

# LEGAL GUARANTEES FOR ENSURING THE RIGHT OF DEFENCE WITHIN CRIMINAL PROCEEDINGS IN ROMANIA AND THE REPUBLIC OF MOLDOVA

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## Abstract

*This paper aims at providing a comparative study of the legal framework applicable in the legal systems of Romania and the Republic of Moldova ensuring the exercise of the right of defence in criminal proceedings. A special focus shall be placed on the fair-trial standards developed by the European Court of Human Rights in interpreting the European Convention on Human Rights, as both Romania and the Republic of Moldova are Council of Europe members. The European system of safeguarding the fundamental rights is made whole by the EU standards, which are briefly presented here (while binding for the Member States, the EU model can also serve as a source of inspiration for third countries with which the EU would hold periodic dialogues on various human rights topic). Subsequently, the applicable national provisions of both States, both constitutional and pertaining to criminal procedure law, will be analysed by also making reference to relevant case-law in order to convey the dynamics of the defence rights in practice. The comparative approach is appropriate in the case in point to emphasise the common elements and values shared by the two legislations under examination, stemming from the consistency with the ECHR model of protecting the right to a fair trial, in general, and the defence rights, in particular, while, at the same time, revealing the national legal specificities.*

**Keywords:** right of defence, criminal proceedings, fair trial, effective defence, ECHR standards

## 1. Introduction

### 1.1. Protecting the Right of Defence at the Supranational Level

The right of defence, as all fundamental human rights, benefits from both a national and a supranational coverage within the applicable legal instruments.

At the supranational level, the concept of “globalisation of human rights” indicates a common set of values and standards promoted notably under the United Nations, of which Romania and the Republic of Moldova are members<sup>1</sup>.

Pursuant to Article 11 para. (1) of the 1948 *Universal Declaration of Human Rights* – a key UN legal instrument – “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial *at which he has had all the guarantees necessary for his defence*” (emphasis added).

The right of defence is also enshrined under Article 14 para. 3 of the 1966 UN *International Covenant of Civil and Political Rights*.

The European model of safeguarding fundamental rights is prominently represented by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted in 1950), the additional Protocols thereto and the case-law of the European Court of Human Rights.

The European system for protecting human rights is characterized by a jurisdictional duality manifested by the European Court of Human Rights and the Court of Justice of the European Union, functionally complementing one another and being interdependent from the regulatory point of view<sup>2</sup>. The regulatory interdependence is made evident by the primary EU law, such as Article 6 of the Treaty on the European Union, which, under para. 3, provides that fundamental rights, as guaranteed by the European Convention on Human Rights and as resulting from the constitutional traditions of the Member States, shall constitute general principles of EU law. Also, the *Charter of Fundamental Rights of the European Union*, proclaimed in 2000 and presently having the same legally binding force as the EU treaties, expressly acknowledges and greatly relies on the European Convention of Human Rights.

The right of defence is a prominent right under European jurisdiction, as shall be shown herein.

### 1.2. Protecting the Right of Defence at the National Level

When analysing the level of protection ensured at the national level, there is a clear interrelation with the applicable international legal instruments, which is to be construed according to the following guidelines:

Firstly, *the subsidiarity principle* and *the margin of appreciation doctrine* are concepts of paramount importance in the Convention system.

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<sup>1</sup> Sabino Cassese, “Ruling Indirectly – Judicial Subsidiarity in the ECtHR”, *Seminar on Subsidiarity: A Double-Sided Coin? 1. The role of the Convention mechanism; 2. The role of national authorities*, 30 January 2015, [http://www.echr.coe.int/Documents/Speech\\_20150130\\_Seminar\\_Cassese\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf), 12-13;

<sup>2</sup> Jean-François Renucci, *Tratat de drept european al drepturilor omului* (Bucharest: Hamangiu, 2009), 26.

These are explicitly acknowledged under Article 1 of Protocol no. 15 to the Convention – ratified by Romania in 2015 and by the Republic of Moldova in 2014, pending entry into force – by an additional recital at the end of the Preamble thereof: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention”.

Secondly, as per Article 11 para. (2) of the Romanian Constitution<sup>3</sup>, the treaties that are *ratified* by Parliament, according to the law, are an integral part of the national law. For example, the European Convention on Human Rights, ratified by Romania by Law no. 30/1994<sup>4</sup>, has a “constitutional and super-legislative force” in the domestic legal order<sup>5</sup>. The same binding force applies to the ECHR case-law<sup>6</sup>.

Pursuant to Article 8 para. (1) of the Moldovan Constitution, the Republic of Moldova undertakes to abide by the *Charter of the United Nations* and the treaties to which it is a party and to base its relationship with other states on the unanimously acknowledged international law principles and provisions. The European Convention on Human Rights was ratified by the Republic of Moldova in 1997.

Thirdly, in case of conflict between the international pacts and treaties relating to the fundamental rights to which Romania is a party to and the domestic legislation, the former shall prevail. This rule regarding *the prevalence of international legal instruments over the national provisions* is set out under Article 20 para. (2) of the Romanian Constitution and the corresponding provisions within the Moldovan Constitution<sup>7</sup> are to be found under Article 4 para. (2). The Romanian Constitution adds an exception to this rule, namely when the Constitution or domestic laws contain more favourable provisions.

Also, as stated under Article 148 of the Romanian Constitution, following Romania’s accession to the EU, the provisions of the EU Treaties as well as the other EU mandatory legislation shall prevail over conflicting domestic provisions.

As shall be further shown, the right of defence is safeguarded by the fundamental laws of Romania and the Republic of Moldova as well as the criminal procedure laws of both these states.

## 2. The European Standards for Safeguarding the Right of Defence

### 2.1. The ECHR Standards

The right of defence is enshrined under Article 6 para. 3 ECHR, which provides in favour of any person charged with a criminal offence the following minimum requirements to be complied with (as such, the list is not exhaustive<sup>8</sup>):

- a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b) to have adequate time and facilities for the preparation of his defence;
- c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court

As pointed out in the ECHR case-law<sup>9</sup>, the guarantees listed above “exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or to contribute to ensuring, the fairness of the criminal proceedings as a whole”; they “are therefore not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings”.

Upon analysing the specifics provided under Article 6 para. (3), on the one hand, the national judicial bodies shall take into consideration the subject-matter and purpose of the right to a fair trial as a whole – such as the equality of arms principle and the adversarial nature of proceedings – and, on the other hand, there must be positive measures adopted by the states for ensuring the effective compliance with these guarantees<sup>10</sup>.

The legal requirements outlined herein are often construed in an integrated manner. For instance, the right to the notification of the charge overlaps to some extent with the right to adversarial proceedings implied

<sup>3</sup> Republished in the Official Journal of Romania no. 767 of October 31, 2003.

<sup>4</sup> Published in the Official Journal of Romania no. 135 of May 31, 1994.

<sup>5</sup> Corneliu Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole* – Vol. I. Drepturi și libertăți (București: All Beck, 2005): 100.

<sup>6</sup> Corneliu Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole* – Vol. I. Drepturi și libertăți, 103.

<sup>7</sup> Published in the Official Journal of the Republic of Moldova no. 1 of August 12, 1994, available at: <http://lex.justice.md>.

<sup>8</sup> Nuala Mole and Catharina Harby, *The Right to a Fair Trial – A Guide for the Implementation of Article 6 of the European Convention on Human Rights* (Strasbourg: Council of Europe, 2006): 58, <https://rm.coe.int/168007ff49>.

<sup>9</sup> ECHR, Case of *Mayzît v. Russia*, Judgment of January 20, 2005, para. 77 and *Can v. Austria*, Commission report, para. 48, in Council of Europe, *The European Court of Human Rights, “Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Criminal Limb)”* (2014): 40, [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf).

<sup>10</sup> Frédéric Sudre, *Drept european și internațional al drepturilor omului* (Iași: Polirom, 2006): 296.

under Article 6 para. 1, the right provided under Article 6 para. 3.b (the right to adequate time and facilities for preparing the defence) as well as with Article 5 para. 2 (regulating the right to be informed of the reasons of arrest and of the charge imposed) of the Convention<sup>11</sup>.

Each element set forth under Article 6 para. 3 of the Convention is covered by a rich case-law developed by the Strasbourg Court.

To exemplify with recent ECHR case-law, we note that, in the case of *Simeonovi v. Bulgaria*<sup>12</sup>, the right to a lawyer and the right to be informed of such right was assessed by the Court. The Grand Chamber decided that the right to legal assistance became applicable from the moment of the applicant's arrest, regardless of whether he has been interrogated or subject to any investigative act during the relevant period (i.e. three-day detention after arrest during which no investigative measure took place). In order to reach this decision, the Court made reference to its established case-law, such as reflected in the judgment of September 13, 2016, rendered in the case of *Ibrahim and Others v. The United Kingdom*, stating "that a criminal charge existed from the moment an individual was officially notified by the competent authority of an allegation that he had committed a criminal offence, or from the point at which his situation had been substantially affected by actions taken by the authorities as a result of a suspicion against him".

With respect to the right provided under Article 6 para. 3.d of the Convention, in the case of *Kuchta v. Poland*, the applicant and other persons had been convicted and their guilt had been established especially based on the statements of the main co-accused. In this specific case, the absent witness (the Court noted that the principles developed with regard to the use of the statements made by an absent witness also apply by analogy to the depositions of an absent co-accused) was solely heard by the investigators and never by a prosecutor or a judge. The absent witness was permitted, upon request, not to appear within the proceedings and his statements were merely read to those present, which did not allow the other accused to interrogate him. The Court noted that the statements in question were instrumental for the conviction of the applicant. As far as the existence of compensatory procedural guarantees is concerned, it was shown that neither the judges nor the applicant could perceive the credibility of the co-accused during his interrogation.

In light of the circumstances of the case, the Court found, by the judgment of January 23, 2018, that Article 6 para. 3.d was violated as the applicant had not sufficient and adequate possibility to challenge the statements that were instrumental for his conviction<sup>13</sup>.

## 2.2. The EU Standards

Article 48 of the *Charter of Fundamental Rights of the European Union*<sup>14</sup> states the following: "Respect for the rights of the defence of anyone who has been charged shall be guaranteed".

This right corresponds to Article 6 para. 3 ECHR, having the same meaning as scope as the conventional text, based on Article 52 para. (3) of the Charter<sup>15</sup>.

As far as the field of application of the Charter's provisions is concerned, Article 51 para. 1 thereof indicates that these are addressed to the Member States only when implementing Union law.

The secondary EU legislation has been enriched in recent years by a set of directives addressing the fundamental guarantees concerning the right of defence:

- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings<sup>16</sup>;
- Directive 2012/13/EU on the right to information in criminal proceedings<sup>17</sup>;
- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty<sup>18</sup>;
- Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings<sup>19</sup>;
- Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings<sup>20</sup>.

It must be mentioned that on June, 20 2017, the European Union and the Republic of Moldova held the eighth round of the Human Rights Dialogue in Chișinău, the discussions also covering human rights protection in the justice system. The next EU –

<sup>11</sup> Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2012): 83, <https://rm.coe.int/168007ff57>.

<sup>12</sup> ECHR, *Simeonovici v. Bulgaria*, judgment of May 12, 2017, in Council of Europe, European Court of Human Rights, *Overview of the Court's Case-Law 2017*, 2018: 34, [https://www.echr.coe.int/Documents/Short\\_Survey\\_2017\\_ENG.PDF](https://www.echr.coe.int/Documents/Short_Survey_2017_ENG.PDF).

<sup>13</sup> Council of Europe, The European Court of Human Rights, "Examination of witnesses. Conviction based on co-accused's statements with no possibility of cross-examination. Violation – *Kuchta - Poland*", Information Note on the Court's Case Law 214 (2018): 17:18.

<sup>14</sup> As published in the Official Journal of the European Union no. C 202 of June 7, 2016.

<sup>15</sup> *Explanations relating to the Charter of Fundamental Rights*, published in the Official Journal of the European Union no. C 303 of December 14, 2007, p. 30.

<sup>16</sup> Published in the Official Journal of the European Union no. L 280 of October 26, 2010.

<sup>17</sup> Published in the Official Journal of the European Union no. L 142 of June 1, 2012.

<sup>18</sup> Published in the Official Journal of the European Union no. L 294 of November 6, 2013.

<sup>19</sup> Published in the Official Journal of the European Union no. L 65 of March 11, 2016.

<sup>20</sup> Published in the Official Journal of the European Union no. L 297 of November 4, 2016.

Moldova Human Rights Dialogue shall take place in Brussels in 2018<sup>21</sup>.

### 3. Constitutional Protection of the Right of Defence

According to Article 20 para. (1) of the Romanian Constitution, “the constitutional provisions pertaining to the citizens’ rights and liberties shall be construed and applied in accordance with the Universal Declaration of Human Rights, with the pacts, and with the other treaties that Romania is a party to”.

As the constitutional provisions benefit from direct application, it follows that these international instruments are integrated into the domestic constitutional block<sup>22</sup>.

Correspondingly, Article 4 para. (1) of the Moldovan Constitution stipulates that “the constitutional provisions pertaining to the human rights and liberties shall be construed and applied in accordance with the Universal Declaration of Human Rights, with the pacts, and with the other treaties to which the Republic of Moldova is party to”.

The right of defence is enshrined within the fundamental laws of Romania and the Republic of Moldova as follows:

The first paragraph under Article 24 of the Romanian Constitution and Article 26 of the Moldovan Constitution, respectively guarantee the right of defence.

The Moldovan Constitutional Court noted that the supreme law guarantees the right and not the obligation of each person to defend themselves<sup>23</sup>.

Throughout the proceedings, the parties are entitled to a lawyer, either retained or publicly appointed, as provided under Article 24 para. (2) of the Romanian Constitution and Article 26 para. (3) of the Moldovan Constitution<sup>24</sup>.

The Constitutional Court of Romania has pointed out in one of its decisions<sup>25</sup> that, by the Constitution’s referring to the parties’ access to a lawyer, this means that the lawyer status has been acquired in accordance with the law and this constitutes a strong guarantee

preventing the clandestine exercise of this profession, outside the legally constituted bar associations.

The Constitution of the Republic of Moldova comprises, under the same article, two additional provisions regarding the right of defence, namely providing that each individual is entitled to react independently, by legitimate means, to the violation of their rights and liberties [para. (2)]; the interference in the activity of the persons that exercise the defence within the established limits is punishable by law [para. (4)].

### 4. Protection of the Right of Defence as per the Law of Criminal Procedure

#### 4.1. The Romanian Criminal Procedure Relevant Provisions

The right of defence is established within the Romanian law of criminal procedure as a fundamental principle thereof, as per Article 10 of the Romanian Criminal Procedure Code<sup>26</sup>, structured into six paragraphs consisting of various procedural guarantees.

The Romanian Constitutional Court noted that art. 10 of the Criminal Procedure Code is in accordance with the constitutional and conventional provisions regulating the right of defence. Also, it added that the procedural sanction provided under the Criminal Procedure Code for violating the right of defence is, as a rule, the relative nullity, which is applicable only when an effective breach of the rights of the parties and the main subjects in the proceedings was caused that cannot be removed otherwise than by the overturning the act; there are two exceptions, triggering the application of absolute nullity, namely in the case of breaching the provisions pertaining to (i) the presence of the suspect or the defendant, when their participation is mandatory according to the law, as well as (ii) the legal assistance of the suspect and defendant as well as the other parties, provided by a lawyer, when such legal assistance is mandatory<sup>27</sup>. The rules and effects of nullity as a procedural sanction are provided under Articles 280-282 of the Romanian Criminal Procedure Code.

<sup>21</sup> EU – Republic of Moldova Human Rights Dialogue, press release, June 20, 2017, Chişinău, available at: [https://eeas.europa.eu/headquarters/headquarters-homepage/28514/eu-republic-moldova-human-rights-dialogue\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/28514/eu-republic-moldova-human-rights-dialogue_en).

<sup>22</sup> Corneliu Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole – Vol. I. Drepturi și libertăți*, 101.

<sup>23</sup> The Constitutional Court of the Republic of Moldova, Decision no. 22 of June 30, 1997, published in the Official Journal no. 146/1997, in Klaus Sollfrank, *Constituția Republicii Moldova – Comentariu* (Chişinău: Arc, 2012): 121, available at: [http://www.constcourt.md/public/files/file/informatie\\_utilita/Comentariu\\_Constitutie.pdf](http://www.constcourt.md/public/files/file/informatie_utilita/Comentariu_Constitutie.pdf).

<sup>24</sup> The Ombudsman of the Republic of Moldova, in the 2016 Report on the observance of human rights, with respect to the right to a fair trial, noted a series of deficiencies pertaining to providing legal aid, such as the lack of response to the legal aid requests, the unsatisfactory quality of defence, the failure to inform the beneficiary of legal aid on the actions carried out or the refusal of the territorial offices of the National Counsel for Legal Assistance to grant legal aid (*Raportul privind respectarea drepturilor omului în Republica Moldova în anul 2016: Dreptul la un proces echitabil*, <http://ombudsman.md/ro/content/raportul-privind-respectarea-drepturilor-omului-republica-moldova-anul-2016-dreptul-la-un>).

<sup>25</sup> Decision no. 1354 of October 22, 2009, published in the Official Journal no. 844 of December 7, 2009, Tudorel Toader, *Constituția României reflectată în jurisprudența constituțională* (Bucharest: Hamangiu, 2011): 91.

<sup>26</sup> Law no. 135/2010, published in the Official Journal of Romania no. 486 of July 15, 2010, in force as of February 1, 2014, with subsequent amendments and supplements.

<sup>27</sup> The Romanian Constitutional Court, Decision no. 336/2015, published in the Official Journal no. 342 of May 19, 2015, para. 39, in Aurel Ciobanu, Petru Ciobanu, Teodor Manea, *Noul Cod de procedură penală adnotat* (Bucharest: Rosetti International, 2015): 25.

The content of the right of defence is compound.

The first paragraph of this legal text provides that the parties and the main subjects within the proceedings are entitled to defend themselves or through legal assistance by a lawyer.

Under Romanian criminal procedure law, there are several situations where legal assistance is mandatory. As the Constitutional Court of Romania showed, the right of defence should not be mistaken with the right to mandatory legal assistance as the former is guaranteed by the fundamental law, whereas the latter lies within the remit of the lawmaker<sup>28</sup>.

The right of defence is not absolute as it must be exercised within certain limits<sup>29</sup>, namely in good faith, according to the purpose for which it was acknowledged by law, as per the final paragraph of Article 10.

The judicial bodies have the corresponding obligation to ensure, throughout the criminal proceedings, the full and effective exercise of the right of defence by the parties and the main subjects within the proceedings, according to para. (5) of Article 10.

As such, the defence rights must be duly made available from the very start of the proceedings. There are various violations that have been generally invoked in the relevant case-law as breaching the right of defence by defendants during the preliminary chamber phase, as points of criticism regarding the conducting of the prosecution, such as: assisting defendants with conflicting interests by the same lawyer; preventing certain lawyers from assisting the defendant; debating whether a defendant arrested *in absentia* required mandatory legal assistance while still at large; failing to hear the defendant throughout in the prosecution phase or hearing him for several hours on end; limiting the defence's access to the criminal prosecution file; a duration of the criminal prosecution phase or between the different stages of the prosecution deemed too short, etc.<sup>30</sup>

Pursuant to para. (2)-(4) of Article 10, the right to have adequate time and facilities for the preparation of the defence, the right to be informed of the nature and cause of the accusation, and the right to silence are ensured.

The parties, the main subjects in the proceedings as well as the lawyer benefit from the right to have adequate time and facilities for the preparation of the defence.

The European Court of Human Rights ruled, in the case of *Beraru v. Romania*, on the violation of article 6 ECHR, among others, on the grounds that, even though the lawyers submitted numerous requests to consult the case file, only in a later stage had they had access to it, they were not provided with a copy of the indictment nor with a copy of the wiretaps or a transcription thereof<sup>31</sup>. In another case against the Romanian State, *Adrian Constantin v. Romania*, the same Court ruled that the right to benefit from the time to prepare the defence has been breached by the court's changing the legal classification directly through the judgment, without previously calling it into question within an adversarial procedure<sup>32</sup>.

The right to be informed of the accusation is adapted for the suspect and the defendant as follows: the suspect has the right to be informed immediately and before being heard of the act that is the subject-matter of the prosecution and its legal classification; the defendant has the right to be informed immediately of the act for which the criminal action has been set into motion against him and its legal classification.

Before being heard, the suspect and defendants are warned of their right not to make any statement.

For the judicial bodies, hearing the suspect and the defendant represent an obligation, for the accused this constitutes a right whereby their defence is organised but which they can equally choose not to exercise: hence, the content of the right to silence is established<sup>33</sup>.

The privilege against self-incrimination is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention<sup>34</sup>.

#### 4.2. The Moldovan Criminal Procedure Relevant Provisions

The legally defined term "defence" means, according to Article 6 item 3) of the Criminal Procedure Code of the Republic of Moldova<sup>35</sup>, the activity carried out by the defending party within the proceedings aiming at combating the charge, in whole or in part, or mitigating the punishment, defending the rights and interests of the suspected persons ("*bănuite*") for or persons charged ("*învinuite*") with committing offences as well as redeeming the persons unlawfully subject to prosecution. The "defending party" ("*partea apărării*") stands for the persons empowered by law to carry out the defence activity, namely the suspect, the charged person, the defendant, the civilly liable party,

<sup>28</sup> Constitutional Court Decision no. 494 of April 19, 2011, published in the Official Journal no. 494 of July 11, 2011, in Tudorel Toader, *Constituția României reflectată în jurisprudența constituțională*, 91.

<sup>29</sup> Nicolae Volonciu and Andreea Simona Uzlău (coords), *Codul de procedură penală comentat*, 3<sup>rd</sup> Ed. (Bucharest: Hamangiu, 2017): 35.

<sup>30</sup> Cristinel Ghigheci, *Cereri și excepții de cameră preliminară – Vol. 1. Procedura, regularitatea actului de sesizare, legalitatea actelor de urmărire penală – Comentarii și jurisprudență* (Bucharest: Hamangiu, 2017): 312-347.

<sup>31</sup> ECHR, *Beraru v. Romania*, judgment of March 18, 2014, in *la Strasbourg asupra procesului penal român* (Bucharest: Universul Juridic, 2017): 138.

<sup>32</sup> ECHR, *Adrian Constantin v. Romania*, judgment of April 12, 2011, in Ramona Mihaela Coman, *Efectele jurisprudenței Curții de la Strasbourg asupra procesului penal român*, 139.

<sup>33</sup> Grigore Gr. Theodoru, *Tratat de Drept procesual penal*, 2<sup>nd</sup> Ed. (Bucharest: Hamangiu, 2008): 379-380.

<sup>34</sup> ECHR, *Saunders c. Regatul Unit*, judgment of December 17, 1996, para. 68, <http://www.echr.coe.int>.

<sup>35</sup> Published in the Official Journal of the Republic of Moldova no. 104-110 of June 7, 2003, in force as of June 12, 2003, with subsequent amendments and supplements, available at: <http://lex.justice.md>.

and the representatives thereof [Article 6 item 30) of the Moldovan Criminal Procedure Code].

Article 17 of the Moldovan Code of Criminal Procedure specifically regulates the right of defence. This legal text ensures basic guarantees of exercising this right, namely:

- I. the right of the parties that throughout the criminal proceedings they be assisted or represented, as the case may be, by a retained or state-appointed lawyer;
- II. the obligation of the criminal prosecution body and of the court to ensure the full exercise of the process rights from which the participants to the criminal proceedings benefit, under the conditions provided by the Code of Criminal Procedure, as well as the right of the suspect, charged person or defendant to qualified legal assistance performed either by a freely-chosen defender or by a state-appointed lawyer who is independent from these bodies;
- III. should the suspect, charged person or defendant lack the resources to pay for their defender, they shall be assisted by a state-appointed lawyer without any charge.

As per Article 167 para. (1<sup>1</sup>) of the Moldovan Criminal Procedure Code, the criminal prosecution body, within one hour as of the taking into custody of an individual, shall request that the territorial office of the National Counsel for State-Ensured Legal Assistance or other persons empowered thereby assign a lawyer on duty in order to grant legal assistance in case of urgency.

## 5. Conclusions

Ensuring the effectiveness of the right of defence is unarguably indispensable within present-day criminal proceedings. The right of defence is justified not only for protecting the private interests of the accused, but also the public interest of achieving the objective of justice<sup>36</sup>.

Any decision of the judicial bodies that is rendered without giving due consideration to the guarantees of the right of defence in the process is severely flawed and must be sanctioned as such.

Both the Romanian and the Moldovan legislators have made consistent endeavours to comply with the well-established international and regional standards applicable in this field.

However, it is clear that in order for this fundamental right to evolve in regulatory terms, this ongoing compliance effort should continue to be closely monitored so as to prevent and eliminate any practical shortcomings.

### Acknowledgement

This paper is written during the sustainability stage of the project entitled "Horizon 2020 - Doctoral and Postdoctoral Studies: Promoting the National Interest through Excellence, Competitiveness and Responsibility in the Field of Romanian Fundamental and Applied Scientific Research", contract number POSDRU/159/1.5/S/140106. This project is co-financed by European Social Fund through Sectoral Operational Programme for Human Resources Development 2007-2013. Investing in people!

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