

THE RIGHT TO DEFENSE AND EQUALITY OF ARMS IN CRIMINAL PROCEEDINGS

Ivan BURLACU¹, Constantin RUSNAC²

¹PhD candidate, "Ștefan cel Mare" Academy of the Ministry of Internal Affairs, Prosecutor at the Main Office of the Chisinau Municipal Prosecutor's Office, ¹email: burlacuiivan8@gmail.com

²PhD, associate professor, "Criminal procedure, Forensics and Information Security" department of the Ștefan cel Mare Academy of MIA of the Republic of Moldova, Chișinău. ²email: constantin.rusnac@mai.gov.md

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Abstract:

This article presents a comprehensive scientific analysis of the right to defense and the principle of equality of arms in criminal proceedings, with a focus on the national, European, and international frameworks. It emphasizes that the right to defense constitutes an essential constitutional guarantee, the foundation of a fair trial, and a prerequisite for the rule of law. The author undertakes a comparative study of how this right is enshrined and implemented in the legislation of Romania, Ukraine, the Russian Federation, Bulgaria, France, and Germany, highlighting differences in approaches and regulations.

Furthermore, the principle of equality of arms is examined as a derivative of the right to defense, underscoring that it requires providing both parties to the proceedings with equal conditions for presenting and supporting their case. Current challenges are identified, such as state interference in the activity of defense counsel, abuses by authorities regarding the confidentiality of the lawyer-client relationship, as well as effective limitations on the defense in the context of restrictive regulations or distorted public perceptions.

The article proposes concrete measures, including strengthening procedural guarantees, expanding the role of the defense in evidence administration, and reinforcing the independence of lawyers. The overall conclusion is that only through the effective respect of the right to defense and equality of arms can genuinely fair and efficient justice be achieved.

Keywords: Constitution, criminal proceedings, right to defense, principle of equality of arms, lawyer

Introduction

Strengthening the fundamental guarantees of the individual within the criminal process represents a constant concern of scholars and legislators, constituting an integral part of efforts to modernize the justice system and to guarantee human rights. At the core of these efforts lies the right to defense, recognized not merely as a procedural tool, but as an essential expression of human dignity and effective access to justice. Recent developments at the

international level, including decisions of the European Court of Human Rights and standards established by the European Union, have prompted a reassessment of the domestic legal framework from the perspective of ensuring a real, not merely formal, defense.

In this context, analyzing how the right to defense and the principle of equality of arms are regulated and applied in criminal proceedings becomes indispensable for understanding the degree of compatibility of national legislation with international requirements. The present study aims to investigate, from a comparative and critical perspective, the foundations of these rights and the challenges encountered in their effective implementation. Through this endeavor, the goal is to identify directions for strengthening legal mechanisms designed to ensure respect for the procedural rights of parties involved in the criminal justice process.

Materials and method

This study is based on a theoretical and applied legal research methodology, starting from a doctrinal and normative analysis of the right to defense and the principle of equality of arms in criminal proceedings. The research used a comparative analysis, focusing on the legal systems of Romania, Ukraine, the Russian Federation, Bulgaria, France, and Germany, to highlight convergences and differences in the regulation and application of these fundamental rights.

Additionally, the systemic analysis method was employed, enabling the examination of correlations between constitutional, international, and criminal procedural norms, as well as their integration within the conceptual framework of the rule of law. The logical-legal method was applied in interpreting the relevant legal provisions and jurisprudence, including decisions of the European Court of Human Rights.

The empirical material used in this study consists of domestic and international normative acts, decisions of the Constitutional Court of the Republic of Moldova, judgments of the ECHR, as well as doctrinal works from specialized literature. To support the validation of the conclusions, official documents from European institutions were also analyzed, including resolutions and reports of the Council of Europe.

Results and Discussion

One of the most important characteristics of the rule of law, directly influencing the legal status of the individual and the citizen, is the mechanism for ensuring and guaranteeing fundamental rights and freedoms. Seeking to enhance the development of democratic institutions in the process of aligning our state's legislation with the *acquis* of the European Union and the most advanced international standards—including those related to the protection of fundamental rights and freedoms—the national legislator adopts a particularly dynamic approach, manifested also through frequent reforms and amendments to the legislation.

The Republic of Moldova has been engaged for several decades in this process of alignment with international standards. It acceded to the Universal Declaration of Human Rights (adopted by the United Nations General Assembly on 10 December 1948) and ratified the International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social and Cultural Rights (both adopted by the United Nations General Assembly on 19 December 1966), as early as 1990 (Decision of the Parliament No. 217 of 28.07.1990). Most international instruments protecting fundamental rights and

freedoms have already become part of the national legal system as a result of ratification or accession.

Through the criminal procedural law, the legislator seeks to strike a balance between two opposing interests: on the one hand, the interests of society, which consist in ensuring the safety and security of its members and which cannot leave unpunished a harmful act (action or omission) stipulated by criminal law, committed with guilt and punishable by criminal sanction, as established by Article 14(1) of the Criminal Code of the Republic of Moldova (CC RM) (Criminal Code of the Republic of Moldova No. 985 of 18.04.2002). In other words, a state that claims to be a rule of law, as stated in Article 1(3) of the Constitution of the Republic of Moldova (Constitution of the Republic of Moldova of 29.07.1994) cannot tolerate leaving a criminal offense unpunished; on the other hand, the interests of the individual (who may have different procedural statuses—suspect, accused, defendant) in defending their honor, dignity, and even liberty. The criminal process must balance these two categories of interests—public interest and private interest (Mateuț, 2007, p.11)—which stem from two categories of subjects with opposing interests. Thus, we arrive at the natural conclusion that criminal procedure can remain just and balanced only if it recognizes and enshrines the right to defense.

In the context of the Republic of Moldova's association with the European Union, we cannot omit from this analysis the provisions of Article 6(3)(b) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention for the Protection of Human Rights and Fundamental Freedoms) (also known as the European Convention on Human Rights), which expressly establishes as a guarantee of a fair trial the right of every accused "to have adequate time and facilities for the preparation of his defense," (Convention for the Protection of Human Rights and Fundamental Freedoms) indirectly enshrining the right to defense within the criminal process. As an example of the continued importance of community norms in affirming the right to defense, we may cite Article 48(2) of the Charter of Fundamental Rights of the European Union, (Charter of Fundamental Rights of the European Union (2010/C 83/02)) which states: "Everyone charged shall be presumed innocent until proved guilty according to law" and "Everyone has the right to defense"(Charter of Fundamental Rights of the European Union (2010/C 83/02).

The Constitution of the Republic of Moldova, in Article 26(1), establishes that the right to defense is guaranteed (Constitution of the Republic of Moldova of 29.07.1994). This provision leaves no room for contestation or doubt: the right to defense belongs to everyone, without any exception. Any limitation of the right to defense would simultaneously constitute a violation of both the Constitution and numerous organic laws that form the backbone of the legal system of the Republic of Moldova. When the text of the Constitution declares that this right is guaranteed by the state—what is actually meant? The term "guaranteed" implies the state's responsibility to create favorable conditions for every person in this regard—so that the individual can defend their legitimate rights and interests.

We consider it particularly useful to examine the provision enshrining the right to defense in Article 14(3) of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966 (International Covenant on Civil and Political Rights):

Any person charged with a criminal offense shall have the right, without discrimination and on equal terms, to the following minimum guarantees:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the charge against him;

b) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

c) to be tried without undue delay;

d) to be present at the trial 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, if the interests of justice so require, to have legal assistance assigned to him, without payment if he does not have sufficient means to pay for it;

e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g) not to be compelled to testify against himself or to confess guilt (International Covenant on Civil and Political Rights).

Equally important is the interpretation given to the right to defense by the Human Rights Committee of the Covenant (CCPR General Comment No. 13):

"The accused and his counsel must have the right to act diligently and without fear in order to employ all available means of defense. They must also have the right to challenge the conduct of the proceedings when they believe that the process is unfair." (CCPR General Comment No. 13).

In the same vein, the Criminal Procedure Code (hereinafter, CPC), in Articles 64 and 66 (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.200.), provides that the criminal investigation body or, as the case may be, the court shall ensure that the suspect, accused, or defendant can exercise the right to defense by all means and methods not prohibited by law. Likewise, the defense counsel provides legal assistance through all means and methods not prohibited by law.

We fully agree with the opinion of the renowned professors B. Negru, N. Osmochescu, A. Smochină, C. Gurin, and others (Negru, 2009, p.122), according to whom the right to defense reflects an essential principle of justice, namely that all parties to the trial are equal. The parties to the trial, as explained in Article 6, point 29 of the Criminal Procedure Code of the Republic of Moldova (CPC RM), must have equal opportunities to present their case, and none of the parties should have a substantial advantage over the opponent.(vocation (Nastas A. Cernomoreț S. 2024, p. 291) This principle establishes the circumstances in which both parties before the courts have the right to possess information about the facts and arguments of the opposing party, while at the same time, each party must have the possibility to prepare and present a response to the opposing side.

The principle also establishes the court's obligation to ensure that this principle is respected by the parties throughout the trial. The principle of equality of the parties in the trial derives from the right to equality enshrined in Article 16(2) of the Constitution (Constitution of the Republic of Moldova of 29.07.1994), which states that all citizens of the Republic of Moldova are equal before the law and public authorities, as well as from the constitutional right of every person to know their rights, guaranteed by Article 23 of the Constitution (Constitution of the Republic of Moldova of 29.07.1994).

The Criminal Procedure Code of Romania, both the old (Romanian Code of Criminal Procedure of 12.11.1968) and the new (Romanian Code of Criminal Procedure of 01.07.2010), explicitly enshrined the right to defense. Article 6 of the Romanian CPC of 1968 provided: “The right of defense is guaranteed to the accused, defendant, and other parties throughout the entire criminal process” (Romanian Code of Criminal Procedure of 12.11.1968). Article 10 of the Romanian CPC of 2010 states: “The parties and main procedural subjects have the right to defend themselves or to be assisted by a lawyer” (Romanian Code of Criminal Procedure of 01.07.2010). Moreover, it introduces several improvements, such as: recognition of the procedural status of “suspect” (Article 10(3)); the recognition of the right not to make any statement, as a genuine component of the right to defense (Article 10(4)); and the obligation to exercise the right to defense in good faith, according to the purpose for which it was recognized by law (Article 10(6)).

In our opinion, the most significant development in the Romanian criminal procedural law regarding the right to legitimate defense consists of establishing the obligation for judicial authorities “to ensure the full and effective exercise of the right to defense by the parties and main procedural subjects throughout the entire criminal process” (Article 10(5)) (Romanian Code of Criminal Procedure of 01.07.2010). A concise analysis reveals two components of this obligation: (i) a prohibitive one—which forbids authorities from adopting any measure that would restrict the exercise of the right to defense; and (ii) a positive one—which requires authorities to communicate (not to keep secret from the parties and main procedural subjects) as soon as a criminal proceeding has been initiated. This obligation of judicial authorities to allow and ensure the exercise of the right to defense remains in force throughout the entire criminal process.

The Criminal Procedure Code of Ukraine (Criminal Procedure Code of Ukraine) not only includes the guarantee of the right to defense among the general principles of criminal proceedings in Article 7, but also expressly regulates it in Article 20: “A person suspected, accused, acquitted, or convicted has the right to defense, which consists of the possibility to give verbal or written explanations regarding the suspicion or charge brought against them, the right to collect and present evidence, to personally participate in the criminal process, to seek legal assistance from a lawyer, as well as to exercise other procedural rights provided by this Code” (Criminal Procedure Code of Ukraine). The investigator, prosecutor, inquiry judge, and court are obligated to explain to the suspect or accused their rights and to ensure the right to qualified legal assistance from a defender chosen or appointed. The Ukrainian legislator also provides for free legal aid to the suspect or accused in certain cases expressly stipulated by law. The participation of the defender of the suspect, accused, victim’s representative, or a third party’s representative regarding the property subject to seizure does not restrict the procedural rights of the suspect, accused, victim, or third party concerning the property whose seizure is at issue (Criminal Procedure Code of Ukraine).

The criminal procedural legislation of the Russian Federation similarly expressly enshrines the right to defense for suspects and accused persons. Article 16 of the Russian Criminal Procedure Code establishes: “The suspect and the accused are guaranteed the right to defense, which they may exercise personally or with the assistance of a defender and/or a legal representative. The court, prosecutor, investigator, and the officer conducting the preliminary criminal investigation explain the rights of the suspect and accused and ensure that they have the possibility to defend themselves by all means and methods not prohibited by this Code” (Criminal Procedure Code of the Russian Federation). We express some reservations regarding the provisions of Article 16(3) of the Russian Criminal Procedure

Code, which provides that “in cases stipulated by this Code, the mandatory participation of a defender and/or legal representative of the suspect or accused is ensured by the officials conducting the criminal investigation” (Criminal Procedure Code of the Russian Federation) — due to the somewhat diminished imperative nature of the norm and because the legal representative of a minor suspect/accused may not reach the competence level of a professional defense lawyer, potentially prejudicing the beneficiary of the right to defense in exercising their right.

The Criminal Procedure Code of Bulgaria, in Article 15, recognizes the right to defense in a somewhat “abridged” manner, placing primary emphasis on the accused person: “(1) The accused has the right to defense. (2) The accused and other persons participating in the criminal process are provided with all necessary procedural means for the defense of their legitimate rights and interests. (3) The court, prosecutor, and investigative authorities shall explain to the persons referred to in paragraph (2) their procedural rights and provide them the opportunity to exercise them” (Criminal Procedure Code of Bulgaria).

Returning to the provisions of Article 24 of the Criminal Procedure Code of the Republic of Moldova (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003), the parties participating in the trial possess equal rights and are vested by the criminal procedural law with equal opportunities to support their positions. The court bases its judgment solely on evidence that both parties have had equal access to examine. The parties in the criminal process independently choose their position, the manner, and the means of supporting it, being autonomous both towards the court and towards other authorities or persons. This provision is one of the norms that enshrine the freedom to choose the tactics of exercising the right to defense within the criminal process, and the court should provide assistance to any party, upon request and within the limits of the law, to administer the necessary evidence.

We may provide some examples from the legislation of other states, where the right to defense and equality of arms — principles which we consider especially important —, although not expressly enshrined, are tacitly confirmed. National legislators, through numerous regulations dedicated specifically to the manner of exercising the right to defense in various case scenarios, merely confirm their existence and value. For instance, the Criminal Procedure Code of France, in Article 114, stipulates that “parties may not be heard, questioned, or confronted except in the presence of the lawyers summoned for the respective procedural act. The hearing or confrontation may take place in the absence of the defenders only if the parties expressly waive this right” (Criminal Procedure Code of France). Along the same lines, Article 317 of the French Criminal Procedure Code establishes that “at the stage of the debates, the presence of a defender alongside the accused is mandatory, and if the chosen defender does not appear, the president of the court will appoint a defender *ex officio*” (Criminal Procedure Code of France).

The Criminal Procedure Code of Germany (German Criminal Procedure Code) similarly provides explicit regulations that ensure and guarantee the exercise of the right to defense throughout the entire criminal process. Thus, according to Article 137, “The accused may be assisted by a defender at any stage of the process. The number of selected defenders may not exceed three. If the accused has a legal representative, they may independently choose a defender.” Article 138 of the German Criminal Procedure Code also provides that “defenders may be both lawyers authorized to practice in German courts and law professors

from German universities sufficiently qualified to hold judicial positions” (German Criminal Procedure Code).

In another context, the proposed purpose of the act of justice is the establishment of truth and is conducted in such a manner as to ensure the respect of the constitutional and procedural rights of any citizen who is a party to the proceedings. Law enforcement bodies, as well as the parties in the trial and their representatives, for demonstrating guilt or innocence and for establishing truth and justice, resort to the arguments of indisputable evidence, which can only be obtained through a fair trial (Gheorghită, Nuț, 2020 p.111).

With due obedience to the imperative provisions of the law, the lawyer is obliged to use all means and methods of defense provided by law in order to ascertain the essence of the suspicion or accusation with the purpose of elucidating circumstances that could lead to the acquittal of the accused or mitigate their liability, as well as to provide the accused or defendant with the necessary legal assistance. In selecting the means and methods of defense, the lawyer must be guided not only by the legal framework established by the Constitution, the criminal procedural legislation, the laws regulating the status of the legal profession, and related normative acts, but also by the ethical norms that govern and regulate the activity of lawyers in the Republic of Moldova.

We support the opinion of Prof. Ig. Dolea, who asserts that the principle of equality of arms is an innovation of the European Court of Human Rights jurisprudence, increasingly utilized in doctrine, and constitutes one of the means of realizing equality before the law (Paraschiv, Damaschin, 2004, p.182]. Article 14 of the European Convention on Human Rights establishes that the exercise of the rights and freedoms recognized by the Convention must be ensured without any distinction based, in particular, on sex, race, color, language, religion, political or other opinion, national or social origin, membership of a national minority, property, birth, or any other status. Article 9 of the Criminal Procedure Code of the Republic of Moldova stipulates that all are equal before the law, the criminal investigation bodies, and the court, without distinction of sex, race, color, language, religion, public or any other opinion, national or social origin, membership of a national minority, property, birth, or any other status. Only on the basis of the provisions of the Constitution, international treaties, procedural criminal legislation, or other national laws may special conditions for criminal prosecution and trial be ensured for certain categories of persons who benefit, under the law, from a certain degree of immunity (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003).

The regulations of the Criminal Procedure Code no.122/2003 (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003) have expanded the parties’ rights to access case files during the criminal investigation phase. The lawyer has the right both to participate in any procedural action carried out with the participation of the person they defend, and to be informed of the minutes of actions conducted with their involvement. According to Article 26 paragraph (3) of the Criminal Procedure Code of the Republic of Moldova (Convention for the Protection of Human Rights and Fundamental Freedoms), the burden of proof was and remains an obligation of the prosecution. We agree with Prof. Ig. Dolea, who states that the legislator “has taken a step towards ensuring the principle of equality of arms in the criminal process, extending, albeit insufficiently, the defender’s rights to participate in the criminal evidentiary proceedings” (Dolea, 2009, p.12).

To assess the respect for the principle of equality of arms, it is important to consider how the court understands to maintain the necessary “balance” for conducting a fair trial,

particularly with regard to the communication between the parties of all case materials that will serve as the basis for the decision-making. However, in situations where the evidentiary process is governed by the principle of officiality, respect for the principle of equality of arms may be called into question. Indeed, when the parties submit certain data as evidence, and the criminal investigation authority determines their relevance, conclusiveness, and usefulness — that is, when it is aware of the essence and detailed content, as well as the possible effects or conclusions they may generate — this principle may be compromised.

We do not intend, in this study, to analyze the conflict of opposites or the competition between private and public interests within the criminal process. For example, expanding the right of the accused or the defense counsel to produce evidence is not considered to cause any prejudice to the public interest, since exercising this right cannot lead to the detriment of the quality of the criminal investigation. Likewise, granting the victim a more active role in the evidentiary process cannot prejudice the interests of the accused or the administration of justice.

Moreover, securing the rights of the accused in the evidentiary process is conditioned by the realization of principles enshrined both in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in regional instruments such as the European Convention on Human Rights. From this perspective, the principle of equality of arms is inextricably linked and interdependent with the right to defense (enshrined in Article 26 of the Constitution of the Republic of Moldova (Constitution of the Republic of Moldova of 29.07.1994) as well as in Articles 64 and 66 of the Criminal Procedure Code of the Republic of Moldova (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003)) and with the principle of adversarial proceedings (Article 24 of the Criminal Procedure Code).

Having been elevated to the status of a fundamental principle, the right to defense has been the subject of multiple theoretical approaches from various angles. There is a rich jurisprudence of the European Court of Human Rights in this field. In most cases, the issue of exercising the right to defense has been analyzed in legal literature from the standpoint of the principle itself or access to justice, legal assistance, etc. It is also worth noting that there are opinions such as those of Prof. C.-S. Paraschiv and M. Damaschin (Paraschiv, Damaschin, 2004, p.199], who argue that no distinction should be made between the activities of representing the suspect, accused, or defendant and those of providing legal assistance.

In view of the foregoing, and instead of preliminary conclusions, we affirm that the procedural guarantees necessary for exercising the right to defense — which themselves take the form of rights — and which stem from Article 26 of the Constitution, consist of the following:

- a) the right of the person to defend themselves;
- b) the right of the person to choose a defense counsel;
- c) the right of the person to be informed about the right to defense;
- d) the right of the person to be provided with a defense counsel *ex officio*, free of charge.

We will now briefly address each of these:

- a) The right of a person to defend themselves — this right stems from Article 26, paragraph (3) of the Constitution and is detailed in Article 71, paragraph (1) of the Criminal

Procedure Code of the Republic of Moldova (CPC RM), which provides that a person may waive their defender. This means the express manifestation of the will of the suspect, accused, or defendant to exercise their own defense without resorting to the legal assistance of a defender. The Constitutional Court of the Republic of Moldova reinforced this conclusion in Decision no. 22 of 30.06.1997 (Constitutional Court Decision No. 22 of 30.06.1997), considering fully constitutional the provisions of procedural criminal law relating to the presence of a defender and emphasizing the right of the person to waive the defender. Waiving the defender is one of the rights of the suspect (according to Article 64, paragraph (2), point 5 of CPC RM), accused, or defendant (according to Article 66, paragraph (2), point 5 of CPC RM).

b) The right of a person to choose their defender — finds its source both in Article 26, paragraph (3) of the Constitution and in Article 17 of the CPC RM. Specifically, these provisions establish the right of the suspect, accused, or defendant to qualified legal assistance from a defender chosen by them. The Constitutional Court has interpreted this term in the proceedings and explained that a person may be assisted by a lawyer not necessarily from the beginning of the criminal process — for example, from the moment it is initiated — but from the moment they are officially recognized as a suspect or accused by an official act (Constitutional Court Decision No. 22 of 30.06.1997).

c) The right of the person to be informed about the right to defense — this right is guaranteed from the moment of detention. It derives from Article 25, paragraph (5) of the Constitution, according to which the detained or arrested person must be informed immediately about their rights. This right is regulated in detail by the Criminal Procedure Code and the rules governing detention (Article 64, paragraph (2) CPC RM; Article 66, paragraph (2) CPC RM, etc.), which require providing written information about the rights of the detained person, including the right to benefit from the assistance of a defender. The fact of informing about this right, among others, must be recorded in the official report. The right of the person to be informed in a language they understand is not indicated in Articles 25 and 26 of the Constitution (Negru, 2009, p.123), but it is stipulated in the Criminal Procedure Code no. 122/2003, in Chapter II regulating the defense part, including with regard to detention and the rights of the suspect, accused, and defendant.

d) The right of the person to be provided with a defender *ex officio*, free of charge — failure to respect this right may lead to a constitutionally unacceptable situation and a breach of the legal system of the Republic of Moldova, such as depriving a person of liberty without the possibility of defense. Furthermore, the provision of the right to defense under Article 26 of the Constitution (Constitution of the Republic of Moldova of 29.07.1994) implies that authorities take measures to respect this right and regulate in legislation and implement in practice effective defense methods for persons unable to afford to hire a lawyer.

In this regard, Article 17 of the Criminal Procedure Code of the Republic of Moldova (CPC RM) is significant, which provides that throughout the entire criminal process, the parties (the suspect, the accused, the defendant, the injured party, the civil party, the civilly liable party) have the right to be assisted or, as the case may be, represented by a chosen defender or by a lawyer providing state-guaranteed legal assistance. The same article obliges the criminal investigation authorities and the judicial court to ensure that the suspect, accused, or defendant have the right to qualified legal assistance from a defender chosen by them or from a lawyer providing state-guaranteed legal assistance. During the hearing of the injured party and the witness, the criminal investigation authority is not entitled to prohibit

the presence of the lawyer invited by the heard person as their representative (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003).

If the suspect, accused, or defendant lack the means to pay for a defender, they have the right to request a lawyer providing state-guaranteed legal assistance in accordance with the law (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003). In addition to the obligation of state authorities not to intervene against the interests of the person being heard, the CPC RM, under Article 167, paragraph (1¹), establishes the active obligation of these authorities to ensure the defense of the suspect, accused, and defendant by a lawyer providing state-guaranteed legal assistance. The legislation requires the criminal investigation authority to request the appointment of a duty lawyer for the provision of urgent legal assistance within one hour after the person's detention (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003).

Article 26, paragraph (4) of the Constitution establishes that "Interference in the activities of persons exercising the defense within the prescribed limits shall be punished by law." (Constitution of the Republic of Moldova of 29.07.1994.) The provisions of the Constitution aim to stop interference in the activities of persons exercising the right to defense. Interference in the activities of these persons leads to the violation of the right to defense of suspects, accused, and defendants. Article 52, paragraph (1) of Law no. 1260/2002 on the Bar establishes: "Interference in the exercise of the profession of lawyer is prohibited. The State ensures respect for and protection of freedom in the exercise of the legal profession, without discrimination and without unjustified interventions by its authorities or the public." (Law No. 1260 of 19.07.2002 on Advocacy)

For the protection of these rights within the criminal process, the Criminal Code (Criminal Code of the Republic of Moldova No. 985 of 18.04.2002) criminalizes under Article 303 any interference in the administration of justice and criminal prosecution, in any form, during the adjudication of cases by national or international courts, with the purpose of preventing a comprehensive, full, and objective examination of the specific case or to obtain the pronouncement of a judicial decision; and under Article 303¹, any interference, in any form, in the activity of a lawyer or trainee lawyer with the aim of hindering the representation and/or defense of the client (Criminal Code of the Republic of Moldova No. 985 of 18.04.2002).

Returning to the concept of equality, which, according to Prof. S.-E. Tănăsescu, is recognized as a norm of conduct and a genuine standard within a human community, with multiple approaches and detailed regulation in legislation and doctrine (Tănase, 1999, p.247), we endorse the opinion of the Romanian professor Gh. Mateuț, who states that in criminal procedure, traditionally, the principle of equality of persons takes the form of equality of arms (*l'égalité des armes*) (Mateuț, 2007 p.234). The renowned Prof. Ig. Dolea explains the concept of equality of arms starting from the fact that even in the case law of the European Court of Human Rights (ECtHR), the principle of equality of arms means equal treatment of the parties throughout the proceedings before a tribunal (Dolea, 2009, p.183).

The ECtHR has specified in several of its judgments, such as *Neumeister v. Austria*, decision of 27 June 1968 (ECtHR, Case *Dombo Beheer v. The Netherlands*); *Dombo Beheer v. The Netherlands*, decision of 27 October 1993 (ECtHR, Case *Dombo Beheer v. The Netherlands*); *Bulut v. Austria*, decision of 22 February 1996 (ECtHR, Case *Bulut v. Austria*); *De Haes and Gijssels v. Belgium*, decision of 24 February 1997 (ECtHR, Case *De Haes and Gijssels v. Belgium*); and *Guillemin v. France*, decision of 21 February 1997

(ECtHR, Case *Guillemin v. France*), that one of the requirements of a fair trial is the equality of arms, which entails the obligation to provide each party with a reasonable opportunity to present their case under conditions that do not place them at a significant disadvantage compared to their opponent. This principle also implies other rights, the analysis of which will be carried out below, correlating them with our domestic law.

It is important to mention beforehand that, as the European Court has shown, the principle of equality of arms applies to any procedure, whether contentious or non-contentious. When verifying the respect of national courts for this principle in a concrete procedure, Prof. C. Bârsan notes that the European court's mission is to rule on the merits of the case, regardless of its object: whether a criminal accusation or a dispute over civil rights and obligations (Bîrsan, 2010, p.511).

Representatives of doctrine such as F. Sudre (Sudre, 2006, p.278), V. Pătulea (Pătulea, 2007, p.117–119], and Ig. Dolea (Dolea, 2009, p.185) have emphasized that equality of arms constitutes one of the elements of the broader concept of a fair trial, which requires the judicial court to offer each party involved in the criminal trial a reasonable opportunity to support their case under conditions that do not place them at a disadvantage relative to their adversary. The ECtHR, in several cases such as *Ankerl v. Switzerland*, decision of 23 October 1996 (ECtHR, Case *Ankerl v. Switzerland*); and *Kress v. France*, decision of 7 June 2001 (ECtHR, Case *Kress v. France*), has underlined the special importance of appearances and the sensitivity of issues related to the proper administration of justice.

Although equality of arms does not apply and cannot apply to the relationship between the parties and the tribunal (Pătulea, 2007, p.117), the principle applies to the relations between the accused and the prosecutorial authorities. The above-mentioned authors have noted that the European judge undertakes an analysis of the intervention of the prosecutorial representatives and of their actual role; thus, it has been found that although the status and duties of the prosecution guarantee the objectivity of their intervention, their conclusions nonetheless carry significant authority and are not neutral for the person concerned.

The notion of “party” in the strict sense, understood in its usual procedural meaning, is overlapped by that of “party” in the broad sense (*lato sensu*), which designates the person whose intervention in the procedure is not neutral but aims to influence the judge's decision. Accordingly, under this broader understanding, nothing prevents the European judge from applying principles originally intended exclusively (such as equality of arms) or primarily (such as the adversarial principle) to govern relations between parties with respect to prosecutorial authorities, if it is found at some stage of the proceedings that these authorities act as a party in the broad sense (Sudre, 2006 p.278; Pătulea, 2007, p.117; Dolea, 2009, p.185).

Equality of arms in the legislation of the Republic of Moldova has not received a clear and unequivocal regulation. On the one hand, the prosecutor is considered a party to the proceedings with equal rights, as established by Article 6, point 29 of the Code of Criminal Procedure of the Republic of Moldova (CCP RM): “party to the proceedings – persons who in the criminal process exercise functions of accusation or defense based on equality of rights and the principle of adversariality” (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003). However, the situation becomes more complex if we examine the provisions of Article 51 CCP RM, which state that “the prosecutor is the person who, within the limits of their competence, exercises or, as the case may be, directs criminal prosecution on behalf of the state...”, and “during the trial, the prosecutor represents the accusation on

behalf of the state and presents in the court session the evidence collected by the criminal investigation body” (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003).

On the other hand, Article 124(1) of the Constitution establishes that: “The Prosecutor’s Office is an autonomous public institution within the judiciary authority, which contributes to the administration of justice, the protection of rights, freedoms, and legitimate interests of the person, society, and the state through criminal and other procedures provided by law” (Constitution of the Republic of Moldova of 29.07.1994). A similar regulation is found in Article 1 of Law No. 3/2016 regarding the Prosecutor’s Office (Law No. 3 of 25.02.2016 on the Prosecution Service). This means that the Constitution of the Republic of Moldova itself grants the prosecutor a role and thus a status distinct from that of the parties – that of a subject contributing to the administration of justice.

However, in all these considerations, we must also take into account Article 19(3) CCP RM, which imposes on the criminal investigation body the obligation to take all measures provided by law to investigate fully and objectively all aspects of the case, highlighting both the circumstances proving the guilt of the suspect, accused, or defendant, as well as those that exonerate them, along with circumstances that mitigate or aggravate liability (Criminal Procedure Code of the Republic of Moldova No. 122 of 14.03.2003).

In light of all these provisions, we conclude that due to the role, importance, duties, and status of the prosecutor, they cannot be categorized as a simple party in the process. At the same time, national legislation does not permit the prosecutor to cultivate the image of an advantaged party relative to the accused or their defense counsel (Cernomoreț S., Nastas A. 2023, p.56).

Contemporary realities shatter the overly “rosy” image regarding the right to defense of the individual and the equality of arms in criminal proceedings at the international level. The shifts in policy and legal perspectives to which we wish to draw public attention have been marked by several key moments. The first moment was the adoption in the United States of America of what later became known as the “USA Patriot Act” (USA PATRIOT Act) in 2001 (following the terrorist attacks on the World Trade Center in New York on September 11, 2001), through which the American legislature sought to strengthen U.S. measures for preventing, detecting, and prosecuting money laundering and terrorism financing.

Title II of the Act (sections 201–225) (USA PATRIOT Act), entitled “Enhanced Surveillance Procedures,” not only ensures better cooperation between U.S. anti-terrorism authorities but also grants these American authorities extended prerogatives for investigating persons suspected of terrorism, significantly curtailing the right to defense. For example, pursuant to section 213, the executing authority of a warrant (arrest warrant) may “delay” notification of the warrant’s execution if it “reasonably believes that immediate notification of the execution may have an adverse effect” (USA PATRIOT Act). This means that a person can be arrested without being immediately informed of their rights and the reasons for the arrest.

The second moment concerns the leaks of classified—confidential, secret, or top-secret—information. For nearly two decades, the media have been shaken by revelations such as the “WikiLeaks” scandal and the “Panama Papers” scandal. The essence of the “WikiLeaks” scandal (WikiLeaks) consisted of this non-profit organization (“WikiLeaks”) publishing caches of documents (approximately 1.2 million documents), revealing serious

violations of human rights and civil liberties by various governments. The “Panama Papers” scandal (Panama Papers Scandal) involved the disclosure (publication) of about 11.5 million documents (or 2.6 terabytes of data), released starting April 3, 2016, on various web platforms. The published documents detailed sensitive financial information related to attorney-client relationships for over 214,488 entities registered in Panama—offshore entities. These documents, some dating back to the 1970s, were created and obtained from the former Panamanian offshore law firm and corporate services provider Mossack Fonseca. It is true that thanks to investigative journalists (the International Consortium of Investigative Journalists (ICIJ)), it was discovered that some of the commercial companies created by Mossack Fonseca were used for illegal purposes, including fraud, tax evasion, and evading international sanctions. However, in most of the 22 states involved, a “witch hunt” was initiated, leading to criminal prosecutions of individuals named in the disclosed documents. It must also be noted that tax authorities in these states recovered from fraud perpetrators \$252 million in the United Kingdom, \$183 million in Germany, \$136 million in France, \$96 million in Australia, etc., amounting to a preliminary total of \$1.2 billion (Three Years since the Panama Papers Scandal). Regrettably, no attention was paid to the other side—the limitation of individuals’ right to defense, the respect for the presumption of innocence, and the fragility of the attorney-client relationship.

The effects of these moments, as well as others of similar nature, quickly manifested not only in the attitude of authorities but also through amendments to the legal framework and criminal procedural laws, often to the detriment of the rights of the parties involved in criminal proceedings—especially suspects, accused persons, or defendants—including the right to defense and the rights of lawyers. In the European context, these changes were thoroughly analyzed in the Bashkin Report (The Principles and Guarantees of Advocates), presented to the Parliamentary Assembly of the Council of Europe (document no. 15152, dated September 29, 2020). The Bashkin Report highlights threats to the legal profession and lawyers, such as:

- (i) harassment, threats, and attacks against lawyers, which have become systematic and appear to be the result of deliberate state policies;
- (ii) holding lawyers accountable for their work denouncing governmental impunity or corruption, or for representing certain individuals (suspected terrorists, opposition politicians, civil society activists, and independent journalists); prosecuting lawyers by law enforcement authorities as “agents provocateurs,” violating from the outset the trust and confidentiality of the attorney-client relationship, as well as the use of lawyers’ reports in criminal investigations;
- (iii) opening and examining attorney-client correspondence when the client is held in pre-trial detention, searches in lawyers’ offices, and similar intrusive actions (The Principles and Guarantees of Advocates).

The decline of the right to defense has been formally noted by the Parliamentary Assembly of the Council of Europe, which adopted Resolution 2348 (2020) (Resolution 2348 (2020) on the Principles and Guarantees Applicable to Lawyers) and Recommendation 2188 (2020) (Resolution 2348 (2020) on the Principles and Guarantees Applicable to Lawyers) concerning the principles and guarantees applicable to lawyers. Resolution 2348 (2020) identifies several problems, including:

- lawyers being identified with their clients and, by extension, with their clients’ political affiliations or alleged crimes;

- frequent violations of lawyers' rights by summoning them as witnesses in cases where they provide legal assistance to their clients;
- lawyers being called upon to explain why and how they represent their clients in proceedings against those clients;
- lawyers facing administrative and judicial harassment, including abusive infringements on their professional rights and privileges, such as violations of privileged communications between lawyer and client, body searches or searches of their professional premises, confiscations of case-related documents, illegal audio and video surveillance, withholding of essential case information, inclusion on various restrictive lists (including travel bans), and others;
- law enforcement authorities improperly attempting to regulate and assess lawyers' fees (Resolution 2348 (2020) on the Principles and Guarantees Applicable to Lawyers).

In Resolution 2348 (2020), the Parliamentary Assembly of the Council of Europe calls on all member states of the Council of Europe to ensure the effective protection of the legal profession, including by:

- prohibiting state interference in the legal profession and clearly identifying specific activities that constitute prohibited interference;
- establishing a domestic legislative framework that guarantees the efficiency, independence, and security of lawyers' work, particularly through: a) ensuring that national legislation and law enforcement practices improve the conditions and safeguards for lawyers' work, fully in accordance with existing standards established in the United Nations Basic Principles on the Role of Lawyers (1990), the Committee of Ministers' Recommendation Rec(2000)21, and Assembly Resolution 2154 (2017) on ensuring detainees' access to lawyers; b) providing adequate national safeguards against abuses and illegal interference in lawyers' professional activities, including in contexts that may justify greater restrictions on lawyers' rights, such as counter-terrorism, organized crime, or money laundering; c) investigating and holding perpetrators accountable in all cases of illegal intimidation, harassment, or physical attacks, and prosecuting any crimes committed against lawyers, regardless of the source of the threat (Resolution 2348 (2020) on the Principles and Guarantees Applicable to Lawyers).

Complementing this, Recommendation 2188 (2020), in paragraph 4, establishes the necessity of ensuring equality between prosecution and defense—that is, the need to guarantee equality of arms—"the necessity of providing by law the right to a fair trial by creating conditions of equality between prosecution and defense in adversarial proceedings, as well as ensuring the safety of lawyers alongside other participants in judicial processes" (Recommendation 2188 (2020) on the Principles and Guarantees Applicable to Lawyers).

Conclusions

We wish to emphasize the vital contribution of lawyers in securing the right to defense and ensuring the effective administration of justice. Defense attorneys play a central role in protecting human rights, particularly the right of individuals to a fair trial, as well as in upholding the principles of the rule of law. In this context, there is a crucial need to prevent and counteract violations of lawyers' rights, including attacks against their safety and independence.

By explicitly enshrining the right to defense, the legislation of the Republic of Moldova and the national legislature duly address both private and individual interests and

the broader societal interest in establishing the truth in criminal cases pending resolution, thereby preventing and excluding judicial errors and contributing to effective justice.

However, the exercise of the right to defense encounters significant challenges. The media and society often, due to lack of knowledge, tend to legitimize the inequality of arms between the prosecution and the defense. Citizens have come to believe that lawyers defend only criminal or corrupt offenders and that their defense should not be supported by the state, or that they would never need defense because the prosecution and investigative authorities always act legally. Yet, the high number of acquittals and the discrepancies between judicial decisions at various jurisdictional levels demonstrate that errors occur, and a strong defense is essential to ensure justice.

It is evident that, at present, the national criminal procedural legislation does not contain effective provisions to secure the effective equality of arms in criminal proceedings. Although Article 100, paragraph (2) of the Criminal Procedure Code of the Republic of Moldova establishes certain defense functions within the evidentiary process, this provision remains declarative in nature, lacking concrete procedural guarantees.

In these circumstances, one of the pertinent solutions, in our view, is to develop and strengthen procedures that allow the defense—namely the lawyer of the suspect, accused, or defendant—to contribute effectively to the investigation. In other words, special emphasis should be placed on developing the institution of investigation.

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