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## Reform of the Prosecutor's Office in Georgia – what is at stake?

**AUTHOR:**

**Ana Natsvlshvili**

Georgian Young Lawyer's Association

**POLICY BRIEF**

**Peer review:**

Kornely Kakachia

**Proofreading:**

Camrin Christensen

### Executive Summary

This policy brief analyses Georgia's progress in reforming the Prosecutor's Office, which is one of the key undertakings in the Georgia–EU Association Agreement.<sup>1</sup> The brief assesses the practices of the Prosecutor's Office and the role it has played in hindering the reform of Georgia's justice system in recent years.



This policy brief covers period from September 2014 (when EU\Georgia AA/DCFTA and Association Agenda provisionally entered into force) - till April, 2015.

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The Association Agreement is intended to have a significant impact on the direction of Georgia's future development. Section 2.1 (ii) places particular emphasis on ensuring the independence, efficiency, impartiality and professionalism of the prosecution. However, both the Action Plan for the Association Agreement and public statements made in relation to reform of the Prosecutor's Office reveal a lack of understanding of the complex needs, context and challenges that the reform must address. The failure to take into consideration both the local context and European standards on the independence and accountability of the Prosecutor's Office<sup>2</sup> can easily undermine Georgia's democratic transition and European integration. Indeed, the absence of an independent and accountable Prosecutor's Office, with the continued real or perceived threat of selective justice, politically motivated prosecutions, unaddressed human rights violations and the persistence of a culture of impunity, will stymie Georgia's implementation of democratic and human rights reforms on a broader scale. Taking this risk into consideration, the policy brief provides a concise assessment of the needs of the reform and presents recommendations for additional components to be included.

## Introduction

In Georgia, like in many other post-soviet states, the Prosecutor's Office plays a dominant role in the criminal justice system. Considering its impact on the function of the justice system in general and, as a consequence, the rule of law, the establishment of an independent, efficient Prosecutor's Office, free of any political or other undue influence, is a critical step in transforming a post-totalitarian state into a truly democratic one. In Georgia, however, despite its impressive reforms in several areas in recent years, the Prosecutor's Office has remained resistant to change – in terms of its legislative framework, institutional setting and, most importantly, its function in practice – and thus has been the target of harsh criticism by both domestic and international observers.<sup>3</sup> Given the impact that the function of the Prosecutor's Office has on other institutions in the country, the failure of reform in this area would have serious negative implications on the overall success and long-term sustainability of reforms in other areas outlined in the Association Agreement.

The need for an independent and effective Prosecutor's Office acquires additional importance for Georgia in the context of its recent history of gross human rights violations. As part of its international obligations,<sup>4</sup> the state must address serious human rights violations regardless of whether they were committed during past administrations or the present one.<sup>5</sup> The 2014 progress report on the fulfilment of the commitments undertaken by Georgia as part of the European Neighbourhood Policy concluded that “the state should establish an independent and effective complaints mechanism and address complaints on property rights, torture and ill-treatment and misuse of the plea-bargaining system.”<sup>6</sup> In this process, Georgia must adhere to the principles of the rule of law and avoid the perception of politically motivated justice. As Thomas Hammarberg put it, there should be “no impunity for serious crimes and also no undue politicisation or selective justice.”<sup>7</sup> Thus far, compliance with the both of these needs has proven to be a challenge for Georgia.<sup>8</sup>

Following the Association Agreement, the Prime Minister's announcement of the reform of the Prosecutor's Office and the follow-up statement by the Minister of Justice that the reform “ought to be carried out swiftly, already this year [2015]... and it cannot wait”<sup>9</sup> signify a promising start to the reform. However, the assessment has identified major inconsistencies between the goals set in the Association Agreement and the activities to be carried out for its implementation, as outlined in the Association Agreement Action Plan. According to the Association Agreement, Georgia has undertaken to:

- Implement the Prosecutor's Office reform ... In particular, identify proper constitutional setting for the Prosecutor's Office with effective oversight – to build public confidence in the Prosecutor's office and establish a truly professional Prosecution service (including through adequate training) independent from political party or other undue influence;
- Ensure that criminal prosecutions are conducted in a transparent and impartial manner, free of political motivation, in order to avoid any politically motivated selective justice.<sup>10</sup>

However, the Action Plan for 2014 –the Government of Georgia's guiding document for state agencies on how to achieve the undertaking stated above—almost exclusively focuses on training and skills-development, rather than the legislative or insti-

<sup>1</sup> Association Agenda between the European Union and Georgia, part 2.1 - political dialogue and reform, section ii - judiciary.

<sup>2</sup> On these standards, see further VENICE COMMISSION'S REPORT ON EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE OF THE JUDICIAL SYSTEM: PART II – THE PROSECUTION SERVICE, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010)

<sup>3</sup> See e.g., country reports by the US Department of State in 2006-2014; see further e.g., Georgian Young Lawyers' Association, “Cases of Criminal and Administrative Offences with Alleged Political Motive” (2011).

<sup>4</sup> see e.g., International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, article 2.

<sup>5</sup> GEORGIA IN TRANSITION, Report on the human rights dimension: background, steps taken and remaining challenges, Assessment and recommendations by Thomas Hammarberg in his capacity as EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, a report addressed to High Representative and Vice-President Catherine Ashton and Commissioner for Enlargement and European Neighbourhood Policy Stefan Füle, September 2013. [hereinafter Thomas Hammarberg Georgia in Transition (2013)]

<sup>6</sup> The report is available at [http://eeas.europa.eu/enp/pdf/2015/georgia-enp-report-2015\\_en.pdf](http://eeas.europa.eu/enp/pdf/2015/georgia-enp-report-2015_en.pdf); see further assessment by the UN Special Rapporteur on Torture, “There have been significant prosecutions and convictions for the torture and abuse of the recent past, but a large legacy remains and hundreds of victims still demand an effective remedy.” Available at <http://www.un.org/apps/news/story.asp?NewsID=50378#.VUnEMPmqko>

<sup>7</sup> Thomas Hammarberg, Georgia in Transition (2013)

<sup>8</sup> see e.g., Annual Report by the Public Defender of Georgia (2014), pages 7-8, available in Georgian

<sup>9</sup> The Minister of Justice comments on the PO Reform, 4 January 2015, available at <http://kvira.ge/თეა-წულუკიანი-პროკურორატუ/>.

<sup>10</sup> EU-Georgia Association Agreement, section 2.1. (ii)

tutional reform of the Prosecutor's Office. The nearly exclusive accent on training is an inadequate response to the need to ensure the independence, efficiency, impartiality and professionalism of the Prosecutor's Office, transparency and impartiality of investigations and freedom from undue influence of any kind, including political. It reveals a lack of understanding and/or acknowledgement of the real problems with the system and the depth of the reforms needed. Training should take place subsequent to and in correspondence with the legislative modifications outlined below.

The Action Plan for 2015 does, to some extent, acknowledge the need for a more comprehensive set of actions to be implemented. It acknowledges that "institutional reform" needs to be carried out, however, it fails to provide further details as to what that implies or what specific activities are needed to achieve the goal.

Last but not least, both the 2014 and 2015 Action Plans lack measurable indicators to allow for an objective assessment of the level of compliance of the relevant state agencies responsible for carrying out the prescribed activities.

## Analysis

In light of the analysis of the law and practice, as well as the views expressed by various stakeholders regarding the Prosecutor's Office in recent years, the major issues of concern are summarised as follows:

### Lack of legislative guarantees for institutional independence

According to the Constitution and the Law on the Prosecutor's Office, it is a sub-unit of the Ministry of Justice. Its clear subordination to the executive branch of the government is further underlined by the fact that, according to the law, the Prime Minister<sup>11</sup> has nearly unlimited power to appoint and dismiss the Chief Prosecutor at any time without the need to refer to any specific grounds for dismissal or provide any guarantees of due process for the dismissed.<sup>12</sup>

### Record of ineffective investigations and the culture of impunity

The Prosecutor's Office has often been criticised for its selective application of justice and ineffective investigations that have engendered a culture of impunity for law enforcement and high-ranking officials.<sup>13</sup> This legacy has led to an advocacy campaign by human rights organisations to establish an independent investigative mechanism,<sup>14</sup> accountable solely to the Parliament and mandated with the authority to investigate and prosecute crimes committed specifically by law enforcement officials in order to eliminate conflict of interest and promote the independent and efficient investigation of allegations.

Thomas Hammarberg, in his capacity as EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, noted:

As part of the ongoing structural reforms, time has come for Georgia to decide, without delay and in the light of a history of past systematic abuses, on the best way to conduct independent and impartial investigations of violations of human rights whenever there is a suspicion that law enforcement agents may

<sup>11</sup> According to Georgia's Constitution, the Prime Minister is the head of the government (executive branch), while the President is the head of the state.

<sup>12</sup> For a detailed analysis see OSCE/ODIHR Trial Monitoring Report, Georgia (2014); see also NGOs urge the Minister of Justice and the Prime Minister to direct the process of appointing the General Prosecutor of Georgia in a responsible way, available at <https://gyla.ge/eng/news?info=1939#sthash.6uR4AWxx.dpuf>

<sup>13</sup> see e.g., *Girgvlani and Enukidze v. Georgia*, ECHR case (2011), paras 242-243. See further, Thomas Hammarberg, *Georgia in Transition*, (2013).

<sup>14</sup> The idea is supported by the Public Defender of Georgia, a number of Georgian NGOs, EU and COE offices in Georgia. The draft law has been submitted to the Inter-Agency Council Against Torture in March 2015 but has not been discussed as of April 2015. see further *Radio Freedom: Independent Investigative Mechanism for Investigating Abuses Committed by Law-enforcement Officials*, 25.02.2015, available at <http://www.radiotavisupleba.ge/content/sagamodziebo-mekanizmi-samartaldamtsavta-danashaulebis-gamosadzieblad/26869100.html>

be involved. By doing so, decision-makers should try to minimise the pernicious consequences of “colleagues investigating colleagues”... considering the country's recent past and the urgent need to build trust between the population and law enforcement, the introduction of a fully independent investigatory body appears to be necessary.<sup>15</sup>

It is important that the discussions over the reform of the Prosecutor's Office and that of setting up the independent mechanism are integrated and conducted in parallel. This has not been the case so far.

### Low public trust due to a record of direct involvement in human rights abuses; the need to address those abuses without the perception of political retaliation

Law enforcement agencies in Georgia have a poor reputation, reflected by the mounting and well-documented allegations of their direct involvement in serious human rights violations in the past and the absence of effective investigations and prosecutions then and now.<sup>16</sup> Although investigating and redressing past abuses was one of the key promises of the ruling coalition, there is growing discontent with the Prosecutor's Office over its ineffectiveness, inter alia, in addressing this issue over the past two years.<sup>17</sup> As predicted,<sup>18</sup> the lack of a clear state policy, strategy and criteria to determine which cases to prosecute, coupled with some instances of extrajudicial actions by the Prosecutor's Office<sup>19</sup> and violations of due process,<sup>20</sup> has given rise to the perception of politically motivated justice.

It took more than two years from the change in government for a special department to be set up within the Chief Prosecutor's Office to investigate abuses committed while administering justice. This department's limited staffing<sup>21</sup> and institutional dependence<sup>22</sup> will unavoidably impact its effectiveness in investigating the several thousand complaints of past abuse. Both victims and the political opposition have criticised this department accordingly.

Moreover, the Government of Georgia should not see this department as a substitute for the independent investigative mechanism advocated by NGOs.

### Lack of internal mechanisms and organisational culture of transparency and accountability

The Prosecutor's Office is a highly centralised and hierarchical system with very limited, if any, room for autonomous decision-making by individual prosecutors. No guarantees are in place for the prosecutor's individual independence and autonomy. In addition, no clear and merit-based criteria and processes are in place for the appointment, evaluation, promotion, demotion or dismissal of prosecutors. The system of disciplinary responsibility as well as prosecutorial ethics needs to be reformed to be in compliance with European standards.<sup>23</sup>

One important aspect of the promotion/demotion/dismissal issue is the legacy of the past. Many allege that the same people who were involved in past abuses still remain

<sup>15</sup> Thomas Hammarberg, *Georgia in Transition* (2013)

<sup>16</sup> see e.g., Girgvliani and Erukidze v. Georgia, *supra* note 12; see further NGO campaign demanding effective investigation of offences committed by the law enforcement representatives on 26 May, available at <https://gyla.ge/eng/news?info=1105>; see further *Those Responsible for the November 7, 2007 Events Have Not Been Held Accountable*, available at <https://gyla.ge/eng/news?info=1020>; see further *Recommendations to the Government of Georgia, By Special Advisor to Georgia on Human Rights, Constitutional and Legal Reforms – Thomas Hammarberg (Follow up on the final mission – 4-9 June 2014)*

<sup>17</sup> NGOs call on the state authorities to conduct the process of effective restoration of rights effectively <https://gyla.ge/eng/news?info=2462>; Civil society organizations call on the Parliament to set up a commission to study high-profile cases <https://gyla.ge/eng/news?info=2419>; GYLA applied to ECtHR for Ineffective Investigation of Facts of Ill-treatment Carried out against Former Political Prisoners <https://gyla.ge/eng/news?info=2444#sthash.27QEUXa1.dpuf>;

<sup>18</sup> “Investigations against former officials can be perceived as selective if there is no clear and transparent strategy on the priorities of the Prosecutor's Office. The principle of impartiality must be honored. Prosecutors should follow legally based procedures strictly and prepare evidence professionally.” See *Recommendations to the Government of Georgia, Thomas Hammarberg (Follow up on the final mission – 4-9 June, 2014)*;

<sup>19</sup> see e.g., *NGO's Statement on the Case of Giorgi Ugulava*, <https://gyla.ge/eng/news?info=2448>;

<sup>20</sup> *OSCE/ODIHR Trial Monitoring Report, Georgia* (2014);

<sup>21</sup> The Department is staffed by the Head of the Department, Deputy Head of the Department, 4 prosecutors, 10 investigators and 4 coordinators.

<sup>22</sup> The department is directly accountable to the Chief Prosecutor and is authorised to take after the cases as determined by the latter, see the *Charter of the Department*, available only in Georgian at <https://matsne.gov.ge/ka/document/view/2728207>

<sup>23</sup> See *Venice Commission Report on European Standards*, *supra* note 2

in the system and continue to hinder the process of investigation and redress of rights violated.<sup>24</sup>

Nevertheless, there is no official and publicly available vision outlining if and how the system is going to free itself from those people with compromised pasts in a way that does not lead to the collapse of the system due to the sudden dismissal of staff or does not violate the right to due process of the people who are dismissed.

### Draft of the Reform Concept prepared by the Inter-Agency Council<sup>25</sup>

#### The content of the draft concept

In December 2014 the Prime Minister designated the Inter-Agency Council of Criminal Justice Reform as the coordinating body for reform of the Prosecutor's Office. In early April 2015, the Inter-Agency Council presented an institutional model for a reformed Prosecutor's Office. It contains a different model for the appointment of the Chief Prosecutor and rules for the appointment/dismissal, promotion and discipline of city, regional and other prosecutors. Among other issues, NGOs have criticised the proposed model of appointment of the Chief Prosecutor, saying:

Considering that the Concept (does not aim at amending but) fits within the current constitutional reality, we maintain that Prosecution needs comprehensive reform to ensure strengthened institutional independence and distance from political influence. Realizing these objectives requires constitutional amendments. We believe that the proposed Concept that corresponds with the current Constitutional framework cannot ensure substantial changes in the prosecutorial system.

...the proposed Concept needs significant review so as to ensure the prosecutorial service's independence from the political leadership... With the proposed model the selection and appointment of the Chief Prosecutor is not sufficiently protected from politization and participation of the political leadership is still high.<sup>26</sup>

It is further notable that the concept contains nothing in relation to the establishment of an independent investigative mechanism or any equivalent. Moreover, the reform concept fails to shed any light on the strategy of the Prosecutor's Office to address the challenging legacy of the past.

#### The format of the work under the Inter-Agency Council

The government plans to develop draft amendments to the Law on the Prosecutor's Office and present them for expert review to the Venice Commission and/or the OSCE/ODIHR. Prior to this, civil society members of the Inter-Agency Council, as well as others have been invited to present their opinion on the reform concept in writing to the Inter-Agency Council.

<sup>24</sup> When presenting to the public the new department set up under the Prosecutor's Office, the Prime Minister specifically noted that the department's staff was selected with particular caution to make sure that these were not the people against whom complaints had been submitted for their involvement in abuses. See <http://www.24saati.ge/news/story/44977-prokuraturashi-akhali-departamenti-iqmneba> (available in Georgian) This statement can be taken as an acknowledgement at the highest political level of the challenging past of the Prosecutor's Office, however leaves the problem of retaining the same staff who were allegedly involved in serious human rights violations in other departments of the Prosecutor's Office, and the risks associated with this fact, unaddressed.

<sup>25</sup> The Council was set up in 2008 by the Decree of the President. It is chaired by the Minister of Justice with various relevant ministries represented in the Council as members. The decree also invited GYLA and other NGOS for the participation in the work of the Council. Further information is available at <http://www.justice.gov.ge/aboutus/Council/238> (in Georgian) <https://gyla.ge/eng/news?info=2479>

<sup>26</sup> i.d.



The process, however, fails to ensure the genuine involvement of domestic civil society actors. Immediately after the draft concept of the reform was published, NGOs stressed the need for the Inter-Agency Council to discuss alternative models and not decide the matter hastily. Unfortunately, the first meeting in late April, where the members of the Council and NGO representatives were able to present their opinions on the draft concept, provided no room for discussion. The meeting ended with no clarification as to whether the Council is going to revise the draft concept and, if so, which parts; whether there will be follow-up meetings and, if so, when; what the deadlines are, etc. The work of the NGOs in the format of the Council is not subject to clear rules and the process, its timeline and modalities of engagement are not formalised. As such, it is quite difficult for civil society actors to engage in the reform in a meaningful way.

## Conclusion

Reforming the Prosecutor's Office is critical to Georgia's successful implementation of a number of planned reforms, the consolidation of democracy and integration with Europe. Currently, there is a clear mismatch between the commitments under the Association Agreement and the activities to be undertaken according to the Action Plans, indicating a lack of understanding and/or acknowledgement of the context, the needs and the depth of the reforms required. The failure to identify and acknowledge these issues threatens the success of the reform. If the Prosecutor's Office is not transformed into a truly independent, efficient and accountable institution, this will undermine Georgia's progress in reform of the justice system in general and will negatively impact Georgia's transformation into a democracy based on the rule of law as well as its European integration.

## Recommendations

- The reform of the Prosecutor's Office should address institutional deficiencies in the system as well as the past legacy of human rights abuses and new challenges facing the country;
- The criteria for and methods of appointment/dismissal must be changed both for the Chief Prosecutor, as well as city, regional and other prosecutors in order to ensure their independence;
- Any system of selection/appointment, evaluation, promotion and demotion of prosecutors that is established should be based on clear and transparent procedures and objective criteria;
- A system ensuring more decentralisation and autonomous decision-making should be introduced and guarantees of individual prosecutor's independence should be strengthened;
- Prosecutorial ethics and the system of disciplinary responsibility need to be reformed in line with European standards;
- Discussions about the independent investigative mechanism charged with investigating abuses committed by law enforcement officials, including officials of the Prosecutor's Office, should be closely integrated and run in parallel with the reform of the Prosecutor's Office;
- The Government must facilitate the meaningful engagement of civil society in the reform process.



