

Theoretical and Practical Aspects with Reference to the Specific Principles of the Criminal Prosecution Phase

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Abstract: This paper explores, within a theoretical and normative framework, the specific principles governing the criminal prosecution phase of the criminal trial, underlining its essential role in ensuring the balance between the efficiency of criminal justice and the protection of the fundamental rights of the individual. The paper focuses on the criminal prosecution phase, identifying its specific principles. The non-public nature of this phase is justified by the need to protect the integrity of evidence, prevent the influence of witnesses, and guarantee the presumption of innocence. Exceptions, such as the lawyer's right to access the file, are critically analyzed, underlining the tension between transparency and efficiency. The lack of adversarial proceedings is presented as an inherent feature of criminal prosecution, where the prosecutor acts unilaterally, unlike the trial phase, which is based on adversarial debates. The paper insists on the interdependence of principles as pillars of the rule of law, concluding that any derogation from them risks compromising not only the validity of procedural acts but also public trust in the legal system.

Keywords: Criminal Trial, Criminal Prosecution, Fundamental Principles, Non-Public Character, Adversarial Proceedings, Written Form, Hierarchical Subordination, Obligation Principle, Human Rights

1. Introduction. Interdependence of Principles in the Conduct of Criminal Proceedings

The principles of criminal trial represent the foundation on which the entire system of criminal procedure norms is built. They are not simple theoretical ideas, which have no practical relevance, but make their presence felt even in the most insignificant acts of judicial bodies. Practically, there is no provision in the Code of Criminal Procedure that does not reflect one or more fundamental principles of criminal procedure. Thus, each provision of the Code of Criminal Procedure must be interpreted and applied, in a concrete manner, in accordance with the provisions of these principles.

In situations where the judicial body has doubts regarding the interpretation of an obscure text or regarding the concrete solution that should be adopted in a criminal case, it must take into account all these fundamental principles, so as to be sure that it makes a correct and fair application of the law. Otherwise, an erroneous interpretation of the criminal procedural law that would contradict one or even more principles cannot constitute a fair and correct application of it, regardless of the arguments in favor of that interpretation. The one who interprets the law cannot substitute himself for the legislator in order to change something from the substance of the norm and apply it erroneously. Therefore, the criminal procedural law is of strict application and interpretation.

The importance of the principles of criminal procedure has required their reunification in a system that outlines the political-legal framework in which the judicial bodies carry out the general policy (Neagu, 2014, p. 68). Between the fundamental principles, which make up a system, there must be elements of dependence, they must have a unitary theoretical approach that, ultimately, leads to achieving the goal of the criminal procedure. The system of principles must give the same solution to the institutions of the process.

Moreover, the fundamental principles of criminal procedure have special value both in the activity of creating substantive law, in its interpretation, and in its practical application, the functionality of the entire system of fundamental principles being ensured by the interaction and convergence of these principles, whose finality is the criminal procedure through its very purpose, as well as the determination of the procedural phases (Boroi, 2017, p. 34).

Good knowledge of these principles constitutes an essential condition for the development of a coherent criminal procedure system and for the fair application of criminal procedure law, in accordance with the principle of fairness. Since they form a system, the fundamental principles are in a relationship of interdependence and mutual conditioning. These principles presuppose each other, and failure to comply with one of them may affect the achievement of the others. For example, the principle of legality, which is considered a framework principle, requires compliance with the other principles, as regulated by the procedural rules. Violation of one of the principles leads, as a consequence, to failure to comply with the principle of legality. In some cases, the role of judicial bodies regarding compliance with the fundamental principles also intervenes (Crișu, 2018, p. 59).

The fundamental principles of criminal procedure constitute basic rules, applicable throughout its development. These principles do not have the same degree of action in all phases of the criminal process. Determined by the specific conditions of each phase, by the different way of organization and functioning of the judicial bodies, some principles may have different applications. For example, the exercise of the right to defense during the criminal investigation, given its specific nature, does not have the same scope as during the trial (during the trial, the case file can be consulted without restrictions, unlike the criminal investigation, where the prosecutor establishes the date and duration of the consultation of the file within a reasonable period or may restrict its consultation by the suspect, defendant or lawyer, for a period of no more than 15 days, if this could prejudice the proper conduct of the criminal investigation, according to art. 94 para. (3), (4) CPP) (Crișu, 2019, p. 8).

In conclusion, the fundamental principles represent the skeleton of the entire criminal process, no change can take place in contradiction with them. The phases of the criminal process, in addition to the fundamental principles of the criminal process, are also governed by the principles specific only to the criminal investigation phase, respectively, principles specific only to the trial phase.

Thus, the specific principles of the criminal investigation phase are: the non-public nature, the non-adversarial nature and the predominantly written nature of the criminal investigation, hierarchical subordination, as well as the principle of the obligation to initiate and exercise criminal action, the principle of opportunity, the principle of loyalty in the administration of evidence.

2. Specific Principles of the Criminal Investigation Phase in Criminal Proceedings

The criminal trial represents a set of activities carried out in a criminal case by the competent judicial bodies, according to the law, with the participation of the parties, the lawyer and the subjects of the proceedings, in order to establish the facts that constitute a crime and the circumstances of their commission, as well as to hold the guilty persons criminally liable (Paraschiv, 2019, p. 3).

According to the Code of Criminal Procedure, the criminal trial has four phases: criminal investigation, preliminary chamber, trial and execution of the final court decision.

The criminal investigation is the first phase of the criminal process and consists of all the activities carried out by the criminal investigation bodies in order to collect the necessary evidence regarding the existence of crimes, to identify the persons who committed a crime and to establish their criminal and, where appropriate, civil liability, in order to determine whether or not it is appropriate to order their referral to court (Udroiu, 2018a, p. 1).

The principles governing the criminal investigation are not expressly provided for in the legal texts, they are deduced from the overall regulation of this procedural phase.

In the specialized literature (Udroiu, 2016, p. 2-3), some authors consider that the specific principles of the criminal investigation phase are three in number, namely the non-public nature, the non-adversarial nature and the predominantly written nature of the criminal investigation, to which other authors (Volonciu, 1996, p. 11-12; Neagu, 1997, p. 401; Theodoru &

Moldovan, 1976, p. 194; Pinteă, Pinteă & Bălănescu, 2017, p. 33) add a fourth principle, namely hierarchical subordination in carrying out criminal investigation acts.

We also have the principle of the obligation to initiate and exercise criminal action, the principle of opportunity, the principle of loyalty in the administration of evidence.

Even if the existence and legal value of the features of criminal prosecution activity are generally recognized, the rules they imply are not absolute, in the sense that they can be broken in special situations (Zarafiu, 2014, p. 286).

2. 1. Non-public nature

2.1.1. Content - presentation

As regards the nature of the procedure during the criminal investigation, in the new regulation, confirming the doctrinal opinions that were expressed in relation to the rules for conducting the criminal investigation phase, the legislator expressly provided for its non-public nature, considering that the criminal investigation can achieve its object only to the extent that it is devoid of publicity, because, if it were conducted publicly, it could make it difficult to find the truth, so that, once the evidentiary material is known by the parties involved, there is a risk of concealing or distorting the evidence (Boroi, 2017, p. 433).

The case law of the European Court of Human Rights has emphasized that the secrecy of the investigation is legitimate not only from the perspective of the administration of justice, but also to protect the right of persons under criminal investigation to respect for the presumption of innocence. Thus, the secrecy of criminal proceedings is intended to protect, on the one hand, the interests of the criminal action, preventing the risks of collusion and the danger of disappearance or destruction of evidence, and, on the other hand, the interests of the defendant, especially from the perspective of the presumption of innocence. The secrecy is also justified by the need to protect the opinion-forming process and the decision-making process of the judiciary (European Court of Human Rights *Bédat v. Switzerland case*, March 29, 2016). Moreover, according to the provisions of art. 92 of the CPP, during the criminal investigation, the suspect or defendant's lawyer has the right to assist in the performance of any criminal investigation, except in cases provided for by law (art. 92-93 of the CPP).

Thus, from the point of view of content, this procedural right has a complex character, which is manifested through three distinct levels:

- a) the right to study the documents of the file;
- b) the right to note data or information from the file;
- c) the right to obtain photocopies, at the expense of the individual subject.

The right to consult the file does not remove the non-public nature of the procedure during the criminal investigation as long as it implies the correlative obligation to maintain the confidentiality or secrecy of the data and documents of which it has become aware.

The non-public nature, previously known as the "secret nature of criminal prosecution", is determined by the specifics of criminal prosecution activities, but also by the needs for achieving the objectives of criminal prosecution, such as identifying the evidence necessary to establish the existence of the crime, the identity of the person who committed it, etc. The non-public nature of criminal prosecution has several meanings (Fourment, 2006, p. 206). Thus, those involved in resolving criminal cases, especially the perpetrators, are not informed of the steps taken by the judicial bodies (this meaning was typical of the inquisitorial system in this phase of the criminal process).

Another meaning is the obligation of the persons involved in resolving the case, usually the judicial bodies, not to disclose data while the criminal prosecution is in progress.

The Code of Criminal Procedure regulates evidentiary procedures initiated and carried out by the judicial bodies without being known to the parties. The involvement of threatened witnesses, vulnerable witnesses, protected witnesses or collaborators, as well as the implementation of special methods of surveillance and investigation, imply increased

confidentiality of the criminal investigation, which is necessary to find the truth and protect the persons who, in ways permitted by law, are involved in the procedures during the criminal investigation. These aspects give the criminal investigation a necessary confidentiality, since the disclosure of data may endanger these persons, as well as the possibility of identifying evidence that leads to finding the truth in question (Crișu, 2019, p. 12).

In this regard, the provisions of art. 126 of the CPP regulated the procedure for obtaining and using the statements of threatened witnesses, which may involve the protection of identity data, by granting a pseudonym with which the witness signs his statement. Thus, through this method, the identity of the witness is unknown to the subjects of the proceedings and the parties to the criminal trial, if there is a reasonable suspicion that the life, bodily integrity, freedom, property or professional activity of the witness or a member of his family could be endangered as a result of the data he provides to the judicial bodies or his statements.

The secret nature of this evidentiary procedure also results from the provisions of art. 126 paragraph (3) of the CPP, according to which the statement of the threatened witness will not include his real address or identity data, these being recorded in a special register to which only the criminal investigation body, the judge of rights and liberties, the preliminary chamber judge or the court will have access, under conditions of confidentiality.

From the perspective of this special situation, we note a strictly confidential nature of the criminal investigation phase, which consists in limiting the parties' access to certain documents of the criminal file. Thus, it results that the criminal investigation continues to be presented as non-public, with the mention that, under the conditions of art. 126-129 of the CPP, the procedural activity may acquire a secret character towards the parties, certain data being only available to the judicial bodies (Neagu, 2014 p. 25), also, the confidential character is preserved even during the trial phase, thus, according to art. 129 paragraph. (7) of the CPP "The medium on which the witness's statement was recorded, in original, sealed with the seal of the prosecutor's office or, as the case may be, of the court before which the statement was made, shall be kept confidential. The medium containing the recordings made during the criminal investigation shall be submitted upon completion of the criminal investigation to the competent court, together with the case file and shall be kept under the same conditions regarding confidentiality".

2.1.2. Exceptions to the non-public nature of criminal prosecution

The Code of Criminal Procedure provides for the non-public nature of the criminal prosecution phase, but by way of exception, this procedure also contains elements of publicity, for example, the concretization of the right to information provided for in art. 31 of the Constitution (Art. 31, Right to information - (1) The right of the person to have access to any information of public interest may not be restricted. (2) Public authorities, according to their competences, are obliged to ensure that citizens are correctly informed on public affairs and on matters of personal interest. (3) The right to information must not prejudice measures to protect young people or national security. (4) The mass media, both public and private, are obliged to ensure that public opinion is correctly informed. (5) Public radio and television services are autonomous. They must guarantee important social and political groups the exercise of the right to broadcasting. The organization of these services and parliamentary control over their activity are regulated by organic law.), criminal prosecution bodies may inform, in some cases, through various means of communication, certain data of the investigation that is being carried out is possible only when the data provided justifies a public interest or it is necessary in the interest of discovering and finding the truth in the case. In this exceptional case, public communications cannot refer to persons suspected or accused of being guilty of committing a crime (Udroiu, 2018a, p. 5).

The discussions that arose in practice regarding the consultation of the file have claimed the need for a separate regulation of this aspect, including the possibility of restricting the right of access to the case file during the criminal prosecution phase. Thus, the lawyer of the suspect or

defendant has the right to assist in the performance of any act of criminal investigation (the provisions of art. 92 of the Code of Criminal Procedure), except for:

- the situation in which special methods of surveillance or investigation are used, provided for in Chapter IV of the Code of Criminal Procedure;
- as well as in the case of a body search or vehicle search in the case of flagrant offenses.

The lawyer of the parties and the main procedural subjects has the right to request, throughout the criminal trial, consultation of the criminal investigation file, the prosecutor establishing, in this regard, within a reasonable period, the date and duration of the consultation (art. 94 paragraph 4 of the Code of Criminal Procedure). Also, the lawyer's right cannot be restricted abusively, the prosecutor may restrict the consultation of the file with good reason, if this could prejudice the proper conduct of the criminal investigation (art. 94 paragraph 4 of the Code of Criminal Procedure). Until the initiation of criminal proceedings, the restriction may be imposed for an unlimited period, and after this point, the right to consult the file may be restricted for a period of no more than 10 days. The explanation for this regime of consulting the file after the initiation of criminal proceedings is that, at this procedural point, most of the evidence showing that a person committed the crime has already been collected [art. 7 para. (1), art. 309 para. (1) of the CPP], which significantly reduces the risk of compromising the investigation.

The lawyer's right to consult the file does not confer a public character on the criminal investigation, because the law also stipulates the correlative obligation for him to maintain the confidentiality or secrecy of the data and documents that he became aware of when consulting the file.

Another exception to the non-public nature is the existence of acts carried out during the criminal investigation in which the public can participate to a certain extent. For example, the participation of an assistant witness in the conduct of a home search in a space where no one is present (Udroiu, 2018a, p. 2). We can also encounter the presence of certain procedural subjects or protagonists directly interested in the case in the case of reconstruction, in the case of recognition from the group, in the case of confrontation, as well as in the case of conducting an expert examination.

2.1.3. Practical aspects

The right to consult the file during the criminal investigation

ECHR, Case of Dincer Gul v. Germany, Jan. 4, 2012 (Barbu, Tudor and Şinc, 2016, p. 644)

In this case, the Court agreed with the limits of the defendant's right to consult the file during the criminal investigation and the possibility of the judicial bodies of criminal investigation to restrict this right at an early stage of the investigation, as long as the information in question is not essential for exercising judicial control over the legality of a measure depriving of liberty. The applicant alleged that the refusal of the Hanoverian prosecution authorities to grant his lawyer access to the file in the preliminary investigation against him, as confirmed by the decisions of the domestic authorities and the courts, had prevented him from conducting an effective defense and had thus violated his right to a fair trial. As regards the repeated refusals of the applicant's requests for access to the investigation file, the Court recognized the need for the investigation to be carried out efficiently, which implied that some of the information gathered during it had to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. This was particularly the case where the suspect, as in the present case, was on the point of absconding from the prosecution and could not be questioned by the prosecution authorities. The domestic authorities in the present case have indeed repeatedly stressed that, given the applicant's absconding and his alleged links with drug trafficking circles in Turnzăţara, the suspect's lawyer.

The Court continues to consider that there is no indication that the prosecution authorities' refusal to grant the applicant access to the investigation files was arbitrary. The prosecution

authorities stressed that, since the applicant was suspected of having contacts with drug trafficking circles in Turkey and given his absconding from prosecution, there were still reasons to believe that access to the file would have constituted a risk for the ongoing preliminary investigations.

In these circumstances, the Court is satisfied that the rights of the defense were not restricted in a manner incompatible with the guarantees provided for in Article 6 of the Convention.

2.2. Lack of adversarial proceedings

2.2.1. Content - presentation

This feature consists in the fact that the criminal prosecution acts are carried out unilaterally towards the parties, without being put into discussion with them. The procedure during the criminal prosecution does not involve judicial debates. Also, this feature specific to the criminal prosecution phase excludes any adversarial discussion regarding the criminal prosecution acts, even in the event that it is carried out in the presence of the other parties.

Adversarial proceedings presuppose the right of the parties to know the actions and evidence of the party with opposing interests, to discuss the evidence administered adversarially and to administer evidence in combating this evidence (Antoniou & Bulai, 2011, p. 212). At the same time, a real adversarial proceeding presupposes the separation of the functions of prosecution and defense, as well as an equality of arms between the parties with opposing interests in the process.

In specialized literature, some authors (Theodoru, 2013, p. 455-458) have argued that it is not possible to comply with this principle, since the prosecutor would combine in his person the procedural functions of accusation, defense, and resolution of the criminal case. As a result, there cannot be adversarial proceedings under the conditions in which the prosecutor accuses, but also defends, and finally decides (Volonciu, 1994, p. 751). Adversarial proceedings presuppose the exercise of these functions by different authorities, which would mean that the function of accusation would be exercised in contradiction with the function of defense and resolution of the case, by different judicial bodies. The achievement of adversarial proceedings presupposes a condition - premise, that of the presence of the parties during the conduct of procedural activities, so that later, through appropriate procedural means, both the prosecution and the defense can formulate opinions regarding the outcome of these activities (Crișu, 2019, p. 12). Unlike the trial phase, during the criminal investigation the parties do not have the right to draw conclusions, also, at this stage the debates specific to the trial phase are missing.

2.2.2. Exceptions to the non-adversarial principle of criminal prosecution

In the criminal prosecution phase, adversarial aspects may also be raised, for example:

a) in the case of confrontation, when the parties have the opportunity to ask each other questions, by which they support their points of view depending on the procedural interest (art. 131 CPP);

b) when ordering and establishing the objectives of the expertise, the criminal prosecution body sets a deadline for which the parties, the main procedural subjects and the expert are summoned, who have the right to make observations, to request the modification or completion of the questions [art. 177 para. (2) CPP] (Crișu, 2019, p. 13).

c) debating the proposal for preventive arrest or house arrest of the defendant;

d) regulating the right of the injured party, the civil party or the civilly liable party participating in the criminal prosecution acts to ask questions of the defendant or witnesses (Udroiu, 2018a, p. 2).

The above-mentioned exceptions do not eliminate the non-adversarial nature of criminal prosecution, which is imposed for practical reasons. We can also conclude that the lack of publicity of criminal prosecution is the basis for the non-adversarial nature of criminal prosecution.

2.3. Predominantly written nature

This specific feature concerns, first of all, the form of criminal prosecution acts and is a consequence of the lack of publicity and adversarial nature. Thus, criminal prosecution acts by which judicial bodies dispose of the conduct of criminal prosecution are always materialized in documents having a certain form and which must be preserved in consideration of a specific legal regime (art. 287 CPP).

Also, according to art. 286 CPP, criminal prosecution bodies express themselves judicially through written acts:

- ordinance - which materializes acts of disposition;
- report - in which proposals are materialized.

Unlike adversarial and public trial, criminal prosecution activities are predominantly in written form, having legal relevance that characterizes this procedural phase (Volonciu, 1994, p. 15). Orality and adversarial proceedings both presuppose the presence of the parties, the main procedural subjects, and the prosecutor at the time of the procedural activity, so that they can listen to what each participant in the criminal prosecution says and thus be able to take an immediate stance, verbally, regarding what was said, by denying circumstances asserted as existing, by demonstrating as real circumstances that are allegedly non-existent, by asking questions and obtaining answers (Boroi, 2017, p. 435).

However, if the criminal prosecution is not adversarial and is not public, the parties, the main procedural subjects, not being present at the time of the procedural activities, such as hearings and confrontations, can take note of what was declared by consulting the written document, such as the written statement of the parties, the witness, etc.

The written form is necessary because it facilitates the knowledge of what was declared by consulting the content of the written statement, and subsequently, also in written form, objections are formulated and what is considered not to correspond to the truth is contested.

Also, only the documents that are included in the file in written form have legal relevance, since the court is not involved in carrying out the criminal prosecution acts (Crișu, 2019, p. 14).

There are situations when oral form is imposed by the specifics of the activity, for example, in the case of art. 177 para. (1) CPP – procedure for conducting an expert examination – when the criminal investigation body orders the performance of an expert examination, sets a deadline for which the parties, the main procedural subjects, as well as the expert are summoned, informs the parties and the main procedural subjects that they have the right to make observations on the questions to be answered by the expert and that they can request their modification or completion.

2.4. Hierarchical subordination

The involvement in criminal prosecution of several judicial bodies (prosecutors who carry out their activity within the prosecutor's offices, designed in a pyramidal system within the Public Ministry, criminal investigation bodies) requires the establishment of rules that constitute a relational system of a criminal procedural nature between them, suitable for the proper performance of the criminal prosecution function in which they are involved (Crișu, 2019, p. 9).

The procedural relationship between the prosecutor and the criminal investigation body is defined by the provisions of the Code of Criminal Procedure, according to which the prosecutor directly directs and controls the criminal investigation activity of the judicial police and other special investigation bodies and supervises that the criminal investigation acts are carried out in compliance with the legal provisions [art. 56 para. (1)]. At the same time, these provisions in connection with the performance of criminal investigation acts are mandatory and priority for the investigation body, as well as for other bodies that have powers provided by law in establishing crimes. The hierarchically superior bodies of the judicial police or special criminal investigation bodies cannot give guidance or provisions regarding the criminal investigation [art. 303 para. (2) CPP]. Thus, the criminal investigation bodies are led and controlled by the prosecutor, being in a relationship of functional hierarchical subordination to him.

Subordination is also materialized in another aspect, according to art. 303 paragraph (3) of the CPC – “In the event of failure or defective fulfillment by the criminal investigation body of the provisions given by the prosecutor, the latter may notify the head of the criminal investigation body, who is obliged to communicate the measures ordered to the prosecutor within 3 days of notification, or may apply the sanction of a judicial fine for the judicial misconduct provided for in art. 283 paragraph (1) letter a) or, as the case may be, paragraph (4) letter m) or may request the withdrawal of the opinion provided for in art. 55 paragraphs (4) and (5).”

Regarding the relations between prosecutors, the organization of the Public Ministry assumes subordination relations, within the meaning of art. 65 of Law no. 304/2004 on judicial organization (2005, September 13). In carrying out the control, according to art. 65 paragraphs (1) and (2) of Law no. 304/2004, the prosecutors in each prosecutor’s office are subordinated to the head of the respective prosecutor’s office, and the head of a prosecutor’s office is subordinated to the head of the hierarchically superior prosecutor’s office in the same district.

In the old regulation, the principle of the obligation to initiate and exercise criminal proceedings was known as the “principle of the officiality of the criminal process”. The current Code of Criminal Procedure does not expressly provide for this principle, but, in reality, art. 7 of the CPP enshrines the principle of the officiality of the criminal process in an imperfect formulation which, even if it seems to concern only the officiality of the action, was found in art. 2 paragraph (2) of the CPP. Since 1968, which generated both the right and the obligation of the judicial bodies to initiate criminal proceedings on their own initiative, independently of the will of the persons injured by the crime.

The commission of crimes gives the state the right to hold the offender criminally liable. The doctrine emphasized that, “at the same time, the purpose of the criminal trial is the timely and complete ascertainment of the criminal facts. It follows that the judicial bodies have the obligation to carry out the procedural activity whenever a crime has been committed. The existence of the principle of officiality or obligation is based on this basis.” (Volonciu, 1998, p. 84)

The principle of obligation is the rule according to which, since it is established that there is evidence from which it results that a person has committed a crime and there is none of the cases of impediment provided for in art. 16 para. (1) of the CPP, the criminal action must be set in motion and exercised in a mandatory manner by the prosecutor, on his own initiative, independently of the will of the parties to the proceedings. These arise from the provisions of art. 309 para. (1) of the CPP.

According to art. 3 para. (2) of the CPP, judicial functions are exercised *ex officio*, unless otherwise provided by law. Also, the acts necessary for the conduct of the criminal trial are performed *ex officio*. The criminal investigation bodies *ex officio*: may notify, initiate and conduct the criminal investigation, or may order the defendant to be brought to trial.

The effect of this principle is that the criminal trial is terminated either by finding a cause that prevents the initiation and exercise of the criminal action, or by finding that there is no public interest in achieving its object, or by issuing a final court decision.

Violation of the principle of obligation entails the application of disciplinary sanctions to the guilty magistrate or criminal investigation body or the engagement of criminal liability for committing a duty offense or in connection with the administration of justice (for example, negligence in duty provided for in art. 298 of the Criminal Code or favoritism to the perpetrator provided for in art. 269 of the Criminal Code).

2.5. The principle of the obligation to initiate and exercise criminal proceedings

2.5.1. Content – presentation

In the old regulation, the principle of the obligation to initiate and exercise criminal proceedings was known as the principle of the officiality of the criminal process”. The current Code of Criminal Procedure does not expressly provide for this principle, but, in reality, art. 7 of the CPP enshrines the principle of the officiality of the criminal process in an imperfect formulation which,

even if it seems to concern only the criminal action, in reality regulates the officiality, the causes of availability, as well as the possibility of applying the principle of opportunity.

The principle of officiality was found in art. 2 para. (2) of the CPP. Since 1968, which generated both the right and the obligation of the judicial bodies to initiate criminal proceedings on their own initiative, independently of the will of the persons injured by the crime.

The commission of crimes gives the state the right to hold the offender criminally liable. The doctrine emphasized that, “at the same time, the purpose of the criminal trial is the timely and complete ascertainment of the criminal facts. It follows that the judicial bodies have the obligation to carry out the procedural activity whenever a crime has been committed. The existence of the principle of officiality or obligation is based on this basis” (Volonciu, 1998, p. 84).

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According to art. 3 para. (2) of the CPP, judicial functions are exercised *ex officio*, unless otherwise provided by law. Also, the acts necessary for the conduct of the criminal trial are performed *ex officio*. The criminal investigation bodies *ex officio*: may notify, may initiate and carry out the criminal investigation, or may order the defendant to be brought to trial.

The limits of the principle of obligation are determined by law, being the expression of the connection of this principle with the general principle of legality.

The effect of this principle is that the criminal proceedings are terminated either by finding a crime committed in the course of duty or in connection with the administration of justice (for example, negligence in duty provided for in art. 298 of the Civil Code or favoritism provided for in art. 269 of the Civil Code).

2.5.2. Exceptions to the principle of the obligation to initiate and exercise criminal action

The principle of obligation has a series of exceptions, which are absolute in nature, called cases of availability:

Firstly, when a prior complaint is required for the initiation of criminal action;

- it is possible to withdraw the prior complaint;
- the legislator has provided for the possibility of initiating criminal action *ex officio* for offenses for which the law provides for the requirement of a prior complaint, in the event that the injured person is incapacitated or has limited capacity to exercise;
- in case of withdrawal of the preliminary complaint, the suspect/defendant may request the continuation of the criminal trial.

Secondly, in the case of offenses for which, although the criminal action is initiated *ex officio*, the law allows reconciliation [for example, fraud (art. 244 CP)].

And thirdly, when prior approval or authorization is required for the initiation of the criminal action, such as: diplomatic immunity, parliamentary immunity, presidential immunity, immunity of members of the Government, irremovability of judges, prior authorization of the prosecutor general of the prosecutor’s office attached to the court of appeal in whose territorial jurisdiction the prosecutor’s office first notified is located or, as the case may be, of the prosecutor general of the Prosecutor’s Office attached to the High Court of Cassation and Justice when applying the criminal law based on the personality principle [art. 9 para. (3) CP], respectively the prior authorization of the Prosecutor General of the Prosecutor’s Office attached to the High Court of Cassation and Justice in the event of the application of criminal law based on the principle of reality [art. 10 para. (2) NCP].

In all cases of availability, after the filing of the prior complaint, or the receipt of the notification of the competent body or the prior authorization, the criminal process is again subject to the rules of obligation/officiality [art. 7 para. (3) CPP].

Also, the request of the suspect or defendant to continue the criminal process in case of withdrawal of the prior complaint does not entail the re-application of the rules of obligation, since in the event that it is found that the act of which he is accused is a crime, it will not be possible to order the referral to court or conviction, but only the dismissal or termination of the criminal process as a result of the cause of availability (Udroiu, 2018a, p. 35).

2.6. The principle of opportunity

The principle of opportunity of criminal prosecution is deduced from art. 318 of the Code of Criminal Procedure, waiving criminal prosecution, which provides both the conditions of application and the criteria for assessing the public interest. In terms of the crimes for which this solution can be ordered, the Code of Criminal Procedure specifies that the institution of waiving criminal prosecution is incident only in the case of crimes for which the law provides for a fine or a prison sentence of no more than 7 years, with the exception of crimes that resulted in the death of the victim.

The criteria for assessing the public interest are provided in the Code of Criminal Procedure in art. 318 para. (2) and (3) and are evaluated in relation to:

- a) the content of the act and the concrete circumstances of the commission of the act;
- b) the manner and means of the commission of the act;
- c) the purpose pursued;
- d) the consequences produced or that could have been produced by the commission of the crime;
- e) the efforts of the criminal investigation bodies necessary for the conduct of the criminal trial in relation to the gravity of the act and the time elapsed since its commission;
- f) the procedural attitude of the injured person;
- g) the existence of a clear disproportion between the expenses that the conduct of the criminal trial would imply and the gravity of the consequences produced or that could have been produced by the commission of the crime.

In the situation where the perpetrator of the act is known, the person of the suspect or defendant, the conduct prior to the commission of the crime, the attitude of the suspect or defendant after the commission of the crime and the efforts made to eliminate or diminish the consequences of the crime are also taken into account when assessing the public interest.

The most important element characterizing the principle of opportunity is the possibility for the prosecutor to order the defendant to fulfill, within a set period, one or more of the following obligations:

- a) to eliminate the consequences of the criminal act or to repair the damage caused or to agree with the civil party on a way to repair it;
- b) to publicly apologize to the injured person;
- c) to fulfill his/her due maintenance obligations;
- d) to perform work in the event that, due to health conditions, the person cannot perform this work;
- e) to attend a counseling program conducted or monitored by the probation service.

If the defendant does not prove the fulfillment of the obligations within 6 months of the communication of the ordinance, the prosecutor revokes the ordinance and a new waiver of criminal prosecution is no longer possible in the same case.

The conditions that must be met for this institution to be applicable are of strict interpretation and application. These provisions cannot be extended to other situations and must be used by judicial bodies with maximum prudence and rigor. As a guarantee for compliance with this imperative and as a result of the Constitutional Court Decision no. 23/2016, currently, the

prosecutor's ordinance waiving criminal prosecution is subject to confirmation by the preliminary chamber judge (Paraschiv, 2019, p. 14).

The principle of opportunity and the principle of loyalty in the administration of evidence are both included in the content of the principles that we have presented.

3. Conclusions

By respecting these principles, human rights must also be guaranteed, such as: the right to a fair trial, personal freedom, the right to private or family life, domicile, personal or professional reputation, etc. Protection of the rights of victims of crimes in the criminal process – by guaranteeing, for example, the right of access to justice, the right to a fair trial, the right to benefit from protection by the state, the right to be compensated. And last but not least, the fundamental principle of the presumption of innocence must be respected. Thus, for the correct conduct of the criminal process and the guarantee of all essential rights, the criminal prosecution phase must be carried out in compliance with both the fundamental principles of the criminal process and the specific ones that we have presented.

The criminal prosecution must respect the non-public nature, so that the criminal prosecution procedure is carried out in secret in order to be much more efficient, on the one hand, to protect the interests of the criminal action and to prevent the risks of collusion and the danger of disappearance or destruction of evidence, and, on the other hand, to protect the interests of the defendant, especially from the perspective of the presumption of innocence and his personal relationships and interests. Carrying out the criminal prosecution in secret is also justified by the need to protect the opinion-forming process and the decision-making process of the judiciary.

Through the content of this article, I have tried to reproduce the incidence of the specific principles that govern the criminal prosecution phase. Given the importance and complexity of the principles specific to the procedural phases, I considered this topic timely and topical, because the principles are of particular importance in the criminal process, the violation of a principle being sufficient to disrupt the proper conduct of the process.

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