EUROPEAN INSTRUMENTS THAT GUARANTEE THE RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS

THE IMPORTANCE OF A SCIENTIFIC RESEARCH ON A THEORETICAL AND PRACTICAL LEVEL

Nowadays, there are different publications on the matter of the right to a fair trial, laid down in Article 6 (1) of the European Convention on Human Rights, but this paper involves a comprehensive scientific research, approaching different issues.

The research on the paper *European instruments that guarantee the right to a fair trial* is proving to be topical, considering the convictions that our country continues to receive from the European Court of Human Rights for infringement of Article 6 (1) of the European Convention on Human Rights.

The matter of the right to a fair trial has a major importance, considering the current legal context in the field of criminal law and criminal procedure law.

There has been six years since the New Criminal Code and the New Criminal Procedure Code came into force and, at that time, it has been said that they will solve the issues concerning the respect for human rights and will constitute a modern vision on the matter.

With all that being said, all these years showed the the romanian law is perfectible and in need of substantial changes.

We believe that all the changes that need to be achieved, show that this field is alive, it changes and needs to be adapted to the needs of the current society.

Romania society nowadays, driven by all the breaking-news type of TV shows and other media sources, is concerned with respect of the human rights, in general, and the right to a fair trial in criminal matters, in particular.

This effervescence can be regarded as an opportunity for Romania to perfect its law, after an in-depth, professional analysis. In addition, the law experts receive right now the invitation to make legislative proposals.

The research has developed among with the many legislative changes of the provisions of the Criminal Procedure Code during the three years of study. The amendments are made either by legislators or by decisions of admission of exceptions of unconstitutionality regarding provision of the Criminal Procedure Code.

In our opinion, the time chosen to approach this matter was auspicious, considering the fact that neither the legislation, nor the related jurisprudence are in their final form, but on the contrary, they have ample margins for improvement and can withstand heavy changes or additions.

That in fact is the reason this thesis contains many legislative proposals, especially in the matter of criminal procedure law, which have been inserted in those chapters where the analysis of some criminal procedure law institutions require changes or additions, in our opinion.

From the european law perspective, the thesis analyze those normative provisions which refer to the right to a fair trial and to the way the law is applied in the European Union Member States.

We believe that the approach and the structure of the thesis is liable to define it as a complete and innovative paper compared to other publications approaching the same matter.

In the doctrine, the matter concerning the right to a fair trial in criminal proceedings has not been approached exclusively in any publication, at least not from a triple perspective, such as conventional, european and national, exposing the existing defense mechanism which has been developed by the European Council, European Union and Romanian institutions.

In addition to the above-mentioned, the paper combines the theoretical vision of the author with the practical vision of European Court of Human Rights or the Court of Justice judges and the national judges, such as it results from the jurisprudence which can be found in this thesis.

The scientific research has led to obtaining a result, which can be defined as a useful work instrument for criminal law practitioners, such as police officers, prosecutors, judges or lawyers, but also for those who study this matter for the first time, whereas the thesis was written in a clear and concise manner.

PAPER STRUCTURE

The paper *European instruments that guarantee the right to a fair trial* approaches the matter of the right to a fair trial from a triple perspective, by reffering to treaty law texts, European Union law and European Union Member States law.

The research aims to present those institutions and bodies that have a specific role in guaranteeing this fundamental right, in order to create a complete picture of the legal instruments that can be applied in a practical way.

In addition, the paper is not limited to a theoretical approach, furthermore, it combines theoretical concepts with practical examples, revealing the way in which international law can be applied in a romanian criminal trial.

The paper contains six chapters, structured in subchapters, sections and subsections, in order to create a logical, accesible structure, easy to acquire for those who will use it in their professional activity, whether students, researchers or law experts.

The first chapter contains considerations of the aspects regarding the current research, objectives of this paper, methodology and the theoretical and practical importance of the research.

Chapter two sets out the instruments used by the European Council in order to guarantee the right to a fair trial in criminal proceedings. In this chapter, institutions such as European Council will be individually analysed, as well as aspects regarding the European Convention on Human Rights jurisprudence on the matter of the right to a fair trial.

In the same chapter above-mentioned, there will be an extensive presentation of all the equity elements regarding the procedure, laid down in Article 6 (1) of the European Convention on Human Rights, as well as in the jurisprudence of the Court in different cases regarding European Union Member States.

Chapter three, entitled *European instruments that guarantee the right to a fair trial in criminal proceedings* approaches the subject of European Union and its institutions, as well as the normative acts adopted by them and the important role it has in the development of the matter of the right to a fair trial, at both European and national level. This chapter, as well as the others, deals with jurisprudence of European Court of Justice, precisely to have a obtain a better understanding of the terms used by the European Union.

The fourth chapter presents a comparative analysis of the efficiency of the different mechanisms approached by the European Council and the European Union in the matter of the right to a fair trial, by comparing the most important aspects revealed in chapters two and three.

Chapter five highlights the way the operating concepts of the conventional law and the EU legislation, were taken over in the national criminal law, as well as the standard of protection offered by the national law regarding some aspects of the equity of the procedure. This chapter exposes some examples of court's reasoning, that show the way romanian judges are maintaining the standard of protection in their cases.

Chapter six, entitled *Features of the EU Member States in the matter of the right to a fair trial* completes the research by presenting the way some

democratic countries understood to govern, in their criminal proceedings law, aspects regarding the matter of the right to a fair trial.

These features, laid down at the end of this paper, lead to the most important conclusion, which will be revealed in the chapter entitled *Conclusions and proposals*, namely the trend towards legislative uniform between the EU Member States, the conventional law, as well as the European Union law.

Throughout the course of this paper, we have exposed personal opinions and critical acclaim for every matter approached, but also legislative proposals, in order to deliver value to our opinions.

In the chapter entitled *Conclusions and legislative proposals,* we resumed the most important conclusions and opinions, which were fully debated in the thesis, as well as the subchapters regarding partial conclusions.

EUROPEAN COUNCIL INSTRUMENTS THAT GUARANTEE THE RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS

The aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

The European Council should not to be confused with Council of the European Union or Council of Europe, which are institutions that handle exclusively the problems encountered by the European Union Member States and the European Union, in general.

Currently, the European Council has 47member states, including Romania, and it is based in Strasbourg.

According to the Statute of the Council of Europe, The organs of the Council of Europe are the Committee of Ministers and the Consultative Assembly, which are assisted by the Secretariat of the Council of Europe.

The European Council plays a fundamental role in defending the principles of democracy, the rule of law and the fundamental human rights, therefore its actions were not limited to a polite dialogue with the member states, offering expert advice or making proposals, but also the council took actions in the matter of legislation.

Moreover, the Council of Europe is a defender of the fundamental rights guaranteed by the European Court of Human Rights and, implicitly, the right to a fair trial.

The European Convention on Human Rights, signed in Rome 1950 by the member states of the European Council and others contracting parties, represents the most important regulation in the matter, in which the council had a leading role.

The convention is important for the proper functioning throughout the member states of the fundamental rights system for almost 7 decades, not just because it lists these fundamental rights, but also because it provided an efficient international control in order to ensure that the rights are respected, through the European Court of Human Rights.

The judgments of the Court are mandatory for the member states that signed the convention. The member states shall take all necessary measures to respect the judgments of the court and the Committee of Ministers shall supervise its execution.

For the right to a fair trial in criminal proceedings, Article 6 of the European Convention on Human Rights is a genuine source of law, but also a refference point in interpretation of the equity concept.

Article 6 of the European Convention on Human Rights states the following:

1.In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3.Everyone charged with a criminal offence has the following minimum rights:

(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;

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

Based on the content of the article above-mentioned, Chapter 2 of the thesis contains a detailed presentation of the concept of *criminal offence, criminal trial* and *court*.

Next, based on the jurisprudence of the European Court of Human Rights and research, we have exposed aspects regarding conventional law in the matter of the right to a fair trial in criminal trials and criminal proceedings.

Article 6 of the European Convention on Human Rights, in criminal matters, alongside with the Conventional European Court jurisprudence, laid down throughout this paper, are proof that, even though the member states have constantly evolved since signing the convention, they still constitute an efficient instrument in order to guarantee an effective and fair criminal procedure.

Thus, 70 years after the European Convention on Human Rights was signed, the Court continues to receive requests that indicate the violation of Article 6 above-mentioned (right to a fair trial), which reveal the fact that, despite the article being brief, it continues to represent an ideal in the matter.

The concise nature of Article 6 allows the Court to develop and adapt its jurisprudence to the new social reality of the XXI Century, considering that the majority of the EU Member States are trying to bring their legislation in the matter of human rights to the highest standards. It is a good thing that this practice adapts to the current needs of the society, proving that we are not in a undesired situation, where the european court remains strongly committed to its jurisprudence, without actively solving every specific case.

Considering the above-mentioned, it is confirmed the following saying: An effective law is a short and brief law.

The practice of the Conventional Law Court combined with Article 6 of the European Convention on Human Rights, it’s an advantage for the litigants of the member states, who may address themselves directly to the Court, but also for the national authorities, that can apply or modify the law, guaranteeing respect for the convention.

EUROPEAN UNION INSTRUMENTS THAT GUARANTEE THE RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS

The European Union, a unique worldwide institution, given its origins and organisation, it's a political and economic community which brings together 27 member states, that share common European values and objectives.

In order to create the right picture of this community, we shall take into consideration that the European Union was created after the World War II, in order to avoid a new world war, which might have had devastating consequences for the entire population of the continent, preventing any progress. 25 centuries ago, Herodotus foresaw this tragedy: "In peace, sons bury their fathers. In war, fathers bury their sons."

Initially, the idea of creating a European Union was seen as a goal of people of culture, which later became a political goal, Victor Hugo being the first person who used the term *United States of Europe*, during a speech at the International Peace Congress held in Paris in 1849.

Nowadays, the European Union is more than a association of states, it is a new legal order, *for the benefit of which Member States have consented to a restriction of their sovereign rights.*

The uniqueness of this european project consists in combining the legitimacy of democratic states with the legitimacy of Supranational institutions, such as the European Comission or the Court of Justice of the European Union. Supranational institutions that protect the general european interests, also protect the european wellbeing and embody a common destiny. Alongside the European Council, which represents the governments, was established, over time, a transnational democracy, represented by the European Parliament, directly elected.

The European Union manifests its direct influence in the matter of the right to a fair trial, through its institutions with legislative, executive and judicial activity, but also through the normative acts adopted in the matter.

Thus, the European Parliament participates, alongside the European Union Council, in the ordinary legislative procedure, when it comes to adopt normative acts regarding the European Union principles and objectives, in terms of state of law and, implicitly, the matter of the right to a fair trial.

Also, the European Comission, *as the executive branch of the European Union, responsible for proposing legislation* is playing a integrant part in the above-mentioned.

The Court of Justice of the European Union plays a very important role, being the judicial authority of the European Union.

The Court does not solve internal litigation of the member states, given the fact that each state has the mission to regulate through national law those remedies, in order to guarantee a legal protection in the matters regulated by European Union law.

According to Article 19 (1) of the European Union Treaty, the Court of Justice of the European Union solves the following types of actions:

(a) actions brought by a Member State, an institution or a natural or legal person;

(b) preliminary rulings, at the request of courts or tribunals of the Member States, on then interpretation of Union law or the validity of acts adopted by the institutions;

(c) other cases provided for in the Treaties.

According to Article 267 of the Treaty on the Functioning of the European Union, *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

This form of communication between the Court of Justice of the European Union and the member states emphasises the fact that the national judge plays the role of the first european judge in the matter of European Union law and oversees the uniform application and interpretation of European Union law, verifying if the national law complies with the principles established by the European legislation.

From this perspective, the separate opinion of the Court of Justice of the European Union is often necessary when it comes to the interpretation of the European Union law, opinion which is mandatory for the national court hearing the litigation.

At the same time, the Court judgments due to a preliminary ruling are mandatory for all the other courts of the member states, which litigate similar cases.

For this reason, we apreciate that the preliminary ruling procedure plays a decisive role in ensuring that the Court of Justice of the European Union is a guarantor of respect for human rights, given the fact that it offers the national judges specific answers, helping the member states interpret and enforce the European law.

From a regulatory point of view, the right to a fair trial is comprehensively regulated both in primary and secondary legislation of the European Union.

Regarding the primary legislation, Article 6 for the Treaty on European Union stands out. It states that *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties*.

This rule gives the Charter of Fundamental Rights of the European Union the same legal value as the Treaties.

Any time there are litigations regarding rights, freedoms and principles regulated by the Treaty on European Union, the answers shall be found in the Charter of Fundamental Rights of the European Union.

In order to strengthen the unique space of liberty, security and justice, created on the mutual trust in the Court judgments given in the national courts of the European Union Member Sates, the European Parliament and European Union Council adopted mandatory legal acts, in order to guarantee the rights laid in Article 6 of the European Convention on Human Rights.

The decision above-mentioned has led to adopting some directives that regulate aspects regarding respect of the right to a fair trial.

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010, regulated rules on the right to interpretation and translation in criminal proceedings and the execution of a European arrest warrant.

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012, was adopted aiming the *establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension [...]The competent authorities should inform suspects or accused persons promptly of those rights, as they apply under national law, which are essential to safeguarding the fairness of the proceedings, either orally or in writing, as provided for by this Directive.*

At 11 December 2009, the European Council included the roadmap in the Stockholm Programme - *An open and secure Europe serving and protecting the citizens.*

At the same time, the European Council mentioned that the roadmap is not a comprehensive document and the rights regulated by it are not restrictive,

allowing the European Comission *to put forward the foreseen proposals in the Roadmap for its swift implementation, on the conditions laid down, examine further elements of minimum procedural rights for accused and suspect persons and assess whether other issues, for instance the presumption of innocence needs to be addressed, to promote better cooperation in this area*.

In order to apply the right to legal counseling, the European Union has adopted the 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 in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.*

Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016regulates *legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.*

The European Union law has taken into account the matter of the victim of the crime and through the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, has established *minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.*

The Directive above-mentioned has replaced the Council Framework Decision 2001/220/JHA and states that victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health.

Furthermore, the stated aim was to take into the personal situation of the victim of the crime and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity.

Like this, at the European Union Member States level, it has been created a unique framework regarding the manner in which victims of a crime should be treated in criminal proceedings.

DEVELOPMENT OF NATIONAL LEGISLATION IN THE MATTER OF RESPECT OF THE RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS

The starting point in analyzing a national legislation is the Constitution of that state, in order to establish precedents that constitute the legal basis of the state.

The Constitution of Romania established in Article 11 and Article 20 the principle of preeminence of international law from the national law in the matter of fundamental human rights.

Article 11 states that Treaties ratified by Parliament, according to the law, are part of national law. Also, Article 20 (2) of the Constitution of Romania states that, where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions.

Pursuant to the provisions above-mentioned, the Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to.

At the same time, Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal

Declaration of Human Rights, with the convenants and other treaties Romania is a party to.

Another Constitutional provision that has major implications regarding the principle of preeminence of international law is Article 148 (2) of the Constitution of Romania, which states that, as a result of the accession to the constituent treaties of the European Union, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations, shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

Furthermore, Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.

Article 148 (4) of the Constitution of Romania states that The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

Therefore, our state shall consider part of national laws all those treaties Romania is a party to, and where any inconsistencies exist between the treatiesand the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions.

So, we can state that the relationship between the Romanian law and international law in the matter of the fundamental human rights, in general, and the right to a fair trial, in particular, is not a subordination relationship, but a complementarity one, with the aim to guarantee real and effective right, not illusory or theoretical.

The national and the international laws shall complete each other any time there is a litigation as above-mentioned, so that the State of Romania offers a guarantee of respect for fundamental human rights.

The European instruments that are used when it comes to a litigation regarding the fundamental human rights are the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, combined with the provisions of the European Union secondary law.

The European Convention on Human Rights is one of the most efficient international instrument to protect human rights and political freedoms, not just at the European Union level, but also at a global level, from a dual perspective. On one side, once the Member States became a party to the Convention, they have signed up to apply its provision. On the other side, the Convention is a supranational judicial mechanism and its regulations are mandatory for the Member States.

Law nr. 30/1994 of 31 May 1994, states that any person whose fundamental human rights are infringed shall appeal to the European Court of Human Rights.

Until now, the State of Romania was part of many conventional-contentious court cases, regarding fundamental human rights violation.

As part of the Convention, the State of Romania encountered many legislative changes, some of them determined by pilot decisions of the Court, such as the changes regarding The Restitution of the Goods Illegally Confiscated by the Totalitarian Communist State - the Experience in Romania.

The pilot decision procedure appeared as a result of the Court need to identify a method that shall allow it to identify repetitive structural problems that occur frequently, demanding the Member States to handle the issues in a adequate manner. That's the reason why the Court can make the decision to apply a priority treatment to one or more applications having the same origin and legal issue, according to the pilot decision procedure.

During this special procedure, the Court not only decides if the Convention provisions were violated, but is also able to identify any systemic issues that a Government encounters, giving clear instruction on the ways the problem shall be solved.

One of the fundamental feature of the pilot procedure is that the Court can "freeze" dealing with pending cases, for some time, provided that the Government reffered to swiftly adopts the internal measures demanded by the Court, in order to comply with the pilot decision. At the same time, the Court may resume the examination of "frozen" cases if, individually, the the interest of justice requires it.

The objectives of the pilot decision procedure are to help all the 47 Member States, party to the Convention, to solve the existing structural and systemic issues, in order to give the complainants a faster recovery opportunity and also help the Court to decrease the number of cases and work more efficiently and diligently, especially in complex cases, which require a in-depth research.

It's important to emphasise that the State of Romania adapted its legislation according to Courts demand not just regarding the pilot decisions, but also regarding regular litigations concerning the violation of fundamental human rights.

In the matter of the right to a fair trial in criminal proceedings, the State of Romania has evolved over the years, adopting a Criminal Procedure Code that guarantees a higher level of protection of fairness than the level guaranteed by the Convention.

These changes happened over time, as a result of the decisions of the European Court of Human Right, but also as a result of the accession to the European Union in 2007, when the directives of the European Parliament and the Council of the European Union began to apply directly in the national laws of the Member States.

Considering all the external influence, the national legislator adopted in 2010 a New Criminal Procedure Code[1] according to international standards in the matter of fundamental human rights.

Thus, Romanian legislation regulates through its Criminal Procedure Code provisions regarding procedural fairness, providing a higher standard of protection than the one requested by the Convention or by the Court of Justice of the European Union.

The Criminal Procedure Code contains many legal texts, which refer to a independent and impartial court, the presumption of innocence, the right of defence, the right to interpretation and translation, the right to a public hearing, the reasonable period of time principle, the rule against retroactivity and enforcement of the more permissive criminal law, the principle of proportionality of penalties and the principle of ne bis in idem.

At the same time, the legal provisions have practical application, being more and more frequently used in the reasoning developed in national courts decisions, that punish the procedural acts performed violating these rules, in order to guarantee the actual respect of rights, not only at a theoretical, delusional level.

In conclusion, at this moment, the State of Romania is a state that respects the European values, not only at a legislative level, but also at a practical level. Its judicial system offers sufficient mechanisms in order to guarantee the right to a fair trial in criminal proceedings, so that all the other European Union Member States to develop mutual trust towards the Romanian Criminal Law, trust that is needed in order to achieve an efficient cooperation between the Member States.

[1]The Criminal Procedure Code, published in Official Jurnal of Romania no. 486 from 15 of july 2010

FEATURES OF THE LEGISLATION OF EUROPEAN UNION MEMBER STATES IN THE MATTER OF THE RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS

The right to a fair trial in criminal proceedings, through its national and international coverage, manifests in all European Legislation, according to the minimal standards set by the European Convention on Human Rights and the European Union Law, but the legal tradition of every Member States puts its mark on the forms of regulation.

That is why states with an established democracy, such as England, France, Italy, Germany or Spain, represent role-models regarding their form of regulation. The analysis within Chapter 6 proves that, despite judicial culture differences, the principles pursued are the same and the the unification of the law at a European level manifests as a genuine goal of all Member States.

CONCLUSIONS AND PROPOSALS

The conclusion of this thesis is that the national criminal proceedings law manifests a constant concern for guaranteeing respect of the right to a fair trial and has adapted to the European standards in the matter, by following as such the provision of Directives or by following the jurisprudence of The European Convention on Human Rights or The Court of Justice of the European Union.

At the same time, law experts from the European Union Member States had to participate in continuing training schemes in the matter of European Union Law or Conventional Law. Many of the reasoning used by judges or lawyers in Court are based on the respect of procedural fairness, as laid and interpreted in the European jurisprudence.

Romanian Criminal Procedure Law should have been one of the most adapted legislation in the matter of respect of fundamental human rights,

considering that the New Criminal Procedure Code was developed starting from this premise.

The starting point in drafting the Criminal Procedure Code, according to the reasoning, was the over-load of Courts and Prosecutor's Offices and the unreasonable period of time spent investigating criminal cases. The New Criminal Procedure Code was supposed to solve these issues.

However, even though some of the provisions are expressions of some principles of the Conventional Law and the European Union Law in the matter of the right to a fair trial, as a whole, the criminal procedure law turned out to be far from the aim pursued.

Thus, during the 6 years since it came into force, it had many unconstitutionality complaints, that include violations of the right to a fair trial.

The multiple admission decisions of the complaints regarding the unconstitutionality of some articles of the Criminal Procedure Code, apply directly in the judicial practice, because the Romanian legislator has failed to transpose those decisions into national law.

We propose the removal from legislative fund of institutions like the Preliminary Chamber, especially since after 6 years since the Code came into force, the Preliminary Chamber Judge is the same with the President of the Judicial Panel, the separation of judicial functions principle being violated.

We also propose the total elimination from the Criminal Procedure Code of Articles 342-348, introducing **Article 371^1, stating the following:**

(1) During the first court hearing when the summoning procedure shall be fulfilled, the court shall, ex officio, review its jurisdiction and legality of notifying the court.

(2) During the same hearing the court, ex officio or by demand, illegally administered evidence and annuls illegal procedural documents.

At the same time, it is necessary to regulate the perpetrator as a party in a criminal trial, separated from the suspect or the accused, in order to hear the

perpetrator according to its capacity before becoming a suspect. Presently, the perpetrator shall be heard as a witness, with the consequence of the impossibility to use his deposition as evidence.

Thus, Article 33 (1) of the Criminal Procedure Code shall be amended, in the way of listing the main subjects, as follows:

Article 33: Main subjects

(1) The main subjects are the perpetrator, the suspect and the victim[2]

Furthermore, the designation of Article 77 of the Criminal Procedure Code, shall be *The perpetrator and the suspect*. Also, Article 77 will have 2 paragraphs that define both capacities. We propose the following content for this article:

Article 77: The perpetrator and the suspect

(1)A person in respect of whom there exists a presumption that they committed an act stipulated by the criminal law, but from insufficient data and evidence existing in a case there is not a reasonable suspicion in this regard, is a perpetrator.

(2)A person in respect of whom, from the data and evidence existing in a case, there exists a reasonable suspicion that they committed an act stipulated by the criminal law, is a suspect.[3]

As currently drafted, Article 318 (3) of the Criminal Procedure Code, establishes a legal obligation that shall be borne by the criminal investigation bodies to acquire the capacity of suspect before dropping the charges, even though there is not enough evidence against the suspect.[4]

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[2] Presently, art. 33 al. 1 C.p.p., states that: The main subjects are the suspect and the victim

[3] Presently, art. 77 C.p.p., states that:A person in respect of whom, from the data and evidence existing in a case, there exists a reasonable suspicion that they committed an act stipulated by the criminal law, is a suspect.

[4] Presently, art. 318 (3) C.p.p., states that: When the offender is identified, weighing the public interest aspect also involves the person of the **suspect or defendant**, their conduct previous to the offense and the efforts they made in removing or minimizing the consequences of the offense.

Thus, there are practical situations, such as a person being responsible for a crime of a decreased public interest and even though the offender is identified, there is not enough evidence to acquire the capacity of suspect or there is enough evidence, but the start of the criminal investigation would be redundant compared to the decision to close a case and to drop charges, this way leading to an additional resource consumption, rather than actually helping the investigation.

For this reason, it should be let at the criminal investigation bodies's discretion to decide whether it's required that the perpetrator should be acquired the capacity of suspect or defedant. Even though the offender is identified, the legislation should allow dropping the charges.

Considering the above-mentioned, we propose to modify the content of Article 318 (3), as following:

Article 318:

(3)When the offender is identified, weighing the public interest aspect also involves the person of the perpetrator, suspect or defendant, their conduct previous to the offense and the efforts they made in removing or minimizing the consequences of the offense.

Another legislative amendment shall be regarding the period of time regulated for *taking in custody*. The 24 hours deadline, as laid in Article 209 (3) of the Criminal Procedure Code, is most of the time insufficient to produce evidence required to order the house arrest or the pre-trial arrest. The proposals before mentioned shall be ordered by the Judge for Rights and Liberties at least 6 hours before the taking in custody expires.

Also, in those cases when the criminal investigation is performed by the criminal investigation bodies, in the period of time of 24 hours, besides producing evidence, they have to make a proposal to the prosecutor, who shall prepare another preventive measure proposal and order it by the Judge for Rights and Liberties at least 6 hours before the taking in custody expires.

Moreover, the deadline for judging the preventive measure proposal must be set before the taking in custody expires, so that all the activites involved happen very quickly, fact that prevents the defendant to access the materials of the case and also the Judge to properly study the case before judging the proposal, especially when the case is complicated.

Given the above-mentioned, we believe that a deadline of 48 hours would better fulfill the need to fully respect the legal deadlines in the matter of preventive measures and shall better guarantee the right of the defendant to build a solid defence until the hearing in front of the Judge.

The scientific research involved in writing this thesis, shall conclude with the acknowledgement of the *Constitutional Court of Romania guarantor of the right to a fair trial* status, given its virtue of Constitutional Court.

It should be noted that elements of the rights to a fair trial, such as a fair and public hearing, the independence and impartiality of the court, the reasonable time or the publicity of the hearing, are also regulated through Constitutional articles. The interpretation the Court gives, as laid in the reasoning of its decisions, is often based on reasoning of the European Court of Human Rights or the Court of Justice of the European Union, but also on recommandations of Venice Comission.

Noteworthy is the recent legal practice of the Constitutional Court of Romania, that had the tendency to admit some exceptions of unconstitutionality in litigations regarding law provisions violations rather than actual Constitutional violations. This proves that the Constitutional Court is substituted more and more often for the Common Law Courts and even the Legislator.

This kind of judicial practice is more and more often encountered in the Courts jurisprudence, but this fact does not affect by any means the obligation of the admission decisions, which are opposable by all and as a result shall be respected by the legislative, executive or judicial bodies.

However, to clarify the issue of the generally binding effect of Courts decisions, we need to analyze Article 147 (1) and (4) of the Constitution of Romania[5], which refers to the provisions of the laws and ordinances in force, as well as those of the regulations, which are found to be unconstitutional.

The Decisions of the Court regarding the matter above-mentioned are generally binding, according to Article 147 (4) of the Constitution of Romania, not only the operative part of the judgment, but also the reasoning.

On the Contrary, I do appreciate that the reasoning of the decision, as useful as it may be for pending or future cases, shall not be generally binding, as the operative part of the judgment is.

To accept another decision means that all Courts judgments shall be generally binding, regarding any aspect, whether the matters are related to law interpretation, the application of law or the need to legislate, matters that the exclusive jurisdiction of other state institutions.

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[5]Article 147 – Decisions of the Constitutional Court
(1) The provisions of the laws and ordinances in force, as well as those of the regulations, which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended de jure.
(2) In cases of unconstitutionality of laws, before the promulgation thereof, the Parliament is bound to reconsider those provisions, in order to bring them into line with the decision of the Constitutional Court.
(3) If the constitutionality of a treaty or international agreement has been found according to article 146 b) , such a document cannot be the subject of an objection of unconstitutionality. The treaty or international agreement found to be unconstitutional shall not be ratified.
(4) Decisions of the Constitutional Court shall be published in the Official Jurnal of Romania. As from their publication, decisions shall be generally binding and effective only for the future.