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ORIGINAL PAPER

The Effects of the State of Emergency/Alert with Regard to the Statute of Limitations for Criminal Liability

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Abstract:
In the Decree no. 195/2020 issued by the President of Romania by which the state of emergency was declared it was shown that in the cases where preventive measures have been taken, the trial is not adjourned. However, due to the restrictions imposed on the postal and passenger transport services, those cases could not be solved and no judicial inquiry could be conducted in the absence of the possibility of producing evidence. The statute of limitations for criminal liability was suspended only in the cases where the course of the criminal proceedings was suspended. Thus, although a period of time elapsed during which the cases could not be resolved, the statute of limitations for criminal liability continued to run, without the judicial bodies being able to order measures to shorten the period of inactivity.

Keywords: *state of emergency; statute of limitations for criminal liability; adjournment; right of defence; trial.*

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The measures ordered during the state of emergency / alert aimed at finding solutions to the problems caused by the pandemic in the administration of justice, but in practice there are situations in which at least one of the parties to the criminal proceedings is harmed.

In this sense, in art.42 paragraph 1 of the Decree no.195 / 2020 issued by the President of Romania by which the state of emergency was established, it was specified that the list of urgent cases whose trial is not suspended, is established by the Management Board of the High Court of Cassation and Justice, respectively the management boards of the courts of appeal. Thus, each court of appeal, through the management board, drew up a list of those cases, but the lists differed according to the criteria taken into account by the members of each board, leading to the same cases be solved only by certain courts. Consequently, there have been situations in which litigants in the same legal situations have received different legal treatment in terms of the length of time for settling cases.

Difficulties also appeared regarding the procedural steps that had to be completed both in criminal proceedings which, according to art. 43 para. 2 of Decree no. 195/2020 issued by the President of Romania, were suspended by law, but also in cases established by the management boards as urgent and their trial was not suspended. Thus, in cases suspended by law, the question has been asked whether the judge must find by a procedural act that, according to the decree, the trial is suspended by law. In some cases, the judge issued a resolution, and in other cases, he ruled that the trial was suspended by law. This procedural act is of particular importance because its preparation removes any doubt as to whether the trial is suspended by law under the presidential decree, or is part of the category of urgent cases on the list prepared by the board of the court, in which the trial activity continues. At the same time, this aspect is important regarding the prescription for criminal liability, given that, according to art. 43 paragraph 8 of Decree no. 195/2020 issued by the President of Romania, the prescription for criminal liability is suspended only in cases where the course of criminal proceedings has been suspended. By drawing up that respective procedural act, both the judicial body and the other participants in the criminal proceedings will know exactly whether or not the course of the prescription for criminal liability has been suspended and will be able to establish the date when the limitation period will expire, so that they take all the steps necessary in order to avoid the solution of termination of the criminal trial for the intervention of the statute of limitation.

Regarding the difference between interruption and suspension, in the doctrine it has been shown that the suspension of the prescription course has a more limited effect than the interruption as it is only a postponement of the prescription course during the existence of the cause of suspension (Papadopol Vasile in Vasiliu Teodor, Pavel Doru, Antoniu George, 1972: 648). On the other hand, regarding the special prescription and the suspension of the course of prescription, several divergent opinions were expressed in the doctrine. Thus, according to one opinion, the special prescription also intervenes in case of suspension of the prescription course, reasoning that otherwise it would be impossible to prescribe (Bulai, 1997:138). According to another opinion, the special prescription concerns exclusively the interruption of the prescription for criminal liability, not its suspension, because, in the current criminal code, the special prescription is expressly provided in the legal provision that regulates the interruption of the prescription course – art.154 para. 4 Criminal Code (Vlăsceanu, Barbu, 2014: 348). There was also an opinion that distinguished between the situation in which the course

of the prescription was suspended throughout the limitation period - in which case the special prescription does not operate, and the situation in which there were only limited suspensions in time - in which case the prescription intervenes when from the addition of the limitation periods elapsed between suspensions the duration of the special limitation period would be reached (Rădulescu, Rosenberg and Tudor, 2005:124-128).

More significant effects occurred for the defendants under a preventive measure, given that there were also cases in which only the legality and validity of the measure was verified, without being able to resolve the merits of the case for various reasons, such as procedural irregularities with the other parties or their inability to appear before the court in the context in which the freedom of movement of persons has been drastically restricted and public transport has ceased to operate.

In such situations, the issue of the expiry of the limitation period arises, given that, in the presidential decree, it was stated that in cases where preventive measures have been taken, the trial is not suspended. However, due to the restrictions imposed on the postal and passenger transport services, those cases could not be solved, nor could a judicial inquiry be carried out in the absence of the possibility of producing the evidence.

On the other hand, according to the decree, the prescription for criminal liability is suspended only in cases where the course of criminal proceedings has been suspended, in which case, in cases where there are defendants against whom preventive measures have been ordered, the limitation period for criminal liability has run during the state of emergency. Thus, although a period of time elapsed during which the cases could not be solved, the limitation period for criminal liability continued to run, without the judicial bodies being able to order measures to shorten the period of inactivity. We could say that the defendant was advantaged to the detriment of the damaged party, because in case the prescription intervenes, the defendant can no longer be convicted and the damaged party can no longer request the defendant be held criminally liable. In such situations, the legislator must find solutions so that the right of the damaged party to request the conviction of the defendant and his obligation to civil-law damages is not limited. In the doctrine, the obligation of the state related to the content of the rights was analysed, in the sense that the "rights of…" presuppose a negative obligation, not to harm them, and "rights to…" require a positive obligation, to adopt effective measures to protect them and to regulate effective procedures by which the damaged parties claim their recovery and compensation for the damages suffered, in case their rights have been violated (Sudre, 2006:185). At the same time, regarding the meaning of the term equity, the doctrine has shown that all participants in criminal proceedings must be on an equal footing, and in order to be achieved, it cannot be separated from the basic idea that all persons who have violated the law must be punished and no innocent should be punished" (Antoniu, Volonciu, Zaharia, 1998:97). Public authorities, regardless of their competences, have the obligation to respect and protect the rights of all participants in criminal proceedings, emphasizing in the doctrine that "the functions assigned to the state are divided, according to the state's traditional theory, into three categories: legislation, administration (including government) and jurisdiction ", but all are ''legal functions, whether they are in the stricter sense of respect of functions of law production and application of law, or they are legal functions in a broader sense, which also includes the function of observing the law." (Kelsen, 2000:348).

The incidence of the provisions of art. 156 paragraph 1 of the Criminal Procedure Code, in the sense of the existence of a circumstance that could not be foreseen or

removed and which makes it impossible to continue the criminal trial could be questioned. However, there are difficulties in establishing with certainty such a circumstance that fulfils all the conditions to be considered *unforeseeable or unavoidable*. In this sense, the doctrine has shown that "The impediment that the causes of suspension imply must be absolute; otherwise (hypothesis in which certain acts of prosecution, trial may be performed) the prescription will run" (Nedelcu Iuliana in Bodoroncea Georgiana, Cioclei Valerian, Kuglay Irina, Lefterache Lavinia Valeria, Manea Teodor, Vasile Francisca-Maria, Zlati George, 2020:595).

En order for these difficulties not to appear in the activity of the judicial bodies, in our opinion, it would have been useful to expressly provide in the decree of the President of Romania declaring the state of emergency and in the Government decision to establish or extend the state of alert that, if the litigants or parties are in institutional quarantine, quarantine at home or isolated at home or are hospitalized, due to the SARS-CoV-2 virus, there is an unavoidable circumstance or, as the case may be, the continuation of the criminal trial. Moreover, such a provision would also be appropriate if the lawyers of the litigants or of the parties are in the situations set out above, provided that they are unable to ensure their substitution. For reasons related to the observance of the right to defense for all litigants, it would be recommended that that regulation not be limited to cases where legal aid is mandatory. On the contrary, in addition to limiting the right to defense, a different situation would be created, without any grounds, for major litigants in cases where no preventive measures have been taken and have as object offenses whose sentence limits do not exceed 5 years.

The incidence of this case of suspension of the course of prescription for criminal liability must be ascertained by the judicial body before which the case is pending, by order of the prosecutor, respectively by resolution of the judge. The judicial body must be aware of the existence of the case of impossibility for the litigant or the lawyer, who is in any of the situations indicated above, to appear. In this regard, it would be necessary for the person concerned to inform the judicial body of the impossibility of appearing, but there may also be situations in which, due to the lack of means of communication or the consequences of SARS-CoV-2 virus infection on the physical condition, he/she cannot send any kind of message. In such cases, the judicial body must be able to verify, as soon as possible, whether there is a case which would lead to the suspension of the limitation period for criminal liability. Thus, the Public Health Departments must have a correct and up-to-date record of persons in institutional quarantine, home quarantine or are isolated at home or are hospitalized, due to the SARS-CoV-2 virus, a record to which the judicial body has access, similar to the access to the Directorate for the Personal Records and Database Management.

If it is found that there is a case of suspension of the prescription for criminal liability, the prosecutor orders the suspension of the criminal prosecution, and the court orders the suspension of the trial, without the need for a forensic expertise according to art. 312 and art. 367 para. 1 Criminal Procedure Code, given that a person can be isolated at home due to the fact that he was in contact with another person infected with the SARS CoV-2 virus. In such cases, the isolated person may not be infected, but may not leave the home in order to avoid any possibility of transmitting the virus to other people.

Against the resolution by which the first instance suspends the trial, the appeal can be exercised, according to art. 367 para. 4 of the Criminal Procedure Code, but the question arises as to how the appeal will be resolved, given that the appellant or another

person who is the main litigant or party in question, cannot travel to the seat of the superior court due to the fact that he is in institutional quarantine, home quarantine, isolated at home or is in hospital. Significant is the fact that art.367 para. 4 and 5 Criminal Procedure Code provides for strict deadlines, in the sense that within 24 hours the appeal can be filed, within 48 hours from the registration of the appeal, the case file must be submitted to the hierarchically superior court, and within 3 days from receiving the file, the appeal is solved. In this context, in our opinion, the appeal can be solved in the absence of the person who is unable to appear, provided that it is legally summoned and legal assistance is provided in cases where such assistance is required by law. If one does not proceed to this solution, given that, according to art. 367 paragraph 5 Criminal Procedure Code, the appeal does not suspend the execution of the resolution ordering the suspension of the trial, it could end up in the situation that until the settlement of the appeal the reason for the suspension no longer subsists and the trial is resumed.

If, when trying the appeal, the appellate court orders the suspension of the trial, the criminal procedural law does not provide for the possibility of formulating an appeal against the resolution of suspension. In this sense, the doctrine has shown that "In the expression of the legislator, by resolution given in the first instance must be understood the judgment rendered by the first instance, a court which, as a rule, does not express through final judgments. *Per a contrario*, when the resolution given regarding the suspension of the trial is ordered not by the first instance, but by the appellate court, it will not be possible to formulate an appeal, in this case being incident, under certain conditions, the interruption of the course of justice" (Andone-Bontaș Amalia, Chiș Ioan-Paul in Udroiu Mihail – coordinator, Constantinescu Victor Horia Dimitrie, Șinc Alexandra Mihaela, Postelnicu Lucreția Albertina, Meceanu Constantin-Cristinel, Chertes Dan Sebastian, Iugan Andrei Viorel, Zlati George, Jderu Claudia, Kuglay Irina, Bulancea Marius Bogdan, Trandafir (Ilie) Andra-Roxana, Tocan Isabelle, Bogdan Sergiu, Răduleţu Sebastian, Slăvoiu Radu, Vasiescu Mihaela, Nedelcu Iuliana, Bodoroncea Georgina, Grădinaru Daniel, Popa Mihai, 2020:1928)

A special situation arises if in the preliminary chamber procedure a case arises which would justify the suspension of the prescription for criminal liability. It could be said that there would be no problem if, in the first stage of the preliminary chamber procedure, the defendant, the other parties or the injured person were in institutional quarantine, quarantine at home, isolated at home or in hospital, because this phase does not require the presence before the judge of the preliminary chamber. Thus, it is taken into account that at this stage, the indictment is served on the defendant, the other parties, the injured person and the defendant is informed of the object of this procedure, the rights provided by law, the term in which, starting with the date of service, they may formulate in writing exceptions and requests regarding the legality aspects regarding the seising of the court, the production of evidence and the performance of acts by the criminal prosecution bodies. However, in our opinion, the right to defense of all participants in criminal proceedings must also be taken into account in such cases, a right which cannot be exercised in the event that a person is hospitalized or isolated at home, given that he/she does not have freedom of movement, he/she cannot meet with the lawyer, he/she cannot go to the court headquarters to study the criminal prosecution file. Moreover, in par. 33 of the considerations of Decision no. 257 / 26.04.2017, the Constitutional Court of Romania pointed out that the right of the civilly liable party to make requests and exceptions to the legality of the seising of the court, the legality of the production of evidence and the performance of acts by criminal prosecution bodies in

the preliminary ruling procedure must be ensured, precisely in order to balance between the relative fundamental rights, namely the right of free access to justice and the right of defense of the injured party who is a civil party, on the one hand, and the right of free access to justice and the right of defense of the civilly responsible party, on the other hand." The jurisprudence of ordinary national courts has established that the introduction of the civilly liable party in criminal proceedings may take place at the latest in the preliminary ruling procedure (Court of Appeal Alba Iulia, Decision no. 561/2019). It was emphasized that the judge of the preliminary chamber has the obligation to inform the injured party who brought a civil action, that he/she has the right to request the introduction of the civilly liable party, and if such a request is made, this party must be summoned in the preliminary ruling procedure (Bucharest Court of Appeal, 1st Criminal Division, Decision no. 398/2019).

Therefore, the preliminary ruling procedure is of particular importance in so far as it has serious consequences for the way in which the trial is to be conducted, given that at this stage the indictment may be returned to the prosecutor's office, evidence may be excluded or it may be sanctioned with the nullity of the criminal prosecution acts.

In this context, the question arises as to what should be done if the suspension of the limitation period for criminal liability in the event of the impossibility of the defendant or other parties or the injured person to exercise their right of defense due to the restriction of freedom of movement or medical conditions caused by the SARS virus - CoV-2.

The criminal procedural law does not provide for the possibility of suspending the preliminary ruling procedure, context in which the preliminary chamber judge, if he finds the incidence of a case of suspension of the prescription for criminal liability, cannot order the suspension of this procedure. In such a case, in our opinion, there would be two solutions: either the amendment of the law in the sense of introducing the possibility of suspending the preliminary ruling procedure, or the preliminary chamber judge, by resolution, finds it impossible to exercise the right of defense by the person in isolation, in a hospital unit, and establishes that the term within which requests and exceptions may be made regarding the legality of the seising of the court, the legality of the production of evidence and of the performance of acts by the criminal prosecution bodies, will start from the date of closing of the proceedings which led to the impossibility of exercising the right of defense. This date will be established by another decision that will be pronounced after checks are performed in the database of the Public Health Department, checks which show that the defendant, the other parties or the injured person or their lawyers are not isolated at home or hospitalized. In this sense, Decision no. 14/2018 of the HCCJ, the Court Panel for solving appeals in the interest of the law, which established that "the term within which the defendant, the injured person and other parties may formulate in writing requests and exceptions regarding the legality of the seising of the court, the legality of the production of evidence and of the performance of acts by the criminal prosecution bodies is a term of recommendation." In the period between the date of the ruling of the judge of the preliminary chamber and the date from which the respective term starts to run, the prescription for criminal liability will be suspended, because during this time the preliminary ruling procedure has stagnated. The question may be raised whether the resolutions of the judge of the preliminary chamber, by which he/she finds that it is impossible to exercise the right of defense, and subsequently sets the date from which the period within which requests and exceptions may be made will start to run may be appealed and if so, what is the time

limit for filing the appeal and what is the date from which it starts to run. Given that those resolutions do not affect the procedural rights of litigants, it could be said that there would be no interest in appealing, but given that the resolutions have effect on the suspension of the limitation period for criminal liability, in our opinion, the prosecutor and the litigants have the right to exercise this remedy. The term within which the appeal can be formulated can be of 3 days from the service of the resolutions, service that will be made, as the case may be, either at the address where the litigant is isolated, or at the hospital where he is hospitalized.

On the other hand, the judge of the preliminary chamber may find that the prescription for criminal liability should not be suspended, even if the defendant or one of the parties or the injured person is unable to exercise his right of defense, considering that it is sufficient to set a longer time limit within which requests and exceptions may be made. In such situations, the defendant has no interest in challenging such a provision of the judge of the preliminary chamber, but the prosecutor, the injured party and the civil party are damaged, provided that the date on which all participants in the criminal proceedings can exercise their right of defense is unknown and the period of inactivity can be very long, during which the term of prescription for criminal liability continues to run. Therefore, in our opinion, the prosecutor or the litigants who consider that their rights have been limited by the resolution of the judge of the preliminary chamber by which the incidence of the case of suspension of the prescription for criminal liability has not been ascertained, have the possibility to file an appeal against that resolution. In this respect, it must also taken into account that, in the context of the global pandemic, during the criminal proceedings, both at first instance and at the court of judicial review, other periods of time may arise in which one or more litigants cannot exercise their right to defense due to the SARS - CoV-2 virus, and by cumulating these periods a long period of inactivity can be reached. Given that the period of inactivity cannot be imputed to the judge or to the other participants in the criminal trial, but it is caused by the spread of the contagious virus, a virus that caused disturbances in all areas of activity, if it had not suspended the prescription for criminal liability, the defendant would have unjustifiably benefited to the detriment of the injured person and the civil party.

In the event that the impossibility of exercising the right of defense by the litigant appears on the date when the court hearing was established in which the debates on the raised requests and exceptions will take place, the question may be asked whether the preliminary chamber judge can resolve requests and exceptions or must set another date.

Given that, according to art. 344 paragraph 2 Criminal Procedure Code, the defendant, the other parties and the injured person may formulate in writing requests and exceptions within the term established by the judge of the preliminary chamber, it could be said that it could take place during the hearing in which the requests and exceptions made in writing are discussed. However, the special importance of the hearing in which the requests and exceptions are debated results from the jurisprudence of the Constitutional Court of Romania, which, in paragraph 57 of Decision no. 641 of 11th of November 2014, showed that: „ With regard to the right to an oral procedure, the Court notes that only in oral proceedings can the process be effectively watched, in the succession of its stages, by the parties. At the same time, the right to an oral procedure also contains the right of the defendant, the civil party and the civilly liable party to be present before the court. This principle ensures direct contact between the judge and the parties, making the exposition of the claims made by the parties respect a certain order

and thus facilitating the correct establishment of the facts." At the same time, the doctrine showed that in that hearing, the judge: „states the exceptions he/she raises ex officio; states the exceptions already raised by the defendant, the injured party, the civil party and the civilly liable party and warn these persons that they may raise such exceptions also at the hearing; (...) may produce evidence to verify the conditions under which the evidence in respect of which exceptions were raised was produced" (Kuglay in Udroiu Mihail et al., 2020:1836).

In this context, we can say that, in case one of the parties or the injured person or their lawyers cannot be present at the hearing established by the judge of the preliminary chamber for debating the requests and exceptions, it is necessary to establish another hearing. However, it is difficult for the judge to know the date on which the cause that determined the impossibility for the litigants or lawyers to appear will end. Therefore, the judge will proceed as in the first phase of the preliminary ruling procedure, finding by resolution the impossibility of exercising the right of defense by the person in isolation or hospitalized in a hospital unit, and the date of the next hearing will be set by another resolution that will be pronounced after, from the verifications performed in the database of the Public Health Department, it results that the defendant, the other parties or the injured person or their lawyers are no longer isolated at home or hospitalized. In the period between the date of the resolution of the judge of the preliminary chamber by which the impossibility of exercising the right of defense is established and the date on which the next hearing in which the requests and exceptions are discussed, the prescription for criminal liability will be suspended. Against the aforementioned resolutions, the prosecutor or the litigants have the right to file an appeal that has the same legal regime as in the case of the resolutions of the first stage of the preliminary ruling procedure, by which the judge ruled on the issues justifying the suspension of the prescription for criminal liability. There is a risk of cases of impossibility to appear before the court due to SARS CoV-2 virus, on the date of settlement of the appeal against those resolutions, but, as I said in the case of appeal against the resolution by which the first instance suspends the case, the appeal can also be solved in the absence of the appellant or the other parties, if they are legally summoned and mandatory legal assistance is provided. If this solution is not accepted, in the context in which the appeal does not suspend the execution of the resolution, it could come up to the situation that until the settlement of the appeal the reason that prevented the preliminary ruling procedure in the first instance no longer exists and the procedure is resumed.

Instead, in the case of the appeal formulated according to art. 347 Criminal Procedure Code against the resolutions provided in art. 346 para.1-4[2] Criminal Procedure Code by which the judge of the preliminary chamber of the first instance settles the requests and exceptions, the appellant and the other parties must be able to appear before the court of judicial review. Although, according to art. 347 para. 4 Criminal Procedure Code, in solving the appeal no new requests or exceptions can be formulated or raised ex officio, but only cases of absolute nullity, this procedural phase has a special importance given that the resolution of the preliminary chamber judge of the first instance may be amended. In this sense it is significant the fact that by solving the appeal, the panel of the preliminary chamber of the court of judicial review makes its own analysis of the issues that form the object of the preliminary chamber, even if the judge of the preliminary chamber of the first instance, by the contested resolution, ruled on these aspects. Moreover, according to art. 425[1] Criminal Procedure Code, there is the

possibility of annuling the contested resolution and referring the case back if the summons was not made according to the legal provisions. In judicial practice, there were judgments by which the case was referred back in the situation where the judge of the first instance did not solve the object of the preliminary chamber in the sense that "he/she rejected only the defendant's request on referring the case back to the Prosecutor's Office, without ruling on the legality of the seising of the court, the production of evidence and criminal prosecutions acts and without ordering the commencement of the trial" (Bucharest Court of Appeal, 2nd Criminal Division, Resolution no. 292 of 19th of March 2015). At the same time, in the national jurisprudence it was appreciated that, although the criminal procedural law does not stipulate that the lack of grounds of the judgment represents a reason for its annulment and the referral of the case, through the direct application of art. 6 of the ECHR, the case must be retried by the first instance. (Court of Appeal Craiova, Criminal Judgment no.178/2018 of 13th of February 2018 rendered in the file no. 2366/201/2015).

Therefore, both the appellant and the other parties must be able to exercise their rights of defense effectively and in the event that, due to the SARS-CoV-2 virus, they are unable to travel to the seat of the court of judicial review, the appeal cannot be solved. In such situations, how could the court panel invested with the settlement of the appeal proceed? Given that the criminal procedural law does not provide for the possibility of suspending the case in this procedural phase, the court panel will find by resolution the existence of the reason that prevents the parties from exercising their right to defense, setting a new time limit for solving the appeal less than 14 days to allow a sufficiently long period for the disappearance of the cause that led to the impossibility for the parties to appear before the court panel of the preliminary chamber. During the period between the two audience dates, the course of the prescription for criminal liability will be suspended.

If, in the case, a preventive measure has been ordered against the defendant, but during the preliminary ruling procedure or during the trial, he may not appear before the court at the hearing where the legality and validity of the preventive measure must be verified, one will proceed according to art. 207 para. 3 Criminal Procedure Code, respectively art. 208 para.3 Criminal Procedure Code, which refer to the provisions of art.235 para. 4 Criminal Procedure Code according to which if the defendant is hospitalized and due to his health he cannot appear before the judge, or due to force majeure or state of necessity travelling is not possible, the verification of the preventive measure will be done in the absence of the defendant, with his summoning and in the presence of the lawyer. The text of the law regulates the situation in which the defendant is hospitalized and due to health problems he cannot be present before the court, but there may be situations in which the defendant is not infected with SARS - CoV-2 virus, but is in institutional quarantine, quarantine at home or isolated at home, either because he has travelled to a foreign country where the virus infection rate is very high, or because he is in direct contact with an infected person. In our opinion, such situations represent cases of force majeure, being produced by the widespread pandemic worldwide, causes that make it impossible for the defendant to travel to the court.

In conclusion, given that the SARS-CoV-2 pandemic is far from being over and that similar situations may arise in the future, the legislator should consider amending the criminal procedure law to allow the suspension of the prescription for criminal liability also in the case where the defendant, the other parties or the injured person

cannot exercise their right to defense due to their state of health or the measures ordered by national or international authorities to prevent the spread of a virus.

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Abbreviations:
C.A. – Court of Appeal;
C.P.C. – Criminal Procedure Code;
C.C. – Criminal Code
C.C.R. – Constitutional Court of Romania;
H.C.C.J – High Court of Cassation and Justice;
Of.G. – Official Gazette;
No. – number;
Para. – paragraph;

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