



**Conference of Prosecutors General of Europe
5th Session**

**organised by the Council of Europe
in co-operation with
the Prosecutor General of Lower Saxony (Germany)**

Celle, 23 - 25 May 2004

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**« Discretionary powers of public prosecution:
opportunity or legality principle -
Advantages and disadvantages »**

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Legality principle in the Polish Criminal Procedure Law

Traditionally the Polish system of criminal law is based on the legality principle. Art. 10 of the Criminal Procedure Code states:

§ 1. The agency responsible for prosecuting offences shall have the duty to institute and conduct the preparatory proceedings, and the public prosecutor shall have also the obligation to bring and support charges, with respect to an offence prosecuted ex officio.

§ 2. Except for cases described in domestic law or international law, no-one may be discharged from liability for a committed offence.

The provision explicitly constitutes the legality principle which creates the obligation to sentence the person who has committed an act prohibited under penalty, by a law in force at the time of its commission if his / her guilt has been properly proved in the fair trial. Furthermore the legality principle entails the obligation to keep vigilance over the execution of valid sentences. This principle also obliges a prosecutor to appeal against unjust court decisions.

The legality of prosecution is confirmed by the relevant provisions of the Law on the Public Prosecution (art. 3,25,32).

There is a controversy, whether the legality principle is applicable to the offences prosecuted *ex officio* or to all types of offences, also those prosecuted from private accusation and those prosecuted at the motion of the victim (e.g. rape). In the Polish literature the opinion that the legality principle is applicable only in relation to the offences prosecuted *ex officio* – prevails.

The principle of legality is also reflected in the art. 13 of the Criminal Procedure Code (1997) which states that in cases against persons protected by immunities from investigation, a prosecutor after having obtained the consent from competent authority (e.g. Parliament), is obliged to institute and conduct preparatory proceedings. It seems to be comfortable for a prosecutor who can act according to his / her duties especially in cases concerning e.g. high ranking public officials where undue pressure and interventions are often exerted.

The legality principle functions in cases prosecuted from the private accusation as well. By virtue of art. 60 § 1 of the Criminal Code Procedure in the private accusation proceedings a prosecutor is obliged to institute a criminal procedure or enter to the case instituted by a victim if there is a public interest to do so. Since there are no strict criteria of a public interest, a prosecutor has to some extent a discretionary power to estimate the level thereof.

Existing in the Polish system exceptions from the legality principle make the whole system of prosecution more flexible. Making careful use of this principle especially taking into consideration legal departures from the principle, a prosecutor may either act whenever it is necessary or in another cases decide not to start criminal proceedings (or to terminate the proceedings when it has already been instituted).

From the point of view of the content and scope of the legality principle, the provision of art. 1 Para. 2 of the Criminal Code plays important role. This provisions states as follows:

” a prohibited act whose social consequences are insignificant shall not constitute an offence”.

It means that solely offences containing significant social consequences, as acts punishable - must be prosecuted, otherwise not. From the point of view of the public interest there are no reasonable grounds to prosecute all acts especially those of inconspicuous social significance (danger). But of course if the level of the social consequence of the offence, in other words, if there is a material element of the offence, is enough high, a prosecutor – according to the legality principle – is obliged to decide to institute a criminal procedure.

Although, as it was said, in the Polish legal system the legality principle exists as one of the general principles, there is in Poland a discretionary practice of public prosecution (especially under former criminal provisions binding since 1969 till 1997). In numerous criminal cases concerning acts of less significance, prosecutors decided to terminate criminal proceedings on the basis that a social danger of the offence is inconspicuous. This practice, but to less extent, is currently in use under provisions from 1997.

The institution of conditionally termination of criminal proceedings is also linked to both principles: legality and opportunity principles. It should be noted that under current provisions solely court is authorised to decide in this respect, not prosecutor as it was under “old “ legislation (1969).

A solid departure from the legality principle in the Polish system we can see on the basis of article 11 § 1 of the Criminal Procedure Code. The provision states:

§ 1. the proceedings in a case of misdemeanour, carrying a penalty of deprivation of liberty for up to 5 years, may be discontinued if imposing the penalty on the perpetrator would be obviously inexpedient in light of a penalty validly decided for another offence, and as long as the interest of the injured is not prejudiced.

§ 2. If the penalty for other offence has not been validly decided, the proceedings may be suspended. The suspended proceedings should be discontinued or re-opened no later than 3 months from the date at which the decision for the other offence referred to in § 1 became valid and final.

The legality principle - with exemptions provided for in law - allows for flexibility of the public prosecution and as having been successfully verified in practice by the Polish prosecutors, may be recommended.

Main profits of the legality system are inter alia:

- The legality principle is an important element of maintaining democracy and rule of law in criminal justice system;

- The legality principle satisfies the social sense of legality and guarantees observing of the constitutional personal rights (e.g. all persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities – art. 32 of the Constitution of Republic of Poland).
- The legality principle guarantees that the public prosecution functions on the basis of law;
- The legality principle eliminates arbitrariness during criminal proceedings;
- The legality principle is a tool to repel unjustified interference into criminal proceedings;

The legality principle ensures that the task of combating crime is realised by professional state authorities (victims need not seek for justice on their own account).