

The Principle of Equality of Arms between the Prosecution and the Defense in Romanian Criminal Procedure

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Abstract: Equality of arms is an essential component of the right to a fair trial, requiring that the prosecution and the defense have a reasonable opportunity to present and challenge the case without either party being placed at a substantial procedural disadvantage. This paper analyzes the normative content and practical application of this principle in Romanian criminal procedure. Drawing on doctrinal, statutory, and case law analyses, it examines the Romanian Constitution, the Code of Criminal Procedure, Article 6 of the European Convention on Human Rights, Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, the relevant EU directives on procedural rights, and the case law of the European Court of Human Rights, the Constitutional Court of Romania, and the High Court of Cassation and Justice. Equality of arms does not require identical powers for prosecutors and defendants. Rather, it requires functional safeguards against the institutional, investigative, and informational advantages of the prosecution. These safeguards include prompt notification of the charges, early and confidential access to a lawyer, sufficient time and facilities, timely disclosure of evidence, meaningful participation in the presentation of evidence, reasoned decisions on defense motions, and effective remedies. Although Romanian legislation provides a generally coherent framework, practical equality can be undermined by delayed disclosure, limited defense resources, formal legal aid, and insufficient judicial oversight of restrictions. Therefore, the principle must be assessed concretely, in relation to the procedure as a whole and the actual effectiveness of the defense's participation.

Keywords: Equality of Arms, Fair Trial, Criminal Prosecution, Defense, Romanian Criminal Procedure, Legal Assistance, Adversarial Procedure

Introduction

Equality of arms is not expressly formulated as an autonomous right in the provisions of Article 6 of the ECHR, but the European Court of Human Rights treats it as an inherent element of the broader right to a fair trial under Article 6 § 1 (ECHR Art. 6(1); ECHR, *Dombo Beheer BV v. the Netherlands*, 1993; *Brandstetter v. Austria*, 1991). Its fundamental requirement is that each party be afforded a reasonable opportunity to present its case under conditions that do not substantially disadvantage it vis-à-vis its adversary (ECHR, *Dombo Beheer BV v. the Netherlands*, 1993). In criminal proceedings, this requirement is linked to adversarial proceedings, disclosure, effective participation, legal assistance, the ability to challenge the prosecution's evidence, and the ability to present exculpatory evidence (ECHR Art. 6(1), (3)(a)–(d)). The ECHR's official guide on Article 6 therefore treats equality of arms and adversarial proceedings as central procedural components of the fairness of criminal proceedings.

Romania's constitutional basis is found primarily in the right to a fair trial and to a resolution within a reasonable time, the guarantee of the right to a defense, the right to assistance from a retained or court-appointed attorney, and the requirements that justice be impartial and equal for all (Constitution, Art. 21(3), 24, 124(2)–(3)). The interpretation of constitutional rights must be grounded in international human rights provisions, and more favorable international standards may prevail under the conditions set forth in the Constitution (Constitution, Art. 20). Binding European Union rules take precedence over conflicting national legislation pursuant to the constitutional framework governing Romania's membership in the European Union (Constitution, Art. 148(2)).

Romania's Code of Criminal Procedure requires that criminal proceedings comply with constitutional, European Union, and international human rights standards; it also mandates the separation of judicial functions, criminal investigation, preliminary proceedings, and trial. It also guarantees the presumption of innocence and the right to a defense, requiring that proceedings be conducted fairly and within a reasonable time (Articles 1, 3–5, 8, and 10 of the Code of Criminal Procedure). The legal provisions also require investigative authorities to gather evidence both for and against the suspect or defendant, while placing the primary burden of proving the charge on the prosecution and relieving the defendant of any obligation to prove innocence (Art. 5(2), 99 of the Code of Criminal Procedure).

Conceptual and Normative Foundations

The prosecutor and the accused do not perform equivalent institutional functions. The prosecutor represents the general interests of society, protects the legal order and the rights and freedoms of citizens, and conducts criminal investigations in accordance with the principles of legality, impartiality, and hierarchical control (Constitution, Art. 131(1), 132(1)). In accordance with the Code of Criminal Procedure (published in the Official Gazette, Part I, No. 486 of July 15, 2010), the prosecutor leads or supervises criminal investigations, initiates criminal proceedings, and participates in judicial proceedings (Articles 55–56). The accused, on the other hand, is the person against whom the criminal investigation is conducted and who enjoys the procedural safeguards associated with the presumption of innocence and the right to a defense (Articles 4, 82–83).

This difference does not in itself violate the principle of equality of arms. The principle does not require the defense to possess coercive powers, issue warrants, or direct police activities. It requires that institutional differences not prevent the defense from challenging the factual and legal basis of the charge. Consequently, equality is assessed with reference to opportunities, information, participation, and remedies, rather than through a mechanical comparison of legal powers (ECHR, *Brandstetter v. Austria*, 1991; *Borgers v. Belgium*, 1991; *Rowe and Davis v. the United Kingdom*, 2000). The ECHR assesses whether a procedural arrangement created a concrete disadvantage and whether the proceedings, viewed as a whole, remained fair (ECHR, *Ibrahim and Others v. the United Kingdom*, 2016; *Beuze v. Belgium*, 2018).

Relationship to Adversarial Procedures

Equality of arms and adversarial proceedings overlap, but they are not identical. Equality of arms refers to the balance of procedural opportunities. Adversarial proceedings require that the parties be able to review and comment on the evidence and observations capable of influencing the judicial decision (ECHR, *Brandstetter v. Austria*, 1991; *Rowe and Davis v. the United Kingdom*, 2000). A trial may formally allow both parties to file motions, but it may still be unequal if only the prosecution receives the opposing party's motions or if the defense is denied the time or practical information necessary to respond to them.

The Constitutional Court of Romania has expressly described the adversarial principle as an element of equality of arms and the right to a fair trial. It has held that a rule of criminal procedure must allow the relevant participants to receive documents likely to influence the decision and to effectively respond to the opposing party's arguments (Constitutional Court Decision No. 166/2015, paragraphs 39–40). The Court has applied this reasoning with particular rigor in preliminary chamber proceedings, where the legality of the indictment, investigative documents, and evidence can determine the evidentiary framework of the subsequent trial (Constitutional Court Decision No. 641/2014; Constitutional Court Decision No. 631/2015).

The Relationship to the Right to Defense

The right to a defense is much broader and more individualized than the principle of equality of arms. It includes the accused's right to defend themselves personally, to receive legal assistance, to remain silent, to avoid self-incrimination, to be informed of the charges, to review the case file, to file motions and objections, to present evidence, to request the examination of witnesses and to question them, to use an interpreter, and to pursue appeals (Constitution, Art. 24; Code of Criminal Procedure, Arts. 10, 78, 83, 89–95, 108–109).

The right to legal assistance is particularly important because the lawyer transforms abstract procedural rights into usable defense tools. Therefore, legal assistance must be practical and effective, rather than merely nominal (ECHR Art. 6(3)(c); ECHR, *Artico v. Italy*, 1980; *Salduz v. Turkey*, 2008; *Beuze v. Belgium*, 2018). The High Court of Cassation and Justice of Romania has similarly treated representation by a person who has not legally acquired the status of a lawyer as equivalent to a lack of legal defense (ICCJ, Decision No. 27/2007, RIL). The legal requirement that a court-appointed attorney provide a substantive and effective defense reflects the same substantive understanding (Code of Criminal Procedure, Art. 91(3)).

The European Legal Framework

Article 6 § 1 of the ECHR guarantees a public and fair hearing within a reasonable time by an independent and impartial tribunal established by law, while Article 6 § 2 protects the presumption of innocence, and Article 6 § 3 specifies the minimum rights of the defense (ECHR Art. 6). These include prompt and detailed information regarding the charges, adequate time and facilities, the right to defend oneself or through a lawyer, free legal assistance when the interests of justice so require, the examination of witnesses, and interpretation (ECHR Art. 6(3)(a)–(e)). The specific guarantees in paragraph 3 are aspects of the broader concept of a fair trial and are assessed in conjunction with Article 6 § 1 (ECHR, *Ibrahim and Others v. the United Kingdom*, 2016; *Beuze v. Belgium*, 2018).

At the EU level, Article 47 of the Charter guarantees an effective remedy, a fair and public hearing, legal advice, defense, and representation, as well as legal aid where necessary, to ensure effective access to justice (EU Charter, Art. 47). Article 48 of the Charter guarantees the presumption of innocence and respect for the rights of the defense. When Member States act within the scope of EU law, restrictions on the rights set forth in the Charter must meet the requirements of legality, respect for the essence of the right, necessity, and proportionality (EU Charter, Articles 51–52).

Directive 2012/13/EU (published in the Official Journal of the European Union No. 142 of June 1, 2012) requires that suspects and accused persons be promptly informed, in simple and accessible language, of their fundamental procedural rights, including access to a lawyer, free legal advice, information about the charges, interpretation and translation, as well as the right to remain silent. Information regarding the charges must be provided promptly and in sufficient detail to safeguard procedural fairness and an effective defense, while persons who have been arrested or detained must be informed of the reasons for their deprivation of liberty. The Directive also requires access to material evidence held by the authorities - whether incriminating or exculpatory - in a timely manner to prepare a defense, subject to strictly defined restrictions compatible with a fair trial.

Directive 2013/48/EU (published in the Official Journal of the European Union, Series L 294 of November 6, 2013) requires access to a lawyer in a timely manner and in a way that allows for the practical and effective exercise of the rights of the defense. Such access must normally be provided prior to police or judicial questioning, during certain investigative procedures, without undue delay following deprivation of liberty, and in a timely manner prior to a court appearance. This right includes private consultations, the lawyer's effective participation during questioning, participation in certain investigative proceedings, and the

confidentiality of communications between the lawyer and the client. Any waiver must be voluntary and unequivocal and must follow clear and sufficient information about the right and the possible consequences of waiving it.

Directive (EU) 2016/343 (published in the Official Journal of the European Union No. 65 of March 11, 2016) reinforces the presumption of innocence, places the burden of proving guilt at on the prosecution, requires that any doubt be resolved in favor of the accused, protects the right to remain silent and the privilege against self-incrimination, and regulates the right to be present at trial. Shifting the burden of proof to the defense may undermine the presumption of innocence, unless the legal presumptions fall within reasonable limits, are proportionate, and preserve the right to a defense.

Directive (EU) 2016/1919 (published in the Official Journal of the European Union No. 297 of November 4, 2016) supplements the right of access to a lawyer by requiring state-funded legal aid for persons who lack sufficient resources, when the interests of justice so require. Legal aid must be provided without undue delay and, at the latest, before questioning or certain investigative measures; decisions must be made promptly; services must be of adequate quality; and there must be an effective remedy in the event of a violation.

The Procedural Roles of the Prosecution and the Defense

The prosecutor is a judicial officer who conducts or supervises the investigation and represents the public interest, but who is also obligated to uphold legality and impartiality (Constitution, Articles 131–132; Code of Criminal Procedure, Articles 29, 55–56). This institutional position explains why the prosecution can exercise powers that are not available to the defense, including leading the investigation, authorizing or requesting certain investigative measures, initiating and conducting criminal proceedings, and preparing the indictment (Code of Criminal Procedure, Articles 55–56, 285–327). The prosecutor’s duties are not limited to building a case against the suspect or defendant. Investigative authorities must gather and manage evidence both for and against the suspect or defendant (Code of Criminal Procedure, Art. 5(2); Art. 100(1)). This obligation is important for the principle of equality of arms, as the state controls investigative resources and is typically better positioned to identify evidence favorable to the prosecution. However, the existence of an obligation to conduct an objective investigation does not eliminate the need for an independent defense. The defense must retain the ability to verify whether sufficient evidence has been gathered, to request additional evidence, to challenge investigative omissions, and to challenge the lawful use of the evidence obtained (Code of Criminal Procedure, Art. 83(d), 92, 94–95, 100).

A person acquires the status of *suspect* when the evidence gives rise to a reasonable suspicion that a crime has been committed, whereas *the defendant* is the person against whom criminal proceedings have been initiated (Articles 77 and 82 of the Code of Criminal Procedure). A suspect generally enjoys the rights granted to a defendant, subject to the distinctions established by the stage of the proceedings (Art. 78 of the Code of Criminal Procedure). Fundamental rights include the right to remain silent, the right against self-incrimination, prompt notification of the charges and their legal classification, access to the case file, assistance from a lawyer, interpretation, the right to present evidence, the right to file motions and objections, and the right to appeal (Articles 10, 78, 83, 108–109 of the Code of Criminal Procedure).

The defendant is not required to prove his or her innocence and may choose not to cooperate with the prosecution (Code of Criminal Procedure, Articles 4, 10(4), 83(a), 99(2), 109). Remaining silent does not relieve the prosecution of its burden to prove the charges in accordance with the law (Directive (EU) 2016/343, Articles 6–7). The court may convict only if the evidence establishes guilt beyond a reasonable doubt, and any remaining doubt must be interpreted in favor of the defendant (Code of Criminal Procedure, Art. 4(2), 103(2); Directive (EU) 2016/343, Art. 6).

Institutional inequality and procedural compensation

The prosecutor normally benefits from police cooperation, public laboratories, databases, mandatory investigative powers, administrative continuity, and prior knowledge of the investigation. The defense typically enters the proceedings after the investigation has begun and does not have equivalent coercive powers. These differences do not require replicating the state apparatus for the defendant, but they do necessitate sufficiently strong safeguards: unrestricted access to counsel, service of procedural documents, access to the case file, time to review the evidence presented, opportunities to request expert opinions, and participation in hearings. (Code of Criminal Procedure, Articles 89–95, 100, 168–181; Directive 2012/13/EU, Article 7; Directive 2013/48/EU, Article 3).

Consequently, the practical scope of the principle of equality of arms varies depending on the nature of the case. A straightforward case based on direct testimony may require fewer technical resources than a complex criminal investigation involving digital forensics, financial analysis, classified information, technical surveillance, or specialized scientific evidence. The more decisive the prosecution's exclusive access to specialized information is, the stronger the procedural need for timely disclosure, adequate preparation time, specialized defense counsel, and reasoned judicial review (ECHR Art. 6(1), (3)(b)–(d); Jackson & Summers, 2012; Summers, 2007).

The judge is the institutional guarantor of this functional balance. The separation of judicial functions prevents the same procedural authority from freely combining the investigation, the review of the indictment, and the adjudication of the case, subject to the rules of compatibility established by law (Art. 3 of the Code of Criminal Procedure). The judge for rights and freedoms reviews measures that significantly affect fundamental rights during the investigation; the preliminary chamber judge reviews the legality of the indictment, the admission of evidence, and investigative acts; and the trial court determines guilt or innocence (Articles 3, 53–54, and 342 of the Code of Criminal Procedure). The independence and impartiality of the judiciary are guaranteed by the Constitution (Articles 124(2)–(3) of the Constitution).

Procedural Safeguards

Information on rights and the charges. A defendant cannot respond to a charge that he or she does not understand. Romanian authorities must inform the suspect or defendant of the alleged offense, its legal classification, and the applicable procedural rights prior to questioning, including the right to remain silent and the right to access a lawyer (Code of Criminal Procedure, Art. 10(3), 83(a), 108). The information must be sufficiently specific to allow for an informed decision regarding the defense strategy. At the European Union level, the notification must be prompt, accessible, and sufficiently detailed to safeguard an effective defense, and relevant changes to the charges must be communicated where necessary for the sake of fairness (Directive 2012/13/EU, Articles 3, 6). This requirement extends beyond the formal designation of the offense. Effective notification typically requires identifying the act, the time and place - to the extent they are known - the alleged form of participation, and the legal characterization. If the legal classification is changed during the trial, the defendant must be informed and given the opportunity to prepare and present a defense regarding the new legal classification (Code of Criminal Procedure, Art. 386; ECHR, Art. 6(3)(a)–(b); ECHR, *Pélissier and Sassi v. France*, 1999).

Access to a lawyer. Romanian law recognizes the right to legal assistance throughout the criminal proceedings and protects confidential communication between the lawyer and the client (Articles 10, 83(c), and 89 of the Code of Criminal Procedure). The lawyer may participate in investigative proceedings, may request notification of their conduct, may file motions and objections, may review the case file, and may obtain the time and facilities necessary to prepare the defense (Articles 92, 94–95 of the Code of Criminal Procedure). A

violation of the confidentiality of communications between a lawyer and a client may result in the exclusion of evidence or the application of the grounds for nullity provided for by law.

Access must be granted early enough to influence the defense, particularly before the first substantive interrogation. The European Court of Human Rights has held that access to legal counsel from the very outset of police questioning is a fundamental safeguard against self-incrimination, ill-treatment, uninformed waivers, and irreversible harm to the rights of the defense (ECHR, *Salduz v. Turkey*, 2008). Restrictions are not automatically decisive in every case, but require a convincing justification and an examination of whether the proceedings as a whole remained fair (ECHR, *Ibrahim and Others v. the United Kingdom*, 2016; *Beuze v. Belgium*, 2018).

Mandatory legal assistance applies in the circumstances listed in the Code of Criminal Procedure, including cases involving minors, detained persons, persons whose ability to defend themselves is deemed insufficient, and cases of a certain gravity (Code of Criminal Procedure, Art. 90). When the retained attorney is absent and representation is mandatory, an attorney must be appointed in accordance with legal procedure (Criminal Procedure Code, Art. 91). The attorney must have a realistic opportunity to review the case and provide a substantive and effective defense (Criminal Procedure Code, Art. 91(3); ICCJ Decision No. 27/2007, RIL; Directive (EU) 2016/1919, Art. 7).

Legal aid and the quality of representation. Equality of arms can be illusory when a defendant officially has a lawyer but does not receive meaningful assistance. Consequently, Directive (EU) 2016/1919 links legal aid to the effective exercise of access to a lawyer and permits examinations of the merits and evidence only within the limits of a fair trial (Directive (EU) 2016/1919, Articles 3–4). Detention, the seriousness of the charge, the complexity of the case, and the severity of the potential penalty are particularly relevant in determining whether the interests of justice require state-funded representation (Directive (EU) 2016/1919, Art. 4).

Quality has both organizational and individual dimensions. An effective system requires timely appointments, reasonable remuneration, access to the case file, facilities for confidential consultation, continuity of representation where possible, professional independence, adequate training, and the replacement of the lawyer when specific circumstances warrant it (Directive (EU) 2016/1919, Articles 6–7). A system that appoints a lawyer only moments before a decisive hearing may formally comply with the appointment requirement, but fails to ensure effective participation in the defense (ECHR Art. 6(3)(b)–(c); CPP Art. 91(3)).

Access to the case file and disclosure of evidence. The defendant and the lawyer have the legal right to consult the case file, take notes, and obtain copies under the conditions set forth in the Code (Articles 83(b), 92(8), and 94 of the Code of Criminal Procedure). During the investigation, access may be restricted by a reasoned decision when necessary for the proper conduct of the proceedings, but such restrictions must remain temporary and proportionate. Once criminal proceedings have been initiated, a general restriction may not exceed the statutory period, while materials essential for challenging detention or another preventive measure must be made available to the defense (Article 94 of the Code of Criminal Procedure).

Directive 2012/13/EU requires the disclosure of evidence in the possession of the authorities, whether favorable or unfavorable to the accused, in a timely manner to allow for the effective exercise of the right to defense (Directive 2012/13/EU, Art. 7(2)–(3)). Materials essential for challenging detention must be made available to the detained person or their attorney (Directive 2012/13/EU, Art. 7(1)). Access may be denied only under strictly defined circumstances, such as a serious risk to the life or fundamental rights of another person or the strict necessity to protect an important public interest, and the restriction must remain compatible with the right to a fair trial (Directive 2012/13/EU, Art. 7(4)).

The ECHR has held that the inability of a self-represented defendant to access and obtain copies of the case file may violate both the principle of equality of arms and the right to adequate facilities for the preparation of the defense (ECHR, *Foucher v. France*, 1997). More generally, the prosecution must disclose material evidence both for and against the accused. Non-disclosure may be justified by competing interests, such as witness protection or national security, only when strictly necessary and adequately balanced by judicial procedures capable of protecting the defense (ECHR, *Rowe and Davis v. the United Kingdom*, 2000; *Jasper v. the United Kingdom*, 2000).

Equality in the presentation of evidence. The prosecutor bears the primary burden of proving the charge, while the defendant is not required to prove innocence (Code of Criminal Procedure, Art. 99(1)–(2)). The parties and the main participants in the proceedings may propose evidence, and the investigating authorities must gather evidence both for and against the accused (Code of Criminal Procedure, Art. 5(2), 99(3), 100(1)). Requests for evidence must be resolved by a reasoned decision and may be denied only on legal grounds, such as irrelevance, redundancy, impossibility, illegality, or lack of necessity or usefulness (Code of Criminal Procedure, Art. 100(3)–(4)).

Evidence must be obtained fairly and lawfully. Violence, threats, coercion, promises of illegal benefits, and methods that impair a person’s ability to recall or recount facts are prohibited (Code of Criminal Procedure, Art. 101). Evidence obtained unlawfully is excluded, and the exclusion of a piece of evidence may extend to evidence directly derived from it, provided that the legal conditions are met (Code of Criminal Procedure, Art. 102). The court evaluates the evidence at its discretion, but a conviction requires proof beyond a reasonable doubt and may not be based decisively on the statements of protected witnesses, undercover investigators, or informants, where the Code prohibits such decisive reliance (Code of Criminal Procedure, Art. 103).

Equality of arms does not mean that every request by the defense must be granted or that the prosecution and the defense must call the same number of witnesses. It requires equivalent legal standards, a reasoned decision, and a genuine opportunity to challenge the opposing party’s evidence. Article 6 § 3(d) of the ECHR expressly provides that defense witnesses must be proposed and heard under the same conditions as prosecution witnesses, subject to their relevance and necessity (ECHR Art. 6(3)(d)). A court may reject cumulative or irrelevant evidence, but it may not apply significantly stricter criteria to the defense’s evidence without compelling justification.

Hearing of Witnesses. The defense must, as a general rule, have the opportunity to examine or request the examination of witnesses whose testimony is used against the accused (ECHR Art. 6(3)(d); CPC Arts. 374–381). Restrictions may be permitted for legitimate reasons, including the vulnerability of witnesses, the risk of retaliation, or the inability to locate a witness, but the court must consider whether there was a valid reason for the witness’s absence, whether the evidence was unique or decisive, and whether sufficient countervailing safeguards maintained overall fairness (ECHR, *Al-Khawaja and Tahery v. the United Kingdom*, 2011; *Schatschaschwili v. Germany*, 2015).

Countervailing safeguards may include prior cross-examination by the defense, audiovisual recording, disclosure of materials relevant to credibility, corroboration of evidence, judicial warnings regarding the probative value of the evidence, and a reasoned assessment of the disadvantage suffered by the accused. Anonymous or protected testimony requires particularly careful scrutiny, as anonymity may impair the defense’s ability to investigate bias, motive, prior relationships, or credibility (Code of Criminal Procedure, Articles 125–130; ECHR, Article 6(1), (3)(d)).

Classified or confidential information. Romanian law allows for special treatment of classified information, while also imposing safeguards against its uncontrolled use. In preliminary proceedings, the judge may request declassification or reclassification to a lower

level and may facilitate access for defense counsel. A reasoned refusal may be issued if access would create a serious danger to life or fundamental rights, or if it is strictly necessary to protect national security or another important public interest; Information withheld by the defense pursuant to these rules may not be used to support a conviction or an equivalent finding of criminal liability (Code of Criminal Procedure, Art. 345(1¹)–(1²)).

This approach reflects the European requirement that restrictions be strictly necessary and subject to judicial review. The judge must have sufficient access and independence to assess the alleged necessity of secrecy, consider less restrictive alternatives, and prevent undisclosed materials from becoming decisive for a finding of guilt (ECHR, *Rowe and Davis v. the United Kingdom*, 2000; *Jasper v. the United Kingdom*, 2000). Merely accepting the prosecution’s assertion that secrecy is necessary would not provide an adequate safeguard.

Effective remedies. The principle of equality of arms requires not only substantive rights but also mechanisms capable of redressing violations of those rights. Romanian remedies include complaints against acts of the criminal investigation authority, requests to inspect the case file, objections to investigative measures, challenges to preventive measures, motions and exceptions before the preliminary chamber, motions to exclude evidence, exceptions of nullity, the right to appeal, and extraordinary remedies when the legal conditions are met (Code of Criminal Procedure, Articles 95, 204–206, 336–347, 408–465).

Appeals must be capable of producing an appropriate procedural consequence. Depending on the violation, these may include a further postponement, access to a lawyer, the re-examination of a procedural act, the exclusion of evidence, a declaration of nullity, the re-examination of witnesses, release from unlawful detention, or the reversal of the judgment on appeal (Code of Criminal Procedure, Articles 102, 280–282, 421). Furthermore, European Union law requires effective remedies for violations of the rights to information, access to a lawyer, legal aid, and the presumption of innocence (Directive 2012/13/EU, Art. 8; Directive 2013/48/EU, Art. 12; Directive (EU) 2016/343, Art. 10; Directive (EU) 2016/1919, Art. 8).

Equality of arms during the main stages

Criminal prosecution poses the greatest structural risk of inequality, as investigative authorities control the initial collection, preservation, and interpretation of evidence (Code of Criminal Procedure, Articles 285–327). At this stage, witnesses’ memories may change, digital data may be extracted and filtered, and the suspect may make statements with long-lasting consequences. Therefore, early information, access to a lawyer, notification of investigative acts, requests for preservation, and access to evidence relevant to detention are particularly important (Code of Criminal Procedure, Articles 89–95, 108–109; Directive 2012/13/EU, Articles 3, 6–7; Directive 2013/48/EU, Article 3).

The defense counsel may participate in investigative proceedings, submit observations and motions, and request additional evidence, subject to statutory exceptions (Article 92 of the Code of Criminal Procedure). The lawyer’s presence does not transfer control of the investigation to the defense, but it allows for the simultaneous review of the legality and accuracy of certain procedures, such as interrogations, confrontations, identifications, reconstructions, search procedures, and expert examinations. The value of such participation is diminished if notice is not provided in a timely manner or if the lawyer does not have access to the underlying technical data. The investigative authority’s obligation to collect evidence both for and against the accused is a significant safeguard, but it cannot replace adversarial scrutiny (CPP Art. 5(2)). The investigative authority may reasonably prioritize a particular hypothesis, interpret ambiguous evidence in a certain way, or fail to recognize exculpatory significance. Therefore, the participation of the defense serves both the individual interest of the accused and the systemic interest in a reliable determination of the facts (Jackson & Summers, 2012; Udrioiu, 2025a).

Proceedings concerning preventive measures require a higher degree of equality, as the individual's liberty is at stake. The defense must receive the materials necessary to effectively challenge detention, have access to counsel, and be able to respond to the prosecution's factual and legal arguments (Code of Criminal Procedure, Articles 202–204, 225–227; Directive 2012/13/EU, Art. 7(1)). A hearing cannot be meaningfully adversarial when the prosecution relies on information that the defense cannot know or challenge.

At the conclusion of the investigation, the prosecutor assesses whether the evidentiary and legal conditions for bringing the case to trial are met (Articles 314–327 of the Code of Criminal Procedure). The indictment defines the factual and legal framework within which the trial will typically proceed. Therefore, clarity is essential: the indictment must identify the defendant, describe the alleged facts, indicate the legal classification of the charges, specify the evidence, and comply with other legal requirements (Articles 328–329 of the Code of Criminal Procedure). Equality at this stage requires more than the mere physical transmission of the indictment. The defendant must be provided with sufficient information and time to identify defects in the indictment, challenge the legality of the evidence, and prepare motions for the preliminary hearing (Code of Criminal Procedure, Art. 344). A complex indictment, supported by extensive digital or financial evidence, may require a preparation period longer than the legal minimum for the defense to be truly effective (ECHR Art. 6(3)(b)).

Preliminary Hearing. The purpose of the preliminary hearing is to verify the court's jurisdiction, the legality of the indictment, the legality of the admission of evidence, and the legality of investigative acts after the case has been referred to trial (Article 342 of the Code of Criminal Procedure). The defendant, the other parties, and the victim must be informed of the purpose of the proceedings, the right to counsel, and the deadline for filing written motions and objections, which may not be shorter than the statutory minimum (Art. 344(2)–(3) of the Code of Criminal Procedure).

If motions or objections are filed or raised *ex officio*, the preliminary chamber judge hears the arguments of those present and of the prosecutor and decides on the basis of the criminal investigation file and any other evidence presented that is relevant to issues of legality (Code of Criminal Procedure, Art. 345(1)). Decisions must be communicated to the prosecutor, the parties, and the victim (Code of Criminal Procedure, Art. 345(2)).

These safeguards have been significantly influenced by the Constitutional Court. In Decision No. 641/2014, the Court ruled that excluding the prosecutor and the defendant from a proceeding likely to influence the trial violated the principles of adversarial proceedings, oral proceedings, and equality of arms. It also objected to the ways in which the prosecution's observations or corrective measures could influence the decision without providing the defense with an equivalent opportunity to review and comment on them (Constitutional Court Decision No. 641/2014).

In Decision No. 166/2015, the Constitutional Court generalized this principle: documents and observations that may influence a judicial decision must be communicated to the relevant parties, who must have a genuine opportunity to discuss them (Constitutional Court Decision No. 166/2015, paragraphs 39–40). The Court reiterated that the adversarial principle is a defining element of the equality of arms and that both the prosecutor and the defendant must be able to review and comment on the evidence and arguments presented to the judge. The preliminary chamber fulfills a crucial corrective function. Illegally obtained evidence may be excluded, unlawful investigative acts may be sanctioned, defects in the indictment may be remedied, and the case may be returned to the prosecution if the legal conditions are met (Articles 345–346 of the Code of Criminal Procedure). Since these decisions shape the evidentiary basis of the trial, formal access without sufficient time, documentation, or technical assistance may not ensure true equality.

Trial. Romanian criminal procedure is oral, direct, and adversarial (Code of Criminal Procedure, Art. 351(1)). The court must subject the motions and objections raised by the

prosecutor, the parties, or other participants in the proceedings to adversarial debate and resolve them through reasoned decisions (Code of Criminal Procedure, Art. 351(2)–(3)). Publicity is the rule, subject to statutory exceptions intended to protect interests such as minors, privacy, dignity, safety, national security, and the proper administration of justice (Code of Criminal Procedure, Art. 352; ECHR, Art. 6(1)).

At trial, the defendant must be informed of the charges and of their procedural rights, including the right to remain silent, and must be able to request evidence and challenge the evidence supporting the charges (Articles 374–375 of the Code of Criminal Procedure). Evidence is typically presented directly before the court through cross-examination and adversarial proceedings (Articles 376–383 of the Code of Criminal Procedure). The defense may cross-examine witnesses and experts under judicial supervision and may challenge their credibility, methodology, relevance, and consistency.

The court's duty of impartiality does not require passivity. The court may clarify the facts, ask questions, and request evidence under the circumstances permitted by the Code, but it must not assume the role of the prosecution or create a reasonable appearance of bias (Constitution, Art. 124; Code of Criminal Procedure, Arts. 349, 351). If the court raises a new issue of law or fact, the principle of equality normally requires that both parties be given the opportunity to address it. The defendant has the right to the final statement after the parties have made their statements, and may not be questioned during this final statement (Article 389 of the Code of Criminal Procedure). The court's decision must be based solely on evidence lawfully assessed during the proceedings, and a conviction requires proof beyond a reasonable doubt (Article 103 of the Code of Criminal Procedure).

Appeal. The appellate court reviews the case within the limits pertaining to the persons and procedural capacities affected by the appeal, and is required to examine the relevant issues of fact and law within those limits (Article 417 of the Code of Criminal Procedure). The appeal is heard with the parties and the victim being summoned; the prosecutor's participation is mandatory, and a defendant in custody must, as a rule, be present (Article 420(1)–(3) of the Code of Criminal Procedure).

The appellate court may hear the defendant, may re-examine the evidence from the trial court, and may admit new evidence in accordance with the rules of evidence (Article 420(4)–(5) of the Code of Criminal Procedure). The prosecutor and the parties have the right to respond to new issues that arise during the hearing; the defendant has the final say; and the court must examine all grounds for appeal (Code of Criminal Procedure, Art. 420(6)–(10)). These requirements safeguard the principle of equality in cases where the appellate court reassesses credibility or adopts a factual or legal basis different from that used in the trial court. An appellate court that intends to overturn an acquittal or make decisive findings regarding credibility must ensure the defense's participation in a manner proportionate to the nature of its review. Where the direct assessment of testimony is decisive, relying exclusively on the written record may be incompatible with the requirements of immediacy and an effective defense (ECHR Art. 6(1); ECHR, *Dan v. Republic of Moldova*, 2011; *Lorefice v. Italy*, 2017). Therefore, equality depends not only on the formal right to appeal but also on the procedure by which the appellate court exercises its powers regarding the assessment of evidence.

Conclusions

Equality of arms between the prosecution and the defense is a fundamental element of the guarantee of a fair trial applicable in all criminal proceedings in Romania (Constitution, Art. 21(3); ECHR, Art. 6(1); CPP, Art. 8). This does not require that prosecutors and defendants possess identical powers. The prosecution may lawfully exercise investigative and public authority functions that cannot be transferred to the defense (Constitution, Art. 131–132; CPP,

Art. 55–56). The principle requires, however, that these structural advantages be counterbalanced by practical and effective safeguards for the defense.

Romanian law provides a generally coherent legal framework. The defendant is presumed innocent, is not required to prove his or her innocence, has the right to remain silent and not to participate in his or her own prosecution, has the right to counsel, may inspect the case file, may propose evidence, may challenge the prosecution's evidence, may move to exclude or declare evidence inadmissible, may participate in adversarial hearings, and may file an appeal (Articles 4, 10, 83, 89–95, 99–103, 342–347, 351, 408–425 of the Code of Criminal Procedure). The prosecution must gather evidence both for and against the defendant, and a conviction requires proof beyond a reasonable doubt (Articles 5(2) and 103(2) of the Code of Criminal Procedure).

European law provides further clarification. Information must be provided promptly and in sufficient detail; access to a lawyer must be granted early enough to be useful; communications between the lawyer and the client must remain confidential; physical evidence must be disclosed in a timely manner; legal aid must be effective and of adequate quality; and violations must be subject to effective remedies (Directive 2012/13/EU, Articles 3, 6–8; Directive 2013/48/EU, Articles 3–4, 9, 12; Directive (EU) 2016/1919, Articles 4–8). The presumption of innocence requires the prosecution to prove guilt and protects the right to remain silent and the right against self-incrimination (Directive (EU) 2016/343, Articles 3, 6–7). The main weaknesses lie in implementation risks rather than a lack of legislative recognition. Delayed access to lawyers, short preparation periods, excessively broad restrictions on case files, late disclosure, unequal access to expert resources, and formally appointed representatives can turn nominal rights into ineffective safeguards. These risks are particularly acute during the investigation phase, when the state exercises maximum informational and institutional control.

Therefore, courts must examine procedural fairness in a concrete manner. They should ask whether the defense was familiar with the case to which it had to respond, whether it had the necessary time and facilities, whether it received effective legal assistance, whether it was able to examine the prosecution's evidence, whether it was able to present relevant evidence, and whether it had access to a remedy capable of correcting the disadvantage. Restrictions should be exceptional, necessary, proportionate, temporary where possible, and accompanied by effective countervailing safeguards. The case law of the Constitutional Court of Romania confirms that procedural efficiency cannot justify unilateral disclosure or exclusion from a decision-making process that is likely to affect the defense. The adversarial principle requires the disclosure of relevant arguments and a genuine opportunity to respond to them (Constitutional Court Decisions Nos. 641/2014, 166/2015, and 631/2015). The same principle should guide the interpretation of the disclosure of evidence, expert evidence, classified materials, detention procedures, participation in the trial, and the adjudication of appeals.

The central conclusion is that Romanian criminal procedure recognizes the equality of arms at a substantive normative level; however, the effectiveness of the principle depends on the institutional culture of criminal prosecution, the quality and resources of defense representation, and the intensity of judicial oversight. Equality is not achieved when the prosecution and the defense appear similar from a formal standpoint, but rather when the defense can participate knowledgeably, independently, and effectively in determining whether the state has proven the charge in accordance with the law.

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