THE PROSECUTOR"S DISPOSALS AT THE HEARING IN A CRIMINAL PROCESS

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Abstract

This paper examines the participation of a public prosecutor to a hearing, as the representative of the Public Ministry, as well as the manner in which he/she exercises his/her judicial attributions. We have found that the judicial actions carried out by the prosecutor can be conditioned or unconditioned and that a clear distinction between them and the prosecutor"s conclusions has to be made. It was therefore concluded that under no circumstances the prosecutor"s conclusions can be assimilated to the disposals that he/she can enforce.

Keywords: *the participation of the prosecutor at the hearing, the disposal act of the prosecutor, the prosecutor"s conclusions.*

1. Argumentation

With this study we wish to highlight the specific activities of the prosecutor and the forms they can take. The need for such an approach issued from the confusion that can be made by the practitioners between the prosecutor"s disposal acts and the conclusions that he/she draws during the hearings.

Thus, for example, through the judgment no. 10/03.07.2020 pronounced by the preliminary chamber judge within Sălaj Tribunal, final due to the failure to initiate a remedy, it was noted that the prosecutor from the Prosecutor"s Office attached to the Sălaj Tribunal has communicated to the judge, within the 5 days deadline stipulated by art. 345 par. (2) of the Criminal Procedure Code, that he/she maintains the order to proceed to trial according to the indictment issued. It was also held that the prosecutor had issued an order for the remedy of the irregularities found by the preliminary chamber judge, an order which was checked by the chief prosecutor from the Prosecutor"s Office attached to the Sălaj Tribunal.

At the hearing established by the judge, where the debates were resumed within the preliminary chamber procedure, the prosecutor has formulated conclusions saying that there still was an inconsistency between the facts and the *de jure* situation, given that the number of the material acts described in the *de facto* situation was not the same as the number of material acts found in the chapter „*de jure*" of the indictment. Under these circumstances, the prosecutor estimated that the object and the limits of the trial were not properly established; therefore the case had to be sent back to the prosecutor"s office.

Following the prosecutor"s conclusions, the preliminary chamber judge ordered the case to be sent back to the prosecutor"s office, according to art. 346 par. (3) lett. c) of the Criminal Procedure Code, estimating that the prosecutor had shown in his conclusions that he/she no longer maintained the order to proceed to trial and that he/she orally asked for the case to be sent back to the prosecutor.

2. The legal attributions of the prosecutor analysed from the perspective of the principles concerning the activity and the organisation of the Public Ministry

According to art. 131 and 132 from the Romanian Constitution, within its judicial activity, the Public Ministry represents the general interests of the society and protects the rule of law as well as the citizens" rights and freedoms. The Public Ministry also exercises its powers through prosecutors organised in prosecutor"s offices, who perform their activities according to the principles of lawfulness, impartiality and the hierarchical control, under the authority of the Minister of Justice.

The prosecutor"s attributions are stipulated by art. 63 in Law no. 304/2004, part of them being circumscribed to the procedural function of prosecution. Thus, the prosecutors conduct the criminal proceedings, they lead and supervise the activity of the criminal investigation bodies, they submit the cases to the criminal courts and they participate to the hearings within the trial.

The principles concerning the organisation of the Public Ministry and the prosecutors" activity relevant for this study are the subordination principle and that of the hierarchical control, as well as the principle of the consistent action. Furthermore, it should not be ignored the fact that the prosecutor is independent in ordering the solutions and the prosecutor"s conclusions presented to the court cannot be censured by the hierarchically superior prosecutor *(la plume est serve, mais la parole est libre).*

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The hierarchical control principle stems from the hierarchical subordination principle so that these two principles must be analysed together.

Thus, the hierarchical subordination principles materialized in the fact that the prosecutors in every office are subordinated to the chief of that office, while the chief on his turn is subordinated to the chief of the hierarchically superior office. This principle is materialized through the hierarchically superior prosecutor"s right to issue mandatory directions to the subordinated prosecutors. Therefore, being in this position, the hierarchically superior prosecutor verifies *ex officio* or upon request, both the merits and the lawfulness of the decisions of the subordinated prosecutors, and when he/she finds them unfounded or unlawful he/she invalidates them providing reasons and he/she orders them to be redone.

Concerning the unitary direction of the Public Ministry, we note that all prosecutors act in the name of the Public Ministry exercising its powers as stipulated by the law, and the acts issued by the prosecutors have the legal effects of an act or measure issued under the power of the Public Ministry. This principle is materialized in the possibility of transferring the work of a prosecutor to another, of replacing a prosecutor working in the judicial sector with another prosecutor who would further participate to the hearings, in the possibility of performing the criminal proceedings acts in the same case by several prosecutors etc.

In exercising the judicial attributions, the prosecutor uses a series of material and procedural acts materialized in orders and acts through which they are fulfilled. The number and the content of the prosecutor"s acts are different according to each procedural stage, and, as natural, most of them are regulated for the criminal investigation stage. We say it is natural because these procedural means are regulated with a view to ensuring the exercise of the judicial function attributed by law to the judicial body, with the purpose of solving the case according to the law and truth.

In the activity performed in front of the court, the prosecutor exercises an active role for the finding of the truth and observing the legal rules, his/her participation to the court"s hearing being materialized through applications and conclusions, as well as raising exceptions.

Although these legal provisions are found in art. 363 of the Criminal Procedure Code, in the chapter concerning the general dispositions applicable in the trial stage, we estimate that they must be applied *tale quale* whenever the judicial activity involves the exercise of the jurisdiction function by the judge or the court.

3. The judicial means available to the prosecutor

The semantic difference material act –procedural act stems indirectly from the provisions in art. 200 of the Criminal Procedure Code[1]. Thus, material acts are the initiation of the criminal proceedings, the taking of preventive measures[2], the approval of evidence etc., the procedural acts being: listening a witness, the conduct of on crime scene investigation, the seizing of objects[3] etc.

From all this it follows that the material act means the acts through which the judicial bodies, the parties and the main actors in the trial, as well as other participants in the trial manifest their will, under the circumstances and forms stipulated by the law, concerning the initiation and evolution of the criminal trial. Therefore, the material act can be defined as the constitutive part of the criminal trial, stipulated by the law, by which the competent judicial body and the authorized person dispose directly, in the exercise of the procedural functions, of the conduct of the criminal trial in order to achieve the purpose of the criminal trial[4].

The procedural act, on the other hand, is the activity performed by the judicial bodies, the parties and the main actors in the trial, as well as other participants in the trial, through which a material act or measure is fulfilled or which registers the fulfilment and records the content of a material act or measure, or of a procedural act[5].

As shown, most of the prosecutor"s material and procedural acts are regulated for the criminal investigation stage because this is the only stage involving the solving of the case by the prosecutor. For the next stages of the criminal proceedings, the preliminary chamber procedure, the trial and the enforcement of the criminal decisions, the responsibility of solving the case does not lie with the prosecutor but with the judicial body, so that it is natural that the procedural means should be given to the judicial body called to give a solution – the judge or the court.

In the conduct of the judicial procedures, the Public Ministry is represented by the prosecutor who has the possibility to file applications, raise exceptions and submit conclusions. These are supplemented by the clarifications that the prosecutor can make in front of the court, such as the clarification of the appeal reasons

[1] A. Zarafiu, Procedură penală. Partea generală. Partea specială, CH Beck Publishing House, Bucharest, 2015, p. 279.

[2] The taking of material measures (for example, the taking of preventive measures, the taking of precautionary measures) is a *characterized* material act.

[3] The activity of presenting the already approved evidence, with all that it involves, the evidentiary procedures, the documents where they are recorded etc., are procedural acts performed within this activity.

[4] Gr. Theodoru, I.-P. Chiș, *Tratat de Drept procesual penal*, 4th edition, Hamangiu Publishing House, Bucharest, 2020, p. 565-566.

[5] *Idem.*

described in writing and which must be presented in front of the judicial review court[6].

However, closely related to the document instituting the proceedings and the evidence adduced during the criminal investigation, the law regulates certain disposal acts available to the prosecutor, both in the preliminary chamber procedure and in the trial stage or in the stage of the enforcement of criminal decisions.

Thus, for example, in the preliminary chamber procedure, when the preliminary chamber judge invalidates the criminal investigation acts or dismisses certain pieces of evidence, the prosecutor has the possibility to dispose of the solution of sending the case to trial by asking for the case to be sent back to the prosecutor"s office. The motivation of this legal solution is that following the invalidation of certain criminal investigation acts and after the exclusion of certain pieces of evidence adduced by the prosecutor, the representative of the Public Ministry must be granted the right to change his/her position towards the solution pronounced. The law establishes that the prosecutor who pronounced the solution of sending to trial has the right to rethink the solution either positively, by maintaining the sending to trial, or negatively, by asking for the case to be sent back to the prosecutor"s office.

Once received the answer of the prosecutor in the case, the preliminary chamber judge is not able to censor it. Thus, if there is a request for the case to be sent back to the prosecutor"s office, the judge will give the solution accordingly, otherwise the judge would substitute himself/herself to the prosecutor and would exercise de facto the prosecution function, a function absolutely incompatible with the jurisdiction function[7].On the contrary, if the prosecutor states that he/she maintains the sending to trial, the preliminary chamber judge is forced to pronounce the commencement of the trial[8].

For the trial stage, the prosecutor can waive the evidence he/she proposed, disposing of them. In this hypothesis, given that the principle of finding the truth in the criminal trial has been kept by the new legislator, the judge shall order for the evidence not to be adduced if he/she deems that it is no longer necessary for the finding of the truth in the case. In this case, it can be noted that the manifestation of will from the prosecutor is conditioned on the court"s finding of the uselessness of adducing the waived evidence.

As we have shown, for the next stages of the criminal trial, the legislator has sporadically regulated the disposal acts available to the prosecutor. In the judicial contexts implying the exercise of the jurisdiction function, the prosecutor"s participation to the hearing is often materialized through the conclusions he/she formulates.

The conclusions formulated in front of the jurisdiction bodies both by the prosecutor and by the rest of the participants to trial represent the statements and the views expressed during the hearing concerning the solution of the case submitted to trial. Essentially, the conclusions represent the result of the interpretation of the legal provisions, when the matter discussed is a question of law, or the interpretation of the evidence when the merits of the trial are discussed etc.

4. Instead of conclusions

We estimate that it is clearly visible which is our point of view on the object of this study.

Thus, starting from the working hypothesis, we estimate, along other authors, that in the situation where the preliminary chamber judge asks the prosecutor to express his/her will concerning the order of sending to trial in the direction of maintaining it or to the contrary, in that of withdrawing the document instituting the proceedings, only the prosecutor who issued the indictment or the replacing prosecutor can dispose of his own document instituting the proceedings[9]. Also, having regard to the effects of the negative disposal act, namely the sending back of the case to the prosecutor"s office, we estimate that the answer can be formulated by the prosecutor only in writing and shall be submitted to the preliminary chamber judge through the notice signed by the chief of the prosecutor"s office, obviously after his/her taking note of the manifestation of will of the subordinated prosecutor. We think that this should be the natural circuit of the document signed by the prosecutor of the case, because the withdrawal of the document instituting proceedings interferes with the initial verification of the indictment made by the chief of the prosecutor"s office.

Between these coordinates, it is obvious that during the hearing, the prosecutor is not entitled to decide the withdrawal of the document instituting the proceedings, as the preliminary chamber judge from the Sălaj Tribunal wrongly held, the prosecutor of the case being the only one able to make this assessment. However, this does not mean that the prosecutor has no other option besides the one expressed by the prosecutor in the case, an opinion he/she is of course, free to present to the judge.

We estimate however, that the principle of absolute independence of the prosecutor present at the hearing, as to the conclusions he/she can formulate must be interpreted in relation to the principle of consistent action, so that the prosecutor present at the

[6] ICCJ (High Court of Cassation and Justice), Criminal Section, dec.no.204/2019, unpublished.

[7] I.-P. Chiș, C. Voicu, Admisibilitatea contestației formulate de procurorul care nu a răspuns în termenul de 5 zile cu privire la menținerea trimiterii în judecată sau a solicitat expres restituirea cauzei la parchet, in „Dreptul" no. 5/2020, p. 159-168.

[8] I. Kuglay, in M.Udroiu, Codul de procedură penală. Comentariu pe articole, 3rd edition, C.H. Beck Publishing House, Bucharest, 2020, p. 1854.

[9] I. Kuglay, op.cit., p. 1842.

hearing should inform the hierarchically superior prosecutor about his/her intention to formulate conclusions in a different direction than the one expressed in writing by the prosecutor"s office. Otherwise, the principle of consistent action following from the representation of the same general interest by all prosecutors in the Public Ministry would be undermined, the inconsistency of the prosecutors placing in doubt both the credibility of the judicial body and the rigor of the activity where it was expressed.

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