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Systematic Understanding of the Function of Public Criminal Prosecution

Public prosecution is one of the necessary and important institutions for effective obstruction of justice. Applying this legal instrument reduces crime, eliminates fear of crime, and strengthens faith in the rule of law in society. Therefore, an accurate understanding of the definition of public criminal prosecution is a kind of guarantee for the correct determination of the criminal law policy for a state. Today, the function of public criminal prosecution is represented on a fairly wide scale in the space of Georgian criminal procedure. This function needs to be further refined and established in a new way to make it more flexible and effective. For this, it is essential to have a clear legal definition of the concept of public criminal prosecution and accurately determine and manage the scope and terms of the prosecution.

Keywords: *Public Criminal Prosecution, Public Interest, Procedural Coercion Measures, Procedural Actions, Indictment Activities, Recognition of a Person as the Accused.*

1. Introduction

The function of public criminal prosecution is one of the necessary and important mechanisms of traditional justice. Every state tries to ensure and establish law and order through this institution in complex with other legal mechanisms. The role of functioning criminal prosecution is vital for the peaceful life of society.

There are many opinions about criminal prosecution;¹ The legal space of criminal procedure seems to abound with scientific works² and practical recommendations regarding the mentioned issue; In practice, serious questions about the function of criminal prosecution are not often met but this is not enough. Criminal prosecution is such a multifarious varied and problematic topic that it has not lost its relevance even now. Accordingly, the purpose of this article is: to highlight some problems related to the function of criminal prosecution, to make a theoretical and practical, systematic analysis of these issues and to form a modern, new vision about the function of criminal prosecution and other elements concerned with it.

Today criminal procedural law is in constant development and dynamics. There are many changes in the current criminal procedure law. Lots of new institutions³ are introduced, and several

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¹ *Meurmishvili B.*, Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), “Meridian” Publishing House, Tbilisi, 2015, 79-92 (in Georgian).

² *Ibid. Abashidze G.*, Prosecutor’s Discretionary Powers on Carrying out Criminal Prosecution, (Georgian Model of Discretionary Criminal Prosecution), Tbilisi, 2011; *Kamisar Y., Lafave W.R., Israel J.H., King N.J.*, Basic Criminal Procedure, Cases, Comments and Questions, Eleventh Edition, Thomson West, 2005, 24.

³ For example, the coordinator of the witness and the victim, etc. (in Georgian).

new questions and problems arise from a practical and theoretical point of view. Accordingly, considering these changes, it is interesting, even necessary, to review the approaches to the function of criminal prosecution and other related topics once again and anchor new opinions in the space of criminal procedure, which will have solid theoretical and practical foundations.

So, the following paper examines: The concept of criminal prosecution and the approaches of the European Court of Human Rights to its function; Scales of criminal prosecution; Relation of the equality of arms and adversarial principle to the function of criminal prosecution; Criminal prosecution term; Possibilities and degree of legal impact from a victim in case of refusal or termination of criminal prosecution.

Naturally, the range of issues listed above is not enough to fully understand the function of criminal prosecution. It is necessary to continue the research on this topic, develop and publish new works, and study the current practice to make a deeper analysis and understanding of this extremely important function.

2. Concept of Criminal Prosecution, Scope, and Interpretations of the European Court of Human Rights

It is known that the current criminal law procedural legislation does not consider the interpretation of criminal prosecution, but its definition⁴ is provided in the scientific literature. In particular, criminal prosecution is defined as: “procedural activity carried out by a person based on the authority granted by the Criminal Procedure Code, which includes the protection of public interest, the disclosure and punishment of the person who committed the crime, after the assessment of actual data (facts and evidence), appropriate procedural actions against the accused, including the implementation of indictment activities in the stage of investigation and during the consideration of the case in the court.”⁵

In addition, the structure of criminal prosecution is also discussed in the legal literature with relevant schemes⁶ based on which we can perceive the concept and scope of the function of criminal prosecution in the space of criminal procedure of Georgia. In particular, criminal prosecution is initiated in two ways: 1. Detention of a person; 2. Recognition of a person as an accused. Completion of these two actions is sufficient to initiate criminal prosecution. So, to start a criminal prosecution, it is necessary to appear a specific person⁷ in the criminal process who has been charged⁸ with

⁴ *Meurmishvili B.*, Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings. (Investigation Stage), “Meridian” Publishing House, Tbilisi, 2015, 79 (in Georgian).

⁵ *Ibid.* 309 (in Georgian).

⁶ *Beltadze V.*, The Concept of the Function of Criminal Prosecution by the Criminal Law of Georgia; *Journal “Justice and Law”*, #2⁽³⁷⁾13, 146 (in Georgian); *Abashidze G.*, The Prosecutor as a Subject of Criminal Prosecution (at the stage of investigation), Tbilisi, 2011, 69-70 (in Georgian).

⁷ See. appendix #1.

⁸ *Papiashvili Sh.*, The Problem of Initiating a Criminal Case and Criminal Prosecution in the Criminal Process, Tbilisi, 1999, 24 (in Georgian); *Papiashvili Sh., Tevzadze A.*, Inspection of Materials and Initiation of Criminal Case and Prosecution, Tbilisi, 2002, 99-101(in Georgian); Practical guide in criminal proceedings (a guide for prosecutors and investigators), General Prosecutor's Office of Georgia, 2007,12 (in Georgian).

committing a crime. However, the legal literature provides different opinions about the criminal prosecution which is considered as a separate, independent stage⁹ and it starts just from the moment of the beginning of the investigation without the accused¹⁰, etc. In this regard, the approach of the European Court is also interesting. In particular, according to the interpretation of the European Court of Human Rights, criminal prosecution begins when the actions are taken against a specific subject, based on which this person can commit a crime and be rendered justice.¹¹ These actions may also include investigative actions, but in this case, it is a broad definition of criminal prosecution.¹²

The European Court, as well as the current Criminal Procedure Legislation of Georgia (Article 167), connects the initiation of criminal prosecution to a specific entity¹³ that appears as an accused in the criminal process. Therefore, it is possible to say that in terms of the initiation of criminal prosecution, there is no inconsistency between the approaches of the European Court and the Georgian criminal procedure. Moreover, concerning legal development, such an advanced country as England has a narrow understanding of the definition of criminal prosecution. In England, the prosecution of a person begins when a criminal case is transferred to the Crown Prosecutor to assess whether a prosecution would maintain public confidence in the courts and the administration of justice.¹⁴ In this regard, there is another approach in Georgian criminal procedural law. Criminal prosecution in Georgia is more extensive and widely represented; The prosecution begins immediately after the person is arrested or recognized as an accused, and at the stage of investigation, it is carried out by conducting various procedural actions; Criminal prosecution includes requesting the court for applying preventive measures by the prosecutor, the dismissal of the accused and a motion of the parties for seizure of property in the court, etc.¹⁵ In addition, the criminal prosecution continues in court, and this is confirmed not only by the legal literature¹⁶ but also by the current criminal procedural legislation (Article 250). So, criminal prosecution is the most powerful function of the prosecutor that combines many procedural actions. This raises the natural question of whether such a broad function of criminal prosecution in the legal space of Georgia can prevent the effective implementation of this function. If

⁹ *Gogshelidze R.*, The Role of the Prosecutor's Office in a Democratic Society; "Law" magazine, 2002, #9-10, 71-75 (in Georgian).

¹⁰ *Bouloc B., Stefani G., Levasseur G.*, Procédure pénale, 23^e édition, Paris, 2012, 144-145, 166-167; *Dubina I.A.*, Objectives of Pre-trial Criminal Proceedings and the Role of the Prosecutor in Achieving Them., Dissertation for the degree of candidate of legal sciences, Volgograd, 2006, 109 (in Russian); *Comp. Molins F.*, L'action public, 2009, (dernière mise à jour: 2013) 8-9.

¹¹ Case of Foti and Others v. (Application no. 7604/76; 7719/76; 7781/77; 7913/77) Kangasluoma v. Finland, no 48339/99, ECHR, June 14, 2004; Zana v. Turkey, no 69/1996/688/880, ECHR November 25, 1997.

¹² Criminal Law Process of Georgia, Private Part, 2nd edition, collective of authors, *Mamniashvili M., Ghakhokidze J., Gabisonia I.* (ed.) publishing house "World of Lawyers", Tbilisi, 2013, 116-117 (in Georgian).

¹³ Regarding the mentioned position, see additionally: Criminal Procedural Law of Georgia, (private part), collective of authors, editor: *Papiashvili L.* "Meridian" publishing house, Tbilisi, 2017, 63 (in Georgian).

¹⁴ Le Code des procureurs de la Couronne, par. 3-4, <<https://www.cps.gov.uk/sites/default/files/documents/publications/FRENCH-Code-for-Crown-Prosecutors-October-2018.pdf>> [20.09.2023].

¹⁵ Criminal Procedural Law of Georgia, (private part), collective of authors, editor: *Papiashvili L.*, "Meridian" publishing house, Tbilisi, 2017, 75-82 (in Georgian).

¹⁶ *Ibid.* 69-72.

we look at legally advanced countries (England, the USA, France)¹⁷, criminal prosecution is not so widely applied. For example, prosecution does not include procedural coercion measures while in Georgian criminal procedural law plays a critical role.¹⁸ In addition, the consideration of procedural coercion measures in criminal prosecution creates certain difficulties and contradictions.¹⁹ For example, the problem of arresting an initial subject of prosecution.²⁰ Talking about the scale of the criminal prosecution the issue of implementing the criminal prosecution in the court is also interesting. Criminal prosecution is carried out in support of the state accusation²¹ but it is necessary to find out how it is continued in the higher instances or if it makes a start in the courts of appeal and cassation. In this case, questions refer to the transfer of the prosecution from one instance court to another. This issue was not a complication under the Criminal Procedure Law of February 20, 1998, because according to the above-mentioned law, the judgment provided by the court entered into force and ensured the enforcement after the expiration of the 1 month of appeal (Article 602).²² The parties had the opportunity to appeal to a higher court as there was not the enforcement of the sentence. The criminal prosecution had to continue because the process of the enforcement of the sentence had not started yet, and by appealing the verdict, the judge (accused) and the prosecutor were still legally in an enduring criminal procedure relationship. The prosecutor by performing the last action²³ in the court fulfilled his function to support the accusation but the criminal prosecution was not finally over; There was a loophole in the procedure legislation to continue the criminal prosecution in an uninterrupted mode in case of appealing the verdict (the execution which had not started yet). Based on the presumption of innocence, a person could not be called guilty because the judgment had not entered into legal force. This rule was changed during the 1998 Procedure Legislation (Article 602).²⁴ According to the current Criminal Procedure Code, a judgment shall enter into force and be enforced upon its public announcement by the court (Article 279). This means that the person has already been

¹⁷ *Wade M.*, The Power to Decide – Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today, 2006, 108-109, <http://link.springer.com/chapter/10.1007%2F978-3-540-33963-2_2#page-1>, [20.09.2023]; *Le Code des procureurs de la Couronne*, par. 3-4, <https://www.cps.gov.uk/sites/default/files/documents/publications/FRENCH-Code-for-Crown-Prosecutors-October-2018.pdf> [20.09.2023]; *Kamisar Y., Lafave W.R., Israel J.H., King N.J.*, Basic Criminal Procedure, Cases, Comments and Questions, 11th Edition, Thomson West, 2005, 9-16; *Bouloc B., Stefani G., Levasseur G.*, Procédure pénale, 23^e édition, Paris, 2012, 137-167, 573-623; *Larguier J.*, Procédure pénale, 18^e édition, Paris, 2001, 85-88; *Guinchard S., Buisson J.*, Procédure pénale, Paris, 2000, 492-494.

¹⁸ *Mamniashvili M., Ghakhokidze J. Gabisonia I. (eds.)*, Criminal Law Process of Georgia, Private Part, 2nd ed., Collective of Authors, publishing house “World of Lawyers”, Tbilisi, 2013, 119 (in Georgian).

¹⁹ *Meurmishvili B.*, Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), “Meridian” Publishing House, Tbilisi, 2015, 117-134 (in Georgian).

²⁰ *Ibid.* 134-136.

²¹ *Ibid.* 237. *Comp. Kobaladze P.*, For Mutual Separation of the Functions of Supporting State and Criminal Prosecution, magazine, “Justice and Law”, #3(22)09 (in Georgian).

²² See <<https://matsne.gov.ge/ka/document/view/31882?publication=51>> [20.09.2023].

²³ *Meurmishvili B.*, Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), “Meridian” Publishing House, Tbilisi, 2015, 235 (in Georgian); *Comp. Laliashvili T.*, Georgian Criminal Process, General Part, Publisher “World of Lawyers”, Tbilisi, 2015 (in Georgian).

²⁴ See <<https://www.matsne.gov.ge/ka/document/view/31882?publication=103>> [20.09.2023].

found guilty and since the process of enforcement of a sentence has been started, the criminal procedure relationship between the state and the convicted person has already ended (the convicted person has entered into a sentence-enforcement legal relationship with the state). Consequently, criminal prosecution (it is a procedure activity²⁵) can no longer continue perpetually in the courts of higher instance. So, the legislator introduced a new approach; In particular, the criminal prosecution in the courts of appeal and cassation can be resumed in case of appealing the sentence. The criminal prosecution started in the investigation stage proceeds continuously in the Court of First Instance if the prosecutor has decided to continue the criminal prosecution while the prosecution in the appeal and cassation stages can be resumed which depends on an appeal of the judgment of conviction already entered into legal force by the authorized entity. At this time, the convicted person is simultaneously in criminal procedure and enforcement relations with the state. The mentioned reasoning is extremely important for a systematic understanding of the scope of the criminal prosecution: the criminal prosecution started in the investigation stage can be continued continuously in the Court of First Instance (the first stage); The prosecution is completed during the substantive consideration of the case, with the last action of the prosecutor. After that, in the appeal (the second stage) and cassation (the third stage) stages, the criminal prosecution can be resumed.

3. Equality and Adversaria Principle and the Function of Criminal Prosecution

From the perspective of the research, another important issue is the correlation of equality and adversarial between the arms to the function of criminal prosecution. The concept and meaning of the mentioned principle are not fully defined in the legal literature.²⁶ For instance, protecting the rights of the accused person before starting the criminal prosecution against him. By the Criminal Procedure Code, upon the commencement of a criminal prosecution, criminal proceedings shall be carried out based on the equality of arms and adversarial principle (Article 9). Therefore, in criminal proceedings, the defense appears in legal terms and acquires its procedural power after the initiation of criminal prosecution.²⁷ Unfortunately, the answer to the following questions if a person against whom criminal prosecution has not been initiated yet and in the shortest period²⁸ he can be known as an accused, has the opportunity to prepare for the defense and participate in the proceedings in any way, get acquainted with the materials of the criminal case or use the right of defense, is negative. This person is provided with the rights and duties of the accused and allowed to fully participate in the criminal process after initiating criminal prosecution against him. However, before receiving the status of the

²⁵ For details see *Abashidze G.*, *Criminal Prosecution as a Function of the Prosecutor and its Implementation at the Investigation Stage*, “Universal” publishing house, Tbilisi, 2018 (in Georgian).

²⁶ *Giorgadze G.*, *Competitive Nature of Criminal Justice Process in Georgia*, a collection of scientific works: *The Impact of European and International law on Georgian Criminal Procedural Law*, scientific eds.: *Tumanishvili G., Jishkariani B., Shrami E.*, “Meridiani” Publishing House, Tbilisi, 2019, 282-294 (in Georgian).

²⁷ *Lomsadze M.*, *Criminal Law Process (Seventh Revised and Completed Edition)*, “Bona Causa”, publishing House, Tbilisi, 2018, 44-45 (in Georgian).

²⁸ For example, in traffic accidents and other crimes, when the alleged perpetrator of the crime has been identified only formal actions stipulated by the law can be performed to charge this person.

accused, a person remains outside the proceedings while the prosecution is free to investigate and gather evidence to get the person charged. Based on all of the above, there arises a question of whether the rights of the accused person are limited at this time or not, also, if the equality and adversarial principle needs to be interpreted in a broader sense. The above-mentioned issue is not odd to the criminal procedure of European countries. For example, France failed to solve the problem referring to a person who had not been accused yet and waiting to get the status of an accused had many limited rights to defend himself.²⁹ This issue was regulated in forming the institution of “assisted witness”. The witness assisted is a person involved in the criminal case. It is an intermediate status between that of the witness and that of the indicted. This status gives rights before the investigating judge. It may change during the procedure.³⁰ It would be better to introduce the institution of “assisted witness” in the space of Georgian criminal procedure because the person exposed as a result of the investigation would be able to participate in the criminal legal process before the charges are filed against him and protect his rights. Simultaneously, the balance characteristic of equality of arms and adversarial principle would be maintained from the beginning.

Therefore, it is appropriate to amend the Criminal Procedure Code and define a new subject of the process – an “assisted witness”, who will have the following rights (*Article 49¹* – rights and obligations of an assisted witness: 1. An assisted witness shall have all rights of a witness; 2. An assisted witness shall also have the right to: a) to have a lawyer at his own expense or the expense of the state provided by law; b) to obtain and submit evidence independently or through a lawyer by the procedure established by the Code; c) to request the carrying out of investigative actions and provision of evidence to refute the charges or mitigate the liability; d) to request the presence of a lawyer during the investigative actions conducted with his/her participation.³¹

An “assisted witness” should be recognized by the resolution of the investigator or prosecutor.

The rights of a prosecuted person before receiving the status of an accused were provided by the Criminal Procedure Legislation of February 20, 1998.

In particular, according to Article 24, Section 51 of the above-mentioned Code, a person, against whom the collection of evidence was ensured but the criminal prosecution had not been initiated, had the right to file a complaint with the superior prosecutor or depending on the scene of investigation request the timely initiation of criminal prosecution. Such a complaint was beneficial for the accused person because by initiating criminal prosecution against him, he would be able to defend himself.³² However, this approach is not considered completely correct as the person against whom the

²⁹ Code de procédure pénale, (français), art. 113-1, 113-2; Dernière mise à jour des données de ce code : 01 avril 2023, <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/>, [20.09.2023]; *Larguier J.*, Procédure pénale, 18^e édition, Paris, 2001, 161-162, 173-174; *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, 429-430 (in Georgian).

³⁰ Ibid.

³¹ *Meurmishvili B.*, Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), “Meridian” Publishing House, Tbilisi, 2015, 318-319 (in Georgian).

³² *Meishvili Z., Zorbenadze O.*, Commentaries on the Criminal Procedure Code of Georgia (as of December 31, 2006), Tbilisi, 2007, 82-87; See also, Criminal Procedure Code of Georgia of February 20, 1998, as of February 01, 2006, Article 24 (in Georgian).

evidence is being collected must be provided with some rights before the criminal prosecution, and he should not request the initiation of the prosecution for this purpose. In this regard, the sharing of the French model (assisted witness) is more appropriate than the provision established by the 1998 Procedural Law.

4. The Term of Prosecution

The term of criminal prosecution is also quite exceptional. The mentioned issue is related to the term of staying as an accused. According to the current criminal procedure, before a preliminary hearing, a person may be indicted due to a single episode of crime for no longer than 9 months, unless he was charged with another crime during this period. Upon expiration of the above period, the criminal prosecution against the person shall be terminated (Article 169). So, based on the current criminal procedure, the term of criminal prosecution against a person is clearly defined in the investigation stage of 9 months. Undoubtedly, the criminal prosecution is carried out in the court during a hearing on the merits, that is why, the term of the criminal prosecution in the court is also noteworthy. In this regard, the current criminal procedure indicates nothing. Thus, there is no term for criminal prosecution during considering the case, which is a drawback. The uncertainty of the prosecution term prolongs the remaining as an accused who is not in agreement with the protection of human rights. Indeed, the status of the accused is also empowering because he has many rights to protect himself but remaining accused for a long time cannot always have a positive effect on him, and specifying this term in the criminal procedure contradicts the expediency of justice (Article 8), this fact also hurts a person's business reputation, etc. In addition, the term of being accused cannot exceed 9 months while a person is in custody, but a person who is not in custody even after a preliminary hearing maintains the status of an accused until the court renders the judgment; At this time, a court of first instance shall render the judgment not later for 24 hours after the judge of preliminary decides to refer the case for a hearing on the merits (Article 185, Section 6). If we add up the 9 months of being an accused before the preliminary hearing and the 24 months for rendering the judgment, it turns out that a person, who is not in custody, can be an accused for 33 months which also contradicts the principle of expediency justice. As mentioned above, after the expiration of the 9 months of being accused before the preliminary hearing, the person is automatically dismissed from the charge, while the expiration of the 24 months for deciding in court (for example, the violation of this term by the judge) is not related to the dismissal of the charge. The above term may be violated but the person retains the status of the accused. Thus, to protect the interests of the accused, it is necessary and important that during a hearing on the merits of the case in court, the term of remaining a person as an accused is determined by the applicable procedure.

5. The Procedure Opportunity of a Victim to Influence the Decision taken by the Prosecutor Regarding the Criminal Prosecution

In addition to the above-mentioned issues, the opportunity for a victim to have a legal influence on the refusal or termination of criminal prosecution by the prosecutor and his legal status are also noteworthy. The problem mentioned above is not new. Around the topic there were discussions and

debates, it was also written in the scientific literature.³³ Some changes were indeed made in the procedure legislation, but the problem has not been solved. Since the implementation of the Criminal Procedure Code of 2009, the right of a victim to appeal the decision made by the prosecutor to refuse or terminate criminal prosecution has been changed several times. Initially, the victim had the right to appeal the above-mentioned decisions only to the superior prosecutor (Articles 106, 168). From July 24, 2014, if a particularly serious crime was committed the victim already had the right after the superior prosecutor to apply to the court for the appeal of the prosecutor's decision.³⁴ From July 21, 2018, the victim was given the chance to appeal the decisions made by the prosecutor on the cases subordinated to the state inspector.³⁵ After that, according to procedure legislation, the victim is provided with the right to appeal the prosecutor's decision on termination of criminal prosecution of domestic violence and other family crimes, as well as the serious crimes under the jurisdiction of the Special Investigation Service (Article 106). As for the refusal of criminal prosecution, according to the current procedure legislation, such a decision of the prosecutor may be appealed to the superior prosecutor. The decision of a superior prosecutor shall be final and may not be appealed, except when a particularly serious crime a crime which is under the jurisdiction of the Special Investigation Service, has been committed (Article 168). As can be seen from the above, the victim did not have the right to apply to the court with a request to resume or initiate criminal prosecution for all categories of crimes and influence the decision made by the prosecutor, which was wrong following this paper. On July 27, 2023, the First Panel of the Constitutional Court of Georgia adopted decision #1/5/1355,1389 which confirmed the validity of the opinion revealed in the work. In particular, the words of Article 106, Section 11, Sentence 2 of the Code of Criminal Procedure of Georgia, “The decision of the superior prosecutor is final and may not be appealed, except when a particularly serious crime has been committed” (the edition valid until October 15, 2019) and the words of the 2nd sentence of the 2nd part of Article 168 “The decision of the superior prosecutor is final and may not be appealed”. The Constitutional Court indicated in the above-mentioned decision that as a result of committing a crime a victim suffers from physical, moral, and psychological stress, as well as material damage. Accordingly, to restore/protect his violated rights, he shall be considered a subject of the right to a fair trial.³⁶ The right of the victim to appeal the decision of the prosecutor on a refusal or termination of the criminal prosecution can be considered as one of the important mechanisms of control used by the state bodies.³⁷ The right of the appeal allows him to reexamine the legality of the refusal to initiate the prosecution again through the state authorities.³⁸ In addition, the Constitutional Court indicated in its decision that the decision made by the prosecutor to refuse to initiate prosecution or terminate the

³³ *Meurmishvili B.*, Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), “Meridian” Publishing House, Tbilisi, 2015, 272-280; Criminal Procedural Systems of the European Union Countries, translated from English: *Tsiskarishvili K.*, scientific ed. *Gvenetadze N.*, Tbilisi, 2002, 131- 132 (in Georgian).

³⁴ <<https://www.matsne.gov.ge/ka/document/view/2434580?publication=0>> [20.09.2023].

³⁵ <<https://www.matsne.gov.ge/ka/document/view/2434580?publication=0>> [20.09.2023].

³⁶ Decision №1/5/1355,1389 of the Constitutional Court of Georgia of July 27, 2023, Samson Tamariani, Malkhaz Machalishvili and Merab Mikeladze against the Parliament of Georgia, 23 (in Georgian).

³⁷ *Ibid.* 51.

³⁸ *Ibid.*

prosecution can be clear and comprehensible, but mistakes cannot be excluded; Moreover, judicial control over the aforementioned decisions of the prosecutor is important to eliminate the risk of the abuse of power or arbitrariness.³⁹ The differentiation of victims according to the categories of crimes (less serious, serious, and especially serious) was considered unacceptable by the Constitutional Court. Everyone has an identical interest in monitoring the decision made by the prosecutor through the court, and this interest is equally important for all categories of crime victims.⁴⁰

Considering the above-mentioned and also other arguments,⁴¹ the Constitutional Court recognized unconstitutional the legal prohibition of appeal of the decision made by the prosecutor on the refusal to initiate criminal prosecution for less serious and serious crimes. In addition, the futility of appealing the decision made by the prosecutor on the termination of prosecution for less serious and serious crimes was declared unconstitutional. Regarding the latter case, the Constitutional Court discussed the version of the Code of Criminal Procedure valid until October 15, 2019.

The above-mentioned constitutional decision of Georgia is quite correct because according to this article, every person, including a victim, should have the opportunity to apply to the court to restore their violated right without being limited by the category of crime. It is not clear why the legislator singled out the right of the victim to influence the initiation or resuming of criminal prosecution by appealing to the court only for family, especially serious crimes and crimes under the jurisdiction of the Special Investigation Service. If we have a look at the above-mentioned changes in Articles 106 and 168 of the current criminal procedure, it is obvious that the rights of a victim to appeal to the court have been clearly but insufficiently increased. Victims should be allowed to file an appeal in all categories of crimes and influence the initiation and implementation of effective criminal prosecutions. This will also affect the prosecutor's decision to refuse or terminate the prosecution, as well as the rendering of correct, fair, and justified judgment by the superior prosecutor. A clear example of this is the approach of European countries to the mentioned issue, for example, France.⁴² This was also confirmed by the decision of the Constitutional Court of Georgia. Therefore, an amendment should be made to Article 106 of the current Criminal Procedure Code, according to which the victim will be given the right to appeal the decision of the prosecutor on the termination of criminal prosecution in court for all categories of crimes. The Constitutional Court discussed the issue concerning Article 106 but the version is valid until October 15, 2019.

6. Conclusion

In conclusion it should be mentioned:

- It is necessary to define the concept of criminal prosecution in the current criminal procedural legislation. This will contribute to understanding the concept of criminal prosecution;
- For the effective implementation of the prosecution function, it is appropriate to present it in a narrow sense, which implies the segregation of separate procedural mechanisms from this function;

³⁹ Decision № 1/5/1355,1389 of the Constitutional Court of Georgia of July 27, 2023, Samson Tamariani, Malkhaz Machalikashvili and Merab Mikeladze against the Parliament of Georgia, 52 (in Georgian).

⁴⁰ Ibid. 63.

⁴¹ For details see *ibid.*

⁴² *Bouloc B., Stefani G., Levasseur G.*, Procédure pénale, 23e édition, Paris, 2012, 293, 614-619.

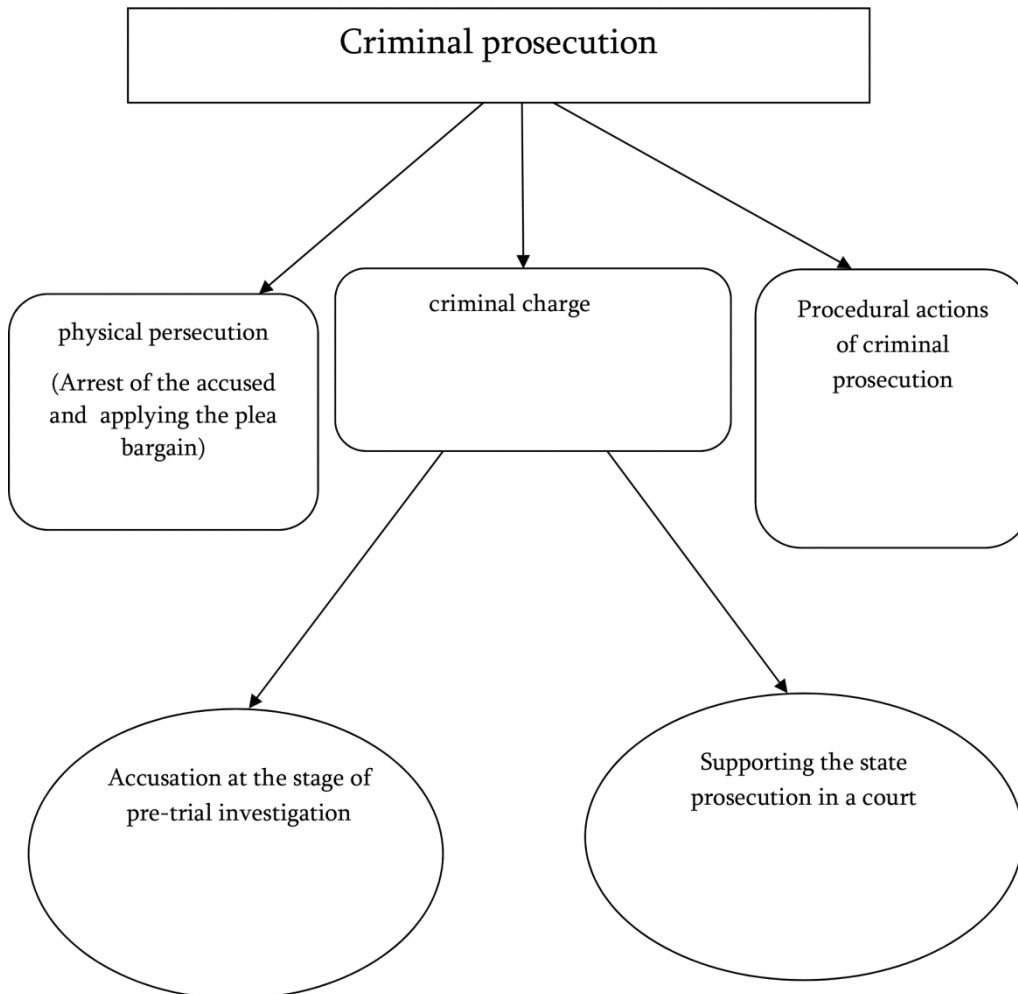
- Criminal prosecution should begin at the stage of the investigation, continue during the consideration of the case in the court of first instance, and can be renewed in the courts of appeal and cassation instance;

- To improve the legal status of a person to be charged with criminal law, it is necessary to provide him/her with procedural rights before starting criminal prosecution. For this purpose, it is appropriate to introduce the institution of “assisted witness” in the Georgian criminal procedural space;

- To ensure speedy justice, it is necessary to clearly define the time limit for criminal prosecution in the current criminal procedural legislation. Currently, there is a problem with the term of keeping a person as an accused in court;

- It is convenient to improve the quality of legal influence on termination of criminal prosecution. Victims of all categories of crimes should have the right to appeal to the court the decision made by the prosecutor to terminate the criminal prosecution.

Appendix #1



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