



RIGHT TO DEFENSE AS A HUMAN RIGHT: « SCOPE AND LIMITS ANALYSIS IN A GLOBAL LEGAL CONTEXT »

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Abstract : This article examines the right to defense as a crucial foundation of human rights and justice. It emphasizes that this right, rooted in various international legal instruments, ensures that every individual has the inherent right to be treated fairly and to have the opportunity to present their defense when facing criminal charges or other legal proceedings.

The scope of the right to defense is broad and encompasses several essential components, such as the right to be informed, to legal assistance, to a fair trial, and to remain silent. These elements are firmly embedded in international legal instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

However, the right to defense is not absolute and may be subject to limitations or restrictions justified by legitimate imperatives such as national security or the protection of others' rights. These limitations may include legal constraints, restrictions related to national security, and conflicts with other human rights.

The article also examines critical perspectives and possible developments regarding the right to defense, such as enhanced protection of digital rights, revisions of anti-terrorism laws, and recognition of the rights of vulnerable defendants. It highlights the importance of striking a balance between security and individual freedom, while underscoring the crucial role of transparency, adaptation to new threats, and protection of privacy.

Key words : Right to defense, Human rights, Global legal context

Digital Object Identifier (DOI): <https://doi.org/10.5281/zenodo.17392699>



1 Introduction

The right to defense, as a fundamental right, is a cornerstone of the international legal system and human rights. It is grounded in the belief that every individual has the inherent right to be treated fairly and to have the opportunity to present their defense when faced with criminal charges or other legal proceedings. This right constitutes an essential element of natural justice and ensures that individuals receive a fair trial.

This right fits within the broader perspective of human rights, which are inherent to all human beings, regardless of their nationality, ethnic origin, religion, or any other condition¹.

Human rights form the moral and ethical foundation of a just and equitable society. They are based on the conviction that every individual has intrinsic value and deserves to be treated with dignity and respect. By integrating the right to defense into this framework, the importance of protecting the individual against the powers of the State is recognized, thereby ensuring a balanced distribution of power and the prevention of abuses.

The right to defense is an essential component of natural justice. It guarantees that every person has the opportunity to defend themselves against accusations and assert their rights fairly. In the broader context of human rights, this contributes to establishing a legal environment that respects the presumption of innocence and avoids arbitrary judgments.

Human rights, including the right to defense, are designed to protect individuals against arbitrariness and injustice. By granting every person the right to be transparently informed of the charges against them and ensuring the right to legal assistance, society seeks to prevent abuses of power and promote fair judicial procedures.

Human rights recognize that even in situations where national security is at stake, appropriate mechanisms must be in place to protect the right to defense and avoid disproportionate measures.

By integrating the right to defense into the framework of human rights, adherence to treaties and international instruments that uphold these rights is emphasized. States parties to these treaties are obligated to respect and protect the right to defense (UDHR, 1948), thereby demonstrating their commitment to international standards of human rights.

The right to defense, as an essential foundation of human rights, constitutes a central pillar of global legal systems. However, its application and limitations raise crucial questions regarding the protection of individuals facing legal proceedings. This analysis will examine the scope and limitations of the right to defense in a global legal context, highlighting persistent challenges and recent developments.

2 Scope of the right to defense

The scope of the right to defense, as a fundamental right, is vast and encompasses several essential dimensions within the legal context.

¹ Universal Declaration of Human Rights, 10 December 1948 in Paris

2.1 Definition and constituent elements

The right to defense includes several essential elements, each contributing to ensuring comprehensive protection of individuals' rights in the face of justice. These elements include the "right to be informed, to legal assistance, to a fair trial, and to silence."

The right to be informed : Every accused person has the right to be informed of the charges against them in a clear and understandable manner. This information is crucial to enable the accused to prepare an adequate defense.

The right to legal assistance : According to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems 2013, legal assistance refers to legal advice, aid, and representation provided to any person detained, arrested, or imprisoned, suspected, accused, or convicted of a criminal offense, and to victims and witnesses in criminal justice, which are provided free of charge to any indigent person or when the interest of justice so requires. Legal assistance further encompasses legal education, access to legal information, and other services provided to individuals through alternative dispute resolution mechanisms and restorative justice.

The accused has the right to be assisted by a lawyer of his choice or, if he cannot hire one, to be assigned a public defender. Legal assistance ensures that the accused understands their rights, the legal implications of the charges against them, and can present an informed defence. The party who wishes to be defended by a lawyer must have a free conversation with him, from the moment a lawyer is chosen by a party, the State must ensure free communication with the client (**S v. Switzerland judgment 28 November 1991**).

The right to a fair trial : This includes the right to be tried by a competent, independent and impartial tribunal. The accused also has the right to confront witnesses against him, to present witnesses on his behalf and to have the time and means necessary to prepare his defence.

The right to silence : The accused has the right to remain silent without this being interpreted as an admission of guilt. This protection is designed to avoid self-incrimination.

2.2 International legal protection

The right to defence is firmly anchored in various international legal instruments, including the Universal Declaration of Human Rights (**Article 11**), the International Covenant on Civil and Political Rights (**Article 14**) and the European Convention on Human Rights

(Article 6). These documents set out the fundamental principles of the right to defence and oblige States parties to respect them.

2.3 Practical implications

In practice, the right to a defence applies at all stages of the judicial process, from the initial arrest to the eventual conviction. It aims to balance power between the state and the individual, ensuring that even those accused of serious crimes are treated fairly and equitably. Thus, this measure also ensures loyalty and above all equality between adversaries (OLIVIER Forin, 2021).

3 Limits of the right to defence

Although the right to defence is a fundamental principle in the context of human rights and justice, there are situations where this right may be subject to limits or restrictions. These limits are often justified by legitimate imperatives, such as national security, the protection of the rights of others, or the prevention of abuse of the judicial system. Some of the common limitations of the right to a defence include :

3.1 Legal constraints

There are certain legal binding limits on the right to a defense that are set forth by the laws and regulations of various jurisdictions. These limits are generally put in place to ensure that court proceedings are conducted fairly while balancing the interests of justice and society. Examples of these legal limits on the right to defence are :

Procedural deadlines : Laws may impose strict deadlines for the presentation of evidence, the submission of documents, and other procedures. These delays are intended to ensure the efficiency of the judicial system.

Rules of Procedure : Courts often have strict rules of procedure that govern the conduct of lawyers, the presentation of evidence, and other aspects of the trial. These rules ensure order and fairness in court proceedings.

Admissibility of evidence : Laws may set strict criteria for the admissibility of evidence. Evidence obtained illegally or through violation of fundamental rights may be excluded.

Confidentiality and Privilege : While solicitor-client privilege is generally protected by solicitor-client privilege, there are circumstances in which solicitor-client privilege may be

waived by law, for example, in cases where there is a serious threat to the life or safety of others.

Limitations on Questioning : Courts may restrict the types of questions lawyers can ask during interrogation, especially if the questions are deemed inappropriate, misleading, or intended to deceive.

Conflict of Interest : Professional ethics rules may impose restrictions in cases of conflict of interest between the lawyer and their client. In some circumstances, the lawyer may be prevented from representing the client.

Refusal to Testify : Laws may allow a witness to refuse to testify in certain circumstances, based on specific privileges such as spousal privilege or attorney-client privilege.

State's Legitimate Defense : In exceptional circumstances, related to national security or other major public interests, certain information may be classified and withheld to protect the state.

Court Authorization of Lawyers : Some courts may require lawyers to be authorized by the court to practice before them, which may include competency and morality criteria.

It is important to note that these legal constraints are often designed to maintain the integrity of the judicial system while preserving the fundamental rights of individuals. However, they must be applied with care to avoid unjustified prejudice to an individual's defense

3.2 National security and public interests

National security and public interests are often cited as legitimate reasons to impose limitations on the right to defense. These limitations are typically implemented to safeguard society as a whole, particularly in situations where national security concerns may outweigh individual rights. Here are some ways in which national security and public interests can restrict the right to defense :

Classification of sensitive information : Governments may classify certain information as sensitive for national security purposes. In a legal proceeding, this information may be

excluded from the defense's case file or subject to strict restrictions due to its confidential nature.

Closed-door hearings : In cases related to national security, courts may order closed-door hearings, thereby limiting public and media access to certain parts of the trial. This may also impact the defense's ability to present its arguments transparently.

Information retention : Authorities may withhold certain information from the defense if they believe that full disclosure could compromise national security or harm public interests. This can limit the defense's ability to prepare a comprehensive case.

Antiterrorism legislation : Antiterrorism laws may include specific provisions that restrict the right to defense in order to prevent terrorist activities. This may involve special procedures, restrictions on the presentation of evidence, or harsher penalties.

Witness disclosure restrictions : In national security cases, authorities may impose restrictions on witness disclosure, especially when the safety of witnesses or the protection of information sources is at stake.

Pretrial detention without formal charges : In situations related to national security, authorities may sometimes detain individuals without formal charges for an extended period, which can restrict the exercise of the right to defense.

Exclusion of evidence for security reasons : Evidence obtained through sensitive intelligence methods may be excluded from the trial for national security reasons, even if it is potentially crucial for the defense.

It is important to note that, while these limitations may be justified in the name of national security and public interests, it is crucial to ensure that they respect fundamental principles of justice, such as the presumption of innocence and the right to a fair defense. Courts must balance these concerns with the respect for individual rights to ensure a fair judicial system. A balanced trial is one in which equality of arms is ensured, and very concretely, in a trial, each party must have a reasonable opportunity to present its case in court, including its evidence, under conditions that do not place it at a clear disadvantage compared to its adversary (**Judgment BEHEER v. Netherlands, October 27, 1993**).

3.3 Conflicts with other human rights

There may be situations where the right to defence conflicts with other human rights, such as the right to privacy, the protection of victims or the prevention of discrimination.

4 Perspectives critiques and evolution of the right to defense

Critical perspectives on the right to defense are essential for assessing its application in an ever-changing context. Furthermore, examining current trends and possible developments in the field of the right to defense helps to better understand how this fundamental right can be strengthened or, conversely, challenged. We can identify some critical perspectives and considerations on the evolution of the right to defense :

4.1 Jurisprudential developments

Jurisprudential developments regarding the right to defense often reflect changes in society, technology, and legal standards. These developments can influence how courts interpret and apply the right to defense. Here are some examples of possible jurisprudential developments in this area :

4.1.1 Enhanced protection of digital rights

Courts may evolve to recognize and further protect digital rights related to defense. This may include decisions that limit the collection and use of digital data by authorities and strengthen the protection of the confidentiality of electronic communications between attorney and client.

4.1.2 Revision of anti-terrorism laws

Courts may be called upon to revise and clarify anti-terrorism laws to ensure they fully respect the right to defense, especially regarding access to independent counsel and the protection of the rights of defendants in national security cases.

4.1.3 Development of the right to counsel at the investigatory stage

An evolution could involve extending the right to counsel to the preliminary investigation stage, ensuring that individuals receive legal advice early in the judicial process, thereby contributing to the protection of the right to defense.

4.1.4 Recognition of defense rights in administrative proceedings:

Courts may expand recognition of the right to defense to administrative proceedings, acknowledging that these rights are not limited to criminal proceedings alone. This could include situations such as disciplinary hearings or administrative proceedings with significant implications.

4.1.5 Protection of the rights of vulnerable defendants:

An evolution could involve strengthening the protection of the rights of vulnerable defendants, such as minors, individuals with mental disorders, or asylum seekers, ensuring they have adequate access to defense and appropriate procedural guarantees.

4.1.6 Integration of new technologies :

Courts may address issues related to the use of new technologies in judicial proceedings, such as video conferencing, virtual hearings, and the use of artificial intelligence in legal research. These developments may influence how the right to defense is exercised and protected.

4.1.7 Recognition of Victims' Rights :

Courts may recognize and balance the rights of victims with the rights of defense, seeking to ensure a fair trial while respecting the legitimate interests of the civil parties.

4.1.8 Role of counsel during preliminary investigation

An evolution could involve defining more clearly the role of counsel during the preliminary investigation, particularly concerning defense rights, evidence collection, and access to witnesses.

These jurisprudential developments may be influenced by specific court decisions, legislative amendments, social concerns, and technological advancements. They reflect the ongoing need to adjust the legal framework to address emerging challenges while preserving individuals' fundamental rights in the judicial process.

4.2 Reflections on balancing security and individual liberty

Reflecting on the balance between security and individual liberty is crucial when addressing the right to defense. Balancing these imperatives can often be delicate, as the need to ensure public safety may sometimes conflict with respecting individual rights. Some reflections on this delicate balance include :

4.2.1 Preservation of public safety

Public safety is a paramount goal for any society. Authorities have a responsibility to protect citizens from potential threats, whether criminal, terrorist, or otherwise. This may require enhanced security measures and restrictions in certain situations.

4.2.2 Respect for fundamental principles

However, respecting fundamental rights, including the right to defense, is also essential for maintaining a fair and just society. Principles such as the presumption of innocence, the right to a fair trial, and the right to legal assistance are pillars of democracy.

4.2.3 Importance of abuse prevention

Achieving an appropriate balance requires constant vigilance to prevent abuses of power. Laws and practices must be designed to prevent any excessive use of government powers at the expense of individual rights.

4.2.4 Crucial role of transparency

Transparency in the actions of authorities is a key element in maintaining public trust. Open communication about security policies and justification of measures taken help ensure that imposed restrictions are necessary and proportionate.

4.2.5 Adaptation to new threats

Societies evolve, as do the threats to public safety. Developing laws and policies must be sufficiently flexible to adapt to these changes while protecting individual liberties.

4.2.6 Protection of privacy

Privacy protection is often a point of tension. Security measures may sometimes involve increased surveillance, and it's important to establish clear boundaries to protect individuals' privacy while achieving security goals.

4.2.7 Ensuring judicial oversight

A strong and independent judiciary is essential to ensure that restrictions imposed in the name of security comply with the law and respect constitutional rights. Judicial oversight mechanisms are crucial to prevent abuses.

4.2.8 Education and public awareness

Balancing security and individual liberty also requires public education and awareness. Understanding the issues allows the public to actively engage in the debate on security policies and hold authorities accountable.

Finding a balance between security and individual liberty is an ongoing challenge that requires social deliberation, ethical reflection, and constant adaptation to changing realities. Protecting the right to defense is essential to ensure that even in times of security concern, individuals still receive fair justice and adequate protection of their fundamental rights.

5 Conclusion

In conclusion, the article emphasizes that protecting the right to defense is essential for ensuring fair justice, even in times of security concern, and that it requires ongoing social deliberation, ethical reflection, and constant adaptation to changing realities.

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