THE RIGHT TO DEFENSE IN THENEW CRIMINAL PROCEDURE CODE

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Abstract::Established and recognized since antiquity [1], in the most important international instruments on human rights [2] and internal fundamental laws adopted by democratic societies [3], regulated and appreciated as a fundamental principle in the conduct of any proceedings public and private internal right to defense is crucial in ensuring an equitable character in criminal procedural matters.

The content of regulation of this institution in the new Criminal Procedure Code has kept, only to a small extent, the provisions of the old Code because, in accordance with the new prescriptions in the field, the evolution of society and the need for harmonization of legislation at European level, more developed and explicit novelty elements, that cannot be understood just by following the provisions of art. 10 of the Code, were included.

In this regard, this study aims to be a comprehensive analysis material - considering the fact that in its development were taken into consideration the fallowing: the rules of the European Convention of Human Rights and the practice of the European Court of Human Rights, constitutional provisions and practice of the Constitutional Court of Romania, the new provisions in the field of criminal procedure (explained due to the interpretation as a whole of the provisions of the general and special parts), the practice of the High Court of Cassation and Justice, respectively the special laws in field [4] – the arguments presented are aimed at ensuring a more accurate and uniform interpretation and understanding of the rules in question.

Keywords: ***right to defense, a fundamental principle, equitable trial, parties, main procedure subjects.***

Introduction

Regulated in the general part of the new Code of criminal procedure (NCCP), Title I - The principles and limits of the application of the criminal procedure law - article 10, the right to defense in criminal procedure law represents the transposition in this field of fundamental rule of tradition, part of the first generation of human rights, consecrated in the most important international legal instruments [5] and taken also in article 24 of the Constitution of Romania.

Thus, the right to defense was included, as it was only natural, in the category guidingrules that determine all criminal procedural institutions [6] and that are applicable in all four new stages of criminal prosecution - criminal prosecution, preliminary chamber, judgment and execution of the decision of criminal court.

Its complex character is based on the means of defense, thought, enacted and composed of all procedural rights subsequent to these fundamental rules, as well as of the guarantees put in place to ensure a full exercise of those rights and implicitly of a quality legal assistance. In this respect, we appreciate that ensuring a proper explanation and understanding of the institution - subject of the present work - must have at its base the explanation of the provisions of the European Convention on human rights (ECHR) concerning the right to a fair

trial (which also includes observance of the right to defense) and the Romanian Constitution - with a direct reference to this fundamental rule.

Last but not least the regulations of art. 10 NCCP includes the concrete content of this rule of criminal procedure, and the special rules [7] extend and strengthen the guarantees of this right.

The characteristics and content of the right to defense

According to the article 6, paragraph 3, letter “c” of the ECHR any "accused" is guaranteed the possibility to defend himself from the accusation that is being brought against him in three ways which in essence represent his essential rights. Thus, he is able either to defend himself or to be assisted by a defender chosen, or to be assisted, under certain conditions, by a defender appointed ex officio.

Although the rules in question recognize the right of each "accused" to defend himself or through a defender, their exercise conditions are not spelled out, for which the national legislature has the task to determine those means which allow the effective production of the right in question, under the imperative condition of normal compatibility with the requirements of a fair trial [8].

The Romanian Constitution contains references to the right to defense in the broad sense (the guarantee stipulated by article 24, paragraph 1 involving all of the rights and procedural rules that allow the parties in the lawsuit, whatever the field may be, to defend themselves from the charges they are accused of), and in a narrow sense (through the possibility of any person to have access to the services of a lawyer according to the article 24, paragraph 2). The legal assistance represents the most important warranty in connection with this right.

Regarding the content of this principle in criminal procedure, article 10 NCCP essentially differs from the old rules, the new rules being more comprehensive and sufficiently correlated with the jurisprudence of the European Court of human rights.

Thus, in the first paragraph of article 10 it is established the possibility that the parties – procedural subjects who exercise or against whom legal action is carrying out (the defendant, civil part and civilly responsible part) - and the main procedural subjects (the suspect and the injured person) are able to defend themselves (under the first method guaranteed by the ECHR) or can be assisted by counsel (under the other two methods of the convention). It must be stated that in the second case the counsel can be either chosen or appointed ex officio - in the latter case the law provides mandatory concrete situations [9]. From this point of view the right to defense should not be confused with the right to compulsory counsel. The Constitution only guarantees the first, the last being the exclusive competence of the legislature [10].

Also in comparison with the old rules, recognition of the possibility of the parties and the main procedural subjects to defend themselves constitutes a new regulation.

In accordance with article 6, paragraph 3, letter "b" of the ECHR, in paragraph 2 of art. 10 NCCP it was introduced for the first time the rule according to which the parties, the main procedural subjects and the leading lawyer are entitled to benefit from the time and the facilities necessary for the preparation of defense, aspect outlined in article 92, paragraph 8

NCCP, but which, in our opinion, inthe lack of regulation of minimum mandatory deadlines that should be respected by the judicial bodies in connection with the implementation of procedural and trail acts (for example, setting a minimum of three or five days between the receipt of the summon and the time of presentation to the judicial body) remains only at the stage of principle.

The basic ideas arising from the interpretation of article 6, paragraph 3, letter "a" of the ECHR were included in the article 10, paragraph 3 NCCP but different, as it was correctly referred to [11]. Thus, the suspect has the right to be informed "as soon as and before he is heard" about the deed for which prosecution and legal classification is carried out, while the defendant has the right to be informed "immediately" about the deed which put in motion the criminal action against him and the legal classification of it.

The right to silence, part of the right to defense, is regulated in the form of obligation in the charge of the judicial bodies of informing the suspect and the defendant, before the hearing, about the privilege to make no statement, according to the article 10, paragraph 4 NCCP.

For the purpose of empowering the judicial bodies it was also established the obligation of ensuring the "full and effective" exercise of the right to defense, in all four phases of the criminal process by the parties and main procedural subjects (art. 10, paragraph 5 NCCP). We appreciate that the legislature, by using the expression above, had in mind the complex content of the right to defense, resulted from the interpretation as a whole of the provisions in matter and circumscribed, in essence, to the three ways of exercise guaranteed by the ECHR.

Thus, the possibility of the parties and the main procedural subjects to defend themselves is guaranteed through the following means or possibilities, which in essence represent their rights:

- the right to be informed about their rights (article 81, paragraph 1, letter "a" and art. 83, letter „b”);
- the right to consult the file (article 81, paragraph 1, letter "e" and art. 81, letter „b”);
- the right to propose the administration of evidence, raise exceptions and make conclusions (article 81, paragraph 1, letter "b", art. 83, letter "d" and art. 99, paragraph 3);
- the right to submit requests related to the settlement of civil and criminal side of the case (art. 81, paragraph 1, letter "c" and art. 83, letter „e”);
- the right of the suspect and the accused to directly participate in the conduct of some acts of criminal prosecution and all acts of trial (art. 159, paragraph 11, and thesis I and article 364);
- the right to take cognizance of the dossier, during trial (art. 356);
- the right of the accused to have the last word (art. 388);
- the right to use the ordinary path of appeal (art. 409), use an extraordinary way of attack when legal conditions are met, namely to formulate complaints against acts of disposition issued by the criminal prosecution bodies or to challenge the judges' decisions.

Regarding the modalities of the right to defense exercised through a defender chosen or ex officio, these are circumscribed to legal assistance - fundamental guarantee of the right to defense. In either of its two forms of assistance, the right to the assistance of a defender involves the prerogative of free communication with the attorney for any reason concerning the trial, with the aim of reaching an effective defense through all legal and necessary facilities. From this point of view the disposition of NCCP, especially those contained in art. 88 - 96, must be coordinated with those of the law No. 51/1995, republished, amended and completed, respectively with the law no. 514/2003.

As far as the duplication of attributes conferred to the attorney with those of the legal advisers, the doctrine and jurisprudence have unequivocally established that the legal assistance of the parties and of the main trial subjects can be provided only by attorneys. By exception, when the civil party or the party civilly responsible is a legal person, the legal adviser may have the quality of representative. The latter can provide legal advice and representation, either to a specific authority or public institutions or to a legal person, in relations with public authorities, institutions of any kind of legal or natural persons or foreign/Romanian. Also, legal advisers may deliver or countersign the legal acts of the employer, in accordance with the law or the regulations specific to the unit whose employee it is [12].

In relation with the lawyers, taking into account the fact that they are independent in relation to the State-giving a liberal profession, how will the Defense be provided depends on the client-lawyer relationship, in the sense where latest is either a salary of one who hires or is appointed ex officio, by the State, based on a judicial support granted in the cases and subject to specific conditions established [13].

In the practice the European Court of Human Rights it has been established that the way in which the defense is been run remains the attribute of the person concerned and his defender. In addition, the European Court has established that art. 6, paragraph 3, letter "c" does not consecrate a right with absolute character, in the sense that does not require the assistance of a lawyer free of charge ex officio, unless the accused person does not have the necessary means to remunerate a defender. In addition, the text does not guarantee the right to choose the defender appointed by the juridical body or the right to be consulted on the choice of a lawyer.

Legal assistance is mandatory depending on the seriousness of the offense charged, the severity of the sanctions, the complexity of the case and the accused person. In all cases, to ensure a fair trial requires the accused to benefit from the assistance of a lawyer from the first hours ofhisinterrogationbythe judicial bodies..

Besides the previously mentioned rights, NCCP contains specific dispositions circumscribed to some obligations of the juridical bodies that constitute veritable guarantees put in place to ensure compliance with the fundamental right to defense. We illustrateinthis regard the followinglegal provisions:

- the obligation of the criminal prosecution bodies to collect and administrate evidence both in favor of and against the suspect or defendant, ex officio or upon request;
- the obligation of the judicial bodies to communicate to the suspect or defendant the quality in which he is heard, the deed provided by the criminal law for the perpetration

of which he is suspected or for which has been put in motion the criminal action, namely its legal classification and procedural rights (art. 108, paragraph 1 and 2);

- obligation of the Court to explain to the accused, during the trial phase, what does the accusation brought to him consist in, to notify him about the right to make no statement – by alerting himthat what hesayscan be usedagainst him. The same warranties also include the defendant's right to ask questions to the person injured, to the co-accused, to the other parties, witnesses, experts and to give explanations throughout the Court when he/she deems it is necessary. Also, it is the obligation of the president of the Court to notify the civil side, the injured person and the side civilly responsible with respect to the evidences administrated in the stage of criminal prosecution which have been excluded - are no longer taken into consideration at the settlement of the case, also he notifies thatthe injured personmay be constitutedcivil partyuntil thestart ofjudicial investigation (art. 374, paragraph 1 and 2);
- in the procedure of preliminary chamber the court is obliged to give to the defendant a copy of the document instituting thecourt or where appropriate its authorized translation - to the address where he lives, or at the address of detention or at the address at which he requested the documents from the procedure to sent to. Also, it is brought to the knowledge of the defendant the object in a preliminary procedure, the right to engage a defender and the deadline in which he may make in writing requests and exceptions regarding the legality of evidence administration and the performing of acts by the criminal investigation bodies, from the date of communication (art. 344, paragraph 2);
- sanctioning the breach of provisions relating to assisting the suspect or the accused and the other parties, by the Attorney, when legal assistance is mandatory, with absolute nullity (article 281, paragraph 1, letter "f").

Through paragraph 6 of article 10, it was introduced, as a novelty character, the obligation of good faith in the exercise of the right of defense, in accordance with the purposes for which it was recognized by the law. The legislator's intention in this case was to eliminate the situations where the defense aims to delay the settlement of criminal cases, the settlement consisting in the application of a legal fine as stated in article 283, paragraph 4, letter "n" (whose amount is between 500 and 5000 lei).

Conclusions

Considering the arguments presented above we can affirm, without fail that the current law regarding the right to defense ensures, quantitatively and qualitatively, an efficient protection of this right, in accordance with the international provisions in the matter specific and assumed by the consolidated democracies. The method of application and observance of the rules in question remains, in our point of view, a challenge, considering the novelty of the regulations and the possibility of committing errors or even more serious abuses.

Without the existence of the right of defense in modern legislation, the participants in the criminal trial would be mere spectators in front of Justice, with the risk of transforming the latter into an arbitrary power.

BIBLIOGRAPHY:

[1] The early forms of right to defense have their source in the period of antiquity, being mentioned in the works of Aristotle and the Stoics philosophers. Later, in Roman law it was submitted the rule according to which nobody can be judged without defense, including the slaves;
[2] See art. 11, paragraph 1 of the Universal Declaration of human rights, art. 14, paragraph 3, letter "d" of the International Covenant on Civil and Political Rights, art. 6, paragraph 3, letter "c" of the European Convention on human rights, namely article. 48, paragraph 2 of the Charter of fundamental rights of the European Union;
[3] See article 24 of the Romanian Constitution, article 104, paragraph 3 of the Constitution of the Federal Republic of Germany, article 24 of the Constitution of the Italian Republic and art. 114 and 317 of the Criminal Procedure Code of France, article 137 of the of Criminal Procedure Code of Germany;
[4] We mention law no. 51/1995, republished in the Official Gazette No. 872 dated December 28, 2010, modified and completed, Law no. 514/2003 on the organization and exercise of the profession of legal adviser, published in the Official Gazette No. 867 dated December 5, 2003, the Government's Emergency Ordinance No. 51/2008 concerning the public judicial aid in civil matters, published in Official Gazette no. 327 of April 25, 2008;
[5] Ibid [2];
[6] Grigore Theodoru, Treatise on criminal procedural law, 2nd Edition, Hamangiu Publishing House, Bucharest, 2008, p. 71;
[7] Ibid [4];
[8] Corneliu Birsan, European Convention on human rights. Comment on articles, vol. I, C.H. Beck Publishing, Bucharest, 2005, p. 557;
[9] See cases provided by art. 90 NCCP;
[10] See the Constitutional Court's Decisions no. 600/2006 published in the Official Gazette no. 868 dated October 24, 2006 and no. 62/2008 published in Official Gazette no. 142 of February 25, 2008;
[11] Ioan Neagu and Mircea Damaschin, Treatise on criminal procedure. The General Part, Universul Juridic Publishing, Bucharest, 2014, p. 98;
[12] See art. 4 of Law no. 514/2003;
[13] ibid [9] and in addition law no. 211/2004 on certain measures to ensure the protection of victims of crime, published in Official Gazette no. 505 of June 4th 2004, amended, law No. 217/2003 on preventing and combating domestic violence, republished in the Official Gazette No. 2 05 of 24 March 2014, law No. 678/2001 on preventing and combating trafficking in human beings, published in Official Gazette no. 783 of 11 December 2001. In civil matters see the Emergency Ordinance of Government No. 51/2008 concerning the public judicial aid in civil matters, published in Official Gazette no. 327 of 25 April 2008.