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| **Violations of the Right to a Fair Trial and the Right to Liberty and Security in Romania** |
| **The Perspective of the Defence** |
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Contents

[Acronyms 2](#_Toc359160699)

[Preface 3](#_Toc359160700)

[1. Introduction 7](#_Toc359160701)

[1.1 Context 7](#_Toc359160702)

[1.2 Methodology 10](#_Toc359160703)

[1.3 Concluding remarks 17](#_Toc359160704)

[2. Definition and legal basis 17](#_Toc359160705)

[2.1. The right to a fair trial 18](#_Toc359160706)

[2.2. The right to liberty and security of person 21](#_Toc359160707)

[2.3. Concluding remarks 24](#_Toc359160708)

[3. The Law 25](#_Toc359160709)

[3.1 General Principles 25](#_Toc359160710)

[3.2 Concluding remarks 36](#_Toc359160711)

[4. Miscarriages of justice in Romania 37](#_Toc359160712)

[4.1 The legal context in Romania 37](#_Toc359160713)

[4.2 Case-law: Romania at the European Court of Human Rights 45](#_Toc359160714)

[4.3 Concluding remarks 57](#_Toc359160715)

[5. Recommendations 58](#_Toc359160716)

[5.1. The length of proceedings 59](#_Toc359160717)

[5.2. Length and lawfulness of pre-trial detention 64](#_Toc359160718)

[5.3. Concluding remarks 69](#_Toc359160719)

[6. Conclusion 70](#_Toc359160720)

[Bibliography 72](#_Toc359160721)

[Appendix 78](#_Toc359160722)

[1. Interview with Mr Peter Robinson 78](#_Toc359160723)

[2. Interview with Mr Radu Chirita 82](#_Toc359160724)

# Acronyms

**CoE**: Council of Europe

**CCP**: Code of Criminal Procedure

**CEPEJ**: European Commission for the Efficiency of Justice

**CVM**: Cooperation and Verification Mechanism

**EAW**: European Arrest Warrant

**EC:** European Commission

**ECtHR**: European Court of Human Rights

**ECHR**: European Convention on Human Rights

**ECJ**: European Court of Justice

**ESO**: European Supervision Order

**E.U**: European Union

**FTI**: Fair Trials International

**HCCJ**: The High Court of Cassation and Justice

**ICTY**: International Criminal Tribunal for the Former Yugoslavia

**SCJ**: Supreme Court of Justice

**SCM**: Superior Council of Magistrates

**U.N**: United Nations

**U.S**: United States

# Executive summary

The aim of the present thesis is to identify violations of the right to a fair trial and the right to liberty and security of person in Romania. It focuses on the developments that have taken place since country acceded to the EU in 2007, and delivers recommendations to address them. The miscarriages of justice committed by the relevant authorities – *i.e. courts, prosecutors and the police* – are analysed in the context of the co-operation between EU Member States and the requirements set out by the European Convention of Human Rights[[1]](#footnote-1) in regard to the right to a fair trial and the right to liberty. The incentive to conduct this research is Romania’s struggle to integrate and actively participate in the progress of the EU. In order for that to become reality, first a level-playing field in the area of justice must be built, which guarantees citizens across the entire territory that their rights will be respected regardless of where they are in the EU.

Understanding how the right to a fair trial and the right to liberty should be enforced demands an examination of their theoretical meaning, by looking at definitions created by national, international and European legal instruments. The most relevant sources of law in this sense are article 5 and 6 of the ECHR and the articles from the Romanian Criminal Code and Code of Criminal Procedure, as well as the Romanian Constitution which govern the two rights discussed in the national jurisdiction. The theoretical framework is, however, not sufficient to understand how the right to a fair trial and the right to liberty are exercised in practice. For that reason, the thesis also answers the question ‘Which are the most relevant principles of law that govern the two rights?’

Having explored these principles of law as developed through ECtHR case-law, the focus shifts on the Romanian practice in upholding the two rights discussed. The findings of the research are that the integrity of the Romanian judicial system is vulnerable and leaves considerable space for interference by the executive and for corruption. The lack of impartiality weakens the rule of law and enables groundless decisions to be taken that violate the right to a fair trial and the right to liberty.

In light of the discoveries made throughout the study and the specific situation in Romania, recommendations are formulated to address the underlying systemic causes of unreasonably lengthy trials and excessive detention measures. The European Commission for the Efficiency of Justice (CEPEJ) proposes measures for preventing unreasonably lengthy criminal proceedings. Moreover, on the basis of the mutual recognition principle, there are also EU legal instruments which could be used more intensely and developed into cohesive policies to improve inter-state collaboration in the area of pre-trial detention.

The enforcement of the afore-mentioned remedies requires a lengthy and stable reformation process, but their proper administration could significantly raise the standard of justice in Romania and strengthen the rule of law. Considering that Romania is making efforts to become a more active member of the EU, improvements in this sense are critical for sustaining a good inter-state collaboration in the common area of justice.

# Introduction

This thesis sets out to investigate the extent to which the right to a fair trial and the right to liberty and security of person are violated in Romania by the judiciary in criminal cases. The subject of the research is examined within the broader European context, with the aim of determining how the this type of miscarriages of justice originated in Romania damage the rule of law in the European Union (hereinafter the ‘EU’). This also brings questions on how the EU can provide means and legal instruments to address violations of the right to a fair trial and the right to liberty in national jurisdictions and thus enable mutual trust between the Member States in the area of justice. The introductory part of the thesis will frame the context, the objectives and the methodology of the research. It will first examine the developments in Europe, as well the Romanian judicial background, which indicate that there is a need for such a study to be carried out. Thus, the context of the research will reveal the importance of protecting the right to a fair trial and the right to liberty and security of person, and of cultivating righteous state practice for this purpose. Afterwards, the focus will shift on how the study was conducted and led to the findings, by describing the research goals, the approach and the methods. This will provide the reader with an understanding of how the thesis is organised, how the results are obtained and how recommendations are formulated. Therefore, the segment on methodology will outline the questions which help distinguish the main concerns of the study, the nature of the observations made and the research tools used to collect information. Attention will be afforded to how these instruments of investigation interacted in order to provide a holistic view of the topic and help the reader better understand the issue at hand.

## Context

The European Union is a community established for the purpose of creating a safer and more democratic Europe, based on common values that promote human rights and inter-state collaboration. Such an ambitious project cannot be realized unless the Member States strive for building just societies that guarantee the respect for human rights evenly across the entire territory of the Union. The rule of law and trust in justice are crucial elements to the attainment of legitimacy and public support. This would not be possible unless all EU citizens are provided with a level playing field in all areas of activity. Having in mind these ideals, the Treaty of Lisbon set out six years ago a common freedom, security and justice policy area that would ensure the same standard of justice across the EU. The importance of having strong co-operation mechanisms in the field of justice is essential to building mutual trust in the Union between Member States, as well as between the individuals that inhabit it. However, mutual trust can only be built if European citizens have the security to be treated fairly in court proceedings, regardless which country of the EU they live in. In that sense, establishing common minimum standards in regard to the right to a fair trial and other rights derived from it is pivotal to the administration of justice evenly in Europe. (European Commission, 2012)

The right to a fair trial plays a central role in delivering justice and is intrinsic to the rule of law in a country. The relationship between the two is reciprocal: one cannot exist without the other. More specifically, if governments do not enforce the rules established under the law accordingly, the citizens will not benefit from fair proceedings and vice-versa: delivering equitable processes in the judicial systems are the key ingredient to building democratic and just societies. Nevertheless, the EU is far from these ideals, as there are still major discrepancies in regard to the rule of law between Member States. This is usually the case with more recent members of the Union because their judicial systems are now in the process of adapting to the European standard of justice. One example in this sense is Romania, which joined the EU in 2007 and is still under the scrutiny of the European Commission (hereinafter the ‘EC’) on the basis of the Cooperation and Verification Mechanism (hereinafter the‘CVM’). The fact that Romania is the seventh biggest country in the EU, which provides it with a representation of 22% in the European Parliament (European Parliament, 2007), and the largest Member State in the most recent wave of integration, gives it a lot of potential for decision-making on European level. However, Romania is also among the three most corrupt EU countries (Verluise, 2010) and the fourth EU country in regard to violations of the right to a fair trial decided at the European Court of Human Rights (hereinafter the ‘ECtHR’) (Bowcott, 2012). Taking into account these two aspects, Romania will be the case-study for this paper.

The fact that the Romanian judiciary was and remains the most debated chapter throughout the country’s integration process in the EU reveals that the Romanian rule of law falls out of compliance with the EU requirements for a democratic society. (Cospanaru, 2011) A clear example of that is the fact that the Romanian judiciary scored 4 points (1 being ‘not at all corrupt’ and 5 being ‘extremely corrupt’) in the Global Barometer Index comprised by Transparency International in 2010, which assesses the extent to which state institutions are perceived as corrupt by the public. (Transparency International, 2010) This is based on the fact that Romanian citizens perceive the legislative framework as unstable, thus leading to contradictory decisions by the same courts and very long terms before trials comes to an end. (Cospanaru, 2011) Having said that, and in light of the fact that most complaints brought against Romania at the ECtHR are connected to the right to a fair trial, this paper will examine the weaknesses of the Romanian judiciary in regard to upholding this right. As mentioned previously, fair proceedings in courts are the key-element to building a ‘rule of law’ state, which gains its legitimacy from the trust of the people that justice is delivered and that their rights are protected. In order for Romania to integrate in the EU and be perceived as a strong, trustworthy member, it must first adress the concerns of its citizens and repair the defficiencies of the judicial system.

The current national context in Romania also demands such an investigation to be carried out, as there has been considerable public debate recently in regard to the lack of independence of the judiciary. This is caused by media and political pressure exercised on magistrates to sentence in favour or against someone, which can only go on to alter the legal culture and, inevitably, the just nature of proceedings. Naturally, not all magistrates are subjected to interferences from the executive, but the numerous high-profile cases of corruption which displayed an unsound behaviour of the courts led to such a damaged image of the judiciary. Additionally, the Superior Council of Magistracy (hereinafter the ‘SCM’) – *the organ responsible for holding magistrates accountable* *for miscarriages of justice* – has not put enough effort into maintaining the legitimacy of the system. (Cospanaru, 2011) Defence lawyer Chirita offers the example of the National Directorate Anti-Corruption cases, where political pressure usually interferes with the judgement . (Chirita, 2013)

In conclusion, the high degree of disbelief people have with the effectiveness the judiciary translates into the lack of confidence that justice is delivered and that their rights are protected. This aspect is also reflected by the Eurobarometer surveys, which show that public trust in justice decreased by 5% from 2007 to 2010, with 63% of the people not trusting the system in 2007 and 68% in 2010. (European Commission , 2010) Furthermore, a study conducted by Global Integrity showed that, although the Romanian legislation is in line with the international standard and establishes all the important safeguards for the administration of justice, in practice it is deficient in regard to the integrity of the system and the magistrates. More specificaly, the judiciary is still perceived as inconsistent, unsupervised and biased. (Mendelski, 2011) Considering the lack of impartiality and effectiveness of the courts, this paper will look at systemic problems that impact the fair nature of proceedings – *with an exclusive focus on criminal justice* – and lead to severe miscarriages of justice.

## Methodology

The scope of this paper is to examine the poignant deficiencies of the Romanian criminal justice system in ensuring fair proceedings for the individuals appearing before the domestic courts. This will be achieved by analysing the most recurring miscarriages of justice in Romania in regard to the right to a fair trial and the right to liberty and security of person. The reason behind choosing to jointly examine these rights is their strong connection to each other. A good illustration of that is the fact that often unfair criminal proceedings lead to unlawful, arbitrary or excessive detention. However, due to the complexity of the subject matter, several research questions had to be drawn to identify the most relevant aspects. Aside from being the basis for the topics treated in this paper, these questions helped determine the challenges faced by the Romanian judiciary and paved the way to the proposal of possible solutions to these problems. Apart from that, this chapter also presents the approach taken in the elaboration of the study, as well as the research methods and tools used to carry out the investigation.

#### 1.2.1. Research questions

In order to achieve the scope of the paper, it was necessary to answer a number of questions that frame the issues which need to be assessed. The general theme of the research stemmed from the question ‘*To what extent violations of the right to a fair trial and the right to liberty by the Romanian judiciary damage the rule of law in the EU?’* The scope of the question is quite broad; therefore it needs to be broken down into several sub-questions that will lead to the identification of the main topics. These questions will be outlined in the following, together with a brief description of what this study is trying to reveal by answering them.

1. ***How are the right to a fair trial and the right to liberty and security of person defined?***

The purpose of answering this question is to find out what is the meaning given to the right to a fair trial and the right to liberty under international law terms. Therefore, the Universal Declaration of Human Rights will be observed, together with definitions provided by specialized authors.

1. ***What is the legal basis for these rights on national and European level?***

In order to understand how these rights can be implemented in practice, it is necessary to look at the legal framework that substantiates them. This refers specifically to the relevant national and European legislation which entrenches these rights under the relevant articles and establishes their scope. Implicitly, the fulfilment conditions of the two rights will be conveyed by the relevant national and European laws in force.

1. ***What principles of law are governing the right to a fair trial and the right to liberty?***

An exhaustive analysis of the safeguards set forth by the relevant legislation would not be possible without also exploring the principles of law which govern the enforcement of these rights. The answer to this question will be sought through a specialized literature review which will engage the approach of scholars and governmental or non-governmental organisations on the legal principles and violations thereof deduced from ECtHR case-law. This will lead to a better understanding of the practices rendered as lawful or unlawful in ECtHR judgements. The relevant Court decisions will be employed as a sample of violations of the two rights in question, which will later be applied to the particular case of Romania.

1. ***What are the most common examples of violations of these rights in Romania?***

The objective of this question is to identify the most recurring Romanian state practices that, from the perspective of defence lawyers, specialized non-governmental and governmental organisations, scholars and the public opinion, require redressal. As a result, several specific forms of violations will be selected, which disguise systemic deficiencies.

1. ***Which are the most relevant cases that found Romania in breach of the two rights at European Court of Human Rights in the last decade?***

Taking into consideration what has been revealed by answering the previous question, the focus will be drawn on the Romanian case-law decided at the ECtHR. The investigation of the cases will concentrate on the types of violations relevant to the purposes of this paper, in order to highlight concrete examples of Romanian judicial practices which fall out of compliance with international human rights law.

1. ***What systemic problems can be identified following the results of the research?***

It is important to answer this question because it will indicate which areas of the Romanian criminal justice system need reform. Assessing all the findings of this study will enable conclusions to be drawn as to which are the systemic problems of the Romanian judiciary that lead to the violations discussed in the paper. This is closely connected to the following sub-question, which will examine possible remedies on the basis of the identified judicial errors.

#### 1.2.2. Approach and research methods

The tremendous transitional process Romania is currently undergoing to fully integrate into the European Union requires that the country complies with all the requirements for upholding human rights and creating a democratic society. As mentioned before, the judiciary plays a key-role in the adaptation to the European standards, so the guarantee of fair proceedings is instrumental to building mutual trust with the other members of the Union. Considering that one of the goals set out by article 6 of the Lisbon Treaty is the EU’s accession to the ECHR for the purpose of ensuring a strengthened and uniform protection of human rights across the entire Union (Council of Europe, 2012), this paper will focus on the views of the ECtHR, as expressed in its judgements, and the meanings given by the ECHR to the two rights discussed. Therefore, all the gathered information will be analysed based on interpretations of articles 5 and 6 of the ECHR. These will be applied to the practice in Romania in order to identify the most stringent violations of the right to a fair trial and the right to liberty, which will then indicate areas of incompatibility with European law. However, due to the complexity of the subject matter, the study will focus only on those aspects of the two rights which reveal systemic faults. Ultimately, the objective of this paper is to identify the judicial errors in regard to the excessive length of proceedings and the length and lawfulness of pre-trial detention, and find possible remedies.

To achieve this goal, the approach endorsed for conducting the research is pragmatic, as it encompasses both quantitative and qualitative research methods. Aside from collecting data provided by objective observers, such as academics, international organisations and institutions, the study also engages case-studies and direct discussions with experienced law practitioners. The purpose of conducting a research which integrates both methods is to observe the theoretical and practical elements of the right to a fair trial and the right to liberty altogether. The meaning of these rights cannot be examined in abstract, as they only gain substance when enforced. Such an exhaustive approach is also advantageous for formulating recommendation, which can be achieved through the parallel analysis of both theoretical and empirical findings. This implies that the information gathered from all the different sources will be confronted in order to reveal the Romanian state practices that do not comply with the European norms.

Having said that, the main research method engaged for the collection of data is desk research, namely the review of the relevant legal framework and specialized literature on the topic. The main sources of information provided by this type of research are the following:

1. Academic literature (books and academic journals) containing a critical analysis of the principles of law which govern the right to a fair trial and the right to liberty, on the basis of ECtHR jurisprudence;
2. Specialized reports elaborated by the Council of Europe, the European Commission, NGOs (Fair Trials International, Transparency International, Open Societies Foundation, EuroMos etc), Romanian and international legal experts, the Romanian Ministry of Justice, the Romanian Superior Council of Magistrates.
3. Journal articles, press releases and other types of media channels that reflect the public opinion on the Romanian criminal justice system.
4. Surveys, statistics and other forms of quantifiable data produced by Eurobarometer, the Global Barometer Index, Eurostat, the CoE, or encompassed in specialised legal case-studies.

Another research method used to obtain information is primary research, which is qualitative. The tools used for this type of investigation involve the examination of relevant case-law, as it provides concrete examples of relevant rights’ violations, as well as interviews with two legal professionals. The case-law considered for this paper includes cornerstone ECtHR judgements which clarify the legal principles underlying the enforcement of the two rights. However, the case-law that is studied more extensively consists of ECtHR judgements which found the Romanian Government in breach of the right to a fair trial and/or the right to liberty. Furthermore, considering that the purpose of the thesis is to identify lines of non-compliance with the European standard in Romanian state practice, one of the interviews was conducted with a Romanian defence attorney and another one with an international criminal law attorney. This type of field research is advantageous for drawing comparisons between the two systems of criminal justice from the insider’s perspective, which can be of assistance in elaborating recommendations. Moreover, the answers provided by the attorneys are indicative of the points of law which seem difficult to be enforced in practice and produce miscarriages of justice.

Each of these instruments of investigation contributes with a particular type of information, but a complete understanding of the topic is not possible unless the results of the research are converged. Therefore, the findings presented in this paper will not be assessed in abstract, from a purely theoretical point of view, but in relationship with the other variables of the research. More specifically, the thesis will provide a comprehensive examination of what the legal theory provides and how that translates into practice.

#### 1.2.3. Interviews

The purpose of the two interviews conducted with defence lawyers Mr Peter Robinson and Mr Radu Chirita - *which are attached in the appendix* - is to shed light on the most problematic aspects of the right to a fair trial and the right to liberty in general. Subsequently, by looking at the answers provided by the Romanian attorney, the deficiencies of the Romanian system will be identified in comparison with the international standard. In this scope, the interview questions are very similar and create the same pattern of evaluation for both legal systems. The questions concentrate on the personal experience the interviewees have had with conducting fair trials and the most recurring practices they encountered which violate defence rights. The most preeminent issues that surfaced from the research and which were investigated in the interviews are trial delays, the lack of impartiality, political pressure and challenging the lawfulness of pre-trial detention.

1. ***Interview with Mr. Peter Robinson***

Mr Peter Robinson is a criminal defence lawyer in the international criminal justice system. He is currently the main legal advisor on the Dr. Radovan Karadzic case at the International Criminal Tribunal for the Former Yugoslavia, but he is also listed as a defence attorney at the International Criminal Tribunal for Rwanda, the International Criminal Court, the Special Tribunal for Lebanon, and the Special Court for Sierra Leone. (Peterrobinson.com, 2013) He started practicing law in California, U.S., and began his career as a public prosecutor, shifting later to criminal defence. (Robinson, 2013) His expertise is relevant to the research in the sense that, in his 26 years of experience working for the defence, Mr Peter Robinson had to struggle with all the impediments that can interfere with the defence rights of the accused. Mr Robinson provided great insight into the inner-workings of criminal proceedings in the U.S., as well as the international system, in regard to the right to a fair trial and the right to liberty and what are the biggest challenges in upholding them.

1. ***Interview with Mr Radu Chirita***

The interviewee is a Romanian attorney, specialised in criminal law and human rights law. He collaborated with a law firm from 2002 to 2008, when he established his private law firm with two colleagues. (Chirita, 2013) His expertise is relevant for the purposes of the research because he is a very experienced criminal attorney, with a background of more than 200 criminal cases, a prestigious attorney appearing before the ECtHR and a law academic at the Babes-Bolyai University in Cluj. The fact that Mr Chirita has written his PhD thesis on the right to a fair trial also indicates that he is a good candidate for providing valuable information on the challenges faced by the Romanian judiciary in upholding it. (Chirita, Farcas, 2012) In light of the issues identified by the Romanian attorney from the ‘insider’s’ perspective, the Romanian standard of justice will be put at test against the European standard of justice.

## Concluding remarks

The context and manner in which this research has been carried out reveal that the most relevant legal framework to look at is ECtHR jurisprudence. Given the accelerated expansion of the European Union – *and what is meant by that is not confined to territorial enlargement, but also includes the growth of EU competences* – and the fact that it aims to become the 48th member of the CoE, it is important to examine the two rights and the extent to which they are enforced in Romanian state practice in light of the interpretations provided by European law. As an actor in one of the leading world powers, the EU, Romania has a duty to uphold that reputation by complying with the European norms establishing the protection of human rights. In light of these acknowledgments, the following chapter will focus on the connotation given to the two rights both by European and Romanian legislation.

# Definition and legal basis

In order to understand how the right to a fair trial and the right to liberty should be enforced, one must first answer two connected questions: how are these rights defined and what is the legal basis that enables their enforcement? To answer them, this chapter presents a detailed analysis of the meaning of the two rights in light of several definitions outlined according to the relevant national and European legislation. As the paper will treat cases originating in the national Romanian jurisdiction that have been transferred to the ECtHR, the relevant entrenchment will be the one created under the scope of article 5 and 6 of the European Convention on Human Rights (hereinafter the ECHR), as well as the relevant articles from the Romanian Constitution and other national legislative acts. Additionally, for the purpose of offering a broader perspective on the intrinsic value of these rights, their definition under other international and European human rights conventions and treaties will also be looked at.

## The right to a fair trial

#### 2.1.1. Definition and scope

The right to a fair trial is a fundamental Civil and Political right instituted in order to ensure that the criminal justice system holds criminal offenders accountable for their acts and protects innocent people from being charged with crimes they did not commit. Depriving an individual of his liberty is one of the most severe sanctions that can be imposed on someone, so the decision to do so must not be taken lightly and must have a solid, legitimate basis. Courts must provide sufficient protective mechanisms against abuses and miscarriages of justice. The right to a fair trial represents one of such measures because without a correct, objective, evidence-based and rigorous examination of cases, one cannot have a just system which separates the guilty from the innocent. Moreover, unfair processes can considerably diminish the credibility and the public trust in the judiciary. (Fair Trials International, 2013)

In its larger scope, the right to a fair trial is considered one of the pillars of the ‘right’s supremacy in a democratic society’. (Golder v. United Kingdom, 1975) This is a principle which binds the contracting states to the ECHR to take the necessary measures for the protection of the fundamental human rights and freedoms. Additionally, the concept of fair proceedings represents one of the guarantees of a public European order, which entails that all parties to the ECHR ensure that the obligations assumed from the Convention are concrete and effective, not theoretical and apparent. (Roghina, 2012) This only goes to show how important upholding the right to a fair trial is - *not only for the protection of individuals from abuses by the authorities* - but also for safeguarding and respecting the values intrinsic to the rule of law. The Council of Europe also emphasizes in its literature on the topic that the right to a fair trial “*enshrines the principle of the rule of law, upon which a democratic society is built, and the paramount role of the judiciary in the administration of justice, reflecting the common heritage of the Contracting States*.*”* (Vitkauskas & Dikov, 2012)

#### 2.1.2. Entrenchment in international law

The right to a fair trial is an essential customary international law norm, all countries being required to respect it through different international conventions and treaties. Having said that, the right in question is entrenched in both international and national law sources. Internationally, it is recognized by the Universal Declaration of Human Rights, which stipulates under Article 10 that “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*.” (United Nations, 1948) However, the declaration has no binding power, so the right had to be further entrenched in international and national legislation. For the purposes of this paper, the relevant definition is the one given by the ECtHR under article 6, paragraph 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”* (Council of Europe, 2010)

Paragraphs 2 and 3 of article 6 also elaborate on the conditions that have to be met in order for a fair trial to be delivered. In that sense, it was established that persons charged with a criminal offence must be presumed innocent until proven guilty according to the law. It is also crucial that they are promptly informed in detail of the cause and nature of the accusation in a language they understand, and that they are ensured with sufficient means and time to prepare the defence. That is why, in case the accused cannot speak the language of the court trying him, the court has an obligation to ensure an interpreter. In relation to legal assistance, unless the accused affords to hire a counsel of his own choosing, it must be provided free of charge. Furthermore, suspects have the right to call and examine witnesses for the purpose of obtaining evidence under the same conditions as the prosecution. (Council of Europe, 2010)

Protocol 7 of the ECHR further expands the requirements for a fair trial, within the scope of articles 2, 3 and 4. Article 2 lays the basis for the right to appeal to a higher court if a review for that specific offence and the sentencing is prescribed by national law, if the previous decision was not given by the highest court or if the conviction was set following an appeal against acquittal. Article 3 of the protocol establishes the right to compensation if a miscarriage of justice occurred. More specifically, if a judgment is reversed and the conviction is cancelled due to new evidence being revealed, the victim of such an error is entitled to compensation as prescribed by law, unless proven that the non-disclosure of the relevant evidence was caused by the person in question. Article 4 introduces the rule of double jeopardy, which prevents courts from trying a person for the same offence twice without the existence of new, relevant evidence. (Council of Europe, 2010)

The right to a fair trial is also recognized by the Charter of Fundamental Rights of the European Union, even though its legal force is weaker than the one of the Convention. The rights enshrined in this charter extend only to EU law and its application by the Member States, i.e. the EU competences. In other words, the EU may not take legal action to vindicate any of these rights unless its capacity to do so is clearly established by one of the EU treaties. (European Commission, 2012) The European Court of Justice (hereinafter the ECJ) ruled in *Kremzouw vs. Austria* that as long as the laws under which the applicant is tried are not meant to uphold compliance with EU legislation, the rights set out in the Charter do not apply and the ECJ does not have the jurisdiction to redress the breaches. (Kremzouw vs. Austrian State, 1997) Nevertheless, the EU Member States and institutions have pledged to safeguard the rights set forth by the Charter, which received substantial legal power after the entry into force of the Treaty of Lisbon in 2009, for the purpose of preventing violations of human rights in the application of EU law by Member States and by EU institutions. The right to a fair trial is entrenched in article 47, Chapter VI of the Charter, which deals with justice, as follows: *“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”* (European Commission, 2010)

**2.1.3. Entrenchment in national law**

In Romanian legislation the right to a fair trial is guaranteed by the Constitution on the basis of article 21(3): *“All parties shall be entitled to a fair trial and a solution of their cases within a reasonable term*.” (Constitution of Romania, 2003) Article 10 from Law no. 304/2004 on Judicial Organisation also establishes that “*All persons are entitled to a fair trial and to the ruling of their cases within a reasonable time, by an impartial and independent court, set-up according to the law*.” (Law no. 304/2004 on Judicial Organisation, 2004) The Romanian Code of Criminal Procedure (hereinafter the CCP) also guarantees the right to a defence, detailing the conditions under which it has to be carried out in article 6. It is stipulated that all parties to a criminal trial are entitled to the right to defence, that the judicial bodies must ensure their full exertion of procedural rights as provided by law and administrate all the evidence required for the defence. Furthermore, the competent judicial organs have the duty to inform the defendant of the charges brought against him and their legal status, as well as to ensure the means for the preparation and delivery of the defence. The accused has the right to a defender, of which he has to be informed before his initial statement that must always be recorded in the taped interview transcript. The legal representation must be guaranteed by the judicial bodies if the accused does not choose one freely. (The Code of Criminal Procedure, 2013)

## The right to liberty and security of person

**2.2.1. Definition and scope**

Liberty is one of the fundamental human conditions and it is crucial to human development. It has been long regarded as an innate human right and debated by the most important political science, sociology and philosophy scholars. It is one of the Civil and Political rights that are the closest to the life of every citizen and for that reason the deprivation of liberty is the most severe sanction imposable in Europe and cannot be treated lightly. Author and defence attorney Monica Macovei elaborates on the importance of this right in the handbook published by the CoE, stating that, since personal liberty is a freedom everyone should enjoy, depriving someone of it can have serious adverse effects on the exercise of other human rights: family rights, private life, freedom of expression, assembly and association, freedom of movement etc. Furthermore, in the opinion of the author, depriving individuals of their liberty puts them in a very vulnerable position, as it exposes them to torture and ill-treatment, which often occur in detention units. (Macovei, 2002)

The scope of the article, as defined under international law terms, is to protect individuals against the abuse of the state, namely against arbitrary arrest and detention, and unlawful acts. According to author Laurent Marcoux, what that actually means is that states are bound by the conventions they agreed to not to manipulate their legal systems as to take oppressive measures against individuals. (Marcoux, 1982) In light of that, the meaning of the article has to be understood giving consideration to the entire concept of ‘right to liberty and security.’ The scope of the right is thus applicable in the context of physical liberty, rather than other forms of security, such as social security. (Macovei, 2002) This was clarified by the ECtHR in the *Kurt v. Turkey* judgement, which laid down that:

*“The authors of the Convention reinforced the individual’s protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. […] What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.”* ( Kurt v. Turkey, 1997)

**2.2.2. Entrenchment in international law**

The right to liberty, just like the right to a fair trial, is a norm of customary international law, every state being required to respect it. The Universal Declaration of Human Rights attests this right under article 3, which stipulates that *“Everyone has the right to life, liberty and security of person.”* (United Nations, 1948)

As mentioned previously, the Declaration has no binding power over states, so the treaty that creates an obligation for countries in Europe to safeguard this right is the ECHR. Article 5 of the Convention establishes that “*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law*” (Council of Europe, 2010). The same article also deals with the limitations of this right and the compensation that has to be awarded for unlawful detention. Therefore, a person may be deprived of liberty for non-compliance with the lawful order of a court, to secure the fulfilment of an obligation prescribed by law or if convicted by a competent court. Deprivation of liberty is also allowed as a measure to prevent someone from committing an offence or fleeing after committing the offence, but only if there are sufficient grounds for suspicion. In the case of minors, detention may be inferred as a way of bringing them before the competent legal authority or by lawful order for purposes of educational supervision. Lawful deprivation of liberty can also be applied in order to prevent the spread of infectious diseases and in the case of mentally unsound, drug addicted or vagrant persons. Additionally, the prevention of an unlawful entry into a country and the deportation or extradition of an individual charged with a criminal offence, are considered grounds for lawful arrest or detention as well. Apart from the limitations set out by the ECHR, article 5 puts forward the rights that a persons has under arrest or detention, including the right to be informed promptly of the reasons for the arrest in a language he understands. Upon arrest, any individual must be brought promptly before a competent judicial authority and is entitled to a trial within a reasonable amount of time or to a release pending trial. Moreover, the accused may also undertake proceedings to challenge the lawfulness of the arrest in court and a release has to be granted if the deprivation is proved to be groundless. Lastly, any victim of unlawful detention is entitled to compensation. (Council of Europe, 2010)

The right to liberty is also enshrined in the Charter of Fundamental Rights of the EU, under article 6, which stipulates that “*Everyone has the right to liberty and security of person*.” (European Union, 2010)

**2.2.3. Entrenchment in national law**

The Romanian legislation guarantees the right to liberty and sets forth its limitations under article 23 of the constitution. Thus, under Romanian law it is established that “*Individual freedom and security of a person are inviolable.*” (Constitution of Romania, 2003) The search, detainment or arrest of someone is only allowed in the circumstances prescribed by the legal procedure. Also, detention cannot exceed twenty-four hours before judicial review and, throughout the course of criminal proceedings, preventive custody can be ordered for a maximum of 30 days. The extension of preventive custody cannot be longer than 30 days, with the overall length not exceeding 180 days. Preventive custody can only be ordered by a judge and during the criminal proceedings. The court is bound to regularly verify - *and not later than 60 days* - the lawfulness of preventive custody and, if it finds that there are no grounds for it, to release the defendant immediately. Another aspect entailed by the article is that any individual held in preventive custody can apply for release under judicial control or bail. Article 23 also includes the right of an accused to be promptly informed in a language he understands of the reasons of the arrest and the charges brought against him, a notification which has to be given in the presence of a lawyer. Furthermore, the law requires the release from detention if the grounds for it ceased to exist or if the conditions provided by law for that are met. The accused is presumed innocent until proven guilty and, upon sentencing, the penalties are set according to the law. The deprivation of liberty shall be imposed only for criminal offences (Constitution of Romania, 2003) The Romanian CCP also enshrines the right to liberty and establishes its limitations. Article 5 stipulates therefore that everyone’s liberty is guaranteed throughout the course of the entire criminal trial and that the deprivation of liberty may take place only under the circumstances prescribed by law. Any person placed in preventive arrest, hospitalization or any other type of liberty restraint who considers the measure to be unlawful, has the right to challenge its legality. When a breach to the right to liberty is found, the victim of the violation is entitled to a redressal of the damages in the basis of the law. During the trial, a defendant who is in preventive custody may request release under judicial supervision or bail. (The Code of Criminal Procedure, 2013)

## Concluding remarks

A clear definition of the right to a fair trial and the right to liberty is central to understanding their scope. However, the simple proclamation of these rights – *as it is the case with the Universal Declaration of Human Rights* - does not imply their enforcement. In order for that to happen, they are enshrined by international treaties and conventions, as well as national legislative acts that lay down the conditions which determine the exertion of these rights. Nevertheless, the articles which create the legal basis for these rights are abstract themselves, so the principles of law thus established would be void of meaning without the elucidations delivered by the ECtHR in fifty years of observing and criticising inadequate state practice. Therefore, giving consideration to the definitions outlined in this chapter, the next segment of the paper will look at the application in practice of article 5 and article 6 of the ECtHR and the principles of law developed through case-law that support their enforcement.

# 3. The Law

The inquiry this chapter makes relates to what legal principles govern the right to a fair trial and the right to liberty. The strict definitions given by the relevant international and national legislation, although central to the enforcement of the two rights in question, are not sufficient to fully comprehend their scope and applicability. For that reason, this chapter will break down the underlying principles of law establishing the conditions for the fulfilment of the two rights, as explained in ECtHR judgements and specialised legal literature. If the previous chapter of the paper focused on a theoretical assessment of the meaning of the two rights, this segment will consist of a critical analysis developed through comparisons between the information collected from all the different sources outlined in ‘Methodology.’ Therefore, in addition to the description provided by the legislation in force, the application in practice of these two rights will also be looked at, through case-law studies that reveal instances of violation. Apart from that, consideration will also be given to the understanding of these rights based on reports by non-governmental organisations active in the field of justice. The reason for that is the ability of external observers to project an unbiased perspective on justice, as they represent the interests of civil society and individuals directly affected by violations of these rights.

## 3.1 General Principles

The previous chapter presented the definitions of the right to liberty and the right to a fair trial, as well as the international and national legal instruments which provide the basis for their enforcement. The articles that entrench these rights in European and Romanian legislation lay out the principles underlying the application in practice of the two civil rights discussed. Although these articles create a general framework for the safeguard of the right to a fair trial and the right to liberty, they are not very explicit in regard to how they should be implemented by the national authorities. For instance, the ECHR itself does not clearly distinguish between what is considered deprivation of liberty and restriction on movement. (Reid, 2004) In that sense, the ECHR developed the necessary jurisprudence to give substance to the principles enshrined by the Convention articles and interpret them for the purpose of actual enforcement by the authorities. It is also important to emphasize the fact that the right to defence encompasses two meanings. One is material and consists of the general legal framework (rights and their respective procedures) put in place to ensure a proactive defence, and the other is formal and is substantiated in the right to benefit from a defender. (Brasoveanu, 2012) Therefore, this chapter will first examine the legal requirements that must be met to ensure the protection of the afore-mentioned rights, as described in specialised literature. Additionally, it will look at instances of violations of these principles and what the effects of that are in practice.

#### 3.1.1. Fair hearing

Conducting fair hearings is the overriding principle behind the right to a fair trial, meaning that compliance with some of the specific requirements set out by article 6 of the ECHR does not guarantee the fair nature of the criminal proceedings. That being said, this requirement cannot be assessed in abstract, but within the context of the proceedings as a whole. Therefore, the overall requirements for fair proceedings are procedural equality, an adversarial process and disclosure of evidence, appearance in person and effective participation. (White & Clare, 2010) However, for the purposes of this paper, the emphasis will be placed on the ‘equality of arms’ requirement, which entails the most relevant aspects of a fair trial that are applicable to the situation in Romania.

1. ***Procedural equality***

In order for a trial to be carried out fairly, it must meet the ’equality of arms’ requirement, which consists of the chance to present a defence, the presumption of innocence and the rule of law. The reason these criteria are crucial to a fair trial is because, in criminal proceedings, the accused is facing the overwhelming power of the state. Therefore, a balance has to be established in court in order to ensure that the offender is held accountable and that innocent persons are not punished instead. (Fair Trials International, 2013) Thus, certain mechanisms have been set up to guarantee the achievement of this balance in trial proceedings, as detailed in the following:

1. A person may be accused of a criminal offence only if there is a legal basis in force that clearly outlaws it. That is why the rule of law is crucial to conducting fair trials. Moreover, the rule of law principle requires that the proceedings are carried out by impartial and independent courts, which leave no opportunity for arbitrariness.
2. The accused must be offered access to legal advice and a legal counsel. In case the accused does not afford one, the government has the duty to provide *pro bono* legal assistance.
3. The accused is presumed innocent until proven guilty. In other words, the burden of proof falls with the prosecution, who has to gather sufficient evidence to discharge any reasonable doubt and, subsequently, establish guilt.
4. The trial should take place without undue delay and the accused may be tried only once.
5. The accused must be provided with sufficient time and facilities to prepare his defence case throughout the entire duration of the proceedings. This includes access to documents and information, and access to confidential communication with counsel.
6. The accused must be provided with access to open justice i.e. a public hearing, disclosure of evidence, information on the charges and the reasons for being charged, and his rights as a suspect. The public hearing is crucial to this process as it represents a protection against arbitrariness. However, it is not an absolute right, but one can be limited, as established in the *Axen vs. Germany case*. For example, parts of the trial may be held in private session if it is for security purposes or to protect the interests of juveniles.
7. The accused has the right to an interpreter, should the court proceedings be in a language he does not understand.
8. The accused has the right to give a statement, as well as to call and examine witnesses.

(Fair Trials International, 2013)

1. ***Adversarial process and disclosure of evidence***

The equality of arms also implies the right to an adversarial trial, namely that both parties – *the prosecution and defence* – must have equal access to the material produced by the other party and an equal opportunity to comment on it. (Ruiz-Mateos vs. Spain, 1993) However, it is not an absolute right, meaning that access to some evidence may be restricted by the court for public safety or for the protection of witnesses. What will be examined in order to determine if the adversarial principle was met is known as the ‘fourth instance’ doctrine, namely the decision-making process the domestic courts have undergone when they restricted access. (Rowe and Davis vs. United Kingdom, 2000) The purpose of this doctrine is to see if the measure is justifiable and does not impact too much on the rights of the defendant. (White & Clare, 2010)

1. ***The length of the proceedings***

In the ECHR, article 6(1) establishes the ‘reasonable time’ requirement for fair trials. It is important to examine the meaning of the term in the context of ECHR jurisprudence and subsequently identify the loopholes which hinder its application in the Romanian juridical system. That being said, the ECHR case-law, which in regard to this principle is dominated by Italy, provides a clear interpretation of what ‘reasonable time’ is in the meaning of the Convention. Accordingly, the ECHR sets the European standard in regard to its application and indicates the necessary safeguards domestic authorities must have in place to guarantee it.

The requirement for a speedy trial is a guarantee “*that within a reasonable time and by means of judicial decision, an end is put to the insecurity into which a person finds himself […] on account of a criminal charge against him*” (Venice Commission, 2007) Therefore, in order for the right to a fair trial to be upheld, the length of the proceedings should not be excessive neither in the determination of the criminal charges, nor in the determination of the defendant’s rights and obligations. Additionally, it is important to evaluate the reasonableness of the length of the proceedings giving consideration to the particularities of each case. The Court has identified in this sense three pivotal assessment criteria: the degree of the case complexity, the conduct of the applicant and the conduct of the authorities in relation to what is at stake for the defendant. (Kudla v. Poland, 2000) In other words, taking into account the penalties the accused are faced with in criminal proceedings, it is of uttermost importance that trials are expeditious, but rigorous. (Reid, 2004) This is essential for the protection of individuals who have to face the challenge of a criminal trial and live under a high degree of uncertainty throughout its duration. (White & Clare, 2010)

The length of the proceedings is equivalent to the period from the moment a formal charge is brought against the accused until the moment the decision on the conviction and sentence, if that is the case, becomes final. This means that the protections contained by article 6 apply also before the trial phase, because it is important that a suspect benefits from legal representation and his other defence rights at the point criminal investigations are initiated against him. (Lorenzmeier, 2007) It is important to clarify what ‘formal charge’ entails, as it is a crucial aspect in assessing whether the initiation of the criminal proceedings is lawful. Thus, the formal charge may be identified with either the date of the arrest, the date of the notification on the arrest or the date preliminary investigations are initiated against the suspect. (Eckle v. Germany , 1982)

As mentioned previously, the complexity of the case also plays a key-role in determining whether the duration of the trial was excessive or not. The aspects weighted in analysing how complex a case is are the subject-matter, the existence of disputed facts, the number of accused and witnesses, the volume of evidence, and whether it involves international elements. Therefore, long trials may not be considered excessive if they are necessary for the adequate administration of justice and if there aren’t substantial periods of abnormal days. (Reid, 2004)

The ECtHR revealed in its judgments that the conduct of the judicial bodies also bears heavily on the length of the proceedings as it is in their duty to take all necessary steps to ensure speedy trials, even if delays may arise from the conduct of the applicant. That is because in cases where the delays are caused by the parties to the trial, the passivity of the courts is still punishable as it reflects the inefficiency of the legal system. (Berlin vs. Luxembourg, 2003) However, from the perspective of Mr Peter Robinson, trial delays are usually caused by the defence’s requests for disclosure of documents or for more time to prepare the case. Thus, it is the prosecution who causes the delay by not disclosing the necessary information, but the defence is the one making the request. So in that sense, trial delays are connected to the ‘adequate time and facilities requirement’, which is often not fulfilled, even in the international system. The interviewee also mentioned that trial delays may occur because of court congestions. (Robinson, 2013) Other common causes of trial delays are unreasonable decisions on taking evidence, moving jurisdiction, joining cases or adjourning. Another reason invoked for trial delays is administrative backlogs, which can be justified only if the authorities have taken prompt and sufficient action to redress the problem. (Reid, 2004) However, when the proceedings are prolonged as a result of a deficient structural organization, the violation is imputable to the Government. (Zimmerman and Steiner vs. Switzerland, 1983) Limited periods of delay, such as delays in delivering a judgment or in the transmission of documents between instances, can also lead to a violation of article 6(1), even if overall the proceedings were conducted with due diligence. (Reilly vs. Ireland, 1995)

According to two legal authors, the ECtHR case-law on length of proceedings reveals that the administration of justice without any undue delays is crucial in order to maintain the legitimacy of the courts and the just nature of the entire juridical process. (White & Clare, 2010) More specifically, the Strasbourg Court emphasized in *McFarlane v. Ireland* that *“The State is obliged to organise its system to avoid the risk of parties unduly delaying their proceedings. It must also therefore be required to ensure that the structure of the legal system itself does not generate undue delays.*” (McFarlane v. Ireland, 2010) Therefore, the states parties to the Convention, including Romania, should take all the necessary measures to create and uphold a legal system that does not compromise the defendants’ right to a speedy trial and thus produces miscarriages of justice.

1. ***Appeals***

When assessing if the length of proceedings was excessive, the Court also takes into consideration periods of appeals. However, it is important to clarify that the scope of evaluating if there was a breach of the right to appeal is not to re-open proceedings or substitute findings of fact, but to analyse and establish whether the trial as a whole, including and determination of sentence, was fair and in line with the necessary safeguards. Therefore, a violation of this right does not translate into an overturn of the judgement. (Pikusova & Spasova, 2012) The right to appeal is also guaranteed on the basis of the ‘equality of arms’ principle, for the purpose of redressing any possible judicial errors or abuses. The state must respect the decision to acquit and implement it, if that is the case. (Fair Trials International, 2013) The right to appeal is not expressly enshrined by article 6, but the provisions of the right to a fair trial equally apply to appeal procedures conducted by higher instances. However, the way in which it applies depends on the particularities of appeal proceedings. Therefore, when the appeal proceedings involve only the revision of points of law or limited cassation procedures, the lack of a public hearing, which presupposes the participation of the defendant, is justifiable. (Axen vs. Germany, 1983) Nevertheless, when the appeal requires an evaluation of both facts and points of law, the right to be heard in person and to examine witnesses bears heavy weight on the determination of the judgement. As a result, the failure to conduct a public hearing may reveal a violation of article 6 by the appeal courts. (Ekbatani vs. Sweden, 1988)

#### 3.1.2. Deprivation of liberty

As mentioned in the first chapter, safeguarding the right to liberty and security of person is fundamental to democracy, as it aims to protect individuals from arbitrary and groundless detention by the authorities. The right to liberty plays a key-role in criminal proceedings and a fair trial is crucial for guaranteeing the freedom of the innocent and the punishment of the guilty. Therefore, it is a limited right that can be waived in accordance with the law. In assessing whether a restriction of freedom amounts to deprivation of liberty, the ECtHR has decided to look at *“the type, duration, and manner of implementation of the measure in question.*” (Guzzardi vs. Italy, 1980) It is also important to note that suspects lose the right to liberty, temporarily or indefinitely, depending on the case, at the moment of the arrest. (Fair Trials International, 2013)

Article 5 of the ECHR outlines several principles that are quintessential in order for the right to liberty to be upheld, namely lack of arbitrariness, the positive obligation on the state, notification on the reason for arrest and detention, the lawfulness of the deprivation and the right to compensation. After examining the theoretical facet of these principles, in light of the most common violations in Romania, this segment of the paper will draw focus on the length and lawfulness of pre-trial detention, as well as the possibility to challenge it.

1. ***The concept of arbitrariness and the positive obligation on the state***

Arbitrariness is an important concept because detention is a last resort measure which must be taken only on the basis of an absolute necessity for it. That is why, before ordering someone’s detention, the authorities must consider remedies of a lesser degree of interference with the person’s liberty. (White & Clare, 2010) When assessing a case for the purpose of deciding if there was a breach of article 5, the ECtHR takes into consideration whether the type, duration and implementation of the detention were reasonable and within the conditions established by the article. The criteria set out under article 5(1) are meant to prevent arbitrariness, which translates into the failure to prove that there is a connection between the reason for the deprivation of liberty and the time and nature of the detention, as settled in *Saadi vs. UK* (Saadi v. The United Kingdom, 2001). The fact that the detention itself is lawful does not necessarily preclude it from being arbitrary, and thus it can result in a breach of article 5. For example, situations in which the national authorities have somehow lured or deceived someone into being arrested, as illustrated by the *Conka* case - *where Romany families were tricked into coming at the police station* - are rendered as arbitrary. (White & Clare, 2010)

However, considering the broad meaning of the term ‘arbitrary’, clarifications must be given as to what type of practices may be renderred as such. One legal author, Laurent Marcoux Jr., is quite critical towards the ECHR’s limitationist approach to the concept of arbitrariness. He consideres that the fact that arbitrary deprivation of liberty is not expressedly enshrined by article 5 decreases the level of protection ensured for the right to liberty under the auspices of the ECHR. Therefore, in order to shed light on what is meant by ‘arbitrary detention’ in ECtHR case-law, the same author proposes the use of a certain methodology to define this principle. In that sense, he asserts that the arbitrary nature of a law or practice can be determined by analyzing if the extent to which the measure restricts someone’s right to liberty is proportionate to the necessity for it. The author adds that *“The more a law operates to deprive individuals of the right to personal liberty, the more such a law becomes arbitrary. At the same time, the state has a correspondingly greater duty to justify its actions. […]This burden becomes greater as infringement upon the personal liberty value increases*.*”* (Marcoux, 1982)

Another concept that is quintessential to the right to liberty is the positive obligation of the state, namely the duty of the government to take measures that ensure and respect the liberty of its citizens and protect them against unlawful or arbitrary detention, as established in *Stork vs. Germany*. As this principle is underdeveloped under the scope of article 5 *- being more expressly established by articles 2, 3 and 8 of the Convention* *(White & Clare, 2010)* - the ECtHR had to elaborate on its meaning in the case previously mentioned. The Court clarified that:

“*Article 5 § 1, first sentence, of the Convention must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens. Any conclusion to the effect that this was not the case would not only be inconsistent with the Court’s case-law, notably under Articles 2, 3 and 8 of the Convention, it would also leave a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge*” (Storck v Germany, 2005)

***b) The lawfulness of detention***

Because it is such a delicate issue, detainees also have the right to test the legality of their arrest and detention, a principle known as *Habeas Corpus*. (Fair Trials International, 2013) Article 5 establishes that in order for the detention to be lawful it has to be provided by domestic law, and also meet the exceptions provided in each paragraph of the article. In the analysis of a case, the Court takes into account the lawfulness and arbitrariness criteria altogether, as the term ‘lawful’ covers both procedural and substantive rules. (Drozd and Janousek v. France and Spain, 1992) However, the Court does not assess the facts of the case, but only whether the procedure was in line with the rules set out by the domestic legal system and whether the method used by the authorities showed signs of arbitrariness. Another aspect the Court pays attention to is the principle of ‘legal certainty’, namely if the rules creating the basis for the detention are sufficiently accessible and clear. (Reid, 2004) In *Baranowski vs. Poland* it was established that any deprivation of liberty will not be lawful if the national legislation allows for excessive and arbitrary detention. The ECtHR decided in this case that the Polish practice to detain someone from the moment of the arrest until the end of the trial without a court order was unlawful as there was no clear legislative regulation or case law to support it, and rather stemmed from the lack of legislation on this particular aspect. (White & Clare, 2010)

***c) Pre-trial detention***

One of the most common and recurring problems with the right to liberty is pre-trial detention, due to its high degree of uncertainty. Pre-trial detention – *or remand in custody* - is a procedure whereby a suspect is kept in a government facility (most commonly in jails, which are not ought to be confused with prisons) throughout the duration of the criminal proceedings against him. This procedure is necessary for the preservation of crucial evidence, to protect witnesses, but, most importantly, for security reasons. (Macovei, 2002) Nevertheless, the legal status of pre-trial detainees is undetermined, as they are not yet found guilty, but are suspected of committing offences and deprived of their liberty. The restriction on their freedom is limited though compared to convicted detainees because they have the option of being released on bail or if there aren’t enough grounds to keep them in detention. (Law Teacher, n.d.)

Article 5(3) can be broken down in two principles that govern pre-trial detention: the amount of time considered reasonable for holding someone in remand and the limitation of the period a suspect is held in pre-trial detention. (Reid, 2004) Having said that, the article does not specifically indicate whether courts should award bail or bring the accused on trial within a reasonable time; in fact, its scope is to require release when the pre-trial detention is not reasonable any longer. (Jablonski v Poland, 2008)

***d) Judicial review***

The ECHR establishes on the basis of article 5 that, in order for an arrest to be regarded as lawful, it must be performed for the purpose of bringing the suspect before the competent judicial authority and only if there is reasonable suspicion that he has committed the offence. These may constitute grounds only for the initial deprivation of liberty; however, reasonable suspicion alone cannot be seen as a justification for the continuation of pre-trial detention. In that sense, the decision to extend detention must be subjected to prompt judicial scrutiny, in order to assess not only if the deprivation was justifiable in the first place, but also if it is still appropriate. Even though reasonable suspicion is essential for prolonging detention pending trial, it is not sufficient. The reason for that is that article 5(3) enshrines the right to be released pending trial unless there are relevant additions of evidence indicating there are legitimate reasons for the extension. These include the risk of flight, the risk of an interference with the course of justice, the need to prevent crime and the need to preserve public order. (Macovei, 2002) The ECHR stresses though that evidence indicating that the suspect has the intention to commit another offence or to abscond is absolutely necessary in order to justify the deprivation of liberty. More specifically, there should be proof that the suspect is carrying out activities which reflect that he is preparing for the commission of the offence. (Trzaska v. Poland, 1993) In regard to the suspicion that he has committed the respective offence, the existence of substantial information that would satisfy an objective observer is required under the meaning of article 5(1). (Reid, 2004)

A breach of the right to liberty takes places if pre-trial detention is not absolutely necessary or if it is significantly and groundlessly prolonged. Therefore, speedy and effective trials are required in order to reduce the time of pre-trial detention and its impact on the human psychological and physical health. (Fair Trials International, 2013) That is why, for the purpose of preventing mistreatment, coercion or arbitrary arrest by the police or any other equivalent authority, it is crucial that the defendant is brought promptly before a judicial officer. (Centre for Human Rights, 1994) The compliance with the ‘promptness’ requirement shall be assessed in light of the particularities of each case; however, the Strasbourg Court did not allow for much flexibility in interpreting the meaning of the term in its judgements. (Brogan and Others v United Kingdom, 1988) Although there is no specific maximum established for the reasonableness of the pre-trial detention, ECHR case-law shows that it should not exceed four days for ordinary crimes, unless the exceptional circumstances of the case require it. (Sakik and Others v Turkey, 1997) Apart from being prompt, the judicial review also has to be automatic, namely it cannot depend on a previous application for release lodged by the defendant. Such a requirement would be unnatural and would contradict the scope of article 5(3), which is a safeguard against arbitrary detention. (Christou, 2005) The meaning of the term ‘judicial officer’ is not restricted to the status of judge, but rather refers to any officer authorized to exercise judicial power. That entails independence from the executive and the parties involved, as well as the attribute to hear the accused in person, to review the extension of the detention by reference to legal criteria and to order release. (Schiesser v Switzerland, 1979)

Furthermore, the decision on whether to prolong pre-trial detention must be based on a thorough assessment of the circumstances of the case to see there is a genuine public interest in depriving the accused of his right to liberty. In this sense, the extension of pre-trial detention can only be justified if sufficient and relevant grounds for the deprivation of liberty continue to exist. For instance, the fact that someone may be detained only for a short period of time does not make the measure lawful. If the reasons provided by the courts for ordering someone’s pre-trial detention are factually unfounded and/or stereotypically formulated, the practice will be regarded as unlawful and will lead to a breach of article 5(1)(c). (Reid, 2004) In case the evidence does not support the imposition of pre-trial detention, the courts should consider alternatives, such as bail or police surveillance. (Stevens, 2009)

The fact that pre-trial facilities conditions are often worse than the ones in prisons and unfit for a decent standard of living takes a heavy toll both on the physical and psychological state of the detainees. (Open Society Foundations , 2011) Apart from the enormous social and financial uncertainty they are faced with, another major issue would be that pre-trial detainees become subject to abuses and human rights violations, which are not verified by any domestic judicial authority. In most cases, such abuses materialize in ill-treatment, coercion to produce self-incriminatory evidence, overcrowding, the transmission of diseases etc. Lengthy and inefficient pre-trial investigations are the most common cause of excessive pre-trial detention periods and overcrowded jails, so the authorities should seek the release of as many detainees as possible, commensurate with the investigations carried out against them and the potential risk they pose to public safety. (Centre for Human Rights, 1994)

Furthermore, most of the suspects held in remand eventually receive a verdict of ‘not guilty’ or the sentence imposed on them does not imply imprisonment, and, if it does, the detention period following conviction is shorter than the pre-trial detention itself. (Centre for Human Rights, 1994) An illustrative example in this sense would be the fact that the European Union average of pre-trial detainees among the prison population is 24.7%, most of who are later released. (European Commission, 2011)

## 3.2 Concluding remarks

The legal principles and violations thereof described in this chapter were mostly developed through case-law and further explained in specialised literature. Thus, the interpretations given to articles 5 and 6 and their manner of implementation by the ECtHR created a margin of appreciation that will later be applied to concrete cases of from Romania. In light of that, the instances of violations identified earlier which are relevant for this study concern the length of criminal proceedings, pre-trial detention and the lawfulness of the deprivation of liberty. Therefore, the clarifications provided on these points of law will help detect Romanian miscarriages of justice and practices which are incompatible with the ECHR requirements.

# 4. Miscarriages of justice in Romania

This segment of the study specifically addresses the standard of justice in Romania by exploring common examples of violations of the right to a fair trial and the right to liberty. Taking into consideration the findings in regard to the fairness of the proceedings, pre-trial detention and the lawfulness of detention, this chapter will examine the Romanian practice in the application of the legal principles previously clarified. First, the Romanian ‘legal culture’ will be analysed in order to determine which systemic deficiencies cause violations of the right to a fair trial and the right to liberty. This means that the integrity of the judicial system as a whole will be put to test. The term ‘integrity’ is used in this context as to imply the rule of law, independence and impartiality, access to justice and the presumption of innocence. Aside from the assessment of the requirements for a fair trial and violations thereof, this chapter will also look at the Romanian standards in regard to detention, with a focus on pre-trial detention.

However, in order to better understand the weaknesses of the Romanian criminal justice system in upholding the two rights discussed, it is important to see how they were evaluated by the ECtHR. Looking in retrospect, the objective of this study is to measure the extent to which the Romanian practice complies with the European standard of justice. Having regard to that, the second part of this chapter will investigate recent and relevant Romanian case-law at the ECtHR and will interpret how the selected cases are reflective of the most common judicial errors in Romania. Therefore, the chosen case-law will specifically entail violations of the ‘trial within a reasonable time’, ‘length of detention’ and ‘lawfulness of detention’ criteria.

## 4.1 The legal context in Romania

This segment of the thesis will shed light on the extent to which the right to a fair trial and the right to liberty are respected in Romania by examining legal culture, as well as the relevant criminal procedure and its most common violations. The findings enclosed in this chapter are extracted from reports compiled by governmental and non-governmental organisations specialised in the protection of fundamental human rights, as well as academic literature. Most of the information used was provided by EuroMos in a final report compiled by J. Rammelt and B.J.G. Leeuw in 2012, on the basis of surveys conducted with defence lawyers from Romania regarding established practices and the most common violations of defence rights. The respondents had to offer feedback on the extent to which defence rights are safeguarded throughout the three stages of criminal proceedings: police custody, remand in custody and the trial itself. (Rammelt & Leeuw, 2012) For the same purpose, and in order to compare the practices in Romania to the ones in the international criminal system, the interview with Mr Radu Chirita – a *Romanian defence lawyer specialized in ECHR law-* will also be consulted. The fact that these respondents can provide inside information on the way criminal proceedings are carried out offers a general perspective on the state of the rule of law in Romania and, implicitly, the respect for these rights by the competent authorities, i.e. the prosecutor’s office, the police and the judicial bodies.

#### 4.1.1. Impartiality, rule of law and access to justice

The impartiality and independence of the judicial bodies is the main ingredient to rule of law and democracy. The absence of these two conditions can seriously impair the delivery of fair judgments and damage the legitimacy of the criminal justice system in a country. A report compiled by Transparency International on the integrity of the Romanian national governmental system deemed the judiciary as not being fully independent, giving it a score of 56.25 out of 100. According to Iulia Cospanaru, one of the authors and co-ordinator of the report, the lack of independence usually stems from political or media pressure on magistrates to give a certain judgment in high-profile corruption cases. Additionally, the SCM does not have sufficient mechanisms to hold magistrates accountable for miscarriages of justice or to facilitate impartial proceedings. An illustration of that would be the manner in which the contests for promoting prosecutors work. For example, in 2007 there was a scandal regarding five magistrates, including the ex-deputy general prosecutor, who allegedly committed fraud and acts of corruption in order to be promoted. Although they have been removed from their positions, the trial has still not been completed. There were also many complaints regarding the 2007 examinations in connection to the very poor competences of the candidates. In addition to that, many magistrates reported in the surveys conducted by Transparency International Romania in 2007 that they are dissatisfied with the appointment and promotion system of the SCM. Although the situation has improved since then, there are still many accusations of corruption or political interference in the appointment of magistrates. There is also the issue of media pressure, which often considerably compromises the independence of the judges by publicizing information about their identity and their family before sentencing. (Cospanaru, 2011)

In the opinion of Mr Radu Chirita, the right to a fair trial would not be so hard to uphold if the judges were free from the mentality of public servants. In order for that to happen, the judges and prosecutors should understand the text from the Constitution, which primarily binds them to ensure the fundamental rights of persons, and not to be the first ones to violate them. When asked how difficult it is to ensure fair proceedings, he answered that he did not have many trials conducted fairly, with the exceptions of the ones where the defendant pledged ‘guilty’ and then the procedure was suddenly respected. He also refers to the biased, even corrupt practices of prosecutors, which are almost always visible. To illustrate, he gives the example of a case where two defence witnesses have admitted to the judge that they received money from the aggrieved party in order to testify. In spite of that, the prosecutor denied that he made a mistake and continued the criminal action. (Chirita, 2013)

The aspects that contribute to the perpetuation of such unjust practices are the peoples’ fear for authority, as a result of the fact that many officials act as if they are above the law, or the fear of many judges to take responsibility for their decisions. (Macovei, 1998) An example in this sense would be a case from 1997 – The Civil Alliance vs. Iliescu – in which defence lawyer Monica Macovei filed a complaint against Ion Iliescu, the former president of Romania, for perjury and requested a copy of his testimony in the case. The judge’s answer to her request was: "*I don't want to lose my job; what happens if Iliescu gets angry with me? He might again someday be president*!" The reasons for his apprehension towards releasing the testimony transcript was that he didn’t want any written proof of his involvement – *which was strictly legal, one might add* - in the case. Ms. Macovei replied that her request was lawful, that the trial was public and that the judge was appointed for life, so there wasn’t any way he could be removed. The judge eventually allowed her to examine the transcript, but only under the strict supervision of a court clerk, who did not even let her take notes. Such behaviour of a court officer only comes to prove the massive interference the executive has in the Romanian judiciary, which directly impacts upholding the right to a fair trial. (Gallagher, 2005) The lack of impartiality also reflects in the fact that usually there is also a lot of prejudice towards the defendant and the parties to the defence, which creates an unhealthy bias. The lawyers surveyed for the EuroMos report claim that the prosecution often acts like a State attorney, gathering evidence only against the accused without being impartial as the law requires. (Rammelt & Leeuw, 2012)

Another recurring problem in Romania that hinders the right to a fair trial and the access to justice is the legal framework, which lacks clarity. The right of an individual to attend his own trial, the procedural equality of arms, the presumption of innocence and many other principles inherent to fair trials are governed by rules which are very general in nature and do not provide any remedies for violations of these principles of law, “that seem thrown somewhere in the first articles of the constitutions or procedure codes.” (Brasoveanu, 2012) Author Florica Brasoveanu gives the example of the ‘innocent until proven guilty’ principle, asserting that “The law on the presumption of innocence does not refer at all at remedies for non-compliance, or at the need for it to be respected by all state bodies, especially in their relation with the media. The rules provided by the legal text are extremely vague and general, and do not offer any enforcement tools to the judicial authorities. (Brasoveanu, 2012) This argument is re-inforced by defence attorney Radu Chirita, who claims that the equality of arms, and as a result, the presumption of innocence, are the two principles which are the most difficult to uphold in Romanian courts. The interviewee explains that “*Not even the law ensures equality of arms in criminal matters, and the practice in courts even less. Any judge who is asked about this considers the lack of presumption of innocence to be a perfectly normal reaction; as long as the accused has been charged with a criminal offence, he must have done something*.” (Chirita, 2013)

The legal aid system is also rendered as inefficient by the respondent defence lawyers. As a legal obligation to provide representation to suspects of serious crimes exists, the Bar Association has a list of counsels who may be required to do that. Unfortunately, many lawyers complain about the quality of this system. What usually happens is that attorneys appointed to such cases are poorly remunerated, which further decreases their motivation. They are also given very little time to prepare, and their commitment to the case is usually very limited because they do not want to cause problems for the police, who may not want to call them again. (Rammelt & Leeuw, 2012) As a result, grave misscariages of justice can occur due to unprepared or unwilling defence counsels. To illustrate this, Ms. Monica Macovei refers to a case from 1997 when a court from Pitesti had to evaluate the request of three suspects to be released from pre-trial detention. The proceedings did not meet the ‘fair hearing’ requirement, as the suspects’ acess to an adequate defence was restrained by their counsels, who only had to declare “*I leave the decision to the court*.” What is even more worrying is that neither the defendants themseleves, nor the judge – *or anyone in the courtroom for that matter* - reacted to this blatant malpractice and refusal to carry out a rigurous and legitimate defence. (Macovei, 1998) This speaks to the ineffectiveness of the Romanian legal aid system and the indulgence courts have towards this kind of gross violation of the right to a fair trial.

The Romanian judiciary has undergone major reforms since 2005, which are still unfolding and contribute to the development of impartial and independent judicial instances. Nevertheless, the surveys conducted by Transparency International Romania in 2003 among Romanian magistrates indicate that 20% of them believe the judicial system is independent only to a small extent or completely lacks independence, while a quarter of the magistrates admit having experiences with people blatantly trying to influence their decisions. (Wittrup, 2006) External observers also perceive the judiciary as corrupt, as illustrated by the data gathered by Transparency International. According to the organization, the Romanian public opinion considers the judiciary to be the most corrupt branch of the government, after political parties. (Transparency International, 2013) The media reports on the vested interest politicians have in influencing magistrates also contributes to such a critical public opinion and reveals a systemic deffect that stems from the interference of the executive in the judiciary. (Wittrup, 2006)

Court and case management has also been identified as a weakness of the Romanian judiciary which leads to excessive lengths of criminal proceedings against an accused. Often courts return cases to the prosecutors for further investigation, which causes trial delays and, subsequently, lengthy pre-trial detention. Nevertheless, the very high workload is considered to be the biggest cause of trial delays and the biggest impediment for improving the efficiency of the system. According to defence lawyer Radu Chirita, “*usually, when the proceedings are prolonged, it is because of the large number of case files assigned to each judge, the lack of court rooms, the unjustified volume of cases and the unreasonably big number of witnesses testifying at the request of the prosecutor*.” (Chirita, 2013)

There are considerable discrepancies between the workload of some courts and that of others, which reflects the fact that “*Romania has until now not had a proper system for measuring the differences in workload among courts, so as to be better able to allocate staff among courts*.” (Wittrup, 2006) Due to the fact that courts are often understaffed, judges can become very busy, having to go through even 40 trials per week. Therefore, hearings become rushed and make it difficult to go through all the evidence thoroughly, creating thus disadvantages for the defence. (Rammelt & Leeuw, 2012) An example in that sense would be the fact that at the High Court of Cassation and Justice (hereinafter the ‘HCCJ’) a significant number of high-profile corruption cases is pending, while the instance faces a shortage of courtrooms, but too many vacant places in the criminal section. (European Commission, 2011) The fact that many courts are understaffed and have to deal with a large amount of information also comes to the detriment of the quality of the judicial process, which by such means unnecessarily extends the length of the trial and undermines the accused’s defence rights.

The extent to which access to justice is provided can also be examined from the angle of the time and facilities the defence benefits from to prepare the case. In this sense, the Romanian legislation provides that after the investigation file is closed, access to it must be given free of charge and a reasonable amount of time must be awarded to the lawyer and the client to review it before trial. However, many defence counsels report that most of the times, they are not given sufficient time to prepare even if it is stipulated by law. It has often been reported that in most cases the quantity of evidence that has to be analysed is too big for the amount of time given to the defence for the preparation before the initial appearance. This has happened recently due to pressure from the European Union to prevent corruption, but the hearing terms are most of the times too tight. (Rammelt & Leeuw, 2012) Moreover, Mr Radu Chirita asserts that no prosecutor gives access to the file during the criminal investigation, which makes the work very difficult for defence attorneys in that phase. Usually they find out what the file contains by participating at the hearings held during the criminal investigation. There is also the problem of preparing the case and the real acess to the file when it is provided at the end of the criminal ivestigation. Copying it is very difficult and expensive, and the archives have a program of approximately three hours per day and by that time the case file is already transferred to court. (Chirita, 2013)

#### 4.1.2. Pre-trial detention and preventive arrest

The Romanian law distinguishes three phases of the criminal proceedings, namely the pre-trial phase, the trial itself and the enforcement of the judgment. The pre-trial phase is further divided into the preliminary phase, during which no procedural steps may be taken, and the pre-trial investigation phase. Pre-trial detention is applicable only when the criminal investigation phase has been initiated and it can be ordered by the prosecutor for a maximum of 24 hours. On the basis of article 136(d) of the CCP, after the expiry of this period, the decision to keep the suspect in remand can be taken solely by an officer of the court upon the request of the prosecutor. Other preventive measures can also be adopted, such as the obligation not to leave town, the obligation not to leave the country, temporary release under judicial control or temporary release under judicial bail. (van Kalmthout & Knapen, 2009) Romanian law allows for a maximum of 180 days for pre-trial detention (with each extension lasting no more than thirty days), yet there is no specific limitation on the duration of detention throughout the trial. The law provides though that the defendant has to be released immediately if the duration of the sentence imposable for the respective offence is reached during the first phase of the trial, although that stage of the proceedings has not been completed. (Fair Trials International, 2011) During the trial, the remand in custody can be reviewed by a competent judicial authority if requested by the defence, a procedure which has to be carried out by hearing the subject and his counsel. The decision has to be made in the presence of the defendant or his lawyer, but according to some attorneys this never happens. A copy of the decision is given to the subject, but not a translation if the suspect does not understand Romanian. (Rammelt & Leeuw, 2012) However, the court is under a legal obligation to review the preventive arrest every sixty days in order to determine whether there are grounds that justify its continuation. Otherwise, the law stipulates that the suspect may be released. (van Kalmthout & Knapen, 2009)

In spite of the legal safeguards set by the CCP, Romania has been highly criticized by the ECtHR for lengthy delays before the judicial authorization of the detention, as well as excessive pre-trial detention, even though most persons subject to this measure are not eventually convicted. There is also the issue of transparency, which the review of detention and the decision on it usually lacks. Although holding monthly reviews of pre-trial detention is in line with the international standard - *which is the state practice in Romania* - due to the lack of resources, the hearings themselves only re-affirm earlier decisions and have no effect on the reduction of trial delays or periods of pre-trial detention. (Fair Trials International, 2011)

When asked to elaborate on the subject, Mr Radu Chirita claimed that he encountered many cases of unlawful pre-trial detention in Romania. Most of the times, when a person is charged with a significantly severe offence, the arrest is imposed as a form of anticipated punishment, rather than a preventive measure.

It is also very hard to challenge the lawfulness of the arrest, which, according to the interviewee, can only occur at the end of the trial. He referred to a case he had where pre-trial detention was proposed on grounds that his client accepted bribery on a certain date and had 200 witnesses who have seen him at a wedding 500km away on that day. However, during the arresting procedure, evidence can’t be administered, except from what is already in the prosecutor’s file, who discloses whichever piece of information he chooses. Therefore, the accused couldn’t bring any witness to court until the trial on the merits, so he was arrested on a false accusation. (Chirita, 2013) Nevertheless, such degree of difficulty in challenging the lawfulness of the arrest also occurs in countries with higher standards of justice, such as the U.S. Mr. Peter Robinson explained that when a defence lawyer tries to do that, the answer given by the court is that the trial on the merits should be carried out first, and then, at the end of it, it will be decided if there is enough evidence to indicate that the deprivation of liberty was unlawful. Therefore, it is very hard to challenge the lawfulness of the detention without first going through the entire trial proceedings. (Robinson, 2013)

Apart from excessive lenghts, problems regarding the conditions in which pre-trial detainess are kept have also been reported. For example, altough there is a protocol between the Ministry of Administration and Interior and the Ministry of Justice to bring the detainees to a prison after the judicial review, the practice shows otherwise. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment noted after its visit to Romanian detention facilitites in 2006 that a large number of remand prisoners are kept in police establishments for prolonged periods which sometimes amount to six months and more. In the same visit, The Romanian authorities have often been found responsible for ill-treatment of detainees and extorsion of evidence using violence or brutality, as well as inhumane pre-trial detention conditions. The poor material state of jails and the fact that they are overcrowded can only come to the detriment of preparing an effective defence. (The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment , 2008)

## 4.2 Case-law: Romania at the European Court of Human Rights

To further illustrate the defects of the Romanian justice system, this chapter will include a part on Romanian ECtHR case-law which displays the most pertinent and perpetual breaches of the principles intrinsic to the right to a fair trial and the right to liberty. Due to the complexity of the case-law on the matter and its entire context, the main focus of the paper will be the length of criminal proceedings and pre-trial detention, as these are recurring deficiencies of the Romanian criminal justice system in regard to the two rights discussed. Consequently, the critical analysis of these principles of law and their pragmatic exercise - *or lack of* - will lead to the identification of the justice miscarriages in recent Romanian state practice and their underlying flaws. This will create the basis for the following chapter, which, in light of these violations, will find possible solutions and give recommendations to redress the set-backs of the Romanian criminal justice system.

The European Court of Human Rights is an international judicial organ established by the Council of Europe in 1959, functioning on the basis of the European Convention on Human Rights. Its role is to rule on individual or State applications in regard to possible violations of the rights enshrined by the Convention. The judgments delivered by the ECHR are final and binding to the party-states, which has caused the respective governments to modify their legislation to make it more compliable with the provisions of the Convention. In its years of activity, the ECtHR jurisprudence has significantly developed and contributed to international human rights law, making the case-law and the Convention powerful legal tools that set the standard of justice in Europe. (Council of Europe, 2013) As a member of the Council of Europe and a party to the Convention, Romania has assumed its responsibility to safeguard the rights therein and to develop the necessary legal instruments to enforce them.

However, according to a survey conducted by the European Union judicial bodies, Romania’s criminal justice system is one of the weakest in the union. In this respect, Romania is the fourth EU country with the most breaches of the right to a fair trial and the right to liberty recorded at the ECtHR. In the period 2007-2012, the Romanian Government was held in violation of the two rights in 49 cases. The judgments delivered in this time span illustrate that the preeminent problems in Romania are related to delays in bringing cases to trial, allowing suspects to challenge the lawfulness of their detention, the presumption of innocence and the cross-examination of witnesses producing evidence against them. (Bowcott, 2012)

For the purposes of this paper, the chosen ECtHR case- law on Romania will shed light on the most recurring judicial errors in regard to the right to a fair trial and the right to liberty in the domestic criminal proceedings. Most of the cases examined in this chapter were decided in 2012 and 2013, so they reflect the most recent justice miscarriages that were not resolved domestically and were transferred into ECtHR jurisdiction. However, since Romania’s adherence to the Council of Europe in 1993 until 2010, almost half of the applications (43%) have concerned the right to a fair trial and/or the right to liberty. Furthermore, 91% of the Romanian cases brought before the Court contained violations of the ECHR, so the authorities were found responsible for a significant proportion of human rights breaches. (Council of Europe, 2013) These statistics indicate that there are systemic irregularities in the Romanian judiciary which constantly hinder the conduct of fair trials or contribute to the unlawful detention of suspects. As mentioned previously, this can only go on to negatively affect the legitimacy of the Romanian criminal justice system and the standard of justice in the EU.

**4.2.1. Pantea v. Romania**

***a) The facts of the case and relevancy***

The judgement for this case was delivered in September 2003 and it concerns the lawfulness of detention and prompt judicial review. The reason for studying an older case is the fact that it was a landmark case in Romanian law, as it gave the legislature the incentive to carry out the major reform of the CCP in 2003. As a result, the current CCP – *which has been amended a few times since –* is more in line with the requirements set out by the ECHR. (van Kalmthout & Knapen, 2009)

Coming back to the facts of the case, the applicant was involved in an altercation with D.N. in the night of April 20th to 21st 1994, who sustained severe injuries that could have been fatal. After the opening of the criminal investigation on the case, on the 23rd of June 1994, the prosecutor from the prosecutor’s office attached to the Bihor County Court questioned the applicant wihtout the presence of a lawyer, and, subsequently, released an order to open criminal proceedings and to place him in pre-trial detention. The committal period was valid for thirty days from the moment Mr. Pantea was taken into police custody and the warrant was based on the fact that the suspect was trying to evade the procedure and that he was a danger to public order, as stipulated by article 148(c)(e)(h) of the CCP. The reasons given by the prosecutor were that the applicant didn’t present himself for the reconstruction of the events from the night of the altercation and also didn’t respond to the summons to give a further statement. (Pantea v Romania, 2003)

On the 13th of July 1995 the trial proceedings were initiated and the applicant was detained in the Oradea prison on July 20th. The following day, the applicant challenged the lawfulness of the arrest in a private hearing from the Bihor County Court, holding that the prosecutor did not allow him to write the statement himself as it was late and there wasn’t enough time. Furthermore, the prosecutor allegedly kept him waiting for two days in the halls of the prosecutor’s office, threatening that he will not have his statement recorded and that he will be arrested. Not only that, but the applicant claimed that he actually responded to the summons and was not trying to evade the investigations. Another issue is that the records of the following court hearings do not give any indication that the judge discussed the issue of the lawfulnnes of the deprivation of liberty. The defendant applied for a reduction of the charges to assault, pleading self-defence. A judgement was given on the 28th of November 1994, which deemed the criminal investigation as incomplete and returned the case file to the prosecution service for additional investigations. The court also decided to extend pre-trial detention on grounds that the gravity of the offence Mr. Pantea was charged with presented a risk that he will commit other crimes if released. (Pantea v Romania, 2003) Afterwards, the applicant lodged an appeal before the Oradea Court of Appeal, trying to quash the previous judgement on grounds that the prosecutor was not impartial, that his basic defence rights were violated and that his presumption of innocence was not respected because the prosecutor described him as a ‘habitual offender’, although he was never before charged with any crime. Mr. Pantea also alleged that by prolonging his pre-trial detention, he would be subject to fuither abuse by the authorities and ill-treatmen by other prisoners. The Oradea Court of Appeal quashed the decision of the Bihor County Court deeming the applicant’s arrest and pre-trial detention unlawful, on grounds that he was not afforded legal representation at his questioning and that the authorities failed to produce an official record when the criminal investigation ended. (Pantea v Romania, 2003)

Following this judgment, Mr Pantea was released in April 1995. However, in April 1997 trial proceedings were then initiated at the Beius Court of First Instance, who found the defendant guilty of assault causing grevious bodily harm. After this, the applicant requested the Supreme Court of Justice (hereinafter the ‘SCJ’) to refer the case to another court, so in the following years, up until May 2001, the case file was reviewed several times by the Cravoia Court of First Instance, the Dolj County Court and the Craiova Court of Appeal. At the point the ECtHR started reviewing the case, it was still pending before the Romanian domestic courts. (Pantea v Romania, 2003)

1. ***Violation of article 5(1): the lawfulness of the detention***

The applicant complained that his arrest was unlawful as the grounds for preventing him from fleeing after having committed the offence were null. Referring to the decision by the Oradea Court of Appeal, the ECtHR concluded that Mr Pantea never tried to evade the proceedings and, as a matter of fact, responded to the summons. The arrest warrant also did not comply with domestic law as it did not indicate any reasons as to why his liberty posed a danger to public security. The requirement for a legitimate assumption that the defendant poses a threat to the society is also stressed by Professor in Criminal Law Lonneke Stevens, who asserts that “*there should be specific indications of a (danger of) social disturbance in the case at hand. For indications one could maybe think of the media attention the case already attracted, public protest, or agitation within a small community that served as crime scene*.” (Stevens, 2009)On this reasoning, the Strasbourg Court decides that compliance with the ‘procedure prescribed by law’ criteria was not met, which automatically led to a violation of article 5(1). (Pantea v Romania, 2003)

***c) Violation of article 5(3): prompt judicial review***

As pointed out in the chapter on the underlying legal principles, the scope of article 5(3) should be interpreted in this case in light of whether the prosecutor ordering pre-trial detention can be considered an ‘officer’ invested with judicial powers and whether the ‘promptness’ requirement was met. In regard to the first point, the Court noted that the prosecutor attached to the Bihor County Court acted as a prosecuting authority during the investigation phase, as he was the one in charge of initiating the criminal proceedings and drawing up the indictment. The Court also stressed that it is very important that the officer is independent from the executive, as this is one of the core principles of article 5(3). The handbook on the right to liberty issued by the CoE elaborates on this requirement, explaining that the officer entitled to exercise judicial power must be independent and impartial, therefore a prosecutor enforcing decisions of such nature cannot be considered compatible with the scope of article 5(3). The reason is that “*the two functions of investigation and prosecution could not be performed by the same person. The basic problem is that the prosecutor is a party to the proceedings and the person taking that role could not, therefore, be expected to be impartial when performing a judicial function in the same case*” (Macovei, 2002). In light of this, in the Romanian system, the prosecutor bringing the charges against the applicant was a member of the Prosecutor’s General Department, which was sub-ordinated to the Minister of Justice, violating thus the requirement of independence from the executive. Therefore, he cannot be considered a judicial officer for the purposes of article 5(3).

Secondly, the Court looked at the promptness of the procedure. Considering that the pre-trial detention period set out in the prosecutor’s order was thirty days from the date of the arrest, which took place on July 20th, and that Mr Pantea’s first hearing on the merits was held on November 28th, the total length of pre-trial detention exceeded four months. Based on its case-law, which found pre-trial detention periods of more than four days without judicial review incompatible with article 5(3) the ECtHR considered that the instant case did not satisfy the ‘promptness’ criteria either. (van Kalmthout & Knapen, 2009) Therefore, because none of the principles of law inherent to article 5(3) were met in imposing the deprivation of liberty, the Court found that there was a breach of the applicant’s right to liberty and security of person. (Pantea v Romania, 2003)

**4.2.2. Jiga v. Romania**

***a) The facts of the case and relevancy***

This case was finally decided in March 2010 and it displays violations of both the right to liberty and the right to a fair trial. More specifically, what is taken into consideration here is the excessive custodial measures taken by the authorities and the violation of the presumption of innocence. It is an illustrative case of the Romanian legal culture, as it exemplifies the practice of political and media pressure on courts and the lack of impartiality in high-profile cases.

To elaborate on the increased risk of unfair proceedings in high-profile cases, consideration will be given to the expertise of defence attorney Peter Robinson from the ICTY. He stated that it is more difficult to uphold the right to a fair trial in high-profile cases, where the prosecution has a vested interest in obtaining a conviction. On the other hand, in the average criminal case, the prosecution is more neutral and there is much more opportunity to conduct a fair trial. Nevertheless, Mr Robinson claims that usually prosecutors become invested in the case and it is hard for them to assess the facts of the case objectively. This bias may result in mistakes in the criminal investigation phase or in overcharging a persons with an offence he has not committed, which directly impacts on the fair nature of the trial. As mentioned before, this occurs more often in political cases. I asked Mr Robinson to expand on that, so he answered that in high profile cases there is a lot of pressure on the prosecution, the judges and even the juridical system as a whole to convict someone. He offered the example of the ICTY, which was established as a political court, where the decisions are mostly taken on political considerations and that really affects the right to a fair trial of the accused. (Robinson, 2013)

Referring to the facts of the case, Mr Jiga, the applicant, used to be the Director General of the Economic and Budgetary Directorate of the Ministry of Agriculture and Food. His colleague, D.F., and he were charged in 2002 with trading in influence, accepting and soliciting bribes, abuse of office in the detriment of the public interests, and were subsequently placed in police custody. Eventually, in February 2003, the co-accused were committed to trial proceedings at the Bucharest County Court. The applicant didn’t manage to challenge the lawfulness of his remand, as the domestic court argued that he posed a threat to public safety. It also extended his pre-trial detention on five occasions by thirty days, dismissing all his appeals, on grounds that he was a danger to public safety, that the damage produced by him was too extensive, that his criminal activities were organized and that D.F.’s and his conflicting attitudes would hinder the establishment of truth. The Court of Appeal eventually replaced his arrest with an order not to leave the country. However, between the end of 2002 and 2003, when he was kept in custody, Mr Jiga was brought to court in handcuffs and prison clothes usually worn by convicts. In January 2005, he was convicted for taking bribes and abuse of office, and his time serving in pre-trial detention was deducted from his sentence. Mr Jiga was released in 2006 on parole. (Jiga v Romania, 2010)

***b) Violation of article 5(3): excessive pre-trial detention***

The ECtHR noted that pre-trial detention is to be considered the period from the moment of the arrest until the moment of conviction, which in Mr Jiga’s case lasted for more than 11 months, from November 2002 to November 2003. Throughout the duration of his remand, the domestic courts were bound to review his detention and assess whether the danger he posed to society by committing the offences he was charged with has decreased with time. More specifically, the courts had a duty to justify the order to prolong his pre-trial detention by providing specific and concrete reasons in that sense. However, they failed to demonstrate how releasing the applicant, especially after the examination of witnesses, would negatively impact the criminal proceedings and would pose a threat to public safety. The only grounds offered by the judicial instances for keeping Mr Jiga in custody was the a brief reference to the seriousness of the charges brought against him, the harshness of the imposable sentence and the damage caused by the alleged offences. Furthermore, the courts refused to consider alternative measures of maintaining custody without giving any arguments as to why they decided that. The standard established by the ECtHR is that the scope of article 5(3) is not to give domestic courts a choice between pre-trial detention and other custodial methods, but to limit the duration of the deprivation of liberty even if the length of the criminal proceedings is reasonable. More specifically, an individual held in remand is entitled to a more expeditious trial and that he may be released before the trial finishes if there aren’t sufficient grounds for extending detention. (Centre for Human Rights, 1994) Therefore, because the defendant was held in remand for almost a year on no justifiable grounds, the ECtHR concluded that the applicant’s pre-trial detention was excessive, both in terms of length and necessity for it, and thus found a violation of article 5(3) by the Romanian authorities. (Jiga v Romania, 2010)

***c) Violation of article 6(2): the presumption of innocence***

First of all, it is important to mention that the presumption of innocence is not only expressed in the fact that the burden of proof falls with the prosecution, but it must also be fulfilled by conditions in which an accused is kept. An indication of that would be the UN Standard Minimum Rules for the Treatment of Prisoners, which provide that pre-trial detainees, who are unconvicted and presumed innocent, may be subject to different conditions and treatment than convicts. This also reflects in their right to wear civil clothes and to come before the court without leaving the impression of guilt through their appearance. (Centre for Human Rights, 1994) Having said that, the Strasbourg Court assessed the alleged violation of the presumption of innocence in light of the media campaign which portrayed the defendant as guilty, the statements of the prosecutor made to the press and the fact that he was forced to wear convict clothing during his trial. The Court found that in regard to the first two aspects his complaint was ill-founded. However, even though States are not obliged to treat convicts and pre-trial detainees differently, they have a duty not to take any measures that would indicate that individuals in remand are guilty. At the time, the national legislation provided that pre-trial detainees are not to be dressed as convicts; moreover, the authorities did not justify in any way this measure. The fact that Mr Jiga had to dress as a prisoner, in contrast to his co-accused who participated at the trial in civil clothing, emphasised the impression that he’s guilty. In this sense, the ECtHR found a violation of article 6(2) as the applicant’s right to be presumed innocent was breached. (Jiga v Romania, 2010)

#### 4.2.3. Riccardi v. Romania

***a) The facts of the case and relevancy***

This case was chosen as it contains a violation of both article 6 and 5. More specifically, the points of law which were in question are the length of pre-trial detention and the ‘trial within a reasonable time criteria’. The case was decided in July 2012 and concerns Mr. Riccardi, who was charged in October 2001 with embezzlement, forgery of accountancy papers and tax evasion. He was taken in police custody on the same day for 24 hours, as stipulated by article 148(c)(h) of the CCP, on grounds of reasonable suspicion that he committed these offences, that he posed a threat to public order, that he was punishable with more than two years of imprisonment for these charges, and that he was preparing to abscond. His pre-trial detention was repeatedly extended by interlocutory decisions by the Tg. Mures County Court because the complexity of the case required such a length of proceedings. His overall pre-trial detention lasted for more than two years and ten months, from the moment of his arrest in October 2001 until the 30th of August 2004. Throughout the entire duration of his pre-trial detention, Mr. Riccardi attempted numerous times, giving solid grounds, to obtain a release order, but was rejected every time by the Tg. Mures County Court and the Tg. Mures Court of Appeal. (Riccardi vs. Romania, 2012)

***b) Violation of article 5(3): length of pre-trial detention***

The applicant submitted that the length of his pre-trial detention was excessive and that the extension was not justifiable on grounds that he poses a threat to public order. In analysing the parties’ arguments, the Court notes that there are four acceptable reasons developed by case-law for placing a suspect into pre-trial detention, namely the risk that the accused will not appear on trial, that he would take action to prejudice the administration of justice if released, the likelihood to further commit criminal offences and the risk to cause public disorder. (Stevens, 2009) There is also the issue that the considerations for release must not be made in abstract, but by assessing the particularities of each case. Therefore, the extension of custody is allowed only if there are specific indications of “*a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty*.” (W. v. Switzerland, 1993) In light of this, the Chamber considers that the Romanian courts regularly and repeatedly extended Mr. Riccardi’s pre-trial detention by giving brief and abstract reasons for it, based only on the provisions of the CCP, but without explaining how the criteria entailed by the code applied to this specific case. The courts also used identical and stereotyped wording in giving their decisions, which does not comply with the requirements set forth by article 5. Furthermore, the grounds for keeping suspects in custody inevitably become less relevant as time passes (Macovei, 2002), so the Romanian judicial bodies were bound to examine the applicant’s situation in greater detail and provide specific arguments for his deprivation of liberty. In regard to whether Mr. Riccardi was a danger to public order, the domestic courts failed to argue why his release would pose a threat to society or the investigation. The severity of the offences, the context in which they were committed and the potential sentence cannot be the sole reasons for extending detention. Moreover, the detention remains legitimate only if there is substantial proof that public order is actually threatened by the suspect. (Reid, 2004) In the view of the Court, the severity of the potential punishment alone does not constitute sufficient ground for the risk to abscond. This risk must be assessed according to a number of relevant factors that indicate or confirm its existence; otherwise it cannot justify detention pending trial. Additionally, upon the request of the applicant, the courts were required to give consideration to alternative means of securing the defendant’s presence at the trial, which they did not. In conclusion, the Romanian courts failed to provide relevant and sufficient grounds for the extension of the pre-trial detention, which, in these conditions, cannot be considered reasonable and thus breaches article 5(3) of the ECHR. (Riccardi vs. Romania, 2012)

***c) Violation of article 6(1): reasonable time***

The trial of the applicant is still pending before the domestic courts after eight years, from the moment of the indictment in 2002. However, the criminal proceedings were initiated on October 19th 2001, so over nine years ago, and the case has still not been closed. The Court notes that there have been repeated procedural delays throughout the nine years and that some of them are due to applicant’s numerous requests for release. However, such an excessive length of proceedings cannot be justified by the complexity of the case and the adjournments requested by the applicant alone. The Court’s opinion is that these delays were the result of the domestic authorities’ negligence in dealing with the case, as they have an obligation to ensure that all parties to the trial do not undertake any steps that delay the proceedings. (Kuijer, 2013) In conclusion, the Chamber finds that the length of the proceedings is not in line with the ‘reasonable time’ requirement and leads to the violation of article 6(1) of the ECHR. (Riccardi vs. Romania, 2012)

**4.2.4. Ghiurau v. Romania**

***a) The facts of the case and relevancy***

The judgement for this case was delivered in April 2013 and it is reflective of judicial miscarriages regarding the lawfulness of detention. The applicant, Mr.Ghiurau was arrested by the Bihor Police Inspectorare intervention forces on November 27th 2006 at 4 p.m. in order to be taken from his home to Cluj, 200 km away. The applicant claims that the police did not show him any legal document justifying the arrest, nor did they inform him on the reasons for the arrest or where he was being taken. Furthermore, he claims being beaten until he lost his consciousness during the transport, so he had to be taken to the emergency ward of the Huedin Hospital on the way to Cluj. While in the hospital bed, he was hit again and handcuffed by the police officers. While all of this was happening, his lawyer was also there. He was immediately transferred by the Cluj police forces to the emergency ward of the Cluj hospital, where he stayed from 9:15 p.m. until 0:45 a.m. At that time, even though unable to speak due to the sedatives given to him, the applicant was taken to the Cluj Police headquarters for an interview. Only when he arrived there was he informed that he was arrested because he was suspected of repeatedly calling someone to threaten to kill them. The interview lasted until 1:52 a.m. Mr.Ghirau submitted a request on November 29th to be provided with a copy of the warrant, which he claims he did not receive. On June 22nd 2009 the Prosecutor’s Office attached to the Cluj County Court closed the criminal proceedings against the applicant because of the lack of evidence to prove his guilt. (Ghiurau v. Romania, 2012)

***b) Violation of article 5(1): the lawfulness of the detention***

The Court holds that, according to article 183(1) of the Romanian CCP, a suspect may be brought before a criminal investigation body on the basis of an order to appear if previously summoned. The fact that the government failed to bring proof of the summons before the Cluj authorities and that the prosecutor’s order did not include reasons to justify the deprivation of liberty, breaches compliance with the criminal procedure. The prosecutor’s decisions for the initiation of criminal proceedings are also contradictory. The one issued on February 12th 2008 explains that the reason for depriving the applicant of liberty without a prior summon was the necessity to interview him immediately. However, according to the decision from August 1st 2008, the order to appear was necessary because, although previously legally summoned, Mr.Ghirau refused to come to the police to give a statement. The Court also considers that the measure to take the applicant into custody and bring him 200 km away from his home for the sole purpose of giving a statement is unnecessary and fails to comply with domestic law, which is a fundamental requirement for upholding the right to liberty. (White & Clare, 2010) As a result of all the afore-mentioned, the Court contends that the deprivation of liberty was unlawful and that the Romanian authorities are in violation of article 5(1) of the ECHR. (Ghiurau v. Romania, 2012)

**4.2.5. E.M.B. v. Romania**

***a) The facts of the case and relevancy***

The case was decided in February 2013 and reflects excessive lengths of proceedings due to procedural delays. The applicant was the director of a refinery, a position which she left in March 2002. The following month she permanently moved from Romania to the United States. On the 18th and 22nd of July 2002 she received summons at her home address for questioning at the Police Inspectorate in Romania. On the 25th of July 2002, the prosecutor office attached to the Prahova Court of Appeal issued a pre-trial arrest warrant on grounds that the accused was absconding, that she faces imprisonment for more than two years for the charges brought against her and that she is a danger to public order. Subsequently, an international arrest warrant was issued against the applicant in August 2002. Although the applicant stayed outside of Romania, she challenged the legality of the warrant through her legal representative, who was present at the trial throughout its entire duration. (E.M.B. v. Romania, 2013)

***b) The criminal proceedings on the merits***

The indictment was initially registered by the prosecutor with the Prahova County Court in March 2003. Later, it was assigned to the Bacau County Court. However, the applicant requested the removal of jurisdiction for alleged bias on behalf of the court. In May 2005 the case was transferred to the Brasov County Court, which referred the case back to the prosecutor on grounds that the criminal investigation was prejudiced by procedural irregularities and that it should be carried out again in compliance with all the procedural requirements. As a result, the case was transferred until February 2010 to five different judicial instances, which repeatedly relinquished the jurisdiction in favour of another court. In the end, the HCCJ decided that the jurisdiction belonged to the Brasov District Court. (E.M.B. v. Romania, 2013)

***c) Violation of article 6(1): reasonable time***

In assessing if the length of the proceedings was reasonable, the Court takes into consideration three essential criteria: the complexity of the case, the conduct of the applicant and the conduct of the authorities. (Vitkauskas & Dikov, 2012) In light of this, the Court notes that the proceedings in the present case were initiated on July 25th 2002 and were still pending before the domestic courts when the ECtHR judgement was delivered. Moreover, during this lengthy period of time, only two judicial decisions were delivered and they strictly concerned procedural matters. Nothing has been decided based on the merits of the case. The delays were also caused by the fact that a significant part of the proceedings had to be carried out again due to the procedural irregularities identified by the district court, which took two years decide on them. At the moment the Court was analysing the instant case, the proceedings in Romania have lasted for more than ten years and new developments had still not taken place. The Court is of the opinion that the remittal of cases for re-examination exposes a serious systemic deficiency, as it is usually a sign of judicial errors committed by prosecutors or lower courts. Therefore, the Romanian authorities are to be held accountable for the delays, and not the applicant. Furthermore, even though the applicant was not in Romania throughout the duration of the proceedings, her lawyer represented her at the trial adequately, so none of the hearings was postponed because of the applicant’s failure to be present. The Court thus reaches the conclusion that the length of the proceedings was excessive and that the Romanian Government is in breach of the provisions of article 6(1) ECHR on ‘reasonable time’. (E.M.B. v. Romania, 2013)

## 4.3 Concluding remarks

This chapter shed light on the Romanian state practices which fall out of line with the requirements of articles 5 and 6 of the ECHR, as well as on the shortcomings of the judicial system which lead to such miscarriages of justice. They have been uncovered by consulting the public opinion and the opinion of defence attorneys and legal specialists, as well as ECtHR judgements on Romanian cases that entailed violations of the length of criminal proceedings, the presumption of innocence, and the lawfulness and length of pre-trial detention. In light of these breaches of the right to a fair trial and the right to liberty, the Romanian judicial system seems to have a weakened independence and impartiality, which are often compromised by the interference of the executive or media pressure. Another common cause that calls for the reformation of the judicial performance is procedural delays caused by domestic courts – *usually lower courts* – such as unnecessarily relinquishing jurisdiction, returning the case to the prosecutor for further investigation, deciding on previous procedural irregularities etc. There is also the problem of an overwhelming workload and staff shortage for some courts, which have to examine even forty cases per week. This inevitably leads to rushed decisions, which can negligently disregard the defendant’s rights. Furthermore, the vague nature of the rules governing the ‘equality of arms’ principle, the presumption of innocence and other rights inherent to a fair trial damage the effectiveness of judicial proceedings and the rule of law in Romania. Taking into consideration all of the aforementioned, the following chapter will look at the areas which demand reform and possible remedies in that sense.

# 5. Recommendations

In light of the findings of the previous chapters, several problem areas have been identified in regard to the right to a fair trial and the right to liberty in Romania. Therefore, considering the most pertinent state practices that fall out of line with the European standard of justice, this chapter sheds light on the aspects of the Romanian judicial system which need to be reformed and formulate recommendations for their redressal. Having said that, the issues that will be addressed are the length of proceedings, the length of pre-trial detention and the lawfulness of pre-trial detention.

It is important to note that since its ascension to the EU, Romania has undertaken major reform steps to modernize the performance of the judicial system. This has been pursued by adopting a new Criminal Code and the supplementary procedures in 2010, based on international norms. Now the code has been amended for a better compliance with the ECHR requirements and it will enter into force in July 2013. Nevertheless, the simple adoption of these legal texts is not sufficient to improve judicial proceedings, as that requires a lengthy process of implementation. Concerns have been expressed as to whether Romania possesses the necessary systems for the implementation of the new proposed measures, which will have to be intensified in order to achieve efficiency, transparency and consistency in the judicial process. (European Commission , 2012) In order to identify solutions to these problems, the recommendations provided by legal scholars, defence attorneys, NGOs (Fair Trials International, EuroMos), the EC, the CoE and its subordinate organs, the ECtHR, the Romanian Ministry of Foreign Affairs and the Romanian Ministry of Justice will be consulted.

## 5.1. The length of proceedings

**5.1.1. The problem**

In a general sense, the problem of excessive lengths of proceedings is increasingly recurring in Europe because of the judiciary strengthening as a ‘third power’. More specifically, the effort of the countries to strengthen the rule of law – *which was a requirement for Romania for its ascension to the EU* (Roos, 2007) *-* inevitably leads to more cases brought before the courts and thus a longer duration of the proceedings. (Drzewicki, 2006) According to the observations made throughout this study, most of the violations of the ‘trial within a reasonable time’ principle occur due to procedural delays or irregularities caused by the court itself.

However, the problem of speedy trials is double-sided. In this respect, Mr Peter Robinson asserts that adequate time and facilities are the biggest challenge he had to face because the complexity of the cases he worked on. The reason for that is the long investigation carried out by the prosecution, which creates a great amount of material that has to be examined by the defence before the trial. However, because it is expected that the accused is given a speedy trial, that pressure implies that there is very little time to prepare the case before going to trial. (Robinson, 2013) This double-standard calls for special attention to be afforded by the authorities in order to ensure the celerity of the trial without causing any damage or disadvantage for the defence.

#### 5.1.2. Proposed solutions

The ECtHR articulated in *Scordino v Italy* the remedies domestic courts are expected to enforce to reduce excessive lengths of proceedings. These can either be remedies which expedite lingering proceedings, either compensation systems. However, the first are considered to be more effective than the latter, as they can produce a more immediate result. In spite of this, states with systemic problems are encouraged to implement both types of redressal. (White & Clare, 2010)

Mr Bogdan Aurescu, the former Romanian Secretary of State, asserts that the issue of slow proceedings can be remedied “*by using procedural steps leading towards rendering of a decision by the same court or by a different one, thus making it possible for the interested party to obtain the taking of a measure which the dilatory judge […] failed to take*.” (Aurescu, 2007) He thus identifies three means of addressing breaches of the reasonableness of time. The first could be applied during the criminal investigation phase and it could consist either of a petition right before the prosecution authority handling the case or the possibility to lodge an appeal before the court holding jurisdiction for speeding-up the procedures. A concrete example in that sense would be the establishment of a deadline for the termination of the criminal investigation. Another proposed solution refers to compensation in kind upon finding a violation of the right to a fair trial by the competent courts. These could translate into the abandonment or inadmissibility of the prosecution investigation, the reduction or mitigation of the punishment, or acquittal, on considerations that the defence rights of the accused were violated by the excessive length. The last remedy acknowledged by Mr Aurescu is pecuniary or non-pecuniary compensation for the damages, which can be awarded together with the other aforementioned remedies. However, the request for such a measure should be filed with a higher court which has the competence to review the length of proceedings and decide whether the compensation is justifiable. The acceptable grounds for obtaining compensation for the damages are the overwhelming workload of courts, judicial malpractices or the denial of access to justice, judicial errors (or of any other authority involved in the proceedings) and violations of the reasonableness of time criteria. In the opinion of the author, this particular remedy would be effective because it would represent an incentive for courts to deliver judgements within a reasonable time. (Aurescu, 2007)

Leaving aside all the remedies for excessive lengths of proceedings, the ECtHR pointed out in *Scordino v Italy* that the best solution to lengthy trials is prevention. The CoE - *through the European Commission for the Efficiency of Justice (hereinafter the ‘CEPEJ’)* - produces regular recommendations, based on the evaluation reports of the effectiveness of the Member States’ judicial systems, which are designed to indicate specific causes of trial delays and best practices that could create solutions to the problem of lengthy proceedings. Nevertheless, due to the factual particularities of each country, the examples contained in the CEPEJ annual reports do not represent a universal formula to redress all the causes of lengthy trials, but are meant to provide a general framework for formulating national policies that can effectively address lengthy proceedings. (Roghina, 2012) For this purpose, the CEPEJ has developed a time framework program, which elaborates on the tools judicial authorities could use to conduct trials within an optimum and foreseeable time and avoid trial delays. More specifically, the CEPEJ recommends the establishment of timeframes for the measurement and comparison of trial delays in order to determine the difference between the desired outcome and the actual situation. (European Commission for the Efficiency of Justice, 2006) They should be established on the basis of an evaluation of the national and court system performance, as well as an elaborated case book. Each court should divide cases in groups reflecting the timeframe they required for resolution or since they have been pending (e.g. 1 month, 1 year etc) and assess them accordingly. (Superior Council of Magistrates , 2007) This will facilitate the conception of policies to remedy the causes of excessive lengths by following these steps: a) setting up realistic and measurable timeframes; b) enforcing the timeframe; c) monitoring and disseminating information; d) formulating procedural and case management policies; d) formulating caseload policies. The CEPEJ stresses the importance of having such instruments of measurement in determining the level of efficiency of domestic courts and in finding adequate solutions for improving the length of proceedings. (European Commission for the Efficiency of Justice, 2006)

In regard to the first policy – *setting up timeframes* – one author considers that these “*should reflect what is reasonable for citizens to expect for the prompt and fair conclusion of most cases of a given type. Standards should therefore be different for different types of cases. In determining what is reasonable for citizens to expect, court officials setting time standards should keep in mind that any elapsed time other than reasonably required for pleadings, discovery and court events, is unacceptable and should be eliminated*.” (Wittrup, 2006) Dr Pim Albers, one of the CEPEJ advisors, elaborates on the subject, offering concrete examples extracted from other states’ practices on what a reasonable timeframe entails. Thus, he explains that they can be set on national level, at court level and at the level of each individual judge. They also have to be proportional to the complexity of the case. In Norway, for example, the timeframe for all criminal trials is set at three months. However, this is only an indicator, as the time in which cases are resolved is highly dependent on the allocated resources. (Albers, 2007) In Romania, developing such a policy represents a high priority because the shortcomings of the system and lack of monitorization of lower courts demands an accurate evaluation of their performance. The implementation of the policy should translate into the establishment of time standards for the most important categories of cases, as well as enabling ECRIS – *the national Romanian digital case management system* - to measure their celerity and duration in more detail by breaking the information into a higher number of time intervals. (Wittrup, 2006) As timeframes are inter-organisational tools that help courts meet the timeliness of proceedings and manage the cases smoothly, it is important that they are formulated by means of comparison with similar judiciaries in other CoE members. This contributes to the development of realistic benchmarks and a uniform standard of justice in Europe through the promotion of common solutions and exchanging knowledge. (European Commission for the Efficiency of Justice, 2006)

Despite all of the aforementioned, the mere existence of timeframes is not enough for ensuring trials within a reasonable time; they also have to be enforced adequately. In order for that to happen, it is necessary to have an organisational environment that supports the implementation of timeframes by all involved parties and that is suitable to the institutional judicial structure and culture. This includes the relationship of authority between courts, the role of the chief judge and the level of internal independence of the judges. (European Commission for the Efficiency of Justice, 2006) One way timeframes could be enforced is by having the court manager or the chief judge of the Court of Appeal intervene when the timeframes are not respected. As an example, in Austria the heads of the courts receive information on how long all the cases have been pending and, according to it, they balance the workload or initiate disciplinary proceedings if that is the case. In Stuttgart, Germany, there is a system of inspections by which upper judges regularly visit lower courts and control all the cases that are not within the given timeframe. (Albers, 2007)

The success of this system directly relates to a proper and effective dissemination of information on the progress of the cases. This implies that not only quantitative data will be transmitted, but that it will have to be incorporated in comprehensive reports that monitor and emphasize the causes of lengthy trial proceedings. In that sense, it is important to distinguish between cases delayed because of periods of inactivity and cases actively pending before courts, as the first will have to be managed differently. It is also crucial that this data is made available to the entire court staff and that it is subjected to public scrutiny, in order to improve transparency, public trust and to obtain feedback on the performance of the court. (European Commission for the Efficiency of Justice, 2006) Therefore, it is advisable for the situation in Romania that the released information is compiled on the basis of the measurement of the overall length of criminal proceedings. The objective is to monitor the entire process from the investigation until the final decision and its enforcement as to identify the key phases of the proceedings and establish the time standard for each of them. (Wittrup, 2006)

Considering that a poor juridical administration can seriously affect the length of proceedings, the development of a comprehensive case management policy is recommended. This entails that a common procedural framework exists on national level, with specific guidelines set up on court level which allow for discretion in formulating rules consistent with the local customs. For an optimum implementation of this policy, the CEPEJ suggests that the procedures are designed according to how complex cases - *with a typical procedure being based on two hearings at the most (one preliminary and one for deciding on the merits)* – that the judges are actively involved in case management, and that a strict policy on minimizing adjournments is adopted. Other solutions include the enforcement of incentives or penalties in order to ensure that deadlines are met, the creation of a standard and concise template for written judgements and the use of information and communication technology to speed up hearings in complex cases. (European Commission for the Efficiency of Justice, 2006)

Considering that Romania was highly criticized for its weak judicial administration, lack of resources and overload of cases, the implementation of an effective caseload policy is essential for enhancing court-level performance. (Mendelski, 2011) According to Dr Albers, this can be achieved by closely monitoring the workload of courts and judges, using a flexible case assignment system, moving extra-judicial tasks from the competence of the judges to court staff and the stimulation of one-sitting judge benches rather than a panel in lower courts. (Albers, 2007) Apart from the time-saving measures, there are also ways to improve the flow of information and minimize the workload in domestic courts. At the moment, completing a system for measuring the workload, establishing productivity standards, measuring and establishing the equivalent of full time personnel in courts and adjusting the human resources policies so that the workload is allocated efficiently to the staff are high priorities for Romania. These practices must be implemented to ensure a more effective allocation of court staff and to assess the performance of the court with more accuracy. (Wittrup, 2006)

All the aforementioned mechanisms that can be implemented to improve and accelerate court proceedings are solutions for court backlogs; nevertheless, they are ineffective unless the celerity principle is respected by the judges themselves. In order for the reasonableness of the trial length to be upheld, one author claims that article 6 and article 233 of the new CCP must be corroborated, which means that after the first hearing of the parties the judge has to estimate the total length of the trial according to the circumstances of the case. This is for the purpose of evaluating at the end of the proceedings if the trial was carried out within a reasonable time. Another relevant provision is article 236 of the CCP, which confers the judges the responsibility to take all necessary legal measures to ensure the celerity of the trial and assign all parties to the procedures tasks relating to documentary evidence, other types of documents, responses to interrogatories, timely delivery of reports, etc. (Roghina, 2012)

## 5.2. Length and lawfulness of pre-trial detention

#### 5.2.1. The problem

According to author Lonneke Stevens, pre-trial detention is on the raise in Europe, although the ‘presumption of innocence’ principle indicates that authorities should be restrictive in putting suspects in pre-trial detention. In spite of that, European states are increasingly imposing it as an allegedly preventive measure, which has now become a strategy of the authorities to manage and control risk. (Stevens, 2009) An example would be the fact that between 2003 and 2007 only 2% of the cases used alternatives to pre-trial detention. (Cape, Namoradze, Smith, & Spronken, 2010) The excessive use of pre-trial detention also costs the EU around €5 billion per year, excluding the costs caused by the loss of jobs and children being taken into social care. (Fair Trials International, 2011)

Pre-trial detention also impacts on the mutual recognition principle in the EU. More specifically, the poor treatment of detainees and overcrowding of jails undermine the necessary trust for a smooth judicial cooperation between the Member States. A concrete example in that sense would be the fact that “*European Union mutual recognition instruments that have a bearing on detention will not work properly, because a Member State might be reluctant to recognise and enforce the decision taken by another Member State's authorities. It could be difficult to develop closer judicial cooperation between Member States unless further efforts are made to improve detention conditions and to promote alternatives to custody* *[…] The instruments in question are the Council Framework Decisions on the European Arrest Warrant, the transfer of prisoners, mutual recognition of alternative sanctions and probation and the European Supervision Order.*” (European Commission, 2011)

In the context of EU mutual recognition, it is important to examine Romania’s situation in regard to pre-trial detention and offer recommendations as to how it could improve its practices to comply with the EU requirements. In light of that, it has been noted by this study that the most common violations in Romania relate to the length of pre-trial detention and its lawfulness. The most recent statistics – *compiled by the International Centre for Prison Studies in March 2013* – show that 10.6% of the prison population in Romania consists of pre-trial detainees and that the occupancy level of the prison system is 119.3%. (International Centre for Prison Studies, 2013) Considering that prison overcrowding has proved to lead to higher public spending, degrading detention conditions and inhumane treatment in prisons, it is essential that the grounds on which the pre-trial detention is enforced are legitimate, lack arbitrariness and conform to the law. (van Zyl Smit & Snacken, 2009)

Furthermore, the need for reforms in Romania in this respect stems from the fact that the legal system had to go through a transition phase since the fall of the communist regime in 1989. More specifically, in those times the criminal procedure and substantive law were only formal and not applied democratically. The strongest actor in the criminal proceedings was the prosecutor and the shift from such a paradigm was lengthy and difficult. The CCP and the judiciary have undergone major reforms since, aimed at adapting the Romanian system to the international standards. However, these reforms have often been criticized for being random and not having a “*clear pursuit of specific parameters integrated into a practically functioning system.*” (van Kalmthout & Knapen, 2009)

#### 5.2.2. Proposed solutions

For the purpose of managing prison capacity and limiting the number of pre-trial detainees as much as possible, it is recommended that Romania establishes central registries which keep a record of all the individuals deprived of their liberty, including both suspects and convicts. Furthermore, it is crucial that courts ensure that the detention is administered only by competent and specifically designated authorities. In this sense, pre-trial detainees should not be placed in detention units managed by the authorities responsible for the investigation and apprehension of suspects, as that subjects them to mistreatment and forced extortion of evidence. If persons in custody were supervised by a separate chain of command, their exposure to such unlawful conduct would be considerably diminished. In other words, it is advisable that the authorities supervising pre-trial detainees are completely independent from the arresting and investigative bodies. As mentioned previously in this paper, it would be ideal if pre-trial detainees were kept in facilities established solely for that purpose. If there are absolutely no alternatives to detaining someone in police facilities, this type of detention should be imposed only for a very short period of time. (Centre for Human Rights, 1994)

In light of these propositions, the Romanian State should ensure, both through substantive law, as well as practice, that pre-trial detention is a last resort measure, by introducing practical alternatives and mechanisms to speed up the proceedings. Moreover, for the purpose of avoiding arbitrary, unlawful or excessive detention, it is important that the legal representative of the defendant is adequately prepared to challenge the necessity of the measure. This could be accomplished by setting up a system which ensures that lawyers deliver qualitative services and are pro-active throught the entire duration of the criminal proceedings. Two measures with potential for improving the performance of defence attorneys would be offering higher remuneration for lawyers in the legal aid system and training prosecuting and police bodies to be aware of and respect human rights. (Cape, Namoradze, Smith, & Spronken, 2010) It is important to note, though, that the responsibility to provide a strong Bar Association also falls with the courts and the judges, who, according to Mr. Peter Robinson, should ensure that well-trained, professional and experienced lawyers are provided to clients. If the attorneys meet these conditions and if they are impartial and free from any kind of pressure, they will do their best make sure that the rights of their clients are respected. (Robinson, 2013)

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In regard to judicial reviews, most CoE members have agreeed that they should be carried out on a monthly basis. However, the problem of busy court schedules and lack of resources severely affects the effectiveness of the monthly reviews, as they usually stereotipically reiterate previous decisions. (Fair Trials International, 2011) Therefore, such judicial reviews do not actually contribute to reducing periods of delays or pre-trial detention. For that purpose, the recommendantions elaborated for reducing the length of proceedings and court congestions should be taken into consideration.

The solutions described in this chapter are not exhaustive and cannot prevent unlawful or arbitrary detention alone. In the opinion of author Lonneke Stevens, it would be more realistic to create a new, more practical theoretical framework for pre-trial detention. For this purpose, the following questions should be addressed: a) the accepted grounds on which a judge or a prosecutor decides to detain a suspect; b) the relationship between pre-trial detention and the punishment, i.e. is it used in fact as a form of punishment?; and c) how does the length of pre-trial detention affect the actual punishment? Assessing these issues in the context of today’s ‘risk society’ could significantly adapt the legislation to the current reality and thus develop new legal principles that would better protect the right to liberty and security of person. (Stevens, 2009)

Advancements in this sense have taken place within the EU. The European Parliament released in February 2011 a Written Declaration on infringement of the fundamental rights of detainees in the EU, which called the EC to propose a legislation which would develop *“minimum standards for prison and detention conditions and a common set of prisoners' rights in the EU*”. (European Commission, 2011) The EC thus issued a Green Paper that analyses the relationship between detention conditions and the mutual recognition mechanisms – *e.g. the European Arrest Warrant (hereinafter the ‘EAW’) and pre-trial detention -*  and proposes solutions to regulate this area. (European Commission, 2011)

The non-governmental organisation Fair Trials International (hereinafter ‘FTI’) responded to the proposals of the Commission in its October 2011 report compiled of cases from 11 FTI clients and a comparitive examination of pre-trial detention in 15 EU members. The report also looked at ECHR case-law in regard to article 5 of the Convention and, on the basis of a comprehensive analysis of these three elements, made four recommendations, detailed in the following. (Fair Trials International, 2011)

1. ***Minimum standards for pre-trial detention***

The EU should establish minimum standards for the imposition of pre-trial detention. This is recommended in light of the fact that all EU Member States are signatories to the ECHR, and thus bound to uphold the scope of article 5. The failure of states to develop practices in line with the ECHR requirements can lead to substantial costs for the defendants and their families, as well as the society as whole. Therefore, it is essential that clear and enforceable laws, designed to stop countries from imposing unnecessary pre-trial detention, exist. (Fair Trials International, 2011)

1. ***Effective implementation of the European Supervision Order***

The Member States should effectively implement the European Supervision Order (hereinafter ‘ESO’), in a manner that guarantees real alternatives to pre-trial detention and that it operates evenly throughout the Union. (Fair Trials International, 2011) This is important because the ESO – *which entered into force at the end of 2012* – was created to allow the supervision of suspected non-residents in the Member State where they reside until the case is decided in the Member State where they committed the offence. The purpose of this instrument is to reduce the number of non-resident EU citizens detained in foreign facilities and thus also decrease jail overcorwding. (European Commission, 2011)

However, the ESO also demands Member States to recognize a decision on remand by a another EU country as an alternative to pre-trial detention. Although in principle the ESO was designed to strengthen mutual trust, in practice there is a danger that it will be used only by those countries who already trust each other and that the defendants will not be treated equally throught the EU. That is why the legislation on this issue should be drafted in a way that ensures a consistent, uniform and widespread enforcement of the ESO. Unfortunately, many EU countries are not ready yet to use the ESO and, for that reason, its operation has to be supported by adequate training offered to judges and defence lawyers in regard to its use. (Fair Trials International, 2011)

1. ***Deferred surrender under the EAW***

The EAW is a legal instrument which requires Members States to automatically recognize, with minimum formalities, the request of any other EU national authority to surrender a suspect. (European Union , 2011) Having said that, the negotiated deferred surrender of suspects should be used to prevent unnecessary pre-trial detention post-extradition. More specifically, in light of the right to an expeditious trial, in cases where pre-trial detention can be expected to be excessively long, Member States enforcing the EAW can object to an instrument that facilitates the rapid surrender of suspects pending trial if they “*risk spending months awaiting trial in a foreign prison when they could have remained in their home environment until the authorities in the issuing State were ready for trial*” (European Commission, 2011) This should also be allowed for suspects who meet the supervision conditions in their home country and can stay there until the case is ready for trial in the state where they allegedly committed the offence. (Fair Trials International, 2011)

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1. ***The one year maximum pre-trial detention limit***

The EU should establish a flexible one year maximum for pre-trial detention. Given the right to a trial within a reasonable time, the FTI is of the opinion that depriving someone of their liberty, who has yet not been found guilty, for more than a year is unreasonable, unless exceptional circumstances demand it. On the other hand, some respondents to the study conducted by FTI considered that a maximum limit for the length of pre-trial detention is not sufficient for preventing arbitrary detention unless minimum standards for prompt and regular reviews of the detention are introduced. The preparotory stages for such legislation should be based on a targeted research conducted by the EC as to why such wide discrepancies exist between Member States in terms of both the length of pre-trial detention and the decision-making process when the detention is imposed or reviewed. The results of this reasearch could be further used to develop a program of information and best practices exchange between Member States, with the objective of achieving a balanced standard of justice throughout the EU. (Fair Trials International, 2011)

## 5.3. Concluding remarks

In light of the observations made throughout this study, several key recommendations can be formulated. Thus, in regard to unreasonably lengthy trials, two types of solutions are applicable: remedies that address the issue post-trial (the compensation systems) and remedies that could repair the incompatibilities of the Romanian judiciary with the requirements set out by the ECHR and the malfunctions that lead to them. For a successful outcome in the problems areas analysed, these remedies should be corroborated in comprehensive reforms of the judiciary and the legal framework. Secondly, remedies for the issue of the length and lawfulness of pre-trial detention have been recommended. These include instruments that could be developed in the national jurisdiction, as well as policies established by the EU which could be implemented on the basis of subsidiarity.

# 6. Conclusion

The objective this study set out to achieve was to identify the causes of the most recurring miscarriages in Romania in regard to the right to a fair trial and the right to liberty and security of person and formulate recommendations that address them. First, the context which urges Romania to address these issues was examined and led to the conclusion that the breaches discussed hinder the development of the rule of law in the country, which is one of the key-elements to Romania’s complete integration in the EU. The second step was to build a methodology suitable the purpose of the paper. Thus, the extent to which defendants benefit from fair proceedings in criminal cases in Romania implied the comprehensive evaluation of two fundamental rights, namely the right to a fair trial and the right to liberty and security of person. The research tools used engaged the analysis of the national and European legal instruments which regulate the two rights, as well as expert opinions from relevant stakeholders (NGOs, the EU, the Council of Europe and national ministries), case-law, specialised legal literature and interviews with defence attorney. The corroboration of these research instruments led to the conclusion that the particular issues which need to be redressed are the length of criminal proceedings, the length of pre-trial detention and the lawfulness of pre-trial detention.

On the basis of these findings, it has been revealed that the Romanian judiciary requires more independence and impartiality, a clearer legislative framework, more material resources, better training of the judges and counsels, as well as a more efficient management of time, cases and court staff. The recommendations detailed in the previous chapter addressed these particular aspects, calling for more action in establishing minimum standards of compliance with European law. It has been thus determined that this could be achieved by implementing procedural and managerial mechanisms that would reduce the length of proceedings and of pre-trial detention, as well as combat unlawful and arbitrary deprivation of liberty, inhumane detention conditions and overcrowding of jails.

However, the simple adoption of laws and procedures which theoretically protect the right to a fair trial and the right to liberty is not sufficient for upholding these rights. The effective and immediate implementation of these principles of laws and remedies by the national authorities is required for compliance with the ECHR criteria. However, the achievement of a high standard of justice is not possible without the willingness and professional conduct of judges and attorneys, as they are the most responsible for ensuring that the rights of defendants are protected in the spirit of the presumption of innocence. Lastly, as a reminder for future possibilities in strengthening the rule of law in Romania, consideration should be given to Mr Radu Chirita’s assertion that, in order to have fair trials, the delimitation between the function of a judge and the one of a prosecutor should be fully respected. Thus, the courts should, first and foremost, uphold the binding nature of the law not only for the defendants, but also for prosecutors. (Chirita, 2013)

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# Appendix

## Transcript of interview with Mr Peter Robinson

***Q: Mr Robinson, can you tell me a little about your professional experience?***

A: Yes, I became a prosecutor when I graduated from law school and I did that for ten years. After that I was a criminal defence lawyer for thirteen years and for the last thirteen years I have been defending people at international tribunals.

***Q. As a defence lawyer, you probably have a lot of knowledge about the right to a fair trial and what conducting a fair trial means. So there are several criteria which have to be met for a fair…for a trial to be conducted fairly: access to court, equality of arms, time and facilities to prepare the case, the presumption of innocence etc. From your experience, which one of these requirements proves to be the most problematic in court proceedings?***

A: In my experience, adequate time and facilities is the biggest problem for the defence, mostly because I’m working in complex cases and the prosecution conducts a long investigation before they charge the person and then the person is arrested and brought to the tribunal and immediately expected to have his trial…a speedy trial. So the pressure to have a speedy trial…uh…it’s hard to have adequate time and facilities under that pressure.

***Q: Ok. Is the right to a fair trial hard to uphold in your opinion? Have you encountered many difficulties in conducting fair trials, regardless whether you were working for the prosecution or the defence?***

A: I think it’s hard to uphold the right to a fair trial in political cases or cases which are high profile because the prosecutor has a vested interest in getting a conviction. In the average case, where the prosecutor is neutral and the police are neutral, they can have much more success at having a fair trial. So that’s why I think there are difficulties.

***Q: I see…What do you think is the biggest cause of trial delays in national jurisdictions? Are they usually caused by procedural steps that have to be taken (such as establishing the jurisdiction of the court), by the defence or by the prosecution?***

A: I would say that most of the procedural delays are requested by the defence. Sometimes because of the prosecution not having given the disclosure that was required, so the cause may be the prosecution, but the it’s the defence that is making a request…and the biggest cause of trial delays in national jurisdictions may be, in some courts, the congestion of the courts themselves, but in particular cases that’s usually because the defence haven’t had enough time to investigate the case from their side.

***Q: I see. So considering that the burden of proof lies with the prosecution, have you noticed in your years of practicing law that the bias on the part of the prosecution in regard to the guilt of the defendant negatively impacted the fair nature of the trial?***

A: Yes. I think that many prosecutors become invested in the case and it’s difficult for them to see objectively that the person…that they made some kind of mistake or overcharging and the person is not guilty of all those things that they’ve charged him with. So in that way the person has less of a fair trial when the prosecution is more invested in trying to ensure that there is a conviction even if the person is not guilty.

***Q: Does that usually occur also in cases which are more political, as you mentioned previously?***

A: Yes, yeah…

***Q: Have you come across many cases of unlawful detention throughout your career?***

A: No because in the United States they…you have to go before a judge very quickly after you’re arrested, and so uhm…the detention is usually no more than 48 hours before a judge has to review the situation about bail. So…

***Q: I see. Because, for example, in Romania there have been a lot of problems with extensions of pre-trial detention. I mean the maximum length that can be reached is 180 days, but that is still an enormous length of time.***

A: Yes, yeah…that is. Well in the U.S. also there can be detentions of up to those periods of time, but they have to make a finding that the person is likely to flee if they are released or if they’re a danger to the community.

***Q: Oh I see. Is it usually difficult for the defence to challenge the lawfulness of arrest warrants or pre-trial detention in the national jurisdiction, if that is the case?***

A: Yes. Very! The lawfulness of arrest warrants…frequently the answer when you challenge that is that you should have a trial and at the end of the trial it will be decided if there’s enough evidence or not so that they don’t want to test the lawfulness of the arrest until there’s been a full trial. Meanwhile, the person can often be detained, so it’s difficult to challenge the lawfulness of the arrest in the first place without going through the whole trial.

***Q: From your experience as a defence lawyer, are the accused usually aware of their rights? If not, do the authorities ensure that they are properly informed and that they acknowledge them?***

A: Uhm, most people are not really aware of their rights. In my own experience in the U.S., people become more aware of their rights from television shows about crime, so they tend to find out something about that, but not necessarily correctly. And the authorities do ensure that people are informed of some rights, such as the right against self-incrimination. So whenever someone is arrested, they have to be advised in the U.S. about their rights not to answer any questions that might incriminate them. But other rights…people, you know, frequently don’t know about them and they’re not required to be informed. So in general I would say that people aren’t as aware of their rights as they should.

***Q: I see…When someone is arrested, are they informed of their rights in written form also or just orally?***

A: In the United States they’re informed orally and then, within the 48 hours when they appear before a judge, then they’re given the written…the copy of the charges and they’re also informed orally of their rights.

***Q: Ok, I see. Did you encounter many difficulties as a defence attorney in working on a case with the prosecution, the police and the courts? For example, did you often have problems with the disclosure of documents or with the time that you were given to prepare the case?***

A: Uh, yes. Often we have problems with the disclosure of documents being either late or incomplete, so we have to start to investigate once we receive those documents. It’s not just a question of receiving the document and then just using it five minutes later. You have to read it and discuss it with the client and investigate it and…whenever there’s like disclosure, it always causes problems for the defence.

***Q: I see. In many cases in Romania, there is a lot of political pressure on the authorities to convict someone of a crime, even if that comes to the detriment of the defendant’s rights. In your experience, has this type of political pressure ever interfered with the criminal proceedings to such an extent that it compromised the fair nature of the trial?***

A: I would say ‘yes’. In the United States sometimes when there’s a high profile case, there’s a lot of political pressure on the prosecution, the judge, and sometimes the juridical system, to convict someone and that really affects the right to a fair trial. And secondly, in the tribunal *(N/A. the ICTY*), it’s a political court to begin with, and so there’s a lot of political pressure, decisions are made based on political considerations here in the tribunal and I’ve seen that also detrimentally affected the right to a fair trial.

***Q: Ok and the last question: What can domestic courts do to guarantee fair proceedings for the defendants appearing before them?***

A: Ok. To me the most important thing is that they train and make available experienced lawyers to be able to defend people’s rights. And if lawyers are well trained and independent and free from any kind of pressure, then they will guarantee that the rights of the accused are respected.

***Q: Ok, thank you very much. This concludes our interview.***

A: Ok, you’re welcome.

## Transcript of interview with Mr Radu Chirita

***Q: Can you tell me a little about your professional experience as a lawyer?***

A: I collaborated with a law firm from 2002 until 2008. In 2008 I became a lawyer at that firm and in 2011 I established, together with two colleagues, my own law firm. Generally, I practice criminal law and human rights law. Over time, I have worked on more than 200 criminal cases.

***Q: There are several criteria which have to be met in order for a trial to be conducted fairly: access to court, equality of arms, adequate time and facilities to prepare the case, the presumption of innocence etc. From your experience, which one of these requirements proves to be the most problematic in court proceedings?***

A: Probably the equality of arms and, as a consequence, the presumption of innocence (*N.A. are the most challenging*). Not even the law ensures equality of arms in criminal matters, and the practice of the courts even less. Any judge who is asked about this considers the lack of presumption of innocence to be a perfectly normal reaction; as long as the accused has been charged with a criminal offence, he must have done something.

***Q: Is the right to a fair trial hard to uphold in your opinion? Have you encountered many difficulties in conducting fair trials?***

A: I don’t think it is hard to uphold the right to a fair trial, but for that we need judges that are free from the mentality of public servants. We would also need judges and prosecutors that can understand the text from the Constitution, which primarily binds them to ensure the fundamental rights of persons, and not to be the first ones to violate them. I don’t think I had many trials that were conducted fairly, except the ones where the defendant pledged ‘guilty’. Then, suddenly, the procedure is entirely respected.

***Q: What do you think is the biggest cause of trial delays in the national jurisdiction? Are they usually caused by procedural steps that have to be taken, by the defence or by the prosecution?***

A: I don’t believe that, in general, Romania has a problem regarding the length of trials. Usually, when the proceedings are prolonged, it is because of the large number of case files assigned to each judge, the lack of court rooms, the unjustified volume of cases and the unreasonably big number of witnesses testifying at the request of the prosecutor.

***Q: Considering that the burden of proof lies with the prosecution, have you noticed in your years of practicing law that the bias on the part of the prosecution in regard to the guilt of the defendant negatively impacted his fair trial rights?***

A: Almost always. I have a case in which two defence witnesses have admitted to the judge that they received money from the aggrieved party in order to testify and, in spite of all that, the prosecutor denies that he made a mistake and continues the criminal action.

***Q: Have you come across many cases of unlawful detention throughout your career?***

A: Yes, many. In the majority of the cases in which a person is charged with a significantly severe offence, the arrest is imposed as a form of anticipated punishment, rather than a preventive measure.

***Q: Is it usually difficult for the defence to challenge the lawfulness of arrest warrants or pre-trial detention in the national jurisdiction? If that is the case, could you please elaborate on the subject and maybe offer an example?***

A: It is almost impossible. During the arresting procedure evidence can’t be administered, except the ones from the file compiled by the prosecutor until that moment, who provides whatever evidence he want. For example, I had a case where pre-trial detention was proposed on the basis that a person accepted bribery on a certain date and I had 200 witnesses who have seen him on that day at a wedding 500km away. I couldn’t bring any witness in court until the trial on the merits and the Office of the Prosecutor refused to hear him. Thus, the person was arrested on the basis of a false accusation.

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***Q: From your experience as a defence lawyer, are the suspects usually aware of their rights? If not, do the authorities ensure that they are properly informed of their rights and that they acknowledge them?***

A: No, they are not aware. However, they are usually properly informed by the authorities regarding the fundamental rights they have: legal assistance, the right to silence etc.

***Q: Did you encounter many difficulties as a defence attorney in working on a case with the prosecution, the police and the courts? For example, did you often have problems with the disclosure of documents or with the time that you were given to prepare the case?***

A:There is no prosecutor who gives you access to the file during the criminal investigation, which makes the work very difficult in that phase. Attorneys has the right to participate while the statements are taken during the criminal investigation and, often, this is how they find out what the file contains. Otherwise, the file is presented only at the end of the criminal investigation phase. There are many problems regarding the preparation of the case, more precisely the real access to the file. Copying it is very difficult and expensive because the archives have a program of approximatelly three hours per day, exactly when any lawyer’s file is assessed in court.

***Q: In your experience, has political pressure ever interfered with the criminal proceedings to such an extent that it compromised the fair nature of the trial? If yes, could you give me an example?***

A: Yes, many times in the National Anti-Corruption Dirrectorate cases.

***Q: What is, in your opinion, the biggest challenge the Romanian judiciary is facing in regard to the protection of the right to a fair trial and the right to liberty and security of person?***

A: The delimitation between judges and prosecutors (*N/A: is the biggest challenge*). Until we don’t succeed in separating the two professions, there won’t be any fair criminal trials in Romania.

***Q: What can domestic courts do to guarantee fair proceedings for the defendants appearing before them?***

A: They can respect the binding nature of the law also for prosecutors, and not only the accused.

1. European Convention on Human Rights: a product of the Council of Europe, not to be confused with the EU or any of its institutions. [↑](#footnote-ref-1)