UNIVERSITATEA LUCIAN BLAGA DIN SIBIU

Doctoral School of Social Sciences
Field of doctoral studies: Law

# PHD THESIS

# GUARANTEES GRANTED TO THE DEFENDANT IN A CRIMINAL TRIAL BY ARTICLE 6(3) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

## - SUMMARY -

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SIBIU2023

## Objectives

This paper aims to analyse the provisions of Art. 6(3) of the European Convention on Human Rights[1], which guarantees a minimum set of rights to be enjoyed by any person against whom a criminal charge has been brought. At the same time, this paper aims to present the relevant aspects of the case law of the European Court of Human Rights on the right to defence, understood lato sensu, to highlight both the guiding principles that can be deduced from it and the standards of protection of these rights, as they have been configured by the European court.

The provisions of Art. 6(3) of the Convention to which I referred earlier establish several rights in favour of any defendant, which he or she may exercise in the course of criminal proceedings against him or her: the right to be informed promptly of the nature and cause of the charge against him or her; the right to have adequate time to enable him or her to arrange for his or her defence; the right to defend himself or herself in person or through legal assistance of his or her choosing or, if he or she does not have sufficient means to employ legal assistance, through ex officio legal assistance; the right to cross-examine witnesses in his or her defence as well as those proposed by the prosecution; last but not least if he or she does not speak the language of the trial, the defendant has the right to have the services of an interpreter free of charge.

First of all, this paper focuses on a presentation of the case law of the Strasbourg Court on the rights listed above, as we believe that a better knowledge of the decisions handed down by the European Court can lead to a correct national application of the principles established in the conventional protection system.

At the same time, I analysed to what extent the principles derived from the Strasbourg Court's case law have been transposed and are reflected in domestic legislation, namely whether the provisions of Romanian criminal procedure law meet the requirements of the European Court of Human Rights and are compatible with the provisions of the Convention. Thus, one of the aims of the paper is to analyse the interaction between the existing legal order in the conventional system and the national one.

The Romanian fundamental law contains rights similar in content to those guaranteed by Article 6 of the European Convention on Human Rights. Thus, Article 21 of the

[1] The Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953. Romania ratified the European Convention on Human Rights on 20 June 1994.

Constitution[2], whose marginal title is "Free access to justice", stipulates in paragraph 3: *"The parties have the right to a fair trial and to have their cases settled within a reasonable time".*

The first express constitutional enshrinement of the right to a fair trial in Romania was achieved by supplementing Article 21 of the Constitution on the occasion of the constitutional revision that took place in 2003[3]. However, the right to a fair trial provided for in Article 6 of the European Convention on Human Rights had been part of domestic law under Article 20 of the Constitution since the ratification of the Convention by Law no. 30/1994[4].

Despite its importance, the right to a fair trial was not enshrined in the Romanian Constitution in a separate article, but by supplementing Article 21 of the fundamental law, even though free access to justice is considered to be a constituent element of a fair trial and not vice versa in the conventional system[5].

Although the Constitution does not specifically stipulate the fair trial guarantees that were envisaged by the constituent legislator, referring only to the reasonable time limit for the procedure, the view has been expressed in the literature, which I endorse, that in the light of the provisions of Article 20 of the Constitution, all the express and implicit guarantees provided for in Article 6 of the Convention, as interpreted in the case-law of the Strasbourg Court[6], must be taken into account in determining fair trial at national level.

It has been argued in the doctrine that the introduction in the Constitution of the right of the parties to a fair trial, conducted within a reasonable time, constituted *"a correct transposition of modern legal developments at the European level and an alignment of the legal protection guaranteed to subjective rights by domestic regulations with international ones."* [7]

Also, a significant part of this thesis focuses on proposals to amend the Romanian criminal procedure law so that it fully meets the standards of protection established by the European Court of Human Rights in its case law and aims to provide a higher level of protection to ensure the exercise of the right to a fair trial, with all its components, at the highest possible level.

The research topic chosen attracts attention primarily because of its novelty, but also because of the usefulness of such an approach, given that Romania is in the ranking of

[2] Revised Constitution of Romania, published in the Official Gazette of Romania no. 758 of 29 October 2003;
[3] Bianca Selejan-Guțan, in Ioan Muraru, Elena-Simina Tănăsescu (coord.), Constituția României: comentariu pe articole, 2nd edition, revised, C. H. Beck Publishing House, Bucharest, 2019, p. 163;
[4] Idem
[5] Ibidem
[6] Ibidem
[7] Marian Enache, Ștefan Deaconu, Drepturile și libertățile fundamentale în jurisprudența Curții Constituționale, Vol. 1, C. H. Beck Publishing House, Bucharest, 2019, p. 56

countries against which individual claims are directed to the European court, and violations of the right to a fair trial are most often invoked.

Examining the foreign literature, there is currently a trend towards the elaboration of scientific papers dissecting the fundamental rights guaranteed by the European Convention on Human Rights and analysing in extenso the case law and doctrine relevant to that field, as well as how the national legal framework existing in the signatory states has been influenced by the Convention.

As far as national doctrine is concerned, there are no papers that analyse how the international legal framework has influenced the drafting of the new Criminal Procedure Code, as existing papers refer exclusively to the provisions contained in the old legislation. At the same time, it is not irrelevant that the Romanian literature has not focused on the presentation and detailed analysis of the issue related to the rights conferred to the defendant by Art. 6(3) of the Convention, choosing a global approach regarding the right to a fair trial, regulated by art. 6 of the above-mentioned international instrument. Also, the existing domestic literature was developed a decade ago, and there is thus no update on the development of the case law of the European Court.

In this context, this paper aims to analyze how the existing trends in foreign doctrine are transposed to the Romanian legal system, to deepen the issue of the special guarantees conferred to the defendant by the provisions of Art. 6(3) of the Convention and to highlight how the domestic legislation reflects the standards of protection established by the Strasbourg Court in this matter.

Therefore, the novelty of the paper lies, on the one hand, in the fact that this component of the right to a fair trial has not been treated so far as a stand-alone topic in a specialized paper developed in Romania, and on the other hand, in its interdisciplinary nature, the topic will be addressed both from the perspective of the international legal framework for the protection of fundamental human rights and by reference to domestic procedural-criminal regulation.

This paper aims to make doctrinal contributions both in the field of human rights protection and Romanian criminal procedure law, trying to provide a critical perspective on how the domestic regulation of the right to defence, understood broadly, meets the requirements of the Convention. At the same time, I have tried to analyse to what extent these legal provisions can be amended to better serve this purpose, and thus avoid that Romania suffers new convictions on the existence of violations of Article 6(3) of the Convention in domestic judicial proceedings.

Therefore, the present paper aims to analyse the extent to which the new criminal procedure law that entered into force on 1 February 2014 is compatible with the conventional standards established by the case law of the Strasbourg Court, by meeting the following research objectives:

a) making conceptual delimitations concerning the guarantees conferred on the defendant as regulated by Art. 6(3) of the European Convention on Human Rights;

b) analysis of the content of the rights established in favour of the defendant by Art. 6(3) of the European Convention on Human Rights;

c) analysis of the content of the rights conferred on the suspect and the defendant in national law;

d) analysis of the relevant case law of the European Court of Human Rights, with emphasis on the judgments handed down in cases against Romania;

e) revealing the evolution of the case law of the European Court of Human Rights on the rights provided for in Article 6(3) of the Convention;

f) analysis of the guarantees under national law to protect the rights of the defendant;

g) analysis of relevant national case law on the rights enjoyed by the suspect or defendant in criminal proceedings;

h) critical analysis of national legal provisions, concerning the international legal framework and the guiding principles deriving from the case-law of the European Court of Human Rights;

i) making proposals to amend national legislation so that the protection of the rights referred to in Article 6(3) of the Convention is fully reflected in the national legal order.

## Methodology

The following research methods were used to achieve the above objectives: the logical method, the comparative method and the historical method.

Given the fact that law is an eminently deductive science, the need for argument is an essential requirement in the process of scientific research in this field, both in theoretical constructions and in judicial practice. In this context, the logical method is one of the most important research methods used in the legal sciences. The logical method relates to the main types of legal activities, from the drafting of legal rules, and their interpretation, to the

establishment and qualification of the state of affairs under analysis and the application of legal rules to it.

Given these aspects, the scientific approach has mainly considered the following steps:

a) Knowledge and study of the literature dealing with the chosen research topic;

b) Knowledge and study of the relevant case law of the European Court of Human Rights on the rights provided for in Article 6(3) of the Convention;

c) Exploiting the results of the bibliographical documentation by presenting the theoretical concepts and relevant case law;

d) Carrying out a critical analysis of how the Strasbourg Court has interpreted and applied the provisions of Article 6(3) of the Convention in its case-law;

e) Critically analyse the results of previous scientific research;

f) Formulating personal views, both on the theoretical concepts presented and on the conventional standards of protection established concerning the rights set out in Article 6(3) of the Convention;

g) Presentation and analysis of the existing criminal procedural provisions in Romanian law that have implications for the rights provided for in Art. 6(3) of the Convention;

h) Formulating personal views on the degree of compatibility between the conventional standards of protection established in the field of the rights set out in Article 6(3) of the Convention and national standards of protection;

i) Making proposals for the amendment of national legislation to bring national standards of protection into line with those of the Convention, in cases where they diverge.

Therefore, the scientific research will mainly focus on the study of the case law of the European Court of Human Rights and the revelation of the conventional standards of protection established in the field of the rights granted to the defendant in criminal proceedings. Thus, this paper aims to highlight the principles that emerge from the case law of the European Court of Human Rights in the field under analysis and to analyze their practical implications, having a predominantly documentary nature.

At the same time, I believe that a scientific approach aimed at comparing the Romanian criminal procedural law system with the conventional system of protection of the rights of persons defendant of committing crimes, by highlighting the similarities and differences between them, may prove extremely fruitful in the proposed methodological process.

Given the topic of the PhD thesis, the comparative method will occupy a significant place in the scientific research that I intend to carry out since an important objective of this research will be the analysis of the compatibility of the Romanian criminal procedural law rules with the protection standards existing in the conventional system.

Therefore, the paper aims to analyse to what extent the existing criminal procedural rules in the Romanian legal system are compatible with the standards of protection established by the Strasbourg Court in its case law, thus attempting to point out both the inconsistencies and the commonalities between the two standards of protection and to put forward proposals for amending national legislation to bring it into line with conventional standards of protection.

In this context, it should be recalled that the conventional standard has been transposed at the national level both through the judgments delivered by the Strasbourg Court in cases against Romania and through those delivered in cases concerning other Contracting States. Thus, the judgments of the European Court enjoy the interpretive authority concerning the question of law under consideration, the standard of protection established concerning the rights protected by the Convention having to be interpreted and applied in the manner established by the Strasbourg Court by the judicial bodies of all the Contracting States.

At the same time, the paper aims to highlight how the case law of the European Court has influenced the domestic legal framework in criminal procedure. Thus, I will try to emphasize how the Romanian legislator understood to transpose these principles domestically and to analyze to what extent the new institutions of criminal procedure law, introduced on 1 February 2014 by the entry into force of the new Criminal Procedure Code, are functional and compatible with Romanian legal culture.

As regards the third research method to which I have turned my attention, namely the historical method, I consider it to be extremely useful in the context of the scientific research undertaken, given the fact that the case law of the Strasbourg Court has exerted an undeniable influence on the Romanian legal landscape, following Romania's ratification of the European Convention on Human Rights in 1994.

In these circumstances, the paper will try to highlight how the Romanian criminal procedure law on the rights of the defence has been transformed over time, as a result of the need to bring it into line with the principles laid down in its case law by the European Court.

At the same time, the paper aims to analyse the development of the case law of the European Court of Human Rights on the guarantees provided for in Article 6(3) of the

Convention and to highlight the substantive changes that have occurred over time in the way the Strasbourg Court has understood to address the issue of the rights of the defendant.

Taking into account all the above aspects, I am confident that this paper will represent a novelty in the Romanian legal landscape, both in terms of the relevance and topicality of the subject matter of the scientific research and the research methodology chosen.

## Summary

In the first chapter of the paper, I have underlined that the Romanian legislator has paid particular attention to the right of the defendant to be informed in a detailed manner about the nature and cause of the charge. In this respect, the Romanian criminal procedure law provides that the person under investigation must be informed of the charges against him/her both at the time of their formulation and subsequently, in the event of changes concerning them, following the extension of the criminal proceedings or the change of legal classification.

The national standard of protection is higher than the conventional one, as it requires the defendant to be informed of the evidentiary basis of the charges, and the prosecutor must refer to the evidence of the prosecution when describing the facts in the indictment. Moreover, the national standard of protection requires that the information on the charge must be in writing, including in cases where the defendant does not know Romanian, in which case the document instituting the proceedings must be translated by a sworn translator.

Last but not least, the Romanian legislator has established two separate procedures in which the indictment is checked for regularity, including how the prosecutor has described the facts of the case and indicated their legal classification. Thus, the national legislator has been particularly concerned to ensure that the right to be informed in detail of the nature and cause of the charge is respected, by establishing a double verification of the regularity of the notification of the charges in the case, both by the prosecutor superior to the one who drew up the indictment and by the preliminary chamber judge.

Concerning the change of legal classification during the trial, the intervention of the Constitutional Court was necessary to bring the national standard of protection into line with the conventional standard, by requiring the courts to rule on the change of legal classification in a judgment separate from the judgment deciding the merits of the case, to enable the defendant to know in advance the legal classification of the offence to which he/she must refer during the final proceedings. I believe that it would be appropriate for this interpretation offered by the Constitutional Court to be enshrined in law, which is why it seems necessary to amend the Criminal Procedure Code in this regard.

Last but not least, I consider that a legislative solution must be found to enable the defendant to obtain, on a domestic level, the removal of the procedural harm suffered by the violation of his/her rights of the defence if the appeal court does not refer the parties to the change of legal classification or does not rule on it in a judgment separate from the judgment settling the appeal in question. In this regard, I believe that it would be useful to introduce a new case in the Criminal Procedure Code in which the defendant may appeal for annulment or a cassation appeal against the decision of the court of appeal. I believe that the most appropriate legislative solution would be to allow the defendant to lodge an appeal for annulment in such cases, which would be dealt with by the court that handed down the appealed decision since a cassation appeal would mean that all such cases would be pending before the High Court of Cassation and Justice, which would lead to overcrowding of this court and thus delay the resolution of this type of case.

Such a legislative amendment is all the more necessary since the standard of protection in this matter was established by the European Court of Human Rights in a case against our country, namely in the judgment handed down in the *Adrian Constantin v. Romania* case. In this context, I consider that amending the legislation in the way suggested above would be likely to bring the national standard of protection into line with the conventional standard.

In the second chapter of the paper, I showed that, as regards the right to have the necessary time to prepare a defence, the national standard of protection is similar to the conventional one, giving the defendant the possibility to obtain, during the trial, a postponement of the case to prepare a defence, to hire a lawyer or to define the position on procedural incidents occurring during the trial, etc. At the same time, the national legislation complies with the conventional standard of protection concerning the time to be granted to the defendant to appeal.

Similarly, concerning the second component of the right under Art. 6(3)(b) of the Convention, i.e. the right of the defendant to be afforded the facilities necessary for the preparation of his/her defence, the national standard of protection follows the principles derived from the case-law of the Strasbourg Court. Thus, Romanian criminal procedure legislation offers both the suspect and the defendant the opportunity to study the case file during the criminal proceedings.

However, in my opinion, the national legislation is deficient in that the prosecutor in charge of the case can restrict the suspect's access to the prosecution file for an indefinite period, and the suspect has no effective means of appeal against this measure, given that a

possible complaint is to be dealt with by the senior prosecutor in charge of the case, and therefore has minimal chances of success.

In this respect, I believe that it would be useful to establish a maximum time limit for the prosecutor to limit the suspect's access to the case file, similar to that established for the defendant, and to regulate the means of appeal against the order rejecting the request to study the case file, to be decided by the judge of rights and freedoms. Even if such a legislative solution would be likely to further burden the work of the courts, I believe that it would be appropriate, given, on the one hand, the importance of the right infringed and, on the other hand, the harmful consequences that may result from the abusive restriction of this right in the early stages of the investigation, consisting mainly in the suspect's inability to defend himself/herself effectively. In this regard, I would point out that there are situations where the in personam prosecution phase is unduly prolonged in judicial practice, with the defendant being denied access to the case file even for a period of several years, without the defendant currently having any effective means of appeal against this measure.

National law does not regulate the possibility for the suspect, the defendant or their lawyer to request a postponement of the case if they are in a physical condition which does not allow them to participate effectively in the trial, whether due to excessive fatigue or certain medical problems. Although such a request may be based directly on the general, national and conventional provisions governing the right to be granted the facilities necessary for the preparation of the defence, I consider that it would be appropriate to regulate this hypothesis expressly in national criminal procedure law.

With these exceptions, we note that the national standard of protection for the facilities offered to persons deprived of their liberty to enable them to adequately prepare their defence is similar to the conventional one.

The third chapter of the paper deals with the rights covered by Art. 6(3)(c) of the Convention - the right of the defendant to defend himself or herself and the right to legal assistance by a lawyer, chosen or appointed ex officio – which are extremely important components of the concept of a fair trial. These rights are closely linked to those guaranteed by Article 6(3)(b) and (d) of the Convention, as the defendant often consults the case file or questions the witness through or with his or her lawyer.

The European Court of Human Rights has paid particular attention to the right of the defendant to participate in the criminal proceedings against him or her, ruling as a matter of principle that he or she must be duly informed of the date and place of the trial, failing which

he or she may request and obtain a retrial in his or her presence while respecting the rights of the defence.

Although by introducing the special procedure of reopening the criminal proceedings in the case of trial in absentia of the convicted person in the new Criminal Procedure Code, the Romanian legislator wanted the national standard of protection in this matter to become compatible with that established in the conventional system, the domestic regulation has some shortcomings, which mean that the original intention has not been achieved.

Domestic legislation is characterised by formalism, in that it focuses exclusively on the legality of the procedure for summoning the defendant, without giving due weight to the essential circumstances in cases conducted in the absence of the defendant, namely whether the defendant has actual knowledge that criminal proceedings are being conducted against him or her, and the place and date on which he or she must appear before the judicial authorities. Thus, in many cases, even if the summons procedure is legally fulfilled, this does not guarantee that the defendant has been notified of the above-mentioned matters, in cases where he/she was not personally served with the notifications issued by the judicial authorities and has not signed the proof of delivery.

Even if the conventional standard of protection does not require the appointment of a public defender to represent the defendant who does not participate in the proceedings, I consider that a new case of mandatory legal assistance should be established in Romanian law in the case of proceedings conducted in absentia. Thus, I consider that, in the hypothesis where the defendant does not have the possibility of defending himself or herself or has waived this right, it is necessary, to ensure a fair trial, that he or she be represented by a lawyer, chosen or appointed ex officio by the judicial bodies, who can properly exercise part of the rights of the defence, which do not belong exclusively to the defendant: to consult the case file, to propose the taking of evidence, to request the hearing of witnesses for the prosecution and question them, to object, to make submissions on the merits of the case, etc.

The national standard of protection is higher than the conventional one in terms of the possibility for the defendant to be present and participate in the appeal proceedings, regardless of whether the judicial review courts are re-hearing the merits of the case or only considering issues of the illegality of the judgment under appeal.

As regards the right of the defendant to legal assistance from a lawyer, it is noted that the national standard of protection is similar to the conventional one, in the context that the defendant has the right to a lawyer throughout the criminal proceedings.

In addition, Romanian criminal procedure law stipulates that discussions between a lawyer and his/her client are confidential and cannot be intercepted and used as evidence under any circumstances.

Moreover, a novel element introduced with the entry into force of the new Criminal Procedure Code is the right of the lawyer to participate in most criminal proceedings. I consider this aspect to be extremely important to ensure respect for the rights of the defence during the early stages of criminal proceedings, as the participation of the lawyer in the taking of evidence by the prosecution is relevant from two perspectives.

First of all, the presence of the defence counsel is a guarantee that the legal provisions have been respected when the evidence was taken, as he/she signs the statements, minutes, etc., thus confirming the veracity of what has been recorded, and has the possibility of objecting or refusing to sign when the criminal proceedings have been carried out in violation of the law. If, later on in the trial, issues concerning the illegality of certain criminal proceedings are raised, the fact that they were conducted in the presence of the defendant's lawyer, who signed the documents drawn up on that occasion without objection, is a highly relevant aspect to be taken into account by the court.

Secondly, the lawyer can directly influence the content of the evidence presented during the criminal proceedings, by asking questions to the witnesses heard, thus contributing to the shaping of the statement of facts that shall later be the subject of the trial.

As regards the right of the defendant to receive legal assistance from a court-appointed lawyer in certain cases, the national standard of protection is prima facie higher than the conventional one, since it guarantees the exercise of this right without taking into account the financial situation of the defendant. In other words, in Romania, a defendant benefits from the services of a court-appointed lawyer in situations where legal assistance is compulsory, even if his/her financial situation would allow him/her to hire a chosen lawyer but he/she has not done so.

However, I believe that the Romanian legislator should draw inspiration from the case law of the European Court of Human Rights to extend the scope of situations requiring the appointment of a public defender to provide specialist assistance to the defendant. As stated above, from the perspective of the interests of justice criterion, which should be taken into account when judicial bodies consider the need for free legal assistance, the national standard of protection is lower than the conventional one.

Last but not least, I believe that judicial practice needs to be reoriented to give greater importance to the right to practical and effective legal assistance, which is currently sacrificed

in favour of speedy proceedings or the interests of other participants in the proceedings, i.e., aggrieved parties or witnesses, to the detriment of the defendant, for whom the criminal proceedings are most at stake, as he/she risks losing his/her liberty and suffering particular consequences, including financial ones, as a result of the legal proceedings against him/her.

In this respect, until a new reform of the Romanian criminal procedure system, I consider that national courts can directly apply the principles laid down by the European Court of Human Rights in its case law, given that the conventional standard of protection applies with priority, in the absence of an express regulation of the right to practical and effective legal assistance.

The fourth chapter of the paper examines the defendant's right to question the witnesses and to have them summoned and heard, guaranteed by Article 6(3)(d) of the Convention. This right enjoyed by the defendant in criminal proceedings is an essential component of the rights of the defence, as it enables him or her to be actively and directly involved in the taking of evidence, whether in the form of evidence for the prosecution or for the defence and thus to seek to influence the outcome of the proceedings to obtain the most favourable solution possible.

Regrettably, unlike the other rights analysed in this paper, in the case of this right, the national standard of protection is lower than the conventional one, as the Romanian legislator has not shown any concern to create a clear legislative framework, leaving no room for ambiguity, and thus be able to provide adequate protection concerning all the aspects analysed by the Strasbourg Court regarding the right provided for in Article 6(3)(d) of the Convention.

Thus, Romanian criminal procedure law does not expressly provide for the right of the defendant and his/her lawyer to ask questions to the persons heard during the criminal trial, a circumstance which is likely to erroneously suggest that this right is of little, marginal importance in a criminal trial.

Moreover, the existence of legislative gaps and inconsistencies makes it difficult even to establish this right by way of interpretation, as it is not always very clear from the provisions governing how the subjects of the proceedings are heard, the legislator omitting to specify, for example, that the defendant's lawyer would have the right to question the witnesses heard during the judicial inquiry.

Even if in judicial practice the lawyer is allowed to ask questions to witnesses in whose hearing he/she participates, I consider that this circumstance is not such as to make up for the lack of express legal provisions guaranteeing the exercise of this right, which is of crucial importance in criminal proceedings, especially since case law is not a source of law in the

existing legal system in Romania. Thus, a practice existing at a certain moment in case law, even if it is the majority practice, is not such as to make it mandatory for other judicial bodies to comply with it in the future, in similar situations, which is why I believe that it would be preferable for it to be embodied in a legal rule, capable of providing consistency, certainty and predictability to the judicial process.

Similarly, the Romanian legislator has not established clear rules regarding the use of statements made in the course of criminal proceedings by witnesses who subsequently fail to appear in court to be heard as evidence in criminal proceedings.

Thus, domestic law does not provide any criteria based on which the judicial authorities can assess whether the reasons for the witness's absence from the trial were compelling, as required by the conventional standard of protection. Therefore, the domestic legal rules do not make the use of statements obtained in the course of criminal proceedings, which could not be challenged by the defence, conditional on the judicial authorities having first made reasonable efforts to ensure the witness's presence, or on the impossibility of hearing the witness having been the result of compelling reasons.

In this context, the national courts shall have to refer to the principles which follow from the case law of the Strasbourg Court concerning absent witnesses to determine whether the reasons given by the witnesses to justify their absence from the trial date set for their hearing were adequate and, if not, their statements given during the criminal proceedings cannot be taken into account in the deliberations.

At the same time, unfortunately, the Romanian legislator has not transposed the "exclusively or to a decisive extent" rule into domestic criminal procedure law, an essential component of the conventional standard of protection in the matter of absent witnesses, according to which a conviction cannot be based exclusively or to a decisive extent on the statements of witnesses who have not been directly heard by the court. Although the courts apply the conventional standard of protection directly in judicial practice, I believe that the "exclusively or to a decisive extent" rule should be expressly regulated to emphasise its importance and to also ensure that it must be complied with, given that case law in Romania is not a source of law, as mentioned above.

In my opinion, this legislative omission is inexplicable, given that the aforementioned rule has been transposed into the provisions of Article 103(3) of the Criminal procedure code concerning anonymous witnesses, a sign that the Romanian legislator was aware of the existence and importance of this condition of the Al-Khawaja and Tahery standard, but chose to transpose it only partially into domestic law.

The adoption of the new criminal procedure legislation in February 2014 was, however, a step forward in terms of the domestic protection of the right provided for in Article 6(3)(d) of the Convention. Thus, I consider the establishment of procedural safeguards that counterbalance the absence of witnesses to be extremely welcome, namely: the possibility for the defendant's lawyer to participate in the hearings held during the criminal proceedings and to ask questions to the persons being heard; the audio or audio-video recording of the hearings held during the criminal proceedings; the procedure for an early hearing before the judge of rights and freedoms.

These new regulations are likely to increase the protection offered at the national level to the right provided for in Article 6(3)(d) of the Convention, in that they allow the authorities to assess the probative value of statements given in the course of criminal proceedings by witnesses who subsequently fail to appear before the court for rehearing during the judicial inquiry, in adversarial conditions.

I consider that the national standard of protection is superior to the conventional one in the matter of anonymous witnesses, in the context of transforming the "exclusively or to a decisive extent" rule into an absolute one. Thus, the Romanian courts cannot, under any circumstances, pass a sentence based on the testimony of protected witnesses without having to analyse the existence of counterbalancing factors, as provided for in the conventional standard of protection.

Last but not least, as regards the right of the defendant to have defence witnesses summoned and heard under the same conditions as the prosecution's witnesses, the national standard of protection is similar to that established at the conventional level, although there is no express regulation to this effect. In my opinion, however, the domestic legal framework should be amended, namely the provisions of Article 99(3) of the Criminal procedure code, in the sense of introducing the obligation of the parties who propose the taking of evidence to give adequate reasons for their requests, indicating the proof of evidence to be proved.

In conclusion, although there are no fundamental divergences in case law and doctrine as to how to interpret and apply the domestic legal provisions falling within the scope of protection offered by Article 6(3)(d) of the Convention, I consider that the legislative framework needs to be amended to establish an express, coherent regulation that reflects the concern of the Romanian legislator to internally transpose the principles deriving from the case law of the Strasbourg Court, namely to create a modern criminal procedure system that ensures respect for the rights of the defence at a higher level.

The fifth chapter of the paper examines the right of the defendant to be assisted free of charge by an interpreter. With the entry into force of the new Criminal Procedure Code, new legal provisions on the right to an interpreter have been introduced, making the national standard of protection in principle similar to the conventional one. Thus, national legislation guarantees the right of suspects and defendants who do not speak or understand Romanian or cannot express themselves to have the services of an interpreter free of charge. At the same time, they are notified of this right before their hearing by the judicial authorities. Last but not least, legal costs relating to the fees due to interpreters are always borne by the State and can never be recovered from the defendants, whatever the outcome of the proceedings against them.

In some respects, national law even provides a higher degree of protection for the right to translation and interpretation, in that it gives the defendant the possibility to choose the interpreter to assist him/her in the proceedings from the list of interpreters authorised by the Ministry of Justice, and expressly stipulates that the defendant has the right to the services of the interpreter when communicating with his/her lawyer, thus ensuring the practical and effective exercise of the right of defence.

However, Romanian law does not require the judicial authorities to verify the quality of the services provided by the interpreter after his or her appointment. Although, in theory, the interpreter's level of training is high, given the procedure for authorising him or her, I believe that the judicial authorities must carefully monitor how the interpreter carries out his or her professional duties. In the absence of express legal provisions to this effect, the conventional standard of protection should be applied directly.

At the same time, given the importance of the right to interpretation in a fair trial, which is also revealed by the fact that it is among the minimum rights that must be guaranteed to any defendant in a criminal trial, I consider that its violation must be sanctioned by absolute nullity. Thus, the annulment of procedural documents drawn up in breach of the right to interpretation should be directly effective, without the defendant having to prove the procedural harm suffered and to demonstrate that it could not be removed otherwise than by annulling the documents drawn up in breach of the law. Even if the conventional standard of protection does not refer to the sanction of nullity in the event of an infringement of the right provided for in Article 6(3)(e) of the Convention, I believe that the Romanian legislator should be concerned with ensuring greater protection of the rights of the defendants.

Last but not least, the national standard of protection is lower than the conventional standard for the written translation of documents essential for defence preparation. Thus,

according to Romanian criminal procedure provisions, judicial authorities must ensure written translation only of the indictment.

The fact that the defendant is provided with a translation of the judgment in the case is such as to guarantee the full exercise of the rights of the defence since it enables the defendant to know the reasoning with matters of fact and of law on which the court's decision was based and to assess objectively whether it is necessary to lodge an appeal against the judgment and what the chances of success of such an appeal would be.

Given all these aspects, I consider that the Romanian criminal procedure legislation must be amended to bring the national standard of protection fully into line with the conventional standard.

## Conclusions

The right to a fair trial is a fundamental right guaranteed by the European Convention on Human Rights and has a double valence, both procedural and substantive. The provisions of Article 6 of the Convention, and in particular of paragraph 3 of the Convention, lay down a set of minimum rights to be enjoyed by any person charged in a criminal trial which is designed to ensure the overall fairness of the proceedings in question.

In this respect, the European Court has repeatedly ruled against a rigid application of the guarantees offered in criminal matters by the provisions of Article 6 of the Convention, often choosing to analyse to what extent their violation has affected the fairness of the proceedings.

The case law of the European courts on the right to a fair trial, and more specifically on the rights of the defence, is extremely rich and constantly evolving, leading to a permanent development of the standards of protection established concerning the rights of the defence.

Although the right to a fair trial is now regulated globally and guaranteed in several existing international conventions at the regional level, the European system of protection created by the adoption of the European Convention on Human Rights remains the oldest and best developed, including in terms of the case law of the Strasbourg Court, which is much more extensive than that of other jurisdictional bodies for the protection of human rights in other geographical regions.

In this context, a better knowledge of the standards of protection established in the conventional system, in particular by criminal law practitioners, is essential for the domestic conduct of a process that respects the requirements of fairness of judicial proceedings at the highest level - a desideratum pursued in any genuine democracy.

The provisions of Art. 6(3) of the Convention, and the related standards of protection developed in the case law of the Strasbourg Court, form a hard core of the broader notion of the rights of the defence, a source of law increasingly taken into account by the national legislator when constructing or reforming the criminal procedure system in that State.

Therefore, it can be said that Article 6 of the Convention outlines a model of trial in criminal matters[8], which offers a certain coherence within the existing criminal procedure systems of the 47 member states of the Council of Europe, through the minimum set of guarantees it regulates.

The importance of the right to a fair trial in democratic societies has led to the emergence of additional protection instruments, including at the level of European Union law. The European legislator has considered that the guarantees provided by the European Convention on Human Rights are not sufficient to ensure adequate protection of the rights of defendants in criminal proceedings, which is why it has sought to develop these standards of protection by adopting its legislation at both primary and secondary law level.

The protection offered to the rights of defendants in criminal proceedings under primary EU law is weaker than under the system of the European Convention on Human Rights since the Charter of Fundamental Rights of the European Union explicitly regulates only part of the general guarantees of a fair trial (publicity of proceedings, the conduct of proceedings within a reasonable time, access to independent and impartial courts constituted by law), the presumption of innocence and the right to be defended by a lawyer chosen or appointed by the court, without any reference to the other guarantees specific to criminal proceedings, as provided for in Article 6(3) of the Convention.

The procedural rights of the person suspected of having committed a criminal offence are, however, also regulated in EU law at the secondary legislation level, with the European Parliament and the Council of the European Union adopting a series of directives covering, among other things, the right to interpretation and translation, the right to information, the right of access to a lawyer, chosen or appointed by the court, and the right to be present at the trial in criminal proceedings.

Thus, although the Member States of the European Union are also members of the Council of Europe and signatories to the European Convention on Human Rights so that their criminal systems must comply with the minimum requirements laid down in Article 6, the European legislator wished to develop conventional standards of protection by adopting its regulations in this area.

[8] Jean-François Renucci, op. cit., p. 381;

To this end, a series of directives have been adopted to enhance the protection of the rights of defendants in criminal proceedings under EU law:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings[9];
- Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings[10];
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and proceedings relating to the European Arrest Warrant, as well as the right of a third party to be informed following deprivation of liberty and the right to communicate with third parties and consular authorities during deprivation of liberty[11];
- Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on free legal assistance for suspects and defendants in criminal proceedings and for persons wanted in European Arrest Warrant proceedings[12].

The European legislator considered that, although the Member States are contracting parties to the European Convention on Human Rights, this is not always sufficient, since strengthening mutual trust in the European judicial area requires more consistent implementation of the rights and guarantees laid down in Article 6 of the Convention, as well as the development of the minimum standards of protection laid down in the Convention and the Charter, at the level of secondary law of the European Union.

Given the above, I consider that the standards of protection existing in European Union law (both primary and secondary), and in the European Convention on Human Rights and developed by the case law of the Strasbourg Court, are similar and complementary. At the same time, Member States are encouraged to develop higher standards of protection in their legislation, those offered in European Union law and in the Convention system being only a starting point, a set of minimum standards of protection that should be respected in any criminal proceedings.

In conclusion, the two systems of protection are complementary and constantly influence each other, constantly seeking to develop the standards of protection of the rights of defendants by establishing new rights for their benefit, which are designed to ensure a high level of fairness in criminal proceedings throughout Europe. Thus, while the European

[9] Published in the Official Gazette L 280/1 of 26.10.2010
[10] Published in the Official Gazette L 142/1 of 01.06.2012
[11] Published in the Official Gazette L 294/1 of 06.11.2013
[12] Published in the Official Gazette L 297/1 of 04.11.2016

legislator is constantly attentive to the latest developments in the case law of the Strasbourg Court, it analyses the existing relevant rules on European Union law in its judgments.

At the same time, this continuous interference between the two protection systems automatically influences national legal systems. Firstly, the conventional standard of protection laid down in the case law of the Strasbourg Court is transposed at the national level both through judgments against the State concerned and through judgments against other Contracting States, which enjoy interpretive authority giving clear guidance as to how these standards of protection should be applied. Secondly, directives issued at the European Union level are transposed by the Member States and become part of national law, thus establishing binding legal rules for the judiciary in these countries.

In Romania, the concept of a fair trial was expressly introduced into our legal system with the change in the legislative framework, which occurred during the change of political regime in December 1989. Since then, the Romanian legislator has begun to show real concern, more timidly at first, but increasingly consistent with time, to create a criminal procedure system that meets the requirements of a fair trial and guarantees the rights of defendants in criminal proceedings against them.

Subsequently, given the numerous reforms that have taken place in terms of criminal procedure legislation, the standard of protection offered to the rights of the defence has constantly evolved and has been steadily strengthened, including as a result of the rulings of the Strasbourg Court in cases against Romania, in which certain problems in the architecture of the Romanian criminal trial were identified. These systemic problems, pointed out by the European Court, led the Romanian legislator to amend national legislation in an attempt to align the standard of protection existing at the national level with that created at the conventional level.

Therefore, the Strasbourg Court's case law has been an important driving force for the reform of the Romanian criminal procedure system, which continues to have a significant influence, both at the legislative and case law level. The conventional standard of protection has thus been a point of reference both for the Romanian legislator, in the process of modernising and reforming the domestic legal framework, and for the national judicial authorities, in their attempt to fulfil the desire to ensure a fair trial in criminal matters at a practical level.

As I have shown in the sub-chapters dedicated to the conclusions of each previous chapter, the national standard of protection of the rights conferred to the defendant is currently

similar to the conventional one in many respects, their compatibility being achieved also following the adoption of the new Criminal Procedure Code on 1 February 2014.

At the same time, concerning certain aspects, which I shall detail below, the standard of protection offered by domestic law is higher than that established by the case law of the European Court of Human Rights, an assumption which is also desirable in any judicial system, in the context in which the conventional standard of protection is a minimum one, therefore only a starting point, the national legislator having the possibility to domestically extend the scope of protection offered to the rights of the defence.

Thus, in the matter of the right provided for in Art. 6(3)(a) of the Convention, the national standard of protection is higher than the conventional one, given that the defendant is provided with information on the evidence which the prosecutor considers relevant to the charges. According to the provisions of Article 328 of the Criminal Procedure Code, the prosecutor must carry out an analysis of the evidence produced in the course of the criminal proceedings when describing the facts in respect of which he/she orders the indictment of the defendant. The presentation of such logical-legal reasoning in the document instituting the proceedings is likely to enable the defendant to know in concrete terms what the facts considered by the prosecution and the evidence from which they arise are so that he/she can effectively exercise his/her right of defence.

At the same time, Romanian criminal procedure law requires that the information on the charge must be in writing, the national standard of protection being superior to the conventional one, including from this point of view. Moreover, national criminal procedure provisions require a written translation of the indictment to be provided if the defendant does not know Romanian, whereas the conventional standard of protection allows for the possibility of an oral translation of the document instituting the proceedings.

As regards the right to have the time and facilities necessary for the preparation of the defence, the national standard of protection is higher than the conventional one, since the defendant can request a postponement of the case and a new trial date during the trial, even though he/she was able to consult the file and prepare his/her defence strategy already at the criminal prosecution stage. Thus, in cases which are not particularly complex, going through the pre-trial stages provides sufficient time for the defence to familiarise itself with the contents of the case file. However, the defendant shall benefit from an additional trial date for this purpose if he/she intends to request the postponement of the case to prepare his/her defence properly.

Similarly, I consider that the national standard of protection of the right of access to the case file is higher than the conventional one, as it allows the defendant to consult the case file in person throughout the trial and not only indirectly through his/her lawyer.

I consider that the national standard of protection of the right to legal assistance enjoyed by juvenile defendants is higher than the conventional one, in the context of making legal assistance compulsory in all cases involving juvenile defendants, without stipulating additional conditions in this regard concerning the complexity of the case, the level of psychological and emotional development of the minor, etc.

I also consider that the national standard of protection is higher than the conventional one, since it allows the lawyer of the defendant to take part in almost all criminal proceedings and not only in those which require the presence of his/her client (hearing of the defendant, confrontation procedure, person identification procedure, etc.), as ruled by the European Court.

At the same time, national criminal procedure law guarantees the confidentiality of conversations between lawyer and client and expressly provides for the sanction that occurs if these discussions are recorded, namely the exclusion of evidence obtained in this way. Given the sanction established in such situations, which operates ope legis in all cases where the confidentiality of conversations between the defendant and his/her lawyer is breached, I consider that the national standard of protection is higher than the conventional one.

Last but not least, the national legal framework does not allow restricting the defendant's access to a lawyer under any circumstances, so the national standard of protection is also higher than the conventional one in this respect.

As regards the right of the defendant to free legal assistance from a lawyer appointed by the judicial authorities ex officio, the national standard of protection is higher than the conventional one, in that it guarantees the exercise of this right even if the financial situation of the defendant would allow him/her to hire a lawyer of his/her choice, but he/she chooses not to do so.

At the same time, the national standard of protection is higher than the conventional one in cases where anonymous witnesses have been heard, in a context where the "exclusively or to a decisive extent" rule is domestically an absolute one, given the fact that Romanian courts cannot, in any case, pass a sentence based on the testimony of protected witnesses. Thus, according to Romanian criminal procedure law, it is no longer necessary to analyse the existence of factors counterbalancing the difficulties encountered by the defence as a result of the fact that it did not know the identity of the witnesses and was thus unable to challenge

their credibility by raising elements relating to their personality, as provided for by the conventional standard of protection.

As regards the defendant's right to free assistance of an interpreter, the national standard of protection is higher than the conventional one, given the following aspects:

a) the defendant shall have the opportunity to choose the interpreter who is to assist him/her in the proceedings from the list of interpreters authorised by the Ministry of Justice;

b) Romanian citizens belonging to national minorities are allowed to express themselves in their mother tongue, even if they know Romanian;

c) Romanian criminal procedure legislation expressly regulates the right of the defendant to the services of an interpreter when communicating with his/her lawyer;

d) national legislation also protects deaf, dumb and deaf-and-dumb persons by expressly guaranteeing them the possibility of using the services of an interpreter.

I consider that the aim which should be pursued by each Contracting State is the development of national standards of protection established concerning the rights set out in Article 6(3) of the Convention to ensure that the right to a fair trial is respected to the highest possible level. This is the reason why I have put forward proposals for amendments to national criminal procedure law throughout this paper, aimed at creating a higher level of protection for the rights of the defence. I believe that without an express regulation and a constant concern to develop the existing standard of protection, both by the legislator and by case law and doctrine, the goal of ensuring genuinely fair proceedings remains elusive.

In other respects, which I shall discuss in more detail below, the national standard of protection is lower than that existing in the conventional system, given that the case law of the Strasbourg Court is constantly evolving, thus lagging behind the legislative changes made at the national level. At the same time, although it represented an important step in the reformation of the Romanian criminal procedure law, the adoption of the new Criminal Procedure Code failed to transpose important rights and principles existing in the conventional system, thus the Romanian legislator missed the opportunity to ensure a full, up-to-date alignment of the two standards of protection.

In this regard, it should be pointed out that certain rights, such as the right of the defendant to question witnesses in the trial, are not even expressly regulated in Romanian law, a circumstance which I find more than regrettable, given the fact that Romania ratified the Convention more than 25 years ago, a period during which it went through a series of reforms

of criminal procedure law, without managing, in certain respects, to ensure a clear, coherent regulation of the rights that are part of the concept of fair trial in criminal matters.

At the same time, it is noted that national law sets a lower standard of protection than the conventional one in terms of the right to free legal assistance. Thus, domestic law does not require the appointment of a defence counsel ex officio where the defendant risks being sentenced to a custodial sentence, contrary to the standard established by the European Court in *Benham v. the United Kingdom*, given that Romanian criminal law provides for a prison sentence for almost all offences, even though there is the alternative of a criminal fine in some cases.

The same is true concerning the standard of protection of the right to legal assistance in appeals, given that the courts in Romania take into account the statutory penalty limit for the offences being tried, whether the defendant is a minor or in detention when appointing a lawyer ex officio, without considering whether this is necessary concerning the complexity of the issues to be debated in the appeal or the penalty imposed at first instance.

Moreover, the national legislative framework does not contain any rules enabling the court to order the replacement of the court-appointed lawyer if he or she does not provide effective legal assistance in the cases in which he or she has been appointed, nor does it expressly give the Romanian judiciary the possibility to intervene in any way in the way the court-appointed lawyer carries out his or her professional duties.

As I have already pointed out, the right of the defendant and his/her lawyer to question the persons heard during the criminal proceedings is not expressly regulated in the Romanian Criminal Procedure Code, which is why I consider that the national standard of protection is lower than the conventional one, even if the exercise of this right is adequately ensured in judicial practice. Given that, in the Romanian legal system, case law is not a binding source of law, this right must be expressly regulated, otherwise, there is a risk that it shall not be respected by the judicial authorities, without such an incident being punishable under criminal procedure law.

At the same time, Romanian criminal procedure law does not contain express provisions regarding the right of the defendant to obtain the hearing of the prosecution's witnesses during the judicial inquiry, under adversarial conditions.

Similarly, the national legislative framework does not lay down express rules on the use of statements made by witnesses heard in the criminal prosecution phase as evidence in criminal proceedings if they subsequently fail to appear in court to give statements. I, therefore, consider that the national standard of protection is insufficiently clear-cut and

leaves room for interpretation, which is why it is lower than the conventional standard and why, in my opinion, the rules applicable to absent witnesses should be expressly regulated.

Thus, I consider that the national standard of protection for absent witnesses is lower than that established in the conventional system, given that:

a) the court may find that it is impossible to hear witnesses without first being obliged to make reasonable efforts to ensure that the witness is present in the courtroom;

b) the national legal framework does not prohibit the statement of an absent witness from being the exclusive or decisive evidence on which a conviction is based;

c) national law does not require courts to take into account counterbalancing factors when considering the possibility of using the statements of absent witnesses as evidence at trial.

Given these aspects, I believe that the task of ensuring the practical compatibility of the two standards of protection falls primarily to doctrine and case law, which is why I think it is useful to popularise the guiding principles established in the case law of the European Court on the rights laid down in Article 6 of the Convention among criminal law practitioners (judges, prosecutors, lawyers).

In my opinion, a change in case law would be much easier and more feasible to implement than a change in the legislative framework, as it is well-known that the legislative process is generally quite slow. Thus, I believe that most of the time, the first signal of change in the orientation of a procedural system comes from case law, which, once crystallised around clear and coherent principles, can then lead to changes in the law, in which case the legislative process benefits fully from the experience gained from judicial practice.

In this regard, I consider that the Romanian judiciary is obliged to apply the conventional standard of protection as a matter of priority in situations where it is more favourable to the defendant, in the light of the provisions of Article 20 of the Romanian Constitution, according to which *"(1) The constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied under the Universal Declaration of Human Rights, the covenants and other treaties to which Romania is a party.*

*(2) If there are inconsistencies between the covenants and treaties on fundamental human rights, to which Romania is a party and domestic laws, international regulations take precedence, unless the Constitution or domestic laws contain more favourable provisions."*

Although there has been a permanent interest in judicial practice in issuing solutions that comply with the requirements of a fair trial and thus respect the standards of protection

established at the conventional level, unfortunately, solutions such as those referred to above are still rare, an aspect that is likely to signal, on the one hand, the fact that the principles developed in the case law of the European Court of Human Rights are not yet sufficiently well known by legal practitioners in Romania, and, on the other hand, that even in the hypothesis that they are known, the judicial bodies are still reluctant to apply them directly, in the light of the provisions of Art. 20 of the Constitution, in the absence of express legal provisions existing in the criminal procedure legislation, which transpose and possibly develop the standard of protection established at the conventional level.

Therefore, even if the popularization and knowledge of the case law of the Strasbourg Court are likely to generate a more rapid change in domestic judicial practice, it is still necessary to change the legislative framework of the criminal procedure so that the protection offered to the rights of the defence is effective, especially since the case law does not constitute a source of law in our legal system so that it does not generate an obligation to respect it by other judicial bodies called to resolve similar cases.

Even if, at first glance, the shortcomings noted in practice seem to be solely the consequence of poor knowledge or improper application of the content of conventional and constitutional rules by those called upon to apply these rules, they are, in my opinion, the result of a legislative framework that is not sufficiently coherent. I believe that exhaustive normative regulation goes hand in hand with the ability of the legal practitioner to know and apply the interpretation of the content of rights already achieved through case law, and only together can the two components ensure the content of fundamental rights.

Thus, to ensure compatibility between the conventional standard of protection and the national standard of protection of the rights granted to defendants, I believe that the criminal procedure legislation must be amended.

## De lege ferenda proposals

The Romanian legislator has been concerned with regulating the right to a fair trial in domestic law on several levels: at the constitutional level, at the level of legislation governing the conduct of criminal proceedings, and at the level of legislation governing the main legal professions.

However, the right to a fair trial is not uniformly regulated in Romanian law and some of the guarantees provided for in Article 6 of the Convention have not been regulated in principle in domestic law. Thus, the right of the defendant to question witnesses in the trial, guaranteed by the provisions of Article 6(3)(d) of the Convention does not appear in principle

in the Romanian criminal procedure system. I believe that it would be appropriate to regulate this right expressly, by inserting a new paragraph in Article 10 of the Criminal Procedure Code, which would ensure uniform regulation of the rights of the defence at the national level and at the same time highlight the similarity between the national and conventional standard of protection.

In this context, I think that it would be useful to reconfigure how the Romanian legislator understood to regulate the component guarantees that are part of the content of the right to a fair trial, both in the Constitution and in primary legislation, to ensure a coherent, unitary regulation, faithful to its source of inspiration - the European Convention on Human Rights.

Thus, although both the right to a fair trial and its components (access to justice, the right to defence, and the right to interpretation) are expressly guaranteed by the Romanian Constitution, the method of regulation chosen by the constituent legislator was not the most inspired, in the context in which, in my opinion, it would have been desirable to ensure a unitary, coherent regulation of these rights. In the context of a future constitutional revision, I believe that it is necessary to regulate the right to a fair trial as a right in its own right, in a separate article, which would reflect its importance in democratic societies and provide a higher degree of coherence and consistency to the regulation of this right at the national level. In addition, to make the text more precise and clear, I consider that it would be necessary to expressly indicate the procedural guarantees that are part of the content of the right to a fair trial.

At the same time, given that the provisions of Article 6 of the European Convention on Human Rights offer only a set of minimum rights applicable in criminal proceedings, I believe that the Romanian legislator should, show more interest in developing the current standards of protection in line with recent trends in the European Union, which I mentioned in the previous sub-chapter, along with future constitutional revision. In other words, I believe that constitutional standards should provide greater protection for the rights of defendants in criminal proceedings in Romania. For this purpose, the conventional protection system should be seen as a starting point in terms of fair trial guarantees and not as a maximum level of their protection, as is currently the case.

In my opinion, it is necessary to expressly regulate certain guiding principles that are derived from the case law of the European Court of Human Rights, to make it compulsory for the Romanian judicial bodies to comply with them and to ensure a relatively uniform judicial practice in this matter. Although, as I have previously stated, the application of the

conventional protection standards is still mandatory, in light of the provisions of Article 20 of the Romanian Constitution, I believe that an express regulation of these standards is necessary to underline, once again, the importance of respecting them.

As regards the defendant's right to be informed in detail of the nature and cause of the charge, I consider that it would be useful to introduce into the Criminal Procedure Code a new case in which the defendant may appeal for annulment or an appeal in cassation against the decision handed down by the court of appeal, if the latter does not refer the parties to the change of legal classification or does not rule on it in a judgment separate from the one ruling on the appeal in question. Such a legislative amendment is all the more necessary given that the standard of conventional protection in this area was established by the European Court of Human Rights in a case against our country, namely in the judgment handed down in *Adrian Constantin v. Romania.*

Concerning the right of the defendant to benefit from the facilities necessary for the preparation of the defence, given that the prosecutor can currently restrict the suspect's access to the criminal prosecution file for an indefinite period, I think it would be useful to amend the national legislative framework, by setting a maximum time limit for this purpose, as well as by providing for an appeal against the order whereby the prosecutor rejects the request to study the case file, to be decided by the judge of rights and freedoms and not by the prosecutor superior to the one who rejected the request.

Even if such a legislative solution would be likely to further burden the work of the courts, I believe that it would be appropriate, given that the abusive restriction by the prosecutor of the defendant’s right to study the case file would make it objectively impossible for him/her to defend himself/herself effectively during the criminal proceedings, a circumstance likely to affect the fairness of the subsequent criminal proceedings. In this regard, I consider that an effective remedy against possible undue restrictions on access to the case file must be established to ensure the right of the defendant to benefit from the facilities necessary for the preparation of the defence from the early stages of the investigation.

I also consider that it would be appropriate to expressly regulate in national criminal procedure legislation the possibility for the suspect, the defendant or their lawyer to request a postponement of the case if they are in a physical condition that does not allow them to participate effectively in the trial, whether due to excessive fatigue or to certain medical problems. I believe that such a legislative amendment would be likely to ensure that the conventional standard of protection established for the right to be granted the facilities necessary for the preparation of the defence is respected at the national level.

Last but not least, I think that it should be made possible for the defence to request that the case be adjourned and that a separate trial date be set aside exclusively for the hearing of the merits of the case to allow the defence to study properly the content of the evidence produced at the last trial date so that it can be used in its submissions.

Concerning the defendant's right to defend himself/herself or to be assisted by a lawyer, as provided for in Article 6(3) of the Convention, I consider that it is necessary to amend national criminal procedure legislation to establish, as a matter of principle, the practical and effective nature of the legal assistance which should be provided to defendants by lawyers. In this regard, I believe that the courts should be obliged to take measures to achieve this goal, by allowing them to replace lawyers appointed by the court if they notice that they are not performing their professional duties properly.

At the same time, I believe that the Romanian criminal procedure legislation should be amended to establish the obligation of the judicial bodies to inform the defendants about the possibility of applying for free legal assistance if they consider that they are unable to defend themselves and that the judicial bodies should consider on a case-by-case basis, concerning the criterion of the interests of justice, whether it is necessary to appoint a lawyer to assist the defendant free of charge.

I also believe that a new case of compulsory legal assistance should be introduced for defendants who cannot read and write or who have difficulty expressing themselves, as in such a case they are unable to defend themselves effectively and need specialist legal assistance. I consider that the same solution is required for defendants with mental health problems.

Similarly, I consider that compulsory legal assistance should be introduced in the preliminary chamber proceedings, irrespective of the penalty set by law for the offence for which the case has been referred, since this procedural stage is a complex one in which only questions of law can be raised, and directly influences the fairness of subsequent procedural stages.

Concerning the right provided for in Article 6(3)(d) of the Convention, I consider that the right of the defendant and his/her lawyer to question persons heard in the course of criminal proceedings should be expressly provided for in domestic law.

At the same time, I believe that the Romanian legislator should establish clear rules regarding the use of statements made during criminal proceedings by witnesses who subsequently fail to appear in court to be heard as evidence in criminal proceedings. Thus, national law should provide criteria based on which the judiciary can assess whether the

reasons for the witness's absence from the trial were compelling, as required by the conventional standard of protection. I also consider that the "exclusively or to a decisive extent" rule, an essential component of the conventional standard of protection in the matter of absent witnesses, should be established in Romanian criminal procedure legislation, according to which a conviction cannot be based exclusively or to a decisive extent on the statements of witnesses who have not been heard directly by the court.

At the same time, I think it would be useful to make it compulsory to record all hearings held during criminal proceedings by audio-visual means, and not only those concerning suspects or defendants. Such a regulation would allow the court to view these recordings at a later date during the trial and thus to directly perceive the behaviour of witnesses during these hearings and to assess their credibility, which is particularly relevant in cases where witnesses could not be heard directly during the judicial inquiry. This hypothesis was taken into account by the European Court, which considered that it may constitute a relevant counterbalancing factor to be taken into account when applying the standard established in *Al-Khawaja and Tahery v. the United Kingdom.*

I also think that it is necessary to expressly regulate, at the national level, the right of the defendant to obtain the summoning and hearing of defence witnesses under the same conditions as prosecution witnesses.

In my opinion, this should include amending the internal legislative framework, i.e. the provisions of Article 99(3) of the Criminal Procedure Code, in the sense of introducing the obligation of the parties who propose to take evidence to give adequate reasons for their requests, indicating the proof of evidence to be proven.

Concerning the defendant's right to free assistance of an interpreter, guaranteed by Article 6(3)(e) of the Convention, I consider that the Romanian legislation should be amended to impose on the judicial authorities the obligation to verify the quality of the services provided by the interpreter after his/her appointment.

Also, given the importance of the right to an interpreter in a fair trial, I believe that its violation should be sanctioned by absolute nullity, which would be appropriate to supplement the provisions of Article 281 of the Criminal Procedure Code.

At the same time, I believe that it would be useful to introduce a "proportionality filter" at the national level so that any procedural flaws likely to give rise to violations of the right to a fair trial can be remedied at the national level before the defendant whose rights have been violated can apply to the European court.

To this end, I believe it necessary to supplement the provisions of Article 438(1) of the Criminal Procedure Code by introducing a new case of appeal in cassation, allowing defendants to complain to the High Court of Cassation and Justice that the proceedings before the lower courts did not meet the standards of protection existing in the conventional system in criminal matters.

I think that the High Court of Cassation and Justice should also set up specialised panels on the case law of the European Court of Human Rights, which would have exclusive jurisdiction to hear appeals in cassation in criminal matters in which defendants claim violations of conventional provisions.

Should such a legislative amendment be adopted, it would give the Romanian judiciary, i.e. the High Court of Cassation and Justice, the possibility to remedy violations of conventional provisions in domestic judicial proceedings, thus reducing the number of convictions Romania has suffered before the European Court of Human Rights. At the same time, by introducing this new ground of appeal in cassation, the defendant would have the possibility to claim the violation of his/her most important rights before the highest court in the Romanian judicial system and thus be able to obtain redress for the procedural damage suffered much more quickly, as it is known that the procedure before the European court can take several years.

Last but not least, I consider the possibility that the minimum rights guaranteed by the provisions of Art. 6(3) of the Convention are not respected domestically is enhanced by the fact that the legal regime applicable to the sanction of nullity is either too rigid in the case of absolute nullity, which intervenes in the cases expressly and restrictively provided for by law, or too lax, subjective, in the case of relative nullity, which intervenes only in cases where the failure to comply with the legal provisions has caused procedural harm to the defendant, which he/she must prove, and the harm in question cannot be removed other than by annulling the deed drawn up in disregard of the law.

Given that the rights guaranteed by Art. 6(3) of the Convention are minimal and represent the hard core of the concept of fair trial in criminal matters, the Contracting States having the possibility to develop the conventional standard of protection and to establish other procedural rights and guarantees in favour of the defendant, I consider that it is necessary that the failure to respect the principles developed in the case law of the European Court of Human Rights in the field of the rights of the defence, provided for in Art. 6(3) of the Convention, should be sanctioned by absolute nullity. In this regard, I believe that the current

legislative framework should be amended by adding the cases of absolute nullity provided for in Article 281 of the Criminal Procedure Code.

In my opinion, failure to respect the five rights analysed in this paper automatically results in procedural harm to the defendant, which is why the remedy designed to correct this should lead ope legis to the annulment of the deed in question so that the harm can be removed quickly and effectively.

Although the European Court has assessed the fairness of the proceedings as a whole as a central point in the analysis of any complaints based on Article 6(3) of the Convention, I believe that it is appropriate for the Romanian legislator to offer a higher degree of protection and to sanction any violation of these rights most vigorously and drastically, to show that it gives due attention and importance to the right to a fair trial, especially concerning its component concerning the rights of defence.

I consider that the existing gap between the two standards of protection must be eliminated or at least reduced as soon as possible, so that Romania can have a modern criminal procedure system in the true sense of the word, in line with the most recent trends at European level, particularly in the conventional system, which aims to harmonise the judicial systems of the contracting states by providing minimum standards of protection. I believe that these standards must be uniformly respected, as they constitute a starting point, a foundation on which each contracting state is to build its judicial system to achieve the goal of ensuring the right to a fair trial at the highest possible level.