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The Principle of Respecting the Rights of the Suspect/Accused, the Principle of Equality of Arms and the Principle of Immediacy - Basic Principles of the Criminal Trial

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Abstract: By the basic principles of the criminal trial, we understand those rules of a general nature based on which the entire development of the criminal trial is regulated. The fundamental principles of the criminal trial are written as basic rules in the Criminal Procedure Code. Apart from these principles, procedural doctrine, judicial practice and other legal provisions enshrine other fundamental ideas that can be considered principles. Among these, the principle of equality of arms and the principle of immediacy are among the most important, because along with the presumption of innocence, they are the guarantors of the rights of the suspect or the accused.

Keywords: *rights of the suspect/accused; the principle of equality of arms; the principle of immediacy.*

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1. Introduction

From the perspective of the principle of respect for the rights of the suspect or defendant, we will highlight the right to remain silent and the privilege against self-incrimination that he enjoys. Both the right to remain silent and the privilege against self-incrimination are regulated by art. 99 para. (2) of the Criminal Procedure Code, as well as the jurisprudence of the European Court, in the interpretation of art. 6 para. 1, as a component of the right to a fair trial (Romanian Parliament, 2014b). The right to remain silent implies the negative procedural obligation of judicial bodies not to be able to compel a suspect or defendant to give statements (Barbu, 2015; 2016a; 2016b). Correlatively, the refusal of the suspect or defendant, which does not have to be justified, cannot be used against them (Udroiu, 2020, p. 341).

The guarantee of compliance with the principle of the right to remain silent can be found in the procedure provided by art. 108 para. (2) related to art. 83 letter a). Unlike the right to remain silent, the right not to contribute to self-incrimination has a wider scope of applicability, including the right to refuse to give statements and the right to refuse the delivery of certain objects, or even the performance of actions that incriminates (nemo debet prodere se ipsum) (Romanian Parliament, 2014b). At the same time, it should be noted that the sanction arising from the violation of any of the two rights is relative nullity under the terms of art. 282 OF THE CRIMINAL PROCEDURE CODE, sanction that operates only in the event of proof of procedural injury (Romanian Parliament, 2014b).

2. The content of the principle of equality of arms and the principle of immediacy

The principle of equality of arms is one of the principles mainly specific to the trial phase in both stages (trial on the merits and trial on appeal) and which requires the court to ensure an effective, not just apparent, balance of treatment between prosecution and defense (Barbu et al., 2019). This principle has a much wider scope, it does not refer exclusively to evidence, but its valences cannot be overlooked in situations when the defendant could not benefit, as is often the case, from specialised legal assistance during the criminal investigation phase, and most of the existing evidence concerns the accusation (Barbu & Pană, 2021). In such circumstances, requests for evidence from the defendant (Florea et al., 2019; Gales et al., 2019) will have a high margin of admissibility due to this principle. In the same sense, the coverage of irregularities regarding the right

to defense can be remedied both by applying the principle in question and by its complement, namely the principle of immediacy, which presupposes a direct perception of the evidence by the court (de visu et auditu).

A very important notion in this matter is that of the object of the evidence (thema probandum). The object of the evidence is mentioned in art. 98 of the Criminal Procedure Code(Romanian Parliament, 2014b), as it needs to ascertain: the existence of the crime and its commission by the defendant, the facts regarding civil liability, when there is a civil party (for example, the existence of concurrent fault, or the existence of a legal child support obligation), the facts and factual circumstances on which the application of the law depends - for example, in the situation when the Romanian criminal law is applied based on the principle of personality or reality in the matter of the existence of a prior authorization of the general prosecutor affiliated to the public prosecutor's office attached to the court of appeal in whose territorial constituency the prosecutor's office who was first notified is situated or, as the case may be, the general prosecutor affiliated the prosecutor's office attached to the High Court of Cassation and Justice (Romanian Parliament, 2014a, art. 9 para. 2 and art. 10 para. 2), or any circumstance necessary for the just resolution of the case.

Summarizing, this represents "what must be proven in the criminal process" (Mateuţ, 2019, p. 450), i.e. the administration of the evidence provided by law in order to establish the existence or non-existence of the facts or factual circumstances that constitute the crime (Damian et al., 2021), that have to be clearly deduced from the judgment and which represent the factual basis of the criminal and civil action (Udroiu, 2020, p. 273). It can be observed that the object of the evidence consists of certain facts or circumstances in relation to these facts, and the legislator did not provide the need to prove some domestic law situations in the exemplary enumeration provided by art. 98 of the Criminal Procedure Code(Romanian Parliament, 2014b), thus respecting the principle *nemo censetur ignorare legem*. Also from the dispositions of art. 98 of the Criminal Procedure Code(Romanian Parliament, 2014b), it can be observed that the legislator chose to consider foreign legal provisions (Mateuţ, 2019, p. 451) and extra-penal norms (Udroiu, 2020, p. 274) as matters of fact and therefore which can be proven. Also, the doctrine (Udroiu, 2020, p. 274) states that the object of probation can be extended. Extension targets the criminal prosecution phase through the procedure provided by art. 311 of the Criminal Procedure Code(Romanian Parliament, 2014b) regarding the extension of criminal prosecution.

Regarding the burden of proof (onus probandi), the seat of the matter is represented by art. 99 of the Criminal Procedure Code (Romanian Parliament, 2014b). Paragraph (1) distinguishes between the two actions that can be exercised within the criminal process, stating that "in the criminal action the burden of proof belongs mainly to the prosecutor", and "in the civil action, to the civil party or, as the case may be, to the prosecutor who exercises the civil action". Through this legal text, the Romanian legislator tries to implement amendments compared to the old regulation, which in art. 62, which imposed the burden of proof on the court, which had to administer evidence so that the guilt and the innocence of the defendant would be proven beyond any reasonable doubt. Currently, art. 100 paragraph (2) enshrines a subsidiary role of the court in the administration of evidence. In the light of the mentioned provisions, we can easily observe that although we are not talking about a burden of proof imposed per se on the court, it is recognized that the court has certain prerogatives in the administration of evidence, that can be implied from the phrase "when it considers it necessary for the formation of the courts conviction", so that whenever the court considers that the administration of a means of evidence or an evidentiary procedure is required, it will, in compliance with the principle of adversariality, resort to its administration (Romanian Parliament, 2014b).

The same active role of the court is provided by the provisions of art. 374, which in para. (7) tries to maintain, within reasonable limits, the idea of subsidiarity imposed by art. 100, but the active role is again enshrined in paragraph (8), which gives the court the possibility of the "ex officio administration" of the evidence referred to in paragraph (7) (Romanian Parliament, 2014b). However, the notion of the burden of proof, which implies an obligation, should not be confused with the possibility of the court to exercise an active role, the current regulation conferring only the faculty of exercising an active role, and not an obligation on the court, as the criminal investigation bodies are oblidged to do (Udroiu , 2020, p. 275).

Regarding art. 99 para. (1), this will have to be corroborated with the provisions of art. 285, that has the marginal note "Object of criminal prosecution" and which provides, in para. (1), that "the object of the criminal investigation is to gather the necessary evidence", but also with the provisions of art 100 paragraph (1), which provide that "during the criminal investigation, the criminal investigation body collects and administers evidence..." , so that in the criminal investigation phase the burden of proof belongs to the criminal investigation body, i.e. the prosecutor and the criminal investigation body (Romanian Parliament, 2014b).

The idea of placing the prosecutor at the center of the geometry of the evidentiary mechanisms is not at all accidental, considering his constitutional role as guarantor of the "general interests of society and the legal order" (Chamber of Deputies, n.d., |Art. 121), because he has the obligation to find out the truth and complete the operational purpose of the criminal process. Although the text of art. 100 speaks of the "criminal investigation body", in reality we must not overlook the provisions of art. 299 et seq. of the Criminal Procedure Code, which also establishes and imposes the obligation to "conduct and supervise the activity of the criminal investigation bodies" (Romanian Parliament, 2014b).

The same idea is supported by the provisions of art. 305 paragraph (3) of the Criminal Procedure Code, which provides for the positive procedural obligation of the criminal investigation body to submit for confirmation the solution to continue the criminal prosecution and, *a fortiori,* of art. 311 para. (2) of the Criminal Procedure Code, which regulates the extension of criminal prosecution against a person, solutions that are available "when there is evidence" and therefore the prosecutor will be the one who will appreciate the aspect of substantiation that refers to the administered evidence (Romanian Parliament , 2014b). Also, in order to reach a criminal action within the meaning of the provisions of art. 99, we must consider the provisions of art. 309, regarding the initiation of criminal proceedings, which require the evaluation of the evidence by the prosecutor (Romanian Parliament, 2014b).

3. The applicability of the principle of equality of arms and the principle of immediacy in the exercise of the criminal action and the civil action

The burden of proof in criminal proceedings depends directly on the principle of the presumption of innocence. This idea is implicitly supported by the regulation of this principle in the article entitled "Burden of proof". The link between the two legal institutions emerges from the fact that, as we have shown previously, the existence of suspicions, doubts, assumptions in relation to the defendant's guilt will be interpreted in his favor (in dubio pro reo). As a result, the prosecution must take care of completly prosecuting the case, which confers certainties in order to establish the object of the judgment, so that the legally administered evidence (Huidu, 2019a; 2019b) is able to remove the presumption of innocence by the act of sentencing through a definitive decision by the court.

Otherwise, although the presumption of innocence is *una iuris tantum*, the lack of the solidity of the evidence (for example, certain violations of the

rights of the suspect/defendant not sanctioned in the preliminary chamber phase will lead to the hypothesis of review/re-review before the trial court or the court of appeal, in order not to affect the reliability of the evidence; "groundedness" refers to aspects of reliability and not legality, or the lack of legality (in case the illegality affects the administration of the evidence, respectively the conduct of evidentiary procedures, when sanctioned by the judge of the preliminary chamber) will lead to the pronouncement of an acquittal, respectively a dismissal (in cases such as the annulment of illegal acts, the exclusion of the evidence obtained in this way and the return of the case to the prosecutor's office in order to complete the criminal prosecution, and as a result of the return, certain impeding conditions are found in readministration). Within the meaning of art. 100 paragraph (4) , the prosecutor will have to order the classification keeping in mind art. 16 paragraph 1 letter c).

The opinion was expressed in the jurisprudence (Grădinaru, 2014, p. 18) that the evidence from the criminal prosecution phase should be decisive only for the referral of the case to the court. But although the statement is apparently correct, we cannot entirely agree with it. In support, we show the fact that one of the components of the purpose of the criminal process is the "timely and complete ascertainment of the facts that constitute crimes", and the criminal investigation bodies have a positive procedural obligation to administer evidence both in favor and against the suspect or the defendant. The entire activity of the criminal investigation bodies must aim at finding out the truth. Moreover, the stage of the preliminary chamber does not involve an analysis of the reliability of the evidence, or of the referral act, but it is more precisely about a regularity of the indictment - so we are talking about an intrinsic control (Udroiu, 2020, p. 184), respectively an extrinsic control of its substantive and formal conditions, a verification of the legality of the administration of evidence and the drawing up of documents in the criminal investigation phase.

Considering that this is the only case in which we are talking about a referral document that goes through the preliminary chamber phase, the other two referral documents, namely the agreement to admit guilt and respectively the conclusion of the preliminary chamber judge as a result of the procedure provided for by art. 340-341 of the Criminal Procedure Code, the agreement that orders the start of the trial, do not go through the phase of the preliminary chamber: the recognition agreement is checked both in terms of legality and evidentiary basis by the trial court, and in the case of the conclusion of the preliminary chamber judge, as a result of the procedure we mentioned above, it will be referred to the trial court.

So, until this moment, we draw the conclusion that the notion of "referral to the court" only assumes the intrinsic nature of the indictment, i.e. to comply with the criteria provided in the jurisprudence of the European Court regarding the predictability of the law (Udroiu, 2020, p. 184) relative to the identification and description of the facts and the person against whom the criminal investigation was carried out (Romanian Parliament, 2014b, Art.328 para. 1 sentence I), and not to a certain evidentiary reliability. This article also reinforces what has been shown in art. 374, which in para. (7) provides that the evidence from the uncontested criminal prosecution phase will not be re-administered during the judicial investigation. Therefore, the notion of "referral to the court" considered by the jurisprudence cannot be considered the exclusive purpose of the criminal prosecution, but if we were to interpret the activity of the judicial bodies in the defendant's favor, we could draw the conclusion that the notion used by the court is that of administration of a sufficient number of evidence so that the criterion of art. 309 for initiating criminal proceedings is met.

In conclusion, we can affirm that the activity of the criminal investigation bodies does not have the exclusive purpose of "notifying the court", but its main purpose is finding out the truth and ensuring an optimal procedural framework, so that the principle of the equality of arms is respected and gives the court the opportunity to follow the principles of adversariality and immediacy in their spirit, and not just in their letter.

Regarding the burden of proof in the civil action, which is an accessory action to the criminal action (Udroiu, 2020, p. 61), the burden of proof belongs to the natural or legal person who suffered material or moral damage by the commission of the crime and who was established, in compliance with the conditions provided by art. 20 of the Criminal Procedure Code, as a civil part in the criminal process (Romanian Parliament, 2014b). Regarding the object of the evidence in the civil action, art. 98 letter b) clearly states that this represents "facts regarding civil liability", in reality going beyond the deficient way of drafting the indictment. This provision is about the elements necessary for incurring the tortious civil liability provided for by art. 1349 and art. 1357 of the Civil Code (the illegal act, the damage and its extent, assesing guilt - except for objective civil liability -, the causal link between the illegal act and the damage).

It should be noted that the Supreme Court of Romania (Udroiu, 2020, p. 60; Decision no. 1/RIL/2016) decided that the nature of liability is not exclusively tortious in all cases, but can also be of a contractual nature (as is the case of the insurer). We cannot overlook the active procedural legitimacy of the Public Ministry within the civil action in exceptional

institutions, in case of passivity on the part of the legal guardians of persons lacking legal capacity, or with limited legal capacity, this is why the law states that the civil action will also be exercised in the conditions of the general provisions of the law, i.e. art. 20 of the Criminal Procedure Code (Romanian Parliament, 2014b).

The exercise of the civil action by the Public Ministry does not imply, *per se*, the annihilation of any procedural independence between the participating prosecutor and the persons who *ab initio* remained passive and whose inaction justified the active procedural legitimacy of the prosecutor. Thus, the specialized literature (Udroiu, 2020, p. 98) has appreciated that representatives or legal guardians can conclude acts of disposition on behalf of the person lacking legal capacity or with limited legal capacity, such as mediation agreements, transactions and even can waive civil claims (without breaching the provisions of art. 158 para. 4 of the Penal Code, which can not be applied by analogy in this matter, as it provides for the hypothesis of the withdrawal of the prior complaint in the case of crimes for which the initiation of criminal proceedings presuppose the a priori existence of a prior complaint; the judicial bodies have started the investigation ex officio, due to the extraordinary conditions concerning the case, the withdrawal of the complaint will not produce effects if it is not appropriated by the prosecutor), and these documents are opposable to the prosecutor exercising the civil action.

4. Conclusions

Based on the fundamental principles of judicial activity in criminal matters, the criminal process is carried out in its entirety. The fundamental principles of the criminal process are of particular importance, as they are irrefragable absolute guidelines, from which there must be no deviation. There are situations when there are differences between the formal proclamation of some principles and their implementation in practice, arising, first of all, from the ways in which the existing rules ensure the protection of the rights and interests of the parties in the process.

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