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MANDATORY DEFENCE IN CRIMINAL PROCEEDINGS

General observations on the defence of the defendant in criminal proceedings

1.1 The right of the defendant to defence

The right of the defendant to defence is considered as one of the most important rights in criminal proceedings. The defendant can exercise this right either personally or through a professional defence lawyer.

The necessity of appropriately determining the material truth compels the authorities that implement the proceedings (police, prosecution, court) that in a correct and complete manner prove the facts which are important for reaching a legal decision. The Criminal Procedure Code of Kosovo, in Article 7 par. 2 foresees that “Subject to the provisions contained in the present Code, the court, the public prosecutor and the police participating in the criminal proceedings have a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his or her favour, and to make available to the defence all the facts and pieces of evidence, which are in favour of the defendant, before the beginning of and during the proceedings”. From this we can derive that the main burden for proving the existence or non-existence of guilt on the part of a defendant that is being tried is on the

1 Dr. Ejup Sahiti, Criminal Procedure Law, Prishtinë 2005, page 90.

authorities that implement the proceedings and that the role of the defendant can be subject to his or her choice. However, the appointment of a defence lawyer can assist in the sense of realising his or her rights in the procedural aspect and to avoid the potential consequences which the defendant may face in absence of legal knowledge. The existence of professional defence for the defendant is important also due to the fact that during the development of the criminal proceedings against him or her, the defendant is in a different spiritual and psychophysical condition.

Therefore, with the aim of realising this defence the law has foreseen the principle of equality of arms which balances his or her position with that of the plaintiff authorised as a party in the proceedings except when foreseen differently by the Code (Article 10, paragraph 1 KCPC). Furthermore the KCPC in a very clear manner specifies this principle, as it foresees in Paragraph 2 of this Article that the defendant has the right to declare himself and he should be allowed to declare all the facts in his favour. He has the right to examine or require the examination of witnesses against him, and require the presence or examination of witnesses in his favour under the same conditions applicable for witnesses' against him. Therefore, the principle of equality of arms means that both parties in litigation should have equal opportunity to present their declarations in relation to the case. As such this principle should be guaranteed throughout all the phases of the criminal proceedings, regardless of the level of punishment foreseen for that criminal act. Therefore, authorities that enforce the law, the Police, Public Prosecution, preliminary procedure Judge or the chairperson of the tribunal, including the Judge confirming the indictment, are obliged to instruct the suspect or defendant on his rights to hire a defence attorney and that the defence attorney has the right to take part during his examination.

Therefore, with the objective of equally treating the defendant with the authorised plaintiff and in relation to the above mentioned, we can ascertain that the defendant through all the phases of the criminal proceedings can have a defence attorney and that in some certain cases defence is mandatory. In this regard the Criminal Procedure Code of Kosovo, Article 12, paragraph 5 foresees that "the court or other competent authority conducting criminal proceedings shall inform the defendant of his or her right to a defence counsel, as provided for by the present Code".

Therefore, based on all the above mentioned we can freely conclude that defence in a criminal proceeding in accordance to the Criminal Procedure Code of Kosovo, can be an:

- Optional defence
- Mandatory defence, which will be the object of further study in this paper.

1.2. Appointment of a defence attorney, declining and inability to decline defence

The defendant is free to appoint a defence attorney according to his choice. If he does not appoint a defence attorney, his legal representative, spouse, extramarital spouse, next of kin of direct blood lineage, adopted parents, adopted child, brother, sister and supporter, can appoint a defence attorney for him, but not against his will, Article 69, paragraph 6 of the CPCK. The defendant can have up to three defence attorneys and the right to defence is considered to have been satisfied when one of these defence attorneys is present in the proceedings². A defence attorney can only be one who is a registered lawyer with the Bar Association and under conditions determined by law a lawyer can be replaced by an intern, while the latter cannot be presented as a defence attorney before the Supreme Court of Kosovo, however for criminal cases which deal with crimes for which a penalty of less than five years of imprisonment is foreseen, the intern lawyer can replace the lawyer only if he has passed the bar exam.

One can decline a defence attorney, except for in cases of mandatory defence (Article 73 of the CPCK), if the decline is made in clear circumstances, in an informed manner and voluntarily. The decline of defence has to be done in writing and has to be signed by the suspect or the defendant and the authority which is implementing the procedure or is done verbally through a audio or video recording, the authenticity of which is verified by the court.

Persons under the age of eighteen can decline the right to appoint a defence attorney with the approval of the parent, guardian or representative from the

² Criminal Procedure Code of Kosovo, Article 71 paragraph 2, page 264,

centre for social work, except for in cases of domestic violence in which the parent is involved or the guardian to whom he/she is entrusted, then the parent or guardian cannot give their consent to the declining this right.

Persons that exhibit signs of mental instability or mental inability cannot decline the right to appoint a defence attorney.

When the suspect of the defendant who has declined the right to defence subsequently requests such a right, he can exercise this right immediately.

2. MANDATORY DEFENCE

2.1 On mandatory defence in general

Mandatory defence means the existence of circumstances under which the criminal proceeding against the defendant cannot be applied without defence. These circumstances are determined in a specified manner through the provisions of the CPCR and are foreseen in relation to the physical and psychophysical attributes of the defendant in the procedure, with the criminal act or the penalty foreseen, as well as in cases where the defendant cannot cover the expenses of a defence attorney.

According to Article 73, paragraph 1 of the CPCR, the defence is mandatory, and hence the defendant should have a defence attorney in the following cases:

- From the initial examination where the defendant is a deaf-mute or exhibits signs of mental instability or disability and hence is unable to successfully defend himself,
- During examination while in detention and throughout the times while he is detained,
- From the filing of the indictment, where the indictment against him is related to a crime for which a penalty of at least eight years of imprisonment is issued, and
- In proceedings based on extraordinary legal remedies where the defendant is a deaf-mute or exhibits signs of instability,

mental disability or has been issued a penalty of long-term imprisonment.

In such cases the defendant should have a defence attorney despite his will, even though this practically can be questioned in certain cases, specifically when the defendant is examined during detention or from the moment of an indictment being filed for a crime for which a penalty of at least eight years of imprisonment can be issued and when in a persistent manner he objects to the presence of any defence attorney that could be appointed to him. Surely the objective of the legislator in the concrete case was to provide larger reassurances and procedural guarantees on observing the rights of the defendant.

Furthermore, if the defendant in a case of mandatory defence does not hire a defence attorney, and the appointment is not made by anyone in accordance with Article 69, paragraph 6 of this Code, the president of the court or the competent authority which applies the procedure in the preliminary phase, appoints an ex officio defence attorney under public expenses. When a defence attorney is appointed ex officio after the indictment has been filed, the defendant is informed of this when the indictment paper is served.³ According to Article 127, paragraph 3 of the CPCK, mandatory defence is also applicable when a defendant who does not have a defence attorney is to be served with the verdict through which he is issued with an imprisonment punishment, while the verdict cannot be delivered in the previous address. In such a situation the court will appoint a defence attorney who exercises this duty until the address of the defendant is found. The defence attorney is allowed a necessary period to acquaint himself with the paperwork and is subsequently handed with the verdict and the procedure continues.

When there are no conditions for mandatory defence as in the previously mentioned cases, the defendant, in accordance to Article 74, paragraph 1 of the CPCK, is appointed with the defence attorney under public expenses upon his request or that of his relatives (Article 69, paragraph 6 of the CPCK), but not against the will of the defendant:

³ Criminal Procedure Code of Kosovo, Article 73 paragraph 2, page 264,

- The procedure is applied for crimes punishable with at least eight years imprisonment, or
- When the defendant cannot pay the expenses of defence and if the court of competent authority which applies the procedure in the preliminary phase determines that the appointment of a defence attorney under public expenses is in the interest of justice.

This defence is different from mandatory defence in line with Article 73 of the CPCK, as it cannot be applied contrary to the will of the defendant, either in a general sense of defence or that of the appointed defence attorney, and that this particular defence is related to the crime punishable with at least eight years of imprisonment, or when the defendant cannot pay the costs of defence and the court determines it to be in the interest of justice to appoint a defence attorney. Therefore, according to the conditions foreseen by the Code, the defendant who cannot cover the cost of the defence and due to this he cannot engage an independent and experienced defence attorney who is competent in the field of the given crime, upon his request an independent defence attorney is appointed covered by budget funds when this is in favour of justice (Article 12, paragraph 4 of the CPCK) .This form of defence in the theory of criminal proceedings is known also as defence for the poor. However, the appointment of an ex officio defence attorney in such cases and in particular from the time of the Criminal Procedure Code of Kosovo entering into force since 2004 and onwards, was often criticised by the monitors of law enforcement, as often this was used to fulfil only the legal procedural requirements, while from a substantial aspect this was not satisfactory, a circumstance which has brought the defendant into an unfavourable position and has damaged his rights.

It has been concluded that legal representation from defence attorneys in criminal cases has often been below standards and ineffective. This could violate the legal framework of Kosovo, the Code of Professional Ethics of lawyers and international law⁴. This includes both the defence attorney appointed with authorisation by the defendants or their family members and also those appointed ex officio.

4 Ineffective legal representation, Department for Human Rights and Communities / System for monitoring of Legal System / OSCE

No evidence gathered during the examining of the defendant is considered as admissible evidence in the proceedings if the report does not include the instructions on the right to appoint a defence attorney and the declaration of the suspect or the defendant related to this instruction. Furthermore, inadmissible evidence in criminal proceedings is considered the examination of the defendant when conducted in violation of provisions from Article 231, paragraph 2 and 3 of the CPOK, which covers the rights of the defendant on assistance from a defence attorney and consultations with the attorney before and during the examination session.

2.2 Defence of the injured party (authorised representative)

According to Article 82 of the Criminal Procedure Code of Kosovo, the injured party has an authorised representative from the outset of the criminal proceedings when:

- The party is a child,
- The party is family related with the defendant,
- The proceedings are applied for crimes under Article 139 of the of the Criminal Code of Kosovo or for crimes against sexual integrity from Chapter XIX of the Criminal Code, except for crimes under Article 203 of the Criminal Code of Kosovo,
- The injured has mental instabilities or inabilities, or
- The court determines that the injured is unable to defend himself and requires the assistance of an authorised representative.

The capacity of the authorised representative in these cases is exercised by a professional legal defender (lawyer), with the aim of defending the interest of the injured in the criminal proceedings. The appointment of the legal representative in these cases is foreseen to be mandatory having in mind either the nature of the crimes which have caused the injury (victims of trafficking and victims of crimes against sexual integrity) or taking into consideration the degree of psychophysical development of the injured, like children or persons with mental instability or inability.

2.3 Mandatory defence in criminal proceedings against minors

When we refer to the institution of mandatory defence, there is no doubt that cases of mandatory defence for minors in criminal proceedings have to be treated with a special attention also. If we look at local criminal legislation, specifically Criminal Law on minors before the amendments, it is worth mentioning that Criminal Law on Minors of Kosovo in Article 40, determined that: “a minor has a right to defence in cases of mandatory defence”, which means that the minor was appointed with a defence attorney only in cases of mandatory defence determined by the CPCK, which were elaborated earlier in this sense.

However, after the amendment made to the Criminal Law on Minors, through which the name Criminal Law on Minors was changed to Justice Code for the Minors, this Code in Article 43, determines that: a minor shall have a defence attorney from the outset to the conclusion of the proceedings⁵. This novelty represents a significant importance as far as guarantees for professional legal protection of a minor is concerned in a criminal proceeding against him.

Even though a careful reading of this Article confronts one with a dilemma, as in the fourth paragraph (4) of this Article it is determined that upon the request of the minor, of the legal representative or his family member, a defence attorney is appointed under public expense, if he cannot cover the costs of the defence himself, but not against the will of the minor. This fact can cause one to doubt if defence is mandatory or not in criminal proceedings against minors. However, taking into consideration the best interests of the minor, a defence attorney has always to be appointed even in cases when a minor refuses such a thing.

In addition to local legal acts and international instruments on human rights, specifically the European Charter of Children’s Rights, Article 40, paragraph 2, item (b) of this Charter, determines the minimum legal guarantees for minors in criminal proceedings, and that in addition to respecting the principle of presuming innocence amongst other rights that

⁵ Article 43, par. 1 of CMR

⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6

are guaranteed is specifically the obligation to provide legal support for the minor in the preparation and presentation of an effective defence in the criminal proceedings against him.

This means that states which have ratified this charter should undertake measures to create conditions in regard to upholding the minimum of rights in criminal proceedings against minors, where the provision of professional assistance is foreseen due to the best interests of the minor during a criminal process. Furthermore, the non provision of legal assistance by a professional defence attorney would represent a violation of children's rights as determined by this important international document.

When we refer to similar international instruments, also Article 6 (3) of the European Convention on Protection of Human Rights and Fundamental Freedoms (ECPHRFF), provides individuals with the right "to defend himself personally or through legal assistance of his choice or if he does not have sufficient funds to pay for legal assistance, this will be provided free of charge when the interests of justice require such a thing"⁶.

This Article of the European Convention on Protection of Human Rights and Fundamental Freedoms determines the right to defence where this is necessary, the provision of legal assistance free of charge as required by the interests of justice, which to a large degree are related to observing the principle of equality of arms as mentioned above.

Conclusion

In general the provision of mandatory defence by a professional legal defence attorney is considered as a great achievement for the justice system and also a guarantee for the proper application of criminal proceedings against the defendant. Even though the right of the suspect or defendant to legal defence is considered as one of the most important rights of the defendant in the procedural aspect and one of the elementary standards which determines the possibility of observing human rights, equally important is for legal representation through a defence attorney to be practical and effective, which unfortunately is not up to standards in Kosovo.

This phenomenon was also an object of frequent criticism from international monitors of the justice system in Kosovo.

The achievement of a higher standard in this regard should be a primary objective of the law enforcers in Kosovo and the justice system in general.

LITERATURE:

- Criminal Procedure Law, Dr. Ejup Sahiti, Prishtina 2005,
- Criminal Procedure Code of Kosovo,
- Criminal Law on Minors,
- Justice Code for Minors,
- European Convention for Human Rights and Freedoms,
- International Convention for Children's Rights – Peking Rules,
- Non-effective legal representation, OSCE report.