

## **Peculiarities of separate forms of discretion according to the procedural law of Georgia**

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### **Abstract**

In modern criminal proceedings, one of the key criteria for expressing the state's democratic nature and high standard of rule of law is the legal and legitimate empowerment of participants in the justice process with "special authorities." This endowment is an indicator of the unique role they play within the process. However, granting such "special authorities" solely to certain participants can create an illusory appearance of privilege. In reality, these powers serve as tools for participants to perform positive roles in accordance with legally defined procedural procedures. This contributes to the effective and transparent administration of justice.

The conducted research raises the question of whether it might be appropriate to refine and clearly define the framework within which process participants act, even within "special authorities," incorporating judicial oversight. The research conducted on the raised issue led us to relevant conclusions, which are fully reflected in the work. Through comparative and qualitative research methods, a rational analysis was conducted, suggesting possible legislative changes at the national level to expand and refine discretionary authority for the prosecutor and other participants in criminal proceedings.

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**Keywords:** Discretion, Diversion, Adversariality, Public and Private interest, Forms of discretion

## **Introduction**

In Georgian criminal proceedings, the institution of "discretionary power" holds significant importance. This concept is relatively new in national legislation and reflects a priority for the state's humane approach toward individuals in conflict with the law, within various legal procedures.

Discretion, in terms of its introduction, development, and application within the legal system, spans decades but has continuously adapted to modern psychological, social, and moral perspectives. It is characteristic of the Anglo-American legal system and was widely incorporated into Georgian criminal procedure with the new Criminal Procedure Code, adopted by the Georgian government on October 9, 2009, and in force since 2010. The primary foundation of this Code is the Anglo-American legal tradition (Criminal Procedure Code of Georgia, 1998).

As a fundamental principle in criminal proceedings, discretion is embedded in the general section of the Georgian Criminal Code, specifically in Article 16. The procedural norms for its practical implementation are found in various articles of the special part: Articles 105, 106, 107, 108, 168, 168<sup>1</sup>, 168<sup>2</sup>; (Criminal Procedure Code of Georgia, 1998).

The aim of our research is to identify the issues and characteristics that arise in the exercise of discretionary power, as well as its impact on procedural progress, participants in criminal proceedings, and society at large. Based on public views and sentiments, it is crucial to evaluate whether the mechanisms for refraining from or discontinuing criminal prosecution are loyal and humane. Additionally, it is important to consider what legislative changes may be necessary to establish innovative legal procedures. Such developments would simplify the legally stipulated actions involved in exercising discretionary power, achieving the desired outcomes in terms of reduced human resource usage, avoidance of delays in justice, and minimization of unnecessary financial costs.

## **The Essence of Discretionary Power**

According to Article 2 of Georgia's General Administrative Code, discretionary power is the authority granted to an administrative body or official to choose the most appropriate decision from several lawful options, based on the protection of public and private interests.

Under Article 16 of Georgia's Criminal Procedure Code, one of the primary participants in the process—the prosecutor—holds "special authority," or discretionary power, to make decisions on initiating or discontinuing criminal prosecution, guided by the public interest (Gakhokidze, Mamniashvili, & Gabisonia, 2015, pp. 89-90).

Based on this provision, the initiation of criminal prosecution is exclusively the prerogative of the prosecutor and is not the subject of this

study. As for the discontinuation of criminal prosecution, this procedure can be carried out by either the prosecutor or a judge within the criminal process, while the decision not to initiate prosecution falls solely within the prosecutor's competence (Commentary on the Criminal Procedure Code of Georgia, 2015).

To ensure more flexible and efficient legal decisions, participants in the criminal process could be granted expanded authority during various stages, whether in the investigation or court trial phase, especially when it comes to the discontinuation of criminal prosecution (Tumanishvili, 2014, pp. 70, 103, 104;).

### **The Importance of Discretionary Power**

The introduction of prosecutorial discretionary power in national legislation marked a significant innovation, becoming a key research topic due to its scope and implications. This became even more relevant with the implementation of the new criminal procedure in Georgia (the Criminal Code came into force in 2010), as the prosecutor's powers were clearly defined within specific parameters. This shift was driven by the transition from the Euro-continental legal system to the Anglo-American system, which fundamentally emphasizes adversarial and contradictory principles (competition and equality).

This change, as a foundational principle of criminal procedure, is reflected in Chapter 2 of the Criminal Procedure Code. Among the "principles of initiating proceedings," (Lomsadze, 2016, pp. 37-38;) the principle of "discretion in criminal prosecution" holds a prominent place. It is articulated in Article 16 of the Georgian Criminal Code as the principle of initiating and discontinuing prosecution, where it states: "In making decisions on the initiation and discontinuation of criminal prosecution, the prosecutor exercises discretionary power, guided by public interest" (Criminal Procedure Code of Georgia, 1998).

The term discretion derives from the Latin word meaning the resolution of an issue by an official or state authority based on personal judgment (Gakhokidze, Mamniashvili, & Gabisonia, 2015, p. 172; Meparishvili, 2014, pp. 18-19).

In French (*diskretionnaire*), it implies action taken according to one's own, unrestricted judgment (Laliashvili, 2014, p. 85; Dictionary of Foreign Words, 1989).

The principle of discretion is a fundamental part of the Anglo-American legal system. In the United States, discretion is exercised frequently, making the justice system more efficient. This "positive filter" allows quick and accurate decisions on numerous initial criminal cases, ultimately conserving human resources and significantly reducing financial costs.

### **Peculiarities of discretion based on the examples of Georgia and the USA**

In relation to the fundamental principle of criminal procedure-“discretion”-Georgia's example is distinct from other countries in the Anglo-American and Euro-continental legal systems in several ways. Although Georgia's procedural law is currently oriented towards the Anglo-American model, it still maintains certain unique features. Specifically, under Georgian criminal law, discretion appears in a much more restricted form, as this significant authority is vested exclusively in the prosecutor. It is the prosecutor alone who is legally empowered to exercise discretion, making independent decisions regarding the initiation, non-initiation, or termination of criminal prosecution.

It is clear that the prosecutor exercises this authority in deciding whether to commence or terminate prosecution against an individual, which does not include the initiation of an investigation. This procedure is bound by the principle of legitimacy, where both the investigator and the prosecutor are obligated to initiate an investigation. In contrast, the initiation of prosecution is governed by the principle of discretion, making it the exclusive prerogative of the prosecutor to decide whether to initiate or discontinue criminal prosecution once begun (Laliashvili, 2014, pp. 92-95).

Under U.S. law, the prosecutor is granted the authority, based on the principle of discretion, to make decisions regarding the initiation or termination of criminal prosecution based solely on their own judgment. U.S. legal regulations do not contain mechanisms to limit this discretionary power, and consequently, such prosecutorial decisions are not subject to appeal in any instance within the legal or judicial system (Ackermann, 2006, p. 56; Kaufman, 1980.) Unlike U.S. law, Georgian national legislation does not grant prosecutors the authority to conduct a legal assessment of actions based on the principle of discretion and freely select one of multiple existing or potential charges, flexibility available to U.S. prosecutors. In Georgia, such an approach is possible only within the framework of a plea agreement, provided certain grounds and conditions are met (Dengler, 2003, p. 168). According to Article 168 of the Criminal Procedure Code of Georgia, “the prosecutor formalizes a decision to refuse the initiation of criminal prosecution through the application of discretionary authority in an appropriate decree.”

This means that if the prosecutor decides, through the exercise of discretion, to select one charge among several and not pursue certain charges against a particular individual, they must issue a decree formally stating the refusal to initiate prosecution on those specific charges.

Under Article 168 of the Criminal Procedure Code, the victim has the right to appeal this decree to a superior prosecutor and the court, thereby limiting the prosecutor's discretionary authority. In the event of an appeal, the prosecutor is required to justify their decision, demonstrating both the

presence of public interests and the rationale behind their judgment or its formation (Laliashvili, 2014, pp. 98, 99; Commentary on the Criminal Procedure Code of Georgia, 2015, pp. 486-487; Bykov v. Russia, 2009). On the one hand, the prosecutor has the right to make decisions at their own discretion; on the other hand, in the case of an appeal, they are required to provide explanations regarding their intent or viewpoint. Ultimately, it is up to the judge to assess whether the prosecutor's perspective is justified and to make a final decision. In essence, this approach moves beyond a proper understanding of discretion and lends a somewhat formal character to its application in the process. If the prosecutor is only to consider public interests, and if judicial oversight is limited to this consideration in case of an appeal, it raises the question-what role does discretionary authority actually serve? It is evident that the prosecutor's discretion is confined within a framework, requiring them to rely solely on public interests, even if they hold additional perspectives (Court of Georgia, 2017).

If the law grants discretionary authority to the prosecutor, by definition, they should be able to exercise this authority without restrictions, acting solely according to their own judgment. It is also worth noting that concerns may arise regarding potential subjectivity if discretion is exercised by the prosecutor without judicial oversight (Minister of Justice of Georgia, 2010, Order No. N181, section 3). Should the prosecutor display any private interest or bias in this context, their actions could indicate elements of misconduct, requiring intervention by competent authorities. Fearing potential subjectivity in the prosecutor's use of discretionary power does not justify limiting this authority, as such limitations would undermine the inherent freedom of decision-making that discretion entails. In that case, the action should no longer be considered "discretionary" but rather a routine exercise of authority, devoid of the unique freedom associated with true discretion (Minister of Justice of Georgia, 2010, Order No. N181). It is also significant that, in the United States, the police exercise discretionary authority and independently decide whether to initiate or close investigations in certain categories of cases, without oversight from any other law enforcement body. However, as mentioned, this discretion applies only to the initiation of investigations. If the police determine that prosecution is necessary, they are obligated to transfer the case to the prosecutor, as only the prosecutor has the authority to initiate prosecution proceedings.

Georgian legislation does not recognize similar procedures, and therefore, the police and other investigative bodies do not possess discretionary authority. However, it would be beneficial for investigative bodies to have a limited degree of discretion for certain categories of cases-considering factors such as case severity, uniformity, public interest, and other relevant grounds. This could include the authority to terminate investigations

based on personal judgment, discretion, and public interest, even under prosecutorial oversight and judicial review mechanisms. Implementing such a framework would enhance the efficiency of the investigative phase, act as a filtering mechanism, and allow timely decisions on cases without the need for additional resources or expenses.

As noted, in the United States, the prosecutor's discretionary authority is unrestricted. In contrast, in Georgia, it is limited by several significant, legally prescribed procedures:

1. According to Article 169 of the Criminal Procedure Code of Georgia, the accused has the right to appeal the prosecutor's decision on indictment within ten days of being informed of the charges, based on delays in initiating criminal prosecution. This appeal can be submitted to a superior prosecutor or to the court.
2. Under Articles 106 and 168 of the Criminal Procedure Code of Georgia, the victim has the right to appeal the prosecutor's decision to terminate prosecution on various case categories. This appeal can be made to a superior prosecutor and, if denied, to the court in the jurisdiction of the investigation. The court must issue a decision within 15 days, which can be further appealed to the investigative panel of the Criminal Cases Chamber of the Court of Appeals.
3. According to Article 105 of the Criminal Procedure Code of Georgia, the prosecutor is obligated to terminate the prosecution when grounds specified in the article are identified (Meurmishvili, 2015, pp. 96-100).

### **Specifics of Using Diversion as an Alternative Mechanism to Criminal Prosecution at the Court Trial Stage**

Among the alternative mechanisms to criminal prosecution, diversion is particularly important. This procedure is based on the offender's attitude towards the committed act, their sense of personal responsibility, and willingness to take effective actions to address the harm caused (Commentary on the Criminal Procedure Code of Georgia, 2015, pp. 487-491).

Considering all of the above, the prosecutor has the discretion to decline the initiation of prosecution, while the subject of diversion undertakes legally prescribed obligations, representing their conscious approach towards the committed crime and its negative consequences. This, in return, prevents a criminal record status and allows the individual to integrate into society, maintaining a normal life within legal bounds (Tumanishvili, 2014, pp. 71-73).

According to Part 4 of Article 168<sup>2</sup> of the Criminal Procedure Code of Georgia, "As a rule, diversion is applied before a preliminary court hearing. Diversion can also be applied after a preliminary hearing if the parties petition the court for the return of the case to the prosecutor for the purpose of



diversion. In this case, the court has the authority to return the case to the prosecutor, who will offer diversion to the accused.”

This procedural provision is significant. If, after the preliminary hearing, diversion is necessary based on the parties’ consensus, it inevitably leads to case delays. The court must undertake various legal and technical measures to return the case to the prosecutor, which requires a certain amount of time.

The article specifies that, upon returning the case to the prosecutor, the prosecutor will offer diversion to the accused, which appears contradictory. The basis for returning the case should be the parties’ consensus on the use of diversion and their petition before the judge to return the case, indicating that the parties are already in agreement, and their proposals have already been made.

If a decision to terminate prosecution on a returned case is appealed by the victim, this, too, will lead to case delays, as the judge has a 15-day review period. The judge’s ruling may be further appealed to the Constitutional Court, requiring more time, additional human resources, and financial costs. An even more undesirable outcome could occur if the judge overturns the decision to terminate prosecution, necessitating the return of the case to court (Commentary on the Criminal Procedure Code of Georgia, 2015, pp. 492).

To avoid the issues mentioned above, it would be advisable to implement legislative changes allowing diversion agreements at any stage of the trial, based on a consensus between the parties and with a judge’s approval while preserving prosecutorial discretion. Under this arrangement, a diversion agreement would be reached between the prosecutor and the defense, where the prosecutor issues a decision to discontinue prosecution and submits it for judicial review. Subsequently, the judge would issue a decision to terminate the case. This approach would require less time and fewer resources while preserving the victim’s right to appeal. Notably, all procedures would be conducted under judicial oversight.

In this context, two opposing perspectives could emerge:

The first perspective is that if the accused is in custody, the law currently prohibits the use of diversion procedures. However, this obstacle could be easily addressed, as it is possible to change the preventive measure during the court proceedings, allowing for the option of diversion once the accused is no longer in detention.

The second consideration is the form in which the judge’s decision should be issued to ensure that prosecutorial discretion remains intact, while also protecting the rights of the accused, who should not be considered a convicted individual when diversion is applied. To avoid any issues, all necessary procedures for diversion could be carried out in accordance with the legally prescribed process. This would include the prosecutor issuing a formal

decision to discontinue prosecution and presenting all relevant documents to the court for attachment to the case file.

In cases involving a single defendant, the judge would issue a decision solely to terminate the proceedings. If there are multiple defendants, the judge could attach the diversion materials to the case file and continue the trial for the remaining individuals. This approach would ensure clarity in the procedural framework, preserve the discretion of the prosecutor, and safeguard the defendant's rights in cases of diversion.

## **Conclusion**

The institution of discretionary power is a highly complex and extensive topic. At this stage, we have examined certain characteristics of discretion using examples from both Georgia and the United States. Based on this, several rational conclusions can be drawn to support its practical implementation and broader application in both investigative and judicial processes, making it a more innovative and flexible procedure.

In Georgian criminal procedural law, only the prosecutor has discretionary authority. Consequently, the first area of focus in this study was the potential expansion of prosecutorial discretion, allowing the prosecutor to exercise discretion more freely in choosing one of several potential charges at different stages of prosecution, including after initiating proceedings.

The second consideration was the possibility of granting discretionary authority to the police and other investigative bodies at the investigation stage. This would allow these bodies, based on various circumstances and public interest, to discontinue investigations at their own discretion, albeit under the supervision of the prosecutor and subject to judicial review (including appeal procedures).

The third area addressed the possibility of forming a diversion agreement through prosecutorial discretion during trial proceedings, based on consensus between the parties, without the need to return the case to the prosecutor.

Implementing these three proposals through amendments to the current national legislation would ensure a more effective and refined use of the discretion system, avoiding unnecessary expenditure of human and state resources.

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