The Liberty and Custody Judge in the Romanian New Code of Criminal Procedure

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Abstract:

Romania is the last state of the European Union that adopted a modern code of criminal procedure, and this was to a considerable extent, the outcome of the pressure from the European Court of Human Rights who urged our country to amend the former criminal legislation and make it correspond effectively to the standards imposed by the European Convention.

The Romanian New Code of Criminal Procedure, adopted by Act no. 135/2010, came into force on the 1st of February 2014 and reshaped the whole structure of a criminal trial, by importing many essential institutions from the other, more advanced, European codes of criminal procedure. Among the most important legal novelties, the following are worth mentioning: the ne bis in idem principle, the right to a fair trial within a reasonable time, the separation of judicial functions, the liberty and custody judge, the pre-trial chamber judge, the home arrest as pre-trial detention alternative, the two degrees of jurisdiction in criminal affairs (instead of three, as in the former code), the appeal on law as extraordinary relief, and certain special procedures, such as plea bargaining, the challenge against the unreasonable time of a criminal trial, the procedure in case of criminal liability of legal persons, and so on.

One of the positive features of the New Code of Criminal Procedure is undoubtedly the settlement of the liberty and custody judge, long needed as a guarantor of the legality of criminal investigation acts and the respect of individual rights and liberties.

The liberty and custody judge was inspired by the French model of "le juge des libertés et de la détention" and has important control prerogatives during the stage of criminal investigation that precedes the trial. However, the liberty and custody judge is not absolutely new in the Romanian criminal procedure tradition, since in the codes of criminal procedure of 1864 and, respectively, 1936, there used to be the criminal instruction judge, but this institution faded away in the communist era and was revived in the current code under a different form, adapted to present realities.

The following study aims at presenting the new institution in a comparative law approach, enhancing the advantages it brings into the present criminal trial, as well as the drawbacks of the new regulation consisting in that the prosecutor still preserves some powers that seriously diminish the role of the liberty and custody judge. Apparently, no Romanian governance so far could afford to displease the prosecutor. This in fact turns the new institution into a legal compromise.

Keywords: *Romanian New Code of Criminal Procedure; separation of judicial functions; liberty and custody judge; comparative approach; legal compromise.*

In the Explanatory Note preceding the draft law on the Romanian New Code of Criminal Procedure[1] (adopted by Act no. 135/2010[2] and in force starting the 1st of

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[1] Available on the site of the Romanian Ministry of Justice at: http://www.just.ro/Sections/PrimaPagina.

[2] Published in the Official Journal no. 486 of 15th July 2010.

February 2014, already amended by the Government Emergency Ordinance no. 3/2014[3]), the authors make reference to some newly introduced principles of a criminal trial, among which the separation of judicial functions, a kind of checks and balances at the micro- level of criminal proceedings. According to the authors of the Explanatory Note, this principle will considerably improve the quality of the criminal justice acts in Romania; it is provided by art. 3 in the New Code of Criminal Procedure (hereinafter, the Romanian abbreviation "NCPP") and it proclaims and guarantees that four judicial functions are exercised in a criminal trial, namely: a) the criminal investigation (carried out by the judiciary police and the prosecutor), b) the control ruling on the fundamental rights and liberties of an individual during the investigation stage (carried out by the liberty and custody judge), c) the judicial review of the legality of prosecution or charge dropping (performed by the judge of pre-trial chamber) and d) the judgment (carried out by the courts of law).

Some authors of the Romanian doctrine,[4] while analyzing the new conception at trial proposed by the NCPP, have actually drawn attention upon the fact that the notion of "judicial function" is misinterpreted as representing the duties of judicial authorities. As an example, the criminal investigation is a stage of a criminal trial during which the prosecutor or the judiciary police exert their competences, but it is not a function. Similarly, the same author states that when referring to the function of control ruling on the fundamental rights and liberties of an individual during the investigation stage or, similarly, to the judicial review of the legality of prosecution or charge dropping, the code refers to the function of instruction (from the French "instruction criminelle"), in a contemporary understanding of the term.

Therefore the judicial functions should not overlap with the duties of judicial authorities.

Two of the above-mentioned judicial functions are newly introduced in the Romanian NCPP, namely the control ruling on the fundamental rights and liberties of an individual during the criminal investigation and the review of the legality of prosecution or charge dropping. These judicial functions are accordingly performed by the liberty and custody judge and the judge of pre-trial chamber. While the latter represents an absolute novelty for the Romanian criminal procedure, as the pre-trial chamber procedure is itself completely new, the former, namely the liberty and custody judge is a relative novelty, mostly due to the name and extended competences. In fact, the recent history of Romanian criminal procedure shows that for more than a decade, there has been a judge appointed for the control of the criminal investigation stage, especially for the ruling on pre-trial detention.

The past history of Romanian codes of criminal procedure (specifically, that of 1864 and that of 1936) reminds us that there used to be an institution similar to the current liberty and custody judge, namely the instruction judge.

Nonetheless, there are important distinctions between the two institutions, considerably in favor of the latter; thus, as concerns the competence, the liberty and custody judge rules on complaints against the acts carried out during the criminal investigation stage, being a genuine guarantor of possible abuses occurring at that crucial stage, whereas the instruction judge used to effectively perform acts of criminal

[3] Published in the Official Journal no. 98 of 7th February 2014.

[4] Diana Ionescu: *On the Conception at Trial and the new Code of Criminal Procedure. A Few Basic Issues*, Caiete de Drept Penal (Criminal Law Writings), no. 1/2011, p. 88.

investigation amounting to the criminal instruction (or the French inspired "instruction criminelle") which aimed at finding clues and evidence based on which the authorities decided whether to prosecute a defendant or not.[5] Furthermore, as concerns the independence, the liberty and custody judge is an independent magistrate, in the sense conferred by the European Convention, while the instruction judge would perform his activity under the supervision of the Attorney-General attached to the Court of Appeal, which interfered a lot with his independence.

The liberty and custody judge and his extended competences in the NCPP are the result of a long series of amendments of our former codes of criminal procedure.

The first relevant amendment of the initial Romanian Code of Criminal Procedure of 1969 occurred by an act of Government, namely the Government's Emergency Ordinance no. 109/2003,[6] which substantially modified the former art. 136 parag. (5) of the Code of Criminal Procedure of 1969, in the sense that pre-trial detention could no longer be ordered by a prosecutor, but, for the first time, by a judge. This amendment had been announced by a previously enacted law – the revolutionary Act no. 281/2003,[7] which amended itself the old Code of Criminal Procedure, as well as some subsidiary penal legislation. Art. X of said act expressly stated that whenever other laws contain dispositions on the orders, by a prosecutor, on the pre-trial detention or its revocation, on judicial supervision (bail), on the prohibition of a defendant to leave his home town, on detention orders, phone tapping, searches or mail interception and delivery of the defendant's correspondence and objects, there will accordingly apply art. I of the act, pursuant to which all such competences belong to a judge.

Apparently, these acts were nothing but a legal echo of the conviction that Romania suffered before the European Court of Human Rights (hereinafter the ECHR) in the famous affair of *Pantea v. Romania*[8] in which the European Court harshly criticized the lack of separation of judicial functions in a Romanian criminal trial, the lack of impartiality of the prosecutor who ordered the pre-trial detention, as well as the fact that the judicial review of the pre-trial detention by an independent tribunal occurred only at a very late stage of proceedings, which amounted to a violation by the Romanian authorities, of article 5 paragraphs (1) and (3) of the European Convention on Human Rights. More precisely, in paragraphs 238-239 of its judgment, the court stated that "since prosecutors in Romania act as members of the Prosecutor-General's Department subordinate firstly to the Prosecutor-General and then to the Ministry of Justice, they do not satisfy the requirement of independence from the executive". The Court thus found no reason to depart from this conclusion, given that "independence from the executive is one of the guarantees inherent in the concept of «officer» for the purposes of article 5 parag. 3 of the Convention". Having regard to these arguments, the Court concluded that "the prosecutor who ordered the applicant to be placed in pre-trial detention was not an «officer» for the purposes of the third paragraph of article 5". Subsequently, the court determined whether judicial review of the applicant's detention nonetheless took place «promptly» within the meaning of the same Convention provision.

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[5] Ioan Tanoviceanu: *Treaty of Law and Criminal Procedure*, vol. IV – Criminal procedure – Curierul Judiciar Publishers, Bucharest, 1924-1926, p. 504.

[6] Published in the Official Journal no. 748 of 26th October 2003.

[7] Published in the Official Journal no. 468 of 1st July 2003.

[8] ECHR, *Pantea v. Romania*, application no. 33343/1996, judgment of 03.06.2003, final judgment of 03.09.2003, available at http://hudoc.echr.coe.int/sites/fra/pages/search.

The Court reiterated that art. 5 parag. 3 of the Convention requires that judicial review take place rapidly, the promptness in each case having to be assessed according to its special features. A prompt judicial review of pre-trial detention is an important safeguard against ill-treatment of the individual subject to a criminal trial.

In the aforementioned case, the Court noted that the applicant was placed in pre-trial detention by an order of the prosecutor dated 5th July 1994 for a period of thirty days starting from the date of his arrest, and that he was apprehended and imprisoned on 20 July 1994. Yet it was only on 28 November 1994 that the question of the merits of his detention was examined by the Bihor County Court, which finally provided the guarantees required by art. 5 parag. 3 of the Convention. The total length of the applicant's detention, before being brought before a judge or another officer within the meaning of art. 5 parag. 3, was therefore more than four months.

Or, the Court, in its previous case-law,[9] held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by art. 5 parag. 3, even though it was designed to protect the community as a whole from terrorism. A fortiori, the Court could not therefore accept that it was necessary to detain the applicant for more than four months before bringing him before a judge or another officer who satisfied the requirements of parag. 3 of art. 5.

There was accordingly a violation of art. 5 parag. 3 of the Convention.

The requirement that pre-trial detention must be ordered only by a judge, as an essential guarantee of the separation of judicial functions at trial and of the right of the accused to a fair trial, was immediately adopted by Romanian domestic legislation, as shown above. This exigency is accordingly set out in the Romanian Constitution, in the form amended in the same outstanding year of 2003.[10] Parag. (4) of art. 23 of the Romanian Constitution, relating to individual freedom, reads "Pre-trial detention is ordered by the judge and only within a criminal trial".

It is clear that it was high time that the Romanian New Code of Criminal Procedure followed the standards imposed by the European Convention and the case-law of the European Court of Human Rights that were formerly adopted by all EU member states in their codes of criminal procedure.

Probably the best example at hand is the French Code of Criminal Procedure (hereinafter the FCCP),[11] wherefrom the Romanian lawmaker took his inspiration upon elaborating the new institution, *i.e.* the liberty and custody judge. Inserted in the Code of Criminal Procedure by the French Act of 2002 on the presumption of innocence, art. 137-1 parag. (2) sets out the rules on the appointment of the liberty and custody judge. His replacement was later on provided by the French Perben II Act of 9th March 2004.

According to art. 137-1 in the French Code of Criminal Procedure, pre-trial detention is ordered and extended by the liberty and custody judge. Release applications are also submitted to him.

The liberty and custody judge is a judge with the rank of president, of senior deputy president, or of deputy president. He is appointed by the president of the district first

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[9] ECHR, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988.

[10] In 2003, the Romanian Constitution was amended by Law no. 429/2003, a law approved by the national referendum of 18-19th October 2003 and came into force on 29th October 2003.

[11] The French Code of Criminal Procedure is available at: http://www.legifrance.gouv.fr/initRechCodeArticle.do.

instance court. When he gives a decision at the end of a debate, he is aided by a clerk. Where the nominated custody judge and the president as well as the senior deputy presidents or deputy presidents are unable to act, the custody judge is replaced by the highest level judge with the most seniority, nominated by the president of the first instance court. He may not, under pain of nullity, participate in the trial of criminal cases of which he has taken cognizance.

He is seized by means of a reasoned judgment from the investigating judge, who transfers the case file and the district prosecutor's initial submissions to him.

According to art. 137-2, judicial supervision is ordered by the investigating judge, who gives his judgment after taking note of the district prosecutor's recommendations.

Where he is in charge of the case, the liberty and custody judge may also make a custody ruling. Pursuant to art. 137-3, the liberty and custody judge gives his ruling by a reasoned judgment. Where he orders or prolongs a remand in custody, or rejects a request for release, the ruling must enunciate the legal and factual matters that render judicial supervision inadequate, as well as the grounds for detention, In every case, the person under judicial examination is notified of the ruling and receives a complete copy of it, for which he has to sign the case file.

Essentially, the liberty and custody judge in France has the following competences within a criminal trial:

- orders or extends pre-trial detention, release of an individual or sanctions the breach of judicial supervision (art. 137-1 parag. 2 FCCP);

- may, at the request of the district prosecutor, authorize the searches, house visits and seizures of exhibits be carried out outside the times provided by article 59 FCCP (*i.e.* between 6 a.m. and 9 p.m.);

- where an investigation has been opened, and in order to guarantee the payment of the fines incurred as well as, where applicable, the compensation of the victims and the execution of any confiscation measures, the liberty and custody judge, at the request of the district prosecutor, may order protective measures to be taken over the assets, movable or immovable, owned jointly or severally, of the person under judicial examination (art. 706-103 FCCP);

- authorizes, at the request of the district prosecutor, the installation of all technical instruments destined to localize a person or vehicle under observation, for a maximum period of one month (art. 230-33 FCCP);

- maintains in complete hospitalization the persons in need of psychiatric care (art. 18 parag. IV of the French Code of Public Health);

- authorizes the maintenance in the waiting zone of foreign citizens in demand of asylum, for a period that cannot exceed 8 days (art. L 221-1 of French Code of Entrance and Stay of Foreign Citizens and the Right to Asylum).

The institution of the liberty and custody judge is equally provided by the Italian Code of Criminal Procedure (hereinafter, the ICCP);[12] art. 328 sets out the so-called "giudice per le indagini preliminari", literally meaning the judge of preliminary investigations. The Italian Code of Criminal Procedure adopted by the Italian Parliament in 1988, replaced the instruction judge with the preliminary investigations judge, thus creating the premises of an adversarial procedure. In fact, the Italian Code of Criminal Procedure is one of the most adversarial in nature from all European codes.

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[12] Codice penale e di procedura penale, Luigi Alibrandi e Piermaria Corso (eds.), Casa Editrice La Tribuna, Piacenza, 2008, p. 656. Also available at http://www.legislationoline.org.

Much like the Romanian system, the Italian criminal law system was traditionally structured on an inquisitorial framework, which means that the investigation was carried out by the instruction judge who would collect the evidence. The new Italian Code of Criminal procedure, subject to a series of legislative initiatives, took its inspiration from the adversarial model of the unitary U.S. Code – Title 18: Crimes and Criminal Procedure.[13] By leaving aside the instruction judge, the new code of criminal procedure settled the preliminary investigations judge who has the prerogative to supervise the preceding stage of a criminal trial, the acts ordered by the prosecutor ("il Pubblico Ministero") and more importantly, to guarantee the rights and liberties of the investigated person. Also, this judge may order himself measures that restrain individual liberty (art. 275bis ICCP, "li arresti domiciliari", the home arrest; art. 281 ICCP, "il divieto di espatrio", the prohibition to leave the country; art. 283 ICCP, "il divieto e obbligo di dimora", the prohibition to leave the home town) or the pre-trial detention (art. 280 ITCP "custodia cautelare in carcere"), the detention orders (art. 321 ICPP, "le misure di sicurezza"), the precautionary orders (art. 316, "il sequestro conservatorio", the distraint upon property; art. 321, "il sequestro preventivo", the seizure), if such measures prove necessary during the criminal investigation stage.

It is extremely important to remark that in the Italian Code of Criminal Procure, the preliminary investigations judge may exert his prerogatives only prior to the initiation of prosecution - "Prima dell'esercizio dell'azione penale provedde il giudice per li indagini preliminari", according to art. 328 and art. 405 ICCP).

When it comes to the Romanian NCPP, the competences of the liberty and custody judge are provided in a general manner under art. 53. They are however completed and developed by a series of other articles that particularize and enhance such competences.

An overview of the opinions expressed by the Romanian doctrine[14] that has so far examined the new institution provided by the NCPP reveals a somewhat unanimous trend of accepting the liberty and custody judge as a positive element of novelty.

This new institution is saluted as extremely useful and fully corresponding to the exigencies of the ECHR, especially since the European court convicted Romania on several occasions precisely because certain measures related to individuals' deprivation of liberty or to intrusions in their private life were either taken by non-independent authorities (in the sense established by the European court), who were directly involved in the criminal investigation, or they were not subject to the control of an impartial tribunal, therefore disregarding the fundamental rights and liberties of persons.

At the same time, taking into account the current practice of Romanian investigation authorities that order abusively certain measures that restrain the individuals' fundamental rights and liberties, and motivate them in a strictly formal manner, it became necessary to set out this new institution that represents an independent magistrate, a specialized judicial organ able to assess whether the restraints of individual freedom are justifiable.

Thus, according to art. 53 NCPP, the liberty and custody judge is that judge who, within a court of law, in accordance with the jurisdiction of that court, during the criminal investigation stage, rules on the requests, proposals, complaints, challenges (contestations) or any other submissions relating to:

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[13] Available at http://www.law.cornell.edu/uscode/text/18.

[14] Ioan Gârbuleț: *The Liberty and Custody Judge, a New Institution in Criminal Procedure Law*, Dreptul (The Law), no. 11/2009, pp. 181-186.

a) preventive orders;

b) precautionary orders;

c) detention orders of temporary character;

d) acts of the prosecutor, in the cases expressly provided by the law;

e) authorization of searches, the use of special methods and techniques of supervision and investigation or other evidentiary proceedings according to the law;

f) anticipated hearings;

g) other situations expressly provided by the law.

The liberty and custody judge was envisaged as an independent guarantor of the respect of fundamental rights and liberties during the criminal investigation stage. As such, he is appointed by law to authorize those acts of criminal investigation that may constitute a serious interference with the private life of an individual, such as the following:

- issuance and extension of the technical supervision mandate (art. 139-144 NCPP); this implies, among others phone tapping, audio-video supervision and technical localization of objects and persons;

- ruling on withhold, delivery and search of mail and objects belonging or addressed to the suspect (art. 147 NCPP);

- authorization of obtaining data generated or processed by the providers of public networks of electronic communications (art. 152 NCPP);

- authorization of obtaining data related to the financial records of a person (art. 153 NCPP);

- authorization of home searches (art. 158 NCPP);

- authorization of searches into computer data (art. 168 NCPP);

- authorization of home arrest, extension of home arrest and their revocation/replacement (art. 218 - 222 NCPP; art. 242 NCPP);

- ruling on pre-trial detention, extension of pre-trial detention, as well as their revocation (art. 223-234 NCPP; art. 242 NCPP);

- ruling on compulsory provisional treatment orders (art. 245 NCPP);

- ruling on provisional hospitalization orders (art. 247 NCPP).

Having regard to these powers of the liberty and custody judge, after a thorough analysis of the New Code of Criminal Procedure, some authors of the doctrine[15] have drawn attention to a sensitive issue, namely that, although the liberty and custody judge has control over many acts carried out during the criminal investigation stage, still he has limited competence over other very important procedural acts that considerably interfere with the suspect's private life and could easily lead to the disregard of his rights and guarantees in a criminal trial. Much surprisingly for a criminal procedure code that aims to be more adversarial in nature than inquisitorial, as before, such powers are entrusted to the prosecutor. Or, under these circumstances, one cannot help wondering what have been the criteria according to which the Romanian lawmaker guided himself when determining that certain investigation acts that could easily qualify as interferences with private life should be authorized by the liberty and custody judge, while others should remain at the prosecutor's discretion.

For instance, the prosecutor can authorize himself the above-mentioned acts of technical supervision for a term that cannot exceed 48 hours, in case of emergency,

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[15] Dorel Lucian Julean: *The Liberty and Custody Judge as Settled by the New Code of Criminal Procedure*, the "In Honorem" Collection, Universul Juridic Publishers, Bucharest, 2012, p. 399.

when the obtainment of a mandate from the judge could lead to a serious delay of the criminal investigation (art. 141 NCPP). Also, he can authorize the use of under-cover investigators and agents, for a maximum period of 60 days (art. 148 NCPP), that can be extended even up to one year for well-grounded reasons (art. 148 parag. 9 NCPP), he can authorize participation to certain activities –art. 150 NCPP (*Nota bene*: according to art. 138 parag. 10 NCPP, this may imply the commission by the investigator of an act similar to the *actus reus* of a corruption offence, the conclusion of transactions, operations or any other agreements related to goods or persons that are suspected to be missing, to be victims of human trafficking or kidnapping, the involvement in drug dealings and performance of services, with the aim to obtain evidence) for a maximum period of 60 days (art. 150 NCPP), that can be extended up to one year for well-grounded reasons (art. 150 parag. 9 NCPP), he can authorize controlled deliveries – art. 151 NCPP (pursuant to art. 138 parag. 12 NCPP, controlled delivery means an investigation and supervision technique that allows the entrance, transit and exit into and out the state territory of certain goods that are suspected to have been illegally detained or obtained, with the aim of investigating an offence or identifying the persons involved in its commission) for an unspecified period, he can further authorize preservation of computer data (art. 154 NCPP) for a maximum period of 60 days that can be extended only once for another 30 days (art. 154 parag. 3 NCPP).

This distinction between the prerogatives of the liberty and custody judge and the powers of the prosecutor is difficult to understand, and obviously fails to meet the European Convention's requirements for accessible, predictable and clear laws, especially given the perspective of the aforementioned principle governing the separation of judicial functions, newly inserted in the Romanian Code of Criminal Procedure and, for these good reasons, they have been harshly criticized by the doctrine and practice. This unusual distinction between these competences raises even an issue of unconstitutionality of such provisions.

When confronted for an answer of this strange choice of prerogatives upon criminal investigation acts, the representatives of the Ministry of Justice, as initiators of the draft law preceding the new code of criminal procedure, came up with a purely formal response,[16] namely that authorization of the use of under-cover investigators or agents and authorization of controlled deliveries are justifiable by the fact that the prosecutor carries out and supervises the criminal investigation and that the supervision and investigation techniques are used in order to obtain evidence. As concerns their gravity, they are not as serious interferences with private life as phone tapping, for instance, therefore they should not fall within the competence of the liberty and custody judge. The prosecutor is, in his turn, a magistrate, acting as the leader of criminal prosecution, therefore he may order the procedural acts and measures necessary for a good administration of evidence, with a view to finding the truth in a criminal case (in my opinion, the discovery of truth, as a purely inquisitorial principle, should have been left out from the new code of criminal procedure!).

The representatives of the Ministry of Justice further explained that the prosecutor takes care of the respect of the legality and loyalty of criminal proceedings, and the breach of legality or loyalty can be later on sanctioned by the judge of pre-trial chamber, according to his competences, who may apply the exclusionary rules on illegally or disloyally obtained evidence.

[16] For this explanation, see http://www.just.ro.

This explanation is far from satisfactory and lacks legal logic.

However, despite this "trial of competences" between the prosecutor and the judge, the liberty and custody judge preserves a special competence, namely that of ruling on the challenge (contestation) against the unreasonable time-period of a criminal trial, during the criminal investigation stage. During the judgment stage, the challenge (contestation) is solved by the court of law. This is also a new procedure inserted in the present code of criminal procedure under the pressure of convictions incurred by Romania before the ECHR as a consequence of the excessive length of criminal trials (currently, there are almost 147 cases in which Romania was convicted for the violation of art. 6 of the European Convention, most notably for the excessive time-period of trial proceedings).[17]

According to art. 488^1 parag. (1) NCPP, if the criminal investigation activity is not carried out within a reasonable period of time, a person may file a challenge (contestation) by which he demands the speeding of the proceedings. During the investigation stage, this challenge may be filed by the suspect, the defendant, the injured party, the civil party as well as the party liable under civil law.

The procedure governing the ruling on this kind of challenges (contestations) is settled by art. 488^4 NCPP. More precisely, the liberty and custody judge, in order to be able to rule upon the challenge, will order the following measures:

a) notification of the prosecutor about the challenge that has been filed, indicating the latter's possibility to present a legal opinion on the challenge;

b) transmission of the case-file or a certified copy of the case-file, in a 5 day-term, by the prosecutor;

c) notification of the other parties to the trial about the challenge that has been filed and their possibility to present a point of view within the term granted to that end by the liberty and custody judge.

In case the suspect or the defendant are remanded in custody, the notification will be made both to these persons and to the lawyer of one's choice or appointed ex officio.

If the prosecutor or the parties do not present their opinion to the liberty and custody judge within the term established by the former, the ruling will take place irrespective of this situation. The liberty and custody judge will rule upon the challenge against the unreasonable term of the criminal investigation in a maximum period of 20 days from the registration of the challenge. The challenge is ruled upon by a reasoned judgment, in closed session, without attendance by the parties or the prosecutor.

At a *prima facie* analysis of the legal novelties brought about by the Romanian New Code of Criminal Procedure, the institution of the liberty and custody judge stands out as a positive feature, since he is primarily meant to represent an efficient promoter and guarantor of the lawfulness of procedural acts carried out during the investigation stage in a criminal trial.

This institution was created following mainly the French model of the "juge des libertés et de la détention" (art. 137-1 in the French Code of Criminal Procedure) but in a manner specific to the Romanian legislator, who has good intentions but lacks consistence. More precisely, although the liberty and custody judge enjoys a broad jurisdiction as to the control of investigation acts performed by the judiciary police and the prosecutor, this jurisdiction is still limited and voided of legal sense by the fact that the prosecutor seems to have his fair share of prerogatives upon many important acts of

[17] For the analysis of the 147 cases against Romania, see http://hudoc.echr.coe.int/fra/Pages.

investigation that allow serious interferences with the individuals' right to private and family life.

Therefore, although the Romanian New Code of Criminal Procedure finally took distance from an old and pernicious conception at trial, much influenced in the past by the communist regime, it is still very close to the inquisitorial system by granting the prosecutor large powers and initiative as regards certain sensitive acts of investigation, such as the authorization of under-cover investigators and agents, the authorization of investigators to participate in certain activities and the authorization of controlled deliveries.

In my opinion, all such procedural activities should have been entrusted to the liberty and custody judge, if he was truly envisaged as a checking filter and guarantor of the acts carried out during the criminal investigation stage. Moreover, the new code of criminal procedure cannot possibly accept some obnoxious overlapping of prerogatives belonging at the same time to the prosecutor and to the liberty and custody judge (the prosecutor may even authorize himself certain acts that theoretically fall under the general jurisdiction of the liberty and custody judge, *i.e.* the acts of technical supervision for a term that cannot exceed 48 hours, in case of emergency).

Certainly, the liberty and custody judge has access to the prosecutor's file, but the judge is not in charge of the overall control of the investigation stage in which authorization is demanded and must commonly decide in a situation of emergency. It means that, in practice, the obtaining of the authorization mostly depends on the ability of the prosecutor to convince the judge, and not merely on the needs of the investigation. In fact, it suggests that the institution of the liberty and custody judge has been exploited by the Romanian legislator to put in front of the public prosecutor a judicial judge – which apparently justifies the requirements of the ECHR – with apparent powers but no proper means to enforce them in practice.

As a general and bitter conclusion, if the Romanian New Code of criminal Procedure is certainly interesting, it can hardly be regarded as a model, because, aside of the achievements above presented, it carries weaknesses that should not be neglected. Piercing the veil of appearances leads to the notice that, despite the ongoing legislative efforts, the Romanian justice system is still affected by the lack of protection of human rights and liberties during the criminal investigation stage.

Legal rumor has it that the Romanian Parliament is currently preparing an act which is meant to amend the very new code of criminal procedure and hopefully, this act in progress will deprive the prosecutor of his present powers to decide on some essential and extremely sensitive acts of criminal investigation, in the absence of a prior authorization by the liberty and custody judge.

Until that forthcoming act destined to amend the code comes into force, the New Code of Criminal Procedure looks very much like a compromise. It is a legal compromise between essence and appearance. Between the European Convention-oriented manner in which the liberty and custody judge has been settled in the codes of criminal procedure of the EU member states (see France and Italy) and the purely Romanian variant in which said institution was provided in our new code.