

# CONNECTIONS AND INTERFERENCES BETWEEN THE RIGHT TO DEFENCE AND THE RIGHT TO LEGAL ASSISTANCE

Professor **Claudia ANDRIȚOI**<sup>1</sup>

Assistant professor **Florentina LUPȘA**<sup>2</sup>, Ph.D. student

## **Abstract**

*Between the right to defence and assistance and the civil rights a close connection has been identified. Sometimes the realisation and protection of these rights, such as the right to life, to personal dignity, to private life etc., in general are impossible without the right to defence and legal assistance. First, the right to legal assistance allows the individual to comprehend the powers conferred to him by this right. Second, the right to legal assistance allows the protection and enforcement of these personal rights.*

*The subjects of both rights are all the persons who have the right to information about the status of their own rights and liberties and the problems impeding their achievement. The importance of informing citizens and states in all spheres, and in particular about the implementation scope of the right to legal assistance consists in the population's comprehensive legal information.*

**Key words:** right to defence, right to legal assistance, subjects, legal regulation

**JEL Classification:** K41

## **1. Preliminary considerations**

The foundation of the rule of law is made of a set of fundamental rights that are inscribed in texts with superior legal value.<sup>3</sup>

The right to defence is a fundamental human right whose apparition goes back to the Ancient Times, in Aristotle's conception and in the stoic philosophers' thinking. The Roman Law contained the rule that nobody could be judged, not even a slave, without a proper defence. Obviously, we refer to incipient forms of apparition of fundamental human rights.

The right to defence and legal assistance in the capacity of legal institution has its own history and development. The formation of this institution's components during the evolution of law was gradual, and in each historic period characterised by the development of one or another right element of the right to defence. In general this institution has improved and reached its modern form in the period of the constitutional regime's installation.

The true preoccupations to regard man as an autonomous being, with his own personality, with rights related to his individual being, and not as an indistinct part of society, started in the Renaissance epoch, the era that meant a grand renewal of the Europe of the 4th – 6th centuries in all domains.

In the 17th – 18th centuries, rationalists like Hugo Grotius, J.J. Rousseau, Thomas Hobbes gradually laid the scientific foundations of the doctrine of individual human rights, regarded as an expression of a natural law.

The first two international documents containing one of the aspects of law when it comes to civil and political rights is the International Pact regarding civil and political rights. In accordance with art. 14, paragraph 3 of this Pact, "*Any person accused of having committed a penal crime has the right, in conditions of full equality, to at least the following guarantees: letter d). to be present at his/her trial and to defend himself/ herself or to benefit from the assistance of a chosen defender; if he has no defender, to be informed about the right to have an attorney and whenever the interest of the justice requires it, to be assigned a public defender, for free, if that person does not have the means to pay for an attorney's services*"<sup>4</sup>.

<sup>1</sup> Claudia Andrițoi - „Eftimie Murgu” University of Reșița, andritoiclaudia@yahoo.com.

<sup>2</sup> Florentina Lupșa - „Eftimie Murgu” University of Reșița, lupsa.florentina@yahoo.com.

<sup>3</sup> Andrițoi Claudia, *General Theory of Human Rights*, Bren-V.I.S. Print Editions, Bucharest, 2011, pg.51

<sup>4</sup> *Main international instruments regarding Human Rights to which Romania is party*, in Romanian Institute for Rights, V. I., p. 25-58

The right to legal assistance found its reflection also in international documents with regional character. The European Convention for the defence of human rights and fundamental liberties (Rome, 4th of November 1950) consecrated the following in its art. 6 point 3: „*Any person accused of a crime has, in particular, the right: c) to defend himself / herself, to be assisted by a chosen defender, and if he / she does not have the means necessary to pay for a defender, to be assisted free of charge by a public defender, when the interests of justice requires it*”<sup>5</sup>.

In view of maintaining peace and security and for the cooperation among states one elaborated the Universal Declaration of Human Rights, in 1948, as fundamental international document of inalienable and inviolable rights of all men. The declaration stipulated the interdiction of torture and of humiliating and degrading punishments, of condemnation for actions or missions that do not constitute penal deeds at the moment of their commission. Furthermore, one recognises each person’s right to make appeal to a court of law to protect his/her rights, to be heard in person in public before the courts, and, last but not least, to defend himself/herself against any accusations brought against him.

In order to conform to the Universal Declarations of Human Rights and International Pact regarding civil and political rights, the 1965 Constitution of Romania, in its art.31, par.3, inscribed the right to defence among the citizens’ fundamental rights and liberties<sup>6</sup>.

It is necessary to point out that due to its innovating and comprehensive character, Romania’s 1991 Constitution explicitly refers to the Universal Declaration of Human Rights in art.20 par. 1, expressly stipulating that the constitutional dispositions regarding the rights and liberties of citizens will be interpreted and applied in accordance with the Declaration. The nomination of this document in Romania’s Constitution changes its nature from a political document into a legal one.

At present, in Europe there is an utmost important document similar to the Declaration, more precisely the European Convention of Human Rights, signed in 1959 by the member states of the European Communities. In art.6 it stipulates that the right to defence is guaranteed to any person who is subjected to statements in public in relation with a judiciary case, related to the contestation of rights or obligations with civil character, or in relation with the merit of an accusation or indictment in the criminal matter.

In the ECHR spirit it was appreciated that the state cannot restrain or suppress the control of judges in certain domains, nor intervene in the activity of judges, but on the other hand, if a certain case raised problems requiring a high level of professional knowledge, the state should not leave the accused to meet these professional requirements all by himself.

The list of these rights comprised in art.6 point 3 of ECHR is not exhaustive; although the respective rights belong to the accused, it is not excluded to extend their application to civil trials and to all parties. In order to secure an equitable and fair trial, art.6 point 3 is applicable not only before the court, but in all the trial phases and stages.

From the same perspective of the development process in time, we may follow also the occurrence of the right to legal assistance. The initial stage of the development of the right to legal assistance is related to the „*apparition of the state and of the trial as a consequence of the civil and criminal legal procedure*.”<sup>7</sup>.

Consequently, the apparition of the right to defence is conditioned by and correlated with the apparition of the state and is a result of law installation. We may thus speak about the legal assistance in society’s stage of organisation in states only as „*a quasi-legal assistance*”.

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<sup>5</sup> *Main international instruments regarding Human Rights to which Romania is party*, in Romanian Institute for Rights, V. II, p.55-95

<sup>6</sup> Muraru Ioan, *Constitutional law and political institutions*, Actami Editions, Bucharest, 1998, pag.178

<sup>7</sup> Stoica Cristiana, Webster J. H. *The Romanian attorney-at-law in the European system of law*, AL Educational Editions, Bucharest, 1997, p. 218

## 2. Connections and interferences between the right to defence and the right to legal assistance

Between the right to defence and legal assistance and the civil rights a close relationship was identified. Sometimes the achievement and defence of these rights, such as the right to life, personal dignity, private life etc. are generally impossible without the right to defence and legal assistance. First of all, the right to legal assistance allows the individual to understand the powers offered by this right. Second, the right to legal assistance allows the fulfilment of the defence of these personal rights.

A certain connection is remarked between the right to legal assistance and one of the civil rights, the right to life, consecrated in art. 22 of Romania's Constitution. The relation between the right to life and the right to defence and legal assistance consists in the fact that very frequently the enforcement of one depends on the achievement of the other. It is obvious that this connection is realised directly all the time.

The violation of the right to legal assistance cannot directly limit the right to life. However, the failure to observe legal assistance risks to endanger man's life. For instance, the absence of an attorney who would have granted legal assistance during a civil or labour litigation may provoke deadly consequences for the person who lost the trial (poverty, famine, suicide). Nevertheless, in this respect we find even more important the defence and legal assistance during the criminal trial, especially if the person risks the dead penalty or long terms of imprisonment<sup>8</sup>.

From the perspective of the object of law, the given rights only partly coincide. The right to life includes a multitude of concrete empowerments, that must be defended, and the achievement of the right to legal assistance may be only one of the factors guaranteeing the right to life. For a real guarantee of the right to life it is necessary to enforce measures such as annulment of the death penalty, maximum reduction of mortality during war acts, fight against criminality, guarantee of an adequate environment quality etc. The absence of access to legal assistance is only one of the factors that may trigger man's physical demise. That is why the right to life in this sense is much more comprehensive, according to the object of the juridical regulation, than the right to defence and legal assistance.

The achievement of the right to legal assistance is also in close connection with another personal human right – the individual freedom and person's safety – consecrated in art. 23 of Romania's Constitution. In accordance with the constitutional dispositions comprised in these articles of the Constitution, each man and citizen enjoys the right to personal inviolability and safety.

The right to defence acquires an extremely high importance from the moment a tentative of restraining the right to individual life and personal safety occurs. In other words the moment of personal freedom limitation needs qualified legal assistance, more than any other moment.

Another human right in a certain connection with the right to defence may be considered also the right to health protection, consecrated in art. 33 of Romania's Constitution. At first sight, this relation is not obvious, but when we analyse the relations between these human rights we remark a series of common moments, but also certain distinctions in the object of regulation,.

The object of legal regulation in the case of the right to health protection is constituted by the social relations resulted from man's condition, in which he is guaranteed the highest level of freedom in the protection against diseases and other negative influences. It is known that the health of the individual and of the nation depends on a set of conditions. They usually determine the life standard: quality of the products used, lifestyle, level of medical system development in the country, ambience and environment condition and other aspects. The legal sphere is called to ensure the benefits from the aforementioned assets. For example, the system of medical insurance is consecrated by the norms of law. For the most efficient use of the assets forming the content of the

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<sup>8</sup>Mihoci Vasile, *Theoretic and practical problems regarding the enforcement of fundamental right to defence and legal assistance*, Manuscript, Chisinau, 2007, p. 52

right to health protection legal assistance is also needed. Anyway, it is obvious that the actual guarantee of human rights is impossible without guaranteeing the adequate legal assistance. By guaranteeing this aspect, we solve only one of the many sides of enforcing the right to health protection.

Thus, in the right to legal assistance the object of juridical regulation is constituted by social relations, but not because of the actual guarantee of qualitative conditions of people's health, but for the reason of offering the subject the possibility to reach this good condition. The main difference between these two rights consists in the different object of the legal regulation. The subjects of both rights coincide in principle – as concrete persons, irrespective of nationality, race, age, domicile etc.

The right to enjoy defence and legal assistance also interacts in close connection with the constitutional right to intimate life, family and private life, consecrated in art. 26 of Romania's Constitution. By means of achieving the right to legal assistance, the person shapes for himself the sphere of his private life, protected by law, and exercises its protection.

The specificity of the correlation between these rights consists in the fact that the person, by offering legal assistance, practically interferes in the private life of the persons benefiting from legal assistance.

A special attitude was adopted by the Romanian legislator, stipulating the following in the Code of penal procedure (art. 79 par. 2): "The capacity of witness takes precedence to the capacity of defender, in relation with the deeds and circumstances he knew before having become the defender or representative / attorney of any of the parties"<sup>9</sup>.

Another condition of achieving the right to defence and legal assistance is the enforcement of man's right to information consecrated in art. 31 of Romania's Constitution. It is assigned to the multitude of man's political rights, its achievement being made in the sphere of political freedom.

The right to complete and true legal information is a component of the right, much wider by content, to information in general. The latter comprises the right of each person to get precise and true information from the persons and state's competent organisms related to the issue of enforcing his rights and liberties, but also the way of seeking and obtaining information etc. From the subject's point of view, these rights have many affinities: the right to information is a distinct constitutional right, whereas the right to true juridical information is only an element of the right to information.

The subjects of both rights are all the persons who have the right to information about the status of their own rights and liberties and the problems impeding their enforcement. The importance of informing citizens and states in all spheres, in particular the sphere of achieving the right to legal assistance, consists in the general legal information of the population.

Consequently, we remark, in the analysed right, a connection with man's political rights, manifested by the fact that political rights are immaterial rights lacking any moral content.

Another aspect denoting the close connection between them is that due to the relations of man's political rights for the installation of the democratic regime, legality and rule of law, the right to defence and legal assistance may be secured along with all the other rights of man and citizen.

We find equally close the connection between the right to defence and legal assistance and the economic, social and cultural human rights. The country's economic life is regulated by legal norms, and consequently the awareness of the given rules is absolutely necessary for the persons who participate in the civil circuit; that is why legal assistance is so important for the enforcement of economic rights such as the right to economic activity, the right to private property etc.

The interaction of the right to legal assistance with the rights ensuring social protection consists in the fact that the right to defence and legal assistance, in some of its aspects, possesses *in se* the social rights elements. Thus, the right to benefit from free legal assistance is a social right, because it allows the population poor layers' access to justice. Without legal assistance, the realisation of rights such as the right to labour or the right to social assistance, besides being very complicated, would even become impossible in certain circumstances.

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<sup>9</sup> Art.79 par.2., Code of Penal Procedure

### 3. Conclusions

The importance of guaranteeing the right to defence and legal assistance, on the constitutional level, is justified by their major role in human society.

Due to the fact that the efficient realisation of human rights and liberties implies conjugated and conscious efforts of people and public authorities, it is essential that human rights are protected by a rule of law, by clear, firm provisions in the Constitutions and laws. They should not be confined to their mere proclamation, but we have to ensure, by precise means, their daily guarantee and exercise.

As social value, the right to defence and legal assistance is necessary to any social-human environment, and the formation of its elements in different stages of civilisations has known a progress, and thus the right to defence and legal assistance has developed more or less dynamically. In general, this institution has acquired clearer outlines in the period of the consolidation of modern constitutionalism.

In the context of the rule of law in Romania, the present legislation and, in its context, the individual's right to defence, the way of its exercise and guarantee, has acquired remarkable authentic values, falling within the set of preoccupations of state bodies for promoting a pluralist authentic democracy and certain political-legal principles, unanimously admitted and persistently supported in the European Community.

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