REFLECTION OF THE PRINCIPLE OF LOYALTY IN MATTERS REGARDING THE ADDUCTION OF EVIDENCE IN THE ROMANIAN CRIMINAL PROCEEDINGS

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Abstract

This study aims the matter in which the Principle of Loyalty regarding adduction of evidence is reflected in the new criminal procedural legislation of Romania. It is a regulation addressing explicitly this principle for the first time, without this meaning that it had no representation in the practice of domestic courts under the previous criminal legislation. The author points out that the new regulations aim at internalizing the standard of protection established by the European Court of Human Rights concerning the right to a fair trial.

Keywords: *Principle of Loyalty, adduction of evidence, criminal proceedings, exclusion of evidence obtained illegally.*

Introduction

A new Code of Criminal Procedure came into force in Romania on 1 February 2014 containing modern elements and innovations, conferring added value to this legal act. Although the new Code of Criminal Procedure failed to always pass the constitutionality review, already existing a number of important decisions of unconstitutionality given on some item thereof, it also has the merit of trying to modernize the Romanian criminal trial by aligning, at least at the level of intent, with the European standards in the protection of fundamental human rights.

These factors also include the express declaration, with this *nomen iuris* of the Principle of Loyalty of proceedings in the adduction of evidence.

The Principle of Loyalty in the new rules of criminal procedure

The text including the regulation of the Principle is the one stated in Art. 101 of the Code of Criminal Procedure, entitled "Principle of Loyalty in the adduction of evidence". According to the first paragraph of the article, "it is forbidden to use violence, threats or other forms of coercion, inducements and promises in order to obtain evidence".

As explained in the explanatory memorandum of the new Code of Criminal Procedure, the establish of the Principle of Loyalty was made "in order to avoid the use of any means that could be aimed at administering of evidence in bad faith, or which could have as effect the commission of an offense in order to protect human dignity, and its right to a fair trial and privacy".

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One shall not consider, however, violations of the Principle of Loyalty the promise of the judicial organs that if a denunciation is made, the person making it will benefit from a reduction of penalty. This because there are legal texts which explicitly establish the occurrence of the effect to reduce the penalty. For example, Art. 15 of Law 143/2000 on preventing and combating drug use[1] provides that if the person who committed one of the offenses defined by that law denounces and facilitates, during the investigation, the identification and criminal liability of other persons who have committed drug related offenses, benefits from halving the limits of the punishment provided by law. Similarly, Art. 18 of Law 508/2004 on the organization and operation of the Directorate for Investigating Computer Crime and Terrorism [2], states that the person who committed one of the offenses attributed by law to the judicial authority, and during the prosecution denounces and facilitates the identification and criminal liability of other participants in the crime benefits from halving the limits of the punishment provided by law. Given these legal provisions, the Prosecutor's promise that in exchange of the denunciation, the offender will receive the mitigation of punishment will not constitute a breach of the Principle of Loyalty. However, we believe that the denunciations made in the context in which its author aims specifically at reducing the limits of penalty should be weighed especially when one takes into account the indictment of a person.

The text of Art. 101 of the Code of Criminal Procedure supplements the statement of the principle, providing some explanations on the content of rule. Thus, paragraph (2) of Art. 101 expressly explains that "methods or listening techniques that affect a person's ability to remember and report consciously and voluntarily the facts which are the subject of proof cannot be used. The prohibition applies even if the person heard consents to the use of such methods or techniques of listening".

This is the case, for example, of a person put to hypnosis in order to remember certain facts. Furthermore, the jurisprudence of the European Court of Human Rights reckoned that the use on people, during the criminal investigation, to obtain evidence, of disorientation techniques, or of sensory deprivation leading to acute mental disorders, such as exposure to continuous noise are prohibited methods of investigation [3].

In close connection with the provisions of Art. 101 paragraph (2) of the Code of Criminal Procedure is also Art. 115 paragraph (2) of the Code of Criminal Procedure which provides that "persons who are in a situation which reasonably calls into question the ability to witness can be heard only when the judicial authority finds that that person is able to report consciously the facts and circumstances actually compliant with the reality". The prohibition acquires an irrebuttable status in that it expressly excludes the possibility of recourse to such techniques, even when the person subjected thereof consents to them being used. The specification is especially important given that the new criminal legislation gives higher express valence to the consent of the victim. Art. 22 of the Criminal Code defines as supporting grounds the "Consent of the injured party". Under this text, "it is justified the fact under the criminal law committed with the consent of the injured person, if it

[1] Republished in the Official Gazette of Romania, Part I, no. 163 of 6 March 2014.

[2] Published in the Official Gazette of Romania, Part I, no. 1089 of 23 November 2004, as subsequently amended and supplemented.

[3] ECHR, Case of Ireland v. United Kingdom, judgment of 18 January 1978, www.echr.coe.int

could lawfully have affected the social value injured or endangered". However, the consent of the injured person has no effect for crimes against life, and when the law excludes the supporting effect thereof. In this case, we believe that the use of prohibited techniques of hearing a person may constitute the offense of abusive investigation in the violence component, as defined by Art. 280 paragraph (1) of the Criminal Code, if the other conditions imposed by law are met. Given the express prohibition that Art. 101 paragraph (2) of the Code of Criminal Procedure establishes, the person eventually accused of such a crime cannot invoke in its favor the supporting grounds consisting of the victim's consent, because the law expressly excludes its scope.

In addition to the above aspects, Art. 101 paragraph (3) of the Code of Criminal Procedure states that "it is forbidden that criminal judicial bodies or other persons acting for them to cause a person to commit or continue committing a criminal offense for the purpose of obtaining evidence".

There will not be considered violations of the Principle of Loyalty using special investigative techniques, such as: the use of undercover investigators, investigators with real identity, collaborators and authorized participation in certain activities [Art. 138 paragraph (11) of the Code of Criminal Procedure].

Regarding these special methods, it should be emphasized that the new provisions of Art. 101 of the Code of Criminal Procedure aim at internalizing the standard of protection of human rights established by the ECHR according to which flagrant violations of the right to a fair trial take place, as the person is provoked to commit a crime to obtain evidence. The concept of challenge to which we refer is the one outlined in the jurisprudence of the European Court of Human Rights that "the actions of the undercover investigator must not exceed the level of passive research of a criminal conduct, there must be indications that such offense was committed without the intervention". The Court consistently considers that the right to a fair trial is violated in the event that the "careful evaluation of the evidences reveals that the prosecuting authority, through the intermediary coordinated in its actions by the undercover investigator, did not limit itself to passively investigate the criminal fact, but also exerted an influence on the person concerned as to cause the commission of a criminal offense which would not have been committed without this intervention, in order to ascertain a crime openly or to obtain evidence" - causes Vanyan v. Russia, judgment of 15 December 2005, respectively Ramanauskas v. Lithuania, judgment of 5 February 2008.

We also believe that there are violations of the Principle of Loyalty in matters of adduction of evidence the fairly frequent cases in the current social reality where the organized criminal group activity is monitored for very long durations in order to obtain evidence of its existence. We reckon that such situations require that the criminal activity be stopped immediately in order not to tolerate the existence of a threat in full swing to the stability of society only to produce evidence.

While it may seem an absolute novelty in the Romanian legislation, the new provisions of Art. 101 of the Code of Criminal Procedure are nothing but a restatement and express consecration as a principle of the provisions of Art. 68 of the Code of Criminal Procedure 1969. The text alleged prohibited the use of coercion in order to obtain evidence of a formulation similar to the current one: "is forbidden to use violence, threats or other forms of coercion, inducements and promises in order to obtain evidence . It is also forbidden to

incite a person to commit or continue a criminal offense, in order to obtain evidence".

The doctrine developed under the previous Code of Criminal Procedure emphasized that if an evidence is relevant, conclusive and useful but was administered in violation of Art. 68 of the Criminal Code 1969, such evidence cannot be exploited in the criminal proceedings[4].

In the jurisprudence outlined under the Code of Criminal Procedure entered into force in 1969 the courts found that violations of the Principle of Loyalty occurred in concrete situations. Thus, a decision validated by the High Court of Cassation and Justice [5] noted that the criticism regarding the manner in which the research began, undercover investigator and undercover officers were used it is well founded. The court noted that based on alleged information - that the investigator refused to submit to the censorship of the court and critics of the accused – it was established that the defendant would be the leader of an organized crime group specializing in drug traffic - marketed drugs and, consequently, the undercover collaborator, codenamed G.G., was contacted, who repeatedly asked him to sell him various amounts of risk drug, which the defendant did, and that on the date when it was arrested in the car it had commissioned, they found the amount of 389.9 grams of cannabis resin. The same court stated that according to the provisions of Art. 6 paragraph (1) HRFR, in order to receive a fair trial the defendant must be ensured the actual fairness of the criminal proceedings, a procedure requiring precise guarantees related to the advertising of the criminal proceedings before the court, and also implicit guarantees concerning the obligation of loyalty in the gathering of evidence by police and judicial authorities. It is understandable that a fair trial cannot tolerate wickedness or violent processes and that, in any case, the right of defense must be guaranteed, and this is why the use of evidence gathered as a result of challenges is contrary to the Convention.

Addressing issues of disclosure of evidence and challenges or committing of crimes must meet the requirements necessary to ensure the adversarial of proceedings of evidence adduction and legality of weapons. In those circumstances, the Court held that it is obliged, finding irregular processes, to remove the evidence obtained in this way, given the provisions of the domestic legislation, respectively, the provisions of Art. 64 paragraph (2) and Art. 68 of the Code of Criminal Procedure 1969. In this context, the Court drew a distinction between an instigation to commit an offense - which is forbidden and is contrary to the Principle of Loyalty - and the instigation to obtain evidence, of a criminal conduct that is permissible to fight organized crime. The findings of the court was based on the fact that, prior to the referral ex officio, no investigation was carried out upon the indicted on the commission of any offense under criminal law, that the data or information that should have been the basis for prosecution and wiretaps were not subjected to the censorship of the court and critics of the defendant - not being filed, though the court requested them, and that material acts of sale by which it is argued that the defendant would have given for hire risk drugs to an undercover collaborator, have occurred only after the defendant had been contacted by it, when the prosecution was not initiated when a first sale had already taken place, and only after being asked insistently the sale of drugs by this collaborator. The

[4] I. Neagu, Tratat de procedură penală, 3rd Edition III, Legal Publishing House, Bucharest, 2013, p. 452.

[5] Criminal Section Decision no. 1852/2009, available at http://legeaz.net/spete-penal-iccj-2009/decizia-2852/2009

conclusion was that the defendant was subjected to an instigation for the sale of drugs, and therefore, all evidence were dismissed - the reports drawn up by the investigator and the undercover collabo-rator, the ambient audio - video recordings and records of phone calls during 13 August 2008 - 25 August 2008 that only shows the conducting of material acts on the sale of risk drugs and do not evidence the possession of risk drugs with the purpose to sell. The court concluded that in this case, even if the accused was a drug consumer and there existed data in this regard, nothing required the investigative authorities not to ascertain only this illegal fact or the possession of risk drugs with the purpose to sell.

In another solution in the legal practice, validated by the decision of the High Court of Cassation and Justice [6], it is stated that the undercover investigator P., police officer within the S.C.C.O.N., organized the purchase from the indicted of a quantity of cannabis. Thus, on 17 March 2006, the collaborator T., a private person, bought from the indicted the amount of 1.5 grams of cannabis, for which he paid the sum of lei 200. The operation was organized and verified by the investigator. Nothing indicates that without their intervention the defendant would have sold the drugs.

Moreover, there was no evidence at the file that the defendant had been known at the time as drug seller or consumer, and its criminal record showed that he had never been convicted. There is only a report concluded on 16 March 2006 by a policeman within the S.C.C.O. N. showing that he was notified that the defendant consumes and sells drugs, without mentioning who made the referral in order to be verified. Accordingly, the court held that the defendant was provoked to commit the crime for administering incriminating evidence, in violation of the provisions of art. 68 paragraph (2) of the Code of Criminal Procedure 1969. Consequently, the court dismissed the evidence obtained by using the undercover investigator and collaborator, because, by their activity, they have led the accused to commit an offense that otherwise, in the absence of maneuvers used, would not have committed.

The court reviewed the case in the light of the existence of evidence that the defendant would have committed the offense even if it had not been instigated. It was found that the file contains only the report drafted on 16 March 2006 by a police officer showing that he was notified that the defendant consumes and sells drugs, without mentioning who made the referral in order to be verified. Because the non disclosure of the source is permissible in order to protect it, or to use it on another occasion, the first instance checked the other evidence assessed as well. The analysis was done by reference to the ECHR jurisprudence in cases E. and L. v. the United Kingdom and J. v. the United Kingdom where the European Court showed that when the information disclosed by the prosecution authorities do not allow to determine whether the defendant was or was not the victim of an instigation, it must be checked whether the right of defense was adequately protected, namely the compliance with the principles of adversarial, equality of arms, unhampered, legality and loyalty in the adduction of evidence was analyzed, guaranteed by Art. 6 § 1 and 3 point d) of the Convention. From this point of view, the domestic court found that the procedure was not fair to the defendant in the burden of proof by witnesses with protected identity D.I. and D.V. These witnesses were heard only during the prosecution phase. During the trial phase, although several steps were taken, they could not be heard because D.I.I.O.C.T.

[6] Criminal Section Decision no. 626/2010, available at: http://legeaz.net/spete-penal-iccj-2010/decizia-626-2010.

[Directorate for Investigation of Organized Crime and Terrorism] - N. Territorial Service, which was required to present them, did not find them. At their hearing in the prosecution phase, the defendant or his attorney had no opportunity to question them. These witnesses were heard in June and December 2006 after the beginning of the prosecution, which requires that the defendant should have been informed of the accusation and the right to defense, and if it wasn't found, the file would contain evidence that it was sought. Or, the evidence that it was sought are from August and September 2007, well after the beginning of prosecution and hearing of witnesses. The domestic court invoked the ECHR rules according to which, in order to grant the right to a fair trial, all evidence must be, in principle, adducted before the defendant, in open session, for a preliminary ruling, as stated, as a principle, by the European Court in a constant jurisprudence (G. v. France, judgment of 22 June 2006 L. v. Italy, judgment of 27 February 2001, V.M. and Others v. the Netherlands, judgment of 23 April 1997).

However, the domestic court also found that Art. 6 of the European Convention on Human Rights does not require that the accused or its lawyer have the right to participate in the hearing of a witness and to submit questions during the prosecution stage of the proceedings if the defense has this right before the court. Use as evidence of statements made during prosecution phase is not in itself incompatible with Art. 6 of the Convention, provided that the rights of the defense were respected, i.e. if the defendant had an adequate opportunity to challenge or question a witness giving statements against him, either during its hearing, or in a subsequent phase the procedure (C. v. Italy, judgment of 5 December 2002, B. and Others v. Lithuania, judgment of 28 March 2002). In the case of D. v. Romania, the judgment of 8 March 2007, the European Court stated that in case of impossibility to obtain the presence of a witness in court, the court may, subject to the rights of the defense, take account of the depositions taken during prosecution, especially as these they may appear to be corroborated by other evidence adducted.

The court concluded that in the cause analyzed, neither the defendant or its lawyer could not interrogate the two witnesses, neither in the prosecution stage or during trial, so that a conviction of the defendant highly based on this testimony would be incompatible with Art. 6 of the Convention. Moreover, it should not be overlooked that the identity of these witnesses is protected, so that for this reason, it cannot be highly founded on a conviction of the defendant on their testimony. In the case of K. v. the Netherlands, judgment of 20 September 1989, the European Court stated that the undeniable difficulties of the fight against drug trafficking cannot be ignored, in particular on the discovery and the adduction of evidence, nor ravages of drug trafficking in society, but it considered that these difficulties cannot lead to restricting so much the right of defense of any accused.

In its jurisprudence (F. and S. v. Italy, judgment of 7 August 1996, G. v. France, judgment of 22 June 2006, Z. v. France, judgment of 13 April 2006, C. c. Italy judgment 21 March 2002), the European Court pointed out that Art. 6 authorizes the court to found its conviction on the deposition of a witness of the prosecution whom the defendant or its lawyer could not interrogate at any stage of the proceedings only if it is impossible to locate the witness, being necessary to prove that due care was taken and that the witness was actively sought, and the testimony is not the only element serving the basis of the judgment. Or, several request for witness presentation have been made in the present case, and D.I.I.O.C.T. announced that they are working abroad, without additional data and no evidence that they

were actively sought. For all these reasons, it ruled in favor of its acquittal.

Therefore, the national courts reported their solutions to the European standards even before the entry into force of the new Code of Criminal Procedure which expressly defines the Principle of Loyalty. In this way, the premises of its compliance consistent with the new regulation seem generous.

Our assertion seems even more true in so far as in the new criminal law the Principle of Loyalty has reverberations throughout the criminal proceedings, and various provisions of the Code of Criminal Procedure are meant to ensure its compliance. For example, art. 110 paragraph (5) of the Code of Criminal Procedure enshrines the rule according to which during the prosecution, the hearing of the suspect or the accused is recorded with audio or audiovisual means.

However, for the same purpose, the new Code of Criminal Procedure provides that the verification of compliance with the Principle of Loyalty upon the adduction of evidence in the prosecution stage takes place in the preliminary hearing. At this stage, the preliminary chamber judge is called upon to verify the legality of evidence during prosecution.

To the extent that the preliminary chamber judge ascertains violations of the Principle of Loyalty, it excludes the evidence from the evidence of the case.

Even in the explanatory memorandum accompanying the new Code of Criminal Procedure stresses that the institution of exclusion of evidence unlawfully or unfairly adducted knows a detailed regulation, being acquired by the legitimacy theory that places the debate in a wider context, given the functions of the criminal proceedings and the judgment resulted. Given the nature of this institution (taken in the continental law system from the common-law tradition) and the jurisprudence of the European Court of Human Rights, the evidence adducted with certain infringements of the legal provisions may exceptionally be used if this does not prejudice the fairness of the criminal process as a whole.

In close connection with the sanction of exclusion of evidence illegally obtained is another new institution introduced - the exclusion of derivative evidence (the doctrine of "distance effect" or "fruit of the poisonous tree") that seeks the removal of evidence adducted legally, but which are derived from illegally obtained evidence. This sanction becomes incident in cases where there is a necessary causal link between the evidence adduced illegally and the derived evidence adducted subsequently, and the judicial authorities used principally and directly the data and information obtained from the illegal evidence, without any other alternative source and without definite possibility for them to be discovered in the future to legally manage the evidence derived.

Conclusion

All regulations concerning the need to comply with the Principle of Loyalty of adduction of evidence in the criminal proceedings, the new Code of Criminal Procedure entered into force on 1 February 2014 in Romania ensure a modern regulation that tends to assimilate in the internal judicial practice the standards of protection regulated by ECHR. It is only a first step, which although it is indispensable for achieving this goal, is not sufficient, requiring awareness of the need to internalize an adequate level of protection of human rights including matters of guaranteeing the right to a fair trial.

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