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(summary)

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THE RIGHT TO TRIAL WITHIN A REASONABILE TIME

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SUMMARY

<u>Key-words</u>: reasonable time, optimal and foreseeable time, length of procedure, fair trial, guarantees, procedure, access to justice, effective remedy, complexity of the affair, parties' behaviour, what's at stake for the plaintiff, behaviour of national authorities, subjective right, complaint about the protraction of procedures

The right to trial within a reasonable time is an essential part of the right to a fair trial, as enshrined in article 6 par. 1 ECHR. In that respect, based on a comprehensive study of the case law of the European Court of Human Rights and the European doctrine[1], the thesis first approached matters concerning the concept of "fair trial" and the legal nature of the right to a fair trial. It was therefore concluded that, besides the narrow sphere of any definition, the fair trial is a vivid reality which is permanently illustrated at the European level by a rich jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union[2]. At the same time, the fair trial tends to become, as days pass by, a universal model of trial. This model is projected by means of three categories of guarantees: guarantees concerning the right of acces to justice; institutional and procedural guarantees; guarantees concerning the enforcement of legal decisions[3].

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[1] For concludent considerations on the subject, see: F. Sudre, *Droit européen et international des droits de l'homme*, Ed „P.U.F.", Paris, 2005, p. 318-386; R. Chiriţă, *Dreptul la un proces echitabil*, Ed. „Universul Juridic", Bucharest, 2008, *passim*; D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, Ed. „Butterworths", Londra - Dublin - Edinburgh, 1995, p.163-273; J.F. Renucci, *Traité de droit européen des droits de l'homme*, Ed. „L.G.D.J.", Paris, 2007, p. 351-494; C. Ovey, R. White, *The European Convention on Human Rights*, Ed „Oxford University Press", Oxford, 2002, p. 140-187; F. Quilleré-Majzoub, *La défense du droit à un procès équitable*, Ed. „Bruylant", Bruxelles, 1999, *passim*; I. Deleanu, *Instituţii şi proceduri constituţionale - în dreptul român şi în dreptul comparat*, Ed. „C.H.Beck", Bucharest, 2006, p. 551-560; C. Bîrsan, *Convenţia Europeană a Drepturilor Omului. Comentariu pe articole*, Ed. „C.H. Beck", Bucharest, 2010, p. 351-569; D. Liakopoulos, *Equo processo nella Convenzione europea dei diritti dell'uomo e nel diritto comunitario*, Ed. "CEDAM", Padova, 2007, p. 21-140; B. Selejan-Guţan, *Protecţia europeană a drepturilor omului*, 2nd edition, Ed. "C.H. Beck", Bucharest, 2006, p. 108-130.

[2] The right to a fair trial is considered by the Court of Justice of the European Union as a general principle of European Law (C.J.E.U., judgement of 17 December 1998, case C-185/95 P, *Baustahlgewebe GmbH c. Comisia*, Rec. 1998, p. I-8417, par. 21-33). All the judgements of the Court of Justice of the European Union can be consulted online, in electronic format, on the Court's website, http://curia.eu.

[3] S. Guinchard, C. Chainais, C. Delicostopoulos, I. Delicostopoulos, M. Douchy-Oudot, F. Ferrand, X. Lagarde, V. Magnier, H. Ruiz Fabri, L. Sinopoli, J.-M. Sorel, *Droit processuel. Droit commun et droit comparé du procès équitable*, ediţia a V-a, Ed. "Dalloz", Paris, 2009, p. 471. The doctrine rightly pointed out that the right to a fair trial is not limited to the positive and negative obligations imposed by article 6 ECHR, as a series of procedural guarantees that contribute to ensuring the „fair trial" are regulated by article 5 and article 13 ECHR. Besides, this is

As far as the legal nature of the right to a fair trial is concerned, we also accept the idea that the right to a fair trial has a dual nature. On one side, the fertile jurisprudence of the Courts leads to the substantialization of the right to a fair trial. On the other hand, during that evolution, the Court also elaborates the corresponding procedural guarantees[4].

In the words of the European Court of Human Rights, "*the right to a fair trial enshrines the fundamental principle of the rule of law in a democratic society*"[5]. In that context, the European judge made this principle an essential elment of the European public order in the field of human rights[6]. Consequently, before approaching one of the components of the right to a fair trial – the right to trial within a reasonable time – we considered necessary to proceed to a review of the general rules of the fair trial, as they come out of article 6 par. 1 ECHR and particularly out of the abundent case law of the Court in Strasbourg.

Even if the conventional text is precise, in the sense that the right to a fair trial concerns only the „claims relating to civil rights and obligations" and „the validity of any criminal charge", the difficulty of determining the doMayn of the right to a fair trial is obvious. This is particularly derived from the fact that the European judges attributed to the concepts used by article 6 par. 1 ECHR an autonomous meaning, so that difficulties of interpretation can arise in every single dispute[7]. Moreover, the extensive interpretation offered by the Court caused not only an extension of the classical field of the fair trial, but also an „escape" over the trial's frontiers, in the strict sense of the term. Therefore, as it was pointed out by the doctrine[8], the right to a fair trial is applicable before the „trial"[9], after the trial is finished[10] and even in cases where there si

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also the solution adopted by article 21 of the Romanian Constitution, which does not limit the domain of application of the right to a fair trial to a strict correspondance with article 6 ECHR (R. Chiriţă, *Dreptul ...*, *op. cit.*, p. 12). However, departing from the Convention, article 21 of the Constitution considers the right to a fair trial as a condition for the access to justice and not the other way around. This approach is to be found also in the South American doctrine, which considers that all the breaches that attract, under the European Convention of Human Rights, the breach of the right to a fair trial – lack of celerity for the proceedings, inequality of arms, the formalism suffocating the core of the dispute and so on – are elements that affect the right of access to justice (V. Fairén Guillén, *Teoría general del derecho procesal,* Ed. "Instituto de investigaciones jurídicas", México, 1992, p. 33).

[4] For extensive considerations on the subject, see L. Milano, *Le droit à un tribunal au sens de la Convention européenne des droits de l'Homme*, Ed. "Dalloz", Paris, 2006, p. 33 and the following.

[5] Judgement of 26 April 1979, *Sunday Times c. United Kingdom*, par. 55.

[6] The Court underlined the fact that national courts cannot recognize a judicial decisions from a state which does not respect the guarantees of article 6 ECHR without violating article 6 ECHR themselves (judgement of 20 July 2001, *Pellegrini c. Italy*, par. 40).

[7] J. F. Renucci, *Tratat de drept european al drepturilor omului*, Ed. "Hamangiu", Bucharest, 2009, p. 380; Judgement of 4 May 2006, *Ekdoseis N. Papanikolau A.E. c. Greece*, par. 18-21.

[8] J.F. Renucci, *Traité ...*, *op. cit.*, p. 389-392.

[9] For example, the Court held that the presumption of innocence, enshrined in article 6 par. 2 ECHR, must be respected before a trial even exists. The Court's judgement in the *Allenet de Ribemont c. France* of 10 February

no direct link to a judicial procedure[11]. In a logical succession of ideas, the first chapter concerns the content of the right to a fair trial, with reference to the relevant case law of the Court.

A distinct section of the first chapter concerns the analysis of the Mayn problems the Romanian State has in the case of the right to a fair trial, seen in the light of the judgments given by the Court in Strasbourg in the cases concerning Romania. The analysis started with a statistical element, namely the fact that out of the 938 judgements against Romania between 1998 and 2012, a violation of the Convention was found in a number of 847 cases. Out of these, 360 concerned the violation of the right to a fair trial, 97 the violation of the right to trial within a reasonable time and 36 concerned the failure to enforce judicial decisions. After reading the judgements against Romania in the field of the right to a fair trial, we are entitled to conclude that the Romanian State had and still has very serious problems in respecting article 6 ECHR as a whole. Although some issues related to the „full jurisdiction" of the courts have been solved, Romania continues to be blamed for breaching the right of access to justice. The Court constantly sanctions the violation of the principle of legal certainty by the re-discussion of final legal decisions. More recently, case law disputes at the level of the Supreme Court or the lower appeal courts have been harshly punished. The institutional and procedural guarantees, particularly those related to the reasoning of the legal decisions, the respect of the principle of contradictoriality and the respect for the rights of the defence generate continuos sanctioning

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1995 is the school example in this respect: the allegations of the home affairs minister and police representatives as to the guilt of the accused, based on preliminary investigations, were considered a violation of article 6 par. 2 ECHR. In Romanian law, it was said the administrative procedure under article 7 of Law no. 554/2004 is within the domain of the right to a fair trial, so it must be taken into account when the length of the proceedings is determined; it was also said that such a procedure is contrary to the access to justice (I. Deleanu*, Tratat de procedură civilă din perspectiva noului Cod de procedură civilă,* Vol. I, Ed. "Wolters Kluwer", Bucharest, 2010, p. 747).

[10] According to constant case law of the Court, the phase of execution of legal decisions also enters the sphere of the right to a fair trial (Judgement of 19 March 1997, *Hornsby c. Greece*, par. 40; Judgement of 12 January 2010, *Emilian Ştefănescu c. Romania*, par. 27). As it was nicely said, it would be useless that article 6 par. 1 ECHR guarantees the access to justice if it wouldn't guarantee in the same manner the execution of legal decisions (for example, Judgement of 31 October 2006, *Jelicic c. Bosnia-Hertzegovina*, par. 38). Under the same pattern, it was said that national authorities cannot claim the lack of resources in order to refuse the payment of sums established by a court decision - Judgement of 26 January 2010, *Aurelia Popa c. Romania*, par. 24.

[11] The Court held that article 6 ECHR is applicable to the judicial execution procedure of a notary act of a debt guarantee (Judgement of 21 April 1998, *Estima Jorge c. Portugal*, par. 37-38) or to a conciliation document (Judgement of 28 October 1998, *Perez de Rada Cavanilles c. Spain*, par. 39), as far as these procedures are determinant for the effective realisation of the plaintiffs' rights.

decisions. Finally, there is a significantly high number of violations for the failure of the Romanian State to enforce final judicial decisions[12].

The second chapter of the PhD thesis is dedicated to the study of the case law of the European Court of Human Rights concerning the right to trial within a reasonable time. Amongst the requirements of the right to a fair trial there is the right to have the case heard speedily or in a "reasonable term", according to article 6 par. 1 ECHR. The celerity of the proceedings, besides the fact that it represents a purpose for any legal system, it also stays as a double guarantee: on one side, the scope of the right conferred by article 6 par. 1 este to avoid that a person is over exposed to the stress generated by the fact there is no solution in his/her own case[13]; on the other hand, the demand to have the cases heard in a reasonable time is meant to ensure both the credibility and the efficiency of justice[14]. The reasonable term enshrined in article 6 par. 1 of the Convention must be distinguished from other „reasonable terms" referred by articles 2, 3 and 5 of the Convention; that is the reason why this distinction was made.

The duty to respect the reasonable term referred to in article 6 par. 1 of the Convention is an obligation of result pending on the Contracting Parties of the Convention. Basically, the Court's assesment is limited to the evaluation of a certain result: *was the term in which the case was heard reasonable or not ?* In these terms, the Mayn discussion points coming out of the Court's case law analysis, approached in the thesis in this order, refer to: (A) the term to be taken into consideration; (B) the evaluation of the reasonable character of the term; (C) the indemnisation of prejudice caused by the breach of the right to trial within a reasonable time.

Most often plaintiffs that send their griefs to the Court refer to the excessive period of the whole jurisdictional procedure, which usually comprises multiple levels of jurisdiction. However, there are cases in which the Court does not examine the judicial process as a whole, since the plaintiff only refers to the excessive period of time at one jurisdictional level[15]. In all

[12] For the problems underlined by the European Court in the case of Romania and for deep conclusions, see I. Deleanu, *Adnotări la câteva opinii disidente ale judecătorilor de la Curtea Europeană a Drepturilor Omului în materie procesual-civilă*, in Pandectele Române no. 3/2012, p. 15 - 35.
[13] C. Ovey, R. White, *The European Convention..., op.cit.*, p. 166.
[14] *Bottazzi c. Italy*, par. 22.
[15] For example, judgement of 23 September 1998, *Portington c. Greece*, par. 20.

cases, though, when it looks into the duration of the procedure, the Court first determines the starting point (*dies a quo*) and the final point (*dies ad quem*) of the term to be considered.

In the civil area, the starting point is represented in principle by the time when the case is referred to the competent court by filing a claim, according to national rules.

However, the starting point is determined, in other cases, with reference to contentious acts or proceedings, that can mark the start of the term in the civil area: the issuing of a payment injonction[16]; the seizuire of goods[17]; the civil claim in a criminal trial[18]; the request for provisional measures[19]; the opposition to execution at the national level[20]; the filing of an intervention claim during an on-going procedure[21]. By way of exception, if the judicial stage is necessarily preceeded by an administrative appeal, the term starts to run from the date this appeal is registered. On the contrary, in the criminal area, the term starts running from the moment where a „charge" was formulated, because otherwise it would be impossible to determine the existence of a „criminal charge"[22]. It is worth mentioning, in that respect, that the „criminal charge" is defined as „the official notification, coming from the competent authority, of the accusation of having committed a felony" with the idea o „significant consequences for the status of the accused"[23]. As far as the final point of the term to be examined is concerned, there are no differences between the civil and the criminal area. Generally speaking, in both areas, the period under the scrutiny of the Court ends, in principle, at the time when the last internal judicial decision, which is definitive, has been executed. However, as it is pointed out below, there are cases in which the national procedure is still pending at the time the European Court rules and in such cases the final point of the term is represented by the date of the European Court's judgment. In the criminal area, if the accused is not sent to trial, it shall be considered that the final point is met when the prosecutor issues the ordinance to dismiss the case[24].

[16] Judgement of 24 May 1991, *Pugliese c. Italy (no. 2)*, par. 16.
[17] *Raimondo c. Italy*, judgement of 22 February 1994, par. 42.
[18] *Acquaviva c. France*, judgement of 21 November 1995, par. 50.
[19] Judgement of 12 October 1992, *Cesarini c. Italy*, par. 16.
[20] *Barbagallo c. Italy*, judgement of 27 February 1992, par. 14.
[21] Judgement of 26 October 1999, *Varipati c. Greece*, par. 22.
[22] *Neumeister c. Austria*, par. 18. For more recent judgements in this direction, see for example *Venditelli c. Italy*, judgement of 18 July 1994, par. 34; *Reinhardt şi Slimane-Kaïd c. France*, judgement of 31 March 1998, par. 93.
[23] Judgement of 27 February 1980, *Deweer c. Belgium*, par. 42.
[24] Judgement of 25 February 2004, *Schumacher c. Luxembourg*, par. 28.

In a usual manner of speech, the Court said that „*the reasonable period of a procedure must be determined considering the circumstances of the case and with the aid of the following criteria: the complexity of the case, the behaviour of the plaintiff and the competent authorities, as well as what's at stake for the interested party*"[25]. In other words, the analysis of the Court is firstly a particular one, *in concreto*, considering the specific elements of each case. On the other hand though, judges in Strasbourg use a number of objective criteria specifically designed to reduce the amount of subjectivity in this analysis[26].

With regard to the objective criteria used for the analysis of the reasonable character of the term, the Court tradionally considered, as from its judgment in the *Pretto and others* vs. *Italy* case, three main factors: the complexity of the case, the behaviour of the plaintiff and the behaviour of the national authorities, particularly the judicial authorities. Following an evolving case law, in some cases the Court took into consideration even a fourth criteria, „what's at stake" in the case for the plaintiff [27]. According to the Court's jurisprudence, the complexity of the case can be firstly generated by the *complexity of the facts to be investigated*. Usually, this complexity might derive from: the number and the particular nature of the crimes the plaintiffs had been accused of [28]; the dissimulation of the criminal acts by the accused and his connections to the accomplices[29]; the national interest character of the facts[30]; the number of the accused and witnesses[31]; the need for recourse to an expertise[32]; the partition of indivisible goods to a number of heirs[33] etc. *The complexity of the legal problems that must be solved* is also discussed by the Court. Such a case exists when a new and imprecise regulation appears[34], it might concern

[25] For example, judgement of 27 June 2000, *Frylander c. France*, par. 43; judgement of 18 February 1999, *Laino c. Italy*, par. 18; judgement of 4 April 2006, *Maršálek c. Czech Republic*, par. 49; judgement of 13 July 2006, *Nichifor c. Romania (no. 1)*, par. 26.
[26] F. Edel, *La durée des procédures civiles et pénales dans la jurisprudence de la Cour européenne des Droits de l'Homme*, "Editions du Conseil de l'Europe", Strasbourg, 2007, p. 33.
[27] The formulas used by the Court are *l'enjeu de l'affaire pour le requerant* in French and *what is at stake for the plaintiff* in English, respectively.
[28] For example, in the case of the so-called "white collar crime" that implies the participation of multiple companies (*C.P. and others c. France*, par. 30).
[29] *Viezzer c. Italy*, judgement of 19 February 1991, par. 17.
[30] *Dobbertin c. France*, par. 42.
[31] *Milasi c. Italy*, par. 16; *Bejer c. Poland*, judgement of 4 October 2001, par. 49.
[32] Judgement of 4 October 2001, *Ilowiecki c. Poland*, par. 87.
[33] Judgement of 27 February 1992, *Vorasi c. Italy*, par. 17.
[34] *Pretto and others c. Italy*, par. 32.

the principle of equality of weapons[35], matters of competence [36] or constitutionality [37], urbanism issues [38] or the interpretation of an international treaty[39]. Last but not least, *the complexity of the proceedings* might justify the breach of the reasonable time requirement. Usually, this happens in cases with a great number of parties[40], in trials slowed down by a significant number of procedural incidents[41], when the hearing of a great number of the accused and witnesses is required [42] or when witnesses are difficult to trace[43]. The complexity of the proceedings is also analysed by the Court when it comes to witnesses frequently changing addresses[44], interrogations by means of a rogatory commission (in the country or abroad[45], the administration of an enormous file[46] or the coordination of more trials involving the same person[47]. Another criteria used by the European Court of Human Rights when it determines the reasonable character of the procedure's duration, of a more recent use, is what's at stake for the plaintiff (no matter whether it's a moral or a material component[48]). Following the formula employed by the Court, there are certain *hypothesis that require a special (particular) dilligence from the national authorities*. Some of the fields in which such a dilligence is required are mentioned below. As the Court often says, only the delays attributable to the competent authorities at the national level can convince the Court that the reasonabile term requirement wasn't met[49]. However, the analysis of the parties' behaviour is, in this respect, just as important, as this attitude is an objective elemente, not attributable to the defending State, an element that must be taken into account in order to determine whether the reasonable term in article 6 par. 1 ECHR was met [50].

Based on the above mentioned criteria – complexity of the case, what's at stake for the plaintiff, parties' behaviour and national authorities' behaviour – the Court proceeds to an overall analytic appreciation of the factual elements of each case, for the purpose of checking how the

[35] *Baraona c. Portugal*, par. 50.
[36] *De Moor c. Belgium*, par. 22.
[37] Judgement of 26 November 1992, *Giancarlo Lombardo c. Italy*, par. 2.
[38] *Katte Klitsche de la Grange c. Italy*, par. 55.
[39] *Beaumartin c. France*, par. 33.
[40] Judgement of 26 February 1993, *Billi c. Italy*, par. 19.
[41] *Monnet c. France*, par. 28.
[42] *B. c. Austria*, par. 11.
[43] Judgement of 22 December 2004, *Mitev c. Bulgaria*, par. 145.
[44] *König c. Germany*, par. 102 – 107.
[45] *Van Pelt c. France*, judgement of 23 May 2000, par. 41; *Messina c. Italy*, judgement of 26 February 1993, par. 28.
[46] *Yagci şi Sargin c. Turkey*, par. 63.
[47] *König c. Germany*, par. 102 – 107.
[48] *Karakaya c. France*, par. 45.
[49] *Zimmermann şi Steiner c. Switzerland*, par. 24.
[50] *Wiesinger c. Austria*, par. 57.

requirements of the reasonable time were met[51]. However, in some cases the Court considers other elements as well for its analysis, such as: the overall duration of the procedure, especially when the Government of the defending state does not provide any reasonable explanation for it[52]; the admission of its own guilt by the defending State[53]; the number of the involved courts[54]; the end of the litigation at the national level; the political context [55] etc.

When it decides that article 6 par. 1 ECHR was violated, as far as the disrespect by the Contracting Parties of the reasonable time requirement is concerned, the Court helds that the states must repair the moral and material prejudice and bear the legal expanses, under article 41 ECHR. As the European Court underlined[56], the nature of the breach of the right to trial within a reasonable time does not allow a full compensation (*restitutio in integrum*) and therefore it is possible only to grant a financial compensation for the plaintiff's material and moral prejudice[57]. Finally, it must be reminded that, according to established case law, the Court admits that when the right to trial within a reasonable time is violated, it can oblige the defending State to pay the legal expanses. Such expanses include both legal expanses during the Conventional procedure and expanses in national proceedings in order to prevent or corect the breach of the right to trial within a reasonable time. The conditions for the recognition of these amounts have been established in the Court's jurisprudence: the expanses must be real and necessary and their amount must be reasonable; the expanses must be linked to the violation[58].

At the end of the second chapter, the author presents the way in which the Court of Justice of the European Union received, in time, the right to trial within a reasonable time. In a nutshell, following the conclusions of the Great Chamber of the European Court of Human Rights in the

[51] For example, judgement of 28 June 1990, *Obermeier c. Austria*, par. 72.
[52] *Messina c. Italy*, par. 28.
[53] Judgement of 20 October 1993, *Darnell c. United Kingdom*, par. 20.
[54] *Hakkanen c. Finland*, par. 72 (three courts); judgement of 27 February 1992, *Tumminelli c. Italy*, par. 18 (case *pendinte* during criminal prosecution); *Abdoella c. Netherlands*, par. 22 (five courts) etc.
[55] *Acquaviva c. France*, par. 66.
[56] Judgement of 10 March 1980, *König c. Austria*, par. 15.
[57] In some cases, the Court does not grant any sume, as it rules that the acknowledgement of the violation is an adequate (for example, *Giancarlo Lombardo c. Italy*, par. 26).
[58] *Scordino c. Italy (nr. 1)*, par. 283.

case*Bosphorus Airways c. Irlanda*[59], we shall conclude that at the time being European law, through its Charter, offers an equivalent level of protection to that guaranteed by the Convention, due to the close link between the two courts (Court of Justice of the European Union and European Court of Human Rights) and the recognition of the right to trial within a reasonable time – together with the other rights – as a principle of European law.

As the European doctrine pointed out[60], article 6 par. 1 ECHR has closed links with article 13 ECHR, especially since the Court decided in its *Kudla* judgement that article 13 guarantees to an individual the right to an effective remedy in order to complain about the duration of the procedure. This is the reason why Chapter III of the thesis is exclusively dedicated to the right to an effective remedy. Also according to the European doctrine[61], the Courts' judgement in the *Kudla* case represents an exquisite jurisprudence, meant to grant article 13 the right spot in the system of human rights' protection under the Convention. A few supplementary considerations are needed.

Before the Kudla case judgement, there were two approaches when the plaintiff complained both about the unreasonable length of the internal procedure and about the lack of an internal remedy to challenge that[62]: if article 6 par. 1 ECHR was violated, the Court ruled that is not necessary to examine the complaint under article 13 ECHR, since article 6 par. 1 is *lex specialis*; if the Court ruled that article 6 par. 1 ECHR wasn't violated, it considered necessary to make sure that the less generous provisions of article 13 ECHR were not breached. Even if this solution was criticized by the doctrine[63], the Court's case law remained unchanged. By the

[59] Judgement of 30 May 2005. According to the European Court, „ ... *the protection of the fundamental rights in Community Law is ... equivalent ... to the protecion under the Convention*" (par. 165).
[60] F. Sudre, *Droit européen ...*, *op.cit.*, p. 371.
[61] See J.-F. Flauss, *Le droit à un recours effectif au secours de la règle du délai raisonnable: un reviriment de jurisprudence historique*, în Rev. Trim. Dr. Hom. 2002, p. 179-201; F. Sudre, J.-P. Marguénaud, J. Andriansimbazovina, A. Gottenoire, M. Levinet, *Les grands arrêts …*, *op. cit.*, p. 319-327; P. Frumer, *Le recours effectif devant une instance nationale pour dépassement du délai raisonnable - un reviriment dans la jurisprudence de la Cour européenne des droits de l'Homme*, Jour. Trib. Dr. Eur. 2001, p. 49 - 53. For some doubts on the importance of the *Kudla* jurisprudence, see J.-F.Renucci, *Traité ...*, *op.cit.*, p. 221 - 222.
[62] F.G. Jacobs, R.C.A. White, *The European Convention on Human Rights*, Ed. „Clarendon Press", Oxford, 1996, p. 337-338.
[63] For example, P. Van Dijk, G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Ed. „Kluwer Law International", The Hague, 1998, p. 701.

judgement of 26 October 2000, the Court explicitly reconsidered this jurisprudence[64]. The reasons envisaged by the Great Chamber were especially the following:

- It cannot be considered that the guarantees offered by article 13 ECHR are absorbed by the guarantees offered by article 6 par. 1 ECHR when the right to trial within a reasonable time is in discussion; according to the Court, the problem whether the plaintiff in a certain case enjoyed a trial within a reasonable time of its claim related to civil rights and obligations or a criminal charge is a different legal matter from the problem whether he benefited, under national law, of an effective remedy to complain about this (par. 147);

- The Court's case law shift was based on the fact that, through its earlier judgement in the case *Bottazi c. Italy*, the European court underlined „the important danger" that „the excessive lenience of justice" poses to the state of law in the national legal systems „when plaintiffs do not dispose, in this respect, of any internal remedy".

- From the elements of the right recognized by article 6 par. 1 ECHR, the right to trial within a reasonable time claims, through its importance, the existence of a supplementary protection system that article 13 ECHR can provide; the requirements of article 13 ECHR must be considered as enforcing those of article 6 par. 1 ECHR and not as absorbed by the general obligation not to surpass a reasonable term in the course of the judicial proceedings (par. 152).

- With reference to the report between article 35 par. 1 and article 13 ECHR, the Court underlined the fact that the human rights protection mechanism is meant to first put the alleged violation under the scrutiny of the national authorities, while the Court has subsidiary competence to deal with those matters[65].

- In conclusion, article 13 ECHR guarantees an effective remedy before a national court so that a person can complain about the breach of the obligation imposed by article 6 par. 1 ECHR, that is the obligation to trial the cases in a reasonable time (par. 156).

After the Court provided this new interpretation of article 13 ECHR, the center of interest is represented by the way in which the signing parties of the Convention understand to apply the

[64] For some elements that foreseen such a reconsideration, see F. Sudre, J.-P. Marguénaud, J. Andriansimbazovina, A. Gottenoire, M. Levinet, *Les grands arrêts …*, *op.cit*., p. 321 - 322.

[65] On the subsidiary characted, see also H. Petzold, *The Convention and the Principle of Subsidiarity*, în R. St. J. Macdonald, F. Matscher, H. Petzold (editors), *The European System for the Protection of Human Rights*, Ed. „Martinus Nijhoff", Dordrecht - Boston - London, 1993, p. 41-62.

obligations bearing on them[66]. Obviously, if an effective remedy is available at the national level, the plaintiff must make use of it before addressing the Court. On the contrary, the grief shall be rejected as inadmissible[67]. The signing parties of the Convention regulated at the national level some remedy-mechanisms meant to prevent or sanction the breach of the reasonable time requirements[68]. The step-by-step analysis of these mechanisms, as reported to the European Court's evolutive case law, allowed important conclusions as to the „effectivity" of the remedies, which were later used when we analysed the situation of Romania and the remedies put forward in time by the Romanian authorities.

Chapter IV is dedicated to the right to trial within a reasonable time in Romania. The acceptance of the Convention ratified in 1994 at the constitutional level happened with the Romanian Constitution revision of 2003[69]. Therefore, article 21 par. (3) reads as follows: „*Parties have the right to a fair trial and to trial within a reasonable time*". From this moment on, the right to trial within a reasonable time is constitutionally regulated, as a fundamental right. As the doctrine nicely put it, „ ... trial within a reasonable time is no longer a simple wish or

[66] In this respect, the Court mentioned that the contracting parties have a level of appreciation in order to respect their obligations under article 13 ECHR (judgement of 19 February 1998, *Kaya c. Turkey*, par. 106). The doctrine pointed out that four categories of solutions might be envisaged: **i)** personal responsability of magistrates (which must be considered only as an *ultima ratio*); **ii)** establishment of a procedure that allows dropping off charges (applicable in Belgium, Germany, Netherlands, Ireland) or the reduction of sentences (Germany, Luxembourg, Denmark, Finland, Spain); **(iii)** specific remedy having as object the end of the breach of reasonable time (Portugal – criminal area, Sweden – civil area, Austria, Switzerland), also at the constitutional level (Germany, Spain, Czech Republic, Slovakia, Croatia); **iv)** possibility to bring in a claim for damages against the State (France, Spain) – see J.-F. Flauss, *Le droit ...*, *op.cit.*, p. 189-195. It was also pointed out that the *Kudla* case law is not relevant for those states in which the length of procedure is an adequate one (for example, in Island, the medium length of procedure for the first instance in 2001 was 251 days in the civil area and 69 days in the criminal area and in Estonia 109 days and 93 days respectively) - *idem*, p.188.

[67] For example, decision of 27 April 1999, *Avdula, Medzid şi Vlora Hasani c. Elveţia*; decision of 16 March 1999, *Husein Basic c. Austria*; *Gonzalez Marin c. Spania*, decision of 5 October 1999; *Toma Mota c. Portugalia*, decision of 2 December 1999.

[68] In a distinguished paper, the authors happily reminded probably the first remedy meant to ensure a trial within a reasonable time: in a document of 775 AD, Carol the Great decided that if the judge was late in giving a sentence, the party could choose to live in the judge's home, on his expanse, until the judgement was delivered [see S. Guinchard (coordonator), *Droit processuel. Droit commun et droit comparé du procès*, ediţia a III-a, Ed. „Dalloz", Paris, 2005, p. 761]. We wonder whether the solution wouldn't sometimes be efficient in our days ...

[69] The doctrine said this thing constitutes " *... a correct reception of the modern legal evolutions at the European level and an agreement of the legal protection granted to subjective rights by national regulations with international regulations*" (I. Muraru, E. S. Tănăsescu, *Drept constituţional şi instituţii politice*, 11th edition, Ed. "All Beck", Bucharest, 2003, vol. I, p. 174).

vocation; it is a „subjective" right, as an compulsory element of the effectivity of other rights and first of all of the alleged ones and as an element of a fair trial ..."[70].

The old Romanian Civil Procedure Code did not comprise a principle of efficiency[71] or celerity[72]. Despite that fact, the old Civil Procedure Code contained a series of dispositions meant to touch this objective, under the „pressure" of article 6 par. 1 ECHR and the Court's relevant case law and in accordance with the newly introduced constitutional text of article 21 par. (3) that provides for the parties' right to trial within a reasonable time. As the legal literature pointed out, while analysing the legal texts meant to ensure celerity in the civil trial, one could distinguish between *procedural rules focusing on celerity* and *special, simplified and accelerated procedures*[73], an analytical structure used by this doctoral thesis.

Alike the Civil Procedure Code, the old Criminal Procedure Code did not provide for a principle of the celerity of procedure[74]. However, it is common ground that the criminal procedure is generally quicker that the civil procedure, even if the Romanian legislator did not choose a strict regulation model, with terms for the ending of the criminal prosecution or the trial[75]. The explanation for this relative celerity in solving the criminal cases can be found, in our opinion, in article 1 par. (1) Criminal Procedure Code: „The criminal trial has as purpose the *early* and complete discovery of the facts that constitute crimes ...". Since time is a significant pressure factor in the criminal trial, the assurance of a trial within a reasonable time must prevail. However, the trial within a reasonable time must not touch the special guarantees of article 6

[70] I. Deleanu, *Drepturile fundamentale ale părţilor în procesul civil*, Ed. "Universul Juridic", Bucharest, 2008, p. 275.
[71] M. Tăbârcă, *Drept procesual civil*, Ed. „Universul juridic", Bucharest, 2005, vol. I, p. 47.
[72] I. Muraru, E. S. Tănăsescu (coordonatori), *Constituţia ...*, *op. cit.*, p. 183.
[73] I. Deleanu, *"Termenul rezonabil" - exigenţă a unui proces echitabil. De la un "termen rezonabil" la un "termen optim şi previzibil*", in Revista de Drept Public nr. 1/2005, p. 132. In the first category we mentioned, the quoted author makes a distinction between ii) *procedural rules touching celerity, with no respect to the nature of the trial* and ii) procedural rules also touching celerity, for some categories of disputes. With no contest to the rightfullness of this distinction, for this thesis we decided to proceed to a unitary presentation of all the procedural texts that have as purpose, even in a distant view, the speeding of procedures.
[74] In the sense that celerity is a fundamental principle of the criminal trial, see D. M. Ionescu, *Procedură penală. Partea generală. Sinteze şi speţe*, Ed. "Sfera juridică", Cluj-Napoca, 2007, p. 54.
[75] Such a solution was preferred, for example, by the Italian legislator. Therefore, according to the Italian Criminal Procedure Code, the length of the criminal investigation is limited in principle to 6 months and the length of the trial is in principle limited to one year. There are derogations that can be granted by the court, for some categories of crimes or in cases of clear complexity of investigations that make it objectively impossible for the investigation to be closed within 6 months.

ECHR in the criminal area, particularly the right to have the time and the necessary facilities for preparing a defense.

In the same chapter, there is a particular interest for the underlined deficiencies on different levels as far as the right to trial within a reasonable time in Romania is concerned. Namely, from the analysis of the violation judgements of the European Court of Human Rights in the criminal area were the following: the game of successive re-trials, no matter if the cases were sent back to a lower court (*Pantea c. Romania, Rosengren c. Romania, Ballai c. Romania*) or to the prosecutor's office for a new criminal investigation (*Aliuţa c. Romania, Temeşan c. Romania*); the unreasonable and unjustified length of the criminal investigation, marked by significant inactivity periods in the prosecutor's offices (*Reiner şi alţii c. Romania, Florin Ionescu c. Romania*) or military prosecutor's offices (*Tudorache c. Romania*); the difficulty of establishing the competent prosecutor's office (*Georgescu c. Romania, Didu c. Romania*) or the competent court (*Constantin Florea c. Romania*); significant periods of unjustified inactivity in criminal courts, including the Supreme Court (*Damian-Burueană şi Damian c. Romania*); national authorities' ignorance for what's at stake for the plaintiff (*Bursuc c. Romania*, *Gheorghe şi Maria Mihaela Dumitrescu c. Romania, Csiki c. Romania*); procedural errors of national courts accounted for violations in other cases, concerning the non-applicance or late applicance of measures to bring in witnesses (*Bursuc c. Romania*), late ordering of a compulsory psychiatric expertise (*Bragadireanu c. Romania*), delayed subpoenas (*Crăciun c. Romania*) or failure to analyse the appeal reasons (*Damian-Burueană şi Damian c. Romania*). In the same manner, one should observe that the problems pointed out by the Court in the civil area specifically concerned: successive re-trials (*Nicolau c. Romania*, *Ispan c. Romania, Varvara Stanciu c. Romania, Parohia Greco-Catolică Sfântul Vasile Polonă c. Romania*); difficulty to determine the competent court (*Guţă c. Romania*, Cârjan *c. Romania*); extremelly long terms, particularly at the Supreme Court level (*Nicolau c. Romania, Gheorghe c. Romania, Valentin Dumitrescu c. Romania, Stancu c. Romania, Tăşchină c. Romania, Marinică Tiţian Popovici c. Romania, Ciovică c. Romania*); blockage of the case in one court and the subsequent delayed analysis of the dispute [*Străin şi alţii c. Romania, Forum Maritime SA c. Romania, Cerăceanu c. Romania (nr. 1), Alecu c. Romania, SC Apron Dynamics SRL Baia Mare c. Romania*]; national authorities' ignorance of what's at stake for the plaintiff (*Cârstea şi Grecu c. Romania, Deak c. Romania şi*

Regatul Unit, Codarcea c. Romania, Floarea Pop c. Romania, Ciută c. Romania); the excessive length of the administrative procedure (*Nichifor c. Romania*); procedural errors and the lack of dilligence of national courts, especially regarding witnesses and experts (*Matica c. Romania, Tăşchină c. Romania, Bercaru c. Romania, Lăzărescu c. Romania, Balea c. Romania, Toader c. Romania, I.D. c. Romania*); unjustified periods of inactivity for executors, during the forced execution stage (*Kocsis c. Romania*).

Probably the most comprehensive x-ray of the „performances" of the Romanian legislator and judges was taken by the European Court in its judgement in case of Vlad and others c. Romania of 26 November 2013. If the violation under article 6 par. 1 ECHR is not entirely different from previous case law, we shall point out that from the perspective of article 13 ECHR the Court stated that the remedies put forward by the Government did not meet the condition of effectivity for the following reasons:

(i) *Claim for damages based on the direct application of the Convention, taken alone or together with the provisions of the Civil Code*. As for this remedy – documented by the Government with case law coming from Iassy and Oradea Courts of Appeal – the Court underlined that, although the Convention was in force for nearly 20 years, no one managed to speed up the procedure by evoking the direct application of the Convention. The provided case law concerned cases in which compensation was granted for judicial errors or for the State's faulty activities, under articles 998 – 999 of the old Civil Code. Finally, this type of action has to follow the general procedural rules, including stamp duties and generally speaking the risk of a lengthy procedure. Therefore, the remedy is not effective (see par. 116 – 119 in the Court's judgement).

(ii) *Law no. 202/2010*. The law that tried to boost the judgement of cases was not considered a convincing remedy since it came into force a few years after the cases concerned by the griefs were finished and the Government failed to provide, for the three years in which the law was applied, examples of speeding up procedures or compensation being granted (par. 120 – 121).

(iii) *New Civil Procedure Code rules*. In that respect, the Court ruled that there is no effective remedy since the New Code does not apply to pending or closed procedures, but only to procedures starting after 15 February 2013 (par. 122).

Under these circumstances, the Court ruled that article 13 ECHR in conjonction with article 6 par. 1 ECHR were violated. Also, under article 46 ECHR, the Court ruled that the violations were a result of the malfunction of national legislation and practice and that the Romanian State is obliged to ensure the right to trial within a reasonable time by means of legislative measures and administrative practices concerning particularly a compensation mechanism. Basically, what was for about to happen actually happened. In its analysis in the case of *Vlad and others c. Romania*, the Court pointed out that it had already found violations concerning the right to trial within a reasonable time in some 200 cases and that 500 more cases with similar problems were under scrutiny. Therefore, the Court concluded that the Romanian State sistematically ignores the Convention and launched a serios warning as to the necessity to adopt legislative measures and administrative practices to approach this problem. There are essential Court's arguments referring to: the refusal or the reticence of national courts to apply the Convention directly, for some 20 years, especially in hypothesis where a breach of the right to trial within a reasonable time is claimed; the impossibility or excessive difficulty of sustaining a damages claim for the excessive length of the procedure, following the French model; lack of reforms that seriously approach this problem, taken into account that Law no. 202/2010 did not lead *in concreto* to the speeding up of procedures and the complaint for the protraction of procedures from the New Civil Procedure Code is not applicable to pending or finalized cases; lack of a compensation remedy to allow the obtaining of an indemnisation in case the length of procedure was excessive. The severity of the situation comes, in our opinion, from two perspectives: on one hand, the legislator doesn't take specific measures to speed up the judicial proceedings and compensate the victims of excessive delays; on the other hand, 20 years after the Convention was recognized, Romanian judges didn't come up with anything legally relevant, the "remarkable" succes being just a strike that itself contributed to increased length of some judicial proceedings.

The thesis focuses, in the same consistent chapter IV, on the deficiencies underlined by the Superior Magistrates' Council, the European Commission (in the context of the mechanism for cooperation and verification) or even by the magistrates.

The reply of national authorities to these problems, as of 2010, is mainly analysed in the light of the measures applied through the "Little Reform" of the national legal system (Law no.

202/2010) and the measures of the Superior Magistrates' Council on a optimal workload for courts.

Finally, this chapter is concluded by an original analysis of the factors that lead to the breach of the parties right to trial in an optimal and foreseeable time. In this respect a number of factors have been underlined and analyses, structured as follows:

Table no. 3. Synthesis of the factors that block the efficient functioning of the national legal system, as far as the right to trial within a reasonable time is concerned

Category of factors	Type of factors
A_1. Factors concerning the structure of the national judicial system	**1.** distribution of cases between courts, through competence rules; **2.** distribution of competence between the prosecutors' offices; **3.** development of mamooth courts, overcrowded and inefficient; **4.** lack of specialised courts per type of litigation; **5.** often, radical and unpredictable changes of the national legal framework or the application of legislation contrary to European law or to European humar rights law; **6.** application of laws designed to decelerate the judicial proceedings and to deprive the parties of direct and immediate acces to justice.
A_2. Factors concerning the actors ensuring the functioning of the national judicial system	**1.** inefficient distribution of judges and prosecutors and the wrong distribution of tasks;

	2. insufficient training of judges and prosecutors; **3.** lack of an objective and serious evaluation of the performances and conduct of judges and prosecutors; **4.** the refusal of applying the national procedural texts or of applying with priority European law and European human rights law; **5.** poor and insufficient training of the administrative staff; **6.** the shortage and lack of responsability of judicial experts.
A_3. Factors concerning the resources of the national judicial system	**1.** inefficient distribution of existing human resources; **2.** insufficient financing and equiping of the national judicial system, as reported to: **a)** the existence of a pressure factor consisting of unpaid salaries before 1 January 2010; **b)** wrong repartition of stamp duties income and associated tasks; **c)** lack of sufficient efforts to ensure adequate working offices and court chambers for a good administration of justice; **d)** late and inefficient allocation of resources for the auxiliaries of the judicial system.
A_4. Factors regarding the applicable procedures for the functioning, regulation and interactions of the judicial system	**1.** general lack of reaction of national authorities; **2.** lack of a crash procedure in case of temporary overload of courts with a certain

	type of disputes; **3.** excessive formalities for the execution of judicial decisions; **4.** possibility of judges, prosecutors and administrative staff to refuse the execution of the public service of justice; **5.** lack of a mechanism-remedy to prevent the overpassing of the reasonable length of procedure and to repair the prejudice when the reasonable time requirement was breached; **6.** lack of transparency of the national justice system and strong opposition for any feed-back from justice seekers or the auxiliaries of justice.

Finally, the last chapter of the thesis concerns a stringent matter, as a consequence of the appearance of the new Codes: the coordinates and the imperatives of the passing from the right to trial within a reasonable time to the right to trial within an optimal and foreseeable time.

On 13 September 2005, in Strasbourg, the European Commission for the Efficiency of Justice (CEPEJ) presented a Framework-Programme entitled „*A new objective for the judicial systems: solving any case in an optimal and foreseeable time*". This plan of action contains a series of measures as suggestions for the member states of the Council of Europe, that were to be implemented by CEPEJ based on the observations of these states, especially as far as the priority lines of action are concerned. For the first time, this document brought into light the concept of „*optimal and foreseeable time*". Precisely, the authors of the document started from the idea that the concept of „reasonable term" of article 6 par. 1 ECHR is a „lower limit" that makes the distinction between violating and respecting the Convention, a reason why it must not be considered an adequate result where it is respected. Also, they noticed that even the European Court of Human Rights is overwhelmed with complaints against the states for delays in solving

the cases and allocates a significant part of its time to give judgements against the states that violate the standard of „reasonable time period" necessary for the court proceedings. The excessive length of time is a major problem for most of the member states and affects all its beneficiaries, whatever their position in the judicial system (justice seekers, accused persons, victims, witnesses, jurors etc.). In these circumstances, CEPEJ stated that the standard of „reasonable time" must be replaced by the standard of „optimal and foreseeable time", an objective that must be pursued by the member states of the Council of Europen and their flag holder, CEPEJ.

Based on these, we came to the conclusion that at the European level, having as a catalyser the European Commission for the Efficiency of Justice, there is an evolution from the „*right to trial within a reasonable time*" to „*right to trial in an optimal and foreseeable time*". In this European judicial context, the question arising is whether Romania connects to the European reform process destined to ensure the translation form a „reasonable time" to an „optimal and foreseeable time". Of course, in the case of an affirmative answer, it must be evaluated whether our legal system is ready to make steps in the light of what CEPEJ identified as the coordinates and the imperatives of that passing.

In this context, we shall gladly note that the New Civil Procedure Code[76], finally entered into force on 15 February 2013, contains as one of the fundamental principles of the civil trial *the right to a fair trial, in an optimal and foreseeable time*[77]. The dispositions of article 6 NCPC read as follows: „(1) *Any person is entitled to a fair trial, in an optimal and foreseeable time, by an independent, impartial and law established court. For this purpose, the court is obliged to take all the measures permitted by the law and to ensure the development of a speedy trial.* (2) *The provisions of paragraph (1) also apply at the forced execution stage*". In other words, there is a

[76] Law no. 134/2010 concerning the Civil Procedure Code, initially published in "Monitorul Oficial al României", Part I, no. 485 of 15 July 2010, republished in "Monitorul Oficial al României", Part I, no. 545 of 3 August 2012. For the following, we shall quote the New Civil Procedure Code in a short manner, as NCPC. For wide and subtle critical observations on the new regulation and its entry into force, see: I. Deleanu, *Observaţii generale şi speciale cu privire la Noul Cod de Procedură Civilă (Legea nr. 134/2010)*, in Dreptul no. 11/2010, p. 11 - 42, I. Deleanu, *Avatarurile punerii în aplicare a Noului Cod de Procedură Civilă*, in Revista Română de Jurisprudenţă no. 1/2013, p. 13 - 26.

[77] For the envisaging of the new regulation, see I. Deleanu, *Timpul - în ambianţa prevederilor viitorului Cod de Procedură Civilă*, in Revista Română de Jurisprudenţă no. 2/2011, p. 229 - 243.

significant evolution of the national legal framework: if article 21 par. (3) of the Constitution, as reported to article 6 par. 1 ECHR, only mentions the right to trial within a reasonable time, the new regulation of the civil trial goes beyond and provides for the right to trial within an optimal and foreseeable time. Therefore, the analysis was directed to the changes proposed by the new Codes – Civil Procedure Code and Criminal Procedure Code – and especially to the remedy procedures provided so that parties can challenge the excessive length of time in the civil and criminal area.

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Notă: *The doctoral student considered, while writing the thesis, a number of 1,101 judgements and decisions of the European Court of Human Rights, the European Commission of Human Rights and the Court of Justice of the European Union. Considering the admissible length of the thesis' summary, the exhaustive list of those cannot be presented in this document.*