

## Characteristics of Initiating Criminal Prosecution in England and France

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### Abstract

The given article concerns the characteristics of initiating criminal prosecution in England and France. Besides that, discussions are held in the comparative legal context about initiating criminal prosecution in Georgia, France and England. Based on the comparison of procedural provisions of these countries the similarities and differences of initiating criminal prosecution have been distinguished. Furthermore, the article focuses on the range of bodies having an authority to initiate the prosecution. In the final part an evaluation is made whether it is appropriate to consider the elements of initiating prosecution of England and France in the criminal procedure law of Georgia.

**Keywords:** civil suit, criminal prosecution, crown prosecution service, crown prosecutor, private prosecution, public prosecution

### Introduction

The way towards the understanding of the criminal prosecution concept is quite long and difficult. Diverse opinions have been formed about this institution and it can be said that this process is pending until today. There is no common opinion in legal literature about the term of criminal prosecution, its constitutive elements and procedural actions, prosecution initiating bodies, as well as its start and finish. Part of legal scholars identifies criminal prosecution with the charge or/and investigation, (Nikitin E.L., 2000, p.56; Strogovich M.S., 1958, p.100; Strogovich M.S., 1948, pp.113-114.) while others consider that prosecution is carried out only at the so called, pre-trial stage and there is no prosecution in court proceedings. (Gabisonia I., 1999, pp.260-262)

The criminal prosecution as a function of criminal procedure has not only the legal, but philosophical significance as well, because it is related to such categories, as are justice, human rights and freedom; this is a kind of communication between the State and individual. (Yakovenko, V.V., 2006, p.13.) Forcing an individual or performance of anti-social activities is not an end in itself of the criminal prosecution, but

this institution is committed to protect the state and society from harmful consequences. (Kuchin A.F., 2004, p.14.) The more a state is developed, the less it uses coercive methods or avoids to reveal them. (Kuchin A.F., 2004, pp.14-15.) As mentioned above, there is no common idea about legal nature of criminal prosecution, as well as the procedure how to initiate it. Against a background of diverse opinions and evaluations the interest comes naturally as to how the criminal prosecution is initiated in such countries with different legal traditions as are England and France. It's worth noting that initiating criminal prosecution depends on the legislation and various legal opinions of particular country. Therefore, it would be reasonable to discuss and analyze the existing approaches about initiating criminal prosecution in England and France and to compare them with the Georgian criminal procedure law.

### Initiating Criminal Prosecution in England

Criminal proceeding in England is based on traditional doctrine that a criminal case is a dispute about the committed particular crime, which will be considered in the court like other disputes (e.g. property, labor, etc.). (Makharadze A., 2007, #3, p.53.)

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The British system is founded on the notion of a private prosecution. Under certain conditions any person can institute a criminal action against an alleged offender, though this does not mean that the dockets of English courts are crowded with such prosecutions. On the contrary, an ordinary British citizen is usually content merely to report a suspected criminal violation to the police and leave the matter in their hands. (Kaufman I.R., 1980, Volume 49, Issue 1, Article 8, p.28., Korolyov G.N., 2005, p.319; Prof. Alekseev, 1995.)

An explanation, why a private individual is reluctant to prosecute, is the expense of bringing a prosecution, which is significant and presents a major economic hurdle. (Kaufman I.R., 1980, Volume 49, Issue 1, Article 8, p.28.)

Additional impediment on private prosecution is a complete discretion of the Director of Office of the Attorney General, to undertake control on any criminal case and the Attorney General's power to halt the prosecution of cases, which are to be heard by the court. (Wyngaert C.V.D., 2002, p.114; Kaufman I.R., 1980, Volume 49, Issue 1, Article 8, p.29.)

In spite of these limitations, the English view a private person's right to bring a criminal proceeding as an important constitutional support or guarantee against abuse of discretion by public officials. (Kaufman I.R., 1980, Volume 49, Issue 1, Article 8, p.29.)

Unlike Georgia, there is a different situation in terms of initiating prosecution in England. Before the adoption of the Prosecution of Offences Act 1985, the police had an authority to institute and carry on criminal prosecution. (Wyngaert C.V.D. 2002, pp.92-93; Kartokhina O.A., 2003, pp.72-102; comp. by Gorlova S.V., 2006, pp.103-104.) However, since 1879 the office of Public Prosecutions has existed having an authority to prosecute, but it only conducted five to 10 percent of the prosecutions brought on indictment. (Kaufman I.R., 1980, Volume 49, Issue 1, Article 8, p.30-33; Korolyov G.N., 2005, pp.319-320.) In 1985 the Crown Prosecution Service was created and the Code for Crown Prosecutors was adopted, which empowered the above mentioned office to initiate and carry on prosecution. This decision was made following a fact that police could not act effectively in terms of evaluation of evidences. The purpose of creation of the crown prosecution service was not to allow too many weak cases to go to the court. (Wyngaert C.V.D. 2002, p.93.)

The crown prosecution service is still operating up to present and it is headed by the Director of Public Prosecutions, who carries responsibility before the Attorney General. (Wyngaert C.V.D. 2002, p.93; Kartokhina O.A., 2003, pp.72-102.)

In accordance with the Code for Crown Prosecutors (paragraph 3.1.), in more serious or complex cases, prosecutors have a right to decide whether to start criminal proceedings. As set out in this Code, in particular type of cases, except for the prosecutors, the police also has a power to start criminal proceedings as police apply the same principles in deciding whether to prosecute. (Poursuites pénales, La décision d'engager des poursuites pénales, 2013.) One of such cases may be the commitment of a new crime by offender following the official warning given by enforcement agencies, when it becomes unavoidable to initiate criminal

persecution immediately by police. (Golovko L.V., 2003, pp.56-64; Gutsenko K.F., Golovko L.V., Filimonov B.A., 2007, pp.147-149.)

Furthermore, police bear responsibility to conduct a comprehensive investigation and solve a case. During this time the crown prosecutors are constantly giving advice to the police (Lewis C., 2006, p.151, p.171.) regarding directions on conducting investigation (especially, when large-scale crimes with many episodes are being investigated), as well as acquiring evidences. This helps them to complete investigation successfully and obtain evidences to justify a prosecution. Though, the crown prosecutors cannot always handle the investigation. (Le Code des procureurs de la Couronne, par. 3.2.)

When the police establish offender and deem it appropriate to institute criminal prosecution against the offender, in such case a person will be formally charged with a crime. This procedure includes input of data in a special database about the crime and offender. Following that a defendant taken to the officer, who will inform about the content of charge and determine whether the defendant wants to notify the police about anything. Convicting material gathered by police is handed over to the Crown Prosecution Office, which will decide about further development of the case. (Korolyov G.N., 2005, pp. 323-324; Gutsenko K.F., Golovko L.V., Filimonov B.A., 2007, pp.151-152.) Although in England in less important cases police has an authority, following investigation, to make independent decision to dismiss a case. (Wade M., 2006, pp.108-109.)

Crown prosecutors shall study the criminal case, detect weak aspects of the case and if they find out that not appropriate evidences have been acquired and it is impossible to supplement them in further investigation and at the same time, there is no public interest towards the case, they shall immediately drop the case. On the contrary, if the crown prosecutor is satisfied with the case meeting the abovementioned requirements, the prosecutor shall immediately bring the criminal prosecution. (Le Code des procureurs de la Couronne, par. 3.3., 3.4., par.4.)

While studying the criminal case filed to the crown prosecution service a prosecutor shall consider all possible options and changes that may take place in future concerning the case; together with investigators they should discuss all measures to be taken on the case, whenever changing charges or dropping the case is necessary. Prosecutors and investigators of the case should cooperate closely. Though the final decision whether to proceed with the case shall be made by the crown prosecutor and accordingly, the responsibility relies on them. (Le Code des procureurs de la Couronne, par. 3.6.)

It should be also noted that parliament has identified offences that require the consent of the Director of Public Prosecutions or of the Attorney General before forwarding the case to the court, initiating and conducting criminal prosecution against defendants. Such cases are: inciting national enmity, violation of official secrecy, etc. (Le Code des procureurs de la Couronne, par. 3.7., Wyngaert C.V.D. 2002, p.93.)

Therefore, initiating and carrying on criminal prosecution

in England is apparently characterized by certain peculiarities. In particular, unlike the current procedure law of Georgia, prosecution is instituted by police, so as a specially created crown prosecution service. This agency, similar to the Prosecutor's office of Georgia, makes decisions regarding initiation and conduct of criminal prosecution. Though, unlike the crown prosecution service, in Georgia only a prosecutor (and not police) decides the expedience of bringing and carrying on criminal prosecution (Criminal Procedure Code of Georgia, Art. 166, Law on Prosecutor's Office of Georgia, Art. 13).

## Initiating Criminal Prosecution in France

The rule of initiating criminal prosecution in French criminal procedure is characterized by certain peculiarities. Under the procedure law of this country the prosecution is related to the public prosecution (the same as public suit, l'action public). The terms criminal prosecution and public prosecution are considered to have equal meanings. (Gutsenko K.F., Filimonov B.A., 2007, p.410; Bouloc B., Stefani G., Levasseur G., 2012, pp.137-167, 573-619.)

According to the French legislation, public prosecution for the imposition of penalties is initiated and exercised by the judges, prosecutors or civil servants to whom it has been entrusted by law. (Code de procédure pénale, (français), Art. 1.)

In French scientific literature active and passive actors are distinguished. Passive actors are those against whom the criminal prosecution is carried out. (Bouloc B., Stefani G., Levasseur G., 2012, pp.144-145; Molins F., 2009, (dernière mise à jour: 2013, pp.8-9.) As regards the active actors of public prosecution, as mentioned above, they are, primarily, a prosecution office (ministère public, the same as the Office of Public Prosecution), which is granted a special authority and role to institute and carry on criminal prosecution, and some public officials. (Larguier J., 2001, pp.85-88; Molins F., 2009, (dernière mise à jour: 2013) pp.9-13.)

Prosecutor's office is authorized to conduct criminal prosecution as determined by the law (Code de procédure pénale (français), art. 31; Molins F., 2009, (dernière mise à jour: 2013) pp.4-5.) At that moment they act on behalf of the society. Therefore a prosecutor (prosecutor's office) is often called a community advocate. (Bouloc B., Stefani G., Levasseur G., 2012, pp.155-156.) This body is characterized by a strict hierarchy. In the courts of upper instances prosecution is conducted by the public prosecutor (ministère public), who has his delegates. The public prosecution is also carried out by the prosecutor general in person or through his deputies. The Minister of Justice is a higher representative of the prosecution office. (Bouloc B., Stefani G., Levasseur G., 2012, pp.147-160, 575-578; Larguier J., 2001, pp.85-88.)

In exceptional cases some administrative authorities may also initiate public prosecution and file an action with

the trial court for violation of rules in the field of water supply, forest and agriculture. In given cases the public action may take place, e.g. on behalf of a director of forestry or agrarian department. These authorities may act independently, (Code de procédure pénale, (français) p.134.), as well as together with the prosecution office. (Molins F., 2009, (dernière mise à jour: 2013) pp.5-7; Bouloc B., Stefani G., Levasseur G., 2012, pp.160-163.)

There exist three stages of pre-trial criminal proceedings: inquiry, initiation of criminal prosecution and preliminary investigation. (Kartokhina O.A., 2003, pp.72-102; Gutsenko K.F., Golovko L.V., Filimonov B.A., 2007, p.410.) The inquiry proceedings are of greatest significance in French criminal procedure. It is carried out by police under prosecutor's supervision. At this stage the evidences are being collected, (Aubusson de Cavarlay B., p.201.), also a person may be detained. The inquiry proceedings are carried out prior to initiating a prosecution. (Code de procédure pénale, (français), art. 53, 74-78; Korolyov G.N., 2005, pp.302-303; Golovko L.V., 1995, pp.10-41; Gutsenko K.F., Golovko L.V., Filimonov B.A., 2007, pp.406-407.) Afterwards, a prosecutor evaluates filed complaint (also, other materials), as only he has an exclusive power to make decision regarding further proceeding of the case (e.g. initiating criminal prosecution). (Code de procédure pénale, (français), art. 40; Guinchard S., Buisson J., 2000, pp.493-494.) Although, a prosecutor has right to institute criminal prosecution without carrying out inquiry, by lodging case files before investigating judge or court. (Korolyov G.N., 2005, p.303; Gutsenko K.F., Golovko L.V., Filimonov B.A., 2007, p.400.) Besides, a prosecutor is authorized to prosecute the case in court. (Molins F., 2009, (dernière mise à jour: 2013) pp.9-12; Korolyov G.N., 2005, p.300; Gabisonia I., 2001, #5, pp.57-61.) Among powers of the prosecutor the forms of initiating criminal prosecution at his own initiative are especially notable: (Bouloc B., Stefani G., Levasseur G., 2012, p.146.)

## Initiating Criminal Prosecution through Issuance of Request on Preliminary Investigation (Le réquisitoire introductif)

In such case the prosecutor general will require from investigating judge to conduct preliminary investigation (that exactly means the initiating of criminal prosecution). (Bouloc B., Stefani G., Levasseur G., 2012, pp.166-167.) The investigating judge shall undertake preliminary investigation. Requirement about initiating preliminary investigation may be of two types: by addressing a particular person, if this person is known to the prosecutor and without reference to the alleged offender, if the last has not been identified yet and preliminary investigation is responsible to undertake that task. (Bouloc B., Stefani G., Levasseur G., 2012, pp.166-167.)

Therefore, criminal prosecution is initiated in the pursuit of the committed criminal act and not necessarily against a

1 An exclusive power to conduct preliminary investigation is granted to an investigating judge. He has a power to carry on various investigation activities in order to establish the truth. See: Code de procédure pénale, (français), art. 49, 81, 51e édition, Paris, 2010, 159, 293; Korolyov G.N., 2005, p.301.

particular person. This can be proved by the fact that when prosecutor so requests the investigating judge is limited towards the committed actions and not a group of persons. Investigating judge has a right not to agree with a prosecutor's opinion and charge not a person who was requested to, but the other person.<sup>2</sup> At the same time, the judge cannot investigate and charge a person to the fact or episode, which has not been indicated in prosecutor's request. (Korolyov G.N., 2005, pp.305-306; Strogovich M.S., 1948, p.318.)

Thus, unlike Georgia, the French criminal procedure recognized the initiation of criminal prosecution on the base of the committed crime and not only against a particular person. According to the current procedure law of Georgia based on a crime the investigation and not the criminal prosecution is initiated.

In this particular case, initiating criminal prosecution under French criminal procedure law means that investigating judge shall conduct preliminary investigation on material, that have been filed by a prosecutor. Such understanding of the criminal prosecution completely differs from the Georgian criminal notion of the prosecution. In the Georgian criminal procedure the prosecution is initiated following evaluation of investigation results, and in urgent cases, upon detention of a person.

### Initiating Criminal Prosecution through Issuing a Direct Summon to the Court (*La citation directe*)

The given form of initiating criminal prosecution is used on such cases when the prosecutor's office does not require and at the same time, it is not necessary to conduct preliminary investigation. (Bouloc B., Stefani G., Levasseur G., 2012, p.166.) As mentioned above, the inquiry system is well developed in France, which is closely related to the prosecutor; the inquiry is carried on prior to the initiation of prosecution. Therefore, such cases may occur when a prosecutor deems not necessary to conduct preliminary investigation, but based on the inquiry material will initiate criminal prosecution. (Kartokhina O.A., 2003, pp.72-102.) Initiating prosecution through summoning a defendant to the court mainly takes place on the cases of misdemeanor and petty offence. (Bouloc B., Stefani G., Levasseur G., 2012, pp.614-615) It is impossible to refer this form of prosecution to the criminal actions, which require the conduct of preliminary investigation. (Bouloc B., Stefani G., Levasseur G., 2012, pp.163-166, 613-616.)

Direct summoning of a defendant to the court is conducted in the following way: in particular situation a prosecutor sends a request to a court bailiff to draft and hand over proper document to the defendant. The mentioned document comprises various requisites, including brief content of charges. The court bailiff hands over a copy of the document to the de-

fendant, while the last signs the original copy certifying that he got familiarized with the document. The signed original copy is passed to the prosecutor. (Bouloc B., Stefani G., Levasseur G., 2012, pp.165-166, 615-619.)

### Simplified Procedures of Initiating Criminal Prosecution

Summons with a statement of charges (*convocation par procès-verbal*) takes place when a prosecutor does not deem it necessary to arrest a person and there is no need to conduct preliminary investigation either. A copy of this summons is handed over to the defendant. The document includes information about violation of law and the statement about the date, place and time of a court hearing. In such case the term from the moment of initiating prosecution up to the court proceeding will be reduced. (Code de procédure pénale, (français), art. 394; Bouloc B., Stefani G., Levasseur G., 2012, pp. 167-168; 621-622.)

As for immediate appearance in court (*comparution immédiate*) this procedure is referred to such cases of misdemeanor, which provide pre-trial custody and if prosecutor deems necessary to leave the defendant in custody before trial. If for particular reasons it is impossible to conduct a court hearing on the same day, when a person is brought before the prosecutor, the issue of pre-trial detention measure shall be decided. But if the court can be convened that same day, then court proceedings will start. (Code de procédure pénale, (français), art. 395, 396; Bouloc B., Stefani G., Levasseur G., 2012, pp. 622-623.)

It is worth to note that when using the abovementioned method of initiating criminal prosecution a prosecutor does not issue any special statement. Procedure of initiating prosecution is related either to the drafting of other type of procedural document (not a statement), or the performance of all the procedural steps. (Korolyov G.N., 2005, p.307.)

### Right of a Victim in Connection with Initiation of Criminal Prosecution

In France, a power granted to the prosecutor to decide at his own discretion the issue of initiating criminal prosecution is balanced by a special procedural mechanism, which ensures the protection of legal rights of a victim. (Gutsenko K.F., Golovko L.V., Filimonova B.A., 2007, p.420) In particular, an injured party may exercise a civil action (*L'action civile*) and thus influence on initiation of public prosecution. (Code de procédure pénale, (français), art. 1, 2; Wyngaert C.V.D. 2002, pp.131-132.) There are two forms of bringing

<sup>2</sup> In France investigating judge decides whether to charge or not a person. See.: Code de procédure pénale, (français), art. 80.2, art. 116, 51e édition, Paris, 2010, 286-287, 380; Kartokhina O.A., 2003, pp.72-102.

<sup>3</sup> In French criminal procedure the offences are divided into three categories : felonies, misdemeanors and petty offences. See :Gutsenko K.F., Golovko L.V., Filimonov B.A., 2007, pp. 367-368.

criminal prosecution on the initiative of a victim: filing a complaint to investigating judge and immediate appearance in court. (Bouloc B., Stefani G., Levasseur G., 2012, p.293.)

*The first case* refers to the prosecution to be initiated by a prosecutor on felonies through drafting and filing a request to conduct preliminary investigation. If in such case a victim deems that he caused damage and the criminal prosecution has not been initiated yet, he will send a complaint in written form to a judge. The judge will send the mentioned complaint to the prosecutor, who decides the issue of initiating the public prosecution.

It is noteworthy that in this case a prosecutor does not have right to make a decision on the expedience of initiating or refusal to initiate criminal prosecution. In such case he will act within the scope of circumstances strictly defined by law (as are: limitation, amnesty, etc.). If such grounds do not exist a prosecutor will initiate the public prosecution and send a request to investigating judge regarding preliminary investigation. (Code de procédure pénale, (français), art. 86; Bouloc B., Stefani G., Levasseur G., 2012, pp.293-296; Gutsenko K.F., Golovko L.V., Filimonov B.A., 2007, p.420.). Thus, a prosecutor shall initiate criminal prosecution following a victim's complaint.

*The second method of initiating criminal prosecution* is referred to when preliminary investigation is not conducted. A victim will apply to the court requesting to send a written summons to the defendant. Court bailiff will draft the mentioned document and introduce it to the defendant, in the same procedure as it happens by the request of a prosecutor. Afterwards, the court hearing is held, which is initiated by the victim. (Larguier J., 2001, gv.108-148; Bouloc B., Stefani G., Levasseur G., 2012, pp.293; 614-619.)

Therefore, as can be seen from above, in French criminal procedure a victim's position in terms of initiating criminal prosecution is of great importance. A victim may put into motion the whole process, start criminal proceedings on his initiative. (Wynngaert C.V.D. 2002, pp.131-132.)

## Conclusion

Initiating criminal prosecution in England and France differs from provisions of Georgian criminal procedure law regulating this issue. In particular, police and crown prosecution service are considered the actors of criminal prosecution in England; i.e. the police has a power to initiate and carry on criminal prosecution on cases of certain categories that is not allowed under the current procedure law of Georgia. Though as in England, so as in Georgia two important components – sufficient evidence and public interest must exist in order to bring criminal prosecution.

Criminal prosecution initiating figures in French criminal procedure are of particular interest. Depending on how grave an offence is an authority to initiate prosecution in this country is exercised by prosecutor, victim and several civil servants. Though it should be noted that prosecutor's role has a great importance in terms of initiating and carrying on criminal prosecution. Unlike current procedure law of Georgia, in France

a prosecutor may initiate prosecution as on the crime, so as against the particular person. Forms of initiating criminal prosecution on the initiative of a prosecutor are substantial, which are characterized by certain peculiarities. It is not recommended to introduce similar methods of initiating prosecution in Georgia, as their implementation will not be possible in practice. Moreover, there is no practice of conducting inquiry under the current legislation. In France the inquiry is one of considerable procedural mechanisms for investigation and establishment of factual circumstances, which is conducted under a prosecutor's supervision.

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