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Ph.D. THESIS

THE PROCEDURE IN THE PRELIMINARY CHAMBER

(*content and summary*)

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Preliminary chamber; separation of judicial functions; the rapidity of the criminal process; the court's jurisdiction examination; the legality of the referral to the court; exclusion of evidence; the standard of proof; the nullity sanction; the start of the trial; returning the case to the prosecutor's office.

SUMMARY

The purpose of the doctoral thesis is to analyze the procedure in the preliminary chamber, as it is regulated in the national legislation, through the lens of similar procedures identified in comparative law. When the current Criminal Procedure Code entered into force, the legislator brought many novelties to the configuration of the Romanian criminal process. Among all of these, the institution of the preliminary chamber is obviously the one that raised the most discussions in the specialized literature and in courtrooms regarding the interpretation and application of the criminal procedural norm. Also, the massive intervention of the Constitutional Court through the decisions pronounced on this new procedural phase was likely

to intensify the uncertainty with reference to the way of interpretation of the provisions governing the preliminary chamber.

Moreover, the new legal institutions introduced in the Criminal Procedure Code currently in force, many taken from the architecture of other criminal procedural systems, have already been readjusted. Under this aspect, we consider that the insecurity of the Romanian legislator has determined an acute lack of stability of the criminal procedure, the multiple changes brought to the preliminary chamber procedure representing the eloquent example in this regard.

According to the Statement of Reasons to the current Criminal Procedure Code, the preliminary chamber institution is likely to produce a direct, positive effect on the speed of solving the criminal cases, eliminating a gap in the existing criminal procedural provisions under the empire of the previous Criminal Procedure Code, which allowed that the examination of the legality of the indictment, respectively of the evidence administered during the criminal investigation phase, to prevent, in many cases, for an indefinite period, the start of the court investigation.

In this procedural context, the legislator was concerned to include in the preliminary chamber phase provisions intended to remove the possibility of a subsequent return, in the trial phase, of the criminal case to the prosecutor's office, taking into account that the legality of the evidence and the referral to court are verified in this second phase of the criminal process.

The doctoral thesis is divided into six chapters which contain several sections and subsections, in relation to the need to systematize the aspects under analysis.

The first chapter is dedicated to the introductory considerations regarding the preliminary chamber. In this regard, I presented, first of all, the reason for the introduction of this procedural phase in the national criminal process, during which the judge exercises the function of examining the lawfulness of the decision to prosecute. The preliminary chamber is inspired by Anglo-Saxon legislation, where there is a procedure that allows a preliminary check on the basis of the prosecution before the start of the trial. Furthermore, Anglo-Saxon legislation had a decisive role in influencing the legal systems in Italy, Portugal, Germany or Spain, which were considered by the Romanian legislator when drafting the Criminal Procedure Code currently in force. However, compared to the above-mentioned legislation, the examination carried out by the preliminary chamber judge is limited to the aspects related to the legality of the criminal investigation material. Under this aspect, we showed that the role of the preliminary chamber should not have been limited to shortening the duration of the criminal trial, but it would have been necessary for the legislator to also aim to avoid an

unnecessary trial, which can be triggered by issuing an indictment that is not substantiated on solid evidence. In this sense, we believe that it is necessary to expand the object of the procedure to a control of the sufficiency of the evidence.

The preliminary chamber institution is not entirely new in the criminal procedural science in our country, bearing in mind that the legislative fund in Romania has known a similar regulation before which was called *preparatory meeting*, registered in the Criminal Procedure Code of 1936 by Decree no. 506/1953[1]. However, the competence of the court in the above-mentioned procedure was broad, given that this judicial body could rule on all matters of material law and criminal procedural law, provided that the substance of the case is not affected.

Also, in the first chapter, it was analyzed the connection of the preliminary chamber institution with the common principles of the criminal process and were identified the specific principles of the second phase of the criminal process, respectively: non-publicity of the court session, the partially written and partially oral nature of the procedure, as well as the limited adversarial nature of the judicial debates. Emphasizing the autonomy of the procedural phase of the preliminary chamber, we expressed our opinion in the sense of the possibility of formulating an appeal regarding the duration of the criminal trial during this procedure.

A separate section is dedicated to the analysis of the preliminary chamber judge competence in the light of the principle of the separation of judicial functions. In this sense, we have shown that the most important attribution of the preliminary chamber judge is, with certainty, the one that refers to the examination regarding the legality of the referral to the court. However, apart from the specific object of the preliminary chamber phase, the legislator also instituted other activities on which this judicial body is called upon to rule during the filter procedure regulated by articles 342-348 of the Criminal Procedure Code. At the same time, the preliminary chamber judge has the important task of analyzing the complaints filed against the order to close a case (in the procedure provided for by article 341 of the Criminal Procedure Code, attached to the criminal investigation phase), as he carries out the procedure of confirming the decision to drop the charges adopted by the prosecutor. In addition, as follows from article 54 of the Criminal Procedure Code, this judicial body also resolves other situations expressly provided by law. In this category are included: the procedure for confirming the reopening of the criminal investigation and the procedure for forfeiture or invalidation of a document when a case is closed.

[1] Official Bulletin no. 53, dated December 14, 1953.

Last but not least, in the opening chapter, certain considerations were made regarding the future of the institution of the preliminary chamber in the contemporary legislative context. Under this aspect, in the context of an unprecedented instability of the criminal procedure, the legislator's intention to eliminate the function of examining the lawfulness of the decision to prosecute or drop charges was emphasized [article 3 para. (1) letter c) of the Criminal Procedure Code], as a separate judicial function, conferred on the judge of the preliminary chamber. As a direct consequence of the abrogation of this judicial function, the legislator wanted to abandon the preliminary chamber, as a distinct procedural phase of the criminal trial. In this regard, in our opinion, the disappearance of the intermediate procedure would have been only apparent, as it would have been replaced by the procedure of preliminary check in the court of first instance. In other words, it would have been a new form with the same background.

We consider that the above-mentioned intention to amend the law is not likely to improve the quality of the judicial act, so that it is not necessary to eliminate the preliminary chamber phase from the configuration of the criminal process, but only to modify it, as we pointed out in the content of the doctoral thesis. The preliminary chamber represents an institution that has taken a certain shape, operating in the architecture of the criminal process in our country for almost 10 years and which, despite several reported deficiencies, should remain in force.

The second chapter includes the most extensive analysis of the doctoral thesis, as it concerns the complex object of the procedure in the preliminary chamber. First, we considered it appropriate to define the object of the proceedings in the preliminary chamber and delimit it from the object of other phases of the criminal process. According to the law in force, the object of the intermediate procedure resides in the examination of four fundamental aspects with regard to the subsequent development of the trial phase: the jurisdiction of the court, the legality of the referral to the court, the legality of the administration of evidence and the legality of the acts carried out by the criminal investigation bodies. As can be seen, the legislator understood to limit the object of the procedure in the preliminary chamber to the examination of the elements related to the legality of the criminal prosecution, excluding any verification of the validity of the accusation.

The importance of the preliminary chamber phase, the object of which is an exclusively legal judgment regarding the criminal investigation file, is an overwhelming one in the economy of the criminal process viewed as a whole. Under this aspect, it is important to emphasize that the judge has the obligation to examine the entire criminal investigation file in

terms of all aspects of legality, which is, with the power of evidence, likely to directly influence the decision regarding the validity of the accusation.

A first examination, made at the beginning of the procedure in the preliminary chamber, concerns the jurisdiction of the court. Thus, since the preliminary chamber procedure takes place after the drafting of the indictment, the preliminary chamber judge, as a judicial body that is part of the competent court to judge the case in the first instance, must first verify the court's competence. An interesting issue analyzed in this section concerned the possibility of changing the legal classification of the offences during the preliminary chamber phase, having as a derivative effect the decline of jurisdiction. We believe that the judge can change the legal classification of the offences retained in the indictment if he considers it to be erroneous in relation to the prosecutor's wrong reference to the incrimination norm.

In a separate section, we have analyzed the issue of verifying the legality of the referral to the court. The act of referral to the court that can form the object of control in the preliminary chamber is the indictment. Also, the court referral documents that can form the object of legality control in other procedures were also subjected to analysis (in this sense, we analyzed the decision of the preliminary chamber judge to sustain the injured person's complaint against the order to close a case and rule to begin the trial and the guilty plea agreement).

Among the attributions by which the preliminary chamber judge exercises his judicial function, by reference to the provisions of article 54 letter a) of the Criminal Procedure Code, a substantial role is occupied by the examination of the legality of the referral ordered by indictment. This fundamental activity of the judge is transposed through the provisions of article 342 of the Criminal Procedure Code, which states that the object of the procedure in the preliminary chamber is represented, first of all, by the examination of the competence and legality of the referral to the court.

We have shown that the notion of legality and the notion of regularity used in the activity of verifying the notification of the court through the indictment cannot be equated. We believe that the notion of illegality refers to any disregard of the provisions of the law regarding the referral to the court, being a broader notion than that of irregularity, the latter only indicating the non-fulfillment of the formal and substantive conditions of the indictment.

Subsequently, we analyzed the examination of the legality of the administration of evidence in the preliminary chamber, including the differentiation between legality and loyalty in the administration of evidence in the criminal investigation phase. In this regard, we have shown that, according to article 342 of the Criminal Procedure Code, the examination of the legality and loyalty of the administration of evidence during the criminal investigation phase

represents another major objective of the preliminary chamber procedure, which is designed separately from the examination of the indictment. Taking into consideration that the trial phase will start from the evidence administered during the criminal prosecution, it is natural for the defendant to try, through the requests and exceptions formulated, to determine the reduction of the evidence. The preliminary chamber judge proceeds, thus, to verify the incidence of the sanction of the exclusion of illegally obtained evidence.

During the preliminary chamber phase, the relevance, usefulness or conclusiveness of the evidence is not evaluated, as it happens in the court investigation. The preliminary chamber judge's analysis is limited to the legality of the criminal investigation file. We believe that the judge will not proceed to verify the legality of all the evidence administered by the criminal investigation bodies, but will only consider the evidence that concerns the deed and the person for whom the prosecutor issued the indictment and that outlines the object and limits of the judgment. It is necessary that these aspects are properly indicated in the content of the indictment.

A separate analysis concerned the examination of the legality of the administration of evidence in the case of the use of surveillance or investigation special methods and in the situation of body or vehicle searches in the case of flagrant crimes. We proceeded in the same way with regard to the examination of the legality of the records obtained through specific information gathering activities, as a result of the recent changes made to the Criminal Procedure Code by Law no. 201/2023[2].

In the last part of the second chapter of the doctoral thesis it was analyzed the activity regarding the examination of the legality of the acts carried out by the criminal investigation bodies. In this regard, represents a part of the object of the procedure in the preliminary chamber the examination of the legality of the acts in the first phase of the criminal process, so the sanction of absolute or relative nullity can become incident. In our opinion, only the documents on which the indictment is based will be subject to examination; the checks carried out by the preliminary chamber judge will focus on this act.

The third chapter of the doctoral thesis refers to the conduct of the procedure in the preliminary chamber. From this perspective, we emphasized, first of all, the effects of the Constitutional Court's jurisprudence on the way the intermediate procedure is conducted. In this regard, the provisions regulating the preliminary chamber phase have been repeatedly criticized through the the exceptions of unconstitutionality, some of which have been admitted

[2] Official Gazette no. 618 of July 6, 2023.

and consequently lead to the modification of the legal texts. Practically, it can be stated that, through the jurisprudence of the Constitutional Court, the procedure in the preliminary chamber was constitutionalized and it resulted several fundamental changes regarding this procedural phase.

The remedies of the principle of impartiality of the judge in the preliminary chamber were also analyzed. Specifically, both abstention and recusal request during the second phase of the criminal process were considered.

In a separate section, the solving of the preliminary chamber procedure following the initial debates was examined. In this sense, I first defined the concept of resolving the preliminary chamber procedure and distinguished between solutions and ways of resolving requests and exceptions. We consider that the method of resolving the requests and exceptions formulated by the parties or the injured person or the exceptions raised *ex officio* constitutes the premise of solving the preliminary chamber procedure (by pronouncing the decision to start the trial or, as the case may be, to return the case to the prosecutor's office).

We also showed that the procedural phase of the preliminary chamber includes in its structure: preliminary measures, judicial debates and solutions, all of which are extensively analyzed in the third chapter of the doctoral thesis. In the situation where no requests or exceptions were formulated and no exceptions were raised *ex officio* by the preliminary chamber judge, only two stages will be completed: preliminary measures and solutions. It should also be emphasized that following the intervention of the Constitutional Court, the possibility of conducting a court investigation appeared during the procedure in the preliminary chamber. Under this aspect, it was emphasized that the intervention of the legislator is necessary in order to establish an applicable standard of proof during this procedural phase.

Regardless of the solution pronounced by the judge at the end of the procedure in the preliminary chamber, it is mandatory to continue the procedural activity, as the case may be, either in a progressive sense (as a result of moving the file in the trial phase), or in a regressive sense (as a result of the resumption of the criminal prosecution). From another perspective, we believe that it is a mistake to adopt the thesis according to which, in the preliminary chamber phase, it is excluded the incidence of any case of extinguishment of the criminal action, taking into account that not all the cases provided for in article 16 para. (1) of the Criminal Procedure Code are incompatible with the provisions of article 342 of the Criminal Procedure Code, legal text that regulates the object of the preliminary chamber procedure.

The fourth chapter is dedicated to the issues related to the solving of the preliminary chamber procedure after the remedy of the indictment. Under this aspect, according to the

criminal procedure law, if the judge finds irregularities in the indictment or if he cancels the criminal prosecution acts carried out in violation of the law or excludes one or more of the evidence administered during the criminal prosecution (but not all), the prosecutor, within 5 days from the communication of the court decision, has to remedy the irregularities of the indictment and to communicate whether it maintains the disposition of the referral to court or, on the contrary, requests the restitution of the case.

In other words, the incidental procedure regulated in article 345 para. (3) of the Criminal Procedure Code aims to carry out, in a short period of time, the activities necessary to remedy the indictment and the communication by the prosecutor of his procedural position regarding the referral to court, in the sense of maintaining it or not. This stage is absent in the other scenarios (when no requests or exceptions were formulated, the requests and exceptions were entirety rejected or when it occurred the exclusion of all the evidence administered during the criminal investigation), because the preliminary chamber phase has already been resolved (by ordering the start of the trial or the return of the case to the prosecutor's office, as the case may be).

A separate analysis concerned the procedural act by which the irregularities of the indictment can be remedied in the preliminary chamber phase, in the context that the provisions of the law in force do not refer to the form that the prosecutor's answer must take. The solutions which the preliminary chamber judge can pronounce in the subsequent session were also analyzed.

The fifth chapter of the doctoral thesis concerns the procedural measures in the preliminary chamber phase. Under this aspect, distinct from the judicial function of examining the lawfulness of the decision to prosecute [article 3 para. (1) letter c) of the Criminal Procedure Code], the legislator established in the competence of the preliminary chamber judge attributions with reference to the procedural measures likely to harm fundamental rights and freedoms. In this regard, preventive measures, asset freezing, as well as medical safety measures are considered, regarding which, during the preliminary chamber phase, associated files are formed.

During the second phase of the criminal process, any of the preventive measures provided for by law can be ordered, with the exception of taking in custody. The preliminary chamber judge pronounces on the taking of the preventive measure by court decision, *ex officio* or at the request of the prosecutor. From this last perspective, the prosecutor can formulate the proposal to take the measure either by indictment, according to article 330 of the Criminal Procedure Code, or at a later time, during the preliminary chamber phase.

According to the law, in the preliminary chamber, lawful cessation of previously ordered preventive measures could intervene, or these procedural measures could be replaced or revoked by the judge. In the event that the preventive measures were previously ordered, they are periodically reviewed.

Following the analysis of the preventive measures, the asset freezing in the preliminary chamber were examined. From this perspective, we have analyzed inclusively the provisions of article 250^2 of the Criminal Procedure Code, which regulated, in a deficient manner, a procedure for periodic verification of these procedural measures throughout the criminal process. Under this aspect, the legislator did not expressly regulate the one-year term also regarding the preliminary chamber phase, which seems to circumscribe it only to the trial phase. At the same time, we consider that the terms provided in the previously indicated legal text are substantial terms.

Last but not least, the medical safety measures as well as the protection measures in the preliminary chamber were subjected to analysis.

The sixth chapter of the doctoral thesis is dedicated to the appeal during the preliminary chamber phase. In this sense, the appeal that can be formulated against the aspects decided by the judge of the first instance is governed by the special rules inscribed in article 347 of the Criminal Procedure Code, which are supplemented by the common provisions that are compatible, regulated in article 425^1 of the Criminal Procedure Code. The object of the appeal is: the judge's decision pronounced at the end of the procedure, according to article 346 para. (1)-(4^2) of the Criminal Procedure Code, regardless of its type; the way of solving the requests and exceptions formulated during the preliminary chamber procedure. The appeal may consider both aspects of the judge's decisions or, as the case may be, only one of them.

The procedure for resolving the appeal is provided in article 347 para. (3) of the Criminal Procedure Code, as follows: the appeal is resolved in a non-public meeting, with the summon of the parties and the injured person and with the participation of the prosecutor. Also, the provisions of article 345 and article 346 of the Criminal Procedure Code, regarding the procedure conducted before the judge of the first instance and the solutions, are applied. From this last perspective, the solutions in the appeal stage were subjected to analysis, as well as the *res judicata* authority of the preliminary chamber judge's decision, from which certain genuine exceptions were identified.

Under this aspect, we considered the possibility for the court to proceed to a new examination of the legality and loyalty of the evidence that was administered during the first procedural phase. In this regard, by paragraph 29 of the Decision of the Constitutional Court

no. 802 of December 5, 2017[3], it was expressly stated that the examination of the legality or loyalty of the evidence is also admitted during the trial phase. In this sense, is applicable the general rule according to which the sanction of absolute nullity can be invoked throughout the criminal process. Another exception to the *res judicata* effect of the final decision of the preliminary chamber judge derives from the Decision of the Court of Justice of the European Union dated October 21, 2021[4], which shows that the irregularities of the indictment regarding the description of the act imputed to the defendant can be found also by the court, after closing the preliminary chamber procedure.

Last but not least, the institution of the resumption of the preliminary chamber procedure was subjected to analysis, in a separate section. In this regard, in a vague expression, the provisions of article 386[1] of the Criminal Procedure Code, recently introduced by Law no. 201/2023, establish that, in the situation where during the trial phase the absolute nullity of the preliminary chamber procedure is established, the court annuls the decision to start the trial and determines the limits within the preliminary chamber procedure will be resumed. In accordance with the same legal provisions, an appeal can be filed against the court's decision, according to article 425[1] of the Criminal Procedure Code.

Summa summarum, throughout the doctoral thesis we emphasized the positive aspects of the regulation of the procedure in the preliminary chamber in national law, as we did not hesitate to criticize the vulnerabilities which we encountered. We believe that the regulation in the current Criminal Procedure Code of the institution of the preliminary chamber is fully justified, because in this way criminal trials built in violation of the legal provisions can be avoided. Despite the fact that, obviously, serious arguments can be made in favor of the idea of repealing the procedure in the preliminary chamber (as it is known, in most cases, the purpose of the function of verifying the legality of the criminal prosecution has not been reached, and the judge of the preliminary chamber is the same judge who will rule in the trial phase as well), we consider that it is not necessary to remove this procedure from the configuration of the current criminal process, but only to modify it, as we have shown have shown in the content of the doctoral thesis.

[3] Official Gazette no. 116 of February 6, 2018.
[4] Court of Justice of the European Union, case C-282/20, available at *https://curia.europa.eu/juris.*