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The Principle to Guarantee the Right to Defense in The Romanian Penal Legislation. Theoretical and Practical Aspects

Ioana Emilia Milanovici

"Dimitrie Cantemir" Christian University, Bucharest, Romania, milanovici.ioana@yahoo.com

ABSTRACT: The principle of guaranteeing the right to defense is a principle of a constitutional nature in the Romanian legislation, the right to defense representing a fundamental human right established by the international community in the most important international or regional documents. Romania lacks in what regards the guarantee of the right to defense, as evidenced by the numerous convictions at the ECHR regarding the violation of art. 6, point 3 of the European Convention on Human Rights. The inefficiency of the Romanian judicial system to ensure the defendant's right to defense is a result of mixed factors, starting from the poor training of criminal investigation bodies, the uneven practice of courts on the application of Romanian criminal law, the unjustifiably long duration of criminal proceedings and the impossibility of the defenders to prepare an effective defense due to a limited and cumbersome access to the criminal cases pending before the Romanian courts.

KEYWORDS: right to defense, suspect, defendant, legal assistance, ECHR

Introduction

The right to guarantee defense has a long legal tradition, being established starting with the Roman law where there was a regulation according to which no one could be trialed, not even a slave, without being defended (Neagu and Damaschin 2020, 126). The right to defense is considered a requirement of the principle of equality of means as inferred by the provisions of Art. 6, point 1, section c in the European Convention of Human Rights, which stipulates equal positioning of parties in a trial (Tulbure and Tatu 2001, 43).

The right to a defense has, prior to any legislative establishment, a constitutional nature, being mentioned in Art. 24 of the Constitution of Romania:

"Right to defense

(1) The right to defense is guaranteed.

(2) All throughout the trial, the parties shall have the right to be assisted by a lawyer of their own choosing or appointed ex officio."

This constitutional right regulates the right to defense in terms of a wider meaning, both penal trails, as well as civil ones being discussed. One has to mention that the lawmaker did provide cases when the assistance of a lawyer is compulsory, especially for penal trails entailing criminal cases where the defendants are under age or those where severe crimes are under judgement. The same constitutional text provides in Art. 23, para (8) that the any person detained or arrested will be notified to the respective person only in the presence of a lawyer *appointed* or *selected* ex officio.

The principle to guarantee the right to defense is also regulated by the Romanian Law on the Criminal Procedure Code, coming in force on February 1, 2014, which provides in Art. 10:

"(1) The parties and main subjects in the proceedings have the right to defend themselves or be assisted by a counsel.

(2) The parties, main subjects on the proceedings and the counsel have the right to be given the time and facilitations needed for preparing a defense.

(3) The suspect has the right to be informed immediately, and before being interviewed, of the offense the criminal investigation is looking into and the charge for that offense. The

defendant has the right to be informed immediately of the offense the prosecution against them has started for, and the charges for that offense.

(4) Before being interviewed the suspect and defendant 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 proceedings.

(6) The right to defense shall be exercised in good faith, according to the goal for which the law recognizes it."

Law no. 304/2004 regarding judicial organization, published in the Official Gazette, Part I, no. 653 of 22 July 2005 also establishes the right to defense in Art. 15: "The right to defend is guaranteed. Throughout the process, the parties have the right to be represented or, as the case may be, assisted by a defender, elected or appointed ex officio, according to the law."

Law no. 254/2013 on the execution of sentences and restrictive measures involving deprivation of liberty decided by judicial organisms during the trail, published in the Official Gazette no. 514 on August 14, 2013, provides in Art. 100 para (3) that the *Right to defense is guaranteed.*

The European Convention of Human Rights guarantees the right to defense, in Art. 6, para 3, c which provides that "anyone charged with a criminal offence" has the right "to defend himself in person or through legal assistance of his own choosing or, he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

The same principle to guarantee on Civil and Political Rights, Art. 14, para 3 d) where it stipulates that any person accused by a criminal offense has the right, in full equality "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right and to have legal assistance to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

The EU Charter of Fundamental Rights guarantees the right to defense in Art. 48, para (2): "Respect for the rights of the defense of anyone who has been charged shall be guaranteed."

The Universal Declaration of Human Rights also validates the right to defense in Art. 1, para 1: "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" (UN General Assembly 1948).

While reinforcing the above-mentioned definitions, I can conclude that the right to defense can be defined as that right, admitted to the suspect, accused and other parties during a criminal trial, in its stages, through which the equality of means is achieved, necessary to harmonize the interests to defend the society with the rights and freedoms of the individual (Radu 2014, 31-32).

Legal characteristics of the right to defense

1. The main parties and subjects in the trial have the right to defend themselves or to get the assistance of a lawyer

According to the regulations of the Criminal Procedure Code, the right to defense is acknowledged to the parties in the criminal trial (the defendant, the civil party and the party holding a civil liability) and the main subjects of the trial (the defendant and the injured person).

The legal assistance of the suspect or defendant is regulated by Art. 89 in the Criminal Procedure Code:

"(1) A suspect or a defendant has the right to be assisted by one or more counsels all along the criminal investigation, the preliminary chamber procedure and the trial, and judicial bodies are under an obligation to inform them on such right. Legal assistance is ensured when at least one of the counsels is present.

(2) A person detained or arrested has the right to contact their counsel, and confidentiality of communications shall be ensured to them, in compliance with necessary measures of visual supervision, guard and security, and the conversations between them shall not be wiretapped or recorded. Evidence obtained in breach of this paragraph shall be excluded."

The possibility of the defendant, provided by the law, to be assisted by several lawyers does not entail any sanction in what regards the absence of one of them during the trial. The High Court of Cassation and Justice (2003), Criminal section, established in their Decision no. 5079 on November 7, 2003 that if a defendant was represented by two lawyers and one of them elaborated a request to day the judgement of the cause given the impossibility to attend due to health issues, the legal assistance was covered by the second defendant present in the court.

The legal assistance of the injured person, the civil party and the party holding a civil responsibility is provided by the Art. 93 of the Criminal Procedure Code. Although the Criminal Procedure Code confers the right of main parties and subjects in a trial to defend themselves, there are cases when legal assistance is compulsory. The right conferred by the lawmaker to the defendant to defend himself assumes that the defendant is present during the trail, the possibility to get access to documents and learn about them. However, if a cause poses certain legal difficulties requiring a certain level of professional knowledge, one needs to also appoint a defender ex officio. In this sense, ECHR established that the state does not have to let the defendant to be on his own in front of such professional requirements (Jurisprudentacedo.com n.d. *Case Pakelli v. Germany*).

According to Art. 90 in the Criminal Procedure Code, legal assistance is obligatory in the following cases: the suspect or accused one is under age, finds himself in a detention center or in an educational one or, when hold or arrested, even in another cause, or when the safety measure of medical internment was established even in another cause, as well as in cases provided by the law; in case the legal organism appreciates that the suspected or the accusee could not complete defense on his own; during the trial for the causes when the law provides for the committed crime the punishment of life detention or the punishment of over 5 years of detention.

One can thus note the concern of the lawmaker to protect the persons who, given their situation, have limited opportunities to organize an appropriate defense during the criminal trial, such as those under age, or interned in an educational center, being hold or arrested even in another case, those for whom the safety measure of medical interment was applied, even in another cause, as well as other cases provided by the law when the legal organism considers that the suspect or the accusee may not defend himself, such as those presented so far for which the measure of the medical interment was adopted, based on the consideration that they suffer from a mental condition (Neagu 2007, 189-190).

According to Art. 93, para (4) and (5) in the Criminal Procedure Code, the legal assistance of the injured party, the civil party and of the party holding civil liability is mandatory in the following situations: when the injured person or the civil party is someone lacking capacity or having limited capacity to exercise; when the judicial body considers that for certain reasons the injured party, the civil party or the civilly liable party could not defend himself, it shall decide to take measures for the appointment of an ex officio lawyer.

2. The parties, the main subjects in the trial and the lawyer have the right to benefit from the time and facilities necessary for the preparation of the defense

This right is conferred to the parties, the principal subjects and the lawyer by virtue of the fact that certain cases are of particular complexity, which means that the time needed to prepare the defense is longer. In the jurisprudence of ECHR, it is considered that a period of 3 weeks is sufficient to prepare a defense in a case in which the defendant's lawyer had to formulate a response to a 49-page document (see case Kremsow v. Austria). On the same note, the ECHR appreciated that only two weeks to prepare defense in a case containing 17.000 pages were insufficient, the right to defense of the accusee being thus infringed (see Ocalan v. Turkey).

3. The suspect has the right to be informed immediately and before being heard about the act for which the criminal investigation is being carried out and its legal classification. The defendant has the right to be informed immediately about the act for which criminal proceedings have been instituted against him and of its legal classification

This right provided to the suspect and the accused requires detailed, accurate and complete information on the nature and causes of the charge, which is necessary for the accused to prepare his defense. Regarding this right of the defendant, the Constitutional Court of Romania provided its opinion in the motivation of Decision no. 250 of April 16, 2019, regarding the exception of unconstitutionality of the provisions of Art. 386 paragraph (1) of the Criminal Procedure Code, the following aspects, relating the internal regulation of this right to the jurisprudence of the ECHR: "The Court also notes that Article 6 para 3 (a) of the Convention for the Protection of Human Rights and Fundamental Freedoms governs the right of the "defendant" to be informed of the nature and causes of the "accusation" brought against him. The above-mentioned conventional provisions highlight the need for national authorities to do their utmost to ensure that the "accusation" is transmitted to the person concerned, as the indictment plays a key role in criminal proceedings; from the date of notification, the person concerned shall be officially informed of the factual and legal basis of the charge against him (Judgement of December 19, 1989 adopted for Case Kamasinksi v. Austria, para 79; Judgement of March 25, 1999, adopted for Case Pélissier and Sassi v. France, para 51-52; Judgment of July 25, 2000, adopted for the Case Mattoccia v. Italy, para 59). Art. 6 para 3 a) in the Convention admits for the defendant not only the right to be informed about the "cause" of the accusation, which means the material facts about which he is accused, and which are at the core of the accusation, but also the "nature" of the accusation, which translates into the legal classification of the facts in the cause; in both cases the information must be detailed (Judgement of March 25, 1999 adopted for Case adopted for Case Pélissier and Sassi v. France, para 51; Judgment of July 25, 2000, adopted for the Case Mattoccia v. Italy, para 59; Judgment of January 7, 2010, adopted for the Case Penev v. Bulgaria, para 33 and 42; Judgment of April 12, 2011, adopted for the Case Adrian Constantin v. Romania, para 18)" (Decision no. 250 of April 16, 2019).

4. Before being heard, the suspect and the defendant must be informed that they have the right not to make any statement

The Constitutional Court of Romania, being notified to rule on an exception of unconstitutionality, in the motivation of Decision no. 236 of June 2, 2020, explains in detail Art. 10 paragraph (4) of the Criminal Procedure Code, in conjunction with other articles guaranteeing the observance of the right to silence and non-self-incrimination:

"…the right to silence and non-self-incrimination are listed between the procedural rights of the suspect and the defendant, Art. 83 a) of the Criminal Procedure Code providing that the defendant has the right to refuse to give a statement without the risk of suffering any unfavorable consequences as a result of this refusal, Art. 78 of the same normative act establishing that the suspect has the rights provided by law for the defendant, unless the law provides otherwise. At the same time, according to Art. 99 para. (2) of the Criminal Procedure Code, the suspect or defendant enjoys the presumption of innocence, not being obliged to prove his innocence, and "has the right not to contribute to his own accusation." In fact, according to Art. 109 para (3) in the Criminal Procedure Code, "During the hearing, the suspect or defendant may exercise his right to remain silent in respect of any of the facts or circumstances in question." In the same way, the Court observes other criminal procedural norms regulating the right to silence, such as Art. 209 para. (6) regarding the preventive measure of detention, incident both in the matter of judicial control - according to Art. 212 para. (3), as well as in the matter of judicial control on bail, correlated with Art. 216 para. (3); Art. 225 para. (8) to which Art. 238 para. (1) refers as well, regarding the preventive arrest of the defendant during the criminal investigation, respectively in the procedure of the preliminary chamber and during the trial; Art. 374 para. (2) on the trial

procedure - the procedural moment of the preliminary explanations, when, among other things, the president explains to the defendant the accusation against him and notifies the defendant about the right not to make any statement, drawing his attention that what he declares can also be used against him. The latter text is also incidental in the matter of appeal, according to Art. 420 para. (4), which states that "The appellate court proceeds to hearing the defendant, when possible, according to the rules of the trial on the merits". The afore-mentioned criminal procedural norms establish the obligation of the judicial bodies to warn the suspect or the defendant, at different procedural moments, regarding the right to silence and non-self-incrimination, the violation of the mentioned obligation being sanctioned under the conditions of Art. 282 para. (1) of the Code of Criminal Procedure, with the consequence of excluding the evidence thus obtained in the conditions of Art. 282 para (1) in the Criminal Procedure Code, with the consequence of excluding the evidence thus obtained, according to Art. 102 para (2) in the Criminal Procedure Code" (Decision no. 236 of June 2, 2020).

5. Judicial bodies have the obligation to ensure the full and effective exercise of the right to defense by the parties and the main procedural subjects throughout the criminal process

The investigative bodies have the obligation to administer ex officio any evidence which capitalizes on the interests of the parties or the main procedural subjects. This obligation means to gather and administer evidence both in favor and against the defendant or suspect. (Art. 100 para. 1, Criminal Procedure Code).

In practice, it was established that the sentencing of a first-instance conviction at first trial without hearing witnesses who had testified during the criminal investigation violated the legal provisions guaranteeing the truth and also violated the rule of fairness, according to which the court was obliged to directly verify the evidence produced in proving the guilt of the defendant. (Decision no. 1003/1992 of the Bucharest Municipal Court, Second Criminal Section, in Neagu and Damaschin 2020, 131).

6. The right of defense must be exercised in good faith, in accordance with the purpose for which it was recognized by law

Through this regulation, the lawmaker aimed at resolving criminal cases within a reasonable time, a regulation determined by the need for the defenders in a criminal trial not to delay cases by excessive requests. This provision is completed with Art. 94 para. 1 in the Criminal Procedure Code, which provides that the right of the lawyer to request consultation of the case during the criminal proceedings may not be abused. The exercise in bad faith of the right to defense is assimilated to an abuse of rights and sanctioned with a judicial fine from 1,000 to 7,000 lei and with the payment of legal expenses occasioned according to Art. 488^6, para (4).

Regarding the exercise in bad faith of the right to defense, the Constitutional Court of Romania motivated in Decision no. 675 of November 6, 2018 following: "The abuse of procedural law presupposes both a subjective and an objective element. Thus, the subjective element consists in the exercise in bad faith (mala fides) of procedural law, with the purpose of harassment, without justification of a special and legitimate interest, but only with the intention of infringing the rights of the opposing party, either by limiting or delaying it. In the process of capitalizing on the rights or means of defense, either by exerting pressure, in order to give up support or to lead to compromises. At the same time, the objective element consists in diverting the procedural right from the purpose / end for which it was recognized by law, the abusive act lacking legitimate motivation. In addition, in the criminal proceedings, the subjective element may concern not only the harm of the interests of the adverse party, but also of the company, which are represented by the Public Ministry, but also the prevention of the judicial bodies from finding out the truth in question… Frequent situations in practice in which procedural rights are exercised in bad faith are, for example, those concerning the formulation of identical claims, repeated shortly after the rejection of the previous application or the termination of the legal aid

contract at different procedural points, when the party has an interest in postponing the trial by any means - such as preventing the court from adjudicating a proposal to extend the pre-trial detention measure" (Decision no. 675, 2018).

Conclusions

Romania has suffered numerous ECHR convictions over time for violating its rights of defense. This is due to the fact that there is no uniform practice of courts at national level, and last but not least, the inability to harmonize domestic law in criminal matters with the principles evoked by the European Convention on Human Rights or other international regulations. The analysis of the internal jurisprudence of the criminal proceedings in which the defendants allege the violation of the right to defense highlights an overwhelming number of trials completed with the rejection of the actions brought by the defendants. Another cause of numerous convictions at the ECHR may be the superficiality of criminal investigation bodies in the application of criminal procedural rules, an unjustified "supremacy" of the prosecutor in the courtroom, but also the delay of a criminal trial by a difficult access of defenders to the files of criminal cases. I consider that all the aspects highlighted above as well as the context of the right to a fair trial in Romania were possible also due to the fact that the material liability of magistrates is not legislated. As long as there is no liability of the magistrates, and the material responsibility for the compensations granted to the winners of the ECHR proceedings against Romania belongs to the Romanian state, the criminal conviction of a defendant and the legal motivation of this conviction will be made with the same non-uniformity in decisions and application of the Romanian criminal law.

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