

Features of substitute private accusation in Hungarian Criminal Procedure

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Abstract: *According to the data of the past short term, it can be stated that the victims enforced their rights on acting as a substitute private prosecutor only in a few cases. Some authors deem the reason for this is that the “ruling of the institution of substitute private accuser cannot be found in one certain place in the C.P.C.” but the rights of substitute private accuser are ruled in connection with different stages of the procedure and it is measurably criticizable. Other point of view is that “the rules on the acting of substitute private accuser followed by the rules on starting procedure one of the least successful part” of the C.P.C. In my point of view the ruling cannot be exceptionable, it has definitely expanded victim’s rights, his possibility to enforce his criminal claims. According to my judgment the “idleness” of the victims derives from the novelty of this institution rather than from the erroneous ruling.*

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In the Hungarian Jurisdiction the prosecutor has not have monopoly on bringing case to court not even the crime fall under public accusation because the Act XIX of 1998 on Criminal Procedure Code (in what follows: C.P.C.) – if the legal conditions consist - provides opportunity for victim to file charge to court.

1. Submitting a charge to court by victim is not unprecedented in the history of Hungarian Criminal Procedure. The Act XXXIII of 1896 on Adjective Law of Crimination (in what follows: A.L.C.) has already known and according to substance of this rule in cases when prosecutor entitled to the right of filing charge but he refused it or the charge was filed but the prosecutor dropped the charge, the victim was entitled to take over this prosecutorial rights. Since it may occur that the public accuser “refuses to file the charge or drops the charge without forcing reason hence his default or improper dropping charge absolutely will obstruct the administration of criminal justice.”² The authors of this era deemed that the possible reasons of omission of filing charge are in followings. As it:

- suit the pressure of political expectations,
- professional incompetency,
- work load,

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² Jenő Balogh, Karoly Illes Edvi & Ferenc Vargha, *Commentary on Adjective Law of Crimination* n.309 (Grill Karoly Konyvkiado 1910)

- fault of prosecutor.

Accordingly, the legal institution of substitute private accusation presented a possibility for the victim to turn to the court in all those cases when the prosecutor was not willing to do so. The “legal interest existing by victim naturally will him expedite to exercise his right of accusation in all cases when it is necessary to supplement the functioning of prosecutor.”³ The rules of this legal institution were abolished by the Act V of 1954 and resuscitated by the C.P.C.

Between the two Acts countless essays were published on substitute private accusation and the one part of the authors argued pro and the others contra. Many of them indicated that “the victim because of injury experienced during the commitment of crime can not be objective. He is not supposed to be objective, easily may overcome the ebullition of feeling, especially the feeling of vengeance: he will be the one whom any kind of punishment will not be severe enough, who will turn to each possible authority to enforce the truth conceived by him. The substitute private prosecution may turn against the innocent.”⁴ The debate ended with the codification of the substitute private accusation as I mentioned earlier.

The victim may act as a substitute private accuser – meeting also with the other requirements of the law - , if

- the prosecutor or the investigating authority rejected the report, or terminated the investigation,
- the prosecutor filed formal charges only in respect of a part of the accusation,
- the prosecutor dropped the charge,
- the prosecutor based on the data of the investigation not established commission of criminal offence based on public accusation therefore not filed a charge or according to the data of investigation in cases falling under private accusation did not take over the representation of charge,
- the prosecutor dropped the charge during the court procedure because according to his judgment the committed crime is not based on public accusation.(§ 53 (1) C.P.C.)

No substitute private accusation can be applied against a juvenile offender not even the previous requirements are fulfilled. (§ 449 (2) C.P.C.) In military criminal proceedings conducted owing to a military criminal offence (§ 474 (5) C.P.C.) substitute private accusation can be applied if the victim is natural person.

One of the main arguments for the substitute private accusation is strengthening competences of victim thereby the state grants “to the victim the right of representing the charge because important is only that the court representing the state has to handle the conviction and sentencing.”⁵

a) The law allows only for the victim to file a charge to the court from whence it concludes two basic ascertainments. In respect that not each crime has victim hence acting as a substitute private accuser is restricted, it is allowed only when the crime injured or endangered somebody’s (natural person’s, legal person’s, economic organization’s, etc.) right or legal interest. Therefore, the point of view of those is not relevant who state “the effective law not restricts the crimes owing to substitute private accusation.”⁶ Thus, solely the victim (namely the victim of the particular crime) has the right to act as a substitute private accuser. As § 51 (1) of C.P.C. stipulates the victim is the party whose right or lawful

³ Jenő Balogh, Karoly Illes Edvi & Ferenc Vargha, *Commentary on Adjective Law of Crimination* n. 313 (Grill Karoly Konyvkiado 1910)

⁴ Tibor Kiraly, *Victim in the Criminal Procedure Magyar és külföldi jogi szemle* 79 (February 1968)

⁵ Sandor Kardos, *Thoughts on substitute private prosecution* n. 43 (Debreceni Konferenciak 2005)

⁶ Sandor Kardos, *Thoughts on substitute private prosecution* n. 42 (Debreceni Konferenciak 2005)

interest has been violated or jeopardized by the criminal offence. Accordingly, the meaning of victim is “whose any kind of rights the committed or attempted crime directly violated or jeopardized in manner of special features of particular crime.”⁷ The victim – acting as a substitute private accuser – may enforce his criminal claim if he is passive subject of the crime or the matter of fact contains result. At the same time, in each case when the denunciation is made by other than the victim, the person who made the report is not entitled to file substitute private accusation. The victim must be warned to his right of possible acting as a substitute private accuser and it’s time limit as well.

According to the resolution 3/2004. BJE of the Supreme Court in those initiated criminal procedure where damage was caused for the State the substitute private accusation is possible if other requirements are fulfilled. The emplacement of the crime in the chapter of Crimes Against Property or in other chapter of Special Part of the Criminal Code is not counts. According to the point of view of the Supreme Court the victim may be natural person, legal person and the State as well. At the same time the procedural code has not have that kind of regulation which allows to restrict or to deprive any procedural right from any kind of victim. It results from all this that the Sate possesses all the rights which the law ensures for the victims, if the crime violates or jeopardizes its rights of property or its lawful interest. Thus, through his representative the State may act as a substitute private accuser.

The State as a substitute private accuser is represented by that government body whose interest was attached. That kind of government body may be a state enterprise, other state- owned economic organization or other organization having independent position in the State Budget. The substitute private accusation can be filed by legal representatives of these organs.

The resolution 3/2004. BJE of the Supreme Court was declared as anti-constitutional by the resolution 42/2005. (X.14.) of the Constitutional Court dated on 12 November 2005 and thus the resolution of the Supreme Court became annulled from the day of the delivering of judgment of the Constitutional Court. The justification of the Constitutional Court’s resolution drew attention to the fact that by the Constitution, organizational laws and the C.P.C. prosecution is entrusted to clam for the State’s criminal demand whose function the State is responsible. If dispute occurs between the prosecution and other organizations of governmental bodies the risk of it is burdening the State. The criminal procedure, which necessarily touches basic constitutional rights of the parties of the procedure and in many cases also might touches these rights of the third parties, can not be use either institutionally or in individual case to solve the dispute between the prosecutor and the public authority the damage was caused. Substitute private accuser can be a natural person, a legal person or an organization without having status of legal person but it is constitutional requirement that besides the prosecutor public authority can not be exercise the rights of public accuser. The substitute private accuser videlicet in the court procedure exercises the rights of prosecutor including proposal for applying coercive measures to which deprivation and restriction of personal liberty are attached. To let involving public authority into the criminal procedure could resulted to situation that these authorities could act in those cases also when the prosecutor authorized by the Constitution repute it unjustified or groundless. Missing restrictions however would lead to the State’s preponderance because that kind of public authorities would become substitute private accusers which are not burdened with the professional responsibility based on the Constitution.

⁷ Jenó Balogh, Karoly Illes Edvi & Ferenc Vargha, *Commentary on Adjective Law of Crimination* n.317 (Grill Karoly Konyvkiado 1910)

Therefore, to act as a substitute private accuser is generally excluded if the particular crime violates or jeopardizes basically the governmental, social or economical system and infringement of lawful rights of natural or legal person eventuates only indirectly.

b) That fact that the prosecutor rejected the complaint or terminated the investigation is not enough for the victim to act as a substitute private accuser to enforce his lawful rights.

Further requirement has to be suited namely victim has to protest against the prosecutor's decision on rejection of the complaint in proper time with the aim of ordering the investigation or if the investigation was terminated the protest has to aim the resumption of the investigation. The victim may act as a substitute private accuser only after the dismissal of protest by prosecutor or superior prosecutor on condition that the rejection of complaint or termination of the investigation based on that kind of reason in connection with the law allows acting as a substitute private accuser. Namely, the § 199 (2) C.P.C. allows it only when the reason of the rejection of complaint were the action was not constitute criminal offence (§ 174 (1) a) or punishability was precluded (§ 22 of Criminal Code) with the exception of if the offender was a child or mentally disabled (§ 174 (1) c C.P.C.).

If the prosecutor or the superior prosecutor has dismissed the protest for the resumption of the proceeding of the victim concerning with the termination of the investigation the victim may act as a substitute private prosecutor only if the reason of termination of the investigation was one of the followings:

- the action does not constitute a criminal offence,
- if, based on the data of the investigation, the commission of a criminal offence cannot be established and continued procedure is not expected to yield any result,
- if the criminal offence was not committed by the suspect, or based on the data of the investigation it cannot be established whether the criminal offence was committed by the suspect,
- a ground for the preclusion of punishability exists, unless the offender is a child or mentally disabled,
- due to other grounds for the preclusion of punishability stipulated by law.

Thus, to act as a substitute private accuser is not possible if:

- the rejection of complaint or termination of investigation is based on other reason,
- the offender is a child or mentally disabled
- death of the offender.

“If this situation (also) serves as a correction of investigation authority's or prosecutor's fault this institution can be applied only in that case when we give a chance for investigation authority or for the prosecutor to correct in advance. Thence it arises that the substitute private accuser may act only after the dismissal of the protest lodged because of rejection of the complaint or termination of the investigation.”⁸

Summarized the above can be stated that in the cases of the rejection of complaint or the termination of investigation may be filed substitute private accusation only if:

- a) non-military crime has a concrete victim, and if it is a military crime a further restriction exists namely the victim has to be a natural person,
- b) the rejection of complaint or the termination of investigation is based on strictly listed reasons (§ 199 (2)) of the law,
- c) the victim lodged the protest against the decision of rejection of the complaint or termination of the investigation within eight days following the communication of the decision,
- d) the protest was lodged for the ordering or resumption of the investigation,

⁸ Bela Bush, *Institution of the Substitute private accuser* n. 135-136 (ELTE 2004)

- e) the prosecutor or the superior prosecutor founded the protest unfounded so he rejected,
- f) the victim can identify a concrete person as the offender,
- g) the offender is not a child and
- h) he still alive.

The victim also may act as a substitute private accuser in that case when the prosecutor partially omits the charge for that committed crime which have no significance for the purpose of liability due to the commission of another, graver criminal offence. The decision on the partial omission of the charge victim has to be notified and has to draw his attention to his right on acting as a substitute private accuser in that part in which the prosecutor omitted the charge.

In related, omitted part of charge to act as a substitute private accuser possible also only when the offence has a concrete victim, the offender is not a child, lodged the protest and the protest was dismissed by the superior prosecutor. The victim has sixty days from the communication of the decision for enforcing his rights on substitute private accusation but he is allowed to entitle to legal remedy because of missed deadline.

If the decision of the superior prosecutor rejected the protest against the termination of the investigation not contains the reference of the possibility of submitting a motion for prosecution and also that it can be lodged within sixty days following its communication, the charge can not be rejected because the reason of defaulting the deadline. The § 229 (3) rules the requirement of informing the victim, namely if the prosecutor or superior prosecutor rejected the victim's protest on rejection of the complaint or termination of the investigation the victim must be informed about the conditions of acting substitute private accuser and also about his right to turn to the service for legal aid with the aim of granting personal exemption from paying the costs of procedure and of having appointed lawyer by court of a law firm if he is not able to cover legal fees of the procedure regarding to his income and property.

If several parties are entitled to lay or represent the substitute private accusation the person of the representative has to be decided by way of agreement, if they are not able to agree the court will designate the representative from among them.

Finally, the victim entitled to lay as a substitute private accuser in those cases also when the prosecutor drops the charge but this entitlement exists only in the court procedure.

2. Right to examine the documents. During the investigation the victim has restricted right on examination of the documents but to make the decision on submitting a motion of prosecution the documents might be known. Therefore, victim has to be given a possibility for knowing in the official premises all the documents which are connecting to the committed crime. The victim may examine only that documents which are connecting to that crime was committed against him. In this stage the involving of legal representation is not necessary yet - hence the decision on submitting the motion for prosecution might be related on examination of documents – but allowed. Regarding to that fact only the victim has the right for acting as a substitute private accuser the prosecutor is enforced to verify if the person who claims for this is really the victim of the case.

3. Examining the documents relating the offence was committed against him or without possible examination the victim decides to act as a substitute private accuser – in compliance with § 230 (1) and (2)⁹ - he submits, by a way of his lawyer, a motion for prosecution to the prosecutor's office of first instance having proceeded in the case before.

⁹ **Section 230 (1)**⁹ If the victim intends to act as a substitute private accuser, he shall submit, by way of his lawyer, a motion for prosecution to the prosecutor's office of first instance having proceeded in the case before. The prosecutor's office shall forward the motion for prosecution, together with the documents to the court

The involving of legal representative of the victim mainly is obligatory except if the natural person has the examination in law.

The prosecutor forwards the motion for prosecution together with the documents and with the copy of the receipt of handling the decision of rejecting the protest to the court having competence and jurisdiction for the case. If the substitute private accuser designated the court having jurisdiction at the residence of the defendant as a court of jurisdiction the prosecutor forwards the documents to this court.

The prosecutor is not entitled to any kind of verification of the motion for prosecution. Therefore, he is not able to examine if the victim filed the motion for prosecution by the way of lawyer, if he as a natural person certified properly his previous statement that he has an examination in law. The prosecutor also not able to verify the existence of the legal requirements of the motion for prosecution.

Consequently, the prosecutor can not take any official statement to the motion for the prosecution.

4. The substitute private accuser files the charge with submitting the motion for prosecution. The motion for prosecution has to contain the personal data of the accused, the description of the act being the subject of motion, the classification of the act, the civil claims announced, other proposals and also the proposal concerning the persons to be summoned to the hearing and the persons to be notified thereof. The substitute private accuser may propose the application of a coercive measure entailing the restriction or deprivation of personal freedom of the accused, but he may not motion for the termination of the right of the accused to parental custody (§ 236 C.P.C.).

Regarding to these rules, can be stated unambiguously that victim has to identify that person – together with his personal data – against whom submits the motion for prosecution. It has significant importance when the complaint was filed earlier against an “unknown offender” and the reason of rejecting the complaint was that the action was not constitute a criminal offence or the reason of the termination of investigation based on the data of the investigation it could not be established the commission of a the criminal offence and continued procedure was not expected to yield any result. If this situation occurs the victim has to identify that person whom he deems the offender – regarding to the criminal consequences of the false accusation of course – otherwise he is not able to act as a substitute private accuser.

Have to take into consideration also that the motion for the prosecution can not be rejected because of missing data of the accused if the accused can be identified beyond any doubt otherwise.

In the motion for prosecution victim has to assign those reasons on which despite of rejecting the complaint, termination of the investigation or partial omission he proposes the continuation of the procedure.

5. The court has to examine the motion of prosecution in that viewpoint firstly if it exists or not that kind of reason because of the motion of prosecution can not be admitted. Therefore, in the procedure of substitute private accusation first of all the court has to make a

having competence and jurisdiction in the case. (2) The motion for prosecution shall contain the data set forth in Section 217 (3) *a*) to *c*), *g*) and *h*), as well as the substitute private accuser’s reasons to motion for conducting the court procedure despite the dismissal of the complaint, the termination of the investigation or the partial omission of the indictment. In the motion for prosecution, the substitute private accuser may also designate the court having jurisdiction at the residence of the defendant as a court of jurisdiction [Section 17 (3)]. In this case, at the request of the substitute private accuser, the prosecutor’s office shall forward the documents and the motion for prosecution to the court of jurisdiction.

decision on existence of the (procedural) conditions of court procedure and after the positive answer to this question, in the situation of missing legal procedural obstacles can be further examined the grounding of the criminal liability by the substantive law and make a conclusive final decision on criminal liability of the accused.

The court scilicet has to dismiss the motion for prosecution in the following cases:

- a) The law stipulates the term in which the substitute private accuser may submit the motion for prosecution. According to § 229 (1) the victim may stand as a substitute private accuser within sixty days of the communication of the decision concerning the rejection of the protest against the rejection of complaint, termination of the investigation or partly omission of the charge. The fault of missing deadline leads to forfeiture of rights, hence if he submits the motion for prosecution after the lapse of the deadline it has to be dismissed. The deadline set forth in § 229 (1) can not be prolonged, the act does not contain this kind of possibility. But legal remedy because of missed deadline can be filed.
- b) The motion for prosecution has to be dismissed also if the substitute private accuser is not represented by lawyer. As I mentioned earlier the substitute private accuser may exercise his rights by way of representative who has to be a lawyer, unless he is a natural person having taken an examination in law and the victim is being a non-natural person can be represented by a member authorized for managing or for as an executive or by an employee on condition that he has an examination in law. The power for representation may be issued by the victim - or, upon the death of the victim, the relative in direct line, a spouse, life partner or legal representative – victim's full aged relatives, and if the victim is incompetent or partially incompetent the power for representation may be issued by the legal representative or by office of guardians. When the victim is a government body or economic organization the member of the body or employee of the organization having authorization for the representation, may issue for the lawyer the power for the representation (§ 57 (1) C.P.C.).

Consequently, the representation of a lawyer is not necessary, if the substitute private accuser is a natural person having examination in law or if the substitute private accuser is a non-natural person and its member, executive or employee authorized for representation have taken examination in law.

The suiting the requirements have to be authentically proved – by attaching the original or certified copy of document of taking the examination in law - by substitute private accuser.

- c) The motion for prosecution also has to be dismissed if it was filed by non-entitled party. The motion for prosecution can be submitted without any exceptions only by the victim or those persons who may replace him. The court has to examine carefully who is the victim of the committed crime described in the motion for prosecution. As the § 51 (1) C.P.C. stipulates the victim is the party whose right or lawful interest has been violated or jeopardized by the criminal offence.

In the Hungarian Criminal Code – as I mentioned earlier – are number of that kind of offences which have not has victim (such as the incitement to war (§ 153 of Criminal Code), the driving under influence of alcohol, on condition that nobody get injured § 188 (1) of Criminal Code, etc.). In these cases the motion for prosecution is impossible in advance.

The motion for prosecution was filed by non-entitled party also if the protest was rejected by the reason of delay. The motion for the prosecution scilicet can be applied if during the investigation stage all the possible legal remedies were fulfilled. Therefore, if the prosecutor rejected the protest because of its delaying, the victim did not file all the possible legal remedies so he did not enforce his rights on remedies in time which caused that the prosecutor was not in situation to make definitive decision. Regarding to all this the legal title of the dismissing of the motion for the prosecution will not be the delay but the missing legitimacy.

d) The concept of the legal charge is stipulated by § 2 (2) of C.P.C. Regarding to this rule the charge of substitute private accuser is not legal for example if it not contains those concrete facts which are competent to the elements of legal ruling of the crime, or if the described action does not constitute a criminal offence or also if the motion for prosecution does not contains unambiguous historical matter of facts. Consequently, the substitute private accuser has to describe the committed crime in his motion for prosecution because with this he assigns the framework of the charge at the same time. The motion for the prosecution also has to contain the time, the place, the instrument, the method, the results of the commitment of the crime and all those data which could be relevant to punishability or to classification.

When the historical matter of facts is not fits legal ruling of any criminal offence based on public accusation, namely if the motion for prosecution's historical matter of facts is not constitute any criminal offence, the competent action is not the rejection of charge but the terminating the procedure because actually the thing is that the facts are contained in the motion for prosecution are irrelevant. The charge is not legal if the substitute private accuser is unknown or he submitting a motion for prosecution against more than one person alternatively. Thus, pursuant to § 2 (2) C.P.C. the criminal procedure can be initiated by charge only against certain person.

Will not cause any obstacle for submitting the motion for prosecution if the accused during the investigation was not questioned as a suspect. There is not a requirement in every case the hearing of the accused as a suspect during the investigation stage. It is obvious that if the complaint was rejected, the person against the complaint was filed was not questioned, and in those case of termination of the investigation when the motion for prosecution is allowed also may occur that it will happen the termination without the questioning a suspect. If according to available data, reasonable ground exists to suspect the hearing of the suspect will come off. But in the part of the investigations the evidences gathered not ground the complaint. In these cases the investigation will start, the evidences will be gathered but because of the missing reasonable grounds to suspect the investigation will be closed without hearing of the suspected person. But the victim – as a substitute private accuser – after the legally binding decision on the termination of the investigation may submit a motion for prosecution to the court against the person who was not questioned by the investigative authority.

“The submission of the motion for prosecution is still not a charge. The motion for prosecution will turn to indictment and filing the motion for prosecution will turn to charge if the court admits this.”¹⁰

The court admits the motion for prosecution without any formal decision. There is no necessity for noticing the victim about the admission of the motion. If the court is not handling for him a decision on dismissing he may trust with a reasonable grounds in that the court has started the procedure.

The decision dismissing the motion for prosecution can be appealed regardless the reason the dismissal based on.

In those cases when there is no reason for dismissal of the motion for prosecution but the court notices any reason for termination the procedure has to be terminated by court's pre-trial stage. In these cases in the decision on termination has to indicate that the admission of the motion for prosecution is eventuated but because of the reason of termination the continuation of the proceeding is not possible. Describing all this expedient in the justification.

¹⁰ Tibor Kiraly, *Criminal Procedure* n.417 (Osiris 2008)

If the court does not dismiss the motion for prosecution it has to ensure the availability of the means of evidence at the hearing and it may order the application of a coercive measure.

After the admission of the motion for prosecution the accused is entitled to know the documents of the investigation.