| Chapter 5 |

Romania: National Regulations in the Shadow of a Common Past

Cristian Dumitru MIHEȘ

ABSTRACT

The rule of law is very difficult to enforce during periods of dictatorship or war. We can have a justice system that functions, as we had before 1989, but that system was confined to upholding the regime in power. Romania experienced a dictatorship for a very long period of time. In the first phase, there was a royal dictatorship from 1938, then a military one, followed by the communist regime until the end of 1989. Since 1945, Romania has been a part of the world where the communist system imposed by the Soviet Union left its mark on criminal justice. The authors of the 1968 Penal Code considered that code to have been adopted "with the purpose of solving uniformly the vast problematic of preventing and punishing the crimes." In a practical regard, the entire legislation was a tool to ensure the success of the regime of communist oppression. In these circumstances, the events that took place in 1989 liberated the spirit of freedom; meanwhile, the consequences of those events took the citizens of the Central and East European countries by surprise, and they were unprepared for the struggle toward democracy and the rule of law. This was the case in Romania when, finally, in 2014, the process of enforcing all fundamental codes was established. In fact, the reform was deeper than the adoption of a new Penal Code, the Code of Criminal Procedure, and the Law on the Execution of Sentences, Educational Measures, and Judicial Measures during Criminal Proceedings. This study presents the main principles, legal institutions, and operational characteristics of the new laws.

KEYWORDS

Romania; criminal justice; Penal Code; Code of Criminal Procedure; Law on the Execution of Sentences, Educational Measures, Judicial Measures during Criminal Proceedings

1. Brief overview

Criminal Law and Criminal Procedure are very closely related to certain values that we share or accept, voluntarily or otherwise, over a period of time. At the same time, they are inextricably linked to the exercise of state sovereignty. However, from this perspective, the states of Central and Eastern Europe had similar experiences, having been assigned to the Soviet sphere of influence at the end of World War II.

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From the perspective of historical developments, Romania had a fairly modern penal code; however, the Criminal Code of Carol II[1] was amended successively, especially after 1945. These changes were the practical basis for the adoption of a new Criminal Code in 1968[2], with a new structure and a new approach to criminal justice. During the same period, a new Code of Criminal Procedure was adopted.

Furthermore, after the 1989 Revolution, Romania attempted to revise and adapt the criminal legislation to meet the criteria of a democratic legislation. As the path was highly sinuous, there are certain milestones of evolution that must be highlighted.

First, reform was conducted in 1996 through Law no. 140/1996 on modifying the Penal Code and Law no. 141/1996 on amending and supplementing the Code of Criminal Procedure. Regarding the Penal Code, through this change, offenses such as the following were criminalized: "Propaganda in favor of the totalitarian state," Article 166, and "Actions against the constitutional order," Article 166 index 1; moreover, the former offenses against public property were repealed with the idea of ensuring the same treatment for public and private property from the perspective of the Penal Law. Furthermore, the modification on the Code of Criminal Procedure updated the provisions to a certain extent – for example, Article 91 indices 1 to 5 introduced another means of proof in the Criminal procedure: audio-video recordings.

The next milestone was the modification in the prosecutor`s competence to decide arrest as a preventive measure in 2003.[3] The decision to change the procedural regulation was caused by the European Court of Human Rights (ECHR) jurisprudence and, from national/internal perspective, was not easy to accept and implement.

In 2004, a new Penal Code was adopted by the Romanian Parliament, but it never entered into force, as its enforcement was postponed several times and ultimately repealed.[4]

Law no. 202 from 2010 was intended to be a small justice reform, introducing, among other provisions meant to make the administration of justice more efficient, a procedure for admitting guilt.[5]

Following changes to the existing national regulation framework and taking into consideration the effect of the ECHR decisions in criminal matters, the need for a new Penal Code and a new Code of Criminal Procedure arose.

The adoption of the new Criminal Code pursued a number of objectives, among them, the repealing of some criminalizing texts from special legislation, the elimination of the unnecessary overlap of some texts that protect the same social values, adapting the punishment, decriminalization of certain facts provided in

1 The Criminal Code of 1936, titled the Criminal Code "Carol II," published in the Official Gazette, part I, No. 73 of 27 March 1936.

2 The Official Bulletin no 79 – 79 bis 21 June 1968.

3 Law no. 281/2003 regarding the amendment and completion of the Code of Criminal Procedure and of some special laws.

4 Criminal Code of 2004 repealed by Law no. 286/2009 on the Penal Code.

5 Spânu, 2020.

the special legislation and their contravention where appropriate, and respecting the principle of minimum intervention, which states that the criminal law of any rule of law requires recourse to the criminal protection mechanism only in situations in which the protection provided by the regulations of other branches of law is insufficient.[6]

Regarding the Code of Criminal Procedure,[7] the new provisions were intended to meet the requirements of the time, such as accelerating criminal proceedings, simplifying them, and creating a unified jurisprudence in line with the jurisprudence of the European Court of Human Rights. The new code aimed to lead to the objective of predictability of judicial proceedings deriving from the European Convention for the Protection of Human Rights and Fundamental Freedoms and from the jurisprudence of the ECHR.

1.1. Main (legal) sources (legislation in force)

The first national legal source is the Romanian Constitution, title II "Fundamental rights, freedoms and duties" Articles 15 – 60 and title III "Public Authorities"– chapter VI "Judicial Authority" Articles 124 – 147. One of most important and relevant provisions is Article 20 of the Romanian Constitution,[8] which regulates the supremacy of the most favorable provision regarding Human Rights.

The main legal sources are the Penal Code[9] and the Code of Criminal Procedure[10]. The legal framework in our area of interest is completed with Law 254/2013 on the execution of sentences and custodial measures ordered by the judiciary during criminal proceedings and Law 252/2013 on the organization and operation of the probation system.

Regarding the judicial and investigative authorities, the following norms must be mentioned: Law no. 304/2004 on judicial organization, Law no. 303/2004 on the status of judges and prosecutors, Government Emergency Ordinance no. 43/2002 on the National Anticorruption Department, Government Emergency Ordinance no. 78/2016 for the organization and functioning of the Directorate for the Investigation of Organized Crime and Terrorism as well as for the modification and completion of some normative acts, and Law no. 218/2002 on the organization and functioning of the Romanian police.

6 Explanatory memorandum of the Penal Code.

7 Explanatory memorandum of the Code of Criminal Procedure.

8 Article 20 – International Human Rights treaties: "(1) The constitutional provisions regarding the rights and freedoms of the citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the covenants and with the other treaties to which Romania is a party. (2) If there are inconsistencies between the pacts and treaties on fundamental human rights, to which Romania is a party, and domestic laws, international regulations shall take precedence, unless the Constitution or domestic laws contain more favorable provisions".

9 Law no. 286/2009.

10 Law no. 135/2010.

An important actor in recent years was the Constitutional Court, which has the competence to enforce the constitutionality control of the laws and as well as the exception of (un)constitutionality[11].

Legal assistance during criminal investigation and justice procedures is performed according to Law 51/1995 for the organization and exercise of the legal profession.

An important criminal provision is also found in special laws regulating criminal aspects, such as Law no. 241/2005 for preventing and combating tax evasion, Law no. 129/2019 for preventing and combating money laundering and terrorist financing, and Law no. 143/2000 on preventing and combating illicit drug trafficking and consumption. Furthermore, there are laws that regulate civil or administrative aspects and also contain criminal law provisions, such as Law 8/1996 on copyright and related rights, which criminalizes certain offenses in Articles 193 – 200,[12] or the Forestry Code of 2008[13], which also criminalizes certain offenses in Articles 68 and 106 – 110.

1.2. Relevant institutions and their role

The judicial system consists of courts on three main levels: city court, which functions in most of the cities in Romania; Tribunals, which function in each county; 14 Courts of Appeal; and the High Court of Cassation and Justice. Additionally, there are prosecutor`s offices next to each court that supervise criminal investigation or, in certain cases of serious offenses, perform it themselves. The general investigation body is the police through special agents and offices appointed by the Ministry of Interior Affairs.

Regarding investigative and prosecution bodies, there are two special bodies within the Prosecutor's Office next to the High Court of Cassation and Justice: the National Anticorruption Directorate and the Directorate for the Investigation of Organized Crime and Terrorism.

Probation services are located next to each Tribunal aiming primarily to contribute to the accomplishment of the act of justice in the interest of the community in order to rehabilitate the offenders, to reduce the risk of committing new crimes and increase the degree of security in the community, to reduce the social costs of the execution of sanctions and criminal measures by decreasing the population in penitentiary units, to capitalize on the socioeconomic potential of criminals, and to maintain the safety of the community.

11 Law no. 47/1992 on the organization and functioning of the Constitutional Court.

12 Miheș and Mihăilă, 2018.

13 Law no. 46/2008.

2. Main substantive criminal law items

2.1. General principles: The general principles of criminal liability

The general principles of substantive Criminal Law are inserted within Articles 1 and 2 of the Penal Code: "Legality of criminalization" and "Legality of criminal law sanctions."

The principle of the legality of criminalization means that criminal law stipulates the facts that constitute crimes, and no person may be criminally sanctioned for an act that was not provided for by criminal law as of the date when it was committed.

The legality of criminal law sanctions refers to the idea that *"(1) the criminal law provides the applicable punishments and the educational measures that can be taken against the persons who have committed crimes, as well as the security measures that can be taken against the persons who have committed deeds provided by the criminal law. (2) A punishment may not be enforced or an educational or safety measure may not be taken if it was not provided for by the criminal law on the date when the deed was committed. No punishment may be established and applied outside its general limits."*[14]

Other fundamental principles or rules of Criminal Law can be included in this category of principles: the personal nature of penal responsibility, the idea that penal responsibility is based on the guiltiness of the person, the individualization of penal responsibility, the principle of humanism, equal treatment, and non bis in idem.[15]

2.2. Grounds for impunity

To activate penal responsibility, certain criteria must be met. In Romania, the doctrine identified three features of an active subject based on interpretation of the Penal Code. First, an active subject of a criminal offense can be a natural person or a legal entity.

Second, the minimum age to activate criminal responsibility is 14 years. The threshold of 14 years of age means that minors who, at the time they committed the offense, are under 14 years age are considered without (sufficient) discernment to be trialed as criminal offenders.[16] Persons who are 14–16 years old can be criminally liable only if it is proved that they committed the act with discernment. If the person has reached the age of 16, they are criminally liable according to the law (just as an adult).[17]

Third, discernment is an important criterion of impunity and the liberty of will and liberty to act. The existence of discernment is presumed, except in the aforementioned situations. Furthermore, the mental state of the defendant should be examined in cases of certain serious offense (ex. Murder) and when there are serious doubts as to their mental capability. A person has liberty of will and liberty to act

14 Article 2 of the Penal Code.
15 Mirișan and Domocoș, 2019, pp. 15–20; Antoniu and Toader, 2015, pp. 33–53.
16 Antoniu and Toader, 2015, pp. 340–343.
17 Article 113 of the Penal Code; Antoniu and Toader, 2015, pp. 340–343.

when that person acted freely, without constraint, according to their own beliefs and decisions.[18]

2.3. Definition of criminal act

The definition of an offense according to Article 15 of the Penal Code is as follows: *"The criminal offense is the act provided by the criminal law, perpetrated with guilt, unjustified and imputable to the person who committed it. The criminal offense is the sole basis of criminal liability."*

Based on this definition, the essential features of a criminal offense can be deduced: 1) it is be provided for by law, 2) the act should be perpetrated with guilt, 3) the act is unjustified, 4) the act is imputable to the person who committed it.

The first feature means that the criminal offense is the sole basis of criminal liability. If the act is not criminalized by a law, then criminal responsibility cannot enter the discussion. In this regard, that the doctrine and practice speak of typicity of the perpetrated act must be noted. A correspondence of the factual elements of the act with the features of the act as described in the criminal law must be established[19]

The second condition is that the act should be performed with guilt as regards the state of mind of the active subject (*mens rea*). An action only constitutes an offense if committed under the form of guilt required by criminal law.[20] The subject must be aware that they are breaching the law as well as of the consequences of the act. In Romanian Criminal Law, there are three forms of guilt: intention, culpa, and praeter intentionem.

Intention can refer to direct intention when the subject can foresee the outcome of their act and acts under the expectation of causing such an outcome by perpetrating the act or indirect intention when the subject can foresee the outcome of their act and, while not intending to produce it, nevertheless accepts the likelihood that it will occur.

Culpa (fault) includes two forms: criminal negligence – the subject cannot foresee the outcome of their actions, though they should and could have done so – and indulgence – the subject can foresee the outcome of their actions but does not accept it, believing without reason that such an outcome will not occur.

Oblique intent *(praeter intentionem)* exists when an act consisting of an intentional action or inaction causes more serious unintended consequences and is attributable to the perpetrator.

On the other hand, the act consisting of an action or inaction shall constitute an offense when committed with direct intent. The act committed with basic intent *(culpa)* constitutes an offense only when the law specifically establishes it as such.[21]

18 Mirisan and Domocos, 2019, p. 123.

19 Ibid., p. 117.

20 Article 16 of the Penal Code; Antoniu and Toader, 2015, pp. 340–343; Mirisan and Domocos, 2019, pp. 146–155.

21 Article 16 last paragraph of the Penal Code.

Finally, an express provision covering the committing the crime of commission by omission is included. A commission offense that involves the production of a result is also considered to have been committed by omission when there is a legal or contractual obligation to act, and the perpetrator of the omission, through a previous action or inaction, created, for the protected social value, a state of danger that facilitated the production of the result.

2.4. Types of offenders

As mentioned above, the active subject of the criminal offense can be either a natural person or a legal entity.

According to Article 135 of the Penal Code, legal entities, except for state and public authorities, shall be responsible for offenses committed in the performance of the object of activity of legal entities or in their interest or on their behalf. Public institutions shall not be held criminally liable for offenses committed in the performance of activities that cannot be the object of the private domain. In addition, it is important to highlight that the criminal liability of legal entities does not exclude the criminal liability of the individual participating in the commission of the same act.

The Penal Code does not expressly limit the offenses that can perpetrated by legal entities; therefore, any offense can be committed by a legal entity.[22]

In certain cases, as provided for by the Penal Code, there are special requirements for an active subject such as that the perpetrator should be a public official in the case of duty offenses or an accountant, director, or legal representative of a company in the case of offenses related to, for example, tax evasion.

Legal persons without legal personality and individual enterprises cannot be criminally liable under the conditions provided by Article 135 of the Penal Code.[23]

Procedure in cases with juvenile offenders. In cases with underaged offenders, there are criminal liability limits imposed by Article 113 of the Penal Code, as described above.

Both during the criminal investigation and during the trial, the project stipulates the obligation to summon the probation service as well as the general directorate of social assistance and child protection in the locality where the hearing takes place.

In accordance with the new approach of the Penal Code, according to which only non-custodial or non-custodial educational measures may be taken against a juvenile who has committed a crime, the procedures for enforcing these measures have been reconsidered.[24]

The trial is conducted in accordance with the rules of the adversarial process regarding the order of the judicial investigation, and for the additional protection of

22 Antoniu and Toader, 2015, pp. 379–380.

23 HCCJ decision no. 1/2016, preliminary ruling for resolving an issue of law, issued on 13.01.2016, Official Gazette no. 138 from February 23, 2016.

24 Antoniu and Toader, 2015, p. 343.

the minor before the court, the rule of a single hearing is provided, with the possibility of re-hearing in duly justified cases.

In cases in which juvenile defendants are tried together with adult defendants, the jurisdiction always belongs to the specialized court for juveniles and family.

2.5. Sanctioning system, possibilities of diversion, alternative sanctions, restorative elements, mediation

2.5.1. Sanctioning system

Criminal law sanctions have certain characteristics: they are necessary in regard to the defense of the values protected by criminal law, and they are mandatory when criminal responsibility was established; they are stipulated only by criminal law, and they are enforced only by penal judicial authorities; their enforcement implies a diminishing of the human rights and liberties; they have a inflictive effect; and they are enforced with the purpose of preventing the perpetration of such acts in the future by either the same offenders or other future offenders.[25]

The sanctioning system provided in our Penal Code consists of three categories of sanctions: penalties (punishments), educational measures enforced on juvenile offenders, and safety measures.

The most important part of the sanctioning system may be the main penalties as defined by Article 53 of the Penal Code: life imprisonment, imprisonment, and fines. In addition, our Penal Code provides for additional punishments and complementary punishments. An additional punishment consists in the prohibition of the exercise of certain rights from the moment of the final conviction and until the execution or considered execution of the custodial sentence.[26]

Complementary punishments are prohibition of the exercise of certain rights, military degradation, and publication of the conviction decision. These punishments are ordered by the court to supplement the effect of the main sentences and usually occur after the execution of the main sentences.[27]

Notably, penalties (punishments) are under the strict regime of legality in the sense that the punishment is provided only by criminal law. The punishment provided by law refers to the punishment provided in the text of the law that incriminates the deed committed in the consumed form without considering the causes of reduction or increase of the punishment.[28]

The regime of life imprisonment is determined by Penal Code, primarily Article 56 – 59 of the Penal Code. Life imprisonment consists of imprisonment for an indefinite period and is carried out in accordance with the law on the execution of sentences.

25 Mirisan, and Domocos, 2019, p. 292.
26 Article 54 of the Penal Code.
27 Toader, 2014, p. 212.
28 Article 2 of the Penal Code; Article 141 of the Penal Code; Miheș, 2015, pp. 331–371.

There is a limit as regards setting this punishment in terms of the age of the defendant at the time of conviction. The defendant, if they have reached the age of 65, shall be sentenced to 30 years imprisonment and to the prohibition of the exercise of certain rights for the maximum term rather than life imprisonment.

Practically speaking, this punishment is not enforced entirely for an indefinite period from the moment of conviction because it can be replaced in certain conditions. The sentence of life imprisonment may be replaced by imprisonment for 30 years and the penalty of prohibition of the exercise of certain rights for its maximum duration, if the defendant has been well behaved throughout the execution of their sentence, has fully fulfilled the civil obligations established by the conviction (unless they prove that they had no possibility of fulfilling them), and they have made constant and obvious progress toward social reintegration if the person sentenced to life imprisonment reaches the age of 65 during the execution of the sentence.[29]

According to Article 60 of the Penal Code, imprisonment consists of deprivation of liberty for a fixed period, between 15 days and 30 years, and is executed according to the law on the execution of sentences.

Fines set by criminal courts refer to the amount of money that the convict is obliged to pay to the state.

The amount of the fine shall be determined by the system of fine days.[30] The amount corresponding to a fine day, between 10 and 500 lei, is multiplied by the number of fine days, which can be between 30 and 400 days. The court establishes the number of fine days according to the general criteria for individualizing the punishment. The amount corresponding to a fine day shall be determined considering the material situation of the convicted person as well as their legal obligations to the persons in their care.[31]

Fines can also be enforced if the committed crime was aimed at obtaining a patrimonial benefit, and if the punishment provided by law is only a fine or the court opts for the application of this punishment, the special limits of the fine days may be increased by one third. In addition, the fine can be set by the court together with the imprisonment sentence if the committed crime was aimed at obtaining a patrimonial benefit. These are options of the court.[32]

Moreover, our code provides for replacement of the fine with imprisonment[33] if the convicted person, in bad faith, does not execute the penalty of the fine in whole or in part; in such a case, the number of unexecuted fine days shall be replaced by an appropriate number of days in prison.

29 In the case of commutation or replacement of life imprisonment with imprisonment, the period of imprisonment executed shall be deemed to have been served as part of the imprisonment sentence.
30 Article 61 of the Penal Code.
31 Streteanu and Nitu, 2018, pp. 299–310.
32 Ibid.
33 Article 64 of the Penal Code.

In this situation, if the unfulfilled fine was accompanied by imprisonment, the number of non-enforced fine days shall be replaced by an appropriate number of days of imprisonment, which shall be added to the imprisonment sentence, the resulting punishment being considered a single punishment. In the case of replacing the penalty of the fine with the punishment of imprisonment, under the aforementioned conditions mentioned, one day of fine corresponds to one day of imprisonment.[34]

Finally, there are situations in which the fine sentence cannot be executed. In these cases, Article 64 of the Penal Code provides for the rule of execution of the fine by performing unpaid work for the benefit of the community. The essence here is the consent of the convicted person to perform the unpaid work (community services).

When such consent is provided, the court shall replace the obligation to pay the unexecuted fine with the obligation to perform unpaid work for the benefit of the community except if, due to their state of health, the person is unable to perform this work. A fine day corresponds to one day of community service. If the fine replaced accompanied the prison sentence, the obligation to work for the benefit of the community is executed after the execution of the prison sentence.

The coordination of the execution of the work obligation for the benefit of the community is carried out by the probation service.

The court shall replace the fine days not executed by community service with an appropriate number of days in prison if a) the convicted person does not perform the obligation to work for the benefit of the community under the conditions established by the court or b) the convicted person commits a new crime discovered before the full execution of the work obligation for the benefit of the community. Fine days replaced by imprisonment that are not served via community service on the date of final conviction for the new offense shall be added to the sentence for the new offense.[35]

The ordered execution of the work for the benefit of the community shall cease to pay the fine corresponding to the remaining unexecuted fine days.

2.5.2. Alternative sanctioning

The (new) Penal Code does provide for alternative sanctions such as waiving the sentence, postponing the sentence, and suspending the execution of the custodial sentence.[36]

The court may order the *waiver of the sentence*[37] if the following conditions are met: the crime committed is of low gravity, considering the nature and extent of the consequences produced, the means used, the manner and circumstances in which it

34 Streteanu and Nitu, 2018, p. 317.

35 If the convicted person in the situation provided in par. (1) does not consent to the performance of unpaid work for the benefit of the community, the unexecuted fine is replaced by imprisonment according to Article 63 of the Penal Code; Streteanu and Nitu, 2018, pp. 317–323.

36 For additional details, please see Streteanu and Nitu, 2018, pp. 450–575; Antoniu and Toader, 2015, pp. 157–231.

37 Article 80 of the Penal Code.

was committed, the reason, and the purpose pursued; or, considering the character of the offender, their conduct before the crime, the effort they made to mitigate or reduce the consequences of the crime, and their likelihood of correction, the court determines that the application of a punishment would be inappropriate due to the consequences.

However, it is not possible to order the waiver of the application of the punishment if the offender has previously suffered a conviction or for which the rehabilitation intervened, or the rehabilitation term was fulfilled. In addition, it is not possible if the same offender has also been ordered to waive the application of the sentence in the last two years prior to the date of committing the crime for which they are being tried or if the offender has evaded criminal prosecution or trial or has attempted to thwart the determination of the truth or the identification and prosecution of the perpetrator or participants.

Waiver of the sentence cannot be ordered if the punishment provided by law for the committed crime is imprisonment for more than five years. In the case of concurrence of offenses, the waiver of the application of the punishment may be ordered if, for each concurrent offense, the aforementioned conditions mentioned are met.

The court may order the *postponement of the enforcing of the sentence,*[38] establishing a term of supervision, if the established punishment, including in the case of concurrence of offenses, is a fine or imprisonment for a maximum of two years; the offender has not previously been sentenced to imprisonment, the rehabilitation intervened, or the rehabilitation term was fulfilled; the offender has agreed to perform unpaid work for the benefit of the community; or, considering the offender's character, their conduct, the efforts they made to mitigate or reduce the consequences of the crime, and their likelihood of correction, the court considers that the immediate application of a sentence is not necessary and supervision of their conduct for a specified period is sufficient.

The application of the sentence may not be postponed if the punishment provided by law for the crime committed is seven years or more or if the offender has evaded criminal prosecution or trial or attempted to thwart the truth or identify and prosecute the author or participants.

The court is obliged to present the reasons that determined the postponement of the application of the punishment and to warn the offender regarding their future conduct and the consequences to which they will be exposed if they commit further crimes or do not comply with supervision measures or surveillance.

Moreover, the court shall order a term of supervision of two years calculated from the date of the final decision by which the postponement of the application of the punishment was ordered. During the term of supervision, the person against whom the application of the sentence has been postponed must observe the supervision measures and execute the obligations incumbent on them under the conditions set by the court.

38 Article 83 of the Penal Code.

The court may order the *suspension of the execution of the sentence under supervision*[39] if the following conditions are met: the punishment applied, including in the case of concurrence of offenses, is imprisonment for a maximum of three years[40]; the offender has not previously been sentenced to more than one year in prison, or the rehabilitation intervened, or the rehabilitation term was fulfilled; the offender has agreed to perform unpaid work for the benefit of the community; in consideration of the character of the offender, their conduct before the crime, the efforts they made to mitigate or reduce the consequences of the crime, and their likelihood of correction, the court considers the application of the sentence to be sufficient and believes that, even without its execution, the convict will not commit any other crimes, but it is necessary to supervise their conduct for a certain period.

However, the court cannot order this alternative sanction if the penalty applied is only a fine; if the enforcement of the punishment was initially postponed, but the postponement was later revoked; if the offender has evaded criminal prosecution or trial or has attempted to thwart the determination of the truth or the identification and prosecution of the perpetrator or participants.[41]

In addition, it is obligatory to present the reasons on which the conviction was based as well as those that led to the suspension of the execution of the sentence and to warn the convict regarding their future conduct and the consequences to which they will be exposed if they commit crimes or do not comply with their obligations during the term of supervision.

The court orders a term of supervision between two and four years but may not be less than the duration of the sentence applied. The term of supervision shall be calculated based on the date when the decision by which the suspension of the execution of the sentence under supervision was pronounced became final. During the term of supervision, the convicted person must observe the supervision measures and execute the obligations incumbent on them, under the conditions established by the court.

Finally, *mediation* is possible in criminal law cases involving offenses for which, according to the law, the withdrawal of the prior complaint or the reconciliation of the parties removes criminal liability.

39 Article 91 of the Penal Code.

40 Decision no. 13 from May 7, 2019, issued by the High Court of Cassation and Justice on interpretation of law: "in case of cancellation of the postponement of the application of a sentence, followed by the suspension under supervision of the execution of the resulting main sentence, the term of supervision, established according to the provisions of art. 92 of the Criminal Code, is calculated from the date of finality of the decision ordering the suspension under supervision of the execution of the resulting main punishment".

41 In the unitary interpretation and application of the provisions of Article 91 paragraph (3) of the Criminal Code, when the penalty of a fine is added to the prison sentence, the criminal fine is executed, even if the execution of the prison sentence has been suspended under supervision.

2.6. Highlights of the special part of substantive criminal law

2.6.1. Offenses against property

Over the last 32 years, the reformulation of some texts and resettlement of crimes aimed at protecting the patrimony of the natural person or of legal persons was, unfortunately, a continuous process. As previously mentioned, since 1997, the special protection of public property was repealed through Law no. 140/1996. It took a long period of time for the general society and doctrine and practitioners "*to be become acquainted*" with the new reality, in which the rules of democratic society mean equal treatment of different forms of assets and property, irrespective of their owner or user.

Working through that process, later, in the (new) Penal Code, the title "Offenses against the patrimony," which includes the regulation criminalizing offenses against the patrimony of the persons, was divided into four chapters: "Theft," "Robbery and Piracy," "Offenses against property by disregard of trust," "Fraud by computer systems and electronic means of payment," and "Destruction and disturbance of possession."

First, the "old/classic" offenses, such as theft, robbery, and piracy, were updated and redefined in regard to both the content and the sanctioning. For example, the sanction for theft was reduced by nine years, with the simultaneous introduction of the alternative punishment of the criminal fine.[42] Thus, there was a need to decrease the severity of the sanctions, although at present, this tendency is, generally speaking, arising again.[43] Another aspect is that for most of the offenses provided for under this title, criminal prosecution can be initiated only on the victim's prior complaint, an aspect that, should not be valid for most offenses.

This title also covered the main offenses in relation to the protection of assets and property, including provisions from special laws[44]. For example, bankruptcy and fraudulent bankruptcy in Law no. 85/2008, the law of insolvency, were included here under Article 255 and 256; computer fraud from Law 161/2003 was covered in Article 249; and the offenses provided for in Law no. 365/2002 on electronic commerce, "Carrying out financial operations fraudulently," were included in Article 250, those in "Illegal operations with non-cash payment instruments" in Article 250 index 1, and those in "Acceptance of financial operations carried out fraudulently" in Article 251.

Furthermore, new offenses are criminalized in Article 239, "Abuse of trust by fraud of creditors," in Article 245, "Insurance fraud," in Article 246, "Diversion of public auctions," and in Article 247, "The patrimonial exploitation of a vulnerable person."

42 In the former regulation, the punishment for theft was imprisonment for a period ranging from one to 12 years, and in the present form of Article 228 of the Penal Code, theft shall be punished by imprisonment for a period ranging from six months to three years or by a fine.

43 Cioclei, 2020.

44 Bodea and Bodea, 2018, p. 191.

Although under the communist regime, embezzlement was considered an offense against public property and then modified to be considered an offense against the assets (patrimony) of legal entities, in the new code, it is integrated into the chapter dedicated to “Duty Offenses.”[45]

One of the debates in the doctrine and in practice was the relationship between the offense of misrepresentation[46] and the crime of computer fraud[47]. The stakes of this debates can easily be seen in the different sanctioning regime: in cases of aggravated misrepresentation, the sanction is imprisonment for a period ranging from six months to three years for the basic form of the offense and from one to five years in cases of the aggravating form, which is perpetrated by fraudulent means. In cases of computer fraud, the sanction is imprisonment for a period ranging from two to seven years.[48] In an attempt to resolve these debates, the High Court of Cassation and Justice ruled on the question “The publication of fictitious online advertisements, which has resulted in damage, without intervening in the computer system or the computer data processed by it, achieves the typical conditions of the crime of computer fraud, provided by Article 249 of the Criminal Code (in the alternative way of ‘entering computer data’), or of the crime of deception, provided by Article 244 paragraph (2) of the Criminal Code (in the alternative way ‘by other fraudulent means’)?”[49] The law is interpreted within decision no. 37/2021[50]: *“It establishes that the publication of fictitious online announcements that resulted in a damage, without intervening on the computer system or on the computer data processed by it, achieves the typical conditions of the crime of deception, provided by article 244 of the Criminal Code.”*

2.6.2. Offenses of corruption and duty offenses

The previous Criminal Code of 1968 regulated offenses that are detrimental to activities of public interest or to other activities regulated by the law in Title VI of the special part; the most numerous texts of the Criminal Code are found under this title, which presents a wide range of criminal offenses united by the same generic legal object: the social relations the existence of which is ensured by defending social values such as the functioning of state and public entities, the legal interests of persons, the carrying out of justice, and the safety of traffic on the roads.[51]

Taking into account the evolution of the criminal phenomenon, particularly in the sphere of public servant duties, as well as the international acts in this field to which the state has adhered, Parliament adopted Law no. 78/2000 on the prevention,

45 Ibid., p. 426.
46 Article 215 of the Penal Code.
47 Article 249 of the Penal Code.
48 Mihes, 2021; Zlati, 2020; Kadar, 2019, p. 202; Cioclei, 2017, p. 380.
49 Decision no. 37/2021 of the High Court of Cassation and Justice is available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/244415 (Accessed: 05 March 2022).
50 Decision no. 37/2021 of the High Court of Cassation and Justice is available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/244415 (Accessed: 05 March 2022).
51 For details, please see Mirișan and Miheș, 2019, pp. 373–386.

detection, and sanctioning of corruption. This law established in Article 5 a classification of the offenses that are its object of regulation, grouping them into four categories: a) corruption offenses – those stipulated in Articles 254–257 of the previous Penal Code and Articles 61 and 82 of law no. 78 from 2000, as well as offenses provided for in special laws as specific modalities of these crimes; b) crimes assimilated into corruption offenses – those stipulated in Articles 10–13 of Law no. 78 from 2000; c) offenses directly connected to corruption offenses – those referred to in Article 17 of Law no. 78 from 2000; and d) offenses against the financial interests of the European Union – those stipulated in Articles 18/1–18/5 of Law no. 78 from 2000.

The new Penal Code included the corruption offenses in Title V of the special part, "Corruption and offenses in public positions," which is structured in two chapters: "Corruption offenses", in Articles 289–294, and "Duty offenses in public positions", in Articles 295–309.

Another important aspect is related to the offense of abuse in office by a public official. The legal text stipulated that "The act of a civil servant who, in the exercise of his duties, does not perform an act or perform it in a defective manner and thereby causes damage or injury to the legitimate rights or interests of a natural or legal person shall be punished with imprisonment from 2 to 7 years and a ban on exercising the right to hold a position of public office." In Decision of the Constitutional Court no. 405 of June 15, 2016,[52] the exception of unconstitutionality regarding the provisions of Article 297 paragraph (1) of the Criminal Code was admitted, with the decision stating that they are constitutional insofar as the phrase "performs in a defective manner" in their content means "performs in violation of the law." The court considered the legal text to be imprecise and the law to be the only grounds for criminal responsibility in the sense that not just any violation of any norm can trigger criminal responsibility, but only a violation of a law. In other cases, disciplinary,[53] patrimonial, or other forms of responsibility should be activated. Consequently, the judicial practice did consider the convictions based on this text only when a normative act with a force of law was violated.

2.6.3. Sexual offense, with particular look at minors

Another aspect that was subject to many changes was the provisions related to the sex crimes and family violence.

Recently, the legal framework for sexual offenses was amended regarding a significant number of such offenses covered by Law no. 217/2020,[54] which recently entered into force.

The above-mentioned law amends the provisions of Article 153 of the Penal Code regarding the prescription of criminal liability from the Criminal Code and those

52 Published in the Official Gazette no. 517 on July 8, 2016, available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/179919 (Accessed: 05 March 2022).

53 Chipea, 2017, pp. 291–292.

54 Published in the Official Gazette no. 1012 on October 30, 2020.

of Article 154 on the statute of limitations for criminal liability in regard to establishing criminal liability for acts of rape[55] and sexual intercourse with a minor[56] as imprescriptible.[57]

Other amendments refer to the articles related to regulating the following offenses: pimping and rape; sexual assault; sexual intercourse with a minor; sexual corruption of minors; recruitment of minors for sexual purposes; and child pornography and aggravating circumstances related to these offenses.

The changes are intended to offer better protection to underage victims of sexual offenses.

This issue should be viewed the light of the *Report on the practice of courts and prosecutor's offices attached to them in investigating and resolving cases of crimes against sexual life with minor victims*[58].

3. Main rules of the criminal procedure

3.1. General principles: The aim of criminal procedure

The rules of criminal procedure aim to ensure the efficient exercise of the attributions of the judicial bodies with the guarantee of the rights of the parties and of the other participants in the criminal process to respect the provisions of the Constitution, of the constitutive treaties of the European Union, and of the treaties on fundamental human rights to which Romania is a party[59].

The fundamental principles as provided in the Code of Criminal Procedure[60] were systematized as follows:[61] the *principle of legality of criminal proceedings, the separation of judicial functions, the presumption of innocence, in dubio pro reo, determining the truth, ne bis in idem, obligation to initiate and exercise criminal proceedings* except for certain cases in which the principle of opportunity may intervene,[62] *the fair character and reasonable term of the criminal trial*, and *the right to liberty and security during the criminal proceedings*.

55 Article 218 of the Criminal Code.

56 Article 220 of the Criminal Code.

57 This amendment was unsuccessfully challenged by the Romanian government in front of the Constitutional Court.

58 See Report on the practice of courts and prosecutor's offices attached to them in investigating and resolving cases of crimes against sexual life with minor victims.

59 Article 1 paragraph 2 of the Code of Criminal Procedure.

60 Articles 2–13.

61 Volonciu and Uzlău, 2014, pp. 4–38.

62 There are cases, under the conditions expressly provided by law, in which the prosecutor may waive the exercise of the criminal action if, in relation to the concrete elements of the case, there is no public interest in achieving its object. In the cases expressly provided by law, the prosecutor shall initiate and exercise the criminal action after the introduction of the prior complaint of the injured person or after obtaining the authorization or notification of the competent body or after fulfilling another condition provided by law.

Furthermore, *the right to a defense* includes the following: the parties to the main proceedings shall have the right to defend themselves or to be assisted by a lawyer and the right to benefit from the time and facilities necessary for the preparation of the defense, the right to be informed immediately and before being heard regarding the act for which the criminal investigation is carried out and its legal classification, the right to be informed immediately of the act for which the criminal action against them was initiated and its legal classification, and the right to make no statement.[63]

The principle of respect for human dignity and privacy means that any person who is being prosecuted or tried shall be treated with respect for human dignity; respect for privacy, inviolability of the home, and secrecy of correspondence are guaranteed. In a democratic society, restriction on the exercise of these rights is permitted only in accordance with the law and if it is necessary.

Other principles regard the official language and the right to an interpreter as well as the application of the criminal procedural law in time and space to the acts performed and to the measures ordered on Romanian territory, with the exceptions provided by law. In criminal proceedings, criminal procedural law shall apply to the acts performed and the measures ordered, beginning from the moment of its entry into force until the moment of ending its force, except for the situations provided for in the transitional provisions.

3.2. Stages of criminal procedure

The stages of the criminal procedure correspond to the different functions. The judicial functions are exercised ex officio, unless, by law, it is otherwise provided for. As a general rule, in carrying out the same criminal trial, the exercise of a judicial function is incompatible with the exercise of another judicial function.

The criminal investigation is carried out by the prosecutor and the criminal investigation bodies, which collect the evidence necessary to ascertain whether there are grounds for prosecution.

During the phase of carrying out the criminal investigation, the function of disposition over the fundamental rights and freedoms of the person is exercised by the special appointed judge of rights and liberties. The judge appointed with attributions in this respect shall decide on the acts and measures within the criminal investigation that restrict the fundamental rights and freedoms of the person, except for in the situations provided for by law.

After completing the investigation, the prosecutor draws up the indictment (prosecution act) that is sent to court so that the judge of the preliminary chamber can rule on the legality of the act of summons and the evidence on which it is based as well as on the legality of the solutions of non-trial in accordance with the law.

After confirming the prosecution (indictment) act from legality standpoint, the actual criminal trial phase begins. This phase is carried out by the court with legally constituted panels.

63 Volonciu and Uzlău, 2014, pp. 4–38.

The Preliminary Chamber was subject to a great deal of debate in the doctrine and issued contradictory decisions in practice. The Preliminary Chamber was a novelty in our criminal procedure; thus, naturally, its features caused substantial debate.[64]

The object of the preliminary chamber procedure is the verification of the legality of the notification of the court as well as of the administration of the evidence or of the execution of the acts by the criminal investigation bodies.

Regarding the Preliminary Chamber proceedings, the Constitutional Court of Romania[65] ruled that the legislative solution contained in Article 345 paragraph (1) of the Code of Criminal Procedure, which does not allow the judge of the preliminary chamber, in resolving the requests and exceptions formulated or the exceptions raised ex officio, to administer other means of proof other than "any new documents presented," is unconstitutional.

Furthermore, upon request or ex officio, the judge of the preliminary chamber shall rule on the taking, maintenance, replacement, revocation, or termination of preventive measures. In cases in which a preventive measure has been ordered against the defendant, the judge of the preliminary chamber of the court made notification using the indictment act.

This provision was also challenged, and the Constitutional Court admitted the exception of unconstitutionality of the provisions of Article 348 paragraph (2) and found that the phrase "or, as the case may be, the judge of the preliminary chamber of the hierarchically superior court or the competent panel of the High Court of Cassation and Justice, invested with resolving the appeal" in their content was unconstitutional.

Other provisions that were challenged immediately upon adoption of the new code concern the procedure in the preliminary chamber, which previously had taken place in the council chamber without the participation of the parties and the prosecutor, and the judge decided on the requests or exceptions invoked under the same conditions.

Another provision that was challenged refers to the fact that any exceptions raised ex officio or the prosecutor's response to the exceptions raised were not communicated to the defendant. In practice, the person being trialed was deprived of hearing the possible exceptions raised ex officio or the prosecution's opinion of the exceptions raised by the parties or ex officio. Instead, all of the exceptions raised in the case were communicated to the prosecutor allow them to express their point of view.[66] The effect of this decision by the Constitutional Court was that the debates and the ruling in the preliminary chamber or on appeal, which account for nearly the entire procedure,

64 Șandru and Mareș, 2018; Stan, 2016; Voicu and Atasiei, 2014, p. 885; Zarafiu, 2017, p. 59.

65 Decision no. 802/2017, available at: https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_802_2017.pdf (Accessed: 05 March 2022).

66 Decision no. 641/2014, available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/163600 (Accessed: 05 March 2022).

became subject to the general procedural rules, which respect the three principles of fairness of the procedure: orality, publicity, and adversarial proceedings.[67]

3.3. Possibilities for diversion

The prosecutor has the option to waive the criminal investigation when there is no public interest for its continuation.[68]

The waiver of criminal prosecution may be applied in the case of offenses for which the law provides for the penalty of a fine or imprisonment for a maximum of seven years. The prosecutor may waive the criminal prosecution when they find that there is no public interest in prosecuting.[69]

The public interest is analyzed in relation to the content of the deed and the concrete circumstances of committing the deed; the manner and means of committing the act; purpose pursued; the consequences produced or that could have been produced by committing the crime; the efforts of the criminal investigation bodies necessary for the development of the criminal process in relation to the gravity of the deed and to the time elapsed from the date of its commission; the procedural attitude of the injured person; the existence of a clear disproportion between the expenses that the criminal trial would entail and the gravity of the consequences produced or that could have been produced by committing the crime; when the perpetrator is known, the character of the suspect or the defendant, the conduct prior to the crime, the attitude of the suspect or defendant after the crime, and their effort to mitigate or reduce the consequences of the crime.

It is not possible to waive criminal prosecution for crimes that resulted in the death of the victim.

The prosecutor may, after consultation with the suspect or defendant, order that they perform one or more of the obligations under the law outlined below.

3.4. Significant changes to sentencing practices

According to Article 349 of the Code of Criminal Procedure, the court resolves the case brought before the court with the guarantee of respecting the rights of the procedural subjects and ensuring the administration of evidence for the complete clarification of the circumstances of the case to determine the truth in full compliance with the law.

The court can resolve the case only based on the evidence administered in the criminal investigation phase if the defendant requests this and fully acknowledges the facts retained in their charge and if the court considers that the evidence is sufficient to determine the truth and fair settlement of a case in which the criminal action concerns an offense punishable by life imprisonment.

67 Chiriță, no date; Decision 599/2014, available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/163597 (Accessed: 05 March 2022).

68 Article 314 paragraph 1 letter "b" of the Code of Criminal Procedure (CoCP).

69 Article 318 CoCP.

Furthermore, the principles of orality, directness, and, contradictorily, publicity of the court hearing are enriched within the criminal procedure law.

Given the space limitations of this article, it is critical to highlight a change of significance importance. Before last year, the decisions ruled by the courts were issued in short (at the moment), and then after a period of time, those decisions were fully motivated, and these full decisions were sent to the parties. Practically speaking, the criminal sentence was enforced and executed before the parties (the convicted person, the injured party, the prosecutor, etc.) were informed of the reasoning behind the court's decision.

The Constitutional Court admitted the constitutional exception and ruled that the provisions in the Code of Criminal Procedure that allow the sentence to be enforced before publishing or communicating the reasoning behind the sentence were unconstitutional: "Therefore, the Court finds that the drafting of the judgment by which the case is settled by the first court, respectively of the judgment by which the court rules on the appeal (reasoning in fact and in law) after the ruling of the minute (solution) in question, 'within 30 days of the ruling' or after a period of time which may well exceed the said time limit, the person convicted shall be deprived of the guarantees of the performance of the act of justice, prejudice the right of access to court and the right to a trial fair. At the same time, the Court finds that the enforcement of a final judgment prior to its factual and legal reasons is contrary to the constitutional and conventional provisions on individual liberty and security of person and to those who uphold human dignity and justice as supreme values in the state of law."[70]

In this case, the provisions of the code were changed, and Article 406 of the Code of Criminal Procedure, in its present version, stipulates that the judgment must be drafted at the time of its delivery.

4. Main features of the execution of sanctions

4.1. General principles: The aim of penitentiary law

The execution of sentences and custodial measures is carried out in accordance with the provisions of the Criminal Code, the Code of Criminal Procedure, and Law no 254/2013,[71] bearing in mind that the purpose of the execution of sentences and educational measures exercising the deprivation of liberty is to prevent the commission of new crimes.

The execution of sentences and educational measures exercising the deprivation of liberty is aimed at forming an acceptable attitude toward the rule of law, the rules of social coexistence, and work to facilitate detainees' and inmates' reintegration into society.

70 Decision no. 233/2021, available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/242296 (Accessed: 05 March 2022).

71 Published in the Official Gazette 514 on August 14, 2013.

Regarding the execution of sanctions, the following principles are also taken into account: punishments and custodial measures are executed in conditions that ensure the respect of human dignity; subjecting any person serving a sentence or other measure of deprivation of liberty to torture, inhuman or degrading treatment, or other ill-treatment is forbidden; discrimination during the execution of sentences and custodial measures is prohibited; the exercise of the rights of detainees, except for those who have been prohibited according to the law, by the final conviction as well as those the non-exercise or restricted exercise of which results inherently from the deprivation of liberty or for reasons of maintaining security of detention.

According to Article 8 and 9 of Law no. 254/2013, one or more judges are appointed every year as designated judges for supervision of the deprivation of liberty.

4.2. The prison system

The penalties of life imprisonment and imprisonment are to be served in designated places called penitentiaries. The penitentiaries are established by a government decision, have legal personality, and are subordinate to the National Administration of Penitentiaries.

The penitentiary in which the convicted person executes their custodial sentence shall be established by the National Administration of Penitentiaries and should be located as close as possible to the convicted person's place of residence, considering the execution regime, the security measures to be taken, their identified social reintegration needs, their sex, and their age.[72]

The prison system also includes special penitentiaries: penitentiaries for young people, penitentiaries for women, and hospital penitentiaries.

4.3. The main characteristics of the regulation

The general conditions include rules related to the security of detention, the utilization of handcuffs and other restriction devices, and other rules with the purpose on ensuring the carrying out of the sentence and avoiding danger for the convicts, the personnel working in the penitentiary, and society.

For each convicted person, a certain regime for the execution of custodial sentences shall be established by the commission responsible for establishing, individualizing, and changing the regime of the execution of custodial sentences within the penitentiary, respecting fundamental human rights and the criteria set out by Article 39 of Law 254/2013. The regime of execution includes the set of rules underlying the execution of custodial sentences and is based on the progressive and regressive systems (the convicted persons passing from one regime to another under the conditions provided for by the present law).

72 Decision no. 15/2018 of the High Court of Cassation and Justice: "The competent court the place of detention is at the date of the application, regardless of whether the place of detention is represented by the initially established penitentiary or by the penitentiary established by the definitive or temporary transfer of the convicted person." Available at: https://www.iccj.ro/2018/09/17/decizia-nr-15-din-17-septembrie-2018/ (Accessed: 5 March 2022).

The regimes for the execution of custodial sentences are differentiated in relation to the degree of restriction of convicted persons' freedom of movement, the manner of granting rights and carrying out activities, and the conditions of detention.

There are four types of regimes for the execution of custodial sentences: a) Maximum security regime[73] – in the case of an imprisonment sentence of more than 13 years as well as for those who pose a risk to the security of the penitentiary b) Closed regime[74] – in the case of an imprisonment sentence of more than three but not exceeding 13 years as well as for detainees who are hospitalized in penitentiary -hospitals and the infirmaries c) The semi-open regime[75] – shall initially apply to persons sentenced to imprisonment of more than one but not exceeding three years d) The open regime[76] – initially applies to persons sentenced to imprisonment for a maximum of one year.

According to Article 42 of Law 254/2013, during the execution of their sentence, convicted young people are included in special educational programs as well as provided psychological and social assistance, depending on their age and personality.[77] These special programs provided in paragraph 1 are carried out by the staff of the education and psychosocial assistance services within the penitentiaries with the participation of probation counselors, volunteers, associations, and foundations as well as other representatives of civil society. When the convicted young people are transferred to an adult penitentiary, the education and psychosocial assistance needs of the convicted person are reassessed.

In addition to the penitentiary system, there is a system of educational centers for underage (juvenile) convicted persons. Generally, the principles mentioned above shall apply mutatis mutandis to the implementation of custodial educational measures depriving of liberty.

The execution of educational measures depriving of liberty is aimed at the reintegration into society of the interned persons and their accountability in regard to assuming their own actions and as well as preventing the commission of new crimes. The educational measures of deprivation of liberty are executed in conditions that do not restrict the exercise of the right to privacy more than is inherent in their execution.[78]

These sentences are enforced either in an educational center or in a detention center.

During the execution of the educational measures, the maintenance and development of the inmate's ties with the family and the community are ensured as is their

73 Article 36 of Law 254/2013.

74 Article 37.

75 Article 38.

76 Article 39.

77 For the purposes of this law, convicted persons who have not reached the age of 21 are considered young.

78 Article 135 of Law 254/2013.

involvement in recuperative approaches adapted to their psychosomatic particularities and personal development needs.

Imprisoned persons receive protection and assistance in educational, professional, psychological, social, medical, and physical terms, depending on age, sex, and personality and in the interest of personal development provided by specialized personnel.

4.4. Educational, reintegration, and resocialization tools

Chapter VII of Law 254/2013 regulates the educational activities, psychological and social assistance, school training, university education, and vocational training of convicted persons.[79]

A convicted person may be released on parole before the full execution of their custodial sentence if they meet the conditions provided for in Article 99 or Article 100 of the Criminal Code. The part of the sentence duration that is considered to have been executed based on the work performed and/or the school training and professional training is shorter than the period actually spent in jail.[80]

Convicted persons who are well behaved and who have made the necessary efforts in the work performed or in the activities of education; moral-religious, cultural, therapeutic, psychological counseling, and social assistance; and school and vocational training can be awarded certain rewards based on the procedure established by the decision of the Director General of the National Administration of Penitentiaries.

Moreover, in the case of violation of the rules of the detention place, certain disciplinary sanctions can be imposed following the procedure regulated by law.

Social reintegration activities and programs in the case of underage convicted persons is destined for their reintegration and social responsibility. The educational, psychological, and social assistance specific to educational and detention centers is a structured set of programs and activities that offers the inmate the opportunity to acquire skills that lead to the adoption of constructive, autonomous, and responsible behavior in the community.

Educational, psychological, and social assistance includes the following components: school training, vocational guidance and training, educational activities, psychological and social assistance, moral-religious, individual, and group activities, as well as activities to maintain an active lifestyle.

Furthermore, the educational center, respectively the detention center, submits a personalized social report to the County Agency for Employment of the administrative-territorial unit in which the interned person has their domicile for a person who has three months remaining until the fulfillment of the term, at which point they acquire a vocation and can be released on probation.

79 Articles 89–93 of Law 254/2013.

80 As a number of convicts have published so called scientific papers and unjustifiably obtained the benefit of an early release, the legislator had to intervene, and Article 96 index 1 was introduced, regulating the procedure for the elaboration of published scientific papers or patented inventions.

Law 252/2013 on the organization and operation of the probation system must also be mentioned here.[81] The main duties of the probation counselors are set by Article 32 of Law 252/2013: perform the evaluation of the defendants, of the minors in the execution of an educational measure, and of the supervised persons ex officio or at the request of the judicial bodies according to the law; assist the court in the process of individualization of punishments and educational measures; coordinate the process of supervising the observance of the measures and the execution of the obligations established in the task of the supervised persons ordered by the court; coordinate the process of supervising the observance of one of the following non-custodial educational measures: civic training internship, supervision, weekend recording, and daily assistance; and coordinate the execution of a fine through performing unpaid work for the benefit of the community.

5. Comparison with relevant EU documents and main international trends

European legislation and practice influenced the evolution of the legislative framework in Romania. Particularly in regard to Criminal Law, the jurisprudence of the ECHR and, later, the process of Romania's integration of into the European Union substantially impacted both substantive criminal law provisions and criminal procedure regulations.

For the purpose of the present paper, I chose to present three such aspects, as outlined below.

First, I must remind the reader that the process of harmonization with European documents and jurisprudence was a sinuous process with many obstacles, particularly those of a subjective nature. Strictly speaking, from the perspective of national sovereignty, the reluctance was understandably, but in retrospect, the progress of our penal legislation and procedure can be seen. Nevertheless, the Romanian experience did show that even European practice and regulations could be turned around and used to undermine the rule of law.

5.1. Extended confiscation

Extended confiscation is among the penal sanctions under the category of safety measures.[82] A new institution for the Romanian criminal law system, namely the institution of extended confiscation, was introduced by Law no. 63/2012 for the amendment and completion of the Criminal Code of Romania and Law no. 286/2009 on the Criminal Code, transposing the Decision Council Framework Decision 2005/212 / JHA of February 24, 2005, on confiscation of products, tools, and goods related to the crime, as well as in Article 118 index 2 of the Criminal Code of 1968 and Article 112 index1 of Law no. 286/2009 on the Criminal Code.

81 Official Gazette 512 from August 14, 2013.
82 Hotca, 2012; Streteanu, 2012; Gorunescu and Toader, 2012.

These provisions were challenged as being incompatible with the Constitution of Romania based on decisions by the Constitutional Court on the texts contained in the previous Criminal Code[83] as well as on the texts contained in the Criminal Law Code in force[84]. These decisions stated that these legal provisions are compliant with the Fundamental Law. However, the Constitutional Court ruled that the extended confiscation security measure in the Criminal Code does not apply to property (assets) acquired before the entry into force of Law no. 63/2012.

Recently, in 2020, the next step was Law no. 228/2020,[85] which was adopted due to the need to transpose Directive 2014/42/EU of the European Parliament and of the Council of April 3, 2014, on freezing and confiscating instruments and proceeds of crime committed in the European Union. The main changes were as follows: the condition of a sentence of four years of imprisonment; extended confiscation may also be ordered on assets transferred to third parties if those parties knew or should have known that the purpose of the transfer was to avoid confiscation; and in the case of assets that may be subject to special or extended confiscation, the prosecutor shall take precautionary measures to avoid concealment, destruction, alienation, or evasion of the pursuit of such property.

5.2. The problem of the ratio of the prison population

In its jurisprudence, the ECHR sanctioned Romania for unsuitable conditions of detention, the reference moment being represented by the pilot decision in "Rezmiveş and others case vs. Romania."[86]

To respond to this decision and to address the problem of overcrowding in the penitentiary system, Law no. 169 of July 14, 2017, was adopted for the purpose of the amendment and completion of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judiciary during criminal proceedings.[87]

The newly introduced Article 55 index 1 regulated the "Compensation in case of improper accommodation"[88]: (1) The calculation of the sentence actually executed shall take into account, regardless of the regime of execution of the sentence, as a compensatory measure, the execution of the sentence in improper conditions, in which case, for each period of 30 days executed in improper conditions, even if they are not consecutive, six additional days of the sentence applied shall be considered executed.

Intense debate surrounded this solution, as a significant number of convicted persons were released, and some did commit offenses after being released from

83 Decision no. 356/2014, published in the Official Gazette no. 691 on September 22, 2014; for details, please see Hotca, 2015.

84 Decision no. 11/2015, Published in the Official Gazette no. 102 on February 9, 2015.

85 Law no. 228 of November 2, 2020, published in the Official Gazette no. 1019 on November 2, 2020.

86 Pronounced by the ECHR on April 27, 2017; available at: https://www.juridice.ro/507211/cedo-condamnare-impotriva-romaniei-25-aprilie-201/7-decizia-pilot-ref-situatia-din-penitenciare-prof-univ-dr-iulia-motoc-membru-completul-de-judecata.html (Accessed: 5 March 2022).

87 Published in the Official Gazette no. 571 on July 18, 2017.

88 Law no. 169 of July 14, 2017

prison.[89] The essence of the problem was not solved: new structures to detain convicted persons were never even planned to be build, nor were specific, targeted measures to counter recidivism taken.

Later, in its jurisprudence, the ECHR ruled that the compensatory remedy under Romanian law provided adequate and appropriate redress for unsatisfactory prison conditions (between July 2012 and December 2019).[90] Law no 169/2017 was repealed by Law 240/2019.

5.3. Dispute of Constitutional Court – National courts – EU law

To understand the implications of such disputes as those regarding criminal justice in Romania, two decisions of the Constitutional Court of Romania must first be considered.[91]

Decision no. 51 of February 16, 2016, regarding the exception of unconstitutionality of the provisions of Article 142 paragraph (1) from the Code of Criminal Procedure[92] states the following: The court *"does admit the exception of unconstitutionality (…) and finds that the expression 'or by other specialized bodies of the state' from the provisions of article 142 paragraph (1) from the Criminal Procedure Code is unconstitutional."*

Decision no. 302 of May 4, 2017, regarding the exception of unconstitutionality of the provisions of Article 281 paragraph (1) lit. b) of the Code of Criminal Procedure[93] *"Admits the exception of unconstitutionality raised by (…) and notes that the legislative solution contained in the provisions of article 281 paragraph (1) lit. b) of the Code of criminal procedure, which does not regulate in the category of absolute nullities the violation of the provisions regarding the material competence and according to the person's quality of the criminal investigation body, is unconstitutional."*

Furthermore, the Constitutional Court ruled by decision no. 26/2019[94] that there is legal conflict of constitutional nature between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, the Parliament of Romania,

89 During the period of October 19, 2017, to June 6, 2019, a total of 19,849 persons were released based on compensatory appeal. Regarding recidivism, 39 rapists out of the total of 566 detainees convicted of rape who were released based on the compensatory appeal reoffended; 12 detainees convicted of aggravated murder, seven detainees convicted of child trafficking, and 186 convicted of robbery reoffended. Moreover, during this period, a total of 1,299 persons were re-arrested; Grigore, 2019.

90 Motions No. 14224/15 and 50977/15, Gheorghe-Marius Dîrjan against Romania and Marian-Valentin Ștefan v. Romania, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-202610%22] (Accessed: 5 March 2022).

91 After the enforcement of the new codes, the Constitutional Court of Romania became an actual "negative" legislator, admitting over 70 unconstitutionality exceptions against various provisions on the nature of criminal law and criminal procedure.

92 Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/176576 (Accessed: 5 March 2022).

93 Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/191291 (Accessed: 5 March 2022).

94 Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/211779 (Accessed 5 March 2022).

the High Court of Cassation and Justice and the other courts, mainly because of the involvment of secret (inteligence) services in the criminal investigation, without having the legal compentence and atribution as regarding criminal investigation and prosecution.

Because of these decisions, recordings made by the Romanian Intelligence Service were annulled as evidence and were removed from the respective files, especially in cases in which the mandate to create those recordings was enforced by the technical service of the Romanian Intelligence Service and not by the police.

According to Article 147 paragraph (4) of the Constitution, "the decisions of the Constitutional Court are and remain generally binding" – they are mandatory for the general public and courts, and when they are not observed, the magistrates can be subject to disciplinary action.

In this context, several notifications were sent to the European Court of Justice by a number of judges from Romania, asking, essentially, how to position themselves in relation to the decisions of the Constitutional Court and how the dispute can be resolved.

The ECJ ruled in connected cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19[95] in the direction of reassuring the supremacy of EU law[96], affirming the necessity of an independent constitutional court and that EU law must be interpreted as precluding a national rule or practice according to which national courts governed by common law are bound by the decisions of the national constitutional court independent of that constitutional court.[97]

The dispute has not been resolved entirely at this time, as the Constitutional Court issued a press communicate[98] re-affirming the generally binding nature of its decisions.

In my opinion, the solution would be that the High Court of Cassation and Justice should issue a decision regarding the interpretation of the law, resolving the dispute. Regardless, the decisions in the casefiles pending trial in lower courts will ultimately be challenged in the highest court; thus, resolving the dispute will be within its competence.

95 Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0357 2117 79 (Accessed: 5 March 2022).

96 Patrăuș, 2021, p. 76.

97 "Articles 2 and 19 (1), second subparagraph, TEU, and Decision 2006/928 must be interpreted as not precluding national rules or practice according to which decisions of the national constitutional court are binding on the courts of common law, provided that that national law guarantees the independence of the said constitutional court in particular from the legislative and executive powers as required by those provisions. Instead, those provisions of the EU Treaty and that decision must be interpreted as precluding a national regulation according to which any failure to comply with the decisions of the national constitutional court by ordinary national courts is liable to disciplinary action." "The principle of the supremacy of European Union law must be interpreted as precluding a national rule or practice according to which national courts governed by common law are bound by the decisions of the national constitutional court and may not, therefore for the risk of disciplinary ex officio the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to the second subparagraph of Article 19 (1) TEU, Article 325 (1) TFEU or Decision 2006/928".

98 Available at: https://www.ccr.ro/2021/12/23/ (Accessed 5 March 2022).

6. Conclusion

Criminal Justice in Romania took certain important steps toward modern justice. The pressure from European practices, bodies, and regulations was constant and pushed politicians to initiate reforms. The enforcement of the new codes was a major step; however, the process of modernizing criminal justice should continue.

In particular, toward implementing practical solutions there is an increase of using new technologies in administering criminal justice, in investigation, and in research and documentation, in the process of judgement and executing the sentences. However, technology works in our favor and is not a replacement for the human factor. Justice should remain human-centered and dictated by human decision making.

Romania has many similarities with the other countries in Central and Eastern Europe, most being self-evident as they arise from the "soviet era." State-centered and public property-oriented codes are now a modern instrument of criminal justice. Carrying out this process is not easy.

One of the first issues that comes to mind when speaking about criminal justice in Romania is the indecision caused by the political factor. For example, we ratified the ECHR in 1994, and regarding the criminal justice aspects, we began observing the regulations stipulated in the ECHR in 2003; the indecision regarding protecting minors and family relations and that regarding properly regulating duty offenses since the aforementioned decision of unconstitutionality in 2016 (six years before the writing of this article). Another peculiar aspect is the fact that the Institute of Criminology was reinstated only a few years ago (in 2018).

Moreover, regarding the criminal procedure, although it is faster than 10 years ago, criminal investigation and criminal trials often exceeding a reasonable timeframe.[99]

I cannot conclude this paper without reminding the reader of the situation of minors, who are subject to several offenses – from sexual offenses to trafficking and even violence against a family member. A recent report by the Superior Council of Magistrates acknowledged the problem; however, there remains more to be done.

Essentially, criminal justice lacks a long-term policy vision; every government wants to shape Criminal Law and Criminal Procedure according to its own interests, and the counterbalance among the power of the states does not yet function efficiently.

99 Gherasim, 2020.

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