

*V. B. Prosecutorial Discretion and its Limits*

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## **Prosecutorial Discretion and its Limits**

**Abstract.** The traditional “continental” criminal procedure is not able to cope with the increasing number of cases and to respond to the newly developing types of crime. So the legislator has to allow authorities dealing with criminal matters to select cases, to decide which categories of cases should have priority and to create exceptions to the principle of legality. At the same time the requirements of fair process should not be forgotten when a state fulfils the claim for the simpler and quicker arrangement of criminal cases. This study pays attention to the Recommendation of the Committee of Ministers of the Council of Europe (No. R. (87) 18) and compares its guidance with the features of discretionary power of the Hungarian public prosecutor. By now due to the intention of the legislator who has the requirements of our age and the limits of the ability of the criminal justice in sight, the discretionary power of the prosecutor has become wider and wider. In Hungarian law discretionary prosecution requires previous consent of the suspect and in other cases the suspect has right to remedy and challenge the judicial judgements. Rules of the new Code of Criminal Procedure (Act XIX of 1998) strengthen the role of the prosecutor in the criminal process.

**Keywords:** Council of Europe, criminal procedure, discretionary power, human rights, investigation, offender, prosecution

First of all I would like to emphasise that the Hungarian law of criminal procedure belongs to the so called continental “mixed” system of the law. The convergence of two traditional law systems in the field of criminal justice did not avoid our rules of criminal procedure either. The changes of the law connected with our joining the human rights conventions (UN International Covenant on Civil and Political Rights and European Convention for the Protection of Human Rights and Fundamental Freedoms) are the most significant.

The extent of the discretionary power of the prosecutor is influenced first of all by requirements put by the given state before the criminal investigation. Whether the system of law requires the compulsory investigation, prosecution on the basis of the principle “legality” or gives larger scope the “opportunity”, authorises the prosecutor not to bring every case and every

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offender to the court, bearing in mind the point of view of appropriateness and economic efficiency.

Although in most part of Europe theoretically every person who commits a crime is brought before the court, nowadays the principle and practice of opportunity are more and more spreading.

What is the reason of this phenomenon? First of all the traditional “continental” criminal procedure is not able to cope with the increasing number of cases to respond to the newly developing types of crime. So the legislator has to allow authorities dealing with criminal matters to select cases, to decide which categories of cases should be dealt with first and so create various exceptions to the principle of legality. The quantitative changes of the crime (complicated, referring to special knowledge or so-called “monstre” cases) were not followed by the raising of the staff number and by the development of facilities of the organisations dealing with crime.

At the same time the requirements of fair process should not be forgotten when a state fulfils the claim for the simpler and quicker arrangement of criminal cases. The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4. November 1950.) requires a fair and public hearing within a reasonable time. (Article 6. Paragraph 1.) However, as the exact content of words “reasonable time” are not determined, every member state has to work out a more effective way of dealing with criminal cases without unnecessary delay. With regard to these two requirements the Recommendation of the Committee of Ministers of the Council of Europe [No. R (87) 18] gave guidance concerning the simplification of criminal justice reserving significant role to the discretionary prosecution.

In this study I try to have this guidance in sight and compare it with the features of discretionary power of the Hungarian public prosecutor.

Public prosecution and the public prosecutor play a key role in the criminal justice system as well as in international co-operation in criminal matters. Functions of the public prosecutor are multiple. As another recommendation of the Committee of Ministers of the Council of Europe (Rec (2000) 19) defines:

#### *Functions of the public prosecutor*

1. “Public prosecutors” are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.

2. In all criminal justice systems, public prosecutors:
  - decide whether to initiate or continue prosecutions;
  - conduct prosecutions before the courts;
  - may appeal or conduct appeals concerning all or some court decisions.
3. In certain criminal justice systems, public prosecutors also:
  - implement national crime policy while adapting it, where appropriate, to regional and local circumstances;
  - conduct, direct or supervise investigations;
  - ensure that victims are effectively assisted;
  - decide on alternatives to prosecution;
  - supervise the execution of court decisions;
  - etc.

In this list there are two (or in wider sense three) functions concerning the discretionary power of the public prosecutor:

1. when he decides to initiate or continue prosecutions,
2. when he decides on alternatives to prosecution,
3. (in wider sense as I mentioned above) when he conducts prosecution before the court.

In Hungary the prosecution service headed by the General Prosecutor is independent of the government. Investigations in certain cases (prescribed in the Act V of 1972 on the public prosecution service) are carried out by the prosecutor. In the overwhelming number of cases investigations of other authorities (mainly of police) are supervised by the prosecutor. So he/she should scrutinise the lawfulness of investigation and shall ensure that the persons taking part in investigation may enforce their rights and shall supervise the lawfulness of the application of coercive measures.

### **The legal background<sup>1</sup>**

The legal situation in the field of criminal procedural law is very specific nowadays. Our Code of Criminal Procedure in its basis was socialist, however survived a lot of amendments. In the opposite side there is a new Code which hasn't enter into force yet. This new Code preserving former values puts the criminal process on mainly new fundament, changing, strengthening the

<sup>1</sup> I mention the original number of the Act and instructions, but all of them were modified several times.

role of parties (i.e. the role of the prosecutor and on the other hand the role of the defence lawyer and the accuse) in examination of evidences; the relation between investigation and court process and the structure of court-system. The new Code will enter into force in 2003, but some provisions of the new Code have been embodied into the existing Code as amendments since 1998.

The organisation of public prosecution service is based on the Constitution. Article 52. para 2. says that the General Prosecutor shall answer to the Parliament and shall provide a report on his activities. The Act V of 1972 says about the organisation of the public prosecution office. The Code of Criminal Procedure (Act I of 1973) contains several paragraphs concerning the role of the public prosecutor in the criminal procedure. Last but not least the instructions of the General Prosecutor determine the every day work of prosecutors. Among them, of outstanding significance are the instruction 2/1999 regarding the supervision of the investigation in criminal cases, tasks of the public prosecutor after finishing the investigation, the instruction 10/1995 on the investigation conducted by the prosecutor and the instruction 6/1987 on the activity of the prosecutor before the court.

In our country there was serious opposition against the discretionary prosecution until quite recently. Some experts held that the discretionary power of the prosecutor means that he has similar power to that of the court, judges of criminal cases and can impose sanctions. By now due to the intention of the legislator who has the requirements of our age and the limits of the ability of the criminal justice in sight, the discretionary power of the prosecutor has become wider and wider. The facts and figures of how often prosecutors use this power can be found in the statistics (see next pages). We have to admit that statistics never show how many cases go through the prosecutors' hands in which the possibility of discretionary prosecution exists. It will be very demonstrative to compare the data of French and Hungarian practice. We have French statistics from the year 1998. In that year 1,193,994 cases became known to the investigating authorities—in Hungary 140,083 offenders became known. In France in 34.9% of cases the investigation was refused with reference to the opportunity. In 13.7% of cases the prosecutor applied mediation, therapy, obliged the offender to do some kind of professional training or warned them. So 48.6% of cases were not brought before the court. In Hungary 12.48% of the cases were quashed.<sup>2</sup>

<sup>2</sup> In: Nacsádi, P.: Az opportunitás kérdése a francia jogban (Problem of the Opportunity in the French Law). *Ügyészek Lapja* No. 2. 2001. 17.

These figures show that in our country the prosecutor—if he has the possibility to stop the procedure—is not very keen on using his discretionary power, or not to such an extent that would be desirable.

Which are the stages of the process where the discretionary power of the prosecutor may be exercised?

1. *Ordering of the investigation:*

The prosecutor may decide to refuse the investigation if the offence committed is of negligible degree of the dangerousness for society or its dangerousness became negligible, if the suspect collaborates with the authorities or in the case of covered agent.

2. *In the stage of prosecution:*

— The prosecutor may quash the process in cases mentioned in point 1 of this section,  
— he may postpone indictment or set aside the prosecution.

3. *In the stage of court procedure*

The prosecutor may withdraw the indictment.

4. *If the suspect pleads guilty:*

The prosecutor may propose the application of the following special procedure providing a simpler and quicker judgement of the case:  
— bringing to court,  
— waiver of trial,  
— omission of trial.

The basic principle is that the offender's consent is necessary wherever conditional waiver and conditional discontinuation of procedure is envisaged. So if the prosecutor quashes the case and applies reprimand and the suspect does not agree with it, he has a right to legal remedy called "complaint". The consequence of this complaint is that if there is no other reason to quash the investigation, the prosecutor has to prosecute because the consent of the suspect to arrange the case without court procedure is absent.

On the next pages we look over conditions of discretionary decisions.

1. If the offence committed has negligible degree of the dangerousness for society (this is a reason when punishability shall be precluded according to the rules of Criminal Code) or if the offence became dangerous for the society to a negligible degree (this is a reason in Criminal Code when the punishability shall be terminated) the prosecutor may refuse the investigation and reprimands the offender. Reprimand is a measure similar to

warning. As it is written in the Criminal Code Section 71 paragraph 3 “By a reprimand, the authority expresses its disapproval, and invites the perpetrator to restrain himself in the future from the perpetration of a crime.”<sup>3</sup>

If this reason exists, the investigating authority has no power to take such decision, although the decision to refuse the investigation is generally in their competence. But in these cases balancing is the most important feature of the decision-making and the legislator did not entrust this task to the investigating authority. So they have to refer the case to the prosecutor with a recommendation and the prosecutor takes the final decision.

Similarly active participation of the prosecutor is necessary for the refusing of investigation in the case of collaborating suspect and the covered agent (in the first case the prosecutor’s consent is necessary, but in the latter case the prosecutor himself makes the decision).

At this point we try to make clear what is meant by the collaborating suspect and the covered agent. *Collaborating suspect* is the person with whom the interest relating to co-operations is more important from investigating or national security point of view than the interest relating to the enforcement of the criminal law claim of the state: i.e. in exchange for his co-operation (collaboration) authorities let him off.

The *covered agent* supports the successfulness of the investigation with cover his character. His application is allowed only with the permission of the prosecutor, and if he commits a crime during the performance of his duties and the interest of the investigation (for which he is working) is more important than the interest relating to the enforcement of the criminal law claim of the state, the investigation can be refused. Only the county chief prosecutor or his deputy is entrusted to give the consent mentioned or make such decisions. They decide on the basis of the proposal of the police and after examining the file.

<sup>3</sup> Whole text of this section is:

Section 71 (1) That person shall be reprimanded, who is not punishable due to the negligible degree of the dangerousness for society of his act (Section 28) or its becoming negligible (Section 36).

(2) Reprimand may also be given to a person, who is not punishable due to the cessation of the dangerousness for society of his act (Section 36), or whose punishability has ceased to exist for another reason defined in the Act [Section 32, paragraph e)].

No other investigating authorities (such as Customs Police, Investigating Unit of the Tax and Financial Control Office and the Border Guard) acting in the criminal procedure are excluded to propose to the prosecutor to refuse the investigation or to quash it in the case when collaborating suspect or covered agent is concerned.

2. In the *stage of prosecution* the prosecutor has much wider possibilities to make the most adequate decision—taking into consideration the seriousness of the offence committed, circumstances of commission of the crime and the personality of the offender. In this stage the procedure could be quashed because of the same reasons as during the investigation. A new possibility is the omission of prosecution, where the expansion of the principle of opportunity is observable. In this case the prosecutor may omit prosecution for a criminal offence which, compared to the criminal offence of greater weight made subject of the charge is of no significance for the purpose of liability under criminal law, and this shall accordingly be applicable also to petty offences connected with the criminal offence. It is to be noted that because of the same reason the investigation would have been omitted by the investigating authorities and the prosecutor deals with this question only when he investigates himself or in the frame of the supervision of the lawfulness of the investigation. In Hungarian legal system we can find a very new institution introduced at the end of the 1990s called *postponing of prosecution*. First it was applicable only in the procedure against juveniles and only since 1999 it is possible to postpone the prosecution in the case of adult offenders. However, conditions are different: while juveniles have one more chance to prove that personally they are not dangerous for the society if they commit a crime punishable not more than 5 years imprisonment, this merit of punishment is 3 years imprisonment in cases of adult offenders.

Prosecution may be postponed if this measure could influence the future conduct of offender favourably (in cases of juvenile in the interest of proper tendency of his development). This means a conditional discontinuation of the case, its period is between 1 and 2 years and during this time the suspect is under the supervision of a probation officer. If this time passes successfully the prosecutor quashes the procedure.

The postponing of the prosecution is “not successful” if the suspect was charged with an offence perpetrated intentionally during this period or he breaks the rules of conduct imposed seriously. In these cases the procedure is not closed but the prosecutor charges him.

Which conditions preclude the possibility of postponing of the prosecution?

The first reason is the police records concerning the suspect: if he is habitual recidivist, the possibility of postponing the prosecution is excluded.<sup>4</sup>

The second reason connected with the time of commission of the offence in question: if the suspect commits the intentional crime during the probation when imprisonment suspended for probation or after he was sentenced to imprisonment but the enforcement of this punishment is not ended. The explanation of these exclusionary rules is that postponing of the prosecution is planned to make possible to avoid the trial for offenders behind whom are not so called “criminal career”, for whom it is enough to keep him back from committing further crime (special prevention): overhead of him hang the possibility of the continuation of the process as Democles’s sword. Postponing of the prosecution is more frequent in cases of juveniles, the explanation of this phenomenon is not only the wider possibility written in the law, but the difference in the structure of offences committed by juveniles and adults and the intention of the prosecutor.

The decision on diversion connected with two circles of crimes does not definitely belong to the prosecutor, but we would like to say some words about it.

a) In the Criminal Code a special reason of termination of punishability for drug-dependant suspects is created.<sup>5</sup> In this case the investigation may be suspended for one year conditionally if the suspect promises to undergo continuous treatment for drug-addiction for at least six months.

b) The investigation may be suspended once in the case of omission of support if the satisfaction of offender’s obligation is expected.

<sup>4</sup> Habitual recidivist shall mean a person, who has been sentenced to imprisonment without probation as a recidivist prior to the perpetration of a premeditated criminal act, and three years have not yet passed from having served the last term of imprisonment or the termination of its executability until the perpetration of another criminal act punishable by imprisonment. (Criminal Code of Hungary Section 137. 16)

<sup>5</sup> Criminal Code, Section 282/A. (6) A drug-addicted person shall not be punishable  
*a)* in respect of Paragraph a)-b) of Subsection (5), or  
*b)* if having committed another criminal act related to the use of narcotic drugs that is punishable with two years of imprisonment at most,  
 provided, that he proves with a document prior to the rendering of the sentence in the first instance, that he has received continuous treatment for drug-addiction for at least six months.



The reason of suspension of the process in these cases is that the treatment of drug-dependent suspect and that the entitled party receives the allowance which is necessary for his/her existence are more important, than the enforcement of the criminal claim of the state.

These circumstances giving basis for the suspension of the investigation will turn back in the stage of prosecution and before the court: if earlier it has not happened the process may be suspended in these stages, because it is a fundamental condition that these reasons—essentially the promise of the offender—may serve as the reason of suspension only once during the process, may block the process once and it is not allowed to give a ground to the suspect to cause delay in the criminal process.

The decision of the prosecutor about how significant he considers the confession of the suspect is connected with the stage of the prosecution: whether he proposes the application of some quick and simplified special procedure or not. Pleading guilty has importance in bringing the suspect before the court, concerning waiver of trial and omission of trial. While the two previous procedures combine only the advantages of quickness and simplicity, in the case of the waiver of trial the suspect receives obvious advantages: punishment may be imposed against him in the sense of the law could be diminished at least by half.<sup>6</sup>

After the prosecutor's proposal, the court, may find the defendant guilty (in charges which are not to be punished with more than eight years of imprisonment) and may also come up with a sentence with a verdict pronounced in an open session, if defendant waives its right to a trial and pleads guilty. In case of a waiver of trial the sentence of imprisonment is imposed according to Article 87/C of the Criminal Code (Section 355/J. paras (1) and (2) of the Code of Criminal Procedure).

The prosecutor, after giving weight to all the circumstances of the case—especially the personality of the suspect and the nature of the offence—may propose the trying of the case in an open session if the suspect pleaded guilty during the investigation and proposes the open session-procedures

<sup>6</sup> Section 87/c of the Criminal Code says:

In the case of waiver of right to trial (CP, Chapter XXV) the term of imprisonment may not exceed

*a)* three years in respect of crimes punishable by more than five but less than eight years of imprisonment,

*b)* two years in respect of crimes punishable by more than three but less than five years of imprisonment,

*c)* six months in respect of crimes punishable by imprisonment of up to three years.

(Section 355/K. para (1) of the Code of Criminal Procedure). Even if the suspect did not pleaded guilty during the investigation, he/she may propose the open session-procedures for fifteen days after the delivery of the indictment. If the prosecutor finds that there is a chance that the court will accept the proposal, will hear the accused and send the proposal for an open-session procedure to the court (Section 355/K. paras (3) and (4) of the Code of Criminal Procedure).

In court process the court is bound by the charge as a principle, which means that

- judicial procedure can be instituted only on the ground of a lawful indictment,
- judicial procedure can go on until the lawful indictment exists,
- court can judge only the act contained by the indictment,
- court can make decision only against the accused who was charged,
- the indictment must be exhausted regarding both acts and persons.

The right of disposal of the prosecutor manifests itself in what the prosecutor brings before the court, what he makes subject of the indictment. At this point we would like to mention that the classification of the offence by the prosecutor does not bind the court.

The prosecutor can drop the charge even before the court until the court convenes a divisional session for passing its decision. During the preparation of the trial he can do this without offering any explanation, but after the trial was appointed, the prosecutor has to explain his decision on withdrawing the indictment. The court is not allowed to examine whether the explanation is reliable or established, it is bound merely by the fact that the prosecutor withdrew the indictment and so the court must quash the procedure. Explanation of the withdrawing of the charge may be important only within the organisation of prosecutor office. The prosecutor can withdraw the charge if the act made subject of the indictment is not a criminal offence, or it has not been committed by the accused. Really this rule of criminal procedure gives the prosecutor a possibility to correct the lack of the former procedure—i.e. insufficiency of fact-finding, insufficiently supported indictment—because this solution is much more elegant than the acquittal. The reason of being the acquittal so “discreditable” for the prosecutor has its root in the statistical measuring of the work of prosecutors: so called effectiveness of indictment as measurer must approach 100%.

## Statistics

Now we try to support our statements with statistical data.

In 2000 the number of offences supervised by the prosecutor was 220,716. The investigation was discontinued in 1,788 cases (9.74%) and the prosecutor instructed investigating authorities to quash proceeding in 19 cases (0.1%).

This year 364,325 criminal cases were registered and the prosecutor's supervision concerned 80,724 cases (22.16%). (The difference between the offences and cases comes from the fact that most criminal cases contain more than one offence committed.) In 3,152 (3.9%) out of 80,724 supervised cases supplementary investigation was ordered, in 2,618 (3.24%) some addition of the investigation was necessary and in 373 cases the prosecutor himself executed investigating act.

I mentioned that the effectiveness of the charge is a very important measure in the life of every prosecutor and in every prosecutor's office. This index shows in how many cases decisions of the court corresponded with the proposition of the prosecutor. In the last five years this index varied as follows:

1996: 95.07%;	1997: 94.61%;	1998: 94.85%;
1999: 94.40%;	2000: 96.22%.	

From the point of view of discretionary prosecution the rate of postponing and omission of prosecution is more important. The number of decisions regarding the omission of the prosecution (because the minor offence has no significance beside the more serious offence) was:

1996: 13,502;	1997: 12,087;	1998: 11,811;
1999: 6,980;	2000: 2,761.	

The proportion of this decision is decreasing among the so called "other way of closing" of the case between 2.65% and 0.55.

As we mentioned the postponing of prosecution as a relatively new measure, could be taken by the prosecutor (since 1996 in juvenile cases and since 1999 against adults). Although the proportion of this kind of decision is increasing, very few suspects were concerned:

1996: 793;	1997: 744;	1998: 896;
1999: 1,999;	2000: 2,686.	

In the last 5 years 36.98–45.02% of accomplished cases were settled with bringing the case before the court.

The investigation was refused and the suspect was reprimanded only in few cases:

1996: 237;                      1997: 223;                      1998: 460  
1999: 251;                      2000: 214 cases.

Far more cases were quashed and the reprimand applied:

1996: 10,676;                      1997: 10,987;                      1998: 12,351;  
1999: 11,403;                      2000: 10,856  
(1.90–2.15% regarding every closed investigation).

### **The new Code of Criminal Procedure**

Rules of the new Code of Criminal Procedure strengthen the role of the prosecutor in the criminal process:

- refer some decisions containing averting of the institution or continuation to the exclusive competence of the prosecutor,
- widen the circle of cases when the prosecutor entrusted to waive prosecution. Adjoining to limitation of the prosecution and the waiver it because of “bagatelle” (petty) offences the prosecutor will have power not only to prescribe rules of conduct for the suspect (both adult and juvenile) against whom the prosecution postponed, but he may call the suspect to fulfil some duties: pay compensation for the victim, pay certain amount of money for the particular purpose or work for the public. But juveniles could not be bound to pay money for particular purpose or to work for the public: namely these may impose impracticable obligation for juveniles and so couldn’t serve the aim of their proper development.

As it is written in the reasoning of the Act XIX of 1998 regarding preconditions of prosecution: It follows from the principle of legality that if evidence gathered in the preparatory stage of the procedure gives enough ground for the prosecution, the indictment is well-founded in respect of facts and law as well, the prosecutor has to prosecute; he has discretionary power only if the law entrusts him to do so (postponing of prosecution, omission of prosecution etc.). The new Code stops the possibility of the prosecutor to apply reprimand if he quashes the case. The reason of this rule is that every kind of sanctions could be imposed according to the new code only by judge.

Postponing of prosecution is compulsory if a drug-dependant suspect promises to submit himself to treatment for drug-addiction for at least six

months or the suspect charged with alleged commission of omission of support to satisfy his obligation.

The consent of the suspect is necessary for imposing obligation if the prosecutor postpones the prosecution. The prosecutor has to hear the suspect for making clear conditions of postponing of the prosecution, whether the suspect wants and is able to fulfil his duties. The compensation of the victim supposes the consent of the suspect and of the victim as well.

### **Conclusions**

The Recommendation R(87) 18 requires that “The principle of discretionary prosecution should be introduced or its application extended wherever historical development and the constitution of member states allow...”.

As we can see, the discretionary power of the prosecutor has become wider and wider during the last ten years in Hungary. But as opposed to the way of thinking usual in the Anglo-Saxon legal system, in Hungary the preference is on the side of prosecution. Even the reasoning of the new Code stands by the principle of legality.

Instructions created by the General Prosecutor are very generally phrased regarding the discretionary power, provide hardly any help for prosecutors and so give wide scope for the local variations and applying possibilities of diverting of the offender from the court proceeding not consistently.

The main problem of the discretionary prosecution is that this decision may be accompanied with some kind of sanctions: nowadays with reprimand and supervision by a probation officer, but after the new Code enters into force these possibilities will widen with obligation the suspect to pay a certain amount of money for a special purpose, to work for the public and pay compensation to the victim. Even the European Court of Human Rights dealt with this question, but the conclusion was that if the discretionary prosecution depends on the suspect's consent, the presumption of innocence is not injured.

In Hungarian law discretionary prosecution requires previous consent of the suspect and in other cases the suspect has right to remedy and challenge the judicial judgement.