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THESIS SUMMARY

DISCONTINUATION OF PROSECUTION AS A FORM OF RESPONSE TO A CRIME IN A LEGALLY ADMISSIBLE CRIMINAL PROCESS

The modern criminal process is characterized by the need to deal with phenomena such as the ever-increasing detection of crimes, the phenomenon of "overcriminalization" and the abuse of prosecuting function. Legislators, having based the functioning of criminal procedural law system on the principles of legalism and retributive philosophy on reaction to crime, led to the creation of inefficient and ineffective systems. It is necessary to adopt a new philosophy in terms of responding to the legal and social phenomenon of crime. If law enforcement authorities are not guaranteed the possibility of assessing the advisability of prosecution at least in minor cases, they may begin to "defend" themselves against the overabundance of cases by resorting to practices rooted in unauthorized (legally unsanctioned) opportunism. Contemporary criminal process faces the dilemma of implementing moderate opportunism and mechanisms of "negotiated justice" or accepting the fact, that phenomenon of unauthorized opportunistic practices will spread. Therefore, a new philosophy towards reaction to crime is needed.

This new philosophy is offered by the institution of discontinuation of prosecution. The subject matter of thesis is to examine the legal nature of this institution, to describe it, as well as to propose the optimal shape of this institution in Polish criminal procedural law. The aim of the work is to assess the possibility of implementing (more precisely: extending the scope of application) of prosecution drops in Polish law and to assess the need for such implementation. Due to the lack of cognitively attractive forms of prosecution drops in Polish legal system, the thesis focuses on the analysis of forms of expediency prosecution drops existing in European legal systems, which apply principle of legalism (Germany, Slovakia), as well as those which apply principle of opportunity (France, Belgium). Dogmatic analysis will be conducted from the perspective of Polish law with references to foreign systems. Individual chapters of work are aimed at realizing the above research assumption.

The subject of analysis conducted in the first chapter is to present the definition of prosecution drop based on reasons of expediency, to compare the scope of meaning of the

concepts of inadmissibility and pointlessness of criminal prosecution, as well as an attempt to define them. In addition, the subject of consideration in the first chapter will be the concept of social harmfulness of a deed, which in the Polish system of criminal procedural law is an element of the definition of a crime (Article 1 § 2 of Penal Code), as well as a negative, substantive premise for conducting criminal proceedings (Article 17 § 1 point 3 of the Code of Criminal Procedure) and its' comparison the concept of the expediency of prosecution. The basis for assessing the expediency (profitability, legitimacy) of conducting criminal proceedings in the Polish legal system is the degree of social harmfulness of an act, i.e. the degree of violation of the interest of society in prosecuting a certain crime, which is defined by the legislator (Article 115 § 2 of the Penal Code). Sole existence of this factor, which is also a procedural condition, means that the principle of mandatory prosecution in Polish legal order (Art. 10 § 1 and 2 of Code of Criminal Procedure) is referred to as the principle of substantive legality; Had any formally unlawful act been committed, which is prosecuted in public prosecution mode, provided that the degree of social harmfulness of the deed exists and exceeds the threshold of insignificance, the act must be prosecuted. From the point of view of effectiveness of criminal proceedings, as well as from the point of view of achieving its objectives, it is permissible and desirable to deviate from the implementation of the prosecution function (sometimes combined with the use of substitute liability mechanisms) in situations where the degree of social harmfulness is higher than negligible, but still cannot be described as significant. The subject of consideration will also be the assumption of the inadequacy of leaving to the notion degree of social harmfulness exclusivity in deciding whether given prosecution is proportional and just. The purposefulness of the implementation of the law enforcement function and the possibility of meeting the challenges posed by the justice system of the twenty-first century should be seen in entrusting law enforcement authorities with discretionary powers, rather than in the threshold of profitability of conducting criminal proceedings rigidly defined by the legislator. Conducting criminal proceedings is a result of the implementation by the state of *jus* (or, as is sometimes referred to, *obligatio*) *puniendi.* The exercise of a states' *imperium* on the basis of penal policy must have its limits. Legal and procedural measures do not operate in a vacuum and serve clearly defined objectives. A specific, public-law right in a form of *jus puniendi* also has its limits, and their description and delineation are also the subject of considerations that will be conducted later in chapter I. The final part of the chapter is devoted to locating the notion of expediency prosecution drops on the background of the phenomena of privatization, dejuridization and minimization of the criminal process.

The institutional approach to the analyzed issue, as well as the desire to answer the question whether there are prospects for the development of abandonment of prosecution in Polish system of criminal procedural law, require an answer to be given as to whether this institution may contribute to the implementation of main or secondary subject matter of criminal proceedings and determining its relation to the statutory and dogmatic objectives of the proceedings . The subject of the argument conducted in the second chapter of the thesis will also focus on the issue of relationship expediency prosecution drop to the principles of legalism and opportunism. Manifestations of those principles in contemporary criminal procedural law are not reduced to a simple opposition of theses: "every crime should be prosecuted" and "in any case the expediency of prosecution can be assessed", but to search for a "middle way" aimed at ensuring an optimal model of response to a crime, respecting the forces and resources at the disposal of law enforcement agencies and preserving the authority of the judicial authorities.

Subject of deliberations conducted in third chapter will focus on the analysis of the compliance of discontinuation of prosecution to the standards of fair trial derived from both the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms and the Constitution of the Republic of Poland. Application of the principle of opportunism leads to expression of fears of performing vindicative or selective prosecutions, which might violate the principle of equality of citizens before the law. Doubts will also be analysed as to how far the possibility of fulfilling the subject matter of criminal trial can be advanced in a contractual form and to what extent the administration of justice in criminal matters may take such form. Answer to these questions depends on the extent to which the set of guarantees constituting the right to a fair trial is absolute, and to what extent and under what conditions these guarantees can be waived. The third chapter will also deal with the constitutional problems which have arisen in the Kingdom of Belgium as a result of implementation of expediency prosecution drop mechanisms. Taking into account the fact that the scope of procedural guarantees in all analyzed legal systems meets the minimum level set by the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms, it must be stated that the cited cases of non-compliance of certain forms of failure to prosecute with guarantees resulting from supra-statutory norms have a chance to occur in all countries that introduce similar solutions into their systems.

The issue of prosecutors' discretionary powers and its limits will be analyzed in fourth chapter. Prosecution drop mechanisms are based in all analyzed legal orders on a smaller (§

153a STPo) or greater (art. 28quater sentence 1 c.i.c.) amount of discretionary powers. There is a noticeable tendency that in systems based on principle of mandatory prosecution, the right to discontinue proceedings or not to conduct them due to expediency reasons is enclosed by a number of conditions expressed by law (e.g. "lack of public interest in prosecution", "satisfaction of the interests of the victim" or "small or negligible value of damage caused by the crime"). On the other hand, in systems based on the principle voluntary prosecution, the scope of exercise of discretion is limited by guidelines exercised by the authority leading states' prosecuting authority or the Minister of Justice. These guidelines, although not legally binding, are widely respected in countries where the principle of voluntary prosecution applies and have a fundamental impact on the implementation of law enforcement functions and penal policy. The subject of considerations conducted in the fourth chapter of the thesis will also focus on the shape Recommendations issued by Committee of Ministers of Council of Europe which had been implemented in almost all European legal systems, with exclusion of Poland. The next part of this chapter will be focused on the analysis of prosecution and prosecution drops guidelines issued in France, Belgium and Germany, as examples of coordination of prosecution policies through internal acts.

The subject of the considerations conducted in the penultimate chapter – the most important from the point of view of the subject of this work – will be the description of forms of prosecution drops present legal systems of the Federal Republic of Germany, the Slovak Republic, the French Republic and the Kingdom of Belgium. Some forms of discontinuations of prosecution present in those states' systems were purposefully omitted, while those which, in the author's opinion, are most relevant from the point of view of the examined comparative issue have been thoroughly described and analyzed. The selection of legal institutions put into analysis was performed in such way to be able to illustrate the functioning of its various models, as well as the various forms of potential reactions to the crime that may occur in given systems, starting from simple drops (i.e. *classement sans suite*) to prosecutorial probations which may sometimes be more severe than criminal liability in *stricto sensu*. The chapter will also present statistical data on the scale of popularity of expediency prosecution drops in examined legal systems.

Last chapter of the thesis is a synthetic summary of hitherto deliberations. In this chapter, based on performed analysis, conclusions will be presented and *de lege ferenda* postulates determining optimal shape of discontinuation of prosecution in Polish legal order will be stated.

It will also be demonstrated that both from a purely dogmatic and guarantee – oriented perspective in Polish criminal proceedings, there are no legal obstacles towards implementation of the institution of discontinuation of prosecution without simultaneous renouncement of principle of legality. The conclusions will be a synthesis of strictly dogmatic considerations with comparative legal considerations performed in the thesis.

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