UNCONSTITUTIONAL ASPECTS OF THE GUILTY PLEA PROCEDURE

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ABSTRACT: *In cases where criminal proceedings do not concern a crime punishable by life imprisonment, the presiding judge intimates the defendant that he can request the judgment to be based only on evidence taken during prosecution and based on the documents submitted by the parties, if he fully acknowledges the facts incriminating him. If the court is notified with the commission of a crime for which the law provides life imprisonment, the issue of simplified procedure will no longer occur. If we speak of an attempt to such a crime, the question of the simplified procedure does not exist. But, whatever the defendant should acknowledge is not the legal classification of the crime but the facts in their substantiality. Basically, the possibility of exercising a legal right, like that of applying for the simplified procedure, is influenced by the decision of the prosecutor which may be wrong. The disadvantage of the defendant consists of the fact that even after the legal classification of the crime is changed, he will not be able to benefit from mitigated penalty limits.*

KEYWORDS: *Unconstitutionality, guilty plea procedure, life imprisonment.*
JEL CODE: *K14*

The guilty plea procedure was introduced in Romanian criminal procedural legislation once with the entry into force of the Law no. 202/2010 regarding some measures aiming at accelerating the settlement process[1]. The recitals to this Law show that "*the introduction of a new institution in the Code of Criminal Procedure, such as the judgment in case of guilty plea, is an answer to the need for an effective trial, contributing to the removal of cumbersome and often unnecessary procedures for establishing the judicial truth, falling into the qualitative requirements of the act of justice*".

When speaking about the defendants who resort to this procedure, the law sees it as an advantage related to the penalty limits. The effect of applying the simplified procedure of guilty plea is the mitigation of the penalty limits by a third in case of imprisonment and a quarter in case of monetary penalty.

The simplified procedure has also been provided under the same conditions in the New Code of Criminal Procedure which entered into force on 1 February 2014. However, this procedure cannot be applied in all circumstances, as the Procedure Code expressly provides what circumstances it can be applied to.

Analyzing the provisions of Article 349 paragraph 2, Article 374 paragraph 4 and Article 375, it appears that, in order to apply the simplified procedure, the following terms

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[1] Published in the Official Gazette, Part I no. 714 of 26 October 2010.

must be fulfilled: first, the subject of judgment should not be a crime punishable by life imprisonment, second the accused should seek trial based on the evidence produced during prosecution and to fully confesses the facts incriminating him, last but not least, a procedural condition, consisting of the approval of the application by the presiding judge.

As regards the first condition, there was a question raised in the judicial case law, whether the guilt plea procedure of an attempt at a crime, punishable by life imprisonment, could be applied. This is because, according to the provisions on attempt, the sentence imposed in such cases would be between 10 and 20 years. The High Court of Cassation and Justice, revealed by several decisions[2] that the simplified procedure cannot be applied in this situation because the text makes references to "*punishment provided by law*", a collocation which, according to Article 187 of the Criminal Code, refers to "*the punishment provided in the text of the law incriminating the act committed and consumed without considering the causes of mitigation or increase of penalty*".

Regarding the condition relating to the confession of the defendant, in the aggregate, of the facts in his trust, the legal literature (Ioan Neagu, Mircea Damaschin , 2015, p. 247) shows that it is the recognition of the facts in substantiality as described in the indictment which leads to the conclusion that the defendant can challenge the legal classification of the offence. Therefore, even if the changing of the legal classification of the offence is requested, once the facts are confessed by the defendant the simplified procedure may be applied.

According to Article 374 paragraph 4 of the Criminal Procedure Code, in cases where criminal proceedings do not concern a crime punishable by life imprisonment, the presiding judge intimates the defendant that he can request the judgment to be based only on evidence taken during prosecution and based on the documents submitted by the parties, if he fully acknowledges the facts incriminating him. *Per a contrario*, it may be inferred from the recalled text that, if the court is notified with the commission of an offense for which the law provides life imprisonment, the issue of simplified procedure will no longer occur.

Thus, the negative condition is fulfilled (Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor, Victor Văduva , 2014, p. 438), and therefore there is no question about the simplified procedure when: it is a crime punishable only by life imprisonment, a crime which stipulates life imprisonment alternately with the prison penalty, the attempt to such a crime, multiple crimes out of which one is punishable with life imprisonment[3].

If we speak of an attempt to such an offense, based on the arguments mentioned above, the question of the simplified procedure does not exist. But, as we have asserted, whatever the defendant should acknowledge is not the legal classification of the offence but the facts in their substantiality. It is possible that, for example, the act of hitting the victim to be confessed by the defendant, but because the prosecutor assigned the attempt to qualified murder[4], the court might not to call into question the possibility of a guilt plea. If, along the way, the legal classification of the offence changed from attempted murder into injury, the defendant, basically, would not be able to benefit from mitigated penalty

[2] We recall for example the Decision of the High Court of Cassation and Justice, criminal section, no. 523 of 22 February 2012.
[3] The High Court of Cassation and Justice, Decision no. 16/2013 ruled in the referral in the interests of the law, published in the Official Gazette no. 12 of 9 January 2014.
[4] The penalty provided by law is life imprisonment or imprisonment for 15-25 years.

limits by a third because he was not given the possibility of applying for the simplified procedure.

We believe that this situation would lead to discrimination between those who have committed a crime of injury, and the prosecutor who made a precise legal classification of the crime from the outset, and those who committed the same crime, but where the prosecutor made a wrong legal qualification of the crime. Basically, the possibility of exercising a legal right, like that of applying for the simplified procedure, is influenced by the decision of the prosecutor which may be wrong. The disadvantage of the defendant consists of the fact that even after the legal classification of the offense is changed, he will not be able to benefit from mitigated penalty limits.

The Romanian Constitution picked up by Article 20 the criteria of non discrimination included in the main international documents on human rights, namely the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms (Pavel, 2010, p. 256.): race, sex, language, religion, social origin, fortune. The concept "any other status", although it was introduced separately in the wording of article 4 of the Constitution, was resumed in Article 16 paragraph 1 by ensuring equality "with no privilege and no discrimination" (Pavel, 2010, p.158.)

The Constitutional Court consistently ruled in its jurisprudence[5] that cases consisting of certain categories of people should differ in essence in order to justify the differentiation of legal treatment, and this differentiation should be based on an objective and rational criterion. It is established a constitutional obligation for the legislator to stop proceeding with the comparison of the situations - whether they are analogous or different, and properly to establish similar or different rules, but to handle these situations equally (Pavel, 2010, p. 340.)

This solution is consistent with the jurisprudence of the European Court of Human Rights according to which any differentiation in treatment made by state between individuals, in analogous situations, must find an objective and reasonable justification[6].

The discriminatory criteria "any other status" is called in some decisions of the European Court as being *neutral criteria*. In the case Lithgow and others v. United Kingdom, the Court considers that the following circumstances exist in the application of Article 14 of the Convention: there is no difference in treatment; those concerned are not found in sufficiently analogous situations, the distinctions are based on objective and reasonable justification.

Or, to be treated differently for the same offense, just because the prosecutor's legal classification of the offence in the indictment was different, we believe it cannot establish an "objective and reasonable justification".

The solution that we think would be appropriate for this situation is discussing the possibility of pleading guilty and of enforcing the simplified procedure, even if it is a crime for which the law provides life imprisonment. In case the defendant requests its

[5] In this regard, see the Constitutional Court Decision no. 89 of 27 February 2003, regarding the Constitutional challenge of Article 8 of Law no. 543 of 2002, on the pardon of penalties and the removal of certain measures or sanctions, published in the Official Gazette of Romania no. 200 of 27 March 2003.

[6] In this regard, see CEDO, Case *Marckx v. Belgium*, 1979

application, he will be required to plead guilty, the court would reject the request, given that at that time the legal classification of the offence did not permit the application of such a procedure, and finally, if it turns out that the facts retained in the indictment and acknowledged by the defendant requires a change of legal classification into an offence for which the law provides the simplified procedure, the judgment should consider the mitigation of the penalty limits by a third.

Obviously, as long as the provisions of laws stipulate, as we have already presented, that in such cases the possibility of pleading guilty by the parties is not even questioned, the judge cannot break the law by applying another procedure. The legislature's jurisdiction is to amend this legal provision which violates the principle of non-discrimination provided by Protocol 12 to the European Convention on Human Rights, which provides in Article 1 that "enjoyment of any right set forth by law shall be secured without discrimination, on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*". This collocation *other status* might include also the discrimination due to a wrong legal classification of the offence given by the prosecutor.

REFERENCES

Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor, Victor Văduva . (2014). *Noul cod de procedură penală, ghid de aplicare pentru practicieni.* Bucharest: Hamangiu Publishing House.

Ioan Neagu, Mircea Damaschin . (2015). *"Tratat de procedură penală - partea specială".* Bucharest: Universul Juridic Publishing House, .

Pavel, N. (2010). *Egalitatea în drepturi a cetăţenilor şi nediscriminarea.* Bucharest: Universul Juridic Publishing House.