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INITIAL HEARING ACCORDING TO CRIMINAL PROCEDURE

ABSTRACT

The reason in discussing the Initial Hearing according to the Criminal Procedure lies in the fact that various courts in Kosovo used different approaches when applying this institution regarding review of indictment when the Criminal Procedure Code entered into force on 1 January 2013. Thus, application of provisions foreseen by the Criminal Procedure Code regarding holding of an Initial Hearing represents a topic of study in the criminal procedure field. This work, apart from its introduction contains discussion on filing of the indictment in front of a court, scheduling of the initial hearing, instructions that shall be given to a defendant on his rights during the initial hearing, review of a guilty plea agreement by the court, the guilty plea by the defendant, sentencing during an initial hearing once the defendant has pleaded guilty. It also contains objections against evidence listed in the indictment, defendant's request to dismiss indictment, filing of the amended indictment by the State Prosecutor, dismissal of the indictment and Conclusion. The list of references consulted in preparing this work is provided at the end.

Keywords:

Initial hearing, defendant, guilty plea agreement, objection to evidence in indictment, dismissal of indictment.

Introduction

The Criminal Procedure Code of the Republic of Kosovo has paid particular consideration to the Initial Hearing. This hearing makes the criminal procedure more effective, since immediately after filing of the indictment during the Initial Hearing, in cases when a defendant pleads guilty, the trial

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may be concluded during the same session by announcement of a punishment imposed by the single trial judge or presiding judge.

Knowing that the Initial Hearing is held immediately after filing of the indictment, the Criminal Procedure Code has accurately and in detail foreseen how is the Initial Hearing supposed to be held, the guilty plea by the defendant, objections to evidence, the request to dismiss the indictment, dismissal of the indictment, amendment of the indictment by the State Prosecutor and other details to be dealt with in this work.

In order to see how this matter is regulated by the Criminal Procedure Code, we shall look into it in more detail, starting from filing of the indictment up until scheduling of the Second Hearing, also in respect of any change, supplementation or any suggestion, which would be beneficial for further improvement of the Initial Hearing.

1. The Initial Hearing

The State Prosecutor, once investigations have ended, or when he/she considers that information in his/her possession about the criminal offence and its perpetrator represent a well-grounded suspicion that the defendant has committed the criminal offence, files the indictment. This indictment is filed in front of the competent court in as many copies as there are defendants and their defense counsels, plus one (1) copy for the court. Filing of the indictment represents the end of the involvement for the Pre-Trial Judge in the proceedings.

Once the indictment is filed, the Court immediately assigns a judge or a trial panel with its presiding judge.

If the indictment is filed in front of General Department, the Initial hearing is held by the single judge including the second hearing and the main trial. Whereas, if the indictment is filed in front of Department for Serious Crimes of Basic Court, the initial hearing is held by the presiding judge including the second hearing. The main trial is held by the trial panel composed of the presiding judge and two professional judges.

The single judge or presiding judge decides ex-officio whether it has jurisdiction over the matter within the indictment and if he/she finds that he/she has jurisdiction to decide over the matter within the indictment, then he/she immediately shall schedule the initial hearing to be held within 30 days of the indictment being filed. If the defendant is being held in detention on remand, the initial hearing shall be held at the first opportunity, but not to exceed 15 days from the indictment being filed.

The initial hearing is regulated by article 245 of the Criminal Procedure Code.

The single judge or presiding judge shall notify the state prosecutor, defendant/s and defense counsels of the time and place of the initial hearing. As a rule, hearings are held in the courthouse.

Where, in particular cases, the courthouse is unsuitable due to the lack of space or other justified reasons, president of the court may order that the main trial be held in another building. This issue is regulated by article 286 of the CPC, which determines the venue where the main trial may be held and which is also applicable in the case of the initial hearing and the second hearing.

The State Prosecutor, the defendant/s and their defense counsels shall be present at the initial hearing. Regardless of the fact that article 245 para.1 does not expressly foresee presence of the injured party; we consider that it is not a legal obstacle for the injured party to be present at the initial hearing²⁵². This is due to the fact that, in cases when it is foreseen that the defendant may plead guilty at the initial hearing according to the CPC in article 248 para. 2, it is also foreseen that the single judge or presiding judge may also invite the opinion of the injured party in evaluating the guilty plea.

During the initial hearing, the single judge or presiding judge provides a copy of the indictment for the defendant/s, if they have not already received this copy of the indictment and also decides on all proposals to extend or implement measures to ensure the presence of the defendant. Also, he/she ensures that the State Prosecutor fulfilled obligations in relation to disclosure of evidence arising from article 244 of the CPC. Article 244 of the CPC stipulates what materials are provided to defendant upon filing of the indictment, where, no later than at the filing of the indictment the state prosecutor shall provide the counsel or lead counsel the following materials or their copies, which are in his/her possession, control or custody, if these materials have not already been given to the defense counsel during the investigation:

- a. records of statements or confessions, signed or unsigned, by the defendant,
- b. names of witnesses whom the state prosecutor intends to call to testify and any prior statements made by those witnesses,
- c. information identifying any persons whom the state prosecutor knows to have admissible and exculpatory evidence or information about the case and any records of statements, signed or unsigned, by such persons about the case,
- d. results of physical or mental examinations, scientific tests or experiments made in connection with the case,
- e. criminal reports and police reports and
- f. a summary of, or reference to, material evidence obtained in the investigation.

So, this material and all witness statements are made available to the defendant in a language that he/she understands.

²⁵² The Criminal Procedure Law - Prof.Dr.Ejup Sahiti and Prof.Dr.Rexhep Murati, page 339

2. Instructing the defendant about his/her rights during the initial hearing

At the beginning of the initial hearing the single trial judge or the presiding judge shall instruct the defendant of his/her rights:

- a. the right not to plead his/her case or to answer any questions,
- b. if he/she pleads his/her case, not to incriminate himself/herself or a close relative, nor to confess guilt,
- c. to defend himself/herself in person or through legal assistance by a defense counsel of his/her own choice, and
- d. to object to the indictment and admissibility of evidence presented in the indictment.

Once the defendant is instructed of his/her rights the single trial judge or the presiding judge shall then satisfy himself/herself that the right of the defendant to defense counsel has been respected and that the state prosecutor has fulfilled the obligation relating to the disclosure of evidence under article 244 of the CPC.

The state prosecutor shall then read the indictment to the defendant.

Once the single trial judge or the presiding judge is satisfied that the defendant understands the indictment, he/she affords an opportunity for the defendant to plead guilty or not guilty. If the defendant has not understood the indictment, the single trial judge or the presiding judge shall call on the state prosecutor to explain it in a way the defendant may understand without difficulty. If the defendant does not want to make any statement regarding his/her guilt, he/she shall be considered to have pleaded not guilty²⁵³.

In cases when the defendant does not plead guilty during the initial hearing the single trial judge or the presiding judge shall inform the defendant and defense counsel that prior to the second hearing, they must:

- a. file any objections to evidence listed in the indictment;
- b. file any requests to dismiss the indictment as legally prohibited; and
- c. file any requests to dismiss the indictment for failing to describe a criminal offence under the law.

It is worth mentioning that no witnesses or expert witnesses shall be examined or other evidence presented during the initial hearing, unless a witness is required for the decision to extend or implement measures to ensure the presence of the defendant under article 245 para. 3 of the CPC.

During the initial hearing, the single trial judge or presiding judge shall schedule a second hearing no less than thirty (30) days after the initial hearing and no more than forty (40) days after the initial

²⁵³ Article 245 para. 6 of the CPC.

hearing. In the alternative, the single trial judge or presiding judge may only require the filing of motions by a date set no more than thirty (30) days after the initial hearing²⁵⁴.

In relation to the issue of whether it is necessary to proceed to the second hearing in cases when it has already been decided on objections during the initial hearing or in cases when there is no decision pending on any motion, the Supreme Court of Kosovo has issued a Circular in relation to a consideration of indictment GJ.A 5/2014, dated 03.01.2014, where it provided an explanation regarding proceeding to the second hearing by saying the following: the second hearing is not always necessary, the second hearing may not be proceeded to at all, if the judge has decided on filed objections at the first hearing and if there are no pending decisions to be made on any motion, there is no need to proceed to the second hearing, but it shall be proceeded to the main trial (article 245 para.5 of the CPC), it shall be proceeded to the second hearing only if the court has not yet decided upon all objections of the parties filed during the initial hearing²⁵⁵.

3. Evaluation of the guilty plea during the initial hearing

The state prosecutor may file a guilty plea agreement together with the indictment to the court. This case is present in article 247 of the CPC. If the plea agreement under article 233 of the CPC has been filed with the indictment, the single trial judge or the presiding judge shall evaluate the plea agreement and renders the following decisions:

- a. accepts the agreement
- b. rejects the agreement, or
- c. schedules a separate hearing in accordance with the procedures on guilty pleas under article 248 and procedures on negotiated pleas of guilty under article 233 of the CPC.

In cases when the defendant pleads not guilty, the court may not sentence the defendant unless the defendant changes the plea to guilty or the court convicts the defendant after the main trial, regardless of the plea agreement.

The single trial judge or presiding judge may hold hearings in connection with the check of the indictment under chapter XV with measures of secrecy upon the request of the state prosecutor under Chapter XIII of the CPC²⁵⁶, this chapter dealing with protection of injured parties and witnesses (article 247 para.3 of the CPC).

A plea agreement under article 233 of this Code or a guilty plea agreement under article 248 of the CPC may be considered by the court at any time prior to conclusion of the main trial²⁵⁷.

²⁵⁴ Article 245 para. 5 of the CPC.

²⁵⁵ The Supreme Court of Kosovo, Circular on reviewing of indictment Gj.A 5/2014, dated 03.01.2014, page 2

²⁵⁶ The Criminal Procedure Law - Prof.Dr.Ejup Sahiti dhe Prof.Dr.Rexhep Murati, page 341

²⁵⁷ Article 247 para. 4 of the CPC

4. Guilty plea by the defendant during the initial hearing

Once the indictment has been read to the defendant and once he is instructed of his rights under article 246 para.1 of the CPC, the defendant is afforded an opportunity to plead guilty during the initial hearing.

In cases when the defendant pleads guilty on each count of the indictment under articles 246 or 247 of the CPC, the single trial judge or presiding judge shall determine whether conditions foreseen under article 248 para.1 of the CPC have been met, so, whether:

- a. the defendant understands the nature and consequences of the guilty plea;
- b. the guilty plea is voluntarily made by the defendant after sufficient consultation with defense counsel, if the defendant has a defense counsel;
- c. the guilty plea is supported by the facts of the case that are contained in the indictment, materials presented by the state prosecutor to supplement the indictment and accepted by the defendant; and any other evidence, such as the testimony of witnesses, presented by the state prosecutor or the defendant, and
- d. the indictment does not contain any obvious legal errors or factual misstatements.

In this case, the judge is the protector of the defendant's rights, so, he/she ensures that all of the above conditions have been met.

It is worth mentioning that the authors of the "Criminal Procedure Law", have replaced in their textbook formulation of paragraph 1.4 of article 248 of the CPC, which in this work is present under d) where it says: indictment does not contain any obvious legal errors or factual misstatements, by formulating provision from paragraph 1.4 of article 248 with: d) none of the circumstances foreseen by article 253 para. 1 of the CPC to dismiss the indictment exist, with the reasoning that provision of para. 1.4 of article 248 of the CPC is too general and even unclear and, as such, it may cause dilemma during practical judicial work, emphasising that the proposal for the legal formulation in question, with formulation under d), was rightly presented and argued by judge Xhevdet Elshani of the Basic Court in Prizren, at the Meeting of Judges and the State Prosecutor, lawyers and others, held some time ago as part of review-meetings for easier and unobstructed implementation of CPC provisions in practice²⁵⁸.

In considering the guilty plea of the defendant, the single trial judge or presiding judge may invite the views of the state prosecutor, the defense counsel and the injured party.

If the single trial judge or presiding judge is not satisfied that the matters provided for in para.1 of article 248 of the CPC are established, he/she shall render a ruling to reject the guilty plea and proceed with the initial hearing as if the guilty plea has not been made.

²⁵⁸ The Criminal Procedure Law - Prof.Dr.Ejup Sahiti dhe Prof.Dr.Rexhep Murati, fusnota 322, Faqe.341

Regardless of the fact that the defendant does not plead guilty during the initial hearing he/she may choose to change the plea to guilty at any time and in this case, for any defendant wishing to plead guilty under article 248 of the CPC, the single trial judge or presiding judge shall conduct, *mutatis mutandis*, a hearing under article 248 of the CPC.

5. Sentencing during the initial hearing after a guilty plea by defendant

In cases when the defendant pleads guilty during the initial hearing and when the single trial judge or presiding judge is satisfied that the matters provided for in para. 1 of article 248 of the CPC are established, he/she shall render a ruling to accept the guilty plea made by the defendant and shall proceed with sentencing, schedule a hearing to determine a matter relevant for sentencing or shall suspend sentencing pending the completion of the cooperation by the defendant with the state prosecutor. This possibility is foreseen under article 248 para.4 of the CPC make the procedure more effective and more practical.

Once the Criminal Procedure Code entered into force on 01.01.2013 application of para.4 of article 248 of the CPC caused confusion because it was understood and interpreted in different ways and, in particular, whether it is necessary to proceed with closing speeches in order to go ahead with sentencing or not in cases when the defendant pleads guilty during the initial hearing; and also whether it is necessary to establish a trial panel in cases when a 3 judges panel decides.

The Supreme Court of Kosovo has issued the legal opinion, GjA.nr.207/2013, dated 19.03.2013, on this issue, which states the following: If the defendant has pleaded guilty during the initial hearing in front of the single trial judge or presiding judge and the single trial judge or presiding judge, respectively, evaluates that the guilty plea was made in accordance with the law, i.e. all legal preconditions required by the law for the guilty plea have been met, in such a situation, the single trial judge or presiding judge, respectively, may proceed with sentencing, without proceeding to the main trial and, also, without complementing the trial panel at all even in cases when the law, for such offences, foresees that the trial panel is composed of three (3) professional judges²⁵⁹.

6. Objections to evidence in the indictment

Prior to the second indictment, the defendant may file objections to the evidence listed in the indictment. In cases when the defendant has a defense counsel engaged, he/she may also object to the evidence. The defense counsel is a vital protector of the defendant's rights.

According to article 249 of the CPC the defendant may file objections based on the following grounds:

²⁵⁹ The Supreme Court of Kosovo, Legal Opinion Gj.A no.207/13, dated 19.03.2013, page 1

- a. the evidence was not lawfully obtained by the police, state prosecutor or other government entity;
- b. the evidence violates the rules in chapter XVI of the present Code; or
- c. there is an articulable ground for the court to find the evidence intrinsically unreliable.

The state prosecutor shall be given an opportunity to respond the filed objection verbally or in writing, also, this response to the objection he/she may present during the second hearing, verbally or in writing. Also, there is a possibility for the single trial judge or presiding judge to provide the state prosecutor with a period of one (1) week to file a written response to an objection (article 251 para. 3 of the CPC).

For all evidence where an objection has been filed, the single trial judge or presiding judge shall issue a written decision with reasoning that permits or excludes the evidence. In cases when the court renders a decision by which it declares certain evidence as inadmissible, such evidence is separated from the case file and kept separated from other records and evidence. It is worth mentioning that evidence declared as inadmissible may not be examined or used in the criminal proceedings, except in an appeal against the ruling on admissibility.

For the purposes of efficiency in criminal proceedings all evidence where no objection has been filed according to the CPC shall be admissible at the main trial, unless the court ex-officio determines that admission of the evidence would violate rights guaranteed to the defendant under the Constitution of the Republic of Kosovo²⁶⁰.

Either party may appeal a decision on admissibility of evidence in front of the Court of Appeals of Kosovo, through the Court which rendered the decision, within five (5) days of the receipt of the written decision.

7. Request by the defendant to dismiss the indictment

Article 250 of the CPC foresees the possibility that the defendant may file a request to dismiss the indictment based on four basic reasons, namely because:

- a. the act charged is not a criminal offence,
- b. circumstances exist which exclude criminal liability,
- c. the period of statutory limitation has expired, a pardon covers the act, or other circumstances exist which bar prosecution, or
- d. there is no sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.

²⁶⁰ The Criminal Procedure Law - Prof.Dr.Ejup Sahiti and Prof.Dr.Rexhep Murati, page 343

Same as in the case of objection to evidence, also in case of a request to dismiss the indictment the state prosecutor shall be given an opportunity to respond to the request verbally or in writing, also, this response to the request he/she may present during the second hearing, verbally or in writing. Also, there is a possibility for the single trial judge or presiding judge to provide the state prosecutor with a period of one (1) week to file a written response to a request (para. 3 of article 251 of the CPC). Apart from this, in this case, in lieu of a response to a request filed to dismiss the indictment the state prosecutor may file an amended indictment.

For a request to dismiss the indictment filed by the defendant, the single trial judge or presiding judge shall render a justified written ruling by which it rejects the request or it dismisses the indictment.

8. Filing of an amended indictment by the state prosecutor

If the defendant files a request to dismiss the indictment before the second hearing, the state prosecutor, in lieu of a response to this request, may file an amended indictment in accordance with article 241 of the CPC within one (1) week of the second hearing.

If an amended indictment is filed against one defendant or multiple defendants, the single trial judge or presiding judge shall schedule an initial hearing under article 245 of the CPC as though the indictment was new.

Also, the defendant may file any new objections about evidence under Article 249 of the CPC or requests to dismiss the indictment under Article 250 of the present Code, but only as to those parts of the indictment that have been amended. If the defendant does not renew his/her previous objections, or he/she presents previous requests, the single trial judge or presiding judge shall conclude that those objections or requests are not relevant to the amended indictment and shall not consider them further.

Also, the state prosecutor may only amend the indictment once, unless he/she has obtained new information that requires the indictment to be amended.

9. Dismissal of indictment

For every request to dismiss the indictment filed by the defendant under article 250 of the CPC the single trial judge or presiding trial judge shall render a ruling to dismiss the indictment and to terminate the criminal proceedings if he/she determines that:

- a. the act charged is not a criminal offence,
- b. circumstances exist which exclude criminal liability,
- c. the period of statutory limitation has expired, an amnesty or pardon covers the act, or other circumstances exist which bar prosecution; or

- d. there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.

In rendering a ruling on dismissal of the indictment and termination of the proceedings, the single trial judge or presiding judge shall not be bound by the legal designation of the criminal offence as set forth by the state prosecutor in the indictment.

Either party may appeal a ruling on the request to dismiss the indictment in front of the Court of Appeals of Kosovo, through the Court which rendered the ruling, within five (5) days of the receipt of the written ruling.

It should be said that apart from the single trial judge and presiding judge, the state prosecutor may also dismiss the indictment when he/she, on the response to the request to dismiss the indictment filed by the defendant under article 250 of the CPC, finds that the request to dismiss the indictment is grounded and renders a ruling to dismiss the indictment and terminate the proceedings.

10. Conclusion

- Implementation of the Initial Hearing, by judges who are given this responsibility as well as precise application of provisions of the Criminal Procedure Code, represents assistance for parties to the proceedings and the court that at the end renders a decision supported on elaborated facts and evidence.
- A merited decision, always supported by evidence and proof, protects all parties, but, it also increases reputation of the Judiciary and promotes justice.
- It is very important that the Initial Hearing is scheduled and held within the foreseen legal deadline, and that is concluded as it merits, in accordance with the Criminal Procedure Code.
- Aiding circumstance in this case such as the guilty plea agreement, defendant's guilty plea, in this phase makes criminal proceedings very effective and practical, so, contribution of the parties to the proceedings has its importance in relation to a just conclusion which is accepted by everyone, therefore, effectiveness of criminal proceedings perhaps needs further improving, to harmonise it with the most advanced international acts and always having in mind that human rights need to be respected.

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