The Complaint before the Judge against the Prosecutor's Resolutions or Writs for not Proceeding to Trial – Article278 (8), Letter c) C.C.P

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Abstract: It has been noticed in the doctrine a more pronounced current trend of "privatizing" the trial, this aspect concerning a significant part of the foreign doctrine. It was proved that its most insidious form, and undoubtedly the most dangerous, is not the traditional one, of the injured person's prior complaint, but that which is incident to the public prosecution itself. Romanian legislator gave up the prior complaint formulated in the article 279. par. 2 letter A, C.C.P., repealing these provisions through the Law no. 356/2006, thus eliminating the procedure of direct criminal proceedings. The complaint registered in the article 278 C.C.P. arousing lots of controversies, which allow almost unlimited access from the crime victim to public proceeding. Generally, the complaint governed by the provisions of the article 275 and the next C.C.P. is, in terms of legal nature, an appeal against criminal acts and measures of prosecution and a way to control their legality. According to the law, any person whose legitimate rights were affected can lodge a complaint. The law without prescribing a limitation period, the complaint can be lodged by any natural or legal person, if there is evidence of harm of her legitimate interests.

Keywords: complaint; trial; public prosecution; notification

By the law, 356/2006 it was repealed the article 279 par. 2 letter a., by means of which the court's direct intimation was disbanded through prior complaint from the part of the injured party, but it has still remained in force the proceeding condition, that of preclusion from starting the prosecution and the criminal investigation.

Being connected to the promotion and the exercise of penal action, meaning to the activity of arraignment, the prior complaint, besides being a condition for the judicial activity's unfolding, appears also as **a special notification** in the case of offenses subjected to this condition.

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Romanian legislator gave up the prior complaint formulated in the article 279 paragraph 2 letter a, C.C.P., repealing these provisions through the Law no. 356/2006, thus eliminating the procedure of direct criminal proceedings. The complaint registered in the article 278 C.C.P. arousing lots of controversies is that which allows almost unlimited access to the crime victim to public proceeding.

Generally, the complaint governed by the provisions of the article 275 and the next C.C.P. is, in terms of legal nature, *an appeal against criminal acts and measures of prosecution and a way to control their legality.* (Volonciu & Ţuculeanu, 2007) According to the law, any person whose legitimate rights

were affected can lodge a complaint. The law without prescribing a limitation period, the complaint can be lodged by any natural or legal person, if there is evidence of harm of her legitimate interests.

By the provisions from the article 278 C.C.P.[1] it was governed the complaint before the judge against the prosecutor's resolutions or writs for not proceeding to trial, this leading to the victim's authorization to start the penal action, by the court's intimation document mentioned by the letter c. of the text's paragraph 8 (the complaint) and even to exercise along or in the place of Public Ministry.

The concept of privatization, applied to the criminal law, is revealing, both from the state's withdrawal through non-prosecution solutions and from a certain fluctuation of the boundary between the public and the private. The new role of victims in criminal proceedings contributed to this fact, the development of alternatives to prosecution, as well as the formula, "consensual justice", the "negotiated justice" or the "contractualisation of justice", which covers various forms of privatization of the trial. Regarding our concern, there have been discussed many issues in the doctrine and in the jurisprudence concerning the solution in terms of the par. 8 article 278 letter c) C.C.P. regarding the *acceptance of the complaint through finality, contested act's abolition and case retain for trial.*

By the decision of no. XV 22 of May 2006, the United Sections of the High Court of Cassation and Justice pronounced that the judge who, according to the article 278 par. (8), letter c), by concluding, accepts the complaint, abates the resolution or the writ and retains the case for the trial, assessing that the examined proofs are sufficient for the prosecution, becomes incompatible to solve the fund of this.

It was argued that, in this case, the provisions of the article 278 (8), letter c) C.C.P. bring a change of the prosecution and penal action functions, the concluding of the document becoming both the intimation act and that of starting the prosecution, so that the judge's further participation in solving the case breaks the provisions of the article 6 from the European Convention on Human Rights; on the other hand, the re-evaluating material of proofs administrated during prosecution and considering that the evidence are sufficient for the proceedings, the judge becomes incompatible in accordance with the article 47 paragraph (2) C.C.P.

The acknowledgement regarding the existence of sufficient evidence for detaining the case for trial is not possible in the case of the resolution for non-prosecution, prosecution lacking because, according to article 228 (4) C.C.P., this solution is based on, where appropriate, the intimation document of the criminal prosecution body or on the preliminary acts carried on. In the latter hypothesis, only the minutes can be considered evidence through which the performing of the preliminary acts are assessed before the prosecution, in order for this to be started.

Regarding the article 278 (9) C.C.P., it is stated explicitly that the court's intimation document is represented by the person's complaint to which the article 278 paragraph 1makes reference, in the case provided by the article 278 paragraph (8) point c), the judge only took the indictment function (the beginning of the criminal proceedings, if the criminal action was not started by the prosecutor during the prosecution) (Volonciu & Ţuculeanu, 2007).

Although, according to article 278 (9) C.C.P. the intimation act (complaint) can come from any person whose interests were affected, it was considered that this complaint, in the case provided by the article 278 (8), letter c) can be lodged only by the injured party (victim of crime).

It was explained that, in the situation in which the complainant is the very person to whom it had been ordered the solution for the non-prosecution, the penal action would be initiated by the complaint of

[1] Terminer no. XXXXVIII passed on 4 of July, 2007 of the I.C.C.J. United Sections, unpublished.

the person against whom the trial is intended to, leading through the acquirement of the defendant's quality to the aggravation of the situation of the one who lodged the the complaint (it is broken the principle *of non reformatio in pejus)* (Al.Ţuculeanu, 2007) (Gr.Gr.Theodoru, 2007). It was also asserted that a person who is not party in the penal process could be the complaint's holder who initiates the start of the prosecution in conformity with the article278 par. (8) point c) C.C.P. because that person has access to the civil court in order to solve the injury which he reports.

By the Decision no. XXXXVIII of June 9, 2007, passed by the High Court of Cassation and Justice, the United Sections, it was accepted the appeal in the interest promoted by of the general prosecutor of the High Court of Cassation and Justice and it was stated that the provisions of from the article 278 (8), letter c) C.C.P. shall be construed in the sense that "if the complaint was lodged against the resolution, through which it was ordered the non-initiate of the prosecution or classification, the court cannot pronounced the solution provided by the article.278 (8), letter c) C.C.P. "being obliged in case of the complaint's acceptance, to send the case to the prosecutor in order to start the criminal prosecution according to the article278 (8) letter b) C.C.P. This approach of the complaint's legal nature formulated under the incidence of the article278 C.C.P. by placing the victim at the heart of penal policy, amounts to an unprecedented recognition of its role and consequences of the individual will in the penal process (Iordache & Alexandroiu, 2007)[1].

Through a criminal policy inspired more and more from *the principles of victimology,* the criminal procedure - enriched with the provisions of the article 278 C.C.P.- is ranged to two new targets that tend to satisfy the interests of those who claim having been harmed by crimes, namely the aim of compensation, which competes directly with the repression, and objective of consideration, which is linked to the development of the human dignity concept and contributes substantially to the specificity of the penal process against a civil lawsuit in matter of responsibility.

Such perspective transposed in the literature of specialty - through the given arguments –has in view,primarily, the victim of the crime, who is seen as a genuine subject for the proceedings, with a considerable power of initiative, both in initiating the prosecution and the evaluating evidence as well. This prerogative of the injured person acquires in the boost, energizing the criminal procedure is in fact a sign of *partial privatization of public action*, and thus pre-trial phase (Iordache & Alexandroiu, 2007). The continuous strengthening of the private parties' rights and the more obvious shape, of an accusing model in criminal matter entails a decrease of the procedural rules' imperative, official and unavailable character.

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[1] Also, by the Terminer no. XIII 2005,the sections of the High Court of Cassation and Justice, accepting the appeal in the law interest for the application of the article 2781C.C.P., have established that the complaint directly lodged to the court against the resolution for the non-prosecution or the writ or, where appropriate, against the classification resolution of criminal prosecution placing out or cease, given by the prosecutor, without these having been contested from advance, according to article 278 C.C.P., at the superior prosecutor, it cannot be accepted.