BRIEF CONSIDERATIONS ON COMPLIANCE WITH THE PINCIPLE OF FINDING THE TRUTH IN CRIMINAL CASES

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Abstract

Prior of being a legal category, truth is a philosophical one; throughout the time philosophers have emphasized the objective character of truth that does not depend on the will of man and humanity in general. The doctrine has appreciated that no matter how the objective truth was perceived, the notion must be understood and resolved only by finding that it represents a fair reflection of the objects and phenomena of nature and society. In the Romanian procedural system in order for the justice to be able to achieve its purpose directly or indirectly, it must know the real truth that emerges from the reality of the facts and not from the fictitious evaluation; in other words, it must know the material truth and not the fictive one at all. The courts have the obligation to ensure the truth is found, and for this purpose they must verify the evidence gathered by the criminal investigation authorities in order to establish the truth, even if the defendant admits the charges, and the prosecutor has stated that he has no evidence to solicit.

Keywords*: principles, finding out the truth, forensics, legality, identity, material truth.*

JEL Classification*:* K14

1. Preliminary remarks

The fundamental principles are enshrined in the current Code of Criminal Procedure as basic rules in the criminal process and can be defined as the general directions governing all procedural institutions and phases of criminal proceedings. They reflect the essential features of the Romanian criminal process.

In this sense, the fundamental principles have been defined as those guiding and fundamental ideas according to which the procedural system is organized and the entire criminal procedural[2] activity is carried out, in which are contained the fundamental norms on which the entire construction of the criminal process is built.[3]

In fact, in the legal literature of other countries the same point of view has emerged that the principles of criminal proceedings are defined as the basic rules on which the criminal process is built and which determines the entire structure of procedural relations of a procedural system, as well as its most important characteristics.

The analysis of the definition made above leads to the conclusion that the notion of a fundamental principle can be retained only in the sense of the rule that underlies the entire criminal procedural activity, since those rules that refer only to some of the phases of the criminal proceedings (publicity of the hearing, the written nature of the criminal investigation) do not have this character.

The essential role of fundamental principles is that of correct application of criminal procedural legal norms in cases subject to criminal prosecution and trial.[4]

The fundamental principles are constituted in a system that ensures the conduct of criminal proceedings in accordance with the requirements of a civilized state of law and are expressly enshrined in the law (Constitution, Code of Criminal Procedure) and in the international treaties to which Romania has also acceded.

The action of the fundamental principles is limited by the provisions of the law, because it is necessary that the general interests of the society to be combined with the ones of the individual.

The framework of the fundamental principles of the Romanian criminal process has been perfected in recent years, so that at present we can speak of a system of principles enriched by the adoption of a new Criminal Procedure Code, as well as by their constitutional consecration.

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[2] Ion Neagu, *Tratat de procedură penală,* Ed. Pro, Bucharest, 1997, p. 38.

[3] Nicolae Volonciu, *Tratat de procedură penală, Partea Generală,* Vol. 1, Ed. Paideea, Bucharest, 1993, p. 44.

[4] Gheorghe Teodoru, *Drept procesual penal. Partea Generală,* Alexadru Ioan Cuza University, Iași, 1966, p. 38.

The ratification by the Romanian Parliament of the European Convention for the Protection of Human Rights and Fundamental Freedoms determined the introduction in the new Code of the principle of the right to a fair trial and within a reasonable term.

Taking into account the considerations made above, we can conclude that the system of fundamental principles of the criminal process currently consists of the following basic rules: the legality of the criminal process, the separation of the judicial functions, the presumption of innocence, the finding of the truth, ne bis in idem, the obligation to initiate and exercise the criminal action, the fairness and the reasonable term of the criminal trial, the right to liberty and security, the right to defence, respect for human dignity and privacy, the official language and the right to an interpreter.[5]

Analyzing the structure of the principles contained in art. 2-12 of the Criminal Procedure Code, Title I – General Part, a classification of these into three categories can be made, as follows:[6]

a. principles guaranteeing the pre-eminence of law (legality of the criminal proceedings, separation of judicial functions, finding out the truth, *ne bis in idem);*

b. principles relating to the protection of persons involved in criminal proceedings (respect for human dignity and privacy, official language and the right to an interpreter, presumption of innocence, right to liberty and security)

c. principles relating to the quality of the criminal trial and the rules governing the criminal proceedings (fairness and reasonable time of the criminal proceedings, the right of defence, the obligation to initiate and exercise criminal proceedings)

Even if the listed principles are also found in the Charter of Fundamental Rights of the European Union or in the ECHR jurisprudence, it is noteworthy that they are also enshrined in the Constitution of Romania, which represents a form of expression of the sovereignty of the Romanian state that objectively implies the existence of particularities regarding the public order or the national identity.

Even if the object of the chosen topic is aimed at analyzing the principle of finding out the truth, I considered it necessary to make a brief presentation of the other principles governing the Romanian criminal process, given the fact that finding out the truth is the fundamental element of it, being in a close connection with the other principles, which ultimately leads to the adoption of legal solutions, in compliance with the principle of a fair trial.

2. Fundamental principles of criminal proceedings

2.1. Legality of the criminal proceedings

This principle is found in Article 2 of the Code of Criminal Procedure and it states that the entire criminal process is conducted according to the law (*nullum judicium sine lege*). The legality of the criminal proceedings represents a projection into the criminal procedural law of the general principle of legality enshrined in Article 1 paragraph 5 of the Constitution according to which, *„in Romania, respect for the Constitution, its supremacy and of the laws is mandatory"*.

The legality of the criminal process is ensured in all phases of the criminal trial, so both in the criminal investigation phase and in the preliminary chamber phase, of the trial and execution of criminal judgments, as well as in the post-executory one. In this sense, Article 3 paragraph 3 of Law no. 303/2004 on the status of judges and prosecutors, specifies that judges are independent, are subject only to the law and must be impartial.

The judicial authorities and participants in the criminal proceedings must act only under the conditions and limits provided by the law.

The criminal procedure activity is carried out only by the judicial authorities established for this purpose. Also, the judicial authorities must act in strict compliance with the competence conferred by law and ensure the full exercise of procedural rights for the parties.

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[5] Elisabeta Boțian, *Drept procesual penal. Note de curs*, Ed. „Burg", Sibiu, 2014, p.16.
[6] Mihail Udroiu, *Codul de procedură penală. Comentariu pe articole,* Ed. C.H. Beck, Bucharest, 2015, p. 3.

Compliance with this principle is ensured by several guarantees, namely:

- the non-compliance with the law may lead to a series of sanctions such as, the annulment of documents drawn up in illegal conditions, the application of administrative, civil or criminal sanctions. Judicial fines may be imposed for committing judicial misconduct.

- if the official subjects violate the law during the criminal proceedings, they can be held for civil and even criminal liability (reparation under articles 504-507 of the Code of Criminal Procedure of material damage or moral damage in case of wrongful conviction or deprivation or restriction of liberty illegally, patrimonial liability of the state for damages caused by judicial errors, in accordance with art. 52 par. 3 of the Constitution)

- the establishment of judicial supervision and control, that has the purpose of discovering the violations of the law and the application of the sanctions of procedural or other nature. Thus, the prosecutor leads and controls the activity of the judicial police (art. 2 of Law no. 364/2004 on the organization and functioning of the judicial police); the court has the possibility to verify, in accordance with the law, the legality of the criminal investigation activity, and the activity of the court is controlled by the hierarchically superior court.[7]

2.2. Separation of judicial functions

This principle was introduced in the new Code of Criminal Procedure in art. 3 and refers to the existence and exercise of four distinct judicial functions in the criminal proceedings, namely:

- criminal investigation function;
- the function of disposition on the fundamental rights and freedoms of the person during the criminal investigation phase;
- the function of verifying the legality of sending or not sending to court;
- the function of judgment.

These functions are usually exercised ex officio, not requiring the intervention or perseverance of the parties/procedural subjects in this regard. However, exceptionally, there are situations in which the exercise of judicial functions is conditioned by a certain manifestation of will (filing a prior complaint, authorization or notification by the competent authorities, etc.). Of the four existing judicial functions in criminal proceedings, the function to verify the legality of sending or not sending to court is compatible with the court function. The other judicial functions are not compatible, which means that they cannot be exercised by the same person.[8]

2.3. Presumption of innocence

The principle of the presumption of innocence is both enshrined in Article 6 para. 2 of the European Convention on Human Rights, as well as in the provisions of Article 23 para. (11) of the Romanian Constitution.

In the Code of Criminal Procedure, it finds its headquarters in art. 4 para. (1), according to which "*every person shall be considered innocent until his guilt is established by a definitive criminal judgment*".

The presumption of innocence constitutes the procedural guarantee that, in the absence of certain evidence, no person can be held criminally liable. In regulating the way in which the criminal proceedings are conducted, the law obliges the judicial bodies to start from the assumption of the innocence of the suspect or defendant. Under this aspect, we would like to point out that, during the procedural activity until the criminal judgment becomes final, the one who in the objective reality committed a crime will have the status of an innocent in the procedural reality. Consequently, the burden of proving by evidence the guilt of a person lies with the judicial bodies during the criminal proceedings.

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[7] Boțian Elisabeta, *op. cit.*, p.17.
[8] Ibid, p.18.

The principle of the presumption of innocence does not mean the passive attitude towards criminals but requires that the body conducting the criminal investigation against a person proves his guilt and that the court does not declare a person guilty until his guilt results with certainty from the evidence administered. This rule is explicitly stated in art. 99 para. (1) thesis I of the Code of Criminal Procedure, according to which[9] *"in criminal proceedings the burden of proof belongs mainly to the prosecutor"*, text doubled by the provisions of art. 99 para. (2), according to which *"the suspect or the defendant benefits from the presumption of innocence, not being obliged to prove his innocence, and has the right not to contribute to his own accusation"*.

The presumption of innocence makes the burden of proof in the criminal proceedings fall on the accuser, i.e. the criminal investigation bodies (*eius incumbit probatio qui dicit, non qui negat*). Until evidence of guilt is produced, the suspect or defendant may have a passive attitude, not having to prove anything, since the presumption of innocence takes advantage of them. Once there is evidence of guilt, the suspect or defendant has the right to prove their lack of validity by proposing and administering evidence in accordance with the law.[10]

From the game of evidence is born the court decision by which the court solves the merits of the case, which can be one of conviction, of renouncing the application of the sentence, of postponing the application of the sentence, of acquittal or of ceasing the criminal trial.

As it results from the provisions of Article 396 para. (2)-(4) of the Code of Criminal Procedure, conviction, renunciation of the application of the penalty and postponement of the application of the sentence may be pronounced only if the court finds, *"beyond any reasonable doubt"*, that the act exists, constitutes a crime, and was committed by a defendant. This means that the presumption of innocence is overturned only by certain evidence of guilt.

However, if, following the administration of the entire evidence, there is any doubt, it will always be interpreted in favor of the suspect or defendant, according to art. 4 para. (2) of the Code of Criminal Procedure (*in dubio pro reo*). As can be seen from the above, the presumption of innocence is relative. It ceases to subsist towards the defendant whose guilt was proved without doubt, being established by the definitive court decision of conviction, waiver of the application of the sentence or postponement of the application of the sentence.

In the light of the judicial practice in this matter, the importance of the presumption of innocence in the whole economy of the criminal trial and the need to improve the procedural institutions in which the existence of evidence of guilt is evoked become obvious, so that the regulation subscribes to this fundamental principle.[11]

2.4. *Ne bis in idem*

Certain principles that have crystallized in previous practice are expressly provided for in the Code of Criminal Procedure. For example, "*ne bis in idem*", the principle of the authority of res judicata, is expressly regulated in the current Code of Criminal Procedure, as an absolute rule.

The exception to the principle of res judicata provided by the provisions of art. 335 of the previous Code of Criminal Procedure, which aimed at extending the criminal proceedings for other material acts, when the court brought together the cases and the desimending a definitive decision, no longer exists, all these situations being solved in the current regulation in the preliminary chamber procedure, and not during the trial. In the current regulation, article 6 inscribes the principle ne bis in idem to art. 6, in the form of: *"No person may be prosecuted or tried for committing a crime when a definitive criminal judgment on the same act has been previously, even under another legal classification"*.

The new regulation maintains the character of the authority of the thing judged by the case

[9] Grigore Theodoru, *Tratat de Drept procesual penal*, 2nd ed., Ed. Hamangiu, Bucharest, 2008, p. 99.
[10] Of otherwise, according to art. 83 lit. a) of the Code of Criminal Procedure, the defendant has the right not to give any statement during the criminal trial, drawing his attention to the fact that, if he refuses to give statements, he will not suffer any unfavourable consequence; the same right is held by the suspect, according to art. 78 of the Criminal Procedure Code.
[11] Ion Neagu, *op. cit.*, p. 79.

that prevents the initiation or continuation of criminal proceedings [art. 16 para. (1) lit. i) of the Code of Criminal Procedure], and the final decision of the court is declared as a cause for extinguishment of criminal proceedings [art. 17 para. (2) of the Code of Criminal Procedure].[12]

Also, the negative effect of the authority of the res judicata in the matter of special requests is still recognized, but, regulating the effects of the criminal court decision in the civil trial, they are limited to the existence of the illicit act and to the person of the perpetrator, the text of art. 28 of the Code of Criminal Procedure being ambiguous, since in the second thesis of para. (1) stipulates that the civil court is not bound by the final decision to acquit or terminate the criminal proceedings regarding the existence of damage or guilt of the perpetrator of the illicit act, although from the first sentence of the same article it is understood, applying the legal reasoning *per a contrario*, that all the other elements of tortious civil liability, except for the existence of the illicit act and the person of the perpetrator, are established by the civil court, regardless of whether the criminal decision has ordered a solution of acquittal, termination of the criminal proceedings or conviction.[13]

They are also limited, according to art. 52 para. (3) of the Code of Criminal Procedure, and the effects of final judgments of courts other than criminal courts delivered on preliminary issues; in the field of appeals, the provisions of art. 426 lett. b) in conjunction with those of Article 16 para. (1) lett. i) and art. 396 para. (6) of the Code of Criminal Procedure, regulating the situations in which an appeal may be made for annulment against final criminal judgments, provide for the case in which the defendant was convicted, although there was evidence on the cause of termination of the criminal proceedings consisting in the existence of the authority of res judicata, and the provisions of Art. 438 para. (1) point 8 in conjunction with Article 16 para. (1) lett. i) and Article 396 para. (6) of the same normative act, regulating the situations in which an appeal in cassation can be promoted, provide for the case in which the termination of the criminal proceedings was wrongly ordered for the existence of the authority of res judicata; also, in the matter of extraordinary remedies, under the aspect of the positive effect of the authority of the thing judged, the new criminal procedural provisions maintain the power with which the legislator understands to invest the decisions of the supreme court by which the interpretation of the law and the resolution of legal issues, respectively the decisions given in resolving appeals in the interest of the law and the preliminary decisions for resolving legal issues.

A novelty of regulation regarding the authority of res judicata in the Code of Criminal Procedure was observed in the provisions of art. 589 para. (6), which extend the effects of the authority of the res judicata of the previous criminal judgment granting the request for postponement of the execution of the prison sentence and on the execution of another final criminal court decision by which a prison sentence was applied, as they provide that the last warrant for the execution of the prison sentence cannot be executed until the expiry of the postponement period set by the court.[14]

2.5. Obligation to initiate and exercise criminal proceedings

This principle is provided in art. 7 of the Code of Criminal Procedure, under the marginal name of *"the obligation to initiate and exercise the criminal action*". The officiality of the criminal trial means the rule that, since there is evidence that a crime has been committed and there is no legal impediment, the criminal action aimed at prosecuting the offender must be initiated and exercised compulsorily by the prosecutor, on his own initiative, without the need for the perseverance or request of a natural or legal person. This also results from the provisions of Article 309 para. (1) of the Code of Criminal Procedure.

Because of this principle, the judicial authorities have established obligations related to the initiation and conduct of the criminal trial. For example, according to art. 305 para. (1) of the Code of Criminal Procedure, *"when the act of notification meets the conditions provided by law and it is found that there is none of the cases that prevent the exercise of the criminal action provided in art.*

[12] Cristina Celea, *Summary of the doctoral thesis with the title „Autoritatea de lucru judecat a hotărârilor penale. Ne bis in idem",* p. 11, www.univnt.ro.
[13] Ibidem.
[14] Cristina Celea, *op. cit.*, pp. 12-13.

16 para. (1), the criminal investigation authority orders (the wording being imperative - n.n.) the beginning of the criminal investigation regarding the deed".

As it results from the provisions of art. 7 of the Code of Criminal Procedure, the obligation to initiate and exercise is aimed at the criminal action. It follows, therefore, that the principle of officiality acts on the criminal side of the case. In the civil side of the criminal proceedings, however, the principle of availability is manifested, the civil action being triggered and exercised only as a result of the will of the injured person or of his successors. From the officiality of the criminal trial the legislator derogates in certain situations.[15]

Thus:

(a) according to art. 7 para. (2) of the Code of Criminal Procedure, in the cases and under the conditions expressly provided by law, the prosecutor may waive the exercise of the criminal action if, in relation to the concrete elements of the case, there is no public interest in achieving its object. The object of criminal proceedings is represented by the criminal liability of those who have committed crimes [art. 14 para. (1) of the Code of Criminal Procedure]. Although, in principle, the crime harms the entire society and it must react, there are concrete situations in which, from the evaluation of the manner and means of committing it, of the consequences produced, of the person of the perpetrator, it is found that the deed has a low significance, and the public interest for its pursuit (reflected in the impact in society of the procedural activity, in the expenses it implies, etc.) is missing. In such cases, the prosecutor may renounce – in compliance with certain conditions (provided for in art. 318 of the Code of Criminal Procedure) – to criminal prosecution, which is an exception to the rule of obligation to exercise criminal proceedings in case of committing any crime.

(b) according to art. 7 para. (3) of the Code of Criminal Procedure, in the cases expressly provided by law, the prosecutor initiates and exercises the criminal action after introducing the prior complaint of the injured person or after obtaining the authorization or notification of the competent authority or after fulfilling another condition provided by law. There are situations in which, given the particularities of certain crimes (related to their nature or the quality of the perpetrator), the criminal process cannot be initiated ex officio. For example, there are offences for which the law conditions the initiation of criminal proceedings by the introduction of a prior complaint by the injured person [hitting or other violence – art. 193 of the Criminal Code; culpable bodily harm – art. 196 of the Criminal Code; rape in the standard form – art. 218 para. (1)-(2) of the Criminal Code][16] or the notification of a certain person (in case of offences of unjustified absence, desertion, violation of the record, leaving the post or order, insubordination, it is necessary to notify the commander – art. 431 of the Criminal Code). Also, in the case of crimes for which the Romanian criminal law is applicable according to the principle of personality or reality, the initiation of criminal proceedings is done only with the authorization of the prosecutor general of the prosecutor's office attached to the court of appeal or, as the case may be, the prosecutor general attached to the High Court of Cassation and Justice, under the conditions of art. 9-10 of the Criminal Code. Likewise, if the perpetrator has a certain quality, the criminal investigation can be ordered only after prior verifications have been performed (art. 2941 of the Code of Criminal Procedure) and a certain authorization has been obtained [art. 305 para. (4) of the Code of Criminal Procedure]. For example, such a situation is encountered when the perpetrator is a minister; [17]

c) there are situations in which, although the criminal action was initiated ex officio, its subsequent exercise is left under the sign of availability, as the injured person may reconcile with the perpetrator, for crimes for which the law expressly provides this possibility, according to art. 159 para. (1) of the Criminal Code [for example, in the case of the crime of theft, in the situations expressly provided by law - art. 231 para. 2 of the Criminal Code, or of the crime of fraud].

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[15] Except in the cases referred to in Article 19 (19) (a) and (b), the following shall apply: (3) of the Code of Criminal Procedure.

[16] In such cases, the law leaves under the sign of availability not only the initiation of the criminal trial, but also its continuation after obtaining the prior complaint, as the injured person may withdraw it under the conditions of art. 158 of the Criminal Code.

[17] According to art. 109 para. (2) of the Romanian Constitution, only the Chamber of Deputies, the Senate and the President of Romania have the right to request the criminal investigation of the Goverment's members for the deeds committed in the exercise of their function.

In doctrine, in relation to the above, it was opted for the following classification of criminal cases: public prosecution (when the official acts uncontrollably), private accusation (when the officiality is removed both in terms of the initiation of the criminal trial and in terms of its continuation) and of mixed accusation (when the officiality is removed either with regard to the initiation of the criminal trial, or as regards its continuation).[18]

2.6. Fairness and reasonable term of the criminal proceedings

The principle of fairness and reasonable term of the criminal trial was explicitly enshrined in article 8 of the Criminal Procedure Code. Although the provisions of the previous Code of Criminal Procedure did not expressly provide for this principle, it should be noted that the doctrine[19] has long considered it, for a long time ago, as a fundamental principle in criminal proceedings, it naturally deriving from the provisions of art. 6 of the European Convention on Human Rights, art. 21 para. (3) of the Romanian Constitution and art. 10 of Law no. 304/2004 on the judicial organization.[20]

According to the provisions of art. 8 of the Code of Criminal Procedure, the judicial authorities have the obligation to conduct criminal prosecution and trial in compliance with the procedural guarantees and the rights of the parties and of the procedural subjects, so as to establish in time and completely the facts that constitute crimes, no innocent person shall be held criminally liable and any person who has committed a crime shall be punished in accordance with the law within a reasonable time.

As an effective guarantee for the observance of this principle, in the current regulation, in the provisions of art. 488(1)-488(6) of the Code of Criminal Procedure, it is provided the objection regarding the duration of the criminal proceedings, through which, when the activity of criminal prosecution or trial is not carried out within a reasonable period, the suspect, the defendant, the injured person, the civil party and the civilly liable party may request the acceleration of the procedure.[21]

2.7. The right of freedom and security of the person

The Constitution of Romania enshrines in Article 23 the individual freedom. Also, Article 9 of the Code of Criminal Procedure provides that the right to liberty and security is guaranteed throughout the criminal proceedings to any person. So, investigation and trial in a state of freedom is the rule, and deprivation of liberty is the exception. No person may be detained or arrested, nor may he be subjected to any form of restriction of liberty, except in the cases and under the conditions provided for by law. If the person against whom the measure of preventive arrest has been taken or the medical admission or any other measure restricting the freedom has been ordered, considers that that measure is illegal, he has the right, throughout the criminal trial, to address to the competent court, according to the law.

Throughout the criminal proceedings, the suspect or defendant in custody may request that this measure be replaced by another measure or that the measure be revoked. These forms of restriction of freedom may refer, in addition to preventive measures, to body/domicile searches, body examinations, medical admissions, etc. Throughout the criminal proceedings, the suspect or defendant may challenge the legality of the preventive measures.

Corroborating the provisions of the Code of Criminal Procedure with the constitutional provisions, it is concluded that in Romania, the deprivation of liberty or the restriction of the freedom of the person in any other form is possible only as a result of a procedural-criminal judicial activity.

According to paragraph 4 of Article 23 of the Constitution, the preventive arrest shall be ordered by a judge and only during the criminal proceedings, and according to the last paragraph of the same article, the custodial sanction can only be of a criminal nature.

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[18] Nicolae Volonciu, *op. cit.,* p. 67-68, apud Ion Neagu, *op. cit.,* p. 85.
[19] Idem, p. 115-119.
[20] Republished in the Official Gazette no. 827 of September 13, 2005.
[21] And during the trial, the prosecutor also.

The authors of criminal procedural law unanimously admit that the deprivation of liberty as a result of the application of criminal sanctions is justified, but the same cannot be said about preventive measures of deprivation of liberty. Thus, opinions were expressed that a person's freedom could never be restricted, even if the major interest of society requires it.

Despite these views, all the legal systems in the world currently regulate custodial or restrictive preventive measures, in one form or another.[22]

2.8. The right to defense

Enshrined since the time of Roman law when not even the slave could be tried without being defended, the right to defence has been recognized long time ago in our criminal legislation, but it has received a wider content through recent amendments to the Criminal Procedure Code and the Romanian Constitution.

Thus, according to Article 10 paragraph 1 of the Code of Criminal Procedure, the parties and the main procedural subjects have the right to defend themselves or to be assisted by lawyers throughout the criminal proceedings.

In 1948, the right of defence was included in the Universal Declaration of Human Rights, adopted by the General Assembly of the U.N. Also, Article 6 of the European Convention on Human Rights also guarantees the right of the person to have access to fair justice and states that the person charged with a crime must have the time and facilities necessary to prepare his or her defense. Similarly, according to para. 2 of article 10 of the Code, the parties, the main procedural subjects, and the lawyer have the right to benefit from the time and facilities necessary for the preparation of the defence. The right to defence also implies the obligation of the judicial authorities to notify the suspect, before the first statement is taken, about the act for which he is accused, its legal classification and about the right to be assisted by a lawyer, about the fact that he has the right not to make any statement. The defendant must be informed immediately of the act for which the criminal proceedings against him were initiated and its legal classification.

In the cases provided for by law, if the accused or defendant does not have a lawyer of his choice, the judicial body will order the appointment of a defence counsel ex officio. At the same time, the judicial bodies are obliged to ensure the parties the full exercise of the procedural rights under the conditions stipulated by the law and to administer to them the evidence necessary for the defence.

Analyzing the content of the right of defense as regulated in the domestic and international legislation, it can be concluded that it includes:

- the possibility of the parties to defend themselves during the criminal proceedings;
- the obligation of the judicial authorities to inform the parties and the main procedural subjects, the right to the defender;
- the possibility or obligation, as the case may be, to provide legal aid during criminal proceedings.

In order to function fully during the criminal proceedings, the right of defence is accompanied by numerous guarantees provided by the provisions of the law. A fundamental guarantee of the right of defence is the legal assistance granted to any part of the criminal process by a legally qualified person – the lawyer.

Legal aid is in principle optional, but in special cases the law establishes for the judicial authorities the obligation to provide legal assistance. Through the lawyer, the suspect or the defendant has the right to consult the criminal investigation file as well as the right to propose the administration of evidence in accordance with the law.

Listening to the suspect or defendant at the various stages of the criminal trial is not only a means of proof, but concrete possibilities for exercising the right of defence. Prior to the listening, the suspect or accused must be informed that they have the right not to make any statement in case.

[22] Elisabeta Boțian, *op. cit.*, p. 24-25.

Thus, the right to silence is also a form of his right of defence.[23]

2.9. Respect for human dignity and privacy

According to Article 11 of the Code of Criminal Procedure, any person who is under criminal investigation or trial must be treated with respect for human dignity. Subjecting it to torture or cruel, inhuman or degrading treatment is punishable by law.

During the criminal proceedings, the law guarantees respect for private life, the inviolability of the home and the secrecy of correspondence. Any restriction on the exercise of these rights must be carried out only in accordance with the law and only to the extent necessary in a democratic society. It is also forbidden to obtain samples through torture, inhuman or degrading treatment. The conditions under which statements can be obtained from persons heard in a criminal case are strictly determined by law, and persons who resort to torture, inhuman or degrading treatment will be punished.

These legal provisions represent primarily the consequence of Romania's accession in 1990 to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The same principle is found in article 22 paragraph 2 of the Constitution, according to which no one shall be subjected to torture or to any kind of punishment or inhuman or degrading treatment. It is forbidden to use violence, threats, or other means of coercion, as well as promises or exhortations, in order to obtain evidence. Illegally obtained evidence cannot be used in criminal proceedings. When the official subjects called to carry out criminal procedural activities, violate this principle, they can be held criminally liable for committing the offences of torture, illegal arrest and abusive investigation.[24]

2.10. The language in which the criminal proceedings are conducted and the right to an interpreter

According to Article 12 of the Code of Criminal Procedure, in criminal proceedings, judicial proceedings are conducted in the Romanian language which is the official language. The same principle is enshrined in article 128 paragraph 1 of the Constitution. Romanian citizens belonging to national minorities have the right to express themselves in their mother tongue before the courts, and procedural documents are drawn up in the language of the Romanian. The parties and the procedural subjects who do not speak or understand the language of the Romanian or cannot express themselves, are provided free of charge with the possibility to get acquainted with the pieces of the file, the right to speak, as well as the right to draw conclusions through the interpreter. The right to use an interpreter in criminal proceedings is provided free of charge by the state.

The use of the interpreter ensures a correct translation into and from the Romanian language, with the consequence of knowing the exact points of view expressed by the parties. Interpreters used in court proceedings must be authorised according to the law. Authorized translators may be used as interpreters.[25]

In the following, I shall analyse the principle **of finding out the truth** in order to demonstrate its indissoluble connection with the other principles set out above, as well as the defining role of that principle for the progress in legal conditions of the criminal process.

2.11. The principle of finding out the truth

The principle of finding out the truth is enshrined in art. 5 of the Criminal Procedure Code, which states that "the judicial authorities have the obligation to ensure on the basis of evidence that the truth is found out about the facts and circumstances of the case, as well as about the person of the

[23] Idem, pp. 25-26.
[24] Idem, pp. 26-27.
[25] Idem, pp. 27-28.

suspect or defendant."

On the other hand, the text of the law provides that *"the prosecuting authorities have the obligation to collect and administer evidence both in favor of and against the suspect or defendant. Rejection or failure to record in bad faith the evidence proposed in favour of the suspect or defendant shall be sanctioned in accordance with the provisions of this Code."*

The notion of "*truth*" has preoccupied philosophers since antiquity, their view being different about this concept.

Thus, Aristotle considered that: "the truth belongs to the one who considers separated what is in reality separated, and that united is that which is united, as is in error he who thinks contrary to how things are in reality."[26]

In a more recent era, *Rene Descartes*[27] believed that "something that is obviously known as true should never be accepted as *true, haste and prejudice and any means of doubt should be carefully avoided."*

In philosophical research are analyzed various aspects of truth, for example, the objective content, the concrete and dynamic character (the unity between the relative and absolute content of truth), different types and species of truth (ontic, correspondence, validity, coherence, utility, semantic, consensual, veracity, justice) that can be applied in cognitive activity and concrete practice, including the legal one. In the legal literature, too, the philosophical category of truth is present, but for a long time the problem of the specificity of legal truth was reduced only to the analysis of the ratio between objective truth and formal truth.

Regardless of how objective truth has been perceived, the notion can only be understood and solved by finding that it represents a fair, verified reflection by practice of objects and phenomena in nature and society, existing outside consciousness and independently of it.[28]

Referring to the finding of the truth in the criminal trial, it will obviously be limited only to the facts and circumstances of the file that are the subject of probation, the judicial bodies having the obligation to issue court decisions that reflect the truth and in which no judicial errors have crept in.

The existence of remedies against solutions of the prosecution or the courts is a genuine guarantee of respect for the principle of finding out the truth.

Thus, the Code of Criminal Procedure regulates in the provisions of art. 204 - 206 the appeals against the decisions by which it was ordered on the preventive measures taken by the judge of rights and freedoms, by the judge of preliminary chamber or by the court of law, there being also the obligation stipulated in articles 207 and 208 of the Criminal Procedure Code to verify the preventive measures both in the preliminary chamber procedure and during the trial.

The provisions of art. 339 of the Criminal Procedure Code provide for the possibility of complaint against the measures taken or of the acts carried out by the case prosecutor who addresses the First Prosecutor of the Prosecutor's Office, while the provisions of art. 340 of the Criminal Procedure Code regulate the way of complaint against the solutions of non-prosecution or non-referral to court that addresses to the judge of preliminary chamber from the court to which it would have the power to judge the case at first instance according to the law.

Moreover, the solutions pronounced by the courts of first instance may be reviewed by the court of appeal according to the provisions of art. 408 and the following Criminal Procedure Code or by appeal according to art. 425^1 of the Criminal Procedure Code, when the law expressly provides for it.

Finally, also in order to fully guarantee the finding of the truth, the legislator has included in the Special Part of the Code of Criminal Procedure, Title III – Judgment, Chapter IV – Extraordinary appeals against final criminal judgments, respectively the Appeal for annulment, the Appeal in cassation and the Revision, and for the person definitively convicted who was judged in absentia, the Procedure for reopening the criminal proceedings was provided in art. 466 of the Criminal Procedure

[26] Aristotel, *Metafizica,* Academy Publishing House, Bucharest, 1965, p. 301-302.
[27] Rene Descartes, *Discourse on the method,* Scientific Publishing House, Bucharest 1957, cited in Nicolae Volonciu, *op. cit.*, p. 93, Mihail Udroiu, *op. cit.*, p. 39.
[28] Ion Neagu, *op. cit.*, 1997, p. 39.

Code.

Frequently, the issue of legal truth is discussed in procedural law because the purpose of the judicial investigation is to solve criminal, civil cases, etc., pending in the courts. Most lawyers of continental orientation (Roman-Germanic), in their professional activity, usually operate with two types of truth: objective (material) and formal (judicial).

The criminal doctrine emphasized the importance of knowing the objective content of criminal phenomena and events for the just settlement of conflicts between persons and the state.

Criminal procedural law provides that "the task of establishing objective truth in the event of examination of criminal cases is unfeasible outside the full investigation and in all aspects of the circumstances of the case. The full reflection in all aspects of the circumstances of the case, both in general and in particular, the objective investigation of all the evidence in the defence and in the indictment, the objective examination of all the arguments 'for' and 'against', of all the pluses and minuses, constitutes the appropriate guarantee of establishing the truth in the criminal case". [29]

Criminal procedure (criminal proceedings) is that activity regulated by law, carried out by the judicial authorities, with the participation of parties, lawyers, and other procedural subjects who, in order to establish in a timely and complete manner the facts that qualify as crimes, so that any person who has committed a crime is punished according to his guilt and no innocent person is held criminally liable.[30]

In particular, the task of establishing objective truth in the criminal case "*dictates the need to establish what are the limits of the investigation of evidence at the hearing, to submit to verification and investigation those evidence that would give the judges full opportunity to clarify themselves on all the circumstances of the case, reaching clear and exhaustive conclusions on the absence or presence of the fact of the crime, of the guilt or innocence of the defendant in committing it and of his degree of responsibility.*" [31]

Evidence restores the actual picture of the deed or event, the latter being subsequently subject to legal interpretation.

The material truth about certain real facts or events, which has been established by the system of evidence, must be analyzed by applying the rules of material and procedural law, that is, by legal qualification. Qualification presupposes that the specific case is classified into a general rule, which must precede the case.

Without knowing the material truth, they are not possible: the law-making processes, the fair qualification of the facts and the realization of justice, through court decisions. Normative statements (judgments) represent value judgments, which contain both material truth and a specific addition of practical or pragmatic truth.

The principle of finding the truth implies the legal obligation of the criminal judicial bodies – the court, the prosecutor, the criminal investigation body – to establish the real factual situation as well as all the circumstances and circumstances – real and personal – regarding the committed deed and the perpetrator.

In the criminal-procedural legal doctrine it is considered that the notion of finding out the truth means the finding of the existence or non-existence of the deed (which implies the knowledge of the real circumstances: of place, of time, of mode, of means, of purpose), of establishing the form and eventually of the modality of guilt, of finding the existence of a purpose or mobile that united with the subjective side, it characterizes it (in the form of qualified direct intention) and generates an enlarged constitutive content.

Also, finding out the truth implies knowing the nature and amount of the damage generated by the illicit act of conduct, as well as the aspects that influence the liability of the perpetrator.

With regard to the personal circumstances of the perpetrator, finding out the truth implies the finding of the guilt of the defendant (accused), establishing with certainty the identity and civil status

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[29] Vitalie Rusu, Dumitru Gherasim, *Unele reflecții asupra limitelor cercetării judecătorești în procesul penal al Republicii Moldova,* „Revista națională de Drept", 2015, no. 8, p. 28.
[30] Elisabeta Boțian, *op. cit.*, p.7.
[31]Vitalie Rusu, Dumitru Gherasim, *op. cit.*, p. 28.

data of the perpetrator, as well as of his possible criminal history that characterizes, in the situation in which there is, a certain persistence in the criminal activity.

This principle is stipulated in the Code of Criminal Procedure in the provisions of art. 5, which states that in the conduct of the criminal trial, it must be ensured that the truth is found out, regarding the facts and circumstances of the case, as well as about the person of the perpetrator.

In the procedural-criminal legal doctrine of the interwar period, the principle of finding the truth was called the principle of "veracity"[32] or the principle of "reality"[33].

Analyzing the provisions of art. 5 of the Criminal Procedure Code, we note that the legislator has included the obligation of the criminal investigation bodies to collect and administer evidence both in favor and against the suspect or defendant, after which the prosecutor according to art. 327 of the Criminal Procedure Code will proceed to the settlement of the case and to the notification of the court through the indictment, only if the legal provisions guaranteeing the finding of the truth have been observed, that the prosecution is complete and there is the necessary and legally administered evidence.

In its turn, according to art. 349 of the Criminal Procedure Code, the court settles the case brought before the court with the guarantee of respect for the rights of the procedural subjects and ensuring the administration of evidence for the complete clarification of the circumstances of the case in order to find out the truth in full respect of the law.

Finally, the court of appeal according to art. 420 of the Criminal Procedure Code will examine whether all the evidence necessary to find out the truth has been administered in the case, having the possibility to re-administer the evidence already administered in the first instance or to administer new evidence.

In support of the idea that the principle of finding out the truth is the fundamental principle of the criminal process, the case-law[34] has ruled that "in the conduct of the criminal proceedings, it must be ensured that the truth is found out about the facts and circumstances of the case, as well as about the person of the perpetrator, meaning that the criminal investigation bodies and the court are obliged to take an active role. It follows that the trial court, when deciding on the charge and issuing the conviction, must find that all the evidence necessary to find out the truth has been obtained and administered lawfully, that it has clarified all the contradictory or unclear aspects and that the solution resulting from the deliberation is the only certain result required by that evidence."

Even in the context analyzed above, it is unanimously recognized that the principle of finding out the truth has a number of limits in application, these referring to the following aspects:[35]

a. the prohibition of the establishment of the truth by unlawfully or unfairly administered evidence which significantly and substantially affects the fairness of the proceedings;

b. the existence of an impediment to the setting in motion or the exercise of criminal proceedings;

c. the application of the principle *non reformatio in pejus* when an appeal is heard.

Referring to the first case of limitation of the application of the principle of finding out the truth of the Code of Criminal Procedure in art. 100 para. (1) to (4) and art. 101 para. (1) – (3) expressly regulates the manner in which evidence is administered in accordance with the principle of loyalty of its administration, expressly stipulating the manner in which this activity is carried out during the criminal investigation, at the preliminary chamber stage and during the trial.

Specifically, the taking of evidence throughout the criminal proceedings must take into account a number of criteria, namely: the legality, relevance, conclusiveness, usefulness of the evidence and the material possibility of taking the evidence, so that it actually contributes to finding out the truth.

It is precisely because of these mandatory criteria that the possibility for the judicial bodies to

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[32] Ibid, p. 28.
[33] Ion Ionescu-Dolj, *Curs de procedură penală român,* Ed. Socec, Bucharest, 1937, p. 12.
[34] High Court of Cassation and Justice, Criminal Section, Decision no. 5738 from 04.11.2004 in George Antoniu, Adina Vlăsceanu, Alina Barbu, *Codul de procedură penală,* 2nd ed., Ed. Hamangiu, Bucharest, 2008, p. 4.
[35] Mihail Udroiu, *op. cit.*, p. 41.

reject the request for the administration of evidence, which is inconclusive, pertinent or unutile to the case and of unlawful and inadmissible evidence appears to be perfectly justified, which obviously represents a limitation in the exercise of the principle which I am considering.

In the same sense, the provisions of art. 101 of the Code of Criminal Procedure establish a series of prohibitions in relation to the way of obtaining evidence, stipulating that violence, threat or other means of coercion, promises or exhortations is stopped in order to obtain evidence, but also methods and listening techniques that affect the person's ability to remember or report facts that constitute the subject of the case.

Those constraints imposed by the legislature are in view of respect for the principle of loyalty to the administration of evidence, which in turn stems from the principle of the right to a fair trial.

The second limitation of the application of the principle of finding the truth considers the existence of impediments to the setting in motion or to the exercise of criminal proceedings, and here I refer to the cases referred to in art. 16 lett. a) – j) of the Criminal Procedure Code.

Some of these cases are final because once they have intervened, they permanently remove the criminal liability (amnesty, prescription, death of the perpetrator) or have a temporary character, with the possibility of abolishing under certain conditions the pronounced solutions, and the impediments disappear when the prior complaint, authorization or notification of the competent body is obtained, cases in which the process can be initiated or resumed.[36]

In relation to the above, the cases indicated in art. 16 of the Criminal Procedure Code can be classified as impediments resulting from the lack of basis of criminal proceedings (art. 16 lett. a - e) and impediments resulting from the lack of object of the criminal proceedings (art. 16 lett. f - j).

Finally, a final limitation in the application of the principle of finding out the truth relates to the non-aggravation of the situation in one's own appeal – *non reformatio in pejus*.

The rule I am referring to is a derogation from the principles of legality and finding out the truth, because the appellate court, even if it finds an illegality of the decision of the court of first instance, does not have the possibility to pronounce a decision that would worsen the situation of the appellant.[37]

3. Conclusions

As I have indicated, finding out the truth is imperative in the correct resolution of criminal cases. The principle implies the removal of any influence outside the act of justice performed by the criminal investigation bodies or the court.

All the fundamental principles of the criminal process must be applied, during the trial phase, by the judges. They also have the legal obligation to verify the procedural activity, including the observance of the fundamental principles, carried out by the criminal judicial authorities, within the criminal investigation phase and which were the basis for finding the existence or non-existence of the deed, the circumstances of place, time, manner, means and purpose that characterize the deed, the form of guilt, the motive and its purpose, as well as the aspects that influence the criminal liability of the perpetrator.

Bibliography

1. Aristotel, *Metafizica,* Academy Publishing House, Bucharest, 1965.
2. Cristina Celea*, Summary of the doctoral thesis with the title „Autoritatea de lucru judecat a hotărârilor penale. Ne bis in idem"*, www.univnt.ro.
3. Elisabeta Boțian, *Drept procesual penal. Note de curs*, Ed. „Burg", Sibiu, 2014.
4. George Antoniu, Adina Vlăsceanu, Alina Barbu, *Codul de procedură penală,* 2nd ed., Ed. Hamangiu, Bucharest, 2008.
5. Gheorghe Teodoru, *Drept procesual penal. Partea Generală,* Alexadru Ioan Cuza University, Iași, 1966.

[36] Ion Neagu, *op. cit.*, p. 170.
[37] Vintilă Dongoroz et all, *Explicații teoretice ale Codului de procedură penală român, Partea specială,* vol. II, Academy Publishing House, Bucharest, 1976, p. 228.

6. Grigore Theodoru, *Tratat de Drept procesual penal*, 2nd ed., Ed. Hamangiu, Bucharest, 2008.
7. Ion Ionescu-Dolj*, Curs de procedură penală român,* Ed. Socec, Bucharest, 1937.
8. Ion Neagu, *Tratat de procedură penală,* Ed. Pro, Bucharest, 1997.
9. Mihail Udroiu*, Codul de procedură penală, Comentariu pe articole,* Ed. C.H. Beck, Bucharest, 2015.
10. Nicolae Volonciu, *Tratat de procedură penală, Partea Generală*, Vol. 1, Ed. Paideea, Bucharest, 1993.
11. Vintilă Dongoroz et all, *Explicații teoretice ale Codului de procedură penală român, Partea specială,* vol. II, Academy Publishing House, Bucharest.
12. Vitalie Rusu, Dumitru Gherasim, *Unele reflecții asupra limitelor cercetării judecătorești în procesul penal al Republicii Moldova*, „Revista națională de Drept", 2015, no. 8.