

GUARANTEES SPECIFIC TO A FAIR TRIAL IN CRIMINAL MATTERS. HARMONISATION OF JURISPRUDENCE

Mircea DAMASCHIN*

Abstract

By adopting the European Convention on Human Rights (hereinafter referred to as “the Convention”) in 1994, the Romanian State recognised the necessity that any criminal trial should be carried out under fair conditions, in accordance with the requirements of Article 6 of the Convention. In this study, we are going to analyse the requirements of the Convention applying especially to criminal trials, namely those related to the right of the charged person to be informed promptly, in a language which he understands, of the nature and cause of the accusation against him. Moreover, we will take into consideration the obligation of the judicial bodies to offer the charged person the adequate time and facilities for the preparation of his defence. The analysis will be based on the relevant regulations set down in the Convention and the Romanian criminal procedure legislation. Last but not least, it will include a presentation of the jurisprudence relevant to these matters, both of the European Court of Human Rights (hereinafter referred to as “ECHR”) and of the Romanian national courts.

Keywords: *criminal trial in Romania, right to a fair trial, the European Court of Human Rights, right to be informed of the nature of the accusation, right to defence.*

Introduction

In accordance with Article 6 Paragraph (1) of the Convention, the requirements regarding a fair trial, consisting of a public hearing within a reasonable time by an independent and impartial tribunal established by the law, are to be applied both to any alleged violation of the civil rights and obligations and to the accusations of a criminal nature.

In addition to these general guarantees, Article 6 of the Convention also includes the guarantees specific to a criminal trial. Thus, Article 6 Paragraph (2) is dedicated to the presumption of innocence (“everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”).

Moreover, in accordance with Article 6 Paragraph (3) of the Convention, everyone charged with a criminal offence shall have the right:

- a). to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b). to have adequate time and facilities for the preparation of his defence;
- c). to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d). to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

* Lecturer, Ph.D., Faculty of Law, “Nicolae Titulescu” University, Bucharest (e-mail: damaschin.mircea@gmail.com). This work was supported by CNCSIS–UEFISCSU, project number 860 PNII – IDEI 1094/2008.

e). to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Within the classification of the explicit guarantees specific to a fair trial in criminal matters, we are going to deal below with the right of the charged person to be informed of the nature of the accusation against him, the right to have adequate time and facilities for the preparation of his defence, the right to examine the witnesses involved in the trial under the same conditions as the other parties and the right to have free assistance of an interpreter.

Moreover, being of the opinion that the right against self-incrimination is a right specific to the criminal proceedings, we considered that this can be regarded as a guarantee specific to a criminal trial, which is not regulated as such in the text of the Convention, but which clearly arises as a requirement regarding the fairness of the proceedings, especially from the point of view of the ECHR jurisprudence.

1. The right to be informed of the nature of the accusation

1.1. The standards established in the national law system

In accordance with Article 6 Paragraph (3) of the Criminal Procedure Code, the judicial bodies have the obligation to apprise the accused or defendant, immediately and before examining him, of the deed for which he is held responsible and of its legal framing, and to give him the possibility to prepare and perform his defence¹.

As compared to the regulation preceding the adoption of the Law no. 281/2003, it can be noticed that the moment when the charged person must be informed of the commitment of a criminal offence was expressly placed before the first statement.

These obligations of the criminal prosecution bodies must be recorded in a minutes, a procedural act which also comprises references to the information of the relevant person of his right against self-incrimination and of his right to know the fact that any possible statement made may also be used against him during the legal proceedings.

The issue that appears in case of a violation of the rules governing the information of the accused or defendant of all these rights defining the broader concept of defence has been debated in the national jurisprudence. Therefore, there has appeared the question what sanction could be applicable if the information minutes comprising, among other components, the information of the nature of the public accusation is not prepared.

Taking into account the fact that this omission is not included in the cases of absolute nullity, the conclusion was that the relative nullity could be applicable, if any injury is caused. But in order to produce effects this nullity must be claimed in accordance with the requirements set down at Article 197 Paragraph (4) of the Criminal Procedure Code, i.e. during the performance of the act, when the party was present or at the first trial date with complete procedure². Nevertheless, under the circumstances leading to the conclusion that the violation of this obligation has had consequences on the manifestation of truth and the fair result of a case, the relative nullity can be claimed within the legal regime of a nullity, whereas it may be stressed upon the request of the

¹ Paragraph (3) of Article 6 is reproduced as amended by Article I Subparagraph 3 of the Law no. 281/2003. Before this amendment, Paragraph (3) was worded as follows: “(3) *The judicial bodies shall have the obligation to apprise accused or defendant of the deed with which he is charged and of its legal framing, and to grant him the possibility to prepare and perform his defence*”.

² The Bucharest Court of Appeal, the Criminal Section II, Decision no. 97/1997, in *Culegere de practică judiciară penală pe anul 1997 (Collection of criminal judicial practice for the year 1997)*, Holding Reporter Publishing House, Bucharest, 1998, pages 44-45; for the same purpose, the Bucharest Court of Appeal, the Criminal Section I, Decision no. 632/1998, in *Culegere de practică judiciară penală pe anul 1998 (Collection of criminal judicial practice for the year 1998)*, All Beck Publishing House, Bucharest, 1999, pages 58-59.

parties or ex officio at any time during the criminal proceedings. For this purpose, if the statements have been obtained by violating the right of the accused or defendant to be informed of the nature of the accusation against him, of the committed deed and of its legal framing, and these are crucial for demonstrating that the accused or defendant is guilty, a procedural defect which can determine the nullity of the evidence obtained in this way may be claimed and the provisions of Article 64 Paragraph (2) of the Criminal Procedure Code may be invoked.

The regulation is also reiterated in Article 70 Paragraph (2) of the Criminal Procedure Code, according to which he must be informed of the deed with which he is charged, of its legal framing, of his right to a defender, as well as of his right to remain silent, whereas he must be warned that any statement made may also be used against him. If the accused or defendant makes a statement, he must be advised to state everything he knows with regard to the deed and the accusation against him³.

There exists in the specialised literature⁴ the opinion that the judicial bodies have the obligation to perform the information of the perpetrator with regard to the defence rights - the information of the nature of the accusation as well - as soon as the commitment of a flagrant offence has been established. Consequently, the perpetrator must be apprised of the accusation against him before his first statement (which includes the questions of the criminal prosecution bodies with regard to the circumstances of the commitment of the criminal offence).

As far as the trial phase and the exertion of the right of the defendant to be informed of the public accusation against him are concerned, there are three instruments for informing the defendant, as well as the public, of the essential elements of the criminal case, namely the preliminary procedure preceding the court hearing, the reading of the document instituting the proceedings, respectively the procedure for changing the legal framing of the deed.

Therefore, in accordance with Article 313 Paragraph (4) of the Criminal Procedure Code, the defendant who is arraigned while being under arrest must be served a copy of the document instituting the proceedings (which can be only the indictment of the prosecutor in this case). In this way, through the submission of the procedural act, the defendant is officially informed of the committed deed and its legal framing, which were referred to the court. Second, we notice Article 322 of the Criminal Procedure Code, according to which, before starting the court inquiry, the President of the court must order the registrar to read or to briefly present the document instituting the proceedings and must then explain to the defendant the accusation brought against him⁵.

In case of a change of the legal framing of the deed during the court inquiry, the court has the obligation, in accordance with Article 334 of the Criminal Procedure Code, to discuss the new legal framing with the parties and to warn the defendant that he has the right to require that the case should be left at the end of the court hearing or should be postponed so that he may prepare his defence.

³ Paragraph (2) of Article 70 is reproduced as amended by Article I Subparagraph 37 of the Law no. 356/2006. Before this amendment, Paragraph (2) was worded as follows: “(2) *The accused or defendant shall be then informed of the deed with which he is charged, of his right to a defender, as well as of his right to remain silent, whereas he shall be warned that any statement made may also be used against him. If the accused or defendant makes a statement, he shall be advised to state everything he knows with regard to the deed and the accusation against him.*”

⁴ C.S. Paraschiv, M. Damaschin, *Dreptul învinutului de a nu se autoincrimina (The right of the accused against self-incrimination)*, in the Magazine “Dreptul” no. 2/2005, pages 141-145.

⁵ Article 322 is reproduced as amended by Article I Subparagraph 154 of the Law no. 356/2006. Before this amendment, Article 322 was worded as follows: “*The President shall order the registrar to read the document instituting the proceedings and shall then explain to defendant the accusation brought against him. He shall also inform the defendant of his right to address questions to the co-accused persons, the other parties, the witnesses, and the experts, as well as to offer explanations during the court inquiry, wherever he considers it is necessary.*”

There has been established in the jurisprudence of the Supreme Court⁶ that the provisions of Article 334 of the Criminal Procedure Code set down the procedure to be carried out in case of changing the legal framing of the deed specified in the document instituting the proceedings. Therefore, in order to comply with the procedural guarantees, the court must discuss the change of the legal framing with the parties, even if the legal framing is more favourable, because in such a case the defendant must organise his defence and, probably, propose evidence correlated with the new legal framing. The obligation of the court is fulfilled only when the defender of the defendant takes into account the new legal framing in his conclusions, whereas the discussion between the parties also derives from the rule that the parties should be heard.

Against this background, as it was established that the appeal court had changed – without discussing it with the parties - the legal framing of the deed from the offence of deceit set down at Article 215 Paragraphs (2), (3) and (5) of the Criminal Code into the offence set down at Article 215 Paragraphs (1), (2) and (3) of the Criminal Code, the court ruled that the defendant had been deprived of the possibility to defend himself against the new legal framing. These aspects led to the cassation of the pronounced judgement, whereas the case was referred back to the court of first instance.

1.2. The standards established in the jurisprudence of ECHR

In accordance with Article 6 Paragraph (3) Point a) of the Convention, *everyone charged has especially the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.*

As far as the right of the charged person to be informed is concerned, it has been established in the jurisprudence of the European Court that it is necessary that the national judicial authorities should perform due diligence with regard to the modality in which the accusation is notified, because this procedure for communicating the criminal offence for which the charged person is held responsible has a special importance, establishing the official legal relationships between the charged person, on the one hand, and the bodies of the state, on the other hand⁷. The right to be informed of the accusation also involves the information of the legal framing of the deed, whereas it is necessary that these two information modalities should be performed in detail⁸. But the detailed character of the information is not applicable at the initial moment of the information of the perpetrator of his deed and its legal framing, because at that procedural stage the details of the accusation may be unclear and the procedural investigations may be in the starting phase. Therefore, it is necessary that the details should be included in the arraignment document, a procedural act which completes any activity of evidence administration.

In the jurisprudence of the court in Strasbourg, the information of the relevant person of the nature of the accusation is analysed as a structural element of the right to a fair trial⁹, whereas this obligation must be *promptly* fulfilled. As far as this requirement for the judicial bodies is concerned, it has been determined that the exact information of the relevant person at the moment when he is arrested is sufficient, even if the preliminary procedure preceding the arraignment started earlier and involved a general and undetailed information of the charged person¹⁰.

⁶ The High Court of Cassation and Justice, the Criminal Section, Decision no. 2255/04.04.2005, according to the Web page of the Supreme Court.

⁷ ECHR, Decision of 25.07.2000 within the case *Mattoccia vs. Italy*, according to HUDOC.

⁸ ECHR, Decision of 25.03.1999 within the case *Pélissier and others vs. France*, according to HUDOC; ECHR, Decision of 01.03.2001 within the case *Dallos vs. Hungary*, according to HUDOC.

⁹ ECHR, Decision of 19.12.2006 within the case *Mattei vs. France*, according to HUDOC; for the same purpose, ECHR, Decision of 11.12.2007 within the case *Drassich vs. Italy*, according to HUDOC.

¹⁰ Radu Chiriță, *Convenția europeană a drepturilor omului. Comentarii și explicații (The European Convention on Human Rights. Comments and explanations)*, Volume I, C.H. Beck Publishing House, Bucharest, 2007, page 418.

Moreover, the right to be informed is also related in the prosecution's procedure for changing the legal framing of the deed that is performed during the legal proceedings. In this case, the judicial bodies have the obligation to inform the relevant person of the new details of the trial, whereas in the opposite case it can be considered a violation of the right to a fair trial¹¹.

In accordance with Article 6 Paragraph (3) Point a) of the Convention, the information of the charged person must be performed in a language which he understands, this regulation being inextricably linked to another provision, that from Point e), according to which the charged person has the right to have the free assistance of an interpreter if he does not understand or speak the language used for the hearing. It was held that the information performed in the official language of the state, due to the fact that the charged person did not speak that language and was not assisted by an interpreter, does not comply with the requirements of the Convention, thus existing a violation of the right to a fair trial¹².

2. The right to have adequate time and facilities for the preparation of the defence

2.1. The standards established in the national law system

The right to have adequate time for the preparation of the defence. In accordance with Article 6 Paragraph (5) of the Criminal Procedure Code, the judicial bodies have the obligation to apprise the accused or defendant, before his first statement, of his right to be assisted by a defender, whereas this is to be recorded in the hearing minutes. Under the conditions and in the cases set down by the law, the judicial bodies must take measures to provide legal assistance to the accused or defendant, if he does not have a chosen defender.

In this way, the principle regulation set down at Article 6 of the Criminal Procedure Code leads to the conclusion that the person charged with the commitment of a criminal offence is apprised of his right to defence at the moment when the criminal procedural relationship appears, whereas he has to take measures in order to prepare his defence. This provision, corroborated with the right of the accused or defendant to remain silent, may lead to the conclusion that, in this way, the charged person is given a period of time for preparing his defence.

With regard to the same issue, namely the time adequate for the actual exertion of the right to defence during the criminal trial, we mention the provisions of Article 171 Paragraph (4¹) of the Criminal Procedure Code, according to which, if the legal assistance is mandatory and the chosen defender does not show up at the date established for the performance of a criminal prosecution act or at the established trial date and does not ensure his replacement, goes away or refuses to carry out the defence, the judicial body must appoint an ex officio defender to replace the chosen one, *granting him adequate time for the preparation of the defence*. During the trial, after the debates have started, when the legal assistance is mandatory, if the chosen defender fails to come to the court, without reason, at the trial date and does not ensure his replacement, the court must appoint an ex officio defender to replace the chosen one, *granting him at least 3 days for the preparation of the defence*.

There has been formulated in the specialised literature¹³ a number of critical comments with regard to the content of Article 171 Paragraph 4¹) of the Criminal Procedure Code. Thus, it was stressed that the present regulation makes a distinction between the legal assistance supplied

¹¹ ECHR, Decision of 19.12.2006 within the case *Mattei vs. France*, according to HUDOC.

¹² ECHR, Decision of 19.12.1989 within the case *Brozicek vs. Italy*, in Radu Chiriță, *op.cit.*, pages 318-320.

¹³ Ion Neagu, *Tratat de procedură penală. Partea generală (Treaty of Criminal Procedure Law. General part)*, Universul Juridic Publishing House, Bucharest, 2010, pages 254-256.

during the prosecution and the legal assistance supplied during the trial, whereas the provisions are confusing. Therefore, in Article 171 Paragraph (4¹) Thesis I of the Criminal Procedure Code, the legislator takes into account the lack of defence at the date established for the performance of a criminal prosecution act, respectively at the established trial date. In this case, the lack of defence can consist in 1) the unjustified absence of the defender, corroborated with the absence of any replacement, 2) the presence of the chosen defender at the judicial activity followed by his leaving and 3) the presence of the chosen defender at the judicial activity corroborated with his refusal to exert his profession. As far as the first legal assumption is concerned, there has been noticed a deficiency of the regulation, because the unjustified absence becomes fully justified if the defender ensures his replacement. Under these circumstances, there has been drawn the conclusion that, at least due to the formulation modality, the first assumption of Article 174 Paragraph (4¹) Thesis I of the Criminal Procedure Code can be subject to criticism. Moreover, a similar and, at the same time, confusing method is used for the other two assumptions. Thus, the use of the conjunction “or” by the legislator in order to delimit the situation in which the defender goes away, respectively refuses to carry out the defence, can lead to the conclusion that there are two different situations which can determine the replacement of the chosen defender. Nevertheless, the situation in which the chosen defender leaves the judicial activity is completely equivalent with his refusal to carry out the defence, an implicit passive behaviour with the same end: the accused or defendant is deprived of the possibility to be defended by experts. If the chosen defender is replaced, the judicial body has to grant the new defender adequate time for the preparation of the defence. But the use of the general phrase *adequate time for the preparation of the defence* can bring about periods of time which are too long and affect the operational character of the criminal trial or, on the contrary, insufficient periods of time violating the right to defence. Under these circumstances, the necessary time for the new defender to get acquainted with the probative evidence must not be established only by the judicial body, but upon consultation with the parties to the trial and, more important, with their defenders.

In accordance with Article 171 Paragraph (4¹) Thesis II of the Criminal Procedure Code, the court must decide the replacement of the chosen defender in case of his unjustified absence during the trial, after the debates have started. Thus, there appear the established legal differences with regard to the lack of defence of the accused or defendant in different procedural stages. First, taking into account Article 171 Paragraph (4¹) Thesis I of the Criminal Procedure Code, the only assumption for the replacement of the chosen defender is his unjustified absence. Consequently, one can state that the fact that the chosen defender comes to the hearing but refuses to carry out the defence or leaves the courtroom may not represent a reason to replace him. And this can happen when the legal assistance for the defendant is mandatory. For this reason, it is considered that these established differences are not justified and that the New Criminal Procedure Code should set down equivalent conditions for the act of ordering the replacement of the chosen defender, whereas this is necessary especially if we take into consideration the end of this order of the judicial bodies, which is, undoubtedly, to ensure an efficient framework for the exertion of the right to defence by the accused or defendant.

Last but not least, in case of the replacement of the chosen defender, the new defender shall be granted a period of at least 3 days for the preparation of the defence. This time, the period of time is established by taking into account its minimum duration, whereas by taking into consideration the provisions of Article 340 Paragraph 4 of the Criminal Procedure Code¹⁴ it is possible to also establish its maximum duration, namely 5 days.

¹⁴ Pursuant to Article 340 Paragraph (4) of the Criminal Procedure Code, the debates can be suspended at most 5 days for reasonable grounds.

With regard to the postponement of the case in order to prepare the defence, there has constantly been established in the jurisprudence of the national courts that the case has to be postponed for the preparation of the defence, a decision to be detailed from case to case. Thus, the Supreme Court took note of the fact that at the first trial date, respectively on 17.07.2002, the defendant, who was arrested and assisted by a attorney, an ex officio defender, had asked the court to postpone the case so that he might hire a defender, whereas the appeal court had agreed with this request and the case had been postponed to 14.08.2002. At this trial date, the chosen defender of the defendant (pursuant to the legal assistance contract concluded on 11.08.2002), another attorney, not the ex officio attorney, came to the court, submitted the power of attorney and requested that the case should be postponed in order to prepare the defence on the ground that he had not had the adequate time to prepare himself because he had been on holidays. The appeal court had rejected this postponement request submitted by the defender on this ground and had judged the case with the help of an ex officio defender. Under these circumstances, the Supreme Court established that the appeal court had legally refused to establish a new deadline for the preparation of the defence by the defendant's chosen defender, because the case had already been postponed to 17.07.2002 upon the request of the defendant to hire a defender and the legal assistance contract had been concluded on 11.08.2002, whereas the chosen defender had had sufficient time to prepare the defence until 14.08.2002, the date to which the case had been postponed. The fact that the chosen defender had not performed due diligence in order to prepare himself and ensure the defence at the established date (because he had been on holidays) could not be considered a fault of the court, but of the attorney who did not carry out in a proper way the legal assistance contract concluded with his client¹⁵.

It was also established that the appeal court had appointed an ex officio defender for the defendant, who had failed to show up at the trial date when the case had been debated. Under these circumstances, the Supreme Court decided that the appeal took place without granting adequate time for the preparation of the defence and the submission of the power of attorney or the replacement proxy. Moreover, this represented a violation of the provisions of Article 172 Paragraph (8) of the Criminal Procedure Code, according to which the chosen or ex officio defender has the obligation to supply legal assistance to the defendant, whereas in case of a non-compliance with this obligation the court may inform the managing board of the Bar in order to take measures¹⁶.

The right to have adequate facilities for the preparation of the defence. There are numerous provisions in the Criminal Procedure Code representing facilities for the preparation of an efficient and concrete defence. Thus, we take into consideration the cases in which, for the analysis of the special circumstances of the accused or defendant, the legal assistance is mandatory and the defender must have the possibility to get acquainted with the elements of the case-file and to take part in the performance of all the criminal prosecution acts, respectively the procedure for presenting the criminal prosecution material.

We notice that fact that these instruments made available to the defender are specific to the criminal prosecution stage, because the trial phase, thanks to the guarantees related to publicity and the rule that the parties should be heard, offers the possibility to ensure a more consistent defence.

First, there have been identified cases in which the accused or defendant cannot prepare his defence due to his age or confinement or state of health. Thus, in accordance with Article 171

¹⁵ The High Court of Cassation and Justice, the Criminal Section, Decision no. 1140/2003, according to the Web page of the Supreme Court.

¹⁶ The High Court of Cassation and Justice, the Criminal Section, Decision no. 6981/2005, according to the Web page of the Supreme Court.

Paragraph (2) of the Criminal Procedure Code, legal assistance is mandatory when the accused or defendant is a juvenile, held in a re-education centre or in a medical-educational unit, when he is in custody or arrested, even within another case, when the safety measure regarding the admittance to a medical unit or the compulsory administration of a medical treatment has been taken against him, even within another case, or when the criminal prosecution body or the court considers that the accused or defendant cannot defend himself, as well as in other cases set down by the law¹⁷. Besides these cases, which are specific to the criminal prosecution, there is also another case which is applicable in the trial phase, namely when the law provides for the committed criminal offence life detention or imprisonment for more than 5 years.

These regulations may be considered facilities made available to the relevant person in order to organise his defence against the accusation brought against him.

In other words, the defence may be organised thanks to the defender's possibility to take part in the performance of any criminal prosecution act.

From the point of view of the possibility of the defender of the accused or defendant to take part in the performance of the criminal prosecution, we can divide the application period of the present Criminal Procedure Code into four large periods: 1). 1968-1992; 2). 1992-2006; 3). 2006-2007; 4). 2007 - up to present.

The first period is characterised by the possibility given to the defender to take part in the performance of any expressly determined criminal prosecution act and to take part in the other activities only on the basis of the approval of the criminal prosecution body. The second period is characterised, due to the social transformations that took place in our country, by the increased attention of the legislator for the right to defence, reflected in the defender's possibility to take part in the performance of any criminal prosecution act. The third period, which started with the Law no. 356/2006, can be defined, in our opinion, as being characterised by the most restrictive legal regime regarding the performance of the defence and, in this last stage, in which we are now, as a consequence of the jurisprudence of the Constitutional Court, accompanied by legislative amendments, we notice again the enacting of the legal framework for an unrestricted exertion of the right to defence.

Before the year 2006, Article 172 Paragraph (1) of the Criminal Procedure Code was worded as follows: *"During the criminal prosecution, the defender of the accused or defendant shall have the right to assist in the performance of any criminal prosecution act which involves the hearing or presence of the accused or defendant for whom he ensures the defence, and may draw up requests and submit written pleadings. The absence of the defender shall not impede the performance of the criminal prosecution act, if there is proof that the defender has been informed of the date and time of the performance of the relevant act. The information shall be performed by telephone notice, facsimile, internet or other such means, whereas a minutes shall be prepared for this purpose"*.

These regulations indicate the significant reduction of the participation of the defender of the accused or defendant in the performance of the criminal prosecution. Thus, the criminal prosecution acts in which the defender could assist were only those related to the hearing or the presence of the accused or defendant, when it is clear that all the criminal prosecution acts within a criminal case have a special importance for the situation of the accused or defendant. Moreover,

¹⁷ Paragraph (2) of Article 171 is reproduced as amended by Article I Subparagraph 98 of the Law no. 356/2006. Before this amendment, Paragraph (2) was worded as follows: *„(2) Legal assistance is mandatory when the accused or defendant is a juvenile, military in service, military with reduced service, called-up or summoned reservist, student of a military educational institute, held in a re-education centre or in a medical-educational unit, when arrested even within another case, or when the criminal prosecution body or the court considers that the accused or defendant cannot defend himself/herself, as well as in other cases set down by the law."*

the restriction on the right to defence could be considered significant, inclusively by taking into consideration the regulation existing before the year 1990. Thus, in accordance with Article 172 Paragraph (1) of the Criminal Procedure Code (the version applicable in 1969), the defender of the accused or defendant could still take part in the performance of any criminal prosecution act on the basis of the approval of the criminal prosecution bodies. This legal participation was, thanks to the application of Article 172 in accordance with the Law no. 356/2006, excluded, because the law did not set down the possibility of the defender to assist in other criminal prosecution acts on the basis of the approval of the judicial bodies. Due to these provisions, the criminal trial knew to a significant setback in Romania, from the point of view of the exertion of the right to defence, not only as to the provisions of the legislative instruments adopted before 1990, but also as to the law in force during the period of the totalitarian state.

The amendment introduced by the Law no. 356/2006 produced an echo in the legal world from our country. As an effect of these controversies, exception of the unconstitutionality of this legal text was referred to the Constitutional Court. Thus, on the basis of the arguments below, it decided that Article 172 Paragraph (1) Thesis I of the Criminal Procedure Code is unconstitutional because it violates Article 24 of the Constitution regarding the right to defence:

- in accordance with Article 24 of the Constitution, *the right to defence is guaranteed; during the whole duration of the trial, the parties shall have the right to be assisted by a attorney, chosen or appointed ex officio*; it can be noticed that this text does not condition, limit or restrict in any way the right to defence of the parties to the trial; it can also be noticed that the constitutional text does not make any difference between the phases of the trial and as to the legal nature of the trial;

- as compared to Article 24 of the Constitution, the phrase *which involves the hearing or presence of the accused or defendant* conditions and restricts the defender's right to assist in the performance of the criminal prosecution acts regarding the accused or defendant for whom he ensures the defence and thus restricts and limits even the right to defence;

- the right of the defender is to assist in the performance of any criminal prosecution act, not the right to take part in the performance of the criminal prosecution acts; for these reasons, it has been established in a consistent way that the defender who assists in the performance of the criminal procedure acts by the prosecutor or the criminal police officer may draw up requests and submit written pleadings;

- Article 172 Paragraph (1) of the Criminal Procedure Code, in the version before being amended by Article I Subparagraph 99 of the Law no. 356/2006, represented a restriction of the right to defence due to the possibility given to the defender of the accused or defendant to *assist in the performance of any criminal prosecution act*, and not to take part in the performance of the criminal prosecution acts; this restriction is determined by the nature of the criminal investigation and by its requirements and corresponds with the provisions of Article 53 Paragraph (1) of the Constitution regarding the "performance of the criminal instruction", the cases in which the law may restrict the exertion of the right of the defender; but the introduction of the phrase "which involves the hearing or presence of the accused or defendant for whom he ensures the defence" in Article 172 Paragraph (1) of the Criminal Procedure Code conditions and limits the right of the defender to assist in the performance of the criminal prosecution acts and, thus, violates the guarantee of the right to defence of the accused or defendant¹⁸.

¹⁸ The Constitutional Court, Decision no. 1086/20.11.2007, published in the Official Gazette no. 866/18.12.2007.

As a consequence of the decision of the Constitutional Court, Article 172 Paragraph (1) of the Criminal Procedure Code was amended by means of the Law no. 57/2008¹⁹. Therefore, *de lege lata*, „during the criminal prosecution, the defender of the accused or defendant shall have the right to assist in the performance of any criminal prosecution act and may draw up requests and submit written pleadings. The absence of the defender shall not impede the performance of the criminal prosecution act, if there is proof that the defender has been informed of the date and time of the performance of the relevant act. The information shall be performed by telephone notice, facsimile, internet or other such means, whereas a minutes shall be prepared for this purpose”.

With regard to the facilities set down for the preparation of the defence within the criminal trial, we also mention the procedure for presenting the criminal prosecution material, an activity which represents a consultation of the case-file by the accused or defendant before the preparation of the final document, the indictment.

As it has a special importance for the approach to the right to defence included in this study, we also notice the jurisprudence of the Constitutional Court²⁰ in which it has been established that the provisions of Article 257 of the Criminal Procedure Code (in the version before being amended by the Law no. 281/2003), according to which the prosecutor, after having received the case-file, can perform the presentation of the criminal prosecution material only if he considers it necessary, are unconstitutional.

Therefore, the regulation was considered to be contrary to the provisions of Article 24 of the Constitution, according to which the right to defence is guaranteed during the whole duration of the trial, whereas the parties have the right to be assisted by a chosen or ex officio attorney, because the free exertion of the right to defence was conditioned by the summoning of the accused to get acquainted with the probative evidence on which the accusation against him was based. Due to the authority of the prosecutor to present the criminal prosecution material, the most important moment of the criminal prosecution – the arraignment – could take place even if the accused was not apprised by the prosecutor of the accusation against him. Under these circumstances, the accused did not have any possibility to be assisted by a defender and to have adequate time for the preparation of his defence, knowing nothing about the decision taken by the prosecutor after the examination of the material received from the criminal prosecution body.

As a consequence of the decision of the Constitutional Court, Article 257 of the Criminal Procedure Code was amended by the Law no. 281/2003, and the present wording is the following: “After receiving the case-file, the prosecutor summons the accused and presents to him the criminal prosecution material in accordance with the provisions of Article 250 and the following articles, which apply accordingly”.

2.2. The standards established in the jurisprudence of ECHR

In accordance with Article 6 Paragraph (3) Point b) of the Convention, *everyone charged has especially the right to have adequate time and facilities for the preparation of his defence*.

This regulation, which has a tight relation of interconditioning with the provisions included in Article 6 Paragraph (1) Point a) of the Convention (the right to be informed of the nature of the accusation), respectively in Article 6 Paragraph (3) Point c) of the Convention (the right to defence)²¹, involves that concrete conditions may be created for the defender to be able to express his point of view, without any limitation or obstacle on the part the national judicial authorities²².

¹⁹ The Law no. 57/19.03.2008 for amending Paragraph (1) of Article 172, published in the Official Gazette no. 228/25.03.2008.

²⁰ The Constitutional Court, Decision no. 24/23.02.1999, published in the Official Gazette no. 136/01.04.1999.

²¹ ECHR, Decision of 01.03.2001 within the case *Dallos vs. Hungary*, according to HUDOC; for the same purpose, ECHR, Decision of 23.03.1999 within the case *Pélissier vs. France*, according to HUDOC; ECHR,

In the jurisprudence of the court in Strasbourg, there are several criteria for establishing the adequate time for the preparation of the defence, such as, e.g., the real possibility to prepare the defence proportionally to the complexity of the probative evidence of the case. For this purpose, the establishment of a short deadline for getting acquainted with a very voluminous case-file is contrary to the requirements of the Convention.

Moreover, the requirements regarding a fair trial are not complied with from the point of view of the time adequate for the preparation of the defence, if the court pronounces a conviction for another criminal offence than that which was referred to it and the change of the legal framing of the deed takes place at the last trial date of the relevant case²³.

As far as the facilities adequate for the preparation of the defence are concerned, ECHR established that the provisions of the Convention had been violated by carrying out the hearing proceedings over a long period of time (15 hours and 45 minutes), whereas the defender had asked that the trial should be suspended for these reasons²⁴.

One of the fundamental elements necessary for the preparation of the defence is the right to have access to the case-file, a right which includes the right to have access to all the elements gathered by the prosecution. This right is not absolute and it can be subject to certain limitations. Nevertheless, when the defendant was not allowed to consult the case-file until a late stage of the trial, the court established that it was a violation of the right to have adequate facilities for the defence²⁵.

Conclusions

In the analysed field, that of the right to defence, a specific assumption of the fair trial in criminal matters (through the two components presented in the study, the right to be informed of the accusation, respectively the right to have adequate time and facilities for the preparation of the defence), the Romanian criminal procedural legislation is in accordance with the requirements of the Convention. Thus, there are provisions which set down the information of the accused of the committed deed, its legal framing, and the right against self-incrimination. Moreover, at present (after the periods of time varying from the point of view of this regulation), the right to defence is secured by the legal provisions, under conditions complying with the requirements of the Convention. Nevertheless, some Romanian criminal procedural regulations may be improved, but, on the whole, the legal framework established in Romania complies with the requirements regarding the fair performance of a criminal trial.

Decision of 22.06.1993 within the case *Melin vs. France*, according to HUDOC; ECHR, Decision of 17.07.2001 within the case *Sadak and others vs. Turkey*, according to HUDOC.

²² ECHR, Decision of 15.11.2007 within the case *Galstyan vs. Armenia*, according to HUDOC; for the same purpose, ECHR, Decision of 11.12.2007 within the case *Drassich vs. Italy*, according to HUDOC.

²³ ECHR, Decision of 17.07.2001 within the case *Sadak and others vs. Turkey*, according to HUDOC.

²⁴ ECHR, Decision of 19.10.2004 within the case *Makhfi vs. France*, according to HUDOC.

²⁵ ECHR, Decision of 12.03.2003 within the case *Oçalan vs. Turkey*, according to HUDOC; for the same purpose, ECHR, Decision of 16.02.2000 within the case *R. and others vs. United Kingdom of Great Britain*, according to HUDOC.

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