



The Normative Study of Defense in the Legislation of the Republic of Moldova: Institutions, Policies, and Perspectives

Andrei NASTAS¹

Abstract: *In criminal proceedings, the defense represents the defendant (the accused person) and plays a role in ensuring the right to a fair trial. It consists of the defendant and the defense attorney, who protect the defendant's rights, contest the charges, present evidence, and formulate arguments. The defense has essential rights, such as the right to information, the right to consult a lawyer, and the right to appeal unfavorable decisions. The role of the defense is to maintain balance in the criminal process and prevent abuses. The defense challenges the charges, presents evidence in favor of the defendant, and formulates legal arguments. The rights of the defense include access to information, the right to consult a lawyer, and the right to appeal unfavorable decisions. Its purpose is to maintain balance in the criminal process and prevent potential abuses by the prosecution. The right to defense, as a constitutional and procedural right of the suspect, the accused, or the defendant, can also be exercised through the mandatory provision of legal assistance by a defense attorney in cases where, due to the personal situation of the accused party or the severity of the potential penalty, the intervention of a legal professional is necessary. This professional's role is to protect the legitimate interests of the accused party throughout the proceedings.*

Keywords: *defendant; lawyer; right to defense; right to information*

1. Introduction

One of the fundamental themes in contemporary society is the issue of human rights, with particular emphasis on the right to defense, which is addressed within various organizations and international meetings.

Thus, *the European Convention on Human Rights* stipulates in Article 6 "The Right to a Fair Trial," paragraph 3(c), the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal

¹ Associate Professor, PhD, Cross-Border Faculty, "Dunarea de Jos" University of Galati, Romania, Address: 111 Domneasca Str., building K, Science Campus, Galati, Romania, Corresponding author: andrei.nastas@ugal.ro.



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assistance, to be given it free when the interests of justice so require." Similarly, the *Charter of Fundamental Rights of the European Union* regulates in Article 48, paragraph 2 that "Respect for the rights of the defense of anyone who has been charged shall be guaranteed."

The defense in criminal proceedings plays an essential role in protecting the fundamental rights of the defendant and ensuring a fair trial. This includes the accused, i.e., the person charged with committing an offense, and the defense attorney, who has the responsibility to represent and advise them. The primary role of the defense is to challenge the charges brought by the prosecution, to present evidence and legal arguments supporting the innocence or mitigating circumstances of the defendant, thus ensuring respect for the defendant's procedural rights. In this way, the defense contributes to the balance in criminal proceedings and the administration of justice.

The commission of a crime generates a substantive criminal law relationship. The main subjects of this relationship are, on one side, society, and on the other, the person who has committed the harmful act (action or omission). Through society's response, represented by the state, to hold the perpetrator accountable, a criminal law relationship is established, wherein the state (through its competent bodies) and the offender become principal subjects. In this case, the person who committed an offense is classified as a suspect, accused, or defendant.

According to Article 6 of the Criminal Procedure Code of the Republic of Moldova, defense represents procedural activity carried out by the defense to contest, in whole or in part, the accusation or to mitigate the penalty, defend the rights and interests of persons suspected or accused of committing an offense, as well as to rehabilitate persons unlawfully prosecuted¹.

According to Article 17 of the Criminal Procedure Code of the Republic of Moldova, "Ensuring the Right to Defense," the constitutional guarantee of this right must be interpreted as a requirement for the active involvement of the defense attorney in criminal proceedings. This involvement aims at providing legal assistance, participating in the administration of evidence, and protecting the legitimate rights and interests of the suspect, accused, or defendant.

¹ Criminal Procedure Code of the Republic of Moldova, Code No. 122 dated March 14, 2003, Published: November 5, 2013, in the Official Gazette No. 248-251.

2. Content

The defense in criminal proceedings is the procedural component that protects the rights and interests of the person accused of committing a crime. It is comprised of the defendant and the defense attorney, who together contest the charges brought, present favorable evidence, and formulate legal arguments to demonstrate the defendant's innocence or reduce their criminal liability. The role of the defense is to maintain a balance between prosecution and defense, thus contributing to ensuring a fair trial and respecting the defendant's fundamental rights throughout the criminal process.

According to fundamental acts, the Constitution of the Republic of Moldova guarantees the right to defense in Article 26, which states that: (1) The right to defense is guaranteed. (2) Every person has the right to independently react through legitimate means to violations of their rights and freedoms. (3) Throughout the process, parties have the right to be assisted by a lawyer, chosen or appointed *ex officio*. (4) Interference in the activities of people exercising defense within the limits provided by law is punishable by law. Consequently, the constitutional guarantee of the right to defense must be interpreted as requiring the active involvement of the defense attorney in criminal proceedings, aiming to provide legal assistance, participate in the administration of evidence, and protect the legitimate rights and interests of the suspect, accused, or defendant.

The legal framework, in Article 62 of the Criminal Procedure Code, defines the suspect as a person for whom there are sufficient indications that they may have committed a crime, but against whom no formal accusation has yet been made. The suspect benefits from the presumption of innocence and the right to defense, being protected by law until the end of the trial and the establishment of their guilt. During this phase, competent authorities may conduct investigations to gather evidence supporting or refuting the suspicions of their involvement in committing the crime. The rights and obligations of the suspect are stipulated in Article 62 of the Criminal Procedure Code of the Republic of Moldova.

According to author Anastasiu Crișu, the "defendant" is the individual against whom criminal proceedings have been initiated and who has the legal status of a party in the process, placing them in the same procedural position as other parties. The position of a party in the process is the key procedural distinction between a "suspect" and a "defendant." Although the suspect has the same procedural rights as the defendant, the latter, as a party in the process and a procedural subject accountable for criminal responsibility, bears greater obligations to meet the needs of case resolution. The status of "defendant" is conferred upon a person against whom the prosecutor has initiated criminal proceedings by order, regardless of their role in the offense (principal, instigator, accomplice). According to Article 309,

paragraph (1) of the Criminal Procedure Code, the criminal action is initiated by the prosecutor, by order, during the criminal investigation when there is evidence indicating that an individual has committed an offense and none of the impediments listed in Article 16, paragraph (1) of the same code apply. The defendant is the passive subject of criminal action and, where applicable, the civil action. Since criminal responsibility is engaged against the defendant, they must have the necessary and sufficient means to counter any false accusations. These means must ensure an appropriate response against opposing parties, especially the prosecutor presenting the charges (Crișu, 2017).

Another definition of the defendant is provided by author Carmen Silvia Paraschiv, who describes the person against whom criminal proceedings have been initiated as a party to the criminal process and labels them as the defendant. In the criminal process, the defendant is the central figure, with the entire procedural activity revolving around the criminal act committed by this person to hold them accountable (Paraschiv, 2004).

A person acquires the status of a defendant once the case is sent to trial. They attain the status of "convict" once the court's decision becomes enforceable. Thus, the term "convict" is also used in the context of appeals. A person is considered acquitted when the court issues a final acquittal decision. Moreover, a person loses the status of "suspect" once the criminal proceedings against them are concluded, or they are exonerated.

The "defense attorney" plays a crucial role in the criminal process, safeguarding the accused or defendant's right to defend themselves against the charges. In the criminal process, the defense attorney actively protects their client's rights and interests, ensuring the judicial procedures are fairly observed and that the accused has a fair trial. Article 67 of the Criminal Procedure Code defines the role and duties of the defense attorney. Paragraph (2) of the same article stipulates that the following individuals may participate as defense attorneys in a criminal process:

- 1) an attorney;
- 2) other individuals legally authorized to act as defense attorneys;
- 3) a foreign attorney, provided they are assisted by a person listed in item 1¹.

According to national legislation, the Constitution of the Republic of Moldova enshrines in Article 26 the right to defense, which is a guaranteed right. Therefore, every person has the right to be assisted by a chosen or court-appointed attorney in a criminal process.

¹ Criminal Procedure Code of the Republic of Moldova, CODE No. 122 of 14-03-2003, Published: 05-11-2013 in Official Gazette No. 248-251.

Authors Ion Neagu and Mircea Damaschin describe defense as a complex procedural activity, requiring that the efforts of an individual fighting to protect their rights and interests be complemented by the participation of an attorney, whether chosen or appointed, to help the parties defend their legally protected interests. Adding new dimensions to the fundamental rights and freedoms of individuals, the Romanian Constitution grants a special place to the right to defense, emphasizing in Article 24, paragraph (1) that the right to defense is guaranteed.

Introducing a new framework of fundamental rights and freedoms for individuals, the Constitution of Romania reserves a special place for the right to defense, emphasizing in Article 24(1) that the right to defense is guaranteed.

The legal framework established for organizing and practicing the profession of attorney, aimed, among other things, at defining the attorney's status within the criminal process system, is based on regulations concerning the right to defense and the rights of the attorney as set forth in the Romanian Constitution (Art. 24), in Law No. 304/2004, as republished, in Article 6 of the European Convention on Human Rights, and, naturally, in the content of the Code of Criminal Procedure (Neagu & Damaschin, 2020).

Gheorghiu Mateuț also discusses the attorney's role in representing a client in the first instance, whether the case involves mandatory or optional legal assistance for the defendant and other parties, positioning himself within their procedural standing.

3. Ensuring Defense

According to the common provisions of Article 294 of the Criminal Procedure Code, the court president, upon setting the hearing date, arranges for the appointment of a public defender in criminal cases where legal assistance is mandatory under the law. At the same time, the president or vice-president takes the necessary measures to ensure the effective exercise of the right to defense, considering the provisions of paragraph 2 of Article 294 of the Criminal Procedure Code, which grants the defendant, other parties, and their attorneys the right to consult the case file during the trial phase, and the detained defendant the right to communicate with their attorney (Mateuț, 1998).

By granting the attorney the right to gather evidence, the legislator has nonetheless left a significant gap in regulating this right. On the one hand, it does not specify in detail the procedural framework for gathering evidence, leaving it to the parties to determine the order and methods of evidence collection. On the other hand, it lacks a clear set of safeguards to ensure the effective realization of this right, essential to protect defense interests. Consequently, the attorney faces much more restrictive

conditions regarding access to evidence and investigative means compared to prosecutors or state agents, who benefit from broader powers and resources provided by public authorities. Thus, the evidence-gathering process by the attorney occurs in an imbalanced context that favors state authorities, risking the defense's rights being affected by these significant differences in resources and capabilities.

The attorney's rights and obligations as a defense counsel in a criminal process are regulated by national and international legislation, playing an essential role in ensuring a fair trial and protecting the rights of the accused. The defense attorney has both rights and duties aimed at guaranteeing an effective and fair defense before the court, which is a fundamental element of the rule of law. These rights and obligations are regulated in Article 68 of the Code of Criminal Procedure.

Attorney's Rights as Defense Counsel:

a) Right to Communicate with the Client

The attorney has the right to communicate with the accused, regardless of the place (in detention, at liberty, etc., without undue control from the authorities. This right includes the possibility of meeting with the client in a private setting to discuss their defense.

b) Right to Consult the Criminal Case File

The attorney has the right to access the investigation file, except in cases where access is restricted for national security or other legal reasons. This consultation is essential for preparing an adequate defense and ensuring the client's right to defense.

c) Right to Participate in Procedural Acts

The attorney has the right to be present at all stages of the criminal process, including the suspect's or defendant's hearings, searches, witness examinations, and any other relevant procedural acts. Additionally, the attorney may question witnesses and seek clarifications during the trial.

d) Right to Request the Admission of Evidence

The attorney may request the court to admit evidence, including through witness interrogation or submission of documents, considering defense interests. Furthermore, the attorney may request the court to exclude illegally obtained evidence.

e) Right to Assist and Represent the Client in Court

The attorney has the right to represent the client before the courts, both at the investigation stage and during the trial. The attorney can make defenses, file

complaints, and request the suspension of proceedings or other protective measures for the client.

f) Right to Defense Confidentiality

The attorney enjoys protection of the confidentiality of information received from the client within the attorney-client relationship. Confidentiality is an essential principle ensuring freedom of defense and protecting the client's rights.

g) Right to Challenge Criminal Procedure Measures

The attorney can submit challenges and complaints against procedural measures, such as detention, searches, preventive arrest, or other restrictive measures. The attorney may also request a review of measures taken during criminal proceedings.

The obligations of the defense attorney in criminal proceedings are regulated by law to ensure the proper conduct of judicial procedures and to protect the rights of all parties involved. In this context, each of the obligations mentioned reflects the responsibilities of the defense attorney towards the court and judicial authorities, as well as towards the fair trial process. Here is a detailed description of each obligation:

1) Obligation to Appear at the Summons of the Investigative Authority or Court.

This obligation concerns the attorney's availability to participate in legal proceedings, whether it involves criminal investigation (in front of the prosecutor or other investigative authorities) or the trial itself. The defense attorney must respond to the calls of judicial authorities and be present when their client is summoned to provide effective representation. This obligation ensures continuity in the criminal process, making sure that the defense is not delayed due to the attorney's absence, which could lead to the violation of the accused person's right to a fair trial.

2) Obligation to Comply with the Lawful Orders of the Investigative Authority and the Presiding Judge.

The attorney has the duty to follow the legal orders and instructions issued by the judicial authorities conducting the process (be it the prosecutor during the investigation or the presiding judge during the trial). This does not imply that the attorney abandons their role in defending the client, but they must cooperate with authorities acting within the legal framework. For example, the attorney must follow instructions regarding the conduct of the hearing or other procedural actions, if they do not violate the fundamental rights of the client. However, it is important to note that respecting authority does not mean that the attorney forfeits the right to challenge measures that are illegal or abusive, as they are always empowered to protect their client's rights.

3) Obligation Not to Leave the Courtroom Until the Session is Adjourned, Without Permission from the Presiding Judge.

This obligation emphasizes the necessity of maintaining order and discipline during the criminal process. The defense attorney cannot leave the courtroom during a hearing without the presiding judge's permission. The attorney's presence is essential throughout the session to ensure that the defense rights are respected and that any decision made during the process can be contested or properly explained. The attorney's absence at key moments could harm the client's right to adequate legal assistance.

4) Obligation to Respect the Order Established in the Courtroom.

Observing order in the courtroom is an essential responsibility for any participant in the criminal process, including the attorney. This involves appropriate behavior during the hearing, adhering to the court's decisions and procedural rules set by the presiding judge. The attorney must not raise irrelevant issues, disrupt the process with uncontrolled interventions, or disregard instructions concerning the conduct of the session. Any conduct violating this order can lead to disciplinary sanctions or additional procedural measures, including penalties for absence or inappropriate behavior. Respecting order allows the court and all participants to focus on relevant matters without being disrupted by unnecessary interventions or behaviors that could create disorder in the courtroom.

The rights and obligations of the defense attorney in a criminal process are balanced, and observing them is essential to ensuring a fair trial. While the attorney benefits from important rights that allow them to adequately represent their client, they also bear fundamental obligations that address the integrity of the process and the protection of the accused person's fundamental rights. An attorney who properly exercises both rights and obligations contribute significantly to the fair administration of justice and the rule of law.

Guaranteed Legal Assistance represents the fundamental right of any person to receive appropriate legal representation and advice in a legal proceeding, provided by the state under certain conditions stipulated by law. In a rule-of-law state, guaranteed legal assistance is essential to ensuring a fair trial and protecting the fundamental rights of those involved in judicial or administrative proceedings, especially when they lack the financial means to hire an attorney.

According to author Carmen Silvia Paraschiv, procedural criminal norms allow each party to defend themselves as they see fit. If a party considers it necessary, they have the right to request the assistance of an attorney who, through professional qualification and specialized legal knowledge, can provide legal assistance. Thus, legal assistance is a component of the right to defend and consists of the fact that the

attorney, through their participation in the criminal process, guides, supports, and clarifies, in all procedural aspects, the party they defend, using all legal means for this purpose. Judicial authorities are obligated to inform the suspect or accused that they have the right to be assisted by an attorney throughout the criminal investigation and trial, and under the conditions and in cases provided, judicial authorities are required to take measures to ensure legal assistance *ex officio*. The absence of the attorney does not prevent the conduct of a criminal investigation act if there is proof that the attorney was notified of the date and time of the act. Whenever legal assistance is mandatory, the investigative authority will ensure the attorney's presence during the accused's questioning (Nastas & Cernomoret, 2024).

If the defense attorney of the suspect or accused is present during the conduct of a criminal investigation act, this fact is recorded, and the act is signed by the attorney.

When the law provides for *ex officio* legal assistance at the request of the investigative authorities and courts, ensuring the execution of this duty falls on the Bar Council. The bar associations present the Bar Council with requests indicating the names and contact information of the attorneys who will provide *ex officio* legal assistance. For *ex officio* legal assistance at the request of the investigative authorities and courts, the Bar Council appoints one or more coordinating attorneys among those registered with the bar associations in the respective administrative-territorial units, who are required to fulfill *ex officio* requests.

4. Conclusions

The defense plays an essential role in the criminal process, having a direct impact on the balance and fairness of judicial proceedings. In any democratic justice system, ensuring the right to defense is one of the fundamental pillars that guarantees a fair trial, in line with the principles of the rule of law and the protection of fundamental human rights. In this context, the defense attorney is responsible not only for protecting the client's rights but also for contributing to the fairness and integrity of the criminal process.

The right to defense includes not only the right to be assisted by an attorney but also the right to effective defense. This right implies that the attorney has access to all relevant evidence, can cross-examine witnesses, and can request the admission of evidence that supports the client's defense. Additionally, the attorney must be adequately informed of the charges and have the opportunity to make reasoned defenses based on facts and law. National and international legislation has sought to establish mechanisms to ensure adequate defense. However, although the right to legal assistance is guaranteed, in practice, judicial systems may face challenges in ensuring adequate resources and training for appointed attorneys, which can affect

the effectiveness of the defense. Despite these challenges, ensuring effective defense is essential for maintaining public confidence in the justice system and protecting citizens' fundamental rights. In this regard, judicial systems must adapt their procedures to more effectively meet the needs of the defense, ensuring that all defendants benefit from fair defense, regardless of their financial resources.

The defense represents a central pillar of the criminal process, and the defense attorney is a guarantor of respecting the accused's fundamental rights. Ensuring a fair trial and effective defense are essential conditions for the proper functioning of justice and for preventing any form of abuse by authorities. At the same time, significant challenges remain, particularly regarding defense resources and powers, which can create imbalances compared to the prosecution.

A functional judicial system must guarantee not only access to legal assistance but also a conducive environment for effective defense, including fair access to evidence and information. This requires not only clear legal regulation but also judicial practice based on transparency, impartiality, and respect for the fundamental rights of each person involved in the criminal process.

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