

Prosecutorial Discretion in the Age of Artificial Intelligence

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Abstract

The aim of the study is to determine the importance of prosecutorial discretion in Georgian criminal procedural legislation and its possible future in the era of artificial intelligence. Against the background of legal innovations in the modern world and taking into account the fact that there are countries where artificial intelligence has partially integrated the role of the prosecutor in making specific decisions in criminal cases, the study of this issue is relevant. The main findings of the study are the following: 1. Prosecutorial discretion is a principle established by the criminal procedural legislation of Georgia and its violation is inadmissible, as it will cause problems in terms of justice and legitimacy; 2. Artificial intelligence is not yet used in Georgian criminal justice to such an extent that the study of the issue is overdue, therefore, the sooner this perspective is discussed in the legal community, the greater the chance that the right decisions will be made against the backdrop of inevitable technological changes in Georgia; 3. Transferring the prosecutor's discretion to artificial intelligence is not allowed and it should be used only as an additional resource, however, with the obligatory reservation that the advice received by artificial intelligence will be substantiated and specific sources will be identified, as a result of the analysis of which specific recommendations were determined.

Keywords: prosecutor, discretion, technology

Introduction

In Georgia, artificial intelligence has also become a subject of discussion in the field of criminal law, and for good reason. For example, since 2021, the Georgian Prosecutor's Office has begun to introduce artificial intelligence into the investigation process. The IBM I2 analysis program is designed for searching, processing and analyzing electronic information and was introduced in Georgia with the support of the US Embassy. IBM I2 is already actively used in the European Union, the US and Canada to assist in the investigation of money laundering, cybercrime, fraud and other complex crimes. ¹Accordingly, the research on the issue discussed in the article is relevant and I believe that it will become even more relevant in the near future, which I hope will also arouse the deep interest of other lawyers in researching this issue.

It is interesting to see to what extent artificial intelligence will take into account both public interests and human factors, which are no less important for the prosecutor when making a decision on a particular issue. The use of one of the most important procedural institutions - diversion - is also related to the prosecutor's discretionary authority. I believe that artificial intelligence should not become a tool to replace

¹ <https://1tv.ge/news/generaluri-prokuroris-moadgile-saqartvelos-prokuraturam-gamodziebis-processhi-khelovnuri-inteleqtis-gamoyeneba-daiwyo/>

the prosecutor's discretion. Artificial intelligence can be used as an auxiliary tool, a mechanism that ensures the effectiveness of decisions. It is necessary to accurately define the legal and ethical framework for the use of artificial intelligence. These restrictions should ensure a balance between the protection of human rights and technological development.

Our research methodology is: study-processing of scientific papers, logical and systematic research, comparative law, deduction and induction methods.

Main part

The 2009 Criminal Procedure Code transferred Georgian criminal procedure law from the list of continental law countries to the list of common law countries. This was primarily due to the fact that the adversarial principle was established and, accordingly, the powers of the prosecutor sharply increased. Among them, the prosecutor's discretionary powers are noteworthy. The prosecutor is today the main figure in the criminal process, and along with the increased powers, he has also been given greater responsibility. There are opinions among lawyers that the prosecutor today has unlimited powers and needs more effective means of control over them, such as court control, than is provided for by criminal procedure legislation. According to the current Criminal Procedure Code, decisions made by a prosecutor within the scope of his discretionary powers are mainly appealed to a superior prosecutor, which is why there is an opinion that this may violate the rights of other participants in the process. These discussions are developing against the background of the reality that a prosecutor always justifies his decisions, taking into account a number of circumstances, thereby making clear the grounds that led him to make a specific decision. Now let's imagine a situation where artificial intelligence makes decisions instead of a prosecutor. We can see a lot of potential problems that criminal proceedings will face in such a case. I consider the issue of justification and transparency of the decision to be particularly important, without proper regulation of which public trust in both the prosecutor's activities and the prosecutor's system in general will disappear. And this will not bring good results to the state either. Therefore, it is important that due attention be paid to the study of prosecutorial discretion in the era of artificial intelligence and each issue be studied with due care before, like some other countries, where artificial intelligence has been making decisions instead of prosecutors for years, regarding too many categories of criminal cases, Georgia will also face the threats posed by technological progress.

Chinese detectives have created artificial intelligence (AI) that can identify crimes and prosecute criminals. The AI was tested at the Shanghai Pudong Prosecutor's Office, the largest district prosecutor's office in the country. The algorithm was created using an existing AI tool. It is called System 206 and has been used by prosecutors working in China. The new AI can identify and prosecute criminals in eight of the most common crimes. These include: credit card fraud, gambling, reckless driving, assault, obstruction of an officer, theft, fraud, and even political opposition.²

² <https://1tv.ge/news/generaluri-prokuroris-moadgile-saqartvelos-prokuraturam-gamodziebis-processhi-khelovnuri-inteleqtis-gamoyeneba-daiwyo/>

The Criminal Procedure Code of Georgia defines principles that constitute the basic and fundamental foundations of criminal proceedings in Georgia. It is these principles that determine the entire essence of the criminal process, its main directions, and the basic standards that form modern legislation. These principles determine the content of criminal procedural legal activities and the scope of activities of the participants in the process. Their observance by the participants in the process is necessary in order for the criminal process to be conducted fairly, legally, and human rights to be effectively protected. Also, in order to effectively ensure both the rule of law and a fair trial for the participants in the process (the accused, the victim, etc.). However, in addition to necessity, it should be emphasized that compliance with the principles defined by the legislator is mandatory for both the bodies implementing the legal proceedings and the participants in the process. What happens if the principles are violated? Violation of any of them at any stage of the criminal process calls into question the fairness, transparency and legality of the decisions made by the participants in the process. Based on the above, it is essential that all basic principles of criminal law are strictly observed.

The Criminal Procedure Code of Georgia establishes the principle of discretion in criminal prosecution.

³According to this legislative provision: “When making a decision on the initiation and termination of criminal prosecution, the prosecutor shall exercise discretionary powers, guided by public interests.” Based on this provision, the exclusive authority of the prosecutor to make a decision on the initiation or termination of criminal prosecution, as well as on the conclusion of a plea bargain and other issues related to criminal proceedings, is protected at the level of the principle.

The order of the Minister of Justice of Georgia contained guiding principles and recommendations for the implementation of criminal prosecution, taking into account which the prosecutor should make a decision on the implementation of criminal prosecution within the framework of discretionary powers.⁴ However, on February 28, 2026, the aforementioned order was declared invalid. ⁵Nevertheless, we can use the information provided in this document for analysis when discussing issues related to prosecutorial discretion and public interest.

The prosecutor's discretionary authority allows for a wide and multifaceted interpretation and creates a risk of abuse of authority. This risk will increase even more if we attribute discretion to artificial intelligence in criminal proceedings. An incorrectly made or unfounded decision may harm the rights of a person and interests protected by law, as well as arouse distrust in society towards the state, because the prosecutor's office represents the state. Therefore, it is important that decision-making is carried out on the basis of a transparent and consistent process, which is practically impossible in the current conditions of the development and operation of artificial intelligence. When using discretion, the foreseeability of the decisions made must be ensured. The issue of criminal prosecution is resolved on the basis of the so-called full test (the full test consists of an evidentiary and public interest test).

³ Internet article: “They created an artificial intelligence that can perform the duties of a prosecutor” (see link in bibliography).

⁴ Article 16 of the Criminal Procedure Code of Georgia (as of May 10, 2026);

⁵ See Order No. 181 of the Minister of Justice of Georgia of October 8, 2010 “On Approval of the General Part of the Guidelines for Criminal Justice Policy”;

When deciding whether there is a public interest in pursuing a case, the following factors should be taken into account: the nature and gravity of the crime, the personal characteristics of the accused and the degree of his culpability in the crime committed, the goals of the sentence, the issue of crime prevention, as well as the legal priorities of the state and other important circumstances. Artificial intelligence, as it currently stands, cannot ensure the adoption of reasoned decisions on all these issues, and it is necessary to use the prosecutor's human resources to avoid the problems that will arise when making decisions by artificial intelligence. It is also necessary to take into account the fact that, as of today, the use of discretion is not under the control of the court. Accordingly, it is necessary to ensure that the prosecutor's discretion is taken taking into account the principles of objectivity, justification and legitimacy.

Every day, investigations are initiated in many cases, and in each specific case, the prosecutor is guided by discretionary authority, which contributes to the prevention of stigmatization, the efficiency of the criminal justice system, saving resources, and most importantly, an individual approach to each case, because each case and each defendant are individual and it is impossible to use a single, dogmatic approach. It is necessary for the prosecutor to study in detail all the circumstances of the case and the personal data of the defendant and make a decision accordingly.

When making a decision, the prosecutor takes into account the principles of crime prevention, the existence of the impunity syndrome, and the inevitability of punishment. When making a decision, the prosecutor also relies on internal beliefs. However, what is internal belief? This does not mean making a decision only according to the prosecutor's personal views. Rather, internal beliefs are formed by taking into account all the circumstances of the case and as a result of summarizing human experience.

In the process of assessing the public interest, the prosecutor must take into account the category and nature of the crime, the form of its commission, the circumstances, place, time and means used, as well as the subjective side of the action. When making a decision, special importance is attached to the interest and position of the victim. When assessing the interest of the victim, the nature and severity of the damage caused, the fact of compensation for the damage, the age of the victim, the state of health and other individual circumstances must be taken into account. The prosecutor must also assess the degree of culpability of a specific person in relation to the responsibility of other participants in the crime. In the conditions of complicity, taking into account the motive and individual role of the person, it may be considered appropriate not to initiate criminal prosecution against a specific person.⁶

When deciding on the issue of initiating criminal prosecution, importance is also attached to the person's past, including convictions, administrative penalties applied to him/her and the presence of guilt in other criminal cases. In addition, it is necessary to assess how many times and for what category of crime the person has been convicted, as well as whether there is a connection between the new and past crimes. When making a decision, the prosecutor must take into account the degree of cooperation of the accused and his readiness to cooperate with the investigation. The confession of the crime, which means the

⁶ See Order of the Minister of Justice of Georgia of February 28, 2026 "On Approval of the General Part of the Guidelines for Criminal Justice Policy" on Annulment of Order No. 181 of the Minister of Justice of Georgia of October 8, 2010;

person's recognition of the committed act as his own guilt, is also of essential importance. In addition, the confession must be made on the basis of free will and free from any coercion.⁷

The individual characteristics of the person who committed the crime must also be assessed within the framework of the public interest test, including his age, physical and mental condition, behavior in the period after the crime, professional or social status and other important circumstances. One of the fundamental goals of justice is the prevention of crime, which is why the prosecutor must definitely take this circumstance into account, especially in relation to less serious crimes. Although a specific act may pose a low public danger, a decision not to initiate criminal prosecution may have a negative impact on society and risk encouraging the commission of similar crimes.

Of particular importance is the assessment of the actual or potential consequences that non-initiation of criminal prosecution may have on society. In this context, it should be assessed whether the perpetrator of the crime poses a threat to society, its individual groups or public order. In addition, the factor of public interest and public opinion should also be taken into account.⁸

The prosecutor must determine what type and severity of punishment is expected for a specific person in the event of criminal prosecution. In addition, it should be assessed how appropriate it is for the state to spend time and resources on the implementation of criminal prosecution and support of the state prosecution. In addition, it is important to assess how priority it is to direct resources to criminal prosecution for a specific crime. However, the time and resources already spent on the investigation cannot be considered independently as determining circumstances for deciding whether to initiate criminal prosecution.

The above-listed circumstances that the prosecutor must take into account when exercising discretionary powers are not exhaustive. Depending on the circumstances of a specific criminal case and the characteristics of the person who committed the crime, absolutely different factors may determine the prosecutor's decision. However, it is not necessary to consider all of the listed factors in each specific criminal case, since the need for their consideration depends on the circumstances of the specific case.

The different practices of using artificial intelligence products in the public institutions studied within the framework of the report, the absence of special regulatory mechanisms and risk assessment and insurance systems, according to the Public Defender, create a significant threat of uncontrolled use of artificial intelligence in the public sector. This risk is especially noticeable in conditions where the institutions themselves may not have complete information about the possible threats arising from artificial intelligence systems created by the supplier and/or developer companies. The threats are further heightened by the fact that there are practically no specific requirements for the protection of human

⁷ Collective of Authors, Commentary on the Criminal Procedure Code of Georgia, Meridian Publishing House, American Bar Association, Tbilisi, 2015. pp. 127-128

⁸ Collective of Authors, Commentary on the Criminal Procedure Code of Georgia, Meridian Publishing House, American Bar Association, Tbilisi, 2015. pp. 347-348

rights for AI products acquired through public procurement. Such inconsistent and poorly regulated practices make effective legal monitoring of the consequences of AI significantly more difficult.⁹¹⁰

Conclusion

Artificial intelligence in criminal procedural justice will undoubtedly create new opportunities - in the direction of rapid analysis, rapid data collection, rapid identification of possible risks. However, it should not replace the work of the prosecutor and his essential role in the criminal justice process. Moral empathy and ethical principles that the prosecutor, as a person, possesses are one of the most important circumstances necessary for making fair decisions and exercising discretion. Artificial intelligence should become a necessary and important tool in the hands of the prosecutor, which will help him work quickly and effectively.

Based on the above, before including the resource of artificial intelligence in the prosecutor's discretion, it is necessary to determine a clear legal framework and regulate the scope, methods and responsibilities of the use of artificial intelligence within this framework. At the same time, it is necessary to establish the obligation of transparency and justification. Accordingly, only those systems that substantiate decisions should be used. It is important that not only prosecutors, judges and lawyers, but also local and international human rights experts, as well as civil society, be involved in the process of introducing artificial intelligence into criminal justice. Finally, it is imperative to mention the possibility of appeal by the participants in the process, which means that decisions must be substantiated, legally clear to persons who have the opportunity to appeal them.

Although artificial intelligence is not an unambiguously positive or negative phenomenon, I consider its inclusion in criminal proceedings to be inevitable in the near future. This change will lead to turning points. Theoreticians and practitioners of law, not only in the field of criminal law, but also in the field of human rights, will have to work with the state with due diligence so that the use of artificial intelligence in criminal proceedings serves not only speed, but also justice and the protection of human rights.

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