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PREREQUISITES FOR EFFECTIVE DEFENSE IMPLEMENTATION DURING THE TRIAL PHASE

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Abstract. This article seeks to examine the prerequisites for ensuring effective defense during the trial phase. The authors first analyze the right to defense, its significance, and its role within the framework of criminal procedural principles. Particular attention is paid to the court's critical role as the guarantor of these principles in securing effective defense.
The study further delves into the restrictions applied to defense counsel, which may arise at either legislative or customary levels. Fundamental principles such as adversarial proceedings, equality of arms, the right to cross-examine witnesses, challenging the admissibility of evidence, delivering closing arguments, and presenting positions on the application or interpretation of the law are identified as crucial components for achieving effective defense.
The authors conclude that the existing regulatory framework for the submission of new evidence—limited exclusively to the phase of supplementing the evidence under review—can be perceived as an unwarranted limitation.

Keywords – *Criminal justice; procedural standards; procedural integrity; criminal-procedural legal framework; right to defense; effective mechanisms to defense; equality of arms; procedural guarantees.*

Introduction

One of the significant achievements in the theory and practice of criminal procedure is the universal recognition and protection of human rights and

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fundamental freedoms through both international and domestic legal instruments. Among these legal tools is the right to defense, which constitutes a core element of the right to a fair trial. On December 10, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (hereinafter "the Declaration"),[1] marking the beginning of an international process in the 20th century aimed at recognizing and protecting human rights. Article 11 of the Declaration explicitly enshrined not only the right to a fair trial but also the right to defense as its integral component. As the evolution of the concept of human rights evolved, the European Convention on Human Rights and Fundamental Freedoms holds special significance among international legal documents safeguarding human rights, and especially the right to defense.[2]

Domestic legislation of the Republic of Armenia also specifically guarantees the rights to a fair trial and defense in its fundamental law, the Constitution,[3] as well as in branch legislation, including the Criminal Procedure Code of the Republic of Armenia.

These mechanisms enable individuals to defend themselves against charges, thereby practically implementing the principle of balancing public and private interests embedded in the current Criminal Procedure Code of the Republic of Armenia. In this regard, it is essential to concur with the perspective that the focus should not be on opposing or competing these interests but rather on recognizing their cooperation and interconnectedness, taking into account the realities of criminal procedure.[4]

Although the right to a fair trial is not a novel concept in the Armenian legal system, new challenges continuously arise, requiring an adaptive and evolving approach to law. Addressing these challenges effectively necessitates the ongoing

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[1] UN General Assembly, Resolution 217A (III), Universal Declaration of Human Rights, A/RES/217(III) December 10, 1948, articles 10, 11.

[2] Council of Europe. “Convention for the Protection of Human Rights and Fundamental Freedoms.” Council of Europe Treaty Series 005, Council of Europe, 1950.

[3] Constitution of the Republic of Armenia, 22 December 2015.

[4] Ghazinyan, G. S., *Historical and Contemporary Issues of Criminal Procedure in Armenia* (Ղազինյան Գ.Ս., *Քրեական դատավարության պատմական և արդի հիմնահարցերը Հայաստանում*), Yerevan, Yerevan State University Press, 2001, p. 190; Ghazinyan, G. S., "Implementation of the Constitutional Idea of Balancing Public and Private Interests in the Context of the Draft Criminal Procedure Code of Armenia" (Ղազինյան Գ.Ս., «Հանրային և մասնավոր շահերի հավասարակշռման սահմանադրական գաղափարի իրացումը ՀՀ քրեական դատավարության նոր օրենսգրքի նախագծի կարգավորումների համատեքստում»), *Yerevan University Herald: Law* (Բանբեր Երևանի համալսարանի. Իրավագիտություն), Yerevan, 2020, No. 2 (32), pp. 3–16.

development of legal frameworks. In this regard, the study of the right to defense, as a fundamental element of the right to a fair trial, is of paramount importance.

One of the goals in ensuring the full realization of the right to defense, in our view, should be resolving complex issues such as providing equal legal standing to both individuals and the state.[5]

By examining both theoretical and practical approaches,[6] it is possible to comprehensively identify the following general and specific directions requiring the implementation of the right to defense:

- Provision of legal assistance aimed at protecting the rights and fundamental freedoms of the accused,
- Participation in the evidentiary process, including presenting new evidence, engaging in evidentiary actions, and challenging evidence presented by the prosecution,
- General oversight of compliance with procedural requirements,
- Cooperation with the bodies conducting proceedings,
- Contribution to the administration of justice.

Focusing specifically on the defense counsel's participation during the main hearings' stage, it can be noted that this involvement inherently demands active engagement,[7] particularly in the evidentiary process. In this context, the defense

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[5] David C. Brody, James R. Acker, Criminal Law, Jones, and Bartlett Publishers, Sudbury, 2010, page 21:

[6] Banks, Christopher P., The American legal profession: The myths and realities of practicing law. n.p.: CQ Press, 2017, Harlow, C., Defense counsel in criminal cases. Washington, DC: Bureau of Justice Statistics, 2000, pages 1-4, Siegel, Larry, and Joseph J. Senna., Essentials of criminal justice. Belmont, CA: Wadsworth, 2008, Meinhold, Stephen Scott, and David W. Neubauer., Judicial process: Law, courts, and politics in the United States. 7th edition, Mason, OH: CENGAGE Learning Custom, 2015, Uelmen, Gerald F.: A train ride: A guided tour of the Sixth Amendment right to counsel. Law and Contemporary Problems 58.1: 2001, pages 13–29, Rhodes, Deborah L., Access to justice: An agenda for legal education and research. Journal of Legal Education 62.4: 2013, pages 531–550, Chen, W., Basic Theory of the Powers and Functions of Criminal Procedure. In: Reform and Development of Powers and Functions of China's Criminal Proceedings. Springer, Singapore, 2021, pages 1-47, Lynn, V., Wohlers, W., Legal Privilege and Right to Counsel in Criminal Proceedings in Switzerland. In: Bachmaier Winter, L., Thaman, S., Lynn, V. (eds) The Right to Counsel and the Protection of Attorney-Client Privilege in Criminal Proceedings. Ius Comparatum - Global Studies in Comparative Law, հատոր 44. Springer, Cham, 2020, pages 293-325, Alschuler, Albert W., "The Defense Attorney's Role in Plea Bargaining". The Yale Law Journal. 84 (6): 1975, pages 1179–1314. Alschuler, Albert W., "The Trial Judge's Role in Plea Bargaining, Part I". Columbia Law Review. **76** (7): 1976, pages 1059–1154, Торянников А. Г. Адвокат в уголовном процессе, publication ВЮЗИ, Moscow, 1987, page 45, Строгович М. С., Проблемы судебной этики, Москва, 1974, page 236

[7] Kulberg, Ya., "The Lawyer as a Subject of Proof in Criminal Proceedings" (Кульберг Я., «Адвокат как субъект доказывания в уголовном процессе»), *Soviet Justice* (Советская юстиция), No. 2, 1966, pp. 16–17.

counsel often assumes a "responsive" role, countering evidence presented by the public prosecutor, cross-examining witnesses who have testified against the accused, and presenting new evidence. In essence, during the trial phase, the defense counsel typically constructs a new hypothesis of the case before the court, one that significantly diverges from the prosecution's position. The importance of main hearings is further highlighted by the fact that it serves as the first procedural stage where the defense, in the presence of the public prosecutor, has the opportunity to substantively contest the evidence. However, the defense counsel's capabilities and the legitimacy of their actions in this process are constrained by legal provisions, the Code of Conduct for Lawyers, and universally applicable ethical standards governing the legal profession.[8] Moreover, American legal scholars, considering the unique features of their legal system, argue that lawyers must also be guided by moral norms in such proceedings.[9] Thus, it can be asserted that even in the absence of explicit regulatory norms, defense counsels are obligated to adhere to universal moral principles, which may, in some cases, carry the force of customary regulation. In our view, this approach is acceptable in democratic states with longstanding legal traditions, given the importance of custom in their legal systems.

Evidentiary process, and in particular the process of proving, in criminal procedure is a distinctive form of cognitive activity.[10] Within this process, the role of the defense is particularly unique, as the defense is not burdened with proving the accused's innocence. From this perspective, it may be "sufficient," for example, to challenge evidence underlying one element of the crime in a way that renders it

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[8] KEIICHI MURAOKA, Roles of Defense Counsel= Ethical Issues in Criminal Defense, Hitotsubashi Journal of Law and Politics, The Hrtotsubashi Academy, 26, 1998, pages 11-18, Gottschalk, P., Theoretical Perspectives on Defense Lawyers. In: Financial Crime and Knowledge Workers. Palgrave Macmillan, New York, 2014, pages 123-134, Rohan C. Ethical Standards in the Practice of International Criminal Law, Rohan C, Zyberi G, eds. *Defense Perspectives on International Criminal Justice*. Cambridge University Press; 20172., pages 41-74, Harris. J. Ch. A monograph on legal ethics. London, 1907, page 35, Williams H. W. Legal ethics and suggestions for young counsel. Pennsylvania, 1996, page 71, Бойков А. Д., Этика профессиональной защиты по уголовным делам, Moscow, 1978, page 46, Жезнер Е., Сорокин Н., Каким должно быть положение об ад вокатуре?, Советская юстиция № 1, 1960, page 64, Стецовский Ю. И., Формиро вание процессуальной позиции адвоката, Советская государство и право, № 10, 1969, page 102, Հ. Ղուկասյան, Ա. Հարությունյան, Ոչ իրավաչափ վարքագծի արգելքը փաստաբանական էթիկայի լույսի ներքո, (O. Ghukasyan, A. Harutyunyan, prohibition of misconduct in the light of lawyer ethics) State and Law, page 32:

[9] Patterson Th. Some problems of legal ethics, Pochester N.Y., 1917, page 3:

[10] Selvestru, Yu. R., "Proving-Justification as an Independent Element of Proof in Criminal Proceedings" (Сельвестру Ю. Р., «Доказывание-обоснование самостоятельный элемент доказывания в уголовном судопроизводстве»), *Bulletin of Omsk University. Law Series* (Вестник Омского университета. Серия «Право»), 2008, No. 1, pp. 255–258.

"unusable." In anticipation of the trial, the defense counsel can present preliminary observations through the opening statement, a procedural novelty introduced in the Criminal Procedure Code of the Republic of Armenia.[11]

Considering the specificities of the pre-trial phase, the significance of the trial lies not only in the defense's active participation in verifying and assessing evidence but also in the application of the principle of adversarial proceedings. Although normative regulations formally establish the equality of both parties without favoring either, the European Court of Human Rights has documented that violations of the principles of adversarial proceedings and equality of arms disproportionately affect the defense. These violations often stem from public authority inaction or the establishment of unclear procedural rules.[12] The guarantee of effective defense and the principle of adversarial proceedings complement one another and are directly proportional in their application.

Another key instrument for ensuring effective defense during the trial phase is the accused's right to cross-examination. As a general observation, it is important to emphasize that the cross-examination framework is highly valued not only within the domestic criminal procedure system but also by international courts and scholars.[13] In our view, this mechanism represents the intersection of the right to defense and the principle of adversarial proceedings.

According to the European Court of Human Rights case law, while the general rule requires evidence to be subjected to cross-examination, certain conditions must simultaneously be met for evidence, even if not subjected to cross-examination, to be admissible. In other words, the absence of cross-examination does not automatically render evidence inadmissible.

The conditions outlined by the European Court of Human Rights are as follows:

- Objective Impossibility of Cross-Examination: Was the inability to conduct cross-examination genuinely due to objective circumstances, such as the death of a witness?

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[11] Melkonyan, D., "New Procedural Opportunities for the Defense and Their Counterbalances" (Մելքոնյան Դ., «Պաշտպանության կողմի նոր դատավարական հնարավորությունները և դրանց հակակշիռները»), *State and Law* (Պետություն և իրավունք), No. 2 (64), Yerevan, 2014, p. 66.

[12] Coëme and Others v. Belgium, 22.06.2000, applications number 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, paragraph 102.

[13] Richard D. Friedman, Confrontation: the search for basic principles, pages 1011-1015, 1998, Evan Semerjian, The Right of Confrontation, American Bar Association Journal, pages 152-155, Randolph Jonakait, Witnesses in the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process, 79 Temp. L. Rev., pages 155-159, 2006.

- Uniqueness and Decisiveness of the Evidence: If the evidence not reinforced by cross-examination is the sole and decisive evidence, it cannot serve as the basis for prosecution.
- Proportional Opportunities in Earlier Proceedings: If cross-examination was impossible but the evidence was neither sole nor decisive, were proportional opportunities provided in earlier stages of the proceedings for the accused to challenge or question the person providing testimony against them? If such opportunities were not available, this evidence cannot form the basis of the prosecution.[14]

The ECtHR links the application of this test directly to the proper implementation of the right to a fair trial.

While, as noted above, the lack of cross-examination does not automatically render evidence inadmissible, both domestic and international courts have adopted stringent standards in this regard. Therefore, cross-examination is a critical tool for ensuring the effective realization of the right to defense during the trial phase.

Another essential instrument available in frames of effective defense during the trial phase is the submission of motions for expert examination as provided by Article 333 of the Criminal Procedure Code of the Republic of Armenia. Within this framework, and in compliance with the requirements of Articles 252–258 of the same code, defense counsel, even if engaged at the trial stage, has the opportunity to participate in evidentiary processes through this mechanism. Moreover, Part 4 of Article 333 provides additional opportunities for the defense to petition the court to request objects, documents, or information necessary for fair proceedings from state or local self-government bodies, officials, individuals, legal entities, and other organizations, including through queries in unified electronic information systems. In addition, the court may, upon reviewing motions from the defense, carry out procedural actions such as inspections, examinations, experiments, identifications, and exhumations.

Referring to Article 334 of the Criminal Procedure Code of the Republic of Armenia, it is noteworthy that after discussing all presented evidence, the defense has the right to file a motion to supplement the scope of evidence under review. While the inclusion of such a provision in the Code is purposeful and facilitates the realization of effective defense, the legislative framework appears to impose overly narrow limitations on the presentation of new evidence. The ability to introduce new evidence represents a relatively autonomous direction for ensuring effective

[14] Al-Khawaja and Tahery v. The United Kingdom, 12.15.2011թ., applications number 26766/05 and 22228/06, paragraphs 119-147.

defense. Importantly, the defense is not statutorily obligated to disclose all data, objects, or information in its possession with evidentiary value to the investigative body, including during the pre-trial phase. Therefore, presenting such evidence during the trial phase can, in certain instances, be a strategic component of the defense's tactics. Additionally, there is the possibility that evidence becomes accessible to the defense or that the defense counsel is involved in the proceedings only during the trial phase, for instance, at the start of the main hearings. Another scenario could involve the defense obtaining evidence during the initial stages of the trial that, due to its nature, might deteriorate, disappear, or be erased if not presented promptly. To avoid situations where the defense is restricted in presenting such evidence, the legislative framework should not limit the submission of new evidence to the stage of supplementing the scope of evidence under review. This is particularly important given the existence of regulations addressing the abuse of procedural rights, which could adequately safeguard against potential misuse.

After the examination of evidence is complete, the defense has the right to file motions challenging the admissibility of evidence. Unlike during the preliminary hearings stage, motions filed at the main hearings phase regarding admissibility address not only the "external" characteristics of the evidence but also its substantive content. In recent years, some legal scholars have advocated for a shift in the approach to admissibility. They suggest moving from a rules-based model to a reasoning-based model, where admissibility standards are not narrowly confined to predefined criteria.[15] While proponents of this approach provide compelling arguments, and its implementation could potentially lead to a qualitatively enhanced evidentiary process, concerns arise regarding its application to ongoing cases during a transitional phase. Although legislative regulations on evidence and proof are not flawless, they offer a certain degree of predictability for both the defense and the prosecution. This predictability is particularly significant given that the resolution of each criminal case directly impacts individuals' rights and fundamental freedoms. Ultimately, we believe that in this context, the decisive factor is not legislative regulations alone but also the practices applied in the judiciary.

[15] Paul Roberts, Theorising Evidence Law, *Oxford Journal of Legal Studies*, number 43, publication 3, 2023, pages 629–649, Fisher T., Truth, Reason, Justice, and Evidence Law, Cornell Review, 2023, pages 92-123, Cortesi, G.A. (2022). The Admissibility of Evidence. In: Proof and the Burden of Proof in International Investment Law. European Yearbook of International Economic Law(), vol 24. Springer, Cham, 2022, pages 101-135.

Another essential tool derived from the traditions of criminal procedure is the opportunity for the defense to present a closing argument. In this phase, the defense counsel has the freedom to critically assess the entire procedural process, including the collection, verification, and evaluation of evidence.

One of the notable innovations in the current Criminal Procedure Code of the Republic of Armenia is the defense's right, under Article 338, to present legal positions on the application and interpretation of the law. Although such positions are not binding on the court, they can be pivotal in cases involving complex or unique legal issues, such as immunity or interdisciplinary matters. For example, several offenses listed in Chapter 32 of the Armenian Criminal Code, which pertain to economic crimes, are directly interconnected with other branches of law. Specifically, Article 268 of the Criminal Code imposes criminal liability for the dishonest use of insider information. A comprehensive interpretation of this offense requires familiarity with laws such as the Law of the Republic of Armenia on the Securities Market, financial processes, or corporate legal relationships. In such cases, the defense's interpretation of the article could significantly influence the outcome of the judgment. The same applies to other offenses, such as price manipulation in the securities market, the creation, organization, or management of financial pyramids, money laundering, and ecocide. By presenting well-founded legal positions on these issues, the defense can play a decisive role in shaping the court's decision.

Conclusion

In summary, the non-exhaustive prerequisites for realizing the right to effective defense during the trial phase encompass several core processes. First and foremost, it must be ensured, through the direct and active participation of the court as the conducting body, that the defense's role is not merely formal. Furthermore, even when genuine participation by the defense is guaranteed, its actions remain subject to a range of normative legal acts that prohibit the use of unlawful methods in defense. Additionally, many scholars argue that lawyers should adhere to universal principles of morality. While agreeing with this view, we believe that under no circumstances should legal or customary regulations impose undue restrictions on the defense's activities.

The genuine and lawful participation of the defense in the trial phase is not only a means of realizing the right to defense but also a guarantee of the principle of adversarial proceedings. Particularly in non-adversarial pre-trial proceedings, ensuring the principle of "equality of arms" becomes a cornerstone during the trial phase.

By participating in the main hearings, the defense becomes an active party to the proceedings, exercising the right to cross-examine witnesses testifying against the accused. Although the lack of cross-examination does not automatically preclude evidence from serving as the basis for a verdict, both international and domestic courts have adopted stringent approaches to the conditions under which such evidence can be admitted.

The defense also holds the right to present new evidence. However, we believe that exercising this right should not be limited solely to the stage of supplementing the scope of evidence under review. This is particularly important in cases where there is a risk of evidence being lost, damaged, or destroyed. Considering these factors, we propose amending Chapter 43 of the Criminal Procedure Code of the Republic of Armenia. Specifically, the possibility of introducing new evidence could be incorporated into Article 325, which outlines the general rules for examining evidence. From another perspective, it might be argued that this could lead to abuse of rights by the defense, disrupting the orderly conduct of the trial. Nevertheless, in our view, Article 29 of the Criminal Procedure Code, which establishes the principle of prohibiting unlawful behavior, provides a sufficient safeguard against potential abuses.

The legislative provisions allowing the defense to challenge the admissibility of evidence, deliver closing arguments, and present legal positions on the application and interpretation of the law also play a crucial role in the arsenal of defense tools.

Assessing the defense tools as a whole, we conclude that while these tools can be further enhanced—for instance, by expanding the scope for presenting new evidence—the primary challenges to realizing the right to effective defense stem not from legislative gaps but from enforcement practices. On the other hand, as societal relations evolve, legal tools, including those aimed at ensuring the effectiveness of the right to defense, are also undergoing active development. For example, decades ago, it would have been difficult to predict the central role that technological tools and electronic evidence would play in the effective realization of the right to defense in certain cases. Therefore, we believe that the effectiveness of defense mechanisms is directly linked to the principle of balancing public and private interests. This principle should not be viewed as representing competing or opposing interests but rather as a framework for finding avenues for their cooperation.

Conflict of Interests

The authors declare no ethical issues or conflicts of interest in this research.

Ethical Standards

The authors affirm this research did not involve human subjects.

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