JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW

No. 1/2014

Evolution of the Penal Legislation in Romania and Hungary, in the Post-Communist Era

2014

The New Romanian Code of Criminal Procedure

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Abstract:

Starting with February 2014, Romania has the latest code of criminal procedure of Europe. A historical opportunity to overtake, adapt and elaborate a legislative work which would enjoy the latest solutions in a huge stake matter. The criminal justice represents to Romania a touchstone, often used in order to verify the progress we have been achieving as a state in the eyes of Europe. The present study aims at identifying the measure in which novelty at a formal level can be associated with efficient innovation in substance, i.e. the measure in which the new code is a professional benchmark as well. Our attempt goes beyond the borders of descriptive and analytical, being critical as well, regarding those provisions of the new code which do not provide the best solutions. We have concluded with a diagnosis of the performances of the new code, supporting the idea that such assessments, although risky, are necessary however in this early stage.

Keywords: *Code of Criminal Procedure; Romania; innovation; mimetism; critics.*

I. Introductory considerations

By entering into force, on 1st February 2014, the new criminal procedure code of Romania has marked the end of the exit of communism. As it has been considered, "more than the criminal code, the code of criminal procedure is <the test paper> of democracy".[1] In the area of the ex communist states, Romania was the only one without a new code of criminal procedure, able to terminate the basis of the old authoritarian legislation. Thus, amongst Romania's neighbours, Bulgaria adopted a new procedural law in 2006, Moldavia in 2003, Serbia and Ukraine in 2012; only Hungary has had an older code (1998). The other states of the former communist influence area have all taken steps in this direction. Poland has had a new code since 1997, Slovakia since 2005, Slovenia since 2006, Croatia since 2009, Macedonia since 2005, Bosnia since 2003, Latvia since 2009, Estonia since 2004, Lithuania since 2002, Russia since 2002, even Albania since 1995, only the Czech republic keeps an old code adopted in 1961.

The appearance of the new code closes an important legislative stage, opportunity which allows formulating a series of remarks.

Firstly, from a diachronic perspective, the code is the fourth in the juridical order of the modern Romanian state. The first code goes back to 1864[2] and it was inspired by the French criminal instruction code of 1808. It had the biggest longevity, staying in force

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[1] Viorel Paşca, *Romanian Criminal Lawsuit between Authoritarianism and liberalism, vol. International Biennial Conferences 2008, Faculty of Law and Administrative Sciences*, Publishing House Wolters Kluwer, Bucharest, 2010, p. 193.

[2] Published in the Official Monitor no. 0 of 2 December 1864.

for over 70 years, till the adoption of the code in 1936,[3] a code with a French and Italian pedigree. This code started producing effects on 1st January 1937 and only had a short life cycle, due to the radical change of the political regime, subsequent to the end of the World War II and the shift of power to the communist forces. Amongst the first measures taken by the new regime, the living proof of the quote mentioned above, were the dramatic modification of the 1936 code; in February 1948 was published the code of the Romanian Popular Republic, which was reflecting the new ratio of state political relationships. Thus a different model of criminal process: the socialist model,[4] which gives up the French model in order to overtake the soviet one. On the same basis, in 1968 a new criminal procedure code[5] was elaborated and entered into force on January 1st 1969 and it will survive, however undergoing numerous "cosmetic" operations for 45 years, till its being abrogated on 1st of February 2014. Since that date, Romania should be thrilled about having the newest code in Europe, at least from a formal point of view.

Secondly, from the perspective of current realities of the judicial life, has been revealed the lack of celerity in the development of criminal lawsuits in general, the significant human and social costs, translated into high consumption of time and financial resources, as well as into the presence of an atmosphere of distrust concerning the efficiency of the act of criminal justice. Several flaws of the criminal lawsuit, such as the measure of preventive arrest, the duration of the procedures, the place of competences and evidence in the criminal matter represented the object of some causes at the European Court of Human Rights,[6] thus the Romanian judicial system receiving numerous and important organizational cues. The old procedural system did not succeeded in balancing, in accordance with the principles of the European family, despite frequent legislative interventions over various institutions. Thus, since 1990 to its abrogation, the criminal procedure code has been modified 35 times, 9 times by Emergency Ordinances, not always fully justified from a constitutional point of view under the aspect of the realities of the emergency situations, and in the last 15 years, the modifications were annual. The maximum of modifications was reached in 2004, when 6 modifications were operated by various normative acts. Quantitatively, the greatest number of modifications operated by one single normative act took place in 1993 (97 amendments), 1996 (74 amendments), 2003 (221 amendments), 2006 (228 amendments), 2010 (65 amendments). This abundance of modifications undermined the stability of the code and led to a non unitary interpretation and application of the criminal procedure law. Consequently, starting with the year 2004, the High Court of Cassation and Justice has been very active performing the role of harmonizing the criminal jurisprudence, through appeals in the interest of law (20 decisions were pronounced in 2006, 37 decisions in 2007, 31 decisions in 2008, 21 decisions in 2009 etc.).

Thirdly, reported to the gestation period of the new code, the way was long and full of gaps. By Government Order no. 829/2007,[7] the Preliminary Theses of the project of

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[3] Published in the Official Monitor no. 66 of 19 March 1936.

[4] Diana Ionescu, *About the Procedural Conception and the New Criminal Procedure Law, A Few Simple Matters*, Criminal Law Notebooks, no. 1/2011, Universul Juridic Publishing House, Bucharest, pp. 77-86.

[5] Published in the Official Monitor no. 145 of 12 November 1968.

[6] Romania ratified the European Convention of Human Rights by Law no. 30/1994, Published in the Official Monitor no 135 of 31 May 1994, date on which this year marks 20 years.

[7] Published in the Official Monitor no. 556 of 14 August 2007.

the Criminal Procedure Code were approved. As it is specified in this document which represented the foundation of the project, it was not intended that the new Criminal procedure Code contain original solutions by all means, compared to the existent legal solutions which proved to be viable in practice or whose use represents a habit to practice, but the new Code was intended to accordingly modify all those solutions which had become obsolete or had revealed a series of anomalies in practice and to introduce new solutions, based on positive comparative experiences or oriented towards the expected favourable outcomes.

The project of the Criminal Procedure Law became Law no. 135/2010,[8] law which needed over 3 years in order to become effective. The entry into force of the new regulation was delayed, since the implementing law was adopted only in 2013.[9] Even at that moment, there had been quite a number of voices[10] claiming the necessity to postpone the new code, from various reasons.

According to the exposal of reasons,[11] the new Code of Criminal Procedure has as essential goal to create a legislative modern framework for criminal procedure matter, able to completely meet the imperatives of the functioning of modern justice, adapted to social expectations and to the necessity of a higher quality of this public service. The objectives of the new Code of Criminal Procedure were the following:

1. provide the legislative framework in which the criminal lawsuit should be faster and more efficient and less costly;
2. unitary protection of human rights and liberties guaranteed by the Constitution and international juridical instruments;
3. conceptual harmonization with the provisions of the new Criminal Code, special attention being paid to the definition of the deed which represents a felony;
4. harmonization of the solutions derived from the Code of Criminal Procedure with the provisions of special laws with criminal procedure dispositions;
5. appropriate regulation of the international obligations assumed by our country regarding the normative acts of the criminal procedure law;
6. settle the adequate balance between requirements for an efficient criminal procedure, protection of the elementary procedure rights, as well as the fundamental human rights, for all the participants to the criminal lawsuit and unitary compliance with the principles regarding the equitable deployment of the criminal lawsuit.

In what follows, we are going to present the main modifications introduced into the new Code of Criminal Procedure, which contribute to the achievement of the general objectives mentioned above.

To what extent the proposed goals have actually turned into results remains to be assessed at the end of the study, though one thing is certain: the construction of the new code seems to be not solid enough, since immediately after its having entered into force,

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[8] Published in the Official Monitor no. 486 of 15 July 2010.

[9] Published in the Official Monitor no. 515 of 14 August 2013.

[10] APADOR-CH, 31 January 2014, *Reasons why the entering into force of criminal land criminal procedure codes should be deferred*, available on www.juridice.ro or Monica Macovei, 29 January 2014, speech available on http://www.revista22.ro/monica-macovei-victor-ponta-sa-amane-intrarea-n-vigoare-a-noilor-coduri-sa-nu-arunce-justitia-penala-n-aer-37242.html.

[11] http://www.just.ro/Portals/0/Coduri/coduri_60309/Expunere%20de%20motive%20Proiectul%20Legii %20privindCodul%20de%20procedura%20penala-forma%20transmisaParlamentului.doc.

the government felt the need to modify it, by means of an Emergency Ordinance.[12] According to one author's statement, the reform of justice is nothing more than the modification of modification.[13]

II. Regarding the fundamental principles of the criminal lawsuit

The major premise taken into consideration in the process of edifying the new code was that an equitable criminal lawsuit, deployed within reasonable time limits, cannot be provided without being supported by new principles, which together with the classical ones, should force the juridical bodies to perform an independent and impartial criminal justice, capable of inducing to the public opinion respect and trust into the act of justice.

This is why, besides the classical principles (finding the truth, the benefit of the doubt, the right to defence, the right to freedom and safety, the respect for the human dignity) new principles were introduced into the new code, such as the right to an equitable lawsuit deployed within reasonable time limits, separation of the judicial functions within the criminal lawsuit, mandatory criminal action tightly related to that of the subsidiary opportunity, *„ne bis in idem,* and as far as evidence is concerned, the principle of loyalty in getting the evidence.

From the category of these new principles, the one referring to the separation of judicial functions within the criminal lawsuit is expected to considerably improve the quality of the act of justice. This principles states and guarantees that there are four judicial functions performing within the lawsuit: criminal prosecution (by the criminal investigation bodies and prosecutor), disposition of fundamental rights and liberties during the criminal prosecution (by the judge of rights and liberties), verification of the legality of referring or not to the court (by procedure of preliminary chamber) and trial by the court of law). Though the idea of regulating such a principle is correct, the new code seems to have missed the opportunity to formulate a clear option able to solve an ancient unsolved issue inherited from the socialist model: which is the procedural function exercised by the prosecutor?[14] Criminal prosecution is not a function nut a stage of the criminal lawsuit. Within this stage prosecution is performed and it traditionally entitles the prosecutor. Furthermore, there is no function of disposition over the rights and liberties or the function of verification of the legality of referring to the court. It might possibly exist the function of instruction, in its contemporary sense, of course.

In order to avoid criminal lawsuits in minor causes, where there is no public interest, the mandatory character of exercising criminal prosecution has been attenuated by introducing the subsidiary principle of opportunity, based on which, in

[12] O.U.G. no. 3/2014, published in the Official Monitor no. 98 of 7 February 2014.

[13] Viorel Paşca, *Reform of Justice: Modification's Modification Reforma justiției: modificarea modificării*, Romanian Pandects, supplement, Publishing House Wolters Kluwer, Bucharest, 2007, pag. 309.

[14] Diana Ionescu, *Quoted Works*, p. 88.

causes of the kind, the prosecutor will be able to give up criminal prosecution, within the legal provisions.

In the chapter dealing with the institution of judicial fine, we have approached the need, felt by most judicial bodies, of regulating and sanctioning the legal abuse in criminal procedural matter.

Analyzed in terms of its general rules, the new code maintains the predominantly continental European character, but it also implies a number of elements whose origins are traced back in the Anglo-Saxon procedure of adversarial type, overtaken in a way which should properly adapt them to our own legislative concept.[15] Such an approach has represented the tendency in modern law and nowadays, the most traditional European countries, such as Germany, Italy or France, have criminal procedures which combine solutions of both systems.

Beyond the positive appreciation which can be brought to the manner in which the new code understood to regulate the principles of criminal procedure, fact which obviously represents some progress, it remains to bring into discussion the criteria according to which the principles of the new procedure emerged. Nothing makes explicit the internal logic of such an operation, given that some of the principles existing already in the previous code have not been materialized into the new regulation (for example, the principle of the active role al judicial bodies) and on the other hand, some notorious principles have not passed yet the threshold of positive law (for instance, the double degree of jurisdiction in criminal matter, equality of arms, protection of the victim's rights, trial according to the same rules of persons in similar contexts- procedural non-discrimination[16]).

Starting from art. 1 of the code which stipulates that "criminal procedure norms seek to ensure the efficient performance of the judicial bodies' attributions....., we cannot lose of sight that above all these principles there seems to be one- the principle of efficiency- which crosses like a red thread the statement of grounds of the new code. Quantitatively, the term "efficient" appears 14 times in the statement of grounds, which legitimately raises the question: what does efficient means in terms of criminal procedure?[17] A high percentage of convictions or a high percentage of acquittals? Or a faster justice?

III. Regarding the competence of courts of law in criminal matter

It was redesigned the division of the material competence of first instance court between courts and tribunals, with the specification that judges will have general

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[15] Viorel Paşca, Flaviu Ciopec, *The Adversarial or Inquisitorial Approach to Romanian Criminal Procedural Law and Practice*, in E. Balogh, A. Hegedüs, P. Mezei, Z. Szomora, J. S. Traser (eds.) *Legal Transitions. Development of Law in Formerly Socialist States and the Challenges of the European Union*, Pólay Elemér Alapítvány, Szeged, 2007, pp. 221-230.

[16] Flaviu Ciopec, *Repetitio Principiis. A Commentary on the Principles of the New Code of Criminal Procedure*, in L. Bercea (ed.) *20 years of juridical education in Timisoara In honorem Radu I. Motica*, Publishing House Universul Juridic,Bucharest, 2012, p. 315.

[17] Diana Ionescu, *Quoted Works.*, p. 87.

competence, while tribunal will have a limited competence. Consequently, courts of law will judge in first instance all crimes, except for those expressly destined to the competence of the tribunal. Courts of Appeal will judge all appeals, while the High Court of Cassation and Justice will judge the appeal in cassation - an extraordinary means of appeal. In exceptional cases, both Courts of Appeal and the

High Court of Cassation and Justice will judge merits of criminal cases having as object crimes committed by certain categories of persons (competence according to the person's quality).

It was redesigned the competence of Military Courts by regulating the competence of military tribunal and military court of appeal and eliminating the intermediary institution of the military territorial tribunal. Thus, the military tribunal will judge in first instance all crimes committed by militaries, up to the rank of colonel included, except for those attributed by the laws to the competence of other courts. The military court of appeal will judge in first instance certain crimes stipulated by the Criminal Code, committed by militaries (higher in rank than colonel), crimes related to the national security of Romania committed by militaries and stipulated by special laws, crimes committed by judges of the military tribunal and military prosecutors of Military Prosecutor's Office, as well as other crimes attributed to its competence by the law. As court of appeal, it will judge appeals against criminal sentences pronounced by the military tribunal.

Amongst the judicial bodies, besides the courts of law and criminal prosecution bodies there were introduced: the judge of rights and liberties and the judge of preliminary chamber. The judge of rights and liberties will solve requests, propositions, complaints, contestations or any other intimations referring to preventive measures, precautionary measures, temporary safety measures, authorisation of searches, special surveillance or investigation techniques or other evidentiary procedures, anticipated administration of evidence and any other cases stipulated by the law. In the procedure of preliminary chamber, the judge of preliminary chamber will verify the legality of the administration of evidence in the stage of criminal prosecution and reference to court and will settle the complaints against the solutions of non-reference to the court, as well as any other cases stipulated by the law.

IV. Regarding the participants to the criminal lawsuit

The parties in the criminal lawsuit have been defined (defendant, civil party and civilly responsible party) with their rights and obligations. The parties are those procedural subjects who exercise or against whom it is exercised a judicial action (civil or criminal). The universal successors of a prejudiced person by the performance of a felony have the quality of civil party, provided that they would exercise civil action within the criminal lawsuit.

The prosecutor, as specialized judicial body of the state, is participant to the criminal lawsuit, not having the quality of procedural party.

Besides the parties, amongst the participants to the criminal lawsuit, there are also the main procedural subjects (the suspect and the harmed person), as well as other

procedural subjects (witness, expert, translator, procedural agent, special finding bodies etc.). The definition of the category of procedural subjects was determined by the need to distinctly present the rights of the suspect and the harmed person, who, even if they are not parties in the criminal lawsuit, must be granted appropriate procedural guarantees, in compliance with the jurisprudence of the European Court of Human Rights and the European regulations regarding the victims' rights.

The suspect is the person who, from the existing data and evidence in the case, raises the reasonable suspicion of having committed an act stipulated by the criminal law, having all the legal rights of the defendant. The injured person is the person who suffered a physical, material or moral injury through the criminal act, his rights being expressly stipulated by the code, amongst which the most important ones are the right to propose administration of evidence by the judicial bodies, the right to be informed, within a reasonable term, about the stage of criminal prosecution, on his express request, the right to see the file, the right to be heard, the right to ask questions to the defendant and the right to formulate exceptions and draw conclusions.

V. Regarding the judicial assistance in criminal matters

The attorney is a participant to the criminal lawsuit, his role, position and attributions according to the law being clearly defined. He assists or represents the parties or the main procedural subjects in the criminal lawsuit. It was expressly regulated the right of the person in custody or arrested to get in touch with his attorney and the confidentiality of the discussions, conversations and mail.

In compliance with the principle of the right to defence, it was regulated the general right of the suspect or defendant's defender to request seeing the file during the entire duration of the criminal lawsuit, as well as the content of this right, which includes the right to study the documents of the file and write down containing notes or information. Furthermore, there were settled the circumstances in which the exercise of this right can be restricted by the prosecutor.

Regarding the right of the attorney to assist in carryout out the prosecution documents, there were expressly stipulated the exceptions from the exercise of this right, respectively the matter of special surveillance techniques or investigation and the search of IT devices or vehicles in case of flagrant crimes.

As far as the right of the attorney to formulate complaint, it was given the opportunity to appeal, at the judge of rights and liberties, the solution of the hierarchically superior prosecutor, if the attorney contested the way in which his rights had been respected.

VI. Regarding evidence, evidence means and evidentiary procedures

a) General considerations

The new code eliminates the limitative enumeration of evidence means, provisioning that any evidence means which are not prohibited by the law, can be used in the criminal lawsuit.

In order to provide an equitable procedure in the stage of administration of evidence, an improvement has been made to the provisions consistent with the right to request administration of evidence, expressly regulating the cases in which the judicial bodies can reject a request referring to the administration of some evidence: when the evidence is not relevant for the object of the evidence in the case; when it is considered that in order to prove the fact which constitutes the object of evidence, sufficient evidence means were administrated; when the evidence is not necessary, since the act is notorious; when the evidence is impossible to get; when the request was formulated by a person who had no right to or it is against the law.

The new code has expressly regulated for the first time the principle of loyalty of procedures in the administration of evidence, in order to avoid the use of any means which might aim at the administration in bad faith of certain evidence or which might lead to the performance of a crime, in view of protecting the person's dignity and his right to an equitable lawsuit and to personal life.

The institution of illegal exclusion or disloyal administration of evidence has known a more detailed regulation. Evidence obtained under torture, inhuman or degrading treatments cannot be used in the criminal lawsuit. Another institution newly introduces is the exclusion of derived evidence (the doctrine of the "distance effect" or "fruit of poisonous tree") whose object is eliminating means of evidence legally administrated but which are derived from evidence illegally obtained. The exclusion of the derived evidence has applicability only when between the illegally administrated evidence and its derived evidence subsequently administrated there is a connection of necessary causality, and the judicial bodies mainly and directly made use of data and information resulted from the illegal evidence, in the absence of any other alternative source and without the definite possibility to be found in the future, in order to legally administrate the derived means of evidence.

b) Hearing of persons

The new code regulates minute regulations for hearing the suspect, the defendant, the injured person, the civil party, the civilly responsible person, the witnesses and the experts.

The main elements of novelty introduced refer to:

- guaranteeing the dignity of the person and the protection of his health during the hearing.
- written communication, previously to the first hearing of the suspect or defendant, of their rights, in order to ensure the right to an equitable lawsuit.
- audio or audio-video recording, during the criminal prosecution, of the hearing of the suspect or defendant;
- informing the injured person, on the first hearing, on the following rights and obligations: the right to be assisted by an attorney, the right to present evidence; the right to be informed about the deployment of the procedure; the obligation to be present at every citation formulated by the judicial bodies; the obligation to communicate any change of address; the obligation to tell the truth.

- the express regulation, in compliance with the jurisprudence of the European Court of Human Rights, the privilege against self-incrimination and hearing of the witness.

- related to the protection of the witnesses, a distinction is made between threatened witnesses and those vulnerable, providing special protection measures.

c) Identification of persons or objects

The new code proposes a detailed regulation of this evidentiary procedure, by capitalizing forensic techniques currently used in practice. It was also regulated the photo taking and fingerprinting of the suspect, defendant or other persons and the conditions in which it is possible to admit making public the photography of the person.

d) Special surveillance and investigation techniques

In order to respect the right to personal life and mail, the new code has introduced procedural rules regarding special surveillance and investigation techniques, able to meet the accessibility, predictability and proportionality requests

There are the following qualified and defined as special surveillance or investigation techniques:

- interception of conversations and communications
- surveillance by video, audio or photo shooting in private spaces;
- GPS surveillance or localization or by other surveillance techniques;
- getting the list of phone calls;
- retain, deliver or search postal packages;
- monitor financial transactions and reveal financial data;
- the use of under-cover investigators
- finding of a corruption felony or of concluding a convention;
- supervised delivery
- identification of the subscriber, owner or user of a telecommunication system or of a computer access spot.
- fast preservation of computer data, data referring to digital traffic or of those provided by telecommunication systems, in compliance with the Convention of the European Council regarding computer crime.[18]

It has been established the principle according to which the surveillance techniques are ordered by the judge of rights and liberties, and investigation techniques are ordered by the prosecutor. In all cases of authorization of such measures, the new code imposes the need of an existent reasonable suspicion about the performance of a crime, the compliance with the principle of subsidiarity, being underlined the character of exception of interference with the right to personal life and the principle of the proportionality of the measure by limiting the right to private life, relative to the peculiarities of the case, the importance of the information or evidence to be acquired or the gravity of the crime.

[18] Ratified by Law no. 64/2004, published in the Official Monitor no. 343 of 20 April 2004.

In order to ensure the right provisioned by art. 8 of the European Convention regarding the protection of human rights and fundamental liberties, it is established as a principle, the prosecutor's obligation, once the technical surveillance measure ended, to inform in writing, in the shortest time, each subject of a warrant about the technical surveillance measure that was used in the subject's case.

Though introducing all procedures defined as surveillance or investigation techniques in one body of norms seems to be something positive, we must reflect on the general outcome of such an operation, from the perspective of the following question: what is lost when something is gained? Apparently, we have gained on the level of formal rigour and operation but haven't we reached a harmful level of what we might call the trivialization of interferences onto the fundamental rights? All techniques mentioned above have been extracted from the special procedural legislation (applicable only to *certain* crimes) and concentrated into the new code, under the name of special techniques. As far as these techniques preserve their special character, wouldn't it have been more legitimate to keep them in the origin legislations, also qualified as special? Transferring them to the common law, only makes them more visible, more frequentable and obviously, more easily acceptable. That this is the case follows from the fact that special techniques are available to investigate all crimes sanctioned by the law with a 5-year prison sentence or longer (art. 139). The exception has turned into rule.

There are also special techniques which can be defined from the very beginning as "poisonous fruit".[19] Simulating corruption acts (procedure which allows the judicial police officer, the undercover investigator or a collaborator of justice to offer bribe - art. 138, art. 150) or the investigator's right to install recording devices in private spaces - art. 140 (including a person's bedroom?!)

e) The search

The new code introduces detailed regulations regarding the evidentiary procedure of the search, depending on its nature: house search, body search, computer search or the search of a vehicle.

- *House search.* Besides the need to find or collect evidence existing in a house, when there is a reasonable suspicion about a crime having been committed, it is provisioned the possibility to perform the house search in order to preserve traces of the crime or to capture the suspect or the defendant.

- *Body search.* The new code establishes the possibility to perform body search in order to find traces of the crime, material evidence or other objects which are important for finding out the truth in question. The body search implies external bodily examination of a person, which might also include examination of the oral cavity, the nose, ears, hair, clothing, and personal objects on the person or under his control at the moment of the search. The distinction is made between the institution of body search

[19] *Viorel Paşca, Romanian Criminal Lawsuit between Authoritarianism and liberalism, vol. International Biennial Conferences 2008, Faculty of Law and Administrative Sciences, Publishing House Wolters Kluwer, Bucharest, 2010*, p. 201.

and physical examination, the latter implying the external and internal examination of the person's body, collection of biological samples, being a more invasive evidentiary procedure which necessitates a stricter control on the way it is performed.

- *Search of a vehicle.* The new code makes distinction between the protection provided to the house and the one provided to the vehicle, regulating the conditions in which the search of the exterior or interior of a vehicle or another means of transport and their components can be performed

Thus, it has been expressly provisioned that the judicial bodies have the possibility to inspect a vehicle or some of its accessible parts either by visual inspection or by dismantling the vehicle's components.

- *Computer search and access to a computer system.* The new code established a joint provision for the two evidentiary procedures in view of respecting the right to private life. The computer search implies the investigation of a computer system or of a storage device of the computer data, in order to find and gather evidence necessary to solve the case. The access to a computer system means to access in a conspired war a computer system or some part of it, or to a storage device of computer data in order to gather evidence, either on the location of the system or the support accessed or remotely, by using special software.

f) Expertise

According to the new regulation, the expertise can be performed by official experts or independent experts nationally or internationally authorized. It was provisioned the possibility of hearing the expert in compliance with the provisions related to the hearing of witnesses, by the criminal pursuit authority or by the court, on the request of the parties or appointed, when the judicial body considers the hearing necessary for clarifying the expert's findings or conclusions. Thus, the additional expertise can be ordered only if it has been established that the expertise in not complete and this flaw cannot be substituted by the hearing of the expert. Furthermore, the performance of a new expertise can be ordered only if the conclusions of the expertise report are unclear or contradictory, or there is contradiction between the content and the conclusions of the expertise report, and these flaws cannot be eliminated by the hearing of the experts.

The new code contains a detailed regulation of the ways to performs:

- psychiatric forensic expertise and hospital admission of the suspect or the defendant into a specialized medical institution for this expertise to be carried out;
- forensic autopsy, exhumation and the forensic autopsy of the foetus or a newly-born child;
- toxicological expertise;
- forensic examination of the person;
- physical examination;
- DNA expertise;

VII. Preventive measures and other procedural measures

In compliance with the jurisprudence of the European Court of Human Rights, it was provisioned the explicit regulation of the principle of proportionality of every preventive measure with the gravity of the accusation brought to a person, and the principle of necessity of such a preventive measure in order to achieve its legitimate goal.

As far as the preventive arrest is concerned, on the level of principle, its exceptional character and the subsidiary character of it related to the other non-custodial preventive measures. Consequently, the preventive arrest can be order only if by taking a different preventive measure is not sufficient for reaching the legitimate goal.

To enhance the efficiency of the above mentioned principles, it is admitted the competence of the prosecutor is or, as applicable, of the judge of rights and liberties to order the measure of judicial control or judicial control on bail, institutions regulated as distinct preventive measures. The proposed regulation changes the previous outlook on the procedural institutions of the judicial control and respectively, the bail, which presently are applicable only in case of a defendant who has been previously placed under preventive arrest.

There have been reformulated the cases where preventive arrest of a person can be ordered in compliance with the jurisprudence of the European Court of Human Rights and the model of the criminal procedure codes of the EU states. Thus, situations when deprivation of liberty can be ordered have been recognised as general cases: when there is a risk to avoidance, the risk of influencing the criminal investigation and the risk for a new crime to be committed. In case of serious crimes, (such as those against life or those with a prison sentence longer than five years), the new code introduced a special case of preventive arrest, respectively the case of the existence of a real threat to public order. Despite the previous regulation, the new code establishes the legal criteria used to assess the mentioned threat and it also provisions, by the German model, a new legal feature of it, respectively its current nature, which implies its being proved at the moment the deprivation of liberty is ordered.

In order to ensure that the eminently preventive character of the arrest ordered during a criminal lawsuit is complied with, the new code, finding inspiration in the model of the Italian Criminal Procedure Code, stipulated the establishment of maximum terms for the preventive arrest and for the trial stage.

As an absolute novelty for the Romanian criminal law, a new preventive measure was introduced, respectively house arrest by the model of the Italian Criminal Procedure Code, aiming at enlarging the individualization possibilities of the preventive measures, related to the previously mentioned principles.

Regarding the minors, it was stipulated as a general rule, the possibility of preventive deprivation of liberty of the minor only if the effects of such a measure on the personality and development of the minor are not disproportioned compared to the legitimate objective aimed at by having taken the above mentioned measure.

VIII. Criminal prosecution

In order to ensure the celerity of the criminal lawsuit, the stage of criminal prosecution was simplified by establishing a fast verification procedure of the intimation addressed to the criminal prosecution authorities, which allows, if the content of the intimation leads to the conclusion that a criminal act was committed and it is not about one of the cases in which the criminal prosecution authority is prohibited to exercise the beginning of the criminal prosecution of the criminal act, to start the investigation stage of the criminal act, being thus drawn-up the general framework of the criminal lawsuit. Thus, it was eliminated the stage of preliminary acts which would prolong the stage previous to the start of the criminal prosecution and it would imply activities similar to the administration of evidence during the criminal lawsuit, without ensuring all its specific guarantees.

Consequently, all activities carried out by the police forces will be deployed during the criminal prosecution, which ensures that the rights and guarantees granted to the investigated person would be respected during the whole duration of the criminal lawsuit and it also ensures that practical inconveniences, generated by the unjustified extension of the categories of investigation acts allowed in this stage, would be eliminated.

Redesigning the stage of criminal prosecution brings as a novelty the fact that the criminal prosecution is carried out in two distinctive phases: the investigation of the criminal act and the investigation of the person. If the phase investigating the act starts, as it was shown above, by notifying the competent judicial bodies, the investigation of the person phase is marked by the act of starting the criminal proceedings.

It was also expressly regulated the interdiction to hear as a witness a person reasonably suspected of having committed a felony. There were thus answered this issues existing in the current practice when it had been allowed that a person reasonably suspected of having committed a felony to be heard as a witness, in the preliminary proceedings.

The start of the criminal proceeding was approached in a new concept. Thus, the start of the criminal proceeding takes place when the administered evidence offers reasonable motifs to believe that the suspect has committed the criminal act. He acquires the quality of a suspect, which provides him the rights specific to this part of the criminal lawsuit and it is eliminated the possibility that the indictment could be ordered by public prosecutor's charge, thus being ensured the full exercise of the right to defence.

As an element of novelty within the deployment of the criminal prosecution, the new code also contains the regulation regarding the procedure of anticipated administration of evidence. This procedure is carried out when there is the danger that certain evidence could be no longer administrate in front of the court and it is subject to the competence of the judge of rights and liberties.

Another element of novelty is represented by the categories of settlements of no ground for criminal prosecution. The new code only stipulates two ways of non

reference to the court; the prosecutor settles the case by closing it or by waiver of prosecution.

First of all, it is aimed at, as a consequence of the principle of opportunity, regulating the settlement alternative to criminal prosecution, assigned to the prosecutor's competence, respectively the waiver of prosecution. Thus, in case of crimes for which the law provisions sanctioning by fine or sentence to prison up to 7 years, the prosecutor can withdraw the defendant's criminal prosecution when, depending on the person of the defendant, his conduct previous to the crime, the content of the crime, means of committing it, purpose of the crime and the real circumstances in which the crime has been committed, the effort made by the defendant to remove or diminish the consequence of the crime, the prosecutor finds that there is no public interest in his prosecution. The criminal prosecution can be withdrawn only after the criminal proceedings started and when the prosecutor finds that the evidence administrated in the case sufficiently proves that the defendant had committed the crime he was charged with. The cessation of the criminal prosecution can be ordered previously to the notification of the preliminary chamber and implies the optimal selection of some of the obligations established in the defendant's charge, so that it would be ensured the efficiency of this alternative way. Furthermore, the failure to fulfill the obligations within the established term induces the penalty of revocation of the measure and the interdiction to subsequently order a new withdrawal of criminal prosecution in the same case.

Secondly, the dismissal unites all solutions of no ground for criminal prosecution which in the previous regulation were provisioned under the name of no ground for criminal prosecution, release from criminal prosecution or cessation of criminal prosecution.

The new code eliminates the procedure of presenting the criminal prosecution material, since it is ensured the actual defence of the defendant in the criminal prosecution stage, by having regulated the right of the defendant's attorney to assist at the carrying out of the criminal procedure documents and the detailed provision of the right to consult the file during the whole duration of the criminal lawsuit.

The introduction of the agreement of recognition of the guilt, even limited to crimes which are sanctioned by the law with a fine or up to 7 years in prison, brings about a dramatic change in the Romanian criminal lawsuit. The procedure of the agreement of recognition of the guilt not only reduces the duration of the criminal lawsuit of the case, but it also simplifies the activity of criminal prosecution. One of the most frequent arguments in favour of this procedure is the economic advantage, which more or less favours nearly all parties of a lawsuit, but mostly the state, which has the possibility to save essential financial and human resources. Today, several European countries (Germany, France, Belgium and Greece) have adopted in their legislations procedures similar to the institution of the agreement of the guilt recognition. The new code overtook elements from the French and German criminal law and adapted them to the characteristics of the Romanian judiciary system.

Without neglecting the rights of the injured person, the defendant has the opportunity to negotiate with the prosecutor the terms of his agreement and thus to participate to the procedure of decision making in establishing the sentence. This type of

participation promotes human dignity. Like the trial carried out on basis of evidence administered in the phase of criminal prosecution, the trial on basis of agreement of guilt recognition is an abbreviated form of the trial for certain crimes, meant to enhance the responsibility of the parties in the lawsuit and relieve the courts. The agreement can be concluded only for crimes sanctioned by the law with a fine or maximum 7 years in prison and only in the case when the evidence administered provides sufficient data regarding the existence of the crime for which the criminal proceedings were started and regarding the defendant's guilt. The agreement is subject to the control of the court regarding its object and the terms of the agreement and if the agreement is admitted, the court will order a sentence for the defendant which cannot be bigger than the sentence requested by the prosecutor by means of the agreement. If the agreement is rejected by the court, the prosecutor will continue the criminal prosecution according to the common law procedure.

IX. Procedure of the preliminary chamber

By regulating the procedure of the preliminary chamber is aimed at solving issues related to the legality of the reference to the court and the legality of the administration of evidence, ensuring the premises to solve with celerity the substance of the case. In this context, the procedure of the preliminary chamber contains rules which eliminate the possibility to subsequently return, in the trial phase, the file to the prosecutor's office, because the legality of the evidence and the reference to the court are settled in this phase.

The new code establishes the competence of the preliminary chamber judge in verifying the conformity of the evidence administered during the criminal prosecution. If the judge finds that the means of evidence should be removed since it essentially damaged the rights of one of the parties in the lawsuit, he will eliminate that means of evidence.

The new institution has focused the specialists' interest within the waiting period for the new code to enter into force. Some appreciated it as being innovative[20] while others placed themselves definitely against the institution.[21] Among the weak points, there have been mentioned: the object of the preliminary chamber lacks of verification of the degree of suspicion of the accusation, starting from the role of the institution to protect the citizens against arbitrary accusations, but mainly the lack of publicity and the contradictory nature of the procedure. How was it possible that a criminal procedure, overtaken from the adverse system, with a protective role, should be regulated in the most genuine inquisition style? And how could such an institution meet the equity requirements of the criminal lawsuit? Questions to which we need to find an answer.

X. First instance trial

The trial in substance was conceived as a complex of specific proceedings and procedures, having as goal the adjudication of a legal and sound solution, equally founded on law and truth.

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[20] Laviu Florin Uşvat, *Is the preliminary chamber a distinct phase of the criminal lawsuit? Law Magazine* no. 3/2014, Publishing House. Universul Juridic, Bucharest, p. 91-104.

[21] Diana Ionescu, *Quoted Works* p. 92-93.

The prosecutor, as the holder of the criminal proceeding will have to prove the charge by administration of evidence. Consequentially it is redesigned the role of the judge, who will make sure that the procedures carried out in front of him should have an equitable nature, the principle of the active role not being established *per se.*[22] To this purpose, if the judge considers it necessary, will order the administration of other evidence than those indicated by the prosecution or the defence.

The introduction of new institutions in the stage of first instance trial, as it is the "trial based on evidence administered during the criminal prosecution" does not have the role to answer merely formally a need of reforming this stage of the criminal lawsuit. This institution, which implies the admission by the defendant of the facts mentioned in the notification document of the court, is consistent with the need of an efficient trial by eliminating some cumbersome procedures often unnecessary to establish the judicial truth.

It has been eliminated the possibility to extend the criminal proceedings or the criminal lawsuit, institutions which contribute to the delay solving the case for which the court was notified.

Regarding the new facts found during the trial, it is regulated the carrying out of distinct criminal prosecution procedures in order to avoid the delay or the dilution of the initial case. It is equally eliminated the institution of returning the file to the prosecutor in order to remake prosecution. The elimination of the return is procedurally prepared by regulating the competence and the regime of nullities and also by introducing the procedure of the preliminary chamber.

According to the principle already existing in the civil procedure, the non final court orders will be integrally communicated to those, who, according to the law, can exercise remedy.

The text of art. 357 line (2) of the new code provisions that "During the trial, the president, after having consulted the other members of the panel of judges, can reject the questions formulated by the parties, the injured person and the prosecutor, if they are not conclusive and useful for the settlement of the case." The text seems reasonable, since it is acknowledged to the panel of judges the competence to filter the questions asked by the parties. The text was necessary in relation to the new regulation concerning the possibility that the examinations could be conducted by the parties or by their attorneys (art. 378, art. 380, art. 381). Thus, the new code made an important step towards an institution originated from the Anglo-Saxon law *cross-examination,* considered to be of capital importance for the criminal lawsuit.[23]

Regarding the cases of incompatibility of magistrates, the procedures of abstention and objection so that the celerity of the criminal lawsuit could not be affected by

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[22] Flaviu Ciopec, *Remarks on Trial in Substance of the Criminal Case from the Perspective of the New Code of Criminal Procedure*, *Annals of the Timisoara West University, series Law, no.* 1/2014, Publishing House. Universul juridic, Bucharest.

[23] In John Henry Wigmore's terms „cross-examination is the greatest legal engine ever invented for the discovery of truth", *Evidence in Trials at Common Law*, Little Brown, 1974, § 1367, 32.

repeated abstentions and objections, including by refusing all the judges of the court or the prosecutors of the prosecutor's office, fact which would lead to the delay of solving the criminal case, at the expense of the operational character of the act of justice.

XI. Trial in appeal

In order to ensure the celerity of the criminal lawsuit and the reduction of the duration of settling the criminal case, under the circumstances of higher guarantees for the criminal prosecution stage and the first instance trial, regarding the remedy, the new code provisions an ordinary remedy to the appeal, totally devolutive. Thus, only one ordinary remedy is maintained, increasing thus the efficiency of the principle of double degree of jurisdiction, stipulated by art. 2 paragraph 1 of Protocol 7 of the European Convention for the defence of human rights and fundamental liberties.

The court of appeal can readminister the evidence administered in first instance and can administrate new evidence, having the obligation, besides the reasons invoked and the request formulated by the plaintiff in appeal, to examine the case and verify the decision of the first instance in all factual and legal aspects. The new code eliminates the institution of appeal over term, taking into consideration the detailed regulation of the opportunity to reopen the criminal lawsuit in case of trial in the absence of the defendant.

XII. Trial in extraordinary remedies

The new code of criminal procedure proposes substance modifications to the matter of extraordinary remedies:

a) The appeal in cassation (petition) will be a remedy, exercised only in exceptional cases, only for reasons of illegality and it will provide nationally wide unitary practice. By this remedy, whose settlement lies only in the competence of the High Court of Cassation and Justice[24] the conformity of final decisions attacked with legal rules is analysed in relation to the cassation cases, expressly and restrictively provisioned by the law. There are expressly stipulated the decisions which can be remedied by appeal in cassation (petition) and those which do not undergo this extraordinary remedy.

The general term for submitting the appeal in cassation is 30 days from the date the decision of the court of appeal was communicated. Regarding the specifics of this extraordinary remedy, strict conditions were imposed in relation to the content of the cassation appeal application, in order to ensure the discipline and the rigour of the lawsuit and avoid the abusive submission of appeals which do not respect the motifs stipulated by the law. The cases in which the appeal in cassation can be exercised aim exclusively the legality of the decision and not factual matters. They can constitute ground for cassation of the decision only if there were not pleaded by appeal or during the appeal trial or, despite having been pleaded, they were rejected or the court omitted to pronounce itself on them.

[24] On this occasion, the Supreme Court will finally have competences consistent with its title The High Court of Cassation, title adopted in 2004, but lacking real correspondence till today.

The submission of the application for the appeal in cassation does not have a suspensory nature, but after admission in principle, the execution of the decision can be justifiably suspended, totally or partially, with the possibility to enforce the defendant to comply with certain obligations.

b) As far as revision is concerned, a new case has been regulated, when the decision was based on a legal provision which was pronounced unconstitutional after it had been pronounced final, in the event that the consequences of violating the constitutional provision continue to be produced and cannot be remedied but by revision of the pronounced decision. It has been thus regulated a procedural remedy, in order to eliminate the possibility to suspend criminal cases during the development of the settlement procedure for exceptions of unconstitutionality.

c) In the original version of the project of the new code, it was eliminated the extraordinary remedy of contestation for annulment, a traditional remedy of the Romanian law system, which aimed at eliminating procedural errors incurred in front of courts of final instance.

The reason of this elimination is the fact that the role was overtaken by the appeal in cassation. After having been consulted the magistrate judges, it resulted that the extension of cases where appeal in cassation can be exercised would have led to a substantial increase of competence and overcharged load of work for the Criminal Section of the High Court of Cassation and Justice. Consequently, the procedural grounds have been eliminated from the appeal in cassation and turned into grounds for contestation in annulment, according to the judicial nature of this remedy.

d) The new code establishes a new extraordinary remedy for withdrawal, reopening of the criminal lawsuit in case of trial in the absence of the convicted person, in order to ensure the compatibility of the Romanian legislation with the standards imposed by the jurisprudence of the European Court of Human Rights. The lawsuit is usually judged in the presence of the defendant. In all cases where it does not result that the absence of the defendant at the trial is the result of a deliberate and unequivocal act on the behalf of the defendant by giving up his right to be heard by the court and defend himself in the trial, this subsequent procedure is regulated, by which after hearing the absent person, judgement would be given on the validity of the allegations brought to him.

In this respect, it is provisioned the opportunity for the person convicted with a final sentence, who had been judged in absence, to request the reopening of the criminal lawsuit in term of 6 months from the date he acknowledged that a criminal lawsuit had been taken place against him, on the condition that the term for prescription of the criminal liability had not turned. It is defined as a person judged in absence the defendant who, on the trial, had no knowledge about the lawsuit, or despite having known about it by any means, was absent from the trial of the case on valid grounds

XIII. Providing a unitary judicial practice

In order to ensure a unitary judicial practice the new code proposes the modification of the appeal on points of law, which, presently, is regulated by the extraordinary remedies and the introduction of a new mechanism, the referral to the

High Court of Cassation and Justice in order to pronounce a preliminary decision to solve some law issues. [25] Thus, this last procedure implies:

- the request for principle settlement of a law issue on which depends the settlement of a case, a law issue which was not unitarily solved in the practice of the courts;
- The referral of the High Court of Cassation and Justice is made of its own motion or on the request of the parties, after contradictory debates, by conclusion, which is not submitted to any remedy.
- In order to ensure the efficiency of this new mechanism, the decision of the High Court of Cassation and Justice, published in the Official Monitor, will be mandatory both for the court that made the request for solving the law issue and for all the other courts.

XIV. Execution of criminal decisions

The regulations contained under this title targeted the correlation with the provisions of the general part of the new Criminal Code. On one hand, it was aimed at introducing the newly regulated institutions into the criminal code – for instance, the complementary sentence of making public or publishing the conviction decision, delay of execution of the sentence, replacing the sentence with fine by work for the community and on the other hand, it was aimed at eliminating the institutions which do not have a correspondant in the new criminal code or are no longer functional – for example, the provisions referring to execution of sentence at the work place or those referring to the execution of sentences by militaries or the replacement of criminal liability.

In the matter of safety measures of medical nature, there were taken into consideration the comments made by the representatives of the National Institute for Forensic Medicine. The proposed regulation does not contain any more those provisions which were not compatible with the valid legislation or the jurisprudence of the Court of Strasbourg in the matter and which represented un unjustified intrusion of the court in the prescription of a medical treatment by specialists.

In order to find those solutions which could increase the degree of celerity of the trial, judges delegated for monitoring the deprivation of liberty have been consulted and the majoritary opinion was that their role is to ensure that the prisoners' rights in the detention places would be respected, the more so since publicity cannot be ensured in the detention places or the contradictoriality of the court hearing. From this point of view, the conclusion was drawn that the court is the solely able to ensure the conditions necessary to settle the circumstances occured during the execution of the sentence, in compliance with the principles and the right to an equitable lawsuit.

Provisions no longer consistent with the practical realities, such as the one regarding the delay or interruption of the execution of the sentence on family grounds, institution which is not justified by solutions pronounced in practice, mostly all of them

[25] At the time this study has been ellaborated, the High Court already pronounced, on la 14.04.2014, the first two decisions in compliance with the procedure in question. Further details on http://www.mpublic.ro/recurs_penal.htm.

had been of rejection, were eliminated and it was taken into the consideration as well the multiple changes in the organization of the activity of the national Administration of Prisons, which allow the prisoners to carry out activities in prison or their circulation outside the detention place, by a simple administrative disposition, under special circumstances.

XV. Conclusions

All the matters presented above appear to signify the presence of a very strong will of change. One thing remains certain - this project attempts to solve a series of issues found in the practice of courts. Nevertheless, the major issue is represented, as mostly, by the attempts to search for the ideal solutions.

Though in many cases, the introduction of new procedures and institutions of European origin proves to be pertinent and functional, there are also cases when overtaking mimetically[26] some European structures turns into a true legislative truism (new names, identical procedures).

[26] Flaviu Ciopec, Magdalena Roibu, *The New Code of Criminal Procedure: Mimetism or Innovation?* Annals of West University, series Law no. 2/2007, p. 170.