A BRIEF VIEW ON THE HISTORICAL TURNING POINTS OF THE CRIMINAL PROCEDURE

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Abstract

This article takes into account the history of criminal procedure, trying to highlight the moments which determined major changes in the development of this science. It also analyses how the modern criminal trial has been shaped, as a mix between the adversarial and the inquisitorial system. The article also tries to offer an image of the particularities of the two major systems in criminal procedure, namely the common-law system and the continental, Romano-Germanic law system. As the latest decades have brought in an unprecedented emphasis of the human rights, this paper refers to the effect that this situation has on the dynamic development of the criminal trial. Also, the article shortly analyses the situation of Romanian Criminal Procedure, especially in regard to determining the major influences which shaped the present-day Romanian criminal trial.

Key words: Criminal Procedure, criminal trial, adversarial system, inquisitorial system, human rights

Criminal procedure has developed alongside criminal law, as a way to ensure the implementation of criminal law. Although both criminal procedure and criminal law have evolved through time, each of them followed their own specific paths of evolution.

The roots of criminal procedure are lost in time. One of the earliest mention of a procedure which loosely resembles to what we call in the present-day as criminal procedure is in Homer's Iliad, where Homer depicts a procedure which can be called a criminal trial (Salas D., 1992). The scene presented by Homer is public, taking place in front of a noisy crowd. Thus, this rudimentary process shows a feature which is essential in nowadays criminal trial of accusatorial influence, namely publicity. Also, it takes place in a physical space which is considered sacred and has a circular formed, being shaped by the body of judges, which are positioned in a circle. This emphasises the idea that criminal process has been considered since its early stages as a highly important activity.

Other ancient mentions of a procedure resembling the criminal trial date since Democratic Athens. Here, the judges are citizens which make their judgement in a public space, also gathered in a circular form. Inside the circle, the accuser and the accused, face to face, can sustain their own points of view towards the accusation. The procedure thus takes place in a publicly and verbally manner. The citizens who judge express their will through a vote, and a simple majority was needed. The jurors did not gather in a special room to debate, thus reducing the possibility of influencing each other. Also, it is interesting to emphasize the fact that the number of jurors was very high (from five hundred to one thousand five hundred and one jurors), in order to discourage bribe. Such information about the trial in Democratic Athens has survived also because of the surviving information regarding the trial of Socrates, which took place in the year 399 B.C.E. (Linder D., 2002).

It is interesting to analyse the fact that, in these early forms of criminal trial, the judges or the jurors place themselves in a circle surrounding the accuser and the accused, who were placed in the middle. For sure, the circle form had a practical significance, because it allowed all the judges or the jurors to clearly hear what the parties were saying in their favour. Nevertheless, the circle has also an undoubtedly symbolic value, because it placed the two parties on equally-based positions, since the circle is the symbol of perfection, and therefore the symbol of the triumph of the truth.

This circle which included the accuser and the accused also illustrates a procedural rule, namely the fact that, depending on what the accused had to say, the accuser could turn into the accused, and the accused could become the accuser. This is because the two parties had equal positions in front of the persons who took the

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decision. For example, if less than one hundred jurors pleaded for guilt, the accuser had to pay a fine, thus being culpable of generating judicial expenses (Linder D., 2002).

The following centuries have brought a dramatic change in the shape of the trial. As we shall present below, the circle as a shape which defines the criminal trial is replaced by a more rigid one, namely the triangle.

In the Middle Age, probably under the influence of a procedure active at the end of the Roman Empire, the Catholic Church develops a new form of trial. As opposed to the form of criminal trial presented above, this new trial is characterised by a sharp inequality between the accuser and the accused. Now, the accuser is no longer a simple citizen, at the same level as the accused, but a state institution which, through the persons designated to represent it, brings the accused in front of the judge. Therefore, the accuser can no longer become the accused (Salas D., 1992). This is the inquisitorial trial, which has, as it can easily be observed, a triangular shape. The three main actors (the accuser, the accused, and the judge) occupy perfectly defined positions, and, as we have already mentioned above, the accused is clearly in an inferior position, because the accuser is someone who is especially trained to bring the persons who are suspected of breaking the law in front of the judge.

Nevertheless, although the traditional opinion about the inquisitorial trial is that it has been specifically created to disadvantage the accused and to constantly prove his or her guilt, in fact this is not true. Hypothetically, in the inquisitorial trial, although there is no equality between the accuser and the accused, there is a certain equity. This comes from the fact that the accused has the right to defend himself or herself, and that there must be enough evidence against him or her, in order for a trial in front of a judge to begin. So, theoretically, the inquisitorial trial has been a step forward from the arbitrary of some of the previous procedures used in criminal trials, like the use of ordeals and judicial duel (Theodoru Gr. Gr., 2007). Among the positive effects of the inquisitorial system is the fact that there was an improved chance that the infringements of the law were punished, since there were persons who had as a profession the responsibility to bring to justice the perpetrators of antisocial acts. Also, a positive effect was that, at least formally, the judges could take a decision only on an evidence basis. Furthermore, the decision of the judge could have been appealed in front of other judges (Theodoru Gr. Gr., 2007). It is important to identify the positive features of the inquisitorial system, because this way we can better understand the evolution of the criminal trial, until present-day. In fact, once the society evolved and human rights have begun to be highly praised, it become obvious that denying all that happened in the past is not a solution; rather, we must adopt what has proved to be good, and use it in order to obtain better systems, including as regards the judicial systems.

The problem within the inquisitorial system, at least when used by the Inquisition, was the way this system was applied. The main issue was the existence of a strong preconceived idea towards the guilt of the accused. In order to prove this guilt, the persons leading the trial were ready to use inhumane methods, like torture. This was a result of the narrow view which society generally had through the Middle Age, which created a world full of prejudice.

After the inquisitorial trial has been adopted by secular world (in France, in 1670), some of the harmful procedures of Inquisition have also been taken over. And the secular evolution of this form of the trial did not improve the trial. Although the accused formally had the right to defend, this right was severely impaired by the fact that the act of judging was a procedure which took place in secret, in a written form and non-contradictorily. So, overall, the accused had little chances to fully defend his or her position (Theodoru Gr. Gr., 2007).

The obvious flaws of the inquisitorial system have brought the need of a new type of trial. It was natural that this intentionally improved trial gathered positive aspects of the previous types of criminal trial.

This new form of trial was the mixed criminal trial, which combined elements of the inquisitorial and accusatorial systems. It first appeared in France, being introduced through The Code of Criminal Instruction from 1808. From France, the model of the mixed criminal trial has been adopted by the majority of the modern legislations, including the Romanian legislation. The Romanian Criminal Procedure Code from 1864 established the institutional forms which allowed this mixed type of trial to be enforced (Theodoru Gr. Gr., 2007).

Generally, the mixed type of trial keeps some inquisitorial features in the phase that precedes the trial in front of the judges, while keeping predominantly accusatorial features during the phase which takes place in front of the judges. This means that, from the inquisitorial system, the mixed type of trial takes over the fact that a especially trained person must inform the court about an offence that has been done, only after having gathered enough evidence to prove the

necessity to inform the court. The procedure in this preliminary phase is not public, it takes place in written forms and generally goes on non-contradictorily, just like the inquisitorial system. Still, it allows the accused to defend his or her position, and the modern form of trial ensures strong guarantees that the right of the accused to defend his or her position are properly respected. The phase which takes place in front of the judges has a pronounced accusatorial aspect, resembling somewhat the trials in Ancient Greece, which we have presented above. Thus, the accuser and the accused stand in front of the persons who will take the decision, namely the judge. The accused and the prosecutor have equal positions in front of the judge, although they cannot change their positions, as they could in Ancient Greece. The procedure takes place in front of the judges publicly, orally, and contradictorily.

Having the structure presented above, the mixed type of criminal trial combines the best features of both the accusatorial and the inquisitorial trial, in the struggle to ensure the best way to enforce criminal law, while offering the accused a real possibility to defend his or her position.

The last decades have brought in a large emphasis of the need to respect human rights, including during criminal trial, especially during the phase of criminal prosecution. The unprecedented attention towards human rights manifested into the criminal trial has led some authors to consider that there is a fourth form of criminal trial, namely the social defensive trial (Merle R., Vitu A., 1967 and Ancel M., 1971, *apud* Theodoru Gr. Gr., 2007).

The importance of respecting the rights of the defendant in a criminal trial has been sustained by a number of international treaties which expressly or indirectly stated some very important rules regarding the activity performed by authorities during a criminal trial. Such treaties are: The Universal Declaration of Human Rights (proclaimed by the United Nations General Assembly on the 10th of December 1948); The European Convention on Human Rights (adopted on the 4th of November 1950); The International Covenant on Civil and Political Rights (adopted by the United Nations General Assembly on the 16th of December 1966); The Charter of Paris for a New Europe (adopted on the 21st of November 1990). All of these treaties are ratified by Romania. (Theodoru Gr. Gr., 2007).

We also want to mention the adoption of the Manifesto on European Criminal Procedure Law at Brussels, on the 12th of November 2013, which contains recommendations regarding the principles of criminal procedure which should be taken into account by the legislators in the criminal procedure field (Panainte R., 2015).

For the states which are members of the Council of Europe, the protection of human rights, including during a criminal trial, is ensured by the European Court of Human Rights, which has the power to convict the states who infringe The European Convention on Human Rights.

Criminal procedure has begun to develop strong relations with constitutional law, as some important procedural rules are provided by the Constitution, for example in Romania. This way, criminal procedure resembles criminal law, which has developed lately a significant relation with constitutional law (Iftimiei A., 2013; Iftimiei A., 2012).

Today, a great number of crimes affect simultaneously many states. In order to act effectively against this sort of crimes, states have understood that they must cooperate at an international level. Although it is hard to create an international common criminal law or an international common criminal procedure law, it is important to adopt procedures that allow states to punish the offenders who act at an international level (Urda O. A., 2012).

The aspects presented above show the turning points that shaped the form of the criminal procedure, until it reached the form that we recognize today as the modern criminal trial.

Romania has a mixed type of criminal trial, and it is in a continuous struggle to improve criminal procedure. Although it has faced numerous problems in the past (Popescu A.I., 2008), the future should bring a positive evolution. It is important to mention that, in 2014, Romania adopted a New Criminal Procedure Code (the Law nr. 135/2010), as it tries to adopt a more effective system.

MATERIAL AND METHOD

The analysis that we have undertaken focuses on the criminal trial and its development, from origins until present-day. The reason for such an approach comes from the high importance that the criminal law, and also the criminal procedure has in modern times, as society faces an intricate system of crimes. It is therefore useful to understand the mechanisms behind the criminal trial, in order to improve criminal procedure. And a good understanding of these mechanisms can only be reached through an analysis from a historical perspective.

The methods we have used are those usually used in juridical theoretical reasoning, namely: deductive and inductive analysis, comparative method and analytical method. Thus, we have consulted various bibliographic resources, in order to

find information concerning the matter that we analyse. After obtaining the information that we needed, we have applied the transversal analysis and the longitudinal analysis. The transversal analysis has the ability to reveal us the situation existing at a certain point in time. This allowed us to find out whether the criminal procedure which applied at a specific moment had good or bad effects. The longitudinal method allows us to analyse the evolution of the criminal procedure and to compare the effects of different systems of criminal trial which existed at different moments in time.

As a result of applying these methods, we have reached a better understanding of criminal procedure and of its historical evolution.

RESULTS AND DISCUSSIONS

The results of our quest are focused on the idea that criminal procedure has had a continuous transformation, beginning with the first attested form of an incipient criminal procedure. This idea of evolution has accompanied criminal procedure over the centuries. Of course, the evolutionary movement appears when we take into account the historic view. This is because certain criminal procedure systems, like the inquisitorial one, have remained unchanged for long periods of time; so, for an observer who lived while the inquisitorial system applied, the system would have seemed very stable.

But, when we analyse the history of criminal procedure at a macroscopic level, we can see that people have essentially searched for ways to make the criminal procedure more effective, in terms of punishing crimes. Also, it is obvious a constant interest in giving the accused the tools to defend himself or herself; this feature exists even in the inquisitorial trial, although the preconceived ideas often made the defence of the accused to be useless.

A distinct feature of the criminal procedure, visible after the World War II, is an increased care for respecting the human rights of the defendant, as provided by international treaties which take this problem into account.

CONCLUSIONS

Historically speaking, the criminal procedure systems have evolved, alongside the evolution of the mankind. This is why the evolution of criminal procedure can be considered a mirror for humanity. Especially in what concerns the human rights, the way that criminal procedure has understood to implement these rights indicates the way that society generally acknowledges human rights. But we believe that criminal procedure has also the potential to create standards, which later influence the way that society sees some issues, like human rights domain. Therefore, it is the responsibility of those who adopt criminal procedure legislation to pay great attention to their work, because they can have a substantial contribution to creating a world where every infringement of the criminal law is punished, but, at the same time, the rights of the defendant and of all parties are fully respected.

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