

## **PRINCIPLE OF OPPORTUNITY OF PROSECUTION AS AN INSTRUMENT OF EFFICIENCY OF RESOLVING CRIMINAL MATTERS (NORM AND PRACTICE IN THE REPUBLIC OF SERBIA)**

**Introductory remarks.** One of the key goals of the process of reforming criminal procedural legislation in Serbia that has lasted for almost twenty years is to create a normative basis for increasing the efficiency of work of the competent state bodies in the field of detecting, proving, prosecuting and adjudicating on the criminal matter in question. To that end, the reform has brought about a number of novelties and one of the key ones is the standardization of new institutes whose essence is to simplify the resolution of a criminal matter, above all the principle of the opportunity of prosecution. Legalisation of the principle has been well received in theory and has shown good results so far. Today, both in theory and in practice, it is almost impossible to find advocacy for its abolition and contestation. Moreover, after it was adopted in 2001<sup>1</sup>, all subsequent legislative interventions went towards creating opportunities to expand the scope of its implementation.

Criminal and political reasons for legalization of the principle, its basic legal characteristics and experiences of its application. In Serbia and generally, the principle of opportunity of prosecution is one of the principles that addresses the issue of prosecution for a committed crime. According to it, in cases where the real and legal reasons for initiating and conducting criminal proceedings are fulfilled, the public prosecutor in each particular case decides whether it is opportune and expedient to initiate and conduct criminal proceedings in a specific criminal matter. In view of this, the public prosecutor must first assess whether there are real and legal reasons for initiating and conducting criminal proceedings, and only then evaluate the expediency of initiating and conducting the procedure, on the further assumption that this is a criminal matter for which the CPC<sup>2</sup> (article 283 and 284 (3), CPC) provides for such a possibility. In the case where he decides that it is not expedient, he has the right not to initiate prosecution, despite the fact that all legal prerequisites for initiating and conducting criminal proceedings have been met. However, this in no way implies that the right of the public prosecutor contained in the principle of the opportunity of prosecution is also the right to arbitrarily, at his discretion, decide whether to prosecute or not prosecute in a specific criminal matter. Contrarily, the public prosecutor must assess the expediency of prosecuting from the point of view of public interest – whether it is in the public interest to prosecute in a particular criminal matter or not. In order to apply the principle, it is necessary to first obtain the conditions laid down by

law for the initiation of criminal proceedings and then, based on his discretion, not to prosecute, if this would not be expedient from the point of view of public interest.

Criminal and political reasons for legalization of the principle in the criminal procedural legislation of Serbia (Bejatović, 2001)<sup>3</sup> are the same as in other criminal procedural legislations. The first reason is to achieve the purpose of punishment in a specific criminal matter without initiating and conducting criminal proceedings, and the second is to increase the efficiency of criminal proceedings as a whole by disburdening the courts more petty, lighter and medium criminal offences. (Čvorovic, 2009).

In terms of content, there are two possible forms of the principle. The first is the conditional delay of prosecution. According to it, the public prosecutor may postpone prosecutions for criminal offenses for which a fine or imprisonment of up to five years is foreseen if the suspect accepts to fulfil one or more obligations provided for by law within a period not exceeding one year. For example, the suspect may be asked to remedy the harmful effect caused by the commission of the crime or to compensate for the damage caused; to pay into a specific account a certain amount of money, which is used for humanitarian or other public purposes.

In case the suspect fulfils the above, in a way and within the time limit specified in the order for deferral of prosecution, the public prosecutor dismisses the criminal charges with a decision whereas the criminal matter is definitely considered to be resolved and the suspect is not convicted. Another form of the principle is the unconditional dismissal of criminal charges (the so-called pure opportunity) (Đurđić, 2011). According to the above, the public prosecutor may dismiss the criminal charges without first delaying the criminal prosecution in the case of criminal offenses punishable by imprisonment for a term not exceeding three years, if the suspect due to actual remorse prevented the damage from occurring or fully compensated the damage, and if according to the circumstances of the case, imposing a criminal sentence would not be fair. With this content, the principle is quite well accepted in theory and practice and the view is that its use achieves two key goals of its legalization. Confirmation of this is the fact that in almost 25% of all criminal charges filed in Serbia the criminal case is solved using the principle.<sup>4</sup> However, this does not in any case mean that there are no disputed issues in its standardization and implementation. There are a number of dilemmas in the way of standardization and application of the principle, and they are mainly the result of insufficient precision of the norms that regulate it. For example, the issue of the position of the injured party when applying the principle is extremely debatable. The issue of the position of the injured party when applying the principle is extremely debatable. Also, there is the issue of reimbursement of costs when applying the principle. Then, there is the question of the absence of precise criteria for the choice of the type and amount of the obligation imposed, etc. (Kiurski, 2019).

However, none of the dilemmas listed calls into question the justification of the principle.

**Final considerations.** The application of the principle of the opportunity of prosecution in Serbia so far shows its full criminal and political justification. However, this does not mean that there are no controversial issues in its standardization and implementation. There are indeed a number of dilemmas in both its standardisation and application, and they are mainly due to the lack of precision of the norms that govern it.

#### *Litrature*

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2. Cvorovic, D. (2009). Criminal and political justification, purpose and form of principle of opportunity of prosecution, Monograph: «Opportunity of prosecution», Belgrade: Serbian Association for Criminal Law and Practice, pp. 124-136.

3. Djurdjic, V. (2011). Principle of opportunity of prosecution in criminal procedure in Serbia, Belgrade: Journal of Criminology and Criminal Law, No 3, pp. 103-119.

4. Kiurski, J. (2019). Principle of Opportunity of Prosecution, Belgrade: Institute for Criminological and Sociological Research, pp. 99-149.

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**Dr Katarzyna Nazar,**  
Faculty of Law and Administration, UMCS, Lublin, Poland

### **THE OFFENCE OF RAPE IN POLISH PENAL LAW**

The offence of rape is addressed in Chapter XXV "Offences against sexual liberty and decency", in Article 197 of the Polish Penal Code. This provision provides for two basic types of offence (§ 1 and § 2) and aggravated types (§3 and § 4). The subject of protection under Article 197 of the Penal Code are sexual liberty (the right to freely dispose of one's sexual life) and decency (which prohibits involuntary sexual intercourse and other involuntary sexual activities).<sup>1</sup> For the offence of rape to exist, it requires a lack of an effective consent from the entitled person to a specific perpetrator's behaviour. The lack of consent is both the absence of a positive decision and the expression of a negative decision. Where such consent (to sexual intercourse or other sexual activity) is expressed there are no statutory criteria of the offence of rape.<sup>2</sup> In the literature, there is also a statement that there is no rape when the resistance is not actual (is apparent)<sup>3</sup>, however, as M. Mozgawa points out, it can cause