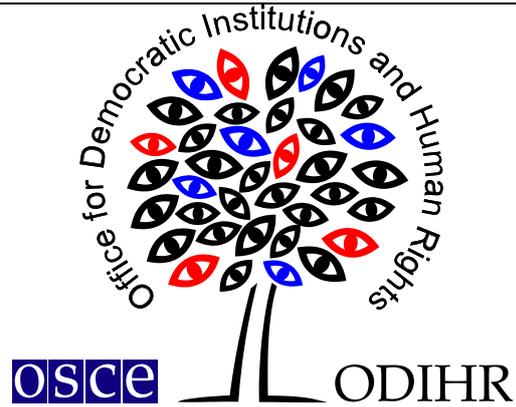


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**OPINION**  
**ON KEY LEGAL ACTS**  
**REGULATING THE PROSECUTION SERVICE**  
**OF THE KYRGYZ REPUBLIC**

**Based on an unofficial English translation of the respective legal acts**

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**TABLE OF CONTENTS**

- I. INTRODUCTION**
  - II. SCOPE OF REVIEW**
  - III. EXECUTIVE SUMMARY**
  - IV. ANALYSIS AND RECOMMENDATIONS**
    - 1. International Standards Related to the Prosecution Service**
    - 2. Analysis of the Law and Other Acts**
      - 2.1 General Provisions**
      - 2.2 The System and the Organization of the Prosecution Service**
        - 2.2.1 Organizational Structure*
        - 2.2.2 The Appointment and Dismissal of the Prosecutor General*
        - 2.2.3 The Powers of Prosecutors*
    - 3. Additional Remarks on the General Prosecutor's Development Strategy**
- Annex 1:** Law on the Public Prosecutor's Office of the Kyrgyz Republic  
Presidential Decree on Measures for the Improvement of Prosecutorial Supervision and Further Enhancement of the Legality of the Kyrgyz Republic  
Development Strategy for 2012-2015 of the Office of the Prosecutor General  
Regulation on the Service in the Prosecutor's Offices and Agencies of the Kyrgyz Republic
- (The above pieces of legislation are unofficial English translations; Annex 1 constitutes a separate document)*

## **I. INTRODUCTION**

1. On 3 July 2013, the Head of the OSCE Centre in Bishkek transmitted to the OSCE/ODIHR a letter from the Office of the Prosecutor General of the Kyrgyz Republic, requesting an OSCE legal opinion on key legal acts regulating the work of the prosecution service of the Kyrgyz Republic. In particular, the request sought an analysis of the Law on the Prosecutor's Office of the Kyrgyz Republic;<sup>1</sup> the Presidential Decree on Measures for the Improvement of Prosecutorial Supervision and Further Enhancement of the Legality of the Kyrgyz Republic;<sup>2</sup> the Development Strategy for 2012-2015 of the Office of the Prosecutor General;<sup>3</sup> and the Regulation on the Service in the Prosecutor's Offices and Agencies of the Kyrgyz Republic.<sup>4</sup>
2. This Opinion is provided in response to the above-mentioned request, by virtue of OSCE/ODIHR's mandate to, upon request, provide assistance to legislative reforms in OSCE participating States.

## **II. SCOPE OF REVIEW**

3. The scope of the Opinion covers certain key legal acts regulating the prosecution service of the Kyrgyz Republic, as enumerated above and listed in Annex 1, which were submitted for review. In particular, the Opinion focuses on the Law on the Prosecutor's Office of the Kyrgyz Republic (hereinafter, the Law), as a *lex specialis* regulating the core competences and organization of the prosecution service, and also analyzes the other regulatory acts submitted for review, in so far as they relate to the provisions of the Law. Thus limited, the Opinion does not constitute a full and comprehensive review of all framework legislation related to the activity of the prosecution service in the Kyrgyz Republic (for instance, apart from one exception, it does not address provisions of the Criminal Procedure Code of the Kyrgyz Republic).
4. The Opinion raises key issues and indicates areas of concern. In the interests of concision, the Opinion focuses on problematic areas rather than on the positive aspects of the respective acts. The ensuing recommendations are based on relevant international rule of law standards and OSCE commitments, as well as good practices from other OSCE participating States.
5. This Opinion is based on unofficial English translations of the respective legal acts. Errors from translation may result.
6. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations or

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<sup>1</sup> Law on the Prosecutor's Office of the Kyrgyz Republic (No. 224), adopted on 17 July 2009, with subsequent amendments.

<sup>2</sup> Presidential Decree on Measures for the Improvement of Prosecutorial Supervision and Further Enhancement of the Legality of the Kyrgyz Republic (No. 48), of 6 February 2001.

<sup>3</sup> Development Strategy for 2012-2015 of the Office of the Prosecutor General, approved by the order of the Prosecutor General of the Kyrgyz Republic of 18 January 2012.

<sup>4</sup> Regulation on the Service in the Prosecutor's Offices and Agencies of the Kyrgyz Republic, approved by the Decree of the President of the Kyrgyz Republic of 5 February 2001.

comments on the respective legal acts or related legislation that the OSCE/ODIHR may make in the future.

### **III. EXECUTIVE SUMMARY**

7. The analyzed legal acts reveal that the prosecution service of the Kyrgyz Republic is still construed as an organ of supervision (in Russian: *nadzor*) reminiscent of the Soviet *prokuratura* model, rather than as a modern, reformed organ of criminal investigation and prosecution. The main recommendation is therefore to fundamentally reassess the role of the prosecution service within the government and criminal justice system, and to reform it by removing its general supervisory powers and confining it to first and foremost, criminal prosecution. A detailed analysis supporting this view can be found in the ensuing written text.
8. In line with the above, to ensure compliance with international standards and good practices, it is recommended as follows:

#### ***1. Key Recommendations***

- A. To reform the prosecution service by removing its general supervisory powers and confining its mandate to criminal prosecution; [pars 13-15; 26-27]
- B. To provide safeguards which would protect prosecutors from any undue interference in their professional activity, e.g. by guaranteeing their autonomy; [pars 16-18]
- C. To provide that the establishment, re-organization and liquidation of prosecution offices, including the specialized ones, shall be carried out only by law; [par 20]
- D. To consider establishing a Prosecution Council which would act as a representative, self-governance body of the prosecution service, entitled to make proposals for the appointment and dismissal of prosecutors, including the Prosecutor General; [pars 22-23]
- E. To consider introducing a clause prohibiting the re-appointment of the serving Prosecutor General, to avert the risk of political partisanship of a candidate seeking re-appointment; [par 24]
- F. With a view to safeguarding legal certainty, to remove prosecutors' prerogative to re-open, in cassation procedure, proceedings which have already been finalized; [par 31]
- G. To amend the rules on prosecutors' immunity by limiting it to functional immunity only; [par 32]

#### ***2. Additional Recommendations***

- H. To reconsider the need for specialized prosecution offices; [par 19]
- I. To specify the grounds for dismissal of the General Prosecutor mentioned in Article 11; [par 21]

- J. To consider removing the prosecutorial powers of “supervision over the observance of human and citizens’ rights and freedoms” and “the right to take legal action or intervene at any stage of court proceedings if this is necessary in order to protect citizens’ rights and lawful interests of the society or state”; [pars 28 and 30]
- K. To expressly prescribe that any interference with the right to private life is allowed only with a court warrant; [par 29]
- L. To reconsider the provision stating that the prosecution service may receive 30% of the funds obtained by the state as a result of a successful prosecution; [par 33]
- M. To re-confer onto the Prosecutor General the role of overall co-ordination of all law enforcement agencies in the fight against crime, as foreseen by the Development Strategy; [par 34] and
- N. To further expand the pilot projects in which the same prosecutor both supervises the investigation of the case and presents the case in court [par 35].

#### **IV. ANALYSIS AND RECOMMENDATIONS**

##### **1. International Standards Related to the Prosecution Service**

- 9. There are a series of international documents which set a framework of standards related to the work, status and role of the prosecution service. These instruments include the 1990 UN Guidelines on the Role of Prosecutors,<sup>5</sup> which aim to assist UN Member States in securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, in particular by setting out basic principles on prosecutors’ qualifications, selection, training, status and conditions of service, as well as on freedom of expression and association, discretionary functions, relations with other government agencies or institutions, and disciplinary proceedings for wrongdoing. Other important principles are contained in the 1999 International Association of Prosecutors’ Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (hereinafter “the Standards”).<sup>6</sup> Further standards are outlined in the UN Convention against Corruption,<sup>7</sup> which calls upon State Parties to take

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<sup>5</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>6</sup> Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, approved by the International Association of Prosecutors on 23 April 1999. These Standards were annexed to resolution 2008/5 of the Commission on Crime Prevention and Criminal Justice of the UN Economic and Social Council on “Strengthening the rule of law through improved integrity and capacity of prosecution services”, which also requested States to take these Standards into consideration when reviewing or developing their own prosecution standards.

<sup>7</sup> The Kyrgyz Republic has signed the UN Convention against Corruption (Text Doc. A/58/422) on 10 December 2003, and ratified it on 16 September 2005.

measures to strengthen the integrity of the [judiciary and] prosecution services and prevent opportunities for their corruption, bearing in mind their crucial role in combating corruption.<sup>8</sup> Moreover, certain principles related to the prosecution service are also contained in OSCE commitments, such as the 1990 OSCE Copenhagen Document which provides that “the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution”.<sup>9</sup> More recently, through the 2006 Brussels Declaration on Criminal Justice Systems, members of the OSCE Ministerial Council stated that “[p]rosecutors should be individuals of integrity and ability, with appropriate training and qualifications; prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law;” and that “[t]he office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges”.<sup>10</sup>

10. Some important principles can also be found in various documents on the role of the prosecution office which were adopted by the European Commission for Democracy Through Law (hereinafter, the Venice Commission);<sup>11</sup> the latter documents are particularly useful in that they are often more detailed and elaborate than the existing UN Guidelines and OSCE commitments.
11. It bears recalling, as a preliminary remark, that the role and status of the prosecution service has been one of the most disputed issues in the legal reform processes undertaken by many post-Soviet countries. It must also be recognized that there are a variety of models of institutional arrangements for the prosecution service, throughout the world: there are, for instance, significant differences between the adversarial and the inquisitorial systems, not to mention the inevitable peculiarities resulting from every country’s domestic system of criminal justice.<sup>12</sup> There is thus no model system for all states, and it has been authoritatively stated that even in regions such as Europe, where systems have converged to a certain degree, it is yet premature to speak of “harmonization around a single concept [of a prosecutor’s office]”.<sup>13</sup> Rather, there is a range of key principles and standards throughout the OSCE region, as outlined in the above-mentioned instruments and documents, which should guide the establishment and operation of the

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<sup>8</sup> See Article 11 of the UN Convention Against Corruption.

<sup>9</sup> OSCE Copenhagen Document (1990), par 5.14.

<sup>10</sup> 2006 Brussels Declaration on Criminal Justice Systems (MC.DOC/4/06).

<sup>11</sup> The Kyrgyz Republic joined the European Commission for Democracy through Law (Venice Commission) in 2004.

<sup>12</sup> See the Venice Commission Report on the European Standards As Regards the Independence of the Judicial System: Part II – the Prosecution Service (Study N° 494 / 2008, adopted by the Venice Commission at its 85<sup>th</sup> plenary session on 17-18 December 2010), section III.

<sup>13</sup> See the Council of Europe Recommendation Rec(2000)19, Explanatory Memorandum p.11.

prosecution service in a given country. It is from the perspective of such core principles that the following review and analysis of the Law and the other regulatory acts are conducted.

## **2. Analysis of the Law and Other Acts**

### **2.1 General Provisions**

12. Article 1 of the Law defines the prosecutor's office of the Kyrgyz Republic as "the state authority which carries out supervision of the correct and uniform application of the laws and other normative legal acts of the Kyrgyz Republic". This definition is illustrative in that it reveals, from the very outset, that the prosecution service of the Kyrgyz Republic is still construed, first and foremost, as an organ of "supervision", rather than of criminal prosecution. This is further reinforced by Article 3 par 1 subpar (1), which specifies that the prosecution service shall carry out, among other duties, the "supervision of correct and uniform application of laws by the bodies of executive power, local public authorities and the officials thereof".
13. Such a "supervisory" model of the role and powers of the prosecution service is rather prevalent among the post-Soviet states, and is in fact reminiscent of the old Soviet *prokuratura* model. It is important to note, in this context, that many post-communist democracies have sought to deprive their prosecutor services of extensive powers in the area of general supervision, by transferring such prerogatives over to courts and to national human rights institutions (such as the Ombudsman). The rationale for such a limitation of prosecutorial supervisory powers was to prevent an over-powerful and largely unaccountable prosecution service which could potentially be used for political goals and for pressuring other state bodies, including the judiciary, as had happened in the Soviet system.
14. Where such prosecution reforms have still not happened, the maintenance of prosecutorial supervisory powers has been repeatedly criticized by international and regional organizations, including the Venice Commission. Particularly relevant, in this context, are the Venice Commission's recent opinions assessing the laws on the prosecution service of the Russian Federation, the Republic of Moldova, and Ukraine.<sup>14</sup> There, the Venice Commission has recommended, for the above-stated reasons, that post-Soviet states abandon the supervisory role of prosecutors, and restrict their hitherto

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<sup>14</sup> See, for instance, the Venice Commission Opinion on the Federal Law on the Prokuratura (prosecutor's office) of the Russian Federation (Opinion no. 340/2005, adopted at the Venice Commission's 63<sup>th</sup> plenary session on 10 - 11 June 2005), the Venice Commission Opinion on the Draft Law on the Public Prosecutors' Service of Moldova (Opinion no. 473/2008, adopted at the Venice Commission's 75<sup>th</sup> plenary session on 13-14 June 2008). See also the Venice Commission Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (Opinion no. 667 / 2012, adopted at the Venice Commission's 92<sup>nd</sup> plenary session of 12-13 October 2012).

very broad role by narrowing it down to criminal cases.<sup>15</sup> In the case of the Russian Federation, the Parliamentary Assembly of the Council of Europe has likewise called for the limitation of the supervisory powers of the prosecutor's office.<sup>16</sup>

15. It is therefore advised that the Kyrgyz authorities similarly consider reforming their prosecution service, by removing its general supervisory powers and confining it to the powers of criminal prosecution. This would not only align the service to international standards and best practices, but would also help increase its efficiency by preventing the waste of resources on “general supervision” – which, as the General Prosecutor's Development Strategy (hereinafter “Development Strategy”) acknowledges, consistently fails to bring results<sup>17</sup> – and instead focus the service on criminal investigation and prosecution. If this key recommendation is accepted, then it should be made a cornerstone of a revised Development Strategy for the Kyrgyz prosecution service. As concerns the Development Strategy itself, corresponding amendments should be introduced in the *Introduction* Section and in Section 4 on *The Supervision over the Application of Legislation*.
16. Article 4 of the Law provides that the prosecutor's service is “a unified system of bodies and institutions, with the subordination of hierarchically inferior prosecutors to hierarchically superior prosecutors and to the General Prosecutor”. Such a highly-centralized, hierarchical institutional arrangement of the prosecution service is also typical of many post-Soviet states, though it may also be found in other countries. Generally speaking, such an institutional arrangement can be considered acceptable and does not raise concerns, provided that certain additional safeguards, such as the principle of autonomy, or independence, are also prescribed by law.<sup>18</sup>
17. In this context it is noted that Article 5 prescribes the “guarantees for the independence of the bodies of the prosecution service”. This provides for the independence of the prosecution service at the institutional level, rather than for the individual independence of prosecutors themselves. This is in line with

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<sup>15</sup> See the Venice Commission Report on the European Standards As Regards the Independence of the Judicial System: Part II – the Prosecution Service (Study N° 494 / 2008, adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010), par. 73. See also the Venice Commission Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (Opinion no. 667 / 2012, adopted at the Venice Commission's 92<sup>nd</sup> plenary session of 12-13 October 2012), par. 13.

<sup>16</sup> See Resolution 1896 (2012) of the Parliamentary Assembly of the Council of Europe on The Honouring of Obligations and Commitments by the Russian Federation, par. 25.4-25.5.

<sup>17</sup> See the Development of the Prosecutor's Offices of the Kyrgyz Republic until the Year 2015 (hereinafter, the Development Strategy), in particular the Introduction Section, and Section 4 on The Supervision over the Application of Legislation.

<sup>18</sup> See, *mutatis mutandis*, the Venice Commission Opinion on the Draft Law on the Public Prosecutors' Service of Moldova (Opinion no. 473/2008, adopted at the Venice Commission's 75<sup>th</sup> plenary session on 13-14 June 2008), par. 15.

international standards.<sup>19</sup> It bears recalling, in this context, that the Venice Commission has stated that while there are no international standards that *require* the independence of the prosecution service, there is a clear general *tendency* towards introducing the independence of the prosecution service.<sup>20</sup>

18. In addition to the guarantee of institutional independence of the prosecution service, it is recommended to also provide some safeguards which would protect prosecutors individually, from any undue interference in their professional activity (including from hierarchically superior prosecutors, on occasion).<sup>21</sup> This can be done, for instance, by adding a provision which would guarantee the individual autonomy of prosecutors. Such provisions have recently been introduced in some post-Soviet states, with a view to ensuring prosecutors' [non-absolute] independence and discretion in decision-making, within the limits of the law.<sup>22</sup>

## **2.2 The System and the Organization of the Prosecution Service**

### ***2.2.1 Organizational Structure***

19. Article 10 sets out “the system of the prosecution service of the Kyrgyz Republic” – which is made up of the Prosecutor General’s Office; the military prosecutor’s office of the Kyrgyz Republic; prosecutor’s offices of regions, of the cities of Bishkek and Osh; district and specialized prosecutor’s offices; as well as scientific and educational institutions and editorial offices of printed publications. On this point, it may be noted that in Europe, for instance, there are usually no specialized prosecution offices as such, but rather specialized prosecutors within the same prosecution office (at the level of district, appeal, and Prosecutor General’s Office). Some post-Soviet states have decided to reform their prosecution systems along this model as well, with a view to streamlining their services and enhancing their efficiency. For instance, in Ukraine, in 2010, the military prosecutor’s office was completely staffed with

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<sup>19</sup> See the 1999 International Association of Prosecutors’ Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, p. 2 on Independence.

<sup>20</sup> See Section 2, on Independence, of the Standards of Professional Responsibility and Statement of the essential duties and rights of prosecutors, adopted by the International Association of Prosecutors (23 April 1999). See also the Venice Commission Opinion on the Draft Amendments to the Law on the Public Prosecution of Serbia (Opinion no. 709/2012, adopted at the 94<sup>th</sup> plenary session of the Venice Commission, on 8-9 March 2013).

<sup>21</sup> See the Venice Commission Report on the European Standards As Regards the Independence of the Judicial System: Part II – the Prosecution Service (Study N° 494 / 2008, adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010), pars. 31-32.

<sup>22</sup> See, e.g., the Law of the Republic of Moldova on the Prosecution Service (adopted on 25 December 2008, with subsequent amendments), which provides in Article 56 par 2 that “[w]hen taking decisions, the prosecutor shall be autonomous, within the limits of the law”. See also the Law of Estonia on the Prosecutor’s Office (adopted on 22 April 1998), Article 2 par 2; and the Law on the Prosecution Service in the Republic of Georgia (adopted on 21 October 2008), Article 35 par 1.

civilians, and its funding from the Ministry of Defence was discontinued. Furthermore, there is a plan to altogether eliminate the military, transport and environmental prosecution offices in Ukraine commencing from 2014. Similar reforms are being contemplated in the Republic of Moldova too, with the overall aim to simplify and streamline the prosecution service and raise its efficiency. Specialized military prosecution offices have also been disbanded in Estonia, Georgia and Lithuania. It is recommended that the Kyrgyz authorities also consider the possibility of such reform, in the context of reorganizing the structure of the prosecution service, as envisaged in the Development Strategy.<sup>23</sup>

20. Article 10 par 4 provides that “the reorganization and liquidation of the specialized prosecutor’s offices, military prosecutor’s offices of garrisons and prosecutor’s offices of districts (cities) is done by the General Prosecutor”,<sup>24</sup> while Article 10 par 5 states that the “establishment or liquidation of the Military Prosecutor’s Office, prosecutor’s offices of regions and of the cities of Bishkek and Osh is decided by the President of the Kyrgyz Republic at the proposal of the General Prosecutor”. This denotes a highly centralized system, with a strong “vertical” hierarchy, in which the President of the Republic and the Prosecutor General may establish or liquidate, and respectively reorganize, the specialized prosecutor’s offices, basically at will. To safeguard against possible excesses of such unchecked executive power, it is advised that the establishment, re-organization and liquidation of prosecution offices, including the specialized ones, be carried out only by law; it would be acceptable for the Prosecutor General to then decide on the particular *competencies and organizational structure* of those offices, within the limits set by the law.<sup>25</sup>

### ***2.2.2 The Appointment and Dismissal of the Prosecutor General***

21. Article 11 outlines the role and structure of the Prosecutor General’s Office, as well as the procedure for the appointment of the Prosecutor General – who is appointed by the President of the Republic with the consent of the deputies of the Jogorku Kenesh (Parliament of the Kyrgyz Republic).<sup>26</sup> If the President’s candidate fails to receive the required number of votes then the President, within 14 days, presents to the Jogorku Kengesh a new candidate. The President of the Republic also appoints the deputies of the Prosecutor General, upon the latter’s proposal (Article 11 par 2 of the Law). The Prosecutor

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<sup>23</sup> See the *General Provisions* section of the Development Strategy.

<sup>24</sup> Similar provisions are contained in Article 59 par 3 of the Law.

<sup>25</sup> Such an arrangement is prescribed, for instance, by the Law on the Prosecution Service of the Republic of Moldova (Article 25).

<sup>26</sup> It is presumed that this means the simple majority of all elected deputies, although this could helpfully be clarified in the text of the Law.

General can be dismissed by the President of the Republic, in cases provided by law, with the consent of not less than one third of the total number of deputies of the Jogorku Kengesh, or at the initiative of one third of the total number of deputies, approved by two thirds of the deputies of the Jogorku Kengesh (Article 11 par 1, sub-par 3). Article 11 states that dismissal of the General Prosecutor shall take place “in cases provided for by the present Law”; presumably, this refers to the grounds for dismissal laid down in Article 19 par 3, but this should be clarified, in the interests of legality and transparency.

22. Generally, based on the above, it transpires that the procedures for the appointment and dismissal of the Prosecutor General are fully controlled by the executive and legislative powers, with no involvement whatsoever by any professional, non-political bodies. A more pluralist approach could help ensure that such proceedings are fair and impartial, as set out in the Standards of the International Prosecutor’s Association.<sup>27</sup> On this point, the Venice Commission has stated that,

“It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore **professional, non-political expertise should be involved in the selection process**. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, *carte blanche* in the selection process. It is suggested, therefore, that **consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government** [...] Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society”.<sup>28</sup>

23. It is recommended that the appointment and dismissal procedure for the Prosecutor General of the Kyrgyz Republic be amended in line with the above-mentioned recommendations. This could be done, for instance, by establishing a Prosecution Council, as was done in recent years in Poland, Slovenia, Croatia, Moldova, Spain and other countries. Such a council can be a representative, professional, non-political and self-governance body of the prosecution service as a whole, entitled to make proposals for the appointment and dismissal of prosecutors, including the Prosecutor General; in terms of representativeness, regard should be had to general principles of equal ethnic, regional and gender representation. Of note, in a recent opinion on the draft

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<sup>27</sup> See Section 6 e), on Empowerment, of the Standards of Professional Responsibility and Statement of the essential duties and rights of prosecutors, adopted by the International Association of Prosecutors (23 April 1999).

<sup>28</sup> See the Venice Commission Report on the European Standards As Regards the Independence of the Judicial System: Part II – the Prosecution Service (Study N° 494 / 2008, adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010), pars. 34-35.

prosecution law of Ukraine, the Venice Commission recommended introducing such a mechanism in Ukraine too, notwithstanding the fact that it is not mentioned in the country's Constitution (in the opinion of the Venice Commission, such an innovation would not contradict the Constitution). A similar arrangement could be considered in the Kyrgyz Republic as well.

24. Article 19 of the Law provides that the Prosecutor General holds a mandate of seven years, while other, lower-ranking prosecutors hold a mandate of five years. The fact that the Prosecutor General enjoys such a relatively long mandate, whose length exceeds that of deputies of the Jogorku Kenesh,<sup>29</sup> is commendable as it helps insulate the Prosecutor General from political change, thereby enhancing his or her independence and stability. Moreover, the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive,<sup>30</sup> so as to avoid the risk of political partisanship of a candidate seeking re-appointment. While Article 19 par 2 states that prosecutors of regions, cities and districts shall not serve for more than two consecutive terms in the same area, this provision does not mention any restrictions on the re-appointment of the Prosecutor General. It is recommended that a clause, prohibiting the re-appointment of the serving Prosecutor General, be added to Article 19 as well.

### ***2.2.3 The Powers of Prosecutors***

25. Article 15 of the Law, along with the articles contained in Chapters III, IV and V, prescribes the powers of prosecutors. Most of those powers represent traditional functions of a prosecutorial and criminal investigation agency. However, there are also some which go beyond that remit, and which might benefit from some reconsideration.
26. One such power is that of “supervision” (in Russian: *nadzor*). The scope of prosecutorial supervision is outlined in Article 31 of the Law, and includes “(1) the observance of the Constitution of the Kyrgyz Republic, accurate and uniform application of laws and other normative legal acts by the Government of the Kyrgyz Republic, Ministries, state committees, administrative offices, agencies and other bodies of the executive power, local public authorities and their officials;” as well as “(2) compliance with the legislation of the normative legal acts issued by the Government of the Kyrgyz Republic and representative bodies of local public authorities, as well as legal acts issued by the bodies indicated in the present article and the officials thereof”. Such vast supervisory powers are reminiscent of the Soviet *prokuratura* model, and, as

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<sup>29</sup> The Jogorku Kenesh consists of deputies elected for a five-year term, see Article 70 par 2 of the Constitution of the Kyrgyz Republic.

<sup>30</sup> See the Venice Commission Report on the European Standards As Regards the Independence of the Judicial System: Part II – the Prosecution Service (Study N° 494 / 2008, adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010), par 37.

was already mentioned in paragraphs 14 and 15 above, they should be revised as they do not fit within a modern concept of the prosecution service, which should basically be limited to the enforcement of penal law.

27. Furthermore, it appears that these vast supervisory powers may also exceed the prosecutorial prerogatives which are expressly recognized under the Constitution of the Kyrgyz Republic. Thus, Article 104 of the Constitution states that the prosecution service shall supervise the “accurate and uniform implementation of laws by executive power agencies, local self-governance bodies as well as officials thereof” (emphasis added). However, under Articles 12, 15, 31 and 34 of the Law, prosecutors may check executive bodies’ compliance with not only laws, but also “other normative acts”. This extension of prosecutorial supervisory powers also to “other normative acts”, and the power to check the legality of executive bodies’ acts (Article 31 par 2), appear to go beyond what is permitted by the Constitution, and thus raises the question of the constitutionality of these provisions. In any case, as was already stated above, it is recommended to remove these powers from the list of prosecutorial prerogatives since they contradict international standards.
28. Similar concerns apply to prosecutorial powers of “supervision over the observance of human and citizens’ rights and freedoms”, which are outlined in Articles 33 and 34 of the Law. These provisions are similarly reminiscent of the old Soviet *prokuratura* model, and are not covered by the current Constitution of the Kyrgyz Republic. It bears recalling that in modern democracies, such functions are bestowed upon national human rights institutions. In the Kyrgyz Republic, an Ombudsman Institute (Akyikatchy) was established in 2002, whose main functions include the “[c]ontrol over the execution of the constitutional human and civil rights and freedoms on the territory of the Kyrgyz Republic”<sup>31</sup> (it is revealing that Article 33 par 2 of the Law on the Prosecutor’s Office actually appears to recognize that the prosecution service is competing with other institutions in protecting human rights). It is therefore advised that these powers of the prosecution service also be removed.
29. Aside from the above-mentioned supervisory powers, there are also some other prosecutorial competences which raise concerns in so far as they might allow for unchecked interference with private life or with confidential information. These include the power “upon presenting a service certificate, to freely enter the territory and premises of [executive] bodies, [...] to have access to legal acts issued by them, as well as to the documents and materials which have served as basis for the issuance thereof” as well as to “require the leaders and other officials of the above-mentioned bodies to present the necessary documents, materials, statistics and other information; [...] to carry out inspections and audits; [...] summon officials and other persons from the

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<sup>31</sup> See Article 1 of the Law on Ombudsman (Akyikatchy) of the Kyrgyz Republic (adopted in 2002).

indicated bodies, as well as citizens to give explanations related to violations of laws” (Article 32). It might be beneficial to introduce some procedural guarantees against the possible abuse of such powers, for instance by requiring judicial authorization for particularly intrusive measures. In this context, it is noted that the Constitution and the Criminal Procedure Code of the Kyrgyz Republic are somewhat ambiguous about whether judicial authorization is required for inspections and searches of dwellings, or whether the prosecutor may still independently order such measures.<sup>32</sup> To prevent the misuse of official powers and guarantee respect for private life, it is recommended to clearly prescribe that any interference with the right to private life is allowed only with a court warrant. Similar private life concerns apply to the publication of prosecutorial acts, under Article 30 of the Law – such publication should not unjustifiably restrict the right to private life of the individuals concerned.

30. Article 40 par 3 provides that prosecutors “have the right to take legal action or intervene at any stage of court proceedings if this is necessary in order to protect citizens’ rights and lawful interests of the society or state”. This is yet another prerogative which in a democratic state would belong rather to a national human rights institution (unless the case in question involves a crime, obviously). It is therefore recommended to reconsider this prerogative as well.
31. Article 41 par 2 provides that “[r]egardless of participation in court proceedings, the prosecutor or his/her deputy, within the limits of his/her competence, shall be entitled to request from the court any case or category of cases in which the decision, sentence, ruling or resolution has entered into force. Should the prosecutor consider that the decision, sentence, ruling or resolution of the court is unlawful or ungrounded, he/she files a submission in the order of cassation or supervision with the hierarchically superior court or addresses the submission to the hierarchically superior prosecutor”. This provision might breach the legal certainty principle, in so far as it allows prosecutors to re-open, at their discretion and at any given moment, proceedings which have already been finalized.<sup>33</sup> The provision also raises concerns from the perspective of the equality of arms principle, in so far as only prosecutors seem to be endowed with this prerogative of re-opening proceedings.<sup>34</sup> It is therefore recommended to remove this prerogative.

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<sup>32</sup> See Article 30 pars 2 and 3 of the Constitution of the Kyrgyz Republic, and Article 184 of the Criminal Procedure Code of the Kyrgyz Republic.

<sup>33</sup> Of note, the European Court of Human Rights has found that a similar procedure which previously existed in Moldova, violated the principle of legal certainty, inherent in the concept of rule of law, which requires that where the courts’ judgments have become final, their ruling should not be called into question. See *Bujnita v. Moldova*, ECtHR Judgment of 16 January 2007 (Application No. 36492/02).

<sup>34</sup> It should be noted that the European Court of Human Rights has stated that the equality of arms principle applies also to cassation proceedings. See *Borgers v. Belgium*, ECtHR Judgment of 30

32. Article 48 prescribes prosecutors' "legal protection". It states, in par 2, that "[i]t is not allowed to apprehend, apply forced bringing, delivery, personal search of the prosecutor and investigator, search their belongings and the means of transportation used by them while exercising service duties, save cases when they are caught on the scene of crime". In this context the rule on the immunity of the Prosecutor General also bears recalling, as also he/she, during his or her mandate "cannot be arrested, subjected to administrative sanctions applied by court, held criminally liable without the consent of the Jogorku Kengesh of the Kyrgyz Republic" (Article 12 par 7 of the Law). While it is recognized that prosecutors should benefit from adequate legal protection and guarantees against interference in their work, these rules on immunity go beyond what is recommended by international standards.<sup>35</sup> Moreover, a general immunity for prosecutors would bear extensive risks, as it could lead to a lack of accountability, and corruption. Prosecutors should instead benefit from a functional immunity for actions carried out in good faith in pursuance of their duties.<sup>36</sup> It is therefore recommended that the rules on the immunity of prosecutors of the Kyrgyz Republic be amended accordingly.
33. Article 63 par 3 of the Law provides that the prosecution service may receive 30% of the funds obtained by the state as a result of a successful prosecution. This provision raises concerns in so far as it might lead to instances where the need to secure adequate and sufficient funding trumps considerations of fairness in the prosecution of cases, potentially resulting in financially-motivated prosecutions. In other words, prosecutors might feel incentivized to prosecute certain cases not for reasons of justice, but rather because that would bring additional funds to their service. It is therefore recommended to reconsider this clause.

### **3. Additional remarks on the General Prosecutor's Development Strategy**

34. Finally, a couple of additional remarks have to be made about some points raised in the Development Strategy. It is noted that this Strategy seeks to give the prosecution service responsibility for the overall co-ordination of all law

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October 1991 (Application No. 12005/86); *J.J. v. The Netherlands*, ECtHR Judgment of 27 March 1998 (Application No. 9/1997/793/994); *Vacher v. France*, ECtHR Judgment of 17 December 1996 (Application No. 20368/92); *Berger v. France*, ECtHR Judgment of 3 December 2002 (Application No. 48221/99).

<sup>35</sup> See point 4 of the UN Guidelines on the Role of Prosecutors, and Section 2, on Independence, of the Standards of Professional Responsibility and Statement of the essential duties and rights of prosecutors, adopted by the International Association of Prosecutors (23 April 1999)

<sup>36</sup> See the Venice Commission Report on the European Standards As Regards the Independence of the Judicial System: Part II – the Prosecution Service (Study N° 494 / 2008, adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010), par. 61.

enforcement agencies in the fight against crime.<sup>37</sup> This is a commendable recommendation, given that the Prosecutor General is the highest law enforcement figure in the country and should therefore be in control of the overall enforcement strategy. It appears that a paragraph prescribing such a coordination role for the Prosecutor General over law-enforcement agencies existed earlier in the Presidential Decree “On Measures Designed to Improve Procuracy Supervision and Further Consolidate the Rule of Law in the Kyrgyz Republic”, but was then removed in 2007, when that role was passed over to the Prime Minister.<sup>38</sup> It is recommended to reconsider that transfer of the coordination role, and to follow the recommendation outlined in the Development Strategy, which would see the Prosecutor General coordinate the law-enforcement agencies.

35. The Development Strategy also mentions “two pilot projects on merging the function of supervision of investigation and presenting state accusation in court, in the prosecutor’s office of the Jalal-Abad region and the prosecutor’s office of the Oktyabrsky district of the city of Bishkek”.<sup>39</sup> These pilot projects presumably refer to situations where the same prosecutor both supervises the investigation of the case and presents the case in court. Such a combination of functions is indeed advisable, as it nurtures the autonomy of prosecutors and improves their understanding of the relationship between the necessity of investigative acts and their effect in proving guilt in court. It is therefore recommended to incorporate this proposal from the Development Strategy into relevant legislation.

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<sup>37</sup>See Section 7 of the Development Strategy.

<sup>38</sup> See the Decree of the President of the Kyrgyz Republic “On Measures Designed to Improve Procuracy Supervision and Further Consolidate the Rule of Law in the Kyrgyz Republic”.

<sup>39</sup>See Section 6 of the Development Strategy, on Participation of Prosecutors in Court Trials.