THE VICTIM IN THE ROMANIAN CRIMINAL TRIAL

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Abstract

When drafting the new Criminal Procedure Code (nRCPC), the Romanian legislator chose to reassign the procedural roles, that is to reduce the number of parties from four (the accused, the injured party, the civil party and the party with civil liability) to three (the defendant, the civil party and the party with civil liability). Thus, the person who has suffered physical, material or moral injury while the offense was being committed can no longer attend the criminal proceedings as a party, as he has the capacity of victim – a main procedural subject. Apparently, this change does not entail the reduction of the procedural rights. Thus, according to art 33. para.(2) nRCPC, the main procedural subjects have the same rights and obligations as do parties, except for those rights that the law grants to them exclusively. Nevertheless, as we will see, we will identify numerous procedural hypotheses in which the victim, stricto sensu, does not have the legal possibility to exercise certain procedural rights, accessible to other parties.

Keywords: *victim, parties in criminal proceedings, main procedural subjects, equality of arms, new Romanian Criminal Procedure Code.*

1. Introduction

When the new Romanian Criminal Procedure Code (nRCPC) entered into force on February 1, 2014, new roles were officially assigned to both the parties and the main subjects. Thus, for the very first time, the legislator defined the parties as the litigants who file judicial action or against whom judicial action is filed [art. 32 para. (1) RCPC]. Furthermore, the defendant, the civil party and the party with civil liability are included in the same category, whereas the victim ceased to be considered a party belonging to the criminal proceedings. This modification was completed by regulating a new category, namely 'main subjects', consisting of two participants, the suspect (the accused in the former Romanian Criminal Procedure Code) and the victim (the injured party in the former Romanian Criminal Procedure Code). In other words, we could see that in case the person injured while an offense was being committed intends to participate in criminal proceedings so that the perpetrator could be prosecuted, he will become 'a victim', no longer being a party.

Considering the provisions of art. 32 para. (1) (as the procedural subject are not statutorily defined), we could draw the conclusion, *per a contrario*, that the victim is not considered a party in the criminal proceedings as he neither files a judicial action (criminal or civil), nor is he a passive subject of a judicial action being filed. In our opinion, this reasoning is partially incorrect, as we will explain in this paper.

2. The relation between the victim and the judicial actions in criminal proceedings

As pointed out earlier, the reason why the legislator chose to confer the status of main subject on the person injured while the offense was being committed, at the expense the procedural status of party, is because it is impossible to establish a connection between this participant and the exercise of civil and criminal actions.

Regarding the civil action, the explanations are simple because the injured party cannot be an active or a passive subject of this action. Thus, it cannot be denied that the active subject of the civil action is the civil party and, in compliance with art. 19 para. (3) nRCPC, the prosecutor, while the procedural subject against which the civil action can be exercised is the defendant and, possibly, the party with civil liability. The person injured while the offense was being committed has the right to exercise a civil action, but, in this case, he becomes a civil party in criminal proceedings.

Regarding the relationship between the victim and the criminal action, it is obvious that he cannot be the passive subject when exercising the criminal action, as the only procedural party in this situation is the defendant.

It remains to be discussed whether the victim may participate in the exercise of criminal action. Undoubtedly, from the perspective of the legislator, the answer is negative, as criminal proceedings can be filed only by the state, through its servants. However, in our opinion, the solution to this problem is nuanced because the victim has a procedural regime (as provided in nRCPC, as well) which allows us to

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consider that this procedural subject can participate in the exercise of criminal action.

But what does it mean to exercise criminal action?

There is no definition for 'the exercise of criminal action' in the criminal procedure law. If we closely examine the criminal procedure rules, the provisions included in art. 14 para. (3) nRCPC easily stand out: 'Criminal action can be exercised during the criminal proceedings, under the law.' [1] Therefore, the legislator prescribes a timeframe for the exercise of criminal action, without specifically indicating who may participate in exercising it.

In specialized literature[2], the exercise of criminal action was defined as 'bringing a criminal action in order to be able to hold the defendant criminally responsible,' which can be achieved by presenting the evidence in a criminal case, taking procedural measures, filing application forms, introducing exceptions etc. In a different form, but expressing essentially the same approach, criminal action may be exercised by performing activities and procedural acts in order to boost the criminal proceedings and thus lead to the effective realization of the objective of criminal action, i.e. holding the guilty ones criminally responsible.' [3].

It is easy to see that the exercise of criminal action is primarily an attribute of criminal investigation bodies, with particular reference to the prosecution. Thus, the prosecutor is the only party who could start the criminal action, participating, in this capacity, in exercising criminal action, which arises directly from art. 55 para. (3) c) nRCPC. Similarly, the provisions of art. 99 para. (1) nRCPC, according to which the burden of proof in criminal proceedings lies mainly with the prosecutor, further emphasizes this aspect.

Although there is no express regulation in this regard, criminal investigation authorities are clearly involved in the exercise of criminal action by means of the acts of disposition that they can issue (beginning *in rem* prosecution, expanding criminal investigation, change the legal classification etc.), by submitting evidence and by having the legal possibility to order detention of the suspect or the defendant. In our opinion, in a subsidiary way, the court may also exercise powers subsumed to the exercise of criminal action during the proceedings, referring to the possibility of submitting new evidence during the court proceedings or when resubmitting unchallenged evidence *ex officio*, according to art. 374 para. (8) nRCPC.

In this context, the next issue that needs to be clarified is whether the victim may participate in the exercise of criminal action. Having in mind the conceptualization of 'the exercise of criminal action', as discussed above, we consider that, indeed, the victim may exercise criminal action, together with the judicial bodies, in particular by activating the rights recognized by law in matters of evidence, and through a series of procedural acts that may result during the criminal proceedings.

In this sense, the victim has the right to propose submitting evidence by the prosecution, to raise claims, to draw conclusions and also the right to make any other claims related to the settlement of the criminal component of the case under article 81 para. (1) b) and c) nRCPC. More importantly, the victim can make a contribution to accomplishing the objective of criminal proceedings by certain procedural acts, such as the complaint against the order of ranking, followed by the judge's decision to start the trial in compliance with art. 341 para. (7) line 2) c) nRCPC, by lodging an appeal call or using extraordinary legal remedies under the law etc. The exercise of criminal action by the victim is even more obvious in cases where criminal proceedings are initiated and carried out, triggered by the prior complaint. In these cases, the victim must express his wish as this is essential when holding someone criminally responsible, not only for the start of the criminal proceedings (the initiation of criminal proceedings, respectively), but also for conditioning the exercise of criminal action by the absence of the order for the prior complaint withdrawal.

On the other hand, it is important to note that, in specialized literature, the victim is considered an active subject of the criminal action, together with the Public Ministry and the criminal investigation bodies, as they have the recognized right to perform procedural acts by means of which the defendant is held criminally responsible[4].

Based on these brief arguments, we consider that the victim may participate in the exercise of criminal action in criminal proceedings together with the prosecutor and the criminal investigation bodies, which invalidates the legislator's option to remove him from the category of parties.

Nevertheless, it is important to determine whether this change in assigning the roles to the parties in the criminal proceedings is likely to jeopardize the

[1] Obviously, it is necessary to consider a restrictive interpretation of the rule invoked because no matter the hypothesis one might have in mind, no criminal action can be exercised during the third phase of the criminal trial, the enforcement of criminal judgments, for the simple reason that once a final decision is taken, the criminal action is extinguished.

[2]. I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise), Ed. Universul Juridic, București, 2014, p. 265; see also A. Crișu, *Drept procesual penal. Partea generală* (Criminal Procedure Law. The General Part), Ed. Hamagiu, București, 2016, p. 178.

[3]. N. Volonciu, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise. The General Part), Ed. Paideia, București, s.a, p. 234.

[4]. Gr. Gr. Theodoru, *Tratat de drept procesual penal* (Criminal Procedure Law Treatise), ediția a 3-a, Ed. Hamangiu, București, 2013, p. 97; see also N. Volonciu, *op. cit.*, pp. 235-236; I. Neagu, *Tratat de procedură penală* (Criminal Procedure Treatise), Ed. Pro, București, 1997, p. 168 (the author particularizes this possibility for the cases in which the victim's prior complaint is necessary); Gh. Mateuț, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise. The General Part), *vol. I*, Ed. C.H. Beck, București, 2007, p. 539.

procedural interests of the person injured while the offense was being committed. Apparently, considering the provisions of art. 33 para. (2) nRCPC, according to which the procedural subjects have the same rights and obligations as the parties, except for those granted by law exclusively to them, including the victim in the category of the main procedural subjects does not change the procedural rules for this party. The provisions of art. 81 nRCPC, which provide for the victim's rights, basically regulated in the same way as the rights of the parties, lead us to the same conclusion.

However, as we shall see below, the new Romanian Criminal Procedure Code comprises many hypotheses in which the victim was omitted by the legislator from the category designating the parties that hold certain procedural rights. As follows, we present these situations (without claiming that we have identified all the cases), trying to determine whether the respective omission could cause infringement of the victim's procedural rights and interests. We would like to mention that had the victim been qualified as a party in the criminal proceedings, these cases would not have existed.

3. Cases in which the victim was wrongly excluded from exercising certain procedural rights

Disjoinder of a civil action. During the trial stage, due to reasons related to ensuring a reasonable timeframe for settling the criminal action, the court has the opportunity to order the disjoinder of the civil action. According to art. 26 para. (2) nRCPC, a disjoinder shall be ordered by the court *ex officio* or upon request by the prosecutor or the parties. In this first example, we consider that this could be explained as an omission done by the legislator[5], as there is no valid reason for which the victim could not seek separation of the two actions, especially if it is thought that settling them together would lead to delays in settling the criminal action.

Disjoinder of cases after joinder. The joinder of cases, procedural hypothesis leading to the prorogation of jurisdiction in criminal matters can be granted according to art. 45 para. (1) nRCPC, at the request of the prosecutor, the parties, the victim and *ex officio*. Although, in this case, the victim is granted the right to seek joinder, as far as the disjoinder of the cases after joinder is concerned, the situation is different. In this regard, according to art. 46 para. (2) nRCPC, disjoinder of a case shall be ordered by the court through a court resolution, *ex officio* or upon request by the prosecutor or the parties.

The conflict of jurisdiction occurs in the event that two or more courts mutually proceed to waiving their jurisdiction (negative conflict of jurisdiction) or admit their jurisdiction to hear the same case (positive conflict of jurisdiction). According to the procedure leading to the settlement of the positive conflict of jurisdiction, provided in art. 51 para. (3), the shared hierarchically superior court may also be seized by the court having acknowledged its jurisdiction last, by the prosecutor or by the parties. It also becomes apparent that the legislator omitted to regulate the right of the victim to seek the ascertaining of the existence of the jurisdiction conflict and its settlement.

The transfer procedure, a remedy for those cases which raised the question of the lack of impartiality of the court as a whole (a threat of a public order disturbance, respectively) occurs, considering the issues analyzed in this paper, when the victim is repeatedly ignored[6]. First, transferring the examination of a case could be sought, among other things, when the impartiality of judges of that court is impaired due to 'the capacity of parties'. The declarative interpretation of this statute should lead us to the conclusion that transferring the examination of a case may not be requested, if, for example, the court president is a close relative of the victim, his capacity not being described in the statute. Obviously, such an interpretation cannot be accepted, as otherwise the principle of equality of arms would be infringed.

The omissive regulation in respect of the victim also existed as far as the parties of the transfer application were concerned. Thus, in the initial form of art. 72 para. (1) nRCPC, transfer could be exclusively requested by the parties or by the prosecutor. Following the amendments made by the Romanian Government Emergency Ordinance no. 18/2016, the victim was included in the category designating the parties, having the right to file for case transfer.

The procedure regulating the settlement of the transfer application comprises other examples where the victim was not taken into consideration by the legislator. Thus, in order to prepare the examination of the application, the president of the hierarchically superior court shall take steps 'to inform the parties on the filing of a case transfer application'; 'parties may transmit memoranda and may come to court on the set hearing term for the application settlement'; if participating in the hearing, the High Court of Cassation and Justice or the Court of Appeals of competent jurisdiction 'shall give the floor to the party who filed the case transfer application, as well as to the other attending parties (...)'. We would like to point out to the fact that, when considering these hypothetical cases, 'parties' refer to subjects procedurally interested in settling the transfer application, therefore the victim is included as well. However, whatever the content of the regulation, it is obvious that the victim will fully

[5] Moreover, anticipating, for most cases that have been analysed, the common element which justifies the lack of regulation is represented by this 'omission' of the legislator.

[6] Nevertheless, we would like to mention that the victim can seek the transfer of the examination of the cause, as art. 72 para. (1) nRCPC was supplemented by the Romanian Government Emmergency Ordinance no. 18/2016.

participate in the transfer procedure, under the same conditions as the parties.

Special rules regarding the hearing of persons. In accordance with art. 106 para. (2) nRCPC, a detained person may be heard at the detention facility through videoconference, in exceptional situations and if the judicial bodies decide that this does not harm the proper conducting of the trial or the rights and interests of the parties. *Per a contrario*, this type of hearing derogating from the rules of ordinary law could not be accessed in the event that one found out that the victim's interests were prejudiced (or, equally, the suspect's), as this is an interpretation which cannot be accepted.

The procedure for the approval of electronic surveillance. ***Home search and computer search***. According to art. 140 para. (3) nRCPC, the application requesting approval of electronic surveillance shall be ruled on in chambers, on the same day, without 'summoning the parties'. Although it might follow that the suspect and the victim will be summoned, the interpretation of this statute is that this activity is performed confidentially, without the main procedural subjects and the parties taking part in the proceedings. In this case, the omission of the legislator may lead to granting additional rights to the victim, as compared to the parties in the trial, as this purpose was targeted when drafting the criminal procedure law, given the peculiarities of electronic surveillance.

Likewise, according to art. 158 para. (5) and art. 168 para. (4) nRCPC, applications requesting approval for conducting a home search or a computer search are ruled on in chambers, without 'summoning the parties'. To comply with identical reasoning, the findings made in reference to the procedure approving electronic surveillance apply in these hypotheses as well.

Appointment of the expert. In the procedure of appointing the legal expert, it is legally possible for the unofficial procedural subjects to get involved in conducting this evidentiary process. Thus, according to art. 173 para. (4) nRCPC, the parties and main procedural subjects have the right to require that an expert recommended by them, other than the one appointed by the judicial body, would participate in concluding an expert report. In this case, we notice that the victim has the opportunity to propose a so-called expert-party. Further on, however, the legislator regulates the expert's incompatibility hypotheses, laying down that one cannot appoint, as an expert 'recommended by the parties' in the given case, a person working in the same forensic medical institution, specialist institute or laboratory as the expert appointed by the management of the relevant institution upon request by judicial bodies. It is clearly an omission of the legislator, omission which is not found as a counter example, in the case referred to in art. 175 para. (4), according to which the expert may request clarifications from 'the parties and main procedural subjects' based on an approval from and under the terms established by the judicial bodies. In the same sense, we can mention the provisions of art. 177 para. (1) nRCPC, according to which, when ordering the conducting of an expert report, the criminal investigation bodies or the court set a term on which 'the parties, main trial subjects (…) are summoned'.

The non-unitary nature of the criminal procedural rules, in terms of omitting the mentioning of the victim, is also present in art. 178 para. (4) nRCPC, which states that the expert report includes in the introduction, among other pieces of evidence, 'the proof of having informed the parties', if they participated in the examination and gave explanations during this activity.

Letters rogatory. According to art. 200 nRCPC, in case a letter rogatory has been ordered by the court, 'the parties may ask questions before such court' and the questions will be submitted to the court performing the letter rogatory procedure. Similarly to the other hypotheses presented, it may result, *per a contrario*, that the victim would not have the right to ask questions that were to be submitted to court which enforces the procedural act by letter rogatory, a situation that of course cannot be accepted. Likewise, 'either party' (including the victim, as well) may request to be summoned in the enforcement of the letter rogatory.

Summoning procedure during court proceedings. While carrying out the summoning procedure, some irregularities may occur, which may end up in failing to accomplish the purpose of the procedure, namely ensuring the presence before the judicial body. These procedural incidents were provided for in art. 263 nRCPC. In this regard, according to para. (1), during the trial, irregularities in the summons procedure shall only be considered if the person who is missing at the date of summons raises such irregularity at the next hearing where they are present or legally summoned. This situation also belongs to the matter of evidence, as the provision could be enforced on the victim, as well. Similarly, the same extensive interpretation should be used with reference to art. 263 para. (2) according to which an irregularity in the summons procedure of 'a party' can be raised by the prosecutor, by 'the other parties' or *ex officio* only at the date where it occurred.

The procedure for correcting obvious material errors. According to art. 278 para. (2) in order to correct the obvious material errors of a procedural act, parties may be summoned to provide clarifications. In this case we are again in the situation of an obvious legislative omission, the victim being able to contribute to the correction of a material error, as far as that is covered by the respective procedural act.

The regime of absolute nullity. In this case, the omission of the legislator leads to some situations which are clearly discriminatory against the victim. According to art. 281 para. (1) f) nRCPC, always causing nullification is the infringement of rules concerning legal assistance by a counsel for the suspect or defendant, as well as of the other parties, when assistance is mandatory. In other words, the hypothetical cases in which the provisions relating to

the mandatory legal assistance to the victim were infringed, the consequent penalty will be relative nullity, only if it is proved that the procedural error caused an infringement of the rights of the victim, which cannot otherwise be removed, but by nullifying the act.

We would like to point to the fact that there are legal hypotheses during the criminal proceedings in which legal assistance to the injured victim is mandatory. According to art. 93 para. (4) and (5) nRCPC, we have in our view those cases in which the victim lacks mental competence or has a limited mental competence or when the judicial body considers that he cannot prepare the defense on his own. For these cases, if legal assistance is not provided, the penalty would be relative nullity.

In this case as well, we hold the view that the provisions included in art. 281 para. (1) f) nRCPC should be extensively interpreted. Otherwise, not only the victim's right to defense would be violated, but also the equality of arms to the procedural rules of the suspect or defendant and, more importantly, to the procedural rules granted to the civil party and the party with civil liability.

4. Conclusions

The examples mentioned in this paper are not unique [the same approach should be taken in respect to the provisions of art. 369 para. (2) nRCPC, art. 381 para. (5) nRCPC, art. 377 para. (4) nRCPC, art. 412 para. (3) and (4) nRCPC etc.]. In our opinion, two main causes could explain the current situation, namely the inclusion of the victim in the category of main procedural subjects, though, as we have seen, being a party in criminal proceedings is perfectly justifiable in terms of the possibility of exercising criminal action, and the legislative shortcomings demonstrated during the drafting of the criminal procedure law.

Thus, referring to the first cause, if the legislator had chosen that the victim would attend the trial as a party, these regulatory differences included in this paper would not have existed, as the exercise of certain procedural rights would have been made available to 'the parties'.

Given that the victim will continue to be considered a main procedural subject, the criminal procedural regulation should be improved by adding references to this procedural subject, as well. In this case, the law takes a cumbersome form, comprising difficult wordings (e.g., in order to meet the requirements of the principle of equality of arms, art. 200 nRCPC should be rephrased as follows: 'when a letter rogatory is ordered by the court, the parties *and the victim* may ask questions before such court'). Therefore, the modification of the procedural framework with regard to the victim (in many cases, issues relevant to the suspect, as well) should be mandatory because the objective is to ensure a procedural regime characterized by the possibility to exercise the same procedural rights during criminal proceedings.

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