

The Principles of New Criminal Procedure Code

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Abstract

Principles regarding Codes of law are the basic foundation of that piece of legislation. The new Code of Criminal Procedure states in its first articles, the principles upon which the rest of it are based. Taking into consideration the previous Code, this paper aims to present the newly-implemented provisions, while comparing them with the ones that existed. Also, commentaries shall be made regarding the necessity of codification of other principles, in relation to the moment in which the new Code was implemented.

Keywords: *principles, criminal procedural law, rights, judicial functions, defence*

Introduction

The implementation of new criminal codes is an important moment in the existence of an autonomous and independent legislation. A code must provide a persistence over time as long as possible, must meet social realities which gave rise to the need for its implementation.

The new Code of Criminal Procedure, in the version promulgated by Parliament, consists of two distinct parts, each with six titles. Of these, this paper is interested in Title I of the General Part, entitled *Principles and limits of the criminal procedure law*.

"*The fundamental principles of the criminal trial represent the structure on which other procedural rules are built*" [2], therefore there is a need to be transposed in the first articles of the code, preserving the vision in earlier legislation and newly introduced legislation.

In this first title the legislative body had a vision of reform, keeping a number of existing principles in the Code of Criminal Procedure recently repealed, and introducing new ones.

LEGALITY OF CRIMINAL TRIAL

Article 2 of the former Code of Criminal Procedure, entitled "*Legality and officialdom of the criminal trial*" [2] was split rightly, in two separate articles, each representing one of the "*fundamental principles underlying the Romanian criminal trial*" [3], as follows: Article 2 of the new procedure code encodes the principle of legality, stating that "*criminal proceedings shall be conducted in accordance with provisions of law*" and Article 7 shows officialdom regarding the criminal trial - "*the*

prosecutor is legally required to start the criminal action ex officio when there is evidence (...) and there is no legal stopping cause" [4]

SEPARATION OF JUDICIAL FUNCTIONS

The legislative body included in Article 3 a new principle, of separation of judicial functions, in order that it will significantly improve the quality of justice, an initiative which we consider appropriate for the purpose of establishing provisions that may expressly disposed by magistrates, and setting limits on incompatibility of judicial functions with one another. We express reserve also on the provision contained in paragraph (3) of that article, which states that, although judicial functions are incompatible, the verification of the legality of sending or not sending the case file from the prosecutor's office (reserved for a judge), is compatible with the trial court, on the following grounds:

Paragraph 3 of Article 3 of the new Code of Criminal Procedure states in sentence 2, an exception to the incompatibility of judicial functions, i.e. if the judge of the preliminary chamber, vested with the verification of documents issued by the prosecutor, has the function of judging the case in subsequent pleadings. Although the article does not show an aspect of temporal order it is commonly understood that the trial is subsequent to the procedure in the preliminary chamber, according to other provisions of the Code of Criminal Procedure.

When the preliminary chamber judge verifies the legality of prosecution acts regarding a person and finds that the acts were legally made, the act of establishing the legality makes the judge know the case file, and at least at a legal level, consider that the prosecutor's acts were in perfect accordance with the law. The situation in which the judge does not agree with the prosecutor means that he expresses disapproval towards the acts carried out by the prosecutor. Thus, we believe that in each case, the judge has already expressed an opinion regarding the case, even if it is only about the legality of the acts, because, at least on a formal level, considering that all the acts were legal or some acts/all the acts were illegal, means that the judicial truth has been uncovered by the prosecutor, following the legal implementation of evidence, and the judge expresses an opinion regarding the case.

PRESUMPTION OF INNOCENCE

The presumption of innocence is implemented as a principle of criminal law by reinstating the former Article 5² "*Everyone is presumed innocent until proven guilty by a final criminal judgment*" [5], adding known principle *in dubio pro reo* in paragraph (2) of the same article: "*after analysing all evidence, any doubt in the formation of judicial bodies shall be construed in favor of the suspect or defendant.*"

We consider appropriate the insertion of the principle *in dubio pro reo* in the fundamental principles, but we believe that it is necessary to separate it from the presumption of innocence by establishing a separate article. The legislator, because of the need for clarity and fluidity of the Code of criminal procedure considered expedient to group the two principles together, but we believe that *in dubio pro reo* is a principle that transcends the criminal procedure law, and it is part of the principles of law, *latto sensu*, being found in other branches of law as well – i.e. civil law - Article 983 of the Civil Code of the 198 "*when questioned, the Convention shall be interpreted in favor of the person who commits*"[6] transposed the new Civil Code - "*If, after applying the rules of interpretation, the contract remains unclear, it shall be interpreted in favor of the person who commits*"[7], and in matters of misdemeanors.

For these reasons we consider necessary to separate Article 4 - *the presumption of innocence*, into two distinct principles – the presumption of innocence, a principle enshrined in both current legislation and the previous one regarding criminal procedure, and the principle *in dubio pro reo*, given the fact that Article 6 has also a Latin name - *ne bis in idem*, and in accordance with its role as a fundamental law principle, not only a criminal procedural law.

THE DISCOVERY OF TRUTH

In Article 5 we find what current doctrine considers to be a "*principle enshrined in all the work of criminal procedural law, whether it is called reality principle, the principle of establishing real truth (objective, material)*" [8], under which the entire criminal process is placed. We also believe that the hiding of truth, for whatever reason - whether it is due to "*dishonesty of witnesses, the failure of evidence or even the ambiguity of experts*"[9] can lead to a number of miscarriages of justice, where innocent people could be found guilty, or persons responsible could not be held accountable.

The previous Code of Criminal Procedure recognized in paragraph (1) of Article 1 that: the criminal procedural code aims at timely finding all facts that constitute crimes, so that any person who has committed a crime will be punished according to his guilt and no innocent person should ever be prosecuted.

The new Code of Criminal Procedure does not distinctly provide a purpose of criminal proceedings, showing, however, in Article 1 that the rules are designed to ensure effective judicial functions towards the safeguard of rights, to comply with the provisions embraced by the Romanian state in regards to human rights.

With such a change we observe the new vision of the Criminal Procedure Code, since its first article, not being a purpose, as defined by previous legislation, the focus is no longer on the citizen, as a subject of law, but on the judiciary, which must be effective and exercise tasks in due process.

The disappearing of its overarching goal - finding the facts, so that any person who is guilty to respond, and the innocent shall not be held responsible, creates no direct guarantee of protection, which must now be sought in other articles – such as the guidance contained in Article 5 towards the judicial bodies in the sense of their activity - criminal investigation or trial - to ensure truth based on facts is obtained legally and loyal. In response to the disappearance of a purpose, in Article 7 fairness is provided as a principle - specifically stated in the new Code of Criminal Procedure, given that the previous legislation there was no such provision, but the doctrine regarded it as one of the fundamental principles of procedural law.

However, we believe that the discovery of truth - *latto sensu* – is not a simple principle of criminal law, but the very foundation under which the need for criminal proceedings was established. The role of finding the truth in criminal proceedings and its purpose is also to ensure criminal liability of the guilty and protect the innocent.

Article 6, named *ne bis in idem*, states that no one can be subject to criminal proceedings twice for the same actions.

THE PRINCIPLE OF OFFICIALDOM

The principle of officialdom, found in Article 7 provides the procedural rule that judicial acts are made *ex officio*, without the necessity of consulting those involved in criminal proceedings. Limitations to this principle are expressly contained in paragraph (2) which states that in the cases and conditions provided by law, the

prosecutor may waive the exercise of criminal action if (...) there is not a public interest present in achieving it.

Establishing the criteria of opportunity is to be welcomed, given the number of existing cases being under criminal investigation, this principle is the right successor of former Article 18 ^ 1 of the Criminal Code recently repealed - "*an act does not constitute a crime (...) if there was a minimum disturbance to the values protected by law and its concrete content, it is irrelevant, and does not show the seriousness of an offense*" establishing the policy that action which have a small degree of social danger, with limited repercussions in social life, should not be considered crimes.

We cannot help but notice the discrepancy between the predecessor and the form in which the principle is laid today - following the introduction of small reform law Article 18 ^ 1 has taken the form: "*the prosecutor or the court may impose one of the penalties of an administrative nature*" having in mind that, in addition to the prosecutor, the court may also find undesirability of continuing criminal action, given, on the one hand, the active role of the courts and secondly that the court is the one who states, *ultima ratio*, the criminal liability of a person.

Although not expressly provided, when the trial court is entrusted with the case in which the social values minimally offended, and with a reduced gravity, it has the opportunity of implementing the institution known as Cancellation of penalty provided for in Article 80 of the new Criminal Code, and the court applies the offender a warning.

Although in this way the possibility of a judge to determine the existence of the principle of opportunity is covered, we believe that the application of such an institution pertains to the Code of Criminal Procedure, and not the Criminal Code. If during the period between 1969 and 2010 such a principle was not expressly provided in the Code, by adopting the small reform law - even within the criminal code - the judge should have the same right as the prosecutor about considering if an offense that undermines minimum social values, expressly stated in the Criminal Procedural Code.

THE RIGHT TO LIBERTY AND SECURITY

The right to liberty and security - one of the fundamental human rights is recognized by the Constitution and procedural law, as a guarantor of social order, is expressly stated in the new Code. According to it, everyone has the right to be

informed about the grounds of their arrest, the right to challenge the measure, and the right to compensation for damage suffered if it was unlawfully taken. The fact that a deprivation or restriction of liberty can be taken only under certain conditions, expressly prescribed by law, comes as a guarantee of the fundamental right to freedom, and such procedural measures are considered to be taken in extraordinary cases, such as crimes of an increased severity.

THE RIGHT TO DEFENCE

Under Article 10 of the Code of Criminal Procedure, the right of defense is the ability of a person to have a lawyer of his choice or to defend himself in the trial. We believe that the explanation is a limiting one, and the right of defense includes, in addition to the right to have a lawyer, the full exercise of the rights in the process, the right to propose evidence, and the possibility of a person not to incriminate oneself.

Self-defense is the "*right of the suspect or the accused to make their defense by themselves during trial, guaranteed whether legal aid is compulsory or not and regardless of the existence of a particular lawyer, chosen or ex officio*" [10], any person having the right and faculty to defend himself in a case, the law establishing a limitation in cases provided by law. However, by introducing a court-appointed lawyer, self-defense is not prejudiced, the person who wishes to defend himself can still do it, just that its defenses will be complemented by those of a lawyer.

THE RESPECT FOR HUMAN DIGNITY AND PRIVACY

Respect for human dignity and privacy is another fundamental human right guaranteed by the Constitution and treaties to which Romania is a party. Being the successor of former Article 5 of the Code of Criminal Procedure recently repealed, this principle guarantees the prohibition of any ill-treatment during the criminal trial, torture or any acts that could undermine human dignity.

THE OFFICIAL LANGUAGE AND RIGHT TO AN INTERPRETER

Article 12 provides that the official language in criminal proceedings is Romanian, instituting safeguards regarding the address in their native language of Romanian citizens belonging to national minorities and providing ex officio an

interpreter for parties who have difficulty expressing themselves, or for parties who do not understand Romanian, such as foreign people, during criminal proceedings.

THE APPLICATION OF THE LAW

The application of the criminal procedure law in time and space is the last item in the principles of criminal law, coming to substantiate the notion that criminal procedure law applies from the time of entry into force for the future, and for crimes committed in the state of Romania.

CONCLUSSIONS.

We can state that the legislative body intended to have a number of existing principles within the previous legislation codified within the new one - procedural legality, presumption of innocence, discovery of truth, officialdom, the guarantee of freedom, rights of defense, respect for human dignity, the official language. The new code also introduced a number of new principles - the separation of judicial functions, ne bis in idem, fairness and reasonable time, and respect of private life.

We believe that the changes in the new Code of Criminal Procedure were appropriate, but we must express our reservations on a few issues:

First it can be seen that there is no provision regarding the active role of the judiciary, as a principle expressly provided in the previous code. We believe that the absence of this principle is not appropriate, although elements relating to the duties of judicial bodies arising from other articles of the Code. In most cases people who are subjects of criminal proceedings do not have legal studies, and "*the prosecution and the court have the right and obligation to actively intervene in criminal proceedings in order to legaly and thoroughly resolve criminal cases.*" [11] Excluding this principle means that, at least in the textual framework, that the role of judicial bodies, as guarantors of the rule of law is changed, their role being one of finding and sanctioning. We believe that the judicial body must continue to have an active role, because it is the one who leads or investigation or trial, and is entitled to take the legal measures in cases.

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