

THE ROLE OF THE PROSECUTOR IN THE CRIMINAL PROCEDURE CODE

Ruxandra MITICĂ*

Abstract

In order to increase the confidence of litigants in the judiciary, a clear enshrinement of the rights of the citizen throughout the criminal proceeding stages and a greater guarantee and promotion of these rights are imperative. Thus, the provisions of the new Criminal Procedure Code bring to our attention changes with impact on the prosecutor's role in promoting and guaranteeing human rights. The general objective of this article is to analyse the role of the prosecutor in criminal proceedings as a result of the latest changes made by the entry into force of the new Criminal Procedure Code.

Keywords: *Public Ministry, citizen's rights, criminal proceeding, Criminal Procedure Code, prosecutor.*

It is of great importance to mention that the current provisions highlight the clear enshrinement of the guarantee of new rights of the citizen: the right of the citizen not to be tried twice for the same crime ("Ne bis in idem"), the right of the citizen to benefit from the righteous character and reasonable time limit of the criminal procedure, the right of the citizen to freedom and safety, the right to have truthfulness in obtaining evidence respected, the right of the citizen to have the principle of the separation of judicial functions respected.

The right of the citizen not to be tried twice for the same crime ("Ne bis in idem"). According to this right, no person can be prosecuted or tried for the commission of a crime when the respective person has been previously issued a definitive sentence for the same crime, even under a different legal classification of offences.¹ The right not to be prosecuted and tried twice is enshrined in Article 4 of the Protocol no. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The purpose of this provision is to prohibit the resuming of criminal prosecutions finalized as definitive in order to avoid that a person is prosecuted or punished twice for the same behaviour.²

The right of the citizen to benefit from the righteous character and reasonable time limit of criminal proceedings. The judicial authorities have the obligation to carry out the prosecution and the judgement by respecting the judicial guarantees and the rights of judicial parties and subjects, so that deeds that constitute crimes are

* PhD Candidate at National School of Political and Administrative Studies (Romania) and researcher at the Romanian Institute for Human Rights (IRDO).

¹ Convention for the Protection of Human Rights, art. 6.

² Protocol no. 7 to the Convention for the Protection of Human Rights, Strasbourg, 1984, 9.10.2013, art. 4, http://www.echr.coe.int/Documents/Convention_ROM.pdf.

ascertained in a timely and complete manner, no innocent person is held criminally liable and any person that committed a crime is punished in accordance with the law.³

The right of the citizen to freedom and safety. During the criminal proceedings, the right of the citizen to freedom and safety is guaranteed. Any measure that is privative or restrictive of freedom is decided exceptionally and only in cases and conditions stipulated by law. Any arrested person has the right to be informed in the shortest time possible and in a language he/she understands of the reasons of his/her arrest and has the right to file an appeal for annulment of the measure. When it is ascertained that a measure of deprivation of freedom has been decided unlawfully, the competent judicial authorities have the obligation to dismiss the measure, and, as applicable, to release the arrested. Any person that has been issued an unlawful measure of deprivation of freedom, during the criminal proceedings, has the right to have their loss remedied, according to the conditions provided by the law.⁴

The right of the citizen to have trueness in obtaining evidence respected. The new Code of Criminal Procedure introduces a novel principle, that of trueness in managing evidence, according to which the following is prohibited: violence, threats or other means of constraint, as well as surveillance techniques that affect the capacity of the person to remember and recount consciously and voluntarily the acts that represent the object of the evidence. Furthermore, the Code prohibits the legal authorities or other persons that act in their name to determine a person to commit or to continue committing a crime with the aim of obtaining evidence.⁵ Non-compliance with the principle of trueness in evidence management will result in the exclusion of the evidence obtained through torture, the evidence derived from this and evidence obtained unlawfully.⁶

The right of the citizen to have the principle of the separation of judicial functions respected. Therefore, in accordance with this principle it is clearly enshrined that there are four judicial functions within the criminal proceedings: the function of prosecution – through the organs responsible with criminal investigation and the prosecutor; the function of availability of fundamental rights and freedoms for the person in the phase of criminal prosecution – through the judge responsible for ensuring the rights and fundamental freedom; the function of verifying the legality of taking legal action or not taking legal action against someone – through the preliminary chamber; the function of judgment – through the judicial courts.

The role of the prosecutor in the criminal proceedings. In the criminal proceedings, the prosecutor has a particularly important role in the preliminary phase of notifying the court. When there is evidence that indicates the commitment of a crime and there is no legal cause of obstruction, the prosecutor has the obligation to initiate and exercise criminal legal action *ex officio*. Furthermore, in the cases and conditions expressly provided by law, the prosecutor can drop the legal action if, in relation with the concrete elements of the cause, there is no public interest to proceed

³ Law no. 135/2010, The criminal procedure law, Official Gazette no. 486/15.07.2010, art. 8.

⁴ *Ibidem*, art. 9, par. 1-5.

⁵ *Ibidem*, art. 101, par. 1-5.

⁶ *Ibidem*, art. 102.

with its object. In the cases expressly provided by law, the prosecutor initiates and exercises criminal legal action after the registration of the preliminary complaint of the aggrieved party or after obtaining authorization or notification of the competent authority or after the fulfillment of another condition provided by law.⁷ Furthermore, according to the Code of Criminal Procedure, the prosecutor can exercise the civil action within the criminal proceedings, when the aggrieved person lacks legal competence or has limited legal competence.⁸

The current Code of Criminal Procedure introduces two new institutions⁹ with impact also on the competence of the prosecutor: the judge responsible for ensuring rights and freedoms and the institution of the preliminary chamber judge.¹⁰

Their regulation can be found in the first articles of the Code of Criminal Procedure. Concurrently, the Code of Criminal Procedure brings to our attention the competence of the two new institutions, as follows: the judge responsible for ensuring rights and freedoms – the judge who, during prosecution, solves petitions, proposals, complaints, appeals or any other notifications regarding: precautionary measures, ensuring measures, safety measures with provisional character, prosecutors' actions, in cases expressly provided by law, approving of searches, the use of special surveillance methods and techniques or other evidentiary methods according to the law, the procedure of preliminary hearing and also other situations expressly provided by law;¹¹ the preliminary chamber judge – the judge that verifies the legality of the legal action initiated by the prosecutor, verifies the legality of evidence management and of execution of criminal investigation documents by the prosecution organs, solves complaints against decisions not to take legal action and also solves other situations expressly provided by law.¹²

During the criminal proceedings, the prosecutor has the following competence: monitors or carries out the prosecution; notifies the judge and the court on rights and freedoms; carries out the criminal proceedings; carries out the civil action, in cases provided by law; executes the agreement of guilt acknowledgment, according to the law; files and executes the appeals and means of action provided by law against the court decisions; fulfills other competences provided by law.¹³

Furthermore, the Code of Criminal Procedure with its current modifications highlights the competence of the prosecutor, who:

- directly leads and controls the activity of prosecution of the judicial police and special authorities responsible for criminal investigation;
- monitors that the activities of prosecution are carried out by respecting the legal provisions;

⁷ *Ibidem*, art. 7, par. 1-3.

⁸ *Ibidem*, art. 19, alin. 3.

⁹ Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, published at 22 January 2014, 24.02.2014, http://ec.europa.eu/cvm/docs/com_2014_37_en.pdf.

¹⁰ Law no. 135/2010, The criminal procedure law, Official Gazette no. 486/15.07.2010, art. 3, par. 1.

¹¹ *Ibidem*, art. 53, letters a-g.

¹² *Ibidem*, art. 54, letters a-d.

¹³ *Ibidem*, art. 55, alin. 3.

- carries out any activity of prosecution in the causes he/she leads and monitors; Prosecution must be carried out by the prosecutor:
- in the case of crimes for which the jurisdiction in the first phase is that of the High Court of Cassation and Justice or the Court of Appeal; -
- in the case of crimes against life (murder, first-degree murder, murder at the request of the victim, determining or facilitating suicide), crimes against justice (abuse of justice) and crimes of corruption (taking bribe, giving bribe, trading in influence, buying influence, crimes committed by or in relation to members of courts of justice, crimes committed by or in relation to foreign clerks) stipulated in the Criminal Code;¹⁴
- in the case of crimes committed with oblique intent, that resulted in the death of a person;
- in the case of crimes under the jurisdiction of the Directorate for Investigating Organized Crime and Terrorism or the National Anticorruption Directorate.

It seems that in regards to the competence of the prosecutor, the new Code of Criminal Procedure limits the range of crimes for which the prosecutor was obliged to initiate own prosecution. The former Code of Criminal Procedure stipulated the competence of the prosecutor to carry out the prosecution for: crimes against national security, crimes against people, crimes against the freedom of the person, crimes against national assets, crimes against authority, crimes within or in relation to the workplace, crimes against the safety of railway circulation, crimes regarding the regime established for certain economic activities, crimes against peace and humanity.¹⁵ Thus, the current Code of Criminal Procedure stipulates only a few of these crimes, for which the prosecutor is obliged to carry out the prosecution on his own.

Conclusions

The provisions of the new Code of Criminal Procedure highlight changes with impact on the role of the prosecutor in promoting and guaranteeing human rights. Concurrently, it seems that with regards to the competence of the prosecutor, the new Code of Criminal Procedure limits the range of crimes for which the prosecutor was formerly obliged to initiate the prosecution. The institution of the prosecutor remains the guarantor of the rights and fundamental freedoms of the citizen.

¹⁴ Law no. 286/17.07.2009 regarding the Criminal law, Official Gazette no. 510/24.07. 2009, art. 188-191, art. 279, art. 289-294.

¹⁵ Criminal Procedure Code 1968, published in the Official Gazette no. 145-146/12.11.1968, republished in Official Gazette no. 58-59/26.04. 1973, version modified at 16/07/2012, art. 209.