WAIVING THE CRIMINAL PROSECUTION ACCORDING TO THE DECISION OF THE CONSTITUTIONAL COURT NO. 23/2016

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Abstract

In the present paper we have examined the institution of waiving the criminal prosecution, as provided in the current law, a text which was modified after the publication of the Decision of the Constitutional Court no. 23/2016. We also considered the formulation of critical opinions regarding the possible existence of other elements of unconstitutionality in the text in force. A very important aspect is the notification of the absence in the text, of some provisions that condition the application of the institution on the need to repair the prejudice caused to the victim. The paper can be useful to students and master students of the country's faculties, as well as practitioners in the field. Also, the work can be useful to the legislator for operating some changes in the current content of the text that regulates this institution.

Keywords: *crime; critical opinions; de lege ferenda proposals; criteria.*

JEL Classification: K14

1. Introduction

Introduced in Romanian law with the entry into force of the new Criminal Procedure Code, the institution of waiving the criminal prosecution is, in its essence, a concrete way of applying the principle of criminal prosecution.

If we refer to the laws of some European states, we find that this institution is provided and works for a long time in the laws of states such as: Germany, Italy, France, Spain, Serbia, Slovenia and Bulgaria.

The reason for introducing this new institution in the Romanian law is presented even in the *Explanatory Memorandum of the Criminal Procedure Code*, where it is argued the necessity of avoiding criminal proceedings in minor cases in which there is no public interest.

On the other hand, this institution leads to the speedy execution of criminal cases in which this solution of criminal non-prosecution is established.

After the entry into force of the new Criminal Procedure Code, the institution was substantially modified once the G.E.O. no. 18/2016[2], modification imposed practically by the Decision of the Constitutional Court no. 23/2016 regarding the exception of unconstitutionality of the provisions of art. 318 of the Code of Criminal Procedure.[3]

In the present study we will insist on the examination of this new institution from the point of view of the initial regulations and of the subsequent ones, based on the existence of provisions found to be unconstitutional or criticized on the ground of their unconstitutionality.

Also, we will insist on presenting the steps that are being carried out in the procedure of waiving the criminal prosecution (in accordance with the provisions of the law in force), as well as formulating critical opinions regarding other provisions of the text that appear to be unconstitutional.

2. Some general considerations regarding the unconstitutionality of the text. The considerations held by the Court

After the entry into force, against the background of critical opinions in the judicial practice, promoted especially by defense and less accusation, the text of art. 318 which regulated this institution was declared unconstitutional (in its initial formulation) by Decision no. 23/2016 regarding the exception of unconstitutionality of the provisions of art. 318 of the Code of Criminal Procedure.

As it is of major importance for the science of law in general, we will continue to present some of the views expressed by the Court in its considerations, which it has repeatedly stated, that are part of *the Court's*

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[2] Government Emergency Ordinance no. 18/2016 for amending and supplementing Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Code of criminal procedure, as well as for the completion of art. 31 paragraph (1) of Law no. 304/2004 regarding the judicial organization, published in the Official Monitor of Romania, Part I, no. 389 of May 23, 2016.

[3] Published in the Official Monitor of Romania, Part I, no. 240 of March 31, 2016.

jurisprudence[4].

The court held that "by regulating the institution of waiving the criminal prosecution in the manner provided in art. 318 of the Criminal Procedure Code, the legislator did not achieve an adequate balance between applying the principle of legality, specific to the system of continental law, existing in Romania, and applying the principle of opportunity, specific to the Anglo-Saxon system of law, giving the latter a prevalence, to the detriment to the former, by regulating among the prosecutor's duties certain acts specific to the judiciary act. Thus, according to the provisions of art. 318 of the Code of Criminal Procedure, the prosecutor has the possibility of waiving the criminal prosecution and, consequently, of substituting the court, in carrying out the act of justice, in the case of a number of about three quarters of the total offenses provided in the Criminal Code and in the special laws in force"[5].

The court "finds that the agreement for the recognition of guilt, regulated in art. 478-488 of the Code of Criminal Procedure, which, as in the waiving of criminal prosecution, is also a form of negotiated justice, based on the principle of opportunity, can be concluded also regarding to the offenses for which the law provides for the penalty of fine or imprisonment for not more than 7 years, according to art. 480 paragraph (1) of the Code of Criminal Procedure, but, unlike the waiving the criminal prosecution, this one, on the one hand, is subject to the control of the court to which it has the competence to judge the case in substance, and, on the other hand, it always implies the application of a penalty, even if its execution is individualized, according to the provisions of art. 80-106 of the Criminal Code"[6].

Considering the above, the Court "finds that the waiving of the criminal prosecution by the prosecutor, without being subject to the control and approval of the court, is equivalent to the exercise by him of attributions that fall within the scope of the jurisdiction of the regulated courts of art. 126 para. (1) of the Constitution, according to which the justice is carried out through the High Court of Cassation and Justice and through the other courts established by law. For this reason, the Court finds that the prosecutor's waiving the criminal prosecution, under the conditions regulated in art. 318 para. (1) of the Code of Criminal Procedure, contravenes the constitutional norm previously stated"[7].

In the separate opinion it is noted that "waiving the criminal prosecution was introduced by the legislator in the architecture of the Romanian procedural law, as an element of novelty regarding the solutions of criminal non-prosecution that can be ordered by the prosecutor, in order to relieve the courts from the task of solving some criminal cases related to facts provided by the criminal law that do not present a high social danger. It is a consequence of the implementation in the criminal procedural law of the principle of opportunity, which is specific to the Anglo-Saxon law system and has been taken over in the system of continental law from the jurisprudence of the European Court of Human Rights, for reasons of efficiency of the activity of the judicial bodies. (...) Therefore, the solution of waiving the criminal prosecution cannot be decided prior to the administration of evidence from which it can reasonably result both the defendant's conduct of the facts held by the criminal prosecution bodies in his charge, and the simultaneous fulfillment by defendant of the conditions provided in art. 318, para. (1) and (2) of the Code of Criminal Procedure, which denotes the lack of public interest in continuing the criminal prosecution…"[8].

At the same time, the authors of the separate opinion argue that the solution provided in the provisions of art. 318 of the Criminal Procedure Code "can be found in the laws of other European states, as well as in other legal systems."

Thus, in the United States, the US Attorney's Manual provides that, in order to waive prosecution for lack of substantial federal interest, the prosecutor considers all relevant considerations, including: priorities for law enforcement, the nature and seriousness of the crime , the deterrent effect of the trial, the degree of guilt of the person against the fact, the criminal record of the person, the person's willingness to cooperate in investigating or prosecuting others, the probable conviction or other consequences of the conviction. According to the same manual, the enumeration mentioned above is not limiting and it is not acceptable for all these factors to be met, but only that, as a whole, it results the lack of a substantial federal interest.

In Canada, when deciding to initiate and conduct criminal prosecution on behalf of the Crown, it must consider two criteria: whether there is a reasonable likelihood of conviction based on evidence that could be administered in the case, and, if the answer to this question is affirmative, if an indictment would

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[4] See Cătălin-Silviu Săraru, *Legea contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curții Constituționale*, C.H. Beck Publishing House, Bucharest, 2015, p. 5, 6.

[5] Decision of the Constitutional Court no 23/2016, para. 30.

[6] Ibid., para. 32.

[7] Ibid., para. 33.

[8] Constitutional Court - Decision no. 23/2016 regarding the admission of the exception of unconstitutionality of the provisions of art. 318 Code of Criminal procedure, separate opinion, para. 1.

best serve the public interest. If the answer to both questions is yes, then the prosecution decision test is completed. If not, but the accusation has already been formulated, it will be withdrawn or will remain in the initial procedural stage.

In the United Kingdom of Great Britain and Northern Ireland, the Code for Crown Prosecutors provides, in the chapter entitled "Decision on prosecution", that prosecutors, police or other investigating agencies decide whether or not to prosecute a perpetrator; the decision is taken on the basis of two criteria: the possibility of administering the evidence leading to a possible conviction and the public interest.

In France, the Criminal Procedure Code applies the principle of opportunity, by regulating two institutions belonging to the negotiated sphere, namely the criminal composition and the transaction. Thus, the Criminal Procedure Code provides for the criminal composition, as an intermediary institution, between the acknowledgment of guilt and the renunciation of criminal prosecution. The main condition for the application of this institution is the recognition of the fact, the procedure taking place before the criminal action is started. In this situation, the prosecutor applies a fine and can order a very wide range of security measures, such as handing over the goods that the perpetrator used to commit the crime, temporarily renouncing the driving or hunting license, following a rehabilitation program for people addicted to alcohol or drugs, etc. At the same time, the French Criminal Procedure Code regulates the transaction, the application of which can be made depending on the seriousness of the crime, the personality and the material situation of the accused, his resources and the charges brought to him. Thus, although the text does not mention the notion of "public interest", it refers to the elements that define the public interest, in terms even more succinct than those contained in art. 318 para. (1) of the Romanian Criminal Procedure Code, such as "the circumstances and seriousness of the crime".

In Belgium, the Judicial Code provides that the King's prosecutor shall judge the suitability of criminal prosecution.

In Finland, the Law on Criminal Procedure regulates the cases in which the prosecutor may decide not to file for judgment, and, in addition, two other such cases, applicable "unless the public or private interests demand it".

In the Federal Republic of Germany, the Criminal Procedure Code regulates the non-prosecution of minor offenses, an institution according to which the prosecutor's office may waive the prosecution, with the approval of the competent court to judge the main procedure, if the perpetrator's guilt is considered minor and there is no public interest in prosecuting it. At the same time, the Code of Criminal Procedure regulates waiving the action in court and the termination of the procedure, referring to the same criterion of the public interest in the prosecution. Similarly, by reference to the same criterion, the renunciation of action for political reasons is regulated in the same Criminal Procedure Code.

In Sweden, the Criminal Procedure Code provides that a preliminary investigation may be interrupted, inter alia, if the continuation of the investigation results in costs that are not reasonably proportionate to the importance of the matter and the seriousness of the crime.

In the Netherlands, the Code of Criminal Procedure provides for the renunciation of criminal prosecution, stating that "a decision not to prosecute can be taken on grounds of public interest".

Finally, the Austrian Code of Criminal Procedure provides for the non-prosecution of cases of minor importance, showing that if the prosecutor has already initiated the criminal prosecution, it can waive it, if the following conditions are cumulatively met: the harm produced by the crime is considered to be small, aspect which is determined according to the degree of guilt, the consequences of the crime, the behavior of the accused after the crime was committed, in particular his efforts to recover the damage caused or other circumstances that are usually taken into account, usually in the individualization of the sentence; a punishment or sanction of the same legal nature appears to be inappropriate in order to prevent the accused from committing other crimes or interacting with other persons in order to commit the crime"[9].

Although the separate opinion presents certain elements that try to accredit the idea that in its initial draft the criticized text is constitutional, in particular by reference to the legislation of other states in this matter, we do not agree with this point of view, primarily because, in its initial drafting, the prosecutor exercises jurisdiction that falls within the exclusive competence of the court.

In this context, as we have shown before, the legislator intervened and modified all the text of art. 318 Code of Criminal Procedure by art. II point 82 of the G.E.O. no. 18/2016.

[9] Ibid., separate opinion, para. 1.

3. Other provisions of art. 318 Code of Criminal Procedure which can be regarded as unconstitutional

The almost complete modification of the text from art. 318 Code of Criminal Procedure, a change that occurred as a result of the intervention of the Constitutional Court, should have led to the adoption of a text that would no longer raise problems of unconstitutionality.

A concrete analysis of certain provisions of this text has led us to consider that the formula adopted by G.E.O. no. 18/2016 is incomplete, including some provisions that appear to be unconstitutional[10].

We refer here to the provisions of para. (16) thesis II, which prohibits the prosecutor from ordering a new waiver of criminal prosecution, provided that a waiver solution has already been ordered, which was rejected by the preliminary chamber judge.

Therefore, in case of rejection of the request for confirmation of the order of waiving the criminal prosecution, the preliminary chamber judge has two options, respectively:

- abolish the solution of waving the prosecution and classify the case, or
- abolish the solution of waiving the criminal prosecution and sends the case to the prosecutor to start or complete the criminal prosecution or, as the case may be, to start the criminal action and complete the criminal prosecution.

In the second case, the prosecutor must comply with the court's order, after which he must have an appropriate solution.

Under absolutely normal conditions, in relation to the evidence administered after the execution of the court's provisions, the prosecutor could have one of the following solutions: sending the case to trial, waiving the criminal prosecution or classifying the case.

However, the provisions criticized for unconstitutionality only allow the prosecutor to adopt two solutions, respectively, the classification or sending to trial.

But what happens when the prosecutor finds that in the respective case, from the interpretation of the administered evidence, it is not necessary to classify or send to trial, but waiving the criminal prosecution?

Can the prosecutor second order this solution with which to appear before the preliminary chamber judge asking for confirmation?

The criticized provisions do not allow the adoption of such a solution by the prosecutor.

Precisely for this reason the text seems to be unconstitutional, as it requires the prosecutor to adopt a solution for which he has no evidence.

In the recent judicial practice, in such situations, prosecutors most often choose to sue the defendant, although the solution seems to be illegal.

De *lege ferenda*, we propose for the legislator to waive the provisions of the second thesis of the contents of par. (16) in art. 318 Code of Criminal Procedure by repealing them.

Such a decision would allow the prosecutor to have the same solution for the second time in the criminal prosecution when it is required.

4. Conditions to be met cumulatively

In order to be able to dispose of the criminal prosecution, the prosecutor must find that the following conditions are cumulatively met in the respective case:

1. The offense must provide a fine or imprisonment for a maximum of 7 years.
2. To note that there is no public interest in the pursuit of the case.

As regards the public interest, its existence or non-existence will be examined in relation to:

a) the content of the deed and the concrete circumstances of its commission;

b) the method and means of committing;

c) the purpose pursued;

d) the consequences produced or that could have occurred by committing the crime;

e) the efforts of the criminal prosecution bodies necessary to carry out the criminal trial by reference to the seriousness of the deed and the time elapsed from the date of its commission;

f) the procedural attitude of the injured person;

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[10] See also I. Rusu, *Elemente de neconstituționalitate cu privire la art. 318 din Codul de procedură penală [Elements of unconstitutionality regarding art. 318 of the Code of Criminal Procedure]*, „Dreptul" no. 8/2019, pp.159-172; Ion Rusu, *Renunciation of Criminal Prosecution. Non-Constitutionality of the Provisions of article 318, par. (16) Thesis II of the Code of Criminal Procedure*, „Acta Universitatis Danubius. Juridica", vol. 15, no. 2/2019.

g) the existence of a clear disproportion between the expenses that would involve the conduct of the criminal trial and the gravity of the consequences produced or that could have been produced by committing the crime[11].

According to the provisions of the law, if the perpetrator is known, when assessing the public interest there will be taken into consideration the suspect or the accused, the conduct prior to the crime, the attitude of the suspect or the defendant after committing the crime and the efforts made to commit the crime or diminution will be taken into account[12].

When the perpetrator of the act is not known, only the criteria set out above will be taken into account. a), b), e) and g)[13].

The solution of waiving criminal prosecution cannot be disposed of for the offenses that resulted in the death of the victim[14].

In accordance with the provisions of the law, the prosecutor, after consulting the suspect or the accused, may order the latter to fulfill one or more of the following obligations:

a) to remove 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) public apologies to the injured person;

c) to perform work for the benefit of the community, for a period between 30 and 60 days, unless, because of the health status, the person cannot perform this work;

d) to attend a counseling program[15].

Researching these criteria allows us to formulate critical opinions, as follows:

1. Although the legislator provides that the public interest is analyzed in relation to a series of criteria explicitly mentioned in the text, however, although the text does not provide, we consider that it is not necessary for them to be cumulatively fulfilled.

At the same time, the legislator does not provide which of these criteria can play a decisive role in the activity of analyzing the existence or non-existence of a public interest.

We believe the legislator has exaggerated by mentioning too many criteria that the prosecutor must examine.

2. Another critical opinion concerns the legislator's attitude to leave on a "second" place the interests of the injured person. The mere mention of a criterion that concerns the "procedural attitude of the injured person" we believe is not sufficient.

We consider basically that one of the criteria for assessing the existence or non-existence of the public interest must be the repair of the damage caused by the crime or possibly the agreement with the civil party on a way to repair it.

In this regard, we consider that the obligation that may be imposed by the defendant's prosecutor should be mentioned as a criterion for appreciation of the public interest.

We believe that the public interest must also be appreciated from the perspective of satisfying the interest of the victim in question, not only from the perspective of the community's interest.

5. Conclusions

Viewed from the perspective of the new legislative changes made in the Romanian criminal law, the introduction of this new institution seems to be a useful one, meant to lead to the dismissal of the courts and prosecutor's offices for some reasons for which a criminal law sanction is not required.

The solution chosen by the Romanian legislator is all the more useful as the internal judicial jurisprudence required the adoption of such an institution.

On the other hand, we must bear in mind that the institution itself is not an invention of the Romanian legislator, which has long been provided for in the laws of other states in Europe.

However, as it turned out and from our examination, the text has undergone many changes compared to its initial drafting, changes imposed by the Constitutional Court's decision to which we referred.

However, we consider that the text in question needs to undergo further modifications and additions, as mentioned above, all in the idea of being a flexible, predictable text that will allow the institution to be

[11] Art. 318 para. (2) Code of Criminal Procedure.
[12] Art. 318 para. (3) Code of Criminal Procedure.
[13] Art. 318 para. (4) Code of Criminal Procedure.
[14] Art. 318 para. (5) Code of Criminal Procedure.
[15] Art. 318 para. (6) Code of Criminal Procedure.

applied in optimal conditions of the institution within the Romanian Criminal process.

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