PUBLIC PROSECUTION CONSUMPTION IN THE POLISH CRIMINAL PROCESS

RYSZARD A. STEFAŃSKI

Discontinuance of preparatory proceeding – without instituting an investigation or an enquiry (Article 327 § 1 CPC) or reopening (Article 327 § 2 CPC) or a reversal of the decision on discontinuing the proceeding by the Attorney General (Article 328 § 1 CPC) – results in the loss a public prosecutor's right to prosecute[1]. In literature, it is called an expiry of the right to prosecute[2] or public prosecution consumption[3]. As the Supreme

[1] R.A. Stefański, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. II, Warszawa 2004, p. 484; resolution of the Supreme Court of 26 September 2002, I KZP 23/02, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2002, no. 11–12, item 98, ruling of the Supreme Court of 18 January 2006, IV KK 378/05, LEX no. 172220, ruling of the Supreme Court of 9 October 2008 – V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, item 1992.

[2] M. Siewierski, [in:] S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1966, p. 35; M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, H. Kempisty, M. Siewierski, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1971, p. 55, J. Tylman, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne [Polish criminal procedure]*, Warszawa 2014, p. 190; J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz do art.1–424 [Criminal Procedure Code: Commentary on Articles 1–424]*, vol. I, Warszawa 2013, p. 127.

[3] R.A. Stefański, Podstawy i przyczyny umorzenia postępowania przygotowawczego [Grounds and reasons for preparatory proceeding discontinuance], *Prokuratura i Prawo* 1996, no. 2–3, p. 31; M. Rogalski, [in:] *System Prawa Karnego Procesowego. Dopuszczalność procesu [Criminal procedure law system: Admissibility of a trial]*, vol. IV, (ed.) M. Jeż-Ludwichowska, A. Lach, Warszawa 2015, p. 199; J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 127; W. Grzeszczyk, Gloss on the decision of the Supreme Court of 8 January 2008, V KK 416/07, *Prokuratura i Prawo* 2008, no. 10, p. 168; *ibid*., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2012, p. 54; T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2014, p. 151; A. Sakowicz, [in:] K.T. Boratyńska, A. Górski, M. Królikowski, A. Sakowicz, M, Warchoł, A. Ważny, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) A. Sakowicz, Warszawa 2015, p. 97; M. Kurowski, [in:] B. Augustyniak,

Court noticed, "The consumption of public prosecution takes place when a prosecutor loses his right to prosecute. It is always connected with a fixed public prosecutor's action and can be reflected in two ways. In the first one, this negative procedural premise consists in the expiry of the right to prosecute because of valid discontinuance of the preparatory proceeding against the given suspect unless there is a possibility of reopening that proceeding (Article 327 § 2 CPC), or unless there is a reversal of the order on discontinuance by the Attorney General (Article 328 CPC). Then, this kind of a procedural situation is not treated as a negative premise of *res judicata*, because it results from the decision issued not by a court but a prosecutor. (…) It must be noticed, however, that the essence of the premise is inability to file – in those indicated cases – an indictment, but also a possibility of regaining the right to prosecute through the application of instituting, reinstating (Article 327 CPC) or reversing a valid procedural decision by the Attorney General"[4].

There is no consensus of opinion in the jurisprudence and judicature on the legal grounds for discontinuance of the preparatory proceeding due to public prosecution consumption. Two contrary opinions developed, the first one assuming that, in spite of differences, the legal grounds are laid in Article 17 § 1 (7) *in principio* CPC[5], the other that the circumstance precluding such a proceeding occurs in Article 17 § 1 (11) CPC[6].

K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) D. Świecki, vol. I, Warszawa 2013, p. 135.

[4] Decision of the Supreme Court of 16 December 2015, II KK 347/15, LEX no. 1948881.

[5] W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne [Criminal procedure law: General issues]*, vol. I, Poznań 2000, p. 158; M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, K. Kempisty, M. Siewierski, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 56; T. Grzegorczyk, Wygaśnięcie prawa oskarżyciela publicznego dom oskarżania [Expiry of public prosecutor's right to prosecute], *Problemy Praworządności* 1980, no. 2, p. 14; K. Marszał, Gloss on the resolution of the Supreme Court of 26 September 2002, I KZP 23/2002, *Orzecznictwo Sądów Polskich* 2003, no. 9, item 105; M. Rogalski, *Przesłanka powagi rzeczy osądzonej w procesie karnym [Premise of res judicata in the criminal process]*, Zakamycze 2005, pp. 491–492; J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 114; F. Prusak, *Nadzór prokuratora nad postępowaniem przygotowawczym [Preparatory proceeding under public prosecutor's supervision]*, Warszawa 1984, p. 230. J. Tylman, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne…[Polish criminal procedure…]*, p. 190; Z. Gostyński, S. Zabłocki, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 311; B. Szyprowski, Kontrola prawomocnych orzeczeń wydanych w postępowaniu przygotowawczym [Supervision of valid judgements issued during preparatory proceeding], *Prokuratura i Prawo* 1999, no. 9, p. 20; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego, Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2007, p. 151; W. Sych, *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym [Influence of the victim on the course of preparatory proceeding in the Polish criminal process]*, Zakamycze 2006, p. 268; decision of the Supreme Court of 26 November 2002, II KZ 47/02, OSNKW 2003, no. 3–4, item 35, ruling of the Supreme Court of 9 October 2008, V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, no. 1, item 1992, ruling of the Supreme Court of 2 March 2011, IV KK 399/10, Biuletyn Prawa Karnego 2011, no. 8, item 1.2.4, I abandon the opinion expressed earlier (R.A. Stefański, *Podstawy i przyczyny… [Grounds and reasons for…]*, p. 31).

[6] F. Prusak, *Komentarz do kodeksu postępowania karnego [Commentary on the Criminal Procedure Code]*, vol. 1. Warszawa 1999, p. 111; M. Kurowski, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 136.

The third opinion that the grounds are laid in Article 17 § 1 (9) CPC[7] applies only to a judicial proceeding because in case a public prosecutor files an indictment when the right to do so has expired causes that a prosecutor becomes a non-entitled party.

Actually, the consumption of public prosecution has features that bring it close to *res judicata* but only when discontinuance is applied *ad personam*, because only then it refers to the same perpetrator and the same act and is similar to it as far as legal consequences are concerned.

It is commonly stated in literature that discontinuance of the preparatory proceeding is of the same importance as a court judgement and thus it creates *res judicata* in the same scope as if a court adjudicated, and it results in proceeding discontinuance under Article 17 § 1 (7) *in principio* CPC[8]. It is assumed that the lack of grounds for proceeding reopening means a negative procedural premise similar to *res judicata* as far as legal consequences are concerned[9].

Thus, a legal question arises whether Article 17 § 1 (7) CPC constitutes grounds for discontinuance in case of former discontinuance of the preparatory proceeding *in rem*. There are different opinions on this matter expressed in jurisprudence and judicial judgements.

Due to that, discontinuance is limited to a proceeding *in personam* and it is stated that discontinuance of the preparatory proceeding *in rem* does not result in the same consequence because it is possible to reopen it at any time[10]. The Supreme Court directly stated: "Discontinuance of the preparatory proceeding at the '*in rem*' stage, as one that may be reinstated at any time, does not exhaust '*res judicata*'"[11].

---

[7] D. Strzelecki, Konsumpcja skargi publicznej [Consumption of public prosecution], *Prokuratura i Prawo* 2016, no. 2, p. 40.

[8] W. Daszkiewicz, *Prawo karne procesowe… [Criminal procedure law…]*, p. 158; M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, K. Kempisty, M. Siewierski, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 56; M. Rogalski, *Przesłanka powagi rzeczy osądzonej… [Premise of res judicata…]*, pp. 396 and 491; J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 114; J. Skorupka, [in:] *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) J. Skorupka, Warszawa 2015, p. 75; decision of the Supreme Court of 26 November 2002, II KZ 47/02, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2003, no. 3–4, item 35, ruling of the Supreme Court of 17 November 2004, C KK 342/04, Orzecznictwo Sadu Najwyższego w Sprawach Karnych no. 1, item 2103, ruling of the Supreme Court of 9 October 2008, V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, no. 1, item 1992, ruling of the Supreme Court of 2 March 2011, IV KK 399/10, Biuletyn Prawa Karnego 2011, No. 8, item 1.2.4.

[9] A. Murzynowski, Przyczynek do zagadnienia ważności czynności procesowych wykonanych w niedopuszczalnym postępowaniu karnym [Contribution to the issue of validity of procedural actions performer in an inadmissible criminal proceeding], *Nowe Prawo* 1962, no. 7–8, p. 995.

[10] J. Skorupka, [in:] *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 75; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 152; M. Rogalski, *Przesłanka powagi rzeczy osądzonej… [Premise of res judicata…]*, p. 516; E. Skrętowicz, Gloss on the ruling of the Supreme Court of 28 february 1979, V KR 168/78, OSP 1980, no. 5, p. 219, decision of the Supreme Court of 4 May 2006, V KK 384/04, *Biuletyn Prawa Karnego* 2010, no. 12, item 31, ruling of the Supreme Court of 9 October 2008, V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, no. 1, item 1992.

[11] Decision of the Supreme Court of 4 May 2006, V KK 384/05, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2006, no. 1, item 944. Also J. Skorupka, [in:] *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 75.

There is also an opinion that it also refers to discontinuance of a proceeding *in rem*. This was admitted by the Supreme Court, which stated:

– "Public prosecutor's valid decision on preparatory proceeding discontinuance under Article 280 § 1 [at present 322 § 1] and Article 11 (2) [at present 17 § 1 (3)] CPC in connection with Article 26 § 1 [at present 1 § 2] CPC, in which it is stated that a given person has committed an act specified in the Criminal Code but of an insignificant social danger (…), it constitutes *res judicata* as understood in Article 11 (7) [at present 17 § 1 (7)] CPC also in the event the person was not presented charges and was not examined as a suspect before the issue of the decision (Article 269 [at present 313] CPC)"[12]. Treating discontinuance of the preparatory proceeding *in rem* as *res judicata* is in conflict with its essence, which consists in the fact that there was a valid judgement in a given case against a given person[13].
– "A prosecutor's valid decision on discontinuance of the preparatory proceeding under Article 17 § 1 (3) CPC, in which it is stated that a given person has committed an act specified in the Criminal Code but of an insignificant social danger constitutes *res judicata* as understood in Article 17 § 1 (7) CPC also in the event the person was not presented charges and was not examined as a suspect before the issue of the decision, constitutes a contempt of Article 313 CPC"[14].

It is emphasised in literature that the preparatory proceeding may be conducted, even though it has been discontinued, as a result of its continuation without reopening or reversing the decision on discontinuing it by the Attorney General, or instituting a new proceeding. In the latest case, there are two types of proceedings and only in that situation *res judicata* may be considered and not in the case of inadmissible continuation of the proceeding, because there may be one decision on its institution regarding one proceeding. One cannot assume that the initiation of a chronologically later proceeding took place within the same process. Thus, the possibility of considering Article 17 § 12 (7) CPC as grounds for discontinuance is *a limine* declined[15].

It is assumed that *res judicata* constitutes an obstacle to conducting the chronologically second proceeding when it was instituted after the decision on discontinuance of the former investigation in the same case and against the same person had become valid and it was done irrespective of the proceeding concluded formerly[16].

It is rightly emphasised that the assumption that defective conduction of the preparatory proceeding that took place after its former discontinuance always constitutes a procedural obstacle in the form of *res judicata* would make Article 327 § 4 CPC useless as it stipulates proceeding discontinuance in case of proceeding reinstatement

---

[12] Decision of the Supreme Court of 17 June 1994, WZ 122/94, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1994, no. 9–10, item 64 with critical glosses by R. Kmiecik, *Wydawnictwo Polskie Prawo* 1995, no. 3–4, pp. 78–84; B. Mik, *Prokuratura i Prawo* 1995, no. 11–12, pp. 79–93 and approval by J. Tylman, *Wydawnictwo Polskie Prawo* 1995, no. 3–4, p. 85 and subsequent ones.

[13] M. Rogalski, *Przesłanka powagi rzeczy osądzonej…. [Premise of res judicata…]*, p. 142.

[14] Ruling of the Supreme Court of 15 February 2012, II KK 201/11, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2012, no. 6, item 60 with a gloss of approval by R. Kmiecika, *Państwo i Prawo* 2013, no. 7, pp. 120–124. The Supreme Court expressed a different stand in the ruling of 27 August 1974, IV KR 172/74, not published.

[15] D. Strzelecki, *Konsumpcja skargi… [Consumption of public prosecution]*, pp. 44–45.

[16] *Ibidem*, p. 47.

despite a lack of grounds for so doing[17]. Article 17 § 1 (7) CPC would be sufficient for the assessment of these types of proceeding competitiveness[18].

The appropriate legal grounds for preparatory proceeding discontinuance in case the former one was validly discontinued are laid down in Article 17 § 1 (11) CPC.

Supporters of the opinion rightly emphasise that *res judicata* may only result from a judgement rendered by a court, not by a prosecutor[19]. Adjudication on the same act committed by the same person does not occur in the judgement issued by a court and this is a basic condition for *res judicata*[20]. A prosecutor does not adjudicate on the matter but only decides on actual or legal inadmissibility of a trial, which at the moment when the decision becomes valid results in a ban established by the principle *ne bis in idem*[21]. Apart from that, it cannot take place in the event former discontinuance of the proceeding took place in the *in rem* phase because of no subjective identity.

The judicature rightly assumes:

– "The public prosecutor's loss of the right to prosecute, as a result of discontinuance of the preparatory proceeding, becomes a separate procedural obstacle to continue, as well as to reopen, a discontinued investigation or an inquiry, but is also a relative obstacle, i.e. an avoidable one. Its elimination can take place via instituting a discontinued proceeding (Article 327§ 1 CPC) or reopening it (Article 327 § 2 CPC), or reversing a valid discontinuance decision as groundless by the Attorney General (Article 328 CPC) providing the decisions are taken according to law. Each of them causes that a public prosecutor can continue the formerly discontinued preparatory proceeding and thus regains the right to prosecute. Consequently, if after the discontinuance of an investigation or an inquiry a prosecutor, not applying the discussed instruments indicated in Article 327 or Article 328 CPC, files an indictment, a court should discontinue the proceeding due to the former discontinuance of the preparatory proceeding and the prosecutor's loss of the right to prosecute (Article 17 § 1 (11) CPC)"[22].
– "Since a senior prosecutor has not issued a decision on proceeding reinstatement, the inclusion of the obligation to discontinue a proceeding in the provision should be understood as the existence of a procedural obstacle different than the one laid down in Article17 § 1 (7) CPC; because, if the procedural obstacle were treated as *res judicata*, special and new grounds for proceeding discontinuance would not

---

[17] R. Kmiecik, Prawomocność postanowień prokuratora w świetle k.p.k. z 1997 r. [Validity of a prosecutor's decisions in the light of the Criminal Procedure Code of 1997], [in:] *Nowy Kodeks postępowania karnego. Zagadnienia węzłowe [New Ciminal Procedure Code: Major issues]*, Kraków 1998, pp. 198–199.

[18] D. Strzelecki, *Konsumpcja skargi…. [Consumption of public prosecution]*, p. 46.

[19] M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski. H. Kempisty, M. Siewierski, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, pp. 55–56; W. Grzeszczyk, Gloss on the decision of the Supreme Court of 8 January 2008, V KK 416/07, *Prokuratura i Prawo* 2008, no. 10, pp. 166–171, decision of the Supreme Court of 16 December 2015, II KK 347/15, LEX no. 1948881.

[20] Ruling of the Supreme Court of 1 February 1962,V K 752/61, LEX no. 1632566, decision of the Supreme Court of 16 December 2015, II KK 347/15, LEX no. 1948881.

[21] W. Grzeszczyk, Gloss on the decision of the Supreme Court of 8 January 2008…, pp. 167–168.

[22] Decision of the Supreme Court of 28 October 2009, I KZP 21/09, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2010, no. 1, item 1.

be necessary (…). It must be noticed that the Criminal Procedure Code does not contain any procedural norms that directly define the consequences of unlawful (legally groundless) continuation of the preparatory proceeding. However, as the Criminal Procedure Code contains a norm that prescribes proceeding discontinuance because the decision on reinstituting it issued by a senior prosecutor was groundless, in accordance with the argument *a maiori ad minus*, the proceeding that has never been reinstated should also be discontinued. Thus, since groundless continuation of the discontinued preparatory proceeding does not constitute a violation of a ban on *res judicata* specified in Article 17 § 1 (7) CPC, it must constitute a procedural obstacle laid down in Article 17 § 1 (11) CPC. It is obvious that a prosecutor has not lost his right to prosecute (file an indictment) unconditionally. A prosecutor regains these entitlements, and thus the possibility of filing an indictment against M.O., when the proceeding is reinstituted by a senior prosecutor under Article 327 § 2 CPC"[23].

Public prosecution consumption, like *res judicata*, raises doubts whether it covers cases of former discontinuance in the *in rem* phase.

In jurisprudence, the consumption of public prosecution is limited to discontinuance of the preparatory proceeding *in personam*[24]. It is assumed that discontinuance of the preparatory proceeding makes it impossible to prosecute a person if the proceeding is not reopened (Article 327 § 2 CPC) or if the Attorney General does not reverse the valid order (Article 328 CPC).[25] Inability to file an indictment results from Article 327 § 2 CPC, which allows for reopening the validly discontinued preparatory proceeding against a person who was a suspect provided a prosecutor senior to the one who

---

[23] Ruling of the Administrative Court in Lublin of 29 May 2002, II AKa 93/02, Przegląd Orzecznictwa, Appellate Prosecution Service in Lublin 2002, No. 19, p. 27–30.

[24] M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, H. Kempisty, M. Siewierski, Kodeks postępowania karnego… [Criminal Procedure Code…], p. 55, J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, pp. 127–128.

[25] Ruling of the Supreme Court of 6 November 2003 – II KK 5/03, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2003, item 2360, decision of the Supreme Court of 26 August 2004 – I KZP 11/04, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2004, no. 7–8, item 84, ruling of the Supreme Court of 18 January 2006 – IV KK 378/05, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2006, item 163, decision of the Supreme Court of 28 October 2009, I KZP 21/09, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2010, no. 1, item 1. Also M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne [Polish criminal procedure: basic theoretical assumptions]*, Warszawa 1984, pp. 305–313; *ibid*., Gloss on the ruling of the Supreme Court of 17 July 1973, V KRN 264/73, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 1974, no. 7–8, p. 362–364; Z. Doda, A. Gaberle, *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz [Appellate review in criminal process: Supreme Court judgements: Commentary]*, vol. II, Warszawa 1997, p. 184–185; R.A. Stefański, *Podstawy i przyczyny… [Grounds and reasons…]*, p. 31; J. Tylman, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne… [Polish criminal procedure…]*, p. 190, M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, K. Kempisty, M. Siewierski, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, pp. 54–56; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 152; M. Rogalski, Wygaśnięcie prawa do oskarżenia na skutek prawomocnego umorzenia postępowania przygotowawczego [Expiry of the right to prosecute resulting from preparatory proceeding discontinuance], [in:] *Z problematyki funkcji procesu karnego [Issues of the criminal process function]*, (ed.) T. Grzegorczyk, J. Izydorczyk, R. Olszewski, Warszawa 2013, p. 189.

issued or approved an order on discontinuance only if new, important facts or evidence unknown in the previous proceeding are disclosed or if there is a circumstance laid down in Article 11 § 3 CPC. Moreover, the Attorney General, according to Article 328 § 1 CPC, may reverse a valid order on discontinuance of the preparatory proceeding against a person who was a suspect if he recognises that the proceeding discontinuation was groundless unless it concerns a case in which a court approved the order on discontinuance. If filing an indictment were admissible despite former discontinuance of an investigation or an inquiry, the discussed provisions would be useless. It is rightly noticed in jurisprudence that the aim of the instruments is to protect citizens against charges that a public prosecutor had formerly abandoned, which is required due to the stability of legal relations[26].

There is also an opinion that the reason for discontinuance covers every instance of discontinuance of the proceeding in a case[27].

Solving the problem, it is necessary to answer the question whether in case of discontinuance of the preparatory proceeding in the *in rem* phase, a prosecutor can regain the lost right to prosecute only through instituting a discontinued proceeding or also through continuation of procedural actions within the current proceeding or performing them in another proceeding.

In jurisprudence, it is pointed out that in case of discontinuance of a proceeding *in rem* there is no full validity[28]. This does not mean, however, that it is possible to perform the proceeding after its discontinuance without instituting it anew. Article 327 § 1 CPC is an obstacle to perform the proceeding because according to it, the discontinued preparatory proceeding may be at any time instituted anew based on a prosecutor's order provided that it is not against a person who was a suspect in the former proceeding. It refers to discontinuance of both an investigation and an inquiry as well as the so-called crime record discontinuance (Article 325f § 1 CPC).

In jurisprudence, it is rightly assumed that:

– "After valid discontinuance of the preparatory proceeding, a prosecutor, without the application of instruments envisaged in Article 327 § 1 and 2 CPC and Article 328 CPC, does not have the right to public prosecution and cannot regain it by continuing procedural actions within the former proceeding or another proceeding. In a situation in which there is a lack of a procedural decision adequate to the stage in which the former proceeding was discontinued and envisaged in the above-men-

---

[26] M. Siewierski, [in:] S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 36.

[27] T. Grzegorczyk, *Wygaśnięcie prawa oskarżyciela… [Expiry of a prosecutor's right…]*, p. 14; *ibid*., *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 151; J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 127; M. Kurowski, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 135; S. Steinborn, O procesowych konsekwencjach niedopuszczalnej kontynuacji prawomocnie zakończonego postępowania karnego (na tle poglądów Mariana Cieślaka) [On the procedural consequences of inadmissible continuance of validly concluded criminal proceeding (confronted with Marian Cieslak's opinions)], [in:] *Profesor Marian Cieślak – osoba, dzieło, kontynuacje [Professor Marian Cieślak: a person, work and follow-up]*, (ed.) W. Cieślak, S. Steinborn, Warszawa 2013, p. 24.

[28] J. Tylman, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne… [Polish criminal procedure...]*, p. 191.

tioned provisions, an indictment filed by a prosecutor must be treated as coming from a person who effectively disposed of his right. The right to prosecute, which a prosecutor disposed of, has not been regained following the procedure envisaged. (…) The statutory norm governing the rules of returning to a validly discontinued proceeding in the *in rem* stage is very clear and does not raise any doubts. The only form of reopening the discontinued proceeding envisaged by the statute is an order on instituting such a proceeding anew issued by a prosecutor (Article 327 § 1 CPC)"[29].

– "The characteristic feature of instituting a preparatory proceeding is the implementation of the principle of legalism in a criminal process in relation to a formerly discontinued case. Thus, such a possibility is taken into account when the course of a process has ended. Instituting the validly discontinued preparatory proceeding anew results in the annulment of the formerly issued order on discontinuance and means opening the way to continuing prosecution in compliance with the directive of legalism. Nevertheless, without issuing an order on instituting a proceeding specified in Article 327§1 CPC, a prosecutor does not possess the entitlement to prosecute and to file an indictment. (…) A valid order on discontinuance of the preparatory proceeding, also issued in the *in rem* stage, constitutes a certain legal state and has impact on the situation of various entities that took part in the concluded proceeding. The above-mentioned order creates a formal obstacle to undertaking other trial-related actions and its continuation. Thus, as long as the discussed order appears in legal transactions, a prosecutor cannot treat it as unimportant and non-binding"[30].
– In a situation when valid discontinuance of the preparatory proceeding in the *in rem* stage resulted in the expiry of public prosecution and procedural instruments allowing for its re-establishing have not been applied, a prosecutor does not have the right to prosecute although, as a rule, he is *ex lege* entitled to file and support a complaint in public prosecution cases. The former valid discontinuance of the proceeding was an expression of disposing of that entitlement and without the application of measures envisaged in Article 327 § 1 and 2 CPC and Article 328 CPC, a prosecutor does not possess the right to public prosecution and cannot regain it via continuation of procedural actions within the former proceeding or performing them in another proceeding"[31].

It is rightly emphasised in literature that instituting a proceeding anew is in its essence re-instituting a proceeding with regard to the same event that is not subject to the *ne bis idem* ban because there is a lack of subjective identity[32]. Since consumption of public prosecution is not the same as *res judicata*, it also occurs when the same act committed by the same person has been subject to discontinuation. In connection

---

[29] Ruling of the Supreme Court of 9 October 2008, V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, no. 1, item 1992.

[30] Ruling of the Supreme Court of 3 December 2015, file no. II KK 272/15 http://www.sn.pl/orzecznictwo/ SitePages/Baza_orzeczen. aspx?Sygnatura=II%20KK%20272/15.

[31] Decision of the Administrative Court in Katowice of 27 July 2011, II AKz 416/11, LEX no. 1102930.

[32] R. Kmiecik, Gloss on the decision of the Supreme Court of 17 June 1994, p. 78.

with that, it must be assumed that consumption of public prosecution takes place in the event of discontinuance of the preparatory proceeding conducted both *in rem* and *in personam*.

Such a situation also takes place in case a prosecutor has divided an act into two separate crimes. It has been wrongly assumed that in such a case it is possible to continue proceedings because it only means a change in a prosecutor's stand with regard to the specification and classification of the act[33]. The Supreme Court rightly stated: "If a prosecutor wrongly recognises two separate acts in one and discontinues the proceeding with regard to one of them, this does not only express a change in a prosecutor's stand regarding defining and classifying the act, but causes expiry of the right to prosecute that act. In a trial regarding one act, the principle of non-division of the trial matter does not allow for "dismembering" one act into several acts and adjudicating on non-independent fragments of the matter. Thus, discontinuance of the proceeding with regard to an act selected in this way excludes the possibility of continuing the proceeding with regard to the second of the isolated charges[34]".

Valid discontinuance of the proceeding binds a court, and an indictment and the judicial proceeding initiated in spite of a prosecutor's loss of the right to prosecute are deprived of legal significance. In case of reopening the proceeding, a court is obliged to examine whether the decision meets the requirements and in case the Attorney General has reversed the order on discontinuance, a court is obliged to check whether a six-month period has passed since the order became valid and final (Article 328 § 2 CPC)[35]. The Supreme Court is right to state: "Since, when an indictment is filed, a court has the right and is obliged to examine whether there are legal obstacles to the proceeding (Article 339 § 3 (1) and (2) CPC) and, in case there are such obstacles, discontinues the proceeding, it can also examine whether the Attorney General's former decision on the reversal of an order on discontinuance of the preparatory proceedings against a given person committing a given act providing a prosecutor with an entitlement to file an indictment was issued in compliance with time limits laid down in Article 328 § 2 CPC and does not violate the ban laid down in Article 328 § 1 sentence 2 CPC as well as whether the reversal has not been issued in spite of other negative procedural premises constituting legal obstacles to the effective annulment of a valid order on discontinuance of an investigation or an inquiry *in personam*. A prosecutor regains his entitlement to prosecute a person only if he had validly discontinued the preparatory proceeding and the order is reversed pursuant to the requirements of Article 328 CPC and there are no other legal obstacles to its effective reversal, and a court cannot allow

---

[33] Resolution of the Supreme Court of 24 January 1963, VI KO 73/62, Orzecznictwo Sądu Najwyższego 1963, no. 9, item 169, ruling of the Supreme Court of 17 July 1974, V KRN 264/73, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1973, no. 12, item 163.

[34] Ruling of the Supreme Court of 18 January 2006 – IV KK 378/05, LEX nr 172220.

[35] Resolution of the Supreme Court of 20 September 1962, VI KO 19/62, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1963, no. 6, item 97, decision of the Supreme Court of 9 December 1974, V KRN 93/74, unpublished, ruling of the Supreme Court of 28 February 1979, V KR 168/78, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1979, no. 7–8, item 82. Ruling of the Supreme Court of 9 April 1976, VI KR 38/76, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1977, No. 1, item 9.

for a judicial proceeding based on an indictment filed although a prosecutor has not regained the right to prosecute"[36].

In case a prosecutor reopens an investigation due to new important circumstances unknown in the former proceeding but next, in the course of evidentiary activities, the circumstances have not been confirmed, he should discontinue the reopened investigation[37]. The lack of new important circumstances unknown in the former proceeding is a negative premise of reopening the discontinued investigation, and thus, of continuing the proceeding.

Questioning this stand indicates that the result of the linguistic interpretation of Article 17 § 1 (9) CPC leads to a conclusion that it is applicable only to a situation when a prosecutor does not have the right to prosecute in the type of criminal proceeding at all, because an entitled prosecutor is one who is *ex lege* entitled to prosecute in case of a particular act. Pursuant to Article 45 § 1 CPC, a prosecutor is always entitled to prosecute in the proceeding with regard to an act that is subject to public prosecution, thus one can conclude that in case of this prosecutor, in the public prosecution mode, the premises of the analysed norm will never be fulfilled[38]. Therefore, it is believed that in case a prosecutor files an indictment with regard to an act that is subject to the public prosecution mode, however, the conducted investigation or an inquiry violates the requirements of Article 327 § 1 and 2 CPC or Article 328 § 1 CPC, there is no lack of an entitled prosecutor's complaint because an entitled prosecutor filed a complaint making use of his prerogative to prosecute[39].

Undoubtedly, the situation would be clear if the reason for discontinuance of the proceeding laid down in Article 17 § 1 (9) CPC were formulated as a lack of an entitled prosecutor's complaint but this does not mean, as suggested, that the current wording of the provision only referred to such a prosecutor who is not entitled to file particular types of complaints at all.

The Supreme Court ruled: "a lack of complaint filed by an entitled prosecutor (Article 17 § 1 (9) CPC) occurs not only when complaints have not been filed at all but also when a complaint has been filed by a prosecutor who has not acquired such entitlements"[40]. The Supreme Court rightly admitted that: "Filing a subsidiary

---

[36] Decision of the Supreme Court of 28 October 2009, I KZP 21/09, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2010, no. 1, item 1 with a gloss of approval by M. Rogalski, Orzecznictwo Sądów Polskich 2011, no. 1, item 1 and comments of approval by W. Grzeszczyk, Przegląd uchwał i postanowień Izby Karnej Sądu Najwyższego w kwestiach prawnych (prawo karne procesowe – 2009 r.) [Review of resolutions and decisions of the Criminal and Military Chambers of the Supreme Court on legal questions (criminal procedure law of 2009), *Prokuratura i Prawo* 2010, no. 5, pp. 85–88; and R.A. Stefański, Przegląd uchwał Izby Karnej oraz Izby Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2009 r. [Review of resolutions of the Criminal and Military Chambers of the Supreme Court regarding criminal procedure law of 2009], *Wydawnictwo Polskie Prawo* 2010, no. 2, pp. 79–82; resolution of the Supreme Court of 20 December 1962, VI KO 67/62, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1963, no. 9, item 167.

[37] Resolution of the Supreme Court of 4 June 1964, VI KO 10/64, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1964, no. 9, item 139.

[38] D. Strzelecki, Konsumpcja skargi…. [Consumption of…], pp. 49–50.

[39] *Ibidem*, p. 50.

[40] Ruling of the Supreme Court of 16 March 2006, V KK 85/06, *Biuletyn Prawa Karnego* 2006, no. 6, item 1.2.7.

indictment in circumstances when requirements laid down in Article 55 § 1 CPC have not been met is equivalent to a lack of an entitled prosecutor's complaint"[41].

Expiry of the right to file a complaint also results in discontinuance of the proceeding with regard to a fragment of an act because in fact it refers to the same matter as, pursuant to the principle of indivisibility of a trial, adjudication on a fragment of the factual grounds for liability covers it as a whole. Expiry of the right to prosecute is sometimes recognised in case of valid discontinuance of the preparatory proceeding *ad rem*. This way the ban *ne bis in idem* is extended to a person who, before discontinuance of the preparatory proceeding, was not examined as a suspect. It is wrongly assumed in the judicature that "Undoubtedly, the features of the crime of burglary defined in Article 279 § 1 CC include, apart from the theft of property, the elimination of a physical barrier blocking access to that property. This crime, although involving two actions, each of which could be treated as exhausting the features of separate crimes under Article 288 § 1 CC and under Article 278 § 1 CC, is in fact one physical act and one crime carrying a more severe penalty because the theft of property was connected with the elimination of the physical barrier. Since a prosecutor ordered discontinuance of the proceeding with regard to the more severe part of the act, it affects the whole physical act the accused are charged with"[42].

A prosecutor regains the right also as a result of an appeal against the order on discontinuance filed by a person deemed to be a victim if a court reverses the order and refers the case to a prosecutor, even if in the further stages of the criminal process, after an indictment has been filed by a prosecutor, it is established that a person deemed to be a victim and acting in the process as such does not have the features required to be treated as a victim, e.g. due to that, their appeal is not adjudicated on[43].

A prosecutor's decision on instituting the preparatory proceeding anew or reopening it is subject to a court's supervision in case of filing an indictment after these decisions. In literature and court judgements, it is stated that a court not only has the right but also a duty to supervise a prosecutor's decisions on reopening the validly discontinued preparatory proceeding, which results from Article 17 § 1 (7) CPC.[44] The Supreme

---

[41] Ruling of the Supreme Court of 26 February 2014, III KK 6/14, Orzecznictwo Sądu Najwyższego Prokuratura i Prawo 2014, no. 5, item 9.

[42] Ruling of the Supreme Court of 6 November 2003, II KK 5/03, Lex no. 82307.

[43] Decision of the Supreme Court of 28 July 2011, III KK 54/11, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2011, no. 9, item 86.

[44] S. Śliwiński, *Wznowienie postępowania karnego w prawie Polski na tle porównawczym [Comparative analysis of criminal proceeding re-opening in Polish law]*, Warszawa 1957, pp. 167–180; M. Cieślak, Przegląd orzecznictwa Sądu Najwyższego w zakresie procesu karnego (II półrocze 1962 r.) [Review of the Supreme Court judgements on criminal process (2nd half of 1962)], *Nowe Prawo* 1963, no. 10, p. 1126; W. Daszkiewicz, Przegląd orzecznictwa Sądu Najwyższego (prawo karne procesowe – 1963 r.) [Review of the Supreme Court judgements (criminal procedure law – 1963)], *Państwo i Prawo* 1964, no. 7, p. 119; S. Waltoś, Gloss on the resolution of the Supreme Court of 4 June 1964, VI KO 10/64, *Państwoo i Prawo* 1965, no. 1, pp. 167–170; *ibid*., *Model postępowania przygotowawczego na tle prawnoporównawczym [Comparative legal analysis of preparatory proceeding models]*, Warszawa 1968, pp. 354–355; A. Kaftal, *Kontrola sądowa postępowania przygotowawczego [Preparatory proceeding under judicial supervision]*, Warszawa 1974, pp. 165–166; W. Boczkowski, Z problematyki podjęcia i wznowienia umorzonego postępowania przygotowawczego oraz uchylenia prawomocnego postanowienia o jego umorzeniu [Issues of instituting and re-opening discontinued preparatory proceeding and reversal of a valid decision on its discontinuance], *Palestra* 1976, no. 11,

Court indicated that: "A court does not only have the right but also a duty to supervise a prosecutor's decisions with respect to reopening the formerly discontinued preparatory proceeding. Because reopening the discontinued proceeding eliminates a procedural obstacle, i.e. a charge of occurring validity and due to that the premise should be examined by a court *ex officio* in the same way as every procedural premise is"[45].

The issue of a court's grounds for supervising the Attorney General's decision on reversal of a valid order on discontinuance of the preparatory proceeding looks differently. It is not subject to a court's examination because the assessment whether the order on discontinuance of the preparatory proceeding was really groundless is the Attorney General's exclusive entitlement. The wording of Article 328 § 1 CPC unambiguously indicates that discontinuance is subject to reversal if the Attorney General recognises its groundlessness[46]. However, a court is entitled to supervise whether the Attorney General has met the requirement of the six-month period since the order on discontinuance became valid and final when reversing the order to the disadvantage of the suspect is possible (Art. 328 § 2 CPC)[47].

---

p. 35; A. Murzynowski, Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, *Nowe Prawo* 1977, no. 2, p. 291; E. Gutkowska, Problematyka ponownego wszczęcia umorzonego postępowania przygotowawczego [Issues of re-opening discontinued preparatory proceeding], *Problemy Praworządności* 1977, no. 7–8, p. 32; T. Grzegorczyk, *Wygaśnięcie prawa… [Expiry of …]*, pp. 24–25; E. Skrętowicz, Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1980, no. 5, item 92; M. Cieślak, Z. Doda, Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (II półrocze 1979 roku) [Review of the Supreme Court judgements on criminal procedure (2nd half of 1979)], *Palestra* 1980, no. 12, p. 99; F. Prusak, Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, *Nowe Prawo* 1981, no. 1, pp. 138–144; M. Rogalski, *Przesłanka powagi rzeczy osądzonej… [Premise of res judicata…]*, p. 515; resolution of the Supreme Court of 20 September 1962, VI KO 19/62, Orzecznictwo Sadu Najwyżższego 1963, no. 5, item 97, resolution of the Supreme Court of 4 June 1964, VI KO 10/64, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1964, no. 9, item 139; decision of the Supreme Court of 19 June 1975, II KZ 136/75, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1975, no. 8, item 113; ruling of the Supreme Court of 28 February 1979, V KR 168/78, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1979, no. 7–8, item 8.

[45] Ruling of the Supreme Court of 9 April 1976, IV KR 38/76, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1977, no. 1, item 9 with a gloss by A. Murzynowski, *Nowe Prawo* 1977, no. 2, pp. 291–296.

[46] T. Grzegorczyk, *Wygaśnięcie prawa… [Expiry of…]*, p. 27; M, Rogalski, *Przesłanki powagi rzeczy osądzonej… [Premise of res judicata…]*, pp. 517–518.

[47] Resolution of the Supreme Court of 20 September 1962, VI KO 19/62, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1963, no. 6, item 97; decision of the Supreme Court of 19 June 1975, II KZ 136/75, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1975, no. 8, item 113; M. Cieślak, Z. Doda, Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (II półrocze 1975 r.) [Review of the Supreme Court judgements on criminal procedure (2nd half of 1975)], *Palestra* 1976, no. 6, pp. 53–59; M. Rogalski, *Przesłanka powagi rzeczy osądzonej… [Premise of res judicata…]*, p. 518.

BIBLIOGRAPHY

Augustyniak B., Eichstaedt K., Kurowski M., Świecki D., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) D. Świecki, vol. I, Warszawa 2013.

Bafia J., Bednarzak J., Flemming M., Kalinowski S., Kempisty H., Siewierski M., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1971.

Boratyńska K.T., Górski A., Królikowski M., Sakowicz A., Warchoł M., Ważny A., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) A. Sakowicz, Warszawa 2015.

Bratoszewski J., Gardocki L., Gostyński Z., Przyjemski S.M., Stefański R.A., Zabłocki S., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. II, Warszawa 2004.

Boczkowski W., Z problematyki podjęcia i wznowienia umorzonego postępowania przygotowawczego oraz uchylenia prawomocnego postanowienia o jego umorzeniu [Issues of instituting and re-opening discontinued preparatory proceeding and reversal of a valid decision on its discontinuance], *Palestra* 1976, no. 11.

Cieślak M., Przegląd orzecznictwa Sądu Najwyższego w zakresie procesu karnego (II połowa 1962 r.) [Review of the Supreme Court judgements on criminal process (2nd half of 1962)], *Nowe Prawo* 1963, no. 10.

Cieślak M., *Polska procedura karna. Podstawowe założenia teoretyczne [Polish criminal procedure: Basic theoretical assumptions]*, Warszawa 1984.

Cieślak M., Gloss on the ruling of the Supreme Court of 17 July 1973, V KRN 264/73, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1974, no. 7–8.

Cieślak M., Doda Z., Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (II półrocze 1975 r.) [Review of the Supreme Court judgements on criminal procedure (2nd half of 1975)], *Palestra* 1976, no. 6.

Cieślak M., Doda Z., Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (II półrocze 1979 roku) [Review of the Supreme Court judgements on criminal procedure (2nd half of 1979)], *Palestra* 1980, no. 12.

Daszkiewicz W., Przegląd orzecznictwa Sądu Najwyższego (prawo karne procesowe – 1963 r.) [Review of the Supreme Court judgements (criminal procedure law – 1963)], *Państwo i Prawo* 1964, no. 7.

Daszkiewicz W., *Prawo karne procesowe. Zagadnienia ogólne [Criminal procedure law: General issues]*, vol. I, Poznań 2000,

Doda Z., Gaberle A., *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz [Appellate review in criminal process: Supreme Court judgements: Commentary]*, vol. II, Warszawa 1997,

Grajewski J., Paprzycki L.K., Steinborn S., *Kodeks postępowania karnego. Komentarz do art. 1–424 [Criminal Procedure Code: Commentary on Articles 1–424]*, vol. I, Warszawa 2013.

Grzegorczyk T., Wygaśnięcie prawa oskarżyciela publicznego do oskarżania [Expiry of a public prosecutor's right to prosecute], *Problemy Praworządności* 1980, no. 2.

Grzegorczyk T., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2014.

Grzegorczyk T., Tylman J., *Polskie postępowanie karne [Polish criminal procedure]*, Warszawa 2014.

Grzeszczyk W., Gloss on the decision of the Supreme Court 8 January 2008, V KK 416/07, *Prokuratura i Prawo* 2008, no. 10.

Grzeszczyk W., Przegląd uchwał i postanowień Izby Karnej Sądu Najwyższego w kwestiach prawnych (prawo karne procesowe – 2009 r.) [Review of resolutions and decisions of the Supreme Court on legal questions (criminal procedure law – 2009)], *Prokuratura i Prawo* 2010, no. 5.

Grzeszczyk W., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2012.

Gutkowska E., Problematyka ponownego wszczęcia umorzonego postępowania przygotowawczego [Issues of re-opening discontinued preparatory proceeding], *Problemy Praworządności* 1977, no. 7–8.

Hofmański P.,. Sadzik E, Zgryzek K., *Kodeks postępowania karnego, Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2007.

Jeż-Ludwichowska M. (ed.), Lach A. (ed.), *System Prawa Karnego Procesowego. Dopuszczalność procesu [Criminal procedure law system: Admissibility of a trial]*, vol. IV, Warszawa 2015.

Kaftal A., *Kontrola sądowa postępowania przygotowawczego [Preparatory proceeding under judicial supervision]*, Warszawa 1974.

Kalinowski S., Siewierski M., *Kodeks postępowania karnego Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1966.

Kmiecik R., Gloss on the decision of the Supreme Court of 17 June 1994, WZ 122/94, *Wojskowy Przegląd Prawniczy* 1995, no. 3–4.

Kmiecik R., Prawomocność postanowień prokuratora w świetle k.p.k. z 1997 r. [Validity of prosecutor's decisions in the light of the Criminal Procedure Code of 1997], [in:] *Nowy Kodeks postępowania karnego. Zagadnienia węzłowe [New Criminal Procedure Code: Major issues]*, Kraków 1998.

Kmiecik R., Gloss on the ruling of the Supreme Court of 15 February 2012, II KK 201/11, Państwo i Prawo 2013, no. 7.

Marszał S.K., Gloss on the resolution of the Supreme Court of 26 September 2002, I KZP 23/2002, Orzecznictwo Sądów Polskich 2003, no. 9, R.

Mik B., Gloss on the decision of the Supreme Court of 17 June 1994, WZ 122/94, *Prokuratura i Prawo* 1995, no. 11–12.

Murzynowski A., Przyczynek do zagadnienia ważności czynności procesowych wykonanych w niedopuszczalnym postępowaniu karnym [Contribution to issues of procedural actions performed in an inadmissible criminal proceeding], *Nowe Prawo* 1962.

Murzynowski A., Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, *Nowe Prawo* 1977, no. 2.

Prusak F., Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, *Nowe Prawo* 1981, no. 1.

Prusak F., *Nadzór prokuratora nad postępowaniem przygotowawczym [Preparatory proceeding supervision by public prosecutor]*, Warszawa 1984.

Prusak F., *Komentarz do kodeksu postępowania karnego [Commentary on the Criminal Procedure Code]*, vol. 1. Warszawa 1999.

Rogalski M., *Przesłanka powagi rzeczy osądzonej w procesie karnym [Premise of res judicata in criminal proceeding]*, Zakamycze 2005.

Rogalski M., Gloss on the decision of the Supreme Court of 28 October 2009, I KZP 21/09, M. Rogalski, Orzecznictwo Sądów Polskich 2011, no. 1.

Rogalski M., Wygaśnięcie prawa do oskarżenia na skutek prawomocnego umorzenia postępowania przygotowawczego [Expiry of the right to prosecute resulting from preparatory proceeding discontinuance], [in:] *Z problematyki funkcji procesu karnego [Issues of the criminal process function]*, (ed.) T. Grzegorczyk, J. Izydorczyk, R. Olszewski, Warszawa 2013.

Skorupka J., (ed.), *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2015.

Skrętowicz E., Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, Orzecznictwo Sądów Polskich 1980, no. 5.

Stefański R.A., Podstawy i przyczyny umorzenia postępowania przygotowawczego [Grounds and reasons for preparatory proceeding discontinuance], *Prokuratura i Prawo* 1996, no. 2–3.

Stefański R.A., Przegląd uchwał Izby Karnej oraz Izby Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2009 r. [Review of resolutions of the Criminal Chamber and Military Chamber of the Supreme Court on criminal procedure law in 2009], *Wojskowy Przegląd Prawniczy* 2010, no. 2.

Steinborn S., O procesowych konsekwencjach niedopuszczalnej kontynuacji prawomocnie zakończonego postępowania karnego (na tle poglądów Mariana Cieślaka) [On the procedural consequences of inadmissible continuance of validly concluded criminal proceeding (confronted with Marian Cieślak's opinions)], [in:] *Profesor Marian Cieślak – osoba, dzieło, kontynuacje [Professor Marian Cieślak: a person, work and follow-up]*, (ed.) W. Cieślak, S. Steinborn, Warszawa 2013.

Strzelecki D., Konsumpcja skargi publicznej [Consumption of public prosecution], *Prokuratura i Prawo* 2016, no. 2.

Szyprowski B., Kontrola prawomocnych orzeczeń wydanych w postępowaniu przygotowawczym [Supervision of valid judgements issued in preparatory proceeding], *Prokuratura i Prawo* 1999, no. 9.

Sych W., *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym [Influence of the victim on the course of preparatory proceeding in the Polish criminal process]*, Zakamycze 2006.

Śliwiński S., *Wznowienie postępowania karnego w prawie Polski na tle porównawczym [Comparative analysis of criminal proceeding re-opening in Polish law]*, Warszawa 1957.

Tylman J., Gloss on the decision of the Supreme Court of 17 June 1994, WZ 122/94, *Wojskowy Przegląd Prawniczy* 1995, no. 3–4.

Waltoś S., Gloss on the resolution of the Supreme Court of 4 June 1964, VI KO 10/64, *Państwo i Prawo* 1965, no. 1,

Waltoś S., *Model postępowania przygotowawczego na tle prawnoporównawczym [Comparative legal analysis of preparatory proceeding models]*, Warszawa 1968.

PUBLIC PROSECUTION CONSUMPTION IN THE POLISH CRIMINAL PROCESS

Summary

The article deals with the so-called consumption of public prosecution consisting in a prosecutor's loss of the right to file an indictment in case he discontinued the preparatory proceeding and it was not instituted anew (Article 327 § 1 CPC) or re-opened (Article 327 § 2 CPC), or the Attorney General did not reverse a valid order on its discontinuance (Article 328 § 1 CPC). The loss of the right to file a complaint results in discontinuance of the reopened proceeding, but the reason for discontinuance presented in jurisprudence and the judicature is *res judicata* (Article 17§ 1 (7) CPC) or another circumstance excluding prosecution (Article 17 § 1 (11) CPC). The author is for the latter opinion and provides arguments for it.

Key words: *indictment*, *consumption of public prosecution*, *public prosecutor*, *preparatory proceeding*, *discontinuance*

KONSUMPCJA SKARGI PUBLICZNEJ W POLSKIM PROCESIE KARNYM

Streszczenie

Przedmiotem artykułu jest tzw. konsumpcja skargi publicznej, polegająca na tym, że oskarżyciel publiczny traci prawo do wniesienia aktu oskarżenia w wypadku, gdy umorzył postępowanie przygotowawcze, a nie nastąpiło jego podjęcie na nowo (art. 327 § 1 k.p.k.) lub jego wznowienie (art. 327 § 2 k.p.k.) albo Prokurator Generalny nie uchylił prawomocnego postanowienia o jego umorzeniu (art. 328 § 1 k.p.k.). Utrata prawa do skargi powoduje umorzenie postępowania ponownie wszczętego, lecz w doktrynie i judykaturze jako przyczynę umorzenia przyjmuje się powagę rzeczy osądzonej (art. 17 § 1 pkt 7 k.p.k.) lub inną okoliczność wyłączającą ściganie (art. 17 § 1 pkt 11 k.p.k.). Autor opowiada się za tą ostatnią koncepcją i przytacza argumenty przemawiające za nią.

Słowa kluczowe: *akt oskarżenia*, *konsumpcja skargi publicznej*, *oskarżyciel publiczny*, *postępowanie przygotowawcze*, *umorzenie*