

DREPTUL LA APĂRARE PERSONALĂ ÎN PROCEDURA PENALĂ BULGARĂ:
CONȚINUTUL ȘI CARACTERISTICILE SALE

(THE RIGHT TO PERSONAL DEFENSE IN BULGARIAN CRIMINAL PROCEDURE: ITS
CONTENT AND CHARACTERISTICS)

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Abstract

Apărarea personală a acuzatului, înțeleasă ca o activitate procedurală personală și activă care vizează susținerea intereselor protejate de lege în cadrul procedurilor penale, constituie o corecție importantă și necesară pentru stat. Fără recunoașterea și respectarea legitimă a dreptului la apărare, nici existența, nici manifestarea statului de drept în viața publică și juridică a cetățenilor nu sunt posibile, deoarece fără existența reală a unui mecanism juridic fundamental de protecție, drepturile și libertățile individului ar fi lipsite de sens. Din acest motiv, prevederea legală a dreptului la apărare personală în cadrul procedurilor penale din Republica Bulgaria este esențială, deoarece reprezintă o garanție reală a drepturilor individuale împotriva arbitrarului autorităților statului în sfera justiției penale.

Cuvinte cheie: dreptul la apărare personală, procedură penală, dreptul acuzatului

Abstract

The personal defense of the accused, understood as a personal and active procedural activity aimed at upholding legally protected interests in criminal proceedings, constitutes an important and necessary corrective to the state. Without the legitimate recognition and observance of the right to defense, neither the existence nor the manifestation of the rule of law in the public and legal life of citizens is possible, because without the real existence of a fundamental legal mechanism for protection, the rights and freedoms of the individual would be deprived of meaning. For this reason, the statutory provision of the right to personal defense in the criminal proceedings of the Republic of Bulgaria is essential, as it represents a genuine guarantee of individual rights against the arbitrariness of state authorities in the sphere of criminal justice.

Keywords: right to personal defense, criminal procedure, right of the accused

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Introduction

The aim of this report is to characterize and present, in the shortest yet philosophically meaningful way, the content of the accused's right to personal defense as a subjective right under the Criminal Procedure Code of the Republic of Bulgaria. On the one hand, this stems from the need to fill certain gaps in legal theory; on the other hand, it is necessary for a proper understanding of the current state of the right to personal defense in Bulgaria. This is important because it constitutes a key prerequisite for strengthening and expanding the personal defense of the accused both in legislation and in practice. Ultimately, only in this manner can one truly grasp the spirit of the centuries-old understanding that where there is a right, there must be the possibility of protection. For this reason, this report does not describe the problems in exercising the right to personal defense, nor does it examine in detail the accused's right to qualified defense (defense by counsel).

The personal defense of the accused, understood as a personal and active procedural activity aimed at upholding legally protected interests in criminal proceedings, constitutes an important and necessary corrective to the state. This is so because, on the one hand, the defense “always arises from life, in which the misconceptions, injustices, and cruelties of the law—historically always safeguarding the interests of the powerful—are most clearly seen,”¹ and on the other hand, because it serves as a means of preventing procedural (judicial) errors. For this reason, the statutory provision of the right to personal defense in the criminal proceedings of the Republic of Bulgaria is essential, as it represents a genuine guarantee of individual rights against the arbitrariness of state authorities in the sphere of criminal justice. In this regard, Leonid Vladimirov also states: “In countries where justice is based on the need to instill in people a sense of fairness and respect for the rights of others, the defensive tendency prevails in the administration of justice; whereas in countries where justice aims merely to instill blind fear of authority, the accusatory tendency dominates. In the former type of countries, allowing the defense to participate in the preliminary investigation is the result of a growing desire to safeguard the court against judicial errors; in the latter, the refusal to admit the defense during preliminary investigations stems from the desire to ensure complete freedom of the prosecuting authority.”² Therefore, it may be said that the question of allowing or not allowing the right to personal defense—both in the pre-trial proceedings and in the trial phase—is organically linked to the manifestation of one of two opposing maxims that govern criminal procedure. “One is: It is better for a hundred guilty persons to go free than for one innocent person to be imprisoned; the other is: There may be a hundred innocent people in prison, but not a single guilty one shall escape—or, in other words: When the dry burns, the green burns with it.”³ Thus, if the authorities perceive the acquittal of the defendant as even a minimal encroachment upon justice, the right to personal defense will be normatively neglected and the objective truth will be ‘smothered.’ Conversely, if acquittal is regarded as a

¹ Vladimirov, L.E., *Advocatus miles, Zashtitata v uglavnia proces*, Sofia, 1922: Kooperativna pechatnica „Gutenberg

² See, Vladimirov, L.E.

³ Salov, I. *Tendencii v razvitiето na nakazatelnoprocesualnoto docazatelstveno pravo*. Plovdiv, 2017: Plovdivski universitet “Paisii Hilendarski”.

value essential to justice, the right to personal defense will be strengthened and expanded with full force, and the objective truth will be illuminated. The conclusion is that the specific state of the right to personal defense in a criminal process is itself capable of accurately reflecting the degree of development of democracy (humanism), or conversely, despotism (tyranny) within a state-organized social system.

Contents

To achieve the objective set out in the introduction of this report, two tasks will be addressed here.

The first task involves providing a legal characterization of the right to personal defense as a subjective right.

The second task involves revealing the content of the right to personal defense by identifying its individual components—that is, the distinct rights of personal defense that collectively constitute it. It should be clarified that a detailed examination of the content of each specific right of personal defense of the accused is not among the aims of this report, primarily because this has already been addressed relatively well in Bulgarian legal theory and judicial practice.

1. Legal Framework

The legislative provision and safeguarding of the accused's right to personal defense in the criminal procedure of the Republic of Bulgaria is an expression of profound humanism and advanced state democracy.⁴ Without the legitimate recognition and observance of the right to defense, neither the existence nor the manifestation of the rule of law in the public and legal life of citizens is possible, because without the real existence of a fundamental legal mechanism for protection, the rights and freedoms of the individual would remain devoid of meaning.⁵ With the development of social relations, the state is continuously confronted with the need both to meet more fully the material and spiritual needs of citizens and to protect more comprehensively their rights and legitimate interests. In this regard, Rumen Vladimirov observes: "...In the stage of building and consolidating a democratic, market-oriented society, in which the Republic of Bulgaria currently finds itself, social relations are characterized by an intensified dynamic of emergence, expansion, and improvement. This places with even greater seriousness the issue of their effective legal regulation..."⁶ Therefore, the timely legislative recognition of the need for more complete protection of the rights and legitimate interests of citizens, including that of the accused, as a function of the dynamism in the development of social relations, is always an important criterion both for the broader and more substantive expansion of the right to personal defense and for the deepening of democratic development and the rule of law as a whole.

⁴ Drumeva, E. *Konstitucionno pravo- peto prerab. I dop.* Izd. Sofia, 2018: "Ciela

⁵ Tanchev, E. *Osnovni prava na choveka.* Sofia, 2002: "Jurispress", p. 211-212.

⁶ Vladimirov, R. *Sauchastie pri uslojnena prestapna deinost.* Ruse, 1996: Izdanie na Rusenski universitet "Angel Kanchev", p. 5

A fundamental form of safeguarding the rights and freedoms of citizens in Bulgaria is the constitutional enshrinement of the right to defense, including the right to personal defense as one of its components. The Constitution of the Republic of Bulgaria of 13 July 1991 contains a general provision according to which every citizen has the right to defense whenever his rights or legitimate interests are threatened or violated (Art. 56, first proposition). Additionally, Chapter Six of the Constitution states that the procedure for exercising the right to defense shall be established by law (Art. 122, para. 2). In further detail, Art. 15, para. 1 of the Criminal Procedure Code explicitly clarifies that the accused has the right to defense, and para. 2 of the same article states that "...the accused and the other persons participating in the criminal proceedings shall be provided with all procedural means necessary to protect their rights and legitimate interests." Moreover, Art. 122, para. 1 of the Constitution mandates that citizens and legal persons have the right to defense at all stages of the proceedings.

Thus, there can be no doubt that the accused possesses the right to defense — and therefore the right to personal defense — at every stage of the criminal process. He is free to employ the procedural means provided in the Criminal Procedure Code to protect his rights and legitimate interests in both the judicial and pre-trial phases of criminal proceedings of a general nature, specifically from the moment the procedural status of "accused" arises. The accused also possesses the right to personal defense in privately prosecuted cases. To ensure and sustain the accused's personal engagement and to stimulate his defensive efforts, the constitutional legislator has secured the real exercise of the right to personal defense by providing procedural guarantees for its implementation (Art. 30, paras. 1–2 and Art. 31, para. 3 of the Constitution).

It can reasonably be affirmed that the accused's right to personal defense possesses universal human significance. This is demonstrated by its embodiment in international legal instruments. For example, the right to defense is extensively outlined in Art. 2(3) and Art. 14(2) and (3)(a–g) of the International Covenant on Civil and Political Rights, as well as in Arts. 6 and 13 of the European Convention on Human Rights. The right to personal defense may also be conceptualized as an integral component of the right to a fair trial under Art. 6 of the ECHR. From a domestic perspective, the most significant is Art. 55 of the Criminal Procedure Code, which provides the explicit content of the accused's right to personal defense.

2. Legal Characteristics and Content of the Right to Personal Defense

The accused's right to defense takes different forms depending on the criteria used for classification. Depending on whether it is exercised solely by the accused, the right to defense may be either a right to personal defense or a right to qualified defense. In short, the right to personal defense is the legally recognized and guaranteed ability of the accused to independently perform procedural actions to protect his rights and legitimate interests during the investigation and adjudication of the criminal case. The right to qualified defense, on the other hand, is the expanded, legally guaranteed possibility for the accused — alongside personal defense — to receive assistance from an authorized or officially appointed defender when exercising the defensive function. Here, however, the focus is on the right to personal defense and its characterization.

The accused's right to personal defense possesses a procedural (public) legal nature. Several arguments justify this and are contained in the law itself (Art. 15, paras. 1–2 and Art. 55 Criminal Procedure Code of Republic of Bulgaria-CPC). **First**, this right is enshrined in the Criminal Procedure Code and not in Criminal Code of Republic of Bulgaria, which indicates that as a subjective right it exists solely as part of a specific criminal procedural legal relationship. **Second**, by express legislative provision, this right is granted for participation in criminal proceedings, meaning it has procedural content, purpose, and orientation. **Third**, it is exercised to protect rights and legitimate interests—that is, it shields threatened or violated subjective rights or lawful interests, making it secondary to them. **Fourth**, the rights or interests of the accused are protected through procedural means of defense, which inherently require the existence and exercise of specific procedural rights.⁷

The accused's right to personal defense is a subjective, personal right. It is subjective because it is inseparable from the personality of the accused/defendant, who, as a party in the criminal process (Art. 253(2), first proposition CPC), is an active subject rather than a passive object of the proceedings.⁸ The accused is a subject of the criminal process because he performs one of the three fundamental procedural functions — the function of defense — by virtue of which he holds numerous procedural rights influencing the course of the proceedings.⁹ He exercises the defense function not arbitrarily but for the purpose of protecting his personal rights and legitimate interests, which confirms the personal character of this right.

In a broad sense, the right to personal defense is a complex public subjective right.¹⁰ It encompasses an entire system of independent procedural rights, exhaustively incorporated in Art. 55 CPC, each of which represents a legally recognized and guaranteed ability of the accused to actively participate in protecting his rights and legitimate interests using appropriate procedural means.

The implementation of the right to personal defense does not aim at acquiring property benefits. Whether it serves to protect property rights and interests is a separate issue. In such cases, it concerns the exercise of the right to defense with property rights as its object, not a “property right to defense.” Thus, as a non-property right, personal defense is nontransferable, non-inheritable, and not subject to enforcement. In this respect, we share St. Pavlov's view that the right to defense arises for a specific person in a specific criminal case from the moment the status of the accused emerges, and extinguishes when that status ceases. As he states: “The right to defense cannot be transferred by contract or inheritance.”¹¹

The right to personal defense is also an absolute subjective right. Its absolute character is determined by the requirement that the accused's procedural efforts to rebut the accusation must be respected and not hindered by *any* legal subject, not merely by the state authority whose actions

⁷ Pavlov, S. *Nakazatelen process na Republica Bulgaria- obshta chast*. Sofia, 1996: Sibi.

⁸ Velchev, S. *Rakovodstvo po uglavnia process*. Tom 2. Sofia, 1923: “Pridvorna pechatnica-Sofia”.

⁹ Pavlov, S. *Nakazatelen process na Republica Bulgaria- obshta chast*. Sofia, 1996: Sibi.

¹⁰ See Pavlov, S. *Nakazatelen process na Republica Bulgaria- obshta chast*, p. 93

¹¹ Pavlov, S. *Osiguriavane na grajdinite pravo na zashtita v nakazatelnia process na NRB*. Sofia, 1986: Izdatelstvo na “Balgarskata Akademia na naukite”, p. 52

the accused challenges, provided these efforts remain within the limits of the Constitution and the CPC.¹²

Furthermore, the right to personal defense is inalienable. It cannot be excluded by agreement between the parties to the criminal proceedings or waived unilaterally (i.e., the accused cannot validly refuse the right to defense).¹³ A distinction must be made between inalienability and non-exercise: inalienability concerns the existence of the right, whereas non-exercise concerns the absence of activity despite the right's continued existence. The right ceases only with the termination of the status of the accused or the conclusion of the proceedings. Therefore, the failure to exercise it does not extinguish it.¹⁴ Any doubts regarding the right's inalienable nature should be considered settled since the constitutional legislator has included the right to defense among the fundamental and inalienable rights in Chapter Two of the Constitution. Accordingly, any attempt by the state to limit this right may be challenged through the direct effect of constitutional norms (Art. 5, para. 2 in conjunction with Art. 56 of the Constitution).

In our view, the right to personal defense does not possess a transformative character. Most rights listed in Art. 55 CPC show that the accused does not have the procedural power to impose, by his own will, legal changes in either the substantive or procedural relationship with the state. Moreover, many of these rights are definitively dependent on the state's conduct.

As a complex subjective right, the right to personal defense consists of the system of independent procedural rights listed in Art. 55 CPC. Collectively, these individual rights form the content of the right to personal defense. Thus, the content of the right is best understood through the content of its constituent rights.

The accused has the following rights under Art. 55 CPC:

- to learn the crime for which he is charged and the evidence supporting it;
- to give or refuse to give explanations regarding the accusation;
- to review the case file, including information obtained through special intelligence means, and to make necessary extracts;
- to present evidence;
- to participate in the criminal proceedings;
- to make requests, notes, and objections;
- to speak last;
- to appeal acts that infringe his rights and legitimate interests, and to have a defender;
- to be provided information regarding the conditions for legal aid and the procedure for receiving it;
- to be provided general information facilitating his choice of defense counsel;
- to communicate freely with his defender, meet privately, and receive advice and legal assistance, including before and during interrogation or any other procedural action involving him;

¹² Tanchev, E. *Osnovni prava na choveka*. Sofia, 2002: "Jurispress", p. 219.

¹³ Pavlov, S. *Nakazatelen process na Republica Bulgaria- obshta chast*. Sofia, 1996: Sibi, p.92

¹⁴ Radeva, R. *Pravoto na zashtita na obviniaemia v nakazatelnia process na NRB*. Sofia, 1985: "Nauka I Izkustvo"

- to make a final statement in court;
- to have his defender participate in investigative and other procedural actions involving him, unless he explicitly waives this right;
- to receive oral and written translation in the proceedings where necessary;
- to submit requests, notes, objections, and appeals electronically, signed with a qualified electronic signature, etc.

The right to personal defense may be exercised from the moment the status of “accused” arises. The accused has the right—but not the obligation—to exercise each of the rights listed in Art. 55 CPC. He is protected by the presumption of innocence regardless of whether he exercises this right. Moreover, no adverse conclusions may be drawn from the fact that he chooses not to exercise it (Art. 103, para. 3 CPC).

Conclusions

From the analysis conducted in accordance with the tasks set out in this report, it may be concluded that the objectives have been fulfilled. The characteristics examined show that the right to personal defense constitutes a subjective, procedural, non-transformative, inalienable, personal, non-property, complex, and absolute right of the accused. It consists of a legally recognized and guaranteed ability to influence (and oppose) the procedural activity of the state at all stages of the criminal process for the protection of threatened or violated rights and legitimate interests through the exercise of numerous procedural rights via appropriate procedural means.

Substantively, the right to personal defense is best understood through the enumeration of the individual rights listed in Art. 55 CPC.

It is essential that the right to personal defense continues to develop through the expansion of Art. 55 CPC with new defensive rights. The strengthening of personal defense must become a sustained trend, as such a tendency contributes significantly to the proper resolution of criminal cases and to the issuance of lawful and fair judicial acts.

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