WITHDRAWAL OF PREVIOUS COMPLAINT. A COMPARISON OF THE OLD AND THE NEW CRIMINAL CODE. PROBLEMS OF COMPARATIVE LAW

Alin Sorin NICOLESCU*

Abstract:

In criminal law previous complaint has a double legal valence, material and procedural in nature, constituting a condition for criminal liability, but also a functional condition in cases expressly and limitatively provided by law, a consequence of criminal sanction condition. For certain offenses criminal law determines the initiation of the criminal complaint by the introduction of previous complaint by the injured party, without its absence being a question of removing criminal liability. From the perspective of criminal material law conditioning of the existence of previous complaint,its lack and withdrawal, are regulated by art. 157 and 158 of the New Penal Code, with significant changes in relation to the old regulation of the institution . In terms of procedural aspect, previous complaint is regulated in art. 295-298 of the New Code of Criminal Procedure. Regarding the withdrawal of the previuos complaint, in the case of offenses for which the initiation of criminal proceedings is subject to the existence of such a complaint, we note that in the current Criminal Code this legal institution is regulated separately, representing both a cause for removal of criminal liability and a cause that preclude criminal action. This unilateral act of the will of the injured party - the withdrawal of the previous complaint, may be exercised only under certain conditions, namely: it can only be promoted in the case of the offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint; it is made exclusively by the rightholder, by legal representatives or with the consent of the persons required by law for persons lacking legal capacity or having limited legal capacity;it must intervene until giving final judgment and it must represent an express and explicit manifestation. A novelty isrepresented by the possibility of withdrawing previous complaint if the prosecution was driven ex officio, although for that offense the law requires a previous complaint in the sense that the withdrawal takes effect only if it is appropriated by the prosecutor.

Keywords: *crime, previous complaint, criminal action, withdrawal of previous complaint.*

1. Introduction. Previous complaint. General considerations.

Legal order and civic discipline in a state of law are established and maintained by means of rules of law. These rules prescribe rules of conduct, which must be obeyed by the community members as well as sanctions to be applied in case of their violation.

The rules of conduct – most of them - are expressed in a particular form: the law[1] in a wider sense (including any normative act).

* Judge, Chairman of the Criminal Section of Gorj Court; PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **alin.nicolescu@just.ro**).

[1] I. Gorgăneanu - Criminal proceedings, Scientific and Encyclopedic Publishing House Bucharest, 1977, p. 13.

The great philosopher, lawyer and orator Cicero (106 BC-43 BC) said more than two millennia before that ”we are slaves to law in order to be free”.

The establishment by law of the facts constituting crime, as well as of the criminal sanctions framework, has a dual role: first to show the members of society which are the deeds prohibited by criminal law and also to warn them about the consequences of committing such deeds, thus fulfilling the function of general prevention and secondly to ensure the correct framing of the facts that infringed the penal law, and a fair sanction for those who committed such acts, with a special preventive function.

In Article 1 of the Criminal Code, the law provides the acts constituting offense, the penalties that are applied to offenders and the measures that can be taken when committing such acts.

Commiting an offense, even when it is discovered and proved by the administration of evidence, adduced against infringers, does not require the automatic application of punishment. In order to reach punishing the offender criminal justice is required, meaning his conviction by the competent court on a trial.

The necessity of restoring the rule of law infringed by committing crimes led to the establishment of the rule that initiation and development of criminal proceedings are made ex officio (principle of officialdom of criminal trial). In the case of minor offenses or those involving relationships between people or their personal life, the Criminal Code and other laws with criminal provisions stipulate that criminal action can be initiated or exercised only if the injured person expressed his/her will of prosecuting the perpetrator by introducing a previous complaint to the courts.

Previous complaint is a criminal institution, its absence representing a cause of removing criminal liability (art. 157 New Criminal Code).

The institution has a procedural aspect which has a direct impact on the possibility of exercising criminal action and implicitly on criminal responsibility.

From the point of view of criminal law, previous complaint is a condition of punishability and in terms of procedural criminal law a condition of procedurability[2].

As outlined, in the case of the offenses for which the law provides the necessity of previous complaint of the injured person, criminal action can not be exercised in the absence of such complaints, art. 295 Code of Criminal Procedure.

Criminal law determines the cases when for the exercise of criminal action, previous complaint is required, starting from the circumstance that these offenses are among those which by their nature concern social relations limited especially to the personal interests of the parties.

In such cases, it is considered that the injured are able to determine whether to start a criminal trial, criminal action being conditioned by the manifestation of an exclusive right of the injured person[3]. Against the will of the injured criminal trial it can not take place.

Justification of the exception consisted either in a lower degree of abstract social danger of these facts or in the circumstance that their bringing to court, with the advertising involved by the trial, could be a source of discomfort or distress to the injured person or would give rise to various conflicts between people belonging

[2] Milea T. Popovici, Prior complaint in regulating the present Code of Criminal Procedure, RRD No.9 / 1969, p.23.

[3] C.Bulai, Criminal Law, General Part, University of Bucharest, 1987, p.469.

to the same family or to the same social environment[4].

Since its legal support - criminal proceedings - in this case is characterized by availability, judicial authorities cannot exercise their duties ex officio.

Conditions of form and substance that must be fulfilled by previous complaint to produce its effect refers, inter alia, to the proprietor of the previous complaint, so, who can introduce previous complaint, the term in which it is introduced, what items previous complaint should include, these being provided by art. 295 para. 3 Code of Criminal Procedure in relation to art. 289 Criminal Procedure Code.

In terms of procedural aspect the institution of previous complaint is to be found in the Special Part of the New Criminal Procedure Code in Title I - Prosecution - Chapter II. art. 295-298, and in terms of substantive law in the general part of the New Criminal Code under Title VII - causes removing criminal liability - art. 157-158.

Therefore, previous complaint can be defined as a manifestation of the will of the injured person embodied in a revocable procedural act requiring criminal liability of the person who committed an offense against him/her for whom the commissioning of criminal action can only be achieved in this way.

Previous complaint, as a notification, is unlike any other ordinary acts referral[5] of the prosecution (denunciation, complaint,ex officio notification) its character necessary and indispensable as a condition for criminal proceedings, as well as through its exclusive character, previous complaint being the only way of valid notification referral[6] for criminal proceedings for certain offenses, which can not take place if there was a common complaint.

The previous complaint must be made by the injured person under the provisions of art. 157 New Criminal Code. It follows therefore that the injured person is the holder of the right to cause the initiation of criminal proceedings by introducing previous complaint.

According to the provisions of art. 158 New Criminal Code, the withdrawal of the previous complaint is, as well as the lack of previous complaint, a cause of the removal of criminal liability. Withdrawal of previous complaint is a unilateral act of will, manifested by the injured person who makes a prior complaint and then returns by withdrawing the complaint he made, and which must be real[7] and indeterminate by fraud or violence[8].

In judicial practice it is questionable which is the procedural remedy where previous complaint was withdrawn due to an error of consent, since the Criminal Procedure Code and the Criminal Code have express provisions on this.

We appreciate that in such a situation the procedural solution must be varied depending on when the withdrawal of prior complaint occurs due to an error of consent.

If viciated withdrawal of previous complaint occurs during the investigation or during the trial in first instance the injured party has the opportunity to inform the appropriate judicial authorities about this issue, promotion or filing a complaint against the solution of classification or,

[4] I.Neagu, Criminal Procedure Law, Special Part, vol. I, Oscar Print Publishing House, 1994, p.152.
[5] Carmen Silvia Paraschiv etc., Criminal Procedure Law, Bucharest, Lumina Lex Publishing House, 2004, p.397.
[6] I.Neagu, work cited., p.431.
[7] I.Neagu, work cited, p.153.
[8] N.Volonciu, Treaty of Criminal Procedure, Special Part, volume II, Paideia Publishing House, Bucharest, 1994, p.116.

respectively against promoting ordinary means of attack .

The problem which finds no firm and explicit solution is when the viciated withdrawal of prior complaint occurs before the final court as a jurisdiction degree pronouncing a final decision without the injured party being aware of the existence of the defect at the time of consent (dol) or was objectively unable to proceed otherwise due to the violence exerted on him.

We believe that by ferenda law this situation should be regulated as to provide procedural remedy in the circumstance when the withdrawal of prior complaint was determined by fraud or violence, and in the meantime a final decision was pronounced.

Withdrawal of previous complaint must be total and unconditional, namely to concern both the criminal and the civil part of the trial.

In other words, the injured person can not renounce criminal proceedings and can not condition the withdrawal of previous complaint by granting civil damages.

As I specified, the withdrawal of the previous complaint must be made within a certain period of time which is situated between its submission and the intervention of the final decision of the court. According to the provisions of the Criminal Code, the withdrawal of the previous complaint has as a legal effect the removing of criminal liability.

Injured person's right to make a prior complaint is a personal right, indivisible and non-transferable in principle.

The exercise of this right may be made, however, by an authorized agent. In this case the mandate should be special and the procuration should be attached to the complaint.

In judicial practice it was established that lack of procedural capacity of the person lodging the prior complaint to the competent body for the injured person is not covered by a mandate given after overcoming these phases of the process, its lack causing the termination of criminal proceedings under Art. 17 Code of Criminal Procedure in relation to art. 396 para. 6 combined with art. 16 para. 1 letter e Code of Criminal Procedure.

Regarding subjects that can introduce previous complaint to the competent bodies we are to see that the legislator has provided the possibility that anyone other than its holder can file a complaint[9], respectively the legal representatives (parents, guardian or curator) when the injured person is a minor or under a disability.

According to art. 157 paragraph 4 of the Criminal Code, if the injured is a person lacking legal capacity or with limited exercise capacity, criminal proceedings are initiated ex officio. Therefore, in the case provided by art. 157 para. 4 Criminal Code functions both the principle of availability on criminal action and the principle of officialdom. In this regard, we consider that initiating criminal action is made ex officio only in the subsidiary, namely only in the event that those entitled by law have not introduced previous complaint to the competent bodies.

According to the New Criminal Code previous complaint can also be introduced or withdrawn by the legal person where he is the victim of a crime for which criminal action implementation is made only in such a way, for example, the crime of destruction provided and punished by art. 253 para. 1 and 2 of the Criminal Code.

[9] I. Neagu, work cited, p.571.

For the legal person previous complaint will be stated and implicitly withdrawn in its name and interest through the legal representative, because as long as there are duties and responsibilities, correlatively there are rights.

A special situation can arise when the legal person, victim of a crime where the criminal proceedings shall be initiated upon previous complaint, is in dissolution or liquidation procedure when we consider that this approach will be achieved by the legal representatives of the company of insolvency . To reason logically and legally otherwise in the sense of a restrictive interpretation of the term " injured person – legal representative " would reach infringement of free access to justice, a right belonging to the legal person too and which is guaranteed by Art. 21 of the Romanian Constitution and art. 6 § 1 Thesis I of the European Convention for defending human rights and fundamental freedoms.

2.1. Comparison between the Old and the New Criminal Code

In the light of new legislation are outlined some new conditions in which withdrawal of the previous complaint removes criminal liability, marking significant differences to the concept promoted by the Criminal Code of 1969, as well as some conditions required under the previous regulation remain valid (some of which being currently established by law, others only reported in the doctrine). Conditions of withdrawal of previous complaint are: intervening in case of offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint - art. 158 para. (1) NCP [but, when the prosecution was initiated ex officio, under the law, the withdrawal of the previous complaint must be appropriated by the prosecutor - art. 158 para. (4) NCP]; being made by the rightholder [injured party / other person who has the necessary capacity -art. 158 para. (3) NPC reported to art. 289 para. (2) NCPP]; constituting an express and explicit manifestation of renounciating previous complaint lodged (special mandate, authentic documents); intervening until giving a final judgment [art. 158 para. (1) NCP].

Offences pursued in previous complaint are in the New Criminal Code largely the same from the Old Criminal Code, respectively offenses which generally concern patrimonial or or non-property rights of the person as well as some offenses against the person (193, art. 206, art. 208, Art. 218 para. 1 and 2 Art. 219 para 1 etc ..) crimes against property (Art. 238, Art. 239, Art. 240, Art. 241, etc.), offenses against family (art.378 art. 379, etc.), thereby without being exhausted procedural valences of this institution whose extension is recommended by the Council of Europe, as a way to retributive - restitutive justice

In the introduction to these considerations we defined previous complaint as a unilateral manifestation of the will of the victim embodied in a revocable procedural act requiring criminal liability of the person who committed an offense against it for whom initiating criminal action can only be achieved in this way.

As it is revocable procedural act, the previous complaint formulation does not remove the injured person's right of having in the future the fate of the criminal proceedings. as provided by law,

The main way to revoke the previous complaint is its withdrawal. It can be said that in this area usually the rule of symmetry works, according to which previous complaint may be withdrawn in offenses for which it is required, but only in the case of these crimes. Exceptions are cases where

the law also allows promoting criminal action ex officio, and judicial bodies were self-informed.

We believe that the withdrawal of the complaint can be made by authentic statement (or even certified by lawyer), which is submitted to the case file. If the declaration of withdrawal has reached the court registry on the day of trial, but by an error of officials it did not join the file, because being in the appeal, the only solution is to promote an abatement legal dispute (extraordinary means of attack) .

Therefore, we can define previous complaint withdrawal as a unilateral manifestation of will, express, explicit, total, irrevocable and unconditional of the injured person embodied in a procedural act which in relation to criminal offenses for which initiation of criminal action is made to previous complaint requesting the removal of criminal liability on the person who committed such acts, in any stage of the criminal process, but before the final verdict is pronounced .

Under art. 284 former Code of Criminal Procedure previous complaint had to be lodged within two months from the day the injured party knew the perpetrator, and according to art. 296 New Code of Criminal Procedure previous complaint must be lodged within three months from the day the injured party learned of the offense committed. Legislative amendment aimes at both increasing the term of formulation of previous complaint and the time when the term starts running, the new regulation "on the day injured person learned about committing the crime " being apt to induce removal of the subjective element in assessing the institution. This moment is easily determined on the basis of objective elements, outside the will of the person injured.

The former regulation leaves the possibility of runing a relatively undetermined period in which the injured party is not obliged to resort to the competent authorities to identify the perpetrator, after a long period he could say he learned who the perpetrator was and introduce previous complaint.

Unlike the time he learned who the perpetrator was, as provided by previous legislation; according to par. (3) art. 296 NCPP, if the offender is the legal representative of the injured party, the period runs from the date of appointment of a new legal representative. In long term offenses (continuous, continued, progressive) the term of three months will run from the time of consuming or the date on which the holder of the right knew about it and if the two moments do not coincide, and not from the date of its exhaustion.

Under the old rules and the new rules if the injured person is unable (without legal capacity or with limited legal capacity) previous complaint is made by her legal representatives (parent, guardian, curator), respectively, with the consent of the persons referred by civil law; In these cases, criminal proceedings may be initiated ex officio.

Specifying as a novelty in agreement with the High Court of Cassation and Justice - Criminal Division (for example: Decision no. 464/2009) the provisions of art. 157 para. (5) NCP provide that, if the injured person died (regardless of cause of death) or legal person was liquidated before the expiry of the term provided by law for the introduction of previous complaint, criminal proceedings may be instituted ex officio; the initiation of criminal proceedings ex officio may be made, in this case, both before and after the expiry term of previous complaint formulation; in this case the prosecuting authority is not bound by the term of previous complaint

formulation for disposing beginning of criminal action .

We believe that the criminal proceedings shall be initiated ex officio also if, throughout the period of formulating previous complaint, the injured party was in an objective impossibility of formulating previous complaint, which is directly related to the offense, dying as a result of the offense after the expiration of the previous complaint term (for example, if the offenses are inextricably connected and consistential at a time after the commission of an offense prior to the complaint, the perpetrator tried to kill the victim, leaving her in a coma; if the comatose state extends throughout the term of formulating preliminary complaint, the victim dying after this period, criminal proceedings may be instituted ex officio).

If the death or liquidation occur immediately after the expiration of the previous complaint formulation, and the victim was not in an objective impossibility to file a previous complaint, criminal proceedings can not be initiated ex officio.

In applying the provisions of the Criminal Code of 1968 it was stated that in case of death of the injured person in which previous complaint had to be made and it wasn't, this right is not transmitted to heirs and exercise of criminal proceedings can not be disposed ex officio[10]. Also in applying the provisions of the Criminal Code of 1968 it was stated that if the victim died after the previous complaint was lodged the criminal trial continues to be called into question heirs, but only to be a civil part[11], the criminal proceedings being exercised ex officio[12].

If non-transferability to heirs of the right to make previous complaint is maintained under the new Criminal Code, in the event that the injured person has died or the legal person was liquidated before the expiry of the period prescribed by law for the introduction of the complaint, the New Criminal Code provides that criminal proceedings may be instituted ex officio (157 para 5).

The aforementioned provision is not likely to clarify the exercise of criminal action in case of death of the injured party, on the contrary it can lead to further confusion.

The fact that criminal proceedings may be instituted ex officio means that there is an obligation for the Public Ministry to pursue prosecution. Justification of ex officio exercise of criminal action could be explained only by the existence of a public interest (pas d'interest, pas d'action) and not by the applications of the heirs whose interests would have been better defended by themselves, if the legislator had granted them this right.

Similarly is regulated the institution of active and passive indivisibility of criminal liability for the application of previous complaint.

Rule of active indivisibility applies where by committing the offense there are several people injured, meaning that the right to enter previous complaint belongs to any of these and the criminal liability of the offender will be drawn even if the previous complaint is made by only one injured party (Art. 157 para. 2 new Criminal Code, Art. 131 para. 3 old Criminal Code).

Rule of passive indivisibility applies where the offense was committed by several natural or legal persons (authors, instigators, accomplices), meaning that they will be held criminally liable even if the

[10] E. Ionăseanu, Prosecution procedure, Military Publishing House, p.122-123.
[11] Supreme Court of Justice., criminal judgment. no.3067/1995.
[12] L. C. Lascu, Prior complaint procedure. The death of the victim. Continuing Criminal, Pro Law Publishing House no. 2/1992, p.191.

previous complaint was made only for one of the participants (Art. 157 para. 3 new Criminal Code, Art. 131 para. 4 old Criminal Code).

Under the old Penal Code withdrawal of previous complaint can only be effective if it was withdrawn on all offenders (opera in rem)

The new Criminal Code renounced this rule with reference to the principle of passive indivisibility in case of withdrawal of previous complaint; this solution being justified by the fact that the institution of reconciliation, which takes effect in personam, has been redesigned and is incidental only for crimes that criminal proceedings shall be initiated ex officio in which the law provides such a possibility of extinguishing criminal conflict and not under the assumption of offences for which criminal proceedings are initiated on the injured person's previous complaint.

Thus, according to art. 157 para. (2) The new Criminal Code, withdrawal of previous complaint removes criminal liability of the person on which the complaint was withdrawn. It is therefore possible to withdraw previous complaint only on one or some of the participants to committing the crime (produces effects in personam, not in rem), the criminal trial being to continue on suspects or defendants regarding to whom the complaint has not been withdrawn.

If the withdrawal of previous complaint occurs during prosecution, the prosecutor disposes classification, and if this occurs during the trial, the court orders the suspension of criminal proceedings.

Other changes with reference to the institution of withdrawal of previous complaint can be found in the mediation law (no. 192/2006):

Thus, according to art. 67 para. (2) of this act "in the criminal process, provisions on mediation shall apply only in cases of offenses for which, by law, the withdrawal of previous complaint or reconciliation remove criminal liability."

It is noted that the mediation agreement establishes a reconciliation between the offender and the injured party as a distinct means of mitigating the conflict between them in relation to criminal-law institutions represented by withdrawal of prior complaint, respectively of reconciliation [according to art. 16 para. (1)letter g) NCPP], without representing a new cause of removal of criminal liability.

Another procedural provision is required by art. 69 para. (2) of the same law, namely that the period prescribed by law for the introduction of previous complaint shall be suspended during the course of mediation. If the warring parties have not reached an agreement, the injured party may introduce previous complaint within the same period, which will resume its course since the date of the writing of the minutes closing the mediation procedure, also considering the time elapsed before the suspension.

In case of withdrawal of the previous complaint, the suspect or the accused may request further criminal proceedings under Art. 18 NCPP with a correspondent in the old Criminal Procedure Code Art. 13 Code of Criminal Procedure in order to be able to prove his innocence, for the purposes of acquiting, and if this is not achieved, it is preserved the benefit of withdrawal of previous complaint, respectively ceasing the proceedings.

According to both provisions the withdrawal of previous complaint removes both criminal liability and civil liability, even if it is made by the legal person through his legal or conventional representatives and it is possible as long as there is a pending criminal trial or preliminary acts are performed. After issuing a final solution the withdrawal of

previous complaint can not be done any more because of the lack of prosecution.

Also unchanged are the provisions under which the injured persons lacking capacity, the withdrawal of previous complaint is made only by their legal representatives. In the case of an injured person with limited legal capacity, the withdrawal is made with the approval of persons prescribed by law; in such cases, the withdrawal of previous complaint may be void as criminal proceedings can also be instituted ex officio.

The new Criminal Code has introduced an additional condition for the offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint, but prosecution was driven instituted ex officio in accordance with the law (in cases where the injured person is: a natural person lacking capacity, an individual with limited legal capacity or a legal person represented by the perpetrator); in these cases the withdrawal of complaint produces effect only if the complaint is appropriated by the prosecutor, thus limiting the right of disposal of the injured person just to ensure a more effective protection of those persons who are in a vulnerable position; in these situations, if the injured person withdraws his complaint, but prosecutor does not appropriate this manifestation of will (for example, if there is reasonable suspicion to believe that the withdrawal of previous complaint is nullified by an error of consent), criminal proceedings will continue under the principle of officialdom. (Art. 158 para. 4 new Criminal Code).

It is noted that the provision laid down in art. 158 para. 4 new Criminal Code establishes the situation when criminal proceedings was initiated ex officio, under the law [ie, art. 158 para. (3) or art. 199 para. (2) The New Penal Code], an optional attribution of the prosecutor who can refuse to accept the withdrawal of the previous complaint and the criminal trial to continue.

A legislative inconsistency problem is noted on the crime of domestic violence. Thus, according to art. 199 para. (2) The New Criminal Code offenses referred to in art. 193 New Criminal Code (beating or other violence) and art. 196 New Criminal Code (culpable bodily accident) committed against a family member, criminal proceedings may be instituted ex officio and reconciliation removes criminal liability. This text is contrary to the provisions of art. 158 para. (4) that the New Criminal Code according to which offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint, but prosecution was instituted ex officio in accordance with the law, the withdrawal of complaint shall take effect only if the complaint is appropriated by prosecutor. Corroborated interpretation of art. 199 para. (2) The New Penal Code and art. 158 para. (4) The New Criminal Code seems to hint that in those cases of domestic violence should be possible both the reconciliation and the withdrawal of previous complaint (if it is appropriated by the prosecutor).

However given the distinct nature of the two institutions, as well as the fact that reconciliation is stipulated by the provisions of the special part of the New Criminal Code, we believe that the only institution that can operate in such a case is that of reconciliation.

If we have detailed above the main differences and similarities between the two regulations we also appreciate that are necessary the following comments in regard to the withdrawal of prior complaint.

These specifications cover issues that are the creation of jurisprudence which shall remain valid and other legislative provisions of the old regulation unchanged by principle.

When the injured person is deaf and dumb, the withdrawal of previous complaint lodged with a statement recorded in conclusion is not valid, if it was not done through an interpreter or a filed document (Supreme Court, Criminal Division, Decision no. 1397/1992, in Problems law ... 1990-1992, p. 436).

Holder of prior complaint is the person - natural or legal - injured by the offense that requires criminal liability.

Previous complaint must meet certain requirements of substance and form, whose not meeting attracts lack or invalid complaint.

Submitting a complaint to an incompetent judicial body does not affect its validity because the incompetent body must send the petition to the organ that has by law, empowerment to address.

Although the law doesn't specifically provide this, previous complaint brought before judicial bodies should be based on fact, namely the one who submits it should rely on facts occurring in the objective world.

We believe that if the previous complaint is made in bad faith, the applicant may be held criminally liable for the offense of misleading the judicial bodies provided and punished by art. 268 new Criminal Code or slanderous denunciation provided and punished by art. 259 Old Criminal Code. With regard to this observation judicial practice and doctrine were not and are not consistent and there is also the substantiated opinion that the crime of slanderous denunciation of the Old Criminal Code with a correspondent in the new Criminal Code offense of misleading the judicial authorities does not concern crimes for which initiation of criminal action is made at prior complaint since the legal text refers only to "the notification made by denunciation or complaint" the prior complaint without being mentioned.

Filing a previous complaint by a general representative does not meet the legal requirement so that the complaint is considered non-existent. For the validity of the complaint, the mandate must be special (ad litem) and the procuration is attached to the complaint. Previous complaint may be drawn up and signed by the attorney if the injured party gave him a special mandate reflected in the content of lawyer's empowerment.

If the injured party is a person without legal capacity or who has limited legal capacity, the previous complaint is not actually necessary because the judiciary organs can notify.

Restoring the term operates if during the criminal proceedings the legal classification is changed for an offense involving the formulation of the previous complaint, when the injured party is called and asked if he wishes to lodge a criminal complaint. From the date when the judicial body announced injured party, it has a period of 3 months.

A special situation exists in the case of flagrant offenses punishable upon previous complaint of the injured party, in which case the criminal investigation body is obliged to establish its commitment even without previous complaint. After establishing flagrant crime, the criminal prosecution body calls the injured party and if he declares that he lodges a prior criminal prosecution continues. Otherwise, the criminal investigation body forwards the concluded documents and the dismissal proposal to the prosecutor.

If within the period of introducing a previous complaint, but before formulating it, there is a law that gives amnesty to the offense provided by the criminal law, the judicial shall order the enforcement of clemency act. The solution will be maintained even if later, within the period prescribed by law, the injured party lodges

complaint, because it was consumed a cause that doesn't leave prosecution without a purpose. The possibility of an equality between amnesty and lack of previous complaint is excluded because, if the complaint was not filed within the prescribed term it is missing, and if submitted within the term the above solution is applied.

Contesting the attack by a parent of the withdrawal of the complaint made by the other can not take place because both parents exercise parental rights.

According to art. 25 para. (5) NCPP with a correspondent in the old regulation in art. 346 para. 4 Code of Criminal Procedure, in the case of the withdrawal of the previous complaint the criminal court leaves civil action unresolved.

2.2. Problems of comparative law

In all legal systems there is the question of knowing if when committing an offense under the criminal law, this act constitutes a crime or not, who is the author and the punishment that is to be applied to the latter in case the person is guilty of committing that crime. To solve these problems it is necessary first to conduct prosecution on that act.

As for the author of the prosecution, some authors of comparative law[13] show that four systems are possible: action emanating from the victim or his heirs (private prosecution); action emanating from all citizens, acting on behalf of the society (popular charge); action that emanates from the very judges (criminal action ex officio); Finally, action emanating from specialized officers such as magistrates from the Public Ministry (public prosecution) or the officials from certain public institutions.

Let's see, then, how these systems are reflected in the different legislations of the countries of the world.

1. Anglo - Saxon (American) Law.

The English system is quite complex, the basic text being Prosecution offences. Act 19852, which refers to the prosecution of offenses.

In principle, all citizens can express their will for criminal investigation in connection with a crime, but in fact, most often, the judiciary police bodies initiate public action .

From this point of view it was brought an attenuation consisting of a specialized service in judicial action: in 1879, was created the Director of Public Prosecution (DPP), ie Department of public and judicial action and in 1985, the CPS, meaning the Crown prosecution service, the first of these two institutions holding the lead. This service has the essential mission to continue or to terminate prosecution initiated by judicial police authorities[14].

Specifically, the Crown Prosecution Service checks the record of the police, if they decided prosecute and decide whether the evidence is sufficient to order continuation of prosecution their insufficiency resulting in the case dismissal. But if the police decided not to pursue, if they just addressed the defendant a warning, they will not send any file to the Crown Prosecution Service and the latter will not be able to exercise prosecution.

The secondary mission of CPS (Crown proecution service) is to decide on prosecutions launched by individuals: in effect, such a criminal action may be contrary to the public interest.

In a word, CPS can only finish prosecution already started by the police or by an individual.

[13] Jean Pradel, taken by Pierre Legrand- Comparative Law, Lumina Lex Publishing House, Bucharest, 2001.
[14] CPS can also give advice to the police.

Finally, in principle, CPS shows which are the exceptions to the rule mentioned above. Thus, there are situations in which the criminal proceedings are not initiated ex officio or on prior complaint of the victim, but require notification or authorization of public institutions. So things are with taxes, customs (for illegal importing of drugs). Health services are competent in terms of fraud benefit offenses in these areas.

Following the investigation, the findings thus made and cumulated in a report made by the criminal investigation bodies, can allow launching of criminal trial.

The American system is very different from the English one and much easier. Originary from the USA, it is separated from the traditional English which is still founded on the idea of ex officio prosecution and previous complaint of the injured person. Also in the USA there is a public service, a veritable Public Ministry possessing monopoly of prosecution: prosecutors of the United States for federal offenses, regional prosecutors and municipal prosecutors for state offenses.

2. German law.

The German law covers, with some differences, the same stages as the Roman criminal proceedings: a preliminary phase of criminal action, followed by the trial phase and ends with the execution of criminal decision.

Prosecution may begin at a notification ex officio, by complaint or by denunciation.

Like the Roman law system for certain offenses such as mild violence, the victim has a specific action: he can act with the same title as the Public Ministry, which is an injury to the monopoly of the latter.

This specific action is the previous complaint, regulated in Book V (art. 374-406h)[15] of German Code of Criminal Procedure, dedicated to the injured person's participation in court.

Previous complaint (Privatklage art. 374-94 Criminal Procedure Code. German) may be exercised for the following offenses: breaking into residence, violating the secrecy of correspondence, personal injury, threat, giving or taking bribes in commercial circuit, destruction and crimes related to intellectual property (Art. 374 para. 1 Criminal Procedure Code. German).

Besides the injured person, holders of previous complaint may be all the people who may lodge a criminal complaint: the family, the legal representative in case of incapacity in civil and superior procedural sense.

If more people were injured by an offense that can lead them to previous complaint, they can act independently of each other. However, if one of the persons injured formulated previous complaint, the others are forced to join the process started, without having to exercise a previous complaint by each. In any case, the effects of a decision favorable for the accused are also opposable to the injured persons who have not participated in the proceedings (art. 375 German Criminal Procedure Code.).

Contents of the previous complaint is the same as the criminal complaint. Preliminary complaint holder is obliged to pay a bail under civil procedural law (art. 379 German Criminal Procedure Code). Making a complaint is not subject to any term.

In relation to the proceedings, previous complaint is not exclusive, so if public interests require, the prosecutor may

[15] Book V - Participation injured person judgment, is divided as follows: Section I. - prior complaint; Section II - Complaint accessory; Section III. - Compensation for the injured person; Section IV. - Other rights of the injured person.

pursue criminal action. Also, the criminal complaint is not a subsidiary of criminal action (Art. 376-377 German Criminal Procedure Code).

Judgment presents some particularities. Before the judgment itself, it is mandatory for some deeds[16] to attempt to reconcile the parties by an appointed mediator (Suhneversuch: art. 380). If the parties are not reconciled, the injured person formulates, in writing or orally before the court a previous complaint, accompanied by evidence showing that preliminary procedure of reconciliation was achieved.

If the complaint meets the legal requirements, the court orders its communication by the accused, who is required to formulate explanations within a given term (art. 382 German Criminal Procedure Code).

The court decides on the opening of the trial, by a conclusion. If the degree of guilt of the perpetrator is low, the court shall order the termination of the trial (art. 383 German Criminal Procedure Code).

Notification act (concluding opening of judgment) is read by the judge (art. 384 German Criminal Procedure Code). The holder of prior complaint can not study the documents in the file other than through a counsel. Otherwise, the law gives the injured person a procedural position equivalent to the prosecutor's (art. 385 German Criminal Procedure Code). Also, this procedure can not be ordered safety or educational measures.

By the time of closing the judicial investigation, the accused in turn may make complaint against the injured person, who will be judged together with the original complaint[17].

Previous complaint may be withdrawn after hearing the accused only with his consent (art. 391 German Criminal Procedure Code). In any case, once withdrawn, previous complaint can not be reformulated. In case of death of the victim, it can be continued (art. 392 German Criminal Procedure Code).

Along with the prosecutor, in the court may participate in some cases the injured person, to protect its interests or for the supervision of the prosecutor's activity. The way the injured person can participate is called Nebenklage (complaint below)[18].

This complaint may be exercised, in addition to cases in which previous complaint may be formulated, and attempted murder victim or the person who had recovery of judjement in the complaint against the solution to end the prosecution (art. 395 par. 2 pt. 2 and 5 German Criminal Procedure Code).

Its procedural position is different from that of the holder of previous complaint by the following features: it can be represented or heard as a witness (art. 397 German Criminal Procedure Code) and may exercise remedies independently from the prosecutor (art. 401) German Criminal Procedure Code), and during the prosecution may file a complaint against the solution of not suing at law (art. 400 German Criminal Procedure Code).

Intention of participation can be expressed at any time[19] during the trial through an application before the court or the prosecutor, in writing or orally. The

[16] Breaking and entering, violating the secrecy of correspondence, personal injury, threat and destruction.

[17] Withdrawal initial complaint by the holder thereof has no effect on the complaint made by the accused (Art. 388 para. 4).

[18] Settlement is to be found in art. 395-402.

[19] The holder of the complaint will state the procedure is (art. 392).

application runs without effect on initiating criminal action. Upon request the court will decide, after hearing the prosecutor and the accused (art. 396 German Criminal Procedure Code).

In case of death of the holder of the complaint, it remains without effect. (Art. 402 German Criminal Procedure Code).

Repair of damage caused to the injured person by offence is in kind or by worth. To this end, the injured person or his heirs make a request before the court by closing of criminal investigation. The application may be withdrawn until the judgment is pronounced(art. 403 and art. 404 German Criminal Procedure Code).

The court will resolve the application for compensation in the following ways: either not to pay compensation if the application is inadmissible or leads to the extension of the trial of the criminal case; this solution can be imposed at any time during the process (art. 405 of the German Criminal Procedure Code Thesis II.); either to grant the application in whole or in part (art. 406 German Criminal Procedure Code) or not to pay damages when the defendant has not committed the act or the application is unfounded (art. 405 Thesis I German Criminal Procedure Code.); These solutions can be pronounced after the debates. In this case, the court may approve the temporary execution, possibly giving a bail.

If the application is not accepted, the injured person can resort to civil action in court.

Against the decision on the application for compensation only the accused can resort to appeal (art. 406A and art. 406c Criminal Procedure Code. German).

Compelled execution follows according to the provisions of civil proceedings (Art. 406h Criminal Procedure Code. German).

Other rights granted to the injured person are provided in art. 406d-h German Criminal Procedure Code).

Thus the injured person is entitled, on request, to be communicated the development of the trial after the decision becomes irrevocable (art. 406d German Criminal Procedure Code).

It also has the right to study, through counsel, the documents in the file, if there are no conflicting interests of the accused with other persons (art. 406e German Criminal Procedure Code.) and the right to be assisted by a defender (art. 406f German German Criminal Procedure Code). The holder of the attached complaint also benefits from this right (art. 406g Criminal Procedure Code).

A right of the heirs is acknowledged by the German Criminal Code Article 77 para. 2 which states that "If the injured person dies, the right to bring a complaint in cases provided by law, passes to the husband / wife and children. If the injured party had no husband / wife, or children, or they die before the deadline for submission of the complaint, the complaint goes right input on parents; and in case they die before the deadline for submission of the complaint, the right of introducing complaint passes to brothers / sisters or grandchildren of son / daughter. If a family member participates in the offense or his relationship with the injured party relationship ceases, he is excluded from taking over the right to lodge a complaint. This right may not be taken by anyone, whether prosecution is contrary to the desire of an injured person".

3. Latin law.

In the Spanish system, criminal action can of course be initiated by the Public Ministry. But what is original, is that all individuals can set initiate it

equally. Under Article 101 LECRIM (Royal Decree for approving the Code of Criminal Procedure) criminal proceedings are public. All Spanish citizens will be able to exercise it in accordance with the provisions of law; Article 102 LECRIM excludes the incapables, those who have already been convicted twice for false allegations and judges. Article 101 is reinforced by Article 270 of the same Code, according to which "all Spanish citizens, who were victims of a crime or not, may lodge a complain exerting public action referred to in Article 101 LECRIM".

Also, foreigners may file a complaint for offenses relating to their person or their loved ones.

This general consecration of public action has besides foreigners, a constitutional basis because, under Article 25 of the Constitution, "citizens will be able to exercise public action".

In some cases however, there is a private prosecution system. Thus, in the case of offenses punishable only upon previous complaint of the victim,only it can act (art. 104 par. 2 LECRIM). But the importance of this system is reduced, because this rule applies only to a limited number of offenses which show a lower degree of social danger (such as insult and libel offenses against individuals); finally, through the obligation of the victim to attempt a reconciliation before submitting the complaint (Art. 278 LECRIM).

The Italian system is relatively distant from that of Spain. For ordinary crimes only Public Ministry may act. For minor offenses which are also called private offenses, prosecution can take place only upon previous complaint of the victim (eg for violence that do not cause distress, inability for more than 20 days).

In the Portuguese system, can act both the Public Ministry and the injured person. In Portuguese law, the concept of victim is original: it includes, on the one hand, the injured person who has suffered damage and who holds civil action (art. 74 Portuguese Criminal Procedure Code), on the other hand, a character who can quote, call offend, insult and who holds the rights protected by law and violated by the offense and that can be an injured party (art. 68 par. 3 Portuguese Criminal Procedure Code). Those harmed may constitute an injured party, but only in the case of crimes traceable at the previous complaint. For these offenses, the victim may initiate prosecution. For other offenses, they are confined for the Public Ministry. Compulsorily, the injured party must be represented by a lawyer and may also require legal assistance.

In the French system, the rule is that the criminal proceedings are initiated ex officio. This can be triggered indirectly by the person injured, but the exercise of this action is essentially entrusted to the Public Ministry, which plays the role of a party in criminal proceedings. He is not an investigating judge (though, in training, he may have a more important role than the defendant or civil part).

But there are a number of offenses that pose a low degree of social danger (eg., In case of insult or defamation art. 48 of Law 29/1881, injury to privacy Art. 226-6 new French Penal Code) in which the criminal proceedings are initiated upon prior complaint of the victim. Lack of this previous complaint constitute a cause for removal of criminal responsibility and also an obstacle in the trial.

Unlike German law, as long as the complaint was not filed, the Public Ministry can not proceed with the investigation. But this preliminary complaint is not a sufficient condition, because even in its presence, the Public Ministry is not required to initiate criminal

action (unless the complaint is accompanied by the application of constituting as civil party)[20].

We also mention that in all cases where prior complaint is a prerequisite of prosecution its withdrawal is a cause of extinction of criminal action.

Apart from these cases that remove criminal liability (lack and withdrawal of prior complaint), criminal action can be also extinguished by the repeal of the criminal law (the new law being far more, indulgent is applied immediately), through the death of the defendant (eg police, criminal action is extinguished only regarding the offender, not in terms of the co-authors and accomplices) by amnesty by res judicata and the prescription of criminal liability.

Like the Romanian legal system, French legislation regulates the special procedure for the settlement of flagrant crimes, in which case it is no longer required a previous complaint of the victim, the criminal investigation bodies only find their perpetration.

As for flagrant offenses in the French legal system, they can have two types of consequences: they cause to rise among people evidence of committing crimes, desire for revenge, and limit the risk of error for justice. These consequences imprint their mark on the procedure for the resolution of cases of flagrant offenses.

Criminal investigation bodies, which have previously notified the prosecutor in charge of the supervision of prosecution, start investigation . Prosecution authorities may prohibit any person to be removed from the scene until the end of operations (to verify their identity). They also can perform certain acts, namely: searching and seizing, especially in the presence of the suspect. For urgent findings, criminal investigation bodies may resort to any qualified person (usually an expert in the field of medicine)., may proceed with the examination of witnesses, may decide on the measure of preventive arrest of the accused.

Apart from detention on suspicion, police can detain the flagrant offender and lead him to the prosecutor. In these cases of flagrant offense, any person can catch the offender and lead him to the nearest headquarters of the criminal prosecution. The prosecutor himself may carry out criminal prosecution and order law enforcement agencies to continue the investigations (as often happens). He has broader responsibilities than criminal investigation bodies.

Thus, in case of a flagrant offense, if the court has not yet been notified, the prosecutor may issue a summons and interrogate the person brought before him. If this person is naturally presented in front of him as a defender, he can be heard only in his presence.

In case of flagrant offense (punishable with imprisonment), if the court was the prosecutor, if he considers that a piece of information is not needed, he may resort to immediate appearance in court.

Also, the court may carry out acts of criminal investigation so that prosecution authorities should require them to continue investigation); if so, the court will extend detention on suspension.

Following the investigation, the findings thus gathered and made into a report by the criminal investigation bodies, can enable initiation of criminal trial.

We note, therefore, that not only in our legal system, but also in the legislations of other states is provided the right of the injured person by an offense

[20] Jean Larguier, taken by Victor Dan Zlatescu - Private Law comparative Oscar Print Publishing House, Bucharest, 1997, p. 104.

that shows a lower degree of social danger, to introduce a previous complaint to the prosecution authorities in order to establish the offense committed, bringing to criminal liability of the perpetrator and repairing the damage. The lack of such complaints is a cause for removal of criminal liability, the victim understanding not to manifest his will towards punishment for the offense committed, under criminal law.

The injured person's right to file the preliminary complaint, in the case of the offenses for which initiation of criminal action is subject to its introduction, and also means a guarantee of protection of fundamental rights and interests of any individual.

Moreover, in the last decade, under the influences deriving from some trends generated by the Council of Europe recommendations and theories which, starting from different bases, predict a repeated dejuridicization of criminal liability on account of promoting solutions that facilitate the reconciliation between the victim - offender, most modern laws are extending cases and situations limiting public action officialdom.

3. Conclusions

In conclusion, the withdrawal of the previous complaint appears as an institution that give legal expression to social-political interests regarding the initiation and the extinction of criminal trial. It is an institution that is considered an exception to the principle of formality and consists in the possibility offered by law to the injured person to decide whether or not further he should impose criminal liability of the perpetrator of a crime that is investigable on prior complaint by the competent authorities.

This exception was allowed by the legislator because, following factual and legal analysis of the situation and also the low level of social danger of certain offenses he can only decide his attitude to criminal liability.

There is an essential difference between the complaint as a way of notification by criminal prosecution bodies, which may be substituted by an ex officio notification or denunciation, and previous complaint, which is the only document required by law for some crimes, without the one who has committed such crimes will not be held responsible and which is, at the same time, a condition of punishability and procedurability.

As a proposal for improvement of the previous complaint procedure, regarding the term of filing previous complaint it should be noted above all the legal nature of this term .

At first glance, as otherwise considered in the specialized literature, it is a decline term.

Thus, if the injured person has not brought the previous complaint within the period provided by law and can not plead interruption of this procedural term, by claiming circumstances beyond his will, which prevented to introduce it, then he can not promote previous complaint and obtain criminal liability of the offender.

If we consider the effects of non-introduction of previous complaint within the period provided by law, we conclude that the time limit for the previous complaint is actually a special term prescription of criminal liability to be subject to the rules of this institution and not only a decline term . Also,we do not see what effect would have the exercise of criminal action ex officio in the case of a liquidated legal person. Who would benefit from such an action?

If all authors of codes were inspired by many European codes (French, German, Italian, Spanish, etc.),they could have chosen a better solution than the one found in the provisions of paragraph 5 157, which refers only to the situation in which the injured party died or the legal person was liquidated before the expiry of the period prescribed by law for the introduction of the complaint, but does not refer to a situation where the injured person has died or the legal person was liquidated during the criminal trial . Does anyone else have the possibility of withdrawing the prior complaint?

As we appreciate in the introduction to this material previous complaint if the legal person is in liquidation proceedings will be formulated and implicitly withdraw from the legal representative of the firm's insolvency, but in this way it does not answer the question above, namely what happens if the legal person was removed from the Trade Register?

Can criminal action ex officio still be exercised automatically in this situation? An affirmative answer would mean an interpretation of the law by analogy, but analogy in mala partem (the solution being obviously against the defendant) is not allowed.

What solution will the prosecutor dispose during prosecution or the court during the trial?

For all these reasons we believe that the text of article 157 paragraph should be reworded in an unequivocal sense either assigning heirs exercise of criminal action in view of their economic interests, or providing that criminal proceedings shall be extinguished upon the death or deletion of the injured person (natural or legal person).

The new Criminal Code differs from the Criminal Code of 1968 and the solution proposed by the 2004 Criminal Code not only by regulating in a separate article of withdrawal of previous complaint but also through the effects that this manifestation of the will of the injured person has.

It was desirable, in the code authors's view, to renounce the parallelism between the causes of removing criminal liability determined today by the existence of the withdrawal of previous complaint, that is the reconciliation of the parties, opting for one of the two, respectively by the institution of withdrawal of the complaint, but the final version was also reintroduced reconciliation, but with different effects from those acknowledged by the old Criminal Code.

We consider that this new regulation managed to upset a legal institution well stabilized in legal practice, with certain restorative values, equally banning the right of the injured party, without any justification of criminal policy, invoking an alleged parallelism, inexisting otherwise, between the withdrawal of previous complaint and reconciliation between the parties, so that finally it should maintain both, distorting their effects.

There is no justification, neither logical, nor of criminal policy, so that the withdrawal of the previous complaint, which is a manifestation of will against the complaint (contrarius actus) should have symmetrical effects, under the symmetry principle of legal documents.

Moreover, we consider that it is inconceivable that the withdrawal of the previous complaint can be carried out prior to a final judgment (Art. 158 para. 1 new Criminal Code), and the reconciliation of the parties can be accomplished only by the reading of notification act(Art. 159 para. 3 new Criminal Code). The law ferenda is necessary, correlating the two institutions and in this respect, or rather the modification of the procedural time of the

possibility of operating reconciliation between the parties so as to provide that this can be achieved until the decision remains final.

Finally, what we have expounded will certainly not clarify controversial issues arising from the withdrawal of the previous complaint being merely an attempt to address this institution, but we believe that it can help the legal practitioners in some way to clarifying novel situations encountered, which will certainly not be few, determined by the new criminal legislation.

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