

ENFORCEMENT OF THE RIGHT OF DEFENSE IN THE CRIMINAL TRIAL

Alina-Marilena ȚUCĂ*

Abstract

One of the fundamental principles of the criminal trial is the principle of enforcing the right of defense, being not only an expression of the rule of law, but also a necessary condition for the efficient course of justice. The right of defense is a complex right, comprising all the possibilities provided by the legislator to the parties and subjects in the criminal proceedings, in order to defend their interests, and is expressed under three general aspects: the possibility of the parties to defend themselves in person during the criminal trial; the obligation of the judicial bodies to consider ex-officio aspects also favorable to the parties involved in the criminal trial; the possibility and sometimes the obligation to provide legal assistance during the criminal trial. The right of defense is a fundamental right, guaranteed by the Constitution, by the Criminal Procedure Code and by the international treaties. Any violation of the right of defense implies various penalties, including the most important sanction provided by the Criminal Procedure Code, respectively the absolute nullity of the acts taken in violation of this right, including the nullity of the decision pronounced under these conditions and retrial of the case.

Keywords: *the right of defense, defense in person, defense through attorney, penalties applied if the right of defense is not respected.*

1. Introduction

Enforcement of the right of defense represents a fundamental principle of the criminal trial and, at the same time, an essential component of the right to a fair trial and a balance is maintained between the individual interests of the people participating to the criminal trial and the general interest of the society to hold criminally liable all the persons who perpetrated a criminal offence if this right is respected.

Taking into consideration the importance of this right in the course of justice, through this study we intend to present the modalities through which this right is established both by the Romanian legislator and by the main international regulations, to underline the fact that it is a

complex right, integrating all the possibilities granted by the legislator to the parties and main subjects in the proceedings in order to defend their interests. Thus, the national legislator underlined the importance of the right of defense, both by stipulating this right among the fundamental rights established by the Romanian Constitution and by a detailed presentation of this right in the Criminal Procedure Code. A special importance was equally assigned to the principle of enforcing the right of defense at the European level, eloquently stipulating the actual dimensions of this right, considering the fact that this principle represents an essential condition for the effective course of justice.

At the same time, in this study we will present the means through which this right can be exercised, as well as the guarantees

* PhD, Faculty of Law, "Nicolae Titulescu" University (e-mail: oprealina83@yahoo.ro)

provided by the legislator for the respect of this right and the penalties applied if this right is violated.

Taking into consideration the fact that the course of justice in a state of law can only take place by respecting the legitimate rights and interests of a person, through this study we intend to illustrate that the right of defense is not an additional institution, but it represents an essential and necessary right for any act of justice. Far from being exhaustive, this study can represent a supporting element for certain legal or practical clarifications related to enforcing the right of defense.

2. The right of defense- definition and regulation

The criminal trial represents “the activity regulated by the law, performed by the competent bodies, with the participation of the parties and of other persons, in order to promptly and completely establish the acts which represent offences, thus any person perpetrating an offence could be punished according to their guilt and no innocent person could be held criminally liable.”¹

Based on this definition, it results that a person who perpetrated an offense is held criminally liable by the judicial bodies only after a criminal trial.

This criminal trial is governed by certain general rules, by certain fundamental principles, which reflect the overall conception of the entire regulation.

One of the fundamental principles of the criminal trial is the principle of enforcing the right of defense, being not only an expression of the rule of law, but also a

necessary condition for the efficient course of justice. The right of defense in the criminal trial represents an essential component of the right to a fair trial and a balance is maintained between the individual interests of the people participating to the criminal trial and the general interest of the society to hold criminally liable all the persons who perpetrated a criminal offence if this right is respected. The right to defense can be defined as “all the fair trial guarantees granted by the law to the parties or to the main subjects in the proceedings within a criminal procedure or criminal trial, in order to efficiently defend their legitimate rights and interests”².

Taking into consideration the importance of this right in the course of justice, it was established through several international law regulations. Thus, the Universal Declaration of Human Rights³ defines the main rights of the human being, which also include several procedural rights: the right to a fair trial, the right to defense, the right to be a subject of law, the right to an effective remedy. Despite the fact that the Declaration is not an international treaty, implying legal consequences if its provisions are violated, it became a reference document for the States and its provisions were subsequently included in various international treaties. Article 11 point 1 of this document mentions that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial **at which he has had all the guarantees necessary for his defense.**” This underlines the particular importance of the right of defense in a fair trial.

¹ Ion Neagu, *Tratat de procedură penală, Partea generală, Ediția a-II-a*, Universul Juridic Publishing House, Bucharest 2010, p.19-20.

² Mihail Udriou, *Procedură penală, Partea Generală, Ediția 5*, C.H.Beck Publishing House, Bucharest 2018, p. 42.

³ Passed on 16 December 1948, by the third session of the General UN Assembly.

Another extremely important international document, expressly establishing the right of defense of any person, is the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights⁴, which, in Article 6 point 3, specifies the fact that “everyone charged with a criminal offence has the following minimum rights:

- a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b) to have adequate time and facilities for the preparation of his defense;
- c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

We notice the fact that this Convention establishes a detailed regulation of the right of defense, capable to highlight its considerable importance within a fair trial, specific to any democratic society. The text of law mentioned establishes both the right of an accused person charged with a criminal offence to defend himself in person during the proceedings against him (defense which implies several guarantees: information in a language which he understands, possibility to examine or have examined witnesses on

his behalf under the same conditions as witnesses against him), as well as his right to be defended through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free, under certain conditions, however, without being an exhaustive enumeration of the guarantees which have to be provided to a person charged with a criminal offence during the criminal proceedings, since the texts mentions the fact that **“everyone charged with a criminal offence has the following minimum rights”**, and then the rights are enumerated. All these rights cannot be separately treated, but they represent all together an essential component of the right to a fair trial.

At the same time, the Charter of the Fundamental Rights of the European Union⁵ reinstates the importance of the right of defense, the document expressly establishing, in Article 48 paragraph 2, the importance of guaranteeing this right, stating that “respect for the rights of the defense of anyone who has been charged shall be guaranteed.” Article 47, paragraphs 2 and 3 also establish this right, the Charter specifying that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

As previously mentioned, a special importance was given to the principle of guaranteeing the right of defense at the European level, eloquently shaping the actual dimensions of this right, considering

⁴ This act represents a catalogue of fundamental rights, elaborated by the Council of Europe, signed on 4 November in Rome and enforced on 3 September 1953. The convention was ratified by almost all the Member States of the Council of Europe and Romania ratified this act through Law 30 in 1994.

⁵ The Charter of the Fundamental Rights of the European Union was proclaimed by the European Commission, the European Parliament and the Council of the European Union, on 7 December 2002, within the European Council in Nice, being enforced on 01 December 2009, along with the Treaty of Lisbon.

the fact that this principle represents an essential condition for the effective course of justice.

The importance of this right is equally underlined at the national level by the Romanian legislation and the Constitution of Romania has a special place reserved for the right of defense. Thus, Article 24 of the above mentioned regulation specifies the fact that the right of defense is guaranteed and the parties are entitled to be assisted by an attorney, of their own choosing or appointed by the court.⁶

The Criminal Procedure Code specifies, at its turn, the enforcement of the right of defense among the basic rules of the criminal trial.” Thus, article 10, called “right of defense”, specifies that:

1. The parties and the main subjects in the proceedings have the right to defend themselves in person or to be assisted by an attorney.
2. The parties, main subjects in the proceedings and the attorney have the right to be given the time and facilities necessary for the preparation of the defense.
3. The suspect has the right to be informed promptly, and before being heard, of the offense the criminal investigation is looking into and the legal classification of the offense. The accused person has the right to be informed promptly of the offense brought against them by the prosecution, and the legal classification of the offense.
4. Before being heard, the suspect and accused person must be informed that

they have the right to make no statements whatsoever.

5. The judicial bodies are under an obligation to ensure full and effective exercise by the parties and main subjects in the proceedings of their right to defense throughout the criminal trial.
6. The right of defense shall be exercised in good faith, according to the goal for which the law recognizes it.

The specification of these rights is not exhaustive and there are other dispositions in the Criminal Procedure Code aimed to guarantee an effective defense during the criminal trial (the right to examine the case file, the right to bring evidence, the right to be informed about his rights, the right to make requests, to claim exceptions). We can notice that the rights specified by article 10 from the Criminal Procedure Code actually represent a transposition in the national law of the dispositions under Article 6 from the European Convention on Human Rights, with the mention that part of the rights specified by Article 6 were also extended to other parties and main subjects in the proceedings, apart from the person charged with a criminal offence.

3. Content of the right of defense

As regards to the content of the right of defense, as established by the Criminal Procedure Code, as well as by the European Convention on Human Rights, we notice that it is not only reduced to the legal assistance from an attorney, as “The right of defense does not have to be confused with the existence of the attorney”⁷. The right of

⁶ Such a regulation is also mentioned by Law no. 304/2004, on the judicial organization, whose article 15 specifies that “the right of defense is guaranteed. Throughout the entire criminal trial, the parties have the right to be represented, or, as applicable, assisted by an attorney, of their own choosing or appointed by the court, pursuant to the law.”

⁷ V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *Explicații teoretice ale Codului de procedură penală român, Partea generală, vol. 1, ediția a-2-a*, Academiei Publishing House, All Beck Publishing House, Bucharest, 2003, p. 49

defense is a complex right, comprising all the possibilities provided by the legislator to the parties and subjects in the criminal proceedings, in order to defend their interests. Thus, the doctrine specifies the fact that the right of defense is expressed under three general aspects: “the possibility of the parties to defend themselves in person during the criminal trial; the obligation of the judicial bodies to consider ex-officio aspects also favorable to the parties involved in the criminal trial; the possibility and sometimes the obligation to provide legal assistance during the criminal trial.”⁸

3.1. Defense in person

Both Article 6 paragraph 3 from the European Convention on Human Rights and article 10 from the Criminal Procedure Code establish the right of everyone charged with a criminal offence to defend himself in person and the article from the Romanian Criminal Procedure Code also extends this right to the other parties and to the victim. However, the text from the Convention does not mention the conditions of exercising this right, leaving the contracting states the choice of the means allowing its effective performance and the Court has to examine if these means comply with the requirements of a fair trial.⁹ Furthermore, the case-law of the European Court of Human Rights¹⁰ indicated that it is necessary to guarantee “not only rights that are theoretical or illusory, but rights that are practical and effective (...) this is particularly so of the right of the defense in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive”. Thus, the possibility of the parties and main

subjects in the proceedings, to defend themselves in person in the criminal trial, is guaranteed by the national legislation, by establishing certain wide fair trial rights and guarantees in the Criminal Procedure Code.

In order to guarantee a concrete and effective defense, several specific rights are recognized for the suspect and for the accused person. Thus, articles 78 and 83 from the Criminal Procedure Code specify the main rights of the suspect, respectively of the accused person, among which:

- a) **the right not to make any statements whatsoever** during criminal proceedings, and their attention shall be drawn to the fact that their refusal to make any statements shall not cause them to suffer any unfavorable consequences, and that any statement they do make may be used as evidence against them.

The right is also mentioned by article 10 paragraph 4 Criminal Procedure Code, which specifies the fact that, before being heard, the suspect and accused person must be informed that they have the right to make no statements whatsoever, as well as by article 99 paragraph 2 Criminal Procedure Code, which specifies that the suspect or accused person has the right not to contribute to their own incrimination and by article 118 Criminal Procedure Code, according to which the witness statement given by a person who had the capacity of suspect or accused person before such testimony or subsequently acquired the capacity of suspect or accused person in the same case, may not be used against them.

Thus, these legal dispositions establish the right to remain silent and the right not to contribute to their own incrimination, right

⁸ Ion Neagu, op. cit.p. 102-103

⁹ Corneliu Bîrsan, Convenția europeană a drepturilor omului. Comentariu pe articole, Ediția 2, C.H.Beck Publishing House, Bucharest 2010, p.551.

¹⁰ See ECHR, judgment from 13 May 1980, case of Artico v. Italy, paragraph 33.

in relation to which the European Court of Human Rights constantly ruled that “even if Article 6 from the European Convention does not expressly mention the right of an accused person to remain silent about the offences held against him and not to contribute to his own incrimination, there represent generally recognized regulations, center of the notion of fair trial, established by Article 6 (...).”¹¹

b) **right to be informed**, promptly and before being heard, about the offense the criminal investigation is looking into and the legal classification of the offense.

This right is also provided by article 10 paragraph 3 Criminal Procedure Code, according to which the suspect and the accused person have the right to be informed promptly and before being heard of the offense the criminal investigation is looking into and the charge for that offense, as well as by article 307 and article 309 paragraph 2 Criminal Procedure Code.

The above mentioned dispositions from the national law actually represent a transposition of the Directive 2012/13/EU, on the right to information in criminal proceedings¹², Directive which mentions, in its preamble in points 27 and 28 that “(27) Persons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defense and to safeguard the fairness of the proceedings. (28) The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at

the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defense.”¹³

At the same time, this right is also established by paragraph 3, letter a from the European Convention on Human Rights, according to which the accused person has the right to be informed about the reason of his arrest and of any charge against him. In its case-law, the Court ruled that, in the criminal matter, “a precise and complete information about the offense the criminal investigation is looking into and the charge for that offense has to be interpreted in the light of the general right to a fair trial, guaranteed by article 6 paragraph 1 from the Convention.”¹⁴

c) the right to consult the case file

This represents an essential component for the exercise of the right of defense in the criminal trial, as the suspect or the accused person could not build a precise and effective defense unless they have the right to study the case.

Thus, the case-file of the European Court¹⁵ established that access to the case file and use of notes, including, if necessary,

¹¹ N. Volonciu (coordinator), A. Simona Uzlău, R. Moroșanu, V. Văduva, D. Atășiei, C. Ghighenci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chiriță, *Noul Cod de procedură penală comentat*, Hamangiu Publishing House, Bucharest, 2014, p. 31

¹² Published in the Official Journal of the European Union, no. L142 dated 01 June 2012

¹³ See also Article 6 from the same Directive

¹⁴ C. Bîrsan, op. cit. p. 544.

¹⁵ Case Matyjek v. Poland, no. 38184/03, points 59 and 63 and Judgment of 15 January 2008, in case Luboch v. Poland, no. 37469/05, points 64 and 68.

the possibility of obtaining copies of relevant documents, represent important guarantees of the fair trial. The failure to afford such access has weighed, in the Court's assessment, in favor of the finding that the principle of equality of arms has been breached.

The right to access the case file is equally explicitly specified by Directive 2012/13/EU, on the right to information in criminal proceedings (directive transposed in the national law, mainly through the dispositions of article 94 Criminal Procedure Code), which specifies in Article 7 that: "(1) Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers. (2) Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defense. (3) Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defense and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered. By way of derogation from paragraphs (2) and (3), provided that this does not prejudice the right to a fair trial, access to certain materials

may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review".

As it can be noticed from the above mentioned text, the right to consult the case file does not appear as being an absolute right, as its exercise can be limited if it could prejudice an investigation, however, its limitation has to be concretely motivated by the judicial bodies (not in generic terms) and it has to be necessary and proportional to the purpose aimed, as equally provided by article 53 from the Constitution of Romania.¹⁶ Similarly, there are the dispositions of article 94 paragraph 4 Criminal Procedure Code, according to which, during the criminal investigation, the prosecutor can restrict, on a motivated basis, the consultation of the case file if this could prejudice the ongoing investigation, but, after the initiation of the criminal action, such restriction may be ordered for up to 10 days. However, in all the cases, the attorney cannot be restricted the right to consult the statements of the party or subject in the proceedings he represents and within the procedures taking place before the judge of rights and liberties, concerning deprivation or restrictive measures of rights, the attorney of the accused person has the right to be informed about the entire material from the

¹⁶ Pursuant to article 53 paragraph 2, Restriction can only be ordered if it is necessary in a democratic society. The measure has to be proportional to the situation which determined it, to be non-discriminatory applied and without harming the existence of the right or freedom.

criminal investigation case file. During the court proceedings, article 356 paragraph 1 Criminal Procedure Code specifies that the accused person can have the right to be informed of the actions under the case file, without establishing limitations of this right.

d) **the right to propose the production of evidence**, within the conditions of the law, to raise exceptions and make submissions.

Article 6, paragraph 3 letter d from the European Convention on Human Rights specifies the possibility of the accused person to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The right of the accused person to propose the production of evidence in the criminal trial is also established through the fact that article 306 paragraphs 3 and 4 Criminal Procedure Code specifies that the criminal investigation bodies have the obligation to collect and present evidence both in favor and against the suspect or accused person, as well as the obligation to rule, by reasoned order, on the request to produce evidence. At the same time, throughout the trial, the court shall produce evidence at the request of the parties or main subjects in the proceedings and the accused person has the right to challenge including the evidence administered during the criminal investigation and to obtain their new production.

Moreover, in its case-law¹⁷, the European Court specified that an important aspect of fair criminal proceedings is the ability for the accused person to be confronted with the witnesses in presence of the judge who immediately decides the case. At the same time, it ruled that Article 6 paragraph 3 letter d establishes the right that,

before an accused person is declared guilty, all the prosecution evidence has to be presented in principle before him, in public pronouncement, for a contradictory debate. However, this principle is not applied without exceptions, as the evidence can only be accepted under the reserve of the right of defense. As general rule, the accused person has to be provided with an adequate and sufficient possibility to challenge the prosecution's testimony and to examine witnesses against him, when they take the stand or afterwards. Two requirements result from this principle based on ECHR case-law: the first – the absence of a witness must be supported by a serious motive; the second – when a conviction is fully or considerably based on the depositions of a person, to whom the accused person was not able to ask questions or he could not request the examination, during the processing stage or during the debates, the right of defense can be restricted in a manner which is incompatible with the guarantees specified under Article 6.¹⁸

- e) **the right to benefit free of charge from an interpreter**, when he does not understand, does not speak well or cannot communicate in Romanian language
- f) **the right to use a mediator**, in the cases provided by the law
- g) the right to be examined in the presence of his attorney, before ordering a custodial measure against the suspect or accused person.

Thus, article 209 paragraph 5 Criminal Procedure Code specifies that taking in custody may only be order after hearing the suspect or the accused person, in the presence of an attorney of his own choosing or an attorney appointed by court. At the same time, article 225 paragraph 4 Criminal Procedure Code specifies that the pre-trial

¹⁷ Judgment of 18 March 2014, in case Beraru v. Romania, request no. 40107/04, point 64

¹⁸ Judgment of 09 July 2013, in case Bobeș v. Romania, request no. 29752/05, points 36, 37.

arrest proposal shall only be made in the presence of the accused person, excepting the cases he is unjustifiably absent, he is missing, he avoids coming to court or cannot be brought before the judge due to health condition, force majeure or a state of necessity, the same guarantee being also established by the legislator for the house arrest measure¹⁹ or for a restrictive measure, respectively the judicial control or the judicial control on bail.²⁰

h) the right to be present at the trial

The judicial bodies have to order the summon of the suspect or of the accused person, in order to be present at the trial, as provided by the dispositions of article 353 paragraph 1 Criminal Procedure Code. For the persons deprived of liberty, their presence at the trial and summon at each trial term are mandatory. This right is also established through Directive 2016/343/EU, which, in Article 8, specifies that: “(1) Member States shall ensure that suspects and accused persons have the right to be present at their trial. (2) Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State. (3) A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned. (4) Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons

but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9. (5) This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defense are complied with (...).

i) communication of the copy of the indictment,

Pursuant to article 344 paragraph 2 Criminal Procedure Code, the certified copy of the indictment and, as applicable, a certified translation thereof, shall be communicated to the accused person at their place of detention or, as the case may be, the address where they live or the address where they requested to receive the procedural acts and the accused person shall also be informed of the object of the Preliminary Chamber procedure, their right to retain an attorney and the time within which, as of the communication date, they can file motions and exceptions in writing concerning the lawfulness of evidence gathering and conduct of criminal investigations by the criminal investigation bodies.

¹⁹ Article 219 paragraph 5 Criminal Procedure Code specifies that the Judge of Rights and Liberties shall hear the accused person when the latter is present.

²⁰ Article 212 paragraph 3 Criminal Procedure Code, the measure of judicial control can only be taken after hearing the accused person, in the presence of an attorney of his own choosing or an attorney appointed by court. These dispositions being also applicable for the judicial control on bail, provided by article 216 paragraph 3 Criminal Procedure Code.

- j) **during the debates, the accused person takes stand** in order to express opinions about the evidence produced in the case, as well as about the charges and individualization of the punishment.

At the same time, before ending the debates, the accused person takes his last stand, procedure during which he cannot be asked questions, in particular in view of exercising a proper defense. If new acts or circumstances are revealed, essential in order to settle the case, the court shall order that the court investigation shall be retaken. He can produce defenses both on the criminal side and on the civil side, challenging the allegations of the prosecutor or of the victim/party in civil claim.

- k) **the accused party has the right to file the legal remedies** established by the legislator, respectively the ordinary legal remedies or, in certain cases, the extraordinary legal remedies.

During the ruling of the ordinary legal remedy of appeal (regardless if it is filed or not by the accused person), he has the right to file requests and raise exceptions, to request new evidence in defense, to debate all the appeal motifs filed in his defense or the motifs raised by the prosecutor, the victim or by other parties.

The suspect and the accused persons are not the only parties for whom the legislator established a series of rights and guarantees in view of concretely exercising the right of defense. Part of the rights established for them are also established under the same conditions for the other parties and for the victim. Thus, pursuant to the dispositions of article 81 Criminal Procedure Code, the victim has the right to consult the case file, to be summoned, to be

present at the trial, to file evidence, to ask questions to the accused person, to witnesses, to expert, the right to use a mediator, to benefit from an interpreter, to be sent in a language he understands the translation of any non-arraignment decisions, as well as other rights provided by the law (to file the legal remedies provided by the law, to make submissions during the debates about the evidence processed and about their lawfulness). At the same time, pursuant to the dispositions of articles 85 and 87 Criminal Procedure Code, the civil party and the party with civil liability benefit from the same rights, with the mention that for the party with civil liability, the rights shall be used within the limits and for the purposes of settling the civil claim.

Another component of the right of defense is also represented by the “obligation of the judicial bodies to consider, ex-officio, aspects favorable for the parties. This obligation actually represents an aspect for the manifestation of the active role played by the judicial bodies. If the parties do not act in order to valorize the evidence supporting their interests, the judicial bodies shall process such evidence ex-officio.”²¹

3.2. Defense through attorney

As mentioned above, the content of the right of defense also includes the legal assistance of the parties by an attorney. This right is established by the Criminal Procedure Code through article 10 paragraph 1 Criminal Procedure Code, according to which the parties and main subjects in the proceedings have the right to defend themselves in person or to be assisted by an attorney, as well as through other provisions from the same Code.²²

²¹ I. Neagu, *op. cit.* p. 104.

²² Article 81 paragraph 1, letter h, specifies that the victim has the right to be assisted or represented by an attorney; article 83 paragraph 1 letter c specifies that the accused person has the right to have an attorney of his own choosing

Considering the importance of this form of exercising the right of defense during the criminal trial, this right is also expressly provided through article 6, paragraph 3, letter c, which specifies that any accused person has the right to be assisted by an attorney of his own choosing and, in certain conditions, he has the right to be assisted, free of charge, by an attorney appointed by the court.

Similarly, Directive no. 2013/48/EU²³, on the right of access to a lawyer in criminal proceedings, specifies in its preamble the fact that Member States should ensure that suspects or accused persons have the right of access to a lawyer without undue delay and in any event, they should be granted access to a lawyer during the criminal proceedings before a court, if they have not waived this right.

Directive no. 2016/1919/EU²⁴ establishes, through Article 4, the rights of suspects or accused persons, who lack sufficient resources to pay for the assistance of a lawyer, have the right to legal aid when the interests of justice so require.

Therefore, legal aid represents a fundamental guarantee of the right of defense and implicitly one of the fundamental components of a fair trial, being provided by a person with legal qualification. Thus, article 1 from Law 51/1995²⁵ specifies that the profession of lawyer is free and independent, with autonomous organization and functioning, and the lawyer profession is only practiced by lawyers registered in the bar table where they belong, bar member of the National Association of Romanian Bars. At the same

time, the activity of the lawyer is reiterated, among others, through legal consultations and requests, legal aid and representation before the courts, criminal investigation bodies (article 3 from Law 51/1995). Thus, it can be noticed that the lawyer profession can only be exercised by observing the law, being conditioned by the observance of certain requirements. Through the Decision no. 15/RIL/2015, the High Court of Cassation and Justice, ruling in appeal in the interest of the law, indicated that the legal aid granted to an accused party in the criminal trial by a person who did not acquire the lawyer quality within the conditions of Law no. 51/1995, is *the equivalent of his lack of defense*.

The right to be assisted by a lawyer invariably also implies an efficient communication between the lawyer and the person he defends and if such communication is not possible, the right to legal assistance is devoid of substance. Thus, the judicial bodies have the positive obligation to assure the effectiveness of this communication, as well as its confidentiality.

Directive 2013/48/EU, on the right of access to a lawyer, specifies in its preamble the importance of assuring the contact between the attorney and his client, and, through Article 4, it establishes that Member States shall respect the confidentiality of communication between suspects or accused parties and their lawyer and such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law. The obligation to respect

and, if he cannot afford one, in cases of mandatory legal assistance, the right to have an attorney appointed by court, the same right being also established for the suspect through the dispositions of article 78 Criminal Procedure Code, according to which the suspect has the rights provided by the law for the accused person, unless otherwise provided by the law.

²³ Published in the Official Journal of the European Union no. L 294 date 06 November 2013, p. 1-12.

²⁴ Published in the Official Journal of the European Union no. L 297 date 04 November 2016, p. 1-8.

²⁵ Published in the Official Journal, no. 113 date 06 March 2001

confidentiality not only implies that Member States should refrain from interfering with or accessing such communication, but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality (Article 33 from the preamble of Directive 2013/48/EU).

ECHR case-law²⁶ established that the right to be assisted by a lawyer does not only mean the assurance of the contact between the lawyer and the accused person, but it also implies a more complex matter, respectively the accused person has to be able to obtain the whole range of services specifically associated with legal assistance: discussion of the case, organization of the defense, collection of evidence, preparation for questioning.

If the legal assistance is mandatory, the simple appointment of the lawyer by the court is not sufficient to consider that the right of defense was respected, but the judicial bodies have the positive obligation to assure that the lawyer appointed by the court studied the case file and performs a practical and effective defense, as provided by ECHR case-law, not being sufficient to guarantee some theoretical or illusory rights, as we indicated above. At the same time, the judicial bodies have to oversee that the lawyer does not find himself in an incompatibility case, through certain qualities or functions exercised.

However, the right to legal assistance is not an absolute right, namely the legal assistance of a lawyer appointed by court is not mandatory in all cases, the rule established by the Romanian legislation stating that the legal assistance is mainly facultative. Nevertheless, there are certain cases when the judicial bodies have to take the necessary measures in order to assure

legal assistance, cases which considered the assistance by a lawyer of certain persons/main subjects in the proceedings who find themselves in a more fragile position, position which has to be protected by assuring an efficient defense in a criminal trial. The mandatory legal assistance is established by the legislator in two separate texts of law, first of all for the suspect or accused person and secondly for the victim, civil party and party with civil liability.

3.2.1. Mandatory legal assistance of suspect or accused person.

The suspect or accused person has the right to be assisted by one or several lawyers, during all the stages of the criminal trial, as soon as starting the criminal investigation *in personam*, as well as in the preliminary chamber stage or during the ruling, including during the legal remedies.

Article 90 from the Criminal Procedure Code specifies the cases when the legal assistance of the suspect or accused person is mandatory, the enumeration is not limitative as there are also special cases which impose the obligation to assure this assistance. Pursuant to the text of law, the legal assistance is mandatory when:

l) the suspect/accused person is underage;

During the criminal investigation, the legal assistance is mandatory up to the date when he turns 18 years and during the course of trial throughout the entire ruling procedure (both in the court of first instance and in appeal) if he was still underage when he committed the offence (article 507 paragraph 3 Criminal Procedure Code).

m) he is admitted to a detention center or educational center;

n) he is detained or arrested (pre-trial detention or house arrest), even if in another case;

²⁶ Case Dayanan v. Turkey, judgment of 13 October 2009.

o) the safety measure of medical admission was ordered for the suspect/accused person, even if in another case;

p) in other cases established under the law;

The cases when the legislator establishes the need to assure legal assistance by a lawyer can be therein included: if the accused party wants to sign an agreement for the admission of guilt during the criminal investigation, within the procedures regarding the ordering, extension, duly cessation of preventive measures (judicial control, judicial control on bail, pre-trial arrest, house arrest; in the procedures related to the ex-officio debate of the lawfulness and substantiation of the preventive measures; in the procedure to settle the appeal against the court resolutions through which the judge of rights and freedoms, the preliminary chamber judge or the court rule on the preventive measures; in the procedure ordering the provisional medical admission, in the procedure for ordering, confirmation, replacement or cessation the provisional processual measures compelling to medical treatment or medical admission, sustained before the preliminary chamber judge following the ruling of not to refer the case to a trial court, if it is requested to replace the punishment by fine with the imprisonment punishment.

q) when the judicial bodies believe that the suspect or accused person could not prepare their defense on their own

These cases can include the elderly, the foreign citizens who do not know the procedural dispositions of the Romanian law, the persons suffering from mental or physical disabilities which may affect the preparation of their defense. At the same time, when assessing the possibility of a person to defend himself in person, the elements considered shall also include the

complexity of the case, the criminal participation, the existence of a high number of offences.

r) During the preliminary chamber procedure and during the course of trial, in cases where the law establishes life detention or an imprisonment punishment exceeding 5 years for the offence perpetrated.

This case of mandatory legal assistance is also incident when the defendant is a legal entity.²⁷ The punishment provided by the law means the punishment stipulated by the text of law, incriminating the act perpetrated under consumed form, not considering the circumstances for the aggravation or mitigation of the penalty (article 187 Criminal Code). When assessing the incidence or non-incidence of this case of mandatory legal assistance, the court shall take into consideration the classification of the acts through the indictment, and if it will order the change into a charge for which the legislator provides a punishment exceeding 5 years, the legal assistance shall become mandatory since the order of the court to change the charge.

3.2.2. Mandatory legal assistance for the victim, civil party or party with civil liability.

Article 93 Criminal Procedure Code mentions, through paragraphs (4) and (5), the cases when the legal assistance is mandatory for these persons: when the victim or the civil party lacks mental competence or has limited mental competence or when, for various reasons, the victim, civil party or party with civil liability cannot prepare their defense in person.

Law no. 678/2001²⁸ establishes another case of legal assistance for the

²⁷ See also Decision no. 21/HP/2016 of the High Court of Cassation and Justice

²⁸ Published in the OFFICIAL JOURNAL no. 783, of 11 December 2001.

victim, during all the stages of the criminal trial, respectively when they are a victim of human trafficking.

4. Penalties applied if the right of defense is not respected.

The violation of legal dispositions concerning the mandatory legal assistance of the suspect, accused person, civil party or party with civil liability is punished with the absolute nullity, as stipulated by article 281 paragraph 1 letter e Criminal Procedure Code. We notice the fact that the text of law mentioned does not punish by absolute nullity the violation of the dispositions concerning the obligation to assure legal assistance to the victim, thus, despite the fact that we do not understand the reason for which the legislator made this distraction between the civil party and the victim, if the right to mandatory legal assistance of the victim is breached, another type of nullity shall intervene, respectively, the relative nullity if the conditions stipulated by article 282 Criminal Procedure Code²⁹ are met.

At the same time, if a case is tried in absence of the suspect or accused party, despite the fact that their presence was mandatory (i.e., they were under detention), the absolute nullity of the acts performed in violation of such dispositions shall nevertheless intervene.

The violation of the legal dispositions concerning the mandatory legal assistance for the suspect, accused person or other parties, as well as of dispositions concerning the absence of the suspect/accused person, when their presence was mandatory, can be invoked up to the completion of the preliminary chamber procedure, if such violation occurred during the criminal

investigation stage or the preliminary chamber. The preliminary chamber judge shall exclude the evidence obtained in violation of the mentioned dispositions, or he will integrally return the case to the prosecutor, where he establishes that the overall criminal investigation was harmed by such violation. Nullity can be invoked in any stage of the trial, if the violation occurred in course of the trial or if the court was referred with an agreement for the admission of guilt, regardless of the moment when it intervened.

The absolute nullity of the decision and the case shall be retried also where the accused persons were assisted by the same lawyer, despite the fact that his interests were contradictory, because the court has the obligation to highlight the contrariety of interests and to provide them with the possibility to hire another lawyer for one of the accused persons, or to appoint an attorney by the court, if they do not have the possibility to hire another lawyer who could provide legal assistance along with the lawyer of their own choosing.

At the same time, if the right of a person to be present at the trial was breached, namely the person was not duly summoned, or, when, despite being duly summoned, the party could appear in person or inform the court thereupon, the court shall admit the appeal of the person, it shall reverse the ruling pronounced under these conditions and it will order the retrial of the case by the court whose ruling was quashed (article 421, point 2, letter a Criminal Procedure Code).

Another guarantee to exercise the right of defense is the possibility provided to the parties by the legislator to file an extraordinary legal remedy. Thus, if the

²⁹ Pursuant to article 282 paragraph 2 Criminal Code, "The violation of any legal dispositions except for the dispositions stipulated by article 281 shall cause the nullification of an act when failure to comply with the legal requirement caused harm to the rights of the persons or main subjects in criminal proceedings, which can only be removed by nullifying the act."

ruling in appeal took place without duly summoning a person, or, when, despite being duly summoned, the party could appear in person or inform the court thereupon, or where the ruling in appeal took place without the participation of the accused person, although their presence was mandatory, or when the court did not hear the accused person, although the hearing was possible according to the law, these parties can file challenge for annulment, the decision pronounced in violation of these rights (essential components of the rights of defense) shall be quashed and a retrial of the appeal or of the quashed case shall take place.

Another guarantee established by the legislator if a person was convicted in absence, without being summoned at the trial and without being otherwise officially informed thereupon, or, despite being informed about the trial, the person was justifiably absent from the ruling of the case and could not inform the court thereupon, is represented by the possibility to reopen the criminal trial and subsequently quashing the decision pronounced under these conditions.

The right to respect the confidentiality of conversations between the lawyer and the client is also guaranteed through article 139 paragraph 4 Criminal Procedure Code, according to which the relationship between the lawyer and a person assisted or represented by them may be subject to electronic surveillance only when there is information that the lawyer perpetrates or prepares the perpetration of any of the offences mentioned under article 139 paragraph 2 Criminal Procedure Code. If, by error, the conversations between the lawyer and suspect/accused person he defends were intercepted, the evidence obtained this way cannot be used in any criminal trial and shall be destroyed forthwith by the prosecutor.

5. Conclusions

As already mentioned above, the right of defense is a fundamental right, guaranteed by the Constitution, by the Criminal Procedure Code and by the international treaties. The practical means to exercise the right of defense are largely stipulated by the Criminal Procedure Code.

Guaranteeing the right of defense represents a fundamental principle of the criminal trial and, at the same time, an essential component of a fair trial. Therefore, the legislator established various guarantees and legal means in order to assure the observance of this right. By recognizing this right, the legislator also established certain obligations for the judicial bodies (the obligation to have a lawyer appointed by court, if the legal assistance is mandatory, the obligation to verify if there are incompatibilities between the appointed lawyer and the person he represents, the obligation to rule on the requests of the persons/their lawyers, the obligation to assure that the lawyer studied the case file and performs a prompt and effective defense).

Any violation of the right of defense implies, as we mentioned above, various penalties, including the most important sanction provided by the Criminal Procedure Code, respectively the absolute nullity of the acts taken in violation of this right, including the nullity of the decision pronounced under these conditions and retrial of the case.

The right of defense is not an additional institution, but it represents an essential and necessary right for any act of justice, because the respect of this right creates a balance between the individual interests of persons participating to the criminal trial and the general interest of the society to hold criminally liable anyone who committed a criminal offense. By respecting this right, the suspect, the victim, the parties are capable of highlighting all the

circumstances of the act under investigation, thus no innocent person is held criminally liable and any person who committed an offence is punished pursuant to the law.

References

- Corneliu Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, Ediția 2, C.H.Beck Publishing House, Buurești 2010.
- V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *Explicații teoretice ale Codului de procedură penală român, Partea generală, vol. I, ediția a-2-a*, Academiei Publishing House, Ed. All Beck Publishing House, Bucharest, 2003.
- Ion Neagu, *Tratat de procedură penală, Partea generală, Ediția a-II-a*, Universul Juridic Publishing House, Bucharest, 2010.
- Mihail Udroi, *Procedură penală, Partea Generală, Ediția 5*, C.H.Beck Publishing House, Bucharest, 2018.
- N. Volonciu(coordonator), A. Simona Uzlău, R. Moroșanu, V. Văduva, D. Atasiei, C. Ghighenci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chiriță, *Noul Cod de procedură penală comentat*, Hamangiu Publishing House, Bucharest, 2014.
- Constitution of Romania, of 21 November 1991, published in the Official Journal No. 767 of 31 October 2003.
- Criminal Procedure Code, passed through Law No. 135 of 1 July 2010.
- Law 51/ 1995, on the Organization and Exercise of Lawyer Profession, republished in the Official Journal No. 440 of 24 May 2018.
- Universal Declaration of Human Rights, passed on 16 December 1948, by the third session of the General UN Assembly.
- Charter of the Fundamental Rights of the European Union, enforced on 01 December 2009.
- European Convention on Human Rights.
- Directive 2012/13/EU, published in the Official Journal of the European Union no. L142, of 01 June 2012.
- Directive 2013/48/EU, published in the Official Journal of the European Union no. L 294, of 06 November 2013.
- Directive 2062/1919/EU, published in the Official Journal of the European Union no. L 297, of 04 November 2016.
- Directive 2016/343/EU, published in the Official Journal of the European Union no. L 65, of 11 March 2016.
- ECHR, case Artico v. Italy, judgment of 13 May 1980.
- ECHR, case Beraru v. Romania, request no. 4010/04, judgment of 18 March 2014.
- ECHR, case Bobeș v. Romania, request no. 29752/05, judgment of 09 July 2013.
- ECHR, case Dayanan v. Turkey, judgment of 13 October 2009.
- ECHR, case Luboch v. Poland, request no. 37469/05.
- ECHR, case Matyjek v. Poland, request no. 38184/03.
- Decision no. 21/HP/2016, pronounced by the High Court of Cassation and Justice for the resolution of points of law.