

## OVERVIEW OF MAXIMS IN CRIMINAL PROCEDURE LAW

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### Abstract

The aim of this paper was to review and historically develop the principles of criminal procedural law, with a focus on the principles of legality and officiality to the present day. Throughout social development, various forms of criminal acts have emerged, characterized by rapid adaptation to the society in which they occur. In terms of organized crime, the example of a repentant witness is discussed, who, although a member of the same criminal movement, is freed and protected for the greater good by using legal principles. The agreement of the parties accelerates the conclusion of the procedure, which is even possible in the preparatory hearing before a panel of judges.

*Keywords:* agreement of the parties, legality, opportunity, officiality, panel of judges.

### Introduction

The overall social and technological development of society, which brings a series of positives, also entails a certain amount of negative aspects. Crime, as a negative phenomenon in society, encompasses increasingly sophisticated forms of criminality. The social community is built in layers and influences the interconnection of active subjects both domestically and internationally, while crime parasitizes over the social structure, being as active as positive social individuals in the community. With the development of society in this way, various forms of organized crime are structured, characterized by a rapid ability to adapt to new social realities, but always with one goal. Its aim is to acquire significant property benefits in a short time, often involving elements of violence. They achieve this goal by using modern infrastructural systems and the collective action of a group of people who deliberately cooperate in illegal activities, all through a certain period of time with a well-organized division of tasks among themselves.

### 1. Principle of Legality

Traditional criminal law principles include: the principle of officiality, the principle of legality, the inquisitorial maxim, actuation, publicity, directness, and orality of the proceedings. These principles, which emerged as creations of liberal Enlightenment

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thought, experience their limitations in application in 21st-century law. Influenced by Japanese and Anglo-Saxon law, they have been infiltrated into criminal procedure and need to be constantly adapted to new requirements in criminal proceedings. Greater value needs to be given to the confession of the accused and judicial decisions should be adjusted accordingly (Eser, 1992).

“The principle of legality in criminal prosecution is such that the prosecutor must always carry out criminal prosecution whenever the legal conditions are met.” The name of this principle originates from the Latin word *lex* (law). In accordance with this principle, the prosecutor will always carry out criminal prosecution when the conditions specified in the law are met. The principle of legality is connected, yet differs from the principle of officiality in criminal prosecution. Under the principle of officiality, criminal prosecution is carried out by official duty, regardless of the victim's will, and answers the question of who and in whose interest carries out the criminal prosecution for the crime that is prosecuted by official duty. The prosecutor carries out criminal prosecution due to the basic suspicion that a certain person has committed a specific criminal offense and there are no legal obstacles to conducting the prosecution. In German legal theory at the end of the 19th century, influenced by so-called absolute theories of punishment, the principle of legality of criminal prosecution emerged. Just retribution as a consequence of committing a criminal offense can be realized in criminal proceedings because the principle of legality is a procedural solution for achieving the material goal and the obligation of the prosecutor to always and everywhere carry out criminal prosecution is accepted (Tomašević, 2011).

The inquisitorial process creates a public law principle in conducting criminal proceedings. This leads to a division of the prosecution function carried out by the public prosecutor and the judging function performed by the criminal court. The principle of legality in Austrian Criminal Procedure Law is called the principle of accusation. The Criminal Procedure Law in the former East Germany valued the principle of legality as a prevailing principle (Perković, 1982).

The positive condition, therefore, the condition that must be met to initiate criminal prosecution, is the existence of a reasonable suspicion of a criminal offense and is not sufficient for the creation of the obligation of the prosecutor to carry out criminal prosecution. This obligation, as already mentioned, arises only if in addition to the existence of the positive does not exist any of the negatively specified conditions. We also call these negatively defined conditions legal obstacles, so criminal prosecution, for example, will not be possible, even though there are well-founded suspicions about the crime and the perpetrator (the defendant died in the meantime, enjoys immunity,

the statute of limitations for criminal prosecution, the application of the institute of amnesty or pardon). An equal procedure is ensured for all citizens, regardless of their function or social position, criminal prosecution must be carried out if the legal conditions are met, and in this way citizens' trust in the criminal justice system is built, while at the same time reducing the possibility of abuse by the state attorney. It strengthens general prevention because potential perpetrators are aware that they will be prosecuted if they commit a crime (Carić, 2001).

## **2. Principle of purpose**

The principle of expediency is the procedural possibility of criminal prosecution to abandon criminal prosecution despite the duty to undertake criminal prosecution (the principle of legality) when it is required by reasons of economy or the purpose of criminal prosecution. The fundamental purpose of the principle of opportunity is, therefore, to avoid criminal prosecution when it is not economical or when it is not purposefully (Krapac, 2009).

The Austrian Code of Criminal Procedure from 1975, amended by the so-called Diversionsnovelle from 1999 (BGBl I 1999/55)<sup>6</sup>, in chapter IXa - Waiver of criminal prosecution (diversion) regulates the conditional waiver of criminal prosecution based on an agreement between the defendant and the state attorney as a specific out-of-court settlement, and the state attorney may, before indictment to give up the criminal prosecution of crimes that are prosecuted *ex officio* (Carić, 2001).

In our judiciary, both principles are accepted (the principle of legality of criminal prosecution and the principle of opportunity). The legal condition is the existence of a well-founded suspicion of the commission of a criminal offense and of the perpetrator, without the state attorney having to have evidence that will confirm with certainty or probability that a person is the perpetrator of a criminal offense. It is sufficient that he has evidence that indicates only the possibility that this person has committed a certain criminal act. When there are legal conditions, the state attorney must perform the function of criminal prosecution, even when, in his opinion, there is no point (Tomašević, 2011).

CPC in Art. 2. St. 3. states that "...if this Law does not prescribe otherwise, the state attorney is obliged to undertake criminal prosecution if there are well-founded suspicions that a certain person has committed a criminal offense for which he is being prosecuted *ex officio* and there are no legal obstacles to prosecuting that person". (Criminal Procedure Act).

### **3. Consensuality in criminal procedure**

Consensual procedures are agreements between the parties to avoid or end the criminal proceedings of the parties during the duration of the proceedings, which sometimes also require the consent of the court, for example, when a judgment is passed based on the agreement of the parties. The reasons for its application are the overcrowding of the courts and the relief of the NHI from a large number of pending cases, the acceleration of the end of the procedure without dissatisfied parties, and the increased effectiveness of the procedure (Tomašević, 2011).

The idea of resocialization and humanization of criminal law in the second half of the 20th century increases the number of tasks of the state administration and the judiciary in response to criminality and changes the understanding according to which criminal proceedings must be initiated and conducted in the state's interest, and serve exclusively as an instrument of the functionality of public punishment of perpetrators of criminal acts regardless of the private interests of the injured party or the defendant, making a decision about him has a resocializing effect (Krapac, 2009).

In continental criminal justice, under the influence of American plea bargaining, different consensual forms of procedure are being developed that allow the state attorney to, in agreement with the perpetrator of the crime, apply a certain form of criminal sanction even before the initiation of criminal prosecution and avoid the initiation of proceedings. Since with consensual principles the state does not confront the perpetrator of the crime, it is considered that they contribute to rehabilitative criminal policy goals and relieve the state budget (Krapac, 2009).

Criminal prosecution is carried out in accordance with the principle of expediency when the state attorney can conditionally dismiss the criminal complaint or conditionally waive criminal prosecution for a criminal offense punishable by a fine or a prison sentence of five years, if the victim or injured party agrees to this, and the suspect agrees to perform certain obligations. The Chief State Attorney of the Republic of Croatia may dismiss the criminal complaint or abandon the criminal prosecution of members of a criminal organization if this is proportionate to the severity of the criminal offenses committed and the importance of the testimony of that person, important for the detection of criminal offenses and members of the criminal organization (Art. 212. paragraph 1.) By accepting the principle of the opportunity of penal persecution, it enables the use of "repentants" in the fight against organized crime (Krapac, 2009).

Recommendation of the Council of Europe Recommendation no. R (87) 18 explains the conditional waiver of criminal prosecution (as well as the conditional suspension of criminal prosecution) and uses the terms conditional waiver of proceedings, ie conditional discontinuation of proceeding.). It attaches importance to elements related

to the simplification of criminal justice. Along with it, Recommendation Rec (2000)19 on the role of the public prosecutor's office in the criminal justice system is also worth noting. These are recommendations that clarify the non-prosecution or waiver of criminal prosecution and the consequences that follow. Thus, the decision itself can be independent, i.e. in the form of a statement, etc. (pure and simple), followed by a warning or admonition, and it can also follow after the suspect or the defendant fulfills certain conditions ordered to him (certain behavior, monetary payment, compensation for damage to the victim or probation). It is precisely in the latter case of non-prosecution, i.e. waiver of criminal prosecution, that we find similarities with conditional suspension of criminal prosecution and conditional waiver of criminal prosecution (Glasnović Gjoni and Sirotić, 2016).

Accepting the status of penitent, the accused admits his criminal activity and confirms that it was indeed committed as part of a criminal organization. If we were to watch it without that court decision on the commission of a criminal offense from Art. 333. Paragraph 4. According to the Criminal Code, based on the agreement of the Chief State Attorney and the suspect, he would be treated as the perpetrator of a criminal offense (Kos, 2001).

The Law on Criminal Procedure also includes: judgment based on the agreement of the parties, Art. 360-365, agreement of the state attorney with the witness (Art. 286), conditional waiver of criminal prosecution according to the principle of expediency in proceedings against minors, Art. 71 - 73 ZSM and issuing a criminal order (Criminal Procedure Act).

Passing judgment based on the agreement of the parties is found in Chapter XIX. of the Criminal Procedure Act and is called Accusation, and that is articles 361 to 364 of the Act, which regulate the passing of a verdict based on the agreement of the parties, and articles 359 to 361 of the Act, which regulate the defendant's declaration of guilt and the negotiation of punishment and other measures. The judgment based on the agreement of the parties is rendered in camera at a non-public session of the indictment panel, i.e. at a non-public preliminary hearing (Turudić et al).

The parties submit the signed statement to the council after the opening of the session of the criminal indictment panel, and if they have not yet completed the negotiations, the panel may postpone the session for a maximum of fifteen days due to the completion of the negotiations. Upon receipt of the statement, the panel is obliged to determine whether the parties are in agreement with respect to the content of the statement and enter this into the record and then decide on the confirmation of the indictment (Article 354, paragraph 1, Article 355 and Article 356.50). The indictment will be confirmed, and then a decision will be made on the acceptance of the statement for judgment based on the agreement of the parties. If it accepts the statement, the panel will sentence the defendant to a sentence or other measure from Article 360,

paragraph 4 of the Law, which was proposed by the parties' statement, from which it follows that the panel cannot impose a different type or amount of sentence or measure than the one proposed. A judgment based on the agreement of the parties can also be made at a preliminary hearing, as the last stage in which the parties can propose a judgment based on the agreement of the parties. The preparatory hearing, as well as the session of the indictment panel, can only be attended by invited persons and is conducted before the president of the panel. Provisions on the hearing are applied to the preliminary hearing accordingly, however, if the president of the council receives a statement for rendering a judgment based on the agreement of the parties from Article 360, paragraph 3 of the Law, he will proceed in the manner prescribed by Articles 361 to 363 of the Law. Before presenting the charge, the parties shall inform the president of the council about the content of the statement from Article 360, paragraph 3 of the Act for all or individual points of the charge. The president of the council will enter the statement of the parties into the minutes and act according to articles 361 to 364 of the Act. If the parties have agreed on a part of the indictment, the proceedings for those offenses will be separated in accordance with Article 26 of the Law. A preliminary hearing will be held for the remaining part of the indictment (Article 374 of the Law). (Turudić et al).

### **Conclusion**

Our legislation opposes organized crime by applying the principle of opportunity where, in relation to the prosecution of a member of a criminal organization, it offers cooperation, while at the same time consensual procedures such as settlements between the parties to avoid or end criminal proceedings. The increase in the number of tasks of the state administration and the judiciary in response to criminality brought about by the idea of the second half of the 20th century greatly changes the understanding of the criminal procedure. The request to resocialize the perpetrator of the crime already in the criminal procedure, and especially by making a decision on it, requires that the scope of the state authorities entrusted with the initiation of criminal prosecution be expanded.

### **References**

1. Carić, M. (2001). "Principle of expediency (opportunity) of criminal prosecution from Article 175 of the Criminal Procedure Act and its application in practice", *Croatian Chronicle of Criminal Law and Practice*, 8(1), p. 603-646.
2. Dorbić Jurčin, L. (2023). "Principles of Criminal Procedure Law". Seminar work. Split: Faculty of Law, University of Split.

3. Eser, A. (1992). "Functional changes in procedural maxims of criminal law: On the way to "reprivatization" of criminal procedure", *Zbornik PF in Zagreb*, 42(2), p. 167-191.
4. Glasnović Gjoni, V. and Sirotić, V. (2016). "Conditional waiver of criminal prosecution and the practice of the Municipal Court in Pula - Pola", *Pravni vjesnik*, 3-4, 157-181
5. Kos, D. (2001). "Application of the principle of opportunity in criminal prosecution - in addition to Article 176 of the Criminal Procedure Act ("penitent")", *Croatian legal review*, 1(4), p. 114-120.
6. Krapac, D. (2009). "Criminal procedural law." Book one: Institutions, Zagreb: Narodne novine, p. 576.
7. Perković, M. (1982). "The principle of legality of criminal prosecution and the institute of insignificant social danger", *Proceedings of the Faculty of Law in Split*, 19, p. 85-100.
8. Tomašević, G. (2011). "Criminal procedural law, General part: basic terms," Split: Faculty of Law, University of Split.
9. Turudić, I., Pavelin Borzić, T., Bujas, I. (2016). "Agreement between the parties in criminal proceedings - trade in justice or not?" *Pravni vjesnik*, 32(1), pp. 121-153.
10. Criminal Procedure Act, Official Gazette no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/2017, 126/2019.