The influence of the constitutional court's decisions in enforcing, with respect of human rights, the penal code and the code of criminal procedure in Romania

CRISTIAN DUMITRU MIHEŞ
Associate Professor, Faculty of Law, University of Oradea (ROU)

Introduction of New Codes in Romanian Legislation

After more than 50 years and many attempts, the four fundamental codes in Romania were changed entirely. The change started with The Civil Code[1] that entered into force on 1 October 2011, followed by The Code of Civil Procedure[2] on 15 February 2013, and finally The Penal Code[3] and The Code of Criminal Procedure,[4] both entering into force on 14 February 2014.

Giving the importance of these new codes, the Parliament adopted specific laws to enforce the codes that did also change and update certain provisions of these fundamental laws.[5]

On the other hand, we have the Constitution of Romania and of course the European Convention of Human Rights and Fundamental

---

[1] Law no 287 from 2009 of The Civil Code. The former Civil Code was 147 years in force and it was inspired by the French Civil Code from 1804.

[2] Law no 134 from 2010 of The Civil Procedure Code.

[3] Law no 286 from 2009 of The Penal Code.

[4] Law no 135 form 2010 of The Criminal Procedure Code.

[5] The Parliament adopted two distinct laws: Law no 187 from 2012 for the implementation of Law no. 286/2009 on the Criminal Code, and Law 255/2013 for the implementation of Law no. 135/2010 on the Criminal Procedure Code and amending and supplementing certain provisions regarding criminal procedure.

Liberties, the EU and international legislation, all of them including provision that directly or indirectly are referring to criminal investigation, criminal trial and respect of human rights.

In this line of thoughts, the Penal Code stipulates, at the beginning the general principles of **substantive criminal law** in articles 1 and 2:

- *Lawfulness of criminalization*: Criminal law stipulates the actions that constitute offenses; No person can have criminal liability for an action that was not covered by criminal law at the date of its commission;
- *Lawfulness of criminal penalty*: Criminal law establishes applicable penalties and educational measures that can be ruled against persons who committed offenses, as well as security measures that can be ruled against persons who committed actions covered by criminal law; No penalty, educational or security measure can be ruled that was not stipulated in criminal law at the date when the violation was committed; No penalty can be ruled and enforced outside the law's general limits.

The definition of the offense, as the only ground for only for criminal liability was changed, according to the new orientations in Criminal Law at European level. As a consequence, according to article 15: "an offense is an action stipulated by criminal law that has been committed under guilt, without justification and for the commission of which a person can be charged." Also, we have to underline certain changes that intervene concerning the forms of quilt – there were introduced the "*praeter intentia*" (oblique intent or exceeded intent)[6] and

[6] Art. 16 of the Penal Code – "Guilt: *(1) An action only constitutes an offense if committed under the form of guilt required by criminal law. (2) Guilt exists when an action is committed with direct intent, with basic intent or oblique intent.(3) An action is committed with intent when the perpetrator: a) can foresee the outcome of their actions, in the expectation of causing such outcome by perpetrating the act; b) can foresee the outcome of their actions and, while not intending to produce it, nevertheless accepts the likelihood that it will occur. (4) An action is committed with basic intent when the perpetrator: a) can foresee the outcome of their actions but does not accept it, believing without reason that such outcome will not occur; b) cannot foresee the outcome of their actions, though they*

violation committed by omission[7] since both doctrine and jurisprudence demanded an update on this aspects.[8]

With regards to **criminal procedure**, the rules stipulated by the code are intended to provide effective exercise of the judicial bodies' responsibilities and guarantee the rights of the parties and the other participants in the criminal proceedings so as to comply with the Constitution, the European Union constitutive Treaties, the other European Union regulations in criminal procedure matters and of the pacts and agreements on fundamental human rights that Romania is a party to.[9]

Another very important aspect is related to the *separation of judicial functions*, as expressly stipulated by article 3 from the Criminal Procedure Code:[10]

- The following judicial functions shall be exercised during the criminal proceedings: *the criminal investigative function; the function of issuing orders concerning the fundamental rights and liberties of a person at the stage of the criminal investigation; the function of examining the lawfulness of the decision to prosecute or drop charges; the trial function.*

---

should and could have done so. (5) Oblique intent exists when an act, consisting of an intentional action or inaction, causes unintended more serious consequences and is attributable to the perpetrator. (6) The act consisting of an action or inaction shall constitute an offense when committed with direct intent. The act committed with basic intent constituted an offense only when the law specifically establishes it as such".

[7] Art. 17 of the Penal Code – Violation committed by omission: "*A committed offense that involves the causing of an outcome is also considered as having been committed by omission, when: a) there exists a legal or contract obligation to take action; b) the author of the omission, through previous action or inaction, created a state of threat for the protected social value, which facilitated the occurrence of the outcome.*"

[8] Domocoş Carmen Adriana, *Infracțiunea Omisiva* (*The Act of Omission and Its Criminalization in Romanian Criminal Law*), Universul Juridic Publishing House, Bucharest, 2010, pp. 9-11.

[9] Article 1 para 2 from the Criminal Procedure Code.

[10] Mihail Udroiu, *Criminal Procedure, General Part* (*Procedură penală. Partea generală*), C. H. Beck Publishing House, Bucharest, 2016, pp. 7-13.

- The judicial functions shall be exercised *ex officio*, unless the law requires otherwise.
- The exercise of one judicial function is incompatible with the exercise of a second judicial function as part of the same criminal proceedings, except for *the function of examining the lawfulness of the decision to prosecute or drop charges, which is compatible with the trial function.*
- In the exercise of the criminal investigative function the prosecutor and the criminal investigation bodies shall gather the evidence needed *to establish whether grounds for prosecution exist.*
- The *acts and measures* that are part of the criminal investigation and restrict individual fundamental rights and liberties *shall be subject to approval by the designated judge* who has authority in this sense, except for cases specifically stipulated by law.
- The *lawfulness of the indictment and evidence* it relies upon, as well as the lawfulness of decisions to drop charges, shall *be subject to approval by the Preliminary Chamber Judge*, as under the law.
- The *trial shall be performed by the court*, with legally-assembled judicial panels.

Other general principles of criminal procedure namely included in the Criminal Procedure Code are:[11] *Benefit of the doubt; Finding the truth; Ne bis in idem; Obligatory character of starting and exercising the criminal investigation; Fair trial and reasonable duration of the trial; Right to freedom and safety; Right to defense; Observance of human dignity and private life; Official language and the right to have an interpreter; Applicability of procedural law in time and space.*

Although there were a lot of debates within the scholars and practitioners as how would the institutions of Penal Law and Criminal Procedure Law should function, and in spite of constant updates of the provision (even through the laws adopted to enforce into practice the codes), in so many cases there was a need to clarify the interpretation of certain norms or to decide if the provision is in compliance with the Constitution of Romania.

[11] Articles 4 to 13 from the Criminal Procedure Code.

As a consequence, at the moment, we have 48 Preliminary Rulings[12] and 30 decision of the Constitutional Court decision to grant the exception of unconstitutionality of certain provision or to rule on interpretation of certain article from these two codes. In the light of these aspects, unfortunately we can say that (...too many) provisions where subject to constitutional examination by The Constitutional Court[13].

The importance of these decisions and their effect cannot be ranked within the criminal law. All of them are essential, since they are concerning aspects of criminal law and criminal procedure law. Within this paper would be impossible to address all of these decisions, but we have chosen to present four of them, two relating to the Penal Code, and the other two relating to the Criminal Procedure Code.

[12] Articles 475-477of Criminal Procedure Code offer the possibility of making a referral to the High Court of Review and Justice for a preliminary ruling to settle legal issues – the settlement of the legal issues shall be binding for courts as of the date of the publication of the decision in the Romanian Official Journal, Part I: "If, during the proceedings in court, a judicial panel of the High Court of Review and Justice, the Courts of Appeals or the Tribunals, entrusted with the adjudication of a case as a court of last resort, finds that there is a legal issue whose clarification is paramount for the settlement on the merits of the respective case and about which the High Court of Review and Justice has not issued any decision in a preliminary ruling or in an appeal in the interest of the law and which is not the subject of a pending appeal in the interest of the law, they may apply to the High Court of Review and Justice for a ruling to settle, in principle, the legal issue referred to it."

[13] In most cases using the legal instrument of "exception" raised during an ongoing criminal trial, in front of a court. According to art. 147 par. (1) of the Constitution, republished in the Official Gazette no. 767 of 31 October 2003, the provisions of laws and ordinances in force, as well as the regulations declared unconstitutional, cease their legal effects within 45 days of publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case, not agree with the unconstitutional provisions of the Constitution. During this period, the provisions declared unconstitutional are suspended by law. Furthermore, according to article. 147 alin. (4) din from the Constitution, "Since publication, decisions are binding and effective only for the future". 'Legea

Decisions of Constitutional Court related to The Penal Code

1. *Article 5 of the Penal Code*

Use of the more lenient criminal law until final judgment in a case, stipulates in the first paragraph that "(1) In case one or several criminal acts have been enacted between the time the violation was committed and the final judgment in a case, the more lenient stipulation shall apply."

The principle of more lenient law, as is the case in most countries, does not refer exclusively to the seriousness of the punishment (how many years of imprisonment or how much is the fine, or what are the complementary measures that a court could sentence after ruling in a criminal case).[14]

Taking into consideration opinions of an important number of scholars that argued the autonomous character of criminal law institutions (concepts),[15] and on the other hand, certain new provisions of the new Penal Code, was born the idea of determining the more lenient law through comparison within institutions of criminal law and not only by comparison of entire code.

Before the ruling of the Constitutional Court on this matter, there was a decision of The High Court of Cassation and Justice addressing the issue of determining the more lenient law and recognizing the autonomous character of the substantive criminal law institutions. The

[14] Streteanu Florin & Daniel Nițu, *Drept penal. Partea generală* (Criminal Law. General Part), Universul Juridic Publishing House, Ist volume, Bucharest, 2014, pp. 133-137; Constantin Mitrache, 'Legea penală şi limitele aplicării ei' ('The penal law and its enforcing limits') in George Antoniu & Tudorel Toader (eds.), *Explanations of The New Penal Code,* Vol. 1, Universul Juridic Publishing House, Bucharest, 2015, pp. 83-86.

[15] Streteanu Florin & Daniel Nițu, *Drept Penal. Partea Generală* (*Criminal Law. General Part*), Universul Juridic Publishing House, Vol. 1, Bucharest, 2014, pp. 137-140; Paşca Viorel, *Curs de Drept Penal. Partea Generală* (*Textbook on Criminal Law. General Part*), Universul Juridic Publishing House, Bucharest, 2012, pp. 91-92; Valentin Mirişan, *Criminal Law. General Part* (*Drept Penal. Partea Generală*),Universul Juridic Publishing House, Bucharest, pp. 18, 19.

High Court of Cassation and Justice finds that through Decision no. 2 from 14 April 2014, the High Court of Cassation and Justice – the panel for the settling of certain legal issues in criminal matters has decided that in the enforcement of art.5 of the Penal Code the prescription of criminal liability represents an autonomous institution with regard to the institution of punishment, thus conferring to art. 5 of the Penal code, in the interpretation given, unconstitutional powers.

However, later The Constitutional Court embraced the other opinion,[16] and did not recognize any autonomous character of any criminal law institution, granting the exception of unconstitutionality introduced by the High Court of Cassation and Justice – Penal division in Case no. 5714/118/2012 and ruling that the provisions of art.5 from the Penal code are constitutional in the measure in which they do not allow the combining of provisions from subsequent laws in establishing and enforcing the more favourable penal law.[17]

---

[16] Constantin Mitrache, *The Penal Law and Its Enforcing Limits* (*Legea Penală şi Limitele Aplicării ei*), in George Antoniu & Tudorel Toader(eds.), *Explanations of The New Penal Code,* Vol. 1, Universul Juridic Publishing House, Bucharest, 2015, pp. 87-88.

[17] Within the reasoning the Court (paragraph 39) referred to the recent jurisprudence of The European Court of Human Rights, held that the provisions of art. 7, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms require, if criminal laws successive election overall more favorable criminal law. Thus, by judgment of 18 July 2013 in Case Maktouf and Damjanovic against Bosnia and Herzegovina, paragraph 70, the Court in Strasbourg, noting that both criminal codes that have succeeded in the time of the facts and until the final judgment (Criminal Code 1976 and the Penal Code of 2003) "provide different ranges of punishment for war crimes", found that there was "a real possibility that the retroactive application of Code 2003 has been to the detriment of the applicants regarding the imposition of penalties" so that "cannot be said that they had received, pursuant to art. 7 of the Convention, the effective guarantees against the imposition of a more severe punishment." Therefore, the European Court ruled unanimously that a violation of Article. 7 of the Convention, while stating that the decision "must be understood as indicating simply that in terms of sentencing, applicants would have to apply the provisions of Code 1976 not that it should have been imposed milder punishment."

Also, The Constitutional Court finds that, starting from the publication of the present decision in the Official Gazette of Romania, the effects of Decision no. 2 from 14 April 2014 of the Supreme Court ceased in accordance with the provisions of art. 147 paragraph (4) of the Constitution and of art. 477[1] of the Criminal Procedure Code and no authority may ignore the constitutional meaning thus established.[18]
Consequently, the courts will proceed determining the more lenient law by comparison of applying effects of the entire provisions of the criminal law, and not to take into considerations institutions from each particular law.

2. *Article 297 of the Penal Code*

Abuse in office:

> (1) The action of the public servant who, while exercising their professional responsibilities, fails to implement an act or implements it deficiently, thus causing damage or violating the legitimate rights or interests of a natural or a legal entity, shall be punishable by no less than 2 and no more than 7 years of imprisonment and the ban from exercising the right to hold a public office.

As regarding the text mentioned above, there were a lot of discussions about the expression "fails to implement an act" and "implements it deficiently". Also, within the reasoning of the decision[19] of the Constitutional Court, it was argued that the expressions mentioned before are not as accurate a criminal law should be, since the public servant cannot determine precisely which act or conduct is punishable by criminal law, and which conduct falls out of the area of criminal responsibility. The problem identified by the Constitutional Court de-

[18] Decision of Constitutional Court no. 265 from 6 May 2014, regarding the exception of unconstitutionality of the provisions of art.5 from the Penal Code, published in the *Official Gazette* no. 372 from 20 May 2014.

[19] Starting from 2011, the Court stated that the reasoning of the decision is mandatory as it is the decision itself, within the limits of the constitutional control (Decision no. 1615 from 20 December 2011).

rived from the fact that not all public servant's duties are regulated by law, but there so many of them regulated by inferior norms, by decisions of the public authority, or even by the job descriptions of each position. In practice, as concerning offense committed by servants all the conducts that could not be attributed to other texts were assigned to the offense of abuse in office.

Among other considerations, the Court said that according to the European Court of Human Rights, art. 7, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which preserves the principle of legality of criminal offenses and punishment (*nullum crimen, nulla poena sine lege*), "in addition to the prohibition, in particular, extending the content of existing offenses on facts which previously is not a crime, states and the principle that criminal law should not be interpreted and applied extensively to the detriment of the accused, for example, by analogy. It follows that the law must clearly define offenses and the penalties applicable to this requirement is satisfied where an individual has the opportunity to know, from the very wording of the legal norm relevant in need with the help of its interpretation by the courts, and following a adequate legal assistance, which are the acts and omissions which may incur liability to prosecution and punishment that is liable pursuant to them".[20]

In different cases, The European Court of Human Rights ruled that the meaning of the notion of predictability depends "to a large extent on the content of which it and the area it covers and the number and

[20] In support of the reasoning the Court cited: Judgment of 15 November 1996 in Case Cantoni v France, paragraph 29; Decision of 22 June 2000 in Case COEM and Others v Belgium, paragraph 145; Decision of 7 February 2002 in Case E.K. against Turkey, § 51; Judgment of 29 March 2006 in Case Achour v France, paragraphs 41 and 42; Decision of 24 May 2007 in Case Dragotoniu and Militaru-Pidhorni against Romania, paragraphs 33 and 34; Judgment of 12 February 2008 in Case Kafkaris against Cyprus, § 140; Judgment of 20 January 2009 in Case South Fondi Ltd and Others v Italy, paragraphs 107 and 108; Decision of 17 September 2009 in Case Scoppola against Italy (no. 2), paragraphs 93, 94 and 99; Judgment of 21 October 2013 in Case Del Rio Prada against Spain, paragraphs 78, 79 and 91 (paragraph 45).

quality of its recipients". On the other hand, ECHR considered that "it is especially for professionals who are required to exercise great prudence in the exercise of their profession, which is why it is expected from them to pay special attention to assessing the risks it entails".[21]

Nevertheless, the constitutional fate of this text was a subject of intense debate within the civil society, because it was argued that if the Constitutional Court would find those provisions unconstitutional, then the immediate effect would be the termination of so many ongoing corruption cases and also the impossibility to prosecute in the future any public servant that does not execute its duties as required.

The Constitutional Court admitted the exception, but the ruling was as follows:" Grants the exception of unconstitutionality (…) and finds that the provisions of art.246 from the Penal Code of 1969 and of art.297 paragraph (1) from the Penal Code are constitutional in the measure in which through the expression „deficient implementation", used in their content, one understands "implementation by breaking the law".[22]

As a consequence, the conduct of subject of the offense must refer to the law, and not to other acts or documents that are regulating its duties.

To the present moment, the law was not changed in order to meet the requirements of the decision and it is still enforced based on the legal text mentioned taking into consideration the interpretation given by the Constitutional Court.

---

[21] In support of the reasoning the Court cited Decision of 15 November 1996 in Case Cantoni v France, paragraph 35; judgment of 24 May 2007 in Case Dragotoniu and Militaru-Pidhorni against Romania, paragraph 35; Judgment of 20 January 2009 in Case South Fondi Ltd and others v Italy, paragraph 109 (paragraph 46).

[22] Decision of Constitutional Court No. 405 from 15 June 2016, regarding the exception of unconstitutionality of the provisions of art. 246 from the Penal code from 1969, of art. 297 paragraph (1) from the Penal code and of art.13 from Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption, published in the *Official Gazette* no. 517 from 8 July 2016.

Decisions related to the Criminal Procedure Code

1. *Article 142 of the Criminal Procedure Code*

Enforcement of electronic surveillance warrants: "(1) The prosecutor shall enforce an electronic surveillance warrant may order that this be enforced by criminal investigation bodies or by specialized employees of the law enforcement bodies or of other specialized bodies of the state."

Electronic surveillance means the utilization of one of the following methods: interception of communications of any kind; accessing an electronic system; video, photo, audio surveillance; localization or following through electronic means.[23] The text mentioned above was considered contrary to the Constitution of Romania since allowed to other authorities – using the expression "of other specialized bodies of the state" – to perform acts that a only law enforcement bodies are able to execute.

Practically, the constitutional challenge of these provisions targeted the right of The Romanian Intelligence Service (most important one in Romania) to execute electronic surveillance warrants (technical supervision), since they had the manpower and the technical means to execute this kind of tasks.

The matter was very sensitive because, in certain cases, there were issues of national security involved, and the ruling of the Constitutional Court was expected with great interest.

From the findings of the Court, we would have to underline certain aspects:

- The Court noted that the *specialized bodies of the state* are not involved in the process of decision with regards of human rights restrictions, but they offer their technical support in order that the decision of a judge to grant the warrant is carried out as sentenced;
- The Court, looking at other codes of criminal procedure, from

[23] Mihail Udroiu, *Criminal Procedure, General Part* (*Procedură Penală. Partea Generală*), C. H. Beck Publishing House, Bucharest, 2016, p. 382.

European states.[24] took into consideration the fact, national codes of criminal procedure provide explicitly that the activity of technical supervision is carried out by the investigating judge, the prosecuting authorities and bodies of police and that, technically, achieving it are obliged to cooperate, if necessary, legal persons in the provision of telecommunications services and other areas expressly and exhaustively provided by the criminal procedure law;[25]

- The Court notes that the legislator included in art. 142 paragraph (1) of the Criminal Procedure Code, in addition to the prosecutor, the criminal investigation body and *specialized employees of the law enforcement bodies (police) or of other specialized bodies of the state*. These specialized bodies are not defined neither expressly nor indirectly the Code of Criminal Procedure. The provision in question does not provide their specific scope. In the meantime, in Romania, they are working under special regulations, numerous specialized bodies in various fields;[26]

---

[24] In this respect, were highlighted the provisions of art. 172 par. (1) of the Criminal Procedure Code of Bulgaria; art. 86-88 of the Code of Criminal Procedure of the Czech Republic; art. 335 par. (1) (5) of the Criminal Procedure Code of Croatia; art. 126 ^ 2 ^ 1-126 of the Code of Criminal Procedure of Estonia; art. 100 b and 110 j of the German Code of Criminal Procedure; art. 251 of the Criminal Procedure Code of Greece; Section 3 of Surveillance in Criminal Law from 2009 in Ireland; art. 267-268 of the Code of Criminal Procedure of Italy; art. 48-13, art. 48-15 and art. 48-17 of the Code of Criminal Procedure in Luxembourg; art. 187 par. (1), Art. 188, art. 189 of the Criminal Procedure Code of Portugal in conjunction with Section 1 par. (2) and Section 3 of Law no. 101 of 25 August 2001 regarding the Regulation of undercover operations carried out in order to prevent crime and criminal investigation in Portugal; Section 88 of the Criminal Procedure Code of Slovakia; art. 149a, art. 149b para. (3), art. 150, art. 151, art. 152, art. 155 and Art. 156 of the Criminal Procedure Code of Slovenia; art. 588bis b and art. E 588ter para. (1) of the Criminal Procedure Code of Spain; Chapter 23 and Chapter 27 of the Swedish Code of Criminal Procedure (Paragraph 36 from the findings of the Court related to the Decision of Constitutional Court No. 51 from 16 February 2016).

[25] Paragraph 36 from the findings of the Court related to the Decision of Constitutional Court No. 51 from 16 February 2016.

[26] Besides the Romanian Intelligence Service (according to Law no. 14/1992 on

- The Court considered that the phrase "or other specialized bodies of the state" appears as with lacking clarity, precision and predictability, allowing subjects to understand that these bodies are empowered to carry out measures with a high degree of intrusion into the privacy of individuals.

As a consequence, the Court granted the exception of unconstitutionality (...) and finds that the expression "*or by other specialized bodies of the state*" from the provisions of art. 142 paragraph (1) from the Criminal Procedure Code is unconstitutional.[27]

The effect: In order to solve juridical and practical problem of executing the electronic surveillance warrants (technical supervision) the Government issued Emergency Ordinance no. 6 from 2016 on measures to enforce the warrants of electronic surveillance in criminal proceedings,[28] and modifying Law no. 14 from 1992 as follows:

> Art. 13. – The Romanian Intelligence Service bodies cannot perform criminal investigation cannot take the measure of preventive detention or arrest nor dispose of their own arrest places. As an exception, the Romanian Intelligence Service bodies may be designated special body of criminal investigation accordance with art. 55 par. (5) and (6) of the Criminal Procedure Code for enforcement of warrants of technical supervision, according to art. 57 para. (2) last sentence of the Criminal Procedure Code.

An important aspect, highlighted in the doctrine was that both decision of the Court and the Government Emergency Ordinance were published in the same day, in the very same Official Gazette, as it was

---

the organization and functioning of the Romanian Intelligence Service, Law no. 51/1991 on the national security of Romania), has exclusive powers in national security, and does not have powers of criminal investigation as stipulated by article. 13 of Law no. 14/1992, there are other services with responsibilities in national security.

[27] Published in the *Official Gazette* no. 190 from 14 March 2016.

[28] Published in the *Official Gazette* no. 190 from 14 March 2016.

intended to prevent other procedural complications emerging when not complying with Constitutional Court decisions in due time.[29]

2.*Article 318 of the Criminal Procedure Code*

Dropping charges: "(1) In the situation of offenses for which the law requires the penalty of a fine or a penalty of imprisonment of no more than 7 years, the prosecutor can drop charges when, considering the contents of the offense, the modus operandi and the instruments used, the goal of the offense and the concrete circumstances of its commission, the consequences that occurred or could have occurred, they find that a public interest is not served in prosecuting." The article has several paragraphs as detailed above.[30]

[29] Mihail Udroiu, *Criminal Procedure, General Part* (*Procedură penală. Partea generală*), C. H. Beck Publishing House, Bucharest, 2016, p. 398.

[30] Another translation of the title of the article could be 'Waiver of prosecution'; other paragraphs of the article: "(2) When the offender is identified, weighing the public interest aspect also involves the person of the suspect or defendant, their conduct previous to the offense and the efforts they made in removing or minimizing the consequences of the offense."

(3) After consulting with the suspect or defendant, the prosecutor can order that they comply with one or several of the following obligations: a) remove the consequences of the criminal offense or make redress, or agree with the civil party on an avenue of redress; b) make a public apology to the victim; c) perform community service for a time span of no less than 30 and no more than 60 days, except for the case where their health precludes them to provide such community service; d) enlist in a counseling program.

(4) In case the prosecutor orders the suspect or defendant to comply with the obligations at par. (3), they shall include in their order the deadline by which those obligations shall be met, which cannot be longer than 6 months in general or 9 months for obligations undertaken by mediation agreement signed with the civil party and which starts as of the date the order is communicated.

(5) The order to drop charges shall include, as the case may be: the mentions stipulated at Art. 286 par. (2), and stipulations on steps taken as under par. (3) in this Article and Art. 315 par. (2) (4); the deadline by which the obligations must be complied with that are stipulated at par. (3) in this Article; the penalty for failure to file the evidence with the prosecutor; judicial expenses.

(6) In case of non-compliance in ill-faith of the obligations within the deadline

Although this article introduced a new instrument of criminal procedure law,[31] instrument that we can find within the legislations of many other states, the Court considered that this entire legal text is unconstitutional[32] for a number o reasons we try to divide them in two categories:[33]

- Reasons regarding the clarity of the penal regulation: The expression "public interest" from legal text is not determined by the legislator through art. 318 par. (1) and (2) of the Criminal Procedure Code and the items listed therein, as criteria for determining the "public interest" are not meant to define the concept previously referenced, which constitute the basis of individualization of penalties, if determination by a court of offenses.
- *Reasons related to the infringement of the separation of judiciary function within the criminal trial* – The Court finds that the dropping charges (waiver of prosecution) by the prosecutor, without being subject to control and permission by the court, is equivalent to the exercise by him of some duties that belong to the sphere of competence of courts. The Criminal Procedure Code provides a clear separation of

stipulated at par. (4), the prosecutor shall rescind their order. The burden of proof for compliance with the obligations or submitting the reasons for failure to comply with the obligations shall fall on the suspect or defendant. A new waiver of prosecution in this same case is no longer possible.

(7) "The order whereby charges are dropped shall be sent in copy to the person who filed the referral, the suspect, the defendant or, as the case may be, other interested parties."

[31] This instrument proved use full in the sens of decreasing the number of cases sent to courts. In 2014 there were 49,135 files where charges were dropped, and in 2015 were 49,479 files where charges were dropped. The number of the files that were solved in this manner was almost equal to the number of files send to courts to be trialed: Mihail Udroiu, *Criminal Procedure, Special Part* (*Procedură penală. Partea Speciala*), C. H. Beck Publishing House, Bucharest, 2016, p. 93.

[32] Decision of Constitutional Court no. 23 from 20 January 2016 regarding the exception of unconstitutionality of the provisions of art. 318 from the Penal procedure code – published in the *Official Gazette* no. 240 from 31 March 2016.

[33] Mihail Udroiu, *Criminal Procedure, Special Part* (*Procedură Penală. Partea Speciala*), C. H. Beck Publishing House, Bucharest, 2016, p. 93.

judicial functions by regulating, distinctly criminal trial stages and competence organs involved in their implementation. This is a direct application of the provisions of art. 3 paragraphs. (1) of the Criminal Procedure Code, and of art. 126 par. (1) and (2) of the Constitution.

In this line of thoughts, we must take into consideration also the findings of the Court within the paragraph 22 of the decision, where were underlined the jurisprudence of the European Court of Human Rights. ECHR by decisions of 22 May 1998 to 3 June 2003 in Cases "Vasilescu against Romania" (par. 41) and "Pantea against Romania" (paragraph 238), retained that the "tribunal" within the meaning of art. 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and of the parties concerned, and that the prosecutors, nor the general prosecutor of Romania, respectively, that in Romania, prosecutors, acting as representatives of the Public Ministry, do not meet the independent from the executive power. Moreover, the judgment in Case "Pantea against Romania" (paragraph 239), the Court in Strasbourg held that the prosecutor who ordered the applicant's detention was not a "magistrate" within the meaning of art. 5 § 3 of the Convention, and that, therefore, is to verify the legality of a detention warrant was subject to judicial review and that it occurred "immediately" in that of the Convention.

The analyzed provision was restructured and changed through Emergency Ordinance no. 18 from 2016[34] amending and supplementing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Code of Criminal Procedure and supplementing Art. 31 para. (1) of Law no. 304/2004 regarding the judicial body. The new text, indicated above, provides for criteria for analyzing the public interest as a condition for enforcing the waiver of prosecution, communication obligations to all parties interested in the matter in order to exercise their

[34] Published in the *Official Gazette* no. 389 of 23 May 2016.

rights, as well as provides for a judicial confirmation carried out by the court, namely by the Preliminary Chamber judge.[35]

[35] Modified article 318 of the Criminal Procedure Code – 'Dropping charges (Waiver of prosecution)':

"(1) In the case of offenses for which the law provides the penalty of fine or imprisonment not exceeding seven years, the prosecutor may waive prosecution if it finds that there is no public interest in pursuing crime.

(2) The public interest is analyzed in relation to: a) the content of the offense and the specific circumstances of committing the offense; b) the manner and means of committing the offense; c) purpose; d) follow-products or which could have caused by the offense; e) efforts of the prosecution needed for criminal proceedings in relation to the seriousness of the offense and the time elapsed from the perpetration there of; f) procedural attitude of the person; g) there is a disproportion between the obvious expenses that they would incur criminal proceedings and severity of consequences or products which could have caused by the offense.

(3) When the offender is known, in assessing the public interest and are considered suspect or accused person, the conduct previously considered a crime suspect or defendant's attitude after committing the crime and efforts to eliminate or mitigate the consequences of crime.

(4) When the offender is not identified, it may be ordered waiving prosecution by reporting only the criteria set out in para. (2) a), b), e) and g).

(5) One cannot waive prosecution for offenses which resulted in the death of the victim.

(6) The prosecutor may decide, after consulting the suspect or defendant that it meets one or more of the following obligations: a) remove the consequences of the offense or to repair damage caused by, or agree with the civil way of repairing it; b) publicly apologize to the injured party; c) to perform unpaid community work for a period between 30 and 60 days, except where, because of his health, the person cannot perform the work; d) to attend a counseling program.

(7) If the prosecutor decides that the suspect or defendant to fulfill obligations under par. (6) establishes an order deadline by which they are to be met, which may not be longer than 6 months or 9 months for obligations assumed by the mediation agreement concluded with the civil and flowing from the notification of the order.

(8) Ordinance waiver of prosecution, as appropriate, the particulars provided in art. 286 par. (2), and provisions on measures ordered under par. (6) of this article and art. 315 par. (2) (4), the deadline to be met obligations under par. (6) of this Article and sanction failing to submit evidence to the prosecutor and court expenses.

(9) In case of failure in bad faith of obligations within the period prescribed in para. (7) the prosecutor revoked the order. The burden of proof for the obligations or the motives of their failure to return the suspect or defendant.

(10) Ordinance ordering the waiver of prosecution is verified in terms of legal-

The number of decisions that are referring to criminal law and criminal procedure law is very high, and one could consider that the Constitutional Court not only ruled on the constitutionality of certain provisions, but adjusted the criminal policy of the as emerged from Parliament and became a passive legislator. Maybe that means real balance between the authorities and powers of the state, or maybe the Constitutional Court had to correct the influence of the political factor related to certain aspects of the Codes.

---

ity and merits of Prime prosecutor's office or, where appropriate, the general prosecutor of the court of appeal, and he was drawn to it, checking is the superior prosecutor. When it was drawn by a prosecutor from the Prosecutor's Office High Court of Cassation and Justice, the order is verified by the chief prosecutor of the department, and when it was drawn up, checking is done by the attorney general of the parquet.

(11) Para. (10) shall apply accordingly when the hierarchy functions in a structure of the floor is determined by a special law.

(12) The waiving prosecution ordinance, checked as in par. (10) shall be communicated in copy if appropriate, the person who made the referral, the parties, the suspect, the injured person and other interested parties and submitted for confirmation, within 10 days from the date of issue, Preliminary Chamber Judge whose court would return the law, jurisdiction to hear the case at first instance.

(13) The judge sets date for the preliminary chamber and summons persons under para. (12).

(14) Preliminary chamber judge decides in a reasoned ruling in chambers, summoning persons under para. (12) and with the prosecutor, on the legality and merits solution waiver of prosecution. Failure legally summoned persons not prevent settlement of the confirmation.

(15) The judge Room preliminary check the legality and merits solution waiver of prosecution on the work and the material from the prosecution and file new documents presented by concluding, allowing or refusing the confirmatory application by the prosecutor. If it rejects confirmation of preliminary chamber judge:

a) abolishes solution waiver of prosecution and refer the case to the prosecutor to start or complete the criminal investigation or, where appropriate, to bring criminal action and complete prosecution;

b) abolishes solution waiver of prosecution and orders the classification.

(16) The conclusion that ruled one of the solutions provided in par. (15) final. If the judge dismissed the application for confirmation of the solution to waive prosecution, a new waiver cannot be ordered, regardless of the reason given."