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CONFRONTING WITH THE PROSECUTION: LIMITS BETWEEN LEGALITY AND ILLEGALITY

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Abstract
Confronting criminal investigation activity cannot always be qualified as illegal activity of some participants in the criminal process. The right to defense in the criminal process is a tool through which the defense side can try to confront the course of the criminal prosecution or redirect it in a convenient way. The possibilities granted by the law to the defense party, which aim to protect legitimate rights and interests, are also a legal tool to confront the criminal prosecution, provided by the legislator **(**the right of the suspect/accused to be assisted by a defense attorney, the right of the suspect/accused not to submit statements, the right to contest the actions of the criminal investigation body, the right to a legal representative, limitation of terms for applying preventive measures, etc.). A way provided by the law, by which the defense side can confront the activity of the criminal investigation body, would be the principle of adversariality in the criminal process. This principle of criminal procedural law, in essence, represents the legal basis for the confrontation with criminal prosecution activities (results of actions), which is obviously limited within an absolutely predefined framework of the Code of Criminal Procedure of the Republic of Moldova. The essence of the principle of adversariality in the criminal prosecution phase implies that the criminal prosecution body "acts" (for example: forwards the accusation), and the defense side confronts it (for example, the accused submits statements by which he argues the non-recognition of the act or guilt). Therefore, the opposition and the pursuit of compliance by the criminal prosecution body with the legal regulations when carrying out criminal prosecution actions will also constitute, an element of the implementation of the principle of adversariality in the criminal prosecution phase and a way of legally confronting the criminal prosecution activity.

Keywords: prosecution, adversariality, right to defence, legality, illegality, confrontation, prosecutor.

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INTRODUCTION

The degree of trust of the society in the act of justice (judicial system), the trust in the existence of truth and justice is greatly influenced by the success of the criminal investigation bodies and the prosecutor's office, manifested in the discovery and ensuring the prosecution of the perpetrators, as well as the timely application of reasonable punishments for defendants found guilty by the law courts. The long delay in solving criminal cases, crimes of social resonance left undiscovered, the application of clearly milder punishments to the defendants, the termination of criminal prosecution in certain cases, its suspension for implausible reasons, the unjustified removal from criminal prosecution of some perpetrators, are effects of confronting prosecution by the defense.

According to art. 303 of the Criminal Code of the Republic of Moldova [4], interference, in any form, in judging cases by national or international courts with the aim of preventing the multilateral, full and objective examination of the concrete case or obtaining the pronouncement of an illegal court decision is punished. The bulletins of official statistics from the Republic of Moldova, which contain information about the level of criminality and indications of the discovery and prosecution of the perpetrators, do not contain detailed information about the number of crimes committed against justice, including those qualified according to art. 303 of the Criminal Code of the Republic of Moldova. According to the National Bureau of Statistics of the Republic of Moldova, in 2021, the rate of crimes against justice constituted 4.2% of the total number of registered crimes (27.2 thousand) [1]. How many of these relate to interference with the administration of justice or prosecution is not specified. Thus, at the civil society level, we do not have official information about this type of crime. The provision of this article, including, interpreted as a forensic tactic, represents the illegal side of confrontation criminal prosecution.

METHODOLOGY

In order to carry out objective and conceptual research regarding the elucidation of the legal and illegal aspects of the actions taken by some participants in the criminal process in order to confront the probation process, in this article, a series of research methods were applied, among which: the logical method, the method of comparative analysis, systemic method, empirical method.

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RESULTS

The concept of the confrontation of criminal prosecution experienced an amplification of the approach in the specialized literature at the beginning of the 90s of the last century, when, after the collapse of the Soviet empire, crime experienced an extremely increased jump, unprecedented until then, including organized crime. This refers to the illegal actions of criminals or third parties, aimed at destroying the traces of the crime, corrupting the persons who carry out the criminal investigation, influencing or threatening witnesses and victims, influencing the decision-making factors in the field of justice in order to obtain decisions favourable to criminals.

Confronting criminal prosecution activity cannot always be qualified as illegal activity of some participants in the criminal process. The right to defense in the criminal process is a tool through which the defense can try to confront the course of the criminal prosecution or redirect it in a convenient way. The possibilities granted by the law to the defense party, which aim to protect legitimate rights and interests, are also a legal tool to confront the criminal prosecution, provided by the legislator **(**the right of the suspect/accused to be assisted by a defense attorney, the right of the suspect/accused not to submit statements, the right to waive the right not to file statements, the right to contest the actions of the criminal prosecution body, the right to a legal representative, limitation by law of the terms for of finding under preventive measures, the right to contest the application of preventive measures, etc.).

A way provided by the law, by which the defense side can confront the activity of the criminal prosecution body, would be the principle of adversariality in the criminal process. Contradiction is a procedural method, thanks to which the goals of the criminal process are achieved by confronting the parties in the process. It can be called a method of legal contest arising from the fact that the defense, by virtue of the public purpose, must contest the accusation (however justified it may be), and the prosecution, in turn, must refute the arguments of the defense (if it is convinced by the opposite) [8. p.599]. This principle of criminal procedural law, in essence, represents the legal basis for confronting with the activities (results of actions) of criminal prosecution, which, obviously, is limited within an absolutely predefined framework of the Code of Criminal Procedure of the Republic of Moldova [3]. The essence of the principle of adversariality in the criminal prosecution phase implies that the criminal

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prosecution body "acts" (example: forwards the accusation), and the defense side confronts it for (for example, the accused submits statements by which he argues the non-recognition of the act or guilt). Therefore, the opposition and the pursuit of compliance by the criminal prosecution body with the legal regulations when carrying out criminal prosecution actions will also constitute, an element of the implementation of the principle of adversariality in the criminal prosecution phase and a way of legally confronting the criminal prosecution activity.

Confronting the criminal investigation and the criminal process in general, is not always associated with the illegal activities of influencing witnesses, victims, performing dissimulations, etc. Thus, according to Art. 24 CCP of the Republic of Moldova, the parties participating in the trial of the case have equal rights, being endowed by the criminal procedural law with equal possibilities to support their positions. The court bases the sentence only on the pieces of evidence to which the parties had equal access to the investigation. The parties in the criminal process choose their position, the way and the means of supporting it independently, being independent of the court, other bodies or persons. The court grants assistance to any party, at its request, under the law, for the administration of the necessary evidence.

The legislator, by including the institution of the principle of adversariality in the criminal procedural law, accepted and strengthened this way of confronting the criminal prosecution and the judicial process, granting the suspect, the accused and the defendant with the right to be assisted by a defence attorney. In accordance with art. 64 paragraph 1 CCP of the Republic of Moldova [3]: “the suspect has the right to defense”. The criminal prosecution body provides the suspect with the opportunity to exercise his right to defense by all means and methods that are not prohibited by law. Likewise, and according to art. 66 paragraph 1 CCP of the Republic of Moldova [3]: “the accused or, as the case may be, the defendant has the right to defense”. The criminal prosecution body or, as the case may be, the court ensures the accused, the defendant, the opportunity to exercise his right to defense by all the means and methods not prohibited by law. The right to defense is also established by Art. 26 of the Constitution of the Republic of Moldova: “the right to defense is guaranteed, every person has the right to react independently, by legitimate means, to the violation of his rights and freedoms, and throughout the process, the parties have

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the right to be assisted by a lawyer, chosen or appointed ex officio" [5]. According to the law, a person benefits from the assistance of a defender from the moment of detention, arrest, indictment, etc. in order to guarantee respect for his rights and freedoms. In this sense, it can be understood that the legislator gives the person the possibility to use "professional knowledge and weapons" against the actions of the criminal prosecution body and amplifies this possibility through the rights granted and the strictly regulated procedures. A person may not possess the necessary knowledge and professional skills to defend himself, even if the legislator accepts, under the terms of the law, that the suspect, the accused, the defendant waive the defense. And the procedure for waiving the defense counsel is also strictly regulated by law to ensure that the person's decision is not influenced by some objective or subjective factors (lack of financial means to pay for the lawyer's services, indifference to the finality of the process, health problems: mental or psychological of the perpetrator, etc.). According to art. 71 CCP of R.M., "the waiver of the defense attorney can be accepted by the prosecutor or the court only if it is submitted by the suspect, accused, defendant voluntarily, on his own initiative, in the presence of the lawyer who provides legal assistance guaranteed by the state". The prosecutor or the court has the right not to accept the waiver of the suspect, the accused, the defendant to the defender in the cases provided in art. 69 paragraph (1) point 2) -13) CCP of the Republic of Moldova, as well as in other cases where the interests of justice require it. We deduce from this that the legislator, aware of a certain inferiority of the procedural position of the suspect, the accused, the defendant associated with the lack of the necessary professional-legal qualifications, takes measures to strengthen it, offering an opportunity to attract to the process persons with sufficient qualifications - defenders (lawyers). Thus, the position of the suspect, the accused, the defendant becomes a strengthened one, able to effectively defend his rights and legitimate interests. This situation, in fact, means that the activity of legitimately confronting criminal prosecution becomes much more qualified and amplified. Of course, the legislator provides restrictions to the lawyer regarding the defense activity of the suspect, the accused, the defendant and, by this, establishes a framework and a recommended behavior related to the limits of confronting the criminal prosecution. In accordance with art. 10 of the Law of the Republic of Moldova on Advocacy [7], the profession of lawyer can be exercised by a person, in respect of whom a measure of judicial protection in the form of guardianship has not been instituted, has a bachelor's degree in law or its equivalent, has an

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impeccable reputation... In the same article, the legislator indicates who are the persons who do not possess an impeccable reputation[1]. According to art. 54 of the same law, the lawyer does not have the right to act contrary to the legitimate interests of the client, to take a legal position without coordinating it with him (except in cases when the client admits his guilt), to refuse, without good reasons, the defense of the suspect, the accused, the defendant or the condemned, to which he was bound. Likewise, he is not entitled to declare the client guilty in court if he does not admit his guilt. The client's admission of guilt does not deprive the lawyer of the right to contest the charge and demand the client's acquittal. According to the Lawyer's Code of Ethics [2], relations between lawyer and client are based on honesty, probity, equity, fairness, sincerity and confidentiality. Thus, criteria are established and that must be respected in the activity of confronting the criminal prosecution, and it is accepted by the legislator and professional ethics to appeal to the defense in defense of its legitimate rights and interests. These criteria include: 1) morality; 2) confidentiality; 3) legality, etc. It is quite obvious that the criteria are relative, as they allow their interpretation according to the ideas and individual perception of those who are empowered to use them to determine the admissibility of measures aimed at protecting the rights and legitimate interests of the suspect, the accused, the defendant. Precisely for this reason, prosecutors and criminal prosecution officers perceive with caution, even such confrontation of the criminal prosecution, apparently not prohibited by law, because they see

[1] a) has been convicted of serious, particularly serious, exceptionally serious crimes committed with intent, even if the criminal record has been erased; b) has an unextinguished criminal record for committing other crimes or prohibitions applied for committing them; c) his license to practice the profession of lawyer was withdrawn; d) left the position of judge, prosecutor, notary, bailiff, authorized administrator, legal consultant, civil servant or other bodies in the field of law in circumstances that are not honorable; e) has a behavior or carries out an activity that is not compatible with the rules of the Lawyer's Code of Ethics; f) committed an abuse that violated fundamental human rights and freedoms, established by a court decision issued by national or international courts.

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in it the readiness of the defense side not to limit themselves, but to resort to more efficiencies that are at the limit of what is allowed or exceed this limit. In other words, from the point of view of the prosecution, for example, they are unfair, and from the point of view of the defense, they fully comply with these requirements and are therefore quite acceptable for use in the defense process. The most important objective of the suspect, the accused, the defendant is to avoid or evade from criminal liability, or at least to significantly mitigate the size of the criminal penalty.

To achieve this, the defense has the means provided by law. According to art. 53 of the Law on Advocacy [7], the lawyer has the right to represent the legitimate interests of the client in the courts, in the law enforcement bodies, in the public authorities, in other organizations, to take cognizance of all the materials of the entrusted case from the moment of concluding the contract of providing legal assistance, make notes and copies, independently collect, fix and present information regarding the circumstances of the case, request and obtain from the courts, law enforcement bodies, public authorities, data register holders with personal character, from other organizations, under the conditions established by the legislation, information, references and copies of the documents necessary for the granting of legal assistance, to summon and hear persons, to order the performance of extrajudicial expertise as an ordered, to investigate territories, premises, goods, with the consent and participation of the owner or his representative take, as well as perform other procedural actions necessary to ensure legal assistance[2]. So, the use of some of these tools can help to establish the truth in the criminal case, but with the same performance, sometimes they can also be used to make it difficult to establish the truth. That is, they can become quite effective means of preventing the establishment of the truth in a particular criminal case. But in both cases, they are supposed to be

[2] Not all of these tools for obtaining information provided in the Law on Advocacy have also found regulation in the Code of Criminal Procedure. In this sense, a discrepancy is observed. The criminal procedural law does not regulate the possibilities for the lawyer (defender) to summon people and hear them, to independently carry out the investigation of objects or places or to order judicial expertise.

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used in the interest of the defense side. And such an interest, as mentioned above, is often the desire to avoid criminal liability.

In this sense, a large number of rights that are conferred on the defense party, provide ample opportunities to confront the prosecution. All these rights can be used by the defense not only to protect their legitimate rights and interests, but also to effectively confront the prosecution. For example, there are cases when defense lawyers, using these rights, try to impose a false version of the committed act, presenting it to the criminal prosecution body in a favorable light to their client. Thus, a certain effect expected by the defense is achieved: the rights granted to a defense attorney have become a means of confronting criminal prosecution. But not only certain rights assigned to the defender become an effective means of confronting the truth-finding process. The defense often seeks, for this purpose, to use any right (means) granted by the law, including the possibilities of delaying the term of the criminal prosecution. For example, according to paragraph 4 of art. 293 of the CCP of the Republic of Moldova, the term granted to take cognizance of the materials of the criminal prosecution, at the end of the criminal prosecution, cannot be limited. However, the prevalence of cases of abuse of this right by the defender forced the legislator to immediately make a reservation: in the event that the person who becomes aware of the materials, abuses his situation, the prosecutor fixes the manner and term of this action, based on file volume. The legislator, however, left without regulation the situation in which the accused and his defender, without a reasonable reason, did not familiarize themselves with the materials of the criminal case within the deadline set by the prosecutor. We believe that a mention of this fact will be made in the report of the presentation of the criminal prosecution materials, which is drawn up in compliance with the provisions of art. 294 CCP of the Republic of Moldova.

Through these details, the legislator seeks to prevent the possibility of the defense party abusing the right granted to him to familiarize himself with the materials of the criminal case. In this way, at the legislative level, it is recognized that sometimes the defense side, using the right to defense, tries a means of confronting the criminal prosecution by delaying its terms (sometimes delaying the terms is favorable to the defense side because the deadlines for applying preventive measures may expire custodial sentences during the criminal prosecution phase and they cannot be extended). There are other norms

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of criminal procedural law, in which the legislator recognizes the actions of abuse of law and, thus, the existence of the possibilities of confronting criminal prosecution. According to art. 261 CCP of the Republic of Moldova, if the person who participated in the execution of the criminal prosecution action refuses to sign the report, this is mentioned in the report, which will be signed for compliance by the person who carried out the action. The person who refused to sign the report must be given the opportunity to explain the reasons for the refusal, and his explanations will be recorded in the report. This regulation is intended to prevent the defense and any other participant in the procedural action from confronting the conduct of the criminal prosecution. The fact of the existence of this regulation aims to make impossible and ineffective such procedure of confronting criminal prosecution. However, it should be noted that even if there are rules by which the legislator seeks to reduce the possible ways of being applied to confront criminal prosecution, they still exist and can be considered to be applied within legal limits.

The reason for this is the difficulty of formulating, in a state of law, all the criteria for determining one or another way of using the abuse of law. Therefore, in the practice of investigating crimes, there are often cases when, despite established legal norms, the defense side seeks to delay the knowledge of the criminal case materials as much as possible, doing so under the pretext of "good reasons", or requests the postponement of the examination in conjunction with the contesting of any court decisions [6]. It is quite clear that the organization and conduct of the prosecution in such a situation requires qualified legal assistance, which is provided by defense lawyers. Thus, the law effectively assists the defense in applying the possibilities of confronting criminal prosecution. But, of course, it would be illogical to raise the issue of confronting the criminal prosecution in such a way as to destroy the idea of the need for the criminal process, the investigation of crimes in general and, in particular, the existence of the principle of adversariality in the criminal procedural law. Disputing their necessity and value, without a doubt, is unthinkable. It is also impossible to question the rights of the suspect, the accused, the defendant, including the possibility to defend their rights and legitimate interests in a democratic state, in a humane and fair trial. When it comes to the fact that, within legal limits, there are possibilities and it is applied to confront criminal prosecution and that it can be quite effective, it does not mean that immediately legislative measures should be taken to prevent them, but it is the case to be

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studied the possibility of developing forensic methodologies and tactical procedures aimed at successfully overcoming such opposition to the investigation of crimes. In this sense, it is the responsibility of the criminal prosecution body to constantly take into account the fact that a defense lawyer is involved in the case, and his knowledge and skills are used by the suspect, the accused, the defendant in his own interests, which are far from always be aimed at establishing the truth in the criminal case. It is necessary that the available investigation methods are applied in accordance with the possibilities of confronting the prosecution by the defense side, with the qualification and training of the representatives of the suspect, the accused.

CONCLUSIONS

The tactical procedures that are used in the investigation of specific criminal cases with the participation of defense lawyers are, in principle, the result of the individual creative approach of criminal investigation officers and prosecutors.

However, the interests of justice require that the achievement of the goals of the investigation should not be accidental, depending on the creative success of a particular employee, but a natural result, characterized by a high degree of certainty, objective, which could constitute the basis for taking correct decisions. This is only possible if the recommendations that can complement the arsenal of the criminal prosecution body are based on scientific evidence. At the same time, these recommendations must comply with the strict requirements of humanism and respect for the rights and legitimate interests of all participants in the criminal process.

The application of new tactical procedures and reaction methodologies to attempts to confront criminal prosecution must ensure the systematic obtaining of reliable information, including evidence, on the basis of which a fair decision can be made during the criminal process, ensuring the establishment of all significant circumstances of the case criminal cases and subsequently the adoption of a just decision.

Reviewing the methods of investigating some types of crimes by applying intelligent analysis systems, streamlining the special investigation activity, and taking into account the participation of the defense attorney in the criminal prosecution phase, would allow the criminal prosecution body to anticipate and

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minimize the effects of attempts to confronting criminal prosecution. The new tactical procedures and revised methodologies would be a sufficiently effective means to prevent the legal confrontation of criminal prosecution. Furthermore, such an investigative methodology would allow the prosecution to perceive the defense and its actions in a different way than is sometimes the case today. The continuous rejection, as obviously inappropriate, hostile, and unfounded, of the requests of the accused and of his defender are not, as a rule, the most appropriate solutions, because the purpose, very often, these decisions are attacked, and by this, the procrastination of the criminal prosecution is obtained. Therefore, the knowledge of the features of the legal confrontation of the criminal prosecution and the ways of overcoming it should be the basis of the adaptation of new specific methodologies for the investigation of crimes.

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