ROMANIAN INSTITUTE FOR HUMAN RIGHTS

REPORT

THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS IN CRIMINAL PROCESS IN ROMANIA

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The Protection of Fundamental Human Rights in Criminal Process in Romania

Applicable international law

Human rights are directly applicable by the Romanian courts, no matter whether they are invoked directly by the parties or *ex officio* by the court.

The Romanian citizens have the right to file complaints to international courts – ECtHR, CJEC – provided that they had exhausted all domestic possibilities of appeal, irrespective of the category of law which the case brought before the court falls in.

General questions on the nature of domestic criminal process

General

The Constitution of Romania includes a distinctive chapter that regulates the fundamental rights of the citizens, including the right to a fair trial (Chapter II, Arts. 15-54).

The criminal process is governed by the Criminal Procedure Code – a distinctive regulation.

Political accountability for the decisions made and the actions taken by the criminal justice authorities lies exclusively with the minister of justice; as far as magistrates and the members of the Superior Council of Magistracy (SCM) are concerned, this particular form of accountability cannot be incurred, but such forms as civil, criminal or disciplinary accountability can.

The criminal justice authorities are active from the first moment the criminal process; the following clarifications should be made:

They cannot initiate a criminal investigation in the absence of a reasonable suspicion that an crime was committed;

In exceptional circumstances, depending on the nature of the crime, they can organize the *flagrante delicto* – a procedure that may be assimilated to the pro-active investigation and is used, as a rule, when serious crimes are involved – corruption, organized crime – but only when there is a reasonable supposition that a crime is planned/about to be committed.

In compliance with the jurisprudence of the ECtHR, the use of a "provocative agent" is not allowed.

The previously mentioned *flagrante delicto* procedure is strictly regulated by the Criminal Procedure Code and so is the methodology for the administration of evidence, in Arts. 465-479, while mention should be made that, even in the framework of this procedure, all procedural guarantees shall be observed.

Actors in criminal process

Judiciary

The Romanian judges are graduates of a law college and benefit both of an initial training, in the framework of the National Institute of Magistracy – a training of variable duration, depending on the length of service in a juridical profession the future magistrate has, in conformity with Art. 36 in Law No. 303/2004, and of continuous training in the framework of the same Institute, throughout the term of office.

As a matter of fact, continuous participation in professional training and specialization courses for magistrates is one criterion for the evaluation of the latter's professional activity.

Irrespective of the nature of the crimes brought before justice and however serious they are, the court that makes a pronouncement is made up only of professional judges recruited in the profession and trained in a unique way, as was showed before.

In Romania, criminal justice is the exclusive competence of courts of law (Art. 2 in Law No. 304/1994).

Within the Romanian law system, the judge plays an active role, namely, establishing the juridical truth, identical with the objective truth, and clarifying the case in all aspects (Art. 287 in the Criminal Procedure Code).

At the same time, the judge is bound to observe the fundamental principles of the criminal process and guarantee the exercise of the parties' procedural rights, in compliance with the domestic and the international regulations.

Even though the judge of instruction institution is not expressly consecrated, the judges assigned on the basis of a previous planning are entitled to authorize telephone tapping, searching and give solutions to the proposals for taking/investigating/revoking/prolonging preventive/restrictive/apprehending measures – the interdiction to leave the place/country and the preventive arrest – throughout the criminal investigation (Arts. 91^{1}, 136 Para (4) and (5) in the Criminal Procedure Code.

Prosecution

According to the provisions of 131 in the Constitution and Art. 62 in Law No. 304/2004 on judicial organization, The Public Ministry is functioning in Romania. The Public Ministry represents the general interests of society and defends the rule of law, as well as the citizens' rights and freedoms. It exercises its powers through prosecutors, organized in parquets, as provided by the law, and is managed by the Attorney General beside the High Court of Cassation and Justice,

According to Art. 3 Para (1) in Law No. 303/2004 on the status of judges and prosecutors, the latter, appointed by the President of Romania shall enjoy stability and be independent, as provided for by the law.

At the same time, the provisions of Art. 132 Para (2) in the Constitution of Romania and Art. 62 Para (2) in Law No. 304/2004 on judicial organization, according to which prosecutors shall perform their activity in consonance with the principle of legality, impartiality, and hierarchic control, **under**

the authority of the Minister of Justice.

Also, according to Art. 69 in the above-mentioned normative act, the Minister of Justice, when deeming it necessary, on self-initiative or on request by the Superior Council of Magistracy, exercises control on prosecutors through prosecutors purposely assigned by the Attorney General of the Parquet beside the High Court of Cassation and Justice or, as the case may be, by the Chief Attorney of the National Anticorruption Directorate, or the Ministry of Justice. The object of the control is to check the managerial effectiveness, the way prosecutors fulfill their tasks and the relationship with the citizens and other persons involved with the activities falling in the competence of parquets. The control cannot refer to the measures ordered by a prosecutor during a criminal investigation and the solutions adopted in the process.

Parquets are organized according to the principle of hierarchic control. This is the meaning of the provisions in previously mentioned Art. 132 Para (2) in the Constitution of Romania and Art. 62 Para (2) in Law No. 304/2004 on judicial organization.

The hierarchic control principle is also to be found in the provisions of Art. 64 Para (1) and Art. 65 Para (1) in Law No. 304/2004.

In conformity with these provisions:

-the orders of the hierarchically higher rank prosecutor, given in writing and in conformity with the law, shall be bounding for the subordinated prosecutors;

-the prosecutors of each parquet shall be subordinated to the head of the respective parquet.

According to the effective legislation, the capacity as prosecutor can be obtained in two ways:

-the first one refers to admission as a member of the magistracy on the basis of a contest and the initial training for obtaining the office of a judge or a prosecutor through the National Institute of Magistracy, while the person that is going to stand for the contest shall meet the following conditions: to be

the holder of the Romanian citizenship, to domicile in Romania and to be in his/her full abilities; to be the holder of a law degree; to have no criminal or fiscal records; to have a good command of the Romanian language; to be capable, medically and psychologically, to exercise his/her office (Arts. 12-14 in Law No. 303/2004 on the status of judges and prosecutors);

-the second way refers to the provisions of Art. 33 Para (1) in Law No. 303/2004, according to which the following can be appointed in the Magistracy, on the basis of a contest, if they meet the requirements provided for by Art. 14 Para (2): the former judges and prosecutors who ceased their activity for reasons beyond their control, the special personnel provided for under Art. 87 Para (1), lawyers, notaries, legal assistants, legal advisers, the personnel on probation having graduated a law university, judicial police officers having graduated a law university, registrars having graduated a law university, persons who have held special positions of legal nature in the staff of Parliament, the Presidential Administration, the Government, the Constitutional Court, the Advocate of the People, the Court of Audit, the Legislative Council, the Academy of Romania's Institute of Judicial Research, the Romanian Institute for Human Rights, the teaching staff in accredited law universities, as well as the assistant-magistrates at the High Court of Cassation and Justice, with at least five years of service.

Prosecution can be brought by prosecutors and the by the criminal investigation bodies, the latter being the investigation bodies of the judicial police and the special investigation bodies.

It should be mentioned that the investigation bodies of the judicial police include specialized employees from the Ministry of Administration and Interior, nominally assigned by the Minister of Administration and Interior, and authorized by the Attorney General of the Parquet beside the High Court of Cassation and Justice, who work under the authority of the Attorney General of the Parquet beside the High Court of Cassation and Justice. Withdrawal of authorization by the Attorney General of the Parquet beside the High Court of

Cassation and Justice entails cessation of the capacity as employee with the judicial police.

The public prosecutor cannot be forced to bring a prosecution.

According to the provisions in the Criminal Procedure Code, the prosecuting body shall be intimated by means of a complaint or denunciation, or it shall be self-intimated *ex officio*, when it comes to know by any other means that a crime has been perpetrated.

In case neither the intimation document nor the documents preceding prosecution pertain to one of the situations preventing the initiation of a criminal suit, which are provided for in Art. 10 of the Criminal Procedure Code, with the exception of that under Para b1), then the criminal suit body issues a resolution ordering initiation of the criminal suit.

It should be mentioned that, according to Art. 10 a), the situations preventing the initiation of a criminal suit are the following: the offense is imaginary; the offense is not provided for by the criminal law; the offense was not committed by the suspect/ defendant; the offense lacks one of the constitutive elements of a crime; existence of the causes that annuls the criminal nature of the offense; absence of a previous complaint by the victim, of the authorization by or the intimation of the competent body, or of any other condition provided for by the law and required for the criminal suit to be initiated; such situations as amnesty, prescription or death of the perpetrator or, as the case may be, when the legal person having the capacity as perpetrator has been crossed off; when the initial complaint has been withdrawn or the parties have settled their dispute, in those cases where withdrawal of the complaint or settlement of the dispute removes criminal accountability; when substitution of criminal accountability was ordered; when there is a cause for impunity, provided for under the law; there is a case law (*res judicata*).

Therefore, when ordering initiation of the prosecution, the prosecutor is required to have checked all aspects related to legality.

In correlation with those mentioned before, the decision not to prosecute shall be motivated by the existence of one of the situations regulated under Art. 10 in the Criminal Procedure Code.

The decision to initiate prosecution can also be made by the criminal investigation body, in which case it has to be endorsed by the prosecutor, within 48 hours since the date prosecution was initiated, while the criminal investigation bodies are bound to produce the case file as well.

As far as the possibility for prosecutors to settle cases out of court is concerned, this is regulated by Art. 11 in the Criminal Procedure Code, according to which the prosecutor, during the criminal lawsuit, on proposal by the criminal investigation body or *ex officio*, can:

a)Quash, when there is no suspect in the case;

b)Drop criminal investigation, in the situations in Art. 10 Para a) – e), when there is an suspect/defendant in the case;

c)Drop criminal investigation, in the situations in Art. 10 Para f) – h), i1) and j) when there is an suspect/defendant in the case.

The Superior Council of Magistracy approved, under its Decision No. 328/2005, the Deontological Code for Prosecutors and Judges, which lays down the conduct standards for the latter, in compliance with the honour and the dignity of their profession.

Observation of the norms included in present Deontological Code is one criterion for the evaluation of the effectiveness and the quality judges' and prosecutors' activity and integrity.

The Deontological Code enshrines the duty of judges and prosecutors to promote the rule of law, and to defend the independence of justice, as well as the requirement that they were impartial when accomplishing their professional duties,

and their obligation to make objective decisions, free of any influences.

As far as the relationship between the prosecutor and the criminal investigation bodies is concerned, the following should be mentioned:

The prosecutor supervises the prosecution in that the criminal investigation documents should be prepared in respect of the legal provisions. In the exercise of this power, prosecutors directly govern and control the criminal investigation activity of the police and other special investigation bodies.

Also, the criminal investigation bodies are bound to immediately inform the prosecutor about the crimes they find to have been committed.

The prosecutor can issue orders related to the initiation of any criminal lawsuit, his orders being compulsory for the criminal investigation body as well as for other bodies having crime-establishing powers provided for by the law.

In order to make more imperative the orders the prosecutor gives to the criminal investigation bodies, the Criminal Procedure Code also institutes a sanction for failure to conform. Thus, it is provided that, in case the criminal investigation body fails to conform or conforms in a defective way, the prosecutor shall inform the chief of the criminal investigation body, who is bound to inform the prosecutor, within three days, about the measures he/she has taken or the fine he/she has applied.

Also, the prosecutor can invalidate the actions or the procedural measures taken by the criminal investigation body when they violate the law.

The legislation in effect does not provide for other categories of investigators, authorized to gather evidence before the trial.

Defence

Lawyers are graduates of a law college and can exercise their profession only after joining The National Association of the Romanian Bars.

Organization and exercise of the lawyer's profession are regulated by a special law, namely, Law No. 51/1995 with its subsequent amendments.

All lawyers enrolled in the bar association are entitled to formulate conclusions before the court.

Law No. 51/1995 enshrines conduct rules for lawyers, as well as the sanctions to be applied for misconduct.

The defence lawyer exercises the procedural rights of the party he/she represents or assists, adopts the procedural position of the respective party, but nevertheless he/she is independent of the party and of the court, exercising a liberal profession.

In their capacity as employed lawyers or lawyers assigned *ex officio* for one of the parties, they are bound to propose any useful evidence and support their client's case.

Investigation of the facts/truth finding/evidence

In a criminal process, the purpose of finding the truth and clarifying the case in all aspects takes precedence with all stages of the process – criminal investigation, first instance trial and trial making use of the appeal procedures.

In the criminal process system, the evidence is equally proposed by the prosecution and by the defence, such as the file should include all necessary evidence to find the truth and clarify the case.

The court is not acquainted with the case before it is intimated; the judges who, in the course of the criminal investigation, pronounced solutions related to the preventive measures, become incompatible to rule the case on the merits.

The court shall examine all the evidence administrated in the case and, also, decides on the legality of the evidence, by virtue of the volume of activity.

Appeal

The appeal is an ordinary challenge that can be exercised, as a rule, against all decisions pronounced by judges in a court of first instance – Art. 361 in the Criminal Procedure Code.

It is a recessive challenge, meaning that the trial on the merits is resumed, within the limits established by the effects of the appeal.

The Romanian legal system always allows for appeal to a higher court; in the case of minor crimes, it is possible to have just one ordinary challenge – the recourse, in which case, the recourse also has a recessive effect.

The Romanian criminal law system has consecrated the triple jurisdiction as a rule – a case is judged on first instance, then on appeal and finally on recourse – as ordinary challenges.

Any of the ordinary challenges can repair miscarriages of justice and so do the extraordinary challenges – revision and challenge in annulment.

The court of appeal may decide to convict the defendant, when the latter has been acquitted by the court of first instance, only provided that prosecutor has exercised the challenge in appeal as well; otherwise, the situation of the defendant cannot be aggravated under his/her own challenge in appeal, according to the principle *"non reformatie in prejus"* – Art. 372 in the Criminal Procedure Code.

The Romanian criminal procedure provides for the possibility to intimate the Constitutional Court only by means of the plea of unconstitutionality, with effects upon the way the case is solved, but not upon the merits of the case as well. Any violation of the rights of the parties can be analyzed by means of challenges.

In terms of the adversarial-inquisitorial dichotomy, on a continuum of 1-10, the essential nature of the Romanian criminal procedure could be rated as 5, that is, in-between.

Human Rights in domestic criminal process

The right to life

The Romanian criminal process system does not provide for the death penalty – the respective provision was abrogated after 1989, and there are no moves to re-introduce the death penalty.

The State has the positive obligation to initiate criminal investigations if reliable information points to a life threatening situation.

The right to be protected against cruel and humiliating treatment

The right to be protected against cruel and humiliating treatment is regarded as an absolute right. The Romanian criminal legislation prohibits any person under criminal investigation or trial to be subjected to torture or cruel, inhuman or degrading treatments, while there is an obligation that the respective person be treated with respect for human dignity.

Failure to observe this prohibition incurs the effect of the criminal law provisions which, in Arts. 267 and 267[1] incriminates such deeds as the application of bad treatment to a detained or arrested person, or in the execution of a security or educational measure. The above mentioned articles also incriminate the intentional inducement of pain or strong sufferings, physical or mental, particularly with the purpose of obtaining from the respective person or from a third party information or confessions, of punishing the person for something he/she or a third party is known or suspected to have done, of intimidating or putting the respective person or a third party under pressure, or any other purpose based on a form of discrimination whatever that might be, when such pain or sufferings are applied by an agent of public authority or by any other person acting in an official capacity or as a result of the instigation by or with the explicit or implicit consent of such persons.

As far as the rules governing the interrogation are concerned, the following should be mentioned: the suspect/defendant is informed about the crime that he/she is held accountable for, the legal framework governing that crime, the right to a legal defender as well as the right not to make any statement, while being informed that any statement can be used against him/her.

Each suspect/defendant is heard separately. First, the suspect/defendant is allowed to state everything he/she knows in relation to the case.

Hearing of the suspect/defendant cannot start by reading or reminding him/her about the previous statements made in the case.

The suspect/defendant is not allowed to present or read a statement previously written, but he/she is allowed to use written notes on hard-to-remember details.

Also, after the suspect/defendant has made his/her statement, he/she can be asked questions related to the crime he/she is held accountable and accused for, as well as to the evidence he/she is going to propose.

Parties who cannot speak, or understand or express themselves in the Romanian language are provided, free of charge, the possibility to become familiar with the file pieces, the right to speak as well as the right to formulate conclusions before the court by means of an interpreter. This right is to be found, of course, in relation to the suspects as well.

As far as the right to counsel is concerned, the suspect/defendant is informed about this right before he/she make the first statement.

This aspect is laid down in the hearing minute.

Under the conditions and in the cases provided for by the law, the judicial bodies are bound to take such measures as to provide legal counsel to the suspect/defendant, unless he/she has one of his/her choice.

In the course of the criminal investigation, the chosen defender is entitled to be present at any investigating action, and

he/she can make requests and submit written statements. Absence of the defender cannot prevent the investigating action if there is proof that the defender has been informed about the date and the time the investigation action takes place. Information shall be accomplished by telephone, fax, internet or other similar media, a minute being written in this respect.

When legal counsel is compulsory, the criminal investigation body shall make sure that the defender be present when the suspect/defendant is heard.

The arrested can request that a member of his/her family or another person of his/her choice should be informed about the arrest. Both the request made by the arrested and its implementation shall be laid down in a minute. Under exceptional circumstances, if the criminal investigation body considers that this would jeopardize the criminal investigation, they shall inform the prosecutor and it is the latter who decides about the request made by the arrested.

Also, when the preventive arrest of the suspect/defendant is ordered, the judge shall inform about this measure, within 24 hours, a member of the suspect/defendant's family or another person of his/her choice, while this shall be laid down in a minute.

Throughout the detention, the detained or the arrested shall enjoy the right to legal counsel.

The order of preventive arrest issued by the criminal investigation body can be challenged, within 24 hours since the arrest, before the prosecutor supervising the criminal investigation, while prosecutor's order of preventive arrest can be challenged, within 24 hours, before the chief prosecutor of the parquet or, as the case may be, before the hierarchically higher-in-rank prosecutor.

When considering that the arrest is illegal or not justified, the prosecutor shall order its cancellation.

In the course of the process, the preventively arrested person may invoke violation of his/her rights. We should illustrate in this respect the provisions referring to the bounding

nature of the legal counsel, whose violation entails the absolute nullity of the action. Such nullity can by no means be removed and can be invoked at any stage of the process and can even be taken into account *ex officio*.

As far as the existence of special groups subject to special conditions is concerned, such groups are juveniles and women. Thus, it is provided that, during the detention and the arrest, juveniles shall be separated from adults, and women shall be separated from men.

Habeas Corpus

The arrested/detained person is immediately informed, in the language he/she can speak, the reasons for the arrest/detention; as to the charges, these are formulated as soon as possible. The accusation is communicated only in the presence of a lawyer, of the arrested/detained person's choice or assigned *ex officio*.

The arrest/detention measure can be extended 24 hours at the most. The duration of the arrest/detention measure is deduced the time the respective person was deprived of liberty as a result of the administrative measure of taking the person to the police headquarters, provided for under Art. 31 Para b) in Law No. 218/2002 on the organization and functioning of the Romanian Police.

The arrest/detention measure can be decided by the prosecutor or the criminal investigation body investigating the suspect/defendant only after the latter has been heard in the presence of his/her legal defender. In case the arrest/detention was decided by the criminal investigation body, the latter is bound to immediately inform the prosecutor about it.

In order to take the arrest/detention measure, it is necessary it should be established that there is solid evidence or clues the respective person has committed an offense provided for by the criminal law.

The total time of the preventive arrest in the course of the criminal investigation cannot exceed a reasonable period, and no more than 180 days.

The preventive arrest proposal made by the prosecutor supervising or conducting the criminal investigation shall be solved in the council chamber by one single judge, no matter the nature of the crime. The defendant is brought before the judge and assisted by the defender.

The preventive arrest measure can be extended on proposal by the prosecutor conducting or supervising the criminal investigation. The extension proposal shall be solved in the council chamber by one single judge, no matter the nature of the crime. In case the judge rules the extension, it cannot be longer than 30 days.

The preventive arrest measure can be taken against the suspect only when there is solid evidence or clues that he/she has committed a crime and in one of the following situations: the suspect ran away or hid out to escape criminal investigation or lawsuit, or when there is evidence that he/she is going to attempt to run away or elude by any means the criminal investigation, the judgment or the execution of the punishment; the suspect violated, in bad faith, the interdiction to leave his/her residential place or country, or his/her obligations throughout the application of these measures; there is evidence that the suspect is trying to directly or indirectly compromise the finding of the truth by influencing a party, a witness or an expert, or by destroying, modifying or stealing material evidence; there is evidence the suspect is preparing a new crime; there is evidence the suspect puts the victim on pressure or is attempting a fraudulent agreement with the latter; the suspect committed a crime for which the law provides the life detention punishment or detention longer than 4 years and there is evidence that to let him/her free is an actual danger to public order.

The Romanian legal system allows for bail. Provisional release based on bail can be decided by the court, both during the criminal investigation and the trial, on request, in the case of

involuntary crimes, as well as in the case of voluntary crimes for which the law provides the punishment of detention no longer than 18 years. The request for provisional release can be made both during the criminal investigation and the trial by the suspect/defendant, the latter's spouse or close relatives.

Provisional release under judicial control is not given in case there is evidence indicating the need to prevent the suspect/defendant to commit other crimes or that he/she is going to attempt compromise the finding of the truth by influencing a party, witnesses or experts, by modifying or destroying material evidence or by other similar doings.

Throughout his/her provisional release, the suspect/defendant is bound to obey several obligations such as: not to go outside the established territorial limits, except for circumstances ruled by the court; to show up before the criminal investigation body or, as the case may be, the court of law whenever he/she is summoned; to show up when the police officer assigned by the court to supervise him/her summons him/her, according to the supervision programme made up by the police; not to change his/her residence without permission by the court who ruled the respective measure; to possess, use or have on him/her no weapon, no matter what type it were.

The suspect/defendant can also make use of the provisional release on parole, which is given under similar conditions as those applicable for bail (of course, no bail being necessary).

Mention should be made that the conditional release is applicable only to persons convicted to imprisonment by an irrevocable judicial decision.

Fair trial

If the prosecutor, while working out a file, appreciates that a criminal lawsuit must be initiated, then he/she shall send a copy after the resolution for the initiation of the criminal lawsuit to the suspect person involved in the precursory criminal investigation, a person who, under the circumstances, becomes a defendant. The resolution shall be motivated.

Also, when a person is summoned before a criminal investigation body or a court of law, a summoning notice is issued where, in addition to a number of data, the capacity of the summoned person and the object of the case should be laid down.

For the accusation to be completed, the indictment should be issued by the prosecutor and the court of law should be intimated, once the criminal investigation is established to have been accomplished, the case should be sustained by all necessary and legally administrated evidence, observance of the legal provisions guaranteeing the finding of the truth should be checked, and the criminal investigation documentation should be presented to the defendant.

If, during the trial, it is appreciated that the legal framework governing the respective crime by the intimation document is to be changed, the court is bound to discuss the new legal framework and inform the defendant that he/she is entitled to request that his/her case should be discussed later or possibly even postponed, so that the defendant might be able to prepare the defence.

Also, if during the trial the defendant is found to have committed new deeds pertaining to the same crime for which he/she has been brought before the court, the latter shall order, by conclusion of law, extension of the lawsuit such as to include the new data as well and proceeds to judge the crime as a whole.

According to the Romanian legislation, the defendant is not entitled to take the initiative to bring his case before an impartial and independent tribunal.

As mentioned before, the status of defendant is acquired, as a rule, as a result of the initiation of a criminal lawsuit, by the prosecutor, by means of an indictment document. There is an exception to this rule, namely, that of crimes for which the previous complaint by the victim is needed, the initiation of the criminal lawsuit depending on such complaint.

The Romanian legal system does not provide for the possibility that the defendant gave up the right to have his/her case brought before an independent and impartial tribunal.

Judges of probation are appointed by the Superior Council of Magistracy, on the basis of the general academic achievement level, obtained by summing up the three academic year achievement levels and the achievement level with the National Institute of Magistracy graduation examination. After completing the probation period, the judges and prosecutors of probation are bound to stand for a qualification examination. Judges and prosecutors who pass the qualification examination are appointed by The President of Romania, on proposal by the Superior Council of Magistracy.

The Superior Council of Magistracy is the guarantor for the independence of justice. By virtue of its powers, the Council is entitled and bound to take action *ex officio* to defend judges and prosecutors against any undertaking that may afflict their independence or impartiality or create suspicions related to them.

A judge who considers that his/her independence, impartiality or professional reputation is jeopardized, no matter in what way, can intimate the Superior Council of Magistracy which, as the case may be, may order checking of the signaled irregularities, and publication of the results; it may also intimate the corresponding body to decide upon the measures to be taken or may order any other adequate measure, in compliance with the law.

Judges appointed by The President of Romania are immovable, as provided by the law. Judges shall be held accountable for the following instances of misconduct: violation

of the legal provisions referring to the declaration of fortune, the declarations of interest, incompatibilities and interdictions for judges and prosecutors; interventions for the resolution of certain applications, requests or acceptance of having their personal interests resolved, or the interests of family members or other persons, beyond the limits of the legal framework, equally provided for all citizens, as well as interference with the activity of another judge or prosecutor; involvement with public activities of political nature or manifestation of their political beliefs in the exercise of their official powers; violation of the secret nature of the deliberations or of the confidentiality of the sessions having such secret nature; repeated violation, for imputable reasons, of the legal provisions related to the celerity that should characterize the resolution of cases; unjustified refusal to attach to the file the applications, the conclusions, the complaints or the documents submitted by the parties involved in the trial; the unjustified refusal to fulfill a formal obligation; accomplishment of their duties with delays, for imputable reasons; unjustified repeated non-attendance; undignified attitude in the exercise of their official powers in their relationship with colleagues, lawyers, experts, witnesses or the citizens; violation of the obligation to transfer their basic work quota to the parquet where they work; violation of the provisions referring to the random distribution of cases; direct or indirect participation in pyramid schemes, gambling or investments where transparency of the funds is not ensured in compliance with the law.

The disciplinary sanctions applicable to judges and prosecutors are: warning; diminution of the monthly gross indemnity with up to 15% for a period of 1 to 3 months; disciplinary displacement for a period of 1 to 3 months to a court or parquet situated in the constituency of the same court of appeal or in the constituency of the same parquet beside the latter; exclusion from magistracy.

These sanctions shall be applied by the sections of the Superior Council of Magistracy, as provided by its organic law.

A judge can be recused both in the course of the criminal investigation and in the course of the trial, by any of the parties, as soon as the party found there is a case of incompatibility. A judge is incompatible when: he/she initiated the criminal lawsuit or ordered initiation of the criminal lawsuit or formulated conclusions in the capacity as prosecutor with the respective court, solved the proposal for preventive arrest or extension of the preventive arrest, during the criminal lawsuit; he/she was the representative or the defender of one of the parties; he/she was an expert or a witness with the respective case; there are circumstances indicating that he/she, his/her spouse or a close relative has certain interests related to the case, whichever such interests may be; his/her spouse, relative or in-law, down to the fourth rank, conducted criminal investigations, supervised the criminal investigation, solved the proposal for preventive arrest or extension of preventive arrest, in the course of the criminal lawsuit; he/she is the spouse, a relative or an in-law, down to the fourth rank, of one of the parties or with the latter's lawyer or authorized agent; there is animosity between himself/herself, his/her spouse or relative, down to the fourth rank, and one of the parties, its spouse or relatives, down to the fourth rank; he/she is tutor or curator to one of the parties; he/she accepted liberalities from one of the parties or the latter's lawyer or authorized agent.

A judge who sat on a court that tried a case cannot sit on a higher court judging the same case or on a court that judges the case after cancellation of the decision to appeal or cassation of the decision to recourse.

Also, a judge who previously expressed his/her opinion on the solution to a case can no longer sit on the court judging the respective case.

The Romanian legal system does not provide for the juries/lay participants procedure.

One of the principles governing the trial stage is the public nature of the judgment sitting.

Thus, according to the provisions of Art. 290 in the Criminal Procedure Code, the judgment sitting shall be public. Juveniles under 16 years old cannot attend a judgment sitting.

Under such circumstances that judgment in public sitting could infringe upon the State's interests, the morals, the dignity or the privacy of a person, the court, on request by the prosecutor, by the parties or *ex officio*, can declare the sitting as secret in its entirety or for a certain part of the judgment.

Declaration of the secret nature of the sitting shall be made in public sitting, after the present parties and the prosecutor, when the latter participates in the judgment, have been heard.

As long as the sitting is secret, the only persons admitted in the sitting hall are the parties, their representatives, the defenders and the other persons called by the court to the interest of the case.

According to the criminal proceeding provisions, any person shall be presumed innocent until his/her guilt has been established by an irrevocable criminal pronouncement.

Prior to hearing, the suspect/defendant is informed that he/she is entitled to remain silent, while being warned that any declaration can also be used against him/her. The suspect/defendant who chooses to make use of his/her right to remain silent shall not be subject to any negative consequence.

The prosecutors and the criminal investigation bodies, who, in conformity with the criminal procedure norms, perform the criminal investigation, have the role to gather the necessary evidence indicating that the crimes were committed, to identify the perpetrators and establish the latter's accountability, in order to decide whether it is or it isn't necessary that the suspects should be brought before the court. The legislation in force does not consecrate other categories as well that exercise the same powers as the criminal investigation bodies.

The Romanian Criminal Code does incriminate insults and calumny.

Thus, according to Art. 295 in the Criminal Code, the prejudice caused to the honour or the reputation of a person by means of words, gestures or any other means, or by exposure to mockery, shall be punished with one month to two years' imprisonment or with fine.

According to Art. 206 in the Criminal Code, the assertion or imputation, in public, by any means, of a certain deed related to a person, which, if true, would expose that person to a criminal, administrative or disciplinary sanction or to public disdain, shall be punished with three months' to three years' imprisonment or with fine.

It should be mentioned that, following publication in the Official Gazette of Romania of Decision No. 62/2007 by the Constitutional Court, under which the provisions of Law No. 278/2006 abrogating the two offenses were declared unconstitutional, Arts. 205-207 in the Criminal Code, which had been in effect prior to the abrogation, came into force again.

According to Art. 6 in the Criminal Procedure Code, the right to defence is guaranteed to the suspect/defendant and the other parties as well, throughout the criminal trial.

Throughout the criminal trial, the judicial bodies are bound to provide the parties full exercise of their procedural rights in conformity with the law and administrate the evidence needed for the defence. Any party has the right to be aided by a defender throughout the criminal trial.

The judicial bodies are bound to **immediately** inform the suspect/defendant that he/she shall enjoy the right to prepare and exercise his/her defence.

For an adequate defence to be ensured, it is provided that, when the legal aid is compulsory, in case the chosen defender unreasonably fails to be present on the summons or on the court day and nor does he/she provide a substitute, or if he/she leaves or refuses to defend, then the judicial body shall take measures for the designation of a defender *ex officio* to replace the former, while providing the latter with the necessary time to prepare the defence. During the judgment, following beginning of the

debates, when the legal aid is compulsory, if the chosen defender is unreasonably missing on the court day and doesn't ensure a substitute, the court shall take measures for the designation of a defender *ex officio* to replace the former, while granting a minimum period of three days for the preparation of the defence.

The defender, chosen or designated *ex officio*, is bound to provide legal aid to the suspect/defender. For failure to conform to this obligation, the criminal investigation body or the court can intimate the leadership of the bar association, for the latter to take measures.

Throughout the criminal investigation, the suspect's/defendant's defender is entitled to be present at any criminal investigation action and can make requests and submit written statements. The defender has the right to complain to the prosecutor who supervises the activity of the criminal investigation body, should his/requests be denied.

Also the defender of the victim, the defender of the civil party and the defender of the civilly accountable party has the right to be present at any criminal investigation action that involves hearing or presence of the party he/she defends and can make requests and submit written statements.

A person in custody or arrested has the right to contact his/her defender, while confidentiality of the discussion shall be provided.

Recording of the conversations between the lawyer and the party he/she represents or aids in court can only be used as evidence if they contain clinching and useful data or information indicating preparation or commitment by the lawyer of a crime for which criminal lawsuit shall be initiated *ex officio*, while tapping and recording are imposed for establishing the truth or because identification or localization of the offenders cannot be achieved in a different way or the investigation would be much delayed. This is the case with crimes against national security, provided for in the Criminal Code and other special laws, as well as such crimes as drug trafficking, weapons trafficking,

persons trafficking, terrorist acts, money laundry, money or other values forgery; it is also the case with the crimes provided for under Law No. 78/2000 on preventing, discovering and sanctioning acts of corruption, with the subsequent amendments and supplementations, the case with other serious crimes and the crimes committed by means of electronic media.

The Romanian legal system provides legal aid for all categories of persons, irrespective of their incomes. To this effect, the Advocate of the People institution should be reminded, which is an independent institution, whose role is to protect the citizens against abuses by the public administration authorities. However, this institution is not in a position to provide the citizens with assistance nor to provide representation in court for them.

When legal aid is compulsory, measures shall be taken for the designation of a defender *ex officio*, whose fee shall be covered from the funds of the Ministry of Justice.

As was mentioned before, the suspect's/defendant's defender is entitled to be present at any criminal investigation action and to make requests and submit statements.

According to Art. 323 Para (2) in the Criminal Procedure Code, the defendant can be asked questions by the President and directly by the other members of the panel of judges, by the prosecutor, by the victim, by the civil party, by the civilly accountable party, by the other defendants, and by **the defender of the defendant who is heard.**

The right to privacy

The Romanian legal system does not allow for the use of invasive investigative methods on persons who are not appreciated as suspect.

To exemplify, tapping and recording of the conversations or communications made via telephone or any other electronic media, is only allowed if there is solid evidence indicating preparation or commitment of a crime for which criminal lawsuit is initiated *ex officio*, while tapping or recording are

necessary for establishing the truth or because identification or localization of the offenders cannot be achieved in a different way or the investigation would be much delayed.

In the above-mentioned case, legality of such a measure is ensured by the requirement that an authorization by the judge should be issued on request by the prosecutor performing or supervising the criminal investigation, in conformity with the law.

Such authorization is given for the period of time needed for tapping and recording, but for no longer than 30 days, in the Council Chamber, by the President of the court that is competent to judge the case at first instance or by a court of equivalent rank as the former, in whose constituency is the parquet that the prosecutor performing or supervising the criminal investigation belongs with.

The procedural provisions institute one single exception, namely, in case of urgency, when the delay owed to obtaining the authorization would seriously prejudice the criminal investigation activity. Under such circumstances, the prosecutor performing or supervising the criminal investigation can assume responsibility and issue a temporary and motivated ordinance, which shall be subsequently be subject to endorsement by the judge, who utters a pronouncement regarding the legality and justified nature of the ordinance.

The right to freedom of expression; the role of the media in the criminal process

A lawyer cannot be prosecuted for his/her pleading in defence of his/her client, except for auditory offenses (which affect the solemnity of the judgment sitting).

Magistrates are bound to refrain from making any statement related to an ongoing case, in conformity with Art. 10 Para (1) in Law No. 303/2004 on the status of judges and prosecutors, republished, with the subsequent amendments and supplementations.

In principle, lawyers are allowed to communicate with the media in relation to ongoing cases, provided that it should not jeopardize finding of the truth and the smooth evolution of the case.

The media have full freedom of expression in relation to ongoing criminal cases, while being allowed to indicate the name of the parties or the latter's statements only on their consent. Nevertheless, such restrictions do not apply to public persons involved with criminal cases, as the interest to have the public informed prevails.

The judgment sittings are public, so the media can be present unrestrictedly, no matter whether it is the written press, the television or the radio; image recordings, namely, showing the panel of judges, the investigation bodies, shall only be made on permission by the court.

The same restriction applies with non-public sittings, which are the exception to the rule, and/or in the case of juveniles.

The media is informed on request or by means of press conferences, through spokesmen, about issues of public interest.

The public information department of each court or parquet accredits the journalists and provides the latter with correct and prompt information.

Protection against discrimination

All guarantees referring to the right to a fair trial and other fundamental rights apply indiscriminately to all persons.

Consequences of misuse or abuse of power and/or infringement of fundamental rights

Observance of the fundamental rights or persons involved with criminal processes is a fundamental principle governing those procedures; any violation of these principles is sanctioned, according to the provisions of the Criminal Procedure Code, with absolute nullity.

Obviously, on finding violations of the fundamental rights, the criminal courts in Romania analyze whether such violations are significant and substantial, with the meaning established by the ECHR jurisprudence, or rather they fall within the limits permitted in a democratic society and those of a response to a general interest.

The sanctions applicable for such violations vary, depending on the perpetrator. Thus, both the police officers and the magistrates involved with the solution to a case can be held disciplinarily accountable for deeds committed in the exercise of their job that may have resulted in violations of the fundamental rights. Depending on the seriousness of the committed deeds, it is also possible that such persons should be held criminally and/or civilly accountable.

As far as the procedural documents elaborated with the violation of the fundamental rights, they shall be considered as absolutely or relatively null, depending on the seriousness of the violation, which means to have the document re-elaborated – when possible –, to modify or to change the pronounced solutions.

State of emergency an derogation from obligations under human rights treaties

The Romanian legal system does not allow for the suspension of human rights, whatever they might be, irrespective of the state of emergency and the reason that has generated it.

The Romanian legal system does not distinguish between derogable and non-derogable human rights (see The Constitution of Romania).

Recent legal changes affecting human rights

General

Since 1990, the Criminal Code and, particularly, the Criminal Procedure Code have been subject to successive modifications, for the main purpose of ensuring additional standards for the protection of the fundamental rights of persons involved with judicial procedures of criminal nature, in consonance or by comparison with the standards laid down in the European Convention on Human Rights and the other international treaties and agreements where Romania is a party.

At present, a new Criminal Code and, respectively, a new Criminal Procedure Code are being drafted; these regulations mainly focus on shortening the length of trials, establishing clear rules in terms of competence, reducing the jurisdiction ranks from 3 to 2 – judgment at first instance and the appeal, while the recourse is to become an extraordinary remedy at law, by cassation (only in law), introducing new institutions – the judge of rights and freedoms, the judge of preliminary chamber, etc.

Pre-trial setting (common criminal proceedings, special proceedings)

The norms introduced by the successive modifications of the Criminal Procedure Code did not affect the right to a fair trial; on the contrary, they introduced higher standards of protection, in consonance with the Constitutional provisions and the provisions of the European Convention on Human Rights.

Special measures for the protection of witnesses and victims were introduced both in the Criminal Procedure Code and by Law No. 140/1996, Law No. 682/2002, Law No. 281/2003, etc.

Any restrictive/depriving procedural measures affecting the rights fall, according to present regulations, in the competence of the courts, not the parquets, while persons under investigation are not bound to be cooperative; instead, they are informed, right from the beginning of the proceedings, about their right "to be silent".

Therefore, in terms of the restrictive/depriving procedural measures affecting the rights, Romania experienced a transfer of power from prosecutors to judges, in consonance with the jurisprudence of the European Court of Human Rights.

It should be mentioned however that, according to the Romanian legislation, both judges and prosecutors have the status of magistrates, with all the powers deriving from this.

At the same time, the continuous training of magistrates – judges and prosecutors – is a permanent preoccupation for the Superior Council of Magistracy and the National Institute of Magistracy and a professional duty for magistrates.

In respect of this direction, preventive arrest warrants can be issued at present only by the courts, not by the prosecutor as well, with an express indication of the *de facto* and the *de jure* grounds that justify such a preventive measure.

The defence is entitled to familiarize with all the documents and the pieces of the file, as soon as the criminal investigation stage.

The suspect's/defendant's statement can serve as evidence only to the extent that it corroborates with the other pieces of evidence and is not of higher value than the rest of the probative material.

The arrest/detention is not of a secret nature, the judicial authorities being bound to announce a person indicated by the suspect/defendant about the latter's deprivation of freedom.

There are no consecrated special provisions referring to the obligation of service suppliers to make the information they have available.

All administrative evidence gathered during the criminal investigation stage is subject to the judicial control; if the evidence thus obtained is legal, it shall serve to find the truth and clarify the case under all aspects, by corroboration with the other evidence administrated for the respective case.

The evidence can be administrated abroad as well, by a rogatory commission – a mechanism of international judicial cooperation in criminal matters – and has a probative value equal the evidence administrated domestically.

Trial setting (criminal proceedings, special proceedings)

The Romanian legal system does not provide for special procedures or different fundamental principles governing the criminal process, depending on the seriousness of the crimes.

The provisions of the Criminal Procedure Code are generally applicable, irrespective of the nature or the seriousness of the crimes which generated the conflicting criminal justice relations brought before the judicial authorities.

As a matter of fact, this principle is preserved in the Draft Criminal Procedure Code as well.

Also, as far as remedies at law are concerned, there is no distinction in terms of the seriousness of the offenses.