

SPECIAL PROCEDURAL MEASURES ADOPTED AND THE OBSERVANCE OF THE HUMAN RIGHTS - ROMANIA'S REPORT -

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Section I

Reform of legal framework: special measures with regard to prevention, investigation, and prosecution

1. Introduction

One cannot fail to notice that the recent evolution of Romanian criminal procedure - due to the emergence of grievous criminality phenomena and to the influence of globalization - has acquired new characteristics: the conciliation between the general and individual or particular interests; the adoption of new different procedural measures, according to the gravity of the committed offences; the escalating denationalization process of criminal procedure, in conformity with the pattern of other procedures. One can say that ever since 1990, when the Romanian political regime changed, our criminal procedure has been undergoing continuous transformation. In all this period many laws have been adopted with a view to alter and complete the Code of Criminal Procedure^{iv}. Among these law, the most important are the following ones (adopted in the last decade): Law no. 141/1996^v, the Government Emergency Ordinance no. 207/2000^{vi} partially and temporarily suspended by Government Emergency Ordinance no. 295/2000^{vii} approved with modifications and adnotations by the Law 456/2001^{viii}, Law 296/2001^{ix}, subsequently repealed by Law 302/2004^x, Law no. 704/2001^{xi}, repealed by Law no. 302/2004, Law no. 756/2001^{xii}, Law no. 169/2002^{xiii}, repealed by Law no. 302/2004, Government Emergency Ordinance no. 58/2002^{xiv}, approved with modifications by Law no. 161/2005^{xv}, Government Emergency Ordinance no. 93/2002^{xvi}, approved by Law no. 574/2002^{xvii}, Law no. 281/2003^{xviii}, Government Emergency Ordinance no. 66/2003^{xix}, approved by Law no. 359/2003^{xx}, Government Emergency Ordinance no. 109/2003^{xxi}, approved, with modifications and adnotations^{xxii} by Law no. 159/2004, Government Emergency Ordinance no. 55/2004^{xxiii}, approved, with modifications and adnotations, by Law no. 548/2004^{xxiv}, Law no. 302/2004^{xxv}, Government Emergency Ordinance no. 72/2004^{xxvi}, approved by Law no. 575/2004^{xxvii}, Law no. 480/2004^{xxviii}, Law no. 576/2004^{xxix}, Government Emergency Ordinance no. 190/2005^{xxx}, approved, with modifications and adnotations by Law no. 332/2006^{xxxi}, Law no. 356/2006^{xxxii}, Government Emergency Ordinance no. 60/2006^{xxxiii}, Law no. 79/2007^{xxxiv}, Government Emergency Ordinance no. 31/2008^{xxxv} and Law n r. 57/2008^{xxxvi}.

This permanent reform attests the instrumentalization of criminal procedure which is enforced by the legislative. In our country, as it happens all over the world, the fight against criminality has become a main objective in public debates and any criminal fact is regarded as a pretext for making and passing a law. Parliament reacts to every particular mediatized case

by issuing a normative act. But, beyond this legislative proselytism, the multi-sized reform is a consequence of a profound change in Romanian criminal procedure and of a major conflict existing between two actual models, the one based on the European Convention, which relies on individual freedoms observance, and the one of particular techniques used for criminal investigations, which relies on public security. Romanian criminal procedure is traditionally inquisitorial and it gives many prerogatives to the judicial police and the prosecutor, under the partial control of the judge, who is more and more present in our country in preliminary procedures, i.e. in the stage of preliminary acts and in the preliminary stage of criminal proceedings (the stage of criminal prosecution). However, this model has been considerably modified recently, since individual freedoms protection has been reinforced and the suspect^{xxxvii} or the accused one^{xxxviii} has been offered more rights, in accordance with the European Convention of Human Rights. At the same time, however, a contrary direction has come into being and it hints at strengthening the investigation powers, to the detriment of individual freedom, in order to fight more efficiently against the grievous forms of criminality. This tendency manifested itself especially after 2000 and it is supported by the concern to fight more energetically against organized crime and terrorism.

2. Which are the treaties concerning human rights and humanitarian law (The Geneva Convention, for example) that are applied in the internal system of law, if there are limitations in applying these international dispositions in our country and if the citizens (those suspected of having committed an offence, those incriminated or accused, the victims of offences and witnesses) can invoke norms of these international acts within the internal judicial activities?

As to the guarantee of the human rights, Romania has ratified the most important international instruments it has adopted, as follows: Geneva Conventions relative to the protection of the victims of international armed conflicts (12.08.1949)^{xxxix}; the international Agreement relative to the economic, social and cultural rights (16.12.1966); the international Agreement relative to the civil and political rights (16.12.1966)^{xl}; the Convention against torture and other punishments or cruel inhuman and degrading treatment (New York, 10.12.1980)^{xli}; the European Convention for preventing torture and punishments or inhuman and degrading treatment (Strasbourg, 4.11.1987), and the Protocols no. 1 and 2 (Strasbourg, 4.11.1993)^{xlii}; the European Convention relative to the imprescriptibility of crimes against humanity and of crime wars (Strasbourg, 25.01.1974)^{xliii}; the European Convention for safeguarding human rights and fundamental freedoms, with additional protocols^{xliv}.

The dispositions provided by these international instruments can be quoted by the parties involved in the criminal judiciary procedures. International acts mentioned above are not limited by internal provisions. In this respect, for example, by Law no. 277/2002 Romania has retracted the reserves formulated in the four Geneva Conventions relative to the protection of war victims. At the same time, by passing the Law no. 345/2004 Romania has retracted the reserve formulated in article 5 in the Convention relative to the safeguarding of human rights and fundamental liberties.

According to the provisions included in article 20 (1) in the Constitution of Romania, the constitutional dispositions relative to the citizens' rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, as well as the agreements and the other treaties that Romania is part of. At the same time, if there are incongruencies between the agreements and the treaties relative to the fundamental human rights Romania is part of, and the internal laws, the international regulations are predominant, except the case in which Constitution or internal laws include more favourable dispositions (article 20 (2) in the Constitution of Romania).

Our juridical system does not have limitations as to the application of the international dispositions, except the ones authorised by the Constitution. Thus, neither the restriction of the exercise of some rights nor the freedoms provided by the international treaties relative to the human rights and by the ones relative to the humanitarian law are admissible unless they respect the provisions included in the fundamental law. In this respect, article 53 (1) in the Constitution of Romania provides that the exercise of certain rights or of certain freedoms may only be restricted by law and only if necessary, if the case may be, for the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation. At the same time, section 2 of article 53 in the Constitution formulates the principle according to which restriction shall only be ordered if necessary in a democratic society, thus putting to good use the provisions of the international specific documents^{xlv}. At the same time, this article provides that the adopted measure shall be proportional to the situation which caused it, applied without discrimination, and without infringing on the existence of such right or freedom. Such a possibility is authorised, as we shall see in the fight against organized crime and terrorism, in which the tension between security and freedom is particularly evident. Restrictions imposed on the rights and freedoms are the ones provided by the Code of criminal procedure, in the laws adopted for altering and completing our legislation, and similarly in some special laws, while they also provide the use of exceptional procedural means, derogatory from common law.

In all cases, restrictions imposed on the rights and individual freedoms for the need to fight against organized criminality and terrorism are, in general, approved both by the Constitutional Court and the European Court of Human Rights. Thus, the Constitutional Court, which always takes into consideration the seriousness and complexity of the causes generating terrorism or the ones belonging to organized criminality, admits the use of particular procedural instrument in investigating offences with a view to safeguard constitutional rights, directly aggrieved by the terrorist threats or the ones of organized crime^{xlvi}. A particular situation is represented by the preliminary acts, which are highly legitimated by the humanitarian practices, as well as the strengthening of the authorities' prerogatives revealing the exclusive power and information practice of administrative and judicial police. The preliminary acts referred to in article 224 from the Romanian Code of Criminal Procedure can be concretely materialized as a multitude of facts "in order to gather evidence necessary to the criminal investigation bodies for the initiation of criminal investigation", as well as the surveillance of suspects, gathering statements, taking photos, making interceptions, as well as audio or video recordings etc. As far as these audio and video surveillance methods acts are concerned, it has been established^{xlvii} that the suspect could not be informed about his/her surveillance, so that he/she could hire a lawyer (of course, these surveillance methods are legal, as provided in article 91¹ and the next one in the Code of Criminal Procedure). A similar incompatibility would exist in the case of surveillance operations - accomplished by the specialized investigation state bodies - performed for persons who are suspected of having committed an offence and who have the right to a lawyer, situation in which these preliminary acts are no longer efficient. Such hypotheses, as well as other similar ones, would make the prevention activity and the deterrence of infractional phenomena impossible (especially when it is about organized crime) and because of that the general guarantee to the exercise of the constitutional right to defence is unacceptable, under the form of a prerogative ensurance of qualified juridical assistance. This consequence corresponds to the provisions of article 53 of the Constitution on the restriction of the exercise of certain rights and freedoms.

In conformity with the provisions of the European Court of Human Rights^{xlviii}, the measures adopted for fighting against terrorism and organized crime are perceived as necessary restrictions in a democratic society, while any state is allowed to consider the

extent to which these restrictions should be imposed. However, derogatory procedures applied to terrorism and organized crime involve the exercise of control over the measures adopted and the limitation of the main excesses that could come from the part of the Constitutional Court, by means of the **a priori** abstract control of constitutionality or the **a posteriori** concrete control (by means of the objections of unconstitutionality expressed in the courts of justice), as well as from the part of the European Court of the Human Rights. The limits imposed can refer also to the extension and the intensification of the derogatory procedures. For example, the derogatory regime from common law can not be extended to offences that lack the characteristics of organized crime offences or which could not be qualified as acts of terrorism or which are not necessarily related to such offences. At the same time, there are certain substantial guarantees which can never become the subject of a derogation, such as: absolute interdiction of torture and of inhuman and degrading treatment^{xlix}, the right to defence – which can be limited but never be suspended, the development of the investigation and evidence research techniques on condition that they remain loyal and obey to a certain degree of equity^l. At the same time, restrictive measures should be considered admissible only on condition that they shall be subject to judicial control^{li}.

3. What important legislative reforms have been adopted in our country in the last decade with a view to ensure national or international security as well as public order?

In the last decade, new normative acts have been adopted in Romania including the regulations on national and international security or on public order. In this respect, two categories of laws are of great significance: the ones relative to preventing, revealing and sanctioning corruption acts (Law no. 78/2000 on preventing, revealing and sanctioning corruption acts^{lii}, with subsequent adnotations and modifications, Law no. 161/2003 on the measures necessary to ensure transparency in performing public offices, public offices in the business environment, preventing and sanctioning corruption^{liiii} and Government Emergency Ordinance no. 43/2002^{liv}, with the subsequent changes and adnotations, concerning the National Anticorruption Directorate); laws on preventing and fighting against organized crime and terrorist (Law no. 39/2003 on preventing and fighting against organized crime^{lv}, Law no. 656/2002 on preventing and sanctioning money laundry, as well as for implementing measures for preventing and fighting against financing terrorism acts^{lvi}, Law no. 535/2004 on preventing and fighting against terrorism^{lvii}, Law no. 143/2000 on preventing and fighting against illicit drug dealing and consumption, with subsequent modifications and adnotations^{lviii}. Law no. 678/2001 on preventing and fighting against human trafficking^{lix} and Law no. 508/2004 on the setting up, organizing and functioning of the Directorate, for Investigating Organized Crime and Terrorist Offences^{lx} (within the Public Ministry) develop the idea of simplified criminal justice and the particular means for gathering evidence.

Special procedural regulations are adopted with Law no. 143/2000 whose provisions cover a long range of purposes from preventing and fighting against illicit drug dealing, with its subsequent adnotations and transformations, including the ones brought by Law no. 522/2004^{lxi} and by Government Emergency Ordinance no. 121 on 21st December 2006^{lxii}, which contains provisions on the impunity of the person who has committed one of the infractions provided by this law, and who during the criminal investigation denounces and facilitates the identification of other persons that have committed drug related offences (article 16), to authorizing surveilled drug dealings with or without the total substitution of the drugs or of the parties involved (article 20), authorizing the use of undercover investigators to reveal the illegal facts, identifying the authors and obtaining evidence tools (article 21), using collaborators (article 22), authorizing access on a specific period of time to

the telecommunication or computer based information systems and their monitoring (article 23) and authorizing medical investigations in order to detect the presence of drugs on someone when there is solid evidence that a person transports drugs on him/her. (article 25).

Similar provisions are included in Law no. 678/2001 on preventing and fighting against human trafficking, with subsequent modifications and adnotations^{lxiii}, which sets forth provisions on the impunity of the drug dealing participant who denounces and facilitates the identification and prosecution of other persons that have committed similar offences (article 20), on the use of undercover investigators, in conformity with the law (article 22), on the access and surveillance of telecommunication or computer based information systems (article 23) and on protecting human trafficking victims (article 26-44).

At the same time, the current Law no. 656/2002 (which replaced the former Law no. 21/1999 on preventing and sanctioning money laundry no. 21/1999^{lxiv}, with subsequent modifications and adnotations, especially the ones brought by the recent Government Emergency Ordinance no. 53/2008^{lxv}) – on preventing and sanctioning money laundry, as well as on implementing prevention and deterrence measures as to the financing of terrorist acts – contains provisions relative to the impunity of the person who has committed the offence provided in article 23, and who denounces and facilitates the identification and prosecution of the other participants to the offence committal (article 23¹), as well as to the inopposability of the bank secrecy and the professional secret of the prosecution bodies or courts of justice (article 26) and admits the possibility of taking measures, according to a special procedure meant to gather evidence or to identify the offender, to monitor the banking accounts and the accounts assimilated to them, to surveille, intercept or record conversations, to have access to the computer based information systems and surveilled delivery of the sums of money (article 27), as well as the possibility to use undercover investigators, under the conditions provided by the Code of Criminal Procedure (article 27¹).

In a similar way, Law no. 39/2003 – on preventing and fighting against organized crime – sets up (within the Ministry of Internal Affairs and Administrative Reforms) specialized structures for preventing and fighting against organized crime (article 12), providing the rule of impunity for collaborators before initiating criminal prosecution or after initiating criminal prosecution, as the case may be (article 9), and the rule of inopposability as to the bank secrecy and professional secret, except the professional secret of the lawyer, prosecutor, after criminal investigation begins, and of the courts of justice (article 14), offering the possibility to use special procedural measures in order to gather evidence or identify the offenders, by implementing special procedures for monitoring banking accounts and the accounts assimilated to them, monitoring communication systems or access to computer based information systems (article 15), allowing surveilled delivery to be made with or without the total substitution of the goods that represent the object of delivery (article 16), using undercover policemen from the specialized structures of the Ministry of Internal Affairs and Administrative Reform (article 17-20), using informers to collect data concerning the committal of offences and to identify the offenders (article 21-22), as well as by taking specific protection measures for witnesses, the undercover policeman, the informer and his/her family members.

In a similar way, Law no. 161/2003 – on certain measures adopted for ensuring transparency in the performance of public offices, of public offices in the business environment, for preventing and sanctioning corruption^{lxvi}, with all the subsequent modifications and adnotations, and for preventing and fighting against hacking offences (Title III) – includes provisions relative to preventing, identifying and sanctioning offences, including, among others, procedural measures conditioned by the existence of data or material evidence as to the preparation or committal of an offence by means of IT instruments, with a view to gather evidence or identify the offender, such as the immediate

conservation of computer data, or of the data reflecting information traffic, which are exposed to loss or destruction (article 54), collecting any objects that main contain information, data relevant for the information traffic or data relative to the users, with a view to make copies, which may be used as evidence (article 55), initiating computer data search, by appropriately applying the dispositions of the Criminal Procedure Code as to the domicile search (article 56), as well as the access to a computer based information system, including the interception and recording of conversations by means of computer based information systems, for which the dispositions of the Criminal Procedure Code are applied with reference to the audio and video recordings (article 57).

Finally, Law no. 535/2004 - on preventing and fighting against terrorism^{lxvii} - contains justified special procedural dispositions, as article 20 of the law stipulates, with a view to deter the threats to Romania's national security as provided in article 3 of the Law no. 51/1991 on Romania's national security^{lxviii}, including terrorism acts. They refer to the authorization of performing specific activities with a view to gather information, by intercepting and recording conversations, searching for information, documents or records for which permission is necessary: to have access to certain places, to an object, to be allowed to open an object, to lift or replace an object or document, to examine it or extract information included in it, to record, copy or obtain samples of it by any means, as well as by installing objects, maintaining them and removing them from the places in which they were installed and for which a special procedure is applied (article 21-22).

All these special procedural rules - used in the field of organized crime and terrorism - are concentrated in Law nr 508/2004, which regulates the setting up, organization and functioning of the Directorate for Investigating Organized Crime and Terrorism Offences (within the Public Ministry). Thus, after the National Anticorruption Directorate (NAD) was set up within the Public Ministry as a Public Prosecutor's Office specialized on fighting against corruption offences^{lxix}, by Law no. 508/2004, a second specialized Public Prosecutor's Office was set up in Romania: the Directorate for Investigating Organized Crime and Terrorism Offences (DIOCTO), as a body with juridical personality, specialized on fighting against organized crime and terrorism acts, within the Public Prosecutor's Office attached to the High Court of Cassation and Justice, whose main powers are: criminal investigations enforced for the offences stipulated in this law and in the special laws mentioned above, the conducting, surveilling and controlling of criminal prosecutions with the approval of the prosecutor by the officers and judicial police agencies coordinated by the DIOCTO, as well as the notification of the courts of justice for adopting the measures provided by law and for judging the causes concerning the offences which correspond to the DIOCTO jurisdiction. This law provides particular procedures assimilated with the ones existing in the criminal law that anticipate it, but they cover a larger area, since they are conceived for a large number of offences that come into the special jurisdiction of DIOCTO, and they are enumerated in article 12 of the law^{lxx}.

The particular procedures refer to the possibility of using as evidence the technical and scientific findings of the prosecutors from DIOCTO, on the basis of the written disposition of the prosecutor (article 10), the obligation of the persons that have ruling or control powers to notify DIOCTO as to any data or information which confirm the committal of one of the offences that come in the DIOCTO jurisdiction, as well as the obligation of the services and bodies specialized in gathering and processing information to immediately offer DIOCTO all the collected data and information that are linked with the committal of the offences provided in article 12, including the data and unprocessed information (article 13), authorized by DIOCTO to possess and to use proper means for obtaining, checking, processing, stocking and finding information concerning the offences that come in its jurisdiction, under the provisions of the law (article 15), the possibility to adopt special procedural measures in

conformity with the Code of Criminal Procedure or other special laws, such as: monitoring banking accounts and the accounts assimilated to them, surveilling, intercepting or recording conversations or having access to computer based information system (article 16), as well as the possibility to use undercover investigators or collaborators and judicial police informers under the conditions stipulated by the Code of Criminal Procedure and other special laws, authorizing the performance of surveillances with or without the total or partial substitution of the goods, merchandise or substances that make the object of the delivery, adopting specific measures for protecting witnesses, the experts and the victims, in conformity with the law, measures which are accompanied by the regulation of a special procedure to be adopted in this respect (article 18), to which another procedure is added for checking the banking accounts and the accounts assimilated to them, specifying that the bank secrecy and the professional secret, except the professional secret of the lawyer, exercised under the law conditions, are not opposable to the prosecutor, after the criminal investigation starts, nor are they opposable to the court of justice (article 19). Finally, article 21 clearly sets forth the applicability of the Criminal Procedure Code dispositions as well as of the dispositions of the laws passed in the cases that are lawfully assigned to DIOCTO.

The Government Emergency Ordinance no. 43/2002 relative to the National Anticorruption Directorate contains, for corruption offences or corruption related acts, procedural dispositions (article 14-24) similar with the ones provided for preventing and fighting against organized crime and terrorism, which constitute alternative procedural measures. These dispositions are completed by other procedural dispositions - provided by Law no. 78/2000 for preventing, identifying and sanctioning corruption acts (article 23-31) - and are in general similar to the ones exposed above, with some exceptions. Thus, as far as the use of undercover investigators is concerned, article 26¹ of the Law no. 78/2000 - introduced by Government Emergency Ordinance no. 124/2005^{lxxi} - contains provisions on the prosecutor's possibility to authorize the use of undercover investigators or of investigators that have real identity, with a view to identify offences, offenders and procure evidence; this article also contains provisions on the prosecutor's authority to promise, offer, or, as the case may be, to give money or other objects to a clerk, under the conditions provided by article 254, 256 or 257 of the Criminal Code, which incriminates bribery, the receiving of inappropriate goods or influence peddling, setting forth that the minutes conceived by undercover investigators or investigators with real identity and authorized by the provisions of the law can constitute evidence and can only be used in the criminal case which was authorized.

New procedural rules were introduced in the Romanian juridical system by Law no. 302/2004 concerning judicial international cooperation in criminal investigation matters, by the Government Emergency Ordinance no. 123/2007 concerning the measures adopted for consolidating judicial cooperation with the EU member states no. 123/2007^{lxxii}. These are influenced, as we shall see, by the transnational character of organized crime and they aim to obtain efficient ways for fighting against the new global criminal phenomena, since recent events in some member states require a strong and firm reaction on the part of Romanian authorities as well as in the domain of judicial cooperation and in criminal law matters. This refers to videoconference auditions (article 165) - subject to a procedure which observes the protection of witnesses, monitored deliveries (article 167) - as part of certain criminal procedures on offences that imply extradition, undercover investigations (article 168); at the same time the Romanian State can come to an agreement with a foreign state for offering mutual judicial assistance and for cancelling certain investigations by undercover agents, common inquiry teams (article 169), transborder surveillance (article 170), interception and recording of conversations (article 179) and the protection of witnesses (article 183), or, at the European Union level, by providing information about banking accounts (article 187¹¹),

banking operations (article 187¹²) and by the surveillance of banking transactions (article 187¹³), while specifying that bank secrecy can not be invoked as a refusal of cooperation when it comes to the assistance demands formulated by a EU member state, or when it comes to the dispositions concerning the facilitation for applying Decision no. 220/187/JAI of the European Union Council passed on 28th February 2002 on setting up Eurojust with a view to fight against grievous forms of criminality^{lxxiii}.

As one can deduce from the above simple enumeration of several procedures, the legislative reforms implemented in our country include judicial cooperation in criminal law matters, which has recently been radically modified by the rapid expansion of organized crime. Juridical assistance in criminal law matters makes use of the new special investigation techniques which should be applied to organized crime offences, at least if we refer to the hearing of suspects or witnesses which is accomplished by videoconferences or if we refer to the use of collaborators and undercover agencies as well as to the protection measures adopted for witnesses. Actually, we have the benefit – **de facto** – of applying several international cooperation means – in criminal law matters – which are provided by proactive inquiries and the special investigation techniques, and new criminal procedure rules - in which the law of the state is applied, and they represent clear instruments used in the fight against transnational organized crime. These are also reflected in the provisions of the Convention concluded on 29th May 2000 on mutual judicial assistance as to criminal law matters among the member states of the EU, to which Romania has recently adhered by the Decision of the Council no. 2007/63/CE on 8th November 2007^{lxxiv}.

These reforms have underlined the important transformations implemented in procedural law as a consequence of the appearance and development of grievous forms of criminality. As one can deduce from the presentation of the new laws that have been adopted to reinforce public security, legislative reforms enforced to fight against organized crime are doubled by the reforms adopted for criminal procedure whose aim is to confer more powers to the magistrates and policemen in such cases by setting up special bodies and by using new techniques in investigating evidence. Judicial practice in criminal law matters has played an important role in this reform, especially with the support of the High Court of Cassation and Justice^{lxxv}. Thus, the decisions reached by the High Court of Cassation and Justice, the Joint Sections – when trying appeals to the interest of law – clarify the most controversial legislative problems offering to the judges solutions meant to eliminate ambiguities give leeway to law texts, making them applicable, both in material law and in procedure. As a consequence of eliminating the recourse in cancellation by Law no. 576/2004, the practice of using recourses to the interest of law has developed considerably. This practice has recently enlarged its area of applicability by intervening – as it happens with the objections of unconstitutionality – in the most delicate problems of law, while finally bringing its contribution to the implementation of the legislative reform, including in the field of organized crime and terrorism. At the same time, an important contribution to the accomplishment of the legislative reform has been brought by the Constitutional Court especially as to its concrete, **a posteriori** control of constitutionality, which – according to article 146 in the Constitution and article 29 in Law no. 47/1992 on its organization and functioning – is enforced within a concrete criminal case, before the court of justice, in conformity with the ordinary procedural norms. After the law is published, the Court may be notified as to one objection of unconstitutionality (which may be invoked only in courts of justice in an on going criminal lawsuit, at any stage that lawsuit may be, until the criminal cause is completely solved), and also directly by the Advocate of the People^{lxxvi}.

All these laws - on reform of law to the interest of public security and the re-balance of the used procedures - have given birth to ample political or public debates. However, reforms are far from being accomplished. They reflect the regulator's vision as to his efforts

to reinforce the procedural means necessary for reprimanding the grievous forms of criminality. However, this implies the continuation of these efforts so that such infractional phenomena could be prevented. That is why, such reform provisions are being adopted gradually, and some of them are even publicly debated. In this respect, the project of a new Code of Criminal Procedure has priority and its accomplishment is an on going process, submitted to debates to the interested persons, as well as to public debates organized by the Ministry of Justice. The project of the new Code of Criminal Procedure contains a distinct chapter, in the special part, on the special surveillance or research techniques, which are used for the interception of conversations. These techniques are: the use of video and audio monitoring, taking photographs in private or public spaces, locating or following by GPS or other technical surveillance means, monitoring telephone conversations, retaining, sending or searching mail, collecting, in real time, the data sent by communication means, monitoring financial transactions and disclosing financial data, using undercover investigators, simulating corruption offences or concluding a convention, monitored delivery and identifying the subscriber, owner or user of a telecommunication system or of an access point to a computer. At the same time the bill for altering and completing Law no. 47/1992 - on the organization and functioning of the Constitutional Court - is still publicly debated; the main provision of the project consists in eliminating the lawful cancellation of the judgment in case the objection of unconstitutionality is invoked. According to this bill the judge is to pass the disposition of judgment cancellation. Thus, this future regulation aims to avoid the delay of the judgment on the grounds of objection of unconstitutionality, which is a frequent tactic used in the present judicial practice, especially in those cases that try grievous criminal offences. The bill for altering and completing Law no. 656/2002 – on preventing and deterring money laundry, as well as on implementing measures for preventing and fighting against financing acts of terrorism – is also publicly debated. By means of this bill, a new measure has been adopted, which is subject to the prosecutor’s authorization, according to a special procedure, namely monitored delivery of money, new regulations on the bank secrecy and the professional secret, as well as the adoption of distraint measures as to the goods that are the object of the money laundry offence or of the financing sources used to support acts of terrorism. This bill provides an impunity cause for the offender who participates to the committal of an offence but who denounces and facilitates the identification and sanctioning of other offenders during the criminal investigation.

SECTION II

General Questions on criminal proceedings and special measures

4. What are the general principles of your criminal procedure (e.g., principle of legality, fair justice, and equality of arms) and what is their legal source (e.g., constitution, statute)?

The procedure adopted in criminal cases in Romania is governed by a series of fundamental principles that are set forth exclusively in the Constitution of Romania^{lxxvii}, or both in the Constitution of Romania and in the Code of Criminal Procedure, or only in the Code of Criminal Procedure. A series of these basic rules that govern the criminal trial are also set forth in Law no. 304/2004 on the organization of the judiciary^{lxxviii}.

In the first category, the one including the fundamental principles set forth exclusively in the text of the Romanian Constitution, there is included:

- equality of rights

This principle is set forth in article 16 of the Constitution. According to this principle, all citizens are equal before the law and public authorities, without any privilege or discrimination, since no one is above the law. At the same time, in conformity with article

124. (2) of the Constitution, justice shall be one, impartial and equal for all. At the same time, in conformity with the provisions of Law no. 304/2004 on the organization of the judiciary, justice shall be done according to the law, it is unique, impartial and equal for all (article 2. (1)); all citizens are equal before the law, without any privilege or discrimination (article 7. (1)); justice is done equally to all people, no matter what race, nationality, ethnical origin, language, religion, sex, sexual orientation, opinion, political orientation, fortune, origin or social condition someone may have or no matter what discriminating argument may be brought in discussion (article 7. (2)).

- free access to justice

This principle is regulated in article 21 (1) and (2) in the Constitution of Romania, in conformity with which any person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests; the exercise of this right shall not be restricted by any law.

According to article 6 of the Law no. 304/2004 on the organization of the judiciary, any person can bring a case before courts to defend his legitimate rights, liberties and interests in exercising his right to a fair trial. Access to justice shall not be restricted in any way.

- the right to a fair trial

This regulation is provided in article 21. (3) of the Constitution, according to which all parties shall be entitled to a fair trial and a solution of their cases within a reasonable term.

According to article 10 of the Law no. 304/2004 on the organization of the judiciary, all persons are entitled to a fair trial and a solution of their cases within a reasonable term, by an impartial, independent and legally constituted court of justice.

- inviolability of domicile and correspondence

Inviolability of domicile is stipulated in article 27 of the Romanian Constitution. According to the constitutional principle set forth in this article, no one shall enter or remain in the domicile or residence of a person without his consent. At the same time, there is an exemption from the provisions of this article – concerning inviolability of domicile – which can operate for the following 4 instances: a) carrying into execution a warrant for arrest or a court decree; b) removing a risk to someone's life, physical integrity, or a person's assets; c) defending national security or public order; d) preventing the spread of an epidemic. The constitutional norms also stipulate – with reference to the same principle of inviolability of domicile - that searches shall only be ordered by a judge and carried out under the terms and forms stipulated by the Code of Criminal Procedure. At the same time, according to the same article of the Constitution, searches during the night shall be forbidden, except for crimes in flagrante delicto (article 27. (4)).

This constitutional norm is also guaranteed by the criminal law on the violation of domicile (article 192 the Romanian Criminal Code).

Secrecy of correspondence is stipulated in article 28, according to which secrecy of the letters, telegrams and other postal communications, of telephone conversations, and of any other legal means of communication is inviolable.

This constitutional norm is also guaranteed by the criminal law on the violation of secrecy of correspondence (article 195 the Romanian Criminal Code).

- right of a person aggrieved by a public authority as a result of a judicial error

This constitutional principle refers to any person who was aggrieved in his/her legitimate rights or interests by a public authority as a result of a judicial error. In other words, one can not talk about a fundamental principle of the criminal case, but rather about a rule which is applicable after the trial and is interconnected with criminal procedure. Thus, according to article 52. (3) of the Romanian Constitution, the State shall bear patrimonial liability for any prejudice caused as a result of judicial errors. The State liability shall be

assessed according to the law and shall not eliminate the liability of the magistrates having exercised their mandate in ill will or grave negligence.

This constitutional norm is also guaranteed by the implementation of a procedure on damage repair necessary to compensate an unjust conviction or unlawful liberty restraint or unlawful preventative measure (article 504-507 the Code of Criminal Procedure).

From the second category of fundamental principles – the ones stipulated both in the Constitution of Romania and in the Code of Criminal Procedure – we mention: the principle of legality, individual freedom, presumption of innocence, right to defence, legal procedure conducted in Romanian, use of interpreter in court.

- the principle of legality

Supremacy of law – according to which in Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory – is stipulated in article 1. (5) of the Romanian Constitution. According to article 2. (1), the Code of Criminal Procedure, the criminal trial takes place both during the criminal investigation and the trial itself, according to the provisions of the law.

We consider relevant to mention, in this respect, the provisions of article 3 of the Law no. 304/2004 on the organization of the judiciary, according to which the competence of judicial bodies and judicial practice shall be established in conformity with the provisions of law.

The principle of legality with reference to criminal trial is doubled by a large number of guarantees; thus, any violation of legal provisions entails the nullity of the act (according to article 197. (1), the Code of Criminal Procedure), and when the violation of the legal provisions is inexcusable, the nullity stipulated in paragraph 2 cannot be suspended in any way (article 197 (2), the Code of Criminal Procedure). Besides the criminal procedural sanctions applicable to the procesual and procedural acts that represent a violation of law, there is a series of sanctions applicable to the persons that infringed the law when performing procesual criminal acts. These sanctions can be administrative, civil or criminal. With a view to reinforce the principle of legality in the criminal trial, besides procedural sanctions, administrative, civil or criminal sanctions, which are applied according to the seriousness of the infringement, there are numerous possibilities of systematic and efficient control by which procesual and procedural unlawful acts are identified and removed. Thus, the whole criminal investigation enforced by judicial police bodies is supervised by the prosecutor (according to article 216-220 the Code of Criminal Procedure).

- individual freedom

This principle is thoroughly regulated in article 23 of the Romanian Constitution; from the regulations stipulated in article 23 we can mention: individual freedom and security of a person are inviolable; Search, detainment, or arrest of a person shall be permitted only in the cases and under the procedure provided by law; preventive custody shall be ordered by a judge and only in the course of criminal proceedings; the release of a detained or arrested person shall be mandatory if the reasons for such steps have ceased to exist, as well as under other circumstances stipulated by the law; any person detained or arrested shall be promptly informed, in a language he understands, of the grounds for his detention or arrest; a person under preventive custody shall have the right to apply for provisional release, under judicial control or on bail etc.

This basic principle applied in a criminal trial is also stipulated in article 5 the Code of Criminal Procedure. Thus, in conformity with this text, the person's liberty is guaranteed all throughout the criminal trial, no person can be retained or subjected to any form of liberty restraint, except for the cases and circumstances stipulated by the law.

- presumption of innocence

According to article 23. (11) of the Romanian Constitution, any person shall be presumed innocent till found guilty by a final decision of the court. This principle is also stipulated in article 5² of the Code of Criminal Procedure, according to which any person shall be presumed innocent till found guilty by a final decision.

- right to defence

This principle is stipulated in article 24 of the Romanian Constitution, according to which the right to defence is guaranteed, and the parties shall have the right to be assisted by a lawyer of their own choosing or appointed ex officio. This principle is also stipulated in article 6 of the Code of Criminal Procedure, respectively in the provisions of article 15 of Law no. 304/2004 on the organization of the judiciary.

In Romanian^{lxxix} criminal procesual doctrine one can notice that right to defence implies new procesual aspects as follows: a) the judicial bodies are bound to inform the defendant, before he/she makes the first statement, about his/her right to be assisted by a lawyer; this acknowledgement shall be mentioned in the hearing minutes; b) the obligation of the judicial bodies – regarded as a fundamental principle – to ensure judicial assistance to the defendant, when he does not have anyone to represent him/her in court; c) the obligation of the judicial bodies – regarded as a fundamental principle – to inform the defendant immediately and before hearing him/her as to the deed for which he/she is investigated, also showing him the judicial framing of the deed committed^{lxxx}; d) the obligation of the judicial bodies – regarded as a fundamental principle – to gather all the necessary evidence both in favour and in the detriment of the defendant (article 202. 1, the Code of Criminal Procedure).

- the language in which legal procedure is conducted; the use of interpreter in court is guaranteed.

According to article 128. (1) in the Constitution of Romania, judicial procedure shall be conducted in Romanian. At the same time, Romanian citizens belonging to national minorities have the right to express themselves in their mother tongue before the courts of law, under the terms of the organic law (article 128. (2)). These constitutional provisions are also stipulated in the Code of Criminal Procedure (article 7), respectively in Law no. 304/2004 on the organization of the judiciary.

Foreign citizens and stateless persons who do not understand or do not speak the Romanian language shall be entitled to take cognizance of all the file papers and proceedings, to speak in court and draw conclusions, by means of an interpreter; in criminal law suits, this right is ensured free of charge (article 128. (4) of the Romanian Constitution). This regulation is detailed in article 8 of the Code of Criminal Procedure, according to which the parties who do not speak the language used in the criminal trial are given the possibility to get acquainted with the record, to speak in court and pass conclusions through an interpreter.

At the same time, similar provisions are stipulated in article 14 of the Law no. 304/2004 on the organization of the judiciary.

From the third category of fundamental principles exclusively stipulated in the Code of Criminal Procedure, we mention: the principle of officiality, the principle of finding the truth, the principle of the active role, the principle of human dignity.

- ex officio procedure

According to this fundamental principle, the papers necessary for the criminal trial are drawn up ex officio, if the law does not stipulate otherwise (article 2. (2), the Code of Criminal Procedure). Thus, according to article 228 in the Code of Criminal Procedure - when the criminal investigation body is informed ex officio - it draws up an official report that constitutes the act of initiation of the criminal investigation; according to article 232 in the Code of Criminal Procedure, the criminal investigation bodies are bound to draw up the papers necessary for the criminal trial; in conformity with article 232, the Code of Criminal Procedure, the criminal investigation bodies are bound to perform criminal investigation acts;

according to article 262, the Code of Criminal Procedure, the prosecutor is bound to bring a case against the defendant if the legal conditions for doing this are met. The obligations that lie with the instance in the trial instance stage are stipulated by article 313, the Code of Criminal Procedure, according to which the instance is bound to adopt preliminary measures before the trial, as well as article 321, 322, 323 and 324 of the Code of Criminal Procedure – relative to the clarification, demands and the exceptions (that the president of the instance requires), the order of the judicial research, the hearing of the defendant and co-defendants, article 345 and 346, the Code of Criminal Procedure – relative to the obligation of the instance to pronounce, according to case, the conviction, acquittal or cessation of the criminal trial etc. The enforcement of the decision is provided in article 418, the Code of Criminal Procedure, according to which once declared final the decision of the criminal court is enforced by the first court of trial.

- the disclosure of the truth

This principle stipulates that the criminal trial must lead to the disclosure of the truth regarding the deeds and circumstances of the cause, as well as those regarding the perpetrator (article 3, the Code of Criminal Procedure);

- the principle according to which criminal investigation bodies and courts must take active part in the criminal trial is stipulated in article 4, the Code of Criminal Procedure;

- the principle according to which any person subjected to criminal investigation or to criminal trial must be treated with respect is stipulated in article 5¹, the Code of Criminal Procedure.

Last but not least, we insist on the fact that - in Romanian^{lxxxix} criminal procesual doctrine - the principle of operativity in the criminal trial is unanimously recognized, even if this is not particularly used. Yet, the urge to inform in due time and completely the deeds that represent crimes at the end of a criminal trial is to be deduced from all the procesual criminal dispositions.

5. At what stage(s) of the criminal process does your legal system provide for the presumption of innocence and the right of the suspect/accused to remain silent?

According to article 5² in the Code of Criminal Procedure, the presumption of innocence can be invoked until the guilt is proved. Guilt is sanctioned by a final court decision. This provision is doubled by a constitutional norm (article 23. 11 of the Romanian Constitution).

Criminal procesual legislation of Romania has been adnotated in the sense that the defendant has the right to remain silent. In this respect, according to article 70. (2) in the Code of Criminal Procedure, altered by Law no. 281/2003, the defendant – before being heard – is informed about the deed that makes the object of the cause, his right to have a lawyer, as well as his right to remain silent, being seriously warned that anything he declares can be used against him in court. Subsequently, by Law no. 356/2006^{lxxxii}, this law was adnotated to include the obligation of the judicial bodies to inform the defendant as far as the judicial framing of the deed committed is concerned.

The text explicitly points out that the criminal investigation bodies are bound to inform the defendant of the deed which makes the object of the investigation before the defendant is asked to make the first statement. The procedure is applied only before the first statement is made, which means that for any further statements the defendant is not to be reformed as to his right to be defended by a lawyer and the object of the investigation.

However, the Romanian regulator has established that this procedure should be also applied at the stage of the judicial investigation, before the defendant is asked to make his/her first statement. In this respect, article 322. (1) of the Code of Criminal Procedure has been modified by Law no. 356/2006, and it has the following contents: The President ... explains

to the defendant the blame for which he is made responsible ... he also informs the defendant as to his right to remain silent, warning him that anything he says may be used against him, as well as to his right to ask the co-defendants, the other parties, the witnesses and experts questions, as well as to give explanations whenever he thinks necessary during the judicial investigation^{lxxxiii}. Under these conditions, we consider that the present processual framework in Romania is attentively regulates the defendant's right to remain silent. In consequence, there are two stages in which the judicial body is obliged to inform the defendant about this right, namely: before he is asked to make the first statement, by the criminal investigation bodies, and before he makes his first statement during the judicial investigation.

6. Does your common criminal procedure or special proceedings provide for a distinction between citizens and non-citizens, nationals or non-nationals, or specific categories of subjects (aliens, enemies, non-persons)?

In general, our criminal procedure, no matter if it is ordinary or special, does not make differences between persons, its fundamental principle being the equality of rights for all citizens, as stipulated in article 16. (1), 16. (2) and in article 21 of the Romanian Constitution. According to article 16, "citizens are equal before the law and public authorities, without any privilege or discrimination" and "No one is above the law". According to article 21, "every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests", and no law can cancel the exercise of this right^{lxxxiv}. Finally, article 21 also provides that "all parties shall be entitled to a fair trial ..." These constitutional principles represent a particular application of the principle stipulated in article 4 of the Romanian Constitution – equality of all citizens – which is the solemn expression of article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights". As to the aliens and stateless persons who live in Romania, article 18. (1) of the Constitution stipulates that they shall enjoy general protection of persons and assets, as guaranteed by the Constitution and other laws.

This principle, which basically provides that similar situations require a similar juridical approach, is also regulated in article 7 of the Law 304/2004, according to which "all persons are equal before the law, without any privilege or discrimination", and justice "shall be equally applied for all no matter the race, nationality, ethnical origin, language, religion, sex, sexual orientation, opinion, political orientation, fortune, origin or social condition or any other discriminatory criteria^{lxxxv}". Similarly, in conformity with article 10 of the Law no. 304/2004 "all persons shall be entitled to a fair trial..." These regulations reinforce the principle stipulated in article 14 of the Strasbourg Convention, according to which the exercise of the rights and freedoms provided by the Convention shall be ensured, without discrimination based on sex, race, skin colour, language, religion, political orientation, national or social origin, ethnical origin, fortune, birth or any other criterion^{lxxxvi}.

Traditionally, in criminal procedure the principle of equality of persons is represented as an equality of arms (l'egalite des armes^{lxxxvii}). However, the Constitution of Romania does not explicitly stipulate such a rule, but in conformity with article (11) and article 20 of the Constitution this principle is referred to since the provisions of article 6 (1) of the European Convention of Human Rights have been integrated in the sphere of constitutional norms relative to the protection of the fundamental rights, which explicitly refer to this principle, as to one of the equity principles which one should take into consideration in a criminal lawsuit^{lxxxviii}.

In conformity with this principle, as it is stipulated in article 6 (1) of the European Convention, and taking into consideration the way it has been developed in the European Court of Human Rights case law, every party in the trial is entitled to equal chances in

pleading for its cause, from all points of view, while it is not permitted for anyone to benefit of any advantage over his opponent^{lxxxix}.

Thus, equality of the persons - that are parties in a criminal trial - means that the same processual rules are applied to all the people and that the same bodies are involved in the criminal trial, without any discrimination and without any privilege for anyone. From this point of view, in a present instance^{xc}, presented to the Constitutional Court as an instance of unconstitutionality, the parties invoked the fact that article 128 of the Constitution (currently article 129) “stipulates the equality of the participants in a trial, which does not mean that the recourse in cancellation exclusively depends on the General Public Prosecutor”^{xc1}. The Constitutional Court appreciated, however, that this is an extremely reductionist perspective, which alters the meaning of the constitutional provisions stipulated in article 16 and article 128. The sintagm “under the terms of law” from article 128 of the Constitution can not have the meaning indicated by the authors of the objection of unconstitutionality, namely that the parties in the juridical system are bound to adopt the same attitude as in the ways of attack conferred by law against judicial decisions. It has also been pointed out the fact that the meaning of the concept of fair trial as it appears in the European Convention of the human rights does not necessarily imply more levels of jurisdiction, nor the possibility to exercise ways of attack, including extraordinary ones, against all judicial decisions, so that the equality of arms could not be invoked. There is an opposite approach which stands with the authors’ of the objection of unconstitutionality principle and it reveals that the principle of equality of arms requires an identical treatment between the Public Ministry and the parties in a trial. The whole regulations concerning the ways of attack stipulated in the Code of Criminal Procedure revealed an ostentative inequality.

The Constitutional Court has decided that the disposition included in article 254 (1), the Code of Criminal Procedure, which conditioned the presentation of the criminal investigation material on the defendant’s living in the country^{xcii}, contravenes with article 16 of the Constitution, which stipulated the citizens’ equality of rights, since it discriminates the persons who live in the country and the ones who live abroad or temporarily stay in a foreign country, but who are investigated in Romania for having committed offences. The persons who temporarily stay in a foreign country do not benefit of all the processual guarantees provided by the law^{xciii}. In the Constitutional Court case law it has been constantly decided that the principle of equality before law means adopting an equal approach for situations which, according to their aim, are not different. The Court appreciates that “the persons who live in Romania and the ones who live abroad are not in different situations that might justify a different approach of the legal matter, so that the criticized legal text disobeys the provisions of article 16”^{xciv}. Consequently, the Court points out the fact that the criminal investigation body, after initiating the criminal action, if all the necessary acts for the criminal investigation have been prepared, is bound to call the defendant who is not in the country to present him the criminal investigation material, after which the dispositions of article 250-254 from the Code of Criminal Procedure^{xcv} are to be implemented.

We underline the fact that, in similar circumstances, the Constitutional Court has also considered as unconstitutional those dispositions which, in one way or another, block the complete exercise of the right to defence which the defendant is entitled to, especially if the defendant is not informed of the object of the criminal investigation, thus, creating a state of unjustified inequality in the judicial treatment of the defendant. According to Decision no. 24/1999^{xcvi} the Court admits the exception of unconstitutionality - stipulated in article 257 in the Code of Criminal Procedure and altered today by Law no. 281/2003 - pointing out that the sintagm “if it finds necessary” is unconstitutional, since it creates the possibility of initiating a criminal investigation against defendant who has not been informed of the object of the

criminal investigation, for the simple reason that the prosecutor considered unnecessary to call him and inform him of the object of the criminal investigation.

At the same time, both in ordinary criminal procedure and in several special criminal procedures there are competence rules established according to the quality of the person^{xcvii}, such as the quality of a soldier, of an employee in the judicial system, of a Member of Parliament etc., quality which requires different competences. Thus, competence of criminal investigation bodies is regulated (article 208 in the Code of Criminal Procedure), competence of the prosecutor (article 209. (3), the Code of Criminal Procedure), competence of the court of justice (article 27 in the Law no. 218/2002), competence of the military court (article 26. (1), let. a, the Code of Criminal Procedure), competence of the court of appeal (article 28¹ let. b, c, the Code of Criminal Procedure), competence of the Military Court of Appeal (article 28², the Code of Criminal Procedure) and competence of the High Court of Cassation and Justice (article 29, the Code of Criminal Procedure). Competence according to the quality of the person, as it is regulated by the Code of Criminal Procedure, does not represent an exception from the principle of the person's equality in the criminal trial, since it does not justify a difference to be made between specific categories of subjects in approaching an ordinary criminal procedure. The same thing may be said, in principle, also with reference to the special procedures provided in the Code of Criminal Procedure, for the criminal investigation procedure and the judgment procedure of juveniles (article 480-493, Code of Criminal Procedure), for neither the competence nor the application of a procedural rule under these circumstances is not discriminatory.

However, not the same thing can be said as to the competence by the quality of the person stipulated by the Government Emergency Ordinance number 43/2002 on NAD, with its subsequent adnotations and modifications, which, in article 13 let. (b), which conditions NAD competence as to the offences stipulated by Law no. 78/2000, with its subsequent modifications and adnotations, on certain qualities of the offender, no matter what damage he created or the breach of peace he provoked to public institutions or any other employee in the judicial system, no matter the sum of money or the values of the good which represents the object of the offence. By means of this regulation, the special competence of a judicial body specialized in preventing and fighting against corruption offences is doubled by a competence imposed by the person's quality. This generates the risk of creating an inadmissible inequality since a fair trial should guarantee a fair trial between the subjects implied in the offence. The difference made as to the problem of competence also generates a different procedural approach here, susceptible to seriously aggrieve the individual rights and freedoms by authorizing the use of special procedural means. However, such a situation can not be found in case of the offenders involved in organized crime and terrorism acts which come in the competence of DIOCTO, according to Law no. 508/2004 (article 12), for in this situation, the competence of the specialized judicial body is not determined according to the person's quality, and the unique criterion used by the regulator is the one represented by the seriousness of the committed offences.

7. Does your legal system allow for the suspension of human rights in emergency situations (including war)?

An emergency state is mentioned, besides the state of siege, in the Constitution, justifying a special procedure to be applied, which reveals the Romanian President's competence, as well as the competence of Parliament, in article 93. A similar procedure is also provided for warfare situations (article 65). Government Emergency Ordinance number 1/1999 on the state of siege and the state of emergency^{xcviii} as well as the Law number 453/2004^{xcix} do not include provisions that authorize the suspension of human rights in emergency situations. On the contrary, article 3² of the Government Emergency Ordinance

no. 1/1999 (introduced by Law no. 453/2004) provides that - as long as the emergency state lasts - torture, inhuman and degrading punishments and treatment, as well as constraint of free access to justice, shall be prohibited. Our juridical system does not recognize the distinction between derogatory and nonderogatory human rights. Article 4 of the Government Emergency Ordinance number 1/1999 (which was altered by the Law no. 453/2004) provides that during wartime the exercise of several fundamental rights and freedoms can be restricted, except the human rights and fundamental freedoms provided in article 3². This restriction is possible only if the situation requires this and in conformity with the provisions of article 53 of the Romanian Constitution, in the republished edition^c.

As to these legal provisions, which have the statute of principles, the Romanian regulator recognizes two categories of rights and freedoms that can not be restricted according to article 53 of the Constitution. The two categories are: the observance of the human dignity, consisting of the interdiction of torture, punishments or inhuman or degrading treatment and free access to justice. As far as all the other rights and freedoms are concerned, they can be restricted, but only if it is absolutely necessary, respectively, in conformity with the legal provisions in force – “only if necessary and as the case may be” – and in conformity with the above mentioned provisions of article 53 of the Constitution. Such provisions, which have a general character, are not sufficient for the authorization of criminal provisions derogatory from the ordinary criminal procedure because the Code of Criminal Procedure and the special laws do not provide exceptional procedural rules that could be justified by an emergency state, as an exigency of the principle of strict lawfulness which governs the criminal trial.

The criminal trial in Romania does not include military procedures derogatory from the ordinary criminal procedural principles. There is an exception and that is regulated in the Criminal Code, according to which for certain types of offences committed against Romania’s^{ci} capacity to defend itself, it is necessary to notify the commanding officer with a view to enforce the procedure for grounding criminal liability. The Code of Criminal Procedure also provides norms that are applicable to the military staff, but they can not be regarded as norms derogatory from ordinary procedure^{cii}.

Special criminal procedures that can be applied in the criminal trial in Romania are regulated either by the Code of Criminal Procedures (criminal investigation procedure, the procedure used in criminal trials for flagrant offences, criminal juvenile procedure, the procedure used in the initiation of a criminal investigation, rehabilitation procedure etc.), or by special laws (international judicial cooperation procedures in criminal law, regulated by Law no. 302/2004 on international judicial cooperation for criminal matters^{ciii}). This procedure provides both the application of norms specific for ordinary procedure and derogatory norms.

8. Does your legal system allow for the use of intelligence information (e.g., general police intelligence, national or foreign intelligence services information) in criminal proceedings?

The national juridical system provides the possibility of using intelligence information for initiating criminal investigation.

Thus, in conformity with article 224 (2), the Code of Criminal Procedure, in order to collect evidence for initiating the criminal investigation, the operative employees of the Ministry of Internal Affairs may perform preliminary acts. The preliminary acts mainly consist of police operations such as operative investigations, gathering information and data, organizing raids, police filters etc. Other preliminary acts are: the interception and recording of conversations – including the conversations made by phone or other electronic means, according to the provisions of the article 91¹-91⁶ the Code of Criminal Procedure.

Undercover investigators may also be used for accomplishing the preliminary acts as article 224¹-224⁴ from the Code of Criminal Procedure^{civ} provides. Thus, investigators with a false identity may be used for gathering evidence to prove the existence of the offence and to identify the offenders, if there are serious and concrete grounds that reveal the commission of an offence or the intention to commit an offence which threatens national security. This possibility is provided in the Criminal Code and in special laws. Undercover investigators may also be used for drug trafficking and gun dealing, traffic with persons, acts of terrorism, money laundry, forgery of coins or other values, or for an offence provided by the Law no. 78/2000 on preventing, identifying and sanctioning corruption acts, with its subsequent amendments and modifications, or for another grievous offence which can not be identified or whose offenders can not be identified by other means. These undercover investigators can be used for an utmost period of 60 days, period which can be prolonged for seriously justified grounds. Every prolongation can not be longer than 30 days, and the whole duration of the authorization, in the same cause and with reference to the same person, can not be longer than a year. The undercover investigator's activity is performed on the basis of an authorization issued by a justified ordinance by the prosecutor who is responsible with the criminal prosecution and its monitoring. The data and information gathered will be handed in to the prosecutor.

As to the intelligence officers, according to article 224. (2) from the Code of Criminal Procedure, preliminary acts may be performed by the employees from the state bodies having attributions related to national security, for the deeds that constitute, according to the law, threats to the national security. In this situation, the gathering of evidence is supervised by the prosecutor. In this respect, we mention the provisions of article 66. (2) from the Law no. 304/2004 on the organization of the judiciary, according to which the services and bodies specialized in gathering, processing and archiving the information are bound to immediately present to the competent Public Prosecutor's Office all the data and information unprocessed and possessed as to the commission of the offence. In this respect, we also refer to the provisions of article 13 from the Law no. 51/1991 on the national security of Romania^{cv}, according to which the gathering of information for national security is the prosecutor's responsibility.

During the criminal trial, coercive processual measures (preventing measures, assurance measures) or probatory acts (that imply restraining certain fundamental rights and freedoms - interception and audio or video recordings, intercepting correspondence, and domicile search) may be adopted. All this set of activities may be performed only with the magistrate's consent (basically, the law provides as necessary a judicial disposition), disposition which can be grounded on the data and information obtained from the police employees or the intelligence officers.

Within the procedure used in the criminal prosecution, there is a disposition which provides the bringing to court of all the persons against whom there are solid grounds and evidence proving their commission of an offence. These data and information may be obtained from policemen or intelligence officers, in conformity with the provisions of the law.

SECTION III

Pro-active enforcement (common police or common criminal proceedings, special proceedings)

9. Do intelligence forces, regular police forces, or administrative enforcement agencies (such as customs or tax agencies) have the competence in your country to use coercive powers in a pro-active way?

In the criminal proceedings performed in Romania personal or real coercive processual measures may be used, by means of which individual freedom, the freedom of movement, patrimonial rights may be aggrieved. At the same time, some probatory methods may aggrieve the right to the inviolability of the domicile and the secrecy of correspondence. In this respect, we distinguish:

- detainment

The disposition for detaining the defendant during the criminal prosecution, for 24 hours the most may be given by the judicial police or the prosecutor.

- the obligation not to live the locality and not to leave the country

During the criminal prosecution, these measures may be adopted against the defendant for a maximum term of 2 years, by the prosecutor or the court of justice. All throughout the criminal trial, these measures are adopted by the court of justice, and the law does not specify a maximum duration.

- preventive arrest

The measure of preventive arrest may be decided only by a judge and for a maximum term of 180 days during the criminal prosecution. All throughout the criminal trial, preventive arrest may be decided by the court of justice for a term that is no longer than half of the maximum punishment provided by the law on the offence which represents the object of the accusation.

- temporary release under judicial control or on bail

Temporary release may be approved as long as the criminal trial lasts by the court of justice. The adoption of this measure implies a coercitive surveillance of the defendant.

- medical internment and obligatory medical treatment

The safety medical measures may be adopted in conformity with the provisions of the law only by the instance, no matter what processual stage the trial is.

- the seizure of the goods

Assurance measures may be adopted during the criminal prosecution by a prosecutor and during the trial by the instance and they consist of seizing the mobile or imobile goods of the defendant or the civilly liable person.

- intercepting and audio or video recording

Intercepting and recording of conversations – made by phone or any other electronic means of communication – is accomplished with judicial grounded authorization, at the request of the prosecutor who is in charge with the supervision of the criminal prosecution, in accordance with the conditions provided by law, if there are data or solid grounds concerning the intention to commit or the committal of an offence for which the criminal prosecution is performed ex officio, and the interception and recording are obligatory for establishing the situation de facto or because the identification or location of the offenders can not be made by other means or because the investigation would be too much delayed (article 91¹. (1), the Code of Criminal Procedure). For exceptional situations, when the procuration of the judge's authorization could cause serious prejudices to the criminal prosecution, the prosecutor in charge with the criminal prosecution may dispose, provisorily, by motivated ordinance, the interception and recording of conversations for a maximum duration of 48 hours.

- retention and delivery of correspondence

The instance, at the prosecutor's request, while the criminal prosecution goes on, or ex officio, during the trial, may dispose that every postal office or transport company should retain and deliver letters, telegrams and any other correspondence, or the object sent by the offender, or the object addressed to him, either directly, or indirectly, on condition that there are data or solid grounds concerning the intention of committing an offence or concerning the committal of an offence for which criminal prosecution is enforced ex officio, and the retention and delivery are necessary for clarifying the situation de facto or because the

identification or localization of the participants may not be performed by other means or if the investigation could be too much delayed (article 98, the Code of Criminal Procedure). Retention and delivery of letters, telegrams and any other correspondence or of the objects sent by the defendant, or addressed to him, either directly, or indirectly, may be disposed, in writing, in cases of emergency and if there are solid grounds justified by the prosecutor, who is bound to announce the instance about this immediately.

- domicile search

Domicile search may be disposed only by the judge, by a motivated decision, during the criminal prosecution, at the prosecutor's request, or during the trial, if the person who was asked to deliver an object or the writings mentioned in article 98 of the Code of Criminal Procedure denies their existence or possession, as well as whenever it is necessary in order to discover and gather evidence (article 100 from the Code of Criminal Procedure).

These legal provisions point out the fact that during the criminal trial, in Romania, intelligence services or other public administrative authorities (customs and tax bodies) may not adopt measures that would restrain the fundamental rights and freedoms of the citizens.

The most delicate aspects concerning the problem of evidence in the fight against serious criminality focuses on the techniques used for investigating the evidence and, in this respect, the main problem remains the inviolability of the secrecy phone conversations and of other communication means. In this respect, it is relevant the fact that besides the provisions from the Code of Criminal Procedure, there are special criminal processual regulations on audio or video recordings, as to the prevention and fight against drug dealing (article 23 of the Law no. 143/2000), traffic of persons (article 23 of the Law no. 678/2001), money laundry and the prevention of financing terrorism acts (article 27 of the Law no. 656/2002), computer criminality (article 57 of the Law no. 161/2003), organized crime (article 15 of the Law no. 39/2003 and article 16 of the Law no. 508/2004), terrorism (articles 20-22 of the Law no. 535/2004) and corruption (article 16 of the Government Emergency Ordinance no. 43/2002), special laws that either include dispositions derogatory from the code, or refer to the appropriate application of the provisions stipulated by the Code of Criminal Procedure.

As to the probatory rules on bank secrecy and the professional secret, there are special regulations for organized crime, terrorism and corruption. Thus, there is a procedure for the supervision of the banking accounts and of the accounts assimilated to them (article 15 let. (a) of the Law no. 39/2003, article 27 of the Law no. 656/2002, article 15 of the Law no. 508/2004, article 27 of the Law no. 78/2000 for preventing, identifying and sanctioning corruption acts^{cvi} and article 16 of the Government Emergency Ordinance 43/2002). Similarly, it is generally provided that as to the serious offences - like organized crime, terrorism or corruption acts - the bank secrecy and the professional secret, except the lawyer's professional secret, are not opposable to the prosecutor, after the criminal investigation is enforced and nor to the court of justice. The data and information may be required in writing by the prosecutor during the criminal prosecution, on the basis of the motivated authorization of the prosecutor appointed by the General Public Prosecutor of the Public Prosecutor's Office attached to the Court of Appeal, and during the trial by the instance (article 14 of the Law no. 39/2003). The regulation is stricter for money laundry or for the financing of terrorism acts for which it is provided that bank secrecy and the professional secret, including the professional secret of the lawyer, are not opposable to the criminal investigation bodies in all instances or to the courts of justice. The data and information are sent at the written request of the prosecutor or of the criminal investigation bodies, if their request has been authorized by the prosecutor or by the courts of justice.

Among the techniques known as "proactive investigation", one can bring into evidence surveilled delivery, for which a special procedure is provided in the laws on organized crime and terrorism (article 20 of the Law no. 143/2000, article 16 of the Law no.

39/2003 and article 18 of the Law no. 508/2004). Recently, by the Government Emergency Ordinance no. 53/2008^{cvi}, such a technique, consisting of "surveilled money delivery" has also been introduced in article 27 of the Law no. 656/2002 for money laundry and the financing of terrorism acts, stipulating that this measure can be adopted by the prosecutor and it is authorized by a motivated ordinance, which must include the solid grounds for justifying the reasons for which the measure must be adopted, the details about the money that make the object of the surveilled delivery, the place where and the time when the delivery takes place or, as the case may be, the itinerary which is to be covered to make the delivery, if they are known, and the identification data of the persons authorized to supervise the delivery.

10. Does your legal system allow for the use of tough forms of investigation techniques (torture or cruel, unusual, or inhuman treatment) during pro-active enforcement, and, if yes, under which conditions?

According to article 5¹ from the Code of Criminal Procedure, any person who is the subject of a criminal prosecution or who is involved in a trial must be treated respectfully, not to aggrieve his/her human dignity. The use of torture or of other cruel, inhuman or degrading treatments is punished in conformity with the law. In this respect, we mention the provisions of article 267¹ from the Code of Criminal Procedure. According to this article, the deed which intentionally causes a person pain or strong physical or psychic sufferance (especially with the intention to obtain from this person or from another person information or confessions, or with the intention to punish him/her for an act committed or supposed to have been committed by this person or a third one, with a view to intimidate or to put pressure on him/her or to intimidate or to put pressure on a third person, or for any other reason which proves to be an act of discrimination), then when such a pain or sufferance are applied by an agent of the public authorities or by any other person who acts officially or agrees to act in this way at the urge of a public authorities employee, we can speak about torture and this is punishable with imprisonment from 2 to 7 years. This article also mentions that no exceptional circumstance, no matter what that may be – a state of war or a war threat, political internal instability or any other exceptional state – may be invoked to justify torture. At the same time, the superior's order or any other public authority's order may not be invoked in this respect.

It is necessary to mention the provisions of article 68 (1) from the Code of Criminal Procedure, according to which violence, threat or any other constraint measures must not be used with a view to procure evidence.

11. In case of serious offences, does your legal system allow for limiting- the right to habeas data (data protection, private life) or the right to habeas corpus (arrest, detention, deportation, extraordinary rendition, etc.)?

Judicial authorities may intervene in a person's private life by constraining his right as to the inviolability of the domicile, by intercepting and recording conversations, phone conversation including, with the help of communication electronic means, and also by intercepting and retaining correspondence.

As we have already noticed, these constrains may be applied especially in the case of grievous offences (e.g. offences against national security as they are stipulated in the Criminal Code and special laws, drugs and guns trafficking offences, the traffic of persons, terrorism acts, money laundry, money forgery or the forgery of valuable objects, corruption acts).

As far as domicile search is concerned, there are no relative criteria as to the seriousness of the offence. However, in contrast with the other instances of aggrieving somebody's right to private life, which can occur even before the criminal trial starts, in the

stage preliminary to the criminal trial, the violation of the domicile by search can be performed only after the criminal investigation is enforced.

Preventive detention may be ordered in the criminal trial in Romania only if the sanction provided by law for the committed offence is life imprisonment or imprisonment for a period longer than 4 years. In other words, the processual regime for adopting such preventive measures does not take into consideration the distinction between summary and indictable offences.

Individual freedom may also be constrained by means of an intermediary European arrest warrant, a judicial decision issued by a competent judicial authority of a EU member state, with a view to arrest a wanted person and send him/her to another member state for him/her to be criminally investigated or in order to apply a penalty or to deprive somebody of liberty (article 77. 1 of the Law no. 302/2004 on the international judicial cooperation in criminal matters^{cviii}). Basically, the execution of such a warrant is subsequent to the accusation of having committed a grievous offence.

SECTION IV

Dispositions applicable before the judgement of the criminal causes

12. Has the national judicial system developed the investigation prerogatives and the coercitive prerogatives of the authorities, as well as the processual obligations to cooperate with the judicial authorities on the part of the investigated person?

Basically, the investigation attributes and the coercitive prerogatives of the criminal judicial authorities have developed lately, and this is proved by the fact that the criminal policy of limiting the socially highly dangerous infractional phenomena has been implemented in our country. Under these circumstances, however, we have noticed that in certain areas the need for defending certain fundamental rights and liberties prevailed, as an imperative for doing justice.

Thus, as to the procedure applied in domicile search, and as a consequence of the modifications brought by Law no.281/2003 and Law no. 356/2006, one can remark the following aspects:

- domicile search can be ordered only by a judge, in comparison with the previous period when the violation of the domicile could be ordered only by a prosecutor^{cix};
- domicile search can no longer be applied outside the processual framework, and the existence of a disposition for initiating criminal investigation is a necessity; previously domicile search could also be made in the preliminary stage of the criminal case;
- a search warrant can be used only once and it specifies the period for which it was issued.

In the same way, one can remark the legislative change made during the year 2003 according to which the measures adopted for insuring the defendant's goods or the civilly responsible person during the criminal investigation can no longer be ordered by judicial police bodies, since it is exclusively an attribute of the prosecutor.

As to the interception and recording of conversations or other communications, one can remark an increase of the judicial bodies' prerogatives, to the detriment of the rights to defence (the modification of the legal framework was made in 2006). In this respect, we underline the modification of the dispositions according to which interceptions and recordings may be provisorily disposed by the prosecutor, too. Thus, in the previous regulation, the duration of these provisory recordings was mentioned, and the prosecutor was obliged to immediately (anyway, no later than 24 hours from the beginning of the interception or recording) announce the instance about the probatory acts that were enforced. According to the present regulation, provisory interception and recording can be disposed for a term no

longer than 48 hours. At the same time, another difference from the previous regulations consists of the fact that instance will be informed by the prosecutor within 48 hours from the expiration of the duration when these may be made without the judge's authorization. It results that, according to the previous norms, the judge was informed about the interceptions and recordings, without his authorization, in an interval no longer than 24 hours since the ordinance was issued, while, de lege lata, the prosecutor will inform the judge about this fact in an interval no longer than 96 hours.

Another modification of the legislation on interceptions and the recording of conversations or any other communications exists as to the conversations or communications between the lawyer and the party to whom he offers juridical assistance. Thus, before 2006, according to article 91³.(7) from the Code of Criminal Procedure, the recording of the conversations between the lawyer and the offender may not be used as a piece of evidence in the criminal trial. De lege lata, in conformity with article 91¹.(6) from the Code of Criminal Procedure, the recording of the conversations between a lawyer and the party he represents or assists in court may be used as evidence in the trial if this conversation contains concluding and useful data or information about the lawyer's intention to commit or the lawyer's committal of a serious offence, such as the ones provided by article 91¹ (1) and (2) from the Code of Criminal Procedure.

We also mention the possibility of using undercover investigators in the criminal trial, starting with 2000, especially in investigating organized crime offences and corruption acts.

In our judicial system, there are no processual obligations according to which those accused of having committed offences should be bound to cooperate with the judicial authorities. The defendant does not have to prove his/her innocence, the judicial bodies are obliged to administrate the evidence in the criminal trial (ejus incubit probatio qui dicit, non qui negat). Yet, in practice constraints are laid on the statements made by the persons suspected of having committed offences by regulating impunity situations or by reducing the punishment if the suspect cooperates (article 16 of the Law no. 143/2000, in the drug dealing matters, article 20 of the Law no. 678/2001 as to the traffic with persons, article 23 of the Law no. 656/2002 as to money laundry or article 9 of the Law no. 39/2003 as to organized crime). The suspects are informed of these legal provisions before they are subject to interrogation recorded in the form of minutes.

13. Did a shift of powers occur in your country?

Important judicial attributes have been transferred from the competence of the criminal investigation bodies to the judges' competence, in the stage of criminal prosecution. We mention several of the most important changes made especially during 2003:

- the defendant's preventive detention is exclusively disposed by the judge; previously, the prosecutor could dispose the preventive detention for no longer than 30 days or provisory arrest for 3 days;
- provisional release may be disposed for the arrested persons only by the judge;
- hospitalization or compulsory medical treatment of the defendant may be disposed only by the judge;
- interception and recording of conversations or other communications is authorized by the judge; only in exceptional cases, the prosecutor may authorize this probatory method;
- retention and correspondence delivery is disposed by the judge; only in exceptional cases, the prosecutor may authorize this probatory procedure;
- domicile search is disposed only by the judge;
- the judge has the possibility to deny the prosecutor's dispositions for not prosecuting a person and, in certain circumstances, he may return the cause to the prosecutor with the decision to enforce a criminal prosecution.

As to the shift of powers from the judicial police bodies to the Public Ministry, one can notice an increase in the number of offences for which criminal prosecution may be exclusively enforced by prosecutors and, consequently, a decrease in the number of offences for which the criminal prosecution is enforced by judicial police bodies. At the same time, according to the same logic, the functional subordination of judicial police to the Public Ministry has been accentuated, and there are legal dispositions according to which judicial police employees may not receive from their superior bodies any other task apart from exceptional situations and events or for accomplishing preparatory tasks and professional training^{cx}.

14. Did a specialization and/or centralization of the judicial investigative authorities take place in your country?

As to the organization of the criminal investigation bodies, one can speak about a specialization and centralization thereof. In this respect, we mention the organization within the Public Prosecutor's Office attached to the High Court of Cassation and Justice, of NAD^{cx} and DIOCTO^{cxii}.

Thus, the National Anticorruption Directorate (N.A.D.) exercises its powers by its prosecutors specialized in fighting against corruption, and it is subordinated to the General Public Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice. NAD is headed by a Chief Prosecutor who is assisted by two Deputy Chief Prosecutors. The organizational structure comprises sections that are subordinated to prosecutor's chiefs of sections, helped by their deputies. At the same time, territorial sections, services, offices and other activity compartments may be set up, at the Chief Prosecutor's order. Within the National Anticorruption Directorate there are prosecutors, officers and judicial police agents, specialists in economics, the banking, financial, customs and IT fields as well as in other fields, auxiliary specialized staff, as well as economists and administrative staff.

The Directorate for Investigating Organized Crime Offences and Terrorism Acts (D.I.O.C.T.O.) is a structure within the Public Prosecutor's Office attached to the High Court of Cassation and Justice specialized in fighting against organized crime offences and acts of terrorism. The Directorate is headed by a Chief Prosecutor, helped by a Deputy Chief Prosecutor, being coordinated by the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice.

The Directorate for Investigating Organized Crime Offences and Terrorism Acts consists of the following services (within which offices can be set up), subordinated to chief prosecutors: a) the service for fighting against organized crime; b) the service for fighting against drug dealing; c) the service for fighting against economic and financial macro criminality; d) the service for fighting against computer criminality; e) the service for fighting against acts of terrorism.

Thus, grievous forms of criminality created particular competences. The regulator took as a starting point the premise according to which special techniques for investigating the evidence are necessary for this directorate to adopt in order to be efficient since this directorate has to fight against well organized networks. In consequence, specialized structures are necessary both within national police and within the Public Ministry. In practice, however, although both laws of organization and functioning impose the necessity of having specialized personnel, for the public prosecutor's offices to be prepared to fight against serious offences, one can notice that magistrates do not always have the proper training, and thus their specialization is not applied in a concrete manner. However, not the same thing can be said about judicial police employees, who work in these specialized offices and who have a real specialization, being organized and equipped properly.

These specialized public prosecutor's offices have an exclusively material competence, of initiating their own criminal prosecution for serious offences: corruption acts, organized crime and acts of terrorism, and also a territorial competence, which goes beyond the ordinary competence of the public prosecutor's offices attached to the court of justice. Article 13 of the Government Emergency Ordinance no. 43/2002 stipulates the special competence of NAD and it sets forth that "specialized NAD prosecutors are bound to enforce the criminal prosecution for the offences provided in section 1, 1¹ and 1²". Criminal prosecution for the causes provided for the offences mentioned in section 1, 1¹ and 1², committed by active military staff, "shall be enforced by the NAD military prosecutors, no matter the military rank which the investigated persons may have". Article 13 of the Government Emergency Ordinance no. 43/2002 regulates a material competence of the anticorruption prosecutors, without making a distinction, in this respect, between the central and territorial structure of NAD. A similar regulation is also stipulated by Law no. 508/2004 (article 12), which, after enumerating the serious offences that come in the DIOCTO competence, section 2, sets forth that "specialized prosecutors from DIOCTO are bound to enforce the criminal prosecution for the offences provided in section 1", while for the offences provided in section 1 and committed by juveniles or against juveniles, "criminal prosecution shall be enforced by DIOCTO prosecutors, especially appointed by the General Public Prosecutor from the Public Prosecutor's Office attached to the High Court of Cassation and Justice", without making a distinction between the competence of the central structure and the territorial structure (services and offices), which is similar with a competence parity at a national level.

15. Were the rules in your legal system changed on the conditions to approve coercive measures, the disclosure of evidence, or the conditions for arrest and detention?

As to the adoption of coercive processual measures, the most important change is the transfer of competences from the criminal investigation bodies to the judge.

As a general feature, these coercive measures might come in contradiction with the acts which define them as being against the legal provisions in force or by which the right to a fair trial is aggrieved. For all instances, a general condition is required to justify the measures taken: the proofs beyond reasonable doubt. Thus, police actions are conditioned, in all circumstances, by the existence of proofs beyond reasonable doubt as to the committal of an offence. The definition of the beyond reasonable doubt proofs is to be found in article 68 from the Code of Criminal Procedure, introduced by Law no. 356/2006. According to this article, "we can speak about proof that is beyond any reasonable doubt when the existing data indicate as reasonable the supposition that the person - for whom preliminary acts and criminal investigation acts are enforced - committed the deed". For acts of terrorism provided by Law no. 535/2004 and for offences that threaten national security, the regulator has lowered the standard of the probability from the terms "beyond reasonable doubt evidence" to the simple terms "data" or "clues". The law does not contain a definition thereof, but, if we relate them to the words "beyond reasonable doubt evidence" it is obvious that there is a less exigent condition than in the case of the other offences.

The file does not contain probatory means that are not accessible to the defence, but, there are instances when information is accessible only to the criminal judicial bodies. Thus, for the witnesses used in the national program for the protection of witnesses, their identity data are not accessible to the parties in the trial. The application of this probatory method means accomplishing a condition which would ensure the protection of the witness's identity. In other words, the witness's identity is secret to the parties involved in the criminal trial, if there is evidence or if there are proofs or if there is solid evidence that by declaring the real identity or the domicile or the residence, the witness's or another person's life, body integrity

of freedom would be in danger. At the same time, the information about the real identity of the undercover investigators may not be known by the parties in the trial. These data are protected by the professional secret.

In the criminal processual system from Romania, there is no possibility to retain or preventively and secretly arrest, or deport or extradite somebody, thus infringing habeas corpus.

16. Is pre-trial evidence, gathered by police and judicial authorities, subject to judicial control (admissibility of pre-trial evidence) in your country? Are there special measures in the field of serious offences?

According to article 275 from the Code of Criminal Procedure, any person can file a complaint against the measures and the criminal prosecution acts, if that person considers that these measures and acts harmed his/her legitimate interests. The complaint is addressed to the prosecutor who supervises the activity of the criminal investigation body and is submitted either directly to him or to the criminal investigation. The prosecutor must settle the complaint within maximum 20 days from receiving it and communicate immediately to the person who filed it the way in which it was settled.

At the same time, according to article 278¹ from the Code of Criminal Procedure, the person harmed (as well as any other persons whose legitimate interests were harmed) may file a complaint to the court of justice against the prosecutor's acts for the latter not to reinforce the criminal prosecution or to take legal actions.

Last but not least, according to article 332 from the Code of Criminal Procedure, during the trial, one may bring into discussion the admissibility of the evidence administrated during the criminal prosecution by infringing the norms relative to material competence (*rationae materiae*), personal competence (*personae materiae*), the notification of the court of justice, the presence of the defendant and his assistance by the lawyer. In this situation, the instance may dispose the return of the file *ex officio* or at the interested party's request, with a view to reconceive the file.

As to the serious offences, there are no norms derogatory from these provisions.

17. Does your country allow for the use of evidence obtained abroad (extraterritorial use of evidence)?

According to Law no. 302/2004 on international judicial cooperation for criminal matters, the evidence obtained abroad may be sent in the criminal trial in Romania. We refer to the procedure of the international rogatory commission, surveilled delivery, undercover investigations.

Thus, according to article 161. (1) of the Law no. 302/2004 on international judicial cooperation on criminal matters, the object of the rogatory commission request is mainly represented by: a) the localization and identification of the persons and objects; the defendant's hearing, the harmed party's hearing, the other parties' hearing, the witnesses' and experts' hearing, as well as confrontation; search, confiscation by force of objects and writings, seizure of objects and special confiscation; field investigation; expertises, technical-scientific and legal-medical acknowledgments; sending information necessary in a certain trial, interceptions and audio and video recording, analysing the documents in the archive and the specialized files as well as other procedural acts; b) transmitting material evidence; c) delivering documents or files.

The aim of rogatory commissions is to make searches, to confiscate goods and writings and to seize goods. These commissions are subject to the following conditions: a) the offence which motivates the rogatory commission must be susceptible to provide extradition

in Romania, as a solicited state; b) the activity of the rogatory commission is to be compatible with the law of the Romanian State^{cxiii}.

At the same time, at the request of the Romanian judiciary bodies, the foreign judiciary bodies may authorize surveilled delivery for a criminal procedure on offences that can imply extradition^{cxiv} (article 167 of the Law no. 302/2004). The Romanian and foreign judiciary bodies may agree to mutually assist themselves with a view to plan investigations with undercover agents (article 168 of the Law no. 302/2004).

18. Have coercive measures been introduced in such a way that they could definitely preclude fair trial norms?

According to article 136. (1) and (2), the Code of Criminal Procedure, in those causes involving offences punished with life imprisonment or imprisonment, with a view to ensure the good development of the criminal trial or with a view to block the escaping from investigation/trial/ punishment of the guilty person, one of the following measures may be adopted: a) the hold measure; b) the obligation not to leave the locality; c) the obligation not to leave the country; d) preventive arrest. Preventing measures may also be adopted by provisional release under judicial control or on bail.

In the same way, the obligation to take medical treatment is a consequence of the fact that the defendant committed an offence because he is ill, drunk, intoxicated with drugs or other substances that are dangerous for society (article 113, The Criminal Code). The security measure of hospitalizing that person implies the fact that the accused person is mentally ill or is a toxicoman and finds him/her in a condition that is dangerous for society (article 114, the Criminal Code).

As to the assurances measures, they are adopted during the criminal trial, by seizing the mobile and imobile goods, in order to execute a special confiscation, with a view to repair the damage caused by the committed offence, as well as by guaranteeing the payment of the fine (article 163. (1), the Code of Criminal Procedure).

As to the coercive measures that may be adopted by the criminal judicial bodies during the whole criminal trial, we also make reference to the interceptions and recordings of conversations or other communications, the interception of correspondence, domicile search, the use of undercover investigators. All these aspects referring to probatory acts in the criminal trial - if they do not infringe the legal frame of the Code of Criminal Procedure and of the special laws - can not lead to the remark that criminal trial was not a fair one. Such a conclusion may be drawn only if – by the coercitive processual measures adopted or the probatory methods enumerated above – criminal processual norms are infringed.

19. Were special measures introduced in your country for the protection of the secrecy of witnesses, victims, judges, etc.?

The new forms of criminality - such as terrorism acts, organized crime, drug dealing or gun traffic, or traffic in human beings, etc. – have substantially modified the ordinary provisions for hearing witnesses. Consequently the Code of Criminal Procedure has adopted several special measures for protecting the witnesses from potential threats, so that criminal justice would not fail to convict the guilty ones. The protection of witnesses may be accomplished in different ways, starting with an extraprocedural protection, stipulated in Romania by Law no. 682/2002 on the protection of witnesses^{cxv} according to which a program for the protection of witnesses is set up. The notion of protected witness has an autonomous meaning and it comprises, in conformity with the European requests on the matter, both the witness, and the members of his/her family (husband or wife, parents and children), and also close friends. The regulation stipulated in article 86¹-86⁶ from the Code of Criminal Procedure, introduced by Law no. 281/2003, provides specific ways for protecting

the witness during the enforcement of the judicial proceedings. In general, this protection means not revealing the identity of the respective person. Taking into consideration the fact that such measures may affect the exercise of the right to defence, special protection measures are accompanied by processual elements for balancing the processual position of the parties, in conformity with the provisions of article 24 and article 53 from the Constitution, as well as the dispositions provided in article 6 of the European Convention and the CEDO case law in this respect^{cxvi}.

The conditions concerning the ensurance of the anonimite, as well as the conditions under which a person may be heard without being physically present are strict, and they are provided in article 86¹ and 86², the Code of Criminal Procedure. These conditions refer to the protection of the data by which the witness could be identified and to the special measures adopted for hearing him/her. Thus, the protection of the witness is admissible only if there is evidence or there are solid grounds to prove that the revealing of the witness's identity or of some information concerning his domicile or residence, could endanger his life, corporal integrity, his freedom or the freedom of another person whom the witness loves. The change of identity during the judicial procedures may be disposed by the prosecutor for the criminal prosecution stage, by an ordinance. If the case is tried in court, then the change of identity may be ordered by the judicial body, after it has found out the real identity of the witness and after it has analysed the aspects concerning the existing pressure, the measure to be adopted and the credibility of that witness.

Law no. 356/2006 introduce in article 77¹ of the Code of Criminal Procedure, similar provisions according to which the harmed person and the civil party (the victim of the offence) may be heard, by using special methods if their life, body integrity of freedom or their relatives' freedom would be in danger. Special protection measures are introduced in the Code of Criminal Procedure for hearing the anonymous witnesses. In this way, the provisions on the hearing of the victim provided by the Code of Criminal Procedure were brought into line with several special laws, such as Law no. 678/2001 on preventing and fighting against traffic in human beings, as well as with the new concept of "witnesses" which is stipulated by Law no. 682/2002 on the protection of witnesses.

As to the protection of magistrates, respectively the judges and prosecutors who are employed or retired, there is a special regulation in Law no. 303/2004 republished^{cxvii}, in article 77. (1) which provides that prosecutors have the right to enjoy special protection measures against threats, violence or any other deed that might endanger themselves, their families or goods. The second section of article 77 from the same law also provides that special protection measures and the conditions for their accomplishment are established by Government decision, at the proposal of the Ministry of Justice and the Ministry of Internal Affairs.

The implementation of regulations ensures only the protection of anonymous witnesses, of the persons who were victims or of the magistrates, as the case may be, but they do not have a coercive effect on the offenders. They have a double connotation: first, they attempt to find out the truth in complex criminal matters, and secondly they attempt to protect these categories of people of the potential threats that might come from the part of the offenders or the offenders' close friends.

SECTION V

Trial setting (criminal proceedings, special proceedings)

20. When dealing with serious offences, does your legal system foresee special rules concerning jurisdiction, the organization of the trial, the protection of the secrecy of witnesses, victims, judges evidence and proof at trial?

Derogatory norms as to trying serious offences are not provided. Basically, these offences come in the jurisdiction of the court of justice (money laundry, drug dealing and consumption, corruption acts, traffic in human beings or anything which has to do with human beings, offence to initiate or create an infractional group, etc.).

Other serious offences are tried in the court of appeal. These are: offences that threaten national security of Romania, offences against peace and mankind, terrorism acts.

In Romania there are specialized courts of justice, in accordance with the provisions of article 126. (5) from the Constitution, according to which by organic law specialized courts can be set up, in which persons who are not magistrates can work. Thus, in Constanța and Galați, for criminal matters, there are specialized sections for trying offences committed at sea. In Brașov a specialized court for juveniles and family matters has been set up. Here are tried the offences committed by juveniles against juveniles. According to these provisions, one can notice that the Romanian judicial system lacks specialized courts for offences which represent a very serious social threat.

The disposition not to take into consideration a certain piece of evidence for solving a criminal cause - evidence that is included in the file (and about which the magistrate appreciated that it is pertaining, concluding and useful for revealing the truth) – may be grounded on the fact that that very piece of evidence does not corroborate with the other pieces of evidence existing in that criminal cause. Under these conditions, no distinctions are made between the evidence used for defence or prosecution.

21. When dealing with serious offences, does your legal system fully provide for the right of the suspect/accused/detained person to an independent and impartial tribunal?

The suspect's or defendant's right to an independent and impartial trial, the presumption of innocence, the right to be judged without undue delay, the right to invoke the lawfulness of preventive arrest, the right to invoke the adagium in dubio pro reo – all are regulated in the Romanian Code of Criminal Procedure. Besides, the regulator does not make any difference between summary offences and indictable offences.

The public character of the trial is a basic principle for the trying of the causes, and there are norms in the Romanian Constitution, the Code of Criminal Procedure and in the Law no. 304/2004 on the judicial organization that regulate this principle. As to serious offences there are no further norms concerning the public character of the trial.

In the same way, we can notice that applicable procedure is not derogatory, according to the distinction between indictable/summary offences. Consequently, there are no specific regulations for serious offences as to the right to assist to one's own trial, the right of the defender to have access to all constitutive elements of the file, the right to be informed without delay about the offence one is accused of, the right to know the evolution of the criminal proceedings and the right to benefit of an adequate period of time for preparing the defence strategy, the right to make public the elements of the case (between the involved parties) and to make public the proceedings, the right to examine the declarations of the aggrieved person and to obtain the presence and hearing of the defence witnesses in the same conditions like the prosecution witnesses, special measures for anonymous witnesses or for those that are part of a protection program (undercover agents, intelligence agents), the right to benefit for free of an interpreter's services, the right not to make a deposition against one's own, the right to have a defender (elected or appointed ex officio), the right to remain silent. All these processual rights are provided by criminal processual legislation for the trial setting stage. Further provisions for grievous offences do not exist.

However, there are limitations imposed on the exercise of these processual rights for the offenders accused of having committed indictable offences. These limitations are

determined either by the nature of the offence, or by the probatory object. Thus, as to the offences that threaten national security, the public character of the trial may be derogated, if it is supposed that the public character of the trial might cause harm to the interests of the state. At the same time, defence does not have access to the elements of real identity or to other information that might endanger the life, corporal integrity of the witness or any other persons in criminal cases in which declarations of witnesses included in the national protection program are used or in criminal cases in which probatory elements obtained by undercover investigators are used.

SECTION VI

Post-trial setting (criminal, special proceedings)

22. When dealing with terrorism and serious offences, did your legal system modify the right of a higher court to review the sentence (appeal, cassation, constitutional review), the prohibition of double jeopardy, following either an acquittal or finding of guilt and punishment?

Judicial decisions can be criticized by attacking the court rulings. The principle of attacking the court rulings is stipulated in article 129, according to which the interested parties and the Public Ministry can establish their ways of attacking the court ruling in conformity with the provisions of law.

In the criminal trial in Romania, ordinary ways of attacking the court ruling (the appeal and the recourse) and the extraordinary ways of attacking the court ruling (appeal for annulment and review) are regulated by law. There are no derogatory norms as to the use of these ways of attack in the cases in which grievous offences are tried.

At the same time, after a final decision is passed - by which the guilt of innocence of the defendant is proved - it is impossible to enforce a new criminal investigation for the same deed and the same person, no matter what the nature of the offence is. In this respect, article 10 let. (j) from the Code of Criminal Procedure includes an impediment to the initiation of the criminal prosecution, and that is double jeopardy (authority of tried matter). Thus, the seriousness of the offence is no longer important when applying this concept in court.

SECTION VII

Conclusions

Taking as a premise the Code of Criminal Procedure provisions, and taking into consideration the numerous laws adopted for altering and annotating this Code – which outlines, with a few exceptions, the ordinary criminal procedure – we can notice that the legislative in our country has passed many special laws which have substantially regulated the criminal procedural measures imposed as a necessity by the specific and complex categories of indictable offences (the ones referring to corruption, grievous criminality and terrorism). These measures, as we have seen above, gradually transform traditional criminal procedure into a new one, which appears as an alternative to the former one. The new criminal procedure is organized in conformity with the types of offences enumerated above, and it is justified by the present need to prevent them and fight against them. Although exceptional procedures are being adopted and they are applicable only to certain categories of offences, the principles that guarantee the protection of individual liberties still subsist, but they are completed by a larger and larger number of exceptions, justified both by the present very grievous infrastructural phenomena and by the limited character of the grievance caused to individual liberties. Basically, the monitoring of these specific offences justifies the adoption of exceptional investigation means. The notion of organized crime is at the core of these

exceptional regimes, since the international character of these criminal phenomena, its structured organization and the seriousness of the offences that generate them impose the adoption of new investigation means as a necessity.

These techniques allow judicial police and its prosecutors to intervene in criminal cases in a more precocious manner, and they have effect on a criminogenous environment even before the offence is committed^{cxviii}. These techniques put to good use the informers and justice collaborators, wire tapping and conversation or communication recording, anonymous witnesses, the infiltration of provoking agents into criminal networks, as well as by means of other techniques which facilitate the previous knowledge of the offenders' intentions, even by taking part in the activities the former perform. Without discussing about the actual effectiveness of these techniques, which is to be demonstrated from case to case, criminal phenomena are certain to seriously aggrieve individual freedoms and fundamental rights. The principle of contradictness, the principle of loyalty in reinterpreting evidence, the principle of respecting private life, as well as the one of safeguarding individual freedom (the freedom to go and to come) are regarded as being of secondary importance in order to facilitate police and prosecutors' intervenience in criminal acts presented as particularly dangerous.

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^{iv} The Romanian criminal procedure is codified, i.e. all the judicial norms it comprises are systematized in a single law: The Code of Criminal Procedure. The Romanian Code of Criminal Procedure, which represents the main common source of criminal procedure, came into force on 1st January 1969 (initially published in the Official Bulletin of Romania no. 145 – 146 on 12th November 1968, and then republished in the Official Bulletin of Romania no. 58 – 59, on 26th April 1973, respectively in the Official Gazette of Romania no. 78, on 30th April 1997). At the same time, the Romanian Code of Criminal Procedure has been modified and adnotated for many times so far with a view to bring into line its existing dispositions with the European requirements and the ones provided by the Constitution, to point out competences and adopt new regulations, especially with reference to the deterrence measurements, evidence and ways to fight against criminality. In this respect, one can notice that there are new formal sources for criminal procedure: international and constitutional sources. At the same time, one can notice that there is an inclination towards the fundamental rights, which is one of the great metamorphoses of any law system at the end of this century, as well as the tendency towards globalization of criminal procedure and the appearance of new directing principles.

^v The Official Gazette of Romania no. 229, 14th November 1996.

^{vi} The Official Gazette of Romania no. 594, 22nd November 2000.

^{vii} The Official Gazette of Romania no. 707, 30th December 2000.

^{viii} The Official Gazette of Romania no. 410, 25th July 2001.

^{ix} The Official Gazette of Romania no. 326, 18th June 2001.

^x The Official Gazette of Romania no. 594, 1st July 2004.

^{xi} The Official Gazette of Romania no. 807, 17th December 2001.

^{xii} The Official Gazette of Romania no. no. 2, 4th January 2002.

^{xiii} The Official Gazette of Romania no. 261, 18th April 2002.

^{xiv} The Official Gazette of Romania no. 351, 27th May 2002.

^{xv} The Official Gazette of Romania no. 470, 2nd June 2005.

^{xvi} The Official Gazette of Romania no. 453, 27th June 2002.

^{xvii} The Official Gazette of Romania no. 783, 30th October 2002.

^{xviii} The Official Gazette of Romania no. 468, 1st July 2003.

^{xix} The Official Gazette of Romania no. 502, 11th July 2002.

^{xx} The Official Gazette of Romania no. 635, 5th September 2003.

^{xxi} The Official Gazette of Romania no. 748, 26th October 2003.

^{xxii} The Official Gazette of Romania no. 451, 20th May 2004.

^{xxiii} The Official Gazette of Romania no. 592, 1st July 2004.

^{xxiv} The Official Gazette of Romania no. 1164, 8th December 2004.

^{xxv} The Official Gazette of Romania. no. 594, 1st July 2004.

^{xxvi} The Official Gazette of Romania no. 909, 6th October 2004.

^{xxvii} The Official Gazette of Romania no. 1210, 16th December 2004.

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- ^{xxviii} The Official Gazette of Romania no. 1088, 23rd November 2004.
- ^{xxix} The Official Gazette of Romania. no. 1223, 20th December 2004.
- ^{xxx} The Official Gazette of Romania no. 1179, 28th December 2005.
- ^{xxxi} The Official Gazette of Romania. no. 629, 20th July 2006.
- ^{xxxii} The Official Gazette of Romania no. 677, 7th August 2006.
- ^{xxxiii} The Official Gazette of Romania no. 764, 7th September 2006.
- ^{xxxiv} The Official Gazette of Romania no. 225, 2nd April 2007.
- ^{xxxv} The Official Gazette of Romania no. 224, 24th March 2008.
- ^{xxxvi} The Official Gazette of Romania no. 228, 25th March 2008.
- ^{xxxvii} According to article 229 the Code of Criminal Procedure, “The person criminally investigated is called defendant as long as criminal action has not been initiated against him”.
- ^{xxxviii} According to article 23 the Code of Criminal Procedure, “The person against whom criminal action has been initiated is part of the criminal trial and is called defendant”.
- ^{xxxix} See Decree no. 224/11.05.1990 which ratifies the additional protocols I and II to the Geneva Conventions (The Official Gazette of Romania, Part I, no. 68-69/14.05.1990); Law no. 32/26.04.1995 regarding the acceptance by Romania of the amendments to annex no. I of the additional Protocol no. I to the Geneva Conventions in 1949 (The Official Gazette of Romania, Part I, no. 82/4.05.1995); Law no. 277/15.05.2002 on retracting the reserves expressed by Romania to the four Geneva Conventions for protecting the war victims (The Official Gazette of Romania, Part I, no. 368/31.05.2002).
- ^{xl} The international agreement relative to the economic, social and cultural rights and the international Agreement relative to the civil and political rights were ratified by the State Council Decree no. 212/31.10.1974, published in the Official Gazette of Romania no. 146/20.11.1974.
- ^{xli} See Law no. 19/10.10.1990 published in the Official Gazette of Romania, Part I, no. 112/10.10.1990.
- ^{xlii} See Law no. 80/30.09.1994 published in the Official Gazette of Romania, Part I, no. 285/7.10.1994.
- ^{xliiii} See Government Emergency Ordinance no. 91/30.08.1999 published in the Official Gazette of Romania, Part I, no. 425/31.08.1999.
- ^{xliv} See Law no. 30/18.05.1994 on the ratification of the Convention for safeguarding human rights and fundamental freedoms as well as the protocols added to this convention (the Official Gazette of Romania, Part I, no. 135/31.05.1994); Law no. 79/6.07.1995 on the ratification of Protocol no. 11 to the Convention for safeguarding human rights and fundamental freedoms, on restructuring the control mechanism established by convention, concluded at Strasbourg on 11th May 1994; Law no. 7/9.01.2003 on ratifying Protocol no. 13 to the Convention for safeguarding human rights and fundamental freedoms concerning death penalty abolishment, concluded at Vilnius 3rd May 2002 (the Official Gazette of Romania, Part I, no. 27/20.01.2003); Law no. 345/12.07.2004 on approving the retraction of the reserve expressed by Romania as to article 5 in the Convention for safeguarding human rights and fundamental freedoms, adopted in Rome on 4th December 1950 (The Official Gazette of Romania, Part I, no. 668/26.07.2004); Law no. 39/17.03.2005 on the ratification of the Protocol no. 14 to the Convention for safeguarding the human rights and fundamental freedoms, adopted in Rome on 4th November 1950, as to the modification of the control system of the Convention, adopted in Strasbourg on 13th of May 2004 (The Official Gazette of Romania, Part I, no. 238/22.03.2005); Law no. 103/25.04.2006 on ratifying the Protocol no. 12 to the Convention for safeguarding the human rights and fundamental freedoms, adopted in Rome on 4th November 2000 (The Official Gazette of Romania, Part I, no. 375/02.05.2006).
- ^{xlv} The criterion referring to the necessity of limitation – which is of significant importance in a democratic society – constitutes a reference element in particularly analysing every situation, both for the regulator, when he adopts such measurements, and for the constitutional judge, when he/she is asked to adjudicate on the constitutionality of such a measure. (See **M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, Constituția României revizuită, comentarii și explicații**, Editura All Beck, București 2004, p. 109)
- ^{xlvi} The Constitutional Court Decision no. 809 passed on the 9th November 2006 on the objection of unconstitutionality concerning adopted dispositions, article 19 in Law no. 682/2002 on the protection of witnesses (The Official Gazette of Romania, no. 29, 17th January 2007). The Court has decided that the principle of equality of rights does not imply uniform juridical approach for all offences, and that the regulation of a sanctioning regime in concordance with the conduct of the persons who are under criminal investigation is the natural implementation of the constitutional principle mentioned above, and according to this principle the same regime should be applied to each juridical situation, and as for different juridical situations they should also be differently approached from a juridical point of view. This is a criminal policy measure adopted to deter grievous antisocial phenomena, such as organized crime, terrorism, drug dealing and traffic in human beings, and to implement a system of measures with a view to protect witnesses, while not affecting the principle of equality of rights. Basically, the Constitutional Court has agreed on the regulator’s providing special criminal procedure rules in conformity with the facts, situations and the persons to which they are addressed and on condition that

these rules should not allow unjustified discrimination to be made and equal guarantees to be offered to the regulators

^{xlvii} **L. Mihai, R. P. Vonica, I. Muraru, N. Popa**, *Opinie separată* as to the Constitutional Court Decision no. 124, 26th April 2001, The Official Gazette of Romania no. 466, 15th August 2001

^{xlviii} ECHR, 1st July 1969, *Lawless c. Ireland* series A, no. 3; ECHR 6th December 1978, *Klass ş. a. c. Germany*, series A, no. 28. (48).

^{xlix} ECHR, 18th January 1978, *Ireland c. U.K.*, series A, no. 25. (47).

¹ ECHR, 6th December 1988, *Barbera, Messegue and Jobardo c. Spain*, series A, no. 146. (78) (it has been established that the evidence should be exposed to adversarial debate); ECHR, 26th March 1996, *Doorson c. the Netherlands*, Recueil II, 1996, no. 6, p. 446 (it has been accepted that a conviction cannot be exclusively or decisively grounded on anonymous statements).

^{li} Judicial guarantee is provided in article 23. (4) and article 27. (3) of the Constitution relative to the exclusive competence of the judge in ordering preventive custody and authorising domicile search, as well as in article 21 of the Constitution relative to free access to justice.

^{lii} The Official Gazette of Romania no. 219, 18th May 2000.

^{liii} The Official Gazette of Romania no. 279, 21st April 2003.

^{liv} The Official Gazette of Romania no. 244, 11th April 2002.

^{lv} The Official Gazette of Romania no. 50, 29th January 2003.

^{lvi} The Official Gazette of Romania no. 904, 12th December 2002.

^{lvii} The Official Gazette of Romania no. 1961, 8th December 2004.

^{lviii} The Official Gazette of Romania no. 1155, 7th December 2004.

^{lix} The Official Gazette of Romania no. 783, 11th December 2001.

^{lx} The Official Gazette of Romania no. 1089, 23rd November 2004.

^{lxi} The Official Gazette of Romania no. 1155, 7th December 2004.

^{lxii} The Official Gazette of Romania no. 1039, 28th December 2006.

^{lxiii} As to **human trafficking**, Romania has ratified the United Nations Convention against transnational organized crime, the Protocol on preventing, repressing and sanctioning the traffic of human beings, especially of women and children, additional to the United Nations Convention against transnational organized crime, as well as the Protocol against the illegal traffic of human beings on land, via air and at sea, additional to the United Nations Convention against transnational organized crime, adopted in New York, 15th November 2000. (Law no. 565/16.10.2002, published in the Official Gazette of Romania, Partea I, no. 813/9.11.2002).

^{lxiv} The Official Gazette of Romania no. 18, 21st January 1999.

^{lxv} The Official Gazette of Romania no. 333, 30th April 2008.

^{lxvi} The Official Gazette of Romania, no. 279, 21st April 2003.

^{lxvii} As to the fight against **terrorism**, relevant international acts have been ratified, of which we mention: the International Convention on Repressing the Financing of Terrorism, adopted in New York on 9th December 1999^{lxvii}, the European Convention for Repressing Terrorism^{lxvii}, the International Convention against Nuclear Terrorism Acts, signed at New York on 14th September 2005^{lxvii}, the European Council Convention on preventing terrorism, adopted at Varşovia on 16th May 2005^{lxvii}, the European Council Convention on money laundry, identifying, seizing and confiscating the products that made the object of the offence as well as identifying the sources for financing terrorism, adopted at Varşovia on 16th May 2005^{lxvii}. (Law no. 623/19.11.2002, published in the The Official Gazette of Romania, Part I, no. 852/26.11.2002. Law no. 19/28.02.1997, published in the Official Gazette of Romania, Part I, no. 34/4.03.1997. At the same time, the Protocol for amending the European Convention for repressing terrorism acts was ratified and adopted at Strasbourg on 15th May 2003 (Law no. 366/15.09.2004, published in the Official Gazette of Romania, Part I, no. 913/7.10.2004). Law no. 369/2.10.2006, published in the Official Gazette of Romania, Part I, no. 847/16.10.2006. Law no. 411/9.11.2006, published in the Official Gazette of Romania, Part I, no. 949/24.11.2006. Law no. 420/22.11.2006, published in the Official Gazette of Romania, Part I, no. 968/4.12.2006).

^{lxviii} The Official Gazette of Romania, no. 842, the 19th of September 2005.

^{lxix} The National Anticorruption Directorate was set up **ab initio** to function at a national level, as a part of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, as an autonomous Public Prosecutor's Office, specialized on fighting against corruption acts (initially named National Anticorruption Public Prosecutor's Office) by Government Emergency Ordinance no. 43/2002, approved by Law no. 503/2002, subsequently altered and adnotated by Government Emergency Ordinance no. 24/2004, also approved by Law no. 601/2004 (the Official Gazette of Romania no. 1227, 20th December 2004) and more recently, by Law no. 247/2005 passed in order to alter and complete Law no. 304/2004 on organizing the judiciary and then by the Government Emergency Ordinance no. 134/2005, by Law no. 54/2006 (the Official Gazette of Romania no. 226, 13th March 2006), having an autonomous structure, its own judicial status within the Public Prosecutor's Office

attached to the High Court of Cassation and Justice; later on the National Anticorruption Public Prosecutor's Office was reorganized and initially transformed into a department to finally become a directorate (as it actually is today). The National Anticorruption Directorate performs its powers all over Romania having specialized prosecutors whose aim is to fight against corruption; it has jurisdiction – according to article 13 in the Government Emergency Ordinance no. 43/2002 – for most of the offences provided by Law no. 78/2000 with a view to prevent, identify and sanction corruption acts, by taking into consideration not only the material damage caused or the value in money of the good which is regarded as the object of the corruption act, but also the quality of the person (the supposed offender). According to article 3 in the Government Emergency Ordinance no. 43/2002, altered by Law no. 54/2006, the main power of NAD is to initiate the criminal prosecution process, under the conditions provided by the Code of Criminal Procedure, in conformity with Law no. 78/2000 on preventing, identifying and sanctioning corruption acts and in the actual Government Emergency Ordinance, for the offences provided by Law no. 78/2000 which come in NAD jurisdiction according to article 13; for exercising these powers NAD may use special means for analysing offence acts, which are derogatory from the common law norms, from among those authorised by special laws in corruption matters, thus creating a special criminal procedure and judgement for corruption offences or for corruption related acts.

^{lxx} This text separates DIOCTO competence not only from the common one, which is specific for ordinary Public Prosecutor's Offices, attached to the courts of justice, but also from another type of competence, a special one, which is specific for NAD, according to article 13 in the Government Emergency Ordinance no. 43/2002; in conformity with this article NAD competence is privileged - as special legislation points out, and thus DIOCTO has competence over certain offences, as article 12 points out: „with the exception of those assigned to NAD”. This actually points out the dimensions that special procedure has, thus making up a new criminal procedure that coexist with common criminal procedure and that can be used whenever it comes to one of the offences that, according to law, refer to organized crime or terrorism. By this regulation, it has been attempted to make a clearer delimitation from NAD competence, not only as far as the quality of the person is concerned (criterion specific for NAD competence) but also as far as the material evidence is concerned, considering that both structures have a special material competence and have a similar rank. (see **I.C. Spiridon**, *Considerații referitoare la Legea no. 39/2003 privind prevenirea și combaterea criminalității organizate*, Dreptul no. 3/2008, p. 174).

^{lxxi} The Official Gazette of Romania, no. 842, the 19th of September 2005.

^{lxxii} The Official Gazette of Romania, no. 751, on the 6th November 2007.

^{lxxiii} In this respect, it is relevant the fact that in conformity with article 2. (2) of the Government Emergency Ordinance no. 123/2007, the national member of Eurojust is appointed by the Ministry of Justice from among the prosecutors with experience in fighting against serious forms of organized crime, corruption or terrorism.

^{lxxiv} The Official Journal of the European Union (JOUE) no. L 307, the 24th November 2007.

^{lxxv} The High Court of Cassation and Justice has been recently updated by the Law of Constitutional Revisions adopted in 2003, and thus, it became, by the reorganization of the Supreme Court of Justice, the supreme instance in Romania. The text of article 126. (3) from the revised Constitution explicitly sets forth the fact that the supreme instance mainly has the role to reinterpret the law and control that law is unitarily applied in all courts of justice. The High Court of Cassation and Justice makes use of its logic, the consequence of its casuistic solutions, and by means of the recourses made to the interest of law. The constitutional provision is pointed out in article 18. (2) of the Law no. 304/2004 with the subsequent modifications and adnotations, which reconfirm the constitutional power with which the High Court of Cassation and Justice is invested in order to ensure the interpretation and unitary application of the law by all the other courts of law. According to the law, the supreme instance performs this power in three ways: a) by solving the causes that come into its jurisdiction; b) by means of the recourses used to the interest of law, regulated in article 414², the Code of Criminal Procedure; c) by means of its practice in the other causes which are not brought before the High Court of Caasation and Justice as a recourse instance. This last way of interpreting and unitarily applying the law by the other courts of law is stipulated in article 27. (2) from the Law no. 302/2004, which provides that the President of the High Court of Cassation and Justice may agrre for the judges to inform themselves at the courts of justice as to the aspects concerning the correct and unitary application of the law, by making known the case law of the High Court of Cassation and Justice.

^{lxxvi} By article 146 let. (d) of the Constitution, exclusive competence of the Constitutional Court has been set forth as to «the objections of unconstitutionality of laws and ordinances brought before the courts of justice». Law no. 47/1992 (article 29. (1)) sets forth the same provision.

^{lxxvii} The Constitution of Romania was adopted in its initial form in the meeting of the Constitutive Assembly on 21.11.1991 and it was published in the Official Gazette of Romania, Part I, no. 233/21.11.1991. In 2003, the Constitution of Romania was altered and completed by the Law on the revision of the Constitution no. 429/2003 (the Official Gazette of Romania, Part I, no. 758/29.10.2003).

^{lxxviii} See Law no. 304/28.06.2004, republished in the Official Gazette of Romania, Part I, no. 827/13.09.2005.

^{lxxxix} See **I. Neagu**, *Drept procesual penal. Partea generală. Tratat*, Global Lex Publishing House, Bucharest, 2007, p. 98.

^{lxxx} This obligation is provided in article 70. (2), the Code of Criminal Procedure, as well as in article 250 (1. a), the Code of Criminal Procedure. We point out the fact that in the previous text of Law no. 356/2006, the defendant was to be informed only of the deed that makes the object of the criminal investigation, and that there were no references as to the judicial framing of the deed committed.

^{lxxxii} See **I. Neagu**, *op.cit.*, p. 106-108; **N. Volonciu**, *Tratat de procedură penală. Partea generală*, Paideia Publishing House, Bucharest, s.a., p.126-129; **Gr.Theodoru**, *Tratat de drept procesual penal*, Editura Hamangiu, București, 2007, p. 65-67; **Gh.Mateuț**, *Tratat de procedură penală. Partea generală, vol. I*, C.H.Beck Publishing House, Bucharest, 2007, p. 238-243.

^{lxxxiii} Law no. 356/21.07.2006 on altering and completing the Code of Criminal Procedure was published in the Official Gazette of Romania, Part I, no. 677/7.08.2006.

^{lxxxiiii} Before the Law no. 356/2006 was passed, article 322 of the Code of Criminal Procedure used to have the following provisions: The president orders that the clerk read the act informing the instance, after which he explains to the defendant the blame for which he is made responsible. At the same time he clarifies to the defendant his right to ask the co-defendants, the other parties, the witnesses and experts questions, as well as to give explanations whenever he thinks necessary during the judicial investigation.

^{lxxxv} See, **I. Muraru**, *Drept constituțional și instituții politice*, Proarcadia Publishing House, vol. I, Bucharest, 1993, p. 229; **I. Deleanu**, *Drept constituțional și instituții politice*, Tratat, vol. II, Europanova Publishing House, Bucharest, 1996, p. 117.

^{lxxxvi} The Constitutional Court has decided that the disposition provided in the former Law on the organization of the judiciary - according to which the Supreme Court of Justice is held responsible for ensuring a unitary judicial practice - corresponds to the constitutional principle according to which all citizens are equal before the law and public authorities. The Constitutional Court motivated its decision as follows: on the one hand, any law is unique, and consequently it can not be differently applied from one court to another [Decision no. 58/1997 (the Official Gazette of Romania no. 90, 26th February 1998)]; on the other hand, the principle of equality before the law includes in its normative content the unitary character of its applicatin in relationship with the territory [Decision no. 4/1992 (the Official Gazette of Romania no. 182, 30th July 1992)].

^{lxxxvii} Analysing the Europene Court of Human Rights case law - as to the principle of non-discrimination - one can notice that case law used in this court is subordinated to all the Convention clauses, which safeguard individual rights and freedoms, so that the Convention can be invoked any time there is a fear that a normative disposition is not observed, and discrimination presents itself as an extenuating circumstance (D. Micu, *op. cit.*, p. 127).

^{lxxxviii} Similarly, **S.E. Tănăsescu**, *Principiul egalității în dreptul românesc*, Publishing House All Beck, Bucharest, 1999, p. 247.

^{lxxxix} See **J.C. Soyér**, **M. de Salvia**, in **L.E. Pettiti** a.a., *La Convention europeenne des droits de l'homme*, Economica Publishing House, Paris, 1995, p. 265.

^{lxxxix} In applying this principle, the Court in Strasbourg has established that every party is entitled to bring counterarguments to the arguments expressed by the other party (C.E.D.O., 29th May 1986, Feldbrugge c. the Netherlands, in V. Berger, *op. cit.*, p. 235). In the trial Bonisch v. Austria on 6th May 1985 (V. Berger, *op. cit.*, p. 254) s-a hotărât că trebuie audiați martorii și experții ambelor părți.

^{xc} The Constitutional Court, Decision no. 73/1996, apud S.E. Tănăsescu, *cit. w.*, p. 248.

^{xcii} At present, recourse in cancellation is implicitly abolished, since it is no longer stipulated in Law no. 304/2004 on the organization of the judiciary, and by Law no. 576/2004 it is eliminated from the Romanian judiciary system, by the repealing of the provisions stipulated by article 409-414¹ from the Code of Criminal Procedure on recourse in cancellation.

^{xciii} At present, article 254 (1), the Code of Criminal Procedure is appropriately altered by Law no. 281/2003.

^{xciv} See the Constitutional Court, Decision no. 294/2002 (the Official Gazette, no. 891, the 10th of December 2002).

^{xcv} *Ibidem*.

^{xci} *Ibidem*.

^{xcvii} The Official Gazette of Romania, no. 136, the 1st April 1999.

^{xcviii} Personal competence is derogation from material competence and it is that form of competence which is determined by the quality that the offender has when he commits the offence.

^{xcix} The Official Gazette of Romania, no. 22, 21st January 1999.

^{cx} The Official Gazette of Romanian, no. 1052, the 12th of November 2004.

^c The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely

severe catastrophe. Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.

^{ci} Thus, according to article 226 from the Code of Criminal Procedure, for unjustified absence (article 331 The Criminal Code), desertion (article 332 the Criminal Code), Transgression of orders (article 333 C.p.), insubordination (article 334 C.p), eluding military service (article 348 the Criminal Code.), eluding recruitment (article 353 the Criminal Code), respectively failure to present oneself for incorporation or concentration (article 354, the Criminal Code), the criminal prosecution may be initiated only at the commanding officer's request.

^{cii} For example, in conformity with article 177. (7) of the Code of Criminal Procedure, the militaries are summoned at the unit where they belong, through their commander. At the same time, in conformity with article 184. (4), the Code of Criminal Procedure, enforcement of the orders of appearance regarding the militaries is done through the commander of the military unit or the garrison.

^{ciii} See Law no. 302/2004 on international judicial cooperation on criminal matters, published in the Official Gazette of Romania, Part I, no. 594/01.07.2004.

^{civ} The undercover investigator body is also regulated in special laws on serious offences, such as Legea no. 678/21.11.2001 on the prevention and the fight against traffic with persons (the Official Gazette of Romania, Part I, no. 783/11.12.2001); Law no. 218 on the 23rd April 2002 on the organization and functioning of the Romanian Police (The Official Gazette of Romania, Part I, no. 305/9.05.2002); Law no. 39/21.01.2003 on preventing and fighting against organized crime (the Official Gazette of Romania, Part I, no. 50/29.01.2003).

^{cv} See Law no. 51/ 29.07.1991 on national security of Romania, published in the Official Gazette of Romania, Part I, no. 163/7.08.1991.

^{cvi} The Official Gazette of Romania, no. 219, 18th May 2000.

^{cvi} The Official Gazette of Romania, no. 333, 30th April 2008.

^{cvi} See Law no. 302/28.06.2004 on international judicial cooperation for criminal matters, published in the Official Gazette of Romania, Part I, no. 594/01.07.2004).

^{cix} More than that, before 2003 domicile search – in case there is a flagrant offence – could also be made judicial police bodies, without the prosecutor's consent.

^{cx} In some instances, the administrative subordination of the judicial police investigation bodies has been completely eliminated. We refer to article 10. (7) from the Government Emergency Ordinance no. 43 /2002 on the National Anticorruption Directorate, according to which officers and agents from Judicial Police of NAD **may not receive from their hierarchically superior bodies any task.**

^{cx} See Government Emergency Ordinance no. 43/4.04.2002 on the National Anticorruption Directorate, published in the Official Gazette of Romania, Part I, no. 244/11.04.2002, subsequently modified and completed for several time.

^{cxii} See Law no. 508/17.11.2004 on the setting up, organization and functioning of the DIOCTO within the Public Ministry, published in the Official Gazette of Romania, Part I, no. 1089/23.11.2004, subsequently modified and adnotated.

^{cxiii} These dispositions are not applied in relationship with the states who are parts to the Convention for applying the Schengen agreements. As to these states, the following conditions are imposed for meeting the requirements of the rogatory commissions whose object is represented by searches or seizures: a) Romanian legislation and the legislation of the solicited state will provide a punishment for the deed which determined the request for a rogatory commission. This punishment will deprive of liberty the offender. A safety measure which restrains liberty will also be provided, and its maximum term is of at least 6 months. Another possibility is for the legislation of one of the parties to provide a countersanction, while in the legislation of the other party the deed will be punished as a breach of the judicial norms, identified by administrative authorities whose decision may be attacked with recourse before a competent criminal court; b) the actions of the rogatory commission must be compatible with the Romanian law.

^{cxiv} Extradition of a person may be required only if the deed - for which the person solicited for extradition is accused or was convicted - is defined as an offence both by the law of the soliciting state, and by the Romanian law. By derogation, the deed need not be defined as an offence in the soliciting state law, if for that deed double criminality is excluded by an international convention to which Romania is part. Extradition may be required from Romania, in order to enforce criminal prosecution or initiate the trial, for deeds whose committal determines – according to Romanian legislation and the other state's legislation – a punishment with imprisonment of at least 1 year, and with a view to serve a punishment, only if this is of at least 4 months (article 28 of the Law no. 302/2004 on international judicial cooperation on criminal matters).

^{cxv} The Official Gazette of Romania, no. 964, 28th December 2002.

^{cxvi} See **Gh. Mateuț**, *Protecția martorilor. Utilizarea martorilor anonimi în fața organelor procesului penal*, Lumina Lex Publishing House, Bucharest, 2003, p. 24-25.

^{cxvii} The Official Gazette of Romania, no. 826, the 13th of September 2005.

^{exviii} The content of internal procedure regulations, of the ones included in the Code of criminal procedure, as well as of the ones provided by the special laws, reveal, as we shall see, the fact that special procedural measurements adoption is conditioned by the existence of solid data or evidence or solid and palpable evidence, as the case may be, concerning the “preparation or committal of an offence”. (see **N. Volonciu, A. Barbu**, *Codul de procedură penală comentat. Article 62-135, Probele și mijloacele de probă*, Ed. Hamangiu, București, 2007, p. 127 și urm.)