

ARTICOLE

CHALLENGES FOR ROMANIAN PROSECUTORS IN  
EXERCISING THEIR DUTIES OF DEFENSE DURING  
PRE-TRIAL STAGE

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**Abstract:** Current paper aims to emphasise that, over the time, it has been proven that the accuracy of an analysis of criminal procedural law is accomplished only whether it is certified by the conviction that norms and decisions of national and European courts enshrine and guarantee human rights. Thus, the legislation in criminal procedural matters can be rationalized compulsorily starting from European premises – “the unit of European conventionality” – and going further to constitutional, organic and ordinary normative requirements.

In the same time, from a methodological point of view, for reaching the human rights goals in criminal procedures, it is crucial to be adopted an approach which includes the requirement for the provisions of the Criminal Procedure Code to be interpreted in the light of the general principles of the criminal trial – many of these principles being principles of human rights, in fact. Equally, indispensable appears the feature of the principle of subsidiarity of European protection of human

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rights which underlines the role of the main guarantees of the European Convention on Human Rights for national judicial authorities.

Whether a hierarchy of the rights relevant for criminal procedures is established, the right to defense should be one of the most important rights to discuss. This traditional approach underlines the horizontal effects of the right to defense, like the need to have regulated the defense of the suspect or the accused by Code of Criminal Procedure. Alike, the vertical effects of the right to defense complete the challenges for national judicial authorities. In this context, it has to be accentuated the role of the prosecutor within the criminal investigation and prosecution phase, respectively the prosecutor must defend the legal order and fundamental rights.

Beyond legal techniques, an exquisite study of the right of the defense must contain interdisciplinary references which value the current requirements for emancipation in criminal procedural matters focused on the legal education of civil society and the change of mentality of judicial authorities.

**Keywords:** right to defense, prosecutor, criminal investigation, legal order

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## I. European premises

The European standard for the protection of human rights is consecrated at the level of the two essential European intergovernmental organizations in a double, but unitary version of reference to normative and jurisprudential benchmarks. Thus, “the unit of conventionality” of the Council of Europe, represented by the European Convention on Human Rights, its 16 Additional Protocols and the jurisprudence of the European Court of Human Rights, highlights its importance both at the regional and national level, through the constant reporting to it done by national and European magistrates. The second European standard, inspired in its substance by the Council of Europe, is the one belonging to the European Union and it is formed by the Charter of Fundamental Rights and the case law of the Court of Justice of the European Union.

The desire to set a common standard for both European intergovernmental organizations will become a reality with the accession of the European Union to the European Convention on Human Rights regulated by the Treaty of Lisbon: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law”<sup>1</sup>.

Beyond these normative benchmarks of a general nature in the field of human rights - the European Convention of Human Rights and the Charter of Fundamental Rights of European Union, as well as other normative acts adopted to the level of the European Union, must be taken into account, in

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<sup>1</sup> Article 6 paragraph 3 of the Treaty of Lisbon, which was signed on 13 December 2007 and entered into force on 1 December 2009; online: <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12007L/TXT>.

criminal procedural matters, in order to contribute to the identification of a set of procedural guarantees common to all member States, which have to constitute the minimum standard for the protection of the rights of persons who are suspected or accused in criminal proceedings.

European secondary legislation has focused on the specific guarantees of the suspect and the accused, regulating them in separate directives, depending on the awareness of the urgency of intervention at the European level in the context of frequent violations of the structural elements of the right to a fair trial. The first procedural guarantee that has been regulated is the one aimed at the right to interpretation and translation<sup>2</sup> in the context of the increase in cross-border crime and not only. But the right that represents the foundation of the guarantee offered to those who do not speak or understand the language in which the judicial procedure is carried out is the right to information about the rights of suspects or defendants in different procedural stages<sup>3</sup> covered by a second directive essential to criminal judicial procedures. Inextricably linked with the right to information, within the European Union directives, are consecrated other essential rights such as "the right to have access to a lawyer in criminal proceedings and European arrest warrant proceedings, the right for a third party to be informed following deprivation of liberty, the right to communicate with third parties and consular authorities during deprivation of liberty, the right to legal assistance

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<sup>2</sup> Directive 2010/64/EU of the European Parliament and of the EU Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, online: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:ro:PDF>

<sup>3</sup> Directive 2012/13/EU of the European Parliament and of the EU Council of 22 May 2012 on the right to information in criminal proceedings, online: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:RO:PDF>

if the defendants do not have sufficient financial resources”<sup>4</sup>. The context of criminal trials carried out *in absentia* – a general procedural exception – and, especially, criminal trials with an arrested defendant has justified a European normative intervention that strengthened elements guaranteeing the presumption of innocence and the sensitive right to be present at the trial in criminal proceedings<sup>5</sup>. Last but not least, the procedural guarantees for children who are suspected or accused in criminal proceedings<sup>6</sup> has constituted a concern for European legislator in order to offer additional guarantees.

Rules adopted by European Parliament and Council of the European Union has assigned the obligation for victims of crime to be treated with respect and to enjoy adequate protection, to get the proper support and to access to justice, targeting specific groups of victims such as children, victims human trafficking and victims of terrorism<sup>7</sup>.

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<sup>4</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings, as well as the right for a third party to be informed following deprivation of liberty and the right to communicate with third parties and consular authorities during deprivation of liberty, online: <https://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1450449360102&uri=CELEX:32013L0048>

<sup>5</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, online: <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32016L0343>

<sup>6</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural guarantees for children who are suspected or accused persons in criminal proceedings, online: <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=OJ:L:2016:132:FULL&from=EN>.

<sup>7</sup> Directive 2012/29/EU of the European Parliament and of the EU Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and

## II. National premises

The status of member State in the main European intergovernmental organizations forced the Romanian legislator to adopt and to transpose into the national normative acts fundamental principles of human rights as an obligation deriving from the ratification of the constitutive or specialized European normative documents in this field. Thus, "the Romanian state undertakes to fulfil exactly and in good faith its obligations from the treaties to which it is a party"<sup>8</sup>. In order to ensure a coherence and, at the same time, a unitary perspective of the entire Romanian normative framework, a complex strategy was created in order to amend both constitutional provisions and organic and ordinary laws, although once ratified the European and international treaties are becoming part of the Romanian law<sup>9</sup>. Constitutional provisions refer to conflicts between Romanian fundamental law and treaties, being recommended a practical solution: "if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification can only take place after the revision of the Constitution"<sup>10</sup>.

The openness towards the internalization of the fundamental values of human rights is marked by the granting of a superior position to the human rights treaties in relation to the domestic laws: "If there are inconsistencies

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replacing Council Framework Decision 2001/220/JHA, online: <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32012L0029&from=EN>.

<sup>8</sup> Article 11 paragraph 1 of Romanian Constitution, Amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003, republished by the Legislative Council, published in the Official Gazette of Romania no. 767 of October 31 2003.

<sup>9</sup> Article 11 paragraph 2 of the Romanian Constitution.

<sup>10</sup> Article 11 paragraph 3 of the Romanian Constitution.

between the pacts and treaties regarding fundamental human rights, to which Romania is a party, and the internal laws, the international regulations take precedence, unless the Constitution or internal laws contain more favourable provisions"<sup>11</sup> – as the rule in the matter, the exception being accepted only in the situation of the establishment at the national level of a higher standard of human rights protection against the international regulations that constitute the common standard.

The constitutional norm that regulates human rights fulfils the role of "mediator" of the relations between ordinary and organic internal laws and international norms in the field of human rights, facilitating the full assumption of international obligations by the Romanian authorities. Thus, it is provided that "the constitutional provisions regarding the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party"<sup>12</sup>. As well, in Romanian organic law it is specified that "the norms of criminal procedure aim to ensure the effective exercise of the powers of the judicial authorities with the guarantee of the rights of the parties and the other participants in the criminal process so that the provisions of the Constitution, the constitutive treaties of the European Union and of the other regulations of the European Union in criminal procedural matters, pacts and treaties regarding fundamental human rights to which Romania is a party"<sup>13</sup>. This double regulation of the application by Romanian magistrates of the legal principles surrounding the field of human rights

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<sup>11</sup> Article 20 paragraph 2 of the Romanian Constitution.

<sup>12</sup> Article 20 paragraph 1 of the Romanian Constitution.

<sup>13</sup> Article 20 paragraph 1 of Romanian Code of Criminal Procedure; Law no. 135/2010 regarding the New Code of Criminal Procedure, published in the Official Gazette no. 486 of July 15, 2010, in force since February 1, 2014.



provided by international treaties attests the indispensable nature of these obligations, Romanian magistrates fulfilling the role of main guarantors of normative acts in the field of human rights, European and international magistrates having a secondary role based on the principle of subsidiarity of European and international mechanisms in the field of human rights.

The provisions of the current Romanian Criminal Procedure Code, whether they establish the role and purpose of the rules of criminal procedure, or whether they provide the fundamental principles of the criminal process, highlight the four normative and jurisprudential benchmarks to which Romanian magistrates must refer constantly in a cumulative and not alternative manner, in own activity in order to satisfy the criterion of its efficiency: the Romanian Criminal Procedure Code, the Constitution, the treaties and other regulations of the European Union in criminal procedural matters, the pacts and treaties regarding fundamental human rights to which Romania is a party.

The provisions of the current Romanian Criminal Procedure Code must be interpreted in the light of the general principles of the criminal procedure regardless whether these are principles specific to the criminal procedural law, such as the legality of the criminal process, finding out the truth, the obligation to initiate and exercise the criminal action or they are principles specific to human rights field, with reference to particularly to social values essential for a democratic society such as the absolute right *ne bis in idem*, the relative rights to respect for human dignity and private life, the right to freedom and security, and the latter, the right to a fair trial with general guarantee elements - the fair, public character and reasonable term of the criminal process - and with specific guarantee elements - presumption of innocence, right to defense and the right to an interpreter.

### III. Fundamental European principles

A fundamental European principle in human rights establishes as a premises that European Convention on Human Rights does not intend to guarantee theoretical or illusory rights, but only concrete and effective rights<sup>14</sup>.

Another fundamental European principle specifies that national authorities are most entitled to act to prevent and remedy any alleged violations of the European Convention on Human Rights. As is has been already mentioned, the national judicial authorities are the main guarantors of the European Convention of Human Rights<sup>15</sup>.

### IV. Correlation between prosecutor and suspect or defendant

The procedural phase that is particularly relevant to highlight the correlation between the judicial authorities whose main duties are the defense of the legal order and fundamental rights is the criminal pre-trial phase, the prosecutor being the judicial authority that has been subject to changes in its duties by the decisions of the European Court of Human Rights.

The perspectives considered by the European judges in their judgments emphasize the dimensions of the relationship between the criminal judicial authorities and the main private actor of the criminal process: the defendant. The legal dimension of the reports is the one that appears to be the most incident and the most analysed within the national and

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<sup>14</sup> ECHR, *Artico v. Italy*, judgment of May 13, 1980, ECLI:CE:ECHR:1980:0513JUD000669474.

<sup>15</sup> ECHR, *Varnava and others v. Turkey*, judgment of September 18, 2009, ECLI:CE:ECHR:2009:0918JUD001606490.

European judicial procedures. The human dimension, which is imposed in particular by the standards specific to the field of human rights, and the political dimension, which cannot be omitted, are outlined by the dynamics of intrinsic and extrinsic approaches applied to the activity of the criminal investigation authorities.

## **A. The human dimension**

The fundamental landmarks of the human dimension of the relationship between the prosecutor and the suspect or defendant are constituted by social values protected by all normative acts in the field of human rights at the national, regional or international level: human dignity, physical integrity, mental integrity.

### 1. The human dimension – Dignity

The fundamental right to human dignity represents the quintessence of any catalogue of human rights, its special status being conferred by its express consecration in the Universal Declaration of Human Rights, but also in the most recent European normative act in the field of human rights. Likewise, it must be accepted that the dignity of the person constitutes not an ordinary fundamental right, but represents “the very basis of fundamental rights provided in any human rights catalogue”<sup>16</sup>. The dignity of the person is part of the substance of the rights registered in the catalogues of rights. None

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<sup>16</sup> Explanations of the Charter for fundamental rights of European Union, (2007/C 303/02), Official Journal of EU, C 303/17, 14 December 2007, online: [https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32007X1214\(01\)](https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32007X1214(01)).

of the rights enshrined in national, European or international normative acts can be invoked without affecting the dignity of another person<sup>17</sup>.

Precisely because of its essential place in the set of social values protected by rights, human dignity has become a fundamental landmark in the establishment and conduct of judicial activity, especially in its initial procedural phase. Moreover, the Romanian normative acts that govern the judicial system enshrine the general fundamental principles according to which prosecutors exercise their functions in accordance with the law, respecting and protecting human dignity and defending the rights of the person.

The same principle of human dignity is also provided as a specific principle for the criminal process, thus establishing an essential standard for the activity of both criminal investigation authorities and judges: "Any person who is under criminal investigation or trial must be treated with respect for human dignity"<sup>18</sup>.

## 2. The human dimension - Degrading treatments

The social value of human dignity is also placed at the core of the right to mental integrity, imposing certain constants of the attitude shown by the prosecutor. Behaviours and attitudes contrary to human rights standards take various forms and target different procedural stages: trivial humiliation of a person in front of other people, who may be forced to act against his will and

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<sup>17</sup> ECJ, Case C-377/98, *Netherlands v. European Parliament and Council*, Rec. 2001, p. I-7079, paragraphs 70-77, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61998CJ0377>.

<sup>18</sup> Article 11 paragraph 1 of Romanian Criminal Procedure Code.

conscience<sup>19</sup>, vexatious measures<sup>20</sup>, discrimination<sup>21</sup>, verbal and non-verbal language that inspires feelings of fear, anguish and inferiority<sup>22</sup>.

### 3. The human dimension - Inhuman treatments

The suspect's or defendant's right to integrity is also protected in its physical form, alongside the mental one. In order to meet the constituent elements of the absolute rights provided by the normative acts in the form of prohibitions, the criminal investigation authorities must cause mental and physical suffering of particular intensity<sup>23</sup>.

Although these variants of behaviour involving the use of physical force against a suspect or defendant are incompatible with the standards of a democratic society, situations which have been brought to the attention of European judges demonstrate a contrary practice. The example set by the in-depth interrogations can only attest that the use of violence is administrative practice. In this context, the impact of the official tolerance preferred by the

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<sup>19</sup> ECHR, *Tyrer v. United Kingdom*, judgment of April 25, 1978, online: ECLI:CE:ECHR:1978:0425JUD000585672.

<sup>20</sup> ECHR, *Pendiuc v. Romania*, judgment of February 14, 2017, online: ECLI:CE:ECHR:2017:0214JUD001760515.

<sup>21</sup> ECHR, *Stoica v. Romania*, judgment of March 4, 2008, ECLI:CE:ECHR:2008:0304JUD004272202.

<sup>22</sup> ECHR, *Kudla v. Poland*, judgment of October 26, 2000, ECLI:CE:ECHR:2000:1026JUD003021096; *Pantea v. Romania*, judgment of June 3, 2003, ECLI:CE:ECHR:2003:0603JUD003334396.

<sup>23</sup> ECHR, *Poede v. Romania*, judgment of September 15, 2015.

ECLI:CE:ECHR:2015:0915JUD004054911; *Cazan v. Romania*, judgment of April 5, 2016, ECLI:CE:ECHR:2016:0405JUD003005012.

competent authorities, such as omitting to take immediate measures to stop the violation of rights, must also be identified<sup>24</sup>.

A peculiarity in the case law of the European Court of Human Rights is represented by the position of the European judges regarding the interpretation of the principle of positive obligations, both substantive obligations and procedural obligations, which belong to the criminal investigations and prosecution authorities. Representing an important jurisprudential change, currently, the burden of proof of the aggressive acts belongs to the judicial authorities when a person is in their custody. This principle applies even if the person is in a context other than actual deprivation of liberty, such as an identity check or a simple interrogation<sup>25</sup>.

## **B. The legal dimension**

The legal dimension of the relationship between the criminal investigation authorities and the suspect or defendant has at its core general fundamental guarantees recognized by the common European standards regarding the judicial system - independence, impartiality - but also guarantees specific to the material criminal sphere of the object of a judicial procedure: *in dubio pro reo*. Equally important is the principle of good faith of criminal investigation authorities in carrying out their own activities.

### 1. Independence

Although expressly enshrined in the normative acts in the field of human rights with direct reference to the courts, the guarantee of

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<sup>24</sup> ECHR, *Ireland v. The United Kingdom*, judgment of January 18, 1978, ECLI:CE:ECHR:1978:0118JUD000531071.

<sup>25</sup> ECHR, *Bouyid v. Belgium*, judgment of September 25, 2015, ECLI:CE:ECHR:2013:1121JUD002338009.

independence was analysed by the European judges and related to the activity of the prosecutors, especially due to the controversial form of regulation in the Romanian normative acts.

The natural similarity of the wording of the constitutional and organic texts strengthens the guidelines of the organization and activity of the prosecutor's offices - independence, impartiality and hierarchical control – but also sharpens the controversies caused by the principle of the Public Ministry's operation "under the authority of the Minister of Justice"<sup>26</sup>. It is precisely this adjacent principle that led European judges, despite the nuances within the organic law regarding the relations between prosecutors and courts and other state authorities, to rule, regardless of the violated right – the right to a fair trial<sup>27</sup> or the right to freedom and security<sup>28</sup> that in Romania, prosecutors do not meet the condition of independence in relation to the executive power due to the double relationship of subordination they have as representatives of the Public Ministry: first, the subordination to the General Prosecutor, then so called subordination to the Minister of Justice.

The clarifications established by the Strasbourg judges regarding the notion of magistrate and the possibility of including prosecutors within

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<sup>26</sup> Article 132 paragraph 1 of Romanian Constitution.

<sup>27</sup> ECHR, *Vasilescu v. Romania*, judgment of May 28, 1998,

ECLI:CE:ECHR:1998:0522JUD002705395: Analyzing article 6 paragraph 1 of the Convention, it was specified that in Romania, prosecutors, acting as representatives of the Public Ministry, are subordinated, first, to the general prosecutor, then to the minister of justice, they do not fulfill the condition of independence in relation to the executive power.

<sup>28</sup> ECHR, *Pantea v. Romania*, judgment of June 3, 2003, ECLI:CE:ECHR:2003:0603JUD003334396: "The Court does not identify any reason that would lead to a different conclusion in the case, this time, on the grounds of Art. 5.3 of the Convention, since independence from the executive is included among the guarantees implied by the notion of 'magistrate', in the sense of Art. 5.3 of the Convention."

magistrates focus on the ability to exercise judicial functions as they present guarantees against arbitrariness and unjustified deprivation of liberty and highlight the need for independence in towards the executive and the parties<sup>29</sup>.

The context of the analysis of some objective circumstances, existing at the time of taking the measure of preventive arrest, may be relevant: if the magistrate can intervene in the criminal procedure subsequent to the time of taking the measure, as a follow-up body, his independence and impartiality may be questioned<sup>30</sup>.

## 2. Impartiality

Impartiality as a general fundamental guarantee is defined in the judgments of the European Court of Human Rights as "the absence of prejudice or preconceived opinions"<sup>31</sup>. Related to the specific activity and to the criteria for distinguishing different types of impartiality, the following should be mentioned: subjective impartiality, which refers to the personal beliefs or interests of a particular prosecutor in a particular case; and objective impartiality, which highlights that the prosecutor offers sufficient guarantees to exclude any reasonable doubt from this point of view<sup>32</sup>.

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<sup>29</sup> ECHR, *Schiesser v. Switzerland*, judgment of December 4, 1979, ECLI:CE:ECHR:1979:1204JUD000771076.

<sup>30</sup> ECHR, *Huber v. Switzerland*, October 23, 1990; *Brincat vs. Italy*, November 26, 1992, ECLI:CE:ECHR:1990:1023JUD001279487.

<https://hudoc.echr.coe.int/eng#%7B%22documentcollectionid%22:%5B%22JUDGMENTS%22%5D%7D>.

<sup>31</sup> ECHR, *N.D. and N.T. v. Spain*, judgment of February 13, 2020, ECLI:CE:ECHR:2020:0213JUD000867515.

<sup>32</sup> ECHR, *De Cubber v. Belgium*, judgment of October, 26, 1984, ECLI:CE:ECHR:1984:1026JUD000918680.



The prosecutor's impartiality must be understood in the key of its relativity, as it is presumed until the contrary is proven. Moreover, the relativity of impartiality is not established only in relation to the prosecutor, but also to any professional magistrate, to a member of a jury or to persons specialized in various fields of activity, who participate, together with the professional magistrates, in solving some categories of litigation.

A particular case is constituted by military prosecutors who are active officers at the time of the commission of the acts. Their membership in a military structure provides the space for the manifestation of the principle of hierarchical subordination, which has both positive coordinates, such as the military ranks, which give them the privileges of hierarchical subordination, and negative coordinates, such as the sanctions applied in case of violation of the rules of military discipline. Specifically, based on the existence of an institutional link, the absence of independence of the military prosecutor can be interpreted as a lack of impartiality in the conduct of the prosecution regarding the accused policemen, if the policemen are active officers<sup>33</sup>.

### 3. Principle *in dubio pro reo*

The principle specific to the criminal sphere *in dubio pro reo* has constituted the concern of legislators both at the national and European level, precisely because it is highlighted the importance of its observance in the context of analysing a factual situation in the light of human rights and criminal law, regardless of the procedural phase of criminal trial.

Thus, at the European level, obligations have been established for the member states by which they, in the national legislation, must ensure that any

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<sup>33</sup> ECHR, *Bursuc v. Romania*, judgment of January 12, 2005, ECLI:CE:ECHR:2004:1012JUD004206698 and *Barbu Anghelescu v. Romania*, judgement of October 5, 2004, ECLI:CE:ECHR:2004:1005JUD004643099.

doubt regarding the guilt is in favor of the suspect or the accused, including in cases where the court evaluates the possibility of his acquittal.

The Romanian legislator complied with European requirements prior to their establishment at the level of the European Union, preferring to regulate the *in dubio pro reo* principle within the legal institution of evidence. By establishing broad limits of manifestation – "after the administration of all the evidence" – an essential objective element is specified according to which the evaluation of the evidence – conviction – is carried out by the judicial authorities. Thus, the doubt is always interpreted in favour of the suspect or the accused.

#### 4. Good faith

The subjectivity of the concept of good faith may lead to different approaches. The diametrically opposite concept can have a more effective impact in the context of analysing the activity of criminal investigation authorities. Thus, bad faith was defined in European judgements as "the attitude of a person who performs an act or a fact that contravenes the law, being at the same time fully aware of the illicit character of his conduct"<sup>34</sup>.

The Romanian criminal procedural legislation expressly provides the principle of the bad faith in relation to the activity of criminal investigation authorities, emphasizing that "the rejection or non-recording in bad faith of the evidence proposed in favour of the suspect or defendant is sanctioned according to the provisions of [the] code"<sup>35</sup>.

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<sup>34</sup>ECHR, *Păduraru v. Romania*, judgment of April 1, 2005, ECLI:CE:ECHR:2005:1201JUD006325200.

<sup>35</sup> Article 5 paragraph 2 and article 306 paragraph 2 of the Romanian Criminal Procedure Code.

Not less important, the same organic law stipulates that “the right to defense must be exercised in good faith, according to the purpose for which it was recognized by law”<sup>36</sup>.

This dynamic of the concepts of good faith and bad faith, related to both to the authorities and defendants has the role to underline the relevance of the ethics of conducts in the criminal trials.

5. Effects of the right to defense

**a) The horizontal effect of the right to defense: the defender of the suspect, the accused**

The protection of the rights provided by the current Romanian Code of Criminal Procedure must be essential for the legal performance of the prosecutor's activity. As well, it also creates directions of activity for the defendant's defender, both approaches having as their source the rights of the defendant<sup>37</sup>. The first right is the right not to give any statement during the criminal trial. This right has an important added provision related to the inexistence of consequences for his refusal to give statements, especially when his statements they can be used as evidence against him. Then is provided the right to consult the file, under the law. As well, is set the right to have a lawyer by his choice and” if he does not appoint one, in cases of mandatory assistance, the right to have a lawyer appointed *ex officio*”. Listing is completed by “the right to propose the administration of evidence under the conditions provided by law, to raise exceptions and to make conclusions”. A general right with double effects is “the right to make any other requests related to the settlement of the criminal and civil side of the case”. A sensitive right for all

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<sup>36</sup> Article 10 paragraph 6 of the Romanian Criminal Procedure Code.

<sup>37</sup> Article 83 of the Romanian Criminal Procedure Code.

national authorities is "the right to benefit from an interpreter free of charge when he does not understand, does not express himself well or cannot communicate in Romanian". Not less important is a specific right for Romanian legislation: the right to appeal to a mediator, in cases permitted by law". The character unlimited of this listing is obvious in the presence of the provision "other cases provided by law"<sup>38</sup>.

**b) The vertical effect of the right to defense: the prosecutor, leader of the criminal process during the criminal investigation**

The defendant's rights represent a challenge for judicial police and magistrates. In order to respect the positive obligations assumed by Romania ratifying European Convention on Human Rights, it is necessary that domestic laws to provide detailed procedural activities.

The management and supervision of the activity of the criminal investigation authorities by the prosecutor highlights not only his role as leader of the criminal process, but also his involvement in collecting and management of evidences, both in favour and against the suspect or defendant<sup>39</sup>.

Consequently, all documents specific to the first phase of the criminal process, including the notification to the criminal investigation authorities, the admissibility of the evidence gathered during the execution of the preliminary documents<sup>40</sup>, the criminal investigation *in rem*, are essential in analysing the observance of the right to defense.

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<sup>38</sup> Idem.

<sup>39</sup> Articles 299 and 300 of the Romanian Criminal Procedure Code.

<sup>40</sup> ECHR, *Creangă v. Romania* (MC), judgment of February 23, 2012, ECLI:CE:ECHR:2012:0223JUD002922603; *Niculescu v. Romania*, judgment of June 25, 2013, ECLI:CE:ECHR:2013:0625JUD002533303, and *Blaj v. Romania*, judgment of April 8, 2014, ECLI:CE:ECHR:2014:0408JUD003625904.

More precisely, the criminal investigation and prosecution authorities have “the obligation to ensure, based on evidence, the truth about the facts and circumstances of the case”<sup>41</sup>. Equally, the criminal investigation authorities have “the obligation to carry out the criminal investigation respecting the procedural guarantees and the rights of the parties and the procedural subjects, so that the facts that constitute crimes are ascertained in time and completely”<sup>42</sup>.

In the administration of evidence, special attention must be paid to the burden of proof. Thus, in accordance with European requirements, “member States ensure that the burden of proof in establishing the guilt of suspected and accused persons belongs to the criminal investigation authorities. This doesn’t create any obligation for judges to seek both incriminating and exculpatory evidences, nor implies the right of the defense to present evidence in accordance with applicable domestic law”<sup>43</sup>.

The criminal prosecution *in personam* is another procedural stage that requires the guarantee of certain parameters imposed by the observance of the right to defense. Consequently, the criminal investigation authorities have the obligation to ensure, on the basis of evidence, the truth about the person of the suspect or the defendant. Likewise, the criminal prosecution authorities have the obligation to collect and administer evidences both in favour and against the suspect or defendant<sup>44</sup>.

Very special are the guarantees regarding the suspect's right to be informed, before being heard, about the action for which he is being

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<sup>41</sup> Article 5 paragraph 1 of the Romanian Criminal Code.

<sup>42</sup> Article 8 of the Romanian Criminal Code.

<sup>43</sup> Article 6 paragraph 1 Directive (EU) 2016/343 of the European Parliament and of the Council.

<sup>44</sup> Article 5 paragraph 1 of the Romanian Criminal Code.

investigated and its legal framework<sup>45</sup>, to which are added the procedural rights provided by current Romanian Code of Criminal Procedure. Before being heard, the accused must be made aware that he has “the right not to make any statement, drawing his attention to the fact that if he refuses to give statements, he will not suffer any adverse consequences, and if he gives statements they can be used as evidence against him”<sup>46</sup>.

Another procedural stage in which the right to defense must be taken into account is the initiation of the criminal action. The prosecutor is obliged to initiate and exercise the criminal action *ex officio* when “there are evidences from which a crime has been committed and there is no legal reason to impede it”<sup>47</sup>, respectively “the fact does not exist; the act is not provided for by criminal law or has not been committed with the culpability required by law; there is no evidence that a person has committed the offense; there is a justifiable or non-culpable ground; there is no prior complaint, authorization or referral to the competent body or other condition required by law for initiating criminal proceedings; amnesty or prescription has occurred, the death of the suspect or the accused natural person has occurred or the suspect or the accused legal person has been ordered to be struck off the register; the preliminary complaint has been withdrawn, in the case of offenses for which the withdrawal of the preliminary complaint removes criminal liability, a reconciliation has taken place or a mediation agreement has been concluded under the conditions of the law; there is a ground for non-punishment provided by law; there is *res judicata*; there has been a transfer of proceedings to another State in accordance with the law”<sup>48</sup>.

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<sup>45</sup> Article 83 letter a<sup>1</sup>) of the Romanian Criminal Code.

<sup>46</sup> Article 83 letter a) of the Romanian Criminal Code.

<sup>47</sup> Article 309 paragraph 1 of the Romanian Criminal Code.

<sup>48</sup> Article 16 paragraph 1 of the Romanian Criminal Code.

“The initiation of criminal proceedings must be communicated to the defendant by the prosecuting authority, which shall summon him to be heard”<sup>49</sup>. Whether the accused asks a copy of the order ordering the measure, authorities must provide it to him<sup>50</sup>. As well, it is imperative for criminal investigation body – judicial police or prosecutor<sup>51</sup> – to hear the defendant in his new procedural quality. Nevertheless, there are several cases when such a hearing doesn’t take place: “the defendant is unjustifiably absent, absconds or is missing”<sup>52</sup>.

Similarly, the conditions for ordering preventive arrest must also be taken into account in the context of a complete analysis of the right to defense: “ the defendant has fled or has gone into hiding for the purpose of evading prosecution or trial, or has made preparations of any kind for such acts; the defendant attempts to influence another participant in the commission of the crime, a witness or an expert, or to destroy, alter, conceal or remove material evidence or to induce another person to engage in such conduct; the defendant puts pressure on the injured person or attempts to enter into a fraudulent agreement with the injured person; there is a reasonable suspicion that, after the criminal proceedings have been instituted against him/her, the defendant has intentionally committed a new offense or is preparing to commit a new offense”<sup>53</sup>.

The extension of the criminal prosecution<sup>54</sup> or the change of legal framework<sup>55</sup> are other procedural acts that raise questions about the way in

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<sup>49</sup> Article 309 paragraph 2 of the Romanian Criminal Procedure Code.

<sup>50</sup> Article 309 paragraph 3 of the Romanian Criminal Procedure Code.

<sup>51</sup> Article 309 paragraph 4 of the Romanian Criminal Procedure Code.

<sup>52</sup> Article 309 paragraph 5 of the Romanian Criminal Procedure Code.

<sup>53</sup> Article 223 paragraph 1 of the Romanian Criminal Procedure Code.

<sup>54</sup> Article 311 paragraphs 1 to 5 of the Romanian Criminal Procedure Code.

<sup>55</sup> Article 311 of the Romanian Criminal Procedure Code.

which the right to defense can be ensured. Some particularities appear in forward procedural movement of this complex legal concepts. Taken into account the importance for the trial of these two procedural activities, Romanian legislator stipulated indirectly which is the authority who is in charge with them. As general rule, it is preferred to offer these assignments to the investigation and prosecuting authority, differentiations being made in function of the number of suspects or defendants from the case. Firstly, there is the situation “when the criminal prosecution is conducted against a single person”, when the extension might be ordered by the criminal investigation body and are imposed the condition regarding “confirmation of the prosecutor supervising the criminal prosecution, within 3 days from the date of the order, at the latest and the obligation to submit the case file to the prosecutor<sup>56</sup>. Secondly, whether the criminal prosecution has been extended to more than one person, the prosecuting authority is obliged to inform them that they become suspects in the criminal case<sup>57</sup>. As well is provided expressly in which situations can be applied these assignments: “where, after the commencement of the criminal prosecution, discovers new facts, data on the participation of other persons or circumstances that may lead to a change in the legal classification of the act”<sup>58</sup>. Not less important, essential is the obligation for the judicial authority that ordered the extension of the criminal investigation or the change of legal qualification “to inform the suspect about the new facts regarding which the extension was ordered”<sup>59</sup>.

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<sup>56</sup> Article 311 paragraph 2 of the Romanian Criminal Procedure Code.

<sup>57</sup> Article 311 paragraph 4 of the Romanian Criminal Procedure Code.

<sup>58</sup> Article 311 paragraph 4 and article 307 of the Romanian Criminal Procedure Code.

<sup>59</sup> Article 311 paragraph 3 of the Romanian Criminal Procedure Code; Decision no. 90/2017 of Romanian Constitutional Court, published in Official Gazzete no. 291, 25 April 2017, online: [https://www.ccr.ro/wp-content/uploads/2020/07/Decizie\\_90\\_2017.pdf](https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_90_2017.pdf).



In case of suspension of the criminal prosecution, other guarantees of the right to defense must be established. Thus, “while the prosecution is suspended, the criminal investigation authorities continue to carry out all the acts, the fulfilment of which is not prevented by the situation of the suspect or the defendant, respecting the right of defense of the parties or procedural subjects”<sup>60</sup>. When the criminal prosecution resumes, “the acts carried out during the suspension can be redone, if possible, at the request of the suspect or the accused”<sup>61</sup>.

A controversial procedural act in the light of the current Code of Criminal Procedure is the presentation of the criminal investigation file to the defendant. Since this is not expressly regulated as in the previous regulations<sup>62</sup>, such a primary procedural activity is left to the discretion of the prosecutor. Fundamental questions arise, such as when and how the defendant learns that the criminal investigation is being completed, both elements being essential for the effective guarantee of the right to defense in the criminal investigation stage.

File consultation is essential under the current Romanian Criminal Procedure Code in the light of the same right to defense. The right to consult the file, under the terms of the law, implies both that the defender assists in the performance of any act of criminal prosecution, and consults the documents of the file in different procedural phases: in the procedure of the preliminary chamber and during the trial. The lawyer of the parties and the main procedural subjects has the right to request consultation of the file throughout the criminal process. This right cannot be exercised or restricted

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<sup>60</sup> Article 313 paragraph 3 thesis 1 of the Romanian Criminal Procedure Code.

<sup>61</sup> Article 313 paragraph 3 thesis 2 of the Romanian Criminal Procedure Code.

<sup>62</sup> Article 254 of the Old Romanian Criminal Procedure Code; The updated Criminal Procedure Code 2011-2012, republished in the Official Gazette no. 78 of April 30, 1997.

in an abusive manner. During the criminal prosecution, the prosecutor sets the date and duration of the consultation within a reasonable period<sup>63</sup>.

The prosecutor can restrict the consultation of the file during the criminal investigation. This restriction has to satisfy different types of requirements such as the necessity for the restriction to affect the proper conduct of the criminal investigation, and the compensation obligation for the prosecutor to argue his measure. A particular demand refers to the term of the restriction which can reach a maximum of 10 days<sup>64</sup>. Another fundamental exigency takes note of the lawyer's obligation "to preserve the confidentiality or secrecy of the data and documents which he became aware of during the consultation of the file, during the criminal prosecution"<sup>65</sup>. Not less important, also related to lawyer's activity, "in order to prepare the defense, the defendant's lawyer has the right to learn about the entire material of the criminal investigation file in the proceedings conducted before the judge of rights and freedoms regarding the privative or restrictive measures of rights, in which the lawyer participates"<sup>66</sup>.

Regarding the completion of the criminal investigation, it is essential to be notified about the closure solutions – a copy of the ordinance or report of the criminal investigation body, the relinquishment of the criminal investigation – copy of the ordinance and the summons by the judge of the

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<sup>63</sup> Article 94 of the Romanian Criminal Procedure Code; Order of the Minister of Interior Affairs No 64/2015 on establishing organizational measures to ensure the exercise of the right to consult the criminal file (Official Gazette No 500 of 7 July 2015); Article 7 of Directive (EU) No 13 of 22 May 2012 on the right to information in criminal proceedings (OJ L 142 of 01.06.2012).

<sup>64</sup> Articolul 94 paragraph 4 of the Romanian Criminal Procedure Code.

<sup>65</sup> Articolul 94 paragraph 5 of the Romanian Criminal Procedure Code.

<sup>66</sup> Article 94 paragraph 7 of the Romanian Criminal Procedure Code.

preliminary chamber, the continuation of the criminal investigation at the request of the suspect or the defendant<sup>67</sup>.

In case of closure of the procedure as a result of finding that the amnesty, the prescription, the withdrawal of the prior complaint or the existence of a cause of non-punishment, as well as in the case of the prosecutor giving up the criminal investigation, the suspect or the defendant can request, within 20 days from receiving the copy of the case resolution order, continuing the criminal investigation<sup>68</sup>.

Regarding the prosecution, in order to satisfy the right to defense, it is required that “the indictment be accompanied by the case file and by a necessary number of certified copies of the indictment, to be communicated to the defendants, they are sent to the competent court to judge the case in fund”<sup>69</sup>. “The indictment must state the names and surnames of the persons to be summoned in court, indicating their capacity in the process, and the place where they are to be summoned”<sup>70</sup>.

Regarding the re-opening of the criminal investigation, it must be specified that it is subject to the confirmation of the judge of the preliminary chamber, both following the denial of the prosecutor's solution by the superior hierarchical prosecutor in the procedure<sup>71</sup>, as well as in the case of the refutation ordered *ex officio*.

As a component element of the right to defense, the right to file a complaint against criminal prosecution measures and documents can be exercised, if legitimate interests have been affected by them. The right to

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<sup>67</sup> Articles 319 and 320 of the Romanian Criminal Procedure Code.

<sup>68</sup> Article 319 of the Romanian Criminal Procedure Code.

<sup>69</sup> Article 329 of the Romanian Criminal Procedure Code.

<sup>70</sup> Article 328 of the Romanian Criminal Procedure Code.

<sup>71</sup> Article 336 of the Romanian Criminal Procedure Code.

defense also includes the requirement to communicate immediately – 48 hours, at most 20 days – the resolution of the complaint<sup>72</sup>. An appeal can be lodged before the judge of the preliminary chamber against the solutions of non-prosecution and non-sentence<sup>73</sup>.

6. Interdependence of rights

The right to defense cannot be analysed individually, but only in close conjunction with other rights provided by normative acts in the field of human rights, or other specific procedural guarantees, such as the presumption of innocence or general guarantees, such as the right to an effective appeal or other rights with fundamental relevance in the criminal sphere: the right to freedom and security.

7. Conflicts of rights

The right to defense can also be analysed from the perspective of the simultaneous exercise of some component elements of the right to a fair trial, elements that can put the criminal investigation body in the situation of choosing which right it will give priority to. The easiest "confrontation" of the right to defense is with the right to a reasonable term of the fair trial.

**C. The political dimension**

Questions regarding political interference in the national and international judicial system arise in the context of certain cases depending on the defendant and division of Public Ministry which investigates the case.

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<sup>72</sup> Article 338 of the Romanian Criminal Procedure Code.

<sup>73</sup> Article 340 of the Romanian Criminal Procedure Code.

## Conclusions

For an effective guarantee of the right to defense has to be taken into account general analysis parameters which require that Public Ministry must defend the rule of law and fundamental rights, being alongside as judges, the main guarantors of the European Convention on Human Rights.

But the most important approach in ensuring the satisfaction of European standards in the field of human rights, including respect for human rights, is educating society and changing the mentality of judicial authorities.

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