

ADMISSION OF GUILT IN THE ROMANIAN CRIMINAL PROCEDURE CODE. A COMPARATIVE LAW PERSPECTIVE

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Abstract

Entry into force of the Law no. 202/2010 regarding some measures to accelerate the settlement of the process, already raises a number of problems of interpretation. According to the Explanatory Memorandum of Law 202/2010 states that: "Unlike the other laws, the Law no. 202/2010 comes into Romanian legislative with the aim of speeding criminal proceedings as well as to prepare the implementation of the new codes, some of the regulations contained in future coding being found in this law." In this respect, in the explanatory memorandum to the bill it was noted that "from the major failures of justice in Romania, the harshest criticism was the lack of celerity in solving cases." As often judicial procedures prove to be heavy, formal, expensive and lengthy it was recognized that judicial effectiveness of justice consists, largely, in the speed with which the rights and obligations enshrined in judgments are part of the juridical circuit, thus ensuring the stability of legal relations to be decided.

Keywords: *simplified procedure, explanatory memorandum, article 320¹ Criminal procedure Code, admission of guilt*

I. Introduction

Entry into force of the Law no. 202/2010 regarding some measures to accelerate the settlement of the process, already raises a number of problems of interpretation. According to the Explanatory Memorandum¹ of Law 202/2010 states that: "Unlike the other laws, the Law no. 202/2010 comes into Romanian legislative with the aim of speeding criminal proceedings as well as to prepare the implementation of the new codes, some of the regulations contained in future coding being found in this law."

In this respect, in the explanatory memorandum to the bill it was noted that "from the major failures of justice in Romania, the harshest criticism was *the lack of celerity in solving cases.*" As often judicial procedures prove to be heavy, formal, expensive and lengthy it was recognized that judicial effectiveness of justice consists, largely, in the speed with which the rights and obligations enshrined in judgments are part of the juridical circuit, thus ensuring the stability of legal relations to be decided².

The introduction of simplified procedure of **admission of guilt** was justified in the explanatory memorandum,

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¹ Law 202/2010 regarding some measures to accelerate the settlement of the process, OG. No.. 714/26.10.2012

² M. Udriou *Preliminary Explanations of Law. 202/2010 regarding some measures to accelerate the settlement of the process in criminal trial*, www.inm-lex.ro

among others, by article 6 paragraphs 3 letter d) of the European Convention which guarantees the defendant the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses under the same conditions as witnesses against him. This right has a relative character; the defendant may give up his pursuit before an independent and impartial tribunal, and elect to be tried based on the evidence administered in criminal prosecution. In this respect, the Strasbourg Court stipulated that the defendant has the opportunity to waive the right guaranteed by article 6 paragraph 3 letters d) of the European Convention and, consequently, he cannot claim that this right was violated, if the sentencing court based its decision on the statement made during prosecution of a witness (anonymously) in whose defendant waived hearing³.

II. The Procedure Admitting Guilt. Romania

It is becoming increasingly clear that the current legislation is no able to face the criminal phenomenon in booming right now. Lately it has increased the number of events seen as crimes, the number of offenders and offenses to be investigated and dealt with too few resources.

Administration of criminal justice requires not only protection against insecurity determined by increasing crime, requiring solutions that result usually in authoritarian policies.

Applying the principle of active role enshrined in article 4 of Criminal Procedure Code, Judicial bodies have an obligation to intervene in criminal proceedings whenever necessary for legal and thorough settlement

of the case, both by clarifications and explanations provided by the parties and by filling their inactivity. The active role⁴ is also manifested regarding the administration of evidence, the judiciary bodies are required to have, by default, the administration of evidence necessary for a fair determination of the case. The exigencies of this principle during trial requirements are usually completed by immediacy rule, so that the first instance court is required to conduct research according to article 321 of Criminal Procedure Code, by hearing again the witnesses that were interrogated during the criminal prosecution.

Inflexible application of these principles whose violation was constantly punished by the courts for judicial review, led inevitably to the extent of the resolution of criminal cases and thus increasing state spending advanced. Defendant's attitude by recognition facts found in documents instituting the proceedings was not likely to contribute significantly to remedy these shortcomings, since the case law did not recognize a special significance of the statement attributed in relation to other evidence.

The need a retrial regulation applicable to pleading guilty was invoked in the doctrine, both as a form of recognition of a relationship of equality between the accused and the state (first offering statement recognition the second offering a procedural transaction, a second trial) and as a solution for certainty and clarity in the process of conflict resolution⁵.

Accepting that the later court proceedings may prove cumbersome, expensive and therefore lack of the required efficiency, the legislator was aware of the

³ ECHR, judgment of 28 August 1991, in Case Brandstetter v. Austria, para. 49 www.echr.eu

⁴ Gheorghe Mateut, *Treaty of Criminal Procedure. General Part*, Vol I, C. H. Beck Publishing House, Bucharest, 2007, p. 174

⁵ Diana Ionescu, *Warning procedure. Implications for the validity*, C.D.P. No. 2/2006, p. 40-41.

necessity to take immediate enforcement provisions, which facilitates efficient procedures and prompt resolution processes. At the same time, these legislative changes have been assigned the role to prepare the implementation of the new codes and applying the proposed solutions⁶.

Therefore, by Law no. 202/2010 it was introduced in the Code of Criminal Procedure Article 320¹, titled marginal "Judgment for pleading guilty" and as follows:

"(1) Until the beginning of the judicial investigation, the defendant may declare personal or by authentic document that acknowledges committing facts retained in the document instituting the proceedings and request that judgment to be made on the basis of the evidence administrated during criminal prosecution.

(2) The judgment can only be based on the evidence administrated in the criminal prosecution only if the defendant states that fully acknowledges the facts established in the document instituting the proceedings and does not require administration of evidence, except that documents in circumstantial can be given at this hearing.

(3) At the time of trial, the court asks the defendant if he requires the judgment to be held based on the evidence administrated during criminal prosecution, that he knows and endorses, and then proceed to hearing the defendant, then the word is given to the prosecutor and other parties.

(4) The court shall settle the criminal action when, the evidence shows that the defendant's actions are determined and is sufficient data on the person to enable establishment a sentence.

(5) If the civil action is required to produce evidence in court, it will have its severance.

(6) Upon settlement of the case by applying paragraph (1), the provisions of article 334 and 340-344 shall apply accordingly.

(7) The court will convict the defendant, who receives one-third reduction of the limits of punishment prescribed by law for imprisonment, and one-fourth reduction limits the penalty provided by law, for the fine. The provisions of paragraphs (1) - (6) shall not apply where the criminal proceedings concerns an offense punishable by life imprisonment.

(8) In case of rejection the application, the court continues the judgment under the ordinary procedure."

With the declared aim of contributing to the establishment the judicial truth with celerity, without sacrificing the quality of justice, the new procedure allows solving cases based solely on evidences administrated during criminal prosecution and a recognizing declaration from the defendant, and possibly taking into consideration some circumstantial documents. Although it contains derogating provisions from the common law, the rule was placed in the chapter regarding the judgment at first instance, before the provisions relating to judicial investigation. Probably justified by the fact that trigger this procedure is conditioned by a statement from the defendant, made prior to the commencement of judicial examination, the questionable option of the legislator has given rise to discussions on both the legal nature of the procedure and the manner in which it will be applied during in the first instance judgment these derogatory provisions. Not surprising, but these effects have put into question the achievement of the goal amendments introduced by Law no. 202/2010, reinforcing the idea that it has to

⁶ See Explanatory Memorandum to the Law no. 202/2010, available at www.cdep.ro

expedite the resolution of cases, and not accelerate the settlement process⁷.

Shortly after the entry into force of the provisions of article 320¹ of Criminal Procedure Code there were highlighted different interpretations on the stages and effects of trials in this way. Regulation proved inadequate not only in this aspect, as well as the conformity with the constitutional principles on the application of more lenient⁸ criminal law and the right to a fair trial in the component on the clarity and predictability of legal rules. Thus, by decision no. 1470 of 8 November 2011⁹, the Constitutional Court upheld the objection of unconstitutionality of the provisions of article 320¹ of Criminal Procedure Code and found that it is unconstitutional to the extent that enforcement removes more favorable. It was also found that the final paragraph of article 320¹ is unconstitutional. Through decision no. 1483 of the same date¹⁰, the Constitutional Court upheld the objection of unconstitutionality and found that the provisions of article 320¹ par. (1) of Criminal Procedure Code are unconstitutional to the extent that enforcement removes more favorable.

Surprisingly, the legislator complied with the two decisions. Under Article V of O.U.G.¹¹ No. 121 of 22 December 2011 amending and supplementing certain normative acts¹², it was ordered amendments to paragraphs (4) and (8) of Article 320¹

Criminal Procedure Code, meaning that they will read as follows:

„(4) *The court shall settle the criminal side when, from the evidence administrated during the prosecution results that the offense exists, it constitutes an offense and it was committed by the defendant.*”

“(8) *The court shall reject the application if it finds that the evidence administrated during the prosecution is not sufficient to establish that the act is exists, it constitutes an offense, and it was committed by the defendant. In this case, the court continues the proceedings according to the ordinary procedure.*”

Juridical nature

The provisions of article 320¹ of Criminal Procedure Code establishes a special procedure itself, having the same object at the judgment at first instance governed by article 313-360 Criminal Procedure Code, namely solving the Fund¹³.

Judgment for *pleading guilty* is achieved, in principle, to a single term, only with the statement of recognition of the defendant and the prosecution evidences, possibly taking into account the circumstantial documents filed at that time. Inquiry being so limited, rightly pointed out,

⁷ V. Cioclei, *About changes brought to the Penal Code by the Law. 202/2010*, Judicial Courier. no.1/2011, page 3.

⁸ For the controversy on this issue see C. Ghigheci *Judgment when pleading guilty*, www.juridice.ro, I. Griga, *Reflections on pleading guilty*, RDP No. 3/2011, I. Narita *Inconsistencies and inaccuracies in the definition and application of more lenient criminal law*, Law no. 9/2011, www.juridice.ro, S. Siserman, *Discussions and reviews on trial for pleading guilty*, RDP No. 2/2011

⁹ Published in the Official Gazette. No. 853 of 2 December 2011

¹⁰ Published in the Official Gazette. No. 853 of 2 December 2011

¹¹ Emergency Ordinance issued by the Government

¹² Published in the Official Gazette. No. 931 of December 29, 2011

¹³ A. Zarafiu, *Some questions regarding transitional and final provisions laid down by Law. 202/2010*, C.J. No. 3/2011, p 169; *Law no. 202/2010. Criminal Procedure. Comments and Solutions*, C. H. Beck Publishing House, Bucharest, 2011, p 111. The author takes special classification proper procedures and ancillary special procedures being those who settled mainly the legal criminal procedure (I. Neagu, *Treaty of Criminal Procedure*. General Part, Universe Publishing, Bucharest, 2010, page 574).

that we are in presence of a simplified (abbreviated) procedure¹⁴.

Procedure reduces demands the active role of the judge, who, noting the conditions and rules of evidence in recognition of criminal prosecution is sufficient to establish that the act is deemed an offense was committed by the defendant, he will not proceed to the administration of other evidence.

From our point of view, although they contain elements of negotiated Justice, the provisions regarding the judgment in case of admitting guilt do not establish a genuine negotiator procedure, which involves an active participation of the defendant interested in exchange for his conduct during the trial to reach an agreement on a solution as favorable as possible. In our case, the defendant's role is limited to recognizing the facts retained in document instituting the prosecution, and the effects of such recognition cannot form the object of negotiation, these effects being prior established by the legislator: reduction the limits of the penalty for a third in case of prison and a one-fourth for the fine. The fact that the defendant, highlighting the benefits of procedural and financial aspects of his behavior (recognition) calls for a sentence in a certain amount and / or a certain way of executing, it doesn't attribute a negotiation character to the procedure as long as the court is not bound by such requests and cannot achieve an agreement.

The defendant has the option to request the simplified procedure proceedings, signifying his recognition of adherence to prescribed conditions of the legislator, which cannot form the subject of negotiations. It is, rather, a procedure of

a consensual nature. Defendant waives this right to silence and not incriminating by himself (which is not an absolute right), without that choice affecting the presumption of innocence, since the solution will be based not only on the statement of recognition, but also on the entire evidence administrated in criminal prosecution, censored by the court.

Declaration form and recognition have a meaning of a partial waiver of the right to defense. We cannot withhold a waiver of the right to defense¹⁵, while this right is not only supporting the innocence, but also the circumstances that characterize the offense and the offender.

Conditions of the application of the simplified procedure

I. Defendant should not be charged with an offense punishable by law with imprisonment for life

According to article 320 paragraph (7) the second Thesis of the Criminal Procedure Code, provisions for admitting guilt judgment does not apply where the criminal proceedings concern an offense punishable by life imprisonment. Obviously, it is the punishment provided for the purposes of article 141¹ Criminal Code.: *penalty provided in the text of the law that incriminates the act committed in the form of consumption without considering the causes of the reduction or increase of punishment.* In this regard it is irrelevant that life imprisonment is provided alternative to prison. Therefore, the procedure for pleading guilty judgment is not applicable if

¹⁴ M. Udriou *Preliminary Explanations of Law. 202/2010 regarding some measures to accelerate the settlement process in criminal trials*, www.inm.lex.ro, A. Zarafiu, *Law no. 202/2010. Criminal Procedure. Comments and solutions*, p 111, I. Griga, *op. cit.*, p 53

¹⁵ As pointed out by D. Atasiei, H. Titus, *Little Justice Reform. Law no. 202/2010 commented*, Hamangiu Publishing House, Bucharest, 2010, p 309.

the prosecution regards an attempted murder in the first degree offense since, under article 176 of Criminal Code; the crime of murder in the first degree is punishable by life imprisonment¹⁶.

If, after acceptance of the application, it has change the legal classification of the offense in an offense punishable by life imprisonment, the court shall return on the admission application for judgment, based on the evidence administrated in criminal inquiring, noting the inapplicability of Article 320¹ of Criminal Procedure, with the result of continuing the judgment according to the usual procedure¹⁷.

If the defendant is accused of committing several crimes, of which only some punishable by law with imprisonment for life, the simplified procedure is not applicable¹⁸, since recognition targets all facts described in the indictment. The provisions of paragraph (1) are clear in this regard ("*... recognizes committing the facts found in the indictment instituting the proceedings ...*"), so, that is the wrong solution to apply the simplified procedure only for some of the offenses retained in the indictment act, on the grounds that it isn't regulated the procedural situation in the case if just for a part of the concurrent offenses the new provisions are applicable¹⁹.

Applying these provisions, the court rejected defendant's request to proceed to judgment on the basis of the evidence in criminal prosecution and will go to trial under the ordinary procedure. In such cases it must be taken into account possibility that the document instituting the proceedings

contain a wrong legal qualification of the act (example: the offense of manslaughter, as provided in article 176 Criminal Code, instead of murder offense, referred to in article 174 Criminal Code.). What would do the court in such situations?

According to an opinion, if it finds that the legal classification of the offense in a crime of aggravated murder is wrong, the classification will be changed according to article 334 Criminal Procedure Code and that will be done before the beginning of trial, to be subject to the provisions of article 320¹ of Criminal Procedure Code²⁰.

Although this ensures the prompt resolution of the case we do not agree with this solution. From the economy of the provisions disciplining the judgment, in the first instance, it appears that changing the legal classification cannot occur until the beginning of the trial, so that the court can retain the same offense committed retained by indictment²¹. Therefore, the court is forced to dismiss the defendant's request to proceed to judgment based of the evidence gathered during the criminal prosecution and then to distinguish if:

1) The act in its materiality was properly retained in the indictment;

Since the defendant has admitted the offense, under the other conditions imposed by article 320¹ of Criminal Procedure Code, he is not responsible for the extension of the trial, so it is fair to benefit from the reduction of the penalty limits.

2) Evidence outlines the other than the accepted facts in the referral act.

¹⁶ I.C.C.J., Criminal Division, December. No. 250 of 27 January 2012 and 523 of 22 February 2012 (www.scj.ro).

¹⁷ Brasov Court, Criminal Division, sent. No. 168 of 11 May 2011 (unpublished).

¹⁸ M. Udriou, *op. cit.*, C. Celea, *The Judgment in Pleading Guilty*, RDP No. 1/2011, p 91

¹⁹ For such a solution see Tribe. Dolj, Criminal Division, sent. No. 161 of 17 March 2011 (portal.just.ro). In this case, the defendant was indicted for crimes of murder, provided by art. 174 para. (1) Criminal Code., Attempted aggravated murder offense provided for in art. 20 rap. art. 174 para. (1) 176 para. (1). b) Criminal Code. and trespassing, provided by art. 192 para. (1), (2) Criminal Code., All applying to art. 33 letters. a) Criminal Code.

²⁰ Neamț Court, Criminal Division, sent. No. 63 of 17 June 2011 (portal.just.ro).

²¹ Gr Theodoru, *op. cit.*, p 689

In such a case it operates a new distinction:

a) The defendant, insincere, acknowledges wrong retained in the document instituting the proceedings.

Speaking strictly about the provisions of paragraph (1) of the article 320¹ of Criminal Procedure Code, it could be argued that in this case the defendant may plead the benefit of lower the penalty, too. This solution is not acceptable, given that the purpose of the simplified procedure, with all speed and reduce the cost of administration of justice, cannot be other than those referred to in Article 1 paragraph (1) and Article 3 Criminal Procedure Code: finding in time and completely the facts of the crime and the truth of the facts and circumstances of the case, and on the individual offender. As the defendant did not contribute to this goal, he cannot receive the legislator indulgence.

b) The defendant acknowledges as has it occurred in reality.

For the same reasons of fairness set out in point 1), although he has not admitted the offense described in a complaint, the defendant will benefit from reduced limits for punishment under article 320¹ par. (7) of Procedure Code.

The same distinction is to be considered in cases where the legal classification change occurs in remedies.

II. The defendant declare that he recognizes the facts established in the indictment act

The form and content of the declaration of recognition

According to article 320¹ par. (1) of Criminal Procedure Code, recognition may

be made in person before the court or an authentic document. Considering the content of recognition, it appears that it must be express and unambiguous and cannot be deducted from a collaborative defendant's attitude with the authorities or from *nolo contendere* plea.

The statement will include both defendant admitted the facts / facts described in a complaint, and request that the trial be held in the evidence administrated in the criminal prosecution, and, therefore, having the meaning of a double act of disposal²².

Unambiguous character of recognition requires the statement to contain a sufficiently clear expression of will by reference to the facts established by the intimation of the court, requesting that the judgment be made on the basis of the evidence during the criminal investigation, accurate knowledge of properties of these samples and renunciation of administration other evidence except the circumstantial documents that may be filed on time. These conditions must be met cumulatively, considering that defendant statement is not only a formal act, but also a substantial background²³. If for recognition made in person in court without some of these items it can be complemented by the defendant questions, if performed by authentic document recognition, it should contain all information given above for the trial to take place in the absence of the defendant, under the simplified procedure²⁴. If authentic document does not contain all the particulars and the defendant fails to appear in court, the penalty can only be the refusal to adjudicate

²² A. ZARAFIU, Law no. 202/2010. Criminal Procedure. Comments and solutions, p.112

²³ V. Pușcașu, *Presumption of innocence*, Legal Universe Publishing House, Bucharest, 2010, p 334.

²⁴ C. Rosu, A. Fanu-Moca, *A special court procedure governed by art. 320 of the Code of Criminal Procedure*, Law Review no. 8/2011, p 179.

under the provisions of article 320¹ of Criminal Procedure Code²⁵.

The holder recognized can only be defendant personally and not by proxy²⁶ (even special mandate provisions of par. (1) - (3) is clear in this regard).

Minor defendant's situation is gentle. If the regulation of the new Criminal Procedure Code is precluded application of the judgment in the case of admission of guilt and plea agreement and juvenile defendants²⁷, article 320¹ makes no distinction in this respect.

According to some opinions, confessions can be made by the minor defendant with the special provisions relating to the summoning persons called at the trial of minors²⁸.

The criticism of this view is based, on the one hand, the nature of the declaration provision act of recognition, on the other hand on the impossibility of applying the provisions of the two concomitant special procedures themselves: that governed by Article 320¹ of Criminal Procedure Code and those covered by article 480-493 of Criminal Procedure Code²⁹. Consequently, the simplified procedure would not apply to defendants who were minors at the time of committing the offense, even if the recognition would be approved by the legal representatives.

From our point of view, the simplified procedure is applicable where defendants are minors. Article 320¹ defendant is not distinguished as major or minor, and automatically reducing the limits of punishment referred to the cited author does

not operate under the provisions of the special procedure in cases involving juvenile offenders, but the basis of the sanctioning regime of the minor contained in the Criminal Code. In addition, the solution of inapplicable simplified procedure might prove unfair to the accused minor compared to the major for the same offense, by the game of mitigating circumstances he could reach the same penalty applied to minors. It might be objected that in such circumstances the court may retain mitigating circumstances in favor of the minor but this operation of individualizing appears forced, since article Criminal Procedure 320¹ of Code expressly provides the solution.

The goal and limits of recognition

Align. (1), article 320¹ of Criminal Procedure Code refers to the recognition of the facts found in the document instituting the proceedings, while the marginal name of the article speaks of the confession. Inconsistent legislator asks whether object recognition is described in the document instituting the act or offense forfeited by this act.

Although marginal name seems to lead to the conclusion that the defendant should acknowledge the offense which it was found by the intimation of the court (offense committed with guilt as required by the text of the indictment), so the content of article 320¹ of Criminal Procedure Code, and the provisions of Law no. 24/2000 regarding the legislative technique for drafting regulations³⁰ indicate that only object

²⁵ C. Celea, *op.cit.*, p 93

²⁶ C. Celea, *ibid.*, p 91.

²⁷ Article 374 refers to a solution of conviction of the defendant receiving a sentence reduction limits, or, in accordance with the minority in the new Criminal Code, against juvenile defendants can only be taken educational measures. The art. 478 para. (6) of the new Code of Criminal Procedure stipulates that juvenile defendants cannot have plea bargain agreements.

²⁸ M. Udrouiu, *op. cit.* p 34

²⁹ A. ZARAFIU, Law no. 202/2010. *Criminal Procedure. Comments and solutions*, p 113.

³⁰ Republished in OG. No. 260 of 21 April 2010

recognition described in the document instituting deed. Thus, the paragraph (1) - (8) of Article 320¹ refers only to recognize the offense and provide the possibility to change its legal classification and the distinction between tort and crime is clearly stated in paragraph (4). In the name of marginal significance, Law no. 24/2000 states that, although marginal expressing synthetic object names article did not have its own significance in regulating the content of [article 47 paragraph (5)].

We believe that "*the act described in the document instituting*" the legislator has considered both the acts described in the indictment rule and all circumstances that characterize it. This conclusion emerges from the provisions of par. (4), article 320¹ of Criminal Procedure Code which both operated as before amendment by EO No. 121/2011 and in its current form, the criminal settlement conditional on the existence of sufficient evidence to characterize the crime scene, and the purpose of the whole procedure (prompt resolution of criminal cases), whose realization requires, besides a sufficient proof to retain the offense, for the sentence sufficient data. In other words, it demands that the facts described in the indictment. In this regard, it was decided that if the trial was conducted according to the procedure regulated in article 320¹ of Criminal Procedure Code, if the document instituting the proceedings prosecutor withheld mitigating circumstance provided legal challenge in article 73 letters. b) Criminal Code on both offenses for which the defendant was indicted on the basis of the

evidence in criminal prosecution, the court cannot invalidate the provisions of article 73 letters. b) Criminal Code for one of the offenses in the absence of judicial investigation showing a change in the status quo retained in the document instituting the proceedings³¹.

On the other hand, the fact challenge the judge may be detained even if was not accepted as such by the indictment, the only condition being that the incidence determining the state of the evidence challenge during prosecution³². If the defendant's request to be tried under the simplified procedure is merely formal it really challenging circumstances relating to the objective side of one of the offenses for which he is prosecuted, not the provisions of Article 320¹ of Criminal Procedure Code³³.

It follows that, in reality, the contradiction between the marginal and the content name of article 320¹ of Criminal Procedure Code is only apparent, the defendant is held to recognize all the relevant factual circumstances, including those that lead to the determination of guilt. Therefore, we can talk and an implicit acknowledgment of guilt. From this perspective it would not be wrong or the words "*recognition of allegations*"³⁴.

According to article 320¹ par. (2) recognition covers all the facts found in the document instituting the proceedings. Partial recognition, which may be in recognition of the offense in other circumstances or otherwise³⁵, be just recognition of facts from those described in a complaint, make inapplicable the simplified procedure, but can be harnessed as a mitigating legal³⁶.

³¹ I.C.C.J., Criminal Section, Decision no. 2334 of 9 June 2011 (www.scj.ro).

³² Appellate Court of Cluj, Criminal and Juvenile Division, in December. No. 188 of 24 October 2011, (www.curteadeapelcluj.ro).

³³ V. Văduva, note in December. No. 1115 of 6 June 2012 Bucharest, Criminal Section I, *Judgment for pleading guilty. Jurisprudence commented*, Hamangiu Publishing House, Bucharest, 2013, p 71.

³⁴ I. Celea *op. cit.*, p 167.

³⁵ C. Celea, *op. cit.* p 92.

³⁶ A. Zarafiu, Law no. 202/2010. *Criminal Procedure. Comments and solutions*, p 113

For situations where the same indictment has ordered the prosecution of several persons, it was shown that, in relation to article 263 paragraph (1) Criminal Procedure Code, recognition by one of the defendants neither does nor refer to the others³⁷. The conclusion is only partially correct because it overlooks crimes ventures, where the defendant recognition should also refer to the contribution of the participants, in order to be possible to establish his own contribution to the commission of the offense.

The defendant is not required to recognize and civil claims brought³⁸. In principle this claim is correct, including the offenses of injury. If contesting the amount of damages, it is possible severance civil action under article 320¹ par. (5) Criminal Procedure Code. The provisions of the simplified procedure may however prove difficult to apply in situations where a certain amount of the damage award aggravated nature of the crime when the criminal case settlement itself depends on the determination of injury.

III. The defendant should require the trial to take place only on the basis of the evidence in criminal prosecution, he knows it endorses

Formulating this request, the defendant waives the right to question unambiguously witnesses in court. Quitting is not contrary to Article 6 paragraph 3 letter. d) of the European Convention on Human Rights, the right enshrined in these provisions having not absolute character.

Defendant's request is accompanied by an indication that he knows and adopts the evidence in criminal prosecution. The specification is necessary because waiving

the public hearing of witnesses must be made knowingly.

To enable the defendant to make an informed choice option, the indictment must be clear and comprehensive, just respecting the structure shown in article 263 Criminal Procedure Code. Checks on the document instituting must be carried out from the perspective of a possible request to be tried on the evidence given in criminal prosecution.

Alin. (1), article 320¹ clearly requires that the statement of recognition should be accompanied by a request to be tried on the evidence given in criminal prosecution. Consequently, the mere statement of recognition is not sufficient for proceedings under the simplified procedure, in the absence of expressions of the will of the defendant.

Finally, it was noted that the defendant expressly requests payment situation, having previously requested the application of Article 320¹ of Criminal Procedure Code³⁹. Supporting the view that these provisions are not automatically compatible with any payment solutions, the author believes that such procedural position of the defendant revokes, cancels the original manifestation of will which should remain irrevocable throughout the process.

The proposed solution is not entirely correct, requiring some clarification. We have shown previously that the declaration of recognition of the defendant aimed facts accepted by the document instituting the proceedings. Return over this lack of certainty recognition manifestation of will for trial based on the evidence given in criminal prosecution as no longer he supports the evidence that the defendant appropriates. All of a return on recognizing it and asks where the defendant was

³⁷ C. Rosu, A. Fanu-Moca, *op. cit.*, p 180.

³⁸ D. Atasiei, H. Titus, *op. cit.* p 308

³⁹ F. Radu, *On the compatibility between different confessions and payment cases* (www.juridice.ro).

acquitted on the grounds that contradicts (fully or partially) the facts accepted by the indictment, namely those provided by article 10 letter a), b), c), d) and e) C.pen. Therefore, we can speak of a revocation or cancellation of events that will, with the consequent trial in normal.

IV. Declaration of recognition to intervene before the judicial inquiry

From the wording of paragraph (1), article 320¹ of Criminal Procedure Code results that recognition that the declaration can only be made at first instance and the onset of inquiry. It thus establishes a limitation period⁴⁰, whose violation is punishable as a belated rejection of the application to be tried under the simplified procedure⁴¹.

These sanctions will only intervene if it is attributable to the defendant's failure to comply. Therefore, if one of the defendants lacked justified the term at which the co-defendant admitted to adjudicate claims under the simplified procedure, he can still benefit from article 320¹ of Criminal Procedure Code⁴².

In light of the considerations and decision no. 1470 of 8 November 2011 the Constitutional Court, the provisions of article 320¹ of Criminal Procedure Code cannot be applied to enforcement appeal procedure. According to article 461 Criminal Procedure Code, the appeal against a final criminal judgment may be enforced when a judgment was not final when implementation is directed against another person, when any doubt arises on the decision that run times any impediment to

the execution or when invoke amnesty, prescription, pardon or any other cause of extinction or a reduction in sentence, and any other incident arose during the execution. It follows that in this way cannot invoke merits issues that can be resolved only in the remedies provided by law. 320¹ Code of Criminal Procedure. Article 320¹ establishes a legal cause of lower limits of punishment, but this question concerns the sentence, taking the merits operation that cannot be achieved in an enforcement complaints.

Doctrine and practice have discussed two special cases of when to intervene in the statement of recognition.

1) Judgment set aside or quashed by first sending the case back to court under Article 379 point 2. b) and article 385¹⁵ point 2. c) Code of Criminal Procedure.

In these situations retrial will take place according to the rules governing the court of first instance, so are the applicable provisions of the Article 320¹ of Code of Criminal Procedure., but not in all cases, but by abolishing limits final judgment and procedural act indicated as valid judicial court⁴³. Therefore, a retrial could take place under the simplified procedure only in cases where at least the criminal side and was not maintained any procedural act performed on the occasion of judgments. Article 320¹ Code of Criminal Procedure is not applied in cases where the first-instance judgment was closed / disposed only in the civil side.

Note that in this way can benefit from article 320¹ of Criminal Procedure Code persons definitively convicted, to the extent that appellate effects were extended to them.

⁴⁰ S. Siserman, *Discussions and reviews on trial for pleading guilty*, Criminal Law Review No. 2/2011, p 81

⁴¹ D. Atasiei, H. Titus, *op. cit.*, p 307; A. Zarafiu, Law no. 202/2010. *Criminal Procedure. Comments and solutions*, p. 112, C. Celea, *op. cit.*, p 93.

⁴² Appellate Court of Constanta, Department for criminal prosecution and juvenile and family in December. No. 30 of 15 March 2011, presented by V. Văduva, *op. cit.*, p 55-56

⁴³ S. Siserman, *op. cit.*, p 81, C. Rosu, A. Fanu-Moca, *op. cit.*, p 183.

2) *The retrial in the case of extradition or surrender under a European arrest warrant*

By a decision of this case, ICCJ retained that the art 320¹ of Criminal Procedure Code shall also apply in case of extradition or surrender under a European Arrest Warrant, provided in article 522¹ of Criminal Procedure Code⁴⁴.

The solution was separated from the interpretation of article 522¹ par. (2) Criminal Procedure Code., that the provisions contained in article review procedure in article 404-408 of the Code, including the provisions of article 405 paragraph (1) shall apply as appropriate and according to article 405 paragraph (1) Criminal Procedure Code, retrial after acceptance in principle of the request for review is made according to the rules of procedure on the judgment at first instance. However, the rules of procedure for the trial of first instance are contained in Article 313-360 Criminal Procedure Code, who under law shall be applied in a retrial after extradition. The provisions of article Criminal Procedure Code 320¹ are covered by Article 313-360 Criminal Procedure Code and are the rule of procedure of adjudication in the background, not understanding the legislator to exempt from the application of the retrial after extradition proceedings.

V. Reasons administered during prosecution are sufficient to establish that the act is deemed an offense was committed by the defendant

From article 320¹ par. (4) (original form) results that the simplified procedure

is applicable only if the evidence gathered during criminal defendant, the facts are established and sufficient data on the person to enable establishment of a sentence. To meet the requirements of clarity and predictability whose lack was notified by the decision of the Constitutional Court no. 1470 of November 8, 2011, the contents of this text was amended by EO No. 121/2011, on the application of the simplified procedure when the evidence administrated during the prosecution results that the offense is deemed an offense was committed by the defendant.

Sufficiency of probation is to be considered as a quantitative and qualitative, of legality. This is because the rule that evidence obtained illegally cannot be used in criminal proceedings applies in any proceedings, without distinction as to whether it is ordinary or special. Renal probation may not be complemented or covered by the statement of the facts the defendant recognition⁴⁵.

When this condition is not met, the court will reject the request to be tried on the evidence given in criminal prosecution. Where insufficient evidences are found only on the occasion of deliberation, the case will be relisted and judged in a normal way⁴⁶.

There was concern that this solution does not result in unfair treatment for defendants who, although made the declaration and recognizing in the time required by law and calls for judgment to take place under the simplified procedure will not be tried in this case for reasons not attributable to them. According to some authors, this difference in treatment is justified⁴⁷ and even if the trial took place following the usual procedure of refusal defendant will benefit from reduced limits of

⁴⁴ Decision. Nr. 3369 of 3 October 2011, www.scj.ro.

⁴⁵ A. Zarafiu, Law no. 202/2010. *Criminal Procedure. Comments and solutions*, p 113

⁴⁶ M. Udrioiu, *Explanations...*, p 56

⁴⁷ C. Ghigheci, *Judgment for pleading guilty*, www.juridice.ro, S. Siserman, *op. cit.*, p 83.

punishment. From our point of view, it might retain discriminatory treatment only if the defendants admitted the facts described in the document instituting proceedings and called on the evidence given during the prosecution (having therefore conduct that would justify simplified procedure), request that was rejected for this analysis, benefit in reducing the final boundaries of punishment. Through rejection does not violate the right to a fair trial or the principle of equality before the law, because it is not the case of similar or even identical situations, the situation on which the evidence of the defendant's criminal prosecution is completely legal and cannot be compared with that given to the defendant for which these requirements are not met. In the latter case the court is required to establish the truth to remove the risk of unfounded or unlawful conviction.

Another issue that should be discussed is the possibility of the defendant to return to his manifestation of will to be tried under the simplified procedure (of course, after acceptance of his application), and if so the terms and timing of the procedure can intervene this "disclaimer".

According to opinions expressed in the case law, the provisions of article 320¹ of Criminal Procedure Code precludes waiver option during trial to trial based on the evidence administrated in the proceedings in the criminal prosecution, since such a possibility is not expressly provided, as if to appeal or waiver⁴⁸. More so could not intervene in the appeal waiver defendant because it would worsen the situation in their appeal.

We do not believe that this solution is correct. The lack of an express provision of abandoning an application not in all cases lead to the inadmissibility of such options relevant in this regard is the decision no.

XXXIV/2006 the High Court of Cassation and Justice, United Sections, which established that the court seized of requests for postponement or interruption of the sentence, review and challenge the performance, if their withdrawal, will take note of this manifestation of will, although this is not expressly provided. It might be objected that this waiver would be in defendant who judged the usual procedure, it would not benefit from reduced limits of punishment. The objection, however, cannot be accepted as the basis for simplified procedure can not only be a manifestation of free will and conscious, these conditions can only speak of a benefit to the defendant. It is possible that due recognition to the constraint (exercised, for example, by the true perpetrator of the offense) or perceptions of the consequences of mismanagement trial based on the evidence in criminal prosecution. Insofar as defendant alleges and proves such circumstances, the court is required to establish the inapplicability of article 320¹ of Criminal Procedure Code. The consequences of these findings will be different when the report comes. In the first instance proceedings shall continue according to the usual procedure. On appeal or recourse solution can only be abolished, that sentence quashed by sending the case back to that court, considering that research is lacking in the first instance court and the parties cannot be deprived of this instance.

III. Aspects of comparative law

1. In the Italian Criminal Procedure Law, the Code of Criminal Procedure of 1988 introduced the institution of applying the penalty at the request of the parties, regulated by article 444-448, with the last

⁴⁸ Appellate Court of Ploiesti Criminal Division for cases involving minors and family in December. No. 29 of 24 February 2012, portal.just.ro.

major changes made by Law no. 134 of 12.06.2003.

The Italian name is *patteggiamento*, translated, in this context, by *agreement, understanding, or a result of negotiations*. The procedure itself takes place between the Prosecutor and the accused, in which the latter is subject voluntarily to the penalty enforced under the terms of the agreement that meets the expressed desire of the prosecution and defense, with no importance regarding who was the initiator of the procedure.

Given the change in 2003, Italian literature⁴⁹ notes that there are two types of guilty plea procedures.

The first is an *ordinary patteggiamento*⁵⁰ and aims at offenses for which the punishment, likely to be imposed under the agreement, will not exceed 5 years. It also bears the name of *patteggiamento allargato* given the relatively wide field of application.

The second procedure is limited to narrow facts of high gravity or situations involving a higher degree of hazard of the offender. In this case, the punishment applied by way of agreement may not exceed 2 years.

Regarding the first typology, about allargato procedure, the *field of application* of the institution is provided by article 444 and requires three ranges: the first is found in paragraph 1 and is given by the maximum sentence applicable to the offense or offenses subject to referral to the court and shall not exceed, reduced by more than a third, five years of imprisonment, whether

accumulated or not with a financial penalty. An example of a situation where the legal maximum may be higher and yet it can attract the incidence of this institution is the existence of mitigating circumstances that reconfigure the limits of punishment, and the maximum effectively applied, reduced by one third, shall not exceed 5 years⁵¹.

The following paragraph sets the second limit, an objective one, arising from the categories of crimes that do not support the applicability of the *allargato patteggiamento*: mafia associations, kidnapping for purposes of extortion (whether these facts are consumed or tempted), trafficking and association to traffic narcotics and psychotropic substances, smuggling and terrorist activities (either tempted form or consumed form). If a legal action falls into one of these offenses, allargato patteggiamento application is not possible, but it remains possible to apply the restricted form, the *patteggiamento piccolo*⁵², providing only that the penalty imposed after the agreement shall not exceed 2 years. Given in abstract the danger in this type of crime and punishment limits generally high, the presence of mitigating circumstances is required in order to reach, in theory, the actual punishment of 2 years.

The third limit is a subjective one and is governed by the second sentence of the same paragraph, excluding from the applicability domain of the extended procedure the individuals that were declared

⁴⁹ F.Peroni – *The new regulation in the matter of enlarged agreements and substitutive sanctions* (original: *Le nuove norme in materia di patteggiamento "allargato" e di sanzioni sostitutive*), in *Diritto penale e processo penale*, 2003, pag. 1067

⁵⁰ J.Pradel – *The guilty plea. A confrontation of American, Italian and French laws* (original: *Le plaider coupable. Confrontation des droits américain, italien et français*) in *R.I.D.C.* no. 2/2005, pag. 477

⁵¹ M.Maniscalco – *The guilty plea agreement* (original: *Il patteggiamento*), Ed. Utet Giuridica, Torino, 2006, pag. 30

⁵² E.Di Dedda – *The consensus of parties in the criminal trial* (original: *Il consenso delle parti nel processo penale*), Ed. Cedam, Milano, 2003, pag. 8

“habitual”⁵³ delinquents, “professional”⁵⁴ delinquents, “per tendenza”⁵⁵ delinquents or reiterated recidivists⁵⁶. In literature⁵⁷, this limitation is explained by the fact that the Italian legislator had no intention to allow qualified offenders to exploit the provisions that have the character of an award, due to their demonstrated inability to move away from criminal tendencies.

The legal text uses the phrase “*siano stati dichiarati*”⁵⁸ but it must not induce the appearance of a declarative nature of the offender qualification in one of the ways mentioned above, and in this respect, Italian case law recognizes the *constitutive character and not declarative* of the decision on the status of the delinquent⁵⁹.

Even for these types of criminals the restricted procedure can operate, as long as the penalty imposed under the guilty plea procedure will not exceed 2 years.

The initiative for starting the negotiations can belong to any party, but in the absence of consensus, an agreement can not be presented to the judge. Given the award nature of this procedure, criminal law literature⁶⁰ considers that the Prosecutor's refusal to conclude the agreement, allows the defendant to propose a penalty which he would have been willing to execute, and,

after the judge debates, if it considers that the proposal adequate, will render a decision in this regard, according to article 448, paragraph 1, second sentence. Therefore, it can be argued that in the absence of commonly accepted establishment of a penalty, the judge will censor the Public Ministry's refusal to accept the proposal of the accused to the extent it deems appropriate.

Regarding the *content of the agreement*, an analysis of paragraph 1 of article 444 of the Italian Code of Criminal Procedure is necessary.

First, the type and quantum of the sentence applicable must be established, because it regards the main element on which the agreement will be achieved, and failure to establish those coordinates makes it impossible to ask for an alternative or lower sanction, as was decided in Italian judicial practice⁶¹.

Indication of the net amount after reduction by a third of the penalty provided by law generated inconsistent practice in Italian courts in the early entry into force of the current Criminal Procedure Code in 1989. Standardization has occurred through a decision of the Court of Cassation⁶², stating that the provision of article 444 shall

⁵³ This category is regulated by the provisions of art. 102-104 of the Italian Criminal Code, and represents the situation in which an individual commits in an interval of 10 years a new crime of the same nature with others previously committed with the condition that there will be at least 3 or 2 of these type so that habituality will be established by legal provision or by the judge.

⁵⁴ This category of delinquent is covered by the provisions of art.105 of the Italian Criminal Code, and represents the situation in which an individual commits a number of crimes of a certain type which provide for his existence or his main means of existence.

⁵⁵ Art.108 of the Italian Criminal Code define this category of delinquents as those that do not fit the previous categories, that are not recidivists and that have committed an intentional crime against the life or integrity of an individual and that reveal a special incline toward crimes due to the way of life and behavior of the delinquent.

⁵⁶ Perpetrators that were already recidivists due to previous convictions at the moment the crime was committed. This institution is regulated by art.99, paragraph 4 of the Italian Criminal Code.

⁵⁷ E. Di Dedda, *op.cit.*, pag. 6

⁵⁸ In English “that were declared”.

⁵⁹ The Italian Court of Cassation, United Sections, 28.06.1988 quoted by E. Di Dedda, *op.cit.*, pag. 6

⁶⁰ M.Mercone – *Criminal Procedure Law* (original: *Diritto processuale penale*) ed. 12, Ed. Simone, Napoli, 2004, pag. 534

⁶¹ Italian Court of Cassation, 3rd Section, 25.02.1993, in M.Maniscalco, *op.cit.*, pag. 29

⁶² Italian Court of Cassation, United Sections, 24.03.1990, in M.Maniscalco, *op.cit.*, pag. 30

be interpreted in the sense that the reduction can not exceed one third of the limits of penalty and not in the sense that the penalty applied will only reach a third of the limits provided by the substantial law.

The decision was altered by subsequent case law⁶³, recognizing the possibility of reducing the already diminished limits by effects of other institutions (ex. extenuating circumstances or special causes of sentence reduction), therefore, it can lead to a sentence effectively applied close to the general minimum of penalties.

Also, the type of penalty should be established by the agreement, given the possibility of alternative sanctions provided by law for the offense. According to article 444, paragraph 3, the content and execution of the agreement may be provided in the form of probation, and if the judge, when presented the agreement, finds non-compliance to suspend, refuses the application.

If multiple offenses are committed on the same occasion or by the same act, Italian literature⁶⁴ recognizes a distinction involving the type of concurrence actually achieved. In case of material concurrence for offenses subject to trial in the same process, the accused is allowed to negotiate penalty for each of them or only some, provided that, taken individually, the penalties for all acts are constituted by imprisonment not exceeding five years with or without a financial penalty also applied, the amount of

which is not relevant to the special procedure itself. The situation is different if the facts are subject to a continuous crime or formal concurrence, when the accused may request a single penalty for all, up to 5 years without the possibility of settling an agreement only for some of them.

After consensus between defense and prosecution over the content of the agreement, it is brought before a judge, who, if satisfied by the conditions of *eligibility and appropriateness*⁶⁵ of the penalty, pronounces a sentence in accordance with the agreement.

The main *effect of the agreement*, once accepted by the judge is the sentencing to a certain penalty as agreed by the parties in both types of procedure, both the enlarged form and the narrow.

In the latter case, the defendant will be exempted from payment of legal costs for enforcing the sentence and security measures except forfeiture of goods regulated by article 240 of the Italian Criminal Code. Equally, for the restricted form, the institution of *conditionally extinguishing the offence*⁶⁶ operates, if the accused does not commit within 5 years, for misdemeanors, and two years, in the case of minor offenses, a new offense.

A common effect of both types of procedure is given by the absence of inclusion of references to the criminal record of the perpetrator⁶⁷. This is due to the nature of the sentence which admits the agreement itself is not a conviction⁶⁸, and has no

⁶³ Italian Court of Cassation, United Sections, 01.10.1991, in M. Maniscalco, *op.cit.*, pag. 30

⁶⁴ M. Maniscalco, *op.cit.*, pag. 5a3

⁶⁵ According to the Italian Constitutional Court's Decision no. 313/1990, the judge will not only state on the eligibility of the case for the *patteggiamento* procedure, but will also rule on the appropriateness of the sentence proposed by the two parties.

⁶⁶ "*l'estinzione del reato*" is a criminal law institution, regulated by art. 167 of the Italian Criminal Code that aims at extinguishing the effects of the misdemeanor if, in a given time period, the perpetrator does not commit another misdemeanor of the same nature.

⁶⁷ M. Maniscalco, *op.cit.*, pag. 220. Another opinion in J. Pradel, *op.cit.*, pag. 481, according to who the provision in art. 445, alin. 1bis that states "the sentence is the equivalent of a conviction", implies that there is a need to register the sentence in the criminal record of the convicted person.

⁶⁸ J. Pradel, *op.cit.*, pag. 481

relevance in case of a civil law trial. Therefore, the criminal sentence pronounced in the procedure of *patteggiamento* does not act as *res judicata* on any items of a civil lawsuit.

Agreement between the Prosecutor and the accused only effects on the criminal side of the proceedings therefore, the civil side can be seized on a separate path, even in the absence of a criminal rulings. The judge, therefore, will not rule on granting civil damages, this being expressly prohibited by article 444, paragraph 2, second sentence. Nothing prevents, however, civil litigation settlement on an alternative route before submitting the agreement to the judge that will acknowledge that the civil action is not promoted.

The sentence pronounced after *patteggiamento* is only subjected to the appeal of the Prosecutor when it did not consent to the agreement, in other cases, this being a final ruling.

Overall, the Italian legislation has undergone a long series of legislative changes in the 24 years of existence, currently reaching a level of procedural maturity which does not eliminate the possibility of criticism and recommendations, but offers at least one example of an operational system likely to be taken, with corresponding adjustments, in other criminal legislations.

2. In the French system, by the Law no.204 of 9 March 2004 the procedure of appearance after prior recognition of guilt was introduced. The regulation is found in the French Criminal Procedure Code Section

VIII, of Title II of Book II, between article495-7 and article495-16.

The French name is *reconnaissance préalable de culpabilité*, which means *preliminary recognition of guilt*. The procedure itself involves *acceptance* by the accused, of the public prosecutor's proposed penalty for the offense which is the subject of a criminal investigation and *subsequent approval* of the acceptance by the competent judge.

The *applicability domain* is regulated in article 495-7, therefore, this procedure can not be used unless the law provides for the misdemeanor in discussion a punishment up to 5 years imprisonment or a fine⁶⁹. Complementary penalties have no bearing on the determination of the applicability domain⁷⁰.

There is an objective limit of the applicability of the procedure, namely article 495-16, which excludes offenses under earlier provisions made by the press, unintentional homicide⁷¹, political offenses and those pursued under a special law. Equally, the procedure does not apply to voluntary or involuntary attacks of the integrity of a person and sexual offenses regulated between article 222-9 and 222-31-2 of the French Criminal Code, according to article 495-7.

A subjective limitation is made by article 495-16 prohibiting the procedure for juvenile delinquents given their inability to be part of a commitment that can attract a criminal conviction, without being offered the guarantees inherent to a criminal trial conducted in full. Moreover, judicial

⁶⁹ In the French system, the criminal illicit is divided in *crimes, misdemeanors and minor offences*. Only for misdemeanors the admission of guilt procedure can be applied, because for an act to be qualified as a *crime* the punishment imposed by law should be greater than 10 years, and for minor offences, there is no special provision in art.495-7 of the French Criminal Procedure Code.

⁷⁰ The applicability domain is quite similar to that of another special procedure, *the penal composition* (original: *la composition pénale*), but the procedure we are analyzing is suited better for misdemeanors with a higher degree of severity - M.L.Rassat - *Criminal procedure* (original: *Procédure pénale*), Ed. Ellipses, Paris, 2010, pag.383

⁷¹ Intentional homicides are not mentioned because they are punishable by more than 5 years.

practice⁷² has stated that people who have been referred to the Criminal Court by order of the judge⁷³ cannot be subjected to this mechanism, therefore, the accused persons that can benefit from this procedure are the ones that appeared before the prosecutor or have been quoted directly or convened.

There are also certain rules regarding the penalties required by the prosecutor on the proposal. Therefore, if the penalty required is a fine then the limits are prescribed by law for this and there are, thus, no special restrictions. If, instead, the penalty required is imprisonment, it will be limited to two thresholds: cannot exceed one year but also may not exceed half the punishment prescribed by law for that offense⁷⁴. The prosecutor may formulate proposals even regarding the suspending of the penalty or make a proposal on the measures of individualization provided by article 712-6 (execution of sentence in semi-freedom, fractionation and suspended sentences, placed under electronic surveillance, parole and conditioned freedom).

Regarding the *content of the procedure*, as there is no such thing as an agreement between the prosecution and the defense, as result of a negotiation, the effects occur by acceptance of the proposed penalty followed by approval of the judge.

The initiative to start the procedure, as shown in article 495-7, belongs to the prosecutor *ex officio* or at the request of the investigated person or its lawyer.

In particular, there are three steps towards successful completion of the procedure when the prosecutor opted for its initiation. Assuming that he has proceeded

ex officio, the accused would appear personally and assisted by a lawyer, and on this occasion he will specify if he pleads guilty to the offense he is being charged as a first step. In this regard, the accused will give a written statement accepting. If he does not recognize the facts imputed, the special procedure ends and the process will continue in the normal procedural mechanism. For the procedure to be initiated by the prosecutor to the defendant's proposal, it is necessary for the latter to send a registered letter with acknowledgment of receipt by the Public Ministry, in which he pleads guilty to the offense committed, and calls into question the prosecutor's application of the procedural path. This letter represents the equivalent of the first stage when the prosecutor does not proceed with the initiation of the procedure. Equally, this letter will have probative value of a document that provides a full confession.

The second stage is common, regardless of how the procedure was triggered so since the accused has pleaded guilty, brought before the prosecutor, the latter shall notify the punishment or punishments that the judge will be required for the confessed facts. The object of the notification will be represented by the means of individualization of execution, therefore, the prosecutor may ask either for a conditional suspension of the sentence or for the immediate enforcement or for the sentence to be convened before a judge charged with the enforcement of sentences to effectively determine the manner of execution, according to article 495-8 of the Criminal Procedure Code. Equally, the accused has the right to a cooling off period

⁷² Constitutional Council, decision no.492/2 March 2004 in S.Guinchard, J.Buisson – *Criminal procedure* (original: *Procédure pénale*), ed. 6, Ed. Litec, Paris, 2010, pag. 897.

⁷³ The order of the judge is a referral document to the Correctional Tribunal which involves the development of larger-scale prior investigations by comparison to other referral documents.

⁷⁴ This provision is applied in cases where the maximum of the penalty does not exceed 2 years, therefore, for other situations, the first hypothesis is applicable.

of 10 days in which to indicate whether he accepts or not the penalty proposed. It is important that the accused cannot negotiate the terms of its acceptance. He is only able to fully accept or decline the prosecutor's proposal⁷⁵. The development of this second phase will be recorded in a written document, subject to annulment unconditional of the existence of any procedural harm, according to article 495-14 of the Criminal Procedure Code.

The third stage takes place before a judge, nominated by article 495-9 as the President of the *Tribunal de Grande Instance* or a judge delegated by the latter to pronounce a sentence of acknowledgement. The presence of the prosecutor is not required, but the presence of the accused person is mandatory⁷⁶, because he will face a hearing in front of the judge in open court in order to verify if the facts and legal qualification have been properly established. The defendant cannot give up his right to be assisted by a lawyer.

Subsequently, the judge shall decide by a motivated order on the acknowledgement of the proposed sanctions by the Public Ministry. Provisions of article 495-9, paragraph 2, provide that the judge "may approve". French criminal law literature⁷⁷, based on a decision of the *Constitutional Council*⁷⁸ states that the judge may reject the application only in terms of new clues on how the offense was committed or concerning the offender's personality. Regardless of the outcome, the judge cannot modify the content of the proposal made by the prosecutor, having the functional responsibility to dispose on the manifestation of will of the Public Ministry.

The same conclusion is reached as an effect of the principle of judicial functions separation.

One issue discussed in French literature, manifested through legislative change aimed at doubling the recognition of guilt procedure by acts of criminal inquiry simultaneously. In the period immediately following the introduction of the guilty plea procedure in 2004, both jurisprudential and doctrinal orientation were against conducting a criminal investigation during the development of the guilty plea procedure. Arguments for this position aimed at the effective function of the procedure, which subjected to acceptance of the accused and approval of the judge would represent, in essence, a form of criminal pursuit, finishing with the referral to a court to resolve the case. To this end, the prosecutor had to wait for the guilty plea procedure to fail in order to launch a new pursuit⁷⁹.

Law no. 526 of 12 May 2009, has introduced article 495-15-1 allowing prosecutors to cite, by judicial police agent, the accused person, during the guilty plea procedure, in order to conduct the criminal pursuit. Successful completion of the special guilt admission procedure will determine the lack of object of any criminal pursuit acts. The solution itself is not widely appreciated in French literature⁸⁰, but its express mentioning is a new element in the studied legislations.

Regarding *the effects of the procedure*, first, it should be noted that the effect of the order by which the judge accepts the prosecutor's request and approves the recognition of the accused is

⁷⁵ M.L.Rassat, *op.cit.*, pag. 384

⁷⁶ For this reason, French literature specified that this is not a judgment procedure, it is only a special manner to exercise the public action - M.L.Rassat, *op.cit.*, pag. 384

⁷⁷ S.Guinchard, J.Buisson, *op.cit.*, pag. 904

⁷⁸ Constitutional Council, dec. 492/2 March 2004, *ant.cit.*

⁷⁹ S.Guinchard, J.Buisson, *op.cit.*, pag. 898

⁸⁰ *idem*

the same as of a judgment of conviction, according to article 495-11, paragraph 2 of the Criminal Procedure Code.

The same paragraph states that the decision is immediately enforceable, therefore, if a penalty or restriction of liberty has been approved, according to the prosecutor's proposal, accepted by the accused, the latter will either be imprisoned or be brought before the judge responsible for the enforcement of the sentence in accordance with article 495-8 previously mentioned. In the latter case, the decision of approval will be sent to the judge responsible for the execution without delay.

According to French literature⁸¹, the law does not allow the judge to partially admit the prosecutor's request for approval, not even in order to amend the amount of the penalty or manner of execution. The solution does not seem natural at first sight, the judge not having the prerogative to state on the guilt or the penalty imposed, freely, but only to accept or reject the pronouncement of an order under the admission of guilt by the accused. Equally, the judge may not issue an acquittal or conviction solution for only some of the facts established by the prosecutor.

Although this mechanism is one of adversarial origin and approaching the Anglo-Saxon model, it is not found in the tradition of continental criminal procedure, and raises questions about the principle of separation of judicial functions under this procedure. A view in this matter was given by a decision of the *Constitutional Council*⁸², which states directly that *the provisions under discussion do not cause any prejudice to the principle of separation of administrative functions of the authorities responsible for solving the public action and*

of judicial authorities. We appreciate that the provision is declaratory and not necessarily the conclusion that may result from the regulation of the procedure, but if the judge rejects the prosecutor's demand, normal procedure will resume, the accused will be subjected to a criminal trial to provide all related safeguards, consistent with international regulations as well as article 6 of E.C.H.R. regarding the right to a fair trial.

Regarding the civil side, it should be noted that there is no such obligation as to solve it for the success of the criminal proceedings, but, according to article 495-13 Criminal Procedure Code, the person whose interests have been harmed, if it declared itself civil party during this procedure, may claim a solution before the judge invested with the special procedure. If, however, the victim could not exercise this right until a sentence was given in the criminal case, it shall have a separate way at its disposal, the ordinary civil action.

If the judge rejects the request of the prosecutor and the case will follow the usual procedure, the statement of admission of guilt by the accused, already given, will no longer be used in that particular trial⁸³, to prevent self-incrimination, as a strategy of the prosecution to strengthen its evidence.

Whatever the solution given by the judge, it is subject to appeal of the accused and the prosecutor has the incident right to appeal, according to article 495-11 Criminal Procedure Code. Literature⁸⁴ has considered that by virtue of the principle of equality of arms, the prosecutor has the principal right to appeal, in the same manner as the accused. The civil party may appeal against the order of the judge, but limited to claims arising in respect of its civil action.

⁸¹ S. Guinchard, J. Buisson, *op.cit.*, pag. 904

⁸² Constitutional Council, decision no. 492/2 March 2004, *ant.cit.*

⁸³ M.L. Rassat, *op.cit.*, pag. 385

⁸⁴ S. Guinchard, J. Buisson, *op.cit.*, pag. 904

On the whole, the French regulation allows the use of this institution only in cases with a low severity level, where a penalty in a diminished amount will not substantially affect its purpose, therefore the ratio between the length of the criminal trial and the effect of the penalty is a justification for the use of the procedure.

The regulation itself does not bring many new elements compared to the other laws studied, but as a novelty, we find provisions concerning the possibility of conducting a concurrent investigation during the plea guilty proceedings, and about the inability to use a confession made towards this procedure if the trial will follow the usual framework, after a judge rejects the request for approval of acknowledgement. These two solutions specifically provided by the French legislator also were implicit in the regulation, as in the first case there is no provision requiring suspension of the investigation, and in the second case the prohibition for using the confession resulted from the principle of probation loyalty, as a guarantee of the right to a fair trial in the light of article 6 E.C.H.R.

3. The Spanish criminal procedure law, the original name is *conformidad del acusado* and a rough translation would be *compliance of the accused*. Through this facility, the accused acknowledges the accusations formulated by the indictment and agrees that the trial will take place without debates, even accepting the proposed penalty. The recognition is the result of negotiations between the defense

and prosecution, reflected usually by mutual concessions.

Looking from a historical perspective⁸⁵, the institution of compliance is not new to Spanish Criminal Trial. Original and essential regulation is found in article 655, 688 and 700 of the Code of Criminal Procedure (*Ley Enjuiciamiento Criminal*, from now on *LECrim.*) articles whose content was essentially maintained during the last hundred years.

In addition to this "more than centenary" provision⁸⁶, punctual regulations have occurred both through Organic Law no.7/1988 which created the *abbreviated procedure* or related laws such as the Organic Law no.5/1995 on the Court of Jury.

The latest amendment dates from 2002 (Law 38/2002 and Organic Law 8/2002) which modified the common compliance regime, the abbreviated procedure and introduced the concept of *quick judgment*.

Starting from these types of regulation, Spanish compliance can be classified as *common* and *privileged*. The latter allows for automatic reduction of one third of the sentence requested by the Public Ministry. The other form of punishment does not allow changes, but only facilitates a prompt resolution of the case.

The *common procedure* is the usual way of solving criminal cases in Spain and finds application whenever another special procedure cannot be used to achieve the goals pursued through the trial. For this reason, Spanish literature⁸⁷, states the subsidiary character of the ordinary procedure.

⁸⁵ J. Moreno Verdejo – The compliance in the criminal trial (original: *La conformidad en el proceso penal*), pag.3239 available on line at <http://www.cej.justicia.es/pdf/publicaciones/fiscales/FISCAL71.pdf>, last accessed on 21.10.2012.

⁸⁶ *idem*

⁸⁷ J.M. Chozas Alonso - The compliance in the Spanish criminal trial (original: *La conformidad en el proceso penal español*), pag.328 available online at <http://www.bibliojuridica.org/libros/4/1574/16.pdf>, last accessed on 21.10.2012.

Specifically, this involves three stages: a) a preliminary stage, called *sumario*, which runs in front of the judge and is aimed at preparing the judgment, since the cause is apparently likely to be subject to full judicial proceedings⁸⁸. b) The next phase, called the *intermediate phase*, takes place in front of the court that is material and territorial competent to judge in first instance. The purpose of this phase is dual, therefore it aims both at verifying the legality and validity of the inquiry that has already taken place, and if necessary some other activities destined to complete the instruction phase may be ordered and, also, this phase represents the closure of procedural activities for the given cause (*sobreseimiento de la causa*). c) The last phase is called *plenario*, it has a decisive character and is represented by oral proceedings before the competent court.

Regarding the purpose of this paper only the oral phase is relevant for invoking the admission of guilt. Under this, compliance can occur in two distinct procedural moments.

The first moment is regulated by article 655 L.E.Crim. To facilitate the exposure a statement is required: Before the debut of the oral judgment, the acts created in the instruction phase are provided to both prosecution and defense so that each will submit a written provisional qualification act (*escrito de calificación provisional*) in which to formulate claims regarding its adversary and to propose evidence in their support.

Article 655 L.E.Crim. stipulates that by the provisional qualifying act, the defendant may express compliance, without reservation, the corresponding qualification

proposed by the prosecution or the most severe qualification presented in it, if the facts are given more legal qualifications. Equally, the defendant must comply with the proposed penalty for the acknowledged facts. The possibility of compliance is, however, limited just to facts for which the law provides a correctional penalty, which is a custodial sentence not greater than 6 years.

For the procedure to be viable, the declaration of compliance should be made also by the defense counsel if it does not consider necessary to continue the ordinary criminal proceedings in order to protect the rights of his client as a guarantee of the right of defense established by the Spanish legislator, given the disposal nature of the act by which guilt is admitted. Specifically, the defendant, although able to bargain on its rights cannot benefit from the provisions of article 655 if his lawyer denies it.

As stated in Spanish literature⁸⁹, in this case, the relationship between lawyer and client passes its usual function, that of "*technical director of defense*"⁹⁰ and becomes a necessary complement to the manifestation of will, in the lack of which the act shall not be validated.

In accordance with article 655 paragraph 2 of L.E.Crim., the Court, unless deemed necessary to continue the trial, renders, without requiring further ado, a decision based on bilateral accepted qualification of the facts without the possibility of imposing a higher penalty than the one requested. One can see the prerogative of the court to state on the opportunity of the guilty plea procedure, so even though formal conditions are met, it is possible for the Court to disregard the statement of recognition and continue the

⁸⁸ Actually, this is phase for collecting evidence, according to art.299 of L.E.Crim., and its purpose is to prepare the judgment of the case, by gathering materials that will prove the existence of the misdemeanor and the guilt of the accused person.

⁸⁹ J.M. Chozas Alonso, *op.cit.*, pag.329

⁹⁰ *idem*

trial by the usual procedure. Equally, the judge will have the possibility to state on the individualization of the punishment being able to sentence the accused at an amount less than what the prosecutor required.

Paragraph 4 of the same article contained a provision that further proceedings will take place according to the usual procedure, if there are several defendants and not all show their compliance with the charges they are brought. The purpose of this provision is to prevent the possibility of removal from the procedure of defendants who have admitted the facts with the purpose of using them as witnesses in the trial of those who have not opted for the special procedure, creating thus an artifice of the prosecution in matter of evidence.

The second moment in which the accused can plead guilty during the oral trial is situated at the beginning of this phase and the related regulation is found in article 688-700 of L.E.Crim.

If the offense that caused the judgment is imposed correctional penalty⁹¹, the president asks each of the accused persons if they admit to the provisional qualification act, and on the civil side, if they agree to the reestablishment of the situation before the offence and to pay damages in the amount provided for in the previously mentioned qualification.

They can recognize both criminal charges and civil claims brought against them. If alongside the action with the Public Ministry (both civil side and the criminal side) there are other civil actions by private persons injured, the defendant is held to recognize the largest sum of damages to avoid a separate trial only on the civil side.

When the same accused person is brought before the court for at least two offences provided for in the qualification

act, he is asked for each act separately, and if there are several defendants, each is asked about the deed attributed.

Just as in the procedure provided for article 655 previously mentioned, if there is one accused concerned and he pleads guilty, the President asks its counsel if deemed necessary to continue the trial. If not, the court will dictate a sentence under article 655. If, instead, the defender does not consent the trial will take place by the ordinary procedure.

If acceptance is reached on the criminal side but on the civil side either guilt is not recognized or the proposed amount is not accepted, the trial will carry on only regarding the civil side, therefore the evidence and subsequent judicial activities will not be able to change the decision on the criminal side.

An analysis of article 696 and 697 will guide us to the same conclusion as set out in the procedure previously presented (article 655, paragraph 4), therefore, if at least one of the accused persons doesn't plead guilty or his lawyer believes that the trial should be continued by ordinary procedure, then the trial will be run by the ordinary procedure for all defendants.

It is interesting to note that Spanish law establishes an obligation for the court to inquire whether the defendant pleads guilty; therefore the judge takes the initiative of the procedure.

Given the fact that the *common admission of guilt* procedure does not offer penalty reduction limits, the main effect is the acceleration of the trial, with the possibility that the judge will take into account the option of the accused, at the time of judicial individualization of the penalty.

The second procedural context in which to study the conformation of the accused is the *abridged procedure*.

⁹¹ Whose maximum provided by law is less than 6 years.

This concept was introduced by Organic Law no.7/1988 and regards the reforming of the classical phases of a trial as mentioned in the case of the ordinary procedure. These phases remain three in number: an initial phase (*diligencias previas*), an intermediate phase (which takes place before the investigating judge) and a final stage, the oral trial, held before the competent court to judge its merits. Their specific is that in each case, activity is majorly simplified by comparison with the ordinary procedure.

In this context, there are three ways in which the accused can invoke its compliance.

The first way is the possibility provided for by article 784.3 and 787 of L.E.Crim., So, according to the first article cited: "*In its writing, also signed by the accused, the defense can show compliance with the prosecution's demands as provided by article 787. This compliance can be equally achieved by use of the new qualification act signed by both the prosecution and the accused, alongside his lawyer at any time before the opening of the oral judgment phase without prejudice to the provisions of article 787.1*".

Article 787 imposes for the application of the abridged procedure a penalty of imprisonment for not more than 6 years. Itself, the admission of guilt in the abridged procedure involves broadly the same terms and effects as in the common procedure, but a significant difference results from the second sentence of article 784.3, as reproduced above: the admission of guilt can be contained in a *new qualification act*, signed by both the prosecution and the defense as a direct result of negotiations between the signatories.

In this case there is no question of unconditional recognition of the

qualification and penalty offered by the prosecution, but a new qualification or penalty that both sides can accept. This option causes a high potential for the defendant to comply, favoring an abundance of such agreements⁹². Its applicability is strictly limited to the abridged procedure, given the fact that this provision is only found in the regulation of the latter procedure.

The second way in which the admission of guilt can be invoked is governed by article 787.1 L.E.Crim. According to it, at the commencement of the oral judgment, defense, with the defendant present, may request the court to dictate a sentence in accordance with the qualification document of the prosecution, without being able to refer to other works or other qualifications. If the penalty does not exceed six years, and if the judge has no doubts about the free expression of will for compliance, it will issue a decision in accordance with the request submitted.

A third way is called "recognition of facts". Without being technically a compliance with the demands of the prosecution, this procedure speeds up the trial by simplifying its first phase, abolishing the second phase of the trial (intermediate phase) and directly transitioning to the oral trial phase. Its regulation is found in article 779.1.5a and provides that if the accused, assisted by its lawyer recognizes the facts before the court, and these facts constitute offenses punishable by a sentence within the limits provided in article 801, the prosecutor is called to be asked if he would formulate an indictment in accordance with the recognition of the accused. If so, then he will initiate the instruction phase in a highly simplified form (*Diligencias urgentes*) and will order the continuation of activities under the terms of article 800 and 801.

⁹² J.M. Chozas Alonso, *op.cit.*, pag. 331

It can be seen that this method of recognition of facts is identical in terms of procedural effects with the privileged compliance provided by article 801 L.E.Crim., specific to quick judgments that will be analyzed in the following lines.

Privileged compliance for quick judgments is regulated by article 801 L.E.Crim. and it is a relatively new institution in the Spanish criminal proceedings being brought by Organic Law no. 8/2002. This new form of compliance is made by a mechanism that reduces one third of the sentence requested by the prosecutor, such a reduction being granted directly by the instruction judge, since compliance is invoked before it.

Due to the automatic reduction of the penalty demanded by one third, this form of compliance is a strong motivation for the accused and a benefit to the celerity of the trial. Spanish legislator has foreseen this possibility only when the requested penalty is imprisonment not exceeding 3 years, or fine regardless of amount, and other penalties not exceeding 10 years.

In addition to the provisions of L.E.Crim., The Spanish procedure law recognizes a **separate compliance form** in article 50 of the Organic Law no. 5/1995 on the Courts of Jury. The marginal title of the article is "The dissolution of the jury by compliance of the parties".

It provides that the court shall proceed to dissolve the jury whether the accused requires a sentence of compliance with the qualification document containing the highest penalty, or other document signed by all parties, without retaining other facts or other qualifications. To achieve compliance, the penalty may not exceed 6 years in prison,

even if it is added to a fine or other penalties restricting rights, regardless of the amount.

The judge will decide the appropriate sentence within the acceptance between the parties, but if there is reason to believe that the facts did not occur or were not committed by the accused, it will not dissolve the jury and will continue the trial.

The compliance of the defendant in what concerns **contraventions (faltas)**⁹³ doesn't have a legislative support in L.E.Crim provisions. In none of the articles devoted to this form of criminal illicit, the accused is not given the possibility to show compliance. Although it can be argued in support of the applicability of the institution, in principle, the majority of Spanish literature⁹⁴ rejects this possibility.

On the whole, the provisions of the Spanish law are the most detailed of the foreign laws analyzed, representing a model of meticulousness, certified in terms of longevity of regulation and of scale reliability when using this procedure.

On the one hand, at a time when European criminal procedures undergo a series of changes that approach them to a private trial, with the possibility of closing it by agreement, even Spanish literature, with a great tradition in matters of admission of guilt, has its own critics on this institution. In this purpose, it was argued that this practice brings a constant infringement to the principle of legality in criminal proceedings, and creates a principle of opportunity for the Public Ministry, principle not recognized by the Spanish Constitution.

On the other hand, criminal justice, a public service, can not function without an economic dimension and without awareness of the effectiveness of the trial and of

⁹³ As forms of criminal offences and not administrative offences.

⁹⁴ J.M. Chozas Alonso, *op.cit.*, pag. 334, J. Moreno Verdejo *op.cit.*, pag.3246, M. Aguilera Morales – *The principle of consensus. The compliance in Spanish criminal trial* (original: *El principio del consenso. La conformidad en el proceso penal español*), Barcelona, Ed.Cedecs, 1998, pag.72

institutional approach. To achieve the social aims of this service, a balance between the renouncement to several aspects of the ideal model of criminal trial, either adversarial or inquisitorial, and the economic conditions necessary to maintain this public service.

In the present case, the Spanish justice appears not to have exceeded that balance and criticisms regarding the admissibility of such procedures appear to be insufficient opposed to contemporary arguments.

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