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DISCRETIONARY POWERS OF THE PROSECUTOR REGARDING CRIMINAL PROSECUTION OF A PERSON IN UKRAINE AND FOREIGN STATES

Abstract. The article examines the essence of the prosecutor's discretionary powers regarding the criminal prosecution of a person, the practice of their application in Ukraine and certain foreign countries, in particular, the USA, France, Belgium, Switzerland, Japan and Taiwan. Foreign experience shows a steady trend towards simplification of criminal proceedings at the stage of pre-trial investigation. In many foreign countries, in order to simplify and expedite criminal proceedings, prosecutors are granted broad discretionary powers to decide on the initiation and termination of criminal prosecution of persons suspected of committing criminal offenses. Such powers can mainly be exercised in proceedings concerning criminal offenses that are not serious. The national criminal procedural legislation does not provide for broad discretionary powers of the prosecutor regarding the criminal prosecution of a person suspected of committing a criminal offense. The prosecutor cannot, at his own discretion, without grounds provided for by law, terminate the criminal prosecution of a person or change the qualification of the committed act. This approach is due to the operation of the principle of publicity. At the same time the criminal justice system of Ukraine can borrow the experience of foreign states in such simplification of criminal proceedings, but it is impossible to implement this without expanding the powers of the prosecutor to refuse to prosecute a person who has committed a criminal offense. For example, the models of «termination of criminal prosecution» in Belgium, «fine by agreement» in France, «postponement of criminal prosecution» («prosecutor’s probation period») in Taiwan, etc., could well be implemented in national criminal procedural legislation. The common content of such procedures is that the prosecutor has the authority to terminate criminal prosecution of a suspect provided that he fulfils the obligations specified

by law or the prosecutor (for example, full and unquestionable admission of guilt in committing the incriminated criminal offense, payment of a certain amount of money, compensation for the damage caused by the offense, undergoing a course of treatment, performing socially useful activities, etc.).

Keywords: powers, prosecutor, discretion, criminal prosecution, criminal proceedings, pre-trial investigation.

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ДИСКРЕЦІЙНІ ПОВНОВАЖЕННЯ ПРОКУРОРА ЩОДО КРИМІНАЛЬНОГО ПЕРЕСЛІДУВАННЯ ОСОБИ В УКРАЇНІ ТА ЗАРУБІЖНИХ ДЕРЖАВАХ

Анотація. В статті розглядається сутність дискреційних повноважень прокурора щодо кримінального переслідування особи, практика їх застосування в Україні та окремих зарубіжних державах, зокрема, США, Франції, Бельгії, Швейцарії, Японії, Тайвані. Зарубіжний досвід засвідчує стійку тенденцію до спрощення кримінального провадження в стадії досудового розслідування. У багатьох зарубіжних державах з метою спрощення та прискорення кримінального судочинства прокурорам надаються широкі дискреційні повноваження щодо вирішення питань про початок та припинення кримінального переслідування осіб, підозрюваних у вчиненні кримінальних правопорушень. Переважно такі повноваження можуть бути реалізовані у провадженнях щодо кримінальних правопорушень, які не є тяжкими. Національне кримінальне процесуальне законодавство не передбачає широких дискреційних повноважень прокурора щодо кримінального переслідування особи, підозрюваної у вчиненні кримінального правопорушення. Прокурор не може на власний розсуд без передбачених законом підстав припинити кримінальне переслідування особи або змінити кваліфікацію вчиненого діяння, що зумовлено дією засади публічності. Водночас, кримінальне судочинство України може запозичити досвід зарубіжних держав, однак реалізувати це неможливо без розширення повноважень прокурора щодо відмови від кримінального переслідування особи, яка вчинила кримінальне правопорушення. Наприклад, моделі «припинення кримінального переслідування» у Бельгії, «штрафу за угодою» у Франції, «відкладення кримінального переслідування» («випробувального строку прокурора») у Тайвані тощо цілком могли б бути імплементовані у національне кримінальне процесуальне законодавство. Спільний зміст таких процедур зводиться до того, що прокурор має повноваження припинити

кримінальне переслідування підозрюваного за умови виконання ним визначених законом або прокурором зобов'язань (наприклад, повного і беззаперечного визнання вини у вчиненні інкримінованого кримінального проступку, сплати певної суми грошових коштів, відшкодування завданої проступком шкоди, проходження курсу лікування, здійснення суспільно корисної діяльності тощо).

Ключові слова: повноваження, прокурор, дискреція, кримінальне переслідування, кримінальне провадження, досудове розслідування.

Formulation of the problem. The formation of a democratic legal state is impossible without the effective activity of the bodies responsible for maintaining law and order, among which the prosecutor's office occupies a special place. In modern criminal proceedings, the prosecutor is endowed with a fairly wide range of powers, in particular, discretionary powers, that is, those that provide for a certain freedom of judgment when making decisions. Discretionary powers allow the prosecutor to act flexibly, adapting to the specific circumstances of criminal proceedings, which contributes to the fulfilment of the tasks of criminal justice.

A comparative analysis of the Ukrainian approach of the implementation of the prosecutor's discretionary powers with the experience of foreign states allows us to identify both common trends and certain differences, which opens up opportunities for improving domestic criminal procedural legislation.

The status of processing the topic. Separate issues of discretionary powers of the prosecutor were the subject of research in the scientific papers of Balov P. O., Berlach A. I., Dragan O. V., Hryniuk V. O., Kahnovets S. O., Korobko Yu. V., Lapkin A. V., Torbas O. O., Voznyuk O. L. and other scientists. However, there is still no unity of views on the limits of the prosecutor's discretion in criminal proceedings in the criminal procedural doctrine. At the same time studying of foreign countries experience will make it possible to rethink and establish domestic approaches and develop proposals for improving the current criminal procedural law.

The purpose of the article is to determine the essence of the prosecutor's discretionary powers relating to the criminal prosecution of a person and to compare their limits in Ukraine and foreign countries.

Presenting of main material. The criminal procedural legislation of Ukraine regulates the adoption of procedural decisions in different ways, providing for special rules containing indications on the subjects authorized to make decisions, grounds, conditions, the procedure for their adoption and possible options for decisions on the relevant issue [1, p. 96]. These rules are determined by the degree of certainty of criminal procedural norms. In particular, if the norm of criminal procedural law is relatively specific, it allows the law enforcement body to take into account the specific circumstances of the proceedings, leaving some room for discretion when making a decision (provides for discretionary powers).

Law enforcement discretion is understood by scientists as the powers of a law enforcement subject provided for by legal norms to choose one of several options for a decision on an individual case, which is implemented in a procedural form defined by law, in order to make a legal, fair, expedient and optimal decision [2, p. 70; 3, p. 301].

Scientists rightly emphasize that the principle of discretion of criminal prosecution does not contradict the existing system of principles of criminal proceedings and can be considered as lying on the verge of implementing the principles of publicity and dispositivity, causing their mutual coordination and complementarity. We also agree with the conclusion that discretion is actually present in the vast majority of cases of procedural decision-making, and therefore it is worth talking not so much about its presence or absence, but about its limits [4, p. 92-93]. In addition, as domestic researchers claim, the right to exercise discretion is considered an indicator of the level and quality of justice in a particular country [5, p. 9].

A. V. Lapkin, considering the principle of discretion in the context of the prosecutor's powers in criminal proceedings in a narrow sense, associates it with the powers to dispose of the accusation as a criminal claim [4, p. 93]. A similar approach is demonstrated by V. O. Hrynyuk, seeing them as a disposition of the prosecution by initiating and/or terminating the prosecution or changing the criminal procedural form of the proceedings under the indictment [6, p. 67].

The national criminal procedural legislation does not provide for broad discretionary powers of the prosecutor regarding the criminal prosecution of a person suspected of committing a criminal offense. The prosecutor cannot, at his own discretion, without grounds provided for by law, terminate the criminal prosecution of a person or change the qualification of the committed act. This approach is due to the operation of the principle of publicity, according to which the prosecutor is obliged, within the limits of his competence, to initiate a pre-trial investigation in the event of direct detection of signs of a criminal offense or in the event of receipt of a statement (notification) about the commission of a criminal offense, as well as to take all measures provided for by law to establish the event of a criminal offense and the person who committed it (Article 25 of the Criminal Procedure Code of Ukraine).

Instead, in the Recommendation № R (87) 18 of the Committee of Ministers to Member States concerning the simplification of criminal justice, the participating states are recommended to apply the principle of discretionary prosecution, which provides for the granting of powers to authorized state bodies to refuse criminal prosecution of a person suspected of committing a criminal offense and to terminate it on discretionary grounds enshrined in law, taking into account the public interest, the degree of gravity, nature, consequences of the criminal offense, the identity of the suspect, the potential possibility of a court verdict, the legal position of the victim, etc. [7].

A similar approach was demonstrated in paragraph 11 of Opinion №°2 (2008) of the Consultative Council of European Prosecutors on «Alternatives to prosecution», which states that some member states have the discretionary prosecution system, other member states have the mandatory prosecution system, but their codes of criminal procedure provide for such exceptions as: 1) cases where prosecution is plainly inexpedient having regard to the stated objectives, one of which is to prevent the recurrence of the offence; 2) cases where financial or other redress is made; 3) cases involving a juvenile offender [8].

Unlike Ukraine, the criminal procedural legislation of many foreign states provides for broad powers of the prosecutor to "dispose" of the accusation (criminal prosecution). For example, in the USA, state policy in the field of criminal justice is focused on extrajudicial, simplified resolution of the criminal-legal conflict, in connection with which prosecutors have broad discretionary powers to decide whether to press charges, which ones and on how many counts, as well as whether to drop charges from individuals (for example, due to the insignificance of the act, the weak prospect of "winning" the case in court, etc.). In addition, in the process of concluding plea bargaining agreements, American prosecutors, in exchange for a guilty plea, can reclassify the act as less serious than the one actually committed by the person, grant the suspect immunity from criminal prosecution in exchange for testimony against other persons, etc. [9].

Unlike Ukraine, the criminal procedural legislation of many foreign states provides for broad powers of the prosecutor to «dispose» of the accusation (criminal prosecution). For example, in the USA, state policy in the field of criminal justice is focused on extrajudicial, simplified resolution of the criminal-legal conflict, in connection with which prosecutors have broad discretionary powers to decide whether to press charges, which ones and on how many counts, as well as whether to drop charges from individuals (for example, due to the insignificance of the act, the weak prospect of "winning" the case in court, etc.). In addition, in the process of concluding plea bargaining agreements, American prosecutors, in exchange for a guilty plea, can reclassify the act as less serious than the one actually committed by the person, grant the suspect immunity from criminal prosecution in exchange for testimony against other persons, etc. [9].

A. I. Berlach points out that one of the most striking manifestations of the peculiarities of the limits of discretion of US prosecutors is that the prosecutor's belief in itself that a person's conduct constitutes a federal offense, as well as the availability of evidence to convict him, is not sufficient to bring charges against him. Along with these conditions, the charge must also serve a substantial federal interest, which is determined taking into account the following factors: 1) the priorities of federal law enforcement agencies (federal law enforcement resources are not sufficient to ensure the investigation of every offense, and therefore appropriate national priorities are determined); 2) the nature and gravity of the offense (the actual and potential impact of the offense on society and individual victims is taken into

account, and therefore criminal prosecution for offenses that caused minor private consequences for the victim, etc., is considered inappropriate); 3) the deterrent effect of criminal prosecution (the possibility of preventing a significant number of similar offenses is taken into account); 4) the degree of culpability of the person in committing the offense (the type and degree of guilt, motives for committing the offense are taken into account); 5) the person's criminal history (presence of a criminal record or other information about previous criminal activity); 6) the person's willingness to cooperate in the investigation or prosecution of other persons (this is relevant when the value of the individual's cooperation clearly outweighs the federal interest in prosecuting of person); 7) personal circumstances (for example, age, health status, etc.); 8) the interests of any victims (the seriousness of the harm caused to the victims and their desire to bring the person to criminal responsibility); 9) the likely criminal punishment and other consequences of the person's conviction (considers whether the sentence will justify the time and effort spent on prosecuting the person) [10, p. 153-154].

In some European countries, a fairly significant amount of prosecutorial discretion is also provided for. Quite often, the prosecutor's authority to discontinue criminal prosecution is associated with the suspect's agreement to fulfil certain obligations. For example, the French Code of Criminal Procedure provides for the «fine by agreement» procedure, which is possible for a criminal offense punishable by a fine or imprisonment for a term of no more than five years. Its essence is that even before the start of criminal prosecution, the prosecutor may offer a person a conditional suspension of prosecution if he or she admits his or her guilt in committing a criminal offense and agrees to voluntarily fulfil certain obligations (pay a fine, hand over certain property, waive certain rights, perform certain work free of charge, attend certain courses or programs, etc.) [11]. Thus, the legislator has created an opportunity for a person to avoid criminal prosecution altogether. In Belgium, the prosecutor has broad powers to make a decision on the initiation, termination or continuation of criminal prosecution. In a significant part of the proceedings initiated by the police, prosecutors do not consider it appropriate to support the prosecution. In this case, the prosecutor is not even obliged to give reasons for making such a decision [12, p. 38]. As in France, Belgian prosecutors can offer the suspect to pay a certain amount of money to the budget within a certain period (not less than 15 days and not more than 3 months). However, this is possible only for criminal offenses for which a penalty of imprisonment for a term not exceeding two years may be imposed. In addition, the prosecutor can offer the suspect to give up property or money that can be confiscated and return it. The fulfilment of the relevant obligations by the suspect within the period determined by the prosecutor leads to the termination of criminal prosecution [13].

In Switzerland, the prosecutor has the authority to finally resolve criminal proceedings regarding criminal offenses that do not pose a major public danger (for which a fine, monetary penalty or imprisonment for a term of not more than six

months may be imposed) without a trial by issuing a sentence order. The condition for issuing a sentence order is the admission of guilt by the suspect in committing a criminal offense, or sufficient establishment of his guilt in another way. Practice shows that about half of completed criminal proceedings were completed precisely by issuing a sentence order [14, p. 12].

In Taiwan, the institution of deferred criminal prosecution or, as scientists call it, «prosecutor's probation» [15, p. 121] is quite successfully used. To some extent, this institution is similar to the domestic institution of conditional early release from serving a sentence, but it is implemented not by the court, but by the prosecutor and does not involve the conviction of a person. Thus, the prosecutor may issue a resolution to postpone criminal prosecution for a period of one to three years, imposing certain obligations on the suspect, for example, to apologize to the victim, compensate him for property or non-property damage, pay a certain amount of money to the budget, provide free services that meet the public interest, undergo treatment, and comply with orders that ensure the safety of the victim or are necessary to prevent the commission of new offenses [16].

Japanese criminal procedure law gives prosecutors the power to refuse to prosecute a person at their own discretion, even if there is some evidence of the person's involvement in the commission of a criminal offense. Article 248 of the Japanese Criminal Procedure Code gives the prosecutor the right not to initiate criminal prosecution if he considers it unnecessary, taking into account the nature, age, environment, gravity of the offense, circumstances that arose after the offense was committed, etc. [17].

Conclusions. Thus, foreign experience shows a steady trend towards simplification of criminal proceedings, including at the stage of pre-trial investigation. It can occur in two directions: either by simplifying the general procedure of criminal proceedings (simplification or elimination of individual stages of proceedings or their stages), or by introducing special simplified procedures of criminal proceedings.

In many foreign countries, in order to simplify and expedite criminal proceedings, prosecutors are granted broad discretionary powers to decide on the initiation and termination of criminal prosecution of persons suspected of committing criminal offenses. Such powers can mainly be exercised in proceedings concerning criminal offenses that are not serious.

The criminal justice system of Ukraine can borrow the experience of foreign states in such simplification of criminal proceedings, but it is impossible to implement this without expanding the powers of the prosecutor to refuse to prosecute a person who has committed a criminal offense (termination of criminal proceedings). For example, the models of «termination of criminal prosecution» in Belgium, «fine by agreement» in France, «postponement of criminal prosecution» («prosecutor's probation period») in Taiwan, etc., in our opinion, could well be implemented in national criminal procedural legislation. The common content of

such procedures is that the prosecutor has the authority to terminate criminal prosecution of a suspect provided that he fulfils the obligations specified by law or the prosecutor. For example, the conditions for such simplification could be: 1) full and unquestionable admission by the suspect of guilt in committing the criminal offense charged; 2) the suspect's willingness to assume certain obligations (to pay a certain amount of money, compensate for the damage caused by the offense, undergo a course of treatment, perform community service, etc.). Provided that the suspect fulfils such obligations, the prosecutor could terminate the criminal prosecution by closing the criminal proceedings.

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