



Why we need the investigative system reform

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Introduction

Conducting an independent and objective investigation has long been a major challenge for criminal justice in the country. Bias and growing political influences over responsible agencies largely undermine public confidence in the investigation process.

Total public distrust of the process is conditioned by many objective reasons. The main problems, still, remain to be the politicized system and inadequate legislative guarantees.

Objectivity of the investigation is primarily determined by **institutional** and **functional** (operational) independence. Institutional independence is important not only for minimizing external political influences, but also for determining which agency exercises legal and political accountability for the outcome of an investigation. Functional independence is a basis of the impartiality of the process and the objectivity of the investigation.

The main problem in terms of independence is the incorrect, improper redistribution of powers between the prosecution and the investigative bodies, resulting in excessive supervisory mandate of the prosecution over the investigation.

The problem of delegating responsibilities and functional independence in relation to the investigation was clearly exemplified in the Khorava Street case, which led to significant political processes in the country. The Prosecutor General resigned,¹ a Parliamentary Fact Finding Commission was set up², and it revealed a range of significant systemic problems.³ It can be said that this was a precedent on the basis of which the state, for the first time, openly started working on the reform of the investigative system.⁴

Work on the reform was commenced under the leadership of the Ministry of Internal Affairs. In this initial stage, the civil sector was also actively involved in the process.⁵ The agency was openly cooperating with interested parties and shared a number of proposals coming from the CSOs. A concept of the reform was developed,⁶ which was further evaluated by the Venice Commission.⁷ Later, due to the change in the leadership of the Ministry, the working process was more or less closed and civil society was also distanced from this process. However, according to the official statement of the Ministry, the draft law is ready and the main themes/topics are being agreed with the agencies.⁸

¹ For detailed information, see: <https://bit.ly/3ftxZ2r>

² See: Resolution of the Parliament of Georgia of September 21, 2018 N3531-IS

³ Commission findings available here: <https://info.parliament.ge/#law-drafting/16335>

⁴ For additional information, see: <https://bit.ly/3fi8y3I>

⁵ For additional information, see: <https://bit.ly/2P89Ao8>

⁶ See: CDL-REF(2019)004-e Georgia - Concept of the reform of the Criminal procedure code regarding the relationships between the prosecution and the police - stages of investigations under the Georgian Law (explanatory note) available here: <https://bit.ly/3tiaPzB> Last accessed: 15.03.2021

⁷ See: CDL-AD(2019)006-e Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), available here: <https://bit.ly/3bOspFj> Last accessed: 15.03.2021

⁸ The Minister of Internal Affairs made an explanatory statement in this regard, including at the parliamentary hearing held on March 5 in the format of "Minister's Hour": <https://bit.ly/3qONO5E>

The importance of the issue is also underlined by the fact that increasing the degree of independence of the investigation has become part of the election program of almost all leading political groups. The ruling party, also, has taken political responsibility for the reform process.⁹

Main Challenges - The need for reform

As noted, we face problems in two main directions namely, institutional and functional independence, on the legislative and practical levels.

There are following challenges in the Institutional level:

- **Two different functions under the mandate of the prosecution's office** - The prosecutor's office is, in essence, the prosecuting authority, which must decide, on the basis of the findings of the investigation, whether there are sufficient grounds to initiate the prosecution. However, under our law, the prosecutor's office has a right to prosecute as well as to conduct an investigation, simultaneously. It is the prosecutor's office that is empowered to launch an investigation into the most important types of cases, including those allegedly committed by political officials or alleged crimes involving these persons holding political positions.¹⁰ Accumulation of direct investigative, oversight and prosecution functions within a single agency undermines the independence of the investigation. In this situation, investigation is clearly inclined to attain "favorable" results for prosecutor's office.
- **Dubiety of functions** - In many investigative bodies, operative and investigative divisions are not clearly separated. Combining investigative and operative functions into one service leads to dubiety of functions, overwork of investigators and reduces the standard of transparency of the process and the quality of investigation in general.¹¹
- **Proper Education and qualification problems** - Uniform qualification requirements for investigators remains a significant challenge. Investigators are required to have a higher legal education only at specific investigative organs.¹² In turn, inadequate education also has a significant impact on the quality and standard of the investigation.

Challenges in terms of functional independence

In 2009, the country's criminal procedure legislation underwent fundamental reforms. Criminal procedure shifted to an adversarial model.

See: Georgian Dream Government Program 2021-2024 "Building a European State" Available: <https://bit.ly/3lh3c9C> Last accessed: 15.03.2021

¹⁰ Order N3 of the Prosecutor General of Georgia of August 23, 2019 on Determining the Investigative and Territorial Investigative Jurisdiction of Criminal Cases

¹¹ Investigative System Analysis, Human Rights Education and Monitoring Center (EMC) 2018, available at: <https://bit.ly/38WMGHd> last accessed: 15.03.2021

¹² *ibid*: p: 15

The idea of the adversarial process is to more or less equate the procedural status of the prosecution and the defense side. Therefore, for the adversarial model, it is essential that the accused be recognized as a subject of the process and not as an object in the hands of the state.¹³

There are following challenges in the functional level:

- **Procedural Status/Position of Investigator** - In order for the outcome of the investigation to be objective, fair to both parties on an equal footing, it is, first and foremost, necessary for the investigator to be a neutral, independent party. Under the current regulations, the investigator is, on the one hand, obliged to conduct the investigation thoroughly, independently and objectively,¹⁴ although, at the same time, s/he is on the side of the prosecution together with the prosecutor.¹⁵ Thus, the investigator is not allowed to act independently due to their procedural standing and position.
- **Prosecutor's Influence on the Investigation** - The conduct of investigation, its process is fully dependent on the prosecutor. During the investigation, the prosecutor may, at minimum:



- **The power to control the Investigation** - As noted, the prosecutor has leading role in the investigation. At the same time, the prosecutor has a power to control the investigation, (the right of procedural supervision). In this regard, when the prosecutor directly plans the investigation process, elaborates a strategy, gives the investigator mandatory instructions to follow, the prosecutor's oversight function loses its essence.

The investigator may present the case and his or her views to a superior prosecutor.¹⁶ This is practically the only measure that the investigator can exercise in relation to the prosecutor. However, the prosecution

¹³ Vogler, R. (2017). A World View of Criminal Justice. Aldershot, Ashgate, pp.27

¹⁴ Criminal Procedure Code, Article 37

¹⁵ Criminal Procedure Code, Article 3

¹⁶ Criminal Procedure Code, Article 37

office is fully centralized agency, where the positional hierarchy is strictly protected. In turn, all decisions of the subordinate prosecutor are pre-agreed with the superior prosecutor. In the conditions of strict centralization of the prosecutor's office, the credibility of this mechanism is questionable and becomes largely formal. Moreover, in practice, this mechanism is almost never used and any disagreement between the prosecutor and the investigator is resolved on an interpersonal level.¹⁷

The need for reform for the effective functioning of the State Inspector's Service

The situation regarding the independence of the investigation is particularly critical for the effective functioning of the State Inspector's Service.

The launch of the State Inspector's Service, as an independent investigative mechanism in the country, is an important step of recent years. This agency has an important mandate to conduct an independent investigation into some of the crimes committed by law enforcement officials.¹⁸

The Inspector's Service, too, faces many challenges, both at the institutional and functional levels. The biggest challenge is to conduct an effective investigation under the existing regulation. Although the Inspector's Service is an institutionally independent body, it does not have proper functional independence from the Prosecutor's Office. Under current law, the Inspector's Service has many hindrances to conducting an investigation objectively, impartially, independently of the prosecuting authority. And, this was the main objective of setting up the Service, to distance the process from potentially interested parties/organs and incorporate the processes under the mandate of a strictly independent agency.

The Inspector's Service experiences all the above obstacles that are created by an improper distribution of powers between the investigator and the prosecutor. Moreover, for this entity, given its mandate and core function, the powers of the Prosecutor General - to withdraw a case from one investigative authority and transfer it to another investigative authority, is further problematic.¹⁹ Although the Inspector's Service has been empowered exclusively to investigate cases of torture, threat of torture, inhuman or degrading treatment or punishment,²⁰ the law does not adequately address the potential risks stemming from the decision of the Prosecutor General. This power of the Prosecutor General should be limited in the cases under the jurisdiction of the Inspector. Otherwise, the objective of the actions of Inspector's Service shall lose its essence if it depends on the decision of the Prosecutor General whether the case shall remain under the jurisdiction of the agency or not.

What should the reform cover?

The above reasoning highlights the need to reform the investigative system in the country. The reform should create sound legislative guarantees for the independence and objectivity of the investigation. Investigators should be able to conduct the process in a competent, objective and impartial manner. The independence and competency of the investigation is precisely one of the foundations of a fair criminal justice system.

¹⁷Investigative System Analysis, Human Rights Education and Monitoring Center (EMC) 2018, p. 52, available at: <https://bit.ly/38WMGHd> last accessed: 15.03.2021

¹⁸ See Law of Georgia on State Inspector's Service

¹⁹ Criminal Procedure Code, Article 33

²⁰ Law of Georgia on State Inspector's Service, Article 19

It is clear, that this document cannot possibly cover, in detail, all the issues that need to be revised under the reform. However, it is possible to observe several issues of principle importance. These are:

The reform should address both the institutional and the functional issues. From an institutional point of view, first of all, it is necessary to distance the Prosecutor's Office from the investigative agencies. The Prosecutor's Office / Prosecutor should not have the authority to conduct the investigation.

From an institutional standpoint, a second important component that the reform should cover is the internal structural separation of competencies. Redistribution of operative and investigative functions between different divisions.

Reform of the investigative system shall not be fruitful unless the state ensures to have qualified, well-educated investigators in all agencies. Thus, higher legal education for investigators and the establishment of uniform qualification requirements should be essential parts of the reform.

In order to strengthen the functionality, the reform should first of all change the procedural position, investigative status of the investigator. It is essential in the adversarial system that the investigator be a neutral subject in the process. The investigator must have legislative guarantees in order to work for both parties, on equal basis. Only in the conditions provided under the proposed procedural standing shall it be possible to establish objective circumstances in the case.

Interdependence of the investigator and the prosecutor at the stage of the proceedings requires fundamental changes. The reform should limit the role of the prosecutor in the investigation process. It is necessary to change the legal nature of the prosecutor's instruction, which shall give the investigator more freedom, and allow for more independence in their actions.

The state must return the issue of reform to the political agenda and facilitate an open, inclusive working process. End goal of the reform should be to strengthen the quality of the investigation, its objectivity and independence and increase public confidence in the investigation process.