TYPOLOGY OF ROMANIAN CRIMINAL TRIAL. REALITIES AND TRENDS

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Abstract

The New Criminal Procedure Act that will soon become effective will also determine a transformation of the position and of the rights of the people involved in legal relations that are specific to the criminal trial. This study is meant to identify the main characteristics of the current criminal trials, as seen in the Romanian legal system. The lengthy process through which Romania became a full-rights member of the European Union caused a radical transformation of the existing criminal trial and it shifted it towards the European model. Identifying the essential elements of the Romanian criminal trial model allows us to frame it in a pattern that will determine the nature of the relations between state and citizen. Last but not least, the study tries to identify the current disruptions, in view of offering effective and precise solutions for overcoming the problems that may surface during the legislative process.

Keywords*: criminal trial model, system, features, elements*

Introduction

Unlike the private lawsuit, the criminal trial has its own legal nature and specific particularities and nature of its own, entailed by the importance of legal relationships it implies.

Currently, the trial model that circumscribes the Romanian criminal trial, which is on the verge of a radical change, may be classified in a certain general typology.

Establishing the correct legal nature and identifying the specific particularities allows the orientation of the trial type towards the European model.

At the same time, this operation brings forward serious advantages as well, designed to identify any procedural obstacles but also to propose practical and useful solutions to overcome them.

The core institution of the criminal procedure or criminal procedural law is undoubtedly the criminal trial. Beyond the theoretical implications involved in identifying the technical semantic scope of that concept, the practical, applied dimension of the institution is the having the uttermost relevance in reality.

Following an intensive use at the conceptual level, the term risks losing its identity as a concept and being confused with the subject (content) on which it relates.

Both repair and repression are required as a result of the imbalance in the legal order caused by committing an offense.

Discovering crimes, identifying and catching the perpetrators, gathering and administrating evidence, and criminal liability constitute a complex activity, carried out by specialized state bodies, called *criminal trial.*[1]

Therefore, a lawsuit filed by a company lies between the crime ascertained and the punishment, when the rule of law has been violated, against the offender, in order to enforce a judicial punishment provided by law.[2]

The criminal trial has also been defined as the activity required by law, carried out by competent bodies, with the participation of the parties and other individuals, aimed at ascertaining, timely and completely, the facts that constitute the offense, so that any individual having committed

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[1] *A. Crişu,* Drept procesual penal, Ediția a 3 a, revizuită şi actualizată, Ed. Hamangiu, Bucureşti, 2011, p. 1.

[2] *G. Stefani, G. Levasseur, B. Bouloc,* Procedure penale, 16e ed, Dalloz, Paris, 1996, p. 1.

an offense would be punished according to its guilt, and no innocent person would be held criminally liable.[3]

Furthermore, criminal trial has been defined as the activity carried out in a criminal case by the judicial bodies, with the participation of the parties and other individuals, as holders of rights and obligations, aimed at ascertaining, timely and completely, the crimes and criminal liability of those who have committed them, so as thereby to ensure the rule of law and protect the rights and lawful interests of individuals.[4]

All these definitions revolve around the essential elements of the criminal trial, setting out its specific features as well.

These basic elements are relevant for our analysis to the content as a whole, systemically creating a certain pattern. Over time, during the evolution of the criminal trial, three types or systems of criminal trial are known, different in their structure by development and basic rules. These are: *the adversarial trial, the inquisitorial trial and the mixed trial.*[5]

The oldest type of trial, *the adversarial trial*, assumed the existence of a prosecutor to make accusations against the person considered guilty. Originally, the victim of the crime could file the charges, and subsequently, especially for much serious crimes, other persons (accusers) could make charges.[6]

The criminal trial did not take place in the absence of the accusation made by the prosecutor, without the possibility of referral ex officio of those who settled the dispute.

Initially, those who made up the court were citizens of the community, and later on, after many years, professional judges performed the judgment. The trial within the adversarial court system is characterized by public debate, orality, adversarial character; the accuser is obligated to prove its accusation and the defendant its innocence. The judge had a limited role, without being able to intervene or act for knowledge and other situations, circumstances than those indicated by the parties, intervening in the trial only to ensure the compliance of judgment rules.[7]

The system has been criticized on the grounds that it offers the accused too many guarantees and too few to the prosecution, and does not create sufficient guarantees for social protection, many of the crimes not being brought to court due to lack of accusation.

The *inquisitorial* system emerged along with the creation of the state as authoritarian body, circumstances in which the interests of state power are much present against the individual ones.

In this context, it was considered that crimes affect both the state and the individual, which is why the state has undertaken to organize the procedural frameworks for the guilty individual to be punished. The intimation could be made both by the victim and ex officio, by the state representatives. Therefore, the support necessary for triggering the procedures for criminal liability of offenders is represented by the overall social interest, justifying state intervention in organizing criminal repression; the final enforcement of the punishment is perceived as the public reaction to the crimes committed by different individuals.[8]

Referral to the court in this system falls on an authorized person with the status of magistrate. Moreover, the designation of the trial type (inquisitorial) is given by the investigation procedure (*per inquisitionem*) used by these people.[9] Subsequently, the Public Ministry performs these tasks. Courts were composed of professional judges, appointed by the government, who were able to intervene in the trial, regardless of the position of the parties involved. Unlike the adversarial system, the trial was conducted in secret, written and non-contradictory (the accused was not allowed to argue the merits

[3] *I. Neagu,* Tratat de procedură penală, Partea generală, Ed. Universul Juridic, Bucureşti, 2008, p. 19.
[4] *N. Volonciu,* Tratat de procedură penală, Partea generalkă, vol.I, ed.Paideia 1997, p. 13.
[5] *Gr. Theodoru,* Drept procesual penal. Partea generală, Ed.Fundației Chemarea, 1996, p. 10.
[6] *A. Crişu,* op.cit., p. 8.
[7] *J.C. Soyer,* Droit penal et procedure penale, 1er ed., L.G.D.J., Paris, 1994, p. 255.
[8] *A. Crişu,* op.cit.p.8
[9] *J.C. Soyer,* op.cit.p. 254-255.

of the evidence against it, and it could only appeal in writing), and the system of evidence allowed consisted of evidence whose value was predetermined by law.

From a historical point of view, this system originates from the canon law enforceable in the ecclesiastical courts, to be adopted subsequently by royal courts, and became in time the system of common law in many countries.[10]

The *mixed* criminal trial system is a combination of the two systems above, created by taking some features from the inquisitorial system consisting of the pre-trial phase, and other specific judgment-related features, common for the adversarial system.

However, it is different from the inquisitorial system, as specialized bodies carry on their activity in the preliminary phase (prosecutors attached to the prosecutors' offices, which form the Public Ministry) and conduct investigations, deciding in the end if the court needs to be intimated. There is a separation of the trial functions (research, prosecution, judgment). Hearings are public, taking place in oral and adversarial conditions, and the courts are composed of judges, and in some cases, other people without legal training (jurors), who decide in free evaluation of evidence, according to their intimate belief.[11]

This crime settlement system was originally present in France, through an interim legislation, and subsequently, knew its final consecration through the Criminal Training Code in 1808; later on, the model was adopted by most European countries, including the Romanian criminal procedure.

Which is the current typology of the criminal trial system in Romania?

Based on the qualifications set out above, we can consider the Romanian criminal trial model as principally being, in terms of guarantees and rights defended, a European model,[12] as it includes features and relies on principles arising from the European Convention on Human Rights. In the absence of European criminal procedural legislation, directly enforceable in the Member States, the European model is inspired by the binding case law of the European Court.

From a systemic point of view, the Romanian model has also an original character that corresponds to the mixed criminal trial system type, featuring elements such as inquisitorial and adversarial type. Composite features of this mixed type interfere, are not legally stable, meaning that they oscillate between adversarial and inquisitorial nature. The essence of such a system, however, is the existence of at least two phases: an instructive one (investigation) with predominantly inquisitorial elements, and an adversarial one (trial) with predominantly adversarial elements.

We can identify the following adversarial type elements in the Romanian criminal trial model:

- the existence during the trial procedure of a *super partes* judge, different from the rights and freedoms judge and the preliminary chamber judge;
- the formal legality between the parties (only during the trial phase);
- immediacy, adversarial character and oral debates;
- the evidence are assembled and administered contradictorily between the prosecution and the defense;
- fair trial;
- the regulation of the presumption of innocence;
- the exclusive jurisdiction of the judge, even during criminal prosecution phase in respect of the *status libertatis* of the defendant

The inquisitorial type elements concern:

- the prosecutor's status of "*dominus*" during the prosecution phase, and the supereminence of the prosecution against the defence at this stage;
- the judge's interference in searching and assembling the evidence;

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[10] *Idem, p. 254.*

[11] *A. Crişu,* op.cit.p. 9.

[12] *M. Delmas - Marty,* Vers un modèle européen de procès penal, în Culegerea Procès pénal et droits de l'homme**,** op.cit., p. 291-303.

- limitations on the procedural rights of the defense in the criminal prosecution phase;

- pre-assembling the evidence, mainly in written and under secrecy, to be used by the judge hearing the debates;

- accepting the possibility of temporary detention as a form of compromise of the presumption of innocence

To summarize, without attempting a detailed analysis of the Romanian criminal trial model, we can acknowledge that although it corresponds to the mixed type, its character is balanced.

Thus, the elements defining the phases of a system are sometimes found in the other system. For example, we have shown that the existence of a preliminary phase, of investigation, with predominantly secret character and lacking contradictoriality is specific to the inquisitorial system. However, some stages of this phase comprise adversarial aspects, primarily characterized by *contradictoriality*. In Romanian criminal trial, contradictory aspects are found in the phase lacking publicity, and contradictoriality during the prosecution phase, [13] in proceedings concerning the settlement of the preventive arrest of the accused or the defendant (art. 146 and art.149^1 CPC), when the judge rules, after hearing the prosecutor and the accused or the defendant, with the possibility for the latter to consult the file which was held secret up to that moment.

Contradictoriality is also encountered in the procedure ordering an expertise in the criminal prosecution phase when, in consideration of the provisions of art. 120 of the CPC, the prosecution body sets a term when the expert and the parties are summoned, to let them know the objectives of the expertise; these individuals have the right to comment and ask the amendment or modification of the questions.

Furthermore, during trial, specific to the adversarial system, characterized by publicity and contradictoriality, inquisitorial type aspects are present in the form of secret and unilateral procedures. Such a procedure involves *changing the trial date* governed by the provisions of art.293 paragraph 3^1 CPC.

Some comments on changing the trial date are necessary.

First, regarding the scope of the institution, the changing of the trial date was expressly included in the trial general provisions (art. 287, 312), which constitute the common regulatory framework for conducting any trial, regardless of its level or type (in the first instance, in ordinary and extraordinary ways of attack).

Therefore, the changing of the trial date can occur in any activity of judicial nature covering the trial (settlement on the merits) of a criminal case after conferring, under the law, a panel of judges.

Per a contrario, changing the trial date time is an impermissible procedure within the other jurisdictional activities which have as object the settlement of claims, complaints or incidents of any such litigation, and do not judge on the merits.

As many of these activities involve a sequence of trial dates (solving the demands on interrupting the execution of sentences, appeals to enforcement, rehabilitation demands etc.) the enforcement by analogy of the institution in these matters would be useful to overcome procedural obstacles.

As for the general terms of changing the trial date, this occurs primarily ex officio or at the request of the parties.

Whereas it is not a party in the criminal trial, the prosecutor does not receive legal standing to that effect, so that its request must be dismissed as inadmissible.

The changing of the trial date may relate either to the first term or to the term taken cognizance of.

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[13] *B. Micu,* Drept procesual penal. Partea Specială, Ed. Hamangiu, Bucureşti, 2010, p. 10-13.

Even if the law does not expressly provide it, I appreciate that changing the trial date may refer to any trial date whether it is received in full knowledge or not, as long as the obligation of summoning the parties on the new trial date was set up.

The only condition is that the changing of the trial date comply with the principle of continuity of the panel.

The grounds for changing the trial date are the impossibility of conducting the judgment, for objective reasons, on the initial term assigned or expediency resolution of the case.

Although following the vesting the court carries out its activity and fulfills its tasks in a panel under the law, within the legal department, the legal procedure of changing the trial date is conducted by graceful appeal.

In this respect, the law provides that the changing of the trial date is ruled by judge resolution in the counsel camera and without summoning the parties.

It is not clear whether if another judge of a panel of several judges aside the president could rule the changeover resolution.

In any case, if not a member of the panel hearing the proceedings, another judge may not rule the changeover, regardless of its administrative position (court or department president).

Even though the trial date was taken cognizance of, the parties shall be mandatorily and immediately summoned for new trial date.

The resolution to change the trial date hearing is not a legal solution, it does not take the form of a judgment, needs not to be reasoned (apart from indicating the grounds that generated the measure) and cannot be appealed either separately or with the merits.

Returning to the subject of this study, I consider that it is necessary to include a brief overview of future criminal trial model brought by the new Criminal Procedure Code of Romania.

After the adoption of the new Criminal Code of Romania [14], the issue of a new Criminal Procedure Code is no longer a matter of political choice but a matter of urgent legal fulfillment of a legal need.

In order to understand this assessment it is sufficient to invoke the organic, indissoluble connection between the substantive criminal law and procedural criminal law, regarded both as branches of law and as legal sciences.

This connection was pictured by the illustrious Romanist T. Mommsen who said, in the nineteenth century, that criminal law without criminal procedure is like a handle without knife, and criminal procedure without criminal law is like a knife without a handle.[15] The same author considered that separating legal rules from their enforcement, pursuant to the usual formula of law and procedure, generally scientifically regrettable, is not at all convenient for the Roman law and it is, at least in part, responsible for legal weakness of this matter.[16] Moreover, great authors [17] considered criminal procedure as far more important than prohibition and sanction (substantive criminal law).

The close connection between the criminal law and criminal procedural law is particularly highlighted by the correlation between the criminal law legal relationship and the legal criminal procedure legal relationship, given that the rights and obligations of the subjects within the criminal relationship is made only through the criminal procedure relationship.[18]

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[14] Romania's new Criminal Code was adopted by Law 286/2009 and will become effective on a subsequent date to be set out in the law for its implementation.

[15] *T. Mommsen,* Droit pénal des Romains, T.I., pag. XIV din prefață, apud I. Tanoviceanu, Curs de Procedură Penală română. Atelierelele grafice Socec & Cp, Societate anonimă, Bucureşti, 1913, pag. IV din prefață.

[16] *T. Mommsen,* op. cit., p. 6, în același autor, pag. V din prefață.

[17] *F. Carrara,* Programma del corso di diritto criminale, 8-va edizione, Firenze, 1897, Sect. a III-a, T.II, p. 198 în același autor, pag. III din prefață.

[18] *I. Neagu,* op. cit., Partea generală, p. 34.

In this context, the construction and enforcement of the new substantive rules will be essentially conditioned by the viability of procedural rules.

In the explanatory memorandum of the draft of Code of Criminal Procedure (the form sent to the Parliament) the social and legal framework that determined the need for this normative act is illustrated.

Thus, the realities of current legal domain revealed a lack of expediency in conducting criminal trials, the mistrust of litigants in social justice and the significant human and material costs, translated into higher consumption of time and financial resources. All these aspects have led to the establishment of a climate lacking confidence in the effectiveness of the criminal justice ruling.

The main issues facing the criminal justice system are related to overloading current prosecution offices and courts of justice, the excessive duration of proceedings, unjustified tergiversation of cases and undue delay in settling cases on procedural grounds.

Among these, the aspects relating on the preventive custody, duration of proceedings, assigning competences and evidence in criminal matters were the subject of several cases before the European Court of Human Rights, to which Romania is a party. That being so, the need to eliminate the deficiencies that led to the repeated conviction of Romania by the European Court of Human Rights became obvious.

The current procedural system governed by the Code of Criminal Procedure, subject to frequent legislative intervention on various institutions, led to inconsistent enforcement and interpretation of the criminal procedure law. Therefore, the need to create the appropriate framework for the High Court of Cassation and Justice to carry out its role in the interpretation and application of the criminal procedure law is obvious.

Considering the shortcomings facing criminal procedural system, the necessity of thinking of a modern system, responsive to the imperatives of justice adapted to social expectations and enhancing the quality of the public service has emerged.

This being said, a legislative intervention is required, aiming at reducing the duration of trials and simplifying criminal proceedings by introducing new institutions, such as plea bargain, making the current evidence or evidence procedures consistent with the European standards thereon, reducing levels of jurisdiction, and regulating the appeal in cassation, as extraordinary way of appeal.

In this context, it appears imperative to adopt the new Criminal Procedure Code to ensure the creation of a uniform national jurisprudence, with observance of the highest international standards of criminal procedure, namely the European Court of Human Rights standards.

The draft of the new Criminal Procedure Code essentially aims at creating a modern legal framework in criminal procedure, fully responsive to the imperatives of running a modern justice adapted to social expectations and the need to increase the quality of this public service.

The provisions of the new Code of Criminal Procedure draft are designed to meet some current requirements as well as to speed up the duration of criminal proceedings, simplifying them and creating jurisprudence in line with the European Court of Human Rights.

Equally, the project aims to meet the requirements of predictability of legal proceedings arising from the European Convention on Human Rights and Fundamental Freedoms and therefore of the ones stated in the European Court of Human Rights jurisprudence.

The Government Decision 829/2007, published in the Official Gazette of Romania no. 556 of 14 August 2007, Part I, approved the preliminary theses of the Code of Criminal Procedure draft.

As noted in this document, which was the basis for the draft, it was not intended that the new Criminal Procedure Code contain original solutions at all costs, as compared with the existing solutions which have proven to be viable in practice, or whose use is a habit to practice, but to properly modify all the solutions that have become obsolete or have revealed a number of anomalies in practice, and introduce new solutions based on comparative experiences or targeting positive or favorable effects expected, all following the study of the criminal law doctrine of the internal and European systems.

Therefore, the draft of the new Criminal Procedure Code preserves its predominantly continental Europe, but as a novelty, it introduces many adversarial elements, properly tailored to our own legal system.

Thus, although the goal is to preserve all viable solutions in the current Criminal Procedure Code, a number of new solutions are introduced, which essentially focus on enabling a fast and efficient decision-making process in a criminal case, giving in full respect of fundamental rights and freedoms of all subjects of criminal proceedings.

Objectives pursued by the draft of the new Criminal Procedure Code are the following:

1. creating a framework in which the criminal trial is faster and more efficiently, thus significantly less expensive;

2. uniform protection of human rights and freedoms guaranteed by the Constitution and international legal instruments;

3. conceptual harmonization with the provisions of the new Criminal Code draft, with special attention being paid to the new definition of the act which constitutes an offense;

4. appropriate regulation of our country's international obligations regarding the normative acts of the procedural criminal law;

5. establishing a proper balance between the requirements for effective criminal proceedings, protection of basic procedural rights, and fundamental human rights of the participants in the criminal trial and uniform observance of the principles concerning the fair conduct of the criminal trial.

Analyzing the contents of the desiderata declaratively announced in this explanatory memorandum, but also a general and particular legislative framework to materialize the judicial activity, we may try to outline the typology (in systemic terms) of the future Romanian criminal trial model.

To begin with, it must be emphasized the observation concerning the model of inspiration for the future criminal procedural legislation. In this regard, the authors of the Code draft have abandoned the traditional Romanian normalization approach, preferring, in terms of the model of inspiration, the Italian system against the French one.[19]

This preference for the Italian model is expressively illustrated by regulating new procedural institutions, which do not exist in the current regulatory framework, and especially in the matter of individual liberty in criminal proceedings.[20]

In this regard, we can recall the introduction, along with the classical principles category, of new fundamental principles, amongst which one will produce major changes in the conduct of criminal justice, namely the principle of separation of judicial functions.

This principle declares and guarantees that four functions are exercised in the criminal trial: prosecution (by criminal investigators and prosecutors), ruling on the fundamental rights and freedoms during prosecution (by the judge of rights and freedoms), verification of the legality of prosecution or decision not to prosecute (by preliminary procedure chamber) and judgment (by the courts of justice).

Italian model also regulates the participants to a criminal trial, the institution to which the project makes several substantial changes compared to current regulation.

Thus, the judicial bodies, along with the courts and prosecution, include: the judge of rights and freedoms and the preliminary chamber judge, who will have specific responsibilities on human rights and freedoms of the suspect or defendant, respectively on verifying the legality of

[19] For French origins of ancient criminal procedure codes see *I. Tanoviceanu*, op. cit., Introducțiune, p. 1-14; *Gr. Theodoru,* op. cit., p. 64-65.

[20] In matters of individual freedom, a French-inspired institution is the provisional freedom, conceived as an alternative to preventive arrest.

administering evidence in the criminal prosecution phase and the legality of intimating the court by the prosecutor.

Furthermore, the parties in criminal trial have also been defined (the defendant, the civil party and civilly responsible party), with their rights and obligations. Along with parties, amongst the participants to a criminal trial are also the main procedural subjects (the suspect and the injured party) and other procedural subjects (the witness, the expert, the interpreter, the procedural agent, special ascertainment bodies etc.). Their specific rights and obligations are also highlighted.

The Italian model was chosen as inspiration in the matter of individual liberty. Thus, the absolute novelty for the Romanian criminal procedural law is the proposed settlement of a new preventive measure, namely the house arrest, pursuant to the Italian Code of Criminal Procedure, aiming, by entering this institution, at broadening opportunities for individualization of preventive measures in relation to the above-mentioned principles.

To ensure the observance of the eminently preventive character of the arrest ruled during a criminal trial in progress, the draft, inspired by the Italian Criminal Procedure Code, proposes the establishment of maximum limits of preventive arrest and the trial phase.

Considering the similarities between the criminal upcoming Romanian model and the Italian model, we may outline the typology of this model based on systemic findings made in this regard by the Italian doctrine.

Thus, the Italian model of criminal trial was described as being a mixed criminal trial type, of original character, that has vague similarities with the Anglo-Saxon type processes with prevailing adversarial elements.[21]

In conclusion, without attempting a detailed analysis of future Romanian criminal trial model, we may assert that although it corresponds to the mixed type, its character is primarily adversarial.

Conclusions

Based on the analysis presented, we may qualify the Romanian criminal trial as being a mixed type trial, with original character, featuring both inquisitorial type elements and adversarial type elements.

Systemically, the Romanian criminal trial model is primarily, from the point of view of defended safeguards and rights, a European model whereas it features characteristics and relies on principles arising from the European Convention on Human Rights.

In the absence of European criminal procedural legislation, directly enforceable in the Member States, the European model includes as source of inspiration the mandatory jurisprudence of the Strasbourg Court.

The Romanian criminal trial model also has an original character, its composite characters interfering, having no legal stability, meaning that it oscillates between the adversarial and inquisitorial nature.

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[21] *M. Mercone,* Diritto processuale penale, XI edizione, Edizione giuridiche Simone, Gruppo Editoriale Esselibri-Simone, Napoli, 2003, p. 36-38.

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