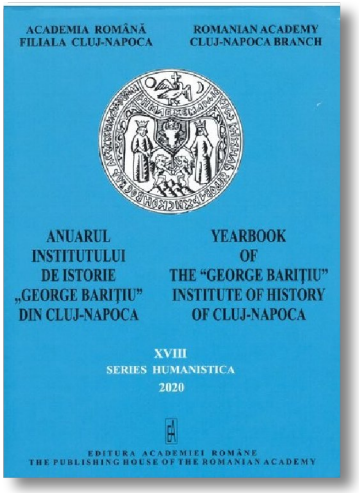

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The pretrial procedure in the Romanian legislation

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DREPT

THE PRE-TRIAL PROCEDURE IN THE ROMANIAN LEGISLATION

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Abstract. *The current Romanian Criminal Procedure Code regulates three stages of the criminal trial: the criminal investigation, the Preliminary Chamber, the trial, and the enforcement of the criminal court's decisions that have remained definitive. Although we are in the presence of relatively new regulation, the dispositions in the Romanian Criminal Procedure Code have been far from perfect, stoking controversy both in the doctrine and in the judicial practice. Numerous dispositions have been subject to constitutionality reviews, especially for the purpose of ensuring the preservation of the rights of those who are involved in the criminal trial, especially in the pre-trial phase. The presentation and analysis of the pre-trial procedure is carried out both from the perspective of the legal dispositions, of the jurisprudence, as well as the decisions of the Constitutional Court of Romania, the latter having an important role in guiding the lawmaker and applying the text of the law.*

Keywords: *criminal law, human rights, pre-trial procedure, preliminary chamber, criminal investigation*

1. INTRODUCTION

The current Criminal Procedure Code, adopted by the Romanian lawmaker through Law no. 135/2010[1], has been in force since February 1, 2014. Due to the desire to create a legislative framework where the criminal trial are faster, more efficient and ensure a high level of protection for human rights and fundamental liberties, the Romanian lawmaker has adopted new solutions, with no counterpart in the previous legislation, while keeping the provisions that have proven their efficiency throughout time.

[1] Published in the Official Gazette of Romania, no. 486 of July 15, 2010.

Criminal trials are defined in the specialized doctrine as the complex judicial activity carried out by the criminal judicial bodies in accordance with the law, with the active participation of the parties and other involved procedural subjects, in order to ascertain, in a timely and comprehensive manner, the acts which represent offenses, such that the person committing an offense is punished according to their guilt, and that no innocent person is held criminally liable (Mateuţ, 2019, p. 25; Neagu & Damaschin, 2014, pp. 11-12).

When carrying out the criminal trial, a special role is played by the principles that govern them, principles that are listed within the first articles of the Criminal Procedure Code (art. 2-12), as the Romanian lawmaker enshrines: the lawfulness of the criminal procedure; the separation of judicial functions; the benefit of the doubt; the discovery of the truth; *ne bis in idem*; the mandatory character of setting in motion and exercising the criminal investigation; the fair character and reasonable duration of the criminal trial; the right to freedom and safety; the right to defend oneself; observance of human dignity and private life; the official language and the right to an interpreter.

Criminal trials contain numerous activities that are carried out in "a mechanism of procedural acts" *("angrenaj de acte procesuale"),* its phases constituting divisions wherein a complex set of activities are performed in a successive, progressive and coordinated manner (Volonciu, 1996, p. 20). It is considered by some authors (Mateuţ, 2019, p. 66; Udroiu, 2014, p. 2)[2] that the phases of the criminal trial are: the criminal investigation, the Preliminary Chamber, the trial, and the enforcement of the criminal decisions that have remained definitive. According to other authors, the Preliminary Chamber procedure cannot be considered a phase of the criminal trial, as the subject of the Preliminary Chamber procedure is to verify, after the case has been submitted to trial, the jurisdiction and lawfulness of bringing the case before a court of law (Olariu & Marin, 2015, p. 13).

As preliminary phases to the trial, the criminal investigation and Preliminary Chamber procedure will be the subjects of our presentation.

2. THE CRIMINAL INVESTIGATION

As the first phase of the criminal trial, which comes before the trial, the criminal investigation is mandatory, being justified, among others, by the necessity of the judicial bodies to carry out the activities specific for combating criminality which is increasingly diversified, as well as the necessity to avoid the indictment and sending to trial of a person with no serious grounds, establishing whether there are such grounds for a person to be held criminally liable (Mateuţ, 1997, p. 103;

[2] For more details, see Fodor & Fodor (2015).

Volonciu, 1996, p. 8). The procedure during the criminal investigation is non-public, non-contradictory, and is predominantly written. The object of the criminal investigation, according to the provisions of art. 285 of the Criminal Procedure Code, is to obtain the necessary evidence related to the existence of the offenses, the identification of the persons who have committed an offense, and the establishment of their criminal liability, in order to ascertain whether it is necessary to send them to trial.

2.1. *Carrying out the criminal investigation*

In accordance with the provisions of art. 305 par. 1 of the Criminal Procedure Code, the criminal investigation body orders the commencement of the criminal investigation concerning the committed act or the act which is about to be committed even if the author is indicated or known, when the referral fulfills the conditions stated in the law.

The avenues for referral in what concerns the criminal investigation bodies are regulated in art. 288 par. 1-3 of the Criminal Procedure Code. Thus, the Romanian lawmaker provides that a referral can be filed with the criminal investigation body in the form of a complaint or report, following acts performed by other law enforcement bodies (for example, referral of the commander of the military unit, the commander of a ship, an airship, art. 61 of the Criminal Procedure Code, par. 5), or it can take action *ex officio*.

In certain cases provided for expressly by the lawmaker, the prior complaint of the aggrieved party, the referral drawn up by the person provided for by the law (for example, according to art. 109 par. 2 of the Romanian Constitution, it is only the Chamber of Deputies, the Senate and the President of Romania who have the right to request the criminal investigation of the members of Government for acts committed while in the exercise of their function) or the authorization of the body provided for by the law (for example, art. 10 par. 2 of the Romanian Criminal Code) are necessary.

In order for the object of the criminal investigation to be realized, the criminal investigation bodies are obligated, after the referral has been filed with them, to seek and collect the data and information related to the existence of the offenses and the identification of the persons who have committed the offenses, to take the measures necessary for limiting the consequences of the offenses, to gather and produce evidence (art. 306 par. 1). The criminal investigation bodies are also under an obligation to perform the investigative steps that are stringently necessary, even if those do not pertain to a case where they have authority to perform a criminal investigation. It is important to mention that, after the criminal investigation has begun, banking and professional secrecy, with the exception of the professional secrecy of the attorney, are not opposable to the prosecutor.

The criminal investigation phases comprise: the stage of the investigation of the act and the stage of the investigation of the person. Thus, when a referral is filed, within the conditions of the law, with the criminal investigation body, concerning a committed offense, the body issues an order to begin the criminal investigation of the committed act (*in rem*), even if the author is indicated or known. The stage of the investigation of the person is marked through the act of initiating the criminal action. The beginning of the criminal investigation is the initial moment of the commencement of the criminal trial (Mateuţ, 1997, p. 142).

According to the provisions of art. 305 par. 3 of the Criminal Procedure Code, when the existing data and evidence in the case constitute probable cause to believe that a certain individual has committed the offense that warranted the initiation of the criminal investigation and it is found that none of the cases preventing the initiation and exercise of criminal action as under art. 16 par. 1 of the Criminal Procedure Code applies, the criminal investigation body shall order the criminal investigation to continue, and the person thus acquires the capacity of suspect.

The suspect is defined in art. 77 of the Criminal Procedure Code as a person in respect of whom, from the data and evidence existing in a case, there exists a reasonable suspicion that they committed an act stipulated by the criminal law. Following the analysis of the regulations contained in art. 305 par. 3, we can deduce that the criminal investigation against the person can be ordered both by the prosecutor and the criminal investigation body. However, when the measure is ordered by the criminal investigation body, it is subject for 3 days' time to the confirmation of the prosecutor supervising the criminal investigation, and the criminal investigation body is also obligated to present the case file to the prosecutor in this situation. The suspect shall be informed, before their first hearing, of that capacity, of the actions they are a suspect for, of the charges for such actions, of their procedural rights, and a report shall be written to that effect (art. 307 of the Criminal Procedure Code).

A defendant is a person against whom criminal action was initiated (art. 82 of the Criminal Procedure Code). Criminal action is initiated by the prosecutor during the criminal investigation by order, when it is ascertained that there is evidence showing that a person has committed an offense and that neither of the circumstances preventing the exercise of criminal action, provided for in art. 16 par. 1 of the Criminal Procedure Code, exist. The initiation of criminal action is communicated to the defendant by the criminal investigation body who summons them for a hearing, and a report is written to this effect.

The judicial body shall communicate to a suspect or defendant the capacity in which they are heard for the act set forth by the criminal law for the commission of which they are suspected or in respect of which a criminal action was initiated, as well as its legal classification (art. 108 par. 1 of the Criminal Procedure Code). At the same time, the judicial body has to inform a defendant

of the possibility to enter, during the criminal investigation, a guilty plea agreement, as a result of admitting their guilt (art. 108 par. 4). During the criminal investigation, before the suspect's or defendant's first hearing, they shall be made aware of their rights and obligations provided for in art. 83 and 108, par. 2 of the Criminal Procedure Code.

During the criminal trial and, thus, the criminal investigation, the defendant has the following rights: the right to give no statement throughout the criminal trial, while being instructed that, by refusing to give a statement, they shall not suffer any unfavorable consequence, and if they do give statements, these can be used against them as evidence; the right to be informed in relation to the act that they are investigated for and its legal classification; the right to consult the file, under the conditions of the law; the right to have a chosen attorney, and, if they do not designate one, in the cases of obligatory assistance, the right to a public defender; the right to propose the presentation of evidence within the conditions provided for by the law, raise exceptions and make closing arguments; the right to formulate any other opinions that relate to the settlement of the criminal and civil aspects of the case; the right to an interpreter, free of charge, when they do not understand, cannot express themselves well or cannot communicate in Romanian; the right to resort to a mediator in the circumstances allowed by the law; the right to be informed about their rights; other rights provided for by the law.

Unless the law stipulates otherwise, a suspect has the rights set by law in respect of the defendant (art. 78 of the Criminal Procedure Code).

The stipulated obligations which must be brought to the knowledge of the suspect or defendant, according to art. 108 par. 2 are: the obligation to go to court on receiving summons from the judicial bodies, drawing their attention that, for failure to comply with this obligation, a bench warrant can be issued against them, and that in case of avoidance, the judge may order their pre-trial arrest; the obligation to communicate in writing, within 3 days, any change of address, by drawing their attention that, for failure to comply with this obligation, summons and any other documents communicated to the first address shall remain valid and shall be deemed as brought to their knowledge. Such rights and obligations shall also be communicated to them in writing and, in the event that they are unable or refuse to sign, a report shall be prepared (art. 108 par. 3).

According to the provisions of art. 309 par. 4, when they deem it necessary, the prosecutor can interview the defendant personally and inform the defendant of the aforementioned rights and obligations. We must emphasize that the criminal investigation shall continue even in the absence of the defendant, when the latter is absent without justification, is avoiding responding to summons or is missing (art. 309 par. 5).

As we have mentioned earlier, the object of the criminal investigation is to gather the necessary evidence related to the existence of offenses, the identification of the persons who have committed an offense, and the

establishment of their criminal liability, in order to ascertain whether the case can be sent to trial. Gathering the necessary evidence must have a view towards: the existence of the offenses, the identification of the persons who have committed an offense, and the establishment of the criminal liability of the persons who have committed an offense. To achieve the goal of the criminal investigation, the criminal investigation bodies must, after receiving the referral, seek out and collect data or information concerning the existence of the offenses and the identity of the individuals who committed the offenses, take steps to limit their consequences, collect and produce evidence in compliance with the requirements of the law (art. 306 of the Criminal Procedure Code).

The production of evidence is governed by rules provided for in the Criminal Procedure Code, including resorting to evidentiary methods and means provided for by the lawmaker. These are the principles governing the production of evidence during the criminal trial (Mateuţ, 2019, pp. 474-484): the principles of freedom, as the legal bodies have the freedom to use any evidentiary means that is not forbidden by law; the principle of lawfulness; the principle of respect for human dignity; the principle of loyalty; the principle of respect for the rights of the defense; the principle of respect for private life; the principle of protecting sources in certain special situations.

In accordance with art. 100 of the Criminal Procedure Code, during the criminal investigation, the criminal investigation bodies shall gather and produce evidence both in favor of and against a suspect or defendant, *ex officio* or upon request, which means that it is their duty to produce all necessary evidence during the criminal investigation phase in order to have the grounds to order one of the solutions provided for by the law. It is important to note that, in the activity of producing evidence, the suspect or defendant benefits from the benefit of the doubt, which is a principle that lies at the basis of criminal trial, and thus she/he has no obligation to prove their innocence, and has the right not to contribute to their own incrimination (art. 99 par. 2 of the Code).

The provisions of art. 4 of the Criminal Procedure Code state that any person shall be considered innocent until their guilt is established by a final criminal judgment, and, after all the evidence is produced in the case, any doubt persisting in the mind of the judicial bodies shall be interpreted in favor of the suspect or defendant. Thus, in the absence of incriminating evidence, the suspect or defendant is not obligated to prove their innocence, but, in cases where there is evidence incriminating them, they can prove their lack of substance by proposing counter-evidence (Mateuţ, 2019, p. 469). At the same time, art. 99 par. 2 expressly provides for the suspect's or defendant's right not to contribute to their own incrimination. This entails that the suspect or defendant can be passive, keeping their silence. The right to remain silent and the right of non-self-incrimination represent, as we can see in the preamble of EU Directive 2016/343 of the European Parliament and the

Council from March 9, 2016 *on the strengthening of certain aspects of the benefit of the doubt and of the right to be present at the trial in criminal trial*[3], an important aspect of the benefit of the doubt.

In producing the evidence, it is forbidden to use methods, procedures, and techniques that corrupt the discovery of the truth, with the principle of fairness in producing evidence being subsumed to the right to a fair trial (Casap, 2019; Volonciu, Vasiliu, & Gheorghe, 2014, pp. 181-182). Thus, according to art. 101 par. 1 of the Criminal Procedure Code, it is prohibited to use violence, threats or other coercion means, as well as promises or inducements for the purpose of obtaining evidence. Hearing methods or techniques affecting the capacity of persons to remember and tell conscientiously and voluntarily facts representing the object of the taking of evidence are also not allowed, such prohibition applying even if a person subject to such hearing gives their consent in relation to the use of such hearing methods and techniques. These provisions (par. 2 art. 101 of the Criminal Procedure Code) also constitute a guarantee of the principle of respect for human dignity (Casap, 2019).

The violation of the legal provisions concerning the production of evidence is sanctioned with the exclusion of the evidence thus obtained (art. 102 of the Criminal Procedure Code), with the concrete content of the sanction of exclusion being debated by the judicial doctrine and practice (Volonciu, Vasiliu, & Gheorghe, 2014, p. 182). The Constitutional Court of Romania, by Decision no. 22/2018, ascertained that the provisions of art. 102 par. 3 of the Criminal Procedure Code are constitutional to the extent that, through the term "the exclusion of the evidence," from their content, we also understand the elimination of the evidentiary means from the case file, stating that "*maintaining the evidentiary means in criminal case files, after the exclusion of their corresponding evidence, as a result of the ascertainment of their nullity, can influence the perception of the judges appointed to settle those cases in what concerns the guilt / innocence of the defendants and determine them to seek to devise judicial judgments in one way or the other, even in the absence of the possibility to concretely invoke said evidence in justifying their judgments, an aspect that can violate the right to a fair trial and the benefit of the doubt for the persons on trial."*[4].

We should also mention that an important role during the criminal investigation is held by the Judges for Rights and Liberties. Thus, electronic supervision can be ordered during the criminal investigation, at the request of the

[3] Published in the *Official Journal of the European Union, L 65* (volume 59, issued on March 11th 2016), https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32016L0343&from=RO (accessed on 14.02.2020).

[4] Decision no. 22 of January 18, 2018, on the exception of unconstitutionality of the provisions of art. 102 par. 2, art. 345 par. 3, and art. 346 par. 4 of the Criminal Procedure Code. Published in the Official Gazette of Romania *("Monitorul Oficial al României")* no. 177 of February 26, 2018. For an analysis of the consequences of the Decision, also see Şandru (2018).

prosecutor, by the Judge for Rights and Liberties, who then orders, in their resolution, the admission of the application, and issues the surveillance warrant (art. 146); home search may be ordered during the criminal investigation, upon request by the prosecutor, by the Judge for Rights and Liberties of the court that would have the jurisdiction of jurisdiction to examine the case (art. 158 of the Code); the approval of the performance of a computer search can be ordered, during the criminal investigation, by the Judge for Rights and Liberties, in compliance with the conditions stated in art. 168 of the Code.

When referring to criminal investigation, we cannot ignore the preventive measures, as it is obvious from the entirety of the provisions of the Criminal Procedure Code how necessary the commencement of the criminal investigation is as a first phase of the criminal trial. However, we should note that some of them can be taken both during the criminal investigation phase and the Preliminary Chamber and trial phase.

We should mention that the person's right to freedom and safety is enshrined as a principle of the criminal trial, in compliance with the provisions of the Romanian Constitution (art. 23), those in the Universal Declaration of Human Rights, and the European Convention of Human Rights. Art. 9 par. 2 of the Criminal Procedure Code expressly provides that "any custodial or freedom-restrictive measure shall only be ordered exceptionally and only in the cases and conditions stipulated by law".

According to the provisions of art. 202 of the Criminal Procedure Code, preventive measures may be ordered if there is evidence or probable cause leading to a reasonable suspicion that a person committed an offense and if such measures are necessary in order to ensure a proper conducting of criminal trial, to prevent the suspect or defendant from avoiding the criminal investigation or trial or to prevent the commission of another offense. No preventive measure may be ordered, confirmed, extended or maintained if there is a cause preventing the initiation or the exercise of criminal action. At the same time, the Romanian lawmaker provides that any preventive measure has to be proportional to the seriousness of the charges brought against the person such measure is taken for, and necessary for the attainment of the purpose sought when ordering it. Preventive measures can only be taken by certain judicial bodies in relation to persons who have a certain capacity, while complying with a certain procedure and certain time-limits, which are also indicated by the lawmaker. Of course, besides the provisions in the Criminal Procedure Code, the provisions in the European Convention of Human Rights and Protocol no. 4 additional to it, as well as the case-law on the subject of the European Court of Human Rights, will also be taken into consideration.

The preventive measures are gradually listed within art. 202 par. 4 in a certain legal order (Mateuț, 2019, p. 742): taking in custody; judicial control; judicial control on bail; house arrest; pre-trial arrest. The first, fourth and fifth preventive measures deprive the person of freedom, while judicial control and

judicial control on bail are preventive measures that restrict the freedom of a person. To be precise, the preventive measure of taking a person in custody can be taken against a suspect or defendant by criminal investigation bodies or by the prosecutor only during the criminal investigation (art. 203 par. 1).

Judicial control and judicial control on bail can be taken against a defendant by the prosecutor and the Judge for Rights and Liberties, during the criminal investigation, by the Preliminary Chamber Judge, in Preliminary Chamber procedure, and by the court during the trial, while the preventive measures of house arrest and pre-trial arrest can be taken against the defendant during the criminal investigation by the Judge of Rights and Liberties (art. 203 par. 2 and 3). Preventive measures are ordered through a justified order by the criminal investigation body and the prosecutor, while the Judge for Rights and Liberties does so through a justified resolution. During the criminal investigations, the claims, proposals, complaints and appeals concerning the preventive measures are settled in the council chamber through a justified resolution, which shall be pronounced in the council chamber.

We can deduce, from the entirety of the provisions, the necessity of a hearing for the suspect or defendant before taking some of the measures, as well as the mandatory provision of legal assistance for the suspect or defendant from an attorney, whether chosen by the suspect or defendant or named *ex officio*. It is also obligatory for the prosecutor to participate.

2.2. Widening the scope of the criminal investigation and changing the charges

According to the provisions of art. 311 of the Criminal Procedure Code, in the situation where (after the criminal investigation has started) the criminal investigation body finds new facts, new data concerning the involvement of other individuals or circumstances that can lead to changing the charges for the offense, that body shall order the widening of the criminal investigation scope or the changing of the charges. When the criminal investigation is carried out in relation to a person, the widening ordered by the criminal investigation body shall be subject to the justified confirmation of the prosecutor supervising the criminal investigation within a maximum of 3 days from the issuance of the order, and the criminal investigation body shall also be obligated to present the case file to the prosecutor as well.

In what concerns the widening of the scope of the criminal investigation, art. 311 par. 3 provides that the legal body is under the obligation to inform the suspect about the new facts that warranted the widening of the scope, which means that, in the event of changing the charges, the legal body is not obligated to inform the accused party in this regard. In this context, the Constitutional Court of Romania, by Decision no. 90 of February 28th, 2017 admitted the exception of

unconstitutionality of the mentioned provisions, determining that a legislative solution that excludes the obligation of informing the suspect / defendant of the changing of charges is unconstitutional. In the opinion of the Court, the defendant's right to defend themselves and their right to a fair trial is affected, given that, by not being informed in the shortest time regarding the new charges, they shall be misled in what concerns the new character of their criminal accusation, thus not benefitting from the adequate time and means to react and organize their defense.[5]

2.3. Suspension of the criminal investigation

The criminal investigation is suspended by the prosecutor in the following cases: in case a forensic medical report establishes that the suspect or defendant is suffering from a serious medical condition that precludes them from taking part in the criminal procedure; in the situation where there exists a temporary legal impediment to the start of criminal action against a person (as in the case of the Romanian President's immunity during their term); for the duration of the mediation procedure, as under the law (art. 312 of the Code). The criminal investigation body is under an obligation to check periodically, but no later than 3 months since the date of suspension, whether the cause persists that required suspension of the criminal investigation (art. 313 par. 4).

2.4. Closing criminal investigations

When the criminal investigation has ended, the criminal investigation body shall forward the case file to the prosecutor, along with a referral. Within no longer than 15 days of receiving the case file referred to them, the prosecutor shall proceed to examining the criminal investigation actions and rule concerning them, and examination in cases that involve individuals already in pre-trial custody shall be performed urgently and with priority (art. 322).

According to the provisions of art. 327 of the Criminal Procedure Code, criminal cases can be closed either through the issuance of an order to close the case or drop the criminal investigation, or through the issuance of an indictment. Closing a case is a *nolle prosequi* that the prosecutor can order when the criminal investigation cannot be initiated, because the referral's crucial requirements of content and form are not met, as well as when one of the cases that impede the initiation and exercise of criminal action exists (art. 315 of the Criminal Procedure Code). This can be done through an order or an indictment (art. 328 par. 3).

Dropping charges can be ordered under the conditions provided for in art. 318 of the Criminal Procedure Code, by the prosecutor, through an order, when it is ascertained that there is no public interest in investigating the act, in which case the principle of the opportunity of criminal investigation (Udroiu, 2014, p. 73) shall

[5] Published in the Official Gazette of Romania no. 291 of April 25, 2017.

apply. We will mention here that the initial regulation for dropping charges was declared unconstitutional by Decision no. 23/2016 of the Constitutional Court, which stated that "the prosecutor dropping the charges, without having been subject to the verification and agreement of the court, is equivalent to the prosecutor's exercise of attributions that belong to the sphere of jurisdiction of the courts of justice"[6] (our translation).

Emergency Ordinance no. 18/2016 by the Romanian Government[7] reconfigured the provisions related to dropping charges, and they are presently in effect. Thus, charges can be dropped in the case of offenses for which the law provides a fine or a prison sentence of a maximum of 7 years as a penalty, and it is ascertained that there is no public interest in investigating the act. Charges cannot be dropped for offenses that resulted in the death of the victim. Public interest is analyzed using the criteria listed by the lawmaker under art. 318 par. 2 of the Criminal Procedure Code.

When the charges are ordered to be dropped, the prosecutor can order, after consulting the suspect or defendant, for the latter to fulfill one or several obligations, among which we have unpaid community service for a period of time ranging from 30 to 60 days, aside from cases where, due to health-related reasons, the person cannot engage in such a labor (art. 318 par. 6). In the latter case, Decision no. 15/2019 of the High Court of Cassation and Justice, the Appeal in the Interest of the Law (AIL) panel, must be taken into consideration, as it states that "in the event of charges being dropped against a minor suspect or defendant who has reached the age of 16, they can be ordered to engage in unpaid community service"[8] *(our translation)*.

The order for the charges to be dropped is verified in terms of its lawfulness and justification by the chief prosecutor of the public prosecutor's office or, by case, the general prosecutor of the public prosecutor's office attached to the Court of Appeals, and, in the cases where it is drawn up by the latter, the verification is carried out by the higher-ranking prosecutor. The order is transmitted, in order to receive confirmation, within 10 days from the date that it was issued, to the Preliminary Chamber judge of the court that has the jurisdiction, according to the law, to try the case in first instance. The Preliminary Chamber Judge shall then decide through a justified resolution, in the council chamber, whether the solution to drop the charges is lawful and justified, accepting or denying the confirmation application formulated by the prosecutor.

The indictment constitutes the document through which the prosecutor orders that a case be sent to trial, in the cases where the material resulting from the criminal investigation indicates that the act exists, that it was committed by the

[6] Published in the Official Gazette of Romania no. 240 of March 31, 2016.
[7] Published in the Official Gazette of Romania, no. 389 of May 23, 2016.
[8] Published in the Official Gazette of Romania no. 789 of September 30, 2019.

defendant, and that they are criminally liable (art. 327 of the Criminal Procedure Code). Thus, it represents the final criminal investigation act.

2.5. Resumption of pressing charges on request by the suspect or defendant

This is one of the important rights that the suspect or defendant can benefit from, as they can use this institution in order to prove their innocence, but also to rehabilitate their public image (Paraschiv, 2017, p. 390). Thus, when a case is closed as a result of finding applicability of amnesty, statute of limitations, withdrawal of preliminary complaint, or a non-punishment clause, the suspect or defendant can, inside 20 days of receiving their copy of the order that closes the case, request that the criminal investigation be resumed (art. 319 of the Criminal Procedure Code). We can deduce from the aforementioned provisions that the request to resume the criminal investigation is not meant to worsen the situation of the suspect or defendant, but, if after the introduction of the request within the legal period of time, another case of *nolle prosequi* is found than those that have been indicated, the prosecutor shall order that the case be closed in relation to it, and, if no other situation is determined other than the one that was initially at the basis of the solution to close the case, the first *nolle prosequi* shall be adopted.

2.6. Resumption of criminal investigation

Resumption of criminal investigation represents a procedural remedy which ensures that the criminal trial continues by re-activating the criminal investigation (Paraschiv, 2017, p. 404). According to the provisions of art. 332 of the Criminal Procedure Code, the criminal investigation shall be resumed in the following cases: the cause for suspension has ceased to apply; the case is sent back by the Preliminary Chamber Judge; the criminal investigation is reopened. We must note, however, that the criminal investigation cannot be resumed if a cause which impedes the initiation of the criminal action or the resumption of the criminal trial has occurred.

The resumption of the criminal investigation is carried out by the prosecutor, in the cases expressly provided for in art. 335 of the Criminal Procedure Code, through an order which is subject, under sanction of nullity, to the confirmation of the Preliminary Chamber Judge, within 3 days at most. The High Court of Cassation and Justice ruled, through Decision no. 27/2015, that "the resumption of the criminal investigation, provided for in art. 335 of the Criminal Procedure Code, is subject to the confirmation of the Preliminary Chamber Judge, both following the denial of the prosecutor's solution by the hierarchically superior prosecutor in the procedure provided for in art. 336 and the following of the Criminal Procedure Code, as well as in the case of a denial that was ordered *ex officio*"[9] *(our*

[9] Published in the Official Gazette of Romania, no. 919 of December 11, 2015.

translation), with the justification that „the procedure through which the Preliminary Chamber Judge confirms the resumption of the criminal investigation thus regulated constitutes a procedural guarantee of the equitable character of the act of resuming the criminal investigation awarded to the participants of the criminal trial, in accordance with the provisions of art. 21, par. 3 of the Constitution and art. 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms" *(our translation).*

2.7. *Challenging criminal investigation measures and acts*

It is important to mention that, throughout the entire criminal investigation, any person can file a complaint against the criminal investigation measures and acts, according to art. 336 of the Criminal Procedure Code, provided that these have harmed that person's legitimate interests. Thus, the interested persons whose rights have been harmed can file a complaint against the acts and measures of the criminal investigation bodies; against the acts of the prosecutor; against the resolutions to close a case or drop charges.

Complaints against the acts of the criminal investigation bodies are submitted to the prosecutor in charge of supervising the work of the criminal investigation body. The prosecutor is obligated to resolve the complaint within no more than 20 days since receiving it and inform the plaintiff without delay via one copy of the resolution order (art. 338 of the Criminal Procedure Code). Complaints against the acts performed by the prosecutor can be filed by any interested person and shall be resolved by the chief prosecutor of that prosecutor's office or, as the case may be, by the chief prosecutor of the prosecutor's office attached to the Court of Appeals or by the head-of-department prosecutor of the prosecutor's office attached to the High Court of Cassation and Justice, within no more than 20 days from having received the complaint.

Complaints against resolutions to close a case or drop charges is a procedural remedy conferred by the law to the persons whose complaints against the resolutions delivered by order or indictment have been rejected (Paraschiv, 2017, p. 412). The person whose complaint against the resolution to close the case, delivered by order or indictment, was rejected according to the provisions of art. 339 of the Criminal Procedure Code, can file a complaint, within 20 days of the communication, with the Preliminary Chamber Judge of the court of law that has, according to the law, the jurisdiction to try the case in first instance, who shall only verify the lawfulness and the merits of the resolution to close the case or drop the charges. The provisions concerning the resolution of the complaint by the Preliminary Chamber Judge have been repeatedly subjected to the control of the Constitutional Court, Decision no. 733/2015[10] and Decision no. 243/2019[11] being notable in this regard, as their content reflects regulation that is contrary to the

[10] Published in the Official Gazette of Romania, no. 59 of January 27, 2016.
[11] Published in the Official Gazette of Romania no. 429 of May 30, 2019.

constitutional provisions related to equality in what concerns one's rights, free access to justice, the right to defend oneself and the role of the Public Ministry.

3. THE PRELIMINARY CHAMBER

One of the functions of the criminal trial that precede the function of the trial is the verification of the lawfulness of sending or not sending a case to trial. This function is performed during the Preliminary Chamber procedure. According to art. 342 of the Law no. 135/2010 on the Criminal Procedure Code, "the object of the Preliminary Chamber procedure is to verify, after having sent a case to trial, the jurisdiction and lawfulness of the referral to the court of justice, as well as the lawfulness of the production of evidence and of the manner in which the criminal investigation bodies have performed their activity".

The purpose for the introduction of the Preliminary Chamber procedure through Law no. 135/2010 was a better protection of the human rights related to the right to a fair trial. First of all, the introduction of this procedure aimed to secure a better protection of the requirement of a reasonable duration of the trial. Many were the situations where, before this procedural phase, after covering long procedural stages, the inspection bodies found that, during these phases, important procedural guarantees of the defendant were violated, thus returning the case file to the criminal investigation bodies in order for them to perform more thorough evidence-taking or to replace certain pieces of evidence that were initially obtained in an unlawful manner, or returning the case file to the court of first instance in order to resume the trial that was initially carried out with the approval of evidence that was obtained unlawfully or on the basis of an act of referral that was not lawfully drawn up (Fodor & Fodor, 2015, p. 61). Currently, the provisions of art. 342 of the Criminal Procedure Code allow the judge (the Preliminary Chamber Judge) to assess, before the trial *per se* starts, whether the presentation of evidence and the acts of the criminal investigation bodies were carried out under the conditions of respect for the procedural guarantees that protect the defendant. The same judge verifies whether the court of justice was lawfully referred to. It is believed that "the function of verification of the lawfulness of the sending of a case to trial appears as a *sui generis* institution, a self-standing institution, which is part of neither the criminal investigation phase, nor the trial phase" (our translation) (Brutaru, 2009, p. 3). According to Law no. 135/2010 on the Criminal Procedure Code, the Preliminary Chamber Judge also has jurisdiction in what concerns the necessity of taking certain preventive measures, such as judicial control, judicial control on bail, house arrest and pre-trial arrest (art. 202), as well as jurisdiction in resolving complaints against resolutions to close a case or drop charges (art. 341).

Depending on the irregularities found, the Preliminary Chamber Judge can render some of the acts carried out by the criminal investigation bodies void, and can exclude the evidence that they believe was obtained while violating the law from the evidentiary material. The resolution through which these measures are ordered is then communicated to the criminal investigation bodies so that they can remedy said irregularities. The judge can pass the entire case to the prosecutor's office in situations where: a) the indictment is not drawn up in accordance with the regulations, and the irregularity was not remedied by the prosecutor until the deadline provided for in the law, if the irregularity leads to the impossibility to establish the object or limits of the trial; b) they have excluded all evidence produced during the criminal investigation; c) the prosecutor requests the restitution of the case after the Preliminary Chamber Judge has communicated to them the resolution through which certain irregularities were ascertained or does not respond until the deadline provided for by the same provisions. The Preliminary Chamber Judge's resolution can be appealed, and the appeal can also take into account the manner in which the motions and exceptions were resolved. The appeal can be resolved by the Preliminary Chamber Judge of the immediately hierarchically superior court of justice. Other motions and exceptions than those invoked or raised *ex officio* before the Preliminary Chamber Judge cannot be invoked or raised *ex officio* in the resolution of the appeal during the procedure carried out before the court of justice referred to by indictment, with the exception of the cases of absolute nullity.

Thus, what was desired was that, at the beginning of the trial, no evidence that the Preliminary Chamber Judge excluded, due to being unlawfully obtained, to be taken into consideration, no matters related to the lawfulness of the production of the evidence obtained during the criminal investigation phase and kept in the case file, and no matters related to the lawfulness of certain acts carried out during the criminal investigation or of the act of referring to the court of justice to be called into question. The number of reasons that could lead to the re-trial of a case after a long initial investigation of the merits would be considerably fewer.

In order to ensure the accomplishment of the goal concerning the reasonable duration to settle a case, the lawmaker has established deadlines for the completion of the procedural steps of this phase: a) the deadline for the parties to formulate, in writing, their points of view, their motions and exceptions related to the lawfulness of the referral to the court of justice, the lawfulness of the production of the evidence, and of the manner in which the criminal investigation bodies have acted is set by the Preliminary Chamber Judge, depending on the complexity and particularities of the case, but it cannot be shorter than 20 days (art. 344 par. 2 and par. 3); b) the prosecutor is under the obligation to correct the irregularities brought to their attention through the Preliminary Chamber Judge's resolution in 5 days' time from the communication of the resolution (art. 345 par. 3); c) the appeal against the resolutions through which the Preliminary Chamber Judge ordered the commencement of the trial or resolved the

motions and exceptions related to the lawfulness of the referral to the court of justice, the lawfulness of the presentation of the evidence, and of the manner in which the criminal investigation bodies carried out their acts must be formulated in 3 days' time from the communication of the resolution (art. 347 par. 1); d) the total duration of the Preliminary Chamber procedure is a maximum of 60 days after the case is registered with the court (art. 343).

With all of these precautions in place, the situations wherein the procedure can stagnate are not excluded yet (Fodor & Fodor, 2015, p. 60). The Preliminary Chamber Judge must verify their jurisdiction before going on to fulfill their role, which is an especially important aspect, given that, once established, this jurisdiction shall be followed by the jurisdiction to resolve the entire lawsuit. Thus, the Preliminary Chamber Judge, who were initially invested, have the possibility, in case they consider not to have jurisdiction, to send the case file to the court of justice that they believe to have jurisdiction, which can lead to a conflict of jurisdiction in the situations where the court referred to also considers that it does not have it. The court of justice that will, in the end, be found to have jurisdiction shall have to restart the procedure provided for in art. 344 and 345 from the beginning. At the same time, in order to establish the lawfulness of the production of certain evidence during the criminal investigation, it may be necessary to produce certain evidence, such as hearings of witnesses or expert reports, which may also require a longer period of time. Thus, the total amount of 60 days for the procedure to be completed remains more of a recommendation.

After completing the preliminary procedure phase, the same judge who had the role of Preliminary Chamber Judge shall preside over the adjudication *per se* of the case on the merits (art. 346 par. 7 of the Criminal Procedure Code). The Constitutional Court of Romania assessed, by Decision no. 663/2014, that art. 346 par. 7 of the Criminal Procedure Code is constitutional because "it is in the interest of the production of the act of justice that the same judge who verified both the jurisdiction and lawfulness of the referral, as well as the lawfulness of the production of evidence and of the manner in which the criminal investigation acts were carried out rule over the merits of the case as well"[12].

The current regulations concerning the procedural phase of the Preliminary Chamber are configured through the repeated intervention of the Constitutional Court of Romania, which has drawn attention to a series of inconsistencies between the initial iteration of Law no. 135/2010 on the Criminal Procedure Code and the requirements for a fair trial as defined by the European Convention of Human Rights and the jurisprudence of the European Court of Human Rights. One of the most important matters was related to the manner of assessing the lawfulness of the production of the evidentiary material during the criminal investigation phase, respectively whether the analysis is formal or substantive. In the initial form of Law no. 135/2010 on the

[12] Published in the Official Gazette of Romania, no. 52 of January 22, 2015.

Criminal Procedure Code, the manner in which art. 344 was written suggested that it is only whether the production of evidence was carried out legally or not that can be verified, and not also whether there was justification for collecting certain evidence, in accordance with the provisions of Law no. 135/2010 on the Criminal Procedure Code. Following the ruling of the Preliminary Chamber Judge, the evidence considered to be lawfully produced could no longer be removed from the evidentiary material. For example, according to art. 157 par. 1, home search or a search of goods found in a residence may be ordered if there is a reasonable suspicion that a person committed an offense or that such person is holding objects or documents that are connected to an offense and it is assumed that the search could lead to the discovery and collection of evidence related to such offense, to the preservation of traces left by the committed offense or to the capturing of the suspect or defendant, and, according to art. 139 par. 1, electronic surveillance can be authorized if there is a reasonable suspicion in relation to the preparation or commission of certain offenses, and if such measure is proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offense. As a result, in order to fully preserve the rights of the accused person, the Preliminary Chamber Judge cannot only verify the existence of a reason for nullity, but must also rule over the existence of the justification that has led to the taking of the measure for the production of a certain piece of evidence or a certain preventive measure. By Decision no. 802/2017, the Constitutional Court of Romania, referring to the admissibility of the evidence obtained through torture[13], has shown that the evidence can be corrupted both through the violation of the procedural prescriptions for their production, in this case through the usage of unfair practices, as well as through the obtainment of evidence through non-legal methods, establishing that, in both cases, the evidence can be excluded from the evidentiary material. At the same time, the Constitutional Court also established that "the evidence upheld as legal by the Preliminary Chamber Judge can be the object of new lawfulness verifications during the trial from the perspective of the ascertainment of the inadmissibility of the procedure through which it was obtained and the perspective of the application of absolute nullity of the procedural acts through which the evidence was produced, in the conditions where, in this hypothesis, it is presumed *juris et de jure* that the lawfulness of the criminal trial is prejudiced, as the harm cannot be covered" *(our translation)*. Through this interpretation, the Constitutional Court reduced the effects of the Preliminary Chamber Judge's decisions in what concerns maintaining certain evidence in the case file in order to better protect human rights. To the same end, the Constitutional Court also decided that the legislative solution contained in art. 345 par. 1 of the Criminal Procedure Code, which does not allow the Preliminary Chamber Judge, when resolving filed motions and raised exceptions or exceptions raised *ex officio*, to administer other evidentiary means aside from "any newly presented

[13] Published in the Official Gazette of Romania, no. 116 of February 6, 2018.

documents" is unconstitutional. As a result, when proving statements concerning the lawfulness or justification of the administration of certain evidence or of taking certain preventive measures, any evidentiary means can be administered. The solutions of the Constitutional Court are in agreement with the decisions of the European Court of Human Rights (ECtHR) against Romania in the context of the legislation prior to Law no. 135/2010 on the Criminal Procedure Code. Thus, in the case of *Calmanovici v. Romania*[14] and *Dumitru Popescu v. Romania (no. 2)*[15], the Court condemned Romania for the lack of *a priori* control of the authorization to intercept communications and the lack of *a posteriori* control of the grounds to order such a measure. In the case of *Bulfinski v. Romania*[16], Romania was condemned for not allowing the presentation of evidence backing the defendant's statement that the evidence was "planted" by the police. In the case of *Văduva v. Romania*[17], it was ascertained that the right to a fair trial was violated because the defendant was not allowed the presentation of an expert report concerning the presented recordings, and in the case of *Acatrinei v. Romania*[18], the condemnation centered on the fact that the lawfulness of the obtainment of the wiretaps was not verified.

It is also through the efforts of the Constitutional Court of Romania that the procedural provisions have been set in accordance with the requirements of a fair trial in what concerns the contradiction and equality of arms. By Decision no. 641/2014, the court of contentious constitutional law declared unconstitutional all provisions referring to the procedure before the Preliminary Chamber Judge through which the defendant did not have access to the opinions of the prosecutor or through which the judge ruled on the positions of the parties in the council chamber without summoning the parties.[19] Currently, according to the provisions of art. 345 of Law no. 135/2010 on the Criminal Procedure Code, the Preliminary Chamber Judge settles the filed motions and raised exceptions or the exceptions raised *ex officio* in the council chamber based on the material in the criminal investigation file and any newly presented documents, listening to the conclusions of the parties and of the harmed person, if they are present, as well as those of the prosecutor.

The importance of the Preliminary Chamber Judge's activity concerning the guaranteeing of the right to a fair trial was underlined by the Constitutional Court in their resolution concerning the situations where the motion of a person tried *in absentia* is accepted for the resumption of a criminal trial. Initially, the High Court of Cassation and Justice established that, in such a situation, the case is resumed from the first instance trial phase. Subsequently, the Constitutional Court established, by Decision

[14] Case *Calmanovici v. Romania*, Application no. 42250/02, ECtHR, July 1, 2008.

[15] Case *Dumitru Popescu v. Romania (no 2),* Application no. 28823/04, ECtHR, April 26, 2007.

[16] Case *Bulfinski v. Romania,* Application no. 28823/04, ECtHR, June 1, 2010.

[17] Case *Văduva v. Romania,* Application no. 27781/06, ECtHR, February 25, 2014.

[18] Case *Acatrinei v. Romania*, Application no. 7114/02, ECtHR, October 26, 2006.

[19] Published in the Official Gazette of Romania, no. 887 of December 5, 2014.

no. 590/2019[20], that the previous interpretation assigned by the High Court of Cassation and Justice through Decision no. 13 of July 3, 2017[21], pronounced during the appeal phase in the interest of the law, on the procedural phase from where the criminal trial is resumed, is unconstitutional. The court of contentious constitutional law has established that the phase from which the trial is resumed shall be the Preliminary Chamber phase, as this is the only way in which the defendant benefits from all guarantees that govern the right to a fair trial.

4. CONCLUSIONS

Although, through the adoption of the Criminal Procedure Code, the Romanian lawmaker aimed to create a legislative framework that is clear and accessible to all participants to the criminal trial, finding legislative solutions contributing to the reduction of the duration of the trials and the simplification of the criminal legal procedures, in accordance with the international standards of criminal trials, respectively the standards of the European Court of Human Rights, it has been demonstrated, throughout time, that not all of its provisions have contributed to a better realization of criminal justice, which has led to the necessary intervention, as we have shown, of either the High Court of Cassation and Justice, the Constitutional Court of Romania, or the lawmaker, with the latter modifying and adding to the initial regulations.

As we have seen, the criminal trial is a complex legal activity, with the criminal investigation and Preliminary Chamber as phases that precede the trial. The criminal trial is carried out by the criminal legal bodies in accordance with the principles stipulated by the lawmaker, with the active participation of the parties and of the other subjects involved in the trial. The importance of the criminal investigation is determined by the fact that its object is to produce the evidence necessary to prove the existence of offenses, identify the persons who have committed an offense, and establish their criminal liability in order to ascertain whether the case should be sent to trial. At the same time, the prosecutor shall order for a case to be closed or charges to be dropped while strictly complying with the legal provisions.

The exercise of the criminal investigation, the evidence-collecting, the suspension of the criminal investigation, the widening of the scope of the criminal investigation and changing the legal classification of the act, the resumption of the criminal investigation at the request of the suspect or defendant, the finalization of the investigation and the solutions of the prosecutor are regulated by the lawmaker, with a view towards ensuring and guaranteeing the protection of the benefit of the doubt, the rights of the suspect or defendant, and the fundamental human rights and liberties in general.

[20] Published in the Official Gazette of Romania, no. 1019 of December 18, 2019.
[21] Published in the Official Gazette of Romania, no. 735 of September 13, 2017.

By seeking to answer the requirements of lawfulness, speed and fairness of the criminal trial, the Romanian lawmaker has regulated the institution of the Preliminary Chamber, while also establishing the jurisdiction of the Preliminary Chamber Judge. However, the current regulations concerning the procedural phase of the Preliminary Chamber are configured through the repeated intervention of the Constitutional Court of Romania, which has found a series of inconsistencies between the initial iteration of Law no. 135/2010 on the Criminal Procedure Code and the requirements for a fair trial described by the European Convention of Human Rights and the jurisprudence of the European Court of Human Rights. Along with the criminal investigation bodies and the prosecutor, the attributions of the Judge for Rights and Liberties and of the Preliminary Chamber Judge, both with jurisdiction during the phases preceding the trial, are also notable.

We believe that, through our analysis, it is transparent that the Romanian legislation contains provisions meant to ensure the protection of the fundamental human rights and liberties, of the requirements of a criminal trial, with the major contribution, through their decisions issued for the cases resolved according to their jurisdiction, of the Constitutional Court of Romania, the High Court of Cassation and Justice, and the European Court of Human Rights.

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