

Some aspects of the initiation of investigation and prosecution of criminal acts committed by particular state officials

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In many countries of the world, including Georgia, the criminal activities of state officials are in most cases related to corruption.¹ Its typical manifestations are: bribery, improper use of public property for private interests, conflict of interest, etc.²

Investigating and prosecuting the corrupt activities of officials is associated with special difficulties. Corruption crimes by government officials are often committed in secret. Officials aren't the people who resemble the criminals.³

The high position of the official in the state structure further complicates the investigation related to his activities. The high position held by such persons allows them to enjoy trust; they have relations with the political and financial elite. Therefore, prosecutors and investigators working on such cases should act carefully and wisely.⁴

The role of the prosecutor during the investigation of this category of criminal cases is particularly noteworthy. In such cases, the essence of the prosecutor's function is expressed

¹ Corruption (corrompu) is a Latin word and in a literal sense it means to take away, spoil, wipe out, destroy, destroy, violate, tempt, pervert, corrupt, bribe, distort, falsify, corruption is not only stealing and bribery; Its spectrum, field of action is wide. This concept implies statewide lawlessness and impunity for criminals. Corruption is the fruit of criminal consciousness. See: <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=5&t=3657>, last requested on 10.04.2019.

According to the Law of Georgia "On Incompatibility of Interests and Corruption in Public Service", corruption in public service is defined as the use of the position or related opportunity by a public servant in order to receive property or other benefits prohibited by law, as well as to transfer this benefit to him or to facilitate its acceptance and legalization. See the 3rd Article of the named law.

² See Encyclopedic dictionary <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=5&t=3657>, last requested on 10.04.2019; Ringler S. M., Criminal prosecution and investigation of public officials, translation: Todua I., <http://www.parliament.ge/files/legal_issues/publications/saxelmcifo_tanamdeboba.pdf>, last accessed on 10.04.2019.

³ See Ringler S.M., noted paper.

⁴ See Ibid.

in the fact that he must give detailed instructions to the investigator to conduct certain investigative and procedural actions within the framework of the implementation of procedural guidance; to constantly monitor the litigation process and not to make mistakes. Both he and the investigator should act as conspiratorially as possible; not to allow the results of the investigation to be disclosed, and in the event of such a threat, to take all measures stipulated by the law to prevent it.

As mentioned above, investigation of crimes committed by officials and criminal prosecution by these persons are characterized by certain peculiarities. In this regard, the process related to the initiation of criminal prosecution and its implementation is particularly interesting. In particular, the current procedural legislation provides for the circle of officials against whom the initiation of criminal prosecution is not easy and depends on certain prerequisites. Namely: the President of Georgia, a member of the Parliament of Georgia, a member of the Constitutional Court of Georgia, a member of the Supreme Court of Georgia, another judge of the General Court of Georgia, the Auditor General, the Public Defender of Georgia, a personal data protection inspector, a person with diplomatic immunity, as well as a representative of the International Criminal Court, who in the exercise of their powers, in accordance with the Statute of the International Criminal Court, enjoy immunity from criminal prosecution, arrest and the use of other measures of criminal procedural coercion against them, are determined by the Constitution of Georgia, international treaties and agreements of Georgia and other legislative acts of Georgia (Criminal Procedure Code of Georgia, article 167). These persons enjoy immunity.

Immunity (*immunitas* (*immunitatis*) means release from obligations, benefit) is a general legal term denoting the non-applicability of legal norms to a defined circle of legal entities.⁵

According to the opinion in the legal literature, the terms "immunity" and "privilege" are synonymous. Immunity is actually a privilege. It provides a high standard of personal inviolability of officials defined by legislation. Establishing such standards is necessary because, compared to an ordinary official or citizen, there is a danger of violating the personal integrity of high-ranking officials.⁶

The initiation and implementation of criminal prosecution against particular officials with special procedures determined by the law is due to the fact that these persons play an

⁵ See: Civic Education Dictionary, <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=6&t=4404>, last requested on 08.04.2019; Galiullin Sh.R., Judicial control over the legality and validity of criminal prosecution against special subjects of criminal proceedings in Russia. Thesis for the degree of candidate of legal sciences, Moscow, 2008, 24.

⁶ See *Ibid.*, 24-25.

important role in state and public life and it is necessary for them to maintain a high degree of independence, to protect their moral and other values.⁷

In the legal literature, the following types of immunity are distinguished: diplomatic immunity, immunity of high state officials, parliamentary immunity, immunity of law enforcement officials.⁸

The current procedural legislation defines the circle of subjects against whom the initiation of criminal prosecution requires the consent of the relevant state bodies or officials. In particular, the approval of the Parliament of Georgia is required for the charge of the personal data protection inspector, auditor general. In order to accuse a member of the Constitutional Court of Georgia, the consent of the Plenum of the Constitutional Court of Georgia is needed; the consent of the Supreme Council of Justice of Georgia is necessary for the accusation of a member of the Supreme Court of Georgia or another judge of the General Court of Georgia. However, the above-mentioned officials can be arrested only if they are present in the act of committing a crime or immediately after it is committed. In other cases, it is impossible to initiate criminal prosecution against them – be it by arrest or by accusing a person, without obtaining the above-mentioned relevant consent (Articles 169, 173 of the Criminal Procedure Code of Georgia).

As for the President of Georgia and a person with diplomatic immunity, there are special rules for initiating criminal prosecution against them. In contrast to the above-mentioned state officials, the president and a person with diplomatic immunity and his family members cannot be arrested during or immediately after committing a crime (Article 173 of the Criminal Procedure Code of Georgia). The prerequisites for their accusation are provided for in the Constitution of Georgia and other normative acts.

It's obvious that the immunity does not completely exempt the official from criminal liability, but it includes the additional procedural guarantees on the basis of which the inviolability of the person and his interests should be protected so that the public interest is not harmed.⁹

Therefore, the purpose of immunity is to ensure the inviolability of an official with public legal powers, which is manifested in the complication of criminal proceedings initiated or about to initiate against him, in order to avoid groundless criminal prosecution of this person.

However, such immunity should not be abused;¹⁰ It means that, at this time, the principle of proportionality, the balance between private and public interests should be

⁷ See *Ibid.*, 25-26.

⁸ See *Ibid.*, 26.

⁹ See Galiullin Sh.R., named paper., 46-47.

¹⁰ See *Ibid.*

respected. The scope of the immunity of the official should be determined to the extent necessary to protect his immunity, but it should be determined in such a way that the public interest is not harmed.¹¹

In addition, the principle of proportionality includes not only the definition of the scope of immunity, but also the necessity (need), legality and duration of immunity.¹²

In this regard, the case when the Parliament of Georgia, the Constitutional Court of Georgia and the Supreme Council of Justice of Georgia did not give their consent to initiate criminal prosecution against the personal data protection inspector, general auditor and judge during the period during which a person is protected by immunity, is particularly important and noteworthy in this regard. According to the current procedural legislation, criminal prosecution should not be initiated in such a situation (Article 167, part 2 of the current Criminal Procedure Code of Georgia).

This request of the legislator is completely understandable, but it is interesting whether the prosecution should continue the investigation – gathering evidence related to the official's criminal activities? The answer to this question is positive. The process of gathering evidence must continue, and after the investigation, the prosecution must wait for the expiration of the period during which the person is protected by immunity. However, other questions of the following content arise here: whether, in case of non-initiation of criminal prosecution on the above-mentioned grounds, the person, against whom criminal prosecution was not initiated, has the right to conduct an investigation and collect evidence in the manner established by procedural legislation or not? Does the non-initiation of criminal prosecution against the officials on the named grounds, and at the same time, the prosecution's continuation of the investigation into a possible crime, limit and contradict the principle of equality and competition between the parties?

According to the first part of Article 9 of the current Criminal Procedure Code of Georgia, upon the initiation of criminal prosecution, the criminal process is carried out on the basis of equality and competition between the parties. Therefore, at the beginning of the criminal prosecution, the defense side appears in the criminal legal process, which is legally equal to the prosecution side, and the proceedings are conducted on a competitive basis. Therefore, until a person acquires the status of the accused, that is, until the criminal prosecution against him begins, the defense does not actually exist. A person against whom prosecution has not been initiated, although formally, still has not acquired the status of accused. Consequently, he is not authorized to conduct his own investigation in the manner established by the procedural legislation. Therefore, there is no legal equality in such a situation. As mentioned above, the defense does not actually exist, while the prosecution continues without obstruction the evidence-gathering process.

¹¹ See *Ibid.*, 47-49.

¹² See *Ibid.*

Based on the above, it can be said that the lack of procedural rights may, to some extent, incite the official to engage in unfair, illegal ways in the criminal proceedings that are ongoing against him. He may try to take advantage of his authority, influence and prevent the initiation of criminal prosecution; destroy evidence; to menace or pressure witnesses; to try to convince the consenting body or official to receive detailed information from the accused party regarding his accusation and to make the essence of the accusation known to him in advance before starting the prosecution. It is significant that the official, depending on his situation, has a better opportunity to do this than an ordinary person.

As already mentioned, while investigating and prosecuting crimes committed by officials, the prosecutor should act as conspiratorially and carefully as possible. Evidence related to a crime committed by an official should not be disclosed ahead of time. Otherwise, there is a danger that the prosecution will be hindered and unable to present a body of evidence in court that meets the beyond a reasonable doubt standard.¹³

Thus, the non-initiation of criminal prosecution due to the immunity of the official may have a negative impact on the successful completion of the criminal prosecution. In addition, in case of non-initiation of criminal prosecution against the officials due to immunity, the principle of equality and competition of the parties is limited and violated. This is expressed in the fact that the prosecution continues the investigation – the process of gathering evidence, when the person against whom criminal prosecution has not been initiated, cannot conduct the investigation in the manner established by the procedural legislation. Therefore, in this case, by not having procedural rights, the legal interests of such a person are limited and, accordingly, the principle of proportionality, which was discussed above, is violated. It is necessary to refine and perfect the applicable procedural legislation in this regard. In particular, it is necessary to bring such a procedural mechanism into the Georgian legal space, which, first of all, ensures that during the pre-trial investigation of crimes committed by officials, such a person will be equipped with a number of procedural rights.

In this regard, the institution of "assisted witness" (*Temoin assisté*) existing in the French criminal justice process is noteworthy. For a long time in France, one of the problems of the investigation was the status of the person indicated in the prosecutor's request, since this person was not accused yet and could not enjoy the right of defense. However, on the other hand, it was obvious that the criminal prosecution had been initiated against this person, since this very person appeared in the prosecutor's request for a preliminary investigation.¹⁴ This problem was solved by the fact that French criminal procedure law

¹³ Beyond a reasonable doubt standard – the set of evidence necessary for the court to issue a guilty verdict, which would convince an objective person of the person's guilt (Part 13 of Article 3 of the Civil Code).

¹⁴ See Code de procédure pénale, (French), art. 113-1, 113-2, 51st edition, Paris, 2010, 362-363; *Larguier J.*, Procédure pénale, 18th edition, Paris, 2001, 161-162, 173-174; *Gutsenko K.F., Golovko L.V., Filimonov B.A.*,

introduced the institution of "assisted witness". This is a person who differs from an ordinary witness in that he has a defense attorney and has acquired the rights of the accused. For example, an "assisted witness" has the right to attend all interrogations, to familiarize himself with the criminal case before the interrogation.¹⁵

It would be advantageous and sensible to introduce a well-developed version of the "assisted witness" institution in the Georgian criminal justice process from the point of view of granting procedural rights to the "alleged accused" of the official exposed in the crime. With this procedural mechanism, the official would be able to gather exculpatory evidence related to the crime through legal ways and means. This would prevent illegal interference by high-ranking officials in the criminal cases of their charges.

Criminal Procedure of the Western States, translated from Russian, scientific ed.: *Gogshelidze r.*, Tbilisi, 2007, 429-430.

¹⁵ See: Code de procédure pénale, (French), art. 113-3-113-8, 51st edition, Paris, 2010, 363-365; *Gutsenko K.F., Golovko L.V., Filimonov B.A.*, named paper 429-430.

Literature:

1. Criminal Procedure Code of Georgia, Tbilisi, October 9, 2009;
2. Law of Georgia "On Conflict of Interest and Corruption in Public Service", Tbilisi, October 17, 1997;
3. *Ringler S. M.*, Criminal prosecution and investigation of state officials, translation: Todua I., http://www.parliament.ge/files/legal_issues/publications/saxelmcifo_tanamdeboba.pdf, last accessed on 10.04.2019;
4. *Gutsenko K. F., Golovko L. V., Filimonov B. A.*, Criminal Law Process of the Western States, translation from Russian, scientific ed.: Gogshelidze R., Tbilisi, 2007;
5. Encyclopedic dictionary <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=5&t=3657>, last accessed on 10.04.2019;
6. Civil education dictionary, <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=6&t=4404>, last accessed on 08.04.2019;
7. *Galiullin Sh.R.*, Judicial control over legality and substantiation of criminal prosecution, implemented in relation to special subjects of criminal justice in Russia, Thesis for the degree of candidate of legal sciences, Moscow, 2008;
8. Code de procédure pénale, (French), 51st edition, Paris, 2010;
9. *Larguier J.*, Procédure pénale, 18th edition, Paris, 2001.

S U M M A R Y

Some Aspects of the Initiation of Investigation and Criminal Prosecution of Criminal Actions Committed by particular State Officials

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The investigation of crimes committed by officials and the criminal prosecution of these individuals are characterized by certain peculiarities. In this regard, the process related to the initiation of criminal prosecution and its implementation is particularly interesting. These individuals enjoy immunity, which may prevent them from being prosecuted. Accordingly, it's limited the officials ability to participate in the investigation, which creates ground for them to be involved in criminal proceedings in different illegal ways.

To avoid this, it would be better to introduce the institution of "assisted witness" in the Georgian procedural space.