Chapter 8

Due Process and Criminal Law Cases with Special Regard to Central Europe

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Abstract

The right to a fair trial is probably the most comprehensive and complex of the rights provided for in the European Convention on Human Rights (ECHR, or 'convention'). This, in order to be respected as a whole, requires respect for the other rights which compose it – and which in turn are composed of other requirements, conditions and elements – each of which in turn must themselves be respected. The European Court of Human Rights (ECtHR or 'court'), which is constantly confronted with new situations arising in the national practice of EU member states, constantly consolidates or reinforces its case law on each element of the right to a fair trial, thus ensuring that the authorities of the member states – whether political, judicial or otherwise – act accordingly. In order to ensure that the legal provisions contained in Article 6 of the convention and the case law of the court are complied with as faithfully as possible, it is useful to be familiar with all the case law, irrespective of which European state it refers to and whether it is older or more recent, since only a cross-referencing of all of them offers the ideal way forward. It could be said that the judicial systems of the countries located in Central and Eastern Europe offer the most negative cases, but this is not really the case: there are plenty of such cases in other more 'modern', evolved systems – towards which those of the countries located in this part of Europe tend – and their progress in this respect is notable, which is gradually leading to a visible decrease in the number of such cases. The fact is that the direction in which things are going is largely due to the court, which, in each case decided, sets benchmarks between which national legislation and judicial practice must fall.

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1. Introduction

The right to a fair trial is regulated in Art. 6 of the ECHR,[1] and its features and components can easily be deduced from the legal regulation. However, these have been given full shape by the intervention of the ECtHR.

In order to make things as uncontroversial as possible, the Council of Europe and the court have even drawn up guides on each individual article, and such a guide also exists for the application and observance of Art. 6 of the convention.

Naturally, as the court has been called upon to deal with more and more cases concerning violation of Art. 6, its judicial practice has provided us with more and more elements – with the help of which anyone interested can grasp its full meaning.

In the following, for the sake of reminder I will present the structure of the right to a fair trial as it appears today through the court's case law – summarised in the guide I have mentioned without taking it verbatim – leaving the reader the pleasure of studying it in detail, in any language. Where in the last 10 years the court has come up with new elements of case law, I will present them – and analyse those cases in which the violation of the right took place in Central and Eastern European countries. In the last section, I will follow the 'case study' method, and inform those interested as to how Art. 6 of the convention has been transposed into Romanian criminal law – with both the positive and negative aspects of this approach.

1 Art. 6 – Right to a fair trial: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

2. The right to a fair trial: structure and content

2.1. Criminal charge

Given that there are several systems of law at European level, it is already well known that certain concepts in European law are explained and interpreted independently (autonomously of each other) in order for the legal provisions to have full applicability and validity in any of the member states. No exception is made to the notion of 'charge in criminal matters', defined by the court as "official notification by the competent authority of suspicion of the commission of a criminal offence". On the other hand, because in some legal systems not all anti-social offences are covered by the concept of 'criminal offence', the court has established that this category includes all offences which are so classified under national law, the nature of the violation to which the offence relates, and the seriousness of the penalty to which the perpetrator is liable.[2]

In such circumstances, Art. 6 of the convention has a much wider application, covering not only criminal proceedings – as we all know and understand them according to the legal systems we are used to – but also various other proceedings, including disciplinary, administrative, tax, customs, competition, political, expulsion and extradition proceedings.[3] The court's practice over the last 10 years has not brought any new elements to the above issues.

2.2. General guarantees: access to a court

Although we are talking about an important right, as regulated by Art. 6, the court has nevertheless established that the right of access to a court is not absolute: it can be limited provided that those limitations do not make it impossible to exercise it. The examples of limitations analysed by the court in its practice refer to parliamentary immunity, conditions imposed by procedural rules with the particularity of the requirement to execute a previously pronounced decision, etc.[4]

Nor does the concept of 'court' have the meaning that the court usually uses to indicate, for example, a judicature, a tribunal or a court, but a much broader one defined by two criteria. The first relates to judicial functions, according to which the court is that entity which has the established competence to rule on certain matters on the basis of rules of law and according to a certain procedure. The second refers to the requirements that this court should fulfil, which relate to its establishment by law; its independence from other authorities, institutions, entities etc.; and its impartiality. Independence is also determined by the way in which the members of the

2 Council and Court 2014, p. 7.
3 Council and Court 2014, pp. 8–11.
4 Ibid., pp. 11–13.

court are appointed, their term of office, the safeguards that exist against external pressure and, last but not least, the appearance of independence. As regards the impartiality of the court, the court states that such a conclusion can be drawn only if a double test is carried out – one of a subjective nature, consisting of an attempt to establish the personal conviction or interest of a particular judge in a given case; and the other of an objective nature, which involves establishing whether the judge has provided sufficient guarantees to exclude any legitimate doubt.[5]

The novel element that has recently emerged in the court's practice with regard to impartiality concerns the situation where a judge participates in two similar proceedings against the accused. The court naturally also recalls here the two tests mentioned above. As regards the subjective test, the court holds that a judge's personal impartiality must be presumed until the contrary is proved. With regard to the objective test, the court states that it is necessary to determine whether, apart from the judge's conduct, there are verifiable facts which raise justifiable doubts as to their impartiality – in which the defendant's opinion is important, but not decisive, the decisive character comprising objectively justified fear with regard to impartiality, of importance here being even the appearances which underline the adage that "justice must not only be done, but must be seen to be done."

Although the court notes that the same judge participated in both proceedings – with the exception that in the first proceedings he did not examine the merits of the case – it points out that the mere fact that a trial judge has taken previous decisions on the same offence cannot, however, justify concerns as to his impartiality. The court continues its reasoning in an interesting way – by showing that there would be no reason for legitimate suspicion of a lack of impartiality, even where the same judge takes part in the adoption of a decision at first instance – then takes part in new proceedings, when the first decision is annulled and the case is referred back to the same judge for trial – nor that there is a general rule requiring a higher court to refer the case back to a court composed differently if it annuls a judgment. In concrete terms, even if the first decision in the case has not been annulled and the case has not been sent back for retrial following a regular appeal, if the applicant has been indicted again on some of the same charges, if the same judge participated in both proceedings he is not in himself to be regarded as incompatible with the requirement of impartiality – especially as he did not in the first proceedings adopt a decision establishing that the applicant was guilty or not guilty, nor did he assess any relevant evidence, but merely examined whether the conditions relating to the application of the general amnesty law were met. There were therefore no verifiable facts which could give rise to any justifiable doubt as to the impartiality of the judge, nor that the applicant had any legitimate reason to fear so, so that Art. 6 para. 1 of the convention has not been violated.[6]

5 Council and Court 2014, pp. 13–21.

6 Case *Marguš v. Croatia [GC],* application no. 4455/10, judgment of 24 May 2014, paras. 69, 84–91.

All of the above is insufficient; it is also necessary to take into account the procedure that such a court carries out, which must be fair, public, and of reasonable duration.

Fairness[7] is also made up of several elements. The need for each party to be able to present its case on such terms that it is not placed at a clear disadvantage compared with its opponent, i.e. the establishment of a balance between the parties, putting them on an equal footing or, in other words, equality of arms, is the first of these. The adversarial procedure is the next step and involves the possibility for the parties to know and comment on the evidence in the case, to make observations designed to guide the court's decision – with the proviso that the ECtHR has established that the right to disclose relevant evidence is not absolute and may have certain limitations which, if they occur, attract appropriate compensation.

In order to demonstrate to the parties that they have been heard, to make the court's decision more acceptable to them, to oblige the court to base its decision on objective arguments and at the same time to preserve the rights of the defence, it is necessary that judgments be reasoned in such a way as to indicate sufficiently the grounds on which they are based, without the courts being obliged to give detailed answers to each argument put forward, provided that it is clear from the judgment that the issues raised in the case have been addressed.

Although Art. 6 of the convention does not expressly refer to the accused's right to silence and not to incriminate oneself, since it is international in character, generally valid, applicable and recognised, it is intrinsic to the right to a fair trial, intended to protect the accused from possible abuse by the authorities, and lead to the avoidance of miscarriages of justice, guaranteeing the fulfilment of the purpose for which Art. 6 was conceived. It is so important that it is applicable from the very beginning of the criminal process – from the first hearings by the police – and cover all categories of offences, whether simple or complex. The right to remain silent is not absolute either, so it may be subject to limitations – but these cannot lead to its annulment, which is why the nature and extent of the limitation, the existence of appropriate safeguards in the proceedings, and how the evidence obtained as a result of the limitation is used must be taken into account.

Although the court is not required to rule on the admissibility of evidence which has been obtained unlawfully or in violation of convention rights, it nevertheless points out that it is necessary in such cases to examine whether the proceedings were fair as a whole – which automatically implies an examination of the illegality of the proceedings, and if there has been a violation of a convention right, and what the nature of the violation is. These issues are also reiterated in more recent practice, where the court has also stated that Art. 6 guarantees the right to a fair trial, but does not lay down any rule on the admissibility of evidence, which is primarily a matter for national law. As to whether the procedure as a whole was fair, the court established that it must be ascertained whether the rights of the defence were respected,

7 Council and Court 2014, pp. 21–30.

i.e. whether the applicant was given the opportunity to challenge the authenticity of the evidence and to object to its use; the quality of the evidence; the circumstances in which the evidence was obtained and whether they cast doubt on the reliability or accuracy of the evidence; whether it was supported by other evidence; whether it was decisive for the outcome of the proceedings or not. The court emphasised that special considerations apply to the use of evidence obtained in violation of Art. 3 in criminal proceedings, noting that the use of such evidence obtained in violation of one of the fundamental and absolute rights guaranteed by the convention always raises serious questions as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction.

In cases concerning ill-treatment by public officials, the court has held that the admission as evidence of statements obtained as a result of torture or other ill-treatment prejudicial to Art. 3, in establishing the relevant facts in criminal proceedings, renders the proceedings as a whole unfair, regardless of the probative value of the statements and whether their use was decisive for the conviction of the accused. The court stated that this applies both to the use of actual evidence obtained directly through acts of torture, and where evidence is obtained through an act characterised as inhuman and in violation of Art. 3, but is not an act of torture - provided that it is shown to have had an influence on the outcome of the proceedings against the defendant and impact on the conviction or sentence. The court also pointed out that these principles apply not only where the victim of treatment in violation of Art. 3 is the accused, but also where third parties are concerned.

Specifically, the court held that the information extracted from the witness was transcribed and used by the prosecution in the applicant's trial – and the court administered the challenged writing as evidence and referred to it in the context of the findings of fact and the determination of guilt of the applicant – who did not succeed in this respect on appeal either, although he challenged the reliability of its production. The court reiterated that the use of evidence obtained as a result of the treatment of a person in violation of Art. 3 – however that treatment is qualified (torture or inhuman or degrading treatment) – rendered the procedure as a whole automatically unenforceable and in violation of Art. 6. These consequences occurred regardless of the probative value of the evidence, and whether or not its use was decisive in securing the defendant's conviction. The court also pointed out that this principle applies equally to the admission of evidence obtained from a third party through ill-treatment by private persons, regardless of the classification of such treatment – which is a novelty in the court's case-law and a complement to it.[8]

Closely related to the taking of evidence is the question of challenge, which the court recognises as a necessity in particular in cases of organised crime and corruption, pointing out that such methods do not *ab initio* constitute a violation of Art. 6, only that the use of such methods must take place within very clear limits, be

8 Case *Ćwik v. Poland,* application no. 31454/2010, judgment of 5 November 2020, paras. 70–77, 78–93.

accompanied by adequate and sufficient safeguards against abuse, and be carried out within clear and predictable procedures.

If we finally refer to fairness in terms of waiving the guarantees of a fair trial when a case is concluded by a negotiated settlement, it should be noted that not long ago, in one case[9] the court pointed out that such a procedure offers important benefits such as the speedy resolution of criminal cases, a reduction in the workload of courts, prosecutors and lawyers, and if properly applied, is a successful tool in the fight against corruption and organised crime – helping to reduce the number of sentences imposed and, as a result, the number of prisoners. The court further held that, by entering into a negotiated agreement with the prosecuting authority regarding the sentence and the non-challenge of the accused, the applicant had waived his right to have his criminal case examined on the merits. The court reiterates that in this situation the acceptance of the agreement should have been accompanied by two conditions: the first being that the agreement should have been accepted in full knowledge of the facts of the case and the legal consequences, in a genuinely voluntary manner; and the second being that the content of the agreement and the correctness of the manner in which it was concluded should have been subject to sufficient legal scrutiny.

In transposing them to the specific case, the court found them to be satisfied since the applicant himself requested the prosecution to initiate the settlement. The settlement was not imposed by the prosecution; the applicant expressed his wish to repair the damage, and had access to the case file. He was assisted by two qualified lawyers of his own choosing from the outset of the proceedings, who ensured that he was assisted during the negotiations with the prosecution, one of whom assisted him during the judicial examination of the settlement. The applicant also explicitly confirmed on several occasions before both the prosecution and the court that he understood the content of the agreement, that his procedural rights and the legal consequences of the agreement were explained to him, and that his decision to accept it was not the result of violence or false promises. The court also found that a written record of the agreement had been drawn up and signed by the prosecutor, the applicant and his lawyer, and that it had been submitted to the court for examination, which had verified the exact terms of the agreement, of the previous negotiations, and had thus been subject to legal scrutiny in a clear and indisputable manner. A very important point emphasised by the court concerns the fact that the court was not, under domestic law, bound by the agreement concluded, but had the right to reject the agreement on the basis of its own assessment of the fairness of the terms it contained and the manner in which it was concluded, while having the right to assess the sentence recommended by the prosecutor and to reduce it, to examine whether the charges against the applicant were well founded and *prima*

9 Case *Natsvlishvili and Togonidze v. Georgia [GC],* application no. 9045/05, judgment of 29 April 2014, paras. 76, 90–98.

facie supported by evidence. All of this also happened in practice in a public hearing, further contributing to the overall quality of judicial review in the case.

Finally, the court found no violation of Art. 6 para. 1 of the convention, further stating that it was natural that the applicant, in waiving his right to an ordinary trial, had also waived an ordinary remedy as a consequence of the procedure consciously and voluntarily followed.

The need for the procedure to be a public one[10] is intended to subject the act of justice to public scrutiny, thus ensuring the avoidance of a secret justice system and confidence in the courts. Proceedings are public if they include a hearing in which the accused has the right to participate, which certainly does not mean that a criminal trial cannot be conducted *in absentia* in certain circumstances. It should also be noted here that the participation of the accused in his or her own proceedings has slightly different meanings depending on how they proceed through the trial on the merits or on appeal. There are also natural exceptions to the rule of publicity if there are interests that require them. The public nature of the proceedings to which the accused is subject also means that judgments must be delivered in public – a concept interpreted by the court to mean that they must be delivered in such a way as to facilitate public scrutiny of the judgment and of the judiciary as a whole.

It is well known even to people who are not familiar with the legal world that a criminal trial with a very long duration deviates from its purpose. Therefore it is necessary that the procedure takes place within natural time limits, in relation to the particularities of the case arising from its complexity, the conduct of the accused and the stakes of the dispute for the accused, i.e. to have a reasonable time limit.[11] In this regard, the court has held that a duration of 15 years, which it can take into account in view of the limitation of its jurisdiction *ratione temporis* of the entire 19-year duration of the proceedings, is excessive and does not meet the criterion of a reasonable time.[12]

In addition to its general components, the right to a fair trial also has in its structure some specifics which, although niche, are so important that their absence also leads to a violation of the right, as we shall see below.

2.3. Specific guarantees

Following the logic of the matter, we see in a criminal trial that a person is accused in fact and in law of anti-social conduct, but because they are not yet considered guilty of committing these acts, they enjoy a presumption which may be the cornerstone of the criminal process – namely the presumption of innocence. The accuser is then called upon to prove guilt, but at the same time the accused

10 Council and Court 2014, pp. 30–33.

11 Ibid., pp. 33–37.

12 Case *Mocanu and Others v. Romania [GC],* application no. 45886/07, 32431/08 and 10865/09, judgment of 17 September 2014, paras. 356, 359–364.

is also given the opportunity to defend themselves by questioning the evidence of the prosecution and at the same time presenting their own evidence in defence. At the end of the trial, if there is no doubt as to the guilt of the accused, they will be found guilty and held criminally liable. In this case, the criminal trial is fair and the accused is protected against abuse of any kind and by any institution or authority. Under these circumstances, it is understandable why the presumption of innocence and the right of defence, with all that they contain, have been incorporated into Art. 6 of the convention.

2.3.1. Presumption of innocence

Apart from the legal provision, which is unequivocal and from which it follows in simple terms that a person is considered guilty only if a final court decision establishes so, the presumption of innocence[13] means that the judicial authorities and especially the court may not assume that the accused is guilty and must therefore be punished. At the same time, the burden of proof in a criminal trial is on those judicial bodies that fulfil the role of the prosecution, and they must therefore present their accusation based on sufficient evidence and give the accused the opportunity to prepare and present their defence. Since the convention does not preclude presumptions of fact and law, they can be taken into account and given effect – especially as the presumption of innocence, with all that it implies, is not absolute. The presumption of innocence is not only specific to a particular part of the criminal trial or to the proceedings as a whole, but extends to all subsequent proceedings, meaning for example that once a court has definitively determined that an accused person is innocent, they must be regarded as such *erga omnes* and may not be treated as guilty. An interesting aspect of the presumption of innocence is that no authority, no public institution, no public official of greater or lesser rank is allowed to express the opinion that the accused is definitely guilty, even if the criminal trial has not yet been completed and guilt has not yet been established by a court. With regard to the judicial authorities, and in particular the courts, it should also be pointed out that even a reference in a court judgment to the certainty of the accused's guilt is prejudicial to the presumption of innocence if the accused has not been definitively found guilty.

Having considered several years ago the violation of the presumption of innocence by other public authorities, and even by the judge or the court, the ECtHR completed its practice by showing that comments made by the Minister of the Interior on the day after the applicant was arrested – comments published in a newspaper at a time when the case was in the public eye – went beyond a mere communication of information, because they were capable of giving the public the impression that the applicant was one of the 'brains' behind a criminal group which had allegedly embezzled large sums of public money. The court held that these comments violated

13 Council and Court 2014, pp. 37–41.

the applicant's right to be presumed innocent. The court also considered the judge's reasoning when he ordered the applicant's continued detention, and stated in his reasoning that the court "remains of the opinion that a crime has been committed and that the accused participated in it", which would amount to a finding of guilt before a judgment had been given on the merits and violated the applicant's right to be presumed innocent.[14]

In addition to all this, a press campaign that exceeds normal limits – with characteristics of aggression and virulence – has the ability to violate Art. 6 regarding the presumption of innocence.

2.3.2. The right to defence

Although the first references to the accused's defence strategy only appears in section b of par. 3 of Art. 6, the whole paragraph is considered to regulate this right, and as a whole is in fact a list of guarantees specific to the right to a fair trial – i.e. it can be argued that an accused person enjoys respect for the right to a fair trial if they also enjoy the right of defence, which in turn consists of a whole series of characteristic elements.[15]

Given that an accused can only defend themselves if they know what they are accused of, the first step is to be informed of the charges. Even if the statement of the accusation does not have to take some form and mention the evidence that substantiates it, it is necessary to include the facts on which the charge is based: the cause of the charge, but also the legal classification of these facts, the nature of the accusation, and where the indictment takes place, carried out in a language which the accused understands, before the trial goes to court.

In relation to these issues, in its more recent practice the court has ruled that information in a language understood by the accused – and free assistance from an interpreter – is an obligation not limited to situations in which the accused explicitly requests it. The court intervenes whenever there are reasons to believe that the accused does not know the language of the proceedings well enough, but also when it is necessary to use a third language for interpretation. In such circumstances, the defendant's knowledge of the third language was required to be verified before the decision to use it for interpretation was taken. The fact that the accused has a basic knowledge of the language of the proceedings – or of a third language in which interpretation is available – should not prevent a person from being interpreted in a language they understand well enough to fully exercise their right of defence. Therefore, the suspect – when "accused of committing a crime", must be informed in a language they understand of their right to be assisted by an interpreter. The court draws attention to the importance of recording in the file any procedure used, and the decision taken to verify the need to ensure interpretation, to notify the right to

14 Case *Gustanovi v. Bulgaria,* application no. 34529/10, judgement of 15 October 2010.
15 Council and Court 2014, pp. 41–57.

an interpreter and to the assistance provided by the interpreter. The court found that there was no indication that the authorities intended to provide the applicant with an interpreter in Lithuanian during the trial or investigation, and that only after the judgment in the second instance raised the issue of the availability of such an interpreter, without taking the necessary measures. The judgments of the national courts were based on the assumption that the applicant understood Russian - and as such could participate in all proceedings in that language. The court noted that the authorities did not explicitly verify the applicant's knowledge in Russian, nor was it ever asked whether he understood the interpretation and translation carried out in Russian sufficiently well to prepare his defence. The court also ruled that there were no records or other evidence establishing the applicant's actual level of Russian speaking, so that his lack of cooperation in the proceedings carried out by the police and the investigating judge could at least be partly the consequence of the difficulties of speaking in this language. The few statements made by the applicant during the hearing, "probably" in Russian, do not prove otherwise – or that the applicant had succeeded in communicating with his lawyer, which would have led to the conclusion that the applicant was fit to speak and understand only a little Russian. As such, the court found that he did not know the language well enough to guarantee the fairness of the proceedings. Although under national law the applicant was entitled to interpretation in his mother tongue, with correlative obligations on the part of the authorities, there was no indication that the authorities complied with that requirement. The court therefore concluded that the applicant had not received any language assistance to enable him to take an active part in the proceedings against him, which speaks to the unfairness of the entire process.[16]

After the indictment is brought to attention, the accused must benefit from the necessary facilities (time and means) in order to be able to deal with it whenever necessary during the criminal trial. Among these facilities we find the defendant's access to the file, with the statement made by the court that this access is not absolute - which means that there may be situations in which access to the entire file, and implicitly to all the evidence it contains, cannot be allowed - whether this is necessary to protect the fundamental rights of another person or a certain public interest, as well as to consult with a lawyer. As for the latter aspect, it should be noted that Art. 6 para. 3 section c of the convention provides for the possibility for the accused to defend themselves or to appeal to a lawyer. When the accused decides to defend themselves, this does not mean that the judicial authorities are not allowed to appoint an *ex officio* defender; on the contrary, when the interests of justice so require, a lawyer will be provided, somewhat beyond the will of the accused, who may be *ex officio* if the accused does not have the necessary financial resources.

With regard to the consultation of a lawyer, there is a relatively recent case in which the court reiterated – and developed upon – the fact that the right to receive

16 Case *Vizgirda v. Slovenia,* application no. 59868/08, judgment of 28 August 2018, paras. 75–87, 88–103.

assistance from a lawyer concerns the entire criminal process, with all of its procedures, including the duration of the interrogation by the police. At the same time, legal aid means not only the fact that the suspect is allowed access to a lawyer from as soon as the first interrogation, but to an elected lawyer. Unlike situations when the authorities refuse access to a lawyer, when the criterion to be considered by the court is "the substantiated reasons", in situations when the authorities refuse "the choice of a lawyer" the court refers to much more mild criteria. This later case must meet only the requirements of being "relevant and sufficient" – that is, if the suspect intends to have a legal representative, the authorities may disregard that intention if there are reasons "relevant and sufficient" to assess that it is in the interest of justice if the defence is prejudiced. In particular, the court held that the suspect's defence was prejudiced because he opted for the *ex-officio* lawyer without knowing that his parents had hired a defender. This defender showed up to contact his client, but the police told him to leave – a fact that was not brought to the attention of the suspect. In the relevant and sufficient reasons, the court only held that the lawyer chosen by the parents was refused because he did not have power of attorney from the suspect – but, on the other hand, the police failed to inform the suspect that the chosen lawyer had applied to give him the opportunity to make an informed choice. It should be noted here that under national law, parents are allowed to hire a lawyer. Compared to the suspect's complaint about how his testimony was obtained by the police, the court noted that the authorities had not taken steps to establish the relevant circumstances for his interrogation by the police. In such circumstances, the court presumed that the conduct of the police officers was such as to create a situation in which the applicant could not exercise his right to silence – and to give a statement which was subsequently admitted against him and had a significant impact during the criminal proceedings, even though there was other evidence, which undermined the fairness of the criminal trial as a whole.[17]

In contrast, in another case the court held that there was no violation of this right – even though the lawyer was absent during the first three days of police custody – because it had no impact on the overall fairness of the proceedings. At the same time, the court reiterated the general rule that access to a lawyer must be ensured from the first police interview of a suspect, except in situations where there are extremely serious reasons for restricting this right, but then only if the suspect's rights are not prejudiced – such as if they make incriminating statements during the interview without the assistance of a lawyer, which are then used to convict. Here, a few particularities are worth highlighting. The court pointed out that even if the suspect does not expressly request a lawyer, it cannot be interpreted as meaning that he has waived his right, since the police did not inform him that he had such a right. The court also found that the suspect was not provided with a lawyer even though there were no compelling reasons to deprive him of this right – such as an

17 Case *Dvorski v. Croatia [GC],* application no. 25703/11, judgment of 20 October 2015, paras. 76–82, 83–111.

imminent risk to the life, physical integrity or security of another person – and no such derogation was provided for in national law. Examining the overall fairness of the entire trial, the court held that, having been heard twice, the suspect remained silent, and when he gave his statement he was assisted by a lawyer and made aware of his rights, in particular the right not to incriminate himself, and moreover, the absence of his statement during this period did not have negative consequences for him during the criminal proceedings. On the other hand, it held that the suspect actively participated in all stages of the criminal proceedings, retracted his statements, and presented another version of the facts; his defenders had access to all the evidence in the case file, and were able to challenge them; the suspect's conviction was based not only on his statements but on a body of evidence; the courts made assessments of the evidence, checked that the applicant's rights were respected, and gave reasons in fact and in law for their decisions. The court concluded that even if the applicant was without a lawyer, it did not find any causal link between the absence of a lawyer and the statements subsequently made in the presence of a chosen lawyer. Thus, the absence of a lawyer did not contribute to his own incrimination, nor did it irreparably affect the fairness of the entire criminal proceedings.[18]

The assessment of the overall fairness of criminal proceedings is reiterated by the court in another case, where it emphasised that compliance with the requirements of a fair trial must be examined in each individual case in the light of the development of the proceedings as a whole, and not on the basis of an isolated examination of a particular aspect or incident. He also pointed out that it could not, however, be excluded that a particular element might be so decisive as to enable the fairness of the trial to be assessed at an earlier stage of the proceedings. Under Art. 6 para. 3(b) of the convention, the defence on the merits includes everything necessary to prepare for the main trial, i.e. the accused must be given the opportunity to organise his defence in an appropriate manner and without any restrictions on his ability to present all his arguments in such a way as to influence the outcome of the proceedings. In determining whether the accused has had sufficient time to prepare their defence, it is necessary to take into account the nature of the proceedings, the complexity of the case, and the stage of the proceedings. With regard to the appointment and assistance of a lawyer, the court emphasised that a state cannot be held liable for any failure of a lawyer appointed for legal assistance purposes, because the legal profession is an independent profession, the particularity of which is that the conduct of the defence is actually the responsibility of the accused and his lawyer, and the authorities are obliged to intervene only when the failure of legal assistance is obvious or is brought to their attention. As such, the court held that the short duration of the period between the time when the applicant was informed of the appeal court hearing and the time when it actually took place did not restrict his right to the time and facilities necessary to prepare his defence, or to be legally

18 Case *Simeonovi v. Bulgaria [GC],* application no. 21980/04, judgment of 12 May 2017, paras. 94–95, 110–120, 121–144.

represented during the criminal proceedings to such an extent that it could be said that he did not receive a fair trial, since the applicant had already had the services of his chosen lawyer and had time to prepare his defence, as demonstrated by the fact that he, through his lawyer, presented his defence before the investigating judge and then – in the proceedings before the court of first instance – in three cases submitted additional written arguments. On the other hand, the national courts allowed the complainant to hire another lawyer, but he did not do so. Moreover, in his oral and written defence, in his appeals the applicant analysed the case in detail and referred to all the main evidence.[19]

From the data provided by the judicial practice presented, it can also be concluded that legal assistance must be characterised by being concrete and effective; a purely formal or superficial legal assistance leads to the emptying of the right of content and entails a violation of Art. 6 in this respect.

Although the right to question and request the examination of witnesses would be inherent or implied in the context of the rights already mentioned, in Art. 6 par. 3(d) of the convention it has been expressly covered. The concept of witness also has an autonomous meaning here, and includes not only any person who under the legislation of the various states has such a status, but also any person whose testimony may lead to the conviction of the accused. For this right to be exercised, the judicial authorities must make every effort to ensure that witnesses are present so that the accused can question them and be questioned, especially where the testimony of a particular witness is unique or decisive, when failure to hear them may constitute a restriction of the right to a fair trial in this respect. In such a situation the judicial authorities must demonstrate that they have made every effort to ensure the witness's presence. This does not mean, however, that the non-appearance of witnesses entails the termination of the criminal proceedings or the acquittal of the accused, especially because, in its practice, the court has pointed out that it is possible to use depositions which were taken before the trial took place in court, such as the death of the witness, the exercise by the witness of the right to remain silent, etc. A different situation is that of anonymous witnesses – whose existence and presence in a criminal trial is not prohibited by the convention, but requires that the interests of the defence in such situations be balanced or compensated by other facilities or inducements. The same solutions are laid down by the court in the case of witnesses in sexual assault cases where their hearing may be sensitive, and therefore, if it cannot take place in an appropriate format, the defendant's defence must be compensated accordingly. In its practice the court has shown that advantages may be offered to witnesses in exchange for their testimony, provided that such situations are treated with caution – as there may be witnesses who make statements contrary to the truth simply to benefit from those advantages. Under the convention and the court's practice, circumstantial evidence is not approved for use either against or in defence

19 Case *Galović v. Croatia,* application no. 45512/11, judgment of 31 August 2021, paras. 74, 79–83, 84–91.

of the accused. Last but not least, the accused must have the benefit of hearing the witnesses proposed in their defence – but they have an obligation to indicate why it is important and necessary for each of them to be heard, and the courts may censor this right by refusing to hear them.

As a continuation of the right presented in Art. 6 par. 3(a) of the convention, which refers to the accused being informed of the charge in a well-understood language, subparagraph (e) of the same paragraph has regulated the right to an interpreter free of charge if the accused does not understand or speak the language used at the hearing – thus highlighting the absurdity of an accused being informed of the charge in a language which he knows, and then having the other proceedings or the criminal trial as a whole conducted in a language which the accused does not know or knows only very little.

At the end of the analysis of the structure of Art. 6 of the convention, I would also like to point out that it has an extraterritorial effect, according to which – when the question of extradition or expulsion arises – such a request may be refused if, in the requesting state, the proceedings that would follow would lead to a serious violation of the right to a fair trial, thus achieving what the court has indicated would be a "flagrant denial of justice", the burden of proof being on the right holder, and the judicial authorities requested having the obligation to remove any doubts that might arise in this respect.

3. The conformity of Romanian criminal legislation with the requirements of Art. 6 of the convention

Naturally, after the Revolution of 1989, legislation began to change in Romania – but the upward trend began after Romania's accession to the Council of Europe on 7 October 1993. In this context, criminal legislation has also been subject to a whole series of changes, the last major one being the entry into force of the new Criminal Code (hereafter CC) and the new Code of Criminal Procedure (hereafter CCP) on 1 February 2014. As the criminal legislation was only partly in line with the ECHR, at least until 2014 Romania was subject to many convictions by the ECtHR – including on the basis of Art. 6 of the convention – which continued after the beginning of 2014, but in a smaller number of cases, due to the adaptation of the criminal legislation to the convention and all European legislation.[20]

In order to see how things stand, in the following I will present those institutions of criminal law and criminal procedural law provided for in the current legislation, which represent a national transposition of the elements and conditions contained

20 European Institute 2023a, pp. 2–3.

in Art. 6 of the convention, and where they exist, those cases registered at the court since 2014 in which Romania has been convicted.

Before that, I would like to mention that although the right to a fair trial is not separately regulated in the legislation, there are direct references to such a right, as we find, for example, in the Constitution of Romania (hereafter CR), where – in the context of free access to justice – the constitutional legislator also mentioned the right of the parties to a fair trial and to the resolution of cases within a reasonable period of time, so that the right to a defence was immediately regulated separately, as well as in criminal procedural legislation.[21]

3.1. Criminal charge

In the Romanian judicial system, the notion of criminal charge is not open to discussion because, as the law now stands, a person can only be charged under criminal law. By all means, given the other forms of liability that exist in the Romanian judicial system, it could be argued that Art. 6 on its criminal side would also apply in other areas such as tax, misdemeanour, administrative, disciplinary etc. This does not change the meaning of the concept, but means that Art. 6 applies mainly in the criminal field, while at the same time it can also cover other areas adjacent to it. As regards the duration of the proceedings to which it applies, it is found from the early stages of criminal proceedings until the end of the proceedings, and even after the end of the criminal proceedings in the procedure for enforcement of judgments, and in proceedings relating to extraordinary remedies. By way of example, I would like to mention that even at the stage of criminal prosecution (the first stage of the criminal process in Romania, carried out by prosecutors and police officers), as soon as the prosecution of the suspect is ordered – i.e. the judicial authorities not only know the apparent perpetrator of the crime, but there is also a reasonable suspicion that this individual committed the crime – official notification takes place, which consists of ordering the suspect to appear before the prosecuting authorities (prosecutors or police officers) – on which occasion, before being heard for the first time in this capacity, the individual is informed of their status, the offence of which they are accused, its legal framework, the rights that persons acting as suspects have, and a report is compiled.[22]

3.2. General guarantees – access to a court

In our judicial system, the right of access to a court is institutionally guaranteed by entities that are only courts and perform the functions of a court of law, and are established by high ranking normative acts, separate and independent from other state authorities and institutions, placed on four levels of jurisdiction (in ascending

21 Art. 21, 24 CR; Art. 8 CCP.
22 Art. 3, Art. 307 CCP.

order: judges, tribunals, courts of appeal and the High Court of Cassation and Justice) made up of judges – legal professionals, licensed in law, rigorously selected, trained and appointed to such positions, the professional career with all that is related to it being the attribute of the Superior Council of Magistracy, the guarantor of the independence of justice. Naturally, the judiciary includes prosecutors, police officers and various other persons with clearly defined duties; but only judges enjoy independence and irremovability.[23] In addition to all this, there is also the Constitutional Court of Romania, which has more complex powers – of which we need only mention here its ruling on the constitutionality of laws.[24]

On the other hand, there are three categories of judges in each court, namely: the judge of rights and freedoms, who acts while the criminal proceedings are in their first stage - that of criminal prosecution – who has the power to deal with applications which would restrict or infringe on the rights and freedoms of a person, from the ordering of preventive measures to the taking of evidence; secondly, the pre-trial chamber judge, who acts after the end of the criminal proceedings and either reviews decisions not to prosecute ordered by the prosecutor – when he decides to end the criminal proceedings at the prosecution stage – or decisions to prosecute by indictment, when the prosecutor decides to go ahead with the trial and refers the case to the court, all these reviews covering both the procedural documents and the evidence submitted so far in the case; third, the trial judge – or the judge who alone or together with others makes up the court having jurisdiction to rule on the guilt of the accused. These three judges have well-defined duties, which cannot be performed by the same person in the same case. Moreover, it is not allowed for the same person to be a judge more than once in the same case, the criminal procedure law regulating a single exception – when a person can be in the same case both preliminary chamber judge and then join the court. As regards the appearance of impartiality, several situations have been regulated in the criminal procedure law in which a judge becomes incompatible to proceed to the trial of a case as well as the mechanisms for removing them from the trial of that case, but also those in which the courts as judicial entities as a whole are replaced by others. It should be pointed out that criminal procedure law also prevents a prosecutor from becoming a judge in the same criminal case, and also establishes categories of incompatibilities with regard to prosecutors, judicial assistants, court clerks and police officers.[25]

Regarding the fairness of the proceedings to be conducted, we have pointed out above that both in the basic law and in the introductory part of the CCP it is established that the entire criminal trial must be fair – this being further ensured by the fact that all parties involved have strictly regulated rights, and the judicial

23 Art. 124–130, 131–132, 133–134 CR, developed by Law no. 303/2022 on the status of judges and prosecutors, and Law no. 304/2022 on judicial organisation.

24 Art. 142–147 CR, developed by Law no. 47/1992 on the organisation and functioning of the Constitutional Court.

25 Art. 3, 35–40, 53, 54, 64–76 CCP.

authorities involved have the correlative obligation to make them known, respect them, and give them effect.[26] From an examination of the rights which the parties have in the criminal proceedings, and by reference to the procedural position of each of them, it cannot be concluded that any of them is placed at a distinct disadvantage compared with the others, and the differences are inherent in their status. It is certainly true that the accused (suspect or defendant) has more rights, but this seems natural, since they are the only one of all the participants who, if found guilty, will suffer harsh consequences if they are held criminally liable.

The contradictory nature of the procedure is given by the right of each party to know directly, subject to certain limitations, which are exceptional and relate only to the stage of the criminal proceedings, all the procedural documents and evidence in the case file and to propose the administration of evidence which it deems appropriate. This is more evident when proceedings are conducted before the judges, especially before the court, where oral hearings[27] take place, and is less noticeable at the prosecution stage because of its specific nature, the fact that it is predominantly written and the place where it actually takes place, i.e. mainly in police and prosecutors' offices.

The obligation to give reasons for judgments is regulated in criminal procedure legislation in almost every situation in which a judge is called upon to rule on any matter – and where it is not expressly provided for, it results from a combination of legal provisions,[28] therefore it would not be possible to envisage situations in which a judge decides on a given issue; their decision is not contained in a judgment, and the judgment does not contain the arguments on which the decision is based. In addition, the legislation clearly sets out the types of judgments that a judge must deliver, their structure, and what they must contain.[29]

During the criminal proceedings the accused person (suspect or defendant) has the right not to give any statement; this is made known to them every time they are heard - it is recorded in the statement or in a written document attached to it. Moreover, they are made aware that they will not suffer any negative consequences if they refuse to give a statement, and that if they do agree to give a statement it can be used against them.[30] There are no limits set for the exercise of the right not to give a statement and not to incriminate oneself. Due to the fact that at the beginning of the criminal proceedings the judicial authorities do not know exactly who the persons to be charged are, they treat them all - within the limits of their capacity - as witnesses, which is why the legislation provides that the witness also has the right not to incriminate themselves, precisely so that the information they provide in this capacity cannot be used against them once they have become a defendant.[31]

26 Art. 77–78, 81–87, 108, 111 para. 1–2, 112, 120 CCP.
27 Art. 351 CCP.
28 Art. 140 para. 4–5, 203 para. 4–5, 318 para. 14, 341 para. 5, 346 para. 1, 351 para. 3 CCP.
29 Art. 370, 401–404 CCP.
30 Art. 83 para. 1 lit. a, 108 para. 1–2 CCP.
31 Art. 118 CCP.

Evidence is administered on the basis of an evidentiary procedure, which regulates in detail the way in which the evidence reaches the case file – and when the legal provisions are not complied with, the criminal procedure law expressly states that it cannot be used in the criminal trial, which also entails the exclusion of evidence derived from it. At the same time, evidence obtained through torture is excluded and evidence derived from it cannot be used. The law also does not allow the use of violence, threats, means of coercion, promises, exhortations to obtain evidence, nor those methods or techniques that affect a person's ability to consciously and voluntarily remember and relate the facts that constitute evidence, regardless of whether or not they consent. Provocation to commit or continue the commission of a criminal offence for the purpose of obtaining evidence by judicial bodies or other persons acting on their behalf is also prohibited.[32] If the accused is sent for trial by indictment, but not by plea agreement, the criminal proceedings do not move directly from the prosecution stage to the trial stage, but to the pre-trial chamber stage, where the accused can contest, as already mentioned, the legality of the taking of evidence and of all procedural acts, including those by which it was ordered to be taken – and if the judge finds that there is illegal evidence on file, it is physically removed from the file so as not to influence the court's decision in any way.[33]

As noted above, in criminal proceedings there is a possibility for the accused to enter into an agreement with the prosecutor – whereby they succinctly accept the offence of which they are accused and negotiate the manner of punishment. This procedure is very quick compared to the ordinary trial procedure. It bypasses one stage of the criminal trial (pre-trial chamber), and the trial is based solely on the evidence given during the criminal proceedings. In addition to this procedure, the trial stage also includes the admission of guilt procedure, which does not require an agreement, where the accused person pleads guilty before the court and the penalty is determined by the court without negotiation. The advantages for the accused are that the penalty limits laid down by the criminal law for the offence committed are reduced by operation of law. The characteristic feature of both procedures is that they largely dispense with the safeguards that an ordinary criminal trial offers.[34]

The publicity of the hearing is a fundamental feature of the trial stage, whether it takes place on the merits, in ordinary or extraordinary appeals. Even if the work of the other two judges – the judge of rights and freedoms and the judge of the preliminary chamber – takes place in chambers and the hearing is not public, it still takes place in a courtroom where, for example, relatives or other interested persons may be allowed access – which is restricted compared with access to court hearings.[35]

32 Art. 97, 101, 102 CCP.
33 Art. 342–348 CCP.
34 Art. 478-488, 349 para. 2, 374 para. 4, 375, 377, 396 para. 10 CCP.
35 Art. 127 RC, Art. 352 CCP.

By their very nature, criminal proceedings are not open to the public, which is also regulated.[36]

Besides the legal provisions indicated above, which stipulate that criminal proceedings must be of reasonable duration, the Romanian legislator has also provided for a procedure to control the duration of criminal proceedings. In this procedure, the competent judicial body first establishes whether the criminal trial in a given case has a natural course, the reference criteria being those taken from the practice of the court, and in the event of a negative answer, it has the power to set the deadline for the resolution or completion of the respective stage.[37]

3.3. Specific guarantees

In addition to the fact that the presumption of innocence is regulated in the CR itself - and then in the introductory part of the CCP where, as in the convention, it is established that every person is presumed innocent until a final judgment has been handed down establishing guilt – it is also reinforced and supported by other legal provisions. Thus, the CCP establishes that the doubt is for the benefit of the accused, that the judicial bodies are obliged to establish the truth in the case, and that the prosecution bodies are obliged to provide evidence both for and against the accused. Furthermore, in order for the court to establish the guilt of the accused and then hold them criminally liable in one of the legal forms, it must find beyond reasonable doubt that the act exists, that it constitutes a crime, and that it was committed by the accused.[38]

With reference to damaging statements or aggressive press campaigns, I would point out that a prohibition of these is not regulated in the criminal procedure legislation.

Like the presumption of innocence, the right of defence is first regulated in the CR and then in the introductory part of the CCP, after which an entire section is devoted to the lawyer and legal aid, and, in addition to all this, throughout the CCP there are provisions relating to the presence of the lawyer and the manner in which they exercise the right of defence.[39] According to these provisions, throughout the criminal proceedings the accused may defend themselves and, if they so wish, may call upon a lawyer. But there are also situations in which, even if the accused wishes to defend themselves and do not call upon a chosen lawyer, they must be provided with a public defender whose fees are paid from the state budget. Regardless of whether we are talking about a chosen or appointed defence counsel, it should be noted that they can only be legal professionals, i.e. law graduates, who, following a

36 Art. 285 para. 2 CCP
37 Art. 488/1-488/6 CCP.
38 Art. 23 para. 11 CR, Art. 4, 5, 396 CCP.
39 Art. 24 CR, Art. 10, 88–95 CCP.

rigorous selection examination and a training period, become members of the country's bar associations.[40]

With regard to the actual exercise of the defence, the CCP contains legal provisions establishing that the accused and other participants in the criminal proceedings who do not speak Romanian may express themselves through an interpreter whose fee is paid from the state budget, that they are informed several times of the charge against them, and that the legal classification is changed whenever this occurs, that throughout the criminal proceedings the accused has access – with certain exceptional limitations and for short periods of time during the prosecution stage – to the evidence in the case file and may propose evidence, and that during the trial stage they may express their position on the evidence taken during the prosecution, that evidence which they contest will be presented again in court and that they may propose new evidence, on which occasion they have an active role. In order to establish the truth they may, together with the parties, the prosecutor and the court of their own motion, take any evidence they deem necessary.[41] The accused shall be given all the time necessary to prepare their defence and shall be provided with the facilities to enable them to do so. In order to exercise these rights, the accused shall be guaranteed participation in the trial, which as a rule shall take place in their presence, although there are exceptions where the court may also hold a trial in their absence. If a trial takes place in the absence of the convicted person, there is a procedure for reopening the criminal trial, whereby the criminal trial is resumed – this time with the defendant present.[42]

3.4. Recent case law of the ECtHR against Romania

If we compare the provisions contained in Art. 6 of the convention, the court's practice with regard to its elements and our national regulations, we could argue that Romania's legislation is almost entirely in line with European law and practice – so at least since 2014 Romania should no longer be condemned by the court on Art. 6. However, Romania has recorded new convictions after 2014, admittedly far fewer than in the past, and in order to have an idea of what Romania still has to do, I will briefly present them below.

Stoicu v. Romania[43]

The court observed that, although the applicant was acquitted at first instance on the basis of the same evidence, the applicant was later convicted by the appeal court only on the basis of a reinterpretation of that court of the evidence which had

40 Law no. 51/1995 on the organisation and practice of the legal profession.
41 Art. 12, 94, 99 para. 3, 100, 374 para. 5-10, 378–384 CCP.
42 Art. 364, 466–469 CCP.
43 European Institute 2023b, p. 11.

been adduced at first instance, without having heard the person concerned in person and without having directly examined that evidence despite the request made to that effect by the prosecutor's office. Given that the court had to establish if the applicant was in bad faith at the time of the commission of the offence – meaning, an element of fact – the court held that this element of fact could only be established through a direct examination of the evidence and a personal interview with the defendant.

Frana v. Romania[44]

The situation is similar to that in the previous case – that is, an acquittal at first instance, followed by a conviction on appeal – except that, unlike the other case, the appeal court relied solely on the statements of a witness given at the scene of the incident and before the prosecutor, without taking into account the statement given in accordance with the adversarial principle before the court – which led to the decision of the first instance to acquit him. This statement was rejected by the court of appeal without giving reasons why it considered it unreliable. The court held that before excluding the statement of the witness, the appeal court should have first examined whether it was necessary to hear the witness and whether it was appropriate to hear the other witnesses. The court pointed out that assessing the credibility of a witness is a complex task which generally cannot be achieved by simply reading written statements.

Gal v. Romania[45]

This case is also an acquittal, followed by a conviction – only here, the appeal court has administered insufficient evidence. The appeal court limited itself to hearing three of the five witnesses heard by the tribunal, to rejecting the request to examine the audio recordings, even though this evidence supported the applicant's challenge and relied on the other documents in the court file, which was such as to undermine the guarantees of an adversarial procedure and the principle of equality of arms.

Spasov v. Romania[46]

Here it should be pointed out that there is a difference between the European and Romanian legislation on the subject. This led to the initiation of proceedings against Romania, proceedings which were under way at the time of the trial, in which the European Commission expressed its views. Although these proceedings were ongoing and led to a change in the law, the Court of Appeal nevertheless convicted the defendant on the basis of Romanian law, in which case the court held that the

44 Ibid., p. 12
45 European Institute 2023a, p. 16.
46 European Institute 2023a, pp. 28–29.

Romanian domestic court had committed a manifest error of law, and the applicant had been the victim of a denial of justice.

Mena v. Romania[47]

The court held in this case that by a final decision the Court of Appeal admitted the defendant's appeal, found that the statute of limitations had expired on his criminal liability but, pursuant to Art. 25 of the Criminal Procedure Code, left the civil aspect unresolved. The court also held that the victim could not be obliged in such circumstances to initiate a new trial, a civil one, more than six years after he was brought as a civil party and seven years after the date of the facts in order to claim compensation for his damage. Although the legal provision on which the judgment of the Court of Appeal was based was declared unconstitutional and then amended to the effect that now, even if the statute of limitations is found to have expired, the civil side is dealt with, I wanted to present it because it is an eloquent example of how the court's practice influences the law, leading to its amendment.

Alecsandrescu v. Romania[48]

In this case the court considered that the subsequent charge was different from the original one, so that the grounds which the applicant could have invoked against the new charge would also have been different, and, therefore, held that the applicant had not been informed in detail of the nature and cause of the charge against him, nor had he had the necessary time and means to prepare his defence.

Călin v. Romania[49]

The court noted that the criminal investigation alone lasted 10 years and 10 months. Throughout, there were procedural delays, such as the submission of an expert account after a year's delay or successive declines of jurisdiction, and numerous periods of inaction by the authorities. The court noted that it did not appear from the documents on file that the applicant was responsible for those delays. (A similar situation is found in the cases of Mocanu and Others v. Romania – analysed above, Palabiyik v. Romania).[50]

47 European Institute 2023c, p. 9.
48 Ibid., p. 19.
49 European Institute 2022c, p. 1.
50 European Institute 2020b, p. 2.

Ionescu v. Romania[51]

The court found that the witness with a protected identity, who was summoned to appear before the tribunal, never appeared to give the parties the opportunity to cross-examine him. Although he was no longer in Romania, the Romanian authorities continued to summon that witness to appear by means of notifications in Romania, and made no effort to try to locate him. Given that the witness's statements were of some importance and that their admission caused difficulties for the defence, the court held that very few procedural steps were taken to compensate for the defence's inability to address the witness.

Nistor and Nistor v. Romania[52]

In this case, the applicants were convicted both at first instance and on appeal, except that the appeal court changed the legal classification – not from one offence to another, but the form of participation from perpetrators to accomplices. Given that the defence strategy differs according to the form of participation, the court concluded that the Court of Appeal did not inform the complainants of the possibility of changing the legal classification, and did not give them the opportunity to present their arguments in this regard.

Tartouși v. Romania[53]

The court held that the High Court of Cassation and Justice, as an appellate court, rejected the applicant's request for the examination of a witness on the grounds that further questioning of the witness was not necessary evidence, since other evidence had already been examined – and subsequently decided that the questioning in the rogatory committee in the case was relevant. Where the prosecutor's office relies on such a witness statement and the court is able to use that statement as a basis for its guilty verdict, the interest of the defence in being able to obtain the examination of the witness in question in their presence must be presumed and, as such, constitutes sufficient grounds for granting the defence's request to summon that witness, and would have required steps to be taken to give the person concerned the opportunity to obtain the examination of that prosecution witness, either by requesting an appearance at trial or by some other procedure.

51 European Institute 2022b, p. 15.
52 Ibid.
53 European Institute 2022a, pp. 12–13.

Toma v. Romania[54]

The court held that the applicants had contested before the preliminary chamber judge the merits of the prosecutor's office's order, sentencing them to pay a fine for participating in a fight. They questioned the credibility of several witnesses on whose statements the prosecution order was based. In addition, they claimed that the investigation had been superficial and complained about the prosecutor's office's refusal to allow them access to the documents on file. The preliminary chamber judge rejected the applicants' complaint without responding to any of their claims, and without even hearing the parties concerned.

Antohi v. Romania[55]

The court held that the change in the composition of the bench of the trial court – and the subsequent failure of the appeal court to hear the witnesses directly – amounted to depriving the applicant of his right to a fair trial.

It follows from the above cases that several of Romania's convictions are due to an incorrect application or interpretation of Art. 6 of the ECHR and the practice of the ECtHR by the courts, and it is necessary for the courts to be more diligent when they change the situation of the accused from acquittal to conviction, to re-administer directly the evidence from which the guilt of the accused emerges, and if a re-administration no longer possible, the court must prove that it has done anything possible to do so, when the legal framework is changed, when the composition of the trial panel is changed, especially when the judge or the court that carries out all of this gives a final judgment. A similar situation is found with regard to informing the accused of the offence of which they are accused, the details of the legal framework and the time needed to make an effective, rather than formal, defence. It is also necessary that when European law is contrary to national law, to apply European law - or at least not to complete the judgement until this issue is clarified, especially if proceedings are being conducted against Romania by European bodies. As regards the need for a party to bring a new civil case after the criminal trial has ended, I think that a legislative intervention would be welcome, whereby the criminal court – if it has ordered the end of the criminal trial by giving a decision on the criminal side of the case – would continue the trial on the civil side of the case or automatically refer the case to the civil court to continue the trial.

Regarding the length of the criminal trial, I consider that legislative changes can be made to facilitate its shortening. For example, the preliminary chamber should be rethought, as well as the two procedures which allow the criminal trial to be conducted quickly – namely the plea agreement and the simplified trial procedure.

54 Ibid., p. 16.
55 European Institute 2020a, p. 6.

At the same time, there is a need to ensure sufficient staffing of both magistrates and court clerks, as the courts are clearly overburdened.

4. Conclusions

In the end, I believe that the ECHR and the ECtHR represent a real bastion designed to protect citizens' rights and freedoms from any kind of violations – all the above being ample proof that the situation would have been entirely different, and predominantly negative, if the convention and the court had not existed, or if the court's case-law had not been attentive and complex with regard to all the situations referred to it. Surely every member state will still have convictions before the court on Art. 6, it being obvious that the whole state of affairs is evolving positively, and the court's case-law is still vital to maintaining this trend and achieving the European desiderata of respect for citizens' rights and freedoms, the foundation of a democratic state to which all peoples should aspire.

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