

OBSERVANCE OF HUMAN DIGNITY; EXCLUDING THE EVIDENCE OBTAINED IN VIOLATION OF THIS RIGHT DURING THE PRELIMINARY CHAMBER PHASE

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ABSTRACT

Production of evidence, as a procedural activity carried out by the criminal judicial bodies, must be made in strict accordance with the legal provisions, so as not to harm the rights and legitimate interests of any person; at the same time, the existence of a deontology regarding the methodology of production of evidence is fundamental in the probation process.

If the criminal investigation bodies proceed to the production of evidence with non-respect regarding the right to human dignity, the preliminary chamber judge will be able, in accordance with the law, to apply the sanction of exclusion of the evidence.

KEYWORDS: *observance of human dignity, evidence, exclusion of evidence, preliminary chamber, personal safety.*

INTRODUCTION

Preliminary, we emphasize that the issue of evidence is one of the essential issues regarding the criminal process. In this regard, pursuant to the provisions in art. 5 of the Criminal Procedure Code, the judicial bodies are under an obligation to ensure the finding of the truth about the facts and circumstances of the case, based on evidence, and about the person of the suspect or defendant; it is necessary that the evidence to be administered objectively, in full compliance with the requirement of fairness.

The administration of evidence is therefore a complex procedural activity through which the criminal judicial bodies, *ex officio* or at the request of the parties and the main procedural subjects, proceed to gather the factual elements necessary for the fair settlement of the case.

In this regard, pursuant to the provisions in art. 100 (1) of the Criminal Procedure Code, during the criminal investigation, criminal investigation bodies gather and produce evidence both in favor and against a suspect or a defendant, *ex officio* or upon request. Also, during the trial, the court produces evidence upon request by the prosecutor, the victim or the parties and, subsidiarily, *ex officio*, when it deems it necessary for the creation of its own conviction. As an expression of an important guarantee of the fairness of the criminal process, pursuant to the provisions in art. 100 (3) of the Criminal Procedure Code, an application regarding the production of evidence filed during the criminal investigation or the trial is sustained or denied, on a justified basis, by the judicial bodies.

We also emphasize that the activity of evidence administration is directed by both the general and the special requirements inscribed in the Criminal Procedure Code and involves recourse to the evidentiary procedures and means of proof provided by law. During this important procedural activity, the criminal judicial bodies are forbidden to infringe, in any way, the rights and interests of the parties and the main procedural subjects.

From this perspective, we note that article 101 of the Criminal Procedure Code took over some provisions of the Criminal Procedure Code of 1968 and established the principle of loyalty regarding the administration of evidence, principle which includes, as we shall see,

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several aspects. In connection with this principle, the Romanian legislator (which has been inspired by the *common law* tradition) regulated the sanction of excluding evidence obtained illegally, as a result of non-compliance with the prohibition to administer evidence in such a manner.

Consequently, we consider that the present study finds its relevance in the context of the section of the conference called "The person's safety from the perspective of respecting the fundamental rights during judicial proceedings". In this regard, we note that, within the judicial procedures, the safety of the person is also guaranteed by strictly respecting the right to dignity, as a basic rule of the Romanian criminal process.

HUMAN DIGNITY - FUNDAMENTAL PRINCIPLE OF THE ROMANIAN CRIMINAL TRIAL

In accordance with art. 11, para. (1) of the Criminal Procedure Code, „Any person under criminal investigation or on trial shall be treated in compliance with their human dignity”. As it can be observed, the legislator preserved the right to human dignity in the provisions currently in force, as a core rule of the Romanian criminal proceedings. Likewise, pursuant to art. 22 para. (2) of the Constitution, „No one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment”.

Thus, the core rule under review, a genuine guiding and fundamental notion¹, establishes the legal framework regarding the applicable treatment to the suspect or defendant during the criminal trial, the prerequisite for ensuring human dignity, during all stages of the criminal proceedings², not just during prosecution and trial.

Furthermore, it is to be noted that this principle is enshrined by art. 3 of the European Convention on Human Rights (body of law which regulates an absolute right, which speaks of five elements, namely: torture, inhuman punishment, degrading punishment, inhuman treatment and degrading treatment), as well as in art. 1 of the Charter of Fundamental Rights of the European Union, in relation to which „Human dignity is inviolable. It must be respected and protected”. Moreover, according to art. 4 of the same provision, „No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

As indicated, the requirement of human dignity observance implies, in addition to other elements, the prohibition of torture, inhuman and degrading treatment, and is closely linked to loyalty and the legality of obtaining evidence during the legal process³. As to assessing the severity of treatments to which a person is subject to during the criminal trial, we emphasize that this is done depending on various factors (for example, the nature and duration of treatments, the method of execution, age or health status of the victim)⁴.

It should also be emphasized that, along with the express provisions found in art. 11 para. (1) of the Criminal Procedure Code, the criminal law and criminal procedure provisions in force also contain other regulations which convey the impression of genuine guarantees in terms of applying the rule of human dignity observance⁵. For instance, in light of art. 101 para. (1) of the Criminal Procedure Code, in order to obtain evidence, the legislator enshrined the principle of loyalty in the process of gathering evidence, prohibiting the use of violence, threats or other means of coercion, as well as promises or exhortations.

Likewise, according to art. 101 para. (2) of the Criminal Procedure Code, „Hearing methods or techniques capable of affecting the capacity of persons to remember and tell

¹ Nicolae Volonciu, *Drept procesual penal*, “Editura Didactică și Pedagogică” Publishing House, Bucharest, 1972, p. 44.

² Gheorghiță Mateuț, *Procedură penală. Partea generală*, “Universul Juridic” Publishing House, Bucharest, 2019, p. 97; Ion Neagu, Mircea Damaschin, *Tratat de procedură penală. Partea generală*, “Universul Juridic” Publishing House, Bucharest, 2014, p. 106.

³ Gheorghiță Mateuț, *op. cit.*, p. 97.

⁴ ECHR, *Kostadinov vs. Bulgaria*, 7th of July 2003, available at www.echr.coe.int.

⁵ Anca-Lelia Lorincz, *Drept procesual penal*, vol. I, “Universul Juridic” Publishing House, Bucharest, 2015, p. 49.

conscientiously and voluntarily facts representing the object of evidence gathering may not be used. Such prohibition applies even if a person subject to such hearing gives their consent in relation to the use of such hearing methods and techniques". Consolidating the fundamental principle inscribed in art. 11 para. (1) of the Criminal Procedure Code, the legislator established, according to art. 102 para. (1) of the Criminal Procedure Code, the sanction of excluding evidence obtained through torture and evidence derived from such means.

Another category of provisions, by means of which the principle of observing human dignity is ensured indirectly⁶, encompasses, for example, the following: (i) the special rules of hearing, set out in art. 106 para. (1) of the of the Criminal Procedure Code, according to which „If, during the hearing of a person, such person shows visible signs of excessive fatigue or symptoms of a disease that affect their physical or psychological capacity to participate in the hearing, judicial bodies shall order cessation of the hearing and, if the case, shall procure that the person is examined by a physician"; art. 110 para. (1) of the Criminal Procedure Code, in relation to which the time when the hearing started and when the hearing ended shall be mentioned every time in the content of the statement, thus preventing a lengthy and excessive procedure.

Lastly, we emphasize that the substantive criminal law provisions in force provide several crimes in obstruction of justice, the legislator taking into account, in this regard, the criminal prosecution of those official procedural subjects which, during the criminal proceedings, disregard the right to human dignity. With regard to this, we shall consider the crimes of abusive prosecution (art. 280 of the Criminal Code), submission to ill treatment (art. 281 of the Criminal Code) and torture (art. 282 of the Criminal Code).

BRIEF REVIEW REGARDING THE OBJECT OF THE PROCEDURAL PHASE OF THE PRELIMINARY CHAMBER

As it can be observed by reading the statement of reasons of the new Criminal Procedure Code⁷, regulating the preliminary chamber's jurisdiction within the architecture of the criminal process in our country began from the realities of the contemporary legal life, characterized by "the lack of celerity of criminal proceedings, in general". In this context, the legislator's intention was that the institution of preliminary chamber should have a significant role, with reference to the removal of the excessive duration of the criminal trial, by enshrining a simplified mechanism aimed at verifying the legality of the criminal investigation phase⁸.

Consequently, in the current configuration, the Romanian criminal proceedings consist of four procedural phases, as follows: the criminal prosecution, the preliminary chamber, the judgement and the enforcement of the criminal court decisions. Thus, the procedure set out by art. 342-348 of the Criminal Procedure Code appears as an autonomous procedural phase, and not as a procedural stage integrated in the trial phase, as it has rightly been retained both in the legal literature⁹ and in the constant jurisprudence of the Constitutional Court¹⁰.

The newly regulated jurisdiction (which has been given the name of preliminary chamber judge), carries out an *a posteriori* legality check regarding the documents drawn up during the criminal prosecution¹¹. Therefore, in light of art. 342 of the Criminal Procedure Code, the purpose of the preliminary chamber procedure is to verify, after the indictment, the

⁶ Ion Neagu, Mircea Damaschin, *op. cit.*, p. 107.

⁷ The substantiation note to the New Criminal Procedure Code, according to the Ministry of Justice webpage <http://www.just.ro>, visited on 12.10.2020.

⁸ Nicolae Volonciu, Alexandru Vasiliu, Radu Gheorghe, *Noul Cod de procedură penală adnotat. Partea specială*, "Universul Juridic" Publishing House, Bucharest, 2016, p. 123.

⁹ Anca-Lelia Lorincz, *Drept procesual penal*, vol.II, "Universul Juridic" Publishing House, Bucharest, 2016, p. 53; Gh. Mateuț, *op. cit.*, p. 27.

¹⁰ Constitutional Court, Decision no. 641 of 11 November 2014, published with the Official Gazette of Romania no. 887 of 5 December 2014.

¹¹ Gheorghică Mateuț, *op. cit.*, p. 66.

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competence and lawfulness of seizing the court, as well as to check the lawfulness of the administration of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies. Thus, the legal mechanism of the preliminary chamber procedure was conceived by the legislator in the sense of corresponding to the accomplishment of the judicial function of verifying the lawfulness of the sending to trial, in order to create the premises for the rapid settlement of the merits of the case¹².

Under these circumstances, during the jurisdiction of the preliminary chamber, the validity of the evidence gathered or the indictment can't be reviewed, the competent judge not being able to deliver a ruling regarding the judicial actions in the criminal proceedings.

Furthermore, *de lege lata*, the preliminary chamber judge is unable to perform a thorough examination of the evidence gathered, his activity being confined to the sphere of lawfulness. Thus, according to article 3, para (3) of the Criminal Procedure Code, the lawfulness of the indictment and evidence it relies upon (as well as the lawfulness of decisions to drop charges) shall be subject to approval by the preliminary chamber judge, as under the law. Undoubtedly, the review of the lawfulness of the administration of evidence gathered represents a distinct objective of the preliminary chamber procedure, the legislator conceiving it separately from the review of the regularity of the indictment.

As it can be noted, the preliminary chamber judge is assigned with the important task of carrying out an objective precisely determined by the legal framework, thus preparing the upcoming procedural phase (that of the trial). Despite the fact that the duties of the preliminary chamber judge do not concern the merits of the case, we consider that the role of this jurisdiction is one of crucial importance within the criminal proceedings. As such, legal literature¹³ has found, in a substantiated manner, that the decisions which can be ordered during the preliminary chamber proceedings, regarding the lawfulness of the pre-judicial phase of prosecution can significantly influence the settlement of the criminal proceedings.

From this perspective, the ruling which can be issued by a grounded conclusion by the preliminary chamber judge¹⁴, following an analysis on lawfulness, aims at either the commencement of the trial or the return of the case to the prosecutor's office.

CONSIDERATIONS REGARDING THE EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF THE RIGHT TO DIGNITY

As a preliminary point, we emphasize that the current Criminal Procedure Code has enshrined, as an innovation, a sanction which applies exclusively in cases of evidence administered in breach of the principle of legality, an institution referred to as the exclusion of evidence obtained illegally. As literature has rightly expressed¹⁵, the purpose of this sanction includes both evidence administered in violation of legal provisions and evidence obtained by failing to comply with the principle of loyalty in producing evidence.

This procedural sanction, which occurs even in cases of disregard for the fundamental rights and freedoms enshrined by the European Convention (such as the use of torture or inhuman or degrading treatment during hearings) is encountered in the adversarial procedural system, being closely linked to the notion of the rule of law¹⁶. In the legal system of the United States, where the sanction of exclusion of evidence produced in violation of law has

¹² Anastasiu Crișu, *Drept procesual penal. Partea specială*, "Hamangiu" Publishing House, Bucharest, 2019, p. 118.

¹³ Mihail Udroi, *Procedură penală. Partea specială*, 3rd edition, "C.H. Beck" Publishing House, Bucharest, 2016, p. 149.

¹⁴ Anca-Lelia Lorincz, *op. cit.*, 2016, p. 56.

¹⁵ Gheorghită Mateuș, *op. cit.*, pp. 485-486; Mihail Udroi (coordinator), *Codul de procedură penală. Comentariu pe articole*, 2nd edition, "C.H. Beck" Publishing House, Bucharest, 2017, pp. 417-422.

¹⁶ Mihail Udroi, *Procedură penală. Partea generală*, "C.H. Beck" Publishing House, Bucharest, 2014, p. 655.

made the highest progress, the influence of constitutional provisions has given the notion of exclusion of evidence a content of its own¹⁷.

Regarding the sanction of exclusion, the doctrine has fundamentally stated that it is necessary for it to intervene as a last resort¹⁸; thus, the exclusion, jeopardizing, at times, the administration of criminal justice, must be applied with great caution.

The exclusion of evidence produced unlawfully, refers to evidence obtained during the first phase of the criminal trial, this procedural sanction being applicable, we believe, only when the preliminary chamber phase is taking place. Thus, by considering the provisions of art. 346 para. (3) section b) and art. 346 para. (5) of the Criminal Procedure Code, the application of the sanction of exclusion implies the restitution of the case to the prosecutor's office (in cases where one or more pieces of evidence have been excluded).

In light of art. 102 para (1) of the Criminal Procedure Code, „Evidence obtained through torture, as well as evidence deriving from such may not be used in criminal proceedings”. Although this provision refers only to evidence gathered through torture, we consider that the rule must be interpreted in a broad manner, evidence obtained through the use of inhuman or degrading treatment, which have the same regime, being included as well¹⁹; in this regard, a similar reasoning has been identified in the jurisprudence of the European Court of Human Rights²⁰.

Respecting the absolute right inscribed in art. 3 of the European Convention, the Romanian legislator regulated in the aforementioned law text a case of automatic exclusion, independent of any procedural damage²¹. From this perspective, we emphasize that even in extreme situations (for example, the fight against organized crime or terrorism), the European Convention strictly prohibits torture and inhuman or degrading treatment, no derogations being allowed.

Furthermore, concerning art. 102 para (1) of the Criminal Procedure Code, it can be noted that not only evidence obtained directly by means of torture, but also evidence derived from such acts cannot be used. In other words, the sanction of exclusion is also applied in regard to evidence arising from evidence gathered in breach of art. 3 of the European Convention, in accordance with the doctrine of "fruit of the poisonous tree", found in the *common law*.

Therefore, while administering evidence, criminal judicial bodies may not prejudice the rights and interests of the parties and of the main procedural subjects. For example, during the hearing, the use of threats, violence or promises for the purpose of obtaining evidence is strictly prohibited, given that it is likely to be in violation of the right to dignity and, at the same time, to harm the prestige of criminal justice²². At the same time, in the category of prohibited procedures we include the provisions of art. 101 para. (2) of the Criminal Procedure Code, according to which, during the trial, certain special hearing methods (for example, hypnotism or narcosis) are not allowed, as they may defeat the conscious resistance of the person heard²³.

Thus, it can be stated that the criminal procedural regulation in force tends to satisfy the requirement of human dignity observance, as enshrined by art. 3 of the European Convention (body of law with direct applicability in national law). From this perspective, during the process of evidence, the judicial bodies cannot make use of physical or moral

¹⁷ J.B. Haddad, L.R. Meyer, J.B. Zagel, G.L. Starkman, W.J. Bauer, *Exclusionary Principles and Alternative Remedies for Unlawful Investigative Practice*, in „Criminal Procedure. Cases and Comments”, 7th ed., Thomson West, New York, 2003, p. 730.

¹⁸ Gheorghiuță Mateuț, *op. cit.*, p. 486.

¹⁹ *Idem*, p. 487.

²⁰ ECHR, *Gäfgen vs. Germany*, 1st of June 2010, available at www.echr.coe.int.

²¹ Mihail Udroui, *op. cit.*, 2014, p. 655.

²² According to the European Convention's jurisprudence, the use of evidence obtained through torture is a denial of justice (ECHR, *Othman vs. United Kingdom*, 17th of January 2012, available at www.echr.coe.int).

²³ Gheorghiuță Mateuț, *op. cit.*, p. 477.

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violence (for example, as it can happen in the case of abnormal prolongation of the interrogation, without breaks), otherwise the sanction of exclusion of evidence shall intervene.

Moreover, it should be emphasized that in the case law formed after the entry into force of the current Criminal Procedure Code, there have been identified numerous cases in which the coercion consisting of degrading and inhuman treatment committed by criminal prosecutors has been invoked before the preliminary chamber judge. For example, according to the report of a flagrant crime, the defendant inserted a piece of paper in the oral cavity, trying to destroy it by chewing it; however, this did not occur, as the criminal investigation body intervened and determined the defendant to remove the piece of paper by locking the jaw. During the preliminary chamber phase, it was considered that the defendant was not subjected to any degrading treatment, the judge stating that the intervention of the criminal investigation body did not aim to humiliate the defendant, but the preservation of a criminal body, considering that the purpose of the defendant's actions was to destroy it, at the time being, a less intrusive method not being identified at that time.

In addition, the entire action lasted for approximately 5 seconds and consisted only of preventing the defendant from chewing the piece of paper. Thus, the preliminary chamber judge considered that, *in concreto*, the defendant faced no suffering or humiliation of such intensity which could be classified as degrading treatment²⁴.

In other cases, our country has been convicted by the European Court of Human Rights on acts of violence perpetrated by the judiciary on individuals. For example, in the case of *Iambor v. Romania*²⁵, the Court found that the Romanian judicial authorities concealed physical aggression against persons in detention, thus violating the provisions of art. 3 of the European Convention.

CONCLUSIONS

Pursuant to the provisions in art. 11 (1) of the Criminal Procedure Code, „Any person under criminal investigation or on trial shall be treated in compliance with their human dignity”. Although this legal text refers to only two procedural phases, we consider that the legal provisions must be extended regarding the preliminary chamber procedure, respectively the enforcement of final decisions.

We also emphasize that at the basis of the principle of loyalty of the production of evidence (rule regulated in article 101 of the Criminal Procedure Code) is the requirement to prohibit any maneuvers which aims at the administration in bad faith of the means of proof or which results in the provocation of a criminal offence, in the context in which these procedures infringe on the dignity of the person, his right to a fair trial or the right to privacy.

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²⁴ Bucharest Tribunal, the decision of November 7, 2016, remained final through decision no. 72/24.02.2017, in Cristina Moisă, *Problele în procesul penal. Practică judiciară adnotată*, ‘‘Hamangiu’’ Publishing House, Bucharest, 2017, p. 69.

²⁵ ECHR, *Iambor vs. Romania*, 24th of June 2008, available at www.echr.coe.int.

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