Theoretical aspects regarding prior criminal acts

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Abstract - The preparatory acts are prior criminal activities (they exceed the trial) and not by accident the legislature has placed them chronologically by the general patterns of referral. If the prosecution learns about a complaint or accusation of an offense there isn't always sufficient data to begin criminal pursuit.

For this reason, given the situation quite often encountered in legal practice, in which the data, information, knowledge of the prosecution is incomplete, uncertain or unverified, practical necessity and the need to strengthen the legality of investigative activities required the inclusion in the law of regulations regarding prior acts as the referral can not operate in a vacuum.

Keywords— criminal acts, legal practice, modern crime, penal law, Romanian Criminal Code

INTRODUCTION

Considered a controversial institution since its first regulation in the Criminal Procedure Code entered into force on 1 January 1969, the prior criminal acts were the subject of special discussion in the specialty literature, almost all subordinated to the idea of improvement and clarification of different[1] views (either on the legal nature or the content and functionality).

The republication of the Criminal Procedure Code in 1997 hasn't brought changes in the prior criminal acts, but by law no. 281/2003 they were substantially improved in comparison to the previous regulations.

Currently, items that require prior acts are those of the Special Part of the Criminal Procedure Code contained in Title I - Criminal prosecution - in terms of chapter IV-criminal investigation, Section I - Notification of the criminal pursuit bodies - art. 224 (governing the general framework of prior acts, but art 224 – 224, that specifically relate to the preparatory acts carried out by undercover investigators, should not be omitted) [1].

According to Art. 224:

(1) CPC "In order to initiate criminal pursuit, the prosecution body **can** perform preparatory acts"

(2) Also to collect the data necessary for the prosecution in order to initiate criminal pursuit, the operative workers from the Ministry of Interior may perform prior acts, as well as other state bodies with responsibilities in national security, specifically designated to this end, for acts which constitute according to the law, threats to national security.

(3) The official rapport confirming the performance of prior acts **may** constitute "evidence"

As the very name states, the preparatory acts are prior criminal activities (they exceed the trial) and not by accident the legislature has placed them chronologically by the general patterns of referral. If the prosecution learns about a complaint or accusation of an offense there isn't always sufficient data to begin criminal pursuit.

For this reason, given the situation quite often encountered in legal practice, in which the data, information, knowledge of the prosecution is incomplete, uncertain or unverified, practical necessity and the need to strengthen the legality of investigative activities required the inclusion in the law of regulations regarding prior acts as the referral can not operate in a vacuum.

Even in the case of ex-officio referral of criminal investigation bodies, there must exist data or information on a crime that is sometimes required to be checked and supplemented by the preceding acts.

As we mentioned, the prior acts are quantitatively and qualitatively limited to fulfill their legal work necessary to reach the goal. It

follows that these needs are met to the extent required by the criminal prosecution.

Although the legislature has specified that the goal of the prior acts is to initiate criminal pursuit I believe that they are required to be made whenever there is a criminal work in the criminal prosecution, whose data are incomplete in order to be able to propose / order a procedural criminal law solution, even if it would be the non-commencement of criminal pursuit.

From this point of view I believe that the legal text should be amended because the current regulation is limited. Also, the current legislation does not expressly provide the duration of prior acts, this being limited in time until the formation of the criminal prosecution body's belief that criminal prosecution may be ordered [2].

PROBLEM FORMULATION

In addition the legislature has not provided the methods of performing the prior acts nor the content of the prepared document, but this point must comply with the provisions in force relating to the preparation of official rapports (in conjunction with Article 91. 224 (3) CCP) since the prepared official report may be considered evidence.

Because this official rapport is signed before the commencement of the trial, taking into account the purpose for which it is drawn the act in question is different from the ascertainment official report of a crime and that of the on spot research, search or collecting objects and documents, the law allows it to be exploited as evidence in the criminal proceedings only to the extent that the act is followed by the initiation of criminal pursuit.

As it was well appreciated [3], in the logical and chronological ranges, the prior criminal acts are found after the notification of the criminal prosecution body, but before ordering criminal prosecution. Normally, the elaboration of the ascertainment official report of the preliminary acts required to be followed by the initiation of prosecutions resolution and its confirmation. Therefore, the preparatory acts precede criminal pursuit and are made for this purpose. Thus, prior acts are not criminal proceedings, but the report prepared for this purpose may constitute evidence.

Given that the specialty literature and juridical practice until now have expressed many opinions, many of them contradictory regarding its legal nature, functionality and effects in a procedural plan of the prior acts of prosecution, I will describe in what follows, on one hand the majority's opinion and on the other hand my own opinion on this institution.

Some authors have defined the preceding acts as preliminary investigations which are designed to supplement the information that the prosecution has regarding an offense or to verify this information in order to decide whether or not it is appropriate to proceed to start prosecution [4].

Other authors mention only in passing that these prior acts may be considered as part of the trial, being treated as a means of verifying the data or information for prosecution [5].

Of course, both views believe that they reflect actual functionality of the preceding acts being performed up to the need limit imposed by the criminal prosecution. Once this goal was achieved, meaning that there is a minimal data on which the prosecution may proceed, they should no longer be made.

Most theorists have rightly considered that the prior acts performed in accordance with the laws achieve the following objectives[2]:

- Completes the information the prosecutors have in order to bring them to the level of knowledge and findings necessary to initiate criminal prosecution;
- Verifies the information held, confirming or contradicting their consistency with the factual realities of the case;
- Substantiates the research body and the prosecutor's conviction to determine whether to start or not the criminal pursuit, according to the rules of art. 228. par. 1, 4 and 6 CPC (according to recent legislative changes made by the Law no. 202/2010)

Therefore, during the prior acts to the prosecution a bundle of activities can be carried, activities which through their purpose and

functionality pursue the achievement of clearly defined objectives, making its contribution to the achievement of the criminal trial, according to art.1 CPC.

The final paragraph of the article 224 pleads in favor of this view. This paragraph indicates that the official report which contains the accomplishment of prior acts may constitute evidence. In other words, in the phase of preparatory acts even probation related tasks that are to be made in a criminal case can be achieved.

In the judicial practice contradictory discussions took place, regarding some procedural measures that can be ordered in the prior acts phase.

By interpreting the provisions of the Penal Procedure Code I believe that there can be ordered in this phase: the lifting of objects and documents (according to art. 96 and 97 CPP, when these documents are made available to the prosecution, voluntarily by their holders without a search warrant being needed – which an be ordered only after the initiation of criminal pursuit, according to art. 100, paragraph 3 CPP), technical - scientific / medical – legal findings, letters rogatory, research on the spot (which can be performed after the initiation of criminal proceedings), investigations, etc.. You can not perform, under any circumstances, house searches and preventive measures can not be taken. Extensive discussions were held regarding the legality of expertise, regardless of their nature at this stage of proceedings. As for me I think it is illegal the arrangement and conduction of surveys, resulting from the interpretation of this art. 116 and the next ones of the Penal Procedure Code in conjunction with Article 24 CPP

Article 118 par. 3 of the Penal Procedure Code provides that each **party** has the right to request that an expert recommended by her to attend the expertise. Article 24 par. 1-3 “Other parties in the criminal proceedings” (except of course for the defendant) refer to the injured party, civil or civilly responsible party. From the title of the article we note that it is about a criminal trial, and the first phase of the criminal trial is the criminal pursuit. So the criminal pursuit must be initiated in order to be in a legal procedural framework, or the prior acts are to be performed outside the criminal trial, in order to determine whether or not it is necessary to prosecute. The question is whether in the cases of damage offenses for which criminal prosecution is not possible without establishing a certain value of the damage is an accounting expertise legal in the phase of prior acts? I maintain my point of view on the expertise and the procedural phase in which I think it must be ordered in and I think that in order for the existence / absence of damage clues, it is sufficient for the beginning an ascertainment from the specialized state bodies (the Financial Guard, the Directorate of Public Finance etc..). The offender can provide its protection even in the phase of preparatory acts including when he is heard as a perpetrator, otherwise the prosecution is obliged to administrate the evidence after beginning criminal prosecution both in his defense or offence, based on the principles of finding out the truth and the active role. In the case when the prosecution is initiated with a minimum of evidence and at its end it is found that there is a case in which the setting in motion or exercise of the criminal action is prevented, one of the solutions provided by art. 11 CPC can be disposed (ranking, removing from criminal prosecution and / or termination of criminal prosecution).

Of course we need to avoid criminal prosecution with a minimum of evidence or unclear incomplete or unverified evidence,. Hence the importance of prior acts and their practical necessity, frequency and variety in the everyday activities of the judicial bodies.

As it was well appreciated, the provisions of Penal Procedure Code Art 224 seem quite elliptical, but their limited nature was explained by the fact that the legislature does not have neither the possibility nor it is advisable to enter into details, often technical, of some activities placed previous to the initiation of prosecution, although a number of issues have outstanding practical implications.

Preparatory acts are voluntary and are not recommended if the information of the criminal investigation body, following referral, does not require additions or verifications being quantitatively and qualitatively sufficient to decide either to start or not the criminal prosecution.

With regard to their legal nature, different views were expressed in accordance

with the legal regulations evolution and there isn't now a unitary point of view.

Starting from the concept that it would be wrong to confuse the proper criminal investigation with the grounds verifications it was confirmed that preparatory acts can not be expressed in criminal prosecution. Such a view was also supported in our doctrine, so long as the institution of prior acts was not regulated by procedural law and after art. 195[1] was introduced in its original form in the prior criminal procedure code. Subsequently, the provision was amended by expressly stating that the prosecution bodies can still make criminal pursuit before trial, which led to a second opinion according to which the preceding acts have - as evidenced by the very terms - common nature of criminal pursuit acts.

The current regulation of the prior acts has justificatory avoided the old forms, in the idea that criminal pursuit acts are only those that take place in the prosecution phase. The fact has determined in the recent specialty literature the specification that, because prior acts are carried out prior to the commencement of prosecution, they can not be considered some sort of acts of criminal pursuit[3].

There were opinions that have held that prior acts are essentially similar in nature to acts such as the ascertainment acts concluded by the bodies mentioned in the article 214 and 215 (state inspections bodies as well as those of management and control, ship and aircraft commanders, Non-commissioned officer's of the Border Guards).

The arguments brought in support were particularly polarized around the idea that the activity of these bodies is previous and linked to the initiation of criminal pursuit as well as around the particularity that in this case, the ascertainments made in order to gain legal relevance, are recorded in an official report which is considered to be evidence in the subsequent juridical activity [6].

This point of view was challenged. Many views stresses the idea that art. 214 to 215 can not be considered random regulations in the domain of prior acts opinion with which I fully agree.

Of the many opinions advanced in the specialty literature the claim that such acts have their own nature, which can not be identified or subsumed under precise and well defined nature of other institutions, has caught more consistency. The large variety of activities, the specific conditions in which they are achieved, the purpose of actions and many other reasons make this institution have a sui generis nature.

Within the prior acts there can take place various activities that have nothing in common with the performance forms of the actual juridical documents. In this sense we can perform actions, more or less discrete, due to the need for investigations (eg, tailing a suspicious person, verifying the suspect's sources of income that exceeds by his way of life the limits of the lawful gains, organization of a filter or conducting raids, legitimating and identifying unknown persons - possibly leading them to the police bodies)

Within the same framework there can take place various formal activities that may resemble the procedural acts but do not have their juridical form. For example, they can demand verbal or written requests from the people whose stories have some common features with the statements with a strictly judicial content of the accused, the parties, witnesses, etc.; checks can be made of some technical assumptions who take a close form to the judicial experiment; it is possible to monitor the management, by making an accounting review that has some common aspects with an expertise, etc..

All acts with the character of preliminary investigation, verification period, operative observations, relations and information are not regulated in the Code of Criminal Procedure. Their legal basis is found in the fundamental constitutive or organizational and functional rules of government bodies within which the judicial body operates [7].

There is often the need in the prior acts to perform tasks that have a devotion to procedural law, and which accomplishment can take place only under the provided and regulated conditions in the Code. For example, the discovery of a violent death occurred in suspicious circumstances entail a legal obligation to layout a forensic ascertainment. Making on-site investigations, legal or medical technical scientific ascertainments, or any other such activities, whereas they should be

conducted under regulations of a criminal trial in progress, are true acts of procedure and as such may be assimilated by the criminal pursuit, almost similar as legal nature.

Even under such circumstances it was considered that the contents of sui generis of the prior criminal acts subjected to criminal procedural regulations is maintained, so in the case of an on-site investigation it is not necessary to record the findings in a separate official report in accordance with art. 131 CPP. The results are enrolled in the official report concluded according to Art. 224, par. 3 CPP. I can not agree with that point of view because of the following reasons:

- different regulation, in the CPC, of the on spot ascertainment official report and that of accomplishment of the preliminary acts (Article 131 CPC, respectively art. 224, par. 3 CPP), both of them are admitted as evidence, as it results from the interpretation of art. 91 CCP;
- the official report prepared according to art. 131 is a special case, the mentions provided by law under Art. 91 letter "f" CPC being found throughout the content of art. 131 CPC (detailed description of the situation of the place, the traces found, etc..). Not the same thing may be mentioned about the official report of ascertainment of prior acts which, according to judicial practice, lists the annexes that supplement it, without detailing their content (Eg in case of requests for verification of individuals, businesses, etc., only the fact that this work was done is mentioned in the official report without detailing the contents of the request, the act through which the activity was performed or the received response is attached to the official report of ascertainment of prior acts);
- it is highly unlikely that only the on-site investigation official report can include all elements of the immediate disposition of prosecution, without conducting other necessary activities required to form the criminal pursuit body's conviction that is sufficient evidence to initiate criminal pursuit. Even in this case the official report of ascertainment of prior acts is mandatory, because it is recognized as evidence, but it is performed outside the trial. Certainly, in terms of time, the concluding moments of the two records should be close in order to prosecute because the evidence subsequently administered should comply with the principle of legality and should ensure all safeguards of the parties involved;
- the on-site investigation official report, as I said above, can be elaborated both before and after the initiation of criminal pursuit. When it was drawn up during the preliminary acts I believe it must be in accordance with Article 131 CPC, separately from the official report of the prior acts. In this case, the carrying out of on site research and the act drown up for this purpose will be recorded in the official report of ascertainment of prior acts. This last act, after the criminal pursuit is initiated, constitutes evidence, together with simmilar other means provided by art. 69, 75, 78, 87, 89, 91^1, 91^4, 91^5, 92, 94, 95 and 100 CCP(Statements by the accused / defendant, witness, injured party, civil party and civilly responsible party, material evidence, written evidence, interceptions and audio-video recordings, searches and surveys).

The dispositive nature of the preparatory acts includes both their performance (depending on the legal status of information in the file) and the probative value of the official report drawn up (Art. 224, par 1".... the prosecution **may**

perform acts preparatory", Art. 224, paragraph 3 "the official report through which it is found that prior acts may constitute evidence". Their conduct is left to the appreciation of the judicial bodies.

We must not forget to mention that in this stage of research tasks related to the prevention of criminal offenses can be performed [8]. In this respect, during the activity that will take place for the collection of data or information regarding crimes, the criminal pursuit bodies as well as the operative workers of the Ministry of Interior and other state bodies with responsibilities in national security (SRI DGIPA, DGIPI, etc.) have a duty to prevent crimes. Therefore, I believe that whenever it is found during the prior criminal acts that a crime has not committed, but there are appropriate conditions for this, the above-mentioned bodies have a duty to intervene and prevent their perpetration. The provisions of art. 224, par. 2 of the Penal Procedure Code are eloquent in this respect. The final paragraph of art. 224 CPC is in favor of the view that the prior criminal acts contribute to the goals achievement of criminal trial. It indicates that the official report through which the prior acts are accomplished may constitute evidence. Thus, in the prior stage to the initiation of criminal pursuit there can be resolved even probation related tasks that are to be made in a criminal case, the law enabling the official report drown up in a preliminary acts stage to be exploited as evidence in the criminal proceedings only to the extent that the act is followed by the initiation of prosecutions (criminal investigation body resolution, followed by reasoned confirmation of the prosecutor) - as stated in art. 228 par. 1, 1^1, 2, 3^1 and 6 CPP.

The preparatory acts must not exceed the legality requirements imposed by the initiation of criminal pursuit, if not it exceeds the legal procedural. In this sense some trends of criminal prosecution bodies must be countered. For example the research problems to be solved in the preceding acts, thereby evading the case in all respects; the prosecution is left with only a quick consecration into procedural forms of the factual content detached from the investigation. Of course we must create conducive conditions which lead to achieving this point since at present there is a large number of employees of the judicial police allotted to a very small number of specialized workers in the investigation and most activities are carried out after beginning criminal prosecution. For example, house searches, defendants or accused hearings, taking preventive, protective or safety measures, the civil application, expertise, etc. can not be performed during the preparatory acts stage.

I believe that the most numerous preparatory acts are those of investigation for verification of complaints and which do not collect evidence, but some needed data for the confirmation / refutation of the received referral (for example the request from different people, field verification, operative observations, comparison of documents even by forensic findings, etc.).. Also, the technical, scientific, graphical findings, financial auditing official reports, official reports of public finance control and of other bodies of those provided in art. 214 and 215 CPC, the examination of material evidence, etc can be made during this stage [9]. These acts and investigations are not fully provided in the criminal proceedings as procedural acts and the investigations made are not regulated as such and do not have determined rules of achievement, only the information obtained being recorded in an official report, prepared separately from the one of consignment of prior acts, but referred to it. Of course, there are general rules (orders,) which provide uniform rules for conducting these investigations, from which the operative workers can not deviate, and when some evidentiary procedures are carried out - on-site investigations, forensic findings etc. - they must properly comply with the provisions of criminal proceedings, becoming procedural acts, accompanied by an official report of ascertainment of the preceding acts, even if they are synthesized within it. There can be considered preliminary criminal acts all the police activities in emergency situations, even if the prosecution has not begun. In these categories we can mention investigations of traffic accidents or accidents at work, the findings of forensic experts in cases where people have died and the cause of death is unknown, fire investigations and other categories of damages, etc..

Mainly, the prior acts are carried out because of two reasons:

- to check if the referral is justified;
- to determine whether or not there are any of the causes of hindering the implementation of the criminal pursuit under Art. 10 CPC.

An important issue that deserves to be addressed is also the possibility of carrying out activities that have the nature and / or legal status of prior acts, after the initiation of criminal prosecution. I think it is possible to carry out prior acts in a case in which the criminal pursuit has started, but it must be related to other facts and / or persons than those confined to criminal prosecution and ordered to be verified / completed in order to decide on the need and opportunity for expanding to other criminal acts and / or persons.

This fact results from the purpose of regulating preliminary acts, according to art. 224 par. 1 CPC ".... for the initiation of criminal pursuit". Thus, once it is initiated the purpose of the prior acts is finished. Moreover, it is the majority view expressed in the specialty literature.

In the judicial practice it was expressed the opinion according to which prior acts are unconstitutional. In connection with this aspect four decisions of the Constitutional Court stated that art. 224 Penal Procedure Code is constitutional, and the invocation of any unconstitutionality in the future, in the absence of some modifications brought to art. 224 CPC will be subject to failure taking into account the practice of the Constitutional Court (see in this respect decisions no. 141/05.10.1999, 210/26.10.2000, 138/08.05.2001 passed by the Constitutional Court).

CONCLUSIONS

In conclusion, the official report provided for in art. 224 par. 3 Penal Procedure Code is considered to be evidence in situations of criminal pursuit, provided that they are useful, pertinent and convincing to the case, and should be corroborated with other evidence in the dossier, having evidential basis.

Regarding the legal provisions on acts preparatory (first preliminary investigations or inquiries as they were called)[4] I think they have their own legal nature, sui generis, but should be improved. It would be desirable that the law should specify what activities can be performed at this stage, the scope of rights that both the prosecution and the parties have, the time period they can be made in, etc. Such regulations would ensure the strict observance of the human rights and an effective control over the legality of prior criminal acts.

Giving importance to the preliminary acts, the initiation of criminal prosecution may be prevented in unjustified cases, eliminating the likelihood that the legal framework can appear in which certain procedural steps can be ordered that ultimately would prove to be unjustified, constituting a further measure of security regarding the respect for legality in the work of justice.

In conclusion, the aim of preliminary acts is to test and strengthen the degree of certainty with regard to the solution that must be delivered in each work / criminal cas.

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