

Institutional Reform of the Prosecutor's Office of Georgia:

Decentralization for Systemic Impartiality and Accountability

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Executive Summary

The aim of this policy paper is to critically reflect on the institutional situation and evolution of the Georgian Prosecutor's Office, within the framework of existing theoretical and comparative knowledge about the institutional arrangements of prosecutor's offices in constitutional democracies.

The first part of the policy paper is divided into three chapters. The first chapter provides an overview of the key normative principles underlying the organizational arrangements of prosecutor's offices in constitutional democracies. Specifically, it analyzes the principles of independence and accountability of prosecutor's offices, emphasizing the importance of balance and the various forms of institutional design that seek to achieve this balance.

The second chapter examines the institutional arrangement of the Prosecutor's Office of Georgia and its evolution from the period of gaining sovereignty from the USSR to the present day. It critically analyzes the reforms focusing on *de jure* institutional independence while neglecting the lack of accountability.

The third chapter explores alternative mechanisms for achieving actual independence, high accountability, and systemic political impartiality in the various institutional arrangements of prosecutor's offices from a comparative perspective.

The second part of the policy paper proposes a concept for reforming the institutional arrangement of the Prosecutor's Office of Georgia, based on the findings and conclusions of the first part.

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Part I

Introduction

In recent decades, the discourse in Georgia regarding the construction of justice institutions in line with principles of constitutional democracy, as well as the focus of reforms implemented for this purpose, has largely centered on the judiciary branch.

The effectiveness of judicial power indeed has a vital impact on the political regime and societal arrangement in Georgia. However, when it comes to institutional enforcers of the Rule of Law, the Prosecutor's Office holds equal central importance.¹

In a Rule of Law state, the Prosecutor's Office plays an immeasurably significant role in the fair and impartial execution of criminal justice.

Therefore, reports from reputable international non-governmental organizations specializing in democracy and human rights, which argue that politicized justice in Georgia is routinized² and systemized, and Georgia's rankings within the zone of hybrid political regimes concerning the Rule of Law and human rights,³ indicate deeper roots of the problem.

The judicial branch cannot be the sole institution responsible for creating objective perceptions of routinely politicized justice. Institutions that define and implement criminal policy must bear their share of responsibility. The Prosecutor's Office of Georgia is a central institution in this regard and has historically been a major target of accusations of politicized justice.

In response to problems of political partiality and justice failures, those in political power over the last few decades have channeled their main efforts into creating institutional guarantees for *de jure* political independence. These efforts, however, have neither ended perceptions of politicized justice nor brought about real independence.

¹ Stefan Voigt and Alexander J. Wulf, "What makes prosecutors independent? Analyzing the institutional determinants of prosecutorial independence," *Journal of Institutional Economics* 15, no. 1 (2019): 99-120.

² Nations in Transit 2020: Dropping the Democratic Façade, Freedom House, <https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade>

³ AMNESTY INTERNATIONAL REPORT 2022/23, Georgia, <https://www.amnesty.org/en/location/europe-and-central-asia/georgia/report-georgia/> According to the report, "government's growing influence on judiciary, use of selective justice and politically motivated criminal prosecution of political opponents and critical of the government media outlets remain a problem".

Based on knowledge acquired from comparative research, this paper takes as a given the issue of the Prosecutor's Office's broad power and discretionary authority, and critical analysis in this regard goes beyond the scope of this document.

Nevertheless, the authors understand the complexity of the prosecutorial system and its power. We acknowledge that in terms of power decentralization, elements of prosecutorial power, such as conducting, leading, and supervising an investigation, can be matters of discussion. However, our focus is on finding optimal institutional architecture within the existing power, and issues of subject-matter jurisdiction are not part of this discussion.

1.

Independence and Accountability Values and Institutional Architecture of Prosecutor's Office

The central role and increasing power of prosecutors within the criminal justice system give exceptional weight and significance to the arrangement of prosecutorial institutions.⁴ In this chapter, we will discuss two important normative values: independence and accountability. We will assess different models of the institutional arrangement of the Prosecutor's Office in light of these values and highlight the necessity of striking an adequate balance when determining the institutional structure of the prosecutorial body.

Despite the paucity of comparative research on prosecutorial institutions—partly due to the existence of drastically different and varied models of institutional arrangements—academic literature broadly agrees on the central importance of independence and accountability for organizing and functioning the Prosecutor's Office.⁵

However, despite the general consensus, there is a lack of agreement and knowledge about the specific content of prosecutorial independence and the ways to achieve it, particularly regarding institutional design. There are two broad models of institutional design: one that places the prosecution within the judiciary branch and another within the executive branch. In institutional models where the Prosecutor's Office is formally differentiated from the judicial or executive branches, it is still functionally and essentially considered part of the executive power.⁶

The idea that the Prosecutor's Office should be independent from political branches, specifically from undue influence by the executive power, is supported by normative arguments similar to those justifying the independence of the judiciary. Given the broad power of the Prosecutor's Office, it may be arbitrarily

⁴ Erik Luna, "Prosecutor king," *Stan. J. Crim. L. & Pol'y* 1 (2014): 48-103.

⁵ Voigt and Wulf, "What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence".

⁶ Erik Luna and Marianne Wade (eds), *The Prosecutor in Transnational Perspective* (New York, 2012).

used by individuals with political authority both to evade individual criminal responsibility and to persecute opponents in a biased and arbitrary manner.⁷

To achieve the normative goal of avoiding politicized criminal justice, various organizational models strive to grant more institutional independence to the Prosecutor's Office⁸ (for instance, by placing it within the judicial branch or establishing it as an independent institution).

However, comparative studies illustrate a negative correlation between the Prosecutor's Office's formal-institutional (*de jure*) independence and its actual (*de facto*) independence.⁹ Specifically, regardless of the institutional arrangement model, a higher degree of formal-institutional independence often corresponds to a lower degree of real independence.

The institutional differentiation of the Prosecutor's Office from branches of political power and the establishment of formal (constitutional and/or legislative) guarantees of independence frequently correlate negatively with achieving real independence and political impartiality.

More differentiation from political branches, particularly the executive branch, reduces the degree of accountability, especially when the reduction of political accountability in favor of higher *de jure* independence is not counterbalanced by alternative mechanisms of accountability. In such cases, both accountability and independence values are compromised.

The lack of accountability,¹⁰ even with guarantees of higher *de jure* independence, creates internal systemic and external risks of political bias that are not adequately mitigated. This lack of accountability undermines both the political accountability and the real independence of the Prosecutor's Office.¹¹

In the next chapter, we will review the institutional evolution of the Prosecutor's Office in Georgia since the restoration of sovereignty. According to our assessment, the apparent normative goal of the reform was often to create more *de jure* independence guarantees. Ensuring accountability has never been a straightforward aim of the reform. Consequently, the lack of accountability has led to severe problems

⁷ Voigt and Wulf, "What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence".

⁸ Thomas Weigend, 'A Judge by Another name? Comparative Perspectives on the Role of the Public Prosecutor', in Erik Luna and Marianne Wade (eds), *The Prosecutor in Transnational Perspective* (New York, 2012).

⁹ Anne Van Aaken, Lars P. Feld and Stefan Voigt, "Do independent prosecutors deter political corruption? An empirical evaluation across seventy-eight countries," *American law and economics review* 12, no. 1 (2010): 204-244.

¹⁰ Ronald F. Wright and Marc L. Miller, "The worldwide accountability deficit for prosecutors," *Wash. & Lee L. Rev.* 67 (2010): 1587.

¹¹ Jerg Gutmann and Stefan Voigt, "The independence of prosecutors and government accountability," *Supreme Court Economic Review* 27, no. 1 (2019): 1-19.

with real independence, even when the Prosecutor's Office was subordinated to a politically accountable figure—the Minister of Justice (2008-2013).

Therefore, an analysis of theoretical literature on the arrangement of the Prosecutor's Office suggests a normative requirement that institutional choices should not only emphasize the value of independence but also the necessity to achieve another important value—accountability. Moreover, these decisions on institutional arrangements reflect the balance achieved between the values of independence and accountability.

This balance, in turn, affects the content of accountability within the context of the Prosecutor's Office. Two ideal types of prosecutorial accountability are distinguished in this regard: political (democratic) accountability and bureaucratic accountability.¹²

Political accountability can take two different forms: direct electoral accountability and indirect accountability through elected representative public officials/institutions. Prosecutor's Offices within the executive power are mostly under the principle of indirect political accountability. In contrast, the direct political accountability form, as seen in the USA, exists in the system of elected district attorneys where accountability takes the form of democratic, electoral accountability.

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¹² Wright and Miller, "The worldwide accountability deficit for prosecutors"; Voigt and Wulf, "What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence".

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In continental Europe, given the specifics of institutional arrangement, there are mixed systems of accountability. These systems combine indirect political accountability and bureaucratic accountability. Prosecutor's Offices that are institutionally within the executive power are part of the single chain of democratic accountability of executive authorities. However, there are various contextual types of institutional design. For instance, there are systems where prosecutorial institutions within the executive and judicial branches co-exist and have overlapping jurisdictions, as seen in France.

Bureaucratic accountability is traditionally characteristic of Prosecutor's Offices within judicial branches, particularly in Roman legal systems. However, it is also widespread in Prosecutor's Offices within the executive branch, which often consider the bureaucratic accountability model most appropriate for the strict implementation of the principle of legality.

The principle of legality is the primary determinant of the normative goal of prosecutorial accountability and is a cornerstone of the legal state's continental European constitutional ideal. The ideal type of prosecutorial accountability, based on the principle of legality, traditionally aimed to minimize or eradicate prosecutorial discretion. In contrast, in systems with political accountability, the higher the direct political (democratic) legitimacy, the greater the boundaries and degree of prosecutorial discretion.

It is essential to note that these models of institutional arrangement and accountability principles, as ideal types, are no longer found in their pure forms in any system. Their convergence has been driven by the inevitable and irreversible expansion of prosecutorial discretion on one hand and the quest for new mechanisms of accountability on the other.

For instance, in Germany, where the principle of legality has historically been the foundation for the accountability of the Prosecutor's Office within the executive branch, prosecutors have acquired rather wide discretionary powers. Meanwhile, in the United States, the principle of democratic accountability applies to elected district attorneys. However, forms of bureaucratic accountability are also used to achieve accountability for subordinate prosecutors and federal attorneys, although their effect is not as strong in a decentralized system as in hierarchical continental systems.

The principle of legality, as the main foundation of an accountable Prosecutor's Office, and bureaucratic accountability as the principal form of its organizational implementation, provide the organizational solution of centralization and hierarchical arrangement. Centralization and hierarchy are essential

organizational elements of bureaucratic accountability, and bureaucratically accountable Prosecutor's Offices are largely hierarchically organized.

However, important contextual details should not be overlooked. Recent comparative research illustrates that prosecutorial systems organized on hierarchical, bureaucratic accountability often take hybrid institutional forms. In these systems, hierarchy and bureaucratic accountability are significantly weakened by prosecutorial discretion and elements of political accountability, leading to decentralization effects.

A good example from the comparative literature is Germany's prosecutorial system. Despite the dominance of the principle of legality, prosecutors have significant discretion, and final verdicts on criminal cases are often made outside the courts based on the prosecutors' discretionary powers.¹³

The expansion of prosecutorial authorities, including discretionary power, is a globally observable trend.¹⁴ Notably, such developments are discernible in both centralized and decentralized systems. It is important to underline that the expansion of prosecutorial discretion in a centralized, bureaucratically accountable system does not necessarily undermine centralization or replace the bureaucratic accountability system.

Georgia's Prosecutor's Office, following the reforms of 2004-2010, exemplifies this. On one hand, prosecutorial discretion expanded significantly, particularly with the introduction of the plea bargain institution. On the other hand, a strictly centralized organization was maintained. This meant that discretionary decisions were made at the highest prosecutorial levels, while subordinate prosecutors were largely deprived of the authority to make discretionary decisions.

In such a system, it is possible to delegate some discretionary powers from the top down, although a strict system of bureaucratic accountability rules out decentralized distribution of these powers.

As illustrated by this discussion, the major normative principles of the arrangement of the Prosecutor's Office and institutional forms do not have strict cause-and-effect relationships with each other. Each institutional arrangement form or solution can be applied not only for the implementation of one normative principle or value but also for achieving other, sometimes contradictory, aims.

For example, a centralized Prosecutor's Office system is an institutional form designed to achieve bureaucratic accountability, which stems from the normative principle of legality as the foundation of accountability. However, a bureaucratic accountability system based on the principle of legality does not

¹³ Jörg-Martin Jehle and Marianne Wade, "Coping with overloaded criminal justice systems: The rise of prosecutorial power across Europe.," *Springer Science & Business Media*, 2006.

¹⁴ Carla Sepulveda and Javier Wilenmann, "Structuring prosecutorial power," *Legal Studies* 42, no. 4 (2022): 680-695.

require a strictly centralized system and is compatible with a high degree of decentralization and prosecutorial discretion, as shown by the examples of Germany, the Netherlands, and other jurisdictions in continental Europe.

As in other contexts, models of institutional arrangement for the Prosecutor's Office and their compatibility with relevant normative values have vast potential for manipulation and misuse. Under systemic malpractice, specific institutional systems or hybrid forms of such systems can serve goals that contradict the normative principles they ostensibly aim to implement.

Centralization in the arrangement of the Prosecutor's Office can be normatively justified as a means to achieve bureaucratic accountability, which includes institutionalized mechanisms against the arbitrary use of prosecutorial discretion. However, when upper-level prosecutors are not subjected to sufficient accountability, a strictly centralized system can become merely a hierarchical conveyor of arbitrarily exercised prosecutorial discretion, where subordinates obediently execute arbitrary directives from their superiors.

In bureaucratic accountability systems, hierarchy, supervision of subordinate prosecutors by their superiors, and oversight of the application of discretionary power are important, but they are not decisive elements.

In the most accountable European systems, bureaucratic accountability is ensured not by meticulous control of superior prosecutors over their subordinates, but by factors such as a legal culture imbued with the values of the Rule of Law, a proper perception of the prosecutor's role, and the internalization of values like justice and other constitutional principles through legal education, as well as a system of professional socialization and career development for prosecutors.¹⁵

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¹⁵ Wright and Miller, "The worldwide accountability deficit for prosecutors".

These factors create a combination of informal rules and practices that, on one hand, allow individual prosecutors autonomy to exercise discretion and, on the other hand, provide a framework for exercising this discretion accountably, without the need for constant control and micromanagement from higher-ranking prosecutors.

Therefore, in systems where the Rule of Law is perceived merely as the accurate execution of directives issued by those in authority, and where the will of regime leaders can outweigh any formal constitutional or legislative restrictions, centralization will only ensure accountability to the arbitrariness of those in power instead of true accountability within the normative meaning of constitutional democracy.

In such systems, a deficit in legal culture based on the values of the Rule of Law, coupled with a lack of infrastructure for legal education and professional socialization needed to internalize this culture, fosters a culture of blind obedience to superiors and acquiescence to the will of those in power.

A clientelist system of career advancement, where climbing the strictly centralized hierarchical ladder depends on unconditional and steadfast implementation of directives from superiors and their political patrons, creates a motivational framework for this culture of obedience. The prosecutor's position and related material or non-material benefits become the main medium of exchange in such clientelist relations. Broadly speaking, clientelism may include related narrow practices, such as nepotism and favoritism.¹⁶

Regardless of the specific forms clientelism takes in such systems, the principal condition for granting prosecutorial power and related benefits is compliance with the arbitrariness of those in power. In places where the Rule of Law has been erased from legal culture, informal laws, institutions, and practices are established to create a strictly hierarchical system based on clientelist exchange logic, where the only guide for exercising discretion is directives from superiors or people in power.

As this discussion illustrates, the independence of the Prosecutor's Office is an important normative value and goal. However, independence alone, especially when perceived narrowly in an institutional sense, cannot achieve the normative values it serves instrumentally, such as carrying out criminal justice fairly and without political or other biases.

The eradication of systemic political bias and politicized justice cannot be achieved solely by creating institutional independence guarantees for prosecutors and the Prosecutor's Office. Independence that is

¹⁶ Peter H. Solomon Jr, "Authoritarian legality and informal practices: Judges, lawyers and the state in Russia and China," *Communist and Post-Communist Studies* 43, no. 4 (2010): 351-362.

not sufficiently supported by accountability mechanisms poses the greatest risk of systemic bias and politicized criminal justice.

From a normative viewpoint, the most appropriate institutional architecture for the Prosecutor's Office strikes a proper balance between independence and accountability. Models of institutional arrangement for the Prosecutor's Office in constitutional democracies aim to achieve such a balance in their own ways.

It is important to note that the functions and authorities of the Prosecutor's Office have undergone significant evolution in all of these models, expanding substantially, often at the expense of other government institutions, particularly the judiciary.

With the irreversible expansion of prosecutorial power and the global trend of functional transformation, a novel understanding and implementation of the balance between independence and accountability has become necessary. These changes have not always been accompanied by radical transformations in formal institutional architecture. However, significant substantive evolutions have often occurred behind an institutional façade that appeared unchanged from the outside.

For instance, in constitutional systems, under the guise of the seemingly dominant position of the legality principle and mandatory criminal prosecution, prosecutors have acquired substantial discretionary powers in shaping and implementing criminal justice policy. However, this broadening of discretion has not always been followed by proper accountability measures.¹⁷

In the subsequent parts, this paper will offer an overview of the evolution of the institutional organization of the Prosecutor's Office in Georgia, placing it in a comparative perspective with models of different arrangements. This will be done particularly in light of the transformation of the authority of the Prosecutor's Office and the expansion of its power. The conclusions based on this discussion will help assess the current state of Georgia's Prosecutor's Office and prospects for reform.

¹⁷ Gwladys Gilliéron, "Public prosecutors in the United States and Europe," *Cham: Springer* (2014).

2.

Institutional Evolution of Prosecutor's Office of Georgia: Resilience of Unified and Centralized System Vis-à-vis Institutional Reform

2.1. Legacy of the Soviet Union

In the Georgian law enforcement system, the Prosecutor's Office, with functions and a form similar to the current institution, began to emerge during the Soviet occupation. The model of the Prosecutor's Office in the Soviet Union was unique in its nature and functions, particularly its power of "general supervision" over socialist laws.¹⁸ However, this instrument of control was not an innovation of the Soviet Union, but a rebuilt institutional "monster" based on the well-tested institution of Czarist Russia (which Peter the Great himself called "The King's Eye").¹⁹

In November 1917, after the Bolshevik Revolution, one of the first decrees aimed at fulfilling the objective of completely destroying the old bureaucratic apparatus was the abolition of the Czar's Prosecutor's Office. This institution had an exceptionally negative reputation in the post-revolutionary period, as it was viewed as a major pillar of the 'old regime' and its repressive legislation.²⁰

Initially, Soviet leaders did not see value in reinstating the institution in the same form. However, domestic threats from rivals were more significant to Lenin than the negative sentiments surrounding the old Prosecutor's Office. To respond effectively to these threats, in 1922, the Bolsheviks began to reanimate the Prosecutor's Office and restore its past glory.²¹ According to Lenin, the misdemeanors of the

¹⁸ George Ginsburgs, "The Soviet Procuracy and Forty Years of Socialist Legality," *The American Slavic and East European Review*, Vol. 18, No. 1, (1959): 34-62.

¹⁹ S.J. Sawicki, "The Soviet Procuracy – The Watchman of Socialist Legality," *New Zealand Slavonic Journal*, No. 10 (1972): 42-51.

²⁰ Ibid.

²¹ Ginsburgs, "The Soviet Procuracy and Forty Years of Socialist Legality".

Prosecutor's Office would not cause as much harm as allowing hostile local forces to influence state governance.²²

Gradually, the Prosecutor's Office evolved into a strictly hierarchical pyramid headed by a Prosecutor General with virtually unlimited authority (the Office of the Prosecutor General of the USSR was established in 1947). The Prosecutor General was appointed by the Supreme Soviet of the USSR for a term of seven years, one of the longest tenures in the entire Soviet governance system.²³

This long tenure underscored the exceptional importance of this position and the high level of partisan trust²⁴ required for the appointment. A prime example is Roman Rudenko, who served as the Prosecutor General of the Soviet Union for 28 consecutive years (1953-1981) until his death. The entire system, including the Prosecutor's Offices of the Soviet republics and rank-and-file prosecutors (who were appointed by the Republic-level public prosecutors with the consent of the Prosecutor General), was under the subordination of the Prosecutor General. This structure minimized local initiatives and threats from them.

The Office of the Prosecutor General wielded authority known as "general supervision" over legality, exercising direct or indirect control over the accurate implementation of laws by all ministries, departments, subordinate institutions and enterprises, executive and administrative bodies of local Soviets, public officials (including judges in court proceedings), and citizens.²⁵

The Office of the Prosecutor General also oversaw the work of the police and prisons, as well as the pre-trial phase of legal proceedings, including decisions on matters such as pre-trial detention, search, seizure, and wiretapping. Additionally, the Office of the Prosecutor General was authorized to monitor the legality of court proceedings, including to request the reversal of any judgments, verdicts, and decisions that came into effect. The Office even had the authority to oversee the behavior of judges themselves.²⁶

As a result, the Prosecutor's Office and prosecutors held a higher status and carried more political weight compared to courts and judges. They constituted one of the most important pillars of the ruling vertical and were key formal-institutional linchpins led by the party elite at the upper echelons of the party

²² Sawicki, "The Soviet Procuracy – The Watchman of Socialist Legality".

²³ Ginsburgs, "The Soviet Procuracy and Forty Years of Socialist Legality".

²⁴ Ibid.

²⁵ Ibid.

²⁶ European Commission for Democracy Through Law (Venice Commission) - Opinion on The Federal Law On *Prokuratura* (Prosecutor's Office of the Russian Federation (CDL-AD(2005)2014), Adopted by the Commission at its 64rd plenary session (Venice, 10-11 June 2005), Strasbourg, 13 June 2005. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)014-e)

hierarchy. Consequently, the Office of the Prosecutor General primarily advocated for the interests of the Communist Party rather than serving as a true defender of the Rule of Law.

The collapse of the Soviet Union entailed the complete dismantling of these foundational elements that upheld the regime. Therefore, post-Soviet countries were compelled to initiate reforms that would dismantle this vertical power structure and decentralize and deconcentrate power.

It was particularly crucial to effect radical and essential discontinuity with institutions of the old regime in the prosecutorial system. This system was widely recognized as one of the main instruments of Soviet oppression, disguising the regime's repressive power under a veneer of legality. Henceforth, the institutional evolution of the Prosecutor's Office in independent Georgia should be analyzed through this lens, assessing to what extent it succeeded in breaking free from the Soviet legacy and establishing itself as an independent and trusted institution.

2.2. From Judiciary to the Executive Branch

2.2.1. From restoration of independence until 2004

After independence was restored, the Prosecutor's Office was one of the few government institutions that maintained continuity not only at the institutional level but also in terms of leadership and personnel. Vakhtang Razmadze, the last Prosecutor General of the Georgian SSR, retained his position despite the Communist Party's defeat in the multi-party elections of October 1990.²⁷

On June 11, 1992, the State Council of the Republic of Georgia approved the "the Provisional Regulations of the Prosecutor's Office of the Republic of Georgia," which defined the status of the Prosecutor's Office. According to this provisional statute, the Prosecutor's Office of Georgia was established as a unified, centralized, and independent body headed by the Prosecutor General appointed by the State Council, with accountability to the State Council.²⁸

During the same period, the Military Prosecution Office was also established,²⁹ comprising the Chief Military Prosecution Office and regional military prosecution offices. Subsequent changes and

²⁷ Vakhtang Razmadze – biography. Parliament of Georgia. <https://parliament.ge/parliament-members/5576/biography>

²⁸ Prosecutor's Office of Georgia. <https://pog.gov.ge/history/>

²⁹ Law of Georgia on Military Prosecutor's Office. Notifications of Parliament, 2, 31/12/1992. <https://matsne.gov.ge/ka/document/view/5506707?publication=0>

reorganizations in 2004 led to the abolition of military, transport, penitentiary, and city prosecutor's offices.

The Constitution of Georgia, adopted in 1995, placed the Prosecutor's Office within the judicial branch,³⁰ considering it as an institution of that branch. However, the Organic Law on the Prosecutor's Office,³¹ enacted after the Constitution and based on it, left ambiguity regarding what defined the Prosecutor's Office as part of the judicial branch and the interrelation between the Prosecutor's Office and the judiciary.

According to the Constitution, the Prosecutor's Office conducted criminal prosecutions, supervised investigations, enforced prison sentences, and supported state prosecution. However, despite its belonging to the judiciary, prosecutors did not enjoy the status and guarantees afforded to judges. Institutionally separate, the Prosecutor's Office was only associated with the judiciary in terms of exercising specific functions, such as supervising investigations, which are typically within the purview of the courts.

Interestingly, the Constitution described the Prosecutor's Office of Georgia as a "unified, centralized system," indicating that despite reducing its powers, relinquishing the exceptional functions of the Soviet Prosecution's Office, such as general supervision over legality, and other formal-institutional changes, this system had not entirely distanced itself from the Soviet legacy. The principle of unity and centralization continued the Soviet logic and remained a major organizational pillar of the prosecutorial system. Specifically, the prosecutorial system remained strictly hierarchical, centered around the figure of the Prosecutor General.

According to the organic law defining the authority, organization, and functioning of the Prosecutor's Office, the Prosecutor General was vested with broad and versatile powers.³² They had arbitrary authority to organize the entire prosecutorial system, manage careers, and perform administrative functions.

The principle of subordinating all prosecutors to the Prosecutor General, rooted in the principles of unity and centralization, allowed the Prosecutor General to make final prosecutorial decisions on criminal justice policy (though discretionary criminal prosecution had not yet been introduced during that period) and specific cases of criminal law.

³⁰ Constitution of Georgia, Article 91, Notifications of Parliament 31-33, 24/08/1995, (24/08/1995-06/02/2004).

³¹ Organic Law of Georgia on Prosecutor's Office of Georgia, 1112, Notifications of Parliament 46, 03/12/1997, (03/12-1997 - 30/06/2004). Date of annulment: 10/11/2008.

³² Ibid.

Under the Constitution of Georgia, the Prosecutor General was nominated by the President of Georgia and elected by a majority vote of the full composition of Parliament for a term of five years. Removal from office was governed by impeachment, the sole form of accountability for the Prosecutor General.

In contrast, Prosecutor Generals in the Soviet Union (both at the central and republic levels) were formally appointed by supreme representative bodies. However, in reality, they were appointed by the Communist Party, to which all public officials, including the Prosecutor General, were accountable.

The framers of Georgia's 1995 Constitution opted to consolidate authority in a single public official—the Prosecutor General—who would oversee this institutionally autonomous structure in a centralized manner. This arrangement provided nominal democratic legitimacy, albeit without the ordinary mechanisms of democratic accountability.

Given these circumstances, it was unclear why the Constitution designated the Prosecutor's Office as part of the judicial branch, since the election and accountability of its main figures were distributed across political branches. Moreover, the Prosecutor's Office lacked the institutional and positional guarantees characteristic of the judiciary.

2.2.2. Reforms of Prosecutor's Office in 2004-2008

After the change of government following the Rose Revolution, amendments to the Constitution were hastily enacted, with the first amendment specifically addressing the Prosecutor's Office. On February 6, 2004, under the Constitutional Law, provisions regarding the Prosecutor's Office were moved from the chapter on the judiciary to the chapter on the President.³³

Consequently, the Constitution no longer indicated that the Prosecutor's Office was part of the judicial branch, and the passage outlining its powers was removed. Instead, a single sentence was added to the chapter on the President (Article 76.1), stating that the authority and functions of the Prosecutor's Office of Georgia would be defined by organic law. The Prosecutor General continued to be elected by Parliament upon nomination by the President.

³³ Constitutional Law of Georgia on the Amendments and Changes to the Constitution of Georgia, Article 16, Legislative Herald of Georgia, 2, 07/02/2004. <https://matsne.gov.ge/ka/document/view/13294?publication=0>

However, relocating the provisions about the Prosecutor's Office to the chapter on the President did not clarify its constitutional status; in fact, it arguably increased confusion. While placing the Prosecutor's Office within the chapter on the President suggested its belonging to the executive branch, it left the major parameters of its institutional arrangement unchanged. Simultaneously, removing the functions of the Prosecutor's Office from the Constitution expanded Parliament's authority over issues related to its institutional structure.

Therefore, the institutional reform of the Prosecutor's Office in 2004, as part of the constitutional amendments, proved to be superficial, as it did not bring about meaningful changes in its powers and institutional setup.

2.2.3. Reforms of Prosecutor's Office in 2008-2013: Prosecutor's Office of Georgia in the Executive Branch

The explanatory note accompanying the draft constitutional law, initiated by the President in 2008, highlights the unresolved status of the Prosecutor's Office following the Rose Revolution, emphasizing the problematic nature of the situation at that time. The note states: "As a result of the constitutional amendment on February 6, 2004, the status of a body of judicial government was removed from the Prosecutor's Office. However, there is no direct indication in either the Constitution or the Organic Law of Georgia regarding the independent position of the Prosecutor's Office within the system of government bodies."³⁴

Instead, the draft law proposed defining the position of the Prosecutor's Office within the executive branch. Under the proposed changes, the Prosecutor's Office of Georgia was intended to become a subordinate government institution within the Ministry of Justice, led by the Minister of Justice, who would simultaneously assume the role of Georgia's Prosecutor General.³⁵

³⁴ Explanatory note to the Draft Constitutional Law of Georgia on the Amendments and Changes to the Constitution of Georgia (N 07-1/8/7), 04/07/2008.

<https://info.parliament.ge/file/1/BillReviewContent/56446>

³⁵ Ibid.

According to the Explanatory Note, this solution aimed to enhance the efficiency of the Prosecutor's Office, drawing inspiration from models like that of the USA (federal government) and other Western countries where the Prosecutor's Office is integrated into the Ministry of Justice system.

The draft proposed amendments to several articles of the Constitution, including:³⁶

- Removing the passage about the Prosecutor's Office from the chapter on the President (removal of Article 76.1)
- Excluding the Minister of Justice – Prosecutor General from the list of officials subject to impeachment
- Granting the President of Georgia the authority to dismiss the Prosecutor General – Minister of Justice from their position. This approach was justified by the need to safeguard the independence guarantees of the Prosecutor's Office within the framework of executive government institutions.³⁷

However, the Committee of Legal Affairs of the Parliament of Georgia, in its expert conclusion,³⁸ criticized the proposed draft constitutional law. Specifically, the criticism was directed at the removal of the norm that the Legal Affairs Committee considered a constitutional foundation defining the legal status of the Prosecutor's Office of Georgia, leaving this issue unresolved.

During the third reading³⁹ of the draft constitutional law, Article 81.4 was added to the Constitution of Georgia, directly stating that "prosecutorial bodies are within the system of the Ministry of Justice and the Minister of Justice exercises their overall administration." This formulation was eventually adopted in its final form.

According to the same article, the powers and procedures for the activities of the Prosecutor's Office are defined by law. Additionally, during the third reading, it was decided that the Minister of Justice would not formally assume the position of Prosecutor General. However, given the powers vested in the Minister of Justice, this figure became equal to the Prosecutor General as envisioned in the initial draft. Moreover, the

³⁶ Constitutional Law of Georgia on Amendments to the Constitution of Georgia (N 07-1/8/7), initiated version (04/07/2008). <https://info.parliament.ge/file/1/BillReviewContent/56445?>

³⁷ Explanatory note to the Draft Constitutional Law of Georgia on the Amendments and Changes to the Constitution of Georgia (N 07-1/8/7), 04/07/2008.

³⁸ Conclusion of the Legal Issues Committee of the Parliament of Georgia on the Draft Constitutional Law on Amendments to the Constitution of Georgia (N 07-1/8) submitted in line with the legislative initiative rule by the President of Georgia. 12/09/2008. <https://info.parliament.ge/file/1/BillReviewContent/89884?>

³⁹ Draft Constitutional Law on Amendments to the Constitution of Georgia (N 07-1/8/7), version submitted at the third reading (10/10/2008). <https://info.parliament.ge/#law-drafting/7863>.

position of Prosecutor General was formally abolished. Therefore, it became even more apparent that in practice, the Minister of Justice was effectively the Prosecutor General without formally holding that title.

As a result of the constitutional amendments on October 10, 2008,⁴⁰ the Prosecutor's Office of Georgia entered the system of the Ministry of Justice in the form of a state sub-agency, headed by the Minister of Justice of Georgia. The Office of the Prosecutor General was transformed into the Chief Prosecutor's Office, led by the Chief Prosecutor who was subordinated to the Minister of Justice. Other structural and territorial units of the Prosecutor's Office remained unchanged.

Alongside the constitutional amendments, the Organic Law of Georgia on Prosecutor's Office was declared null and void, replaced by a Law on Prosecutor's Office.⁴¹ Both the Constitution and the law affirmed that unity and centralization, primarily meaning subordination of lower-ranking prosecutors and other members of the Prosecutor's Office to one individual (in this case, the Minister of Justice), were maintained as the main principles of the Prosecutor's Office's operations.

Under the new arrangement, power with broad and comprehensive scope⁴² remained firmly in the hands of one person, although this individual was not the Chief Prosecutor (who was merely the formal head of the system) but the Minister of Justice.

The Minister of Justice effectively held superior authority over the Chief Prosecutor and in most cases had the power to make final decisions,⁴³ and in certain cases, exercised exclusive powers as well.⁴⁴ It fell within the purview of the Minister of Justice (or alternatively the courts) to review whether decrees or other acts of the Chief Prosecutor were in compliance with the Constitution of Georgia or the law.⁴⁵ The Minister of

⁴⁰ Constitutional Law of Georgia on Amendments and Changes to the Constitution of Georgia, 344, Legislative Herald of Georgia, 27, 27/10/2008. <https://matsne.gov.ge/ka/document/view/19066?publication=0>

⁴¹ Law of Georgia on Prosecutor's Office, 382, Legislative Herald of Georgia, 27, 27/10/2008. Date of annulment: 21/10/2008. <https://matsne.gov.ge/document/view/19090?publication=19>

⁴² Ibid., article 3.

⁴³ At the nomination of Chief Prosecutor: appointment and dismissal of deputies of Chief prosecutor, prosecutors of Abkhazia and Adjara autonomous republics, prosecutors of Tbilisi and district prosecutors, deciding the issue of using disciplinary penalties against them; development of proposals for funding and material-technological provisions of the Prosecutor's Office; approval of structure of prosecutorial bodies, number of personnel and amount of wages of employees of Prosecutor's Office.

⁴⁴ Within the scope of his/her competence creates and abolishes prosecutorial bodies, defines their jurisdiction and competence of structural entities; approves guiding principles of criminal law policy (which are confidential); awards and strips employees of Prosecutor's Office of special state ranks; approves Code of Conduct for employees of Prosecutor's Office; approves charters of prosecutorial bodies and of their structural units as well as rule of internship in prosecutorial bodies; the Minister of Justice is authorized to impose other forms of subordination between low-ranking and superior prosecutors which do not contradict the Constitution of Georgia and this law.

⁴⁵ Ibid., Article 9(6).

Justice was authorized to annul decrees, instructions, and directives issued by lower-ranking prosecutors if they were found to contradict the law.⁴⁶

Interestingly, the Chief Prosecutor also held this power over lower-level prosecutors.⁴⁷ Thus, at the apex of the Prosecutor's Office hierarchical ladder, the Prosecutor General was replaced not by the Chief Prosecutor, but by the Minister of Justice. The Chief Prosecutor had the authority to initiate criminal prosecution against the Minister of Justice.⁴⁸ However, this power was counterbalanced by one of the main mechanisms under the control of the Minister of Justice: the role of appointing and dismissing the Chief Prosecutor. Specifically, the President appointed and dismissed the Chief Prosecutor upon the Minister of Justice's request.⁴⁹

The powers of the Minister of Justice were so extensive that it fell within their competence to initiate criminal prosecutions against the President, Ministers, Members of Parliament, judges of common and Constitutional Courts, prosecutors, and investigators of prosecutors.⁵⁰

Endowed with such broad authority, the Minister of Justice was effectively answerable solely to the President, despite the formal constitutional perspective that as a government member, they were also subject to accountability before Parliament and its oversight mechanisms. The President could dismiss the Minister of Justice at their own discretion.⁵¹ Moreover, the President had to approve the Prime Minister's nomination of the Minister of Justice.⁵²

Thus, the political neutrality of the Prosecutor's Office, a fundamental principle of its operation, was entirely contingent on the goodwill of the Minister of Justice—a strong political figure. In this highly centralized system, where one official concentrated all power in their hands, democratic accountability mechanisms were virtually dysfunctional. Consequently, there was no effective deterrent for the Minister of Justice to wield prosecutorial powers and influence any criminal justice case.⁵³

Additionally, it is noteworthy to mention the fundamental reform in the criminal justice system that coincided with the changes in the prosecutorial system and its impact on the powers of the Prosecutor's

⁴⁶ Ibid., Article 8(1)(L).

⁴⁷ Ibid., Article 9(4)(R).

⁴⁸ Ibid., Article 9(4)(G).

⁴⁹ Ibid., Article 9(1).

⁵⁰ Ibid., Article 8(1)(C).

⁵¹ Constitution of Georgia, Article 73 (1)(c), (10/10/2008-15/10/2010).

⁵² Ibid., Article 73(1)(C).

⁵³ Human Rights Education and Monitoring Centre (currently Social Justice Centre), "Policy of Invisible Power" 2015, 11. https://socialjustice.org.ge/uploads/products/pdf/უხილავი_ძალაუფლების_პოლიტიკა.pdf

Office. This reform had been planned for years, but the new Criminal Procedure Code of Georgia only came into effect on October 1, 2010.⁵⁴

A significant change was the shift from inquisitorial court principles to essentially an adversarial system. The emphasis was placed on prioritizing court investigation, although it significantly restricted the judge's role in this process to that of an impartial referee. Specifically, judges' ability to take proactive actions, such as initiating investigations and independently gathering evidence, was limited. Their powers were confined to ensuring the strict observance of fairness and the adversarial principles for the presentation of evidence by the parties during proceedings. Therefore, overseeing a fair trial and determining whether the prosecution proved the guilt of the accused beyond a reasonable doubt became the primary functions of judges.

It is true that in these circumstances, procedural guarantees benefiting the indicted person have increased, ensuring their ability to participate equally with the prosecutorial side in the investigation, evidence collection, submission, and review phases, although this did not always guarantee absolute equality in practice. One of the most crucial aspects of prosecutorial power was granting the Prosecutor's Office discretionary authority over criminal prosecution. While there were limits placed on this discretion, often these boundaries were defined by the Prosecutor's Office itself. Specifically, the initiation, continuation, and termination of criminal prosecutions against individuals were governed by criminal law policies and mandatory directives stemming from them.⁵⁵

Formally, this arrangement appeared to resemble the model of Prosecutor's Offices within the executive branch prevalent in Continental Europe. However, in reality, the prosecutorial power of the Ministry of Justice was highly consolidated and centralized. The internal bureaucratic accountability of the Prosecutor's Office only ensured loyalty of prosecutors to the head of the system, the Minister. The Minister's democratic political accountability was reduced to answering to the directly elected President, while the judiciary, which was dependent and politically biased, lacked sufficient judicial oversight.

⁵⁴ The Government of Georgia initiated the draft law on 4 April 2006, although the process was suspended for a long period of time. The discussion resumed at the second reading only in 2009 and it was adopted as a law by 9 October 2009, coming into effect from 1 October 2010. See draft law (N07-2/218/6) "Criminal Procedure Code of Georgia", Parliament of Georgia.

⁵⁵ Law of Georgia Criminal Procedure Code of Georgia, Article 105(3), 1772, Legislative Herald of Georgia, 31, 03/11/2009 (03/11/2009-24/09/2010). <https://matsne.gov.ge/ka/document/view/90034?publication=0>

Consequently, with all channels of accountability dysfunctional, the integration of the Prosecutor's Office within the executive branch during this period failed to meet the demand for political impartiality and raised concerns about politicized criminal justice.

2.3. Reforms of Prosecutor's Office in 2013-2018: From the Executive Branch to Autonomous Constitutional Institute

2.3.1. Dissolution of Minister of Justice's Prosecutorial Powers

Immediately after the change of government through the October 2012 elections, a draft law to amend the Law on the Prosecutor's Office was proposed on 29 November.⁵⁶

During this period, public and political criticism regarding the politicization of the Prosecutor's Office was largely directed at the political leadership of the institution.

Therefore, the first stage of the reform aimed to reduce the power of the Minister of Justice and strengthen the institutional autonomy of the Prosecutor's Office.⁵⁷ The future trajectory of the reform was also clear: to transform the Prosecutor's Office from an executive branch entity into an independent institution. Subsequent discussions will show that the primary and sole aim of the reform in terms of institutional design was to strengthen the *de jure* institutional independence of the Prosecutor's Office, with no focus on *de facto* independence or strengthening accountability.

In the initial stages of the reform, the roles of the Minister of Justice and Chief Prosecutor had to be separated to diminish the prosecutorial power of the Minister of Justice. The enacted amendments significantly reduced the Minister of Justice's powers, particularly by removing several exclusive powers, although the Minister retained significant political influence.

Specifically, these amendments removed the Minister of Justice from the role of effectively acting as the Chief Prosecutor, thereby establishing that all lower-ranking prosecutors and other employees of the

⁵⁶ Draft Law (N 07-3/22/8) on Amendments to the Law of Georgia on Prosecutor's Office. Parliament of Georgia, 29 November 2012. <https://info.parliament.ge/#law-drafting/101>

⁵⁷ Explanatory note to the Draft Law (N 07-3/22/8) on Amendments to the Law of Georgia on Prosecutor's Office 03/12/2012. <https://info.parliament.ge/file/1/BillReviewContent/162479?>

Prosecutor's Office were now under the direct authority of the Chief Prosecutor rather than the Minister of Justice.⁵⁸

The amendments abolished the Minister of Justice's authority to review decrees or other acts issued by the Chief Prosecutor for compliance with the Constitution and laws, as well as the authority to revoke decisions made by lower-ranking prosecutors. The law explicitly stated that "the Minister of Justice shall not interfere in actions taken and decisions made regarding the investigation or criminal prosecution of specific cases by the Prosecutor's Office."⁵⁹ Furthermore, the power to prosecute high-ranking officials was transferred from the Minister of Justice to the Chief Prosecutor.⁶⁰ The Minister of Justice also lost significant decision-making powers concerning the appointment or dismissal of prosecutors in the Abkhazian and Adjara Autonomous Republics, Tbilisi, and district prosecutors, deputies of the Chief Prosecutor, as well as the use of disciplinary measures against employees of the Prosecutor's Office.

The Minister's independent conduct of certain powers, such as approval of guiding principles of criminal law (previously confidential but now publicized due to the amendments), approval of the rules of internship for prosecutorial bodies and the statutes of their structural bodies, and approval of the code of conduct for employees of the Prosecutor's Office, has been limited, although decisive power was retained by the Minister.⁶¹

Overall, the amendments enacted in 2013 did weaken the power of the Minister of Justice in certain cases. However, it is doubtful to what extent these reforms succeeded in establishing a politically neutral Prosecutor's Office.

It has become apparent that achieving political neutrality cannot be accomplished solely by removing a political figure from the leadership of the institution. It was superficial to view the model of the Prosecutor's Office being subordinate to the Minister of Justice as the central problem causing the politicization of the Prosecutor's Office, while ignoring the failure of all accountability mechanisms in implementing this model.

In the initial stage of the reform with the 2013 amendments, the Minister of Justice still retained veto powers over important issues and retained significant influence in the appointment and dismissal of the

⁵⁸ Law of Georgia on Prosecutor's Office of Georgia, article 4(e), 382, Legislative Herald of Georgia. 27,27/10/2008 (30/05/2013 – 20/09/2013). Date of annulment: 16/12/2018. <https://matsne.gov.ge/ka/document/view/19090?publication=5>

⁵⁹ Ibid., Article 8(2).

⁶⁰ Ibid., Article 9(3)(d).

⁶¹ Ibid., Article 8.

Chief Prosecutor. Notably, while previously this decision was made by the President upon nomination from the Minister of Justice, another change made in the Law on the Prosecutor's Office in 2013 replaced the President with the Prime Minister.⁶²

As a result, the appointment and dismissal of the Chief Prosecutor remained within the purview of the political branches and thus under the control of the one political power overseeing these branches, without substantial reform in this regard. The parliamentary mechanism was not formally involved in the appointment process, effectively excluding the Parliamentary Opposition.

In these conditions, the Chief Prosecutor remained the central figure in a strictly hierarchical system, holding concentrated power over the accountability mechanisms of every lower-ranking prosecutor and employee. Primarily, the Chief Prosecutor was accountable to both the Prime Minister and the Minister of Justice, who represented the same political team.

Naturally, these reforms did not eliminate the political bias of the Prosecutor's Office or end politicized justice. The challenges that persisted after this reform were clearly illustrated by events unfolding in subsequent years, as well-analyzed in the 2014 Trial Monitoring Report of the OSCE Office for Democratic Institutions and Human Rights.

The report emphasizes the problematic nature of appointing three different Chief Prosecutors between February 2013 and December 2014, particularly highlighting how these changes undermined public confidence in the autonomy of the institution.

According to the report, "The frequent change of Chief Prosecutors in such a short time may have reinforced perceptions of political affiliation or attempts at influence peddling, which can undermine overall public trust in the criminal justice system."⁶³

⁶² The amendment was necessitated by 2010 Constitutional changes coming into effect. See the Law of Georgia on Amendments to the Law of Georgia on Prosecutor's Office, website, 08/10/2013. Date of annulment 16/12/2018. <https://matsne.gov.ge/ka/document/view/2028290?publication=0>

⁶³ OSCE/ODIHR, „Trial Monitoring Report on Georgia“, Warsaw, 9 December 2014, 47. <https://www.osce.org/files/f/documents/b/1/130686.pdf>

2.3.2. 2015 Reform of Prosecutor's Office and Establishment of Prosecutorial Council

In response to widespread perceptions of political bias, the reform of the Prosecutor's Office took a new direction in 2015. It indirectly acknowledged issues of accountability, although the proposed institutional measures were deemed insufficient to fully address this problem.

On 21 May 2015, the government introduced a draft law amending⁶⁴ the Law of Georgia on the Prosecutor's Office (authored by the Ministry of Justice), which, as clarified by its authors, aimed to fundamentally change the institutional framework of the Prosecutor's Office while still maintaining its position within the executive branch.

According to the authors, the amendments were intended to establish adequate legal and procedural guarantees for the independence of the Prosecutor's Office and to enhance public trust in the institution.⁶⁵

To achieve this goal, one of the main changes introduced by the law was the creation of the Prosecutorial Council. The Council's primary functions included participating in the process of appointing and dismissing the Chief Prosecutor, conducting disciplinary proceedings against the Chief Prosecutor and his deputies (including prosecutor members of the Council), appointing an *ad hoc* prosecutor, and carrying out other functions largely of a recommendatory nature.⁶⁶

In addition to the Prosecutorial Council, a Prosecutorial Conference was also established. This assembly comprised prosecutors and investigators from the Prosecutor's Office of Georgia and was authorized to elect the prosecutor members of the Prosecutorial Council.⁶⁷ Together, these two bodies ensured broader participation in the appointment process of the Chief Prosecutor, involving all three branches of government.

The procedure for electing the Chief Prosecutor was also amended to become more complex.⁶⁸ Specifically, the Minister of Justice nominated the candidate for Chief Prosecutor,⁶⁹ who then needed

⁶⁴ Draft Law (N 07-2/336/8) on Amendments to the Law of Georgia on Prosecutor's Office, Parliament of Georgia, 21 May 2015. <https://info.parliament.ge/#law-drafting/9302>

⁶⁵ Explanatory note to the Draft Law on Amendments to the Law of Georgia on Prosecutor's Office (N 07-2/336/8)," 25/05/2105. <https://info.parliament.ge/file/1/BillReviewContent/78065?>

⁶⁶ Law of Georgia on Amendments to the Law of Georgia on Prosecutor's Office, 4300-lb, website, 28/09/2015, date of annulment: 16/12/2018, Article 1(4). <https://matsne.gov.ge/ka/document/view/2992635?publication=0>

⁶⁷ Ibid.

⁶⁸ Ibid., article 1(6).

⁶⁹ The Minister of Justice conducts consultations with academic circles, members of civil society and specialists in the field of law for 1 month to select candidates for the position of Chief Prosecutor. As a result of the consultation, the Minister of Justice will

approval by at least two-thirds of the members of the Prosecutorial Council.⁷⁰ Subsequently, approval was required from the Government (via the Minister of Justice), followed by final approval by a simple majority in Parliament after successfully completing these steps.

Despite this broad involvement, which the Venice Commission concluded represented an improvement compared to the previous system, it still considered the "political element" dominant in the appointment process.⁷¹ Specifically, political bodies were involved at all levels of the process: Firstly, initiated by the Minister of Justice representing the government, which was itself approved by the majority in Parliament.

Additionally, the composition of the Prosecutorial Council, chaired by the Minister of Justice and including members of Parliament and judiciary representatives (elected by the Supreme Council of Justice, whose independence is also questionable), though prosecutors made up the majority, is significant.⁷²

The executive branch retained the ability to block decisions of the Prosecutorial Council, acting as an intermediary between the Council and Parliament, which only began discussing the selected candidate after government approval.⁷³

Simultaneously, the law did not specify the grounds on which the government could reject a nominated candidate, leading to potential delays until an acceptable candidate for the government was chosen. The final decision rested with Parliament, requiring a simple majority rather than a qualified majority, effectively excluding participation of the Parliamentary Minority and formalizing Parliament's role as a rubber stamp for the government's preference.⁷⁴

select and present 3 candidates for the post of chief prosecutor to the Prosecutorial Council for approval, at least 1/3 of whom must be of a different gender. Nominations about candidates for the position of Chief Prosecutor must be substantiated.

⁷⁰ Candidates are voted for separately. The one that receives more votes, but not less than 2/3 of the full composition of the Council, that is, less than 10 votes, will be considered approved. If two or more candidates receive the same number of votes, then the vote of the chairman, that is, the Minister of Justice, is decisive. If none of them get the required number of votes, the 2 candidates with the best results will be voted in the second round. If he/she does not get sufficient number of votes this time, then the Minister of Justice will present other candidates within a week.

⁷¹ European Commission for Democracy Through Law – Joint Opinion on The Draft Amendments to The Law on The Prosecutor's Office of Georgia (CDL-AD(2015)039), Endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), Strasbourg, Warsaw, 4 November, 2015.

[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)

⁷² The 8 out of 15 members of the Prosecutorial Council were prosecutor members elected by the Prosecutor's Conference. Of note is that the remaining 2 members were elected by the Parliament by the majority of the full composition.

⁷³ The Minister of Justice will immediately submit the candidacy of the Chief Prosecutor approved by the Prosecutorial Council to the Government of Georgia for approval. The government announces approval or rejection of the nomination of the Chief Prosecutor within two weeks. In case of refusal, the Minister of Justice will submit to the government another candidate approved by the Council. If the government approves, then it will be immediately presented to the Parliament.

⁷⁴ In particular, if there are sufficient grounds to suspect that the Chief Prosecutor has committed a crime, the Prosecutorial Council, on the initiative of one or more of its members, will consider the feasibility of appointing an ad-hoc prosecutor. In turn, this kind of decision is based on the initial investigation. Therefore, in fact, the Council itself must see sufficient grounds to suspect that prosecutor has committed a crime, and in such a case must appoint an ad-hoc prosecutor, who must draw a conclusion that

The procedure for dismissing the Chief Prosecutor from office was also noteworthy, aiming to appear as depoliticized as possible with the creation of the *ad hoc* prosecutor's institute, an additional but seemingly powerless link in the process.

The Prosecutorial Council held a decisive vote in initiating the Chief Prosecutor's dismissal by submitting the motion to Parliament. Parliament, authorized to dismiss the Chief Prosecutor before the end of their term by a simple majority, had this authority in both appointment and dismissal cases. It is also noteworthy that independently of this process, the Chief Prosecutor could be dismissed if the Prosecutorial Council found disciplinary wrongdoing after reviewing a case (with Parliament making the final decision). This scenario did not require the appointment of an *ad hoc* prosecutor. Importantly, the dismissal of the Chief Prosecutor on either ground could be subject to court review.

Therefore, while the 2015 amendments were significant in many respects, they were not transformative. The system retained its organizational power and accountability structure. The Chief Prosecutor wielded complete authority over the prosecutorial system, heading a strictly hierarchical structure and exercising control over all Prosecutor's Office employees through mechanisms like appointment, dismissal, promotion, and disciplinary proceedings.

The Chief Prosecutor also had the authority to revoke decrees, instructions, and directives issued by lower-ranking prosecutors, as well as the power to initiate criminal prosecutions—a toolkit of accountability instruments that drew criticism from both local and international stakeholders. According to assessments by the Social Justice Centre, the legislation did not provide sufficient guarantees for lower-level prosecutors, leaving them strictly subordinate to their superiors and sometimes unable to make decisions based on their own judgment and beliefs. Moreover, the mandatory directives from superiors were problematic as the legislation did not define their form or content.⁷⁵

The creation of the Prosecutorial Council was a response to the severe systemic deficit in accountability. However, it functioned more as a consultative rather than decision-making body, thus failing to function as an effective mechanism of accountability.

there is a reasonable suspicion and submit it again to the Council, which by 2/3 of the full composition approves the conclusion of the ad-hoc prosecutor and addresses the Parliament with a submission on the early dismissal of the Chief Prosecutor. If the conclusion of the ad-hoc prosecutor does not confirm the reasonable assumption that the Chief Prosecutor committed a crime, the Prosecutorial Council can still reject such conclusion of the ad-hoc prosecutor by a secret ballot with not less than two-thirds of the full composition. In this case, it will be considered that there is a reasonable assumption that the Chief Prosecutor has committed a crime, and the Prosecutorial Council will apply to the Parliament of Georgia for the early dismissal of the Chief Prosecutor.

⁷⁵ Human Rights Education and Monitoring Centre, "Policy of Invisible Power", 15.

Furthermore, the existence of the Prosecutorial Council as a mechanism for holding the Chief Prosecutor accountable was inherently flawed because it combined two contradictory and mutually exclusive accountability mechanisms. While prosecutors constituted the majority in the Prosecutorial Council, they were bureaucratically subordinate to the Chief Prosecutor through accountability mechanisms.

This paradoxical situation meant that individuals bureaucratically accountable to the Chief Prosecutor were tasked with ensuring the Chief Prosecutor's accountability—a logical and theoretical contradiction that was impractical to implement in reality.

2.3.3. 2017-2018 Constitutional Reform and Establishment of Prosecutor's Office as Autonomous Constitutional Institution

As anticipated, the introduction of the Prosecutorial Council did little to eliminate the perceived political bias of the Prosecutor's Office or improve the accountability of the Chief Prosecutor. The next phase of the reform focused once again on fortifying the façade of *de jure* institutional independence, rather than addressing the deficit in accountability or other factors contributing to systemic political bias.

Following the 2017 constitutional amendments, the Prosecutor's Office was removed from the executive branch⁷⁶ and, for the first time in its institutional evolution, established as a fully autonomous constitutional body. The Prosecutor General was reinstated at the helm of the Prosecutor's Office, similar to the arrangement before the 2008 amendments.⁷⁷

The term of office for the Prosecutor General was set at six years. The authority to elect the Prosecutor General was divided between the Prosecutorial Council and Parliament—candidates receiving two-thirds of the Prosecutorial Council's votes required majority approval from the total members of Parliament.

The Venice Commission criticized this electoral rule for the Chief Prosecutor and recommended changing the requirement from a simple majority to a qualified majority⁷⁸ in Parliament, ensuring consensus across

⁷⁶ Constitutional Law of Georgia on Amendments to the Constitution of Georgia, 1324-rs, website, 19/10/2017, Article 65. <https://matsne.gov.ge/ka/document/view/3811818?publication=0>

⁷⁷ Therefore, Prosecutor General replaced Chief Prosecutor.

⁷⁸ European Commission For Democracy Through Law – Opinion On The Draft Revised Constitution of Georgia (CDL-AD(2017)013), Adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017), Strasbourg, 19 June 2017, 17. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)013-e)

political groups and guarding against politically motivated appointments.⁷⁹ However, the Constitutional Commission did not adopt the Venice Commission's recommendation.

Consequently, the majority of the total members of Parliament had the decisive say in electing the Prosecutor General, making the Prosecutor's Office accountable to Parliament. Specifically, accountability was interpreted as the obligation to submit an annual report to Parliament.⁸⁰

The Prosecutor General once again consolidated absolute prosecutorial power, with increased guarantees of *de jure* independence, although the weak accountability mechanisms that existed previously were entirely dismantled without adequate replacements. Furthermore, Parliament can only remove the Prosecutor General through an impeachment procedure,⁸¹ and the new model does not include disciplinary proceedings against the Prosecutor General at all. Therefore, the accountability deficit remained unresolved, as neither constitutional reforms nor subsequent periods brought about tangible solutions.

With the constitutional amendments, the regulation of matters concerning the prosecutor's office reverted to the realm of organic law. Consequently, the Organic Law on the Prosecutor's Office replaced its predecessor to align with these amendments.⁸² While changes were implemented in various areas, they resulted in the Prosecutor General acquiring significantly broader powers, consolidating authority previously shared with the Minister of Justice exclusively into his/her hands.

Under the current constitutional amendments, the Prosecutor General presides over a strictly hierarchical system, virtually unaccountable to anyone, despite the entire system being answerable to him through his control over key mechanisms of incentives, punishments, or the dual nature necessary for effective management.

As an independent constitutional body, the Prosecutorial Council primarily serves in an advisory capacity to both the Prosecutor General and Parliament. Its main function is participating in the appointment of the Prosecutor General, although it lacks decisive authority in this process. Similarly, on other matters, the Prosecutorial Council is limited to issuing recommendations to the Prosecutor General.

⁷⁹ Human Rights Education and Monitoring Centre (currently Social Justice Centre), "Reform of the Prosecution System", 2018, 14. https://socialjustice.org.ge/uploads/products/pdf/პროკურატურის_სისტემის_რეფორმა_1532425361.pdf

⁸⁰ Constitution of Georgia, Article 65(3).

⁸¹ Constitution of Georgia, Article 48(1).

⁸² Organic Law of Georgia on Prosecutor's Office, 3794-IS, website, 13/12/2018.

The Prosecutor General wields essentially autocratic and often unchecked power over personnel policies within the prosecutorial system, including performance assessments (such as disciplinary sanctions, dismissals, salaries, demotions, promotions, and rankings),⁸³ as well as other administrative functions related to managing the Prosecutor's Office. The Chief Prosecutor also holds the crucial authority to initiate criminal prosecutions against individuals with constitutional status and high-ranking political figures.

The Prosecutor General makes final decisions on all matters falling within the jurisdiction of the Prosecutor's Office, including overseeing the investigative process, exercising discretionary powers in criminal prosecutions, and representing the prosecution exclusively in trials.

In these circumstances, the constitutional independence of the prosecutorial system primarily translates into *de jure* institutional independence from the executive and legislative branches, which is primarily applicable to the Prosecutor General. Only through the Prosecutor General does this independence extend to the entire prosecutorial system.⁸⁴ In the 9 recommendations issued by the European Commission to Georgia upon granting EU candidate status, significant emphasis is placed on *de jure* independence and the requirement for a consensus-based method of electing the Prosecutor General.⁸⁵

However, regarding the individual prosecutors and the functional, factual independence of the system as a whole, the organic law fails to provide sufficient guarantees to protect internal independence. The bureaucratic accountability system of prosecutors is structured around their subordination to the unaccountable Prosecutor General. The existing model—a centralized, hierarchical Prosecutor's Office led by a Prosecutor General elected by Parliament—implies complete subordination of all prosecutors and other employees to the Prosecutor General.⁸⁶

⁸³ It is worth noting that according to Article 41 of the Organic Law of Georgia on Prosecutor's Office, "Employee of a Prosecutor's Office shall have right to address to the court on matters related to the appointment to the position, demotion, dismissal and suspension of authority in one month, according to the rule established by the legislation". However, of additional note is that the Prosecutor General himself/herself is an individual which defines rule of use of each of these mechanisms.

⁸⁴ European Commission for Democracy Through Law (Venice Commission) – Opinion on The Provisions on The Prosecutorial Council in The Draft Organic Law on The Prosecutor's Office and on The Provisions on The Hight Council of Justice in The Existing Organic Law on General Courts (CDL-AD(2018)029), Adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018), Strasbourg, 17 December 2018. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)029-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)029-e)

⁸⁵ European Commission – Georgia 2023 Report, Commission Staff Working Document, SWD(2023) 697 final, Brussels, 8.11.2023. https://neighbourhood-enlargement.ec.europa.eu/document/download/388e01b7-e283-4bc9-9d0a-5600ea49eda9_en?filename=SWD_2023_697%20Georgia%20report.pdf

⁸⁶ See judgement of the European Court of Human Rights on case *Ugulava v. Georgia*(No. 2), no.22431/20, 2 February 2024, par. 60. <https://hudoc.echr.coe.int/?i=001-230633>. In this judgement, the Court ruled that former Prosecutor General could not be an impartial judge on case which was examined when he was the Prosecutor General. European Court of Human Rights took into

Interestingly, the Constitution created the Prosecutorial Council to address this issue and ensure the independence of the prosecutorial system. However, the organic law does not grant the Council actionable powers to achieve real independence or accountability. As a result, its role as the guardian of independence remains merely a constitutional formality. The next sub-chapter will delve into the evolution of the Council and its illusory nature throughout its existence.

2.4. Prosecutorial Council and Illusion of Self-Governance in a Centralized System

The history of reforming Georgia's Prosecutor's Office reveals that various institutional models were tested, but most were incomplete and often distorted, existing primarily on paper. Changes were frequently limited to textual amendments in the Constitution without significantly altering the actual operational reality. The latest iteration declared the Prosecutor's Office an independent constitutional body and created the Prosecutorial Council as its guarantor of independence.

The reform of Georgia's Prosecutor's Office somewhat parallels the reform path of the judiciary. Similar to the judiciary, the emphasis was on achieving *de jure* institutional independence, interpreted as freeing the system from direct institutional influences, particularly by minimizing political involvement from both the legislative and executive branches. This process began by gradually reducing the powers of the Minister of Justice within the Prosecutor's Office and attempted to introduce a collegial body in management to safeguard its independence.

The judiciary underwent a similar transformation. The President's direct involvement was phased out in favor of a collegial body—the Council of Justice—also intended as a guarantor of judicial independence. However, in exchange for reducing external influences, the system unintentionally bolstered internal influences, which instead of promoting independent self-governance, became intermediaries and guarantors for external forces.⁸⁷

Specifically, centralized power consolidated in one individual did not empower actors within the system but rather strengthened those external to it, making complete subjugation of the judiciary more cost-

account the role of the Prosecutor General in a strictly hierarchical system of Prosecutor's Office where all prosecutors are under his subordination and have to follow his instructions.

⁸⁷ Davit Zedelashvili, Tamar Ketsbaia and Ana Chiabriashvili, "Institutional Reconstruction of the Georgian Judiciary: A Comparative Perspective". Research Institute Gnomon Wise, Tbilisi, 2023. <https://gnomonwise.org/ge/publications/policy-papers/153>

effective for external forces. Hence, comparing these two institutions, both crucial for the justice system, is significant. They shared a common starting point of centralized power and a deficit of democratic accountability. The difference in the reforms of the judiciary and the Prosecutor's Office lies in the structure of their self-governing bodies and the extent of their authority. The High Council of Justice, for instance, was endowed with broad, comprehensive powers capable of influencing individual judges. In contrast, within the Prosecutor's Office, all such mechanisms were concentrated solely in the hands of the Prosecutor General.

Since its establishment in 2015, the Prosecutorial Council, intended as a guarantor of the Prosecutor's Office's independence, has primarily functioned as a consultative body. Its main role has been limited to participating in the election process of the Prosecutor General, albeit without decisive authority. Following the constitutional amendments of 2017, the Prosecutorial Council was granted constitutional status aimed at ensuring transparency, independence, and effectiveness within the Prosecutor's Office. It was anticipated that this body would be equipped with substantive instruments to fulfill its constitutional responsibilities.

However, according to the Venice Commission's assessment, the current legal framework raises legitimate doubts in this regard. While acknowledging the benefits of an independent Prosecutorial Council as a mechanism to counterbalance the power of the Prosecutor General in an independent Prosecutor's Office model, the Commission criticized the fact that the Council only has the right to nominate candidates for the Prosecutor General. It lacks authority in the process of removing the Prosecutor General from office, which undermines its ability to effectively achieve the constitutional goals.⁸⁸

By comparison, under the previous model before the 2017 amendments, the Prosecutorial Council still operated as a consultative body. However, it had a role in the procedure for dismissing the Prosecutor General (where the key authority lay with Parliament) and was empowered to address issues of the Chief Prosecutor's disciplinary responsibility without requiring an *ad hoc* prosecutor, which could lead to the Chief Prosecutor's removal. In that scenario, decisions of the Prosecutorial Council were subject to parliamentary and subsequently judicial oversight. It's notable that the law provided for back pay to the Chief Prosecutor if the court deemed the Council's decision unjust, though it did not address reinstatement to the position.

⁸⁸ Venice Commission, (CDL-AD(2018)029).

The composition of the Prosecutorial Council is also noteworthy. It includes representatives from all three branches of government and public individuals, with prosecutors holding the majority—a measure intended to strengthen self-governance and independence. Although the Prosecutor General currently does not serve as chair or member of the Prosecutorial Council, this does not preclude their influence over its decisions.

Specifically, prosecutors, who constitute the majority in the Prosecutorial Council, originate from a system solely managed by the Prosecutor General. The fact that the Prosecutor General does not oversee disciplinary matters concerning Council members does not exempt prosecutors from their influence.

The Venice Commission also highlighted that prosecutors form the majority within the Prosecutorial Council. According to the Commission, this composition reflects the previous arrangement before the reforms. However, now that the Council has constitutional status, this composition undermines its effectiveness, as the hierarchical power structure and professional subordination diminish its independence. The Venice Commission argues that broader public participation should be ensured through diverse representative mechanisms.⁸⁹ The current composition, which includes representation from the judiciary and legislative bodies, fails to counterbalance threats posed by the prosecutorial system and does not foster public trust.⁹⁰

The Venice Commission's conclusions once again underscore the fundamental conflict between two mutually exclusive principles and accountability mechanisms. It is theoretically impossible for prosecutors, who are bureaucratically accountable to the Prosecutor General, to hold the Prosecutor General accountable.

Therefore, as long as bureaucratic accountability and a hierarchical system remain central to prosecutorial accountability, the presence of prosecutors in the Prosecutorial Council, particularly in the majority, is fundamentally incompatible with the Council's objectives. The majority representation of prosecutors in the Council creates an illusion of self-governance in a context where hierarchical structure and bureaucratic accountability prevent genuine autonomy.

The composition of the Prosecutorial Council, where prosecutors hold the majority, would be meaningful only if the Prosecutor's Office were fully transformed into a judicial institution where prosecutors enjoy the same guarantees of independence as judges and are not subject to hierarchical bureaucratic

⁸⁹ Venice Commission, (CDL-AD(2018)029).

⁹⁰ Ibid.

accountability. Under such circumstances, the Prosecutorial Council, composed mostly of prosecutors, could function as a self-governing body akin to the High Council of Justice. However, as long as the Prosecutor's Office remains hierarchical and operates under a bureaucratic accountability regime, having the majority of prosecutors in the Prosecutorial Council remains anomalous.

When evaluating the current system, the Venice Commission focused on the independence of the Prosecutor's Office and the potential role of the Prosecutorial Council in safeguarding it. The Commission reiterated that ensuring the independence of the Prosecutor's Office requires protecting it not only from external influences but also establishing internal independence,⁹¹ which necessitates a robust framework for internal accountability. Under the current model, the Prosecutor General wields full discretion over bureaucratic accountability mechanisms, including the career paths of prosecutors.

According to the Venice Commission, the Prosecutorial Council should be empowered to guarantee the independence of prosecutors. Each prosecutor should have the right to appeal to an independent body, such as the Prosecutorial Council. To strike a balance between hierarchical control and the independence of prosecutors, the Prosecutor General and the Prosecutorial Council should share authority over issues related to prosecutors' careers.⁹²

The Venice Commission suggests the possibility of transforming the Prosecutorial Council into an institutionalized mechanism for bureaucratic accountability by reducing the consolidated power of the Prosecutor General in this area, aligning with best practices in Europe. As detailed in the comparative analysis in the following chapter, bureaucratic accountability in continental Europe extends beyond subordination to a single official figure and includes institutionalized mechanisms of accountability.

An analysis of the reforms of the Prosecutor's Office of Georgia through the lens of institutional evolution reveals that the reforms have predominantly focused on establishing the appearance of *de jure* institutional independence. However, the emphasis has been on officials with concentrated power (Prosecutor General, Minister of Justice) who lacked accountability, leading to a strictly hierarchical, centralized system that fully controlled all mechanisms of bureaucratic accountability. Such an arrangement, particularly with a politically loyal Prosecutor General or Minister of Justice, facilitates the creation and operation of a politically aligned prosecutorial hierarchy. Nevertheless, it fails to establish an

⁹¹ Ibid.

⁹² Ibid.

accountable and genuinely politically independent and impartial Prosecutor's Office in accordance with constitutional requirements, thereby perpetuating risks of politicized justice.

3.

Models of Institutional Arrangement of the Prosecutor's Office in a Comparative Perspective: Institutional Forms to Achieve a Balance between Independence and Accountability

The aim of the comparative and theoretical analysis of the models of institutional arrangements for the prosecution in this chapter is to emphasize ways to achieve a balanced approach between the values of independence and accountability within the Prosecutor's Office.

Drawing from the findings of the institutional development analysis of the Prosecutor's Office of Georgia, our research focuses on discussing alternative institutional arrangements where the principle of accountability is adequately implemented without compromising the actual, or *de facto*, quality of institutional independence. Therefore, our analysis will place less emphasis on the issue of *de jure* independence of prosecutorial institutions.

3.1. Tendency of Expanding Prosecutorial Power and Functional Transformation of the Prosecutor's Office's Authority

The prosecutorial power within the criminal justice system has historically held immense significance, often earning the title of "agenda shaper"⁹³ within judicial circles. Over the past century, constitutional democracies with varying legal systems and institutional arrangements for prosecutors have seen an irreversible trend toward increasing prosecutorial authority.

⁹³ Voigt and Wulf, "What makes prosecutors independent? Analyzing the institutional determinants of prosecutorial independence"; Weigend. Weigend, 'A Judge by Another name? Comparative Perspectives on the Role of the Public Prosecutor'.

Even in continental European states, where the judiciary branch traditionally held dominant institutional status and prosecutorial institutions partly remained within the judiciary, the shift towards prosecutorial dominance is now widely acknowledged.

Statistical data consistently illustrate that the majority of final decisions in criminal cases, both in the USA and continental Europe, are made outside the courtroom by prosecutorial institutions.⁹⁴

As prosecutorial power has expanded, so too has the scope of prosecutorial functions. Prosecutorial offices have assumed responsibilities traditionally held by courts, such as case adjudication, while also taking on legislative functions in criminal law policy-making.

Given these developments, it is challenging to classify prosecutorial institutions strictly within the judicial, legislative, or executive functions as defined by classical separation of powers doctrine. The institutional placement of a prosecutor's office—whether within the executive, judicial branch, or as an independent entity—does not significantly alter the nature of its functional responsibilities. For instance, a prosecutor's office within the executive branch effectively combines legislative and judicial functions.

This expansion of prosecutorial authority brings about substantial, sometimes transformative, changes to institutional models, posing new challenges for safeguarding independence and impartiality. Addressing these challenges requires institutional responses that reshape both formal and informal institutional landscapes.

In particular, the increased prosecutorial discretion in continental Europe has introduced accountability challenges that cannot be adequately addressed within the existing framework of legality and bureaucratic accountability.

Therefore, in European systems, a set of mandatory guidelines for criminal law policy has been established.⁹⁵ These guidelines are formulated by politically accountable officials, such as the Minister of Justice, and collegial institutions.

Criminal law policy guidelines serve dual functions: they ensure the rational exercise of discretion and prevent arbitrariness, aligning with principles of the Rule of Law and legality; and they promote accountable exercise of discretion, aligning with democratic principles of accountable government.

⁹⁴ Luna, "Prosecutor King"; Luna and Wade, "The Prosecutor in Transnational Perspective".

⁹⁵ Marianne Wade, "The Januses of Justice: How prosecutors define the kind of justice done across Europe," In *Crime, Criminal Law and Criminal Justice in Europe*, pp. 595-617. Brill Nijhoff, 2013.

In contrast, in the United States, where state-level district attorneys wield substantial discretion in shaping criminal justice policy, criminal justice policy guidelines issued by individual district attorneys play a less significant role. They primarily serve as a secondary means of holding subordinate prosecutors accountable to the district attorney.⁹⁶

This difference is rooted in several factors: district attorneys are elected through democratic processes, which embeds accountability within the electoral system; and the authority to shape criminal law policy is decentralized and localized, with elected attorneys determining policy within their respective districts. Accountability of district attorneys thus extends primarily to the electorate of their district.⁹⁷ In implementing policy, deputy district attorneys are managed through a variety of managerial tools, both formal and informal, to control their discretionary powers.

Therefore, the functional evolution of Prosecutor's Office institutions and the expansion of discretionary powers necessitated adapting traditional forms of accountability. This led to a blending of democratic accountability elements into bureaucratic accountability systems, and *vice versa*. Nevertheless, each system retains a dominant mode of accountability alongside its specific institutional framework, which we will discuss in greater detail below.

3.2. Centralized and Hierarchical Systems of the Prosecutor's Office Based on Bureaucratic Accountability

As noted in the preceding section, the placement of Prosecutor's Office institutions within any branch of government does not fundamentally affect their actual independence or the extent of their accountability. Moreover, regardless of the institutional model adopted, expansive discretionary powers have become a defining characteristic of prosecutorial institutions.

Therefore, in our comparative study of the institutional arrangements of Prosecutor's Offices, we will focus on different institutional solutions aimed at controlling discretionary powers and ensuring accountability.

⁹⁶ Luna, "Prosecutor King".

⁹⁷ David Alan Sklansky, "The nature and function of prosecutorial power," *J. Crim. L. & Criminology* 106 (2016): 473.

Together with the change in the absolutist understanding of the principle of legality and the related principle of mandatory criminal prosecution in continental European legal systems, increasing prosecutorial discretion has become a hallmark of criminal justice systems.

Despite this transformation, the fundamental model of institutional organization within Prosecutor's Offices has remained largely unchanged. The hierarchical organizational structure, coupled with a bureaucratic accountability system, now incorporates mechanisms to oversee the judicious exercise of discretionary powers.

Whether the Prosecutor's Office is situated within the judicial or executive branch, the expansion of prosecutorial discretion in continental European countries and the assumption of separate judicial functions have been irreversible. In essence, despite formal and institutional differences, the variations in the degree and scope of prosecutorial discretion between American and European systems are minimal and inconsequential.

In the subsequent sections of this sub-chapter, we delve into the primary facets of the expansion of prosecutorial discretion across continental Europe, alongside the significant limitations and alterations of the principle of legality and its derivative, mandatory criminal prosecution, from a comparative standpoint.

Following this, we explore the traditional elements of the bureaucratic accountability system within Prosecutor's Offices, associated with a strict interpretation of the principle of legality. Drawing on insights from comparative academic literature, we illustrate the inherent incompatibility of the traditional bureaucratic accountability system with the oversight of increasing prosecutorial discretionary powers.

Concluding this discussion, we examine updated mechanisms aimed at achieving bureaucratic accountability within continental European prosecutorial systems. These mechanisms seek to address the challenges posed by expanding prosecutorial discretion and aim to remedy the deficiencies of the traditional bureaucratic accountability system in effectively managing such discretion.

The goal of this analysis is to highlight the bureaucratic accountability mechanisms within Prosecutor's Offices in continental Europe and to compare them with corresponding elements in the Georgian prosecutorial system. These comparisons will shed light on the extent to which they align in terms of content and outcomes.

Ultimately, these findings will support our conclusion that the adoption of bureaucratic accountability mechanisms from European jurisdictions was not intended to create an accountable Prosecutor's Office.

Rather, due to misappropriation of legal institutional borrowing, we have ended up with a politically influenced and unaccountable Prosecutor's Office, superficially adorned with borrowed Western (continental European and American) institutions. Essentially, these institutional choices have deferred and resisted a complete and radical departure from the centralized systems of the Soviet Union and Imperial Russia.

3.2.1. Curbing Legality Principle in the Continental Europe Through Broad Prosecutorial Discretion

The principle of legality has traditionally been fundamental in criminal law proceedings across continental Europe. According to this principle, crimes and punishments are comprehensively defined in the Criminal Code, and criminal prosecution is mandatory for each crime.⁹⁸

While the continental criminal law system has moved away from the inquisitorial model, the fundamental principles of the inquisitorial process continue to significantly influence criminal law procedures and the functioning of its institutions.⁹⁹

Across the inquisitorial criminal justice systems, the objective of uncovering the truth in criminal cases systematically requires not only judge-dominated court trials but also strict supervision and direction of the investigation by judicial institutions. Given the monumental nature of this task, judges overseeing cases are supplemented by other court officials who supervise and control the investigative process.

In continental European countries, these officials overseeing investigations are common prosecutors.¹⁰⁰ Regardless of whether they are formally part of the judiciary and enjoy the status and independence guarantees of judges, prosecutors perform judicial functions when supervising and leading investigations.

For example, in France, both the public prosecutor and the "investigative judge" may supervise investigations. While the public prosecutor operates within the executive branch under the hierarchical authority of the Minister of Justice, the investigative judge is part of the judiciary and enjoys the status

⁹⁸ Gabriel Hallevy, "The Meaning and Structure of the Principle of Legality in Criminal Law," In *A Modern Treatise on the Principle of Legality in Criminal Law*, pp. 1-14. Springer, Berlin, Heidelberg, 2010.

⁹⁹ Tyrone Kirchengast, "Mixed and Hybrid Systems of Justice and the Development of the Adversarial Paradigm: European Law, Inquisitorial Processes and the Development of Community Justice in the Common Law States," *Rev. Faculdade Direito Universidade Federal Minas Gerais* 75 (2019): 513.

¹⁰⁰ Stefan Braum, 'Prosecutorial Control of Investigations in Europe: A Call for Judicial Oversight,' in Luna and Wade (eds), "The Prosecutor in Transnational Perspective".

and protections of a judge. However, both officials essentially perform judicial functions when overseeing investigations, making them court officials.¹⁰¹

Thus, the authority granted to prosecutors in continental Europe over the supervision and control of investigations already surpasses that of prosecutors in common law countries, who historically have not been tasked with overseeing or leading investigations.

This significant difference is highlighted in comparative literature, which often focuses on the discretionary powers related to criminal prosecution and case resolution. Traditionally, the lack of such discretionary powers characterized the continental European system, and the acquisition of such discretion represents a significant advancement for prosecutors in continental Europe.

In this regard, the first notable mention is the introduction of discretionary powers to initiate criminal prosecution in continental legal systems and the limitation of principles of legality and mandatory criminal prosecution through "opportunity" or "expediency" principles.

Regarding the discretionary power to initiate prosecution, the "expediency principle" establishes a framework for prosecutors in European countries to assess whether the public interest in initiating prosecution outweighs legitimate and practical reasons not to do so. Prosecutors make decisions to either commence or decline criminal prosecution based on this evaluation.¹⁰² Prosecutors in continental Europe have also acquired powers similar to diversion programs in the American system, allowing them to refuse to initiate prosecution based on specific conditions set by prosecutors.

Regarding the resolution of cases without court adjudication, where prosecutors play a participatory and dominant role, it is noteworthy that mechanisms similar to the American plea bargain, as well as other forms of resolving cases without court adjudication with the prosecutor's agreement, have begun to appear in European legal systems.

¹⁰¹ Jacqueline Hodgson, 'Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice,' in Luna and Wade (eds), "The Prosecutor in Transnational Perspective".

¹⁰² Willem Geelhoed, "Prosecutorial Discretion in the Netherlands: An Advantage for Politicians?" *Criminal Liability of Political Decision-Makers: A Comparative Perspective* (2017): 369-381.

For example, there are variations such as the German "order of punishment" (Strafbefehl),¹⁰³ the Dutch "strafbeschikking,"¹⁰⁴ and the Swedish "strafföreläggande."¹⁰⁵ In Germany, this institution operates under court supervision. For cases of certain categories, prosecutors are authorized to submit a substantiated motion to a judge to impose a determined punishment. If the defendant agrees, the judge issues an order of punishment.

This is considered a consensual procedure because if the accused does not admit guilt or disagrees with the prosecutor's proposed punishment, they can reject the order of punishment within two weeks and request a substantive hearing. The judge also has the authority to deny the prosecutor's motion. If the judge does not approve, no order of punishment is issued, and the case proceeds to a formal hearing.

In Sweden and the Netherlands, the judge plays a more distant role in the sentencing process, and prosecutors fully exercise judicial functions by determining guilt and imposing penalties. In Sweden, this authority applies to crimes punishable by fines, while in the Netherlands, it extends to a broader range of less serious crimes punishable by up to 6 years in prison.

The expansion of discretionary powers in these directions has granted prosecutors additional roles in both legislative aspects (determining criminal law policy) and judicial matters (case resolution through plea bargaining or other settlement mechanisms) within continental European legal systems.

The addition of these distinct functional powers has posed new challenges for the independence and accountability of prosecutorial institutions in continental Europe. Granting prosecutors quasi-legislative powers to shape criminal justice policies has necessitated the reinforcement or introduction of democratic accountability mechanisms. Simultaneously, expanding their quasi-judicial role in case resolution has intensified demands for both independence and impartiality.

In response, continental European prosecutorial institutions have had to undergo formal and informal transformations to meet these requirements derived from systemic normative goals in the face of increased powers, striving to align more closely with ideals of independence and accountability.

¹⁰³ Stephen C. Thaman, 'The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?', in Luna and Wade (eds), "The Prosecutor in Transnational Perspective".

¹⁰⁴ Peter J. P. Tak, 'The Dutch Prosecutor: A Prosecuting and Sentencing Officer,' in Luna and Wade (eds), "The Prosecutor in Transnational Perspective".

¹⁰⁵ Josef Zila, 'Prosecutorial Powers and Policy Making in Sweden and the Other Nordic Countries', in Luna and Wade (eds), "The Prosecutor in Transnational Perspective".

3.2.2. Traditional System of Bureaucratic Accountability in the Prosecutorial Institutions of Continental Europe and Differentiating it From the Soviet Neo-Inquisitorial System's Legacy

The traditional system of bureaucratic accountability in continental European countries is founded on the principle of legality and embodies the normative expectations of the classical Rule of Law doctrine, aimed at curbing arbitrariness by subjecting officials to appropriate legal constraints.

Material and procedural criminal law rules serve as the primary and most effective checks on prosecutorial discretion. These rules define and circumscribe the range of actions available to prosecutors, thereby striving to make prosecutorial decisions predictable and determinable.

Thus, the principle of legality sets the outer limits of prosecutorial discretion. Within these bounds, the traditional system of bureaucratic accountability in continental European prosecutorial bodies relies on several key elements, notably: 1. Expertise: Accumulated through professional education and experience and 2. Internal Organizational Hierarchy: Supervision of subordinates by senior prosecutors.¹⁰⁶

Professional expertise is a crucial characteristic of continental European prosecutors, who are career civil servants unlike their American counterparts, who are elected political officials.¹⁰⁷ In continental Europe, the emphasis on political impartiality and reliance on professional expertise instead of democratic accountability mechanisms are considered essential safeguards.¹⁰⁸

This expertise is shaped by formal and informal rules and practices governing prosecutors' education, entry into the profession, and advancement through the career ladder. The self-perception of the prosecutor's role is particularly significant in this context, influenced by expectations derived from the principle of legality, other Rule of Law requirements, and vestiges of the inquisitorial system's emphasis on impartially seeking and determining the truth in criminal cases.

Prosecutorial institutions in continental Europe are hierarchical public bodies adhering to the principles of career bureaucracy. Prosecutors begin their careers at lower levels and may remain within the system for decades, progressing through the career ladder with opportunities for mobility. During this tenure,

¹⁰⁶ Wright and Miller, "The worldwide accountability deficit for prosecutors"; Luna, "Prosecutor King".

¹⁰⁷ Elected attorneys hold membership to local bar association and obey their internal discipline. Therefore, legal and professional expertise of the elected attorneys are proven and guaranteed. However, unlike Europe, this expertise is not an independent ground for legitimacy. At the same time, demonstrating competence is one of main factors to win elections of attorneys.

Leslie B. Arffa, "Separation of Prosecutors," *Yale LJ* 128 (2018): 1078.

¹⁰⁸ Michael Tonry, "Prosecutors and Politics in Comparative Perspective," *Crime and Justice*, (2012).

prosecutors are socialized within the system, internalizing their role and adhering to formal and informal rules and practices associated with it.

Advancement on the hierarchical career ladder in continental European prosecutorial institutions requires approval from superiors, which means these systems are not entirely immune to clientelistic practices. However, several factors mitigate against the dominance of clientelism: deeply internalized institutional ethics and self-perceptions of roles, alongside safeguards against arbitrary dismissal.

Prosecutors enjoying the status and guarantees of judges are particularly insulated in this regard. Even prosecutors placed institutionally within the executive branch benefit from strong protections against arbitrary dismissal, akin to other public servants in continental Europe. The Venice Commission's opinion, as discussed in the previous chapter, regarding the absence of protections against arbitrary dismissal for prosecutors in Georgia, serves as a pertinent reminder here.

The absence of such safeguards in Georgia prevents the exercise of bureaucratic accountability aligned with legitimate systemic goals, instead fostering hierarchical accountability as a means to cultivate politically loyal prosecutors. Importantly, the hierarchical structure of continental European Prosecutor's Offices does not entail complete subordination of all prosecutors to a single official. Politically accountable figures at the helm of the system, such as Ministers of Justice, are materially and procedurally limited in their exercise of bureaucratic accountability.

Conversely, the absence or weakness of these factors in Georgia creates space for the dominance of clientelistic dynamics—where personal benefits and loyalty to superiors or political patrons take precedence over institutionalized accountability mechanisms.

In this respect, comparable to Georgia would be not continental European prosecution institutions, but the neighboring countries where the essential reform of criminal justice and its liberation from the distorted model of neo-inquisitorial criminal justice prevalent in the USSR was not fully carried out.¹⁰⁹

For instance, in Russia, the Criminal Procedure Code of 2001 introduced significant elements of adversarial proceedings and broadened access to jury trials. However, with the consolidation of Vladimir Putin's authoritarian regime, many of these reforms have been substantially restricted, revoked, or emptied of

¹⁰⁹ Peter H. Solomon Jr, "Post-Soviet criminal justice: The persistence of distorted neo-inquisitorialism," *Theoretical Criminology* 19, no. 2 (2015): 159-178.

content. Consequently, the distorted Soviet model of neo-inquisitorial justice, characterized by prosecutorial bias, has persisted.¹¹⁰

As noted by Peter Solomon, prosecutorial bias in the Soviet neo-inquisitorial system was primarily ensured by a weak and subservient judiciary (judges were part of the career bureaucracy, and acquittals were seen as a major hindrance to career advancement), as well as the dominance of investigative bodies during the pre-trial stage.¹¹¹

In contrast to Russia, in Georgia, the formal powers of the Prosecutor's Office in terms of supervising and leading investigations are significantly broader and, from a formal standpoint, establish a neo-inquisitorial model akin to continental Europe. However, it is crucial to emphasize that this significant aspect has had no substantial impact on outcomes, whether regarding prosecutorial bias or the impartiality and fairness of the overall process.

The primary reason for this outcome is a judiciary that is politically dependent and biased. The modified neo-inquisitorial model, where prosecutors direct the investigative process under judicial supervision and verdicts are rendered through open trials imbued with elements of an adversarial process, theoretically achieves the desired result of fair criminal justice only when the court is independent and impartial.¹¹²

In settings where the judiciary is politically dependent and biased, prosecutorial bias persists. The prosecutor's oversight of investigations and the constraints on investigative bodies cannot significantly alter this dynamic.

Furthermore, the Soviet system fostered interlinked career bureaucracies among investigative, police, prosecutorial, and judicial agencies. This practice, inherited from that era and continuing today in Russia, Georgia, and Ukraine, includes former investigators becoming prosecutors or judges, with former prosecutors often moving within the judicial bureaucracy.¹¹³

This feature greatly contributes to prosecutorial bias across these institutions and undermines formal institutional separations and other procedural safeguards.

¹¹⁰ Peter Solomon, "Accusatorial bias in Russian criminal justice," New York: *Cambridge University Press*, 2018.

¹¹¹ Solomon, "Post-Soviet Criminal Justice".

¹¹² Solomon, "Post-Soviet Criminal Justice".

¹¹³ Solomon, "Post-Soviet Criminal Justice"; Kathryn Hendley, "Do Lawyers Matter in Russia?" *Wis. L. Rev.* (2021): 301.

Another significant factor, highlighted by Russian criminal justice scholars and applicable to other countries with a Soviet legacy like Georgia, is the use of practices akin to the so-called “nomenclature” in managing career bureaucracies.

In the USSR, the "nomenclature" system served as a method for the Communist Party elite to populate positions of power with loyal clients.¹¹⁴ The nomenclature list included individuals loyal to the Communist Party, who were expected to accept any position as instructed by the party. Membership in the "nomenclature" guaranteed employment by the party but did not ensure upward mobility. Status within the nomenclature was subject to constant redefinition and change.

Scholars of the Russian Prosecutor's Office have identified practices reminiscent of the Soviet nomenclature logic during Putin's regime's authoritarian consolidation, which systematically bolstered prosecutors loyal to the regime. These practices include: a) short-term appointments to single positions; b) increased rotation frequency; c) positional changes instead of purges; d) recruitment and appointment of personnel from outside.¹¹⁵

Through these techniques, strict hierarchical control is enforced. Prosecutors are socialized in an environment of radical position instability, where unwavering loyalty to superiors/political bosses' directives, along with the ability to anticipate, learn, and adapt to their expectations, forms the basis for maintaining and advancing one's career.

These practices reinforce within prosecutors the sense of being replaceable at any moment. The resulting feelings of instability and vulnerability foster strict centralization, undermining the implementation of bureaucratic accountability and nurturing clientelistic, loyalty-based relationships and informal networks in exchange for personal benefits.

Therefore, we can conclude that the proper institutionalization of bureaucratic accountability within the Prosecutor's Office is hindered by several factors of institutional arrangement: strict centralization, the subordination of all prosecutors to a single official, and inadequate institutional and legal mechanisms to safeguard prosecutors from arbitrary dismissal.

¹¹⁴ Maria Snegovaya and Kirill Petrov, "Long Soviet shadows: the nomenklatura ties of Putin elites," *Post-Soviet Affairs* 38, no. 4 (2022): 329-348.

¹¹⁵ Evgenia Arkadyevna Olimpieva, "Putin's Prosecutors: Personnel Politics and Building Authoritarianism in Russia," PhD diss., The University of Chicago, 2023.

The deficit in accountability and actual independence resulting from these factors cannot be remedied solely by nominal democratic accountability at the apex of a centralized system. As demonstrated by the continental European experience, achieving a proper system of accountability and genuine *de facto* independence requires a balanced synthesis of bureaucratic and political accountability mechanisms. We will explore these solutions in the next subsection.

3.2.3. Synthesis of Bureaucratic and Political Accountability in Continental Europe's Prosecutorial Systems

Alongside the expansion of prosecutorial discretion, traditional mechanisms of bureaucratic accountability have proven inadequate in continental European countries. As a result, the issuance of criminal policy guidelines for both general and specific categories of cases has been established to govern the exercise of discretion in a regular, routinized, and predictable manner.

In Georgia, discretionary criminal prosecution and its procedures were established based on the 2010 procedural code, which drew inspiration from elements of the Netherlands system. However, similar to other cases, the Dutch model was implemented in a distorted manner, leading to misuse of borrowed elements.

Specifically, Georgia adopted from the Dutch justice system the practice of empowering the Minister of Justice—a politically accountable figure—to determine guidelines and directives for criminal justice policy, without incorporating the checks and balances inherent in the Dutch system.

In the Netherlands, the authority of the Minister of Justice is constrained; he does not have unilateral control over prosecutorial decisions, including criminal policy-making, as discussed in the previous chapter. In contrast, due to the 2008 constitutional reform in Georgia, the situation was reversed.

In this sub-chapter, we will therefore delve deeper into the Dutch prosecutorial system and explore the Dutch experience with accountable exercise of prosecutorial discretion under these contrasting institutional frameworks.

The Dutch Prosecutor's Office is endowed with one of the broadest discretionary powers among prosecutorial institutions in continental Europe, operating on an "expediency" basis while overseeing and directing police investigations.¹¹⁶ In the Netherlands, the Prosecutor's Office is structured hierarchically

¹¹⁶ Hans De Doelder, "The public prosecution service in the Netherlands," *Eur. J. Crime Crim. L. & Crim Just.* 8 (2000): 187. Tak, "The Dutch Prosecutor".

across regional first instance and appellate courts, complemented by a national office with specialized jurisdiction.

Managed by a collegial body, the Council of General Prosecutors acts as an intermediary between the bureaucratic hierarchy of the Prosecutor's Office and the Minister of Justice, thereby curbing the Minister's authority and ensuring that the Prosecutor's Office operates according to principles of both political and bureaucratic accountability.

Unlike Georgia's Prosecutorial Council, the Council of General Prosecutors is established with a foundation in political accountability. Its chairperson is appointed by the Head of State—the Monarch—for a maximum of two terms of three years each. Additional members, up to four, are appointed indefinitely by the Minister of Justice, representing the Minister's political accountability and subject to replacement at the Minister's discretion. Consequently, the members of the Council of General Prosecutors are not career prosecutors, unlike the majority on Georgia's Prosecutorial Council.

The Minister of Justice bears political accountability for criminal justice policy, encompassing both general policies and individual cases. Thus, the Minister can issue directives to prosecutors regarding both general policy and specific cases. However, in the Netherlands, Ministers of Justice do not wield direct authority to define and enforce criminal justice policy; their power to issue policy guidelines is constrained by the requirement to collaborate and consult with the Council of General Prosecutors.

This collegial body, majority-appointed by the Minister, comprises professionals whose expertise aids the Minister in exercising authority. Consequently, criminal law policy is effectively shaped and implemented by the Council of General Prosecutors, while the Minister retains roles of political oversight and accountability, with less involvement in policy formulation and execution details.

By 2010, Georgia had partially adopted an element of the Dutch model where the Minister of Justice held formal political responsibility for criminal justice policy. However, unlike the Netherlands, Georgia declined to establish a professional collegial council responsible for creating and implementing criminal law policy under the Minister's political oversight, imposing institutional and procedural constraints on their authority.

Since 2013, Georgia's reform direction for the Prosecutor's Office has aimed at removing it from the executive branch. This move, ostensibly to strengthen independence, has granted extensive discretionary powers for defining and implementing criminal justice policy. It also positioned the Prosecutor General as a procedural leader over investigations, thereby moving away entirely from democratic political

accountability. Instead, the reliance has shifted to bureaucratic accountability within a highly centralized system, resulting in an institution that is *de jure* and *de facto* unaccountable.

Comparatively, the hierarchical structure of the Prosecutor's Office in the Netherlands is less strictly centralized than in Georgia. In the Netherlands, prosecutor's offices and the national office within the jurisdictional boundaries of various court levels are not hierarchically subordinated to one another. Hierarchy primarily manifests in the binding nature of policy directives issued by the Council of General Prosecutors or the Minister of Justice across these levels.

This setup allows each prosecutor's office significant autonomy. Prosecutors are not required to report daily through a strict hierarchical ladder (for example, a prosecutor in a district court's jurisdiction is not subordinate to a prosecutor in an appellate court's jurisdiction). This contrasts with Georgia's Prosecutor's Office, where a hierarchical principle mandates that all lower-ranking prosecutors answer to higher-ranking ones, ultimately culminating in the Prosecutor General's authority.

Therefore, the institutional arrangement in the Netherlands ensures that the creation of criminal justice policy remains subject to channels of democratic accountability. Hierarchy is structured to facilitate consistent implementation of criminal justice policy rather than imposing strict vertical control over prosecutorial discretion.

With excessive centralization inherited from the Soviet system, the Prosecutor's Office of Georgia, like Russia, Ukraine, and other former Soviet Union republics, primarily ensures personal loyalty from prosecutors rather than achieving the goals of consistent and accountable exercise of prosecutorial discretion.

Rigid centralization guarantees uniformity in criminal justice policy but diminishes both the autonomy of individual prosecutors and their ability to make informed decisions based on specific circumstances. Moreover, the detachment of criminal justice policymaking from conventional accountability channels, especially democratic ones, heightens the risk of undermining both independence and accountability.

In conclusion, an effectively institutionalized system of bureaucratic accountability in continental systems necessitates complementing bureaucratic mechanisms with political accountability mechanisms.

It is crucial in this context that the leadership of the Prosecutor's Office is sufficiently politically accountable. As bureaucratic accountability relies on maintaining hierarchical organization, the authority of senior officials should be restrained and redistributed. Simultaneously, to prevent hierarchical control

from fostering personalistic power and clientelistic practices, prosecutors at lower levels of the hierarchy must be adequately safeguarded against arbitrary actions by their superiors.

3.3. Decentralized and Based on Democratic Political Accountability Systems

In contrast to prosecutorial institutions in continental Europe, the United States employs a different model of institutional accountability, particularly at the state level where criminal justice is primarily administered.

Federal criminal jurisdiction in the US is limited. At the federal level, attorneys are appointed officials within the executive branch. The Federal Attorney General leads the Department of Justice and holds a cabinet position in the President's administration.¹¹⁷

The majority of criminal cases fall under state jurisdiction. In most states, prosecutors are elected at the county and city levels. In exceptional cases, state attorney generals are elected and appoint subordinate prosecutors.¹¹⁸

District/city attorneys in the United States wield broad prosecutorial discretion, allowing them to shape criminal justice policy within their jurisdiction and enforce it through prosecution in court. They delegate their powers to deputy attorneys who assist in these responsibilities.

These attorneys have extensive powers to initiate criminal prosecutions, negotiate settlements outside of court, and generally dominate the criminal justice process.

Such powers necessitate robust accountability mechanisms, primarily achieved through direct electoral accountability—one of the strongest forms of democratic oversight. In most states, district/city attorneys are elected to 4-year terms, and they are primarily held accountable through local democratic elections. Additionally, prosecutors are members of local bar associations and are subject to their professional disciplinary rules.

¹¹⁷ Ellen S. Podgor, 'Prosecution Guidelines in the United States,' in Luna and Wade (eds), "The Prosecutor in Transnational Perspective".

¹¹⁸ Michael J. Ellis, "The origins of the elected prosecutor," *Yale LJ* 121 (2011): 1528.

Direct electability largely addresses the issue of prosecutorial accountability, at least in theory. However, on the other hand, direct involvement in democratic electoral politics raises systemic questions about the personal (and to a lesser extent, institutional) independence of the elected prosecutor.

Additional problems associated with electoral accountability include the overwhelming advantage of incumbent prosecutors in re-elections (with a 95% re-election rate). In many instances, particularly in smaller counties and cities, incumbent prosecutors run unopposed. Even in larger cities where challengers emerge, incumbent prosecutors typically secure victory comfortably.¹¹⁹

Prosecutorial elections often lack party politics and ideological debates. However, this absence also means there is no platform for evaluating the criminal justice policies proposed by candidates. Despite being local elections, they exhibit features typical of mass democracies, including high personalization and ample opportunities for manipulation.

Competence is often emphasized by candidates more than demonstrated competence itself. There's also manipulation of statistics related to guilty verdicts and decisions in socially or politically sensitive high-profile cases, which can sway voter perception.

Elected attorneys delegate their authority to deputies (assistants), who are primarily responsible for carrying out prosecutorial functions. Unlike the continental system, district/city attorneys lack a comprehensive internal bureaucratic accountability structure. As a result, deputy district attorneys exercise wide discretion under the delegation of the district attorney.

Efforts by district attorneys to implement bureaucratic accountability have generally been limited to standard organizational management methods. Therefore, district attorneys often lack comprehensive criminal justice policy guidelines, and even where such guidelines are attempted, their restraining impact is frequently minimal.

In the United States, prosecutorial discretion is effectively unchecked by state-level criminal justice policy principles or judicial oversight, which historically have favored a policy of broad deference to prosecutorial discretion.

¹¹⁹ Wright and Miller, "The worldwide accountability deficit for prosecutors"; David Alan Sklansky, "The problems with prosecutors," *Annual Review of Criminology* 1 (2018): 451-469.

Despite these deficiencies, the high degree of decentralization—specifically, election at the local level—creates significant internal safeguards.¹²⁰ Any dysfunction within a district attorney's office tends to remain localized and does not spread throughout the system, unlike in centralized systems.

Addressing these issues through democratic electoral accountability in small local jurisdictions is easier than reforming dysfunctional centralized systems, which often proves nearly impossible.

However, electoral accountability and the decentralization of attorneys are deeply rooted within the framework of American democracy and cannot simply be transplanted into different contexts. This institution has never been replicated outside the USA, likely due to the unique factors of American federalism, a strong tradition of local democratic self-governance, a common law legal tradition emphasizing adversarial processes, and a robust tradition of local democratic involvement in justice administration, including the longstanding institution of jury trials.

Georgia, in contrast, lacks these contextual factors. It is characterized by complete centralization and concentration of political power, an absence of a robust tradition of local self-governance, and little history of democratic participation in justice administration. Particularly notable is the incomplete implementation of jury trials.

Given these conditions, decentralization and electoral accountability reforms for the Prosecutor's Office cannot be considered as viable institutional alternatives in Georgia. Only if Georgia's constitutional development progresses toward adopting models of multilevel governance (such as federalism or regionalism) could implementing systems of political accountability and decentralization at the local levels of the Prosecutor's Office be feasible.

¹²⁰ Arffa, "Separation of Prosecutors".

Part II

Recommendations for Systemic
Reforms of Institutional
Arrangement of Prosecutor's Office
in Georgia

1.

Normative Goals of the Reform:

- 1.1. **Horizontal Decentralization to create system of bureaucratic accountability** - The normative goal of the reform is to completely reject the organizational principle of "unity and centralization" of the Prosecutor's Office, inherited from the Soviet period, and to fully implement the European model of hierarchical organization and bureaucratic accountability. By adopting the European system of decentralization and bureaucratic accountability, the reform aims to increase the autonomy and accountability of individual prosecutors, preventing the formation of loyalist hierarchical subordination and clientelistic networks.

- 1.2. **Introduction of Institutionalized Mechanism of Democratic Accountability for Creation of Criminal Law Policy; Shifting focus from *de jure* institutional independence to proper accountability and *de facto* independence** – This reform aims to enhance democratic accountability in the creation and implementation of criminal justice policy, to transform a system that is formally and institutionally politically separated but *de facto* politically subordinated and unaccountable.

2.

Possible Institutional Ways to Achieve Normative Goals of the Reform:

2.1. Horizontal Decentralization – Division of Prosecutor’s Office into Material Jurisdictions

To achieve decentralization of the Prosecutor's Office in a context where political power is not decentralized and there is no multi-level governance in the country, institutional choices are limited.

Instead of decentralizing on a territorial basis by levels of governance/power, decentralization by material (functional) jurisdiction is possible.

The Prosecutor's Office of Georgia will be divided into several prosecutor’s offices, each with different material jurisdictions and without hierarchical subordination to each other. For example, there will be offices for the protection of fundamental human rights, national and public security, economic crimes, and other areas.

There will be no uniform career ladder or hierarchical subordination among the decentralized prosecutor's offices based on material jurisdiction. However, within each office created for a specific material jurisdiction, there will be a hierarchy and a system of bureaucratic accountability.

2.1.1. Arrangement of Prosecutor's Office at a Local Level

At the local level, prosecutor's offices will be established within the territorial boundaries of city/district and appellate courts. Each office will be staffed by prosecutors who are hierarchically subordinated to the prosecutor's offices of the relevant material jurisdiction.

Prosecutor's offices at the district and appellate court levels will have managers responsible for performing administrative functions, but they will not have the authority to supervise the prosecutors employed in these offices.

2.1.2. Leadership of Prosecutor's Offices Created on the Basis of Material Jurisdiction

All prosecutors in each office created based on material jurisdiction will be subordinated to the hierarchy of that office, headed by the relevant chief prosecutor.

Election of the Chief Prosecutors

The chief prosecutor of each office created based on material jurisdiction will be elected by Parliament for a 5-year term through a consensus-building procedure. A person who has been elected as Chief Prosecutor once may not be elected again as Chief Prosecutor of the same or any other material jurisdiction.

Dismissal of the Chief Prosecutors

The chief prosecutor of an office established based on material jurisdiction can be removed by impeachment. Additionally, if the Prosecutorial Council imposes disciplinary responsibility on the Chief Prosecutor as defined by the Organic Law, the Council can apply to Parliament to remove the Chief Prosecutor from office, requiring the same majority needed for their appointment.

Accountability of Chief Prosecutors

Chief Prosecutors are obliged to submit a report of their activities to the Prosecutorial Council and Parliament every year.

2.2. Introduction of Institutionalized Mechanism of Democratic Accountability for Creation of Criminal Law Policy – Delegation of Power of Prosecutor General in the Field of Criminal Law Policy to the Prosecutorial Council

With the proposed changes, the responsibility for creating criminal law policy (including guiding principles and mandatory instructions) and ensuring its consistent implementation will shift to the Prosecutorial Council.

Prosecutorial Council

2.2.1. Composition of Prosecutorial Council

The optimal number of members of the Prosecutorial Council will be 7-9.

The members of the Prosecutorial Council will include the chief prosecutors of sectoral prosecutor's offices and members elected by Parliament based on their professional expertise.

Members of the Prosecutorial Council who are not chief prosecutors of prosecutor's offices based on material jurisdiction will be elected by the Parliament of Georgia through a consensus-building procedure, based on their professional expertise (candidates can be lawyers, representatives of the legal academy, or civil society organizations), for a three-year term. The rule limiting a person to two terms in this position will apply. Membership on the Prosecutorial Council will be incompatible with other government positions or activities in the legal profession.

2.2.2. Leadership of the Prosecutorial Council

The Prosecutorial Council shall elect its chairman from among members who are not chief prosecutors of offices based on material jurisdiction, by a majority vote. The chairman shall serve a term of two years, with the option to be elected to the position twice.

2.2.3. Main Powers of the Prosecutorial Council

Establishing mandatory guidelines and directives for criminal law policy - The Prosecutorial Council shall establish mandatory guidelines and directives for criminal law policy, and it shall be authorized to issue

instructions aligned with this policy, which shall be binding for prosecutors in all fields of prosecutor's offices.

The appointment and dismissal of prosecutors - The Prosecutorial Council shall be responsible for the appointment and dismissal of prosecutors in all prosecutor's offices based on material jurisdiction, except for chief prosecutors.

Disciplinary Proceedings - The Prosecutorial Council shall review and decide on all cases involving disciplinary action where dismissal of a prosecutor from their office is contemplated as a penalty.

The case of disciplinary responsibility of a subordinate prosecutor, over whom the Prosecutorial Council has jurisdiction, shall be submitted to the Prosecutorial Council for consideration by the respective Chief Prosecutor. The latter cannot participate in the disciplinary proceedings against the individual they have named.

At least two members of the Prosecutorial Council, who are not chief prosecutors, shall have the right to initiate disciplinary proceedings against the Chief Prosecutor of the prosecutor's office based on material jurisdiction. The Prosecutorial Council decides whether to initiate disciplinary proceedings against the Chief Prosecutor. During the disciplinary proceedings, the Chief Prosecutor's membership on the Prosecutorial Council against whom the proceedings are conducted shall be suspended until a final decision is reached.

The decision of the Prosecutorial Council regarding disciplinary cases against prosecutors is subject to judicial review. The Parliament's decision to remove the relevant Chief Prosecutor, based on an appeal from the Prosecutorial Council, shall be final.

2.2.4. Accountability of the Prosecutorial Council

The Prosecutorial Council shall be accountable to Parliament. The Chairman of the Prosecutorial Council shall submit an annual report to Parliament regarding the implementation status of criminal law policy.

3.

Possible Outcomes of the Reforms And Other Necessary Conditions for its Proper Implementation

- The individual prosecutor will no longer be part of the hierarchical ladder of a unified, centralized system.
- The number of superiors whose instructions entry or mid-level prosecutors must follow will be reduced.
- The written principles and instructions of the criminal law policy defined by the Prosecutorial Council will serve as the central instrument of control for superior prosecutors over their subordinates.
- By delegating key aspects of individual prosecutors' careers to a democratically accountable collegial body, guarantees of job stability and protection against arbitrariness will be strengthened.
- Guarantees for holding individual prosecutors accountable in line with constitutional objectives will be bolstered.

In turn, these goals will remain unattainable unless necessary contextual conditions are created in other branches of government:

- If political power is not democratized simultaneously and institutionalized practices of democratic accountability are not established. In the case of Georgia, there has been no institutional consolidation of parliamentary democracy.
- Without complete reconstruction of the judiciary and its foundation on the principles of the Rule of Law, an independent and accountable Prosecutor's Office cannot be established.
- This is because proper functioning of all three channels of accountability for the Prosecutor's Office—democratic, bureaucratic, and judicial accountability—is crucial to achieving perfect accountability.