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A DEFENDANT – RIGHTS OF THE DEFENDANT IN CRIMINAL PROCEEDINGS

ABSTRACT

Rights of the defendant in criminal proceedings are guaranteed by the Constitution and the Criminal Procedure Code of Kosovo, as well as by International Conventions, which organs executing the criminal proceedings are obliged to respect as such. In this work, these rights shall be looked at in detail, the legal status of the defendant in criminal proceedings, during different stages of the proceedings. Particular attention shall be given to the rights of the defendant during all stages of the proceedings, as well as legal remedies available to the defendant for effective defense of his rights.

Keywords: defendant, criminal proceedings, legal remedies, defense counsel, prosecutor, court, police.

Introduction

Criminal proceedings consists of entities, the Court, the Prosecution, the defendant as well as other entities during different stages of the criminal proceedings such as injured party, expert, witness etc.

The criminal proceedings start against the defendant as the subject when a grounded suspicion exists that he committed a criminal offence. The person that commits a criminal offence is the subject of the criminal offence, and at the same time an active subject of the criminal proceedings.

Whereas, a suspect is the person who might have committed the criminal offence or that hold information about the criminal offence. The criminal proceedings against this person have not started formally, but, he also has some rights during the pre-trial phase or during other stages of the proceedings. The suspect may not be questioned without being explained the reasons of his detention and also without engaging a defense counsel for him, since this consists an inadmissible evidence, which at a later stage may be proclaimed as such, except in cases when we deal with

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waiving of the right for mandatory defense-but in this case also a defense counsel is assigned in the capacity of an adviser.

In cases when the grounded suspicion exists that a person committed a criminal offence, and when there are sufficient evidence to this against him, execution of the criminal proceedings start and implementation of procedural legal norms which are linked to the rights and obligations of the defendant but also of the organs that start these proceedings. So, the organs that conduct the criminal proceedings, namely the Court, Prosecution, Police, shall identify the defendant and if possible also identify him as the person suspected of committing the criminal offence, and in order to initiate the investigative procedure his identity and address should be verified. All of this since the criminal proceedings may not be conducted against two persons if actions were undertaken by only one of them. It is not an obstacle for investigations to start against a person, against whom the criminal proceedings are being conducted, as person NN if the criminal offence exists, actions were undertaken and the consequences are known, but whose identity or residence is not known.

A suspect can be a person of any age. So, a suspect can also be a child, whereas the defendant gains this capacity from 18 years of age, regardless of whether he has abilities to act or not, and if he is a minor because according to the law the criminal proceedings may be conducted even against a minor above 14 years of age. The defendant, at the same time is also an active person in the criminal proceedings since he shall personally be present during the criminal proceedings. This active role of the defendant is particularly evident when his duty is to respect restrictions of his rights.

Position of the defendant is regulated and promoted during the last decades by the international positive law and the defendant is a subject equal to the other subject in the criminal proceedings. Main international acts that guarantee standards for a fair trial are:

- International Covenant on Civil and Political Rights (ICCPR) article 14 item 1, which stipulates that “all persons shall be equal before justice organs”.
- UN Declaration on Human Rights of 1948, which we come across in article 11 para. 1 of the Declaration with the formulation “everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.
- European Convention on Human Rights, article 6 para. 1, the right to regular proceedings, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

These principles are implemented in the Constitution of the Republic of Kosovo and they are elevated to standard principles in the Criminal Code of the Republic of Kosovo, Criminal Procedure Code of the Republic of Kosovo, Juvenile Justice Code.

CPC in its general provisions has foreseen as main principles:

The freedoms and rights of the defendant may be restricted before a final judgment has been rendered only under the conditions defined by the present Code²⁶³.

A criminal sanction may be imposed on a person who has committed a criminal offence only by a competent, independent and impartial court in proceedings initiated and conducted in accordance with the present Code²⁶⁴.

Presumption of innocence of the defendant and *dubio pro reo*, any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court²⁶⁵.

Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant (*in dubio pro reo*)²⁶⁶.

Principle *ne bis in idem*, no one can be prosecuted and punished for a criminal offence, if he or she has been acquitted or convicted of it by a final decision of a court, if criminal proceedings against him or her were terminated by a final decision of a court²⁶⁷.

A final decision of a court may be reversed through extraordinary legal remedies only in favour of the convicted person, except when otherwise provided by the present Code²⁶⁸.

A fair trial, impartial and within reasonable time, “any person suspected or charged with commission of a criminal offence has the right to an impartial criminal proceedings implemented within a reasonable time²⁶⁹.

The principle of an independent court shall be independent and decide in accordance with law²⁷⁰.

The principle of equality of arms, the defendant and the state prosecutor have an equal status in criminal proceedings²⁷¹.

Legality of deprivation of liberty and decision rendered speedily “any person deprived of liberty by arrest or detention, shall be entitled under the procedures provided by the present Code to take proceedings by which the lawfulness of his arrest or detention shall be decided by a court speedily and his release ordered if the detention is not lawful²⁷².

²⁶³ CPC art. 1 para. 3

²⁶⁴ CPC art. 2

²⁶⁵ CPC art. 3 para.1

²⁶⁶ CPC art. 3 para.2

²⁶⁷ CPC art. 4 para.1

²⁶⁸ CPC art. 4 para.2

²⁶⁹ CPC art. 5 para. 1,2,3,4

²⁷⁰ CPC art. 8 para. 1,2

²⁷¹ CPC art. 9 para. 1

²⁷² CPC art. 12 para. 1,2

The principle of public hearing, a court trial is public, except in cases when this is foreseen by legal provisions and it may be restricted²⁷³.

The principle of a criminal sanction ”a criminal sanction may be imposed on a person who has committed a criminal offence only by a competent, independent and impartial court in proceedings initiated and conducted in accordance with the present Code”²⁷⁴.

According to the Criminal Procedure Code, the following expressions are determined: a suspect – a person who is suspected by the police and prosecutor that has committed a criminal offence, but against whom no investigations have been initiated, a defendant – a person against whom criminal proceedings are being conducted, accused – a person against whom an indictment has been filed and a court trial is scheduled, convicted person – a person who is found guilty of a criminal offence by a final judgment.

Rights of the defendant

The right to be presumed innocent

This right of the defendant is defended during all stages of the criminal proceedings until his guilt is decided upon by way of a final judgment. Based on this obligation, the defendant is free of obligation to prove his innocence, he is not obliged to present evidence and to defend himself that he is innocent, he may not incriminate himself, but this right does not defend him from execution of criminal proceedings against him and from limits to his rights. In promoting this principle the defendant:

- Is not obliged to plead his case
- Is not obliged to confess guilt
- Has the right to defend himself
- Is obliged to be present in the proceedings
- Is not an obstacle to confess guilt

The defendant is not obliged to prove his innocence, but, the presumption is not an obstacle for him to confess guilt, this principle is often violated and prejudiced by the police, prosecution, court, media etc.

The right to evidence and decisive facts

This right of the defendant consists on the obligation of the prosecution, court and other organs that execute the criminal proceedings to establish facts that go to the detriment as well as in favour

²⁷³CPC art. 293 para.1

²⁷⁴ CPC art. 2

of the defendant, and on which the final decision depends. If a fact, which goes to the detriment of the defendant, is not fully established it shall be interpreted in favour of the defendant even though it is not fully established but it must be a decisive fact.

The right of the defendant according to the principle ne bis idem

It enables that no one is prosecuted or convicted for a criminal offence for which he was acquitted or if the charge was dismissed by a final judgment of a court. It must be said that when applying this principle the subjective and objective identity of the indictment shall exist by a judgment i.e. that the concluded proceedings acts against a determined person whereas the objective identity means that there must be a full match of the elements of the criminal proceedings for which the criminal proceedings were completed with elements of a criminal offence for which another proceedings cannot be executed.

The right to be informed about the reasons of detention or charges

It means the right of the defendant not to incriminate himself, the right to remain silent, not to incriminate himself or any of his relatives, prohibition to impose guilt or any statement through torture, force, threat, promise etc.

The right to be informed of his rights

It is the right of the defendant to, immediately after he is deprived of liberty, be informed of reasons for his arrest in a language that he understands, the right to a defense counsel of his choice, the right to inform a member of family of his arrest and all of this shall be recorded in writing.

The right to remain silent

This right of the defendant consists on not giving a statement, not to give answers to questions posed, not to incriminate him or confess guilt. Organs that conduct the criminal proceedings are obliged to identify the person whereas according to this legal obligation the defendant must identify himself stating the information. This information must be accurate but according to this obligation under no circumstances he must be forced to state this information accurately, but this is no hindrance to conduct criminal proceedings since this does not mean that he, during a later stage in the criminal proceedings, remains silent since this is not in his best interest. There is an exemption to this right if the defendant is announced a cooperative witness.

The right to a defense counsel

It means the right to have a defense counsel during the whole of the proceedings, before each questioning and during the questioning the defendant is instructed of this right. Mandatory defense is present when defendants are minors for domestic violence when a defendant shows signs of mental disorders. The right to a defense counsel never expires, this right includes a defense even when the defendant waives this right. The defendant has a right to a defense counsel at a public expense in case the criminal proceedings are conducted for a criminal offence punishable with imprisonment of 8 years or more, in cases when appointment of a defense counsel is dictated by interests of justice and in cases when the defendant cannot meet expenses for a defense, also, the defendant has the right to have three defense counsels at the most. Whereas the defense counsels shall be given ample time to prepare their defense.

The right of access to evidence

The defendant and the defense counsel may at any time have access to the case files prior to the official investigations, after initiation of investigations by the prosecutor, after conclusion of investigations and after indictment is filed.

The right to propose evidence

The defendant has the right to propose evidence and proof in his favour whereas the defense counsel is obliged to challenge evidence presented by the prosecutor and the injured party and to propose evidence that go in favour of the defendant.

The rights of the defendant once the indictment is filed

After filing of indictment the defendant has the right to:

Receive a copy of the indictment; that the judge ensures that the defendant has a defense counsel and to understand the charges against him included in the indictment, as well as to give him the opportunity to plead guilty or not guilty. To be notified by the judge of his right to submit a request to dismiss the indictment or to challenge evidence within 30 days or prior to the second hearing. To be notified of his right to propose witnesses and evidence which go in his favour.

The rights of the defendant during the main trial

The defendant has the right to a timely notification about the main trial. Presence of the defendant in proceedings is ensured through a summons, the deadline is eight days before the main trial. The

summons is handed over in person and he is notified of his right to a defense counsel as well as of the consequences of not appearing since the court holds the right to compel him. This is due to the reason that no court session can be held without the defendant being present, if he is regularly summoned and he did not respond to the court summons. The obligation for order during the main trial and the only possibility that the law has foreseen for a main trial session to be held without defendant's presence, is his removal from the main trial session due to failure in keeping the order during the main trial session.

The right of the defendant in front of a court of a second instance

The defendant has the right to participate in a session decided upon an appeal of the second instance but there is no obligation for this. It derives from this that he is obliged to inform the court about change of address whereas the session may be held even without his presence.

The right to ordinary and extraordinary legal remedies

The ordinary legal remedies that the defendant may exercise are the appeal against the judgment and the appeal against the ruling, whereas the extraordinary legal remedies are:

1. A Request for reopening of criminal proceedings, in cases when evidence are presented for which he was not aware of or was unable to present during the main trial and which would have led to a different judgment being rendered.
2. Extraordinary mitigation of punishment, in cases when after the final has become judgment final, new circumstances occur which did not exist when the judgment was rendered or, although they existed, were unknown to the court at that time, and such circumstance obviously would have led to a less severe punishment.
3. A Request for protection of legality is an effective remedy against a final decision or against judicial proceedings which preceded the rendering of that decision, which may be filed on the grounds of a violation of the criminal law and violations of the provisions of the criminal procedure.

Waiver of rights

Is done in voluntary manner by the defendant after he is informed of his rights.

It must be in writing and after he is informed of his rights.

He is informed about the consequences of waiving his rights during the later stages of the criminal proceedings.

The defendant as a passive subject of the criminal proceedings

Obligation to respond to the summonses implementing the criminal proceedings.

Obligation to respect limitations of his rights.

Conclusion

The status and the role of the defendant during the criminal proceedings has changed pursuant to the time when Codes were issued, beginning with the Provisional Criminal Code of Kosovo and then the current Criminal Procedure Code. So, with the new Criminal Code, in force since 01.01.2013, the right of the defendant are more emphasised and more advanced in each stage of the criminal proceedings. Hence, in the very pre-trial stage, at the time when the criminal proceedings are not implemented yet and all the way up to the later stages, when investigations and other measures start being applied against him until the criminal proceedings end, but also, in accordance with the ordinary legal remedies and during other stages subject to extraordinary legal remedies.

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