

A RIGHT OF THE DEFENDANT: REQUESTING THE RE-ADMINISTRATION OF EVIDENCE DURING THE CRIMINAL PROSECUTION

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Abstract: *Although the adversarial principle is specific to the phase of preliminary chamber and the trial phase, there are situations in which this general principle of law is also applicable to the criminal prosecution phase. This paper proposes to capture the applicability of art. 100 CPA, by reporting the possibility of the suspect or the defendant to propose the administration of evidence during the criminal prosecution phase. We will dissect the issue of the administration of evidence at the request of the suspect or the accused in the criminal prosecution phase, taking into account the provisions of the criminal procedure code, but also the European provisions applicable to the topic tackled here.*

Key words: *evidence, criminal prosecution, defendant, protection*

1. Introduction

The criminal process is guided by a series of fundamental principles according to which the judicial activity is carried out, regulated by the provisions of art. 2- 12 Criminal Procedure Code, respectively: the principle of the legality of the criminal process, the principle of the separation of judicial functions, the presumption of innocence. The principle of finding the truth, *ne bis in idem*, the principle of the officiality of the criminal process, the fairness and reasonable term of the criminal process, the guarantee of the right to freedom and safety, the guarantee of the right to defense, the respect for human dignity and private life, the conduct of the criminal process in the Romanian language and the right to free assistance from an interpreter.

In addition to these, there are principles specific to the criminal prosecution phase, respectively, only to the trial phase. The follow-up phase is non-public, non-adversarial and predominantly written. Considering the consecration of the non-adversarial aspect to the degree of principle that governs the criminal prosecution phase, we would be tempted to believe that this is not specific to the procedural stage, of adversariality.

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This principle of law should not be viewed in a singular way, because adversariality is closely related to several principles that characterise the criminal process as a whole, which today we consider among the special right to defense and a fair trial.

2. The Jurisprudence of the ECHR

Thus, in the jurisprudence of the ECHR (*Regner v. Czech Republic* Case), the right to a fair trial presupposes the right to an adversarial procedure in court, being closely linked to the principle of equality of arms in the adversarial procedure. But is this right limited only to the court stage, or is it also incident in the criminal prosecution phase? Although in the practice of the ECHR the existence of a global procedure is appreciated globally, considering the criminal process as a whole (ECHR, *Taxquet v. Belgium*, § 84), there are situations in which adversariality is also applicable in the criminal prosecution phase, especially when evidence is administered by the criminal prosecution bodies. Adversariality in the criminal prosecution phase is exercised by means of two procedural instruments, on the one hand, the proposal of evidence by the defense with the correlative obligation of the criminal prosecution body to admit or reject them and to effectively administer them, if that be the case, and on the other hand, the recognised possibility of the defender of the parties and the main procedural subjects to assist in carrying out any act of criminal prosecution and to address questions in the case of hearings of persons. According to art. 100 Criminal Procedure Code: *“During the criminal prosecution phase, the criminal prosecution body collects and administers evidence both in favour and against the suspect or defendant, ex officio or upon request”*, which essentially presupposes the prerogative of each party or main procedural subject to participate and propose the administration of evidence and present their own defenses. The conditions for the participation of the lawyer of the parties in the criminal trial or the other procedural subjects in the administration of evidence in the criminal prosecution phase are regulated by art. 92 and art 93 Criminal Procedure Code.

However, in judicial practice, situations have been reported in which, in the name of ensuring a superior protection of the rights of crime victims, the requests made by suspects or defendants through their defense attorneys, for the re-administration of some evidence (hearings in person), administered before their acquisition of the procedural capacity in question, to be able to assist, under the conditions of art. 92 Criminal Procedure Code, in their performance and to ask possible questions to those who, for instance, have filed a criminal complaint in the case, were rejected. Specifically, in the course of a criminal case, the criminal prosecution bodies proceed to hearing the injured persons or the witnesses, prior to informing the suspect or defendant of the accusation, and upon the request for re-hearing of the same persons made by the defense, the criminal prosecution bodies invoke the provisions of art. 18 and 20 of Directive EU no. 29/2012, in order to limit the right of the suspect or the defendant to propose the administration of evidence, reasoning that these hearings would be unjustified and that in this way the secondary and repeated victimization of the injured persons would be avoided.

Art. 18 of Directive no. 29/2012 provides that *“member states guarantee the adoption of measures to protect the safety of victims and their family members against secondary*

and repeated victimization and intimidation and revenge, including against the risk of emotional or psychological harm, and to protect the dignity of victims during hearings and at the time of testimony,”. And art. 20 states that “Without prejudice to the right to defense and in accordance with the rules on the margin of appreciation of the courts, the member states ensure that during criminal prosecutions: (a) hearings of the victims are carried out without undue delay, as soon as the competent authority registered a complaint regarding the commission of a crime; (b) the number of hearings of the victims is reduced as much as possible, and the hearings take place only when they are strictly necessary for the conduct of the criminal prosecution; (...)”

By invoking the provisions of Directive no. 29/2012, the criminal prosecution bodies have the possibility to avoid the hearings considered unjustified and repeated of the injured person, which would be likely to create a situation of victimization for them, which would lead to unfavorable consequences on a psychological and emotional level. In this sense, the criminal prosecution bodies rely on the idea that the criminal prosecution phase is a non-contradictory phase, and the right established by art. 92 Criminal Procedure Code can be considered to have respected the possibility that the lawyer has, according to art. 94 Criminal Procedure Code, to consult the file throughout the criminal prosecution, but also through the possibility of the defendant to confront the injured person or the witnesses of the accusation at a time after the hearing in the criminal prosecution phase, which corresponds to the moment of re-administration of the evidence in the trial phase of the case.

Considering the above, we cannot agree with this reasoning for the following reasons, which we will explain below. Regarding the right of the lawyer to acknowledge the statements of the injured persons or of the witnesses through the possibility of consulting the criminal prosecution file, as provided for by art. 94 Criminal Procedure Code, this does not equate to the lawyer's right to effectively participate in the execution of the criminal prosecution documents, as provided for by art. 92 Criminal Procedure Code, because the lawyer's participation in the execution of the criminal prosecution documents implies the exercise of an active role, in the sense of guaranteeing the suspect's or defendant's right to defense, by asking questions to injured persons or witnesses, thus generating for his client a position of procedural equality with the accusation.

According to art. 92 para. (1) Criminal Procedure Code, the lawyer of the suspect or the accused has the right to assist in the performance of any act of criminal prosecution, except for the cases expressly provided by law (it is about the fact that the lawyer does not have the right to assist in the execution of the criminal investigation documents when special surveillance or research methods are used, provided in chapter. IV of title IV, or in the situation where body or vehicle searches are carried out in the case of flagrant crimes). From the interpretation of the provisions of art. 92 Criminal Procedure Code, results the fact that the lawyer has the right to participate in the execution of the criminal prosecution documents, but this right can be exercised only after the accused acquires the status of suspect or defendant. In certain situations where the criminal prosecution bodies have proceeded to the administration of certain evidence, such as the hearing of persons (injured persons or witnesses) prior to the acquisition by the

suspect or accused of this capacity, practically the right provided by art. 92 is non-existent, but this procedural “flaw” can be remedied by re-administering the evidence at the request of the suspect or the defendant. Art. 92 Criminal Procedure Code does not represent anything other than the guarantee of the right to defense as well as the guarantee of compliance with the procedural rights established by art. 100 Criminal Procedure Code through the lawyer's participation in the execution of the criminal prosecution documents. The lawyer's participation should not be seen only as a simple presence, but the lawyer's active role in the criminal prosecution phase must be recognized and respected, in the sense that he or she has the right to ask questions to the persons interviewed, because only in this way can the suspect's or the accused's right to defense be effectively exercised. Moreover, in art. 10 para. (2) it is stipulated that the lawyer has the right to benefit from the necessary time and facilities in order to prepare the defense. In this sense, we can observe that one of the “necessary facilities for the preparation of the defense” is precisely the possibility that the lawyer be present at the time of the hearing of the persons in the criminal prosecution phase to formulate questions to the respective persons.

In this sense, although the provisions of the criminal procedure code do not expressly provide that in the criminal prosecution phase the lawyer exercises an active role, from the interpretation of the provisions of art. 110 Criminal Procedure Code as well as from the interpretation of the phrase “the person who formulated them”. Moreover, the contrary interpretation consisting in restricting the right of the lawyer of the suspect or the defendant to ask questions during the criminal prosecution phase, would constitute a violation of the principle of equality of arms in the criminal process as well as an impermissible addition to the law considering the principle *ubi lex non distinguit, nec nos distinguere debemus*. Thus, the provisions of art. 110 Criminal Procedure Code can only know one interpretation, regardless of the procedural moment in which the respective evidence is administered, and the lawyer thus has the right to ask questions to the persons interviewed in the criminal prosecution phase, just as in the trial phase, thus exercising an active role and the criminal prosecution phase, because only thus can the respect for the right to defense be guaranteed. Moreover, the provisions of art. 374 para. (7) Criminal Procedure Code, which provides that “*Evidence administered during the criminal prosecution and not contested by the parties or by the injured person shall not be re-administered during the judicial investigation. They are put in the adversarial debate of the parties, the injured person and the prosecutor and are taken into account by the court during the deliberation*” are also relevant in the case.

From the interpretation of art. 375 Criminal Procedure Code, it results that the right to challenge the evidence should not be interpreted in the sense that the defendant has the right to formulate a simple request by which they understand to challenge the evidence, “the right to defense, as a rule, requires **the adequate and appropriate opportunity to confront and to put questions to prosecution witnesses, either when the witness gives his statement or at a later stage of the trial**” (ECHR – Case of Gabrielyan v. Armenia ; Case of Solakov v. The Former Yugoslav Republic of Macedonia). Even if the legislator guarantees the defendant's right to ask questions of the witness/injured person, when the evidence is re-administered by the court, contesting all or some of the

evidence administered during the criminal prosecution **does not imply a criticism regarding the manner of their administration, accompanied of the requirement of exclusion from evidence, because such criticisms can no longer be discussed since the start of the trial was ordered** (Udroiu, M., 2017, p.1528).

Thus, we consider that ensuring the exercise of the active role of the lawyer in the criminal prosecution phase, by his or her participation in the hearings of injured persons or witnesses, would lead to respect for the principle of equality of arms, a component of the right to a fair trial, guaranteeing respect for the right to defense. In support of that which is stated above, the Court also stated that *"The defendant must have the opportunity to observe the behavior of the witnesses heard and challenge their statements and credibility"* (ECHR - Bocos-Cuesta v. the Netherlands Case). Thus, **we can conclude** that the hearing of the depositions of witnesses or of the injured person before the accusation was made known, not followed by the re-administration of these pieces of evidence at the request of the defense counsel of the suspect or the defendant after he or she acquires procedural status in the case, constitutes a serious violation of the right to defense, a violation that can only be remedied by re-hearing these persons during the trial phase. In the sense of establishing the violation of the right to defense in the situation where procedural acts were carried out prior to the notification of the accusation, the High Court of Cassation and Justice (Criminal Decision no.242) also ruled, essentially supporting the fact that *"hearing the injured party and the witnesses in court, on the occasion judicial investigation, cannot fulfill the prosecutor's obligation of administration with the effective respect of the right to defense of all means of evidence"*, as well as the fact that *"the execution of the criminal prosecution documents, respectively the administration of the evidence shown in the absence of the defender, under the conditions that he or she was not informed of the accusation and the right to hire a defense attorney, are violations that attract the resumption of the criminal prosecution, with the execution of criminal prosecution documents with respect for the right to defense under the conditions provided by law."*

Moreover, in this sense is also the jurisprudence of the Braşov Court (the conclusion of the judge of the preliminary chamber dated October 24, 2014, pronounced in the file no. 23139/197/2014 of the Braşov Court, remained final by the Conclusion no. 135/2014 from 17.12.2014 of the Braşov Court) which, in a similar case, held that: *"in accordance with the provisions of art. 6 para. 3 Criminal Procedure Code, "judicial bodies have the obligation to inform the accused or defendant immediately and before hearing him, about the deed for which he or she is being investigated, its legal framework and to ensure him or her the possibility of preparing and exercising his or her defense."* **This is necessary so that the accused can truly benefit from all the rights guaranteed by law, including the employment of a defense attorney who, in accordance with the provisions of art. 172 of the Criminal Code in force at that time or art. 92 of the Criminal Procedure Code, would be able to request to assist in the performance of any act of criminal prosecution.** Against these considerations, the judge of the preliminary chamber considers that it was justified by the defense counsel that he or she was deprived of the tools he or she could use during the criminal prosecution, **the right to the defense being**

reached in its substance, which is why the evidence indicated above would be excluded.”

Thus, although the criminal prosecution bodies try to offer protection to crime victims, practically avoiding repeated hearings in order to minimize emotional or psychological injuries, however, in assessing the appropriateness and necessity of administering the evidence proposed by the suspect or the defendant, in addition to the criteria provided for in art. 100 para. (4) Criminal Procedure Code, the criminal prosecution bodies must take into account the fact that the ECHR jurisprudence (ECHR, *Süzer v. Turkey Case*) has emphasized the importance of the criminal prosecution for the conduct of the criminal trial, ***to the extent that the means of evidence administered during the criminal prosecution will determine the framework in which the crime charged to the accused will be analyzed during the criminal trial.*** Moreover, the criminal prosecution bodies should take into account the fact that **the accused is often in a particularly vulnerable position at this stage of the procedure** (Udroiu, M., 2017, p.310), an aspect amplified by the multitude of rules that regulate the procedure for collecting and administering the evidence, and this vulnerability could be compensated by the assistance of a lawyer so as not to contribute to self-incrimination. It should also be borne in mind that in the criminal process, there is an undeniable link between the burden of proof and the presumption of innocence (Udroiu, M., 2017, p.26). Thus, although the suspect or the defendant enjoys the presumption of innocence, in the situation where there is evidence leading to the establishment of their guilt, the suspect or the defendant must be ensured the right to prove their lack of grounds, by requesting the administration of evidence in defense.

Considering all the above, we practically observe that in the situation where the criminal prosecution bodies deny the suspect or the accused the right to request the administration of evidence, in order to respect the right of his or her chosen lawyer to attend the hearings of injured persons or witnesses, persons who were heard before the acquisition by the suspect or defendant of a procedural quality, the provisions of art. 92 Penal Code are circumvented, and the right of the suspect or defendant established by art. 100 Criminal Procedure Code practically becomes an illusory right.

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