

THE PRINCIPLE OF SEPARATION OF JUDICIAL FUNCTIONS

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Abstract

The fundamental principles of the criminal procedure are general rules applicable throughout the criminal procedure in order to achieve its purpose. The fundamental principles are covered by art. 2-12 C.C.P. and are: the legality of criminal procedure, separating the functions of the judiciary, the presumption of innocence, finding out the truth, ne bis in idem, a requirement for moving and exercising penal action, is fair and reasonable term of the criminal trial, the right to liberty and security, the right to defence, respect for human dignity and privacy, the official language and the right to an interpreter. The European Court of Human Rights is conscious that by protecting the fundamental principles it does not only aim at the protection of super eminence of the inextricably right tied to the state of law. These principles represent a set of obligations imposed on the State that has as the sole purpose the protection of fundamental rights and freedoms.

Keywords: right to defence, presumption of innocence, guaranteeing the freedom of the person, the legality, the separation of judicial functions.

1. Introduction

The current criminal procedure code brings important changes to some of the old code of criminal procedure, but devotes a number of new institutions, which have not existed in our criminal procedural legislation. All of these changes are reflected primarily in Title I of the General Part of the Code, which governs the procedural criminal law principles¹.

In connection with the principle of separating the functions of the judicial doctrine, the following conclusion was reached, namely, that there are 3 functions: judicial prosecution, defense and jurisdiction (criminal law conflict substantially in the courts of law), showing that they are resolved, by the authorities of their respective differentiated parties involved in the criminal proceedings.²

It may thus be inferred that the legislature did not take into account the doctrine opting for regulating four functions which are incompatible with the exercise of other functions, unless the function available on the rights and freedoms of individuals during criminal investigation and verification of the legality of sending or not sending to court, which are compatible with one another; cf. art. 3 para. 3 C.c.p.

A number of issues concerning the incompatibility of judicial functions in the same case were put into the jurisprudence of the ECHR, laid down a clear situation regarding the impartiality of the Court which adjudicates the case fund and the

judge who ordered the preventive measure of preventive arrest or arranging the sending to court.³

So, the jurisprudence of the ECHR is labile, and felt that taking preventive measure by the Court is not sufficient to establish bias judgment, but there must be objective justified grounds with regard to its impartiality.⁴

Thus, such acts are related to the function available on the rights and freedoms of individuals in the phase of the criminal prosecution, as was provided for in the present Code of criminal procedure, providing however an incompatibility between it and the function of the Court, while the two functions are not incompatible in terms of the ECHR's jurisprudence.⁵

2. Content

In the framework of the principles which guarantee respect for the rule of law, we find:

- the legality of the criminal process;
- the separation of the judicial functions
- finding out the truth
- ne bis in idem

As shown in literature, we can define the General principles of law as the fundamental prescriptions containing essential ideas must permeate any rule of law with a legal phenomenon, having a creator role, but also by the fact that they

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¹ D. Barbu, *Principiile procesului penal*, Ed. Lumen, Iasi 2015, p. 13.

² M. Damaschin, *Dreptul la un proces echitabil în materie penală*, Editura Universul juridic, București, 2009, p.108.

³ CEDO, Decizia *Garrido c. Spania* din 22 martie 2000.

⁴ CEDO, *Hauschildt c. Danemarca*, 24th May 1989; G. Mateuț, *Tratat de procedură penală. Partea generală*, vol. I, Editura C.H. Beck, București, 2007, p. 270.

⁵ D. Barbu, *op. cit.*, pp. 17-18.

basically contain objective conditions which need to be in any law.⁶

The separation of judicial duties is a fundamental principle that binds rather judicial functions by the separation of the incompatibility.

The resolution of the criminal case involves the exercise of several judicial functions throughout the criminal process⁷:

A. the function of prosecution⁸: the prosecutor and the criminal investigation bodies gather evidence to determine whether or not there are grounds for referring to court.

B. the function available on the fundamental rights and freedoms of the individual in criminal investigation: the judge of rights and freedoms (with the exceptions stipulated by law) has on the acts and the measures under criminal prosecution that restrict the fundamental rights and freedoms of the individual (the right to liberty, to privacy, etc.)⁹

- judicial review through the judge of rights and freedoms guarantees the rights and freedoms of persons involved in criminal proceedings.

Within this function, the judge of the rights and freedoms pronounces with regard to:

a) preventive measures:

- taking the measure of pre-trial detention or arrest;¹⁰

- the confirmation of the mandate of preventive arrest issued in absentia;

- the extension of the pre-trial detention measure or arrest;

- the replacement of judicial control or measure of judicial control on bail with the measure of arrest at home or arrest;

- the settlement of termination by operation of law, revoking, replacement of the measure of pre-trial detention or arrest;

- the complaint lodged by the defendant against the order of the Prosecutor took the measure of judicial control or judicial review or control on bail, etc.

b) the consent searches or domiciliary or the use of special informatics methods and techniques of monitoring or research, as well as other methods of proof:

- the settlement proposal authorizing the Prosecutor to carry out an informatics or domiciliary search;

- the resolution of the Prosecutor's proposal for approval of technical supervision;

- the confirmation of technical supervision measure authorized under the emergency conditions by the Prosecutor;

- the resolution of the Prosecutor demand extension of mandate of survey;

- the settlement proposal authorizing the Prosecutor to obtain general data or processed by providers of publicly available electronic communications networks, other than the contents of communications and retained by them;

- the settlement proposal authorizing the Prosecutor to obtain data on the financial status of a person.

c) precautionary measures:

- the resolution of the appeal brought against the order of the Prosecutor regarding precautionary measures;

- the resolution of the Prosecutor's proposal to capitalize the assets, when there is no consent of the owner;

- the resolution of the appeal brought against the conclusion of the recovery of seized assets, when there is no consent of the owner;

- challenging the Prosecutor's solution of things.

d) provisionally safety measures:

- the obliging to the provisional medical treatment/ provisional medical hospitalization of a suspect or accused in the criminal investigation phase;

- the lifting of the provisional measure obliging to the medical treatment/provisional medical hospitalization of the suspect or accused;

e) other procedures under C.c.p.:

- hearing the witness in accordance with anticipated hearing;

- taking, extension, revocation of the measure non-voluntary hospitalization in the clinic to carry out forensic psychiatric expertise;

- physical examination of a person in the absence of the consent of the person concerned;

- the issuance of the mandate of remembrance at the request of the public prosecutor in which to execute the mandate of remembrance is necessary the penetration without consent in a home or establishment, in the framework of criminal prosecution;

- the opposition concerning the reasonableness of overdue the criminal prosecution;

These two functions are exercised within the criminal investigation phase.

C. The function of checking the legality of bringing or non-bringing to trial is exercised by the judge of the preliminary room which verifies the legality of bringing to trial act and the evidence on

⁶ M. Niemesch, *Teoria Generală a Dreptului*, Editura Hamangiu, București, 2014, p.62.

⁷ D. Barbu, *op. cit.*, pp. 23-30.

⁸ I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală*, Ed. Universul juridic, București, 2014, p.61.

⁹ *Ibidem*, p. 7.

¹⁰ In the competence of the rights and judgments there is also the conclusion of the defendant request regarding home arrest, in order to permit leaving the house.

which it is based and also check the legality of the solutions for bringing to trial.

D. The Court Function¹¹ shall be carried out by the Court in legality established panels (art. 3 para. 7 C.c.p.). It specifies the phase and consists of:

- the management of the probation
- the assessment of the evidence for the purpose of the pronouncement of a judgment
- the verification of the claim made by the solidity of the Prosecutor, to the parties and to the trial subjects being guaranteed the rights in the article 6 of ECHR.

From our point of view, although the legislature has omitted, there is also the function of the enforcement of criminal judgments.

From these judicial functions, there are exceptions:

- under article 3 paragraphs 3, the function of checking the legality of bringing/not-bringing to trial is compatible with the function of the judgment-judge of preliminary chamber will participate in the preliminary judgment of the case (art. 346 para. 7 – the Chamber judge which ordered the start of the preliminary judgment exercised the function of the Court in question).

- by default, it has been waiver form the provision on the rights and freedoms of the individual, these tasks can be fulfilled by other judicial bodies:

- art. 141 para. 1 of C.c.p.- authorization by the Prosecutor of the interception of calls for a maximum of 48 hours;

- art. 209 of C.c.p.- suspect apprehension or accused of the criminal investigation or Prosecutor for not more than 24 hours;

- art. 203 paragraph 2 of the C.c.p. Prosecutor has judicial preventive measure control against the culprit¹².

References:

- Barbu Denisa, *Principiile procesului penal*, Ed. Lumen, Iași, 2015;
- Damaschin M., *Dreptul la un proces echitabil în materie penală*, Editura Universul juridic, București, 2009;
- Mateuț Gh., *Necesitatea recunoașterii separațiilor funcțiilor procesuale ca principiu director al procedurii penale, în lumina Convenției Europene și a recentelor modificări ale Codului de procedură penală*, în *Dreptul nr. 9/2004*;
- Neagu I., Damaschin M., *Tratat de procedură penală. Partea generală*, Ed. Universul juridic, București, 2014;
- Niemesch M., *Teoria Generală a Dreptului*, Editura Hamangiu, București, 2014;

¹¹ Gh. Mateuț, *Necesitatea recunoașterii separațiilor funcțiilor procesuale ca principiu director al procedurii penale, în lumina Convenției Europene și a recentelor modificări ale Codului de procedură penală*, in *Dreptul* no. 9/2004, pp. 189-209.

¹² I. Neagu, M. Damaschin, op.cit., p.64.

¹³ M. Udriou, *Procedură penală. Partea generală*, Noul Cod de procedură penală, Ed. CH Beck, București, 2014, pp. 9-10.

¹⁴ M. Udriou (coordonator), A. Andone-Bontaș, G. Bodoroncea, M. Bulancea, V. Constantinescu, D. Grădinaru, C. Jderu, I. Kuglay, C. Meceanu, L. Postelnicu, I. Tocan, A.R. Trandafir, *Codul de procedură penală. Comentariu pearticole*, Ed. C.H.Beck, București, 2015, p.14.

¹⁵ N. Volonciu, A.S. Uzlău și alții, *Noul Cod de procedură penală comentat*, Ed. Hamangiu, 2014, București, p. 10.

¹⁶ *Ibidem*.

The effects of the separation of judicial functions¹³:

- It strengthens the protection of the fundamental rights of the persons concerned in the criminal proceedings;

- by separating the function of criminal prosecution of the provision with regard to fundamental rights and freedoms, it protects the right to liberty of the person, the right to privacy;

- by separating the function of criminal prosecution of the verification of the legality of sending trial protections, a fair trial is carried out¹⁴.

3. Conclusions

What should be noted is that this principle takes into account only judicial bodies with competencies in criminal procedure, without the injured individuals or on the defendant. Thus, it refers only to the separation of the activities of judicial bodies, regardless of the phase they are in criminal procedure, regulating a situation in fact and giving an important role of defense by erecting a correlative function at the level of the indictment.¹⁵

However, the legislature did not expressly enshrine the separation of the judicial functions of the Court, the prosecution and the Defense - for various reasons, primarily because it does not provide a clear principle of prosecution, because the Prosecutor cannot withdraw charges after bringing into court by seizing the appeal court, so as not to be possible to continue the trial in the absence of criminal accusation.¹⁶

Also, it was not expressly regulated the function of defense, although the code enshrines the fundamental principle for the rights of defense.

- Udriou M., Procedură penală. Partea generală, Noul Cod de procedură penală, Ed. CH Beck, București, 2014;
- Udriou M., (coordinator), And one-Bontaș A., Bodoroncea G., Bulancea M., Constantinescu V., Grădinaru D., Jderu C., Kuglay I., Meceanu C., Postelnicu L., Tocan I., Trandafir A.R., *Codul de procedură penală. Comentariu pe articole*, Ed. C.H. Beck, București, 2015;
- Volonciu N., Uzlău A.S. et.a., *Noul Cod de procedură penală comentat*, Ed. Hamangiu, București, 2014.