

## NEW FUNDAMENTAL PRINCIPLES IN CRIMINAL PROCEDURE LAW MATTERS

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### Abstract

*“Upon the birth of the new Criminal Procedure Code, the intention was to establish it on the foundations of new principles which, along with the classical ones, should oblige the judiciary to achieve an independent and impartial criminal justice, able to restore the respect and confidence of the public opinion, as well as that of litigants in the act of justice.*

*These new principles are general rules present in the laws of the European Union Member States which underlie the modern criminal trial, rules whose validity and efficiency have been verified by the case law and jurisprudence of the European Court of Human Rights”.*

**Keywords:** *principles, term, trial, European, human rights.*

### Introduction

The appearance of a new Criminal Procedure Code is an important moment in the legislative and democratic development of any state.

In addition to expressing the political will, the decision to proceed to drafting a new Criminal Procedure Code was the outcome of the economic and social development as a whole and was based on a number of shortcomings present in the previous regulation.

The previous code entered into force in January 1969, and initially had to undergo the rigours of a criminal trial in a totalitarian state, being subsequently adjusted, through numerous changes, to the requirements of a democratic state.

Finally, and of utmost importance, the ratification in 1994 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has led to a direct application in the criminal trial of the European standards of protection, given that there had been numerous instances of a clear contradiction between Romanian criminal procedure rules and the jurisprudence of the European Court of Human Rights (hereinafter called ECHR).

In this context, as a corollary of previous constructive approaches, having the benefit of European sources of law<sup>1</sup>, the new Criminal Procedure Code was adopted by Parliament (Law no. 135/2010, published in the Official Journal of Romania, Part I, no. 486 of 15<sup>th</sup> July 2010).

The new Criminal Procedure Code imposed a legislative intervention aimed at:

1. Reducing the length of trials and simplifying criminal legal procedures by introducing new institutions (guilty plea agreement, rendering current means of evidence or evidentiary

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*In developing the legislative solutions of the new Romanian Criminal Procedure Code, national and international legal instruments were considered, among which we may mention the following: the Constitution of Romania, republished; the Romanian Criminal Procedure Code in force; the French Criminal Procedure Code; the Italian Criminal Procedure Code; the German Criminal Procedure Code; the Serbian Criminal Procedure Code; the Criminal Procedure Code of Bosnia and Herzegovina; the European Convention on Human Rights and Fundamental Freedoms.*

procedures compatible with European standards, reducing the degrees of jurisdiction, as well as regulating the appeal in cassation);

2. Providing a nationwide unitary jurisprudence, complying with the highest international standards of criminal procedure matters, respectively the standards of the European Court of Human Rights.

3. Establishing a modern legislative framework in criminal procedure matters, that would fully meet the operational imperatives of a modern justice, adjusted to social expectations, as well as the need to increase the quality of this public service.

4. Responding to the current requirements, such as accelerating the length of criminal proceedings, simplifying them and creating a coherent jurisprudence, in line with the jurisprudence of the European Court of Human Rights.

5. Preserving the predominantly European continental character, but as a novelty, it introduces more adversarial elements, suitably adapted to our own legal system.

6. Introducing new solutions, which essentially focus on enabling a faster and more efficient decision-making process in a criminal case, while paying due respect to the fundamental rights and freedoms of all subjects of the criminal proceedings.

These new principles are general rules present in the legislations of the Member States of the European Union, which form the basis of the modern criminal trial, their validity and efficiency having been verified by the case law and the jurisprudence of the European Court of Human Rights.

Therefore, in addition to the classical principles (of finding the truth, the presumption of innocence, the right to defence, to respect for human dignity), new principles were introduced, such as:

1. The principle of the right to a fair trial within a reasonable time<sup>2</sup>,
2. The principle of the separation of judicial functions in the criminal trial<sup>3</sup>,
3. The principle of mandatory criminal prosecution closely related to the subsidiary principle of opportunity<sup>4</sup>,
4. The principle of the right to liberty and security<sup>5</sup>,
5. The principle of ne bis in idem (no one shall be twice tried for the same offence<sup>6</sup>),
6. The principle of loyalty of evidence<sup>7</sup> (in the matter of evidence production).

I will present as follows a few considerations regarding these principles, based on the examination of the texts of the law and on specific references.

## **1. The principle of the right to a fair trial within a reasonable time**

*With respect to the fairness and reasonable time<sup>8</sup> of the criminal trial, the code indicates that: “The judicial bodies are obliged to carry out the criminal prosecution and judgment with the observance of the procedural guarantees and of the rights of the parties and of the litigants, so that the facts constituting criminal offences may be ascertained fully and in due time, no innocent person should be prosecuted, and any person who has committed a crime should be punished according to the law, within a reasonable time.”*

In addition to the principles aimed at reducing the duration of criminal cases and, therefore, the costs and consumption of human resources, in the field of evidence production, a set of rules have been implemented, enshrining the principle of loyalty of evidence, which I will discuss subsequently.

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<sup>2</sup> Art.8 CRIMINAL PROCEDURE CODE of 1<sup>st</sup> July 2010 (\*updated\*)

<sup>3</sup> Art.3 CRIMINAL PROCEDURE CODE of 1<sup>st</sup> July 2010 (\*updated\*)

<sup>4</sup> Art.7 CRIMINAL PROCEDURE CODE of 1<sup>st</sup> July 2010 (\*updated\*)

<sup>5</sup> Art.9 CRIMINAL PROCEDURE CODE of 1<sup>st</sup> July 2010 (\*updated\*)

<sup>6</sup> Art.6 CRIMINAL PROCEDURE CODE of 1<sup>st</sup> July 2010 (\*updated\*)

<sup>7</sup> Art.101 CRIMINAL PROCEDURE CODE of 1<sup>st</sup> July 2010 (\*updated\*)

<sup>8</sup> Art.8 CRIMINAL PROCEDURE CODE of 1<sup>st</sup> July 2010 (\*updated\*)

These rules, which provide the sanction of exclusion of evidence obtained unlawfully or unfairly, increase the professionalism of the judicial bodies in obtaining evidence, and, on the other hand, will ensure firm compliance with the rights of the parties to a fair trial.

It should be noted that the principle enunciated above was not altogether inapplicable or unknown in the old criminal procedure legislation, it actually resumes, in a different form, the provisions of the following principle<sup>9</sup> regarding the prohibition of coercive means, according to which: *“It is forbidden to use violence, threats or other means of coercion, as well as promises or inducements in order to obtain evidence. It is also forbidden to incite a person to commit or continue to commit a criminal offence in order to obtain evidence”*.

To ensure the fairness of the procedure during the phase of evidence production, the new Code brings an essential improvement of the provisions regarding the right to request the production of evidence, by specifically covering the cases where the judiciary may reject a request relating to the production of evidence<sup>10</sup>, namely:

- a) when the evidence is not relevant in relation to the object of proof in the case;
- b) when it is considered that sufficient means of evidence have been produced in order to prove the fact which is the object of proof;
- c) when the evidence is not necessary, given that the fact is notorious;
- d) when the evidence is unobtainable; when the request was made for the obvious purpose of delaying the trial;
- e) when the request was made by a person who is not entitled to it or is contrary to the law.

The exclusion of evidence may be ordered when there is a substantial and significant violation of a legal provision on evidence production which, in the specific circumstances of the case, makes the maintenance of the means of evidence thus produced prejudice the fairness of the criminal trial.

The institution of exclusion of the evidence illegally or unfairly produced is regulated in detail, the legitimacy theory being in place, which sets the debate in a wider context, taking into account also the functions of the criminal trial and of the judgment which concludes it.

The issue of fairness is also prominent as regards the hearing of persons, as the new Code regulates in detail the rules of hearing the suspect, the defendant, the injured party, the civil party, the civilly liable party, the witnesses and experts.

Among the main novelties introduced by the new Code for the stage of hearing persons, I may remind that of the mandatory disclosure in writing before the first hearing of the suspect or the defendant of their rights, in order to comply with the right to a fair trial.

In terms of trial and procedural steps, without introducing new legal institutions in the criminal procedure system, the new Code has a particularly firm approach to the issue of summoning, communication of procedural documents and of the warrant for arrest of defaulting witness.

As a new institution, the jurisdiction of the judge chamber to check the compliance of the evidence produced during the criminal investigations proceedings with the guarantees of fairness of the proceedings, is regulated. In this respect, the legality of the evidence produced is closely and exclusively related to ensuring the fairness of the criminal trial.

According to Art. 342: *“The object of the preliminary chamber procedure is the checking of the legality of the court referral, as well as the checking of the legality of the evidence produced or of the acts performed by the prosecution bodies”*.

Therefore, the content of the provisions governing the preliminary chamber, the solutions that may be ordered provide the criteria for determining whether the criminal proceedings were fair, in order to proceed to the judgment on the merits.

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<sup>9</sup> Art. 68 of the previous Criminal Procedure Code.

<sup>10</sup> Art.100(4) CRIMINAL PROCEDURE CODE of 1<sup>st</sup> July 2010 (\*updated\*)

The prosecutor, as head of the criminal proceedings, will have to prove the accusation by producing evidence. Consequently, the role of the judge is reassessed, he/she will mainly make sure that the procedures carried out before him/her are fair, the principle of the judge's active role being no longer enshrined as such in the general part of the code.

The celerity (speed) of the trial judgment has not been expressly stated in the previous criminal legislation, nor is it stated by the current code, but indirect consecrations of this principle are contained in the requirement of a fair trial.

## ***2. The principle of the separation of judicial functions in the criminal trial***

The question of the incompatibility of exercise of various judicial functions in the same case was raised in the jurisprudence of the European Court of Human Rights, in particular with regard to the impartiality of the court appointed to resolve the merits of the case, in cases where the judge ordered the preventive arrest of the defendant or his/her sending to trial.

The new rules aim to remove anachronisms, inconsistencies in the performance of judicial functions, inefficiency and the lack of celerity in the criminal trial, but also to ensure and guarantee compliance with the presumption of innocence, equality of opportunity for the parties, as well as protect human rights and fundamental freedoms.

These new principles include that of the separation of judicial functions in a criminal trial. This principle states and warrants that in the criminal trial *four* judicial functions are exercised under Art. 3 of the Criminal Procedure Code, on the Separation of Judicial Functions, which provides that: "in a criminal trial, the following judicial functions are exercised":

- 1. of prosecution* (by the criminal investigation bodies and the prosecutor),
- 2. of ruling over fundamental rights and freedoms during the prosecution* (by the judge of rights and freedoms)
- 3. of checking the legality of sending or not sending to trial* (by the preliminary chamber judge) and, last but not least, *of judgment* (by the courts).

In order to avoid the carrying out of criminal trials in minor cases, where there is no public interest involved, the requirement of mandatory exercise of the criminal proceedings has been attenuated by introducing the subsidiary principle of opportunity, according to which, in such cases, the prosecutor may waive the exercise of criminal prosecution, as provided by the law<sup>11</sup>.

A direct consequence of this new principle will be a decrease in the volume of criminal cases pending before the judiciary.

As a new principle, the separation of judicial functions also brings about novelties in terms of incompatibility, the Code taking into account new cases of incompatibility, in relation to the fundamental principles of constitutional norms and the jurisprudence of the European Court of Human Rights.

## ***3. The principle of mandatory criminal prosecution closely related to the subsidiary principle of opportunity***

In order to avoid the carrying out of criminal trials in minor cases where there is no public interest involved, the requirement of mandatory exercise of the criminal proceedings has been attenuated by introducing the subsidiary principle of opportunity, according to which, in such cases, the prosecutor may waive the exercise of criminal prosecution, as provided by the law. A direct consequence of this new rule will be a decrease in the volume of criminal cases pending before the judiciary.

According to Art. 7 para. 2 of the Criminal Procedure Code: "In the cases and under the conditions expressly provided by the law, the prosecutor may waive the exercise of criminal

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<sup>11</sup> *Art.7 para. 2 of the Criminal Procedure Code*

prosecution if, in relation to the specific elements of the case, there is no public interest in achieving its object”.

In order to avoid the carrying out of criminal trials in minor cases where there is no public interest involved, the requirement of mandatory exercise of the criminal proceedings has been attenuated by introducing the subsidiary principle of opportunity, according to which, in such cases, the prosecutor may waive the exercise of criminal prosecution, as provided by the law. A direct consequence of this new rule will be a decrease in the volume of criminal cases pending before the judiciary.

In addition to the principles aimed at reducing the duration of criminal cases and, therefore, the costs and consumption of human resources, in the field of evidence production, a set of rules have been implemented, enshrining the principle of loyalty of evidence.

With respect to criminal prosecution/civil proceedings, the conditions of initiating and exercising the proceedings have been regulated, as well as the existence of evidence which gives reasonable grounds to believe that a person has committed a criminal offence and there are no cases that deny the initiation or exercise of such proceedings.

Also, as a consequence of limiting the mandatory nature of the exercise of criminal proceedings, by recognizing exceptions based on opportunity, the case provided by Art. 10 para. 1 letter b<sup>1</sup>, regarding the deed that does not pose the degree of social danger of a criminal offence, has been removed.

Regarding civil proceedings, the mandatory nature of their exercise ex officio has been limited and procedural provisions in this matter have been reassessed, in order to avoid delays in resolution of criminal law disputes.

In order to avoid the carrying out of criminal trials in minor cases where there is no public interest involved, in the new Criminal Procedure Code the requirement of mandatory exercise of the criminal proceedings has been attenuated by introducing the subsidiary principle of opportunity, according to which, in such cases, the prosecutor may waive the exercise of criminal prosecution, as provided by the law. A direct consequence of this new rule will be a decrease in the volume of criminal cases pending before the judiciary.

A direct consequence of this new principle will be a decrease in the volume of criminal cases pending before the judiciary.

The principle of opportunity is expressly stated by Art. 7 para. (2), which provides that: *“in the cases and under the conditions expressly provided by the law, the prosecutor may waive the exercise of criminal prosecution if, in relation to the specific elements of the case, there is no public interest in achieving its object”*.

Also, the waiver of criminal prosecution is provided by Art. 17 as a cause of extinction of the criminal proceedings, and by Art. 314 as one of the solutions for not indicting and not sending to trial that may be ordered by the prosecutor, at the proposal of the prosecution body or ex officio, by ordinance, when there is no public interest involved in the criminal prosecution of the defendant.

#### **4. The principle of the right to liberty and security**

*The right to liberty and security:*

*“(1) During a criminal trial, the right of any person to liberty and security is guaranteed.*

*(2) Any deprivation or restriction of liberty may be ordered only exceptionally and only in the cases and under the conditions provided by the law.*

*(3) Any person who is arrested has the right to be informed without delay and in a language which he/she understands of the reasons for his/her arrest and shall be entitled to submitting an appeal against the action ordered.*

*(4) Where it is found that a deprivation or restriction of liberty was unlawfully ordered, the competent judicial bodies are obliged to order the revocation of the measure and, where appropriate, the release of the person detained or arrested.*

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(5) Any person against who, during the criminal trial, a deprivation of liberty was unlawfully ordered has the right to compensation for the damage suffered, as provided by the law.”

During the criminal trial the parties have all the rights provided by the criminal procedure law, as well as by international regulations in human rights matters, to which Romania is a party.

Thus, Art. 92 provides the rights of a lawyer, as follows: “(1) During criminal prosecution, the lawyer of the suspect or defendant has the right to attend the performance of any prosecution act, except for special surveillance or research techniques, computer search and body search or vehicle search in the case of flagrant crimes, as well as except where the lawyer's presence would prejudice the right to defence of the other parties or main litigants, in which case the lawyer's questions may be uttered by the prosecution body.

During the preliminary chamber procedure and during the trial, the lawyer has the right to consult the documents in the file, to assist the defendant, to exercise the procedural rights of the latter, to file complaints, requests, statements, exceptions and objections.”

The main novelties introduced by the new Code are:

- the respect for human dignity and the protection of the person's health during the hearings;

According to Art. 108: “(4) The judicial body must communicate to the defendant the possibility of concluding, during the criminal proceedings, an agreement as a result of pleading guilty, and during the trial the opportunity to benefit from a reduction in penalty as provided by the law, following the admission of the accusation”<sup>12</sup>.

- the audio or audiovisual recording, during the criminal prosecution, of the suspect or defendant's hearing;
- the bringing to the knowledge of the injured person, upon first hearing, of the following rights and obligations: the right to be assisted.

When the conditions stipulated by the law in relation to the status of a threatened or vulnerable witness or the protection of privacy or dignity are met, the prosecution body may impose, with regard to the injured person or the civil party, the protection measures provided for in Art. 125-130, which apply accordingly.

The privilege against self-incrimination in terms of the witness hearing, as well, is expressly regulated. Thus, Art. 118 of the Criminal Procedure Code provide the witness's right not to accuse himself/herself: “A witness's statement may not be used during a criminal trial held against him/her.”

Under the new regulation, preventive measures are: retention; *judicial review*; *judicial review on bail*; *house arrest*; *preventive arrest*.

1. Retention may be ordered with regard to the suspect or defendant by the criminal investigation body or the prosecutor, only during criminal prosecution.

2. Judicial review and judicial review on bail may be ordered with regard to the defendant during the criminal prosecution – by the prosecutor, in the preliminary chamber procedure – by the judge of preliminary chamber and, during the trial – by the court.

According to Art. 203 of the Criminal Procedure Code:

“(1) The preventive measure provided by Art. 202 para. (4) letter a) may be ordered with regard to the suspect or defendant by the criminal investigation body or the prosecutor, only during criminal prosecution.

(2) The preventive measures provided by Art. 202 para. (4) letters b) and c) may be ordered with regard to the defendant, during the criminal prosecution – by the prosecutor, in the preliminary chamber procedure – by the judge of preliminary chamber and, during the trial – by the court.

The preventive measures provided by Art. 202 para. (4) letters d) and e) may be ordered with regard to the defendant during criminal prosecution. ”

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<sup>12</sup> Para. (4) of Article 108 was introduced by the draft Law on the implementation of the Criminal Procedure Code

## 5. *The principle of “ne bis in idem”*

*“No person may be prosecuted or tried for committing a criminal offence when in relation to that person a final criminal judgment was previously pronounced with regard to the same criminal act, even if under a different legal classification.”*

The right not to be tried or punished twice for the same criminal offence is also enshrined in Art. 4 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, its inclusion among the fundamental principles of the criminal procedure law being justified, as it regards all stages of the trial, not just the stage of enforcement of criminal judgments.

The Code took into account, in relation to the fundamental principles enshrined by constitutional norms, the jurisprudence of the European Court of Human Rights, including the new principles, such as “*ne bis in idem*”.

The *ne bis in idem* principle is analyzed by present-time doctrine in relation to the effects of a final judgment.

Specifically, it is pointed out that, by becoming final, a court decision produces a positive effect (the legal basis for the execution of the operative part of the judgment) and a negative effect (preventing new proceedings and judgment in relation to the facts and claims settled by judgment); this negative effect, which is the result of the *ne bis in idem* principle, is known as *res judicata*.

## 6. *The principle of loyalty of evidence (in the matter of evidence production)*

According to Art. 101 – The principle of loyalty of producing evidence:

*“(1) It is forbidden to use violence, threats or other means of coercion, as well as promises or inducements in order to obtain evidence.*

*(2) No listening methods or techniques that affect the person's ability to recall and report consciously and voluntarily the facts that are the object of evidence may be used. The prohibition applies even if the person heard consents to the use of such listening methods or techniques.*

*(3) It is prohibited to the criminal judicial bodies or other persons acting for them to cause a person to commit or continue to commit a criminal offence in order to obtain evidence.”*

In addition to the principles aimed at reducing the duration of criminal cases and, therefore, the costs and consumption of human resources, in the field of evidence production, a set of rules have been implemented, enshrining the principle of loyalty of evidence.

It may be said that the new Code regulates expressly for the first time the principle of loyalty of procedures in producing evidence, in order to avoid the use of any means that might be aimed at producing in bad faith a means of evidence or might result in causing the committing of a crime, in order to protect human dignity, as well as a person’s right to a fair trial and privacy. But these are nothing more than a restatement and elevation to the rank of principle of the provisions of Art. 68 of the current code on the prohibition of coercive means in obtaining evidence<sup>13</sup>.

Exclusion is a specific trial penalty, applied in matters of evidence produced in violation of the principle of legality, loyalty. This penalty has a special scope, being different from the nullity sanction, applicable only to trial or procedural acts (documents). Exclusion of evidence may be ordered where there is a substantial and significant violation of a legal provision on evidence production which, in the specific circumstances of the case, makes the maintenance of the means of evidence thus produced prejudice the fairness of the criminal trial.

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<sup>13</sup> *Such provisions are present in the current Criminal Procedure Code, being an additional guarantee meant to improve the effectiveness of the fight against inhuman or degrading treatment – for explanations, see Ion Neagu* *Tratat de procedură penală (Treatise on Criminal Procedure)*, Bucharest, Edit. PRO (Publishing House), 1997, p. 57.

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Therefore, in the event of such an occurrence, as provided by the new Criminal Procedure Code, the sanction of exclusion applies by law.

*In conclusion, I think that the new Criminal Procedure Code, the appearance of which is a major event for the last 150 years, brings about a new vision of the role and purpose of the rules of criminal procedure, as well as of the fundamental principles of law, all of which will guarantee the legality of the criminal trial, and compliance with human rights and fundamental freedoms.*

### **References**

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