

## Phases of the romanian criminal proceedings, as per the provisions of the New Code of Criminal Procedure

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**Abstract:** According to the provisions of the Code of Criminal Procedure of 1968, a typical structure of the criminal proceedings included three phases: criminal prosecution, judgment and enforcement of final criminal decision; each such phase was delimited by certain proceedings-related acts and, within each of these phases, certain categories of judicial bodies exercised their duties. Upon the coming into force of the New Code of Criminal Procedure, the criminal proceedings, along with the criminal prosecution, judgment and enforcement of the criminal decision, include a new phase, namely the preliminary chamber. The purpose of the procedure in the preliminary chamber is to verify, after the indictment, the competence and legality of seizing the court, as well as to verify the legality of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies.

**Key words:** proceedings phases; criminal prosecution; preliminary chamber; judgment; enforcement of final criminal decisions.

### Introduction

The phases of the criminal proceedings are divisions thereof, including a complex of activities, successively and progressively undertaken in a coordinated manner, having their own objects and ending by their own solutions [1].

The notion of proceedings phase shall not be mistaken for the notion of proceedings stage. In this respect, the proceedings stages are various steps of conducting the criminal proceedings, within the distinct phases it undertakes. Thus, the proceedings stages are subdivisions of the phases of conducting a criminal proceeding; they have their own function, forming, within the main activities, a unitary set of activities (for instance, within judgment of the means of challenge, which is a stage of the judgment phase, several means of challenge may be successively used - appeal, recourse in cassation, challenge for annulment, revision – and each of them is a proceedings stage) [2].

The division of a criminal proceeding into several phases may be found in modern legislations, and the history of the criminal proceedings records, in this respect, process constructions which do not include such a structure [3].

In this respect, *the adversarial legal system* was characterized by the freedom of producing (meaning gathering) evidence, oral arguments and publicity of judgment. The initiative of the proceedings belonged to the accuser (the victim of the offence or any other person), who had the obligation to produce the evidence, and the accused person had the right to counter-evidence. The evidence and counter-evidence was discussed orally and publicly and the court's role was passive, limited to the settlement of the criminal case based on the evidence presented. This system operated, in several versions, in Antiquity and in the first period of the Middle Ages [4].

*The inquisitorial system* was characterized by features opposed to the adversarial system. Thus, the accusation, defence and judgment were no longer distinct activities, and the criminal proceedings were initiated *ex officio* by the body having the obligation to gather the evidence and judge the case. Also, the procedure was in writing and secret, the only party to the proceedings was the accused person, and the supply of evidence had a formal nature, the cases being usually settled without debates. This system, used in rudimentary forms as early as the Antiquity, appears in its typical form upon the consolidation of the central power in the Middle Ages and upon the organization of canonical inquisitorial justice [5].

Also, *the mixed system* (eclectic) used the aspects it considered useful from the other two systems, and it included a *preliminary phase of the criminal proceedings*, regulated according to the inquisitorial system (*ex*

*officio*, secret and written procedure) and a *phase of judgment* applying the rules of the adversarial system (oral arguments, audi alteram partem rule). However, the mixed system does not strictly apply the rules of the other two systems, including various deviations therefrom, and each criminal proceedings legislation established regulations with their own particulars.

According to the provisions of the Code of Criminal Procedure of 1968, the typical structure of a criminal proceedings included three phases: *criminal prosecution, judgment and enforcement of final criminal decisions*; each such phase was delimited by certain proceedings-related acts and, within each of these phases, certain categories of judicial bodies exercised their duties.

Upon the coming into force of the New Code of Criminal Procedure, the criminal proceedings, along with the criminal prosecution, judgment and enforcement of the criminal decision, include a new phase, namely *the preliminary chamber*. The purpose of the procedure in the preliminary chamber is to verify, after the indictment, the competence and legality of seizing the court, as well as to verify the legality of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies.

These subdivisions of the criminal proceedings correspond to the particulars of the activities which have to be undertaken for a good settlement of the criminal case.

### **1. Criminal prosecution - distinct phase of the criminal proceedings**

Each proceedings phase solves problems whose settlement is crucial for the progress of the criminal file to the next phase. Among the phases or subdivisions of the criminal proceedings, the criminal prosecution has a special place, because of its own finality and function.

The criminal prosecution is the first phase of the criminal proceedings and consists in *the set of activities undertaken by the criminal prosecution bodies in order to gather the necessary evidence on the existence of the offences, the identification of the offenders and establishment of their criminal or civil liability, in order to establish whether the judgment should be initiated or not against them* [6].

Incipient forms of criminal prosecution, as a distinct phase within the criminal proceedings, appeared in the inquisitorial system, in Western Europe, in the 13<sup>th</sup> century, when the so-called *investigation* appeared, conducted on the initiative of the royal power agents [7]. The presentation of the Public Ministry in the legal literature underlined that, initially, the prosecutor's duty was to take care of the material interests of the king and, later on, they started searching the guilty persons and bringing them to justice [8].

Numerous authors underlined the importance of the criminal prosecution phase within the criminal proceedings. In this respect, it was presented that the need to counteract the criminal activity led to the establishment of specialized bodies to undertake specific activities in a phase preceding the judgment [9].

Also, the existence of the criminal prosecution as a distinct phase of the criminal proceedings is also justified by the fact that, in the modern age, offences are committed by using new and increasingly better methods and techniques, and sometimes the criminal activity turns into organized crime [10]. All these aspects led to a focused concern of the state to fight against the criminal phenomenon.

For this purpose, it was necessary to establish some bodies specialized in discovering the offences, identifying and catching the offenders in order to bring them to justice. These bodies have a well-determined competence according to the law, and they conduct their activity within the criminal prosecution phase. According to the criminal proceedings-related provisions, the criminal prosecution is a phase whose contents and performance are strictly limited to what is necessary to achieve the purpose of this proceedings phase and of the criminal proceedings in general [11].

Besides the fundamental rules of the criminal proceedings, several basic rules may be identified for the criminal prosecution phase, which are specific to it [12]. In this respect, the criminal prosecution is not public; however, there are acts of criminal prosecution in which the public may participate to a certain extent (for instance, the participation of assistant witnesses in certain procedures related to the evidence).

The criminal prosecution is also characterized by the absence of the audi alteram partem rule (meaning the existence and exercise within this activity of two opposite sides or functions – accusation and defence); as an exception, there are also “islands” of application of the audi alteram partem rule throughout this proceedings phase (for instance, debate on the proposal of provisional arrest of the suspect or defendant).

The absence of the audi alteram partem rule confers efficiency and mobility to the criminal prosecution, which features are absent in the judgment phase, because the criminal prosecution bodies have

the possibility to undertake the criminal prosecution acts at the most appropriate time, on the date and at the place corresponding to the concrete requirements of the file [13].

Also, the criminal prosecution is preponderantly written, since most of the acts within this proceedings phase are made in writing. In the criminal prosecution phase, the parties may raise exceptions, file requests or memoranda only in writing. Although the written form is not a requirement for validity, but only a requirement for evidence, it may be said that, as compared to the judgment phase (characterized by its oral nature), the criminal prosecution mainly has a written character.

## **2. Preliminary chamber - distinct phase of the criminal proceedings**

The criminal cases follow the procedure in the preliminary chamber only if the court was seized by an indictment. If the court is seized by an agreement for admission of guilt, the criminal case shall go directly to the judgment phase, without following the preliminary chamber procedure.

The preliminary chamber procedure includes a written debate between the defendant (not the civil party, the party liable under the civil law or the injured party) and the prosecutor.

According to Art. 54 of the New Code of Criminal Procedure, the preliminary chamber judge is a judge who, within the court and according to the court's jurisdiction:

- a) verifies the legality of the indictment ordered by the prosecutor;
- b) verifies the legality of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies;
- c) settles the complaints against the rulings of non-prosecution or non-indictment;
- d) settles other situations expressly provided by the law;

The preliminary chamber procedure is regulated by the provisions of Arts. 342-348 of the New Code of Criminal Procedure.

The purpose of the procedure in the preliminary chamber is to verify, after the indictment, the competence and legality of seizing the court, as well as to verify the legality of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies.

The duration of the preliminary chamber procedure is of maximum 60 days from the date of registration of the case with the court (Art. 343 of the New Code of Criminal Procedure). We consider that this term is a recommendation and, if it is exceeded, no procedural sanctions may occur.

For the judgment of the file, certain communications have to be made. Thus, according to Art. 344 of the New Code of Criminal Procedure, the certified copy of the indictment and, as the case may be, its certified translation (in the case of a foreign defendant) shall be communicated to the defendant at the place of his arrest or, as the case may be, at the address where he lives or at the address where he requested the service of process.

As a novelty, the preliminary chamber procedure introduces the regulation of a written procedure regarding the submission of requests, exceptions and the employment of a defence lawyer. Thus, the institution of preliminary chamber emphasizes the written character for the settlement of the criminal case from the standpoint of the object presented in Art. 342 of the New Code of Criminal Procedure.

Along with the communication of the certified copy of the indictment and, as the case may be, of its certified translation, the defendant shall be presented with certain proceedings-related guarantees. In this respect, the defendant's attention is drawn on the object of the procedure in the preliminary chamber, on his right to hire a defence lawyer, the term within which he may file, in writing, requests and exceptions on the legality of evidence gathering and procedural acts undertaken by the criminal prosecution bodies. The term is established by the preliminary chamber judge, depending on the complexity and particulars of the case, but it may not be shorter than 20 days.

As regards the appointment of the *ex officio* defence lawyer, according to Art. 344 para. 3 of the New Code of Criminal Procedure, the preliminary chamber judge takes measures for his appointment, in the cases provided by Art. 90 of the New Code of Criminal Procedure. In the current form of the criminal proceedings-related provisions, the interpretation may be that only the provisions of Art. 90 letters a) and b) of the New Code of Criminal Procedure are applicable; the hypothesis under Art. 90 letter c) is not applicable because it refers to the judgment phase [14], and the preliminary chamber is a distinct phase of the criminal proceedings.

As regards the solutions that the preliminary chamber may order, they are expressly provided in Art. 346 of the New Code of Criminal Procedure.

Within the preliminary chamber procedure, the judge issues a court report supported by reasons, in the court chambers, without participation of the defendant or prosecutor.

According to Art. 346 para. 3 letter a) of the New Code of Criminal Procedure, the preliminary chamber judge shall return the case to the prosecutor's office if: the indictment is not prepared according to the rules and such irregularity was not remedied by the prosecutor within the term provided in Art. 345 para. 3, if the irregularity entails the impossibility to establish the object or limits of the judgment. The preliminary chamber court report establishes the irregularity of the notification act, according to the text of the law; the case is returned for the remedy of the act for notification of the court. Such a ruling was regulated by Art. 300 of the Code of Criminal Procedure of 1968.

Also, the preliminary chamber judge returns the case to the prosecutor if it excluded all the evidence gathered during the criminal prosecution (for instance, establishing a breach in respect of a proof which led to all the evidence deriving from that proof, may lead to the return of the file to the prosecutor, since the entire evidence gathered during the criminal prosecution is excluded), as well as if the prosecutor requests the case to be returned, according to Art. 345 para. 3, or fails to answer within the term provided by the same provisions [Art. 346 para. 3 letters b) and c) of the New Code of Criminal Procedure].

In all the other cases when irregularities of the notification act were found, when it excluded one or some of the gathered evidence (excluded evidence cannot be taken into consideration upon the judgment of the case on the merits) or sanctions, according to Arts. 280 – 282 of the New Code of Criminal Procedure the criminal prosecution acts undertaken in breach of the law, the preliminary chamber judge shall order the initiation of the judgment.

As regards the means of challenge, the criminal trial-related law expressly regulates the means of appeal by a challenge, which shall be filed within 3 days from communication of the court report supported by reasons issued by the preliminary chamber judge. The challenge may concern the settlement of the requests and exceptions, as well as the rulings provided in Art. 346 paras. 3-5 of the New Code of Criminal Procedure (but not the hypothesis regulated in Art. 346 para. 6 of the new regulation) [15].

### **3. Judgment – important phase of the criminal proceedings**

The notion of judgment receives two meanings in the criminal trial-related terminology [16]. Thus, in a narrow sense, the concept of judgment refers to the logical operation whereby the panel of judges settles the criminal case with which it was seized, while, in a broad sense, the judgment means one of the phases of the criminal proceedings, consisting of a set of activities primarily undertaken by the court of law.

The notions of criminal “case”, “cause” or “matter” mean the substantive fact for which the criminal proceedings takes place; this refers to the material criminal law dispute. The concept of “criminal case” should not be mistaken for the notion of “proceedings”, the latter notion referring to the set of activities undertaken for the settlement of the criminal law dispute [17].

The judgment is considered, in its broad sense, as the central and most important phase of the criminal proceedings [18], because its object is the final settlement of the criminal case. The importance assigned to the judgment phase is also justified by the fact that, within such, the court of law verifies the entire activity related to the proceedings, undertaken by all the other participants, both before the judgment of the case and during its judgment.

Also, the importance assigned to this phase of the proceedings is also reflected in the regulations establishing the principle of separation of state powers, and, implicitly, the independence of the judiciary power. In this respect, the Constitution of Romania provides in Art. 124 that “Justice shall be rendered in the name of the law” and that “Judges shall be independent and subject only to the law”. Also, according to Art. 1 para. 2 of Law no. 304/2004 on the judiciary organization, “The Superior Council of Magistracy shall be the guarantor of the independence of justice”.

The purpose of the judgment phase is to find the truth in respect of the fact and the person which were notified to the court, in order to issue a lawful and grounded ruling.

Throughout the judgment phase, the court of law shall verify the legality and grounds for the criminal accusation pressed by the prosecutor, as well as of the civil claim filed by the civil party, making a decision

which shall solve the criminal and civil sides of the criminal proceedings. The decision of the criminal court may be subject to judiciary control by exercising the means of challenge by the parties or the prosecutor.

The acts of judgment are jurisdictional acts whereby the activity of judgment is undertaken in order to achieve the purpose of the criminal proceeding and consist in decisions that the court of law orders during the proceedings in respect of the settlement of the criminal or civil action [19].

**Specific principles of the judgment phase.** Besides the fundamental principles of the criminal proceedings, which are also applicable in the judgment phase, there is a set of principles specific to this phase: *publicity, direct nature, oral arguments and audi alteram partem rule.*

a. Regulated in Art. 290 para. 1 of the Code of Criminal Procedure of 1968, *the principle of publicity of the judgment phase* is established in Art. 352 of the New Code of Criminal Procedure. The publicity of the court session is the basic rule of the criminal trial consisting in the performance of the judgment of a criminal case in public session. The court sessions have a public nature, any person being allowed to participate, including the press.

The presence of the public allows it to become aware of the modality in which the act of justice is rendered and ensures the guarantee of a control by such public or by the press on the modality of rendering justice [20].

It is not required that a public is effectively present in the courtroom upon the performance of the trial, but it is necessary that the public may have access to the court session. In other words, the proceedings in this phase of the criminal proceedings take place “with open doors” [21].

Being an important guarantee of the objectivity and impartiality of the judgment, the publicity of the court session is expressly provided in the Constitution of Romania (according to art. 127, the court sessions are public, except for the cases provided by the law), as well as in Law no. 304/2004 on the judiciary organization (according to Art. 12, the court sessions are public, except for the cases provided by the law; decisions shall be issued in public session, except for the cases provided by the law).

There are exceptions from the principle of publicity of the court session, which are situations expressly provided by the law in which the publicity is no longer mandatory.

Also, according to Art. 351 para. 1 of the New Code of Criminal Procedure, the judgment of the case is made before the court formed according to the law and takes place in a session, orally, directly and according to the *audi alteram partem* rule, this regulation being similar to the one provided in Art. 289 of the Code of Criminal Procedure of 1968.

b. *The direct nature*, consists in the obligation of the court to directly perceive, without any intermediate, the means of evidence produced in the case, as well as the arguments of the prosecutor or of the parties in the criminal trial. By this direct nature, the court has direct contact with all the evidence.

The principles of *audi alteram partem* and of oral arguments blend with the principle of direct nature, according to which the judge “directly perceives, without any intermediate, the entire activity of the parties and of the secondary participants in the trial; directly hears the parties, the witnesses, without any intermediate (...). The entire debate takes place before the eyes and ears of the judge and of the parties. Consequently, the judge is in the position to perceive and assess the elements of the debate and the evidence, *de visu et de auditu*, in the session, in the presence and under the control of the concerned parties and even of the participating public. And the judge can ground his conviction only on what he saw and heard in the debate and on what was discussed there” [22].

In order to ensure such direct nature, *the principle of continuity of the panel of judges* was regulated, according to which the judgment of a criminal case is made throughout the entire criminal trial, by the same panel of judges to which the case was randomly assigned. In this respect, the principle of continuity of the panel of judges implies that “the entire debate takes place before the eyes of the same judges, in an uninterrupted, continuous manner, so that the judges have a detailed documentation of each moment of the debate and form a unitary opinion on the entire proceedings under debate” [23].

c. *The audi alteram partem rule*, as a principle specific to the judgment phase, refers to the fact that the evidence gathered during this phase is submitted for discussions by the participants in the session, thus emphasizing the different trial-related positions of the parties [24].

The *audi alteram partem* rule is in close connection with *the principle of equality of arms*, as parts of the right to a fair trial and involve the right of each party to become aware of all the acts in the file or the observations, reports presented to the judge and to discuss them before such judge in order to influence the

decision of the court of law, within a procedure based on the audi alteram partem rule which does not put any of the parties at a disadvantage [25].

d. Also, *the principle of oral arguments* consists in the fact that the entire activity of the proceedings conducted in the judgment phase takes place orally.

The oral arguments is not only a modality of holding the court session, but, it should be also understood taking into account the legal effects it produces in the judgment phase, being an imperative requirement for its validity, because, upon issuing a decision, the court shall take into consideration not only what was recorded, but also what was discussed orally in the debate stage.

#### **4. Enforcement of the criminal court decisions – phase of the criminal proceedings**

For the settlement of a criminal law dispute arising from the perpetration of an offence, it is required to initiate the criminal proceedings, consequently, a criminal law relationship is born in relation to such proceedings. However, the substantive criminal law dispute is considered settled only after the completion of the criminal proceedings, by reestablishment of the breached order of law, namely by holding the persons guilty of having committed the offence liable under the criminal law.

In order to ensure the completion of the criminal proceedings and to hold the guilty persons liable under the criminal law, it is not sufficient to issue a court decision, but its enacting terms have to be enforced.

The enforcement of the final criminal decisions is an activity included in the proceedings, conducted *ex officio*, whereby the enacting terms of a final criminal decisions are enforced. According to the internal organization regulation of the courts, the criminal enforcement bureaus include at least one delegated judge concretely in charge with the activity of criminal enforcement.

The last phase of the criminal proceedings has the purpose to transpose in life the final criminal decision and to achieve the purpose of the criminal law and of the criminal trial-related law [26]. The enforcement of the criminal decisions is characterized by its own principles such as: mandatory nature, enforceability, jurisdiction and continuity [27].

Within the criminal proceedings, the enacting terms of the final criminal decision have to be enforced, which provide the coercion of the sentenced persons, so that they effectively incur the applied criminal sanctions.

In the criminal trial-related literature, numerous authors claim the autonomy of this stage of the criminal proceedings [28], however, there are also opinions according to which the rules on the enforcement of the criminal decisions fully belong to the autonomous branch of the executive criminal law [29].

Also, it was shown that only a certain part of the enforcement activities is included in the phase of enforcement of the criminal decisions, namely the activities initiating the beginning of the enforcement, and thus, the service of the sentence is different from the enforcement of the sentence [30].

While the regulation of the enforcement of the criminal decisions falls under the exclusive application of the rules of the criminal trial-related law, the proper service of the criminal sanctions falls under the application of the rules of substantive law, which are included in the Criminal Code and in Law no. 275/2006 on the enforcement of the penalties and measures ordered by the judiciary bodies during the criminal proceedings.

The proceedings phase of enforcement is subsequent to the moment when the criminal court decision remains final and, according to Art. 554 of the New Code of Criminal Procedure, it starts with the first judicial activities undertaken at the enforcement court by the judge delegated with the enforcement.

The final limit of this proceedings phase ends with the effective service of the sentences or of the orders included in the court decision.

#### **Conclusions**

In conclusion, we can say that, the phases of the criminal proceedings are divisions thereof, including a complex of activities, successively and progressively undertaken in a coordinated manner, having their own objects and ending by their own solutions.

It is obvious that, the notion of proceedings phase shall not be mistaken for the notion of proceedings stage. In this respect, the proceedings stages are various steps of conducting the criminal proceedings, within

the distinct phases it undertakes. Thus, the proceedings stages are subdivisions of the phases of conducting a criminal proceeding; they have their own function, forming, within the main activities, a unitary set of activities (for instance, within judgment of the means of challenge, which is a stage of the judgment phase, several means of challenge may be successively used - appeal, recourse in cassation, challenge for annulment, revision - and each of them is a proceedings stage).

Upon the coming into force of the New Code of Criminal Procedure, the criminal proceedings, along with the criminal prosecution, judgment and enforcement of the criminal decision, include a new phase, namely the preliminary chamber. The purpose of the procedure in the preliminary chamber is to verify, after the indictment, the competence and legality of seizing the court, as well as to verify the legality of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies.

What is extremely important is that these subdivisions of the criminal proceedings, correspond to the particulars of the activities which have to be undertaken for a good settlement of the criminal case.

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