Aneta Turkowiak-Woźna

Wrocław, on 31 May 2023

Abstract of doctoral dissertation

entitled: "Conditional discontinuation of penal proceedings. Premises for ruling and the question of enforcement" elaborated in the Chair of Penal Enforcement Law of the Department of Law, Administration and Economy at the University of Wroclaw under the direction of prof. dr. hab. Tomasz Kalisz

The institution of conditional discontinuation of proceedings was introduced into the Polish criminal law by way of criminal codification from 19 April 1969 in the period of advanced Polish People's Republic. Justification to the draft Criminal Code assumed severe punishments of crime perpetrators who committed acts of high-degree social danger on the one hand and, on the other hand, promoted the concept of non-custodial penalties with regards to perpetrators of minor offences, especially by way of eliminating short-term punishments of imprisonment. It was explained in the following manner: *"conditional discontinuation of proceedings realizes (...) the principle of limiting penalisation in minor matters assuming that there are incidents in which it is possible to conduct an educational process thus preventing re-entry of the perpetrator on the criminal path through application of other measures without conviction and penalty"*.

Introduction of a new institution which the Criminal Code from 1932 was unfamiliar with (according to which the primary restrictive measure for short-term imprisonment penalties was the institution of conditional suspension of punishment execution), namely, conditional discontinuation of proceedings, was dictated in the Polish criminal legislation by the achievement of specific goals of criminal-political nature.

The institution became an expression of the world trend for the pursuit of new preventive measures and tools designated to combat minor offences. In place of traditional repression measures new measures of educational nature were introduced. The institution of conditional discontinuation of proceedings could only be formulated is a legal system for which punishment constituted, above all, a measure targeted at effects in the future criminal policy and not solely a retaliating or expiation measure.

The basis for adopting the purposive function of criminal measures had to be the prior awareness of the necessity to individualize punishment - the so-called determination of punishment based on not only what the perpetrator had committed but, above all, on who he was. For the legislator it was evident that as part of the criminal policy the aspect of upbringing impact of the penal measure on other members of the society could not have been omitted. The postulates stemming from the necessity for the individual to resocialize interweaved with and supplemented the society upbringing with their intentionality focused on the future.

Introduction of this institution into the Polish Criminal Code (or similar institutions to criminal codes of socialist countries) was determined by two main regards: humanitarian and utilitarian. Experiences of legal thought and the practice of the justice system have stood behind the lack of necessity to implement punishments for committed crimes if the crimes did not constitute a means towards resocialization in case the perpetrator, due to lack of demoralization, did not require a resocialization process and other considerations (weight of the act and social impact of it) did not justify the punishment. Short-term punishments that could be ordered, lacking their resocialization function, might fulfil a reverse function, thus, leading as a result of the encounter of the convict with demoralized individuals to the change of attitudes towards a negative direction. The legislator undoubtedly considered the process economics.

One may note that the institution of conditional discontinuation of proceedings constituting according to this assumption a momentous factor of criminal policy modernization and was a penal oddity in a sense. This original nature of the institution, far from traditional concepts and schemes made it raise substantial interest among both theoreticians and practitioners, leading to many doubts and controversies around some of its provisions. They are largely rooted in the "academic" domain: a dispute about whether the conditional discontinuation is or is not a "conditional conviction"; whether a decision on conditional discontinuation may achieve "standard" validity or only "conditional" validity; a dispute about it being of "material" and not "formal" nature; requiring full "evidence of noting guilt" and thus causing the effect in the form of overthrowing the presumption of innocence of the defendant; concerning doubts whether the decision indicated "completion" or 'suspension" of the proceedings.

In the currently binding Criminal Code the institution of conditional discontinuation of the proceedings was placed in Chapter VIII of the Criminal Code entitled Measures related to subjecting the perpetrator to a trial to conditionally suspend execution of punishment and conditional early release without serving the remainder of imprisonment; after the principles

and institutions of the dimension of the punishment and before the separate chapter devoted to the procedure of crimes and rules of combining punishments and criminal measures. This legislative separation and grouping of three above-specified institutions took place thanks to the legislator perceiving common features for these institutions. Above all, they share the feature of conditionality which is immanently linked to subjecting the perpetrator to an attempt for a given period of time the outcome of which (so-called fulfilment or non-fulfilment of conditions) determines its success as specified by law and court.

In case of conditional discontinuation of criminal proceedings the conditionality feature is linked not with the decision on conditional discontinuation of proceeding itself but rather with the conditions decisions covers. The conditions, obligations of the trial make the legal state formed by the decision in question a "conditional" one until the period of that trial does not successfully pass.

Conditional discontinuation of penal proceedings is an institutionalized form of legal-criminal reaction to the fact of committing a crime assigned to a specific perpetrator, applied towards perpetrators of minor offences. It is an institution with a definitely mixed material-process nature which consists, on the one hand, in applying specific ailments, whilst on the other - which ceases the course of the progressing criminal proceedings, whilst assuming the form of its suspension, however, that suspension occurs conditionally for a trial period the success of which depends on the occurrence or non-occurrence of circumstances specified in the material criminal law. The material-legal nature may also be found in the premises of admissibility of applying this measure, whilst one of them has a transparently process nature (*circumstances of an act do not raise any doubts*).

The standards that regulate a strictly-process-related issue of the institution have been included in the Code of Criminal Proceedings. After completion of the pre-trial proceedings, should premises specified in the material law have been met that justify conditional discontinuation of criminal proceedings, the prosecutor may elaborate and submit to court a motion for such discontinuation instead of an indictment (Art. 336 § 1 of the Code of Criminal Proceedings). The justification of such motion may be limited to indicating evidence in favour of the defendant's guild not raining any doubts and, furthermore, the occurrence of circumstances supporting conditional discontinuation. The prosecutor may indicate the proposed trial period, obligations to be imposed on the defendant and, if applicable, a motion concerning supervision. After the conduct of initial review of the motion according to the same principle as in the case of the indictment, the president of the court submits such a motion to

the court session (Art. 339 § 1 point 2 of the Code of Criminal Proceedings). Referral to the session concerning conditional discontinuation of proceedings is not determined by the application of motion issued by the prosecutor as the court president may, at his own discretion, direct the case to the session also when an indictment has been submitted. This decision may be undertaken by the chairman both at his own initiative and pursuant to the motion of the party (Art. 9 § 2 of the Code of Criminal Proceedings). Referring the case to the session does not bind the adjudicating court.

The following parties are entitled to attend the court session: prosecutor, defendant and the victim. Their participation is obligatory should the court chairman or the court so order (Art. 341 § 1 of the Code of Criminal Proceedings). In the subject of conditional discontinuation of the proceedings the court gives its decision by way of judgment (Art. 341 § 5 of the Code of Criminal Proceedings). The release of such a judgement however is determined by the will of the defendant. If the defendant opposes conditional discontinuation the court directs the case to be resolved during a hearing. Referral to a hearing occurs also when the court finds conditional discontinuation to be unjustified. In the event of referral to a hearing, the motion of the prosecutor for conditional discontinuation of the proceedings replaces the indictment, whereas the prosecutor conducts its supplementation with the necessary list of evidence within the term of 7 days (Art. 341 § 2 of the Code of Criminal Proceedings). Taking into consideration the motion submitted by the prosecutor the court releases a judgment concerning conditional discontinuation of the proceedings in which it precisely specifies the act committed by the defendant and the legal qualification of this act as well as specifies the period of trial (Art. 342 § 2 of the Code of Civil Proceedings). Obligations imposed on the defendant as well as the manner and the term of their execution and the decision concerning supervision are determined in the judgment (Art. 342 § 2 of the Code of Criminal Proceedings). In case of matters concerning the execution of the judgment on conditional discontinuation the court which adjudicated in the first instance the given case is the relevant body (Art. 3 of the Code of Criminal Proceedings).

If in the period of trial a need arises to consider the issue of potentially commencing the conditionally discontinued proceedings, the court adjudicates in this regard ex officio or upon the motion submitted by the prosecutor, the victim or the court professional curator (Art. 549 of the Code of Criminal Proceedings). This is always the court of first instance relevant for the case recognition and the hearing may be attended by the prosecutor, the defendant and his defender as well as the victim and his proxy (Art. 550 of the Code of Criminal Proceedings). In

case of undertaking a conditional discontinuation of the proceedings the case is pending from the start according to the general principles before the relevant court. The previously submitted motion of the prosecutor for conditional discontinuation replaces the indictment (Art. 551 of the Code of Criminal Proceedings). It is obvious that the process organs are in such case bound by the principle of presumption of innocence.

The legal nature of decision on conditional discontinuation of the criminal proceedings was not transparent, especially given that in the previous codification these discontinuations were addressed by the court and by the prosecutors among whom prosecutorial judgments dominated. According to the current codification, conditional discontinuation is not a conviction and furthermore - in case of dismissal of this measure (facultative or obligatory commencement of the proceedings - Art. 68 of the Criminal Code) the proceedings is held from the start according to the general principles (Art. 551 of the Code of Criminal Proceedings) and there can be no doubts whatsoever as to the validity of the principle of presumption of innocent in such new proceedings. This may constitute the basis for the view concerning "provisional" assignment of the crime to the defendant and, in this regard, also the provisional overthrow of presumption of innocence towards him. In accordance with the judicature of the Constitutional Court establishing guilt in the judgement on conditional discontinuation of proceedings is never final in nature, thus, it should not cause any process effect in the form of repealing the basic directive of the penal process which is the presumption of innocence of the defendant. Such a judgment contains process decision on perpetration whilst it does not resolve the issue of guild in this manner. Within the judicature of the Supreme Court the prevailing view in this regard is that the conditional discontinuation involves presumption of innocence without placing any additional prosecutorial of this presumption on this concept.

Application of this measure leads to the occurrence of an important process question, namely, does the judgement (ruling) concerning conditional discontinuation of the criminal proceedings rebut the presumption of innocence of the defendant or not. Presumption of innocence is a binding principle in specific proceedings with regards to the specific subject of such proceedings, thus, suspect and subsequently the defendant (Art. 5 of the Code of Criminal Proceedings). Rebutting the presumption of innocence occurs in an absolute manner as a result of judgement stating guild in that precise proceedings. It is a unique type of proceeding: it may become (by operation of law) conditionally discontinued proceedings but it may also "cease to be discontinued" and become re-commenced - then, the rebutting of presumption of innocence ceases to be binding.

The choice of the topic of the hereby dissertation was dictated by an intention to carry out a synthesis of issues related to the institution of conditional discontinuation of proceedings in criminal law and process. Presentation of historical background of the investigated issue is essential for such analysis. I have attempted to outline this in the introduction to the work further to systemic issues involving ruling of conditional discontinuation of criminal proceedings.

Upon presentation of the subject of the study and the historical overview of the institution I have applied the most crucial terminological observations contained in judicature. I have placed emphasis on certain key elements in the scope of conditional discontinuation of proceedings which had been researched by the representatives of the doctrine as a result of the revision of codes.

I consider the institution of conditional discontinuation of proceedings until its introduction into the Polish legislation to remain crucial for the practice of the system of justice with a potential for being resolved in the future. For this reason, I have devoted special attention to the efficiency and position of conditional discontinuation of criminal proceedings in the system of probation measures.

At this point in time a certain insufficiency remain as the conducted analysis in the scope of subject literature has revealed a shortage in current elaborations corresponding to the legal system shaped after 1997 in this area which would involve empirical studies covering an analysis of penal cases completed in conditional discontinuation of proceedings that would accept the issues arising controversies and practical problems (for instance: M. Leonieni, 1972; A. Marek, 1973; A. Zoll, 1973; M. Leonieni i W. Michalski, 1975; B. Kunicka – Michalska, 1982; currently out of few studies in this regard T. Kozioł, 2009) and would highlight the role of the means of impact on perpetrators of crimes that would not involve imprisonment.

Limiting within the doctoral dissertation to discussing solely changes in the legal system would surely be insufficient from the perspective of providing these deliberations with a value of input into the development of legal sciences. The objective of the study was to investigate the practice of the system of justice in the scope of the discussed institution and to undertake issues concerning the shape it obtained from the legislator. In this regard I have conducted own studies on court case files which allowed me to verify practices of the justice system at least in the minor degree (within the area of Wrocław appeals) in the scope of applying the institution of conditional discontinuation of criminal proceedings.

The above scopes of the dissertation explain the shape of its title in the following wording: "Conditional discontinuation of penal proceedings. Premises for adjudication and the executive issue." The work is at the same time devoted to material-legal issues and formal-legal issues (process issues); on account of their close interrelation the criminal code not only established the premises for their adjudication but also determined the circumstances causing changes which in fact constitutes the executive issue of the institution. The sense of this institution consists in avoiding not only placing punishment on the perpetrator but also a conviction and a significant part of the penal proceedings itself. These issues concern individualization of the means of impacting the perpetrator through his resocialization.

I have placed a rather narrow circle of questions and research hypotheses in the study. Due to stressing out the weight of proper collection of materials necessary for a thorough characteristics of perpetrator's personality with respect of which Art. 66 of the Criminal Code was applied I have carried out an analysis of data from the files of penal cases gathered independently by the Survey to studies of files in cases of conditional discontinuation of criminal proceedings (Annex to the Dissertation) with an intention of verifying the application of possibilities of impacting the behaviour of the perpetrator and his further re-education.

Fundamental conclusions in the dissertation are linked to the conducted statistical data analysis and own research conducted on a randomly selected court files from the area of 41 units of Wrocław appeals (1 court of appeals, 5 district courts and 35 regional courts). Based on the analysis, approx. 300 files on court cases with the use of a survey for studies of files in cases of conditional discontinuation of criminal proceedings (research tool) from amongst which 100 final conditionally discontinued cases from 15 regional courts from the area of the Wrocław appeals were subjected to interpretation. The results presenting specific aspects were obtained along with defining the factual scope of application of conditional discontinuation of criminal proceedings in practice. Motions were submitted to courts concerning insight for scientific-research purposes of court case files in which criminal proceedings had been conditionally discontinued in the years 2010-2016. Taking into account organizational capacity of organs or bearing in mind that the conditional discontinuation of criminal proceedings is targeted at achieving preventive-educational goals towards the perpetrator through avoiding issuance of conviction and placement of punishment on the perpetrator that the efficiency of conditional discontinuation of penal proceedings depends on the statutory construction (shape of the judgment conditionally discontinuing the criminal proceedings) and its adequacy towards social needs for combating crimes (thus, achieving the effects the legislator intended to achieve).

The study of efficiency of conditional discontinuation of criminal proceedings is a reply to the question whether conditional discontinuation achieved the goal designated to it by the legislator or whether and to what extend it fulfilled the hopes it was entrusted with, thus, whether it properly serves the purpose of deepening individualization of penal responsibility, correctly replacing short-term punishments with preventive and educational impact measures.

The model of the discussed institution anticipates deferral for a trial period of adjudication regarding guilt of the perpetrator or regarding the sole adjudication concerning guilt. Hence, in the case of the dissertation in question, successful course of trial period was determined as the key element of efficiency of conditional discontinuation. Data obtained from this period concerning perpetrators and replies to questions whether they had fulfilled the obligations imposed on them and whether they lived in accordance with social principles, thus, whether they obeyed the legal order and, in particular, not committed a new crime in a given period of time – allowed to come up with conclusions, including an assessment of reaching the goal specified by the legislator.

The doctoral dissertation is composed of 202 (in words: two hundred and two) pages organized into four (IV) chapters preceded by the introduction with outlined assumptions and the plan of work. The summary may be found in the final part of the study, in chapter IV. It follows remarks and final conclusions which are drawn from the results of the analysis of files. In the final part of the doctoral dissertation a list of subject literature containing 225 items was presented. Furthermore, internet sources and a number of judgments were outlined: including judgments of the Constitutional Court, Supreme Court, Courts of Appeal, District Courts, Conventions, Treaties, International Agreements, Recommendations, Resolutions as well as Acts and Regulations.

Historical approach to the system of criminal law reaction to crimes is outlined in the first chapter. Subsequently, current catalogue of punishments and criminal measures was presented, further to an attempt made at defining the concept of a punishment. The discussed institution of conditional discontinuation of criminal proceedings was defined, above, in its present shape. At the background of deliberations involving the issue of conditional discontinuation of proceedings, attention was paid to a number of controversies which had emerged at the occasion of legislative changes and proposals. In order to clarify this matter I had to depart for a moment from the main matter of the work. Thereafter, through the analysis of genesis, the assumptions of institution of conditional discontinuation of proceedings were referred to. Substantially, literature acquis as well as judicature enabled me to define the essence and legal nature of

conditional discontinuation as well as to indicate the position of this institution in the system of probation measures.

Within the considerations noted in this hereby work, covering the bases of application of conditional discontinuation of proceedings, chapter two characterizes the concept of premises both in the fundamental aspect and in the factual one. At this point in time, the essential trend of deliberations was presented, since conditions the fulfilment of which determines application of this institution have been specified. Attention was paid to the fact that regardless of the many changes introduced to the principles of adjudication concerning conditional discontinuation by new criminal codifications, these premises have preserved their primary shape. Classification of the premises of conditional discontinuation also in light of judicature was performed. Furthermore, emphasis was placed on the correspondence between additional premises entitling to apply conditional discontinuation of proceedings in light of special laws.

In the subsequent chapter, the course of proceedings and adjudication in the scope of conditional discontinuation of criminal proceedings was analysed. Here, it seemed imperative to compare the present regime of adjudication with the previous regulation, whereas the so far criminal codification allowed conditional discontinuation of criminal proceedings both by a court and by a prosecutor. The issue of compliance of the institution of conditional discontinuation of proceedings with the principle of presumption of innocence turned out to be a far more complicated matter. A review was carried out of the doctrine and the judicature, paying attention to different approaches to the principle of presumption of innocence. Here, it was underlined that until within a conviction an evaluation is expressed in the form of guilt in legal meaning, the arrangements made by the court will solely constitute a more or less sufficient material for the release of such evaluation. In light of the fact that it cannot be stated that a ruling on conditional discontinuation of proceedings contains an ascertainment of committing a crime, obviously partially (Art. 66 (1) (k) (k)), a decision concerning conditional discontinuation of proceedings solely states that all requirements necessary for the granting of legal assessment occurred but the body shall not express such an assessment. Also the National Criminal Record is of significance in this case as well, which was discussed by me in some detail.

It should be underlined that the presumption of the institution of conditional discontinuation is inexpediency of punishment and even indictment stemming from premises specified in Art. 66 (1) of the Penal Code. In light of this I performed a broad overview of judicature of the Supreme Court and general courts, which completed deliberations in chapter three.

Further chapter supplemented the presented issue by the period of conditional discontinuation of proceedings, that is, trial period and means accompanying conditional discontinuation. The legal nature of conditional discontinuation is based on the designation by the court of a trial period for the perpetrator, which does not unequivocally shape the legal situation of the perpetrator. This stems from the fact that depending on the perpetrator's behaviour, conditional discontinuation in that period may assume the character of final judgment in the subject of the trial or else - it may open a possibility of imposition of a rational penalty or a punitive measure, encompassing also the behaviour of the perpetrator in a situation of commencing a criminal procedure and the necessity to conduct the jurisdiction study from the beginning. At this point in time, in my opinion, one ought to conduct an analysis of national, detailed statistical data concerning the execution of conditional discontinuation in district courts and regional courts. In the subsequent part, I drew attention to the consequences of non-affirmation of an additional prognosis existing at the time of undertaking a decision regarding conditional discontinuation – undertaking of conditionally discontinued proceedings (obligatory and facultative bases). It however remained obvious that non-final conversion, due to the still binding presumption of innocence, cannot constitute the basis for undertaking decisions which are detrimental to the perpetrator. Moreover, the issue of unpunishability of the perpetrator constituting a necessary premise for conditional discontinuation of proceedings was addressed.

In light of the overall disclosed circumstances and the discussed executive issue as well as the conducted studies one ought to note that the institution of conditional discontinuation of criminal proceedings, apart from covering a fragment of the general issue of criminal law and constituting a normative system, is also a social fact – representing a social institution that performs a specific function.

Therefore, if criminal law and more precisely a probation measure in the form of conditional discontinuation of criminal proceedings is supposed to express a will of the entire society then I consider the effect of subjecting a perpetrator to a trial as being responsible for the formation of an effective criminal policy in this regard. In such a manner so that in the social perception conditional discontinuation of criminal proceedings was not identified as remission of the punishment or actual impunity. In order to prevent undesired social phenomena one must enable the convict to successfully return to life in the society and to be able to rehabilitate in the conditions of controlled freedom. An attempt made by the convict, taking into consideration the actual possibility of exercising imposed obligations, ought to create an educational impact in achieving the goals of resocialization. Therefore, imposing obligations which will effectively

warn and hinder committing future crimes is essential. Placing the right (realistic) obligation is targeted at simplifying supervision over the convict during the trial period and leading to his concretization as well as strengthening the feeling of responsibility for the committed acts.

It seems necessary to note that obligations should not be imposed on according to the standard scheme of court actions (i.e. establishing the same amounts of financial benefits) as they will be unable to directly impact the perpetrator. Whilst in the scope of executing judgments one might pay more attention to the efficiency and consequences of actions and proper notification of their content (terms of execution, guidelines in the scope of imposed obligations) which would contribute to better functioning of this institution.

The outcomes of conducted tests indicated the need for further facilitating judgments concerning conditional discontinuation of criminal proceedings as, apart from the fully correct judgments, an example of improper application of the provisions stemming from the Act was detected. The issue of applying proper supervision over the convict during the trial period might be elaborated on in more detail. In light of the currently binding Act (Art. 67 § 3 of the Criminal Code), the court, through conditionally discontinuing the criminal proceedings places an obligation on the perpetrator of repairing damages entirely or partly and, to the extent possible, also the obligation to compensate for the harm caused or instead of these obligations imposes vindictive damages; may impose obligations stemming from Art. § 1-3, 5-6b, 7a or 7b of the Criminal Code and furthermore the court may order financial benefits (Art. 39 point 3 of the Criminal Code) up to 2 years. It involves systematic verification of whether the perpetrator performs the imposed obligations and whether he abides by legal order as well as whether he has not committed any new crime. The obligation of control is an indispensable condition for the correct functioning of the discussed institution and its efficiency. In order to increase it, it is necessary to fully abide by each premise specified by the legislator and to more extensively subjecting the conditional discontinuation of criminal proceedings to the condition of the perpetrator's profile and the existing circumstances on the matter. One must take into consideration the proposal of potential changes in the binding legal state which comprises expansion of the scope of allowed obligations in the course of conditional discontinuation of proceedings – possibility of imposing the obligation specified in Art. 72 § 1 point 4 of the Criminal Code on the perpetrator. (conduct of paid work, education or preparation for performance of professional activity). It seems justified to strive to apply intensified means directed ad resocialization-individual-preventive impact which consists in: granting actual educational assistance, therapeutic assistance, social assistance; subjecting to supervision

performed by professional curator (maintaining permanent and regular contacts and systematic supervision), improving the functioning of the entire system of guardianship concerning criminal matters; work in relevant educational programmes with improvement of personal identification data research; imposing obligations (including compensatory), their conditional nature seems obvious.

The choice of the topic of this dissertation also stemmed from a reflection that despite the fact that institutions and adopted legislative solutions should be strengthened over the years, currently the Polish legal system faces changes which do not serve the purpose of realizing the goal of existence, among others, of the discussed institution. In the current year amended changes in the Criminal Code came into force. The Ministry of Justice conducted the largest amendment of the material criminal law since adopting this code in 1997. Despite the fact that the introduced changes do not concern the subject of the discussed institution directly, within the study I have pointed out that in the opinion of experts they completely change the philosophy of punishing and the penal policy is nowadays targeted at mainly repressing and repulsing. The amendment annihilated the assumptions underlying the still binding criminal code from 1997 entirely, treating imprisonment as the final resource and giving the primacy in applying freedom-based punishments. The positions of the doctrine and jurisprudence characterize current amendments as "backward" towards the development of criminal law and state of research in the scope of penal sciences, repressive, casuistic and significantly limiting judicial freedom, disputing the existing criminal law regulations whilst not offering any detailed justification as to the causes of empirical data which indicate practical issues occurring in the course of their application.

Aneta Tulewicka-Woina