

Exclusion of evidence - sole sanction or nullity subsumed

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Abstract: *Realization of the principle of loyalty enshrined in Article 101 CPC, involves fairly judging a person, done in public, within a reasonable term, by an independent and impartial tribunal established by law in the determination of any criminal charges brought thereto on the correctly produced evidence. Thus, by provisions of the new Criminal Procedure Code, the legislature expressly provided both the penalty of exclusion of evidence, but it had also explicitly made a specific procedure for their invalidation and additional procedural solutions under conditions where there are doubts about how the judicial body obtained such evidence.*

Keywords: *legality; criminal trial; court; legislature; evidence; judicial proceedings; fair proceedings; the principle of loyalty; judge.*

Introduction

Regarded as a procedural safeguard for the rights and freedoms, the right to a fair trial, is the one that ensures the supremacy of law in a democratic society, as well as the protection of the individual against possible abuse of the judicial authorities. Subsumed thereof, some of the fundamental principles of the criminal process may be listed, namely, the presumption of innocence, which, reported to the probative regime, is probably the rule governing the burden of proof, as well as finding the truth in achieving the purpose of criminal proceedings, which requires complete and accurate knowledge of facts in their materiality, as well as of the individual who committed them, in order to hold this one criminally liable.

On the other hand, the legality of the criminal trial enshrined by provisions of Article 2 Criminal Procedure Code is the basic principle according to which the entire criminal trial takes place under the provisions of law. This implies that the overall proceedings activity must be conducted in compliance with the rules of criminal procedure law, meaning that the procedural or proceeding documents to be satisfied in compliance with the conditions of form and substance prescribed by law.

Distinctive there from, by provisions of the new Criminal Procedure Code - Article 101, the legislature intended to regulate, unlike the old regulation, the principle of evidence admission loyalty, principle that prohibits the use of any strategy or treatment that aims administration, in bad faith, of a form of evidence or having the effect of causing an offense in order to obtain means of evidence, if such means prejudice dignity, the rights to a fair trial and privacy.

1. The principle of loyalty administrating the evidences

In terms of the concept of "loyalty" it is expressly used for the first time by the Romanian criminal legislature. On this concept, civil procedural law literature, retains that it is vague, proteiformous, having in conjuncture terms, a multitude of meanings, for example: sincerity, honesty, faith, devotion, loyalty, steadfastness, obedience, honesty, probity, good faith. "Judiciarization" - isolated explicitly, but usually implicitly - of the concept of "loyalty" has occurred in procedural relations, being about even of "principle of loyalty" in the civil lawsuit, expressing essentially the requirement that a minimum morals in judicial relationships to be complied with, specifically in trial proceedings between the parties and between them and the court or between the court and the parties.

Using threats, violence, promises while hearing individuals, incomplete or distorted recording of statements, entry in the minutes of circumstances which have not occurred or non-inclusion of circumstances which have occurred, leading to the retention of facts and circumstances which are not the truth; apart from the negative influence in finding out the truth, such illegal ways prejudice the respect for human dignity, physical integrity and mental state of the inquired ones, which is not consistent with the level of civilization

today; there is also prejudice the dignity of justice, whereas the use of violence, false promises, challenges cannot contribute to the prestige of those working in justice.

Par. 2 of the previous art. provides prohibition of the use of hearing methods or techniques that affect a person's ability to remember and consciously and voluntarily report the facts, which is the subject of evidence, prohibition which even applies if the person heard consents to the use of such hearing methods or techniques.

2. The sanction of excluding evidence versus nullity

2.1. Some considerations regarding the sanction of exclusion of evidence

Based on the analysis of the two above mentioned principles and governing the evidence matter, the incidence of both forms of sanctions - invalidity and exclusion of evidence, expression of several opinions related to the latter is required, that is, if this occurs as a corollary of nullity finding or can it operate as an independent sanction.

The distinction is required to be analyzed in the context of the provisions of the Criminal Procedure Code provisions under art. 101-102, and the jurisprudence of European Court of Human Rights at this time of increasingly conspicuous in national courts practice.

Primordial thereto we should recall some definitions assigned to the sanctions by some authors as being a "virtual penalty hitting any procedural event which, as not permitted by law, is by default lacking legal grounds" or as a "preventive and primary penalty in the criminal procedure that stops to produce any procedural manifestation unaccepted by law".

It should also be reminded that this is a fine of Italian tradition consisting of absolute or relative inability of an act to be used in criminal proceedings because of unlawful method of obtaining the evidence that it confirms, although the document bears the appearance of validity. In this regard, it should be noted that this sanction only applies to certain categories of acts, namely those relating to means of evidence.

First ideas circumscribed to such penalty occurred in the explanatory memorandum of the new Criminal Procedure Code which stated that the Draft expressly regulates for the first time the principle of loyalty in proceedings of evidence, in order to avoid the use of any means that could be aimed at administration in bad faith of an evidence or which could have the effect of causing an offense, in order to protect the dignity of the person, as well as its right to a fair trial and privacy. Institution of unfair exclusion or of unlawfully administered evidence knows a detailed regulation, the legitimacy theory being acquired, that places the debate in a wider context, given the functions of the criminal investigation process and judgment which it is completed with. Given the nature of this institution (taken in the system of civil law from the common-law tradition) and the jurisprudence of European Court of Human Rights, the means of evidence given by infringement of legal provisions may exceptionally be used if this does not prejudice the fairness of the criminal trial as a whole.

It thus results from the very reason that led to the regulation of the principle of loyalty of submission of evidence that the purpose of the sanction of evidence excluding consists essentially in protecting individual rights and freedoms. Moreover, it is unambiguously clear that by regulating this new principle, the legislature intended to pay more attention to how evidence is obtained in criminal proceedings, but also to how they are administered. It should also be noted that the legislature reminds for the first time in a normative context, of "good - faith", which should govern all probation activity in the criminal trial, to achieve its defining goal, namely to protect human dignity, and the right to a fair trial and privacy.

As a rule, the sanction of exclusion occurs due to violation of the principle of legality and loyalty of proof, in obtaining the evidence or the administration thereof. In this context it can be said that the penalty of exclusion of evidence can operate both as a result of a finding of invalidity, as well as a single, independent sanction.

2.2. Some considerations regarding the sanction of nullity

Thus, as it is known, the invalidity occurs whenever a procedural or proceeding act or a proceeding activity was done by violation of law. The consequence of non-compliance with the law is the annulment of the act, broadly the nullity being identified with the notion of procedural penalty.

As conditions required for the nullity to operate as procedural sanction, the legislature has set three requirements, such as: breach of legal provisions governing criminal proceedings in violation of the law or failure of its compliance; infliction of bodily and procedural injury can only be rectified by the cancellation of the act.

Some violations of the legal provisions are considered by the legislature so serious that there is no longer need to prove any harm, therefore they were regarded as absolute and always attracting the nullity of the acts done.

Sanction of nullity occurs when criminal proceedings were affected, being also embedded here the fabrication of process or procedural acts. However, if in the case of absolute nullity, grievous no longer be proven, being irrefutably presumed (*iuris et de iure*) and that absolute nullity is established, as reflected in the position adopted by the legislature in the entire regulation of this institution, if relative nullities to become operant, we should find ourselves in a situation where there have been disregarded legal provisions relating to criminal proceedings other than those stipulated in the provisions under art. 281 Criminal Procedure Code, disregarding this legal provision to have produced an injury to the rights of the parties or other main proceedings subjects, which cannot be removed, except by abolishing the act.

Complying with a proportionality between the wrongful act and what measures might be ordered to restore its legality, it is obvious that the abolition of the pleading must only intervene in situations where it can be used no cure, defined as a means of legal reconditioning of procedural documents that can be practically achieved through completion, modification or correction.

Without detailing aspects concerning the institution of procedural or proceeding documents nullity, after reviewing the main points of interest to treatment of the subject, we will further refer to the aspects that characterize and drive the sanction of exclusion of evidence as a distinctive sanction.

3. The sanction of excluding evidence - distinct penalty

Thus, from the explicit regulation of this sanction transposed by the provisions of the Criminal Procedure Code under art.101-102, it results that it stood at its base the intent of the legislature to create a balance between the interests of the society, consisting of criminal liability of the person guilty of committing a crime, but also the individual interests of the one towards the criminal repression is taking place whom, consisting in compliance with all his procedural rights and removal of any abusive behavior by persons performing the criminal investigation. Or, this last item weighed, was transposed by the legislature by expressly regulating the loyalty of submission of evidence and the applicable sanction for non-compliance with the statutory probation provisions, in the Criminal Procedure Code under art.101-102.

Thus, article 101 of the Criminal Procedure Code stipulates that "(1) It is forbidden to use violence, threats or other forms of coercion, inducements and promises in order to obtain evidence. (2) There cannot be used hearing methods or techniques that affect a person's ability to consciously and voluntarily remember and report the conduct which is the subject of proof, the prohibition applies even if the heard person consents to the use of such hearing methods or techniques. (3) It is forbidden to criminal judicial bodies or other persons acting for them to cause a person to commit or continue a criminal offense in order to obtain an evidence" Corollary to exposure of defining elements that reflect the conduct of a criminal investigation with compliance with all procedural rights, the legislature has expressly provided for the sanction which intervenes in case of deviations from the compliance with the legal provisions providing under Article 102 of the Criminal Procedure Code that „(1) Evidence obtained by torture, as well as evidence derived there from cannot be used in criminal proceedings. (2) Evidence illegally obtained cannot be used in criminal proceedings. (3) Nullity of act ordering or authorizing submission of a piece of evidence or which it was administered by determines the exclusion of evidence. (4) Derivative evidence are excluded if they were obtained directly from the evidence obtained unlawfully and which could not be otherwise obtained ”.

It results, therefore, that the new Code of Criminal Procedure provided three components of the principle of loyalty, namely: the prohibition of using violence, threats of coercion, promises or incentives in order to obtain evidence; the prohibition of using hearing methods or techniques affecting the person's ability to consciously and voluntarily remember and report the conduct which is the subject of proof and prohibition of causing a person to commit or continue a criminal offense in order to obtain evidence.

The way in which the penalty of exclusion of evidence operates is prescribed by Article 102 of the Criminal Procedure Code. In order to avoid reaching an excessive formalism, there should be noted that the sanction of exclusion cannot operate yet for any simple violation of law. To exclude evidence there must be noted that this was done in violation of legal provisions and to show that the infringement produced an important prejudice to personal rights and interests of the person interested in requesting the exclusion of the unlawfully obtained evidence. It thus results that for the penalty of exclusion of evidence to operate, primarily the damage caused must regard violation of law during submission of evidence, which breach can cover both the rights and interests of the person claiming such a sanction as opposed to invalidity that, in the text of art. 282 Criminal Procedure Code were only explicitly targeted the “rights” of the parties and

procedure subjects" and secondly it is not necessary to show that the harm caused could not be otherwise removed except by dissolution / exclusion of evidence.

If we refer to the provisions of paragraph 1 of Article 102 of the Criminal Procedure Code we can see that the Romanian legislature has only provided for exclusion of evidence obtained by torture, not those that were obtained by inhuman or degrading treatment, thus requiring a reconsideration of this position in line with the practice of the European Court of Human Rights. In this context appear as defining some cases decided by the European Court of Human Rights that analyzed the breach of article 3 and 6 of the European Convention on Human Rights.

Thus, in the case of *Gäfgen v. Germany*, the ECtHR held that "there is no breach of art. 6 par. 1 and 3 of the Convention where it held that the applicant was subjected to some illegal methods of investigation during the interrogation, that is he was threatened to be tortured, methods considered by the Court as falling within the notion of inhuman treatment, and following these methods of inquiry the national courts have only ruled out the initial self-incriminating statement of the applicant and not the fruits of that statement.

In fact, after this statement there was discovered the victim's body killed by the applicant. The Court held that, although there was a strong presumption that the fruits resulting from the statement given in breach of art. 3 of the Convention would make the process, viewed as a whole, not to be a fair one, like where it was used the very self-incriminating statement, that presumption was rebutted by the subsequent statement of the complainant, who later admitted the facts, and this recognition his conviction was based on. In these circumstances, the Court considered that other deriving evidence, had an incidental nature and were only likely to check the veracity of the two statements. The Court held that as regards the second statement, it cannot be convinced to by the applicant's statement which showed that it was only given for the fact that it had no other option of defense. The Court also held that where there is a violation of art. 3 of the Convention, at least where the acts take the form of torture, the evidence should not be used to prove the guilt of the victim, even if they are credible and whatever their evidentiary value, any other conclusion being likely to legitimize a moral behavior which the authors of the Convention rejected. Thus, the Court ruled that there was no infringement of art. 6 par. 1 and 3 of the Convention. The partly dissenting opinion shown that the use of real evidence, real evidence obtained as a result of the first testimony is likely to violate the right to a fair trial. In this respect, it held that the fact concerning a criminal conviction of investigators is not a sufficient remedy. Although the Court's position is clear in the sense that statements obtained in violation of art. 3 of the Convention are inadmissible, whether it concerns torture or inhuman or degrading treatment, the problem to be resolved is whether the evidence derived there from, particularly real evidence, real evidence, which are obtained in violation of art. 3, but by means which do not have the necessary strength to be considered torture, should be also automatically inadmissible. Thus it was considered unfortunate the Court's position in the distinction drawn on the admissibility of statements obtained in violation of art. 3 of the Convention, and the admissibility of other evidence obtained in the same manner relative to the absolute nature of the rights provided by the above mentioned article. There has also been criticized the Court's decision in terms that the causal chain was interrupted when the complainant gave the second statement, the dissenting opinion considering that an event during the criminal investigation, as that of the infringement of absolute rights, has an effect on the entire subsequent proceedings, and an adverse opinion is not only formalistic, but also unrealistic.

Regarding the interdiction imposed on judicial bodies to cause a person to commit or continue a criminal offense in order to obtain evidence, the practice analyzes with particular attention the cases in which undercover investigators were used. Embracing the concept of proactive investigation, the Court accepts the use of undercover investigators, only if the person suspected of committing or preparing an offense takes advantage of the „opportunity” offered by undercover investigators in the same circumstances in which it results that it would have acted if the „opportunity” had been given to another person. In these cases, a thorough review is initiated on the fulfillment of three conditions: necessity, proportionality and subsidiarity in order to be admissible to use undercover investigators in criminal proceedings, and also their way of action, particularly cases where there may be retained the exercise or not of a challenge from their part.

Thus, in the case of *Ali v. Romania*, the Court held that „the use of special investigative means, cannot itself violate the right to a fair trial, but provocation by police occurs when agents involved are not limited to investigate the criminal activity in an essentially passive manner, but it exercises a certain influence on the subject, so as to incite it to commit an offense that otherwise would not have been committed, in order to make it possible to establish the offense, namely to provide evidence and to initiate prosecution”.

Conclusions

Concluding on those previously exposed, we consider the will of the legislature to qualify the exclusion of evidence as a sanction that can operate autonomously from the invalidity, sanction that only becomes active when the principle of loyalty of evidence administration is violated.

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