Remedies and Sanctions for Non-Compliance with the Aspects Aiming at the Authorization and Development of Supervision and Research Special Methods

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Abstract: The distinction between the notion of sanction and that of remedy is very important from the perspective of the present analysis, as the idea of sanction implies, in addition to bringing the whole criminal process within lex limits and the idea of punitive, sanctioning the individual's conduct, the last being the basis of the institution, while the notion of remedy pursues and at the same time places in the main plan the idea of safeguarding the entire procedure by trying to keep the procedural and processual activities within reasonable limits. From the perspective of the analysis of the existence and the need to implement the legislation, we can easily conclude in the regard that these methods, techniques are intrusive. Thus, in order to be able to determine the concrete content of the intrusion, we must appeal to the principles of criminal procedural law. The latter principles benefit both from a framework regulation in the Fundamental Convention for the Protection of Human Rights and Fundamental Freedoms, but also from an internal regulation in the Code of Criminal Procedure, as amended by Law no. 255/2013 for the implementation of Law 135/2010 on the Code of Criminal Procedure and for amending and supplementing some normative acts that include criminal procedural provisions.

Keywords: *criminal evidence, sanctions for non-compliance, criminal sanctions, criminal procedure.*

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1. The exclusion rule - Nullity or exclusion of illegally and unfairly administered evidence?

The distinction between the notion of sanction and that of remedy is very important from the perspective of the present analysis, as the idea of sanction implies, in addition to bringing the whole criminal process *within lex limits* and the idea of punitive, sanctioning the individual's conduct. The last is the basis of the institution, while the notion of remedy pursues and at the same time places in the main plan the idea of safeguarding the entire procedure by trying to keep the procedural and processual activities within reasonable limits (Bulea, 2017a, 2017b; Ciucă, 2019).

Over time, several views have been expressed on the two remedies (we prefer to adopt the notion of remedy, in accordance with European requirements in the field, in order to harmonize the entire lecture with the rights enshrined in the European Convention, but also with the idea of prevailing to safeguard procedures over the mere sanctioning of conduct). In the synthesis, although many views have been expressed as to whether there is a remedy which enjoys autonomy of evidence, some authors (Mateuț, 2019, p. 486; Udroi, 2017, p. 974) have rightly considered that such autonomy does not exist, the remedy of exclusion being subsumed by that of nullity, the effects of the former producing through the second. In a much harsher regard, other authors (Boțic, 2016, p. 137) have considered that the lack of autonomy of the exclusion remedy is assimilated even to a cause of expiration/caducity, as not being able to produce legal effects *mutu proprio* which would be essentially ineffective.

From the legislative point of view, the remedy of exclusion has its headquarters both in the provisions of art. 102 NCCP and the provisions of art. 89 paragraph (2) NCCP, art. 190 paragraph (5) NCCP and art. 101 NCCP. The idea of subsuming the exclusion of the nullity remedy is enshrined in the provisions of art. 102 paragraph (3) regarding the nullity of an act by which the administration of a test/evidence was ordered or authorized. The other cases concern express provisions of the exclusion remedy in certain situations of serious violation of the rights guaranteed by the European Convention, which although concerning hypotheses of virtual absolute nullity, will be removed by the effects of nullity without proving the damage (Udroi, 2017, p. 980) of those rights, based on its presumption to the legislator. The same reason will be applied regarding the hypothesis of art. 102 paragraph (1) concerning the evidence obtained through torture and *a fortiori*, in agreement with other perpetrators (Udroi, 2019, p. 979), through inhuman or degrading treatment.

In the same order of ideas, art. 102 also highlights one of the rules that originally (both the rule of exclusion and the rule of derived evidence exclusion were taken over by the Romanian legislator from the common law system) accompanied the remedy for exclusion, namely the remedy for the exclusion of derived evidence. The latter is known and there are other names such as the “remote effect” rule or the “*fruit of the poisonous tree*” and which refers to the application of the same effects to the evidence obtained from those who *ab initio* were illegal. In this matter, the rule in question is treated relatively poorly by the legislator who mentions such an institution in para. (1) the second sentence and paragraph (4) of art. 102 NCCP. The idea of deficient regulation starts from the two conditions provided in paragraph (4) (according to art. 102 paragraph (4): „Derived evidence is excluded if it was obtained directly from the illegally obtained evidence and could not have been obtained otherwise”) which place the remedy almost in the realm of the impossible, given that the last condition “*could not be obtained otherwise*” excessively restricts the fairness of the procedure. Finally, it should be mentioned that the Romanian constitutional court paid special attention to the institution of exclusion, and by Decision no. 22/2018 declared unconstitutional the paragraph (3) of art. 102 ruling with *res judicata* that the effects of the exclusion must not concern exclusively the removal of the evidence in question only legally, but requires a *sine qua non* and a material removal of them.

2. The probative value of the evidence obtained from the special evidentiary proceedings.

The notion of probative force is closely related to the cognitive process that involves the activity of forming a belief. Evidence is a corollary of the activity of assessing evidence in criminal proceedings. In the current regulation, it is enshrined, as we intuited from the beginning of the study, the principle of free assessment of evidence in the sense that they do not have an *a priori* established probative force (Art. 103 paragraph (1) NCCP) and there are no criteria to condition the probative force. The only exceptions to this rule are largely related to the present case as collaborators, investigators, or even third-party witnesses (By third party witnesses we will refer to the persons who did not participate in the evidentiary proceedings provided by art. 148 and 150 NCCP and who can be heard as witnesses in the criminal trial) who benefit from procedural safeguards (Udroiu, 2017, p. 396) for threatened witnesses (art. 125 compared to art. 126 and the following NCCP) will be heard in an exceptional manner, which could

violate the right of defence, reason for which the Romanian legislator understood to grant a probative value conditioned (Udroiu, 2017, p. 400) by the regulation of the provisions of art. 103 para. (3) NCCP.

3. Conclusions and proposals for *lege ferenda*

The existence of a regulation on special methods of surveillance and research is welcome, given the speed they entail, for the optimal protection of social values that can be harmed by committing crimes. Starting from this idea, we can say that special evidentiary procedures can help identify and a fortiori prevent the commission of both crimes committed, or remained in tempted form, but also preparatory acts (for example identifying the intention to procure certain goods, or even reaching agreements between the participants, in order to materialize the criminal resolution - the preparatory acts being possible only in the situation of intentional crimes, which presuppose the existence of an internal phase of the criminal process).

At the same time, it should be noted that the purpose of the regulation is not exclusively the repression of cybercrime (in the regard that the material element can not be achieved in the absence of computer means), but it also tends to repress crimes that can be committed by computer means (e.g. a crime of threat through a public communications network), but we must not overlook crimes that are not related to this “environment”, but which can be discovered through such means.

Although modified many times, from the beginning until today, the special evidentiary procedures tend to a “simplified” solution of the cases by obtaining evidence (means of proof) with a greater ease than the common law. The support is reinforced by the same idea reiterated throughout the paper and which generated the proposals of the *ferenda* law in the sense of criticism on the adoption of criteria developed in the jurisprudence of common law and the European Court of Human Rights, criteria that are, in my opinion, ineffective in their legislative explanatory itself, or the granting of clear assessment criteria in the sense of those provided by the provisions of art. 318 NCCP. It is also noteworthy that of the four criteria only the one provided by the provisions of art. 139 paragraph (2) imposes an appreciation *in abstracto*, the other three, respectively proportionality, subsidiarity and necessity, implies a subjective appreciation (*in concreto*), a deficient situation from our point of view because such mechanisms can create arbitrariness in the situation of a motivation (regarding proposals for authorization and confirmation of evidentiary proceedings) what was the basis of evidence about which there is a possibility of not being known by the “accused” person and his defence counsel, or means that may be overestimated (for various reasons, for

example lack of solid evidence), which, in essence, would be imposed on the judge, who, although having exclusively the discretion, will not be able to do so purely objectively, motivated by the lack of objective criteria that meet the criteria that must be met. The problem does not stop here, knowing that there is no appeal against the conclusion and the authorization order, respectively. In resolving this situation, the criminal procedural legislator granted certain guarantees, essentially ineffective, such as the control in the preliminary chamber phase according to the provisions of art. 342 NCCP, as a result of the exceptions raised ex officio or on the initiative of the parties or the injured person - with regard to the injured party's right to raise exceptions and to make claims in this matter, we express a slight doubt as to the „interest” he must show, as it is very unlikely that the main subject-matter will be formulated, for example, exceptions of illegality in this procedural phase in which the evidence was interpreted in favorem, regarding sending the defendant to court -, a control which is “limited” only to the aspects of legality that the provisions shown remind. Thus restricting - we mention that the solution is not the same in the matter of the procedures provided by the provisions of art. 318 and 340 and the following in which the judge will be able to check the aspects of soundness - the possibility for the judge to verify only the legality, the possibility of exercising effective control over the evidentiary procedure as a whole, from the moment of authorization until this procedural stage, the criteria of proportionality, subsidiarity and necessity are in principle impossible to subject to such verification, as they are based only on aspects of soundness. We appreciate that in the solution it will be possible to resort either to motivate the exception of legality by referring to all the criteria that must be met for authorization, and in this motivation to use the arguments of validity in the sense of proving the non-fulfilment of subjective criteria, by a much more difficult way, namely the regulation of the *ferenda* law of an appeal with elements of similarity similar to the procedures in the matter of waiving the criminal investigation, the complaint against the dismissal solution, or in the field of precautionary measures to be able to confer to persons appearing before judges; who have been subjected to such interference to benefit from concrete guarantees, applicable to ensure the uniform and complete observance of guaranteed rights and freedoms, and not from virtual and *de facto* optional guarantees, because the administration of justice should be based on both compliance with the required principles and activities it is to find out the truth, but in order to have a clear, purely objective truth, the justice system and implicitly the state will have to take care of both the possibility of benefiting from certain guarantees (in case, at some point, the litigant could find themselves in such a situation), as well as their

effective and efficient granting in order to strengthen trust in the judiciary and avoid any unfortunate situations of misjudgement, or lack of transparency.

We must show that the rule of procedure should establish a balance point, it must objectify, transpose in a precise way the different situations that may arise in practice so that the entire criminal proceedings have a stable basis.

Finally, we must not overlook the fact that we are in the process of reforming the criminal procedure, a reform that we tend to believe will cover all current shortcomings and guarantee the idea of legislative stability by implementing an optimal legislative framework, by which to solve both possible procedural and procedural pathologies in general, and those in the field of special methods of surveillance and research, in particular.

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