IMPLICATIONS OF THE NEW LEGISLATION ON THE FUNDAMENTAL PRINCIPLES OF THE CRIMINAL TRIAL[1]

Andrei ZARAFIU[*]

Abstract

Each type of criminal trial is construed, from a systemic and normative perspective, on a range of fundamental rules.

The current pattern of criminal trial applied at national level since the implementation of the New Code of Criminal Procedure knows the same normative approach, which begins with the regulation of the Principles for the application of the criminal procedure law.

Even if, from the perspective of the form, the new procedure law was construed on the same normative fundament, from the perspective of the content, these differ from the previous regulations, being more adapted to the new legal realities and correspond to the trial model proposed by the new legislation.

This study aims to analyse the new fundamental principles of the criminal trial, to identify the current dimension of their normative content and to appraise the way in which these reason with the warranties systems offered by the European regulations.

Keywords: *criminal trial, principles, system, warranties*.

Introduction

As a novelty and following the model of criminal law, the new civil procedural law has been explicitly regulated in terms of its fundamental principles.

In addition to the actual content of the fundamental principles, this legislative approach underlines the significant theoretical and practical importance of these basic rules for the judicial system, as a whole.

Any procedural arrangement and, in particular, the criminal procedural one, which is specific to repressive justice, needs an essential, well-rounded framework, as the foundation for the development of the entire judicial construction.

Knowing such basic structure, laying down the correct legislative and practical dimension of its constituent elements, identifying proper solutions to overcome any potential procedural impediments generated by the application of the new basic rules of the criminal trial, become mandatory initial requirements for the application of the New Criminal Procedural Code.

At the same time, any approach which is exclusively theoretical is unable to cover the need generated by the exclusively dynamic character of the application of the criminal procedural law.

Therefore, a useful analysis may not by-pass the specific judicial reflex of effectiveness of certain new fundamental principles of the criminal trial.

Paper content

As a positive law branch, criminal procedural law consists in the entirety of the legal provisions regulating the course of the criminal trial and other legal procedures related to a criminal case. Such provisions, together with those regulating the legal relationships established among the various parties involved in the criminal trial make up the ensemble generically called *procedural law.*

Even if they have the value of *process rules* or *procedural rules*, or belong, as a subcategory, to the category of *organisation rules*, *competence rules* or *procedural rules*, all criminal process law rules have the same purpose: they prescribe procedural rules.

Also, all the provisions of criminal procedural law are mandatory, *i.e.* both the judicial bodies, and the other parties taking part in the criminal trial have the obligation to abide by the rules prescribed by these provisions.

Irrespective of their name, *i.e.* basic rules, fundamental principles, guiding provisions, etc., the provisions of the criminal procedural law comprise some provisions whose value is different from that of the regular provisions. In most criminal procedural laws, these are found in the beginning of the Code.

I believe that the value of a provision of criminal procedural law as a fundamental principle is given by 3 characteristics:

a) *general applicability*, *i.e.* it refers to all the activities carried out during the criminal trial, irrespective of the phase or stage;

[*] Lecturer, PhD, Faculty of Law, University of Bucharest (e-mail: **andrei.zarafiu@mnpartners.ro**).

[1] *This paper was financed under the contract POSDRU/159/1.5/S/133255, strategic project ID 133255 (2014), co-financed from the Social European Fund, under the Sectoral Operational Program Human Resources Development 2007 – 2013.*

b) *direct applicability*, *i.e.* it does not need any additional provisions to transpose the generic rule in a particular context;

c) *priority applicability*, *i.e.* it has priority before all other provisions, even if sometimes these have a special character.

In the New Criminal Procedural Code, these provisions were called *principles of application of the criminal procedural law* and are *expressly* provided by Articles 2-12 of the Criminal Procedure Code.

All of the fundamental principles of the criminal trial make up a coordinated and flexible *system*, based on which the other procedural provisions are formulated, and shaping the political and legal framework of criminal justice.

The past years' evolution of the system of criminal trial fundamental principles confirms the *European model* of the new type of criminal trial in Romania, built in accordance with the provisions of the European Convention on Human Rights and based on the mandatory case-law of the Strasbourg Court.

The content of the fundamental principles of the criminal trial should not be considered only at a declarative level, the understanding of the *legal consequences* involved and the related *guarantees* being essential.

A. Lawfulness of the criminal trial (Article 2 of the Criminal Procedure Code)

This may be considered to be the quintessence of fundamental principles of the criminal trial, the framework principle which is the foundation for all other principles.

Lawfulness, as a fundamental principle, implies that all fragmentary activities making up, together, the criminal trial, are carried out *pursuant to the legal provisions*. The principle of lawfulness governs not only the activity carried out in a criminal case (criminal trial, in its strict sense), but also the activities carried out as part of other legal procedures, related to a criminal case.

Not accidentally, the principle of lawfulness is considered to be the most important fundamental principle of the criminal trial, since the law is not only the *requirement*, but also the *condition of the procedure*.

At the same time, in order to fulfil its purpose of preventing arbitrariness, the procedural law has to be predictable and accessible in accordance with the constitutional and human rights protection standards (*M. Udroiu*, Partea Generală, Noul Cod de Procedură Penală, C.H.Beck Publishing House, 2014 p. 5).

The most efficient guarantee of the principle of lawfulness is represented by the *procedural penalties*. Thus, the failure to comply with the legal provisions during the criminal trial may result in:

- the *nullity* of the acts and trial-related measures, and of the procedural acts;
- loss of trial-related rights (by *termination*)
- loss of efficiency of trial-related procedures (claims, complaints, exceptions), by the acknowledgment of *inadmissibility*;
- *exclusion* of illegally or unfairly produced evidence.

At the same time, the *parties to the trial* failing to comply with the legal provisions during the criminal trial may be held liable under the civil, criminal or judicial law (by the application of the judicial penalty). Also as a guarantee to the principle of lawfulness, the successive and progressive course of the activity making up the criminal trial implies permanent control of the lawfulness of the procedural acts (trial-related acts and measures, procedural acts).

Such control is exercised not only *at the request* of the interested parties (*e.g.*, by complaints against the criminal prosecution measures and acts, by the complaint addressed to the judge of the preliminary chamber against the decisions not to start the criminal prosecution or not to lodge a summons, by the exceptions and claims raised in the preliminary chamber procedure, by the means of appeal), but also *ex officio* (by exercising the supervision and control of the criminal investigation bodies by the prosecutor, by verifying the lawfulness and the merits of the summons indictment by the superior prosecutor, by the capacity held by the judge of the preliminary chamber or the court of law to invoke exceptions *ex officio*, etc.).

B. The principle of separation of judicial offices (Article 3 of the Criminal Procedure Code)

Although this principle functioned implicitly also under the former regulation, the separation of the judicial offices, as a basic rule of any modern procedural system, is currently expressly regulated as a fundamental principle of application of the criminal procedural law.

Pursuant to Article 3(1) of the Criminal Procedure Code, the following judicial offices are exercised in the criminal trial:

- the criminal prosecution;
- the disposition of the fundamental rights and freedoms of the individual at the criminal prosecution stage;
- the verification of the lawfulness of the summoning or non-summoning decision;
- the judgment.

What is the principle which *"represents, for the criminal procedure, what the separation of the legislative, executive and judicial authority represents for constitutional law."?* (*A. Esmein* citing Montesquieu in Histoire de la procédure criminelle en France, 1882, not. 410, apud J.Pradel, Procédure pénale, 16th edition, Cujas edition, Paris 2011, p.27.)

Theoretically, the principle means that each judicial office is exercised by specialised bodies, which may not exercise a different office

For the French judicial system, the consequence of the separatist principle does not have a procedural nature, but an organic nature, *i.e.* different judicial

bodies exercise each judicial office (*J. Pradel*, op.cit.,p.27).

In Romania, the current dimension of the principle is not only the result of a deliberate option of criminal policy, but also the expression of certain administrative constraints generated by insufficient judge magistrates.

By reference to both the general provision (Article 3 of the Criminal Procedure Code) and the special provisions whereby the principle is transposed within a particular context (Articles 203, 335, 341, 346, 362 of the Criminal Procedure Code, etc.) *I believe that*, in the current judicial system, the separation of judicial offices is:

- a relative separation, from an organic point of view (due to the lack of specialisation for jurisdictional offices)
- permissive, regarding the plurality in the same criminal case.

What should be understood by the notion *of judicial office*? This notion must not be mistaken by that of procedural office.

The judicial office is an exclusive characteristic of judicial bodies and refers to their competence, setting out the judicial actions taken by the official subjects in performing their duties provided by the law.

The procedural office is a general characteristic of (official or private) procedural subjects, and refers to the interest in consideration of which such subjects take part in the procedures.

While judicial offices set out the judicial bodies' duties, procedural offices set out the attitude (obviously, in a procedural sense) of the procedural subjects.

While the judicial office implies actions, *i.e.* operations performed pursuant to certain express competences, the procedural office implies manifestations and measures, understood as proper remedies.

Both judicial offices, and procedural offices may be exercised simultaneously during a procedural stage or phase, since they are intertwined and manifest themselves at different levels.

Any modern criminal procedural system, including the Romanian one, includes three trial-related offices:

- indictment (exercised on each side of the trial by the active subjects of the two actions)
- defence (exercised by passive subjects of the two offences).
- jurisdiction (to which the decision-making power belongs, power which is exercised by the judges).

Each of the 4 judicial offices has a proper judicial context of manifestation (procedural stage or phase), with a set object lying at its core.

Presently, one may notice the pre-eminence of *jurisdictional* offices, which are manifested including during the criminal prosecution.

These are exercised by the members of the same judicial category – the court judges, even if the methods and procedures applied are different.

The prosecution office and the judgment office are considered primary offices, given the object of the activity implied, which is related to the merits of the case *(clarification of the essential elements of the conflict relationship)*.

The other two offices are considered subsidiary offices, given that the activity implied is related to the elements adjacent to the merits of the case *(theoretically, the office exercised by the rights and freedoms judge during the prosecution even has a contingent nature, since it may be exercised in a case other than a criminal case in which a final judgment was ruled by the court)*.

Despite the express listing, two other judicial offices may also be identified in the current criminal trial:

- *the temporary order office*, regarding the freedom of the individual, which may be exercised in subsidiary both in the preliminary chamber procedure (Article 348 of the Criminal Procedure Code), and in the judgment phase (Article 362, Article 399 of the Criminal Procedure Code)
- *the office enforcing* penal judgments (see *I. Neagu*, *M. Damaschin*, Tratat de procedură penală. Partea Generală, În lumina noului Cod de procedură penală, Universul Juridic Publishing House, 2014, p.19).

The criminal prosecution office refers primarily to the activity of colleting the necessary evidenced in order to establish the existence or lack of grounds for summons.

From a judicial point of view, the *"collection of evidence"* implies three separate operations: identification, administration and analysis of the evidence.

The criminal prosecution office is exercised by the prosecutor and the criminal investigation bodies through proper acts *(prosecution acts)*.

Although both bodies are criminal prosecution bodies, there is not equality, but a functional subordination relationship between them.

The office of disposition of the fundamental rights and freedoms of the individual has a subsidiary nature and is also exercised at the criminal prosecution stage.

The judicial body exercising this office is a jurisdictional body having duties in this respect (judge of rights and freedoms) or, *as an exception*, the body which exercises the primary office of criminal prosecution.

Thus, in exercising such office, the judge of rights and freedoms rules a decision during the criminal prosecution, regarding: preventive measures, precautionary measures, special supervision and investigation methods, and other evidence-related procedures of emotional nature, temporary safety measures, etc.

Also, in exercising its judicial office, the *judge of rights and freedoms* has other duties as well, during the prosecution phase, regarding the *anticipated hearing procedure*, *the complaint regarding the length* of the criminal trial, etc.

The office regarding the verification of the lawfulness of the decision to lodge or not lodge a summons is usually exercised by the judge of preliminary chamber, during the preliminary chamber procedure.

This judicial office also implies, in terms of duties, the *verification of the lawfulness* of the evidence produced and acts performed during the criminal prosecution, the *verification of the lawfulness* (and, exceptionally, even the *merits*), of the decisions not to lodge summons ruled by the prosecutor, as well as the *verification of the lawfulness and merits* of certain acts ordered by the prosecutor (*e.g.*, in case of re-opening the criminal prosecution, pursuant to Article 335 of the Criminal Procedure Code).

The judgment office is exercised at the judgment stage, by the court referred to and vested according to the law, in panels – Article 3(7) of the Criminal Procedure Code.

The activity implied by the exercise of this office is finalised by a resolution of the two judicial actions which, once it is final, acquires the authority of *res judicata*.

The judgment office implies a *jurisdiction* over the merits.

According to Article 3(3) of the Criminal Procedure Code, *during the same criminal trial, the exercise of a judicial office is not compatible with the exercise of another judicial office, except for that provided at paragraph (1) letter (c), which is compatible with the judgment office*.

This general provision is transposed, in a particular context, into the matter of incompatibility: Article 61(1)(e), Article 64(4) and (5), Article 65(4), Article 340 and Article 342(7) of the Criminal Procedure Code.

There are also certain exceptions regarding the admissibility of *multiple judicial offices*:

a) thus, the body exercising the criminal prosecution office in a case, may also exercise the office of disposition of the freedom of the individual at the same procedural stage: the criminal prosecution body may dispose of the freedom of the suspect by retention (Article 209 of the Criminal Procedure Code), or the freedom of the defendant, by retention or judicial control (Article 211(d) of the Criminal Procedure Code);

b) the implicit office of disposal of the freedom of the individual may be exercised by the same judge carrying out the procedure in the preliminary chamber (Article 348 of the Criminal Procedure Code), or making up the court panel vested with the settlement of the case (Articles 362, 399 of the Criminal Procedure Code).

c) the judge of preliminary chamber who exercised, atypically, duties specific to the verification office in the procedure regarding the settlement of the complaint against the decisions not to lodge summons, and ordered the commencement of judgment, is incompatible with the merits judgment of the case.

Such incompatibility, which apparently contradicts the general permission provided by Article 3(3) of the Criminal Procedure Code, is based on a mandatory decision of the High Court (Decision to approve the appeal in the interest of the Law No. XV/2006, Official Gazette No. 509 of June 13, 2006).

The separation of judicial offices represents the condition for the regulation of the functional competence in the criminal trial.

For a detailed approach of the principle, see *A. Zarafiu*, Despre separarea funcţiilor judiciare.Consecinţe. Impedimente. Remedii, în volumul Conferinţei *Reglementări fundamentale în Noul Cod penal şi Noul Cod de procedură penală,* organised by the Faculty of Law, Bucharest University, published at C.H.Beck Publishing House, 2014, p.225-240.

C. Presumption of innocence (Article 4 of the Criminal Procedure Code)

Pursuant to Article 4(1) of the Criminal Procedure Code, any individual is presumed *innocent* until their guilt is established by a final penal decision.

Based on the environment in which the penal action is settled, an individual's *guilt* is conditional upon three cumulative findings of the court, *i.e.*:

- *the deed is real* (it is material);
- *the deed is an offence* (it meets all the elements making up the criminal deed and was perpetrated with the type of guilt provided by the law);
- *the deed was perpetrated* by the person who is summoned.

Within this complex context, guilt as a *procedural* concept should not be mistaken with guilt as essential characteristic of the crime (subjective attitude), *which is a substantial concept*, and takes one of the forms provided by the criminal law at Article 16 of the Criminal Code (the intention, the guilt, etc.).

The material ground for establishing the guilt of a person, *lato sensu*, may only be a piece of evidence, legally and fairly produced.

Also, a person's guilt must be established *beyond any reasonable doubt*, *i.e.* after removing all doubts or contradictions identified in the evidence produced and influencing the judicial body's opinion.

In case such doubts or contradictions (*doubt*) may not be removed by additional evidence or the removal of contradictory evidence, then, pursuant to Article 4(2) of the Criminal Procedure Code, these are interpreted in favour of the suspect or defendant - *in dubio pro reo*.

In consideration of these aspects, the principle of the presumption of innocence has been granted the most important guarantee in the new procedural law:

The regulation, as a distinct situation of *prevention* of the initiation, or *extinguishment* of the criminal action, of the lack of evidence attesting to the fact that a person committed a crime – Article 16(1)(c) of the Criminal Procedure Code.

In other words, as a consequence of the principle of the presumption of innocence, no person may be considered to be guilty and held liable under the criminal law, if:

- *there is no evidence* attesting to the fact that the three cumulative conditions of penal guilt (the deed is real, it is an offence and was perpetrated by the person who is summoned);
- *the evidence produced* is not sufficient to remove the reasonable doubt in the judicial body's opinion.

Under these circumstances, the only possible decision is acquittal (or *classification* at the criminal prosecution stage).

The doctrine established that the presumption of innocence does not have an absolute, but a relative nature, and may be removed by unquestionable evidence of guilt.

I believe that further analysis of this matter is required.

Until the court's decision establishing the guilt *remains final*, the presumption of innocence operates in an absolute manner.

Irrespective of the nature of the offence and the evidence produced, and despite the defendant's position in the trial (the defendant may admit their guilt), until the final settlement of the case, the person against whom the judicial activity is carried out must be treated as *innocent*, from a procedural point of view.

As a consequence of the principle of the *presumption of innocence*:

- the duty of evidence is incumbent upon the person who raises the *charges* (in criminal matters) or *claims* (in civil matters);
- the suspect or the defendant does not have the obligation to prove their innocence, and has the right not to concur to their own indictment (Article 99(2) of the Criminal Procedure Code);
- the decision ruled by the first instance court (which is not final yet) may not be enforced if it is challenged by appeal, even if it establishes the defendant's guilt, etc.

At the level of European regulation, the *presumption of innocence* is perceived as a specific guarantee of the right to a fair trial, established in criminal matters – Article 6(2) ECHR, C. Bîrsan, Convenția europeană a drepturilor omului, Comentariu pe articole, 2nd edition, C.H.Beck Publishing House, 2010, p.533-543.

D. The principle of finding the truth (Article 5 of the Criminal Procedure Code)

Pursuant to Article 5(1) of the Criminal Procedure Code, judicial bodies have the obligation to ensure, based on evidence, the finding out of the truth about the facts and circumstances of the case, and the suspect or the defendant. Being an *obligation* of the judicial bodies, finding out the truth is also a guiding principle in carrying out the trial-related activity.

However, in order not to become an impossible obligation, finding out the truth *must be based* on judicial coordinates. Therefore, what needs to be found in a criminal case is the *objective truth* (judicial), not the absolute truth.

This type of truth requires a correspondence between the conclusions formulated by the judicial bodies and the objective reality concerning the deed and its perpetrator.

Considering its objective nature, the truth may be found, within the meaning of the fundamental principle regulated by Article 5, by *objective means.*

In this sense, the law stipulates the judicial bodies' obligation to ensure the finding out of truth based on evidence. But, according to Article 97(1), the evidence are *de facto elements* (they may be verified, under their material aspects).

The truth found by judicial means is even preferred to past material reality.

Thus, the *de facto* situation established by a final court decision is presumably reflecting the truth – *res judicata pro veritate habetur*.

An important consequence of the principle of finding the truth is the judicial bodies' obligation to clarify, based on evidence, the case, completely and under all its aspects.

Such obligation is transposed in a particular context into

- article 327(1) of the Criminal Procedure Code, which stipulates that the prosecutor may not proceed with the settlement of the cases, unless the criminal prosecution *is completed*;
- article 349(1) of the Criminal Procedure Code, which stipulates that the role of the court is also to ensure that evidence is produced for the *full clarification* of the circumstances of the case, for the purpose of finding the truth.

The evidence must be collected and produced, for the purpose of finding the truth, in full compliance with the law.

Moreover, Article 5(2) of the Civil Procedure Code stipulates the judicial bodies' obligation to collect and produce evidence both in favour, and against the suspect or defendant.

The dismissal or failure to record, in bad faith, the evidence proposed in favour of the suspect or defendant is punished according to the law.

The principle of finding the truth has an *absolute character.* A criminal case settled in breach of this principle and which does not reflect the truth (judicial error) may be re-examined by extraordinary remedies at law.

Also, according to the law (Article 531-542 of the Civil Procedure Code), the person who received a final sentence and subsequently demonstrates that a judicial error occurred is entitled to remedies for the prejudice suffered, offered by the state.

E. Ne bis in idem (Article 6 of the Civil Procedure Code)

The mandatory rule implies by this principle concerns the *situation following* the final settlement of a criminal case.

The rule is the consequence of the authority of *res judicata*.

The authority of *res judicata* is the *status* generated by the final settlement of a criminal case.

The authority of *res judicata* implies two effects:

- *the positive effect*, which enables the enforcement of the provisions of the final penal decision;
- *the negative effect*, which prevents the initiation of a new criminal trial against the same person fro the same deed.

Pursuant to Article 6 of the Criminal Procedure Code, no person may be prosecuted or judged for the perpetration of a crime when a final penal decision was previously ruled against that person, for the same deed, even of under a different legal classification.

At a national level, the condition for the application of the *ne bis in idem* rule is the ruling of a final penal decision (containing the settlement of the merits).

I believe that the mandatory effect also applies if a *decision not to summon* the same person, for the same deed was previously ruled, such decision being jurisdictionally confirmed by the judge of preliminary chamber (by the dismissal of the complaint lodged pursuant to Article 341 of the Criminal Procedure Code).

But, in this situation, the impeditive effect is *conditional*, because it only applies unless new deed or circumstances are discovered – see the explanations in Chapter III, the section regarding the extinguishment of the penal action.

Subject to the satisfaction of the condition mentioned above, the *ne bis in idem* rule is based on a double identity:

- of the person;
- of the deed (in a material sense)

In criminal matters, the identity *of case* (legal merits) is removed by the effect of the law (Article 6 expressly stipulates that the rule applies even if the deed is classified under *a different legal classification*).

Currently, the *ne bis in idem* rule is regulated both at the level of fundamental principle (Article 6 of the Civil Procedure Code), and at the level of cause, which prevents the initiation of the penal action (Article 16(1)(i) of the Criminal Procedure Code).

The rule may be used at a judicial level:

- by *exceptio rei iudicatae*, until a decision is ruled in the second trial;
- by *main course of action*, as a separate reason for appeal or appeal for annulment (Article 426(b) of the Criminal Procedure Code).

The *ne bis in idem* principle has an *absolute nature* both in terms of effects (the prevention may apply even after a decision ruled in the second trial becomes final, by an extraordinary remedy at law.), and in terms of scope of application (it also applies at a supra-national level, within the framework of international judicial cooperation in criminal matters – Article 8 and 129 of Law No. 302/2004, see *M. Udroiu*, op. cit., p. 26-28).

F. The fair nature and reasonable term of the criminal trial (Article 8 of the Criminal Procedure Code)

While lawfulness is the oldest fundamental principle, the framework or main principle, from which all other principles are derived, namely the right to a fair trial is, undoubtedly, the most *comprehensive*.

In the new criminal procedural system, this principle is stipulated, for the first time, as a basic rule, although its existence was unanimously accepted at the level of doctrine and at a judicial level.

The regulatory basis of the principle is Article 6 of ECHR and the case-law of the Court of Strasbourg.

How should one regard the national regulation, which is obviously incomplete and insufficient, taking into consideration the already settled character of the regulation, at a European level?

Article 8 of the Criminal Procedure Code does not regulate the *content of the principle* which guarantees the fair nature and reasonable term of the criminal trial.

The national rule must be considered the "interface" of the complex and multi-valent European regulation, which it accepts without any reserves.

Thus, the content and guarantees of the right to a fair trial, which also includes the reasonable term of the procedure, may not be found in the national regulation, but in:

- article 6 of the European Convention;
- article 47 of the Chart of Fundamental Rights of the European Union;
- the case-law of the Court of Strasbourg;
- the case-law of EUCJ;

Article 8 merely stipulates that the fair nature of the criminal trial is *conditional* upon the satisfaction of the procedural guarantees and the rights of the parties and of the other subjects taking part in the trial.

Also, the national lawmaker believes that the fair nature of the procedure must also ensure the achievement of the purpose of the criminal trial: the timely and full identification of the offences, so that no innocent person may be held liable under the criminal law, and any person who committed a crime may be punished according to the law, within a *reasonable* term.

The notion of reasonable term, which is *generic* in the regulation, is always considered *in a specific context*, depending on the characteristics of each criminal case.

Undoubtedly, in criminal matters, the reasonable nature of the term for carrying out the judicial

procedures implies the promptness of the judicial response.

There are several arguments in favour of this relationship:

- the purpose of the criminal trial implies the *timely identification* of offences;
- the procedural terms are limited in terms of material content: 24 hours, 3 days, 10 days, etc.;
- even if the judicial bodies' obligations were not conditioned by specific terms, they are bound to *efficiency*, using certain obvious time coordinates: *immediately*, *urgently*, etc.

Efficiency is emphasised when the judicial procedures are performed in relation to a person who is imprisoned (*e.g.* Article 322(2) of the Criminal Procedure Code stipulates that the *cases in which people are arrested by the prosecutor must be settled urgently and with priority*, Article 355 of the Criminal Procedure Code stipulates that the *court dates scheduled in the cases where the defendants are imprisoned are usually of 7 days, the judgment being performed urgently and with priority*.

In its turn, trial-related efficiency implies two aspects:

- *expedience* (mentioned above)
- *simplification* of judicial procedures. For example: even if they lack the necessary competence, the criminal prosecution bodies have the obligation to perform urgent criminal prosecution acts – Article 60 of the Criminal Procedure Code; when it voluntarily intervenes in the criminal trial (which was already initiated), the party who is held liable under the civil law starts the procedure from its current stage – Article 21(3) of the Criminal Procedure Code.

According to the case-law of the Court of Strasbourg (see *C. Bîrsan*, Convenția europeană a drepturilor omului, Comentariu pe articole, 2nd edition, C.H.Beck Publishing House, 2010, p.528; I.Neagu, M.Damaschin, op.cit., p.89, *M.Udroiu*, op.cit.,p.35-37), the following criteria may be taken into consideration when setting out the reasonable term of the procedure:

- the complexity of the criminal case;
- the parties' behaviour;
- the authorities' behaviour;
- the importance or the risk involved in the case.

As a novelty, at a national level, the reasonable term was also expressed at a material level, under Article 488^1 of the Criminal Procedure Code, regulating the appeal regarding the length of the criminal trial:

- less than 1 year for the duration of the criminal prosecution or judgment;
- more than 6 months for the cases which are subject to remedies at law.

The present paper has only considered, in analysing this principle, the regulation contained in Article 8 of the Criminal Procedure Code, and several general coordinates of the European regulation.

For a complex approach of this matter, several works need to be taken into consideration, containing a detailed analysis: *C. Bîrsan*, op.cit., p.351 *et seq.*; R. Chiriță, Convenția Europeană a Drepturilor Omului. Comentarii și explicații, 2nd edition, C.H.Beck Publishing House, 2008, p.194 *et seq.*, *D. Bogdan*, *M. Sălăgean*, Drepturi și libertăți fundamentale în jurisprudența Curții Europene a Drepturilor Omului, All Beck Publishing House, 2005, p.162 *et seq.*, *O. Predescu*, *M. Udroiu*, Protecția europeană a drepturilor omului în procesul penal român, C.H.Beck Publishing House, 2008, p.535 *et seq.*, *M. Damaschin*, Dreptul la un proces echitabil în materie penală, Universul Juridic Publishing House, 2009, etc..

In addition to general guarantees, whether *express* (the trial publicity, the reasonable term) or *implicit* (the equality of arms, contradictoriality, motivation of decisions, the right of the accused to remain silent and not to incriminate themselves), regarding the course of any trial (civil, criminal, etc.), the European regulation establishes, in criminal matters, certain *guarantees specific* to a fair trial – *C. Bîrsan*, op.cit., p.543-568.

Some of these guarantees are:

- the right to be informed on the nature of the indictment, Article 6(3)(a);
- granting the necessary time and facilities to prepare the defence, Article 6(3)(b);
- the right to defence, Article 6(3)(c);
- the right of the accused to examine the witnesses taking part in the trial, Article 6(3)(c);
- the right to the free assistance of an interpreter, Article 6(3)(e).

G. The right to freedom and safety (Article 9 of the Criminal Procedure Code)

The *criminal trial* is the only judicial context with a possible impact on individual freedom.

Therefore, in principle, Article 9(1) of the Criminal Procedure Code proclaims that any individual's right to freedom and safety *is guaranteed* during the criminal trial.

The guarantee implied by this principle covers two separate legal categories:

- individual freedom (as a fundamental right);
- individual's safety (all the guarantees protecting the individual against the actions taken by the public authorities).

The legal dimension of the concept of freedom is characterised by:

- *multiple meanings* (freedom, fundamental freedoms, public freedoms – see *A. Zarafiu*, Arestarea preventivă, C.H.Beck Publishing House, 2010, p.)
- *antithetical regulation* (freedoms protected by the strict regulation of the methods by which it is impacted).

Individual freedom protection at the level of the Criminal Procedure Code is limited to the regulation of the temporary methods by which freedom is impacted (*post-delictum*, but *ante judicium)*.

The methods by which individual freedom is finally impacted correspond to a protection achieved by means of *substantial law*, not procedural law.

What are the *consequences* of guaranteeing the freedom and safety of the individual in the criminal trial:

a) first of all, the temporary impact on individual freedom *has an exceptional nature*; it is preferred to maintain the *status quo* as far as freedom is concerned (which is also the natural condition of the human being) – Article 9 (2) of the Criminal Procedure Code;

- like any other exceptions, detention orders or freedom limiting measures may only be ordered in the situations and under the circumstances provided by the law.

One should notice that the protection of freedom at a procedural level refers to any form of temporary impact on freedom.

Without going into further details, which are the field of analysis of specific institutions one should take into consideration that individual freedom may be impacted by:

- *detention* (retention, house arrest, preventive detention);
- *limitation* (limitation of the freedom to move or travel);
- *conditioning* (following the establishment of certain obligations specific to judicial control).

Also, one should take into consideration that the temporary detention of an individual may take:

- *primary forms* (preventive detention measures, temporary safety measures based on medical reasons)
- *auxiliary forms* (detention in case of a psychiatric forensic examination, execution of a warrant for arrest, when the perpetrator is caught by any person, in the case of citizen's arrest)

b) any arrested individual has the right to be informed, within the shortest possible time, and in a language they understand, on the reasons for being arrested and has the right to lodge an appeal against this measure – Article 9 (3) of the Criminal Procedure Code;

c) another consequence of this principle is the competent judicial bodies' obligation to order the revocation of the measure and, as the case may be, the release of the person retained or arrested, when a detention or freedom limiting measure is found to be illegally ordered;

d) the right of any individual, against whom a detention order was *illegally* ordered during the criminal trial, to obtain a remedy for the prejudice suffered, according to the law.

In this sense, Article 539 of the Criminal Procedure Code stipulates a form of special liability in tort for the act committed by another person *(the liability of the State for the act committed by the judicial body)*, where the tort is the illegal detention.

Also, this special form of liability is also associated to a proper legal instrument for materialisation, *i.e.* a *civil injunction*, with specific elements, also regulated by the Criminal Procedure Code (Articles 541-542 of the Criminal Procedure Code).

H. The right to defence (Article 10 of the Criminal Procedure Code)

The guarantee for this right is a basic rule of all judicial procedures. However, in criminal matters, the right to defence manifests itself in its *complex* dimension.

In reality, the principle guarantees a set of *legal remedies* aimed at protecting the position and trial-related interests of a party or main subject in the trial.

Therefore, the content of this right is a *complex one*, which manifests itself in three separate areas:

- *the right* of the parties and main subjects in the trial to defend themselves;
- *the right* of the parties and main subjects in the trial to be represented *by a lawyer* (the right to a technical defence).
- *the obligation* of the judicial bodies to take into consideration, *ex officio*, the aspects which are in favour of the parties and main subjects in the trial (suspect or defendant), such obligation being expressly regulated by Article 5(2).

Starting from this complex content of the right guaranteed as a fundamental principle, I believe that the wording *right of defence*, used in the former regulation, is more eloquent than *right to defence* used in the note to Article 10 of the Criminal Procedure Code and Article 24 of the Constitution, which seems to induce only one component of the right *(the right to the defence offered by an expert)*.

Defence is a wider notion than *legal assistance.*

Article 10 of the Criminal Procedure Code regulates the *general context* of manifestation of the principle guaranteeing the right of defence in the criminal trial.

There are numerous legal remedies or trial-related guarantees which, *as a whole*, make up the right to defence, and are present in almost all the procedures.

The right to defence is guaranteed not only to the defendant, as a passive subject of the penal action, but also to the other parties or main subjects in the trial – Article 10(1) of the Criminal Procedure Code.

The parties, the main subjects in the trial and the lawyer have the right to be granted the necessary time and facilities to prepare the defence.

This provision allows, for example, the parties and the main subjects in the trial to request and to be granted a term for the purpose of *hiring a lawyer.*

Also, the regulation allows the lawyer to request and be granted a term in order to *study a large legal material.*

Even if, in principle, the time required to ensure an effective defence is *generically* guaranteed, following to be assessed *in a specific context*, depending on the characteristics of each case, sometimes there is no prior material quantification thereof.

Thus, pursuant to Article 91(2) of the Criminal Procedure Code, if the chosen lawyer *is replaced* by an official lawyer, during the trial, the court has the obligation to grant the official lawyer a minimum term of 3 days to *prepare the defence*.

The defence implies, first of all (but without limitation) a *defensive mechanism*, whereby a judicial response is given to certain indictments or claims.

The right of/to defence must be specifically and effectively guaranteed in the criminal trial, not formally or superficially.

In this sense, Article 10(5) of the Criminal Procedure Code stipulates the judicial bodies' obligation to ensure the *full* and actual exercise of the right to defence by the parties and main subjects in the trial, throughout the criminal trial.

A specific component of the *right to defence* in criminal matters is the *mandatory legal assistance* (which is sometimes free).

Even if the European protection of the right to defence (see the comment made by prof. Bîrsan, op. cit., p. 550-558 regarding Article 6(3)(c), which refers to the assistance given to the "accused", at a national level, in certain cases, *legal assistance becomes mandatory* not only for the suspect or defendant (Article 90 of the Criminal Procedure Code), but also for the harmed person and the other parties [Article 93(4) and (5) of the Criminal Procedure Code].

In these cases, the legal assistance must be supplied by a chosen or official lawyer, otherwise the absolute or, as the case may be, relative invalidity of the act is triggered [Article 281(1)(f) of the Criminal Procedure Code].

The new regulation of the right to defence in relation to a trial stipulates, as a component of the fairness and loyalty of the trial, the obligation to *exercise the right to defence* in good faith, in accordance with the purpose for which such right was acknowledged by the law – Article 10(6) of the Criminal Procedure Code.

What is the reason for the special placing of the right to defence, which is regulated as a set of trial-related rights, under the obligation to exercise the right in good faith?

Such provision *seems to be superfluous*, as long as Article 283(4)(m) of the Criminal Procedure Code approves the punishment by fine of up to RON 5000, of the judicial default consisting in the abuse of right (the exercise in bad faith of any trial-related and procedural right).

The regulation is regarded, at the level of the doctrine (*M. Udroiu*, op. cit., p. 48), as an implicit acknowledgment of the judicial bodies' ability to punish, in relation to the exercise of the right to defence, the abuse of right.

However, I believe that this *implicit* instrument of control, may easily become an *arbitrary* and *excessive* instrument, when used as a possibility to limit or condition the exercise itself of the right.

Trial-related excess in the exercise of the right to defence does not require any additional punishment (in addition to a judicial fine), but merely ignored.

Prof. Tanoviceanu (op. cit., vol. IV, p. 141) argues that "*the defence has every right, even the right to exaggerate, to use skills, to deviate from reality".*

Especially as far as the lawyers are concerned, the right to punish the abuse of right *other than* by applying a judicial fine, should only be granted to the bodies fostering the exercise of this liberal profession.

Accepting the judicial bodies' ability to impose additional punishments for the trial-related excess while exercising the right to defence means to implicitly accept the *absolute prevalence of the other trial-related offices* (indictment, jurisdiction) over the defence.

I. Respect for human dignity and private life (Article 11 of the Criminal Procedure Code)

The purpose of the criminal trial cannot be achieved *by any means*.

The judiciary activity encompasses certain exigencies pertaining simultaneously to the protection of both the public and private interest.

In this respect, according to Art. 11(1) of the Criminal Procedure Code, any person against whom a criminal prosecution was initiated or who is being on trial should be treated with the observance of human dignity.

The regulation *is showing deficit* since the protection of human dignity should be extended to all the stages of the criminal trial.

Only through such an extended application does this right correspond to the regulating modality at both national level (Art. 22(1) and (2) of the Constitution), and supra-national level (Art. 3 of ECHR, the European Convention for the prevention of torture and Inhuman or Degrading Treatment or Punishment, Strasbourg of November 26, 1987, ratified by Romania by Law No. 80/1994).

The principle regarding the observance of human dignity has an immediate corollary. No person can be subject to:

- torture;
- inhuman punishment or treatment;
- degrading punishment or treatment.

Each of the 3 notions relates to its *own semantic area* (see in this respect *C. Bîrsan*, op.cit., p.127-167, *A. Crişu*, Drept procesual penal, 4th Edition, reviewed and updated, Hamangiu Publishing House 2013, p. 67-71).

The most obvious consequence of the principle regarding the observance of human dignity can be encountered in the field of evidence.

Thus, the principle regarding the loyalty of the production of evidence entails, according to Art. 101 of the Criminal Procedure Code, the following *interdictions*:

- it shall be prohibited to use violence, threats or other means of coercion, as well as promises or urges

in order to obtain evidence (Article 101(1));

- no interview methods or techniques can be used, which affect a person's capacity to consciously or voluntarily remember or recount the deeds constituting the object of the evidence. The interdiction shall apply even if the interviewed person expresses his/her consent to the use of such a hearing method or technique (Article 101(2)).

Even if Art. 102(1) refers only to the evidence obtained *by means of torture*, as an application of the principle regarding the observance of human dignity, all the evidence obtained in breach of the said interdictions should be excluded.

Other trial-related institutions transpose on a specific level the exigencies entailed by the principle regarding the observance of human dignity:

- the suspension of criminal prosecution (Art. 312(1) of the Criminal Procedure Code) or of judgment (Art. 367(1) of the Criminal Procedure Code) when the suspect or, as applicable, the defendant is suffering from a severe condition, which prevents him *to attend* the criminal trial;
- the interruption of the hearing when a person shows visible signs of excessive fatigue or the symptoms of a disease affecting his/her physical or psychological capacity to attend the hearing (Art. 106(1) of the Criminal Procedure Code);
- the medical treatment under a permanent escort which is ordered when the person who is in preventive detention is suffering from a condition that cannot be treated in the medical network of A.N.P. (Art. 240(1) of the Criminal Procedure Code);
- declaring the session as non-public if the Court considers that judgment in a public session might impair a person's dignity (Art. 352(3) of the Criminal Procedure Code);
- postponing or discontinuing the execution of the punishment by imprisonment or life imprisonment when it is found, on the basis of a forensic expert report, that the convict is suffering from a condition that cannot be treated in the sanitary network of A.N.P. (Art. 589(1)(a) related to Art. 592 of the Criminal Procedure Code).

Last, but not least, emphasis should be placed on the fact that the protection of human dignity may appear in the shape of certain deeds incriminated by the criminal law:

- abusive inquiry (Art. 280 of the Criminal Code);
- subjection to ill-treatment (Art. 281 of the Criminal Code);
- torture (Art. 282 of the Criminal Code).

Art. 11 ensures, at the basic rule level, a double protection: both of human dignity, and of *private life*.

According to Art. 11(2) of the Criminal Procedure Code, observance of private life, of inviolability of domicile and of the secrecy of correspondence *shall be guaranteed*.

However, unlike human dignity, the protection of these rights is not absolute, as certain methods that affect the aforesaid principles are legally accepted.

Unlike other types of trials, the criminal trial entails sometimes the use of certain intrusive procedures, for the purpose of obtaining evidence, liable to affect a person's private life.

In this respect, mention can be made of the special supervision methods, generally stated in Art. 138(1) of the Criminal Procedure Code (interception of communications or of any type of communication, access to an IT system, video, audio surveillance or surveillance by taking photography, the location or monitoring by technical means, the retention, surrender or searching of mail transmissions, the use of under-cover investigators and collaborators, etc.) as well as any other procedures of discovering and seizing objects and writs (searching and seizing of objects or writs, Art. 156 of the Criminal Procedure Code).

Despite their emotional content, these methods of obtaining evidence are accepted at principle level if the limitation of the right to private life, of the inviolability of domicile and mail secrecy entailed by them occurs under the restrictive conditions of the law and if it is necessary in a democratic society.

J. Official language and the right to an interpreter (Article 12 of the Criminal Procedure Code)

Pursuant to Article 128(1) of the Constitution, the judicial procedure is carried out in *Romanian.*

This constitutional rule is transposed, at the level of the fundamental principle of the criminal trial, to Article 12, which stipulates that the official language in the criminal trial is Romanian.

The parties and the subjects in the trial who do not speak or understand Romanian, or unable to express themselves, have the right to an *interpreter*, free of charge.

The interpreter is a participant to the criminal trial who has no legitimacy in the case, who ensures *the exercise of the following* trial-related rights for the party or subject in the trial to which one of the above mentioned situations applies:

- the right to take note of the elements of the file;
- the right to speak (to give statements, to give explanations, to ask questions);
- the right to submit conclusions in court.

Pursuant to Article 12(3) of the Criminal Procedure Code, when legal assistance is mandatory, the suspect or the defendant is granted, free of charge, the possibility to communicate, through an interpreter, with the lawyer in order to prepare the hearing, to lodge a remedy at law or any other claim related of the settlement of the case.

The inability *to speak* or *to understand* Romanian or to express oneself is a matter of fact determined by the statement given by the party or subject in the trial, or inferred by the judicial body, considering all the elements of the case.

Moreover, Article 12(2) of the Criminal Procedure Code acknowledges the right of the

Romanian citizens who belong to national minorities *to express themselves in the mother tongue* before the courts of law.

However, this right is not conditional upon the lack of knowledge or inability to express oneself in Romanian.

In all cases, the procedural acts (understood as judicial writs) are prepared in Romanian.

The notion of *interpreter* is wider than that of *translator*. Also, the category of interpreters also includes the experts ensuring communication with people who suffer from certain sensorial, mental defects – according to the rules of *defectology*.

The interpreter's failure to perform their trial-related obligations may be punished by judicial fine or even by a penal sanction [the interpreter may be an active subject of the offence of false testimony, pursuant to Article 273(2)(c) of the Criminal Code].

This principle is transposed into a specific context by numerous rules:

- articles 81, 83, 85, 87 of the Criminal Procedure Code stipulate, among the trial-related rights of the main subjects and parties, the right to an interpreter, free of charge;
- article 105 of the Criminal Procedure Code regulates the hearing through an interpreter procedure;
- articles 209(2), 212(2), 226(3) of the Criminal Procedure Code regulate the obligation to inform the person against whom a preventive measure was ordered, in the language she understands, of the reasons for ordering such measure;
- article 329(3) of the Criminal Procedure Code regulates the obligation to provide a certified translation of the indictment etc.

Under the European regulation, *the right to free assistance by an interpreter* is a specific guarantee of the right to a fair trial in criminal matters – Article 6(3)(e) of the European Convention (*C. Bîrsan*, op.cit. p. 568-570).

Conclusions

The new fundamental principles of the criminal trial equally demonstrate both the deliberate option of the decision-making factors regarding the orientation of the penal policy at a national level, and the alignment of the Romanian criminal trial to the mixed, European model.

The regulation of the current system of basic rules related to the criminal trial reflects the intention to strike a balance between the need to protect public interest, by constraint, punishment and prevention, and the need to protect private interest, by guaranteeing more individual rights and freedoms.

Equally important is the acceptance and application of this new approach by the judicial system, so that the rules prescribed by these fundamental principles would not operated at a merely declarative level.

References

- *I. Neagu, M. Damaschin*, Tratat de procedură penală. Partea Generală, În lumina noului Cod de procedură penală, Universul Juridic Publishing House, 2014;
- *M. Udroiu*, Partea Generală, Noul Cod de procedură penală, C.H.Beck Publishing House, 2014;
- *J. Pradel*, Procédure pénale, 16th edition, Cujas edition, Paris 2011;
- *B. Micu, A. Păun, R. Slăvoiu*, Procedură penală. Curs pentru admiterea în magistratură şi avocatură, Hamangiu Publishing House, 2014;
- *A. Crișu*, Drept procesual penal, 4th edition reviewed and updated, Hamangiu Publishing House, 2013;
- *A. Zarafiu*, Despre separarea funcţiilor judiciare.Consecinţe. Impedimente. Remedii, în volumul Conferinţei *Reglementări fundamentale în Noul Cod penal şi Noul Cod de procedură penală,* organised by the Faculty of Law, Bucharest University, published by C.H.Beck Publishing House, 2014;
- *C. Bîrsan*, Convenția europeană a drepturilor omului, Comentariu pe articole, 2nd edition, C.H.Beck Publishing House, 2010;
- *R. Chiriță*, Convenția Europeană a Drepturilor Omului. Comentarii și explicații, 2nd edition, C.H.Beck Publishing House, 2008;
- *M. Damaschin*, Dreptul la un proces echitabil în materie penală, Universul Juridic Publishing House, 2009;
- *A. Zarafiu*, Arestarea preventivă, C.H.Beck Publishing House, 2010.