Some problems in interpreting and applying the institute – constitution of an accused under the Bulgarian Criminal Procedure Code.

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Abstract: This article aims to address various issues that arise from the interpretation and application of the institute "constitution of an accused". This is important because it directly affects the effective acquire of the defendant's right of defense. In this sense, the article examines the interaction between the consequences of acquiring procedural quality accused in the context of the real protection of the accused's interests and the European legal protection concept.

Key-Words: constitution of an accused, right of defense, criminal procedure, European law

1 Introduction

The constitution of an accused has been dscussed many times in the the Bulgarian criminal doctrine. In most cases, though with few exceptions, as part of other, larger legal issues or developments. Such scientific modesty is,however, unacceptable, because it unduly detracts from the attention of some important theoretical and practical problems related to the implementation of the institute. For this reason, the present research aims to affect, reconcile and reassess certain regulatory situations in the discusseded procedure and to clarify their importance for the effective exercise of the right of defense in the process.

2 Exposition

It is made our legal literature, tradicionally a distinction between procedural figures - a suspect, an accused and a defendant. The procedural character of the suspect is unknown for the current Criminal Procedure Code (CPC). In the older theory the meaning of suspect in agreement with the concept of the previous procedural law of 15 November 1974 (repealed by the new Criminal Procedure Code of 28 October 2005), which means the person against whom there is some known evidence that he has been involved in a particular crime and against whom the investigating authority's suspicions are directed.[1] At present, according to Art. 219 of the CPC in relation to Art. Article 54 of the same Act for accused person is considered to be the person charged with an offense committed in compliance with the terms and conditions described for the purpose in the Code. With the term defendant is designated a person who is send to be judged, i.e the physical person against whom, is deposited an indictment in publicly actionable case or in private claim cases – a complaint in process.[2]

Therefore, there is a fundamental difference between the concepts of suspect and accused, since in the first case there is a person against whom there is evidence that he has committed a certain criminal act and in the second, there is a person against whom there are not only factual data but evidence and has been preliminary charged for committed a crime. As for the difference between the accused and the defendant, it is rather formal and relates to the procedural moment in which the accusation against the individual is being considered. Thus, when a final charge is clarified in the trial stage, the person whose criminal activity is described in the indictment is accepted to be called a defendant. The subject matter of the publication is only separate issues related to acquiring procedural capacity accused in the pre-trial phase of the trial. According to Art. 4 of the Constitution of the Republic of Bulgaria: "... (1) The Republic of Bulgaria shall be a legal State. It shall be governed according to the Constitution and the laws of the land. (2) The Republic of Bulgaria shall guarantee the life, dignity, and rights of the human person and shall create conditions for the free development of the individual and of civil society."

But according to Art. 31, para. 1 of the Constitution: "... Anyone charged with a criminal offence must be brought before the judiciary within the time limit established by a law."

Further, Art. 121 of the CRB states: (1) The courts shall ensure equality and adversarial conditions to the parties in a judicial procedure.

(2) Proceedings in the cases shall ensure the establishment of the truth"

The interpreted interrelated quoted norms reveal a basic idea of the supreme legislator, namely that in the field of criminal justice the recruitment of an accused is not an end in itself but a procedure aimed at achieving the tasks of the process and respecting the fundamental rights of the individual. In this sense, the constitution of an accused should be carried out in strict compliance with a legal order containing safeguards for justified and fair criminal proceedings. This idea "de lege lata" is normatively detailed in Art. 219 para. 1 of the Criminal Procedure Code claims: "...Where sufficient evidence is collected for the guilt of a certain individual in the perpetration of a publicly actionable criminal offence, and none of the grounds for terminating criminal proceedings are present, the investigative body shall report to the prosecutor and issue a decree to constitute the person as accused party."

Consequently, an accused is attracted, not arbitrarily and at the discretion of the competent authorities, but subject to clear objective guarantees to account for both the fundamental rights of the individual and the public interest. Therefore, the existence of sufficient evidence of a person's guilt in committing a crime and the absence of grounds for ending the criminal process is always an important safeguard for the formulation of fair and justified accusations. Here is the time to recall that "... in the criminal process of the Republic of Bulgaria there is no room for conflict between state and public interests and the right of citizens to protect their rights and legitimate interests in the most efficient way". [3]

It should also be noted here that "... the procedural economy and speed of proceedings must not be at odds with the ultimate aim of the process - a lawful and fair process."[4] These two important conclusions can also be reached in another way, namely through a literal interpretation of the immediate task of the process. Article. 1, para 1 of the CPC says: "... The Criminal Procedure Code shall determine the order for conducting criminal proceedings with a view to ensuring detection of crimes, denouncement of culpable persons and proper application of the law". Hence, the immediate task can only be fulfilled if the criminal process involves accusatory allegations based on objective truth rather than objective repression or speed. It is not possible for an unjustified, improper and unlawful charge to reveal either the crime that formally reverts to, or to expose the person who pursues it, or to promote the proper enforcement of the law.

Given all that has been said so far, it can be summed up that Art. 219 (1) of the CPC contains acceptable and satisfactory guarantees for a legitimate and lawful constitution of the accused. From this point of view, a greater interest "awakens" paragraph 2 of the same text, the so-called special procedure for attracting an accused, which is why a detailed analysis is made below.

According to Art. 219, para. 2 of the CPC: "**...** The investigative body may also constitute the accused party in this particular capacity upon drafting the record for the first investigative action against him/her, of which it shall report to the prosecutor.."

In the interpretation and application of this provision, there are many theoretical and practical problems.

First of all, Art. 219 para 2 of the CPC does not contain any objective guarantee for a justified and fair recruiting of the accused. In contrast to paragraph 1 of the same Article, paragraph 2 does not prescribe a requirement for the existence of sufficient evidence or even sufficient factual data from which it can be objectively inferred the guilt of a person in committing a crime of general character. The investigative body may bring an accused with the minutes of the first investigative action in its sole discretion and when it finds it appropriate. Consequently, there is no differentiation of the investigative action, it is only that they have to be against the personality of the investigations. The exact time at which the investigative body can resort to the attraction in question is not specified. From the literal interpretation of the text, it is remarkable that he can do so always and as a rule and not as an exception - for example, only in urgent cases, as described in Art. 212, para 2 of the CPC in the settlement of the subsidiary procedure for the initiation of pre-trial proceedings. Moreover, this provision is also contrary to the standard established in European law for the recruitment of an accused. In human rights literature, it is argued that the term accusation is of autonomous meaning within the meaning of the ECHR. It is understood to be "a formal notification to a person by a competent authority of a claim that the person has committed a crime or other act of which such a claim is implied and which also substantially affects the suspect's situation".[5] Concerning the concept of "significantly affected", the ECHR concludes in the case of Yankov and Others v. Bulgaria that one

person is significantly affected by the moment when there is a justified suspicion of guilt.

In the case of Wemhoff v. Germany, he assumes that the person in practice becomes the subject of a charge when he is arrested for a crime.[6] But the detention itself is admissible as clarified in the Fox, Campbell and Hartley v. United Kingdom case "... in the presence of facts or information that would persuade the objective observer that the person concerned may have committed a crime."[7] It can be summed up that in the European concept of detention and attraction of an accused, the condition of justification is inevitably present - something that is not observed in the disposition of the norm of Art. 219, para 2 of the CPC, which allows the accused to be recruited in the absence of convincing information about the guilt of a person in committing a crime.

Secondly, the investigative body can safely neglect with its procedural activity an institute of attracting an accused with a deliberate decree, ie to circumvent paragraph 1 of Art. 219 of the CPC, thus ignoring a fully-fledged guarantee of the rights of the accused. It is about the prosecutor's ability to revoke the injunction to bring an accused in case of unlawfulness and unreasonableness.

The Bulgarian CPC does not know the institute of "revocation of a record for constitution of accused".[8] Thus, the constitution of an accused pursuant to Art. 219, para. 2 CPC "de facto" is not subject to scrutiny or cancellation, simply because there is no act to be controlled. The decision of the legislator to allow the prosecution of an accused under a record drawn up on the basis of an investigative action was also unsatisfactory.

What he shares in this respect is the following I. Salov: "... the accused is not drawn with a protocol for investigative action - this is a curious invention of the legislator /innovation/ - he is obviously wondering how to reconcile irreconcilable approaches. The raising of an accusation is the authority of the relevant body of the pre-trial proceedings, the objection of will, and this is done in a deliberate act - decree - Art. 199 CPC. The record is a written means of proof, it does not objection to will but reproduces procedurally relevant facts" [9] In other words, the answer to the question of how and why a protocol of declaratory significance for the facts of reality materialized in it is given a constitutive act in terms of establishing a legal quality (accused)?

Thirdly, in the theory, the norm of Art. 219 (2) of the CPC to be defined as a legal fiction. However, it should be noted that the institute as a construction is rather devoid of the most important constitutive features of classic legal fictions as legal norms and hence of their practical utility. Even, purely lexical in the text of Art. 219, para 2 of the CPC does not detect any indication of a formulated legal fiction. Fictions constitute conscious deviations from reality. In them the fictional fact is assumed to exist even though it does not exist. In para. 2 of Art. 219 The CPC has described an alternative procedure for recruiting an accused. In cases where "X" is charged as an accused with the drawing up of an investigation protocol against him, the issue of the protocol itself gives rise to an independent legal action for the appearance of this figure (the accused), ie the protocol does not substantiate the decree but is treated as an independent a legal fact. In these cases there is an accused not because the protocol is considered a decree but because it is an independent ground for attraction. The accused actually exists because legal protocol in practice has issued a protocol to appeal to the accused, not because it is assumed that there is a decree to attract an accused, although it does not exist. This is evidenced above all by the fact that there is no argument in the CPC to the contrary. Moreover, the legislator emphasizes the self-importance of the Protocol in Art. 219 para. 3 of the CPC, indicating its content, regardless of the provisions of the decree. Moreover, the justification for allowing legal fictions in the legal order always stems from the achievement of some useful legal consequences. In this sense, it can hardly be maintained that the "fiction" in Art. 219 (2) of the CPC replaces and achieves the beneficial effect of attracting an accused in the application of the general procedure (under Article 219 (1) of the CPC), at least because there are no guarantees of issuance, control and submission of the decree to attract, as well as the existence of sufficient evidence of a criminal offense. The procedural literature mentions that the usefulness of attracting an accused with the first action to investigate against him is expressed in as early as possible the emergence of his procedural rights in the process.[10] This view can not be fully credited because it neglects the shortcomings of the institute and overestimates its usefulness too much. Suffice it to recall that the ultimate goal of the process is not to secure the right to defense in unlawful and unjustified criminal proceedings, but to conduct a fair trial and to impose a verdict corresponding to the objective truth. It is absurd, the admission of protection to be used as an excuse for introducing repression!

Fourthly, the interpretation of Art. 219, para. 2 of the CPC leads to the conclusion that the

defendant's figure, or his right to defense, arises prior to the drawing up of the protocol for the first investigative action against him, as the legislator explicitly states that the drawing takes place "by drawing up" the protocol rather than the drafting of the protocol. Such a conclusion can also be reached for reasons of expediency - the earlier establishment of the right to protection in legal peace, such as the EU Guidelines on Human Rights, is necessary. The probable objective is clear as long as the investigation is conducted, that the accused should be able to defend himself, ie he has acquired the procedural quality of the accused. It is unclear, however, why the Bulgarian legislator when complying with European standards of protection with the provision of Art. 219 para.2 The CPC did not notice that the accused cannot exercise his right to effective defense at the time of the first investigative action against him simply because he has no even hypothetical information about the type and object of the indictment. Taking into account the fact that even after the first investigative action, the protocol drawn up may not be brought to the accused (Article 219 (4) of the CPC), he would obtain information about the nature and reasons of the prosecution only when the investigation is made, if he makes such a request - Art. 227, para 2 CPC.

Fifthly, constitution of a person as an accused under Article 219 (2) of the CPC also reveals another significant danger to the rights and freedoms of the accused. The investigative body is not under an obligation to report the case to the prosecutor before drawing up the protocol of the first investigative action against a person, nor to check whether there are any grounds for terminating or suspending the criminal proceedings. Thus, the ability of the prosecutor to supervise the legality and justification of one of the most important procedural steps, which undoubtedly constitutes the constitution of the accused's figure, is so severely limited. It is true that after the drafting of the first act, the investigative body is obliged to notify the prosecutor, but what of this? At this point, an accused has already been recruited, and the prosecutor could only address the matter after the investigation has been completed at the "Pre-Investigation Action" stage when he receives the case. Moreover, in these situations, the prosecutor is in fact subject to the assessment of the investigating authority as to whether to attract a person as an accused, contrary to Art. 46, para 2, items 1 and 2 of the CPC, which effectively vitiates its role as a "bailiff of law" and hence of a guarantor of citizens' rights, including the rights of the accused. In addition - we are guided by the fact of the absence of obligation in Art. 219 para. 2 of the CPC to verify the circumstances leading to the suspension or termination of the criminal proceedings, the investigative body hypothetically, without a problem, can bring a person in the first action against him and initiate an investigation, even though one of these preconditions there is a condition for suspension or termination of the process, without any problems, because the prosecutor under the CPC can only order the suspension or termination of the criminal proceedings only at the stage of "Prosecutor's actions after conducting the investigation ". Then, where is the guarantee not only against unreasonable attraction, but also against an unjustified investigation of the citizens? The answer to this question is rhetorical - there is no answer!

Sixthly, as N. Manev rightly points out: "... the legal opportunity of Art. 219, para 2 of the CPC (new) reveals another disadvantage. The norm of Art. 219 of the CPC (new) is titled "Constituting the accused party and presentation of the decree to this effect", and Paragraph 4 of the presentation provides for an obligation for the investigative body to bring the order, including handing a copy thereof to the accused. It is not regulated to file a record of the investigative action by which a person has been prosecuted. The CPC does not know the Institute of "Presentation of record "(written evidence)"... from here the danger arises in the hypothesis of Art. 219, para. 2 CPC not to be brought ... "[11]. In my opinion, the author's expression deserves full support because it is based on the exact wording and actual meaning of the law. The consequences of failing to file a record of the accused person or the accused are detrimental to his rights of defense. They constitute specific violations of both domestic and international legal standards for its effective exercise: the inability to learn about what crime is attributed as the accused and on what evidence - art. 55 CPC; impossibility to be informed immediately and in detail about the nature and the reasons for the indictment against him - Art. 6, item 3, beech. "A" ECHR; lack of sufficient time and resources to prepare their defense - Art. 6, item 3, beech. "B" ECHR; placing protection in a significantly less favorable position than that of the accusation - "Rowe and Davis vs. The United Kingdom ".[12]

Seventhly, for the sake of completeness, it is appropriate to point out that there is a serious problem for the full exercise of the right of defense and the general hypothesis of attracting an accused with the drafting of a decree by the prosecutor. From the point of view of the requisites of the decree in item 4 of para 3 of art. Article 219 of the

CPC stipulates that evidence is given in the attachment decree, but only if this does not hamper the investigation and there is no clarification in which cases evidence would hamper the investigation. As for the accused, there is hardly any doubt that he would find it difficult to prepare his defense at all times when he is freely dispensed with the right to learn on what the accusatory allegations against him are based on. It should not be underestimated that the ability of the investigative body, which has been legally established, to assess freely when investigations are made difficult by evidence, could be turned into a practice of frustrating the effective exercise of the rights of the defense - in those situations in which the investigative body considers that the reference to the whole of the evidential material makes it difficult to investigate the case. Thus, the accused cannot judge either the type of evidence used to expose him or whether the same evidence sufficiently justifies his guiltiness so as to force him to be accused.

Last but not least, it should be emphasized that in the current CPC the institutes of the recourse of the accused and of the proclamation of the accusation of the accused are settled in the same article - Art. 219 of the CPC, although they individually express quite different procedural tasks. The accusation is formulated with the accusation and the legal figure of the accused is constituted, whereas the prosecution - the person accused of committing the crime - becomes acquainted with the accusation in order to prepare his defense against him. The co-regulation of the two institutes is probably undertaken in the interest of the defense. The legislator is probably aiming at Article 219 of the CPC to implement the European standard for timely preparation of the defense. In our opinion, the simultaneous regulation of the two institutes in the texts of the norm of Art. Article 219 of the CPC only suggests, but does not end to the necessity to bring the prosecution immediately after it is lifted, otherwise par. 4 of the same article would have made it explicit. Therefore, it can be concluded that "de lege lata" continues to manifest the problem of the uncertainty of making the decree of attraction. It in turn reveals a serious obstacle to the timely preparation of the defense and the equality of arms, according to the current para. 4 of Art. 219 of the CPC, the investigative body may bring the charge at a time when it finds itself well, not necessarily immediately after its occurrence in legal peace. To overcome the problem, we propose the existing legislative gap in Art. 219, para. 4 of the CPC, "de lege ferenda" to be filled with the deliberate provision of an obligation to immediately bring the decree of attracting an accused, it is precisely such an approach that the legislator has accepted regarding the forwarding of the case to the prosecutor after the conclusion of the investigation, Art. 235 CPC.

3 Conclusion

In conclusion, it can be summarized that the application of the institute constitution of the accused brings many serious both theoretical and practical problems that distancing the criminal process from its natural role and lowering the confidence of Bulgarian citizens in criminal justice. The norm of Art. 219 (2) of the CPC, de lege lata has become a "good basis" for initiating and developing unjustified and unfair proceedings, as well as for limiting the defendant's right of defense. In my opinion "de lege ferenda", the Bulgarian legislator should thoroughly rethink Art. 219, para. 2 of the CPC in the form of a procedure minimizing any possibility of state arbitrariness against the rights of citizens. In the spirit of Rudolf von Jering, the struggle against the law is necessary to become a struggle for the law, "... because in the law man holds and defends the moral prerequisites of his existence - without the right he collapses to the level of an animal." [13]

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