



Institute for Development  
of Freedom of Information

The opinions of the Institute for Development of  
Freedom of Information (IDFI) on the draft organic  
law on Prosecutor's Office

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To the Chairperson of the Legal Issues Committee

Mrs. Eka Beselia

Dear Mrs. Beselia,

We hereby present the opinion of the Institute for Development of Freedom of Information (IDFI) on the draft organic law on Prosecutor's Office initiated in the Parliament of Georgia on September 20, 2018 (07-3/277/9).

In line with the new Constitutional amendments, entering into force after presidential elections, the Prosecution Service of Georgia (PSG) is facing the important institutional reforms. This institution will be formed as an independent state agency as recommended by the international and local organizations during past several years. IDFI considers that the importance of this process should be strengthened on the legislative level. Namely, the draft organic law on "Prosecutor's Office" should express the solid will of the authorities to implement fundamental reforms in the prosecution system. Only technical amendments to the law will weaken the importance of the process and may significantly hinder the process of forming the PSG as an independent, neutral and accountable body. Thus, further refinement of the initiated draft law is necessary for prevention of the above-mentioned challenges.

**The opinions of the Institute for Development of Freedom of Information (IDFI) on the draft organic law on Prosecutor's Office**

**1. Composition of the Prosecutorial Council**

First, we would like to express our opinion on the article 19 of the presented draft law that provides the possibility for the Minister of Justice to name one member of the Prosecutorial Council. In addition to the number of shortcomings associated to this provision that will be discussed below, it contradicts to the Constitution of Georgia, which provides that all the members of the Prosecutorial Council should be elected. Hence, naming the member of Prosecutorial Council cannot meet with the election criteria. In addition, this provision is supposedly taken from the legislation of Montenegro. Even though the Prosecution Service of Montenegro is independent, the Minister of Justice still holds certain powers in relation to it. Namely, in case of the disciplinary misconduct the Minister may submit the initiative on removal of the Supreme State Prosecutor from the office to the Prosecutorial Council. Moreover, the Minister may address to the Ethics Commission for obtaining conclusion on the compatibility of the actions of prosecutor to the Ethics Code. While in Georgian model, the prosecution service is fully separated from the Ministry of Justice and the Minister loses all its powers in relation to the PSG. Hence, it is hard to follow to the logic of the above-mentioned provision. In addition, the Venice Commission mentioned in its conclusion that "it is wise that the Minister of Justice should not him- or herself be a member but it is reasonable that an official of that Ministry should participate".<sup>1</sup> However, this was

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<sup>1</sup> Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), para. 39, pg. 10, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)039-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)039-e)

recommended in the reality when the PSG was integral part of the Ministry of Justice. Furthermore, this provision does not avoid the possible membership of one more state-political figure (together with the members of parliament) in the Prosecutorial Council in case if the Minister names his/her deputy to the Council. Consequently, this may deteriorate the crucial process of depoliticisation of the Prosecutorial Council and Prosecution Service itself.

As for the judge members of the Prosecutorial Council in addition to the risks of the conflict of interests that might be associated to their membership, there is no other country, where the prosecution service is independent from other branches of the government, in which the Prosecutorial Council members are the judges (e.g. Montenegro, Portugal, Serbia).

IDFI stands firm on its opinion that composition of the Prosecutorial Council with the members of the Parliament, state-political officials, creates risks of the political influence on the Council. Moreover, it is noteworthy that such high number of political representation in the Prosecutorial Councils is almost none of the countries. The election criteria of the non-prosecutor members of the Council is mostly based on their qualification and experience and is not related to specific position. Thus, this part of the draft law needs comprehensive revision.

Based on the above reasoning IDFI considers that:

- The person named by the Minister of Justice should not be the member of Prosecutorial Council;
- Judges should not be the members of the Prosecutorial Council;
- MPs should not be the members of the Prosecutorial Council;
- Non-prosecutor members of the Council should be selected based on their qualification and experience and not in relation to their position.

## **2. Independence of the individual prosecutors**

In addition to the independence of the prosecution system, strengthening the role and the quality of independence of individual prosecutors is also important. The importance of issue is also highlighted in the last reports of both Organization for Economic Co-operation and Development Anti-Corruption Network (OECD-ACN)<sup>2</sup> and Group of States against Corruption (GRECO)<sup>3</sup>. Article 9 of the presented draft law is almost identical to the article 13 of the existing law on Prosecutor's Office. The latter is criticized in the last report of GRECO and it is mentioned that the superior prosecutors have broad powers. Moreover, even though such powers are acceptable and logical in a hierarchical structure such as the prosecution service of Georgia, GRECO evaluation team considered that the allocation of cases ought to be subject to sufficient checks and balances and be justified in writing. In addition, the evaluation team was particularly concerned by the possibility to provide instructions by superior prosecutors in an

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<sup>2</sup> Anti-Corruption Reforms in Georgia, Fourth Round of Monitoring of the Istanbul Anti-Corruption Action-Plan, 2016, Conclusions, pg. 69-70, available at: <https://www.oecd.org/corruption/acn/OECD-ACN-Georgia-Round-4-Monitoring-Report-ENG.pdf>

<sup>3</sup> Fourth Evaluation Round Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report, adopted GRECO (Strasbourg, 28 November – 2 December 2016), Case Management and Procedure, pg. 46-47, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dc116>

oral form.<sup>4</sup> Hence, IDFI considers that revision of the article 9 of presented draft law according to the GRECO recommendation will be important.

In the opinion of IDFI:

- Recommendation 12 of the fourth round monitoring report of GRECO should be reflected in the draft organic law;
- The obligation of the superior prosecutors on the issuance of the decisions and instructions to the subordinate prosecutors in a written form should be regulated by the organic law.

### **3. Appointment, promotion, disciplining and dismissal of the employees of the Prosecution Service**

According to the presented draft law the issues of appointment, promotion, disciplining and dismissal of the employees of the prosecution service are decided by the Prosecutor General. With this provision, the presented draft law suggests identical approach to the existing regulation. The only difference is that according to the draft organic law on Prosecutor's Office the advisory bodies to the Prosecutor General will be formed in relation to above-mentioned issues.<sup>5</sup> However, the decisions of those bodies will have only recommendatory character. In addition, in the reality where the Prosecutorial Council will be formed as a constitutional body and for performing its powers prescribed by the constitution its further integration to the prosecution service will be important, it is vague why should not its resources be used in the direction of human resources management.

There are existing recommendations of local as well as international organizations on assigning the above-mentioned functions to the Prosecutorial Council. For example, the monitoring team of the OECD-ACN criticized the fact that the Chief Prosecutor decides on the appointment, promotion, disciplining and dismissal of the prosecutors. Moreover, on the existing Consultative Council – advisory body to the Chief Prosecutor, that plays an important role in the promotion, disciplining and dismissal of prosecutors, the monitoring team mentioned that its composition is decided by the Chief Prosecutor, it is not a self-governance institution but an advisory body to the Chief Prosecutor. Overall, such system may affect the independence of the individual prosecutors and concentrate excessive powers in the hands of the Chief Prosecutor.<sup>6</sup> If the human resources management regulations will enter into force as it is provided in the presented draft law it will be identical to the existing regulation which will lead to further criticism from international organization.

Based on the above reasoning OECD-ACN issued the recommendation on assigning the leading role in the recruitment, promotion, discipline and dismissal of prosecutors to the Prosecutorial Council. In addition, in the recommendation, a similar body of prosecutorial self-governance independent from the Chief Prosecutor was suggested as the alternative to the Prosecutorial council.<sup>7</sup> Hence, IDFI considers that with assignment of the mentioned functions to the Prosecutorial Council, the gaps of existing

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<sup>4</sup> Ibid, para. 166, pg. 47

<sup>5</sup> Advisory Body – Consultative Council currently exists, however it is formed on the basis of the decision of Chief Prosecutor and not by the law

<sup>6</sup> Supra note 2, conclusion, para. 3, pg. 69

<sup>7</sup> Ibid, New Recommendation 13, pg. 70

regulation will be eliminated and it will be logical given the constitutional role of the Council. Moreover, this will conform to the European standards.<sup>8</sup>

In the view of IDFI:

- Decision-making power on the issues of human resources management as well as on disciplinary liability should be assigned to the Prosecutorial Council.

#### **4. Opinion of IDFI on the certain articles of the draft organic law on Prosecutor's Office**

- IDFI considers that paragraph 2. (b) of the article 15 of draft law needs further refinement and clear elaboration. Namely, it is not clear from the provision who is eligible to present the activity report of the prosecution service to the Prosecutorial Council and the Parliament. In addition, article 19 of the draft organic law provides that the Prosecutorial Council hears the activity report of the prosecution service presented by the Prosecutor General, his/her first deputy or his/her deputy; while article 68 of the draft law provides that the activity report of the prosecution service should be presented to the Parliament by the same persons. Thus, it is vague what is meant behind the sentence of the article – “presented by the Prosecutor General, his/her deputy or the person named by him/her”;
- In the article 16 of the draft organic law in addition to providing the component of interview in the process of selection of Prosecutor General the openness of the interviews should also be provided;
- Paragraph 10 of Article 19 of the draft law grants, without any restrictions, Prosecutor General with the possibility to attend the Prosecutorial Council sessions with the right to vote. Existing regulation limits this possibility to the Chief Prosecutor when the issues of his/her disciplining or dismissal is discussed. In fact, the draft law grants the Prosecutor General with the full-fledged powers of the member of Prosecutorial Council and gives him/her possibility to influence over the decisions of the Council. In addition to the conflict of interest (associated to his/her attendance with the voting right in the discussion of cases related to him/her), this might as well lead to the inconsistency with the Constitution;
- With regard to the subparagraph “b” of the paragraph 9 of article 20, IDFI considers that only one quota in the Prosecutorial Council for the prosecution service of autonomic republics of Abkhazia and Adjara is not justifiable since Adjara represents big region and according to this provision the representative of this region might not be the member of the Council;
- Paragraph “d” of the article 35 provides that if based on the inspection the person does not meet the legal requirements cannot be hired in the prosecution service. IDFI considers that this provision is vague since it is not clear what is meant by the inspection.

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<sup>8</sup> Opinion No. 9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European Norms and Principles Concerning Prosecutors, explanatory note, para. 54: “Striving for impartiality, which in one form or another must govern the recruitment and career prospects of public prosecutors, may result in arrangements for a competitive system of entry to the profession and the establishment of High Councils either for the whole judiciary, or just for prosecutors”, available at: <https://rm.coe.int/168074738b>