

ALTERNATIVE METHODS OF RESOLVING A CRIMINAL CONFLICT IN CRIMINAL PROCEDURE OF LITHUANIA

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Abstract

The paper analyses the dismissal of a criminal case in pre – trial investigation and in court whereby the pre – trial investigation judge or the court exercises their right to release an individual, who has allegedly committed a criminal act, from criminal responsibility, i.e. from pronouncing him/her guilty and from imposing punishment on him/her. It is recognised that modern criminal proceedings embrace a wide range of procedural forms, with a tendency toward the widening of the opportunities for the application of simplified forms of criminal proceedings. The exercise of the discretionary criminal prosecution as an expression of the principle of purposefulness (expediency) is one of the methods of resolving a criminal conflict in criminal procedure. The marked tendency of the new Criminal procedure code of Lithuania (2003) is that there are wide possibilities for terminating the pre-trial investigation (Article 212 of CCP). The author concludes that the regulation of alternative forms of settlement of criminal conflicts in the Lithuanian law of criminal procedure is substantially in line with the global trends of criminal proceedings' development. Advantages and disadvantages of forms of prosecution discretion have been discussed extensively and thoroughly. However, if regulations are not set properly, various dangers may arise. The analyses of national legal acts, especially Criminal Code and Criminal Procedure Code of Lithuania, points to certain problems of the regulation of the discretionary prosecution.

Key words

Criminal procedure; Discretionary prosecution; Diversion in criminal procedure.

Preface

After the restoration of Lithuanian independence, one of the challenges the young state encountered was reform of the legal system. Naturally, the Criminal Procedure Code (1961), as well as other codes, remained in force, and were constantly appended and changed. Within existing old Criminal Procedure Code, many legal norms have been reformed (such as pre-trial detention), new norms were also established (such as appeal and cassation; a preliminary investigation judge etc.). However Lithuanian criminal procedure professionals realized that a change in social reality will change the attitude towards the offenses, their investigation and trial process. It was a clear need for a new Criminal and Criminal procedure code. The new

Criminal Code and Criminal Procedure Code came into force on the 1 May 2003¹.

There are some significant trends of the evolution of the criminal procedure law in Lithuania: constitutionalisation, internationalization - Europeanization, diversification of ordinary law. This paper deals with the last one.

Diversification of Criminal Procedure - result of procedural pluralism

Differentiation of the criminal procedure, especially simplification of the criminal procedure, have been on the agenda of policy makers of Western Europe since the 1960s². Meantime the Soviet doctrine of uniform procedure (irrespective of the seriousness of the criminal offence in question; except the private prosecution cases) in the Eastern Europe was recognized and there were only a few attempts to initiate discussions about differentiation of criminal procedure.

As the result of researches the uniform process ceased. Even more, the variety of procedural forms in one single country makes it rather difficult to classify the criminal process in that given country as belonging definitely to one or other system – inquisitorial or accusatorial procedure³. So-called simplified procedures, such as summary procedures, penal order etc. are discussed but the implementation of discretionary dismissals is much more controversial issue.

The liberalisation of criminal law and criminal procedure allowed “alternative measures” to be legalized and applied. The possibility of discretionary dismissals provides law enforcement authorities with valuable information, presuppose a solution of penal conflict that avoids the traditional schema of the criminal procedure: crime - pretrial investigation - Court proceeding - sentence.

That was not absolutely new in the criminal procedure law. Two basic principles of the prosecution - the legality principle (Legalitätsprinzip; Le principe de la légalité) and the opportunity (expedience) principle

¹ The first draft of the Criminal Procedure Code was presented in 1999. The new CCP was adopted in 2002. Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*. 2002, Nr. 37-1341.

² Albrecht, H.-J. Countries in Transition: Effects of Political, Social and Economic Change on Crime and Criminal Justice – Sanctions and Their Implementation. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol.7/4, 1999, p. 464.

³ Bárd, K. Trial and sentencing: Judicial Independence, Training and Appointment of Judges, Structure of Criminal Procedure, Sentencing patterns, the Role of the Defence in the countries in Transition. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol.7/4, 1999, p. 435.

(Opportunitätsprinzip; Le principe L'Opportunité des poursuites) - were recognised in XIX century. Adherence to the legality principle in the procedural sense means that the prosecution institution can not exercise any discretion over the prosecutorial decision; prosecution must take place in all reported cases in which there is sufficient evidence of a suspect's guilt and in which no legal hindrances prohibit prosecution. The principle of opportunity on the other hand, does not demand compulsory prosecution. Instead, it allows the prosecution agency discretion over the prosecutorial decision, even when sufficient evidence exists of the offender's guilt and there are no legal hindrances interfering proceeding with the matter. In the theory, these two principles are totally contradictory but in practice not a single state applies one of these principles purely.⁴ In different countries 15-75 % of cases in which a perpetrator is known and which can be handed over to the court are terminated by the prosecutor (or other competent officer) who uses his right of discretion⁵.

Due to the fact that in recent years the legal exceptions to the legality principle have been widely extended in Lithuania and in some other countries, the system applying the opportunity principle and those applying the legality principle have been approaching each other.

The principle of expediency instituting criminal proceedings expressed by discretionary prosecution was denied on the whole for a long time in Lithuania in criminal procedure studies but recently the situation has changed: discretionary prosecution is discussed not only in the criminal procedure jurisprudence⁶, also there are wide possibilities for terminating the pre-trial investigation. The new Criminal Procedure Code and new Criminal Code of Lithuania provide set of seven relatively distinct forms of discretionary prosecution. According to 212 article of the CPC criminal proceedings may be terminated: when it is recognized that certain person or

⁴ Tak, P. East meet West. Aspects of Prosecution in countries in Transition. *European Journal of Crime, Criminal Law and Criminal Justice*. Volume 7. Issue 4, 1999, p. 412-432; Головкин, Л. В. *Альтернативы уголовному преследованию в современном праве*. Санкт-Петербург, 2003.

⁵ Parmenter, S., Fijnaut, C., Van Daele, D. From Sisyphus to Octopus: Towards a Modern Public Prosecutor's Office in Belgium. *European Journal of Crime, Criminal Law and Criminal Justice*. 2000. No.3, p. 178; De Doelder, H. The Public Prosecution Service in the Netherlands. *European Journal of Crime, Criminal Law and Criminal Justice*. 2000. No.3, p. 200; Verrest, P. The French Public Prosecution Service. *European Journal of Crime, Criminal Law and Criminal Justice*. 2000. No.3, p. 234; Albrecht, H.-J. Criminal Prosecution: Developments Trends and open Questions in the Federal Republic of Germany. *European Journal of Crime, Criminal Law and Criminal Justice*. 2000. No.3, p. 246; Oda, H. *Japanese Law*. London. Dublin. Edinburgh. 1992, p. 91.

⁶ Ažubalytė, R. *Diskrecinis baudžiamasis persekiojimas: teoriniai pagrindai, taikymo problemos ir perspektyvos Lietuvoje*: daktaro disertacija, socialiniai mokslai, teisė (01 S). Vilnius, LTU, 2002; Ažubalytė, R. Alternatyvūs baudžiamojo konflikto sprendimo būdai nagrinėjant bylą teisme. *Jurisprudencija*. Mokslo darbai. 2008. 6(108), p. 41-47.

the offense has become not dangerous because of change of circumstances (36 Article of the CC); when it is established that the offense is minor (37 Article of the CC); if the suspect and the victim reconciled (38 article of the CC); when a suspect is transferred by endorsement (40 article of the CC); when the suspect assists to disclose an organized group or criminal association (39 (1) Article of the CC); in some special cases, indicated in the Criminal Code; if the suspect is alleged to have committed more than one offence the prosecutor may limit prosecution to the most serious charge and drop all the others (213 Article of the CPC). Similar to many European countries, the use of the principle of expediency in prosecution is constantly increasing in Lithuania as well.

The Criminal Code of Lithuania⁷ provides the standards and conditions, and the Criminal Procedure Code establishes the procedures for discretionary dismissals. On those grounds the CCP allows to terminate criminal proceedings during the pre-trial investigation (Articles 212 of the CPC) or in the court (Articles 235, 303, 327 of the CPC).

Advantages and disadvantages of discretionary prosecution have been discussed extensively and thoroughly⁸. However, if regulations are not set properly various dangers may arise. The analyses of national legal acts, especially Criminal Code and Criminal Procedure Code, points to certain problems of the regulation of the discretionary prosecution⁹. The opinion of discretionary prosecution divides scholars of Lithuania into two different camps. One position is that discretionary prosecution contradicts the principle of equality and presumption of innocence, does not ensure right to the fair trial¹⁰; other - discretionary prosecution does not contradict these principles, perpetrator can waive his right to the trial.

⁷ Lietuvos Respublikos baudžiamasis kodeksas. *Valstybės žinios*. 2000, Nr. 89-2741.

⁸ Tak, P. East meet West. Aspects of Prosecution in countries in Transition . *European Journal of Crime, Criminal Law and Criminal Justice*. Volume 7. Issue 4. 1999, p. 423-424; Albrecht, H.-J. Countries in Transition: Effects of Political, Social and Economic Change on Crime and Criminal Justice – Sanctions and Their Implementation. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol.7/4, 1999, p. 465; Biever, R. Discretionary powers of public prosecution: opportunity or legality principle – advantages and disadvantages. Conference of Prosecutors General of Europe 5 th Sesion (Celle, 23-25 may 2004). http://www.coe.int/t/dg1/legalcooperation/ccpe/conferences/CPGE/2004/ContributionBIEV ER_en.pdf [2008 06 02]; Weigend T. *Prosecution: Comparative Aspects*. <http://law.jrank.org/pages/1857/Prosecution-Comparative-Aspects.html/> [2008 06 02]

⁹ Ažubalytė R. Diskrecinio baudžiamojo persekiojimo ir atleidimo nuo baudžiamosios atsakomybės santykis. *Jurisprudencija*. Mokslo darbai. 2006. 1(79). P. 17-20.

¹⁰ Baranskaitė A. *Taikos sutartis baudžiamojoje teisėje. Atleidimas nuo baudžiamosios atsakomybės kaltininkui ir nukentėjusiajam susitaikius*. Monografija. Vilnius. 2007. P. 79; *Lietuvos Respublikos baudžiamojo kodekso komentaras*. Bendroji dalis. – Vilnius, 2004. P. 232; *Baudžiamoji teisė*. Bendroji dalis. Vadovėlis. Vilnius. 2003. P. 375.

Principle of equality v. discretionary prosecution

Individualization of justice and administrative requirements (increasing number of crimes and respectively crammed court calendar, large criminal justice resources) determine the extension of opportunity principle.¹¹ In my opinion the main application of this principle is to highlight the individualisation in the criminal justice (notably by the seriousness, nature, circumstances and consequences of the offence; the personality of the alleged offender; the possible sentence of the court; the effects of conviction on the alleged offender; the position of the victim): give the opportunity to the person (for the first time committed minor offense mostly) to avoid the trial if he fulfils some obligations in exchange for having his case dismissed¹². However, the question arises, can persons who have committed the same crime be treated differently – one's case is discontinued, although there is a real judicial perspective, the other person - has been convicted.

The Constitutional Court emphasised that „under the Constitution, the legal regulation of the relations of procedure must be such so that the participants (which have the same procedural legal status) in the proceedings would be treated equally; thus, they should have the same rights and duties unless there are differences between them of such character and extent that the unequal treatment would be objectively justified; otherwise, one would deviate from the constitutional principles of a state under the rule of law and equality of persons¹³. When regulating the relations linked to the establishment of criminal liability for criminal deeds, the legislator enjoys broad discretion, he, *inter alia*, may, while taking into account the nature, danger (gravity), scale and other signs of the criminal deeds, consolidate differentiated legal regulation and establish different legal liability for corresponding criminal deeds¹⁴. When he regulates relations

¹¹ Tak P. East meet West. Aspects of Prosecution in countries in Transition . *European Journal of Crime, Criminal Law and Criminal Justice*. Volume 7. Issue 4. 1999. P. 423-424.

¹² Ažubalytė R. *Diskrecinis baudžiamasis persekiojimas: teoriniai pagrindai, taikymo problemos ir perspektyvos Lietuvoje*. Doktoro disertacija, socialiniai mokslai, teisė (01 S). Vilnius. 2002. P.23-24.

¹³ The Constitutional Court of the Republic of Lithuania. Ruling 24 October 2007 „On the Compliance of Articles 4 and 165 (wording of 28 February 2002) of the Code of Civil Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania” . [Ruling 24 October 2007 „On court precedents and on lodging complaints against court rulings whereby one applies to the Constitutional Court or an administrative court”]. http://www.lrkt.lt/Documents1_e_2007.html [2009 11 09]

¹⁴ The Constitutional Court of the Republic of Lithuania. Ruling „On the Compliance of Paragraph 4 (wording of 11 September 2001) of Articles 131 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, on the Compliance of Paragraph 5 (wording of 10 April 2003 and 16 September 2003) of Article 234, Paragraph 2 (wordings of 10 April 2003 and 16 September 2003) of Article 244, Article 407 (wording of 19 June 2003), Paragraph 1 (wording of 14

within criminal procedure, the legislator enjoys rather broad discretion. For instance, the legislator may establish by means of a law different kinds of criminal procedure, as well as peculiarities of criminal procedure in the investigation of certain criminal deeds and/or in the consideration of criminal cases of individual categories, inter alia different rules of investigation of certain criminal deeds, the peculiarities of the legal status of participants of the criminal procedure, etc¹⁵.

It is generally recognized that „the resources (material, human, etc.) allocated for protection of the person and society against criminal attempts must be distributed and used rationally“¹⁶. The Council of Europe has recognized that delays in the administration of criminal justice might be remedied not only by the allocation of specific resources and by the manner of their use but also by resorting the principle of discretionary prosecution¹⁷. The Constitutional Court of Lithuania emphasised that „when regulating the relations within criminal procedure, the legislator taking into account the character of criminal deeds, their danger (gravity), scale, other signs and other circumstances of importance, enjoys discretion to establish also such legal regulation so that the victim (his representative) and the person who is accused of committing the criminal deed, would have an opportunity to reach conciliation and this conciliation would be the basis to dismiss the criminal procedure. <..> While regulating the institute of conciliation of the victim (his representative) and the accused, the legislator must establish also clear procedures of application of this institute“¹⁸. In author's opinion discretionary dismissal (as well as the institute of conciliation of the victim and the perpetrator) is not

March 2002) of Article 408, Paragraphs 2 AND 3 (wording of 14 March 2002) of Article 412, Paragraph 5 (wording of 14 March 2002) of Article 413 AND Paragraph 2 (wording of 14 March 2002) of Article 414 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, and on the petitions of the Šiauliai district local court, the petitioner, requesting to investigate whether Article 410 (wording of 14 March 2002) of the Code of Criminal Procedure of the Republic of Lithuania is not in conflict with the Constitution of the Republic of Lithuania. 16 January 2006. [Ruling. 16 January 2006. On private accusation and on the right of the person, against whom the institution of a criminal case is refused, to lodge a complaint against the decision of the prosecutor]. <http://www.lrkt.lt/dokumentai/2006/r060116.htm> [2009 11 09]

¹⁵ Ruling 16 January 2006 of the Constitutional Court of the Republic of Lithuania.

¹⁶ Ruling 16 January 2006 of the Constitutional Court of the Republic of Lithuania; Recommendation No. R (87) 18 of the Committee of Ministers to Member states concerning the Simplification on Criminal Justice, (*Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies*).

¹⁷ Recommendation No. R (87) 18 of the Committee of Ministers to Member states concerning the Simplification on Criminal Justice, (*Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies*).

¹⁸ Ruling 16 January 2006 of the Constitutional Court of the Republic of Lithuania.

unconstitutional in substance. Alongside, it needs to be noted that by such differentiated regulation of legal relations of criminal procedure the rights of participants of criminal procedure which stem from the Constitution, or their implementation cannot be burdened so that it becomes impossible¹⁹. The most important is that the legislator has to establish clear procedures of application for discretionary dismissals.

Presumption of innocence v. discretionary prosecution

Paragraph 1 of the Article 31 of the Constitution declare that a person shall be presumed innocent until proved guilty according to the procedure established by the law and declared guilty by an effective court judgement. The Constitutional Court emphasised that it is extremely important state institutions and officials to follow the presumption of innocence, public persons to restrain from referring to a person as a criminal until the guilt of the person for committing the crime is proven during the procedure established by the law and recognised guilty by an effective court judgement²⁰. There is an opinion that Article 6 does not provide an accused reason to demand continuation of judicial proceedings but requires only that when he is convicted it is done by the court.²¹ The Constitutional Court of Lithuania emphasised that, „<..> a person may not be recognised guilty for committing of crime nor criminal punishment may be administrated to anyone without proper judicial procedure permitting the accused to be familiarised with everything he is being charged with and on what basis the charges against him are founded, as well as allowing him to prepare and present evidence for the defence“²².

According to Recommendation No. R (87) 18 of the Committee of the Ministers, „the decision to discontinue proceedings should not be treated as equivalent to conviction and can not follow the normal rules regarding, *inter alia*, inclusion in the criminal record unless the alleged offender has admitted his or her guilt“²³. However, it is difficult to comply with the

¹⁹ Ruling 16 January 2006 of the Constitutional Court of the Republic of Lithuania.

²⁰ Ruling 16 January 2006 of the Constitutional Court of the Republic of Lithuania.

²¹ Clayton R., Tomlinson H. Fair Trial rights. Oxford university press. 2001, p. 98.

²² Ruling 19 September 2000 of the Constitutional Court of the Republic of Lithuania „On the compliance of Articles 118¹, 156¹, Item 5 of Article 267 and Article 317¹ of the Republic of Lithuania Code of Criminal Procedure with the Constitution of the Republic of Lithuania. 19 September 2000. [On the provisions of the Code of Criminal Procedure concerning the manner of questioning of an anonymous witness]. http://www.lrkt.lt/Documents1_e_2000.html [2009 11 09]

²³ Recommendation No. R (87) 18 of the Committee of Ministers to Member states concerning the Simplification on Criminal Justice, (*Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the inisters' Deputies*).

requirements of the presumption of innocence when decision to waive prosecution on discretionary basis takes place only if the prosecuting authority has adequate evidence of guilt and the consent to dismiss the case of the alleged offender. The European Court of Human Rights in the *Adolf v. Austria* case holds, by four votes to three, that there has been no breach of that Article (art. 6). The European Court of Human Rights found that „<...>a decision taken in pursuance of section 42 of the Penal Code does not, because of its very character and whatever may be its wording, involve anything in the nature of a verdict of guilt. It would have been preferable, the judgment added, had the District Court stated this explicitly and without ambiguity, but the more or less apposite choice of wording in the reasoning could not deprive the reasoning of the specific significance it had as a result of the nature of the decision given“²⁴. In addition, if after withdrawal of a charge there remains some suggestion of guilt on the part of the accused, then there is an arguable breach of the presumption of innocence²⁵.

There are some Penal Code and Criminal Procedure Code incompatibilities which may cause not only theoretical but also practical problem. The Council of Europe stated, that „the waiving or discontinuation of proceedings may be pure and simple, accompanied by a warning or admonition, or subject to compliance by the suspect with certain conditions, such as rules of conduct, the payment of moneys, compensation of the victim or probation“²⁶. For instance the law of Austria, France and Germany authorizes the prosecutor to propose to the suspect to fulfil certain obligation in exchange for having his case dismissed. The theory of these provisions is that the suspect, by accepting and fulfilling the obligations, eliminates the necessity of punishment because the purposes of punishment (deterrence and / or rehabilitation) have already been met²⁷.

In Lithuania, when a case is terminated on the discretionary grounds following compulsory measures may be imposed for a person: 1) banning to use a special right, 2) restitution payment to the victim; 3) community work, 4) payments to the State Fund of the victims of crimes, 5) property confiscation, 6) a prohibition to approach the injured person, 7) participation in violent behavior modifying programs (Article 67 of CC). Lithuanian

²⁴ Case of *Adolf v. Austria*.

[http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695294&portal=hbk m&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 \[2009 10 31\]](http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695294&portal=hbk m&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 [2009 10 31])

²⁵ Clayton R., Tomlinson H. *Fair Trial rights*. Oxford university press. 2001, p. 98.

²⁶ Recommendation No. R (87) 18 of the Committee of Ministers to Member states concerning the Simplification on Criminal Justice, (*Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the inisters' Deputies*).

²⁷ Weigend T. *Prosecution: Comparative Aspects*.

<http://law.jrank.org/pages/1857/Prosecution-Comparative-Aspects.html/> [2008 06 02]

Criminal Code and criminal law doctrine leads to the conclusion that compulsory measures are part of criminal responsibility (they contribute to the punishment), and may be imposed only to the person who was found guilty²⁸.

Point is – is principle of presumption of innocence violated if compulsory measures - being part of the criminal responsibility- are imposed to a person against whom penal proceedings were dismissed.

The author considers that problem of use of these measures and the presumption of innocence can be solved if the measures of similar nature would be treated not as a form of criminal responsibility but as the obligation for conditional dismissal.

The discretionary prosecution v. the right to a court

Next issue for discussion is relation between the right to the court and the discretionary prosecution.

Article 6 (1) of the European Convention declares that „everyone is entitled to a fair and public hearing“²⁹. In criminal proceedings, the right to access to a court means that the accused has the right to be tried on a charge against him in a court.³⁰ The Constitutional Court of Lithuania emphasised that „<..> the right of a person to apply to court can not be artificially restricted, nor its implementation may be unreasonably burdened.“³¹ But the right is not absolute, it does not imply that every criminal charge ends in a judicial decision.³² European Court of Human Rights recognized the accused's right to refuse the trial: “The "right to a court", which is a constituent element of the right to a fair trial, is no more absolute in criminal than in civil matters. It is subject to implied limitations: f.e. <...> decision not to prosecute and order for discontinuance of the proceedings; it is not the Court's function, though, to elaborate a general theory of such limitations. <..> The waiver, which has undeniable advantages for the individual concerned as well as for

²⁸ *Lietuvos Respublikos baudžiamojo kodekso komentaras. Bendroji dalis.* Vilnius, 2004, p. 375-376.

²⁹ Convention for Protection of Human Rights and Fundamental Freedoms, as amended by protocol No. 11. Rome, 4. XI. 1950.

<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

³⁰ Case of Deweer v. Belgium.
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Deweer%20v.%20Belgium&sessionid=35123624&skin=hudoc-en> [2009 10 31]

³¹ Ruling 16 January 2006 of the Constitutional Court of the Republic of Lithuania.

³² Clayton R., Tomlinson H. Fair Trial rights. Oxford university press. 2001, p. 98.

the administration of justice, does not in principle offend against the Convention³³. Waiver of the rights of access to court is possible but must be „subjected to careful review“³⁴.

The international legal acts and the case law of European Court of Human Rights emphasises that the suspect's consent for the fact that prosecution in his respect shall not be initiated or terminated on the basis of discretion is necessary. According to the recommendation of Council of Europe the alleged offender's consent should be obtained wherever conditional waiving or conditional discontinuation of proceedings is envisaged. In the absence of such consent, the prosecuting authority should be obliged to proceed against the alleged offender unless a different reason to drop the charges is decided. Rules should be prescribed to ensure that informed consent is given freely³⁵. All the options for dismissal must be voluntary. The Court of Strasbourg points out that while the prospect of having to appear in court is certainly liable to prompt a willingness to compromise on the part of many persons "charged with a criminal offence", the pressure thereby brought to bear is in no way incompatible with the Convention³⁶.

But the Criminal Procedure Code of Lithuania does not provide any formal procedures ensuring that a suspect is informed of his right to request for trial, and that his refuse to use this right is deliberate. The defendant must have the right to object to the disposal of his case and force the prosecutor to send his case to court for trial. In this way, the accused can proclaim his innocence and can be heard by a judge. The Council of Europe points that failure to challenge the measure decided upon or in compliance with a condition of discontinuation of proceedings may be considered as amounting to the consent.³⁷ Nevertheless I think, that the right to require the court must be provided by law and must be recorded in the case.

The conditional dismissal is criticized on the grounds that it shifted sentencing power from the judiciary to the prosecutor and that undue

³³ Case of Deweer v. Belgium.
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Deweer%20v.%20Belgium&sessionid=35123624&skin=hudoc-en> [2009 10 31]

³⁴ Clayton R., Tomlinson H. Fair Trial rights. Oxford university press. 2001, p. 90.

³⁵ Recommendation No. R (87) 18 of the Committee of Ministers to Member states concerning the Simplification on Criminal Justice, (*Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies*).

³⁶ Case of Deweer v. Belgium.
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Deweer%20v.%20Belgium&sessionid=35123624&skin=hudoc-en> [2009 10 31]

³⁷ Recommendation No. R (87) 18 of the Committee of Ministers to Member states concerning the Simplification on Criminal Justice, (*Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies*).

pressure was put on the suspect to comply with the prosecutor's offer even when he was in fact innocent or when his guilt could not have been proven at trial.³⁸ There are some opinions in literature that the idea of prosecutorial sanctioning, in spite of its interference with the traditional judicial monopoly on sentencing, has internationally been regarded as a sensible way for disposing minor cases³⁹. The author considers that involvement of the court (decision of court or judicial consent) must be some kind of the compensation for the lack of the trial. Court approval guarantees that the procedure is conducted according to the ideas of the rule of law as the judge has the final word as to the termination of the procedure. On the other hand, though a judge of the pre-trial investigation confirms the decision to terminate the pre-trial investigation made by the prosecutor on the basis of discretion by passing a ruling so it can be stated that in many cases a prosecutor fulfils a function of implementation of justice. It might be that such a transformation of functions is unavoidable but still it has to be linked closely with the requirements for prosecutors' qualification and protection of the rights of all participants of the process.

Lithuania, in the view of its historical development and the requirements of the Constitution, apply the principle of mandatory prosecution, so the law entitles judges to participate in discontinuation of proceedings. Article 214 of CPC stipulates that the preliminary investigation is terminated by the pre-trial judge, who shall confirm a decision of the prosecutor to dismiss pre-trial investigation (criminal procedure). Otherwise the prosecuting authority is obliged to continue proceeding against the alleged offender.

Finalizing it should be highlighted that discretionary prosecution may be an effective instrument of individualization of criminal justice. However this should be clearly regulated by law and applied strictly with regard to the requirements of the principles of the Constitution: equality of persons, presumption of innocence and right to the fair trial.

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³⁸ Weigend T. *Prosecution: Comparative Aspects*.
<http://law.jrank.org/pages/1857/Prosecution-Comparative-Aspects.html> [2008 06 02]

³⁹ Weigend T. *Prosecution: Comparative Aspects*.
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