

# THE RIGHT TO DEFENCE IN POLISH LEGISLATION

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## *Abstract*

*The paper The Right to Defense in Polish Legislation deals with one of the most important human rights guaranteed by the Constitutions and laws of modern democratic states. Firstly the article presents genesis of the institution dating back to the ancient times and its evolution in the next coming centuries up to the present days in Poland. Later it touches upon the problem of the definition of this right and how its meaning is understood in the subject literature, as well as gives its typology. Further on the paper describes the legal regulations concerning the right to defence, which are in force in Polish legal system, starting with the Constitution, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights within the international law, as well as such inner acts like the Code of Criminal Procedure and the Executive Penal Code.*

## 1. Genesis and Evolution of the Right to Defence

The genesis of the right to defence dates back to the ancient times. At first it meant exclusively a possibility of hearing out the accused before the court. The first records concerning this right can be found in the Old Testament<sup>1</sup>. Aristotle also wrote about the right to defence in *The Constitution of the Athenians (Athenaion Politeia)*<sup>2</sup>. A serious contribution to the evolution of the right to defence was delivered by the Roman judiciary which developed the right of appeal i.e. a possibility of appealing from a judge's verdict to a hierarchically higher judge<sup>3</sup>. It should be noticed that the antique law – both in Athens, as well as in Rome – forbade applying tortures towards the accused, which constituted one of basic guarantees of the right to defence realization<sup>4</sup>. The right for defender is closely connected with the right to defence. Its beginnings should also be searched in the ancient Greek and Roman law.

The first mention concerning the right to defence in Poland turned up in the *Annales* by Dlugosz in the part referring to year 1016. It included granting widows, teenager orphans, village and poor people the right to receiving free of charge legal assistance provided by defenders paid by the Treasury<sup>5</sup>. Therefore it could be supposed that the right to defence was developed on Polish land far earlier as it was already guaranteed for lower social strata in 1016. Formal legal regulation of the right to defence was found in Statutes by Casimir III the Great (1333-1370), called the Piotrkow-Wislicki Statutes. They granted the accused the right to defence, particularly an opportunity of possessing a defender, independently of his state and circumstances.

<sup>1</sup> *Biblia. Pismo Święte Starego i Nowego Testamentu*, Warszawa 1986, p. 195.

<sup>2</sup> Arystoteles, *Ustrój polityczny Aten*, Warszawa 1973, p. 120.

<sup>3</sup> M. Szczaniecki, *Powszechna historia państwa i prawa*, Warszawa 1994, p. 34.

<sup>4</sup> S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2001, pp. 295-296.

<sup>5</sup> A. Kisza, Z. Krzemiński, R. Łyczzywek, *Historia adwokatury polskiej*, Warszawa 1995, p. 18.

In early Middle Ages in the Western Europe the trial by Ordeal deprived the accused of the right to proof his innocence. It was similarly in the period of the Inquisition trial development characterized by practicing tortures in the purpose of extorting testimony and making the accused plead guilty without any contact with the jury. Only the English proceedings respected the right to defence.

In Poland during the period of the Republic of nobility (*I Rzeczpospolita*) the right to defence was limited in terms of the subject which then included only the nobility.

In the eighteenth-century Western Europe under the influence of the Enlightenment idea a reform of the criminal proceedings was initiated which resulted in abolishing tortures. It took place the earliest in Prussia (1754), then in Austria (1776).

The Enlightenment ideas had a considerable influence on the Polish law of criminal proceedings because the state reforms in the years 1764-1795 led to abolishing tortures (also in 1776) and restored an opportunity to use the right to defence by all social groups.

The further reforms stepped under the influence of the French Revolution. In 1789 France abolished tortures and granted the accused the right to defence including the right for a defender by means of the Constituent Assembly's decrees. It was the beginning of the process of spreading the right to defence in the world.

The end of the 18th century and the whole 19th century is a period during which the right to defence was raised to the constitutional rank. The first to do it was the American *Virginia Declaration of Rights* from 12th June 1776, the next was the French *Declaration of the Rights of Man and the Citizen* from 26th August 1789, which on 3 September 1791 became a part of the French Constitution.

The 20th century is a period of "internationalization" of the right to defence, which was raised to the rank of the worldwide international law standard by means of the *Convention for the Protection of Human Rights and Fundamental Freedoms* from 4th November 1950 (Dz. U. from 1993, No. 61, item 284) and the *International Covenant on Civil and Political Rights* from 19th December 1966 (Dz. U. from 1977, No. 38, item 167).

## **2. The Meaning and Doctrinal Definition of the Right to Defense**

Presently the right to defence is understood in the subject literature as a personal entitlement of every man to take every activity in the limits and forms determined by legal provisions for the purpose of defending oneself, independently or with the help of a defender, against threatening negative legal consequences, above all accusations.

The doctrine distinguishes material and formal defence. Material defence is understood as taking every activities for the purpose of protection against negative legal consequences of a person, against whom the criminal proceedings is being carried. Such defence can be of a substantive character, i.e. the defence against an accusation, or it can also be a proceedings defence, by raising negligence and procedural defectiveness acting on the benefit of the accused. It can be active defence, which means taking actions for the purpose of proving one's innocence or passive, including refraining from providing evidence against oneself. Formal defense means taking advantage of a defender in this purpose.

## **3. The Right to Defence in the Polish Constitution**

In the Polish legislation the right to defence is guaranteed first of all by the Constitution from 2 April 1997 in art. 42 sec. 2, stating that everyone, against whom criminal proceedings is being carried on, has the right to defence at all stages of the proceedings (material defence). In particular he can choose a defender or take advantage of the court-appointed defender on the principles determined by the act of law (formal defence). The right is one of the substantial

guarantees of the law-abiding judiciary. The task of the judiciary bodies is aspiring to the real and full realization of the right to defence.

The subjective scope of the right to defence should be understood widely because it includes everyone against whom criminal proceedings is carried on. It means that he is entitled to the right to defence from the moment of initiating proceedings till its legally valid ending, as well as at every stage of executing the punishment.

The objective scope of the right to defence should be understood equally widely as it includes entitlement to undertaking every activities in limits and forms determined by regulations of law in the purpose of defending oneself, independently or with the help of a defender, against negative criminal consequences threatening him.

In this respect appropriate regulations guaranteeing the realization of this right as well as consequences of its violation have been predicted. It should be emphasized that the principle of direct application of the Constitution regulations and creating the right to defence as one of constitutional personal rights of every man result certain obligations. It has essential consequences for both the legislator, which is obliged to create the system of guarantees for realization of the right to defence at all stages of criminal proceedings, as well as for the judiciary, since it introduces the requirement of direct application of this principle by judges in concrete proceedings and estimating whether it is fully respected in accordance with the norm included in the Constitution. The result of it is also a prohibition for applying narrowing interpretation of the right to defence by entities using law<sup>6</sup>.

#### **4. The Right to Defence in the International Norms**

Apart from constitutional regulations the right to defence is guaranteed by the acts of international law, ratified by Poland, being a part of its legal system. The most important of them are: the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *International Covenant on Civil and Political Rights*.

The right to defence on the basis of the *Convention for the Protection of Human Rights and Fundamental Freedoms* was regulated in the article 6 sec. 3. p. a-e, which determines that every accused for committing a punishable offence has at least the right to:

- immediately receive detailed information in a language understandable by him on the sense and cause of accusation directed against him;
- possess appropriate time and possibility to prepare defence;
- defend personally or by a defender appointed by himself, and in case he has no financial means being enough for covering the defence expenses – to take advantage of a free of charge defender appointed by court, when good of justice requires it;
- interrogation or cause of interrogation of witnesses for the prosecution as well as demand the presence and interrogation of witnesses for the defence on the same conditions as witnesses for the prosecution;
- free of charge interpreter aid in case he does not understand or speak the language used in the court.

Similarly the right is regulated by the *International Covenant on Civil and Political Rights* in the article 14 sec. 3 p. a–g, determining that every person accused of committing a crime, on the principles of absolute equality, has at least a right to the following guarantees:

- immediately receiving detailed information in a language understandable by him on the nature and the cause of accusation;
- possessing appropriate time and possibilities to prepare defence and to communicate with the defender chosen by the accused;

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<sup>6</sup> *Polskie prawo konstytucyjne*, red. W. Skrzydło, Lublin 1999, p. 400.

- the trial conducted without unjustified delay;
- being present at the trial, defending personally or by means of the defender chosen by himself; being informed, if he does not have a defender, on the existence of the mentioned above right and having a defender appointed in every case when the interests of justice require it, without incurring costs of the defence, in cases when the accused does not have sufficient means for covering them;
- interrogation or causing interrogation of witnesses for the prosecution and assuring the presence and interrogation of witnesses for the defence on the same conditions as witnesses for the prosecution;
- using free of charge interpreter aid in case the accused does not understand or speak the language used in the court;
- not being forced to testify against himself or plead guilty.

## 5. The Right to Defence as it is Determined in the Proceedings Regulations

Detailed regulations of the right to defence are found in proceedings' regulations, namely in the *Code of Criminal Proceedings* from 6th July 1997 (Dz. U. No 89, pos. 555 with amendments) and the *Executive Penal Code* from 6th July 1997 (Dz. U. No 90, pos. 557 with amendments).

Article 6 of the *Code of Criminal Proceedings* states, that the accused is entitled to the right to defence (material defence), which includes the right to use a defender's aid (formal defence) and which he must be instructed on. The situation is similar with the person already convicted by a legally valid court sentence, since according to art. 1 § 2 of the *Executive Penal Code* in executive proceedings in unsettled cases the regulations of the *Code of Criminal Proceedings* are applied appropriately. In executive proceedings the realization of the right to defence is regulated by art. 8 of the *Executive Penal Code* which determines only the cases of obligatory defence and principles of communication of the convicted with his defender. This leads to the conclusion, that the regulations of the *Code of Criminal Proceedings* concerning the right to defence are applied to the convicted as well.

Summing up it should be stated that the principle of the right to defence expressed in art. 6 of the *Code of Criminal Proceedings* is extended to all stages of criminal proceedings. In this context this regulation is a reflection of not only assumptions of the Constitution in this scope, but also of the *International Covenant on Civil and Political Rights* and the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

In the scope of the right to material defence on the basis of the *Code of Criminal Proceedings* one of the most substantial entitlements of the accused (suspected) is first of all lack of obligation to prove his innocence and provide evidence of his innocence, sometimes called "the right of not accuse oneself"<sup>7</sup>.

This entitlement is a consequence of the presumption of innocence, which means recognizing everyone innocent until stated guilty with a legally valid court sentence. This principle is expressed in art. 42 sec. 3 of the Constitution, art. 14 sec. 2 of the *International Covenant on Civil and Political Rights*, art. 6 sec. 2 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* and art. 5 § 1 of the *Code of Criminal Proceedings*.

One of the expressions of this rule is the right to remain silent, which means that the accused can refuse to reply to particular questions or refuse to give explanations without giving reasons. It is the expression of the passive defence.

It is worth emphasizing that the person, against whom the criminal proceedings is being carried on, can limit himself only to passive defence, as well as can act actively in order to prove his innocence applying active defence.

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<sup>7</sup> R. Kmiecik, E. Skrzętowicz, *Proces karny. Część ogólna*, Kraków 1999, s. 109.

The most important entitlements in the scope of active defence include:

- the right to give explanations;
- the right to initiate evidence;
- the right to appeal the decision of trial bodies;
- the right to participate in trial actions.

In the proceedings regulations one can distinguish optional and obligatory defence. Formal defence is not obligatory (optional) when a person, against whom a criminal proceedings is being carried on can but does not have to have a defender. The defence is compulsory (obligatory), when an act of law determines a duty of representing such a person by a defender in certain cases. Establishing a catalogue of cases of obligatory defence by the legislator is aimed at guaranteeing the participation of a defender in all the cases, where the accused is afflicted with an influence of psychological, physical or other factors preventing him from efficient defence, or where its evidential or legal elaborateness should in advance be taken into account.

Violation of the right to defence causes consequences defined in the *Code of Criminal Proceedings*. Some of them state absolute appeal reasons, causing the necessity of overruling of the verdict delivered with violation of the right to defence, other can only be relative appeal reasons in the scope of contempt of proceedings regulations. The essence of relative appeal reasons comes down to the fact that overruling of the verdict is dependant on the court recognition.

In the context of the regulations contained in the Constitution, the *International Covenant on Civil and Political Rights* and the *Convention for the Protection of Human Rights and Fundamental Freedoms* one should take the conjecture that every violation of the right to defence is a contempt of criminal proceedings regulations which may influence the content of the verdict.

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