Efficiency – an Explicit and General Guarantee for a Fair Criminal Trial in Romania. National Standards*

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Abstract: As far as the criminal trial is concerned, celerity generally implies both a swift solution of criminal causes, and, if the case may be, a simplified criminal processual activity. At the same time, celerity implies the pursuance of specific activities by the criminal investigation body which has at its disposal the most efficient means for administering evidence. The efficient performance of a criminal investigation (which is a characteristic of the entire criminal trial), though it cannot be regarded as a rule for this trial, is provided by many regulations comprised in the Criminal Procedure Code. As far as criminal trials are concerned, the principle of reasonable time is indissolubly linked with the principle of celerity. From this point of view, the slow judgment of a criminal case infringes upon the right of a person to have his case solved within a reasonable time, which is an essential characteristic of a fair trial. The topic of this paper is not necessarily a particular issue for our national legal system; in fact, it represents a real problem for most national processual systems and this aspect is revealed by the large number of national and international programmes dedicated to the study of the causes which lead to the non-observance of the reasonable time within which a criminal trial should be judged.

Keywords: Romanian criminal trial; reasonable time; efficiency

1. Introduction

Romanian special literature (Bîrsan, 2005) analyzes fair trial in accordance with the guarantees stipulated by Article 6 in the European Convention on Human Rights (hereinafter referred to as "ECHR"), respectively the guarantees provided by the jurisprudence of the European Court of Human Rights (hereinafter referred to as "ECtHR"); these guarantees fall into the following categories: a) guarantees specific for the fair trial; b) guarantees specific for the fair trial on criminal matters.

* This work was supported by CNCSIS –UEFISCSU, project number 860 PNII – IDEI 1094/2008.

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The first category, i.e. the guarantees specific for the fair trial (Edel, 2007, p. 101)[1], includes explicit guarantees which are provided by Article 6 in the ECHR (the public character of procedures and the reasonable time for solving the cause), respectively explicit guarantees which are provided by the EctHR jurisprudence (equality of means, the principle of contradiction, the motivation of the judicial decisions and the defendant's right to remain silent and not to incriminate himself/herself). As far as the second category is concerned, i.e. the category of guarantees that are specific for the criminal trial, the present detailed analysis refers to the provisions of Article 6 § (3) in the ECHR.

From another perspective (Chiriţă, 2007), fair trial is approached as an analysis of the *general procedural guarantees*, without a differentiation thereof but in accordance with the following elements: access to justice, the neutrality of the tribunal, the celerity of the procedure, the public character of the procedure, the equality of means and special guarantees on criminal matters (as this paper points out, special guarantees which are provided for the criminal trial are general procedural guarantees – a probably incorrect but, however, original classification).

Fair trial has to be approached in relation to the existing guarantees, which can be classified as general guarantees (also applied for the criminal trial) and guarantees specific (only) for the criminal trial.

As to the **general guarantees which are applied to the criminal trial**, the reason for which they have been coined as general is represented by the fact that they are applied to the entire judicial activity, no matter if we refer to public or private trials. Thus, even if these guarantees imply elements which are particular for the criminal trial, however, they are generally applied.

According to the ECHR, these guarantees are classified into two large categories, i.e.: explicit and implicit guarantees which ensure the equity of the procedure. The first category includes the public character of the judicial activity (i.e. the public character of the proceedings) and the efficiency of the judicial activity. General implicit guarantees of the fair trial comprise: equality of means, the principle of contradiction and the motivation of the judicial decision.

As far as the present study is concerned, we are basically going to tackle the first direction of research that we have mentioned. From this point of view, we are going to analyze the efficiency of the criminal trial, as an explicit guarantee of the

[1] For details (Struillou, 2006, pp. 299-304; Wolf, 2003, pp. 189-209)

fair trial, with reference to all types of trials which exist in our legal system and with particular reference to the criminal trial. For analyzing the efficiency of the criminal trial, we are going to take into account the standards applied in the Romanian legal system.

2. Standards Provided for the National Legal System

2.1. Legal Processual Criminal Provisions which Constitute a Novelty and which Support the Celerity of the Criminal Trial

General legal provisions according to which judicial procedures are to be applied within a reasonable time can be found in the republished Romanian Constitution[1]. Thus, according to Article 21 § (3) of the Constitution, the parties shall be entitled to a fair solution of their causes within a reasonable period of time.

The same provision can be found in Article 10 of the republished Law no. 304/2004 on the organization of the judiciary[2]. Moreover, according to Article 64 § (4) letter c), work assigned to a prosecutor can be entrusted to another prosecutor if it is found that the former did not accomplish the assigned work though he had no reasonable ground to fail to accomplish it within a period of time which was longer than 30 days. Furthermore, according to Article 91 § (1) of the republished[3] Law no. 303/2004 on the statute of judges and prosecutors, judges and prosecutors are bound to accomplish the work they have been assigned to within the established terms and to solve the causes that are entrusted to them within a reasonable time. We also consider it important to mention the provisions of Article 99 letter e) from the same normative act, according to which the repeated infringement of the legal

[1] Romanian Constitution was republished in the Official Gazette of Romania no. 767/31.10.2003, after having been altered and completed through the provisions of Law no. 429/23.10.2003, which was published in the Official Gazette of Romania no. 758/29.10.2003.

[2] Law no. 304/28.06.2004 on the organization of the judiciary, published in the Official Gazette of Romania no. 576/29.06. 2004, was altered and completed through the provisions of the Emergency Ordinance no. 124/24.11.2004 (the Official Gazette of Romania no. 1168/9.12. 2004), Law no. 71/7.04.2005 (the Official Gazette of Romania no. 300/11.04.2005). Subsequently, the law was republished in the Official Gazette of Romania no. 827/13.09.2005. At present, this law is in force and it comprises all the provisions that have altered and completed it subsequently.

[3] Law no. 303/28.062004 on the statute of judges and prosecutors was published in the Official Gazette of Romania no. 576/29.06.2004. Subsequently, this law was republished in Official Gazette of Romania no. 826/13.09. After having been republished, Law no. 303/2004 has also been altered and completed.

provisions which bind magistrates to solve causes with celerity constitutes disciplinary misconduct.

Criminal law sets forth several legal instruments which compel magistrates to observe reasonable time for solving criminal causes; thus, Article 1 of the Criminal Procedure Code (hereinafter referred to as "CPC") provides that: "The aim of the criminal trial is to acknowledge in due time and completely the deeds that represent crimes, so that any person who has committed a crime is punished according to his/her guilt, and no innocent person is held criminally responsible."

In the next lines we are going to briefly analyze several provisions of the Criminal Procedure Code; most of these provisions are basically attempts to reinforce the principle of celerity as this is applied to the criminal trial.

The deadlines applied in criminal cases. The duration within which or the period after which judicial bodies or parties can exercise a processual right (Neagu, 2008); deadlines have been basically classified as *substantial deadlines and procedural deadlines*.

Substantial deadlines are established by law for protecting certain extra-processual rights or interests; they set up or organize the measures which judicial bodies can take for interdicting or confining a person's rights which he/she was granted prior to the criminal trial. Substantial deadlines refer to the period of time within which preventive measures are taken, the deadlines applied in case of release on parole, the prescription deadlines for criminal liability etc. *Procedural deadlines* are deadlines which were established for protecting the rights and interests that a person was granted during the criminal trial. One can enumerate the following *procedural deadlines*: the appeal period and the recourse period (Articles 363 CPC and 385^3 CPC), the deadline before which the prosecutor has to submit to the court of justice the criminal investigation file together with the necessary number of copies of the indictment which is communicated to the detained defendants (Article 264 § 4 CPC), the deadline before which the prosecutor has to settle the complaints about the criminal investigation measures and the acts enforced (Article 277 CPC) etc.

The deadlines established for solving a criminal cause aim, on the one hand, to limit the length of time necessary for applying processual measures (if these deadlines were not established, measures adopted for interdicting or restricting a person's rights would become arbitrary) and, on the other hand, they prevent the

delay of the criminal trial, while ensuring the efficiency of the actions performed for the fair settlement of the criminal cause.

For the good accomplishment of certain judicial activities, the law does not provide limited terms but it stipulates that judicial bodies are bound to efficiently accomplish them. There are several legal provisions which set forth the obligation of judicial bodies to efficiently accomplish the tasks assigned to them:

- if the court discovers that the person brought before is not the one specified in the warrant, the court is bound to *immediately* release this person, in conformity with the provisions of Article 153 §(3) CPC;
- the court, ex officio or upon notification of the prosecutor, or the prosecutor in case the person is remanded in custody, ex officio or upon notification of the criminal investigation body, is bound to *immediately* release the person who is remanded in custody or under arrest, in conformity with the provisions of Article 140 § (3) CPC ;
- the court, for the situations mentioned in the special part of the Criminal Procedure Code, Title II, is entitled to arrest the defendant under the conditions provided by Article 146 CPC. When the court held that the defendant should be arrested, the chief justice of the panel issues the warrant of arrest for the defendant. The arrested defendant is *immediately* sent to the prosecutor together with the warrant of arrest (Article 147 CPC) etc.

The Deadlines Established for the Exercise of the Ways of Attack

The exercise of ordinary and extraordinary ways of attack is regulated through deadlines which are imposed by the need to ensure the exercise of judicial control within a reasonable time and, thus, the swiftness with which a constraint is applied. Furthermore, when establishing these deadlines, one took into account the reasonable duration necessary for a criminal case to be tried because these deadlines could provide either the execution of the criminal decision (as this is especially the case for ordinary ways of attack), or the possibility to attack such decisions at any time. Thus, the deadlines applied for exercising the ways of attack are necessary for ensuring both the judicial control of the decisions, before they are executed, and the efficiency of the criminal trial.

Immunity and criminal investigation. We should firstly refer to the modifications which have recently been brought by the common law exemption

procedure, especially for the initiation of the criminal investigation and in conformity with which a series of norms have been repealed because they did not comply with the ex officio character of the criminal trial. We also underline the fact that these legal modifications were brought by Recommendation no. XII in the Council of Europe Report drawn up by the Group of States against Corruption (GRECO); this report was adopted at the Plenary Meeting on 28.06.-02.07.2004 which recommended that Romania should modify its domestic legislation with a view to limiting the categories of persons who have immunity when being criminally investigated. Thus, immunity granted to lawyers, public notaries and bailiffs has been withdrawn; moreover, these legal professions are equally treated.

In this respect, according to Article 37^1 of the republished[1] Law no. 51/1995 on the organization and practice of the lawyer profession, a lawyer could be criminally investigated and brought before the court for having committed an offence while exercising his/her profession or in connection to his profession only with the approval of the General Public Prosecutor of the Public Prosecutor's Office attached to the court of appeal within whose jurisdiction that act was perpetrated. At present, these provisions have been repealed as set forth by Article I § 1 in the Emergency Ordinance no. 190/21.11.2005[2].

A similar provision was set forth by Article 31 in Law no. 36/12.05.1995 on the profession of a public notary and the practice of activities[3] that are specific for this profession; according to this article public notaries could not be inquired, searched, detained, arrested or brought before a criminal court…without notification from the Minister of Justice, for acts perpetrated in connection with their professional activities. This provision was, however, repealed by Article I § 1 in the Emergency Ordinance no. 25/31.03.2005[4].

Moreover, according to Article 36 in Law no. 188/1.11.2000 on bailiffs[5], bailiffs could not be inquired, searched, retained, arrested or brought before a criminal

[1] Law no. 51/7.06.1995 on the organization and the practice of the lawyer profession, which was republished in the Official Monitor of Romania no. 98/7.02.2011.
[2] Emergency Ordinance no. 190/21.11.2005 was published in the Official Monitor of Romania no. 1179/28.12.2005.
[3] Law no. 36/12.05.1995 on public notaries and public notary activities was republished in the Official Monitor of Romania no. 732/18.10.2011.
[4] The Emergency Ordinance no. 25/31.03.2005 was published in the Official Monitor of Romania no. 278/4.04.2005.
[5] Law no. 188/1.11.2000 on bailiffs was republished in the Official Monitor of Romania no. 738/20.10.2011.

court without notification from the Minister of Justice for acts committed in connection with the exercise of their professional activities, except for indictable offences. This text was repealed by Article II § 8 in the Emergency Ordinance no. 190/21.11.2005.

Furthermore, according to Article 91 § (2) in Law no. 92/1992 on the organization of the judiciary, magistrates could not be inquired, detained, arrested, searched or brought before a court without notification from the Minister of Justice. According to domestic jurisprudence, this legal document, which is now repealed, was construed to signify that for applying the set of 5 processual acts it was necessary to have the approval of the Minister of Justice. However, this procedure led to an unjustified prolongation of the term within which the case should have been solved. At present, in conformity with Article 100 § (2) in the republished Law no. 304/2004 on the organization of the judiciary, judges, prosecutors and magistrate-assistants can be searched, detained or remanded in custody only with the approval of the sections of the Superior Council of Magistracy. Under these conditions, one can notice that the most important processual acts that are necessary for submitting a criminal file to the court of justice (initiation of the criminal investigation, respectively bringing a person before the court by indictment) no longer depend on a previous notification.

Challenge procedure. Thus, according to Article 52 § (6) CPC, "The closing that approved or rejected the abstention, as well as the closing that approved the challenge, are not subject to any ways of attack." Law no. 281/2003 introduced Article 52 § (7) CPC, according to which "The closing that rejected the abstention can be attacked only by recourse within 48 hours since the decision was pronounced and the file is immediately submitted to a higher court for recourse. Recourses shall be judged within 48 hours calculated since the file was received, in the council hall and with the participation of the parties". Subsequently, the Emergency Ordinance no. 55/2004 repealed Article 52 § 7 CPC, trying to eliminate the potential abusive exercise of processual rights as soon as possible so that the normal course of the criminal proceedings would not be hindered. Thus, while trying to eliminate potential abuses, the lawmaker infringed upon other principles that are essential for the criminal trial, i.e. the disclosure of the truth. In this respect, a logical interpretation of the provisions stipulated by Article 52 § 6 CPC, in conformity with *per a contrario* reasoning, would lead one to conclude that the closing which rejected abstention is subject to the ways of attack. Taking into account the importance that the lawmaker attaches to the institution of

incompatibility as well as to the institutions of abstention or challenge, importance which is underlined by the frequent and consistent modifications brought to legislation and by the consequences which might be generated if a cause is solved by judges or prosecutors who are incompatible with this role, we appreciate that the closing by which the challenge was rejected can be attacked by recourse which should be judged separately and immediately. If a way of attack was exercised against the closing that rejected the abstention and if this was judged at the same time with the main cause, consequences would only be formal and would seriously infringe upon the process of justice achievement.

Taking into consideration the above presented arguments, *de lege ferenda*, we appreciate that it is necessary for the law to regulate recourse against closings which rejected challenge.

The obligations that the accused / the defendant has in the criminal trial. In order to facilitate contact with the accused or the defendant, according to Article 70 § (4) CPC [1], "the accused or the defendant is informed about the obligation to announce in writing, within 3 days, of any modification of his address during the criminal proceedings". Thus, the legal framework should offer supplementary guarantees that the most important processual subject of the criminal case can be heard or asked to participate in different criminal investigations; in fact, the presence of the accused or the defendant is a premise both for establishing the truth and for guaranteeing the exercise of the right to defence. This norm has been reinforced by the provisions of Article 198 § (4) letter i) CPC, according to which the non-observance by the accused or defendant of the obligation to notify the judicial bodies in writing, within 3 days, about any modification of the domicile during the pursuance of the criminal proceedings represents judicial misconduct and it is sanctioned with a fine from RON 500 to RON 5,000.

The measures which have to be taken or which can be taken as to the accused or defendant who is remanded in custody and who was temporarily released have the same goal. Thus, temporary release implies the obligation to take the following measures – as set forth by Article 160^2 § (3) CPC – so that the accused or the defendant should: 1) not trespass the territorial limit agreed upon in compliance with the conditions settled by the court; 2) come to the criminal investigation body or, as the case may be, before the court of justice any time he is asked to do this; 3)

[1] Section (4) of Article 70 was introduced by Article I § 38 of Law no. 356/2006.

come to the police officer who is in charge with his surveillance according to the decision of the court and in conformity with the surveillance programme which was set up by the police officer or come any time he is asked to; 4) inform the judicial body of any change of domicile; 5) not possess or use or carry with him any weapons.

According to Article 160^2 § 3^1 CPC, the following measures can be taken so that the accused or defendant: 1) permanently carries an electronic monitoring device; 2) does not go to certain sport or cultural events or to any other established places; 3) does not come close to the victim or the victim's family members or to the person with whom the deed was committed, to the witnesses, experts or any other persons that the court of justice indicated and does not directly or indirectly communicate with these persons; 4) does not drive any vehicle or certain vehicles as set forth by the court; 5) is not in the victim's house; 6) does not practice his profession or do his job and does not pursue the activity which led to the perpetration of the offence.

This set of measures which can or must be taken for facilitating the judgment of the criminal trial is reinforced by the provisions of Article 160^2 § (3^2) CPC, according to which the accused or the defendant shall be under preventive arrest in case he disobeys his obligations deliberately.

2.2. Criminal Processual Provisions which Limit the Efficiency of Solutions Passed for Criminal Causes

Prior complaint procedure. For the topic of our analysis, i.e. efficiency in solving criminal causes, it is important to underline the modifications brought on the matter of prior complaint. Thus, according to Article 197 § (2) letter a) CPC, prior to Law no. 356/2006, prior complaint was directly filed to the court of justice for a series of offences. For these offences there was a temporary reduction of the criminal trial because the preliminary stage of the criminal investigation did not exist. From this point of view, most of the studies on the matter stated that direct criminal action represented the most eloquent instance of an atypical criminal trial.

Pursuant to Law no. 356/2006, *de lege lata*, prior complaint was regulated for all offences by all the competent criminal investigation bodies; the current procedure reveals that criminal trials which judge such offences will be solved within a longer period of time.

If we adopt a neutral perspective when analyzing the conflict which exists between the principles applied to the criminal cases, one can notice that the lawmaker granted more guarantees for a fair settlement of the case because he complies with the disclosure of the truth principle. Thus, even if these causes are simple, the activity pursued by the criminal investigation bodies may settle the legal dispute in a fair way.

3. Conclusion

The efficiency of the criminal trial is closely linked to the basic rule which sets forth that criminal causes should be solved within a reasonable term. In the present study we have analyzed several instruments by which the Romanian lawmaker attempted to apply the principle of celerity, with special reference to the cases judged by ECtHR. It is true that we could have brought more examples to support our argumentation especially starting with 2010 when Law no. 202/2010 on reducing the length of time necessary for solving the judged causes was enforced.

However, it is very important to underline the fact that it is not recommendable to reduce the duration of criminal trials only for complying with certain superior targets which are settled with a view to accomplishing the present criminal policy. Thus, the analysis of the institutions through which one attempts to reduce the length of time necessary for solving causes (criminal causes, in particular) reveals the possibility of infringing upon other criminal processual principles. For example, we may point out the fact that the judge has the possibility to quash the annulment of the writ of summons which was issued by the Public Ministry and to judge that case, even if the criminal investigation has not been initiated. However, the initiation of the criminal investigation, which falls within the competence of the Public Ministry only, would also be, as an exceptional case, it is true, within the judge's competence. Consequently, the judgment of the case would be sped up for that case but the principle of separation of processual functions would be infringed upon.

It is also of great importance to underline the fact that the efficient solving of criminal causes depends upon applying the disclosure of the truth principle, which often requires a long period of time. That is why criminal cases should be judged within a reasonable term while it is also important for the other principles which

are characteristic of the criminal trial to be observed when pursuing judicial activity.

4. References

Bîrsan, C. (2005). *Convenţia europeană a drepturilor omului. Comentariu pe articole/ European Convention on Human Rights. Comment on articles*. Bucharest: C.H. Beck.

Chiriţă, R. (2007). *Convenţia europeană a drepturilor omului. Comentarii şi explicaţii/ European Convention on Human Rights. Comments and explanations*. Bucharest: C.H. Beck.

Damaschin, M. (2010). *Dreptul la un proces echitabil în materie penală/The right to a fair trial in criminal matters*. Bucharest: Universul Juridic.

Edel, F. (2007). *La durée des procédures civiles et pénales dans la jurisprudence de la Cour européenne des Droits de l'Homme/The length of civil and criminal proceedings in jurisprudence of the European Court of Human Rights.* 2nd edition. Strasbourg: European Council.

Neagu, I. (2008). *Tratat de procedură penală. Partea general/Treaty of Criminal Procedure. The general part.* Bucharest: Universul Juridic.

Neagu, I. (2008). *Tratat de procedură penală. Partea special/ Treaty of Criminal Procedure. The special part* Bucharest: Universul Juridic.

Struillou, Y. (2006). La condamnation de l'Etat pour délai excessif de jugement/ The condemnation of the state for the delay in judgment. *Revue française de droit administrative/ The French Review of Administrative Law*, no. 2, pp. 299-304.

Wolf, S. (2003). Trial within a reasonable time: the recent reforms of the Italian justice system in response to conflict with Article 6(1) of the ECHR. *European Public Law*, issue 9, no. 2, 189-209.