosecutors, 1990, article 11.

towards this assumption and rather show a reference to public interest in a direct relationship between the state authority in question and the public. Nevertheless, in all democratic societies, the parliament remains a central institution to represent the public in its control of state power – and so also in the public prosecution service's exercise of penal and judicial power. As the following examples show, parliamentary accountability is constructed in different direct and indirect ways. There are examples of direct parliamentary oversight, indirect oversight through the Attorney General or the Ministry of Justice, and there is a widespread practice of annual public reports of both plans and results to the public. Jurisdictions differ markedly as to how much teeth this reporting oversight has. In some jurisdictions, the parliament can actually terminate the position of the Prosecutor General and as such the oversight is backed by a real threat. In others – most – there is no direct authority to dismiss the Prosecutor General by the Parliament. In the following I will go through the main jurisdictions used as examples to build cases of how jurisdictions have constructed public accountability through the Parliament. A number of additional jurisdictions are added to broaden the examples.

In Portugal, the statutory framework does not contain generic rules about the Prosecution service reporting to the Assembly. The independent nature of the Prosecution with close affinity to the Judicial power, is not subjected to the Assembly with the reporting duties that follow. However, the importance of ensuring the input and coordination with the Assembly is fully recognized.[92] Once every three years, the Prosecutor General's Office (Ministerio Publico) presents a draft statute for the Assembly to agree to the strategy and priorities of the prosecution service for the coming three years.[93] The Law defines the priorities for the Public Prosecution Service for the three years.[94] The Prosecutor General appears before the Assembly to report the outcome of the strategy.

Also, the Prosecutor General's Office has an advisory role to the Assembly through its President, but mainly the Office and the Prosecutor General has an advisory role to the Assembly through the Minister of Justice.[95] It provides the Consultative Council to give advice on matters of legality when provided for by law or when requested by the President of the Assembly.

Parallel to this relationship with the Parliament, the Prosecutor General reports directly to the public. On a yearly basis, the Office of the Prosecutor General publishes plans and re-

92 See also the section on Collegial Bodies, describing the role of the Assembly.

93 See for example Lei Politico Criminal No 72, 20 July, 2015 setting out the strategy for 2015-2017 (https://dre.pt/application/conteudo/69839459) (accessed June 10).

94 See also the ensuing strategy of the Prosecutor General (http://www.ministeriopublico.pt/sites/default/files/documentos/pdf/proposta_de_diretiva_lpc_2015_final.pdf) (accessed June 10, 2018).

95 EMP art. 10, 11 and 12. The Consultative Council to the Prosecutor General has a parallel advisory role to the Assembly. SPPS art 37, litra a).

ports of key activities.[96] Also on ad hoc basis, the Office of the Prosecutor General publishes policies for specific areas of crime and justice. This falls well within its authority as a key adviser on legal matters to the Government and as the independent authority to oversee the implementation of criminal law and policy in the prosecution service.

Reporting aside, the key method of ensuring public and parliamentary accountability in Portugal is pursued in the composition of the High Council and the five members elected by the Assembly of the Republic.[97] The term lasts until the first meeting of the newly elected Assembly, and so follows the political mandate of the Assembly.[98] Three of the parliamentary elected members also sit in the disciplinary section of the High Council.[99] What is rarely described but which is of great significance to allow public accountability is securing a high level of transparency. The foundation of transparency is secured in the statute.[100]

The direct relationship between the Parliament and the Prosecution Service is more pronounced in the case of Albania. As described above, the Prosecutor General is appointed by the Assembly.[101] A qualified majority of the Assembly is required. In and of itself this provides a close accountability structure between the Prosecutor General and the Assembly. There are other examples of the Assembly's direct control over the organization of the prosecution service.[102]

There is a reporting obligation in Albania. The Constitution requires the Prosecutor General to report on the status of criminality to the Assembly periodically.[103]. The statute provides detailed requirements of the content of reporting:

> *"Relations with the Assembly of Albania*
>
> *1. The Prosecutor General and the Chief of the Special Prosecution Office, referring to their specific jurisdiction, report to the Assembly on the state of crime in the country at least once per year. The reporting includes data and explanations on the number, type, territorial extension, intensity and forms of crime in the Republic of Albania.*

96 See http://www.ministeriopublico.pt/pagina/documentos-estrategicos (Accessed June 2, 2018).

97 An official overview of the High Council can be found on http://en.ministeriopublico.pt/node/4093 (Accessed May 24, 2018).

98 EMP, art. 25, sec. 4.

99 EMP, art. 29 sec. 3, litra c.

100 EMP, art. 54.

101 Constitution of Albania, art. 148-a.

102 For example, the Assembly has to approve the total number of prosecutors. Law No. 97/2016 on the organization and functioning of the prosecution office in the republic of Albania, art. 18.

103 Constitution art. 148-b, sec. 5 and Law No. 97/2016, art. 38, sec. 2, litra d.

2. The Prosecutor General reports on the implementation of the priority recommendations of the Council of Ministers as follows:

a) Whether the Prosecutor General has issued general instructions based on the periodical recommendations given by the Council of Ministers;

b) Whether the instructions issued by the Prosecutor General according to letter "a" of this Article are implemented and how they impacted on the state of crime in the recommended fields;

c) Whether the Prosecutor General has monitored the observance of these instructions by prosecutors;

3. The Prosecutor General and the Chief of the Special Prosecution Office also submit to the Assembly detailed data related to effectiveness of criminal prosecution, the quality of representation of accusation in court as well as to other essential elements in the activity of the respective institutions. Notification on specific cases is not allowed, with the exception of cases sent by decision of the Assembly.

4. The Prosecutor General and the Chief of the Special Prosecution Office shall cooperate with the inquiry Parliamentary committees in accordance with the legal provisions in force. In each case, the criminal investigation is independent from the inquiries of the parliamentary committees"[104]

Furthermore, the Constitution empowers the High Prosecutorial Council to inform the public and the Assembly on the state of the Prosecution Office.[105] The empowerment is not further described.

In Serbia, the National Assembly has a relatively more central position in the structure of accountability for the Public Prosecution Service.[106] Generally, the service is organized hierarchically, with the highest-ranking prosecutors referring also to the National Assembly. The Republican Public Prosecutor is accountable to the National Assembly for his/her own work and for the work of the public prosecution service.[107] As described above in section four, the

104 Law No. 97/2016, art. 104.

105 Constitution art. 149, sec. 1, litra dh.

106 It should be noted that current reforms in Serbia appear to move away from this pronounced controlling power of the Parliament and allocate more authority with an independent Prosecution Council.

107 Law on Prosecution Service, art. 22.

National Assembly has a key role both in the process of selecting and appointing the Republican Public Prosecutor.

Comparable to Albania, the Republican Public Prosecutor of Serbia submits reports to the National Assembly on an annual basis.[108] There are no provisions about the Assembly's request for hearings.

The reporting of future plans and of past activities to the public – to members of Government, to the National Assembly and to the general public – is widely considered good practice in domestic public prosecution services. Whether in jurisdictions with common law or civil law tradition, the standard is to report annually and publicly. There are other examples to illustrate. For example, the Commonwealth Director of Public Prosecutions of Australia publishes annual budgets and reports.[109] In Canada, the Director of Public Prosecutions presents to the Attorney General the annual report of the Service. The report for 2017 for example contains the following sections:

- An overview of the Public Prosecution Service
- The year in review with topical details
- Litigation before the Supreme Court of Canada
- Training
- Outreach programmes
- Internal Services
- Regional Profiles
- Organizational Priorities, including excellence programmes and employee development
- Financial Information
- Public Contact information

Similar examples can be seen in England and Wales. Here, the Director of Public Prosecutions reports to the Attorney General who in turn submits a copy to the Parliament.[110]

The Crown Prosecution Service is an independent institution, under the authority of the Attorney General, who in turn is accountable to Parliament for the work of the Crown Prosecution Service. The Director issues annual business plans and reports to the Attorney General.[111] The report for 2017 for example contained:

108 Law on Prosecution Service art. 29, sec. 3, litra 4.

109 https://www.cdpp.gov.au/publications?field_publication_type_tid%5B0%5D=21 (Accessed on June 3, 2018).

110 Prosecution of Offences Act 1985, art. 9.

111 https://www.cps.gov.uk/publication/cps-annual-report-2016-2017-pdf-approx-48mb (Accessed on June 3, 2018).

- a performance report,
- an accountability report,
- a financial statement.

It is equally widely practiced that the head of Public Prosecution Services can be requested to testify before Parliament or one of its standing committees. This is for example the case in England and Wales, where the Parliamentary committees may take oral testimony from the Director of Public Prosecutions without the intervention of the Attorney General. Another example can be found in the Republic of South Africa, where the National Director of Public Prosecutions has a close accountability relationship with the National Assembly. The National Assembly's Portfolio Committee on Justice and Constitutional Development has primary responsibility for overseeing the activities of the National Prosecution Authority and may require both written and oral reporting of the Director, as may the Parliamentary Assembly.[112] It is generally understood that Parliaments, exercising the public interest in the activities of the Public Prosecution Service, must respect the autonomous handling of individual cases and so withstand asking to or suggesting activities in individual cases.

Discussion

Accountability to the Parliament comes in many different forms. Who the Prosecutor General reports to and how, and who has oversight, depends on the legal tradition of the jurisdiction, the historical political power of the executive and the parliament, the role of the prosecution vis a vis the judiciary, the role of a public constituency, and it depends on the width of scope of work of the prosecution service. There is no one-size-fit-all, but only context-driven balancing of different institutions and authorities. Nevertheless, there are some characteristics and distinctions worth observing for inspiration.

First, accountability to the public can be sought through the parliament, but can equally be sought by a direct and transparent public reporting arrangement from the office of the prosecutor general.

Second, an important element of accountability to the public – and the parliament – lies in the power to appoint, terminate the office of a Prosecutor General or Director and the power to re-appoint. The case of Serbia, where the deputies are appointed by the Parliament in their first terms, is a particularly strong example of the power asserted through appointment procedures. However, to what extend the parliamentary accountability develops into a political control of the Public Prosecution Service is unclear and should give cause for concern.

112 See for example the Annual Report of the National Prosecution Authority and the Director's Hearing in Parliament, https://www.npa.gov.za/parliamentary (Accessed June 11, 2018).

Third, public reporting and hearings are widely considered legitimate and good practices. Albania, England and Wales and South Africa provide three different examples of how to construct them. There are many more examples. Furthermore, it remains a question bound to the specific jurisdiction and its legal and public service tradition to what extend reporting solutions require statutory stipulation. Reporting is often done directly to the public and not to the Parliament. Transparent reporting to the Parliament carries with it advantages in the shape of credibility, accessibility and transparency. However, it remains questionable to what extent reporting and hearing before the Parliament serves as an effective tool for public accountability. The practice of providing reports of the activities of the Prosecution Service to the public and combine it with the involvement of civil society organizations in collegial bodies, is arguable more prone to capture the public interest than are Parliaments, depending on the political culture.

Summary

The requested report responds to descriptive questions about the legal frameworks of prosecution services and particularly institutional arrangements concerning 1) collegial bodies, 2) appointment and dismissals of prosecutor generals, and 3) parliamentary accountability. By request, the report focuses on legal frameworks in jurisdictions with relatively similar constitutional conditions and legal culture. Some additional jurisdictions are included for illustrative purposes.

The report briefly describes significant international standards pertaining to independence in prosecution and goes on to present the comparative methodology of the selection of jurisdictions for comparison as well as the comparative limitations and possibilities of the descriptions that follow. On that basis the report presents the legal frameworks and institutional principles of selected jurisdictions.

From the comparative descriptions, it is possible to identify key distinctions and characteristics that matter to the drafting process in Georgia towards a sustainable independent prosecution service. Some of the described statutory solutions and practices may serve as inspiration.

Specific recommendations as to what will work best in Georgia is beyond the scope of this report. At the same time, the comparison does allow us to identify important priorities in statutory solutions. They are described in the 'discussion' subsections, and include the following:

- Collegial bodies, their compositions and functions, require transparent statutory regulation to give the collegial bodies the necessary authority in their functions. Main stakeholders from the prosecution service and the professional field as well as stakeholders representing the public interest, should be presented in the collegial body or in the election process. At the same time, a political presence in the collegial body is questionable due to the risk of actual and perceived undue political influence. It is advisable to include other than state authorities in the collegial body to ensure legitimacy in the wider field of practice and among the public.

- The procedure to appoint the prosecutor general must ensure a professional selection among candidates and must secure the confidence of the professional environment, the political bodies (government and parliament) as well as the public. Transparency and formal regulation of the criteria and procedure are relevant. So is the actual involvement of main stakeholders, including representatives of the prosecution service, governing bodies as well as representatives of the non-governing bodies and civil society.

- The access to dismiss the prosecutor general and the procedure to apply vary significantly between the jurisdictions described. The main challenge is to remove the procedure from the control of the governing bodies and the Parliament to avoid the political pressure associated with the power to dismiss the prosecutor general, and to secure a legally based, transparent and fair procedure. For the same reason it remains important to stipulate relevant criteria for the dismissal. The comparison provides useful examples.

- The accountability to the public and to the Parliament are commonplace, either directly to the Parliament or indirectly through another governing body. Accountability directly to the public has become commonplace too through reporting. Directly, the accountability through reporting and hearings carry a significant risk of undue political influence. The accountability should be organized with firm and transparent limits to what the Parliament can ask of the head of the prosecutor general.