

## THE FUNDAMENTAL RIGHT TO INFORMATION WITHIN THE CRIMINAL TRIAL IN ROMANIA

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**ABSTRACT:** *The right to information of a person who is subject to criminal proceedings is circumscribed to the fundamental right to information provided by Article 31 of the Romanian Constitution, but it presents a number of particularities, specific to the criminal process, particularities that will be analyzed in this paper.*

**KEY WORDS:** *Romanian Criminal Procedure Code, the right to information, criminal trial, right to defence, defendant; Directive 2012/13/UE*

**JEL CODE:** *K38, K 40*

The right to information has the status of a fundamental right acquired as a result of international acknowledgment through the established regulations, acknowledgment doubled by recognition at the national level.

Thus, in the Charter of the fundamental rights of the European Union<sup>1</sup> the freedom of expression and information is acknowledged as a fundamental right consisting of the right of any person to the "freedom of expression" understood both as a "freedom to hold opinions" and "and impart information and ideas without interference by public authority and regardless of frontiers" (Article 11 paragraph 1). In addition, the worker's right to information is also acknowledged as a fundamental right, appreciated as a valence of the right to solidarity (Article 27) (Valea, 2014, pp. 66-67)<sup>2</sup>.

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<sup>1</sup> It brings together in a single text all *personal, civic, political, economic and social rights* enjoyed by the people of the European Union and has become mandatory since the entry into force of the Treaty of Lisbon. In December 2009, once with the entry into force of the Lisbon Treaty, in the content of which was included, the Charter of Fundamental Rights of the European Union was given the same binding legal force as to the treaties. At the same time, since the European Union acceded to the European Convention on Human Rights, consequently, the European Court of Human Rights in Strasbourg has become competent to also control the acts of the European Union  
([http://ec.europa.eu/justice/fundamental-rights/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/index_en.htm)).

<sup>2</sup> The *solidarity* category includes: workers' right to information and consultations; the right to negotiate and to participate in collective actions; the right to access placement services; protection in case of unjustified dismissal; the right to fair and equitable working conditions; banning child labor and protecting young people at work; protection of family and professional life; social security and social assistance; access to services of general economic interest; environment protection; consumer protection - for details see Daniela Valea, *Drept*

Within the field of international regulations there should also be mentioned Article 19 of the Universal Declaration of Human Rights ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers")<sup>3</sup>.

The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>4</sup> has made a significant contribution to strengthening the fundamental right status of the right to information, with direct implications in the area of criminal procedures, being taken into consideration several articles from this text: Article 5 regarding the right to liberty and security (paragraph 2 - "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him") Article 6 regarding the right to a fair trial (paragraph 3 section a - "everyone charged has, above all, the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him"); Article 10 regarding the right to freedom of expression (paragraph 1 - "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.").

Moreover, in order to outline the status and content of the right to information in the context of certain criminal proceedings, in particular, the provisions of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (Udroiu, 2016, pp. 45-46)<sup>5</sup> apply. It is a legislative act intended to establish common minimum norms regarding the right to inform the persons involved in a criminal procedure, especially suspects. The right of the Union legislator to intervene by establishing common minimum norms in the matter of the rights of persons in a criminal procedure is stipulated by Article 82 paragraph 2 of the Treaty on the Functioning of the European Union<sup>6</sup>.

Directive 2012/13/EU of the European Parliament and of the Council develops the rights provided in the Charter, in particular, Article 6, 47 and 48 thereof, by relying on Article 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights.

Directive 2012/13/EU of the European Parliament and of the Council imposes a number of main coordinates of the right to information in criminal proceedings:

1. The right to information about rights (Article 3) implies the obligation of Member States to establish those measures designed to ensure prompt information on a minimum of procedural rights to the suspected or accused persons, such as (a) the right to be

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*constituțional și instituții politice - în dreptul român și dreptul comparat*, Universul Juridic Publishing House, Bucharest, 2014, pp. 66-67.

<sup>3</sup> Adopted by Resolution no. 217 A (III) of 10 December 1948 by the General Assembly of the United Nations and signed by Romania on 14 December 1955.

<sup>4</sup> Adopted in Rome on 4 November 1950 and ratified by Romania  
([https://www.echr.coe.int/Documents/Convention\\_ROM.pdf](https://www.echr.coe.int/Documents/Convention_ROM.pdf))

<sup>5</sup> Published in the Official Journal of the EU, L no. 142 of 1 June 2012  
(<https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32012L0013&from=EN>). For details, see Mihail Udrouiu, *Procedură penală. Partea generală*, C.H. Beck Publishing House, Bucharest, 2016, pp. 45-46.

<sup>6</sup> Published in Official Journal C 326/49 of 26 October 2012

(<https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012E/TXT&from=en>).

assisted by a lawyer; (b) any right to free legal advice and the conditions for obtaining such counseling; (c) the right to be informed of the prosecution, in accordance with Article 6; (d) the right to interpretation and translation; (e) the right to remain silent. As a guarantee, the obligation of the Member States to ensure that the above information is provided in such a way as to be accessible and understandable to everyone is also established.

2. The right to information about the prosecution (Article 6) implies the obligation of the Member States to ensure that, within criminal proceedings, the suspects or accused persons receive clear and detailed information about the criminal act, the reasons for the arrest or detention. (if applicable), the legal classification of the criminal offence, the nature of participation by the accused person, including any changes in the respective information.

3. The right of access to the materials of the case (Article 7) implies the obligation of the Member States to ensure that, in the criminal proceedings, the suspects or accused persons have access to the documents related to the criminal case, in the possession of the competent authorities, as well as and to all the means of evidence in their possession, regardless they are for or against suspected or accused persons. The right of access to documents and evidence can be restricted by observing the guarantees of a fair trial. Furthermore, the right of access is granted free of charge.

At the national level, Article 31 of the republished Romanian Constitution<sup>7</sup> regulates the right to information as a fundamental right, thus guaranteeing the person's access to information of public interest, which implies the obligation on the part of the authorities and the mass media to ensure correct, prompt, non-discriminatory information (Valea, 2014, p. 76). Considering the purpose pursued, by raising this right to the rank of fundamental law and the special relevance it acquires, some authors even included it in the category of individual freedoms, alongside the right to life as well as physical and mental integrity, individual freedom, right in the protection of the intimate, family and private life, the inviolability of the domicile and of the residence, the secret of correspondence and other means of communication, the freedom of conscience and the religious freedom, the most important category that includes those fundamental rights and freedoms having as object the protection of the human person and the privacy from any outside interference (Drăganu, 2000, p. 154); and by others, in the category of social-political rights (Safta, 2014, pp. 236-237)<sup>8</sup>.

At the level of ordinary legislation, specific aspects regarding the exercise of the right to information and its particularities are regulated by: Law no. 544/2001 regarding the free access to information of public interest<sup>9</sup>; G.E.O. no. 24 of 5 March 2008 regarding

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<sup>7</sup> Adopted in 1991 and revised by Law no. 429 approved by the Romanian Parliament on 18 September 2003 and published in Official Gazette no. 758 of 29 October 2003, after publication in the Official Gazette of the Decision of the Constitutional Court no. 3 of 22 October 2003 regarding the confirmation of the results of the national referendum.

<sup>8</sup> It was also considered that this fundamental right is part of the category of social and political rights – see Marieta Safta, *Drept constituțional și instituții politice*, vol. I *Teoria generală a dreptului constituțional. Drepturi și libertăți*, Hamangiu Publishing House, Bucharest, 2014, pp. 236-237.

<sup>9</sup> Law no. 544 of 12 October 2001 on free access to information of public interest, published in the Official Journal no. 663 of 23 October 2001, with subsequent amendments and supplements.

access to his/her own file and to exposing Security political police<sup>10</sup>; Law no. 182/2002 regarding the protection of classified information<sup>11</sup>; Law no. 135/2010 on the Criminal Procedure Code<sup>12</sup>, etc.

Within the criminal trial, the fundamental right to information has received special regulation. Obviously, there are several texts in the current Romanian Criminal Procedure Code<sup>13</sup> that regulate the statute, the forms and the exercise of the right to information within the course of criminal proceedings: Article 4 Criminal Procedure Code; Article 10 Criminal Procedure Code; Article 83 Criminal Procedure Code; Article 145 Criminal Procedure Code, Article 352 Criminal Procedure Code.

In the context of the criminal proceedings in Romania, the right to information has a dual nature: firstly as a component element of the presumption of innocence and the right to defense (Udroiu, 2016, pp. 44-47) and, secondly, of the right granted to certain participants in the criminal trial.

According to Article 4 Criminal Procedure Code, the presumption of innocence has the value of "corollary of the criminal trial" and becomes consistent only if the person charged with a criminal offence "was given all procedural guarantees regarding the equality of arms, the right to information, the principle of contradictory, the right to remain silent and the right against self incrimination, the administration of evidence "(ECHR, *Salabiaku v. France*, Decision of 7 October 1988, § 28)<sup>14</sup>.

According to Article 10 Criminal Procedure Code, the right to defense is granted and guaranteed to all the main parties and the main procedural subjects throughout the criminal trial, which can be exercised personally or through a lawyer, the right to defense also having a constitutional basis, by Article 24 paragraph 1 in the Constitution of Romania republished. The content of a right to effective defense assumes the existence and guarantee of certain essential coordinates (Volonciu, 2014, p. 35): the right of all parties and main procedural subjects to defend themselves or to be defended by a lawyer throughout the criminal trial, without any restriction (Article 10 paragraph 1 Criminal Procedure Code); the right of the parties, the main procedural subjects and the lawyer to benefit from the time and facilities necessary for the preparation of the defense (Article

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<sup>10</sup> G.E.O. no. 24 of 5 March, 2008 regarding the access to one's own case file and to exposing Security as political police, published in the Official Gazette no. 182 of 10 March 2008 (repealed Law no. 187 of 7 December 1999), approved with amendments and completions by Law no. 293 of 14 November 2008 (published in the Official Gazette no. 800 of 28 November 2008), with subsequent amendments and supplements.

<sup>11</sup> Law no. 182 of 12 April 2002 on the protection of classified information, published in Official Gazette no. 248 of 12 April 2002, with subsequent amendments and supplements, including by Law no. 253 of 19 June 2013 for the implementation of Law no. 135/2010 regarding the Criminal Procedure Code and for the modification and completion of some normative acts that include criminal procedural provisions, published in the Official Gazette no. 515 of 14 August 2013.

<sup>12</sup> Law no. 135 of 1 July 2010 on the Criminal Procedure Code, published in the Official Gazette no. 486 of 15 July 2010, with subsequent amendments and supplements.

<sup>13</sup> The Criminal Procedure Code of Romania - adopted by Law no. 135/2010, published in the Official Gazette no. 486 of 15 July 2010 and entered into force on 1 February 2014, with subsequent amendments and supplements.

<sup>14</sup> Criminal judgement no. 733 of 13 March 2008, of the Craiova District Court - <http://jurisprudentacedo.com/Schimbare-incadrare-juridica.-Interpretarea-probelor.-Aplicarea-prezumtiei-de-nevinovatie-prev.-De-art.-6-CEDO.JURisprudenta-Curtii-EDO-privind-aplicarea-prezumtiei.html> (viewed on 9.11.2014).

10 paragraph 2 Criminal Procedure Code); the right of the suspect, respectively of the defendant to be informed immediately and before being heard about the deed for which the criminal prosecution was initiated, respectively for which the criminal action and the legal framework established (Article 10 paragraph 3 Criminal Procedure Code and considering the provisions of Article 6 of Directive 2012/13/EU); the right of the suspect and the accused to be informed that they have the right not to make any statement (Article 10 paragraph 4 Criminal Procedure Code) and the obligation of the judicial bodies to ensure the exercise by all the parties and the main procedural subjects of all their procedural rights. Within the scope of the right to defense is also the guarantee of the possibility of those persons who do not know the Romanian language to use their native language, through an interpreter, as well as access to procedures and documents, through an interpreter provided free of charge (it is established and guaranteed by Article 128 of the Constitution of Romania republished).

The right to defense (as, indeed, any of the fundamental human rights (Blaj & Anastasiu, 2015)) would remain a concept lacking consistency if the necessary guarantees for the effective exercise were not offered, among them, a special role having the right to information recognized to participants in the criminal trial, respectively to the suspect and to the accused, to the injured person and the civil party, as well as to the lawyer, thus being considered a framework right (Volonciu, 2017, p. 231).

The suspect and the defendant's right to information, in the specific context of a criminal trial, is materialized in the following: the right to be informed about the deed for which it is investigated and its legal classification (Article 83 letter a<sup>1</sup> Criminal Procedure Code) (Coman, 2017, p. 64)<sup>15</sup>; the right to be informed about its rights and obligations (Article 83 letter g<sup>1</sup> Criminal Procedure Code), written record, under signature; the right to consult the case file (Article 83 letter b) Criminal Procedure Code); the right to file applications (Article 83 letter e) Criminal Procedure Code); informing the defendant of the right to conclude an agreement for the recognition of guilt during the criminal investigation, respectively the right to appeal to the procedure for recognizing the guilt and thus to benefit from the possibility of a reduced sentence, during the trial (Article 108 para. 4) Criminal Procedure Code).

The victim of a crime, as a participant in the criminal trial, either as an injured person or as a civil party also benefits from the right to information exercised specifically by: the right to be informed about his/her rights; the right to be informed, within a reasonable time, about the stage of the criminal prosecution, on his/her express request; the right to consult the case file, according to the law; the right to request to be notified of the release in any way of the arrested or convicted person; the right to be cited, for the first trial term, with the mention that it can become a civil party until the initiation of the judicial investigation (Article 80 Criminal Procedure Code).

The lawyer's right to information is exercised by requesting to be informed of the date and time of the criminal prosecution or hearing led by the judge of the rights and

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<sup>15</sup> "(The right) to be informed about the nature and cause of the accusation (Article 6 para. 3 ECHR), is obviously applied, in the first phase of the criminal trial, the criminal prosecution. This right, as the Court has shown, does not impose a specific form, and the notion of "information" means bringing to the knowledge of the accused the material facts that are incurred on him and the legal qualification given to him, the information having to be detailed"- see Ramona Mihaela Coman, *Efectele jurisprudenței Curții de la Strasbourg asupra procesului penal român*, Universul Juridic Publishing House, Bucharest, 2017, p. 64.

freedoms in order to be able to participate; the right to consult the case file under the conditions provided by law; the right to request the release of some copies of the documents from the criminal case file (Article 92-94 Criminal Procedure Code).

The current Criminal Procedure Code introduces a new form of the right to information recognized to the persons that are under investigation, namely the information, after the cessation of the technical supervision provision<sup>16</sup>; each person has the right of being informed about the technical supervision decision that was taken under the technical supervision warrant<sup>17</sup>. The prosecutor has the obligation to provide this information, in writing, no later than 10 days after the end of the technical supervision measure. After the moment of information, the supervised person has the right to take notice, upon request, of the content of the minutes in which the technical supervision activities performed are recorded. The prosecutor must provide, upon request, the monitored calls, communications or conversations or the images resulting from the surveillance activity (Article 145 Criminal Procedure Code).

A very important aspect, closely related to the exercise of the right of defense is that the right to information should not lack consistency. Relevant is the situation regulated by Article 352 of the Criminal Procedure Code of Romania, according to which: "(11) If the classified information is essential for the resolution of the case, the court urgently requests, as the case may be, the total declassification, the partial declassification or the transition to another level of classification or allowing access to those classified by the defendant's defender. (12) If the issuing authority does not allow the defendant's defender access to the classified information, these may not serve to issue a sentence of conviction, of waiving the application of the sentence or of delaying the application of the sentence in question." Basically, para. 11 and 12 of Article 352 Criminal Procedure Code establishes an exception from the rule provided by para. 10 of the same article, according to which "the information of public interest in the case file is communicated according to the law". Thus, the classified information that is relevant in solving a criminal case received a distinct, special regulation. Thus, in the original form, Article 352 para. 11 and 12 Criminal Procedure Code provided that the court may request the total, partial declassification or the transition to another level of classification or allow access to the respective classified information of the defendant's defender. In the event that the issuing authority does not allow the defendant's defender access to the information, they will not be able to serve a decision of conviction, a waive of the application of the sentence or a postponement of the application of the sentence in question (Volonciu, 2017, pp. 1052-1055).

However, by a recent decision (no. 21 issued on 18 January 2018<sup>18</sup>), the Constitutional Court of Romania stated that "the provisions of Article 352 para. 11 and 12 of the Criminal Procedure Code, in the current drafting, go against the right to a fair

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<sup>16</sup> The methods provided in Article 138 para. 1 letter a)-d) are considered means of technical surveillance: a) interception of communications or any type of remote communication; b) access to a computer system; c) video, audio or photography surveillance; d) localization or tracking by technical means.

<sup>17</sup> Also relevant is the Decision of the Constitutional Court no. 244 of 6 April 2017 (published in the Official Gazette no. 529 of 6 July 2017), which concluded that limiting only the suspect and the accused to the field of the persons who can challenge the legality of the technical supervision measure, by excluding the persons concerned by such mandate but which do not have the mentioned qualities, is unconstitutional.

<sup>18</sup> Published in Official Gazette no. 175 of 23 February 2018.

trial, provided by Article 21 paragraph 3 of the Constitution, and also against the principle of uniqueness, impartiality and equality of justice for all, provided by Article 16 paragraph 1 and 2 and of Article 124 paragraph 2 of the Constitution”.

In reasoning the solution (Cochințu, 2017, pp. 131-136), the Court held that the criticized legislative solution "conditions the use of classified information by the permission of the public authority that classified the information (the issuing authority) to grant access to this information - information determined by the judge as essential for the settlement of the criminal trial, considered important for the defendant's right to information and qualified as evidence in the case file." (para. 62).

Such conditioning is incompatible with the exercise by the competent judicial bodies of their obligations under the competence conferred to them by regulations, respectively, that of "ensuring, based on evidence, finding the truth about the facts and circumstances of the case, as well as about the suspect or the defendant" (Article 5 paragraph 1 Criminal Procedure Code). According to the constitutional court, the provisions of Article 352 paragraph 11 and paragraph 12 of the Criminal Procedure Code in the targeted version by the plea of unconstitutionality, prejudice also the provisions of article 1 paragraph 2 of the Criminal Procedure Code, according to which "the rules of criminal procedure aim to ensure the efficient exercise of the attributions of the judicial bodies with the guarantee of the rights of the parties and of the other participants in the criminal trial in order to comply with the provisions of the Constitution, of the constitutive treaties of the European Union, of the other regulations of the European Union in criminal procedural matters, as well as of the pacts and treaties regarding the fundamental rights of the human being to which Romania is a party." Therefore, the provisions criticized are unconstitutional.

Directive 2012/13/EU on the right to information in criminal proceedings provided in Article 7 paragraph 4) that "Member States shall ensure that, in accordance with the provisions of national law, the decision refusing access to certain materials in accordance with this paragraph is taken by a judicial authority or may, at least, be subject to judicial review."

Or, the legislative solution in Article 352 Criminal Procedure Code criticized provides the opposite of those stipulated in the norm of European law, within the meaning that access/refusal of access to the information essential for solving the criminal case is ordered by an administrative authority, and the refusal cannot be subject to judicial control.

It is true that the constitutional court acknowledges that access to certain information / materials / documents may be denied, if such access could lead to serious endangering of another person's life or fundamental rights or if the refusal is strictly necessary for the defense of an important public interest, such as, for example, in cases where access to information may prejudice an ongoing investigation or may seriously impair national security. Only that the decision must belong to a judge/courts (Chiriac & Truța, 2017, pp. 52-65)<sup>19</sup> and the possibility of judicial control to be ensured (para. 65).

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<sup>19</sup> In consideration of the independence and impartiality peculiar to the judge - for details see also Lucian Chiriac, Roxana Silvia Truța, *Sur l'indépendance des juges et leur soumission seulement devant la loi en Roumanie en vue des propositions de modification de la Loi no. 303/2004 sur le Statut des juges et des procureurs et la Loi no. 304/2004 sur l'organisation Judiciaire*, article in the "Curentul Juridic" Jurnal, no. 4/2017, pp. 52-65.

In conclusion, the protection of classified information cannot have priority over the right to information of the accused and over the guarantees of the right to a fair trial of all parties in the criminal trial, except under express and limiting conditions provided by law (the decision of refused access to classified information always belonging to a judge/court). The decision of the Constitutional Court no. 21 of 2018, by its general obligatory effect (Article 147 para. 4 of the Romanian Constitution republished) does nothing but to offer a sustainable guarantee to the right to information in a criminal trial, and tangentially, to the right to defense and to a trial fair. Practically, there is also a transposition, in part, of the provisions of Directive 2012/13/EU regarding the right to information within criminal proceedings, into the national law, in a pretorian way.

Therefore, the Romanian constitutional court intervenes, once again, to sanction unconstitutional rules of criminal procedure, respectively provisions that infringe a fundamental right, the right to a fair trial. At the same time, it sanctions, implicitly, by the particularity of the case, the breach of the guarantees of this right, including the right to defense and the right to information of the person undergoing criminal proceedings or under criminal charge.

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