

THE LEGAL REGIME OF THE ASSOCIATED FILES IN THE ROMANIAN CRIMINAL PROCESS

Lucian CHIRIAC*
Dragoş Alexandru MAIOR**

ABSTRACT: *This article seeks to discuss a new element in the criminal proceedings in Romania, the so-called associated case files and their legal status.*

Starting from the thesis of the European Convention on Human Rights, which calls on the signatory states to ensure the conduct of a fair trial in full harmony with the principles of criminal proceedings, it is necessary to investigate the extent to which so-called associated cases are built on compliance with the fundamental law, the Code of Criminal Procedure, based on the great principles of law.

The authors seek to make certain observations in order to reveal the technical-legal characteristics that must take precedence in the conduct of the trial in the criminal process.

KEY WORDS: *criminal law; associated case file; the principle of adversarial proceedings; the principle of publicity; a fair trial.*

JEL Code: *K 14*

1. PRELIMINARIES

Criminal procedure is a procedure of equipoise, of harmony, which navigates between two requirements, both fundamental, the security and freedom of the individual (Mateuţ, 2019).

Obviously, the criminal procedure has the essential role of defending the established rights and freedoms in a democratic society, but it must also guarantee the fairness of the judicial process. In essence, the criminal procedure aims to reconcile the public interest with the private interest, by *establishing rules capable of ensuring the achievement of the purpose of the criminal process, ensuring the efficient exercise of the powers of the judiciary by guaranteeing the rights of parties and other participants in criminal proceedings, be complied with the provisions of the Constitution, of the constitutive treaties of the European Union, of the other regulations of the European Union in criminal proceedings, as well as of the pacts and treaties regarding the fundamental human rights to which Romania is a party - art. 1 para. (2) Code of Criminal Procedure*".

* Profesor PhD. at the University of Medicine, Pharmacy, Sciences and Technology „George Emil Palade” of Tîrgu Mureş, Faculty of Economics and Law - Department of Law and Public Administration, Lawyer, Mureş Bar Association, ROMANIA.

** Lawyer, Mureş Bar Association, ROMANIA.

The Fundamental Law establishes on the criminal process rules of a purely *procedural nature*¹, but also norms that guarantee the *rule of law* (legality of the criminal process, separation of judicial functions, principle of finding out the truth), establishes principles regarding the *protection of persons involved in criminal proceedings* (rights and freedoms (Valea, 2014)), fundamental principles of human beings), also principles regarding the *quality of the criminal process* (fairness, the principle of reasonable time, etc.).

The image of a fair trial, seen in the light of the judicial practice of the European Court of Human Rights, implies a series of procedural guarantees that can strengthen the right to defense. These procedural guarantees have their roots in the great principles of law and some of these components, such as the principle of adversarial proceedings, the publicity of the case or the obligation to state reasons for judgments, are specific to the trial phase and have no general applicability. Others find their applicability throughout the criminal process (the principle of legality, the principle of finding out the truth, the right to silence, the privilege against incrimination, the right to defense, etc.).

Starting from these coordinates, the major premise considered in the construction of the new code² was that *a fair criminal trial, carried out within a reasonable time, cannot be ensured without placing it on the pillars of new principles which, together with the classical ones, obliges the judiciary to administer independent and impartial criminal justice, in a position to establish public respect and trust in the act of justice. The new rules aim to remove anachronisms, inefficiency and lack of speed in criminal proceedings, but also to ensure respect for the presumption of innocence, equal opportunities for the parties, and to ensure the protection of human rights and fundamental freedoms*³.

The purpose of the criminal proceedings must be related to the incipient moment of the activity, respectively to the function of that activity and the final moment of the activity, to its finality. The function of the criminal proceedings is to establish in a timely and complete manner the facts which constitute offenses. The purpose of the criminal trial is to accomplish criminal justice (V. Dongoroz, 1975).

Therefore, if the process is understood to be a progressive, ongoing activity that aims to achieve a certain goal, the criminal process is a complex judicial activity carried out by the criminal judicial bodies in accordance with the law, with the participation of the parties and other procedural subjects involved. In order to establish in a timely and complete manner the facts that constitute crimes, so that any person who has committed a crime is punished according to his guilt (Mateuț, 2019), and this legal action must fall within the limits imposed by the fundamental principles of criminal law⁴ enforcement.

¹ For example, art. 23 para. (3) of the Romanian Constitution stipulates that “detention may not exceed 24 hours”; para. (6) provides for the obligation of the court to periodically check the legality and validity of pre-trial detention. These norms are later resumed in the code of criminal procedure, but their insertion in the fundamental law gives them a superior legal force to those found in the organic law - Gheorghită Mateuț – *Procedură penală. Partea generală* – Editura Universul Juridic, Bcucurești, 2019, p.23

² Adopted in 1 februarie 2014

³ PL-x no. 412/2009 - Draft law on the Code of Criminal Procedure

⁴ The new Code of Criminal Procedure no longer uses the notion of fundamental or basic principles, but uses the notion of principles, but this terminology does not change the concept of the legislator, especially in the context in which all these guiding ideas are found in the sources of procedural law. with unquestionable legal force (European Convention on Human Rights, Charter of Human Rights, etc.) –Gh. Mateuț – *Procedură*

Focusing the argument on the issue of associated files, we will limit our analysis to the fundamental principles specific to these procedural stages, during the preliminary chamber procedure or the trial of the case.

Under the dome of art. 8 The Code of Criminal Procedure and in accordance with the case law of the Strasbourg Court, regulate two of these protective principles, namely equality of arms and reasonable length of proceedings.

In accordance with the principle of equality of arms, each party to the proceedings must have an equal opportunity to present his case, and no advantage is allowed over his opponent⁵. The principle of equality of arms is presented in the context of adversarial proceedings⁶, since legal arguments are relevant only in so far as the parties have equal means (Bodea, 2021).

The criminal process must provide the parties and the main procedural subjects with the procedural guarantees, the necessary protective rights against any forms of arbitrariness. The right to a fair trial requires that the right to a fair hearing (the right to have access to a lawyer in criminal proceedings)⁷ and the right to information in criminal proceedings be respected⁸.

The brief exegesis of the fundamental principles is the starting point in the analysis of the equation of the associated files and can give us the answer to the unknown ones, or it can give us a known and correct answer.

2. THE PROBLEM

The question that arises in this context is: to what extent the associated files are created in an ongoing criminal trial, are new cases with a separate course, like any other criminal trial, and with regard for procedural principles and guarantees.

In a summary form, the *Practical Guide in the field of clerk activity management*⁹ perceives “the associated file” as the file that will receive the same number as the initial file in which the request was received, to which is added the code a1, a2, a3, etc. depending on the number of applications submitted.

Upon further investigation, it should be noted that, in this matter, the regulation of the associated files is not done by the criminal procedural law. The seat of this ruling is the Regulation on the organization and functioning of the courts, approved by Decision no. 1375/2018 of the Superior Council of Magistracy¹⁰.

penală. *Partea generală* – Editura Universul Juridic, București, 2019, p.63; in opposition: C. Ghigeci – *Principiile și limitele aplicării legii procesual penale*, în N. Volonciu, A.S. Uzlău (coord.), „Noul Cod de procedură penală comentat”, Ed. Hamangiu, București 2014, p. 1-2

⁵ ECHR *Fedbrugge v. The Netherlands*, Hot. May 29, 1986, available at www.ier.gov.ro;

⁶ ECHR, *Beraru v. Romania*, March 18, 2014, published in the Official Gazette. no. 944 of December 23, 2014, par. 70;

⁷ Directive 2013/48 / EU of the European Parliament and of the Council of 22 October 2013, published in J.Of. Nr. 294 of November 6, 2013

⁸ Directive No. 2012/13 / EU of the European Parliament and of the Council of 22 May 2012, published in J.O.L. Nr. 142 of June 1, 2012;

⁹ Developed under the RO24 Program: “*Strengthening Judicial Capacity and Cooperation*” through the Norwegian Ministry of Finance 2009-2014;

¹⁰ Published in M.Of. al României nr. 970 din 28 decembrie 2015

Thus, according to art. 98 of this Regulation: "(1) after the allocation of the unique number in the ECRIS system for the substantive file, the first associated file shall be created for the preliminary chamber procedure".

According to paragraph (2) of art. 98, "*during the preliminary chamber procedure or the trial of the case by the court, the following shall be registered as associated files, from the moment of their formulation:*

- a) *Requests for taking, replacing, revoking, terminating or modifying the content of preventive measures, as well as the periodic verification of preventive measures;*
- b) *Requests regarding the taking, modification or lifting of precautionary measures;*
- c) *Requests for security measures* ".

In a first research of these legal provisions, starting from the fundamental principles, we consider that the rules for conducting the criminal process can be established only by law (Ramona Mihaela Coman, 2021).

Thus, in the legislative activity, the principle of legality imposes on the legislator, on one hand, the obligation to provide in an organic law or emergency ordinance the procedural rules (*lex scripta*)¹¹, as well as to draft the text in a certain and predictable way (*lex scripta*) (Udroiu, 2016).

According to the doctrine, the main source of the rules governing criminal proceedings is the law, meaning the Code of Criminal Procedure, and this main source of law can be joined by complementary sources as any other law that would contain provisions of criminal procedural law or provisions that may apply in the conduct of criminal proceedings, the law on the organization of the judiciary, the law on the organization of the prosecutor's office, the law on the execution of sentences, the law on extradition, etc. (V. Dongoroz, 1975) .

As we have shown above, the principle of legality presumes that the entire procedural development, all the activities of the participants must take place and be carried out only in accordance with the provisions of the law (*nullum iudicium sine lege, nemo iudex sine lege*).

Art. 2 of the Code of Criminal Procedure states that the criminal process is carried out according to the provisions of the law and in the context discussed it is obvious that the meaning of the notion of law is not the general, but the express, limiting, considering only the provisions of the procedural law criminal law and in no case in other regulations.

Moreover, in art. 126 para. (2) of the Romanian Constitution states very clearly "*the jurisdiction of the courts and the trial procedure are provided only by law*"¹².

The observance of the law in the criminal field is of particular importance, especially since in this field some of the most important civil rights and freedoms need to be defended, and on the other hand the criminal bodies are given the possibility to take measures against those involved of the highest severity (Volonciu, 1972).

¹¹ Art. 73 The Constitution of Romania: (1) The Parliament adopts constitutional laws, organic laws and ordinary laws. (3) The organic law regulates (...) h) the offenses, the punishments and the regime of their execution; l) the organization and functioning of the Superior Council of Magistracy, of the courts, of the Public Ministry and of the Court of Accounts

¹² Art. 126 of the Romanian Constitution: "(2) The competence of the courts and the trial procedure are provided only by law".

In a second argument, according to art. 38 of Law 317/2004 on the Superior Council of Magistracy¹³, the plenum of the Council adopts the Code of Ethics for Judges and Prosecutors, the Regulation on the organization and functioning of the Superior Council of Magistracy, (...) as well as other setbacks and decisions given by the plenum by Law no. 303/2004, and by Law. 304/2004. The Plenum of the SCM has the obligation to ensure the publication of these documents in the Official Gazette of Romania part I and on the website of the Superior Council of Magistracy.

Particularly important is the provision of paragraph 7 of the same article, which stipulates imperatively and unequivocally that the Plenary Session of the Council will not be able to adopt Regulations or decisions by which to add to the provisions contained in law, on the grounds that they are unclear or incomplete. .

Analyzing the provisions of the Regulation of Organization and Functioning of the courts through the prism of art. 38 para. (7) of Law 317/2004 and taking into account that the current code of criminal procedure does not make any reference to the issue of associated files, it is obvious that the Regulation adds to the law¹⁴. However, *ubi lex non distinguit nec nos distinguere debemus*.

It should be mentioned that prior to the billing of the new Regulation, in 2015, the old ruling, the Regulation of 2005 of internal order of the courts¹⁵, in art. 96¹ provided: (1) The accessory requests regarding a randomly distributed file shall be judged by the same panel; (2) The requests regarding the precautionary measures shall be distributed randomly, if there is no pending judgment on the merits.

Thus, it should be noted that according to art. 98 para. (2) *'in the course of the preliminary ruling proceedings or the trial of the case by the court, the following shall be registered as associated files, from the moment they are formulated: a) and regular checking of preventive measures; b) Requests regarding the taking, modification or lifting of precautionary measures; c) Requests for security measures "*.

Taking a look at the history of legislation (Hanga, 1997), in trying to find a justification for the poor systematization of the rules regarding the associated files, one can see an apparent parallel with Hammurapi's legislation, where, without being grouped according to the legal logic of modern legislation, the norms were arranged on practical topics, the legislator in the Babylonian conception not being doctrinaire, but the practitioner who had the duty to solve the various categories of cases offered by practice. From this point of view, the element of theoretical systematization remained meaningless to the Babylonian legislator.

¹³ Published in M.Oficial cu no. 628 from 1 sept. 2012

¹⁴ In the current legislative context, even if without respecting the required standard of legislative clarity, Law no. 85 of 2014 on insolvency prevention and insolvency proceedings, provides in it the rules of procedure applicable in the event of going through the procedure of attracting liability for entering into insolvency. Thus, in the content of the text of art. 169 clearly states that the application submitted in this situation will be judged separately, forming an associated file. As such, in this case the procedural rule has the nature of respecting the principle of legality at least as regards the *lex scripta* coordinate.

¹⁵ approved by the Decision of the Superior Council of Magistracy no. 159/2004, published in the Official Gazette of Romania, Part I, no. 881 of September 27, 2004, amended by the Decision of the Superior Council of Magistracy no. 244/2004, published in the Official Gazette of Romania, Part I, no. 14 of January 5, 2005, and by the Decision of the Superior Council of Magistracy no. 71/2005, published in the Official Gazette of Romania, Part I, no. 222 of March 16, 2005

Like the archaic legislator, as the practice required, the "legislation" was adapted to the requirements of a modern criminal trial. Thus, following the entry into force of the Code of Criminal Procedure, on December 17, 2015 it was adopted, by Decision no. 1375 of the Superior Council of Magistracy, the Rules of Procedure of the courts, which brought additions where the law seemed to leave room for interpretation. However, the issue of adopting criminal procedural rules is not the subject of the Superior Council of Magistracy.

In the current form of "legislation", the problem is obviously not related to the formal systematization of the legal norm, but rather to the fact that the norms governing "associated cases" are outside the criminal procedural legislation. Moreover, the problem is generated by the different nature and legal force of these normative acts, which materializes in a violation of the principle of legality of criminal proceedings.

From the perspective of the principles that guarantee the quality of the criminal process, from a practical point of view, the analysis that needs to be done further aims at the precise way of reconciling the constitutional requirements when the court forms associated files.

Starting from the writing of the Regulation on the organization and functioning of the courts, according to which, when drawing up the statistical reports on the volume of activity of the judges of the preliminary chamber and of the panels, the associated files, registered according to par. (1) and (2) of art. 98, will be counted as newly registered files by the ECRIS software, it is understandable that in this situation we are facing a (new) criminal trial in which the judge is obliged to comply with all the principles and provisions of the Code of Criminal Procedure.

According to art. 351 of the Code of Criminal Procedure, the trial of the case is made before the court constituted according to the law and is held in public, oral, direct and adversarial.

In order to give efficiency to these principles, art. 353 Cod pr. pen. provides that the trial may take place only if the injured party and the parties are legally summoned and the procedure is completed.

The Strasbourg Court, in the case of *Samoilă and Cionca*¹⁶, found the violation of art. 5 para. (4) of the Convention, in the situation where out of seven summonses at court hearings where the measure of pre-trial detention was discussed, four were notified on the eve or even on the same day as the court hearing.

In these circumstances, taking into account the fact that the distance between Oradea and Bucharest is about 600km, the Court considered that the possibility for the lawyers to appear in due time at the court hearing was null. Consequently, by failing to provide the parties with adequate participation in the hearings, the outcome of which was decisive for their continued arrest or detention, the authorities deprived the applicants of the opportunity to properly counteract the reasons given by the prosecutor's office to justify their detention.

In another case settled by the Târgu Mureș District Court, regarding the taking of the measure of pre-trial detention, the judge presumed the evasion of the defendant from the court based on his rich criminal record: "About the defendant A.M. the court notes that he was also not found as a result of the issuance of a warrant issued in this case, and

¹⁶ ECHR, Case *Samoilă and Cionca v. Romania*, Hot. March 4, 2008, available on www.ier.gov.ro

although according to the criminal prosecution documents he is in Germany where he would have a job, the fact that he cannot be contacted in any way and in conjunction with the employment problem generated by the Covid 19 pandemic throughout Europe, the court considers that there is a real possibility that it will evade prosecution ". In addition, an attempt was made in vain to summon the defendant by telephone to the German telephone number, and a telephone note was drawn up to that effect. However, the court accepted the prosecutor's proposal, *ordering the taking of the measure of deprivation of custody in custody in absentia, for a period of 30 days, starting with the date of arrest*. Promoting an appeal against the solution, the court of judicial review annulled the contested decision and ordered the retrial of the case given the illegal summons of the defendant.

Therefore, it is obvious that if we are talking about a new case, an associated case, the trial cannot take place only if the injured party and the parties are legally summoned.

The Strasbourg Court held that "in the interests of the proper administration of justice, each party to the proceedings must be informed of the hearing not only in order to know its date and place, but also to have sufficient time to prepare and be able to appear ", moreover, the Court tells us," simply sending a formal notification, without any certainty of delivery to the addressee, cannot be considered by the Court as a valid judgment¹⁷ ".

Undoubtedly, this procedure of the "associated files" is loaded with the role of the courts and to try to prove an extremely large volume of activity. Of course, the practical utility in certain specific situations is indisputable, but, as we will develop in the following, the formation of an associated file is likely to hinder the work of the magistrate, and in the end may even divert the purpose of criminal proceedings.

Once the courts in their practice have taken over this procedure, beyond completing the code of criminal procedure and accepting the idea of forming associated cases, in our opinion violates the principle of legality, legislation, criminal procedure law and ECHR requirements.

Therefore, in carrying out criminal proceedings, it is imperative that the great principles of criminal procedural law be observed. Being a new file, all parties must be present and draw conclusions. Thus, the conclusions in the case file cannot be relevant in the associated file, all the more so as it is assumed that the associated file concerns an issue tangential to the merits.

3. CRITICIZE

In another situation, the court of first instance received the filing of the civil party requesting the establishment of a precautionary measure. In this context, the issuance of addresses to the National Agency for Fiscal Administration in order to communicate certain supporting documents was discussed. With the issuance of the addresses, the court extended the discussion on the issue of the precautionary measure, leaving it in an unresolved equation, including at the time when the oral and written conclusions were filed on the merits of the case.

¹⁷ ECHR, Mikryukov and others. c. Russia, Hot. of July 31, 2012 - available at www.ier.gov.ro

In view of the fact that this issue has not been discussed, some parties to the proceedings, in the substantive debates, solicited that the request for precautionary measures be rejected.

As the debate and the conclusion of the proceedings extended for a long period, with many parties concluding at various intervals, the court at the end of the debate considered that it could resume the question of the application for precautionary measures ordered the founding of associated files. In these associated files, constituted for each defendant, the summons procedure was not resumed, practically the principles of adversarial trial, directness, orality and publicity were not adhered by, the court resolving the associated case by separate Court decision, but at the same date with main Court decision from the preliminary chamber.

In view of all the arguments presented above, being a new case, a newly addressed issue, the court was obliged to summon, summon the parties before it and, in full exercise of the right of defense, request the position of all parties to the case. As he did not do so, the violation of the right to defense is obvious, becoming an incident of art. 281 para (1) lit. f Cod pr. pen. which entails the absolute nullity of the Conclusion.

Leaving aside the criticism challenged by the provisions on precautionary measures, according to which there are obvious differences in the regulation of the procedural framework¹⁸, the reasoning of the control court in rejecting the appeal that the party has also concluded on the issue of precautionary measures legal substance. The court of judicial review, in its wisdom, did not take into account that, at the time of the oral hearing, the issue of precautionary measures was extended, therefore not discussed by the parties, so it was not subject to adversarial proceedings, and therefore could not be transferred. in the associated file.

But, what is more obvious, the procedure in the appeal before the court of judicial control (Court of Appeal) respected *ad literam* the rules of the criminal process, respectively the summoning of the parties and the main procedural subjects, etc. In such a situation it appears it is difficult to understand how the superior court overcame the lack of procedure, of contradictory debate from the court of first instance.

The judicial review court's decision to reject the appeal is therefore clearly illegal and unfounded.

4. CONCLUSIONS

1. Within the meaning of the Constitution, the criminal procedural law, the great principles applicable to the process, the associated files should not exist.

2. The legal regime applicable to the associated files can be established only by law and in no case by normative administrative acts (Regulations, SCM Decisions), the Superior Council of Magistracy being only an autonomous administrative authority. Even so, put in front of a situation wrongly accepted in jurisprudence, starting from the provisions of the regulation, art. 98 para. (2) we are, as defined, in front of a new case,

¹⁸ According to art. 250 para. (4): "the person who lodged the appeal and the persons concerned" shall be cited; according to art. 250 para. (7): the "parties" are cited; art. 250 para. (3): it cites "the defendant and the interested parties who formulated it" - in this sense Dan Lupașu, Adrian Șandru – *Măsurile asiguratorii în procesul penal. Contestare. Durata. Efecte.* - Revista română de drept penal al afacerilor nr. 4/2019

which requires that the settlement be made according to the rules of the criminal process. The principles of adversarial trial, orality, publicity, directness form the foundation of the right to defense. Naturally, after the formation of the file, the summons of the parties and of the procedural subjects must follow and then, the administration of evidence, debates, etc.

3. In the associated files, once they are considered new files, the judge of the case had to operate with the rules of the criminal process and not take from the main file, procedural documents, statements, conclusions, etc.

4. We do not believe that the *accessorium sequitur principale* rule is applicable.

5. Without overshadowing the principle of speedy judicial proceedings, we consider it essential to maintain a balance between the urgency and reasonableness of justice and fairness, and the existence of associated cases, broken by the main case, may alter these considerations.

6. In the legal reality, the legislator can easily regulate the taking of measures such as pre-trial detention, precautionary measures, etc. it can be done by Court decision, but only in the main case which can be subject to the control of a higher court.

7. The legislator must also be notified if the judgment can be made in a single case or the number of cases will be multiplied starting from the main case. And in this situation, keeping the balance of the arguments, we can say that once the rules of criminal procedure have their source only in law, the Superior Council of Magistracy overcame its role by flagrantly violating the principle "*nemo censetur ignorare legem*".

8. The rules of criminal procedure are the most eloquent manifestation of the guarantee and application of fundamental rights and freedoms.

REFERENCES

- Gheorghiu Mateuț – *Procedură penală. Partea generală* – Editura Universul Juridic, București, 2019.
- Valea Daniela – *Drept constituțional și instituții politice – în dreptul român și dreptul comparat* – Editura Universul Juridic, București, 2014.
- C. Ghigheci – *Principiile și limitele aplicării legii procesual penale*, în N. Volonciu, A.S. Uzlău (coord.), *Noul Cod de procedură penală comentat*, Ed. Hamangiu, București 2014.
- Dan Lupașu, Adrian Șandru – *Măsurile asiguratorii în procesul penal. Contestare. Durată. Efecte.* - Revista română de drept penal al afacerilor nr. 4/2019.
- Ramona Mihaela Coman, Bogdan Bodea – *Drept procesual penal. Partea specială*, Editura Universul Juridic, București, 2021.
- M. Udrouiu – *Procedură penală. Partea Generală Ediția 3*, Editura C.H. Beck, București 2016.
- V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N.Iliescu, R. Stănoiu - *Explicații teoretice ale codului de procedură penală român. Partea Generală*, Editura Academiei Republicii Socialiste România, București 1975.
- N. Volonciu – *Drept procesual penal – Partea Generală*, Editura didactică și pedagogică, București, 1972.
- Vladimir Hanga – *Mari Legiuitori ai lumii*, Editura Științifică și enciclopedică, București, 1997.

Legislation and Jurisprudence

CEDO, Cauza Samoilă și Cionca c. României, Hot. 4 martie 2008;
CEDO, Fedbrugge c. Țărilor de Jos, Hot. 29 mai 1986;
CEDO, Beraru c. României, Hot. 18 martie 2014;
CEDO, Mikryukov șa. c. Rusiei, Hot. 31 iulie 2012

