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CORRELATION OF THE PRINCIPLE: ENSURING THE RIGHT TO DEFENSE WITH OTHER PRINCIPLES IN THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF MOLDOVA

Abstract. Interdependence of the principle ensuring the right to defense with other principles from the perspective of the criminal procedure code of the Republic of Moldova and article 6 of the European Convention. In approaching the notion of system of fundamental principles of criminal law, two aspects must be taken into account: on the one hand, the knowledge of its components and, on the other hand, the interdependence between these principles in achieving the purpose of criminal proceedings. Ensuring the right to defense, as a principle of criminal proceedings, is linked to other principles, which in turn ensure the possibility of ensuring the right to defense and a fair trial in general. No principle of criminal proceedings is superior or inferior, each having its own importance.

Keywords: principle, ensuring the right to defense, suspect, accused, defendant, injured party, civil party, civilly liable party.

Principles have an interdependent relationship, correlated with each other and viewed systemically, and non-compliance with even one principle has detrimental effects on other principles, undermining the guarantees of a fair criminal trial. Each
principle of the criminal process represents a general rule, which allows the realization of the other principles. The principles in the system are distinguished by the fact that they are not in opposite positions, there is a mutual complementarity between them [4].

Criminal procedural guarantees consisting of principles are means that allow the effective, real and consecutive exercise of all procedural rights, in accordance with the legitimate interests of each subject and the administration of justice in criminal proceedings on a legal basis.

The wording of this principle in the Code of Criminal Procedure of the Republic of Moldova as „ensuring the right to defense“ differs, according to the situation of the „right of defense“. This wording, however, does not reduce all forms of exercising the right of defense only to the presence of a lawyer. In art. 17, prescribes the obligation of the criminal investigation body and of the court to ensure to the participants in the criminal trial the full exercise of their procedural rights under the conditions provided by the procedural law.

In the Decision of the Plenum [3] of the Supreme Court of Justice of 24.10.2010 no. 11 „On the practice of law enforcement to ensure the right to defense of the suspect, accused and defendant in criminal proceedings“ in point 11 sets out the criteria when the interests of justice require the presence of a lawyer:

– complexity of the case - the more complicated the case, the more necessary it is to provide the obligatory assistance of the lawyer;
– the ability of the suspect, the accused, the defendant to defend himself - the knowledge and skills of each person are to be taken;
– the gravity of the deed, the commission of which the person is suspected or accused of, and the sanction provided by law for its commission.

In accordance with the content of art. 17 „Ensuring the Right to Defense“ of criminal procedure code of the Republic of Moldova upholding the principle value of the positive obligation of the state to ensure the ensuring the right to defense, throughout the criminal process, the parties (suspect, accused, defendant, injured party, civil party, civilly liable party) have the right to be assisted or, as the case may be, represented by a defense counsel of their choosing or by an attorney providing
the legal assistance guaranteed by the state. While examining the injured party and
the witnesses, the criminal investigative body shall not be entitled to prohibit the
presence of the attorney invited by the person examined to represent him/her. If the
suspect/accused/defendant cannot afford a defense counsel, he/she shall be assisted
free of charge by a court-appointed attorney providing the legal assistance
guaranteed by the state [2].

Also, in art. 16 „Language of a Criminal Proceeding and the Right to an
Interpreter” of the criminal procedure code, stipulates that the state language shall
be spoken during a criminal proceeding. A person who does not speak the state
language has the right to examine all the documentation on the case and to speak
before the criminal investigative body and the court through an interpreter. Criminal
proceedings may also be conducted in a language accepted by the majority of
persons participating in the proceeding. In such a case, judgments shall be
mandatorily prepared in the state language as well. The procedural acts of the
criminal investigative body and the court shall be handed over to the
suspect/accused/defendant translated into the native or other language he/she speaks
in the manner provided for in this Code [2].

In approaching the notion of system of fundamental principles of criminal
procedure law, two aspects must be taken into consideration: on the one hand,
knowledge of its components and, on the other hand, the interdependence between
these principles in achieving the purpose of criminal proceedings. Principles have
an interdependent relationship, correlated with each other and viewed systemically,
and failing to comply even one single principle, it will have adverse effects on other
principles, undermining the guarantees of a fair criminal trial [6].

Each principle of the criminal proceeding represents a general rule, which
allows the implementation of the other principles. The principles within the system
differs in that they are not in opposite positions, with each other complementing
each other.

The principle in question is related to such principles of criminal proceedings
as: Legality of criminal procedures, Presumption of innocence, Equal Protection of
the Law, Observance of Human Rights, Freedoms, and Dignity, Free Access to

Principle Legality of Criminal Procedures. The legality of the criminal trial is the fundamental principle according to which the conduct of the entire criminal trial takes place according to the provisions provided by law. Achieving the goals of the criminal judicial process is possible only under the conditions of strict and unequivocal execution of the provisions of the criminal procedure law.

The principle of legality of the process results in the following requirements [7]:

a) the criminal procedural activity is carried out only by the judicial bodies provided by law, in the composition and within the limits of competence specified by it, and the criminal procedural legal norms that regulate the organization and functioning of the judicial bodies are imperative norms;

b) the criminal investigation and trial procedure takes place only under the conditions and with the forms provided by law;

c) in carrying out the criminal procedural activity, the judicial bodies must respect and ensure the exercise of the procedural rights of the parties for the correct settlement of criminal cases.

The application by the competent bodies of law of provisions contrary to the Constitution, the Code of Criminal Procedure, international treaties or universally recognized principles seriously affects the legality of the criminal process, including the ensuring the right to defense, and will be compensated by the state.

The mechanism for achieving the principle of the ensuring the right to defense requires normative fixation and impeccable execution of the elements of the right of defense: the presence of the defender or legal representative at all stages of the criminal process, providing equal conditions for the defense, according to the national and international law, European Court of Human Rights in Strasbourg, as well as providing defense through any legal means and methods.

We emphasize the fact that the ensuring the right to defense is also limited by
the principle of legality, because only a defense by legal methods and means is allowed by law.

*The presumption of innocence* and its correlation with the ensuring the right to defense follows even from the provisions of art. 21 of the Constitution of the Republic of Moldova stipulates [1] that „any person accused of a crime is presumed innocent until his guilt is legally proved, during a public trial, in which all the necessary guarantees for his defense were provided”.

The presumption of innocence is an entity, an objective provision, of the representatives of the competent bodies that perform the act of detention on the grounds provided by the criminal procedure law and who, at the time of detention, have a reasonable suspicion in the presence of guilt of the suspect. This provision acts during the entire term of the criminal investigation and trial of the case until the court decision becomes final, and the role of the defense is to ensure that this presumption is not rebutted [7].

However, the presumption of innocence is limited if the defendant concludes the plea agreement, an agreement concluded only in the presence of the chosen or appointed defense counsel and with an explanation of all legal consequences.

*The principle of Equal Protection of the Law* presupposes that everyone shall benefit from the equal protection of the law irrespective of sex, race, color, language, religion, political opinion or any other opinion, national or social origin, affiliation to a national minority, wealth, birth or any other situation. Correlated with the principle of the ensuring the right to defense, it presupposes the granting of the same facilities in the exercise of defense without any discrimination and without facilitating a certain category of citizens, in the content of the right of defense is equal for all, with some exceptions for some categories of citizens, deputies, judges and members of foreign embassies.

*The principle of Observance of Human Rights, Freedoms, and Dignity* combined with the ensuring the right to defense corresponds to the fact that every person has the right to defend by any means not prohibited by law human rights, freedoms and dignity, unlawfully infringed or restricted during criminal proceedings, and harm caused to human rights, freedoms and dignity during the
criminal proceedings shall be repaired in the manner established by law [2].

Also here, we mention that no one can be subjected to torture or cruel, inhumane or degrading treatment, no one can be detained in humiliating conditions, no one can be forced to participate in procedural actions that harm human dignity, and the burden of proving the non-application of torture and other cruel, inhumane or degrading treatment or punishment shall be the responsibility of the authority in whose custody the person deprived of liberty is.

*The principle of Language of a Criminal Proceeding and the Right to an Interpreter* is manifested in the principle of the right of defense by the fact that the accused who does not know the language of the judicial procedure, regardless of his nationality or the fact that he is a resident of the statute he could defend himself in any way permitted by law, including acquaintance with all the documents and materials of the case, speak before the prosecution body and the court in the language known to the accused, and a judgment rendered without the assurance of an interpreter leads to the annulment of the judgment [5].

*Free access to justice* in relation to the ensuring the right to defense is characterized by the existence of a real possibility for the person to defend his life, health, inviolability of the home, other, by addressing (complaints and denunciations) to the competent bodies in order to carry out the control for the detection of the crime and the prosecution of the guilty persons.

Ensuring the ensuring the right to defense is a premise of all participants in criminal proceedings, not only the possibility to file an action or application in court, but also the possibility to use the remedies provided by law, being enshrined in art. 20 of the Constitution of the Republic of Moldova [1]. A particularity of the defense is the obligation of the prosecutor and the criminal investigation body to take all legal measures for the investigation in all aspects, complete and objective of the circumstances of the case and to avoid excessive formalism for the exercise of the ensuring the right to defense.

*Principle Freedom from Testifying against Oneself* in connection with the right of defense is manifested by the right not to make any statement as to an act attributed to him or an accusation brought against him, without previously being accused of
insincerity as an aggravating the liability, as well as the immunity to testify against close relatives both at the criminal investigation and at the trial stage.

The reason for recognizing the right to remain silent is in particular the protection of the accused against the coercive, abusive force of law enforcement against him, as he is not obliged to work with the prosecution and the silence cannot have negative consequences [5].

*The principle of Securing the Rights of the Victims of Crimes, Abuses of Official Positions and Judicial Errors* in the light of the ensuring the right to defense presupposes the existence of a remedy if the function of the prosecution during the criminal investigation or in court has committed certain offenses or abuses, which can be detected only by a complaint, invocation made simultaneously with the defense of the suspect, accused or defendant.

At the same time, if serious violations have been committed during the criminal proceedings regarding the rights of the accused, then the court may reduce in proportion to the suffering the punishment to the individualization of the applied punishment.

*Principle of the Adversarial Nature of a Criminal Proceeding* is the principle most closely linked to the right to a defense, because the defense occurs only when there is an accusation against the suspect, accused or defendant. At all stages of the criminal proceedings, the parties have diametrically opposed aims, the prosecution, represented by the prosecutor, the criminal prosecution body to prosecute and the defense provided by the legal or conventional representative to avoid or mitigate liability [6].

The defendant's deprivation of the ensuring the right to defense excludes the adversarial nature, because precisely through it, through controversy in the court, the defendant can defend himself, and the lawyer can defend the represented person. The ways to exercise the ensuring the right to defense consist in the possibility to challenge the opponent's position, as well as the possibility to object to each of his arguments, to bring his own arguments, using procedural rights equal to those of the opponent before the competent body able to make the final decision.

*The principle of Right to a fair trial* correlated with the principle of the ensuring
the right to defense provided in art. 6 of the European Court of Human Rights and which expresses the idea that each party of the criminal proceeding must have equal chances to administer and complete the case materials and that no one should benefit from a substantial advantage over his procedural opponent.

However, in national judicial practice, the prosecutor has much wider powers in the administration of evidence than the defense, even the fact that all evidence is annexed, by order of the criminal investigation body or by the conclusion of the court to the materials of the case, and the lawyer and the accused and the defendant has modest mechanisms for the administration of evidence, having the right to request additional procedural actions or to request the exclusion of certain evidence, which from the beginning leads to an unfair trial [6].

Equality of arms presupposes equal access of the parties to documents and other procedural acts present in the criminal case at least due to the fact that they play a role in forming the court's opinion, although in some cases access to defense may be limited.

If the criminal proceedings are conducted to the advantage of one of the participating parties over the other party, the right at issue in the dispute is prejudiced, an unfair trial leading even to the denial of the right. The right to a fair trial must be found throughout the criminal proceedings, as a totality of procedural guarantees granted to the persons involved, either as suspect, accused or defendant, or as an injured party, civil party, civilly liable party or witness [4].

Overall, the prosecution of the Republic of Moldova is based on all the principles of criminal proceedings, but which, unfortunately, are not sufficiently implemented to guarantee full fairness, therefore, the legislator must improve the rules regarding these principles, because violating a principle alone, automatically violates several, including one or more articles of the European Court.

References:
3. Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova nr.11 from 24.12.2010 on the practice of applying the legislation for ensuring the right to defense of the suspect, suspect, accused, defendant and convict in criminal proceedings;


6. Rusu V., Lichii B. *The participation of the defender in the evidence according to the procedural-criminal legislation of the Republic of Moldova*. In: People's Advocate, Chisinau, 2014. nr. 4-6, p. 9-13;