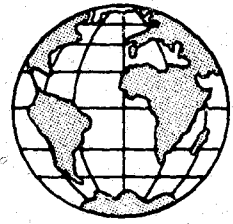


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# International Summaries

A Series of Selected Translations in Law Enforcement and Criminal Justice

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From West Germany

## Sentencing by the Public Prosecutor? Soluble and Insoluble Problems in the Dismissal of Court Proceeding in Favor of Imposition of Fines as Alternative Action

*Issues raised by the transfer of some judicial authority to the prosecutor are discussed, and legislative modifications proposed.*

By Thomas Weigend

### Introduction

Section 153a, an amendment to the Code of Criminal Procedure passed by the West German legislature in 1975, authorizes the public prosecutor to dismiss charges when certain requirements are met, in particular payments to the State or to nonprofit organizations. This particular form of diversion has created a number of problems, three of which are discussed in this essay: 1) Does the transfer of authority to impose sanctions to the prosecutor violate the constitutional allocation of powers? 2) Is it possible to guarantee adherence to the

principle of equality in the administration of Section 153a? 3) Are there ways to avoid undue pressure on the defendant in connection with Section 153a?

### Deliberations For and Against Section 153a of the Code of Criminal Procedure

Rarely have German legal scholars reacted so unanimously and strongly to the introduction of procedural norms as in the case of Section 153a. When the legislature passed the amendment in 1975, establishing that the public prosecutor could, with the consent of the defendant, impose certain requirements on the defendant—usually fines paid to the State or to charitable institutions—and halt proceedings in return, a flood of critical opinions for and against the procedure appeared in legal journals and in the press.

The negative criticism ranged from allegations that dismissal of charges could be bought and that inquisitorial proceeding had been reinstated, to the claim that the newly established law was unconstitutional. In the meantime, influential sup-

porters of the amendment took the position that Section 153a has nothing to do with criminal sanctions, but rather it involves neutral "payments" (unrelated to regular criminal proceedings) that the defendant has the right to accept or refuse.

The controversy has quieted recently; prosecutors and the public have, despite initial reservations, recognized Section 153a as an instrument that relieves the courts of the burden of minor property offenses. A study conducted in 1981 showed that more than 160,000 criminal proceedings were initiated under Section 153a, and ultimately two-thirds of these were heard by the public prosecutor rather than a judge. Furthermore, almost 18 percent of all defendants penalized in criminal proceedings paid fines under Section 153a.

Realistically, the author suggests that the basic premise of Section 153a must be accepted and that changes should be restricted to improvements within the given framework. Legal scholars have already established the basis for reform options in their discussions and studies. Furthermore, improving rather than abolishing Section

This is a summary of "Strafzumessung durch den Staatsanwalt? Lösbare und unlösbare Probleme bei der verfahrenseinstellung unter Aufagen (153a StPO)" in *Kriminologisches Journal*, Vol. 16, No. 1, 1984, pp. 8-38. Juventa Verlag, Dr. Martin Fultermaier, Bocklinstr. 34, 8000 München 19, West Germany. (NCJ 98682.) Lengthy notes and an extensive bibliography referring to previous empirical studies on the application of Section 153a of the Code of Criminal Procedure are included in the original.

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153a is a reasonable course, despite its weaknesses, because of its basic premise: for minor offenses, the defendant should be spared the stigmatization of being labeled a criminal offender, and the justice system should be spared the expense of proceedings, but the violation of the law should be officially acknowledged. The similarity to the internationally accepted and commendable idea of diversion is clear. In addition, no other viable alternative achieves the same economy of proceedings, preventive effect, and reduced stigmatization.

The present study examines three of the most serious problems of Section 153a as well as possibilities for resolving them within the framework of the law: 1) the transfer of sentencing powers from the judiciary to the public prosecutor; 2) the danger of unequal application of the option of dismissal; and 3) the question of the voluntary cooperation of the defendant.

### The Public Prosecutor as Judge

The powers granted the public prosecutor under Section 153a conflict with the role assigned to that office historically. The institution was imported to Germany in the 19th century to counterbalance the unacceptable concentration of powers in the hands of the inquisitorial judge (i.e., the power to investigate, indict, try, and sentence). Basic to the "reformed" criminal proceedings was the separation of the investigation of a case and indictment of an individual (the public prosecutor's responsibility, together with the police and the hearing judge) from the examination and judgment of the facts of the case (the responsibility of the independent court).

In the view of certain legal experts, the problem with Section 153a is that it combines the responsibilities of investigator and judge in the person of the public prosecutor. The question of whether or not the public prosecutor actually impinges on the role of the judge in an unacceptable manner as defined in Section 153a is a constitutional issue. The German Constitution states (in Article 92) that the power to

administer justice, e.g., impose a sentence, is in the hands of the judge. The critical question in this case is whether levying a fine in exchange for dismissal of charges prior to initiation of court proceedings can be regarded as imposition of a criminal penalty.

A clear understanding of the philosophy behind the separation of powers principle within a modern constitutional context is necessary before a judgment on the issue can be made. According to traditionally established principles, going back to Montesquieu, separation of the powers of the State into independent but related units serves to check and balance the powers of the State and thus acts to protect the fundamental freedom of the individual. A more modern version of the separation of powers theory holds that powers of State should be allocated according to the structure, status, and method of operation of the agency to which they are assigned in order to achieve optimal work efficiency.

In light of these theories, it should be asked whether the structure and methods used by the public prosecutor represent the best possible means of sentencing for petty offenses. Sentencing can succeed only when 1) the sanctions are determined by an impartial representative totally committed to justice, 2) the relevant facts as well as the legal parameters are comprehensively and carefully weighed, and 3) the possibility of unequal treatment is eliminated by provision for review by a higher legal authority.

While the public prosecutor is theoretically qualified according to the above criteria to perform sentencing under Section 153a, in practice appropriate judicial objectivity becomes difficult. If the public prosecutor assists in investigations, his or her involvement in preparing the case and in obtaining a conviction may obstruct objective reexamination of the facts. Furthermore, many prosecutors work their way into the role of the defendant's adversary, a role that they assume after indictment because of the dialectical structure of the trial.

The lack of objectivity could possibly be reduced by modifying the internal structure of the prosecutor's office. A "sentencing diversion" could be created; the specialists would not themselves conduct investigations, but would only examine the briefs of cases to be considered for dismissal and set the level of the defendant's fine. This approach would have the advantages of creating objectivity by removing the specialists from the investigative process and of increasing the probability of equal treatment by centralizing the sentencing task.

The public prosecutor's office is also less qualified than the court to determine the facts relevant to a judgment because the prosecutor usually relies on police investigations, which traditionally devote little attention to any psychosocial circumstances of the defendant relevant to sentencing. If dismissal under Section 153a is to become a viable form of disposition, the public prosecutor must base his or her decisions on all criteria generally applied by judges in criminal sentencing. In practice, this means that the public prosecutor must take an interest in personality factors, and meet with defendants or their counsels, to clarify the extent of defendants' property and financial means, to explore the defendants' attitudes toward their offenses, and to determine the willingness of defendants to pay an imposed fine. The type of fines imposed must be based on both the financial position of the defendant and precedents established according to Section 153a of the Code of Criminal Procedure.

### Equal Treatment in Dismissals

The problems of equal treatment under Section 153a relate primarily to achieving consistency across regions in its application in terms of the availability of the option and hardship created by the fine.

Willingness to use the new instrument fluctuates considerably among public prosecutors. Regional differences among States have leveled off. However, 6 years after passage of Section 153a, Bavaria still dismissed more than twice as many criminal proceedings under Section 153a as did

North-Rhine-Westphalia. Even greater discrepancies were reported among individual public prosecutors within the same region.

Skepticism about equal application of the Code relates to the practicability of establishing standards for applying Section 153a. To be effective, criteria would have to be formulated to set limitations for use or to present typical cases illustrating operable examples to follow. However, the conflict between strict adherence to the law and flexibility in individual cases becomes apparent when writing criteria. Neither a complicated network of rules and exceptions nor a collection of nonspecific legal concepts would satisfactorily solve the problems of unequal application or individualization of sentencing.

Two changes in Section 153a, however, might reduce the lack of uniformity in exercising the option and the unequal burdens caused by fines. Up to now the initiative for dismissal in the pretrial stage has come from the public prosecutor; the defendant, who at this point is usually not represented by counsel, often does not even know about this option. A degree of control could be achieved in this area by modifying Section 153a to require that the public prosecutor offer the defendant the fine-dismissal option under certain circumstances, e.g., no previous offenses, minimal damages, or promise of compensation for damages. Cases outside the range of the petty crimes typical for Section 153a would be left to the discretion of the public prosecutor, because generally applicable rules for judgment of the individual cases are virtually impossible to establish.

A further step toward attaining procedural equality would be to establish upper limits for fines. To date, fines in 98 percent of the 153a cases have not exceeded 600 DM (about \$166). However, a maximum based on income would take care of atypical cases in which financially well-to-do defendants might be tempted to buy their way out of criminal proceedings. A maximum limit of 20 to 30 days' income would

correspond to most of the fines in current practice while still allowing larger fines from defendants with larger incomes.

### Voluntary Consent in the Dismissal of Criminal Charges

The question of voluntary consent in the payment of fines is relevant to the basic principles of German law. When the State, within the context of organized proceedings, allows the defendant to choose between cooperation and refusal, then the State will not undermine the choice by exerting unacceptable pressure. Doing so would violate the principle of fairness in criminal proceedings and the underlying principle that the defendant is innocent until proven guilty and should not be disadvantaged.

Unfortunately, the element of choice also presents the possibility that a defendant may accept the designated fine to avoid the expense and frustration of a trial, a prison term, or the stigmatization of having a criminal record. The public prosecutor could use this uncertainty about the results of the trial as a form of subtle pressure to induce cooperation.

The solution to the problem does not lie in the annulment of Section 153a. However, it is essential to reduce the gap between the clearly delineated fine and the extreme maximum penalty theoretically possible under criminal law. If the law could be modified so that the fine offered to the defendant by the public prosecutor with the consent of the judge would also represent the maximum penalty that could be imposed in criminal proceedings, agreement of the defendant under these circumstances could really be considered voluntary.

Since a trial is time-consuming, expensive, and uncomfortable, exposing the individual to a variety of burdensome experiences, the defendant should be informed that insistence on a court trial is worthwhile only if he or she is truly convinced of his or her innocence, has a strong argument or evidence for a verdict of innocence, or has

good reason to believe the penalty will be reduced.

### Summary of Proposed Changes in the Procedures for Section 153a of the Code of Criminal Procedure

Given this context, then, the following changes in procedures for applying Section 153a of the Code of Criminal Procedure are recommended:

1. The possibility of dismissing charges and imposing a fine after indictment should be eliminated.
2. The fine should be set in a division of the public prosecutor's office that is not involved in preliminary inquiries.
3. The public prosecutor must collect sufficient factual information about the individual circumstances of the defendant.
4. Payment of fines shall be established based on daily income amount. The minimum will be 20 days' income; the maximum, 30 days' income. In addition, a compensation for damages may be levied.
5. Under certain conditions (for example, a first offender, no unusual damages, compensation payment) the public prosecutor must propose dismissal of charges under Section 153a.
6. Dismissal after payment of a fine can be offered as an alternative only with the consent of the court. If the defendant does not accept the offer, the court is obligated to hold to the maximum fine in sentencing, unless special circumstances justify an exception to the disadvantage of the defendant.

The proposed modifications would make procedures under Section 153a more complex and expensive, and the practicability of the individual changes remains to be seen. However, disposition of all cases with court trials has always been an even more expensive option.

**END**