

THE SUSPENSION OF CRIMINAL INVESTIGATION IN THE EVENT OF INCIDENCE OF A TEMPORARY LEGAL IMPEDIMENT

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Abstract

The criminal investigation is the first stage of the criminal proceeding, necessary to be carried out under legality, so as to collect the necessary evidence to find the truth in order to prosecute or not to prosecute a person subject to the criminal investigation. Sometimes, depending on the quality at the time the criminal offense was committed or on the occasion of the investigations, it is not possible to order the criminal proceedings to be initiated, given that there is a temporary legal impediment. The present study aims to bring to the debate the theoretical and practical elements regarding the institution of temporary legal impediment.

Keywords: prosecutor, temporary legal impediment, President, Minister, suspension of the criminal investigation.

1. Introductory considerations

The evolution of the criminal trial is such a complex activity being controlled by the necessity to find out the judicial truth in a certain criminal case, but is also necessary to administer judiciously the evidence so that the parties and the procedural subjects ensure that the rights conferred by the legislator are respected.

As we know, according to the Romanian Criminal Procedural Law, this complex activity takes place in several stages meant to convince the purpose of the criminal trial, namely to establish a solution according to the guilt or innocence of the person subject to the criminal investigation. The stages of the criminal proceedings are the criminal investigation, the trial and enforcement of the court decision, and the preliminary chamber is the link between the first two phases, which is intended to check, *inter alia*, the lawfulness of the act referring a case to court and the censorship of the lawfulness and loyalty of the criminal investigation bodies.

In the present study, we intend to draw attention to the criminal investigation, which has as its object, as it appears from art. 285 of the Criminal Procedure Code, collecting the necessary evidence on the existence of a criminal offense, identifying the individual who committed a criminal offense and establishing their criminal liability, in order to decide whether they should be prosecuted.

The quality of a person at the time of committing the criminal offense or subsequently during the criminal proceedings may be a reason to attract the jurisdiction of a particular judicial body, for example, a quaestor who committed the offense of influence peddling, will be tried at first instance by the Bucharest Court of Appeal, but with regard to a person who was a Minister at the moment of committing a criminal offense of influence peddling, and at the beginning of

the criminal investigation he carries out another activity there are certain procedural issues that may impede the initiation of the criminal action.

In the present study we will focus on the institution of suspension of criminal investigation, which does not involve a solution that may be ordered by the prosecutor, but only a temporary interruption of the course of the first phase of the criminal trial. This institution is incidental in several cases, but we will confine ourselves to reviewing all the circumstances in which it may be disposed, but the special attention will be focused on the temporary legal impediment for the commencement of the criminal action.

At the same time, we will try to identify in judicial practice the legal issues that arise over the institution under discussion and how they chose the judicial bodies to interpret the legal provisions when, for example, a person was a minister at the time when a crime was committed in relation to the duties of the service and at the moment when the criminal prosecution bodies appreciate the opportunity to initiate the criminal action, it fulfilled the senator's dignity. Because constitutional issues in the subject matter of the analysis have been shaped in judicial practice, it was necessary for the Constitutional Court to intervene, which has made several decisions.

2. Analysis of the cases in which the suspension may be ordered during the criminal investigation

After the addressee of the substantive criminal law has disregarded the legal compliance report, following the intimation of the judicial bodies, the mechanism of the criminal trial is initiated which seeks to find the judicial truth, so that any person who has committed a criminal offense to be prosecuted in

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relation to the guilt with which he committed the act and no innocent person to be punished.

Therefore, the criminal trial begins with its first phase, one of the most important, since the whole mechanism has its structure in this first stage. In the specialized doctrine, the criminal investigation was shaped as representing the soul and the foundation of the criminal trial, because of the special importance it occupies in this complex activity.

According to the provisions of art. 285 of the Criminal Procedure Code, the object of the criminal investigation is to collect the necessary evidence to prove the existence of criminal offenses, to identify the individuals who committed a criminal offense and to establish their criminal liability, in order to decide whether they should be prosecuted.

Depending on the criminal offense committed and the way in which the participants contributed to the criminal field, the criminal investigation will be carried out by the fact of finding out the truth of the case in order to identify whether they should be prosecuted.

At the end of the first stage of the criminal proceedings, the solutions that may be ordered by the public prosecutor's representative are the classification, the waiver of the prosecution and the prosecution. Therefore, the institution underlying the present study finds its applicability in the course of the criminal investigation, not being a solution that breaks the guilt or innocence of the accused person but represents only a temporary interruption of the first phase of the criminal trial.

Suspension cases are regulated by the legislator in art. 312 of the Criminal Procedure Code of Chapter IV, 2nd Section, which lists the following circumstances that may constitute the basis for discontinuing the first phase of the criminal proceedings:

- In case a forensic medical report establishes that the suspect or defendant is suffering from a serious medical condition that precludes them from taking part in the criminal procedure, the criminal investigation body shall submit to the prosecutor its proposals and the case file so they can order the criminal investigation suspended (art. 312 par. 1 of the Criminal Procedure Code);
- Suspending the criminal investigation shall also be ordered in the situation where there exists a temporary legal impediment to the start of criminal action against a person (art. 312 par. 2 of the Criminal Procedure Code);

Suspending the criminal investigation shall also be ordered for the duration of the mediation procedure, as under the law (art. 312 par. 3 of the Criminal Procedure Code);

3. Judicial bodies who may order the suspension of the criminal investigation and their duties

Even if the criminal investigation is carried out by the prosecutor on a mandatory basis, or under his supervision, the public prosecutor's representative also has the obligation to analyze whether the criminal investigation should be suspended. Insofar, as the criminal investigation is carried out under the supervision of the prosecutor, the criminal investigation body is obliged to submit to the prosecutor the proposals regarding the suspension of the criminal investigation.

The order of suspension of the criminal investigation is communicated to the main procedural parties and subjects and while the phase of the criminal trial is interrupted, the criminal investigation bodies may continue to carry out those activities in which the suspect or defendant is not required. As a guarantee provided by the legislator, when the criminal investigation is resumed, the acts performed during the suspension may be restored wherever possible. We appreciate that criminal investigation bodies may continue to carry out specific activities only in the case of suspension of criminal investigation in case of serious illness of the suspect or defendant.

The communication of this order fulfills a double role – notification of the procedural incident and, on the other hand, gives these main procedural subjects the possibility that, when they are dissatisfied with the measure adopted, when it deems it underground or unlawful, can attack it according to the general procedure established by 339 of the Criminal Procedure Code¹.

During the suspension of the criminal investigation, irrespective of the circumstances which led to this solution, the criminal investigation bodies has the obligation to check periodically, but no later than three month from the date of the suspension, if the fact that caused the interruption of the criminal investigation persists. We appreciate that it is necessary to draw up a report by the criminal investigation bodies whenever they carry out these checks in order to inspect the identified issues. If the fact that leads to the suspension of the criminal investigation is found, the criminal investigation body must draw up the proposal to resume the criminal investigation and immediately inform the prosecutor supervising the criminal investigation of this fact.

When the mediation procedure is initiated, the legislator stipulates in art. 70 of the Law No. 192/2006 the possibility of suspending the criminal investigation, based on the presentation by the parties of the mediation agreement. Therefore, the suspension is an optional one, and the judicial body will appreciate the necessity of the order.

¹ N.Volonciu and others., *The new Criminal Procedure Code commented*, Hamangiu Publishing, 2014, p. 788;

4. The existence of a temporary legal impediment as a basis for suspending the prosecution

In order for this case to be one interrupting the criminal investigation, it is necessary to meet cumulatively the following conditions:

- The criminal investigation to be initiated about an act provided by the criminal law and to be ordered the continuation of the criminal investigation for the suspect;
- To be determined the incidence of a legal obstacle to the criminal proceedings ;
- The impediment to be temporary;
- The impediment to be provided by the law, in a certain normative act.

Such legal and temporary impediments may be those relating to the recognition of immunity from criminal jurisdiction of certain person during the performance of public functions, the performance of a mandate². The President of Romania may be in this situation when he commits a crime provided by the criminal law. According to art. 84 par. 2 of the Constitution of Romania, the President enjoys immunity. We are thus faced with a temporary legal impediment, namely the duration of the mandate, which prevents the need to initiate the criminal proceedings in a particular case.

The case of suspension is not an incident where, for acts committed by a person (even if the function determining the incidence of this condition is limited in time), a prior condition or prior authorization is required (even if the function which determines the incidence of this condition is limited in time) if the fulfillment of the condition is not possible or the granting of such authorization is refused. In this situation, we are in the hypothesis of the prevention provided by art. 16 par. 1 letter e from the Criminal Procedure Code, the finding of which required the issuance of an order for classifying the case. If, due to the eventual temporary nature of the function or mandate (which determined the necessity of the prior condition or authorization), it ceased, so that the condition is no longer necessary, the criminal investigation previously completed by the classification may be resumed, according to the provisions of art. 335 par. 2 of the Criminal Procedure Code³.

This may be the case if, after the commencement of the criminal investigation of a particular criminal offense, it is found that the person who is supposed to have committed has the capacity of a Minister and the deed is related to his/her duties.

Ministerial liability is considered, since the last century, one of the foundations of our constitutional system. We first encounter it in the Organic Regulation (1831), in the March Proclamation of the National

Party of Moldavia and Muntenia and in the United National Principal Constitution of 1859. The principle of ministerial liability is then proclaimed by the Constitution of 1866, as well as by the Constitution of 1923, which further states that the “*Ministerial liability Law determines the cases of liability and the punishment of ministers*”, and it is clear that this text has agreed with the provisions of the Ministerial liability Law of 1879 which encompassed the special criminal offenses ordered in the “*crimes*” and “*felonies*”, as well as the penalties applicable to their gravity⁴.

Art. 109 par. 2 of the Constitution of Romania regulates that only the Chamber of Deputies, the Senate and the President of Romania have the right to request the prosecution of the members of the Government for the acts committed in the exercise of their mandate. If the prosecution has been requested, the President of Romania may order the suspension from the mandate. The suing of a member of the Government brings him out of his mandate.

Thus, after the criminal investigation of a personal begun, the Prosecutor General of the Prosecutor’s General Office attached to the High Court of Cassation and Justice must refer the Chamber of Deputies, the Senate or the President of Romania in order to request the commencement of the criminal proceedings.

In the judicial practice, the problem of issuing these opinions was raised in a criminal case filed by the National Anticorruption Directorate, as follows: Chief Prosecutor of NAD, L.C.K. sent to the Prosecutor General the report for the notification of the President of Romania, of Senate, of the Chamber of Deputies and of the European Parliament, in order to obtain criminal prosecutions for nine former Ministers. The nine were accused in the file known as *Microsoft Licenses*. According to the research carried out, the NAD provides in a statement sent to the public opinion: it follows that “*out of the USD 54 million paid by the Romanian Government under the framework agreement and its extension, the USD 20 million represent the commissions claimed by the persons involved in the project the Government of Romania, the Ministers and the companies involved*”.

In relation to the quality at the time the notification was made, several institutions has been notified as follows:

1. Referral of the European Parliament to the request for criminal investigation against:
N.D., Minister of MCTI between 2000 – July 2004 and currently a member of the European Parliament, for offenses of abuse in office, taking a bribe, influence peddling and money laundering
2. Referral of the President of Romania to the request for criminal investigation against:

² N.Volonciu and others., *The new Criminal Procedure Code commented*, Hamangiu Publishing, 2014, p. 787;

³ N.Volonciu and others., *The new Criminal Procedure Code commented*, Hamangiu Publishing, 2014, p. 787;

⁴ <http://www.amosnews.ro/raspunderea-penala-membrilor-guvernului-2013-02-27>;

Ț.A., Minister of Communications and Information Technology during July-December 2004 for offenses of abuse in office, taking a bribe, influence peddling, money laundering

S.G., Minister of Communications and Information Society between December 2008 and September 2010 for committing offenses of abuse in office, taking a bribe, influence peddling and money laundering

F. P.D., Minister of Education and Research for between 2009-2012 for committing the offense of abuse of authority

A.A., Minister of Education and Research during 2003-2005 for committing offenses of abuse in office, taking a bribe, influence peddling and money laundering

T.M.N., Minister of Public Finance between 2000-2004 for offenses of abuse in office, taking a bribe, influence peddling and money laundering

3. Referral to the Romanian Senate for the request for criminal investigation against:

M.P.Ș., coordinator Minister of SGG between December 200 and October 2003 and presently Senator in the Romanian Parliament for committing offenses of instigation of abuse in office, influence peddling and money laundering

E.A., Minister of Education, Research and Innovation, from December 28, 2000 to June 19, 2009, the Minister of Education, Research and Innovation from December 22, 2008 to October 1, 2009 and currently Senator in the Romanian Parliament, for committing offenses of abuse in office, taking a bribe, influence peddling and money laundering

4. Referral to the Chamber of Deputies to the request for criminal investigation against:

V.V., Minister of Communications and Information Society, from September 2010 to February 2012 and present Deputy in the Romanian Parliament, for committing the offense of abuse in office.⁵

In another criminal case, the Directorate for the Investigation of Organized Crime and Terrorism has requested the commencement of criminal investigation against the Minister of Economy, V.V. and former Minister, A.V.

Thus, according to the press release published on the DIOCT website, the Chief Prosecutor of the DIOCT requested the Prosecutor General of the Prosecutor's General Office attached to the High Court of Cassation and Justice:

1. to notify the Romanian Senate for the request to start the criminal investigation against V.V. (former Minister of Economy an member of the Government during December 2006 – December 2008, Senator in the Romanian Parliament in the current parliamentary legislation, also serving as Minister in the Ministry of Economy) in terms of

the plot and the undermining of the national economy provided by art. 167 par. 1 of the Criminal Code and art. 165 par. 1 and par. 2 of the Criminal Code, with the application of art. 33 letter a from the Criminal Code, acts committed during the period when he was Minister of Economy.

2. to notify the President of Romania of the application for the commencement of the criminal investigation against V.A. (former Minister of Economy and member of the Government from December 2008 to September 2010) in terms of the plot and the undermining of the national economy provided by art. 167 par. 1 of the Criminal Code and art. 165 par. 1 and par. 2 of the Criminal Code, with the application of art. 33 letter c from the Criminal Code, acts committed during the period when he was the Minister of Economy⁶.

In the latter case, the members of the Senate gave a negative opinion to the request of the DIOCT, considering that there is no evidence to indicate the involvement of V.V. in allegedly criminal activity.

Regarding the procedure for the criminal investigation of members and former members of the Government who at the time of the notification had the function of deputy or senator, there was a constitutional legal conflict between the public prosecutor's office – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the one hand, and the Parliament – the Chamber of Deputies and the Senate.

Thus, by decision No. 270/2008, the Constitutional Court was pronounced⁷ and found the existence of a legal conflict of a constitutional nature between the public prosecutor's office – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the one hand, and the Parliament – the Chamber of Deputies and the Senate, on the other hand, in the case of requests concerning the criminal investigation of members and former members of the Government for acts committed in the exercise of their mandate and who, at the time of the referral, also have the capacity of deputy or senator.

In applying the provisions of art. 109 par. 2 the first sentence of the Constitution, the public prosecutor's office - the Prosecutor's Office attached to the High Court of Cassation and Justice shall notify the Chamber of Deputies or the Senate, as the case may be, to request the prosecution of members and former members of the Government for acts committed in the exercise of their office and who, at the time of the referral, also have the capacity of deputy or senator.

In applying the provisions of art. 109 par. (2) the first sentence of the Constitution, the public prosecutor's office - the Prosecutor's Office attached to the High Court of Cassation and Justice will notify the President of Romania to request the prosecution of the members of the Government and former members of

⁵ <http://cursdeguvernare.ro/dna-cere-aviz-pentru-urmarirea-penala-a-noua-fosti-ministri.html>;

⁶ <https://www.hotnews.ro/stiri-esential-15496191-procurorul-sef-diicot-solicita-incepeprea-urmaririi-penale-pentru-varujan-vosgianian-adreian-videanu.htm>

⁷ <https://www.ccr.ro>;

the Government who, at the time of the referral, deputy or senator.

We note in essence that in connection with the situation of the members of the Government who have committed criminal offenses in connection with the service duties, there is a temporary legal impediment to the commencement of criminal proceedings, namely, the commencement of the criminal investigation issued by the Chamber Deputies, the Senate or the President of Romania, depending on the quality at the time of the referral. This impediment is temporary because of the fact that it can be removed by the approval of the competent body after the procedure under Law No. 115/1999 on Ministerial liability has been completed.

To the extent that the Chamber of Deputies, the Senate or the President of Romania will reject the opinion, this circumstance will be converted into a legal impediment that determines the solution of the classification, art. 16 par. 1 letter. e of the Criminal Procedure Code, respectively the authorization or notification to the competent body. In my opinion, to the extent that the request was rejected because there was insufficient evidence and new facts, a new request can be made with respect to the same member of the Government.

Regarding the temporary legal impediment in the event that the President of Romania committed an act provided by the criminal law, we identified the following case in the practice of the judicial bodies:

On April 16, 2014, a Senator from the Romanian Parliament, named G.F. filed a criminal complaint in which she accused the head of state of that time, T.B., of threats and blackmail, of the statements he made about a show in which he said: *'It would be better to stay in her own corner, and to take care of what happens with her husband who is a mayor, because it is possible that she may not find him one day at home if ... she is not careful ... I understand that bad things happened to him'*⁸.

The prosecutors within the Prosecutor's Office attached to the High Court of Cassation and Justice have considered that the provisions of art. 206 of the Criminal Code, with the application of art. 35 par. 1 of the Criminal Code, respectively the perpetration of the threat of continuation (two material acts). Although the initial investigations were the object of the blackmail offense, the legal classification subsequently changed, the case being analyzed only from the point of view of committing the threat offense.

In relation to the quality held at that time by the named T.B., that of the President of Romania, the investigators considered that it is necessary to order the suspension of the criminal investigation due to the incidence of the legal impediment of the motion of the criminal action that we find regulated in art. 312 par. 2 of the Criminal Procedure Code.

Against this order, the plaintiff, through the chosen defender, filed a complaint with the hierarchically superior prosecutor, a complaint that was rejected and then addressed the preliminary judge of the High Court of Cassation and Justice. Although this judicial body had to reject this complaint as inadmissible, since the legislator does not regulate such a remedy, however, the Preliminary Chamber judge allowed the request to refer the Constitutional Court to the unconstitutionality of art. 312 par. 2 of the Criminal Procedure Code.

Thus, by Decision No. 678 from November 13, 2017⁹ the judges from the Constitutional Court rejected the exception invoked by the plaintiff G.F., stating that the provisions of art. 312 par. 2 of the Criminal Procedure Code are constitutional.

The immunity enjoyed by the President of Romania has been defined as a means of protection, designed to protect him from any possible pressures, abuses and blatant lawsuits directed against him in the exercise of his mandate, with the aim of guaranteeing freedom of expression and protection against abusive judicial prosecution¹⁰.

The Constitutional Court motivated its decision to reject, basically acknowledging that the President of Romania, in the exercise of his duties, enjoys immunity in two respects: the lack of liability for the political opinions expressed in the exercise of the mandate, and the inviolability (except of the case provided by article 96 of the Constitution, where the constituent legislator stipulated that the President may be prosecuted for the offense of high treason). By virtue of inviolability, we notice that the provisions of article 312 par. 2 of the Criminal Procedure Code in the case of criminal investigation against the President of Romania, the temporary legal impediment derives from the provisions of article 84 par. 2 of the Constitution regarding the immunity of the President of Romania.

We notice that it will be possible to order the criminal action to be launched against the President of Romania after the temporary legal impediment, namely his mandate, has ceased, and the criminal investigation may be resumed.

In early 2015, after President T.B. completed its second presidential mandate, prosecutors within the Prosecutor's Office attached to the High Court of Cassation and Justice, on the basis of the provisions of art. 333 of the Criminal Procedure Code were ordered to resume the criminal investigation following the cessation of the cause of the suspension, namely the legal impediment - the exercise of the position of the President of Romania.

By the indictment of 15.07.2016, issued in file No. 238 / P / 2014, of the Prosecutor's Office attached to the High Court of Cassation and Justice - the Criminal Investigation Section, verified by the Chief Prosecutor of the Section on 21.07. 2016 in terms of

⁸ www.antena3.ro;

⁹ To be seen <https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx>;

¹⁰ <https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx>;

legality and solidity, the prosecutor ordered that the defendant T.B. be sued in terms of committing the offense of threat in a continuous form (two material acts), a deed stipulated and sanctioned by art. 206 of the Criminal Code with the application of art. 35 par. 1 of the Criminal Code. Subsequently, the indictment was dismissed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and resumed the criminal investigation and the civil party chose to withdraw the previous complaint, so the solution that was ordered was that of the classification¹¹.

In the specialized doctrine¹², it is argued that this temporary legal impediment would be an incident where, after the commencement of criminal investigation of a criminal offense sanctioned *ex officio*, the legal classification of a criminal offense is punishable only upon a preliminary complaint, but this circumstance can not be immediately brought to the

attention of the plaintiff who is away from the country and therefore can not manifest his will for a certain period of time.

Conclusion

We agree with the regulation of this institution under the Criminal Procedure Code which allows the suspension of criminal investigation as long as the incident is a temporary legal impediment.

As John Milton said¹³, where there is a great thirst for learning, it is natural to have many contradictory discussions, many writings and opinions; because the opinion of the people of worth is knowledge, we hope that through this paper we have achieved the desideratum considered at the beginning of this work, and the opinions that are presented will be useful to those who want to deepen the subject of the research.

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¹¹ The opinion was also expressed in the Ph. D. thesis of the undersigned named Infirmation, revocation and legal termination of procedural acts in the light of criminal procedural regulations;

¹² Micu B., and others. Criminal procedure. Admission course in magistracy and law, 3rd edition, Hamangiu Publishing, 2017, p. 323;

¹³ English poet, https://ro.wikipedia.org/wiki/John_Milton