

PROSECUTOR'S DISCRETIONARY POWERS ON CARRYING OUT CRIMINAL PROSECUTION (Georgian Model of Discretionary Criminal Prosecution)

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Abstract

The presented article discusses discretionary criminal prosecution as innovation in modern Georgian criminal procedural legislation.

Legal aspects of criminal prosecution, its procedural regulation and practical implementation issues are discussed in the present work, which mainly deals with the prosecution, as the guiding principles of the prosecutor's discretionary authority and prosecution functions in the investigation stage, Georgian model of general discretionary prosecution.

Keywords: *prosecutor, criminal persecution, discretion*

On October 1, 2010 Criminal Procedural Code of Georgia came into force. The new normative act introduced many legislative innovations and among them the establishment of discretion principle in the modern Criminal Procedural Law of Georgia.

“Discretion” is a Latin word and means the power of the officials or state authorities to make decision based on his/her opinion¹.

The theory of “Discretionary Power”, “Discretion Law” is widespread in constitutional, administrative and criminal laws of many foreign countries.

Discretionary power arises there where the law does not define the standards and accordingly, either directly or indirectly, a judicial person has the right to use his/her discretion².

As we know, in Continental-European Criminal Procedure Law the principle of compulsory enforcement of the charge is dominated. Due to legality principle the state is responsible for the investigation and persecution of the investigation. Prosecutor's office is obliged to detect signs of crime and if there is a reasonable doubt to initiate a criminal case, to prosecute an inquiry, to fulfill criminal prosecution on the basis of gathered evidence and to sustain it on the court. This means that the principle of legality compels the prosecuting body in case of reasonable doubt to start criminal prosecution to all suspects.

¹ Law dictionary / edited by Vazha Gurgeniidze. Tbilisi 2004. P. 483.

² See Kamisar Y., Lafave W.R., Israel J.H., King N.J., Basic Criminal Procedure, Cases, Comments and Questions, Eleventh Edition, Thomson West, 2005, 24. B. Meurmishvili's work – to criminal prosecution in Georgian criminal proceedings (at an investigation stage). Submitted to the academic degree of Doctor of Law. Tbilisi 2014, p. 166

I agree with the opinion stated in the legal-procedural law science, that using this principle, prosecutor's discretion is the least, and according to the principle of legality he/she is obligated to implement authorities granted by law³.

New Criminal Procedural Law of Georgia refused principles of legality and taking mandatory action and by the law, for the time being, to initiate criminal prosecution is not state's obligation, but it's a prosecutor's discretionary power.

Prosecutor defines at his/her discretion to initiate criminal prosecution to the person who committed a crime or to waive to fulfill criminal prosecution. Criminal prosecution (charges) capacity is defined by a prosecutor and judicial control does not apply to it this time.

According to Georgian scientists and who I fully agree, such radical change in procedural law is partly due to the fact, that the principle of discretion is major in the system of Anglo-American criminal procedural law. Criminal Procedure Law of Georgia is oriented on the system of Anglo-American criminal procedural law and accordingly, the principle of discretion is reflected in new Criminal Procedural Law of Georgia⁴.

Due to the number of investigating cases, power of discretion contributes to alleviate emotional state of participants in the criminal case, to avoid stigmatization and the effectiveness of sentence, flexibility and effectiveness of the system of criminal law, individual approach to the case, effective criminal prosecution, and procedural economy, saving human or material resources.

Discretion does not imply the impunity and committed crimes do not remain without a response. Most important prerequisite of using discretion is availability of alternative means. To use discretionary power in fact, is foreclose for individuals, to whom principles of diversion and/or mediation does not apply. For example, to individuals who are accused of grave crimes, and to whom, restorative justice⁵ was already applied, etc.

Criminal prosecution, as the Prosecutor's discretionary power provided by Article 166 of the Criminal Procedural Code of Georgia, and by "The Law of Georgia on Prosecutor's office," Article 14, part one.

Criminal prosecution discretion, due to its procedural importance, is one of the guiding principles of Criminal Procedural Law of Georgia, according to which, while making decision on initiation of the criminal prosecution and termination of the decision, the prosecutor has only the power of discretion, at which time he is guided by the public interest, as defined in the Criminal Policy Guidelines⁶.

The Georgian Criminal Procedural Law does not imply the obligation to initiate criminal prosecution, unlike the obligation to initiate the investigation. Decision making is an exclusive right of the prosecutor regarding the alleged fact of any crime provided by the Code of Criminal Prosecution and no other structure / person has the right to initiate and / or reject the prosecution.

³ G. Meparishvili, I. Chkheidze. The principle of discretion in criminal law procedure. Works of Tbilisi Economic Relations State University, 2010. Meparishvili G. about the principle of discretion, publications of law, Tbilisi 2014, p. 21;

⁴ T. Laliashvili. Georgian Criminal Law Procedure. general part, Tbilisi, 2015, p. 85

⁵ Comments on Criminal Procedure. Tbilisi, 2015, p. 129

⁶See. Criminal Procedural Code of Georgia, article 16, Legislative Herald of Georgia. <https://www.matsne.gov.ge>; Minister of Justice of Georgia, Order #181, October 8, 2010, "On the approval of general part of guidelines for Criminal Law Policy Guidelines~, Chapter II.

During the implementation of the discretionary criminal prosecution, the theoretically important issue is against whom the criminal prosecution is done.

Prior to enactment of the new Criminal Procedural Code of Georgia, criminal prosecution was conducted against suspect and accused, which I think caused many misunderstandings. For example, in the works on law, the scientist-lawyers argued about when the prosecution of the suspect or the accused was initiated. This misunderstanding, in my view, was caused by the fact that the old criminal procedure law was familiar with the institution of suspect.

The new Criminal Procedural Code abolished the Institute of Suspect and the criminal prosecution proceeded only after the accused is detained or recognized as accused (if he is not detained).

The legal consequence of detention is to initiate criminal prosecution against a detainee and acquire the status of accused of the detainee. In case of detention, prosecution is initiated automatically and the prosecutor's discretion is not valid at this moment. At this stage prosecution is expressed in collecting evidence, in approval of the prosecution.

Herewith, it should be noted that Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms specifically explains that criminal prosecution is only against the accused.

The initiation and implementation of criminal prosecution, as noted above, is only the discretionary power of the prosecutor, in case it feels expedient, he has the right to initiate and carry out criminal prosecution. Prosecution is not mandatory for all the facts of the criminal assault.

In addition, the discretion is not unlimited, as during the introduction of discretionary prosecution, Georgian procedural law established that the initiation, pursue and termination of prosecution against a particular person is fulfilled with obligatory instructions of Criminal Law Policy.

In order to ensure this, according to the Order of the Ministry of Justice, October 8, 2010 “on criminal policy guidelines for approval of general part” which defined the main directions, prosecuting bodies must perform state functions according to Criminal Policy for the aim of high standard prosecution.

Obviously, according to the Criminal Procedural Code of Georgia, the initiation and implementation of criminal prosecution is only a prosecutor's discretionary power, but criminal prosecution may not be initiated or terminated if it contradicts criminal policy.

Thus, the abovementioned order establishes guidelines and recommendations for criminal prosecution, considering of which the prosecutor should decide on the exercise of criminal prosecution within discretionary power⁷.

It is important to clarify according to this Order, specifically when and in what circumstances should the prosecutor decide about the implementation of discretionary prosecution.

First of all, the prosecutor's decision on the initiation of criminal prosecution should be taken only if the full test is satisfied, namely, when:

a) Evidence in the case creates sufficient ground for a realistic prospect of conviction in the court – evidence test;

⁷See. Ministry of Justice of Georgia order #181, October 8 2010, Criminal Policy guidelines for approval of general part, chapter 2.

b) Initiating criminal prosecution is dictated by public interest - a test of public interest.

That is, the prosecutor shall be guided by the evidence collected on the criminal case and the public interest of a specific criminal case, which altogether forms the so-called Full test and in case of its satisfaction, criminal prosecution should be initiated. At the same time, both tests are evaluative that requires especial cautious approach from the prosecutor.

Thus, a complete test, which includes evidence and public interest tests, is an important criterion for initiating and implementing criminal prosecution.

Each stage of the full test must be independently disposed by the analysis and evaluation of the circumstances of the case and only after that the decision has to be made to initiate a prosecution or not.

As to the evidence test, its nature is the following that the prosecutor should not initiate or terminate prosecution unless there is a valid reliance⁸ of a crime committed by a specific person and / or if it is less likely to confirm the accusation by the court.

It should also be taken into consideration that when rendering a decision, it is not necessary for the prosecutor to have all the evidence that he intends to use for court trial. It is enough that the prosecutor is convinced that at the trial stage he will have the evidence obtained lawfully, which will be sufficient to justify the charge of the person.

Depending on the content of the test of evidence, which specifically refers to the cumulative evidence and indicates the fact of a crime, a conclusion can be made that it forms enough ground for the conviction of a person in court.

Before initiating the criminal prosecution, the prosecutor must find out and decide to what extent the initiation of a prosecution serves the public interest.

In the interest of judicature, even when the test is satisfied, the prosecutor should not initiate prosecution, if the initiation of prosecution contradicts public interest, if public interest against prosecution clearly exceeds the interest of a person to be sentenced.

Identification of public interest should be done taking into consideration and analyzing different factors, which is essential for rendering the right decision. In each case, the decision to initiate a prosecution shall be based on evaluation and inferences of various individual factors.

Public interest - this is the interest protected by law, behind this, there is the society and the state. Public interest in criminal proceedings is the formation of an irreversible circumstance for the convict to put on trial for the committed crime⁹.

Among the circumstances, that the prosecutor should consider while identifying the public interest, first of all should be named:

- the legal priorities of the state (how important is the criminal prosecution of a specific crime for the state, because the state resources should not be spent on criminal prosecution of minor crimes);

- _ crime severity and nature;
- _ preventive effect of criminal prosecution;
- _ quality of charges;
- _ a person's criminal record;

⁸ According to the part XI of the Article 3 of the Code of Criminal Procedural Code of Georgia, valid reliance, ie the facts or information altogether with the circumstances of the criminal case that would satisfy the object in order to find a person guilty of an offense - is a standard of evidence that is required for the initiation of criminal prosecution.

⁹G. Abashidze, Prosecutor, as the subject of criminal prosecution. Tbilisi 2011, p. 93

- _ willingness to cooperate with the investigation;
- _ personal characteristics;
- _ economic harm caused to the public and factors of making amends;
- _ the interests of a victim and his/her family members when deciding to initiate a prosecution;
- _ expected sentence in case of conviction and expected consequences of criminal prosecution.

In the same order, there are specific circumstances, which, together with other factors, point to the expediency and in expediency of initiating criminal prosecution.

The principles and factors discussed by us are not comprehensive and the decision on the prosecution, to what extent is it in public interest should be taking into consideration the characteristics of each specific case. The order explains legal understanding of the above-mentioned circumstances for their practical use during discretionary prosecution.

Based on the Guidelines for Criminal Prosecution Policies, if the evidence collected in the course of investigation on the criminal case is sufficient for valid reliance that a person has committed a crime, the prosecutor is authorized to render one of the following decisions:

- conduct or demand additional investigation;
- initiate criminal prosecution;
- waive criminal prosecution and use alternative mechanism;
- waive criminal prosecution without using an alternative mechanism¹⁰.

The Criminal Procedural Law of Georgia considers the Institute for Diversion of adults in the alternative mechanism of Criminal Prosecution, concerning which, Georgian lawmakers shared European Experience and after discretion prosecution was established in Criminal Procedural law, the new norm was adopted in the Criminal Procedural Code of Georgia since June 2011, which is a novelty in Procedural law of Georgia.

An alternative mechanism of criminal prosecution – the diversion is to resolve the conflict in a non-criminal manner, practically used in the Common and Continental Law¹¹.

The nature of this norm is expressed in the diversion of the person from criminal liability and deprivation of liberty in the case of a proper legal basis. Consequently, the case ends without a conviction and criminal penalty, since the court does not discuss the guiltiness of a person and does not take a decision against the perpetrator.

Thus, on the basis of the discretionary power of this new norm, the prosecutor has the opportunity to divert the person from criminal liability in the absence of public interest in prosecution of some crimes, so as not to leave the crime and the interest of the victim without response.

In my opinion, the new Criminal Procedural Code of Georgia correctly solved the issue that only the prosecutor is authorized to exercise discretionary criminal prosecution and pass a resolution on the charge of the person. This will raise the issue of liability of the prosecutor as a prosecution.

In addition, when the prosecutor passes a resolution and establishes guilt to a person, he fulfills the function of criminal prosecution, since someone is accused of a crime, thus arraigned, is one of the essential and necessary elements of criminal prosecution.

¹⁰ See the abovementioned order, chapter 2

¹¹ I. Akubardia. About the Advancement of Diversion. Collection dedicated to Professor G. Nachkebia's 75th anniversary, Tbilisi, 2016, page 62

The aim of the prosecutor's discretionary authority is effective criminal proceedings. Accordingly, each decision of the prosecutor shall be lawful¹².

The prosecutor should establish that the criminal prosecution is being proper, that the crime is evident and there is sufficient evidence to indict the prosecution against the person.

Criminal prosecution for the prosecutor is quite laborious, challenging and full of responsibility. In order to ensure criminal prosecution, criminal procedural law has granted him/her significant rights, which is implemented in one case by direct involvement in the investigation and the full extent of the investigation, and in the second case, with the procedural guidance of the investigation.

It is important that any decision of the prosecutor is valid, fair and reflect the interests of the state and society. In addition, the prosecutor should be independent and impartial¹³ in his / her activity.

After arraignment, criminal prosecution of a person does not end the prosecutor's function. Prosecutor is obliged to fulfill comprehensive and complicated prosecution measures even after accusation, procedural and investigative actions, even after the prosecution, to collect evidence against the person. The aim of the prosecution is that when a person is guilty of committing a crime and is indicted, to pursue the activity of the prosecutor to the person and ultimately determine the truth.

At the end of the work, we cannot neglect the most relevant issue, particularly the importance of judicial control over discretionary power, as judicial control is an effective mechanism to prevent the prosecutor from abusing his/her discretionary power.

The Prosecutor has a wide discretionary power granted by the Criminal Procedural Code of Georgia. Unrestricted discretion clearly contains the threat of subjectivism¹⁴. In order the prosecutor not to make such a decision on the basis of the lack of trustworthy control, the abovementioned order of the Minister of Justice of Georgia on the Guidelines for Criminal Justice Policy limits the discretionary power of the Prosecutor in certain ways, limiting the prosecutor's absolute discretion, as well as the scope of his/her activities in this direction.

This, of course, is an important legal tool to avoid abuse of power by the prosecutor, but I consider it necessary to set up judicial control over the decisions taken by him.

Scientists have yet stated¹⁵ on the necessity of introduction of judicial control in the Criminal Procedural Code of Georgia and through this, interested individuals to have the right to appeal the decision taken by the prosecutor, before the introduction of the institution into criminal procedural law.

As noted above, the prosecutor uses discretionary power when rendering a decision on initiation and termination of criminal prosecution, but the prosecutors waive to initiate criminal prosecution by using this authority does not appeal to the court.

Article 168 of the Criminal Procedural Code of Georgia explains that the victim has the right to appeal against the Prosecutor's decree on waiving to initiate criminal prosecution only once, with the chief prosecutor. The decision of the chief prosecutor is final and cannot be

¹²See Конярова Ж.К., Дискреционные полномочия прокурора и проблемы их реализации на досудебных стадиях уголовного процесса., Диссертация на соискание ученой степени кандидата юридических наук, Ижевск, 2008 г, стр. 45-46.

¹³ See the statement of Minister of Justice of Georgia, chapter 2

¹⁴See more G. Meparishvili, I. Chkheidze. New Code of Criminal Procedure: Reform or Counter-Reform? Informational Agency "Sakinform", November 17, 2010

¹⁵see G. Meparishvili about the principle of discretion, publications of law, Tbilisi, 2014, p. 24

appealed, except for the exception when the criminal prosecution is not initiated against a person who committed a grave crime. In this case, the victim has the right to appeal the prosecutor's decision to the District (City) Court according to the place of investigation, whose decision can no longer be appealed.

The abovementioned exceptional right was given to the victims by the scholars and lawyers in accordance with the earlier amendments and proposals on this norm according to the amendments to the Criminal Procedural Code of Georgia.

The aim of the amendment was to reduce the risk of unjustified restrictions on the victim's interests and increase the control over the use of the prosecutor's discretionary authority.

It is quite true that while initiation of the prosecution and termination, the prosecutor should be guided by discretion power and by the public interest, which we have discussed above, but we think it is necessary to consider the interests of the victim to more extent, who can appeal¹⁶ the decision of criminal prosecution made by the prosecutor, only to a chief prosecutor.

It should also be taken into consideration that the decision to terminate investigation and / or criminal prosecution is also not appealed in court. Depending on the norms of the Criminal Procedural Code, it can only be appealed by the victim once, and only with the chief prosecutor.

It seems that there is no longer any possibility of appealing against the prosecutor's waive to initiate criminal prosecution using the discretionary power, as well as the prosecutor's ability to appeal directly to the court by the victim's decision to terminate the investigation and / or criminal prosecution. While the criminal procedural law of the leading European countries, namely England, France, Germany and others, provides the right of the victim - to appeal against the decision of the prosecutor on waiving to initiate criminal prosecution or termination¹⁷ of criminal prosecution.

In this regard, the new Criminal Procedural Code of Georgia has significantly worsened the state of victim's rights because he/she is unlikely to be able to protect its rights and freedoms through judicial control. Dismissal to appeal to the court is clearly contradictory to the Constitution of Georgia, the principles of international law and the Constitutional Court of Georgia.

Strong and public judicial control is the only way to force the Prosecutor's Office to comply with the requirements of the law and to be impartial when making a discretionary decision¹⁸.

Based on the abovementioned argument, we can make a conclusion that it is important and essential to introduce judicial control more than fulfilling discretionary power, provided by the European Code of Criminal Procedure, where it's been a long time since the Institute

¹⁶see the order of Minister of Justice of Georgia, chapter 2

¹⁷ Головки Л.В. Альтернативы уголовному преследованию в современном праве. Санкт-Петербург, 2002, С. 20. Уголовно процессуальный кодекс Франции / Перевод Л.В. Головки. М., 2000. Christine Van Den Vyngaert, Criminal Procedure System of the European Community. Tbilisi, 2002

¹⁸ Gerard e. Lynch. American law and lawyer information. Т. 3. Chicago: American Bar Association. 1998. P.10. G. Meparishvili, I. Chkheidze. Principle of discretion in criminal proceedings. Works of Tbilisi State University of Economic Relations 2010

of Discretionary Prosecution exists and Scientists in the field of Law consider precisely such an approach to ensure transparent and fair discretionary power.

Conclusion

To sum up, legal aspects of criminal prosecution, its procedural regulation and practical implementation issues are discussed in the present work, which mainly deals with the prosecution, as the guiding principles of the prosecutor's discretionary authority and prosecution functions in the investigation stage, Georgian model of general discretionary prosecution. The presented article discusses discretionary criminal prosecution as innovation in modern Georgian criminal procedural legislation.

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