Babeș-Bolyai University
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THE CRIMINAL ACTION

PhD THESIS

(SUMMARY)

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KEYWORDS

Criminal action, criminal proceedings, prosecution, trial; inquisitorial system, adversarial system accusatory system, mixed system; prosecutor, lawyer, judge, court; initiating, exercising and finalizing the criminal action; ordinance, indictment, conclusion, first instance ruling, decision; obligation, opportunity, good faith, procedural functions, accusation, defense, jurisdiction; debates, deliberations, pronouncements; closure, dropping charges, plea agreement, conviction, acquittal, ending of criminal proceedings, appeal.

SUMMARY

The topic chosen for this research is of undisputed theoretical and practical importance, since the criminal action represents the keystone of the entire edifice of criminal proceedings in the Continental law system. The *raison d'être* for criminal proceedings is to ensure that they are initiated, carried out and completed lawfully, expeditiously and efficiently, abiding by all the conditions of fairness. Therefore, the institution that is the object of this analysis is not a peripheral or niched one in the criminal process theory, but on the contrary, it occupies a central and inescapable place in all studies on criminal repression. Equally, the criminal action constitutes a perpetual presence in the daily judicial activity, criminal law practitioners frequently using it in various forms in the unfolding of their specific procedural attributions or competences. The repetitiveness of the forms in which the criminal action manifests itself within the criminal process creates a certain familiarity in the way in which practitioners and theorists alike regard the institution of the criminal action, in particular a feeling of comfort that gives rise to a perception that in this respect things are altogether clear, leaving room for no ambiguities or problematic issues whatsoever. Of course, this perspective is not the most faithful to reality; therefore the coordinates on which this thesis is structured highlight both the strengths and weaknesses of such perception, shortcomings and ambiguities in the regulation of this institution.

Precisely for the reasons shown above, scientific research is intended to be bold, but also balanced, analytical in essence, inquisitive as a vocation, but also synthetic in some places. What it will relentlessly lack will be the exhaustive character. One cannot claim that within the limits imposed by this type of work one can actually exhaust all the procedural implications of the criminal action as a complex institution, since it is well known that it influences and determines almost all the other institutions regulated via the Criminal Procedure Code.

We notice that the long-awaited reform of the national criminal procedure system that has actually occurred inevitably brought both pluses and minuses if compared to the previous regulation. New procedural institutions were transplanted from other legal

systems, such as the *dropping charges* or the *preliminary chamber procedure*, but their implementation in the Romanian criminal system was hesitant and sometimes defective. In order to cover some chronic systemic shortcomings faced by the Romanian criminal procedure system, such as the disproportion between the number of criminal cases and the staff employed, or the lack of sufficient and adequate space for judicial proceedings, the legislator made compromises regarding some procedures proposed for enactment at the time of finalizing the draft of the Criminal Procedure Code. We mention compromises such as: widening the applicability of the institution of *dropping charges*, in order to allow the prosecutor's offices to be relieved of cases whose resolution is not of public interest; eliminating the incompatibility of judges functioning in the preliminary chamber (i.e. *juge d'instruction*) and them functioning (being appointed) as trial judges, in order to allow the proper functioning of the smaller courts; or the elimination of the burden of proof necessary to initiate the criminal action (*reasonable presumption*), giving the prosecutor a fairly large margin of appreciation as to the time at which to initiate the criminal action.

However, the Constitutional Court has consistently and abundantly sanctioned the choices made by the Legislator in criminal matters, interventions which, whether appropriate or not, have sometimes contributed to making the application of legal institutions which were heterogeneous since the entry into force of the new codification more burdensome, or even to divert them from the purpose for which they were enacted.

Regarding *the criminal action*, further to our research we may conclude that the current enactment has clarified some aspects, bringing some undoubted improvements: by establishing a single holder thereof (respectively the Public Ministry, acting through prosecutors); by expressly regulating the role of the lawyer (counsel for the defense); by regulating the possibility of taking preventive measures (except for taking in custody) only against the defendant; by introducing the right of access to the case file; by establishing freedom of evidence. However, it failed to regulate some important aspects, such as: the determination, in relation to the existing evidence in question, of the actual moment from which the initiation of the criminal action can no longer be postponed; expediency of proceedings in the preliminary chamber phase; simplification of the procedure for the dropping charges; or improving the rules on the plea agreement.

In the **first chapter** of **the first title**, we set out to make a brief historical foray into how the notion of criminal repression developed, beginning with its crude forms, characterized by the direct and disproportionate manifestation of human impulses for defense and revenge, continuing with the difficult and long process of refining criminal proceedings, up to contemporary justice, characterized by transparency, fairness and respect for the rights and freedoms of the person.

The history of the criminal action is confounded with the forms of manifestation of the ontological reaction to the violation of certain norms of coexistence, be they oral or written. These manifestations first had private valences, and then they were chiseled, being

transferred to the public authority, a process that was completed by creating detailed and complex procedural codifications.

The description follows the narrative thread of the evolutions and involutions of criminal justice, starting from *in illo tempore* to the present, in an overview of the succession of forms specific to the degree of social development of the time, starting with private revenge, collective revenge, law of retaliation, private justice, optional composition, legal composition, colleges of magistrates, public justice, feudal justice and continuing with medieval codifications.

At the beginning of this research, using the older specialized works of Romanian and foreign authors, we highlighted the historical process of transformation of the criminal action, from ancient forms of criminal repression (private revenge, private justice, retaliation law), passing through the Roman period, particularly relevant in terms of acquiring public character and continuing with feudal justice, achieved in Europe until the late Middle Ages. In the last subchapter, we focused the historical incursion on the European space, on the Carpathian-Danubian-Pontic territory, trying to highlight the evolution of the concept of criminal procedural law characteristic of this homogeneous ethnic group, forerunner of the Romanian people.

From the perspective of the emergence and development of criminal procedural law in Romania, we offered some landmarks on the evolution of the rules of customary origin with Roman influences applicable in the first period, continuing with the Royal Rules of the seventeenth century, the Caragea legislation (1818), Criminal Terms from Muntenia and Moldova from the first half of the 19th century, Prince Alexandru Ioan Cuza's Codes (1864-1865), King Carol II Codes (1936) and ending with the Criminal Procedure Code of 1968.

In the **second chapter**, we presented analytically the three traditional procedural systems (accusatory, inquisitorial and mixed), their good knowledge being fundamental for understanding the specific areas of different institutions existing in the positive law, as well as how to apply them. We preferred to abide by this classic tripartite differentiation, as the characteristics of the three types of criminal proceedings are brought back into discussion and exploited in the argumentative approach of the different sections of this research paper. Moreover, the detection of the elements that differentiate or resemble in equal measure the three ways of achieving criminal justice can be extremely useful in the correct calibration of legislative bills and in establishing future criminal procedural policies.

In order to ensure a correct terminological delimitation of the fundamental notions that we will use in abundance in this scientific endeavor, we chose to make, in the **third chapter** of the first title, a theoretical circumscription of notions such as: criminal procedure, criminal process and criminal action. For a more complete perspective on these notions, we have selected for each notion different definitions, expressed in national

doctrine, be it historical or contemporary, and in foreign publications of Continental or Common Law origin.

Last but not least, we found useful the comparative analysis of the two types of actions that can be exercised during the criminal process, the criminal action and the civil action, given that their correct delimitation and understanding represents a necessity in the study of national criminal proceedings.

Even if we defined the criminal action in the context specified above, in the **second title** of the paper, called *Criminal action - static perspective*, we regrouped the whole chromatic of the theoretical mosaic that makes up the physiognomy of criminal action. Thus, we carefully analyzed with doctrinal references to specialized works of national or comparative law, in distinct chapters: the elements of the criminal action (basis, object, functional aptitude and subjects), its characters (public law, mandatory, unavailable, indivisible, personal and autonomous), as well as the cases that prevent the initiation or exercise of the criminal action (provided in art. 16 paragraph (1) of the Criminal Procedure Code).

Regarding the basis of the criminal action, we concluded that it is represented by the perpetrated crime, and its object is represented by the criminal prosecution of the person who perpetrated said crime. In the analysis of the two elements, we made several clarifications that we considered appropriate, referring to *pros* and *cons*, both from a domestic and a comparative law perspective. Regarding the subjects of the criminal action, we considered it beneficial to keep the prosecutor as the sole holder of the prosecution, but we also highlighted those procedures that involve an overlap of authority exerted by the courts over the powers and role of the prosecutor.

The characteristics of the criminal action did not raise special problems. On the other hand our presentation highlight the exceptional character of the *opportunity* (of exercising it), in relation to the obligation and unavailability of the criminal action. In this regard, we concluded that *the dropping charges* is the only true form of manifestation of the opportunity, adding, equally, that it is far from absolute or unlimited.

The criminal action viewed from a static, conceptual perspective has the ability to fascinate the enthusiasts of doctrinal discussions, without this academic concern to produce, at least in appearance, palpable changes to the act of justice. The correct delimitation and circumscribing of the basis or object of the criminal action has given rise to lively discussions and controversies eversince the first criminal procedural codifications in our country. The same theoretical debate is still maintained today on some purely theoretical details as there is still no consensus among contemporary authors.

The lack of practical relevance of the rigorous and precise exposition of the nature and content of the criminal action is only apparent and yet unfounded, as undoubtedly the thoroughgoing and correct understanding of the circumstances regarding the emergence and historical development of the institution, the complete and exact circumscribing of its

semantic sphere, knowledge and the recognition of its specific elements and of its characters represent *sine qua non* conditions in the process of initiating and exercising the criminal action.

In the third chapter, we concluded the analysis of the criminal action from a static perspective through the theoretical and practical examination of its failures, respectively of the cases that prevent the initiation or determine the exhaustion of the criminal action. In this context, we must emphasize that we have tried to maintain a criminal procedural validity of the assessment of these cases, the full exposition of their characteristics implying an authentic analysis of substantive criminal law. In this chapter, it seemed to us more relevant and useful to set out the guidance offered via the jurisprudence. We highlight situations in which it was considered sensible to retain one or another of the cases that lack the criminal action on grounds or object.

A fortiori, its dynamic valence, its planned, solemn and often fateful development gives the analysis of the criminal action an undeniable practical importance in the social and legal debates specific to the rule of law.

Deliberately and for this specific reason, we chose to assign to **the third title**, called *Criminal Action - dynamic perspective*, a special attention. This part of the research paper is the most extensive, being built on the three terminological pillars that give motor skills to the institution, respectively the initiation, exercise and exhaustion of the criminal action.

Criminal proceedings are eminently dynamic[1], in full swing and constantly evolving, entailing a natural evolution and a transition through several degrees of administration of evidence. Starting from the formulation of the indictment based on evidence from which there results a reasonable assumption that the investigated person perpetrated the crime and continuing progressively until finding beyond any reasonable doubt that the criminal deed exists, that it constitutes an offense and that it was committed by the defendant, the criminal action represents "*legal support for the entire procedural activity*"[2], the legal instrument for subjective concretization and dynamization of the criminal process[3]. In other words, after the initiation of the criminal action by the prosecutor via the prescribed ordinance in the criminal investigation phase, and after the indictment is submitted to the court, the criminal action is exercised uninterruptedly until a final solution is rendered.

This part of the research paper, reserved for the dynamism of the criminal action, is marked as well by our own assessments and findings on the analyzed institution. First of

[1] C. Ghițeanu, T. Glogojeanu, A. M. Dragomirescu, Codul de procedură penală „Regele Carol II", Tipografia Munca, Râmnicu Sărat, 1936, p. 133.
[2] N. Volonciu, Tratat de procedură penală, Parte generală, vol. I, ediția a II-a revizuită și adăugită, Ed. Paideia, București, 1996, p. 231.
[3] V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, Explicații teoretice ale codului de procedură penală român. Partea generală, vol. I, Ed. Academiei Republicii Socialiste România, București, 1975, p. 60.

all, we reiterate the fact that we agree with the minority opinion in the Romanian doctrine, according to which the criminal action can be exercised exclusively in the trial phase of the criminal process. From our point of view, the exercise of the criminal action within the criminal investigation has no purpose, its object being the criminal prosecution of the person who committed the crime and can only be unfolded before a court of law, which invested with functional competence to resolve the conflict born between the state and the perpetrator. On the same logical line, it would have been natural that the initiation of the criminal action be carried out through the indictment, since the procedural act of initiating the criminal action needs to be immediately prior to the order sending the accused person to stand trial. Once the prosecutor finds that there is evidence that a person perpetrated the crime, the initiation of criminal proceedings would also involve the referral to the court, in order to create the procedural framework necessary for the exercise of this action.

As we mentioned, in the exercise of the criminal action there are three successive moments, which we analyzed separately in the third title of the paper: the initiation of the criminal action, the exercise of the criminal action, respectively the extinguishment of the criminal action.

In the **first chapter** dedicated to the mechanism for **initiating criminal action**, we analyzed the concrete incidence of notions such as obligation and opportunity; we identified and characterized the holder of this responsibility, the procedural act and its consequences against the defendant.

In the **second chapter**, we propose a different approach than the classic way of individualizing the forms of **exercising the criminal action**. *Ab initio*, we identified the procedural phase in which the criminal action can be exercised, and then we described the activity specific to the exercise of the criminal action in the form of synergy between the exercise of the three procedural functions, whose separation is essential in a fair trial: the prosecution function, the defense function and the judgment function. This approach is somewhat unique in the Romanian legal literature, with the vast majority of authors preferring the classic way of presenting the exercise of criminal proceedings, in addition, they remain faithful to the division of the criminal process strictly by reference to the four judicial functions (criminal prosecution, provision on the rights and obligations of the person during the criminal investigation, verification of the legality of sending or not sending to trial and the court).

In the paper we highlighted the need for express regulation of the three fundamental procedural functions of the criminal process, as well as the principle of their strict separation. Although the principle of separation of judicial functions is of indisputable utility, the strict circumscription and delimitation of procedural functions is indispensable for the proper conduct of the trial and the observance of the fundamental right to a fair trial.

In the last part of the chapter on the exercise of the criminal action we propose to the reader an x-ray of the notion of *good faith*, which, in our opinion, is indispensable for the good conduct of the criminal process and the proper execution of the act of justice. In this approach, we made a vintage engraving of the characteristics of this concept, presenting the specific daily activity of the judiciary and other participants in the trial, in light and shadow, as it can be felt by practitioners and litigants alike. For a more accurate rendering of the forms of manifestation of good faith, or lack thereof, we have selected various court decisions, supplementing, in some places, the lack of concrete cases, by examples of school-type hypotheses. Therefore, starting from the highlighting of the legal source of the term *bona fides*, we continued with the circumscribing and detection of the forms of its manifestation in the daily activity of the judicial bodies. Our exposition and assertions in this section are abundantly fed with concrete examples of judicial practice, the reader being able to make his own image on the procedural behaviors and attitudes that can be qualified as good faith or on the contrary, bad faith. In our opinion, the obligation of good faith and *common sense* are essential in ensuring efficient and legitimate justice. At least from this perspective, our theoretical approach cannot be voluptuary, but it is intended to be eminently necessary and useful.

The **chapter** consecrated to the **exhaustion of the criminal action** occupies the most important part of the last title of our research paper, from the point of view of the scope and depth of the scientific analysis, its content being analyzed in detail and applied the ways in which the criminal action is extinguished, both in the criminal prosecution phase, as well as in front of the court.

Dividing the last chapter into **two subchapters**, by reference to the procedural moment in which the exhaustion of the criminal action occurs, we analyzed the solutions through which this is done. We realized a systematic and detailed presentation of the closure, the dropping charges and the plea agreement, the first two ways of extinguishing the criminal action being the most used solutions in criminal judicial practice. Our study aimed, individually, each of the three ways of solving the criminal action, being reached and exhausted theoretical aspects regarding: the origins and history of the institution, the competent judicial body to order it, the act by which it is ordered, the specific conditions, the procedure of appeal provided by law, its effects, as well as the reopening of the criminal investigation.

In the context of the analysis of the *closure* solution, in addition to those listed above, we also made a presentation on the applicability of the *ne bis in idem* principle regarding the solutions given by the prosecutor. Regarding the dropping charges solution, we also analyzed the jurisdictional procedure for verifying and confirming the solution, with its specificity.

The analysis of the plea agreement followed the same steps as described above, stating that it involves a judicial procedure of conclusion (carried out between the

prosecutor and the defendant) and a jurisdictional one, confirming or approving the agreement, carried out in front of and sanctioned by the court.

Once the trial starts, the criminal action is exhausted by the final decision (ruling) of the criminal court. The last part of our study deals with the judicial procedure that ensures the exercise of the criminal action, as well as the three main procedural functions, ending with the extinguishment of the criminal action. This purpose may be characterized by the realization of the object of the criminal action, represented by the prosecution of the defendant (by ordering the conviction, postponement of the penalty or waiver of the enforcement of penalty), or by the impossibility of fulfilling his object, in case of incidence of one of the cases provided by art. 16 para. (1) (with the consequence of an acquittal or ending criminal proceedings). We chose to study from a theoretical, practical and comparative law perspective the way of conducting debates, deliberation, decision-making and rendering it. We also analyzed the functionally competent body to exercise the judicial function, the jurisdictional act by which the case is resolved, as well as the solutions provided by law at this stage of the criminal process. Last but not least, we considered as useful a historical and a comparative law perspective of the phrase "*beyond any reasonable doubt*" which defines the standard of proof necessary to order a conviction (postponement of the penalty or waiver of the enforcement of penalty) of the defendant.

The **last chapter** of the paper also contains some considerations on the particularities of the abbreviated procedure of acknowledgement of guilt, as well as a correlative analysis of the particularities of the trial in the appeal.

Considering all the aspects revealed above and deepened in the paper, this doctoral thesis is intended to make a significant theoretical and practical contribution to the overall academic research literature in the field of criminal procedural law, by following the aspiration to portray legally, contemplatively, but also in a permanent academic vigilance, the complex notion and the fundamental institution represented by the criminal action. In the same sense, making a global assessment of the contents of this study, we appreciate that it is able to meet the needs of knowledge of the institution of criminal action, from basic to in-depth, responding to all academic imperatives specific to the subject. The reader has the opportunity to acknowledge, by reading the thesis, the origins and history of the criminal action; the general principles and provisions governing this institution; the definition, characteristics and forms of its manifestation in the criminal process; as well as the manner of initiating, exercising and extinguishing the criminal action. The intellectual exploration of the topic is facilitated by an approach characterized by frequent doctrinal references, jurisprudential examples, as well as personal assessments (derived both from research and from practical trial experience) on the complexities and peculiarities of the issues under discussion.

Finally, as we mentioned in the introductory part, although we do not claim to have succeeded in an exhaustive presentation of the issue forming the object of the

research activity, we are entrusted that we have succeeded in putting forth a comprehensive and in-depth analysis, characterized by the theoretical / academic and also practical usefulness of our academic endeavor.