Crime Control or Due Process? Which are the Tendencies in Romanian Criminal Justice?

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Abstract

A few months ago, Romania celebrated three years since the enforcement of a new criminal legislation. In February 2014, after a long period of maturation, there came into force a new criminal code and a new criminal procedure code. Together, these legal instruments have aimed to transform the context of repression in Romania and to certify that the most modern solutions of criminal legislation are applied. This study focuses on a 3-year-perspective of the criminal procedure code (hereinafter the CPC) and tries to identify what are the tendencies in Romanian criminal justice. Since its enforcement, the CPC has been amended eight times by Government's Acts and five times by Parliament's Acts and refined by more than 40 decisions of the Constitutional Court. It is the time (medium term) and the place (Journal of Eastern European Criminal Law) to expose an insight of one of the most important legislative changes in modern Romania.

Keywords*: crime control – due process – tendencies in criminal justice – Romania – new criminal legislation.*

The title of the study was inspired by the classical distinction made by Stanford University professor Herbert Packer in his famous book of 1968[1]. Crime control or due process model is the inquisitorial / adversarial approach revisited. I will briefly present the basic features of this model in order to accommodate the main lines aimed to work with.

Crime Control Model is easily outlined[2] by the following:

- The repression of crime should be the most important function of criminal justice because order is a necessary condition for a free society.
- Criminal justice should concentrate on vindicating victims' rights rather than on protecting defendants' rights.
- Police / Prosecutor powers should be expanded to make it easier to investigate, to arrest, to search, seize, and convict.
- Legal technicalities that restrain the criminal justice authorities should be eliminated.

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[1] H.L. Packer (1968). *The Limits of the Criminal Sanction*. Stanford, California: Stanford University Press, pp. 149-246.

[2] https://www.cliffsnotes.com/study-guides/criminal-justice/the-criminal-justice-system/which-model-crime-control-or-due-process (accessed on 01.07.2017).

- The criminal justice process should operate like an assembly-line conveyor belt, moving cases swiftly along toward their disposition.
- If the police propose for an arrest and a prosecutor files criminal charges, the accused should be presumed guilty because the fact-finding of police and prosecutors is highly reliable.

Due Process is based on specific requirements:

- The most important function of criminal justice should be to provide fundamental fairness under the law.
- Criminal justice should concentrate on defendants' rights, not victims' rights, because the Constitution expressly provides for the protection of defendants' rights.
- Police / Prosecutor powers should be limited to prevent official oppression of the individual.
- Constitutional rights aren't mere technicalities; criminal justice authorities should be held accountable to rules, procedures, and guidelines to ensure fairness and consistency in the justice process.
- The criminal justice process should look like an obstacle course, consisting of a series of impediments that take the form of procedural safeguards and serve as much to protect the factually innocent as to convict the factually guilty.
- The judicial authority shouldn't hold a person guilty solely on the basis of the facts; a person should be found guilty only if the judicial authority follows legal procedures in its fact-finding.

The work hypothesis of this study is that an ever-increasing tendency has manifested itself in the last three years in the criminal legislation of Romania. The following examples aim to prove that this tendency is a consistent one.

Victim's rights

By means of Extraordinary Government's Act no. 18 of May 2016 (hereinafter EGA) art. 111 (9-10) CPC has been modified as such: "*Judicial authorities shall proceed immediately to the hearing of the victim who has filed a complaint about the commission of an offence [...].The statement of the victim made under the terms provided by art. 111 (9) shall be considered as evidence even if it has been made before initiation of the investigation*". The amendment could be justified by the interest to increase the protection of the victim, facilitating the immediate hearing of the victim who has filed a complaint. This concern is aimed to give efficiency to what the victim has to say about the loss or suffering caused by the crime he/she has been subject to. The problem arises upon hearing, due to the fact that the statement of the victim shall be considered as evidence even if supplied out of trial. As a matter of principle, the Romanian CPC is definitely against the possibility of using evidence if it was not legally supplied, which includes as a basic rule the duty to obtain evidence only after the investigation was officially started . Making an exception to this principle would be both illegal and futile. It would be illegal because evidence could be valid only if it results out of a procedure where the rights of a defendant are respected. Obviously, this is not the case when the defendant does not have the possibility to react. It would be futile because, as a matter of principle, the statement of the victim does not have the effect of a *proba probatissima*, i.e.

it must be taken into consideration only in the light of all evidence and does not produce a particular outcome *per se*. Abandoning a principle for an insignificant advantage surely does not represent a prudent policy. Still, we have here the embodiment of a special way of thinking, i.e. vindicating victims' rights comes first in relation with the protecting of defendants' rights.

Extended powers

In the first place, the CPC provided that "*when the data and evidence in the case constitute probable cause to believe that a certain person committed the offense that entailed initiation of the criminal investigation, the prosecutor shall order that the criminal investigation continue in relation to that person, and the latter shall acquire the status of suspect*" (art. 305 (3) CPC). The law included a special safeguard for the suspect, stating that only the prosecutor had the power to decide when this particular standing was fulfilled. The same EGA, cited above, has modified this rule, by providing that the judiciary police shall order that the criminal investigation continue in relation to that person, and the latter shall acquire the status of suspect. Shifting the power from the prosecutor (a magistrate by law) to the judiciary police has made the investigation easier and faster. The virtual suspect has lost a superior standard and exposes himself to important risks, such as that he could be subject to a custody order for 24 hours or his asset could be subject to seizure.

These extended powers of the investigation authorities are not accidental. This is illustrative of a peculiar and insidious tendency of crime control model. Other examples successfully sustain this allegation.

For instance, art. 150 (1) CPC deals with the "authorized participation to specific activities under the terms of art. 138 (11) ordered by the prosecutor who supervises or conducts the criminal investigation, for a time period of maximum 60 days […]". Art. 138 (11) CPC explains that "authorized participation to specific activities means the commission of acts similar to the *actus reus* of a corruption offense, the conclusion of transactions, operations or any other types of dealings related to an asset or to a person who is presumed missing, a victim of trafficking in human beings or of kidnapping, the performance of operations involving drugs, as well as the providing of services, based on an authorization from the judicial authorities of competent jurisdiction for the purpose of obtaining evidence". No doubt that the performance of an authorized activity does constitute a civil or a criminal offense. Nonetheless, the law expressly declines any criminal liability in such case (art. 150 (4) CPC[3]), legally justifying the commission of an offence for the purpose of supplying evidence. Is this necessary? Have the investigators lost any other possibility of supplying evidence since these artificial instruments are legalized? The answer could easily be detected from the perspective of the crime control model.

[3] Special provisions exist for the undercover agents. See art. 148 (6) CPC "if the activity of an undercover investigator requires authorized participation to specific activities, the prosecutor shall act in accordance with the provisions of art. 150" or art. 148 (7) CPC "judicial authorities may use or make available to undercover investigators any documents or items necessary for the performance of authorized activities. The activity of a person making available or using such documents or items does not constitute an offense".

Another example could be found in the amendment of art. 153 (1) CPC by the above cited EGA concerning the legal possibility of having access to data on the financial status of a person. Initially, the prosecutor, based on a *prior approval* of the Liberty and Custody Judge (hereinafter the LCJ), may request a credit institution, or any other institution that retains data on the financial status of a person, to communicate data referring to the existence and content of accounts and of other financial statements of a person if there is probable cause as to the commission of an offense, and there are grounds to believe that the requested data represent evidence. This moment, the prosecutor enjoys extended access to such data since the condition of the prior approval of the LCJ is no longer required.

Furthermore, the EGA has substantially granted access of the prosecutor to prerogatives which, theoretically, are not is his competence. By law, electronic surveillance is in full control of LCJ. A special exception has been provided in art. 141 (1) CPC based on which the prosecutor may authorize, for a time period of maximum 48 hours, electronic surveillance measures when there is an emergency situation, and the obtaining of a electronic surveillance warrant under the terms of art. 140 (by the Liberty and Custody Judge) would lead to a substantial delay of investigations, to the loss, alteration or damaging of evidence, or would jeopardize the safety of the victim, of witnesses or of their family members. This moment, the exception was applied also to other situations previously secured from the intervention of the prosecutor. It is the case of the acquiring of data on the financial transactions performed or to be performed by the perpetrator, suspect, defendant or by any other person in relation with these (art. 146/1 (5) CPC) or the case of measures in respect of letters, postal dispatches or items sent or received by a perpetrator, suspect, defendant or by any person suspected to receive or send, by any means, such goods from/to a perpetrator, suspect or defendant, or goods intended to it (art. 147 (4) CPC). All these situations could be handled by the prosecutor, by reason of emergency, for a period of 48 hours without the control of LCJ. The ratification of the prosecutor's decisions belongs to the LCJ, within a 24 hour- term, but the interference into constitutional rights and freedoms is undoubtedly a reality. Is this the face of a crime control model? It certainly is.

Having this in mind, it is surely no surprise the rule of art. 190 (5) CPC "in cases where a person subject to examination does not give his/her consent in writing or, in emergency cases, when the obtaining of an authorization from the judge (Liberty and Custody Judge) would lead to significant delay in the investigation, to the loss, alteration or damaging of the evidence, the criminal investigation authority may order a physical examination". The LCJ control is totally ridiculed since any judiciary police member has the power to order the physical examination of a person, both external and internal.

Eliminating restraints

As it has been stated above, the crime control model implies that legal technicalities that restrain the criminal justice authorities to be eliminated. This is the case of art. 306 (6) CPC, according to which "banking and professional secrecy, except for the defence counsel's professional secrecy, cannot serve as a basis to dismiss a request by the prosecutor, once the criminal investigation has started". It has been for the first time that a specific provision of the criminal legislation in Romania expressly eliminates the

legal impediments of professional secrecy which barred the investigation, even if the doctrine has stated that this is tendency in the criminal area[4].

The same logic appears to sustain the amendment of art. 59 CPC related to the extension of territorial jurisdiction: "when particular criminal investigation acts have to be performed outside the territorial jurisdiction in which the investigation is conducted, the prosecutor or, as applicable, the criminal investigation body may perform them or they may order their performance through a letter rogatory or a delegation". The previous provision, before the enactment of EGA, stated that only the prosecutor had the power to extend the territorial jurisdiction. From now on this prerogative is in the competence of the judiciary police, too. Now it is easier to conduct an investigation which implies more than a jurisdiction. Eliminating territorial barriers despite the legal limits of horizontal jurisdiction means an increasing power of controlling crimes.

Assembly-line conveyor belt

A significant amendment has taken place in the field of dispute resolution of a criminal trial. According to art. 480 (1) CPC, a plea of guilty can only be concluded with regard to offenses for which the law requires a penalty of a fine or of no more than 7 years of imprisonment. The EGA extends the penalty latitude from 7 years to 15 years, which means the existence of a larger possibility to close a criminal case without going to trial. The plea of guilty begins to run as a high-speed instrument for dealing with particular kinds of antisocial behaviours, taking into consideration the fact the 15 years of imprisonment cover the majority of medium and petty crimes and also an important part of serious offences. As the doctrine[5] has stated, the guilty plea seems to function as an automatic assembly-line conveyor belt similar to other countries (USA as a notable example).

Highly reliable evidence

The CPC is able to offer a surprising statement in art. 1 (2) stipulating that "the criminal procedure rules are intended to provide effective exercise of the judicial bodies' responsibilities […]". What does "effective exercise" mean? No legal provision explains that. Could be effectiveness a virtual principle of the new criminal order in Romania? And what is the intension of this principle? We could put effectiveness in relation with evidence. And again the crime control model comes into place reminding us that the fact-finding of police and prosecutors is reputed as highly reliable. The investigation stage could be pointed to as the evidence-lab and, for this reason, could change the traditional view. It becomes possible to ascertain the investigation conducted by the judiciary police and/or prosecutor as the most important stage in a criminal trial. This view will certainly reduce the duration of the trial, will maximize the efficiency of

[4] L. Bercea, F. Ciopec (2011). *Secrets Made Public? Limits of the Bank's Duty of Confidentiality in Criminal Procedures* in C. Fenyvesi, C. Herke (eds.), Pleadings. Celebration volume of Professor Tremmel Flórián's 70th Birthday. Pécs: Studia Iuridica Auctoritate Universitatis Pécs Publicata 148., pp. 15-16.

[5] M. Roibu (2004). *On a Different Kind of Compromise in the New Code of Criminal Procedure*. Bucharest: C.H. Beck, Annals of University of Bucharest, supplement, p. 338.

supplying evidence and facilitate the repressive reaction. The effectiveness of the trial shall increase, shan't it?

Sustained by this doctrine, the meaning of the art. 374 (7) CPC becomes clearer. The law states that "evidence supplied throughout the criminal investigation stage and not challenged by the parties shall not be resupplied during the court investigation. It shall feature in the parties' adversarial debate and taken into account by the court upon deliberation". This is a special case of a *nolo contendere* procedure, based on the reliability of evidence supplied during the investigation phase. stage. The criminal trial seems to leave aside the traditional role of the investigating judge and to promote an arbitration of the duelling parties. The judge no longer investigates, but waits for the parties to contest and challenge the evidence supplied in the preliminary stage. If this is the case, the judge is entitled to proceed to his own investigation. If not, the evidence already supplied by police/prosecutor supersedes the activism of the judge. The ground for such a displacement is the trust associated with the preliminary investigation of the police/prosecutor. Imperceptibly, we feel ready to accept that this kind of evidence is highly-reliable and stands for justice[6].

The police and/or prosecutor are interested to create the appearance that the evidence obtained in the preliminary stage could be treated as reliable. That is the explanation of the fact that these authorities have built strong investigative teams in order to produce valid and genuine evidence. As part of the team, they have added specialists in various areas able to "flavour" the reliability of the fact-finding. According to art. 172 (10) CPC, such fact finding is conducted by a specialist working with the judicial authorities or by an external one. Following completion of a fact finding report, when judicial authorities deem that an expert opinion is necessary or when the conclusions of the fact finding report are challenged, an expert report shall be ordered. The law expressly provided for an opinion of an expert in case of doubt. The difference between a specialist and an expert resides in the degree of impartiality. The specialist, often part of an investigative team, does not enjoy full guarantees of impartiality. That is reason why the interested parties have the legal possibility to challenge the report of the specialist and obtain the appointment of an impartial expert. Since the enactment of the EGA, that legal right has been transformed into a simple vocation, leaving the protection of the parties at the discretion of the investigative authority. From now on, there are fewer chances to challenge the fact finding report issued by an internal specialist and to apply for an expertise. Surely, the preliminary stage approaches a high level of effectiveness.

This brief insight into the CPC tendencies must be considered as working paper. Firstly, because a solid analysis implies observations during a longer period of time, in order to eliminate the risk of taking an accidental note as a tendency. Secondly, the hypothesis of crime control model prevalence is based on the last legislative amendments, especially on the enactment of EGA of May 2016. It is possible that new amendments of the CPC (announced by the Ministry of Justice) to counter-balance the view in this matter. That's why, on this subject, the study promises to continue.

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[6] K. Mathis (2009). *Efficiency instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law*. Dordrecht: Springer, pag. 187.