Solving causes by report to the principles of the Strasbourg Court[1]

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Abstract

This study aims to find a new perspective for interpretation in cases where the judgments of the international courts (in particular the European Court of Human Rights) are contradictory or create uncertainty, so that they cannot be effectively considered when judging. It is known that the national judge must take into account the judgments of the Strasbourg Court to prevent a possible condemnation of the Romanian state, but when the conventional block is not unitary, we need to find a benchmark that helps us correctly solve the case. We believe that, in these circumstances, relying on the principles of law is necessary, and the principle of trust in justice can be a new, determining factor, in choosing a concrete legal solution. In order to demonstrate the effectiveness this interpretation, a practical case will also be analysed, on the basis of which the implications of such a method can be highlighted. Moreover, the principle of trust in judgments could be used in other cases similar to the practical situation presented and could become a concrete way of interpretation in cases of case law overruling or case law uncertainties, so that the individual's rights are not injured.

Keywords: *case law overruling, ECHR, legal interpretation, legal principles, prosecutors' papers.*

JEL Classification: K14, K38, K41

1. The emergence of the concept of justice

Man is, by nature, a social being, and Abraham Maslow captures in his hierarchy[3] the need for membership and association as a stringent one for achieving a fulfilling life.[4] Starting from these axiological features, we can characterize society as an eclectic group of people and personalities, which develops especially through non-uniformity – a true **unity in diversity**.[5] There are two great theories about how human personality can be distinguished: the first one tells us that man is born intrinsically good, right, and is negatively influenced by society,[6] while the

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[3] The pyramid created by the psychologist Abraham Maslow to explain the theory of hierarchy of human needs.

[4] According to philosophical conceptions, happiness is the primary purpose of a being. Aristotle, *Politics*, Paideia, 2001, Book VII, Chapters I and II.

[5] The European Union *motto* is "Unite in Diversity!". For details, visit https://europa.eu/european-union/about-eu/symbols/motto_ro (accessed on 27.09.2017 at 01:38).

[6] Thomas D'Aquino, *Summa Theologica*, Polirom Publishing House, Iași, 2009, p. 36 *et seq.*

second one, that man has an individualistic, evil ego, but negative parts, inward, are corrected by society.[7] Both theories make it possible to distinguish between different moral principles and create a mosaic of human characters.

Under these circumstances, when people's principles get into conflict, different disputes arise and people can make decisions that favour an individual, even at the risk of affecting others. Thus, the need for justice appears as a reaction of the man whose interests have been injured to reduce his suffering, to reach the previous state or to receive other advantages in accordance with the prejudice suffered. In primitive societies, the solution to such a conflict was simple: the strongest one was right, and the others had to either obey or oppose (physically), the winner remaining to be the "judge". The community begins to emerge and the need for collective security goes beyond this "law of the strongest", but it also establishes the idea of superior, omniscient and omnipotent force. Of course, under these circumstances the judgment still belonged to divinity, but indirectly – we can think of *auguri*, priests, quacks or pontiffs. The societies are developing and laced, and then the idea of separation of powers in the state appeared[8]. However, the influences of religion can be felt event today in the Romanist law[9] and especially in Sharia, where the Imam still is a true supreme judge.

2. The judge, an essential element of procedural guarantees

With the emergence of a new order, the **judicial power** becomes an integral part, together with the legislative and executive power, in the formation of new democracies. At the same time, it is remarked, through its independence and social force, as a genuine guarantor of the rule of law. Thus, the judge can find himself in a double hypostasis: a representative of the judicial and an agent of it.

As a representative, he should be a moral example and he has an essential role in conveying **trust**. Churchill said "Democracy is the worst form of government, except for all the others". It is therefore essential that both democracy and the elements that define it convey the idea of **trust and efficiency**. The judge, as a representative of a defining component of the rule of law, has a moral duty (that is not necessarily always to be found in the positive law) to convey to people a feeling of safety, comfort, honesty, in a word – **trust**.[10] Using a simple inductive reasoning, we can see that this sentiment is further propagated at the level of the

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[7] We can consider Thomas Hobbes' opinion that "people are very selfish and only concerned about their own well-being and survival; they do not respect others and are indifferent to their fate."

[8] On the emergence of the state and the separation of powers in the state see Cătălin-Silviu Săraru, *Elemente de Teoria generală a dreptului pentru învățământul economic. Caiet de seminar,* C.H. Beck Publishing House, Bucharest, 2010, pp. 2-7.

[9] For a more detailed analysis, Călin Rus, *The material sources of law - from the primordial society to the positive law*, in the volume "*LEGE SAPERE AUDE*!", VIIth edition, Târgu Jiu, 2015, pp. 24-25.

[10] Conclusion arrived at by theoretical and empirical analysis. A complex material demonstrating the link between justice and trust, Jason A. Colquitt, Jessica B. Rodell, *Justice, Trust, and Trustworthiness: a Longitudinal Analysis Integrating Three Theoretical Perspectives*, "Academy of Management Journal 2011", Vol. 6, pp. 1183-1206.

judicial. From there he influences society's perception of the governing system as a whole. By the same causal relationship, the trust of the population in institutions and in the "leviathan called the state",[11] viewed as a set of mechanisms, becomes a tangible objective, if there is a sense of sufficient confidence.

And then the question holds, "How does a Judge convey trust?". We believe there is no exhaustive answer, but it would be good to get closer to one. If a leader's definition is "that person who is followed",[12] finding an equally simple and easy definition for the person conveying the trust is more complicated. However, it is likely that the person who shows good faith, which is a moral model that is worthy to follow, and which, through his actions, proves that he makes the best decisions for the whole society so that the population feels safe and can enter a state of well-being, is a person who conveys trust. By combining this template with the idea of a judge, we deduce some essential elements from the role of a magistrate in society: good faith in the interpretation of laws and in decision-making, impeccable morality in relation to the disputes he solves, the attempt to create **unitary case law** and a hard work of finding out the truth of justice in every case that is attributed to it. Therefore, in order to convey **trust**, the judge has the role of always acting in good faith and acting according to his human ideal. Only a trustworthy judge will be able to give a judgement that would raise trust in justice.

The function of the judicial power's agent instigates an idea of subordination. This is far from truth because the judge's independence is essential in society. The evolution of societies over time has revealed several stages of independence: from physical force, from religion, from public opinions, from state, from mass media, and even independence from other judges. Even if we can see a subordination of the courts, judges should remain independent of this vertical ordering and are obliged to make sovereign decisions. They should act in the judgmental phase on the basis of law, truth, in the public interest of justice, and according to their conviction, conviction that should not be censored. The judge should try, with constant support in The Superior Council of Magistracy, to steadily detach from the public power and any other factors of influence. However, their own conviction should not give an absolute power of interpretation to the judge. Even in cases where the law is inadequate, we consider that the judge needs certain benchmarks to judge the law and to discuss trust in his judgment.

In other words, independence and good faith are becoming more abstract and might seem to be elements that could move to a technical field where definitions would be difficult or even impossible. With the new footsteps of society, technology and computers are becoming ubiquitous in everybody's lives. The idea of using machines that can only think black and white (1 and 0, on and off) instead of judges is no longer a Science-Fiction film, but a matter to be considered, especially in the field of Criminal Law, which lends itself better to simplicity and algorithms. For example, in the field of criminal enforcement law, which is essentially characterized by the application of algorithms, a computer

[11] Glen Newey, *Routledge Philosophy GuideBook to Hobbes and Leviathan*, Routledge, 2008, p. 18.
[12] http://www.vtaide.com/gleanings/leader.htm (accsessed on September 25, 2017 at 22:11).

would tend to be an optimal variant for man in terms of exact calculation of the years of a punishment. Although the idea seems interesting and even applicable at some point, we tend to be rather in its opposition and we take on another role of the judge, specifically that the magistrate has to be a fine observer of the actual state of the objective reality, to precisely determine the grey shades of each cause. The fact that the judge has a dose of subjectivism specific to a human being and tends to be, to a certain extent, empathic is not a disadvantage, but rather the great advantage of the "human judge". The procedural guarantees are preserved in this context and are amplified precisely by the qualities of the person acting with humanity and in good faith. We believe that there is a permanent need for a human factor in making a decision regarding the behaviour, morality and actions of people. Therefore, a final role of the judge in maintaining high standards of procedural guarantees would be to interact with society and to be deeply anchored in reality.

Finally, in order to know the role of the judge and how he contributes to the preservation of procedural guarantees, we must follow certain steps. Clearly, the primary role is to resolve disputes in a fair and loyal way, to know the law (*a fortiori ratione* the international law and the European law, especially in the field of human rights), to observe the society with a special lucidity and to not forget to be human. Of course, in addition to this construction of the elements presented above, we believe that the judge should be a moral person who respects the law and is civically involved in general, but also in the life of the local community. Such a judge is likely to make judgments that can give rise to trust in the courts.

3. Procedural safeguards in the context of criminal law

Assuming we have an ideal magistrate, as he was presented *supra*, we need to see what he should look for in solving a cause. First of all, although the merits are of utmost importance, the first rules that the judge has to apply are those of a procedural nature. Practically, procedural rules are the only ones that manage to create the context for substantive judgment. Their importance is overwhelming because the judge cannot judge in equity (most of the time), but he has to make it *en droit*, and the applications of procedural principles is of particular importance. In this context, the criminal trial addresses two of the most important values of society nowadays – **security and freedom**. That is why we will focus on the field of public law, trying to show the importance of a method of unitary interpretation in creating a sense of trust. The criminal procedure has the task of reconciling two interests that are widely opposed, apparently contradictory: the public interest, of justice, which is to protect the state and the society against those persons who are presumed to have committed crimes and are considered to be dangerous for society and the private interest, which is that of the parties and the main procedural subjects.[13] In a more profane way of expression, we may consider that the rules of

[13] Gheorghiță Mateuț, *Tratat de procedură penală. Partea generală,* Vol. I, C.H.Beck, Bucharest, 2007, p. 106.

the Criminal Procedure Code (hereinafter "CCP"),[14] as a whole, are only a series of procedural safeguards in the field of criminal law.

The principles must prevail criminal proceedings, because any possible breach, even by a law, may result in censorship by the Constitutional Court or even by the European Court of Human Rights ("ECtHR" / "Court" / "Strasbourg Court"). The principles are presented in a non-exhaustive way, in the first title of the CCP, generically called "Principles and Limits of the Application of the Criminal Procedural Law". In trying to enumerate them in a more complete way than they are found in the legal norm, we can say that the principles of criminal procedural law are: the principle of legality, the principle of separation of judicial functions, the principle of presumption of innocence, the principle of finding the truth, *ne bis in idem* the principle of compulsion, the principle of the right of the person to security and freedom, the principle of the right to defence, and the principle of respect for human dignity and privacy. In addition, the Courts of Strasbourg and Luxembourg[15] propose another principle of criminal law[16] – the principle of legal certainty.

4. The principle of legal certainty – European creation and national case law overruling

A problematic issue, in close connection with the case law of the European Court of Human Rights, is how to apply the principle of legal certainty. This is a broader principle, developed at European level, which is the basis of the trust of the individual in the courts' decisions. Some authors[17] argue that the principle, although of overwhelming importance, is not present in the Fundamental Law or in any other legal act but is developed by the case law. Bearing in mind this possibility, to the extent that the statement is valid, we consider that a case law creation of this principle would also come as an effect of the judgments of the Strasbourg Court. In this respect, it can be noticed that the principle has been present in *Marks v. Belgium*[18] since 1979, while its national application is relatively new, post-revolutionary. Practically, the emergence of this principle at national level, in the national case law, would be merely present as an effect of ECtHR's rulings. The principle is considered essential in the application of the European Convention on Human Rights[19] and has been present in numerous subsequent

[14] Romanian Parliament, Law no. 135/2010 on the Code of Criminal Procedure, published in M. Of. no. 486 of July 15, 2010.
[15] The Court of Justice of the European Union, which can be found in Luxembourg.
[16] This principle is found equally in administrative law or tax law.
[17] Ion Predescu, Marieta Safta, *Principiul securităţii juridice, fundament al statului de drept. Repere jurisprudenţiale,* p. 1, published on www.ccr.ro/ccrold/publications/buletin/8/predescu (accessed on 20.09.2017, at 15:45).
[18] European Commission of Human Rights, *Marcks v. Belgium*, App. No. 6833/74.
[19] Corneliu Bârsan, *Convenţia europeană a drepturilor omului, comentariu pe articole. Drepturi şi libertăţi*, vol. I, All Beck, Bucharest, 2005, p. 472.

judgments.[20] The way we find it today in domestic courts' practice is clear evidence that the judgments of the Strasbourg Court produce domestic case law overruling, and the way in which these judgments influence the national law shows that the indirect effect is present.

5. Principle of security of legal relations and its practical implications

5.1. Contextualising principles

In particular, this principle protects the legitimate trust of the individual in front of the court concerning two elements: the possibility of the individual to assess the solution on the basis of existing case law (1) and his ability to benefit from genuine and concrete application of the judgments of the domestic court (2). This principle is only a concrete way of expressing the sense of **trust** that individuals need to feel when calling for a courtroom to speak of a justice that truly fulfils its role, as it was presented above.

Viewing the principle as a component of the right of access to a court within the meaning of Art. 6 of the ECHR,[21] we note that there is a problem with non-unitary case law in Romania, from 2005 to 2015 there are no fewer than 272 Appeals in the Interest of the Law[22] (hereinafter RIL) pronounced by the High Court of Cassation and Justice (hereinafter ICCJ). The problem is a major one, because the security of legal certainty lies in the foreseeability of the law itself, and the effects of a solution contrary to one already given may seriously affect the life of a person or the civil circuit. Such case law changes' repercussions pose a threat to individuals, but could also be real elements in the evolution of the law inasmuch as the hypothesis where case law overruling would fully respect established principles of law. Moreover, when considering the case law of higher courts (especially the ICCJ case-law), the Court held that the principle of legal certainty requires that the judicial control to be ensured bearing in mind that the legal provisions applicable to the cases which are judged in the exercise of the remedies provided for by the internal procedural rules. Specifically, in the cases of *Beian v. Romania*[23], respectively *Păduraru v. Romania*[24], it was stated that the Supreme Court cannot be the source of non-unitary case law. The basis of these allegations is always the notion of trust in justice, a notion which is also highlighted by the Strasbourg Court.[25]

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[20] As an example, we can recall. *Stanca Popescu v. Romania*, App. No. 8727/03, or *Ştefănică and Others v. Romania*, App. no. 38155/02.

[21] European Court of Human Rights, *Bellet v. France*, App. No. 23805/94.

[22] according to http://www.dreptonline.ro/decision_recurs_constitutionala/start_ril_constitutionala .php?an_decizii=2015&tip_dec=2 (accessed on 12.09.2017, at 05:01).

[23] European Court of Human Rights, *Beian v. Romania*, App. No. 30658/05.

[24] European Court of Human Rights, *Păduraru v. Romania*, App. No. 30658/05.

[25] Nina *Peršak, Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes*, Routledge, 2014, § 6.

In our view, the principle of procedural criminal law *ne bis in idem*, which we would prefer to integrate in the principle of security of legal relations. The second can be viewed as a broader principle, embodying *ne bis in idem*. The latter does not allow the trial twice for the same deed, conferring final judgement authority on judgments already given. Besides the positive obligation of the state, the enforcement of the final decision, there is also a negative obligation, not to revert to a ruling already pronounced. For the principle to be applicable the judgment must be identical in the matter of facts (not in its entirety, but in the essential aspects[26]), it must be final, it must look at the substance of the case and address to the same person. The application of this principle has many practical implications because it has been one of the most useful means of defence against the different investigations carried out by the Romanian state's authorities, especially regarding the confluence of criminal law with tax law.[27]

The European Convention on Human Rights (hereinafter referred to as "ECHR") provides real protection to the courts because it enshrines a distinct article, Article 7, the principle of legality, provides greater protection for the security of legal relations through Art. 6 and protects the individual against a decision contrary to *ne bis in idem* by Art. 4 of the Protocol No. 7 to the Convention.

5.2. Practical application of the principles

Through this material we try to find a landmark, a new way of interpreting national law in a particular hypothesis. If the (criminal) law is unclear, the domestic courts often try to resolve the case according to the principles applicable in the case. Another reference factor in solving a case that highlights articles whose interpretation is necessary is the judgments of the Strasbourg Court, by virtue of the supra-constitutional (or constitutional)[28] character of the ECHR and the judgements forming the block of conventionality. However, it sometimes happens that ECtHR's judgments are contradictory one with another or present real issues of applicability. Of course, in these cases, we should consider the decision closest to the national cause, but, as we know, no factual situation is the same as another, and without understanding the principles underlying the judgment, a mechanical application of a Court's solution would only present serious inconveniences. Therefore, when the principles (or legal texts) underlying a judgment of the European Court are unclear, we should have a means by which we can find a desirable solution. In this regard, our proposal in this case is recourse to the principle of trust in the courts' actions (embedded in the principle of legal

[26] The Court of the ECHR ruled in this respect in *Butnaru and Bejan-Piser v. Romania*, app. no. 8516/07.

[27] A relevant ruling in this regard, pronounced by the Grand Chamber of the European Court of Human Rights in 2017, is *A. and B. v. Norway*, Apps. No. 24130/11 and 29758/11.

[28] According to some authors, it would be just an equality between international human rights standards and the Constitution, but this is less relevant in this concrete case.

certainty) as a means of interpretation in situations where the ECtHR judgments leave room for unpredictability.

In order to better observe how the theoretical hypothesis stated in the previous paragraphs find concrete applications, we will imagine a practical situation similar to a real hypothesis that has already been finally judged,[29] and we will try to find arguments against the conviction of the perpetrator in the present case, based on the application of the stated principles.

In fact*, X owns SB football team. In 2011, X promises money to VB's players in order not to lose in a match that could help SB to win the title. The National Anticorruption Direction (hereafter "DNA") starts criminal prosecution against X for bribery. Subsequently, the prosecutor issues a classification ordinance, considering the constitutive elements of the offense to be unfulfilled, arguing that there are no job duties. In the following season, X promises a sum of money to UCJ's players for not to lose a match, which would guarantee SB the title. The DNA prosecutor ordered the prosecution of X for both promises and sued him for bribery. Since X had become a deputy in the Romanian Parliament, the lawsuits are being handled by the ICCJ. In the first instance, X is acquitted because his deeds are not considered to meet the typical nature of the bribery offense. DNA makes an appeal, and X is convicted by ICCJ's appeal panel's decision, for both accusations, six years in prison. We will assume that, in this case, the convict has filed an application to the ECtHR and we will try to argue the complaint from the aplicant's lawyer's position, and finally we will settle the case.*

5.2.1. Regarding the possible violation of art. 7 of the Convention

Article 7 is an absolute right because it only concerns the negative obligations of the state to convict only when relying on a law - a text in force in the law of a Contracting State as interpreted by the competent jurisdictions,[30] fulfilling the conditions imposed by the Convention and set out in the case-law.[31] Synthetically, the ECHR criteria can be expressed by the expression *nullum crimen sine lege praevia, nulla poena sine lege*.[32] In fact, X was convicted because he was trailed by a court that has passed a six-year prison sentence for him and, according to Art. 255 Criminal Code 1968 (hereinafter CC 1968),[33] he was confiscated in kind or equivalent by the amounts of money that dealt with the deed.

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[29] High Court of Cassation and Justice, Criminal Section, Composition of 5 Judges, Criminal Decision no. 156 / 06.04.2013.

[30] European Court of Human Rights, *Leyla Şahin v. Turkey*, App. No. 44774/98.

[31] European Court of Human Rights, *CR v. The United Kingdom*, App. No. 20190/92, § 32.

[32] The doctrine correctly holds that *nullum crimen sine lege* must be expressed in the New Criminal Code view as *nullum crimen sine lege praevia*. For details, Tudorel Toader, Maria-Ioana Michinici, Anda Crisu-Ciocanta, Mihai Dunea, Ruxandra Răducanu, Sebastian Rădulețu, *New Criminal Code: Comments on articles*, Hamangiu Publishing House, 2014, p. 5.

[33] The Romanian Parliament, Criminal Code of 21 July 1968, published in M. Of. no. 65 of 16 April 1997, as subsequently amended and supplemented.

The principle of legality[34] in criminal matters is breached as regards its components (1) *lex certa*, (2) *lex stricta*, (2) *lex praevia*[35] and (4) *lex scripta*. The principle also has a constitutional value, so it could also have been used in the domestic law process.[36] In our case, the *lex scripta* component is met because the norm exists, is published and meets the accessibility criteria. We will evaluate below, on a case-by-case basis, each of the other three listed criteria.

(1) *Lex certa*: There were serious problems of predictability of criminal law because the law was not accurate, the Court sanctioned such issues.[37] The complainant had reasons to believe that his promise of money to UCJ is not an offense because some of the constituents' elements of the offence are absent. Even assuming an "absolute predictability" on the part of X, if the first prosecutor issues a decision not to initiate prosecution, the perpetrator reveals the position of the authorities regarding the interpretation of that law. The applicant may consider that he is not committing an offense, both the prosecutor's order and the reasoning being communicated to him. Basically, the prosecutor, as magistrate, representative of the state, has an appearance of knowing the law in the eyes of the public. Therefore, when it orders that an act is not a crime, there is a reasonable presumption that so it is. Accordingly, in the applicant's view, the deed is still not punishable. If, for an identical act, the applicant is convicted, it is a clear systemic, law-enforcement and interpretation of criminal law. In fact, for the second deed there is certainty for the applicant that if the previous deed has not been sanctioned, neither will be the latter. However, given the first fact in particular, predictability is appreciated in the light of "ordinary legal experience".[38] The predictability of the law does not prevent a person from asking for advice, but many of the person's acts are spontaneous, and if he uses legal advice he cannot be sure that they are always correct. Given the situation, it was difficult to find a person who could accurately predict the evolution of the process, especially since neither the magistrates, nor the law specialists, had a unanimous interpretation of the legal text, as is evident from the state of fact.

(2) *Lex stricta* is the obligation of the domestic courts to interpret the criminal law accurately. A deviation from a rigorous interpretation, when it is not a deliberate omission, an extensive interpretation, or using homogeneous legal clauses, leads to an analogy *in mallam partem*, which is not allowed.[39] We cannot know exactly what is the situation of the footballers in relation to their obligations, if they should win each game or not, so a correct decision would be not to make an analogy, but to apply principles, like *in dubio pro reo*. However, given that we

[34] Matei Basarab, *Drept penal. Partea Generală*, the fourth edition, revised and added, Vol. II, Lumina Lex, Bucharest, 2002, pp. 10-13.
[35] Florin Streteanu, Daniel Niţu, *Drept penal. Partea Generală,* Vol. I, Universul Juridic, Bucharest, 2014, pp. 35-54.
[36] Corroborating Art. 23 par. (12), art. 73 par. (3) lit. h and art. 15 par. (2) of the Romanian Constitution.
[37] European Court of Human Rights, *SW v. The United Kingdom*, App. No. 20166/92, § 35.
[38] European Commission of Human Rights, *Crociani and Others v. Italy*, § 147.
[39] European Court of Human Rights, *Putz v. Austria*, App. No. 18892/91.

cannot talk about a total absence of evidence, the application of the *in dubio pro reo* principle could prove to be a rather uninspired idea, the judge having the duty to decide on the case based on evidence (in favour or not), when they exist and he can apply the principle only when the evidence does not induce any of the solutions – condemnation or acquittal.[40] When trying to solve the case, it should be recalled that there are no express terms in the contract or in the footnote of a footballer regarding such obligations, so no official duty of the official. It is very hard to believe that winning the match can be a duty of service, because although it has control over the outcome, it is limited by external factors. All this because "no one, even the player, has control over sports performance. He may not play, not enter the field, but he cannot play better than in general."[41] In contrast, there is the opposite reasoning of the domestic court. We cannot know exactly which one is the correct one, but we think it is flattering constantly on this issue. Moreover, it does not follow from the criminal text that the offense of bribery refers only to a state's employee or that we should also discuss a private field, although the doctrine clearly excludes the second variant.[42]

(3) ***Lex praevia:*** the law must be applied as it was in force at the time the act was committed. Even the interpretation of the law cannot be retroactively because it is just a form of abusive application and the Convention protects concrete and effective rights.[43] Specifically, **uncertain and unpredictable case law shows that the law was not easy to interpret, which is again an act imputable to the state**. Moreover, uncertain and unpredictable case law at national level demonstrates that there is no clear law to punish the applicant at the time of the offense. As long as a prosecutor's decision has been decided that there is no offense, it was decided at first instance that the constitutive elements of the offense are not to be found and the appeal court decides, by a close majority, that an infringement has occurred, the question of a foreseeable law raises and a law that would undoubtedly be punitive from the outset in the sense of the last decision is questionable. This is all the more serious as the ICCJ has the task of ensuring uniform case law at national level and fails to obtain a unitary decision even in the case of a decision of 5 judges. Moreover, the fact that 3 judges out of 5 of the ICCJ had a contrary opinion is again a state of fact contrary to the principle of **legal certainty**.[44] Another situation that amplifies the seriousness of the act is that an appeal has taken place, so only legal issues have been discussed and these have led to contradictory solutions. Even using a simple mathematical operation we can see that, after the solutions in this case, within the ICCJ, 5 judges believe that the decision is one of acquittal (the unanimous sentence of the first 3 and the dissenting

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[40] Traian Pop, *Drept procesual penal. Partea introductivă*, vol. I, ed. Tipografia Națională SA, Cluj, 1946, pp. 347-350.

[41] Segiu Bogdan, *Drept penal. Partea specială,* 3rd edition revised and added, Universul Juridic, Bucharest, 2009, p. 335.

[42] *Ibidem*, p. 337.

[43] European Court of Human Rights, *Artico c. Italy*, App. No. 6694/74, § 33.

[44] European Court of Human Rights*, Brumărescu v. Romania*, App. No. 28342/95.

opinion of the last 2), and only 3 consider the solution to be one of conviction (the three judges that convicted the applicant in appeal). A possible example shows that a possible new ICCJ decision in a panel of 3 judges, this time with the ICCJ as a court of last resort, would be more likely to have a different solution (using a probability theory, given that there are 8 judges of which we have information, of which 5 are counter and 3 for conviction, we expect that the solution is 62% in favour of the acquittal and that in itself the "justice" of a defendant would be uncertain.

Consequently, X did not act with guilt and should not be hold responsible for a crime. The state has violated its obligation to create a predictable law for X to know the acts and omissions in its contents[45] and not to violate it. The state cannot invoke its own fault to convict someone. The conviction decision is unconventional for these reasons, but also because it does not respect the principle of one's trust in justice.

5.2.2. Violation of art. 4 of Protocol no. 7 to the Convention (hereafter P7-4)

In relation to the promise of money from X to the VB team, there is already a final decision from the authorities on the non-commencement of criminal prosecution and this should remain definitive, restarting the criminal prosecution and sentencing would be against P7-4. P7-4 puts into question the obligation of the State, as a guarantor that a person could not be trailed or punished in view of an act for which he was already convicted or acquitted. In particular, P7-4 recognizes the *ne (non) bis in idem* principle,[46] which, at the time of the internal process, emerged from the text of the Convention, but also from the principle of *res judicata*.[47]

As the Court has already held in countless cases,[48] the way in which the Convention is interpreted is an autonomous one,[49] which means that a purely internal qualification criterion should not be considered,[50] and that the final judgment must be interpreted in the sense of a *res judicata* judgement.[51] The material criterion is also preferred by the Court of Justice of the European Union (hereinafter "CJEU").[52] We mention this because the influence between the ECtHR and the CJEU is known, all the countries of the European Union (hereinafter "the

[45] European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, § 52.
[46] European Court of Human Rights, *Ruotsalainen v. Finland*, App. No. 13079/03.
[47] George Antoniu, Costică Bulai, *Dicţionar de drept penal şi procedură penală,* Hamangiu, Bucharest, 2011, p. 645.
[48] *e.g.*, ECHR, judgement Ozturk; ECHR, judgement Engel and others; ECHR, judgement Campbell and Fell, etc.
[49] Radu Chiriţă, *Convenţia europeană a drepturilor omului. Comentarii şi explicaţii*, 2nd ed., C.H.Beck, 2008, p. 10.
[50] *Ibidem*, p. 519.
[51] European Court of Human Rights, *Franz Fischer v. Austria*, App. No. 37950/97.
[52] Case Van Esbroeck, C-436/04, ECLI: EU: C: 2006: 165, and Case C-367/05 Kralijenbrink, ECLI: EU: C: 2007: 444.

EU" or "the Union") are members of the Council of Europe, and the courts should consider creating unitary European application of the law. In addition, Romania is an EU member and also takes into account the principles and interpretations of the CJEU, which the ECtHR should take into account in the settlement of the complaint, because the Union laws have a direct applicability on the territory of Romania. Such a solution is supported by the doctrine,[53] but also by the case law of the Court in Strasbourg.[54]

The discussion on the facts should also be applied *mutatis mutandis* to the procedural document in order to be able to determine precisely whether or not the act makes P7-4 applicable. The Court considers that three essential criteria must be met: (1) a procedure followed by a final decision, (2) the existence of another procedure for the same offense, and (3) the existence of an acquittal or conviction. Obviously, both the first and the last criterion are met, the prosecution had a decision expressed by ordinance, and the deed is exactly the same. "Removal from criminal prosecution and acquittal of the defendant are solutions that enshrine the non-existence of the offense or the innocence of the accused."[55] The order not to initiate the criminal prosecution is a final decision because, according to Art. 278 CCP 1968,[56] it could be appealed by any interested person within 20 days. Practically, with respect to the applicant, after the passing of those 20 days, the order should have had the authority of *res judicata*. A similar term should also apply to the prosecutor who denies the order because the act has identical effects for the suspect, regardless of the criminal prosecution body ruling on the complaint. The prosecutor's resolution, two months after, without any new elements affecting the status-quo, affects the aforementioned principle and does not help at all to increase trust in justice.

Another possible reasoning in the sense of the theoretical correctness of the conviction in the present case may be based on the reasoning that even if a settlement is incidental, the prosecutor's order has no value for acquittal because it does not held as a court and because it does not offer the stability of the solution, the Court even stating that two possible criminal prosecutions concerning the same deed would be possible.[57] According to Art. 273 CCP 1968, the prosecutor could reopen the procedure by assessing the acts of the hierarchical inferior prosecutor, so a similar solution could be applied. To combat this idea, we should look at that ordinance from the point of view of the suspect. For reasons of equality of arms in the criminal proceeding, we should consider the possibility of obtaining a final solution, otherwise the procedural subject remains unable to obtain a final decision

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[53] Corneliu Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole*, 2nd ed., C.H.Beck, 2010, p. 17.

[54] European Court of Human Rights, *Bankovic and Others v. Belgium and 16 other contracting states*, app. no. 52207/99.

[55] Gheorghiță Mateuț, *Tratat de procedură penală. Partea generală,* Vol. I, C.H.Beck, Bucharest, 2007, p. 727.

[56] The Romanian Parliament, the Code of Criminal Procedure of 1968, published in M. Of. of 30 April 1997, as subsequently amended and supplemented.

[57] European Court of Human Rights, *Zigarella v. Italy*, App. No. 48154/99.

in real terms, because it is ingrained by to complain himself with the prosecutor's solution not to prosecute in order to reach a judge. In this case, the judge could definitively rule on the non-commencement of the criminal prosecution and only in this way could it be a judgmental authority. However, the judge may refuse to rule because such a complaint, coming from the beneficiary of the right to be attacked, could be considered as being of no procedural interest. An interpretation in the sense at the beginning of the paragraph would, *inter alia*, lead to a violation of Art. 6 of the Convention on the basis of an overall fairness of the procedure.

Another idea in favour of the conviction would take into account the criteria of the Court, as they have already been stated,[58] and it can be further argued that only the criterion of the same deed is fulfilled. The ordinance is not an irrevocable one, according to Art. 278 CCP 1968, which could be challenged by the hierarchically superior prosecutor, so it certainly cannot be a final decision that has the authority of *res judicata*. There is no second set of proceedings because the trial is the same, an act is cancelled, the prosecution continues, and there is no splitting. The conviction by the final decision, one that can be qualified as *res judicata,* comes as a first decision in this case.[59] Contrary to the above, there is a judicial practice at European level which expresses similar issues to those already set out in this paper,[60] in which the Court ruled that a criminal prosecution cannot be reopened unless the reopening is authorized by a judge, that the judge must intervene as a guarantor of respecting the rights and freedoms of the person in all cases, including in order to guarantee the principle of legal certainty, which is attached to the right to a fair trial.

However, there is also a contradictory practice in the Strasbourg Court,[61] where the court claims that such a solution might be possible in certain cases. In this context, it should be noted that in the case of Horciag,[62] a cause which could be cited in support of the conviction, there is a relevant change in the status-quo that allowed such an interpretation. In particular, in that case, the applicant's mental condition has changed over time, so we can say that there has been a significant change in the status-quo, and that this change could lead to a new criminal prosecution, but not as resumption of criminal prosecution, but in the sense of a totally new criminal prosecution.

The theory which reveals a margin of appreciation[63] of states in internal regulation, concerning human rights theory, it could also support an opinion in favour of the lawfulness of the conviction. Contrary to this position, we note that

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[58] European Court of Human Rights, *Marguš v. Croatia*, App. No. 4455/10.

[59] European Court of Human Rights, Paksas v. Lithuania, App. No. 44982/01, available in digital format at https://lege5.ro/Gratuit/ge2tqojrg43a/hotararea-privind-cauza-paksas-c-lituaniei-nota-de-jurisprudenta (accessed on September 28, 2017).

[60] European Court of Human Rights, *Stoianova and Nedelcu v. Romania*, App. Nos. 77517/01 and 77722/01.

[61] European Court of Human Rights, *Horciag v. Romania*, App. No. 70982/01.

[62] *cit. supra*.

[63] European Court of Human Rights, *X. c. United Kingdom*, App. No. 10295/82; or the European Court of Human Rights, *Barthold v. Germany*, App. No. 8734/79.

there is a particularly important situation to be considered – whether or not a person is free – which makes an analogy with the Court's judgments on administrative offenses inapplicable, since the rights protected there are not as close to the core of the Convention as the right to freedom, one of the most important human rights.

It might also be highlighted that we are not talking about an act issued by a court, but one issued by a prosecutor, a representative of the Public Ministry, a state authority that cannot be considered a "court" within the meaning of the Convention.[64] One might argue that in such cases we cannot have a final judgement. If only the criterion of qualification in domestic law was accepted both in this case and in others, the State could act abusively and could refute any kind of orders not to initiate criminal prosecution, at any time, which would seriously affect the perception of the population about such acts, being known that such an ordinance means for suspects that they are not considered guilty. Any interpretation contrary to the previous one seriously affects the principle of trust in justice.

Another endorsement might be that the act does not produce any effects. In that hypothesis, there were practically two entirely different criminal prosecutions, which could not be a continuation of the criminal proceedings, as it is stated in the Court case law.[65] The order not to initiate the prosecution after 20 days producing **identical effects** with a final decision to pay to the applicant should be considered a genuine **acquittal** and should be considered as a third criterion fulfilled. There is no derogatory clause in § 2 of P7-4 because there is no question of a fundamental flaw in criminal prosecution and we cannot talk about discovering new facts about the deed, which could have led to a reopening of the criminal prosecution. Any support, in contrast to the above-mentioned arguments, would only affect the **trust** of an individual in the trial and a failure to obey the principle by which we stated that we should look at this practical case.

6. Final words

In concreto, the domestic law has problems and a legislative intervention is needed in order to clarify the way it should be interpreted. In the absence of a legislative solution, the different ways of interpretation, by both the Public Ministry's representatives, the judges and the Court will be problematic in the future. The problem is of a legislative nature, so if one of the three powers has issues, it is up to others to try to give a solution. An eventual appeal to the European Convention or to the case law of the Court is also difficult, as we already noticed through the paper. Since the European Court fails to be fully transgressing, it only underscores inconsistencies between judgments, which should be seen as case law overruling, but unfortunately only resemble uncertainty. In order to assess the court's solution in the practical case presented, we can say that both the

[64] European Court of Human Rights, *Campbell and Fell. c. United Kingdom*, App. Nos. 7819/77; 7878/77.

[65] European Court of Human Rights, *Nikitin v. Russia*, App. No. 50178/99.

domestic courts and the European Court of Justice could have different rulings and both would be justified. Practically, strictly from the perspective of the national law, the prosecutor's decision to restart criminal prosecution is legitimate, since the law does not prohibit it expressly, and, from the point of view of fairness, as the Supreme Court has shown in the final judgment the perpetrator had committed a crime and had to be held accountable. The public interest was to be pursued and, under the principle of official authority, it was the duty of prosecutors to continue prosecution in the present case. In a similar sense, the domestic court should also rule, to decide on the merits, namely, what it did when it convicted the perpetrator. On the other hand, if we look at European human rights from the perspective of the Strasbourg Court, the situation is still somewhat uncertain. There can be arguments from both sides, and it would be difficult to say that strictly by reference to existing articles or case law, we could categorically estimate which would be the solution of the supranational court in this hypothetical complaint. The obvious problem is one of a legislative nature, so if one of the three powers is wrong, it is up to the others, the executive and the judicial to try to find a solution.

From a personal perspective, a real solution would be to return to the principles, namely the principle of **trust in justice**, as elaborated in the first part of this paper. That principle could provide a fair and pragmatic solution in this case. We should go through the criteria listed at the beginning of the material again and reach the solution that should be given on the basis of the need to ensure that justice manages create trust. For these reasons, both the domestic courts and the European Court of Human Rights should give priority to the role of justice, principles and procedural safeguards, and should held a acquittal solution, the principle of **legal certainty** and the principle of **trust in justice** being applicable and prevailing in the interpretation of the law.

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