

THE INTERDEPENDENCE OF THE FUNDAMENTAL PRINCIPLES OF THE PROCESSUAL LAW

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1. General considerations

The guarantee of the right to defence in the criminal case as a fundamental principle of the processual law, can be approached only in connection to the other fundamental principles governing this branch of law and implicitly the criminal case. Taking into account this aspect, the fundamental principles system of the criminal law must be understood as an ensemble of rules which are interconditioned dialectically¹.

The fundamental principles of the criminal case appeared at a certain stage of evolution of the law in a form, which subsequently has been the subject of diverse modifications and approaches mainly determined by the historical evolution of the criminal processual law, of the criminal procedural systems on one side, as well as by the large number of doctrinaires who studied this subject theoretically.

Considered from this aspect, we can estimate that the fundamental principles of the criminal law are not immutable dogmas, settled definitively, but they have a relative value, determined by the continuous movement and transformation of the criminal processual law science in the course of time. From this observation, we can infer that the fundamental principles are subject to the laws of progress due to the fact that law, like life itself is in a continuous movement and cannot be framed in stone-still dogmas and institutions.

Consequently, they have to adapt to the political, legal and social outlook of every country and epoch².

2. The notion of fundamental principle³

The notion of the fundamental principle of the criminal case appeared distinctly in the juridical thinking and in the scientific approach of the criminal processual law constituting itself in a theoretical juridical category with practical applications at the legislative elaboration level.

In Europe, in the countries with a long democratic tradition, it takes specific forms, being included in criminal procedure codes which contain the basic guiding rules of the criminal case. In other countries, these rules are inferred from the criminal processual doctrine.

The explicit or implicit definition of the fundamental principles of the criminal case had diverse approaches, determined either by the period of their enunciation or by the criminal policy led by the state authorities of the respective author.

Thus, the reputed criminal jurist Ion Tanoviceanu, speaking about the fundamental principles, states that they are those rules concerning the elaboration of the criminal procedure positive norms or those used in the interpretation of such norms, so that both the legislator and the interpreter are interested in⁴.

The professor Traian Pop from the Law Faculty of Cluj defines the fundamental principles of processual law, or of the criminal law as being those principles at the base of the criminal processual legal system and of the criminal case organization⁵.

The professor Nicolae Volonciu shows that the notion of the criminal case principle can be defined fully as the ensemble of the general rules having a great importance in the criminal case, and in a limited sense as those guiding ideas specific to the criminal case in its whole, and also to each processual stage, taken separately⁶.

The basic principles of the criminal case are those rules having a general character which regulate the whole development of the criminal case⁷. The basic rules of the criminal case are norms of criminal procedure having the character of fundamental principles⁸.

The notion of the fundamental principle of a criminal case can be taken into account only as a basic rule of the whole processual activity, that is why, the rules referring to only a stage of the criminal case cannot be considered as fundamental principles⁹.

Thus, the fundamental principles of the criminal case could be defined as the general rules which govern all processual institutions and all stages of the criminal case¹⁰.

Regardless any definition that has been given, the fundamental principles of the criminal case constitute, beyond doubt, the main reason for the practical orientation of the judiciary authorities in many complex situations sometimes extremely complicated, which are not entirely regulated or which cannot refer to detailed juridical norms¹¹.

Under such circumstances, the fundamental principles of the criminal case can help and guide the judiciary authorities, as the solution according to these principles meets the general tendency of solving the criminal causes¹².

3. The system of the fundamental principles of the processual case

The norms of criminal procedure have pre-eminently the character of public order. The fundamental principles are inferred from this character as well as from the specific interest of the criminal procedure norms which stand at the base of the criminal processual law¹³.

Circumstances, criminal policy and especially political and social organization have determined the fact that the fundamental principles of the criminal processual law varied in the science and the law of different countries even in the same period; while in different periods the variations have been so great, that they determined three successive fundamental criminal procedural systems: the acusatory, the inquisitorial and the mixed systems in the history of the criminal processual law¹⁴.

The classification of the fundamental principles had several forms according to the historical period and to the respective authors.

In the treaty of law and criminal procedure by Ion Tanoviceanu and Vintilă Dongoroz the fundamental principles fall into three categories:

- the principle of reality,
- the principle of legality,
- the principle of the obligatory character,

while the other principles are derivatives or consequences of the first¹⁵.

The professor Vincenzo Manzini¹⁶ includes these into two groups:

- the principle of establishing the real truth and its main applications,
- the principle of obligatory character of the criminal case and its applications¹⁷.

The professor Eugenio Florian¹⁸ treats the fundamental principles in connection with:

- the object of the case,
- the procedural forms,
- the processual activity¹⁹.

The acusatory principle, the official principle, the material truth principle, the guarantee of the individual rights principle and the general processual principles can be found in other classifications²⁰.

During the historical evolution of the juridical outlook in the Romanian doctrine on the above subject, two stages can be clearly observed: approaches until the elaboration of the Criminal Procedure Code from 1936 and approaches from this date onwards.

One can notice that until 1936, the criminal procedure codes did not include norms which referred directly to the fundamental principles, so that the authors pointed out the system of principles, as a result of certain provisions stipulated in the Constitution or in other norms which regulated the activity of the legal body and the prosecution. These facts explained the diversity of opinions in the identification and the enunciation of these principles.

According to some authors²¹ the existence of the regulations in chapter I referring to the aim and basic rules of the criminal case would not be appropriate within the criminal procedure code, as other European states place the respective issue within the doctrine.

From December 1989 onwards, there has been a tendency of clarifying and improving the system of the fundamental principles, through successive modifications of the Criminal Procedure Code.

The system of the criminal case fundamental principles, understood as an ensemble of rules which are interconditioned dialectically will have to acquire an appropriate structure corresponding to the new social realities; respectively, one must show that in the development of the criminal case, the guiding principles will be the new ones, improving at the same time, the new basic rules of this social activity in content and essence.

The modifications of the Criminal Procedure Code after 1990, as well as the novelties contained within the new Constitution of Romania brought solutions and redefinings, respectively structural improvements to some previous principles, and new ones, too. By art. 5 index 1 the principle „Respect of human dignity”²² has been introduced.

Improvements in structure and clarity have been made to the principles of the guarantee of the personal freedom and the guarantee of the right to defence.

At the same time, the not guilty assumption and the equality in the criminal case have been introduced in the fundamental principles as they are stipulated in the Constitution of Romania

Thus, the fundamental principles of the criminal case appear as a consequence of the constitutional stipulations²³, although the stipulations of international conventions had great importance in their elaboration too, as our country is a part of them, especially, The Universal Declaration of Human Rights and The European Convention of Human Rights.

4. The dialectical joining of the fundamental principles

The fundamental principles of the criminal case do not act separately, they combine dialectically, being interrelated in all the stages of the criminal case, governing in their substance all the criminal law institutions which become manifest within the criminal case. Consequently, we cannot speak about a real manifestation of the principle of guaranteeing the right to defence in the criminal case if we do not consider the other principles, too.

As an example, without respecting the principle of legality one cannot consider the guarantee of the right to defence, as a similar situation takes into consideration the other principles like the material truth, the not guilty assumption, the official character principle, the active role, the equality of the individuals in the criminal case and all other principles.

Any principle has a certain contingency with the others. There are principles so closely connected dialectically from the others than they determine their content and length. Moreover, certain principles can be justified only through the application of the others²⁴.

The principle of guaranteeing the right to defence interferes with the principles of the substantial criminal law such as the principle of the equality within the criminal law or the principle stating that the offence is the only ground for criminal responsibility. Thus, the rule that all individuals are equal in front of the law expresses the principle of equality within the criminal law, and the art. 17 par. 2 Criminal Code establishes the fact that the offence is the only ground for criminal responsibility. The principle functions as a guarantee for the individual freedom, since without committing the offence, one cannot start criminal responsibility for the person who committed it²⁵.

The purpose of the right to defence consists in non-sentencing an innocent person but also in the fact that a guilty person should be sentenced according to his guilt.

This principle is grounded by another, namely the principle of contradiction, which shows that criminal penalties cannot be enforced to any person without learning the accusations and the accusing proofs and the respective person must be given the right to exculpate. The role of the defence is to prevent the mistakes of repressive justice, but also the abuses of judiciary bodies by which the rights and fundamental liberties of the accused person would be violated.

From this point of view, I have tried to approach sequentially the fundamental principles in the criminal case, as a system in which the principle of guaranteeing the right to defence in the criminal case stands in close interdependence to the other principles.

1 Ion Neagu, Ștefan Cristea – „Sistemul principiilor fundamentale ale procesului penal”, Revista română de drept nr. 7/1978, p. 8;

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- 2 Traian Pop – „Drept procesual penal ”, vol I, introductory part, Tipografia Națională S.A. Cluj, 1946, p. 298;
- 3 The criminal processual principles have been defined as general orientations of the criminal case which reflect the conception and the criminal processual policy principles of the state at a certain period of its development (Dicționar de procedură penală, George Antoniu, Nicolae Volonciu and Nicolae Zaharia, Editura Științifică și Enciclopedică, București, 1988, p. 217);
- 4 Ion Tanoviceanu – „Tratat de drept și procedură penală ”, vol. IV, Editura Curentul Judiciar, 1927, p 26;
- 5 Traian Pop – op. cit., p. 298;
- 6 Nicolae Volonciu – „Drept procesual penal ” - Editura Didactică și Pedagogică București, 1972, p. 45;
- 7 Grigore Teodoru – „Drept procesual penal ”, general part, Tiparul Universității Alexandru Ioan Cuza din Iași, 1986, p. 38;
- 8 Vintilă Dongoroz and others – „Explicații teoretice ale Codului de procedura penală ”, vol I, general part, Editura Academiei R.S.R, București, 1975, p 40;
- 9 Ion Neagu – „Drept procesual penal ”, Treaty, Editura GLOBAL LEX, 2002, p. 83;
- 10 Adrian Ștefan Tulbure și Angela Maria Tatu – „Tratat de drept procesual penal ” - Editura ALL BECK, 2001, p 25;
- 11 Nicolae Volonciu – „Tratat de procedură penală ”, general part, vol. I, second edition, Editura PAIDEIA, p. 76;
- ¹² Vasile Păvăleanu - „Drept procesual penal ”- general part, Editura Lumina Lex, 2001, p. 50;
- ¹³ Ion Tanoviceanu - op. cit. , p. 26;
- ¹⁴ Traian Pop - op. cit., p. 298;
- ¹⁵ Ion Tanoviceanu - op. cit., p. 26;
- ¹⁶ Vincenzo Manzini - lawyer, university professor of law and criminal procedure at several Italian universities (Udine, Veneția, Ferrara, Sassari, Siena, Pavia, Torino și Padova). He was a man of strong moral principles, associated to a traditional and uncompromising ethics. He elaborated the project of the criminal procedure code . Together with Arturo Roco he was a founder member of the Technical-juridical Direction and demonstrated in his works the importance of the history of the criminal law. He was a co-director of << Annals of Law and Criminal Procedure >>.He wrote several treaties and courses of criminal law and procedure;
- ¹⁷ Vincenzo Manzini – Treaty of Italian Processual Criminal Law, Torino, Editura Uniunea Tipografică, 1931 - 1932, vol. I, p. 184-214;
- ¹⁸ Eugenio Florian – lawyer and university professor of criminal law and criminal procedure in Italy, author of several traties and courses of criminal processual law (Criminal Processual Law, second edition, Torino, 1939);
- ¹⁹ Eugenio Florian – Criminal Processual Law, second edition ,Unione Tipografico Editrice Torinese, 1938,p. 52-54;
- ²⁰ Traian Pop - op. cit., p. 299;
- ²¹ Gheorghe Stroie – „Regulile de bază ale procesului penal român în lumina exigențelor europene ”, Revista de drept penal nr.1/2000, p. 104 –106;
- ²² Art. 5 index 1 has been introduced by law nr. 32 from 16-th of November 1990, published in the OfficialGazette nr. 128 from 17-th of November 1990 << Any person who is in the course of a criminal pursuit or case must be treated with the respect of his human dignity. The submission of such person to torture or cruel, inhuman or degrading treatments is punished by the law >>;
- ²³ Art. 11 – International and internal law (1) The Romanian state pledges itself to comply exactly and appropriately with the incumbent obligations from the membership treaties. (2) The treaties ratified by the Parliament are part of the internal law, according to the rules in force.
- ²⁴ Nicolae Volonciu – „Drept procesual penal ”, Editura didactică și pedagogică, București, 1972, p. 73;
- ²⁵ Constantin Mitache „Drept penal român”, general part, four-th edition, Casa de editură si presă Șansa, București, 2000, p. 30.