

ANALYSIS OF INVESTIGATIVE SYSTEM

EMC

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Introduction

In 2009, after the long working process, the Parliament of Georgia adopted a new Criminal Procedure Code.¹ Main objectives of the Code were to implement/strengthen adversariality, publicity, equality of arms, direct examination of evidence, respect to defendant's rights and other important principles in criminal justice.² One of the main innovations of the Code was to transfer from inquisitorial to adversarial procedural model, which implies the provision of more or less equal leverage to prosecution and defense parties, so that both can conduct an effective investigation independently from one another.³

In general, adversarial model has a more complex theoretical framework and active debates regarding the model are still underway among scholars. Despite the difference of opinions on several topics, the clear advantage of this model is to give every individual, including the defendant, an opportunity to effectively present his own story from his own perspective. To eliminate inequality of resources/powers available for the State and the citizen, the adversarial model imposes number of structural restrictions on the State in the course of proceedings.

The adversarial procedural model is mainly based on 18th century Enlightenment Movement which set solid theoretical and philosophical bases for human rights and personal autonomy.⁴ Afore-mentioned restrictions, imposed on the State, are designed to ensure that positions of the citizen are fully reflected in a particular case, and all the main decisions are made publicly, by an impartial judge, who personally examines every important circumstance of the case.

The adversarial model imposes three main restrictions on the State:⁵

- It shall be prohibited by the law for the State to use its powers or material capacities and pressure the citizen physically and psychologically to distort the free testimony of the accused
- The law shall ensure that the state must be prevented by the law from using its higher-up power and resources to create an unfair trial for an accused (Prohibiting false accusation);
- The defendant shall be an active subject of the proceedings, not an object placed in the hands of state agencies.

Mentioned restrictions are of primary importance at the investigation stage to insure that the defendant is capable to conduct an independent and effective investigation. Structural and or-

1 The Parliament of Georgia adopted new Criminal Procedure Code on 9 October 2009, setting 1 October 2010 as a date for its main provision to come into force.

2 Refer to the explanatory card of the bill at: <https://info.parliament.ge/#law-drafting/9219>

3 Article 9, Criminal Procedure Code of Georgia.

4 Vogler, R. (2017). *A World View of Criminal Justice*. Aldershot, Ashgate, pp.136-138.

5 Vogler, op cit, p.127.

ganizational separation of the investigation and criminal prosecution bodies, including the existence of effective check/balance mechanisms, are also of considerably essential at this stage. The necessity of functional separation between the institutions is caused by the fact, that without the separation, State investigatory and prosecutorial functions becomes monolithic, lacking effective mechanisms of accountability and increasing risks of arbitrariness.⁶

The Constitutional Court of Georgia emphasizes the importance of protecting defense rights by the adversarial model and explains that “by guaranteeing the defense rights, the Constitution aims to prevent conviction of a person through unfair legal proceedings. Within the frames of adversarial legal proceedings, this can be achieved by, first of all, providing maximum equal opportunities for the parties for gathering and presenting evidence”⁷. According to the position of the Court, in order to comply with the constitutional standard of the evidence authenticity⁸, it is necessary to assess the evidence on the bases of their formal and contextual criticism, in the adversarial process, established for the legal proceedings in Georgia, this may be implemented only by the submitting contrary facts and other counter arguments by the opponent party,⁹

Unfortunately, afore-mentioned topics have not yet become subject of in-depth research and study in Georgia. Despite the implementation of a new procedural model, it has not yet been analyzed how distant are investigator and prosecutor from one another in the investigative process, what problems can be created in everyday practice by Prosecutor’s active role in the process, and if procedural legislation ensures defendant’s right to obtain necessary evidence without the State agencies. In this regard, it is also interesting whether investigative bodies were adapted to the new procedural model and if institutional and operational arrangement of investigative agencies ensures that investigators carry out their obligations properly and with dignity.

The actuality of the research is caused by the significance of this issue itself – as far as existence of effective investigative system, with the procedural capability of objective and detail oriented case examination is of particular significance to the fair justice. In adversarial model this goal is firstly achieved by the effective external control of investigative bodies and secondly, by the empowerment of individual defendant to participate fully and independently in evidence gathering. The problem is aggravated by the fact that the legislative environment never adapted to the new procedural code. Up until now, regulative norms for operative-investigative and police activities contradict the norms of procedural code in a number of ways. At the same time, the Procedure

6 Vogler, op cit, p.23ff.

7 27 January 2017 Decision #1/1/650,699 of the Constitutional Court of Georgia on the case: “Citizens of Georgia – Nadia Khurtsidze and Dimitri Lomadze against the Parliament of Georgia’ II, paragraph, 30.

8 Article 40, part 3, The Constitution of Georgia.

9 27 January 2017 Decision #1/1/650,699 of the Constitutional Court of Georgia on the case: “Citizens of Georgia – Nadia Khurtsidze and Dimitri Lomadze against the Parliament of Georgia’ II, paragraph, 42.

Code itself does not clearly define roles and status of investigator and prosecutor in the investigation process and the intensity of subordination between them is frequently the matter of practice.

The presented research analyzes legal acts that define rules of investigation, relationships between subjects involved in the investigation process, and the level of their independence from each other, as well as from external parties. Subordination between the prosecutor and the investigator is of particular interest in this regard – how broad is the procedural oversight of the prosecutor over the investigation, in what intensity can a prosecutor, being the party of the process at the same time¹⁰, interfere in investigative actions and what space remains to the investigator to carry out the investigation in a thorough, full and impartial manner. The research also focuses on institutional arrangement of investigative bodies, qualification of the investigator, and issues that influence impartiality and effectiveness of investigation.

Research Methodology

The purpose of presented research is not complete and thorough study of the legislation regulating investigation or bodies authorized to investigate. The scope of the research is limited to the stage between receiving an information about the crime and sending the case to the court. Research focused on the investigatory and prosecutorial power, as well as the level of subordination between them in the entire process of criminal proceeding.

Such a direction of research is stipulated by the fact that afore-mentioned topics have significant influence on the process of investigation and its' impartiality. These topics were never subject of broader analysis or deeper consideration. The research analyzes existing investigative system to the extent that would be sufficient for creating an idea on general institutional arrangement of specific investigative agencies, qualification of the investigator and the level of his independence.

'The Human Rights Education and Monitoring Center (EMC)' and the 'Association of Georgian Law Firms' have jointly worked on this research. In order to completely analyze local context and amendments made to the procedural legislation, as well as to better identify problems existing in everyday practice, the project team was supported by Ketevan Chomakhashvili, Assistant-professor of the Free University of Georgia. Professor Richard Volger, from the University of Sussex was also involved in the research. He prepared analysis of theoretical framework of adversarial procedural model as well as analysis of relevant legislation for England, Wales and United States – countries with the biggest tradition of adversarial procedural model. Academic document prepared by professor Vogler also focuses on institutional arrangement of prosecution and investigative bodies.

¹⁰ Criminal Procedural Code of Georgia, , article 3, part 6

As for the research instruments, the project team has relied on the analysis of legislation and practice, workshops with different thematic groups, individual interviews with investigators, prosecutors, academic cohorts, as well as public information and statistical data requested from specific departments, opinions of local and international experts, and secondary analyses of existing relevant researches.

Analysis of Legislation

Relevant legislation regulating principles of criminal justice, process of investigation, investigatory and prosecutorial powers in the process, and the level of subordination between the investigator and prosecutor were completely analyzed within the scope of this research. Normative/subordinate acts regulating institutional arrangement of investigative bodies, as well as other practical matters, were also analyzed. Legislation was analyzed retrospectively, taking into consideration important recent amendments to the normative acts. The following normative acts were studied for the research purposes:

- The Constitution of Georgia;
- The Criminal Code of Georgia;
- The Criminal Procedure Code of Georgia;
- The Law of Georgia on Prosecutor's Office;
- The Law of Georgia on Operative-investigative actions;
- The Law of Georgia on Police;
- As well as the following subordinate normative acts:
 - The Resolution of the Ministry of Internal Affairs (the Resolution is approved by the decree of Government of Georgia);
 - Order N34 of the Minister of Justice of Georgia of 2013 on Investigative Jurisdiction;
 - Internal regulatory acts of each investigative agency regulating institutional arrangement of the agencies, rules for selecting and appointing employees and establishing mandatory professional criteria for the investigator.

Public Information Received from the State Agencies

For the purposes of the project, statistical information, internal regulatory acts, statistics on the number of employees etc. were requested as public information from different agencies. Requests were submitted to the following public agencies:

- Common Courts – information on the satisfaction of specific motions of prosecutors, as well as judicial practices for the topics relevant to the research;
- Chief Prosecutor’s Office of Georgia – number of prosecutors and investigators, information on the number of investigated cases, internal regulatory acts and available guidelines on prosecutorial discretion and other relevant topics;
- Parliament – notes, conclusions, disclosure cards, and protocols of the session prepared during the working process on reforming Procedure Code 2009;
- Ministry of Internal Affairs and other investigative bodies – internal regulatory acts, number of investigators employed in the agency, legislative requirements on their mandatory qualifications, number of investigated cases etc.

Most of the requested information has been received, however, the project team was refused a response to number of topics on different grounds.

Public/statistical data and materials found on official web-pages of specific agencies were also studied in the course of the research. Secondary analysis of relevant researches and reports on investigative/criminal justice and procedure legislation was also included.

Researching Practice

Based on the fact that important part of communication between the investigator and the prosecutor in the investigation process is regulated beyond the formal legal documents, the research team has decided to conduct individual interviews with the representatives of different groups, to better demonstrate the problem. With this purpose, the research team has prepared a questionnaire comprised of open and closed questions, using which the interviews with investigators and prosecutors were conducted.

Each interview was conducted face to face, without the attendance of external parties and was documented by audio recording in most cases (only in exceptional cases was it requested by the respondents to record in writing). The interviews were conducted with:

- 3 investigators of the Ministry of Finance;
- 5 investigators of the Ministry of Internal Affairs;
- 13 Prosecutors.

In selecting respondent investigators, representatives of different departments were considered to better reflect various nature of problems. With regards to prosecutors, via active communication with the management of Prosecutor's Office and on the bases of unilateral decision, the project team has decided on such a list of respondents that would allow better representation of different types of crime and special regional characteristics as well.

Interviews with the representatives of academic circles, former employees of investigative and prosecution systems and individuals involved in systematic reforms of procedure legislation were also conducted within the scope of the research. 8 such interviews were conducted in total.

To complete the practice research, individual interviews were scheduled with the judges as well. However, despite the number of attempts and communication with the representatives of judicial system, cooperation with judges, within the frames of the research, could not be achieved.

Workshops with different stakeholder circles were conducted. More specifically, several workshops were conducted with the representativeness of non government organizations, representing members of criminal justice group of 'the Coalition of Independent and Transparent Judiciary'. Workshops were conducted with attorneys working on criminal cases. Purpose of these meetings was to obtain additional information regarding the relevant practice, as well as to introduce recommendations prepared within the scope of the research and to receive additional evaluations.

Obstacles in the Course of Research

One of the significant challenges of the research was timely and complete receipt of public information from the relevant agencies. Most often, the grounds for refusal to provide information was that the agency did not process specific materials and processing them for the purposes of this research only, required vast administrative resources. Important challenge was created by the fact that number of issues are not clearly regulated at the legal level and it became impossible for the project team to draw generalized conclusions on such issues based on conducted interviews.

The project team intended to conduct interviews with the representatives of judicial system. However, as mentioned previously, judges never agreed on cooperation. The number of investigators and prosecutors involved in the interview was a result of agreement reached with the management of the relevant agencies.

The project team is grateful to every individual who participated in the research, to the Chief Prosecutor's Office of Georgia, Ministry of Internal Affairs and the Investigative Service of the Ministry of Finance for their active cooperation through the research process. Important part of this research would not be available to the society without the cooperation of mentioned agencies.

Main Findings and Recommendations

The reform of Criminal Procedure Code, implemented in 2005-2009, was a crucial step for the further development of Georgian criminal justice system, as it had to establish new standards of crime investigation, high protection guarantees for the defendant, and a new culture of legal mentality, in general. Unfortunately, the final edition of the Code, which came into force in 2010, did not prove to be enough for achieving the mentioned goals, due to number of uncertainties and systematic deficiencies in it. At the same time, the fact that, existing general legal system was never adapted to new procedural regulations, causing problems in practice in number of directions. It is noteworthy that, in the nearest post-reform period, Constitutional Court of Georgia satisfied almost all leading constitutional complaints referred to the equality of arms at an investigative stage. In light of the aforementioned, it's obvious that Criminal Procedural Code of Georgia, after 10 years from adoption, still cannot provide the fundamental guarantees for full, through and impartial investigation.

The following issues were identified within the scope of the research:

- Institutional arrangement of investigative bodies and existing legal framework cannot ensure independent, thorough and impartial process of investigation. Investigator remains the prosecution in the process and is heavily dependent on Prosecutor's decisions;
- The existence of 'pre-investigative' mechanisms that are not subject to prosecutorial and judicial control, remain as a problem. Effective judicial control does not apply to operative-investigative actions. There is no procedure for direct interrogation at the court of persons involved in these activities;
- Statuses of prosecutor and investigator are not clearly defined in the Criminal Procedural code and, in number of instances, both of their roles are contradictory. The investigator is, on one hand, obliged to carry out the investigation in a thorough full and impartial manner and, on the other hand, he represents the prosecution. The prosecutor has the supervisory power over the investigation to control the legitimacy of investigator's actions, but, at the same time he is, in fact, leading the investigation process and is actively involved in it. This significantly complicates proper execution of effective and objective prosecutorial oversight;
- The prosecutor is actively involved in the process of investigation and, quite frequently, defines the strategy and directions of the investigation. This creates a threat for the impartiality and neutrality of the investigation; Level of autonomy of the prosecutor and investigator becomes irrelevant and these two individuals, are naturally motivated to cooperate;

- No obligation of documenting relationship/communication between the prosecutor and investigator exists. The legislation does not specify in what form should a prosecutor give binding instruction to the investigator and what standards of proof shall it satisfy;
- Despite the fact that the Criminal Procedure Code does not even define the status of Investigative Agency Head, individual interviews conducted by the research team, within the frames of the research, revealed that the Heads actively participate in the investigation process and, quite frequently, directly define standards and quality of investigation carried out by specific agencies;
- Institutional arrangement of investigative agencies differ from one another. Mostly, Operative-investigative divisions are not separated from investigative bodies; the concentration of investigative and operative-investigative functions under one agency decreases standard of transparency and is negatively reflected on the quality of investigation, in general;
- The qualifications of the investigator and rules for appointing them to the position are subject of concern. There are no common standards and no criteria that would be compulsory to grant the status of investigator. In some investigative bodies, the investigator is not required to have higher legal education. Rules for appointing them to their positions are in most cases obscure and contain risks of arbitrary decisions by specific officials;
- Methods of responding to the received information about the crime, are problematic and contradictory. The Procedure Code on the one hand, obliges investigative agencies to launch an investigation immediately after receiving information on the crime. However, the so called „preliminary investigation” is quite frequent in practice, within which the investigators try to find factual circumstances relevant to the case, without any procedural regulation. The existence of such practice is supported by obscure and contradictory records in the Law on Operative-investigative actions and the Law on Police;
- There are no common standards and criteria, regulated by the procedural legislation, on the assessment of received information about the crime. The interviews have also revealed that the process of crime registration can negatively be influenced by the issue of crime statistics. Interviews have demonstrated that crime statistics are given incorrect meaning in practice;
- There is no effective mechanism, either in the legislation or practice, that could examine how the investigator performs the obligation, imposed upon him, to register the crime and launch the investigation, immediately after receiving information about the crime;

- Final decisions on implementing all important investigative actions in the process of investigation are made by the prosecutor, not by the investigator. The prosecutor also takes decision on such procedural matters as the qualification of the case, granting a status of victim, transferring the case from one investigator and to another.
- Investigative Jurisdiction of criminal offenses is regulated not by the law, but by the order of the Minister of Justice. At the same time, the Chief Prosecutor of Georgia is authorized , without any justification, disregard subordination rules and withdraw a case from one investigative authority and transfer it to another investigative body.

The project team is presenting the following recommendation to eliminate existing problems in legislation and in practice:

- Investigative jurisdiction of cases shall be regulated by the Criminal Procedure Code of Georgia, instead of the order of the Minister of Justice;
- Authority to transfer a case from one investigative body to another granted to the Chief Prosecutor of Georgia (and to the person authorized thereby by him) shall be limited to exceptional cases and be subject to proper written justification. At the same time, Chief Prosecutor shall not be entitled to delegate mentioned authority to undefined circle of persons;
- In investigative bodies, that do not already practice this, investigative and operative-investigative services shall be separated institutionally and operationally. Employees of each department shall specialize in relevant direction;
- Uniform qualification requirements shall be set out for investigators in all investigative agencies. Alongside with other professional/conscience criteria, higher legal education shall be defined as obligatory minimum requirement for investigators of all investigative agencies;
- Foreseeable and democratic rules for appointing the investigator to his position shall be normatively written out. In this regard, other agencies may implement staff selection and recruitment procedures similar to those at the Investigative Agency of the Ministry of Finance;
- Regulations of the Law of Georgia on Police shall be redefined so that, they could only be used for preventive purposes. Reacting to already committed crime may only be possible via investigative actions within the entirely frames of Criminal Procedure Code of Georgia;

- In order to avoid parallel mechanism to the investigation, the Law on „Operative-investigative actions” shall be annulled. Investigatory mechanisms existing in it, as well as measures of criminal justice intensity, envisaged by the Law on Police, shall be incorporated into investigative activities under the Criminal Procedure Code of Georgia;
- It is important to abolish so called pre-investigative stage and relevant bodies to launch the investigation immediately after receiving the information about the crime, within the frames of Procedure Code and according to the established rules;
- Every investigative body shall implement special rule for registering the information about the crime. The rule, along with instruction on registration, shall define mechanisms for controlling registration process, functions of controlling bodies, and appropriate liability measures for violating registration rules;
- The Criminal Procedure Code of Georgia shall make it obligatory for the relevant bodies to issue written notice to the applicant on the receipt of the information about the crime;
- The crime statistics shall not be the independent ground ,for performance evaluation of specific investigative body or an official, without taken into consideration other important facts. Career related decisions shall not be based only on the crime statistics. as this, in the end, causes an issue of incorrect course of crime registration and statistics;
- Investigatory power shall be driver out from the Prosecutor’s Office and it shall be assigned to other investigative bodies, thematically;
- The prosecutor’s authority to transfer a case from one investigator to another , shall be annulled;
- The prosecutor should not have a role whatsoever in the launching of investigation or involving in entirely investigation process, or in the specific investigative actions; prosecutor should not obtain the status of an investigator;
- In order to make the investigation process and the Prosecutor’s Office more distant on operational level, the prosecutor’s authority to give binding instruction to the investigator for the purposes of investigation, shall be limited;

- The Criminal Procedure Code of Georgia shall specify that prosecutorial oversight is carried out only to ensure the lawfulness of investigation and within the procedural oversight, prosecutor has no authority to identify an investigative strategy;
- The prosecutor shall only be entitled to change or annul investigator's actions/decision if they are obviously illegal; admissibility and effectiveness are not sufficient motives for the Prosecutor to interfere in the investigator's power;
- In order for the investigator to examine the case thoroughly, fully and impartially, it is necessary for his status to be redefined in the Procedure Code; Investigator shall not be considered as a prosecution party and shall be distant from the Prosecutor's Office functionally;
- In order to decrease the level of investigator's dependence on the Prosecutor, it is important for their communication to have an obligatory written character. At the same time, in cases when the investigator deems it necessary to carry out investigative actions requiring court order, but the Prosecutor does not agree, the Prosecutor's refusal on addressing the Court shall be justified in writing and filed into case materials (It is noteworthy that, in some adversarial jurisdictions a police officer has the authority to apply for the court warrant, without prosecutor's involvement in the process);
- The Procedure Code shall define procedural status of the Head of Investigative Service Agency. The later shall ensure effectiveness, qualification and high quality of investigation carried out by the agency reporting to him. The Head of the agency shall be entitled to give out binding instructions to the investigator, assign case to a particular investigator, examine complaints related to investigator's actions etc;
- The prosecutor's failure to disclose evidence that excludes or mitigates person's guilt shall result the prosecution to be terminated or a conviction to be overturned.

1. Institutional Analysis

1.1. Introduction

Reviewing institutional arrangement of bodies equipped with investigative competence is important for a complete analysis of investigation process and authorities of a specific investigator within its scope, as well as for finding out how high is investigators qualifications and level of independence while carrying out investigative actions. As of currently, investigative agencies of the Ministries of Justice, Internal Affairs, Defense, Correction, and Finance, as well as the Prosecutor's Office and State Security Service are equipped with investigative authority.¹¹

The investigative system has not always been decentralized and, until 2003, the mentioned authority was only given to The Prosecutors Office, Ministry of Internal Affairs, and Ministry of State Security.¹² In 2003, a provision on Investigative Department of the Ministry of Finance emerged in the Procedure Code. However, this agency only became active starting from 2004. The agency gained its current status - that of State subordinate agency - in 2009.¹³

In 2005, Investigative Service of the Ministry of Justice was established, functions of which were to investigate crimes related to the execution of judicial acts or committed at the territory of penitentiary agencies.¹⁴ The jurisdiction to investigate the later type of crimes was taken out from the competence of the Agency in 2008, since established a separate Ministry of Correction of Georgia, including a relevant investigative department, entitled to investigate crimes committed at the penitentiary agencies.

In 2006, Investigative Service of the Ministry of Defense – Military Police – was established . In the same period investigative services of the Ministry of State Security, as a separate investigative body were repealed but more precisely they were merged with the Ministry of Internal Affairs. In 2007-2011, Investigative agencies of the Ministry of Environment Protection and Natural Resources, as well as Ministry of Energy, were functioning independently,¹⁵ however, none of them exists in an independent manner today and majority of their competencies is allocated to the investigative bodies of the Ministry of Internal Affairs.

11 Article 34, Criminal Procedure Code of Georgia

12 Refer to article 61 of the Criminal Procedure Code of Georgia, 20 February, 1998 (this edition was effective until 26 August) – invalidated on 1 October 2010

13 <http://is.ge/4162>

14 The order of the Minister of Justice of Georgia on the Adoption of the Regulation of Investigative Department of the Ministry: <https://matsne.gov.ge/ka/document/view/1427487>

15 Article 61 of the Criminal Procedure Code of Georgia, 20 February, 1998 (Edition effective from 22 January, 2007)

In 2015, as part of the institutional reform, carried out in the Ministry of Internal Affairs, the State Security Service was established as an independent entity, directly subordinated to the Government.¹⁶ Along with many other functions, investigative competence was also delegated to the agency and it investigates facts related to corruption, state security, crimes against constitutional order and acts of terrorism.

Under the conditions of such decentralization of the investigative agencies, it is difficult to define which agency is responsible for the criminological situation in the country. As of today, the Prosecutor's Office is carrying out procedural oversight over the investigations by every investigative agency and it can be argued, that the Prosecutors Office is responsible for ensuring that the investigation is carried out as per the common standards and common strategy for combating crime is in force. Such situation is problematic in a sense that the Prosecutor's Office is a prosecuting authority, while crime prevention, detection and suppression, as well as its effective and complete investigation remain in the hands of other agencies. It is noteworthy, that no common strategy and model of crime prevention exists in the country¹⁷ and that's why, the risks of pursuing inconsistent policy against crime by the relevant agencies are increased.

1.2. Investigative Jurisdiction and Case Distribution to Specific Investigative Agencies

Prior to institutional analysis of investigative services, it is important to analyze principles and procedures for distributing specific criminal cases between them. Having clear and fair rules for case subordination are crucial for ensuring effective, impartial and reliable investigation. In this sense, it is problematic that subordination rules for criminal cases are regulated not at the legislative level, but by the order of the Minister of Justice.¹⁸ The legislation does not specify what level of justification shall be included in the decision of the Minister on changing the content of an order.

Regulating the issue of such importance by the subordinate act is clearly problematic, as it creates the risks of changing the content of the Order as a result of unjustified and non-transparent decision. The issue is delegated to the Minister – to the political figure – increasing the risks of politicizing the topic. In this context, authority delegated to the Chief Prosecutor (or person authorized by him) to disregard subordination rules defined by the order of the Minister without

16 Refer to the Law of Georgia on State Security: <https://matsne.gov.ge/ka/document/view/2905260>

17 The Human Rights Education and Monitoring Center (EMC), "Crime Prevention, Risks of Police Control" 2017, page20:<https://emcrights.files.wordpress.com/2017/10/e18393e18390e1839ce18390e183a8e18390e183a3e1839ae18398e183a1-e1839ee183a0e18394e18395e18394e1839ce183aae18398e18390.pdf>

18 See the Order of Ministry of Justice referring to Criminal case investigative and territorial jurisdiction issues (N34-2013. 7 July)

any justification and hand criminal case over from one body to the other, set out by article 33 of the Criminal Procedure Code of Georgia, is also problematic.

It is noteworthy that the Legislation does not consider either the obligation for justification the decision taken by the Chief Prosecutor or a person authorized by him, or a mandatory form of decision. It also does not specify who specifically, along with the Chief Prosecutor, shall be authorized thereby to transfer the cases, between investigative agencies, by disregarding the subordination rules, as the law only makes general reference to an ‘authorized person’.

Granting such broad powers to the Chief Prosecutor, in fact, disables the Order of the Minister of Justice, as it makes it possible to routinely violate investigative jurisdiction rules established by the Order, without any justification. To get a complete picture of this issue, the research team has requested public information from the Prosecutor’s Office on a number of cases when a criminal case was transferred by the Chief Prosecutor/person authorized by him. Unfortunately, the Prosecutors Office refused to provide such information on the grounds that the Agency would not normally record the requested material.¹⁹ Under such conditions, it becomes impossible to control/monitor the mentioned authority of the prosecutor and this increases arbitrary risks from his side even more.

No clear rules of case distribution exist in the sense of allocating cases to investigators/investigative subdivisions within a specific Investigative Agency. The only exception is the Ministry of Internal Affairs, where subordinate cases for each department are defined by the Order of the Minister²⁰, however, what principle is used to distribute cases to specific employees within the department, remains unclear. As a response to the request of public information on the mentioned topic, submitted to each investigative agency, only the Ministry of Defense notified the research group, by responding that cases between specific employees are distributed according to the rotation schedule²¹ (However, the latter does not specify what rules of rotation are applied in the agency and how are these rules defined).

There might not be a need for the common rule of case distribution between the subdivisions of investigative services for each and every case, as they are distributed logically in line with territorial or crime grade principles in some agencies. However, it is important that case distribution issues to be regulated by clear rules to avoid conflict of interest, arbitrary decisions by the Head of Investigative Service and to effectively use human resources of a specific agency.

19 Public information obtained from the chief office of the prosecution of Georgia and from the Ministry of justice officially dated 24.01.2018. N13/5475

20 31 July 2015 Order #566 of the Minister of Internal Affairs on “Investigative Jurisdiction of criminal cases subordinate to the Ministry of Internal Affairs”

21 29 January 2018 Letter #MOD2 18 00087365 of the Ministry of Defense of Georgia

1.3. Internal Structure of Investigative Bodies

Institutional arrangement of individual investigative agencies has a significant impact on the quality of investigation carried out by them, as well as on the qualifications and independence of the investigator. Under the conditions of decentralization of investigative system, internal arrangement of investigative agencies also differs from one another, influencing investigator's daily actions in some ways. In this regard, it is particularly important whether and how separated are operative-investigative and investigative agencies from one another. Experts interviewed within the scope of this research²² have clearly indicated, that when operative and investigative functions are not operationally and institutionally distant, risks of the abuse of authority by the law enforcement officers increase. E.g. cases of so called preliminary investigation, when information about the crime that was received by the investigator did not become ground for launching investigation.

Uniting operative-investigative and investigative actions under one agency and equally equipping law enforcement officers with both of these competencies, is problematic in the following two ways:

1. Judicial/prosecution control over operative-investigative activities is carried out in a limited and pointless manner. For the information, obtained by such activities, to satisfy minimum standards of credibility, it shall be assessed by a neutral individual before it becomes a part of the investigation or before specific investigative actions are carried out on the bases of such information. When afore-mentioned two functions are not institutionally allocated to different agencies, the 'operational information' does not undergo any test of credibility and directly becomes part of investigation/ground for investigative actions. In such cases, individual responsibilities of operative employee and investigator also become vague;
2. Operative-investigative and investigative actions require significantly different theoretical knowledge and practical skills. That is why it is necessary to institutionally separate mentioned functions and specialize employees in more specific directions, in order for them to effectively carry out operative-investigative and investigative functions.

It must be noted that situation is different in diverse investigative agencies in this respect:

²² Experts of criminal law with relevant academic or practical experience were interviewed along with prosecutors and investigators within the scope of the research

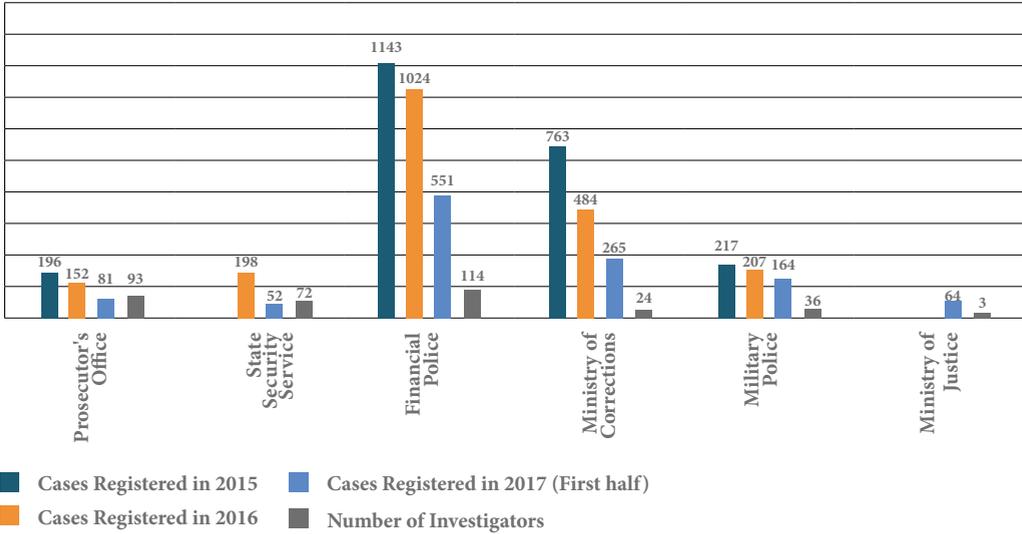
Ministry of Internal Affairs
Main investigative agencies: Criminal Police, Patrol Police and Operational Department Investigative and operational-detective agencies are not separated
Financial Police
Investigation is carried out by the investigative department Operative-investigative function is separated from the investigation
Military Police
Operative-detective agency exists in the form of a separate unit
Prosecutor's Office
Operative-detective and investigative agencies are not separated As a response to offenses committed during proceedings, investigation and prosecution functions are combined under newly created departments
Investigative Units of the State Security Service
Main investigative agencies: Counter-intelligence and State Security departments, Anticorruption Agency and Counterterrorist Center Investigative service is partly separated
Investigative department of the Ministry of Correction
Investigation is carried out by two territorial agencies Operative-detective service exists in the form of a separate subdivision
General Inspection of the Ministry of Justice
Investigative and Operative-detective functions are separated

Size of investigative agencies as well as the number of their employees also differs and this is naturally dependent on the type of work for each of these agencies. As mentioned previously, Ministry of Internal Affairs is the main investigative body of the Country and it employs 7948 investigators in its different agencies. Statistics on crimes registered and cleared by the Ministry of Internal affairs is as follows:

- 2015 - 35 096 cases, 21 176 cleared;
- 2016 - 35 997 cases, 20 661 cleared;
- First half of 2017 - 18 465 cases, 10 035 cleared.²³

²³ 22 January 2018 letter #4 18 00161750 of the Ministry of Internal Affairs as a response to the request of public information from the research team

With regards to the number of investigators employed in remaining six investigative bodies and registered crime statistics, please refer to the below picture:



* Crime data for 2015-2016 was given in a combined form by the State Security Service. Registered crime for 2015 is implied under the 2016 data on the diagram;

* The Ministry of Justice provided crime data in a combined manner, without a reference to years, thus, 2017 data also unites registered crime statistics from 2015 and 2016.

1.4. Qualifications of a prosecutor and investigator

Qualifications of a prosecutor and investigator directly determine quality of investigation for individual criminal cases, influencing the effectiveness of investigative system, in general, in the long run. Accordingly, it is important to assess minimum professional requirement, established at a normative level, in order for a person to qualify as a prosecutor or an investigator.

Law of Georgia on Prosecutor's Office establishes clear requirements for appointing the prosecutor or the investigator at a Prosecutor's Office²⁴. More specifically, an individual who has higher legal education, practices language of judicial process, has completed 6 months to 1 year internship in one of the agencies of the Prosecutor's Office, and has passed qualification exam in rele-

24 Article 31, part 1, The Law of Georgia on the Prosecutor's Office

vant legal disciplines to the Qualification Exams Commission, can be appointed to the position.²⁵ At the same time, an employee of the Prosecutor's Office is required to possess relevant business and moral features and prove that his health condition is fit enough to carry out obligations required from the prosecutor or the investigator of the Prosecutor's Office.

Only in exceptional cases does the law on Prosecutor's Office allow an opportunity to start working at the Prosecutor's office without satisfying the afore-mentioned requirements. Namely, a person may become exempt from passing the Prosecutor's Office Qualification Examination, in case he has already passed judges' qualification exam, or has taken lawyer's test. At the same time, a person may become exempt from the obligation to complete internship at the Prosecutor's office, in case he has no less than a year of experience working as a judge, attorney, or investigator, has passed lawyer's qualification exam, or has no less than 3 years of work experience in jurisprudence.

The Afore-mentioned criteria and procedure for appointing employees to their positions creates a real idea on recruitment requirements in the Prosecutor's Office. Positive assessment must be given to the fact that minimum space is left for the possibility of making exclusive, unjustified decisions by the management of the Prosecutor's Office.

With regards to the investigative agencies, there is no common standard and individual agencies have different criteria for the investigators.

Investigative Department of the Ministry of Penitentiary and Probation: Minimum criteria defined for investigators is to have higher legal education, no less than 6 months of experience working as an investigator or an intern in the investigative service, complete knowledge of office computer programs, knowledge of foreign language (preferably) and participation in trainings, local and international seminars (preferably)²⁶. The higher the position is the stricter the criteria is becoming.

Financial Police: Investigators are required to have higher legal education and knowledge of foreign language and office programs.²⁷ The agency is practicing appointing individuals after they have passed the preparatory training courses; this is aimed at employing qualified personnel at investigative agencies.²⁸

25 Constitutional Law, International Law of Human Rights, Criminal Law, Criminal Legal process, Penal Law, and bases of operative-investigative actions

26 Article 4 of 24 June 2015 Order #51 of the Minister of Penitentiary and Probation on the "Approval of additional qualification requirements and topics for adversarial process for recruiting staff at vacant positions at the investigative department of the Ministry of Penitentiary and Probation"

27 21 April 2010 Order #324 of the Minister of Finance of Georgia on "Approval of special qualification requirements for the recruitment at positions in the Investigative Agency of the Ministry of Finance"

28 The rule of service at the Investigative Agency of the Ministry of Finance of Georgia, Chapter III

Military Police: Higher legal education is required from the investigators of Military Police.²⁹

Ministry of Internal Affairs: Employment criteria in investigative services of the Ministry of Internal Affairs is problematic in terms of qualifications. The Law of Georgia on Police sets unreasonably general employment requirements for the largest investigative agency of the country. Any citizen of Georgia, who has reached 18 years of age, knows state language, and is by his professional and personal character, education, physical fitness and health conditions capable to carry out functions required of a Policeman, can be employed in the Police.³⁰ According to the Regulation established by the Minister of Internal Affairs,³¹ secondary or higher education is enough to be appointed as an employee of the Police (in accordance to the maximum applicable rank in the staff unit). Mentioned order never refers to additional qualification requirements or mandatory legal education. The Minister, by his own order, equips himself with an excessive discretion to use exclusive authorities in the process of staff selection³².

To sum up, the legislation does not define uniform standards to qualify as an investigator. In most of the cases, higher legal education is a mandatory criteria, however, the main investigative agency of the country (the Ministry of Internal Affairs) considers full secondary education as sufficient.

Selection procedures also differ for different agencies – Investigative Agency of the Ministry of Finance does provide preparatory training courses³³ for its employees, other agencies, however, either don't practice such mechanism at all or less frequently apply it. Intensity of further training/improvement of qualifications also differs in different agencies.

Quality of preparation and qualifications of an individual investigator significantly impact activities of the investigative agencies in general. Under such conditions, it becomes complicated to implement common investigative standards and define clear responsibilities for the investigators in the criminal investigation process, as, in most cases, their level of preparation and their qualifications define the intensity of Prosecutor's involvement in the process. Severity of mentioned problem was revealed in the interview with the prosecutors who clearly indicated that investigators' qualifications represent a serious problem, naturally causing prosecutors' active involvement in the investigation process. It is noteworthy that some investigative agencies (Military Police, for instance) do not face such problems.

29 Article 19, point I of the Law of Georgia on the Military Police.

30 Article 37, The Law of Georgia on the Police

31 31 December 2013 order #995 of the Minister of Internal Affairs on the approval of rules of service at the Ministry of Internal Affairs

32 The Human Rights Education and Monitoring Center (EMC), Political neutrality in the Police System, page 42, 2016

33 22 December 2017 Letter 9656/15-02 of the Investigative Agency of the Ministry of Finance

Recommendations

When investigative agencies are being so decentralized and internal institutional arrangements, as well as the level of independence differ in individual agencies, risks of developing non-uniform practice are increasing. Qualifications and impartiality of an investigator are not sufficiently ensured. In this regard, it is important to apply following amendments to the legislation:

- Investigative Jurisdiction of cases shall be regulated by the Criminal Procedure Code of Georgia, instead of the order of the Minister of Justice;
- Authority to transfer a case from one investigative body to the other, granted to the Chief Prosecutor of Georgia (and to the person authorized by him) by the Procedure code, shall be limited to exceptional cases and be subject to proper written justification. Also, the Chief Prosecutor shall not be entitled to delegate mentioned authority to undefined circle of persons;
- In investigative bodies, that do not already practice this, investigative and operative-investigative services shall be separated institutionally and operationally. Employees of each department shall specialize in relevant direction;
- Uniform qualification requirements shall be set out for investigators. Alongside with other professional/ conscience criteria, having higher legal education shall be defined as obligatory minimum requirement for investigators of all investigative services;
- Foreseeable and democratic rules for appointing the investigator to his position, shall be normatively written out. In this regard, other agencies may implement staff selection and recruitment procedures similar of those at the investigative Service of the Ministry of Finance;

2. Stages of Criminal Proceedings

2.1. Introduction

There are several stages in criminal proceedings. The initial stage is the receipt of information about the crime which, according to Georgian Legislation, is a ground for launching investigation. State's Investigative authority constitutes its obligation to the society to take immediate and effective response to specific criminal actions. Approach of the Criminal Procedure Code to the investigative stage is quite straightforward at one glance - every single action related to the information about the crime shall be taken within the frames of the investigation. However, the opposite is demonstrated by systematic analysis of legislation. More precisely, the receipt of information about the crime is not always considered as a sufficient ground for launching the investigation and carrying out operative-investigative activities in parallel, are allowed.

Contradictory regulations of the legislation erase boundaries between investigative and non-investigative stages. Despite the imperative requirement of the Procedure Code, it is still vague whether the investigation starts, - right after the receipt of the information or investigative-operative actions are carried out first, instead. Regulations of the Law of Georgia on Operative-Investigative Activities, directly create alternative investigative regime or at least, practical risks of so called preliminary investigative stage.. These risks are strengthened by the fact that prosecution and judicial control over operative-investigative actions are far less intense than that over standard investigative actions.³⁴

The Law of Georgia on Police also creates similar risks. According to this law, operative-investigative action is one of the means of crime prevention. The law is also familiar with several such preventive actions³⁵. Grounds for implementing such a measure may be related to an offense, person being hiding, illicit property, and other such circumstances that are clearly a subject of investigation.

Taking these circumstances into consideration, legal nature of preventive actions is also problematic. Risks of concrete measures getting transformed into investigative actions is high. Accordingly, it is difficult to differentiate some of these measures from investigative actions.³⁶ The following chapter of the research will provide legislative analysis of afore-mentioned topics. The goal of this chapter is to emphasize legislative barriers between investigative, preventive and operative-investigative actions, as well as risks of investigative intensity of preventive measures. The chapter

³⁴ The Human Rights Education and Monitoring Center (EMC), "Crime Prevention, Risks of Police Control", 2017, page 31

³⁵ Article 18, the Law of Georgia on Police

³⁶ E.g. Surface inspection Considered under the Law of Georgia on Police

will also analyze the crime reporting and registration issues, as well as the ways relevant bodies' respond to the reporting of crime.

2.2. Police Activity and Investigation

One of the main goals of the Law of Georgia on Police was to grant preventive authorities to the Police, as part of legislative amendments of 2013. However, Police is equipped with not only the authority to carry out preventive measures. Some measures established by the Law on Police directly apply to the detection of already committed crime, while the latter shall be the competence of investigation. According to the article 22 of the Law, for instance, frisk and examination is carried out, if there are reasonable grounds to believe that a subject or the mean of transport is located where a crime may be committed, for avoidance of which surface inspection is necessary. Movement of an individual or of a mean of transport as well as factual ownership of a subject is also limited in order to avoid crime or an administrative offense. According to the Law of Georgia on Police, the existence of an assumption that crime or offense was/may be committed, is sufficient grounds for special police control, so called raids³⁷.

Under existing legislative order, risks for the Police prevention to take over investigative competence – or for law enforcement officers to carry out police-preventive measures for investigative purposes - are high. This is encouraged by the fact that agencies having preventive functions are at the same time those that carry out investigation and, in most cases, legal boundaries between these two activities are not clear enough. As it has been demonstrated, some preventive measures, by their nature, are a lot like investigative actions (e.g. interrogation). Some police measures can easily be transformed into investigative actions. (E.g. surface inspection to search). Criminal intensity of preventive measures is particularly problematic in a sense that, prosecutorial monitoring standard over police mechanisms is low, unlike the one over investigative actions and the Judicial control is only possible post factum.

It becomes clear that the Law of Georgia on Police directly considers the possibility to implement police preventive measures with the purposes of establishing factual circumstances of the crime and responding to it and this is illogical and unjustifiable. These measures are not perceived as investigative or criminal procedure mechanisms and, as mentioned previously, prosecutor's procedural oversight does not apply to these measures. At the same time, in several instances, boundaries for interference in this authority are not clearly established and the legislation does not sufficiently ensure that such interference does not reach criminal intensity.³⁸

³⁷ Article 24, The Law of Georgia on Police

³⁸ The Human Rights Education and Monitoring Center (EMC), "the Politics of Invisible Power" 2015, page 46.

It is straightforward that the legislator fails to ensure clear boundaries between investigative and preventive measures. Especially, when implementing such police measures that are basically of procedural-judicial nature and have more of an investigative character than preventive. Such police actions certainly involve high risks of restricting human rights. This becomes especially relevant under circumstances when investigative and preventive authorities are placed in the hand of one agency and the legislation does not foresee mechanisms of human rights protection. It may well be concluded that the legislator entrusts an individual to the pre-assumed good faith of the law enforcement agencies.

2.3. Operative-Investigative Actions

One of the main goals of operative-investigative actions is to detect, suppress and prevent criminal action. The legislation foresees several types of measures for achieving defined objectives – interview a person, collect information and conduct surveillance, controlled delivery, identification of person and others being among them³⁹. Specific actions, established by the legislation, clearly indicate that operative-investigative measures are aimed at not only identifying, putting an end to and preventing a crime or any other unlawful act, but also at responding to/determining factual circumstances of complete or incomplete crime.

Together with the types of measures, grounds for implementing such measures are also problematic. Quite often, operative-investigative measures are based on the assignment given to the investigator by the prosecutor or as a result of prosecutor's approval. The legislator only allows implementation of operative-investigative measures on this grounds, in case when there is a duly received report or notification that a crime or any other unlawful action is being prepared, or is in progress or has been committed, and which requires the conduct of an investigation, but there are no elements of a crime, or of any other unlawful action that would be sufficient to commence an investigation⁴⁰. Mentioned provision directly contradicts with regulations of the Criminal Procedure Code. The Procedure Code imposes imperative requirement to start an investigation immediately after receiving information about the crime in any form.⁴¹

Mentioned rule applies to already committed and complete crimes, as well as to the information on the preparation or attempt of a crime (if the legislation deems such preparations and attempts punishable). Thus, the legislation, on the one hand, establishes the obligation of investigative response to the information in the scopes of Procedure Code, while, on the other hand, it allows

39 Article 7, the Law of Georgia on Operative-investigative actions

40 Article 8, paragraph 1, sub-paragraph "b", the Law of Georgia on Operative-investigative actions

41 Article 100, the Criminal Procedure Code of Georgia

law enforcement officers to carry out law enforcement measures on the bases of this information, and obtain important materials for the investigation, by avoiding the obligation to start an investigation.⁴²

Contradictions in the legislation between the grounds for implementing investigative and operative-investigative actions are obvious. The procedure code imposes the obligation to launch the investigation, immediately after receiving the information about the relevant offense.⁴³ The Code does not require any special standard nor does it define the reliability level. Quite in contrary, the law of Georgia on Operative-investigative measures emphasizes the quality of this existing information for the implementation of a specific investigative action⁴⁴.

The existence of such obscure records in the legislation, increases risks of arbitrariness. Law enforcement officers are allowed, for each specific case, to independently, without relevant legal criteria, assess the received information and decide whether to react by investigative or operative-investigative manner. Taking into consideration that prosecution and judicial control over operative-investigative actions is far less intense in comparison to investigative actions, it is logical that the law enforcement officer will give his preference to the former and will try to gather necessary information within its' scope.

Responding to the information about the crime by operative-investigative measures, or implementing so called preliminary investigative actions is a solid part of practice. This is referred to as a „verification” stage in practice. This method is used by the law enforcement officers to uncover the real situation not through procedural steps, but through artificially established mechanisms lacking procedural standards and guarantees. These methods and associated problems will be reviewed below in further detail. However, it shall be noted here that, external mechanisms beyond the scope of procedure code are mainly evaluated as problematic by the representatives of academic circles, as well as practitioners and it is deemed reasonable to incorporate these procedures into the Criminal Procedure Code⁴⁵.

2.4. Types of Information about the Crime

Law enforcement agencies receive information about the crime in different ways. Investigation may start on the bases of information that was given to the investigator or the prosecutors, was

42 The Human Rights Education and Monitoring Center (EMC), „Crime Prevention, Risks of Police Control” 2017, page 31

43 Article 100, the Criminal Procedure Code of Georgia

44 Article 8, the Law of Georgia on Operative-investigative actions

45 The information is based on the results of interviews with the representatives of academic circles and practitioners.

revealed during criminal proceedings, or was published in the Media. Criminal Procedure Code of Georgia does not set out a specific form of submitting information about the crime to the relevant agencies. Information about the crime may be verbal, written or recorded in any other way⁴⁶. The code does not establish the requirement on conducting any kind of test to check the authenticity of information source. Instead, it directly imposes the obligation to launch an investigation immediately after receiving the information.

In practice, information about the crime goes through several stages before a final decision on it is taken, regardless of in what form it was received (written, verbal, telephone message, confession etc) it needs to be registered, first of all. According to the established practice, when the information is received verbally, via phone call or confession, relevant person shall compose a report on the receipt of notification⁴⁷. The report shall be registered as information, in case the applicant confirms it.

Quite often individuals approach the Police with already completed application or compose their application at the Police office directly. Seems like the most problematic cases in practice are the ones when the application is composed at the police office. As revealed from the interviews, there are cases when the employees of the Police, in order to avoid worsening the statistical picture of crime, try to formulate the content of the application so that signs of crime are not revealed⁴⁸. Problems related with statistical data will be discussed in further detail below.

2.5. Registering Information about the Crime

It must be noted that there is no uniform rule of registering information about the crime in the relevant agencies. Such information is subject to the general regulations of the proceedings (e.g. in the Chief Prosecutor's Office, Investigative Service of the Ministry of Finance).⁴⁹ Situation in this regard is different in the Ministry of Internal Affairs where the rules of registering information about the crime are defined by the order of the Minister⁵⁰. According to the order, it is obligatory to register any information received by the Ministry in the electronic system and refusal on registration is prohibited. In case of technical difficulties, notifications are registered in a special recording journal. Content of the application must be kept as precisely as possible

⁴⁶ Article 101, Criminal Procedure Code of Georgia

⁴⁷ Guidelines for Investigation Methodology, Multiple authors, 2017, Tbilisi , pages 20-23

⁴⁸ The assessment is based on the results of interviews conducted with representatives of academic circles and practitioners.

⁴⁹ The assessment is based on public information on special rules of crime registration received from the Chief Prosecutor's Office of Georgia, The Ministry of Internal Affairs of Georgia, and the Investigative Agency of the Ministry of Finance of Georgia

⁵⁰ 14 April 2012 order of the Minister of Internal Affairs on the approval of electronic registration of information containing signs of crime and/or any other notification received by the Ministry of Internal Affairs

during the registration and interpretation is not allowed. It is obligatory to record date and time for the receipt of the information. The order also defines the rules for redirecting the information via the system of document circulation. It also establishes the obligation to send the information on grave, particularly grave and resonant crimes to operational-rotation service of the Administration of the Ministry.

Despite the fact that the Ministry has uniform special procedure for registering the information about the crime, afore-mentioned regulation is still problematic in a number of ways: It is not obligatory to hand over the document confirming registration to the applicant. The authorized employee (on duty) is only obliged to hand over the registration card (date and number) to the applicant, if this has been requested by the applicant. The instruction lists prohibited cases (refusal of registration, interpreting the content of the application etc), however, in parallel to this, no special rule that would establish liability for violating rules of registering information/notification, has not been determined. Violation rules of information registration is not recorder as a separate paragraph, when processing disciplinary statistics. As, statistics are being processed by general norms, it becomes difficult to identify what was implied under improper performance of official duties – was it the violation of crime registration rules or other disciplinary misconduct. Such situation does not allow for transparency, public accessibility and control of statistics with regards to registering the received information.

Information about the crime, along with other type of information on which the relevant bodies shall start proceedings, requires special attention. By having a proper registration system, the State expresses its readiness to respond to any criminal act and thus protect individual and public interest. Nonexistence of special rules for registering the information in different agencies, excludes the possibility of effective internal and external control over the registration.

2.6. Verifying Information about the Crime

Launching investigation is the stage that follows crime registration. As opposite to criminal persecution, investigation stage is not entirely discretionary one and is exercised upon the received information about crime. The existence of imperative investigative obligation over the information about the crime cannot be assessed as a defect of the Procedure Code. Quite in contrary, investigative obligation, unlike investigative discretion, hinders the establishment of impunity culture in the state⁵¹.

51 Eileen Overbaugh, Human Trafficking: The Need for Federal Prosecution of Accused Traffickers, 39 Seton Hall L. Rev. 635, 641-42 (2009).

As revealed from the interviews with practitioner lawyers, despite the imperative norms in the Criminal Procedure Code of Georgia, there is no concurring opinion between officials authorized to launch the investigation on whether the investigation shall start on the ground of any information about the crime. Information about the crime is sorted out by the investigative agencies in the following way:

- Information where crime presence is obvious;
- Disputable information where crime presence is not clear;
- Information indicating on the different type of legal or factual problem and does not include signs of crime⁵².

Despite the fact, that according to the Criminal Procedure Code, the only process following the information registration is the launch of investigation, cases of ‘assessing’ or ‘verifying’ the information before officially starting the investigation are familiar to the practice. Rules and standards of “preliminary assessment” are non-uniform. Investigator, as well as prosecutor are involved in the assessment of information about the crime; As a rule, three main decision are taken on the information about the crime: launching investigation (in case the criminal action is clearly revealed from the information), carrying out so called preliminary on the bases of the information (in the form of ‘verification’ in case the existence of crime signs in the action is debatable) and refusing to launch the investigation (in case the information does not indicate to criminal offenses and describes other types of factual circumstances or legal problems).

In this regard, information from which the criminal action is not obvious is particularly problematic. It turns out, that in such instances, relevant officials artificially refer to mechanisms established in parallel to the Criminal Procedure Code – to so called ‘verification of information’ via pre investigative actions. As previously mentioned, ‘verification’ is carried out in different ways, however, it clearly is not a procedural-legal tool and is not considered as an investigative action. ‘Verification’ stage is considered as a step preceding the investigation and its’ results determine decision on whether to start or refuse the investigation process.

In practice there exist different methods of ‘verification’. Relevant agencies often use the so called official inquiry, interviews, requesting additional information from interviewed persons etc. The interview is usually taken from the author of the information or from the person who actually received the information about the crime. Interview may be scheduled with other neutral parties, not directly involved in these facts.⁵³

52 The information is based on the results of interviews conducted with the representatives of academic circles and practitioners

53 The information is based on the results of interviews conducted with the representatives of academic circles and practitioners

It must be noted that such responses to the crime are not considered by the Criminal Procedure Code at all. Such practice, along with the fact that it does not coincide with the requirements of the Criminal Procedure Code, is also problematic in a sense that no warning is given on the imposition of criminal liability in case the false information is communicated. Defense rights are never explained to the person in this process. Mentioned measures are not limited in time either. Relevant officials are free to define desirable and effective method, time and duration of verification. The applicant does not have any procedural ability to control the proceeding of so called pre-investigative actions and receive information in a timely manner, on the application submitted by him.

Such approach increases risks of arbitrariness, refusal to start investigation or procrastination of investigation by relevant officials. The verification process requires significant effort. However, due to the fact that it is not carried out on the bases of norms set out by the Criminal Procedure Code, information obtained as a result of verification, does not have the value of proof. Accordingly, in case the investigation does start, the investigative agency has to repeat summons in order to frame information received by pre-investigative actions into the format of investigation.

2.7. Influence of Crime Statistics

In practice, the introduction or pre-investigative stage may have an intention to artificially influence crime statistics. Representatives of investigative agencies do not confirm the influence of crime statistics in any way, but they indicate that crime statistics should not be defining their activities. Statistics and cleared crime index were set as one of the main indicators of success for the management of Ministry for many years and this increased the influence of statistics on daily activities of policemen. Interviewed investigators declare that statistics should not be defining their activities⁵⁴.

Influence of statistics on investigative stage is shared by the representatives of experts interviewed within the project. According to their position, factor of crime statistics largely determines activities of law enforcement agencies. In this picture, 'Good statistical' situation might as well be assessed as a job guarantee for the law enforcement officer. Under such circumstances it is difficult for the authorized individuals to act with honesty and not to respond to the relevant information in a pre-investigative manner, instead of an investigative one.⁵⁵ It becomes clear, that by non-procedural response to the information about the crime, law enforcement agencies are trying to study the situation without starting the investigation and thus, avoid worsening crime statistics.

⁵⁴ The information is based on the results of interviews conducted with investigators and prosecutors

⁵⁵ The information is based on the results of interviews conducted with the representatives of academic circles and practitioners

Systematic analysis of the Criminal Procedure Code demonstrates that established practice of launching the investigation contradicts with requirements of the legislation. Obligation to launch an investigation on the bases of any information, is set out by article 105 of the Code as well. According to this norm, the investigation shall be terminated in case no action considered under Criminal code is established. It is clear that the Code requires to start an investigation to establish whether signs of crime in a specific action are well-founded or not. Investigation shall be terminated and/or criminal persecution shall not start/be terminated in case evidences obtained by the investigation does not ascertain the existence of crime.⁵⁶

2.8. Informing Prosecutor and Applicant on Launching the Investigation

According to the Criminal Procedure code, when information on the crime is received and the investigation is launched, the investigator becomes automatically obliged to immediately inform prosecutor. No uniform standard of informing the prosecutor about launching the investigation exists in practice. Obligatory indication of the Criminal Procedure Code to immediately inform the prosecutor can be interpreted differently. The Criminal Procedure Code does establish the necessity of informing, however, it never indicates what types of notification are sufficient procedural legal purposes.

With regards to receiving information about the crime and investigative response to this information, it is important to note that the initial edition of Criminal Procedure Code included control mechanisms for responding to mentioned information. More precisely, the investigator/prosecutor was obliged to inform the applicant on launching the investigation within 3 days of launching the investigation⁵⁷.

Current edition of the Code only foresees the possibility for the applicant to receive written notification confirming the receipt of the information⁵⁸. However, this provision is not of obligatory character for relevant agencies⁵⁹ and it becomes subject to their preferences. The problem is not fully solved by the fact that the victim has the right to receive information about the proceedings of the crime⁶⁰, as a person who delivered the information is not always granted a status of victim.

56 Commentary to the Criminal Procedure Code, plural authors, Tbilisi, 2015, page 337

57 Refer to Article 100, Criminal Procedure Code of Georgia (Edition before the amendments of 7 December, 2010, N3891)

58 Article 101, Criminal Procedure Code of Georgia

59 Ibid:Part2'

60 Article 57, Criminal Procedure Code of Georgia

Recommendations

To sum up, non-existence of a clear boundary between investigative and non-investigative stages represents a severe problem of the legislation. So do criminal intensity of preventive measures and risks of them being transferred into investigative stage, as well as artificially established pre-investigative stage, that does not even comply with legislative regulations, situation on crime statistics and its influence on procedural stages.

In order to eliminate mentioned deficiencies, the following is recommended.

- Regulations of the Law on Georgia on Police shall be redefined so that they could only be used for preventive purposes, so that reacting to already committed crime may only be possible via investigative actions in the frame of Criminal Procedure Code of Georgia;
- In order to avoid parallel mechanism to the investigation, the Law on Operative investigative actions” shall be annulled. Mechanisms of investigative effect existing in it, as well as measures of criminal justice intensity, envisaged by the Law on Police shall be subject to investigative actions under the Criminal Procedure Code of Georgia;
- It is important to abolish so called pre-investigative period and relevant bodies to launch the investigation immediately after receiving the information about crime, within the frames of Procedure Code and only by the established order;
- Every investigative body shall implement special rule for registering the information on the crime. The rule, along with instruction on registration, shall define mechanisms for controlling registration process, functions of controlling department, and appropriate liability measures for violating registration rules;
- The Criminal Procedure Code of Georgia shall make it obligatory for the relevant bodies to issue written notice to the applicant on the receipt of the information on crime;
- When assessing activities of a specific investigative body or official, crime statistics shall not be the only factor taken into consideration, as this in the end causes an issue of correct processing of crime registration and statistics;

3. Investigation and the Process of Obtaining Evidence

3.1. Introduction

According to the Criminal Procedure Code, the State, unlike for criminal persecution cases, does not have a full monopoly over the investigation. Within the scopes of adversarial process, the parties, in order to be placed in equal conditions in the investigation, shall have an opportunity to obtain and exchange evidence. This model somehow limits the State's sole authority over criminal jurisdiction and this strengthens chances of the defense side to independently obtain evidence⁶¹. The existing Criminal Procedure Code is based on basic principles on Adversarial system, however, it does not fully ensure the establishment of these principles. Equal investigative authorities of the parties, prosecutors board monitoring role over the investigation and impartial, full and thorough investigation guarantees, accordingly, are all problematic within the scope of the Code.

Initial edition of the Criminal Procedure Code contained important amendments to make the general principle of adversariality affectively work in practice. Provisions that innovated regulations of investigation and rules for carrying out specific investigative measures are particularly interesting: Firsts of all, operative-investigative actions were transformed to investigative actions. One of the main purposes of this amendment was to establish judicial control of same level over the activities that in their intensity did not differ from investigative actions and were potential causes of interference into personal life (e.g. secret eavesdropping, visual control, conspiracy etc).⁶²

Unfortunately, afore-mentioned legislative amendment was annulled before it actually came into force: According to transitional provisions of the Criminal Procedure Code established in 2009, the chapter on secret investigative measures would become active in April of 2011 and the law on operative-investigative actions remained into force before then.⁶³ However, by amendments of 24 September 2010, the parliament of Georgia, without any justification took out provisions on secret investigative actions from the Criminal Procedure Code, together with the indication on the annulment of the Law on Operative-investigative actions.⁶⁴

61 European Journal on Criminal Policy and Research, pp.203-224, pp.204-207

62 Refer to the explanatory card of the legislation, 'ა' 'ბ'

63 The Procedure Code also included the indication that the chapter on secret investigative actions would have a temporary nature and the Minister of Justice would prepare new legislation, regulating secret investigative actions in a new manner

64 Georgian Young Lawyers' Association, Gaps and Recommendations in Criminal Justice, 2012

Later, by the amendments of 1 August, 2014,⁶⁵ several measures from the Law on Operative-Investigative activities⁶⁶ were moved to the Criminal Procedure Code and became subject to Prosecutorial control. However, the mentioned reform was not systematic and the Law on Operative-Investigative actions is still in force, enabling specific measures to be carried out for the purposes of investigation, without being subject to relevant procedural standards.

By the Criminal Procedure Code of 2009, Scopes of Prosecutorial control over the investigation were expanded and independent action area for the investigator was partly limited. More precisely, the investigator became fully dependent on the management of the prosecutor overseeing his case, and prosecutor was defined as a decision maker on every investigative measure, subject to court approval. Such unequal distribution of authorities between the investigator and prosecutor is not characteristic to the adversarial model, in general. It is noteworthy, that according to the existing legislation, Investigator represents the prosecution. Thus, it becomes difficult to trust that the investigator will carry out investigation in a thorough, full and impartial manner.

This part of the research includes legislative analysis of specific investigative actions, assessment of the level of involvement of the prosecutor in the investigative stage and its comparison to classical adversarial systems. Analysis of problems related to full and objective investigation and monitoring authorities of the investigator will also be presented.

3.2. Status of a Prosecutor and Level of His Involvement in Investigative Measures

Institutional and operational separation of agencies carrying out investigative and prosecutorial functions is of crucial importance in limiting administrative and material resources of the State in the investigation process. In order to achieve this it is important for the legislation to clearly define statuses of prosecutor and investigator, their institutional objectives and establish specific structural barriers between them – mechanism of checking and verification.

The Georgian legislation, at one glance, clearly defines the status of a prosecutor and grants him exclusive function of criminal persecution. In other words, according to the Criminal Procedure Code, The Prosecutor's Office is the only prosecuting authority in the country. For the execution

65 1 August 2014 Law on amendments to the Criminal Procedure Code: <https://matsne.gov.ge/ka/document/view/2457218#DOCUMENT:1>

66 Eavesdropping and recording of telephone conversation; removal and fixation of the information from the communications channel, control over post deliveries, secret video and audio recordings, filming and photo shoots, electronic surveillance procedures (Article 1431, Criminal Procedure Code of Georgia)

of mentioned function, the Prosecutor's office is equipped with procedural oversight authority over the investigation, along with other tools.⁶⁷

Prosecutor is an active subject involved in the investigation stage, and gets involved in the investigation from the initial stage⁶⁸. Involvement of a prosecutor in the investigation is expressed by giving mandatory instructions to the investigator, assign criminal case to a specific investigator, by following requirements of Investigative Jurisdiction, or seizing a case from the investigator; the prosecutor is also authorized to get directly involved in the investigation or to carry it out on his own with a status of an investigator. He has unlimited authority to review case materials or the entire case and to seize the investigation in specific instances⁶⁹.

The Criminal Procedure Code also establishes Prosecutor's obligatory participation in several investigative measures and procedural activities. Only the prosecutor is authorized to appeal to the court to request approval on such investigative or procedural measures that limit constitutional rights and freedoms of an individual⁷⁰. The list of such measures is quite broad and it includes search seizure, secret investigative measures, mandatory interrogation of witnesses etc.

Unlike the prosecutor, the investigator is not authorized to take independent decisions on investigative measures of the same type. If taken into consideration how important the listed investigative measures are for the thorough review of cases, it can be concluded, that the investigator is fully dependant on the prosecutor In the investigation process.

With regards to obtaining evidence in practice, this process is different in various investigative agencies. As a rule, planning the process of obtaining evidence as well as basic investigative actions are carried out by the involvement of the prosecutor. Investigation process is most frequently defined by the prosecutor, taking investigator's opinions into consideration. Active involvement of prosecutors is also caused by the fact that in number of cases investigators try to avoid the responsibility, which might be caused by the problem of their qualifications⁷¹. In some investigative bodies, however, (investigative service of the Ministry of Finance), investigator is the one who draws strategy for obtaining evidence and obtains the evidence too, through the communication with the prosecutor.

It is noteworthy that investigators are more independent in the cases of more simple category and prosecutor's involvements in there is also comparatively low. Qualification problem stands out

67 Article 32, Criminal Procedure Code of Georgia

68 Article 100, Criminal Procedure Code of Georgia

69 Article 33, Criminal Procedure Code of Georgia.

70 Article 112, Criminal Procedure Code of Georgia

71 The information is based on the results of research interviews conducted with the representatives of academic circles and practitioners

while investigating some crimes of a specific nature – when a legal case contains not only criminal but adjoining, sectoral characteristics too. E.g. in case of fraud, when equal qualifications are required in criminal and civil laws. The issue is intensified by the fact that no specialized investigative bodies, oriented on specific cases, exist in the country⁷².

As made obvious by the above stipulations, scopes of procedural oversight of the prosecutor are too broad and include every important aspect of the investigation. Under such conditions, questions on the status of the prosecutor naturally arise – shall the prosecutor be leading the investigation, or shall there be an external party monitoring him in the process in the sense of legitimacy and effectiveness.

It shall be noted that in classic adversarial model, prosecutor has more limited investigative authorities. Legislations of some countries⁷³ only grant the authority of electronic surveillance or execution of secret investigative actions to the prosecutor in exceptional cases⁷⁴. Countries of common law are characterized by strict separation of the prosecutor from the investigation process. Unlike Georgian legislation, legislations of England, Wales and US, prosecutors do not exercise any investigative powers at all in either jurisdiction and have no authority whatsoever to identify an investigative strategy or to initiate the implementation of specific investigative actions. These are matters entirely and exclusively within the discretion of the investigative bodies. The prosecutor's involvement in investigation stage may be merely advisory. Outcomes of consultation only have a recommendational character and, thus, are not obligatory for the investigative agency⁷⁵.

In these countries discretion to start an investigation is only granted to the Police, which is not considered as a prosecution and has an authority to fully lead the investigation. Accordingly, liability for investigation of any case is distributed not between the investigator and prosecutor but within the investigative agency itself, between the direct investigator of the case and a superior investigator⁷⁶. The investigative agency is responsible for ensuring the safety of victims and obtaining evidence, independently from the prosecutor's office⁷⁷.

72 The information is based on the results of research interviews conducted with the representatives of academic circles and practitioners

73 The US legislation is familiar with the involvement of prosecutor in the stage of investigation, at a federal level, for some instances

74 AMERICAN BAR ASSOCIATION (2013). ABA Standards for Criminal Justice (Third Edition). Prosecutorial Investigations. Washington, American Bar Association., p.1

75 JACKSON, R. H. (1940). The Federal Prosecutor. 3(5) Journal of Criminal Law and Criminology, pp.3-6., p.3

76 Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, s.3(i).

77 Harris, D. (2012). The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and how this Affects Police Reform Efforts. Luna, E., Wade, M. and Bojańczyk, A. The Prosecutor in Transnational Perspective. New York, Oxford University Press: 54-66, pp.57.

3.3. Procedural Guarantees for Carrying out thorough, Full and Impartial Investigation

Provisions of the Criminal Procedure Code are contradictory in identifying investigator's status and authorities during the investigation as well. The investigator is granted a status of a party (prosecution), on the one hand, and is obliged to conduct investigation in a full, thorough and impartial manner, on the other hand.⁷⁸ The latter obligation takes the investigator out from the position of the prosecution. The investigator shall not act only for the effective criminal persecution at a later stage, but shall study every important circumstance of the case in a thorough, full and impartial manner and make is possible to obtain beneficial evidence for both parties.

In order for the investigation to be carried out fully, thoroughly and objectively, it is important for the legislation to ensure operational independence of the investigator, expressed in the definition of the status of the investigator in the first place. As it has been mentioned already, the existing Criminal Procedure Code, unlike the older edition, perceives investigator as prosecution party⁷⁹.

Contradictory provisions in the Criminal Procedure Code with regards to the status and role of the investigator, as well as prosecutor's active oversight in the process, make executing the obligation of full, thorough and impartial investigation in practice, impossible. Existing edition of the Code cannot ensure functional independence of the Investigator from the prosecutor, and this effects the level of impartiality of the investigation at the end.

Status of the Head of Investigative Service in the investigation process is also problematic. He is not considered as a subject of investigation, by the existing Criminal Procedure Code. However, in practice, heads of investigative services play an important role in the process of Investigation. Interviews with prosecutors and investigators have demonstrated that the involvement of the head of Investigative body in the investigation process is different in various agencies. Head of investigative services of the Ministry of Internal affairs – head of Police or his deputy – mainly participates in handling administrative issues such as ensuring movement of the investigator and other technical questions. However, there are cases, where the head gets involved in the contextual part as well. E.g. participates in defining strategy and tactics of an investigative measures directly.

Contextual involvement of the head of the agency in the investigation process might not have the permanent character but it depends on the category and significance of the crime to be investigated. For instance, in cases of assassination, heads are more actively involve than in other types of

78 Article 37, part 2, Criminal Procedure Code of Georgia

79 Article 3, part 6, Criminal Procedure Code of Georgia

cases. The Investigative Service of The Ministry of Finance has a mechanism of periodic reporting to the head that may be followed by additional commands from the manager⁸⁰.

It is straightforward that the Head of the Investigative Service plays an important role in the practice and can directly participate in the investigation process as well. The fact that this issue is not regulated by the legislation at all, increases risks of developing non-uniform practices and taking arbitrary decisions by the Head of the Service.

In countries of classical adversarial model, where investigative bodies are strictly distant functionally and institutionally⁸¹, Investigator enjoys maximum independence at the investigation stage. These countries are not familiar with the practice of granting the status of prosecution party to the investigator. Thus, it is logical, that unlike in Georgia, the investigator is equally obliged to obtain convictional and equittal evidence⁸². Therefore, it is crucially important investigator to have the obligation to collect exculpatory as well as inculpatory evidence.

3.4. Disclosing Evidence with the Parties

Together with objective investigation, disclosing evidence and its availability for another party is of particular importance to the adversarial process. The Criminal Procedure Code obliges both parties to satisfy each other's request on sharing the information that is intended to be submitted to the court as an evidence, at any stage of criminal proceedings⁸³. The Criminal Procedure Code also obliges the prosecution to ensure the provision of existing acquittal evidence to the defense party.

In this case it becomes problematic that there are no effective legal impact mechanisms for the violation of procedural obligation for disclosing evidence. The only legal consequence of not exchanging information (including acquittal) to the defendant is that the prosecutor is not able to present such information at the court⁸⁴.

As conducted individual interviews highlighted the issue is problematic in practice as well. In most cases, procedural legal guarantees for disclosing evidence are assessed differently in practice. According to one approach, the prosecution party is not obliged to obtain acquittal evidence. However, if such evidence is obtained in any case, unconditional obligation of passing such evi-

80 The discussion is based on the results of research interviews conducted with the representatives of academic circles and practitioners

81 European Journal on Criminal Policy and Research, pp.203-224, pp.204-207.

82 Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, paragraph 3(5)

83 Article 83, part 2, Criminal Procedure Code of Georgia

84 Same as above, part 3

dence to the defense party is imposed. Prosecutor's authority to not present acquittal evidence at the court is also assessed as problematic⁸⁵.

Unlike Georgia, other countries of adversarial model, norms for obtaining and disclosing evidence, as well as related liabilities are strictly defined by the legislation. For instance, according to the legislation of England and Wales, the investigator, as an independent party, is liable to obtain convictional as well as acquittal evidence. Exchange of evidence is mainly the function of Prosecution⁸⁶ and investigator is not involved in this process. Federal legislation of the United States obliges the prosecutor to make timely disclosure to the defence at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

At federal as well as local levels in the US, the Prosecutors office is obliged to ensure the availability of even minor acquittal evidence to the defense party. Clearly, the question as to what is "material either to guilt or punishment" is a complex one and some states have simply adopted an "open file" policy to enable the defence to have full disclosure⁸⁷. Other countries of adversarial model, unlike Georgia, has also established strict legal consequences for violation the rule of exchanging evidence. E.g. according to the procedure legislation of England and Wales, failure to disclose such evidence will result in the court ordering a prosecution to be discontinued or a conviction to be overturned⁸⁸.

3.5. Scopes and Objectives of Procedural Oversight over the Investigation

According to the Criminal Procedure Code, the prosecutor is an individual equipped with the exclusive authority of criminal persecution. In order to carry out this function effectively he is in charge of procedural oversight over the investigation. Effective investigation is a necessary precondition for criminal persecution, thus, it is logical that the intention of supervision over the investigation is related to better execution of criminal persecution and not to ensuring the impartiality of the investigative process.

85 The discussion is based on the results of research interviews conducted with the representatives of academic circles and practitioners

86 Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, paragraph 3(5).

87 Siegel, D. M. (2014). An Introduction to Exculpatory Evidence Under US Law for the Uzbek Prosecutor. Boston Research Paper No. 15-06, p.7

88 The Police and Criminal Evidence Act 1984, Code C, para. 11.1A. See <https://www.gov.uk/guidance/police-and-criminal-evidence-act1984-pace-codes-of-practice>, accessed 14th February 2018.

It is not debatable that the prosecutor, taking his obligations into account, cannot remain as a neutral figure in the process of investigation and his main priority will always be to obtain evidence favourable for the prosecution. Based on the fact that the prosecutor is a party in criminal proceedings,⁸⁹ his procedural oversight over the investigation shall have a limited character and his involvement in the investigative process in general should be minimized. However, as mentioned previously, the practice has demonstrated quite a contradictory conditions, as the involvement of the prosecutor in the process of investigation is basically unlimited.

More precisely, prosecutors oversight role is expressed in different ways in the course of the investigation. In this context, one of the most significant functions of the prosecutor, as of the procedural leader of the investigation, is to annul decision taken by the investigator. The prosecutor is also entitled to review the complaint on investigator's actions and decisions as well as to periodically request materials of criminal case⁹⁰. Despite the afore-mentioned procedural interventions in investigative actions, the Criminal Procedure Code also enables the prosecutor to, by following the Investigative Jurisdiction, transfer a case from specific investigator and to different one⁹¹.

The only prosedural leverage that the investigator has when communicating with the prosecutor, is the right to refuse executing the commands of the latter, in which case the investigator shall present the case and his opinions in writing to the superior prosecutor. The superior prosecutor in such case annuls the command of a subordinate prosecutor or transfers the command to other investigator for execution⁹². This mechanism cannot be considered as impartiality and objectiveness guarantee of the investigation as it only allows for the possibility of 'negative decision' – seizing individual from the case or annulling the command⁹³. Interviews with practicing investigators and prosecutors have demonstrated that they never refer to mentioned legal leverage and any disagreement between the prosecutor and investigator is always settled via internal communication.

Another significant element of procedural oversight is the control over the lawfulness of investigators actions. According to the legislation,⁹⁴ investigators actions related to the investigation of criminal case are objected before the superior prosecutor, however this loses the point in practice, since the prosecutor is the main decision maker on important circumstances of the investigation. At the same time, the interviews have revealed that investigators, in most cases, undergo consultations regarding the strategy of investigation as well as before actually conducting specific investigative activities. Thus, according to the current situation, decisions/actions that are

89 Article 3, part 6, Criminal Procedure Code of Georgia

90 Article 33, Criminal Procedure Code of Georgia

91 Same as above, part 6, point 'a'

92 Article 37, part 3, Criminal Procedure Code of Georgia

93 The Human Rights Education and Monitoring Center (EMC), 'Politics of Invisible Power' 2015, page 54

94 Article 33, part 6, subparagraph 'h', Criminal Procedure Code of Georgia

objected before the prosecutor, are the ones that were planned through the involvement of this very prosecutor.

It becomes clear that absolute boundaries of procedural supervision over the investigation as well as strong subordination of the investigator to the prosecutor, cause imbalance of the investigative system. The investigator is in fact no longer able to conduct a thorough investigation. The prosecutor, instead of being a neutral controller of the investigation and investigative process, is directly leading the investigation and takes decisions on all important aspects. Under such conditions it becomes vague what shall prosecutor's role be in the investigative process, what shall his main priority be – conducting effective and objective investigation ensuring maximum protection of rights for each and every citizen or preparing case for the criminal persecution and the decision to convict guilt.

As mentioned in the previous paragraph, prosecutors active involvement is not characteristic to the criminal proceedings of the adversarial system. Institutional and functional separation of the Prosecutor's office from investigative system ensures maximum independence of investigation from the prosecutor. One of the leverages of functional independence of the investigator is the fact that in discussed systems, the investigator is not considered as a prosecution⁹⁵. In countries of adversarial model, prosecutor is not authorized to directly lead the investigation and get actively involved in the process⁹⁶.

Recommendations

A legislative, practical and theoretical analysis of discussed issues has revealed main problems faced at different stages of criminal proceedings. As confirmed by the research, equal investigative authorities of the parties, issues of full, thorough and impartial investigation, existing legislative order of exchanging evidence, issues of institutional and functional independence of agencies in the scope of adversarial model, as well as the broad investigative authorities of the prosecutor and the risk of his influence on the impartiality of the investigation - all represent a significant problem.

In order to eliminate discussed problems, it is important to consider the following:

- The Prosecutor's Office of Georgia shall be seized the competence to investigate criminal offenses and it should be distributed to other investigative bodies, thematically;
- The prosecutor's authority to seize one investigator from the case and transfer the case to the other investigator, shall be annulled;

95 Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, paragraph 3(5).

96 European Journal on Criminal Policy and Research, pp.203-224, pp.204-207

- The prosecutor shall not be authorized to get directly involved in the investigation process and fully run the investigation, obtaining the status of an investigator;
- In order to distance the investigation and the prosecutor's office more on operational level, the prosecutor's authority to give binding instructions to the investigator for the purposes of investigation, shall be limited. The Criminal Procedure Code of Georgia shall specify that procedural oversight over the investigation is carried out to ensure the lawfulness of investigation and the prosecutor has no authority to identify an investigative strategy within the prosecutorial supervision;
- The prosecutor shall only be entitled to change or annul investigator's actions/decision if they are obviously illegal; admissibility and effectiveness are not sufficient motives for the prosecutor to interfere in the activities of investigator;
- In order for the investigator to study the case thoroughly and impartially, it is necessary for his status to be redefined in the Criminal Procedure Code; Investigator shall not be considered as a prosecution and shall be distant from the Prosecutor's office institutionally as well as functionally;
- In order to decrease intensity of investigator's dependence on the Prosecutor, it is important for their communication to have an obligatory written character. At the same time, in cases when the investigator deems it necessary to carry out investigative actions requiring an approval from the court, but the Prosecutor does not agree, the Prosecutor's refusal for appealing to the Court shall be justified in writing and filed in case materials (It is noteworthy that, in some adversarial jurisdictions a police officer has the authority to apply for the court warrants, without prosecutor's involvement in the process);
- The Criminal Procedure Code shall define procedural status of the head of investigative service. The later shall ensure effectiveness and high quality of investigation carried out by service reporting to him. The Head of investigative service shall be entitled to give out binding instructions to the investigator, assign case to a particular investigator, examine complaints related to investigator's actions etc;
- In the course of disclosing evidence by the parties, legal effect shall become more severe for cases, when the investigator/prosecutor did not ensure to disclose to the defendant of such evidence that excludes or alleviates person's guilt; Such cases shall become grounds for terminating criminal prosecution or for acquittal sentence by the Court.

Research Summary

The legislative and practical analysis of the investigative system revealed the fundamental problems that exist in the areas of institutional, organizational and functional independence of the investigation. These problems largely determine the settings of the objective, thorough and effective investigation.

The main purpose of systematic reform of the Criminal Procedure Code was the creation of guarantees of an independent and objective investigation to improve the defendants' rights. However, the incomplete review of the legislation and the lack of supportive institutional reforms hindered the process of achieving the goal. The research shows that the existing legislative order does not provide sufficient guarantees for the independence of the investigative system, which impedes the process of thorough and impartial investigation.

Under the current legislation, an investigator has the status of the prosecution and is largely bound by the prosecutor's decisions regarding a case. A prosecutor has direct investigative powers and also has the right to give the investigator mandatory instructions, which enhances the influence of the prosecution on the process of investigation. In addition, a prosecutor's active involvement in the investigation of the case prevents the proper supervision of the legitimacy of the investigation.

Within the frameworks of the research, it became clear that in order to achieve the impartiality and independence of the investigation, it is important to review the procedural status of an investigator. An investigator should not be regarded as the prosecution party and a prosecutor should not be entitled to investigative powers. For the purpose of dividing the investigative and prosecutorial activities, it is important for the Prosecutor's Office to not have an investigative competence and the investigative jurisdiction should be regulated by the law instead of the order of the Minister of Justice.

The goal of the procedural supervision should be the control of the legality of an investigation, therefore prosecutor should not be entitled to decide the strategy of the investigation or to conduct certain investigative actions. In order to ensure the quality of investigation, the research revealed the need to determine the procedural status of the head of the investigative agency under the Criminal Procedure Code. Instead of the case prosecutor, the head of the investigative agency, together with investigators of the case, should ensure the efficiency and quality of the investigation carried.

In order to improve the quality of an investigation, the attention should be given to the investigator's qualification. As the research shows, there are no uniform qualification requirements for investigators, including the fact that the investigator of main and largest investigative body - the Ministry of Internal Affairs – is not required to have a higher legal education. It is important to determine consistent and relevant minimum qualification requirements for investigators of all investigative bodies.

One of the main challenges of the investigative system, as the given research demonstrated, is the existence of the so-called “preliminary investigative” mechanisms, which is caused by the controversial legislative framework. The research showed that the operative-investigative and investigative activities are not divided. A number of investigative agencies are involved in investigative and operative-investigative activities at the same time. In order to eliminate legislative and practical inconsistencies, it is important to implement the obligation to start an immediate investigation upon receiving information about the crime. At the same time, it is necessary to bring the legislative system in line with the Criminal Procedure Code to eliminate parallel investigative mechanisms and the superficial “preliminary investigative” stage, which is conducted without prosecutorial and judicial control. In this regard, one of the main recommendations of the research team is to repeal the law on operative-investigative activities. The research also revealed that the process of disclose evidence by the parties needs to be regulated differently. It is important to aggravate the legal outcome of cases when the prosecution does not provide for the exchange of exclusion and/or mitigating evidence for the accused. Such cases should be the grounds for termination of criminal prosecution against a person, or the acquittal by the court.

Taking into consideration the results of the research, in order to ensure independent, thorough and impartial investigation, it is necessary to organize systemic reform at the legislative level, as well as, in terms of organization of the system of the investigative and prosecutorial bodies. The investigative system reform must ensure a clear division between the investigative and prosecutorial activities, as well as, increase the role and importance of an investigator in the investigation process and strengthen the quality of prosecutor's supervision by distancing a prosecutor from an investigation.

Annex

Authorities of investigator and prosecutor in the investigative process (according to the legislation in force)	
Investigator	Prosecutor
Launching the investigation/qualification of crime	
<ul style="list-style-type: none"> The investigator is authorized to start an investigation on the crime, according to the relevant article of the Criminal Code (Articles: 37,100); Investigator is obliged to immediately notify the prosecutor about launching the investigation (article 100). 	<ul style="list-style-type: none"> The prosecutor is obliged to start an investigation on the bases of information about the crime (Article 100); Prosecutor is authorized to change qualifications of investigation started by the investigator or terminate the investigation (Article 33, part 6, paragraph „G“).
Investigative jurisdiction	
<ul style="list-style-type: none"> The investigator starts investigation on the crime under his/her investigative jurisdiction (Order N34 of the Minister of Justice). 	<ul style="list-style-type: none"> The Chief Prosecutor of Georgia or a person authorized by him is entitled to assign investigation to the investigative agency despite the investigative jurisdiction (Article 33. part 6, paragraph „a“); The prosecutor is entitled to transfer a case from one investigator to the other (article 33. part 6, paragraph „a“); If a competence of other investigative body becomes relevant after launching the investigation, the case, according to its subordination, is handed over by the prosecutor (Article 102).

Rights and obligations of investigator and prosecutor in the process of investigation	
<ul style="list-style-type: none"> • The investigator is obliged to conduct investigation in a full, thorough and objective manner (article 37, part 2); • The investigator is obliged to follow the instructions of the prosecutor (Article 37. part 3). <p>The investigator is entitled to:</p> <ul style="list-style-type: none"> • Investigator is entitled to present a case and personal opinion on prosecutor's command to the superior prosecutor; • At his own initiative, carry out only such investigative actions that do not restrict private ownership or the right to personal life; The investigator is not authorized to independently take decisions on search and seizure (except in case of urgent necessity) implement secret investigative actions related digital data, or interrogate the witness (except for specific cases considered under the older edition of Criminal Procedure Code); • Request a revision of a submission of document; • Invite interpreter, expert, or a person to be identified; • Issue command on bringing detained persons to the relevant location; • Send material to prosecutor/the court in cases his decision is being objected; • Address the prosecutor to grant investigative assignment to another investigator⁹⁷. 	<ul style="list-style-type: none"> • The prosecutor is entitled to implement any investigative action, appeal to the court by motion on conducting a specific investigative action, assign mandatory instructions to the investigator regarding implementation of a particular action or its avoidance (Article 33); • Request either part of case material or a full case; • Annul decision of the investigator; • Make a decision about the complaint on investigator's actions, give an explanation in case of appeal.
Protecting rights of participants of criminal proceedings	
<ul style="list-style-type: none"> • The investigator is not authorized to grant status of a victim to the victim of the crime (article 56, part 5); • The investigator is not authorized to independently take decisions on implementing measures for protecting rights or parties involved in the process, in order to ensure their security (Article 68, part 2). 	<ul style="list-style-type: none"> • Status of a victim is granted to the person by the prosecutor (Article 56, part 5); • The prosecutor takes decision on the usage of special measures of security (Article 68, part 2).

⁹⁷ Criminal Procedure Code, article 37.

Accusing a person and case proceedings	
<ul style="list-style-type: none">• The investigator is not authorized to accuse a person (article 169, part 2);• The investigator is not authorized to address the court through the motion on detention (article 171, part 1);• The investigator is not authorized to participate in the selection of evidence should be presented to the Court;• The investigator is interrogated as a witness at the trial.	<ul style="list-style-type: none">• Only the prosecutor is authorized to accuse a person (article 169, part 2);• The prosecutor is authorized to address the court through the motion on detention (article 171, part 1);• The prosecutor takes independent decision on the selection of evidence to be presented to the court;• The prosecutor is authorized to use diversion/mediation mechanism against the defendant or sign plea agreement with him (article 168¹, 210).

The post-reform situation	
Institutional arrangement:	
<ul style="list-style-type: none"> • The Criminal Procedure Code defines the status of the Head of Investigative Agency and grants him the authority of direct guidance over the investigation; • The Head of the Agency will be authorized to give mandatory instructions to the investigator, change investigator’s decision, transfer a case from one investigator to the other, review complaints on the legitimacy of investigator’s actions; • The investigator and the Head of Investigative Agency should not be considered as the prosecution; • The prosecutor will carry on with procedural oversight over the investigation, in order to control the lawfulness of the investigation. 	
Competences of prosecutor and investigator	
Investigator	Prosecutor
Launching investigation/qualification of the crime	
<ul style="list-style-type: none"> • The investigator is obliged to start an investigation immediately after receiving information about the crime under him investigative subordination; • The investigator independently decides on what qualification to grant to the action. However, the Head of the Agency is entitled to change the mentioned decision; • The investigator immediately informs the prosecutor on launching the investigation; • The investigator is not authorized to terminate the investigation. 	<ul style="list-style-type: none"> • The Prosecutor’s Office is not an authorized body for carrying out an investigation; • The Chief Prosecutor of Georgia, only in exceptional cases, is authorized to transfer the case from one investigative agency to the other, through the justified decision, despite the obbing of investigative jurisdiction rules. This decision shall become inseparable part of the case; • The prosecutor is not authorized to transfer a case over from one investigator to the other; • The prosecutor is authorized to terminate the investigation on the bases of investigator’s motion.

Rights and obligations of prosecutor and investigator in the process of investigation	
<ul style="list-style-type: none"> • The investigator collects exculpatory as well as inculpatory evidences; • The investigator is authorized to independently take decisions on conducting investigative actions, except those that restrict rights of a person and require court order; • The Head of Investigative Agency leads the process of investigation, in the scope of which, he is authorized to give mandatory instructions to the investigator, transfer a case from one investigator to the other; • The investigator is authorized to address the prosecutor with the purpose of carrying out investigative actions, which require court order. 	<ul style="list-style-type: none"> • The Prosecutor is in charge of procedural oversight over the investigation, in order to ensure the legitimacy of investigation/particular investigative actions; • The prosecutor does not have a status of investigator and is not authorized to directly carry out investigative actions; • The Prosecutor is authorized to observe the course of investigation via electronic system; • The prosecutor can address the court by the motion on implementing such investigative action that causes interference into a person's constitutional rights;* • In case the prosecutor deems that no sufficient base exists for submitting motion to the court, his position shall be justified in writing and be reflected in the criminal case; • The investigator has a one-off right to object the prosecutor's refusal on submitting the motion before the superior prosecutor; • The prosecutor is authorized to review the complaint on the lawfulness of investigator's actions; • The prosecutor is authorized to annul unlawful decision.

Protecting rights of parties involved in the process	
<ul style="list-style-type: none"> • The investigator is not authorized to grant status of a victim to the victim of a crime. 	<ul style="list-style-type: none"> • Status of a victim is granted by the prosecutor; • The prosecutor, within the scope of his competence, takes the decision on the use of special security measures against the person.
Accusing a person and case proceedings	
<ul style="list-style-type: none"> • The investigator is not authorized to accuse a person or to address the court with a motion on detention; • The investigator does not participate in the selection of evidence to be presented at the court; • The investigator is interrogated as a witness at the trial; • The investigator does not participate in the process of disclosing evidence to the parties. 	<ul style="list-style-type: none"> • Only the prosecutor is authorized to accuse a person; • The prosecutor takes independent decision on the selection of evidence to be presented to the court; • The prosecutor is obliged to disclose every obtained evidence with the defense side, including those that may be acquittal or may alleviate the guilt; • The prosecutor is authorized to use diversion/mediation mechanism against the defendant or sign plea bargain.

*Prosecutor's involvement in this process diverse in different adversarial jurisdictions. For instance, according to the South Wales legislation, the police officer has the authority to apply directly for seeking the court warrants, but in some cases, only a high ranking police official holds the authority to apply for specific court warrants. Confirming with the US legislation, prosecutor should review court warrant applications before they go to a judge, even if the jurisdiction allows police officer to apply directly. In reviewing the application, the prosecutor attempts to assure that it is complete, accurate and legally sufficient.