Legal Instruments for Determining Personal Insurance Measures in the "Republic of Albania"

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Received: 05 May 2022 / Accepted: 16 May 2023 / Published: 20 May 2023

Doi: 10.56345/ijrdv10n1s111

Abstract

Any restriction of freedom must be objectively justified and for a duration no longer than is necessary. In exceptional cases, when the limitation of freedom is considered necessary, it must guarantee the respect of rights and guarantees of a procedural nature, provided for in international acts that are mandatory to be implemented in domestic legislation. The right to liberty means only protection from restriction of physical liberty. It is not easy to define the meaning of the term "restriction of freedom", but in general we will understand this as the obligation to stay in a limited space for a considerable period of time. In every country in the world, people are arrested and detained on suspicion of having committed a criminal offence. Often, these individuals are kept restricted from their freedom for weeks, months or even years before a competent court pronounces a decision on their case on the merits. The conditions in which these individuals are kept are often the worst in the internal penitentiary system. Their legal status is in jeopardy as they are suspects but have not pleaded guilty and they are under enormous pressure, due to the damage they suffer in economic terms or separation from family and community. The extended use of arrest in prison or at home, in the Republic of Albania, evidences a poor recognition of the conditions and criteria for assigning coercive personal security measures, by the actors of the criminal justice system, in particular by the prosecution and the court. However, the role of the courts remains fundamental not only for the correction of procedural actions carried out by the prosecution and the police, but especially for the guarantee of freedoms and fundamental rights, as well as the principles of the rule of law.

Keywords: *Reasonable Suspicion, Security Measure, Jail Arrest, House Arrest, Substitution, Pretrial Detention*

1. Introduction

The purpose of this paper is to analyze the most important international acts that recognize and promote the right to freedom and security, the jurisprudence of the European Court of Human Rights, our internal legislation of the Republic of Albania in this area of setting measures of security with arrest, as well as the findings that have resulted from what belongs to judicial practice for the assignment of measures of security with arrest. Given that the forms of restriction of freedom according to international standards and Albanian legislation are among the most diverse, the main focus of this dissertation is the analysis of standards and Albanian judicial practice, for determining the measure of personal security "prison arrest" and "arrest in house". This is because the forms of restriction of freedom are different and depending on

them, the criteria and procedural guarantees for the persons to whom they are given also change.

2. Security Measures in the Criminal Proceedings.

2.1 Understanding security measures

Bearing in mind the requirement that the criminal proceedings have a normal flow to fulfill its purpose, in accordance with the procedures and deadlines provided for in the Code of Criminal Procedure, the legislator has provided in this code a series of procedural actions, including security measures . These measures should not be understood as criminal sanctions, but as tools that help the normal development of criminal proceedings and the fulfillment of its goals.

"Security measures are procedural actions that remove or limit the freedom and rights of the person against whom criminal proceedings are conducted. Their purpose is to prevent the further criminal activity of the one who has committed a criminal offense, to prevent his evasion of the proceedings, the efforts he may make to jeopardize the taking of the evidence or its authenticity, as well as to guarantee repayment of obligations arising from the criminal offense."[56]

Regarding security measures, the Criminal Panel of the Supreme Court [57] stated: "The security measure is not a criminal penalty to be used as a punitive measure for the person who is suspected of having committed a criminal offense and, on the other hand, it is not given to facilitate the work of the prosecution body in the investigation of a criminal case. Security measures are applied for reasons and criteria clearly defined in articles 229 and 230 of the Criminal Code."

There are some differences between security measures and criminal penalties:

a) The purpose of the security measures is to prevent the further criminal activity of the one who has committed a criminal offense, to prevent his evasion from the proceedings, the efforts he may make to endanger the taking of the evidence or its authenticity, as well as to guarantee the repayment of the obligations arising from the criminal offense, while the criminal penalty is a sanction whose purpose is to protect society from criminal activity, to prevent the convicted person from committing a criminal offense in the future and to rehabilitate him;

b) The criminal sentence is the result of a judicial process in which the case was resolved on the merits and the defendant's guilt was established, while the judicial process regarding the measure of insurance does not decide on guilt or innocence, but decides on the possibility or not of applying an insurance measure and if so, which one;

c) The special nature of the trial and the manner and criteria on which the conviction of the court is created for the assignment or not of the security measure are different from those of the awarding or not of the sentencing decision. The judgment of the merits is based on the evidence that proves and convinces the court, beyond any reasonable doubt as to whether or not the criminal offense is the subject of proceedings by the defendant, while the judgment on the measure of security is based on reasonable doubts based on evidence that shows the possibility of committing the criminal offense subject to proceedings and the possibility of its attribution to the defendant (famus commissi delicti).

2.2 General principles related to security measures.

2.2.1 The principle of legality

Since the freedoms and rights of the individual are based on the rule of law and are specially protected by the European Convention on Human Rights and the Constitution of the Republic of Albania, even the cases of their limitation or removal must necessarily adhere to the principle of legality, because at the end of the day, limiting or removing individual freedom and rights is the exception and not the rule.

The basic principle on which they find support and apply the security measures is the principle of legality because the ECHR has determined that "*Everyone has the right to freedom and personal security. No one can be deprived of their freedom, except in the following cases and in accordance with the procedure provided by law*"[58]. Even in the Constitution

56 Islami, H; Hoxha, A; Panda, I. (2011). "Criminal Procedure". pg.301.
57 Decision of the Criminal Panel of the Supreme Court nr.489, datë 12.12.2000.
58Article 5 of the ECHR, "Everyone has the right to freedom and personal security. No one can be deprived of their freedom, except in the following cases and in accordance with the procedure provided by law:
a. when lawfully imprisoned after a sentence given by a competent court;

of the Republic of Albania it is determined that *"Limitations of rights and freedoms can only be established by law,... and they cannot violate the essence of freedoms and rights and in no case can they exceed the limitations of provided for in the European Convention on Human Rights"*[59].

In Article 5 of the ECHR entitled *"The right to freedom and security of the person" it is predetermined that: "Everyone has the right to freedom and personal security and that no one can be deprived of their freedom, except when arrested or is legally prohibited from being brought before the competent judicial authority upon reasonable suspicion that he has committed a criminal offense or when it is reasonably deemed necessary to prevent his commission of the offense or his departure after its commission, and in in accordance with the procedure provided by law".*

In the second paragraph of Article 27 of the Constitution, and specifically in its point c, it is provided that: "*The freedom of a person cannot be restricted, except when there are reasonable suspicions that he has committed a criminal offense or to prevent him from committing the offense criminal offense or his removal after committing it."*

Only in cases of compliance with the principle of legality, which forms the basis of the application of security measures, it can be said that the security measure fulfills a legal purpose, the purpose of guaranteeing security needs, respecting the freedoms and rights of the individual, and minimizing any possibility of arbitrary deprivation of the freedoms and rights guaranteed in the ECHR and the Constitution. Any deviation from legal procedures carries with it the risk of arbitrary use of security measures in order to fulfill an illegal objective, which contradicts both the provisions of local law and the ECHR

Determining the exceptional nature of security measures [60], completed with the determination that the only body that can assign a security measure is the "court" as well as the provision of the possibility of appeal, revocation or replacement of the measure within the judicial system in accordance with legal procedures, guarantees that the deprivation of the individual's freedoms and the rights provided for in the ECHR and the Constitution when done in accordance with the principle of legality, pursues a legitimate purpose and minimizes the risk of arbitrariness.

The requirement of legality has been interpreted by the ECHR in the framework that refers to both the procedure and the substance. [61]. *In Kurt v. Turkey* [62] *The ECtHR stated that "... any deprivation of liberty should not be implemented only in accordance with the substantive and procedural rules of local law, but should also adhere to the main purpose of Article 5, namely the protection of the individual against arbitrariness"*.

The principle of legality does not only determine the cases and procedures of restriction or removal of freedom and rights, but also determines the rights enjoyed by each individual who is subject to a procedure related to security measures and the obligations of the competent bodies. It is important that the judgment regarding the security measure to guarantee "equality of arms" is subject to the principle of "adversariality". The person must be provided with the facts and evidence presented by the prosecutor, the decision of the court that determined the measure of security, have the right to be represented by counsel, be given time and be provided with the necessary facilities to prepare the defense his, to have the right to present his objections, to have the right to appeal which will be examined within a quick period, as well as any other right specifically related to security measures[63], or that is included in the corpus of law for a regular legal process [64]. The competent bodies have the obligation not only to make these rights known to the person, but also not to take any measure that prevents the person from exercising these rights.

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b. when he is arrested or legally detained for non-compliance with an order issued by the court in accordance with the law or to guarantee the fulfillment of an obligation provided by law;

c. when he is arrested or lawfully detained to be brought before the competent judicial authority on reasonable suspicion that he has committed a criminal offense or when it is reasonably deemed necessary to prevent him from committing a criminal offense or his departure after its commission ;

d. when a minor is lawfully detained for the purpose of supervised education or for his lawful detention in order to be brought before the competent legal authority;

e. when legally prohibited to prevent the spread of contagious diseases, mentally ill persons, alcoholics, drug addicts or vagrants;

f. when he is lawfully arrested or detained in order to prevent his unauthorized entry into that country, or if deportation or extradition proceedings are being carried out against him;

59Constitution article 17.

60 Article 5 of the ECHR and Article 27 of the Constitution.

61Macovei, M.(2002). The right to freedom and security of the person, pg. 9

62 ECHR, Kurt v. Turkey, 28 May 1998.

63 Article 5 (3), (4), (5) of the ECHR and Article 28 of the Constitution.

64 Article 6 of the ECHR and Article 31 of the Constitution.

2.2.2 The personal character of the security measures.

The insurance measure has a strictly personal, individual character, and therefore the request for its appointment, the review, the appointment decision and its implementation must be made individually, for each specific person. The use of the qualifying epithet "personal" used by the legislator in the title of Chapter I "Measures of personal security", in title V "Measures of security", but also the content of articles 228, 229 and 230 of the Penal Code that make words about the conditions and criteria for determining the amount of insurance clearly show that it is about a single person, which also shows the individuality of the amount of insurance.

Despite the fact that the prosecutor can proceed in a joint criminal case because we are in front of the cases provided for in article 79 or 92/b of the Penal Code, he cannot address the court with a joint request to set security measures simultaneously for some people, since such an action not only contradicts the personal nature of the insurance measure, but is also legally unfounded because there is no legal basis to legitimize such an action. In such cases (when the prosecutor turns to the court to set a security measure simultaneously for several persons) as a result of the expansion of the meaning of Article 79 of the Penal Code, which refers to the joining of proceedings, a confusion is mistakenly made of the cases of merging proceedings related to the foundation of preliminary investigations (the process of proving the charge), with those related to special actions of this phase, such as the request for determining the amount of personal insurance..

The reference that can be made to the provision of Article 92 of the Criminal Code is also wrong, because the implementation of this provision is closely related to the cases of submission of requests for trial of criminal cases, trials of the merits, the evidentiary process of which can and should be part of a single judgment and as such this provision cannot serve as a legal basis to legitimize the submission of a joint request for the assignment of personal insurance measures to several persons. The provision of Article 92 of the Penal Code *"refers to the criminal case or cases in their entirety that have arrived at the court for the trial of the merits and which, not only for judicial economy, but also for the coherence of the trial process , as well as the mutual correlation they may have between the objects of the trial (when the participants in the process may be, at the same time, injured but also defendants, - see articles 79 and 92/"b" and "c " of the Penal Code), can and should be merged into a single one"* [65].

Even if we are in front of the cases provided for in Article 79 or 92/b of the Penal Code, the review of the prosecutor's request for the appointment of security measures must be done separately for each person. The prosecutor must present for each person the circumstances of the fact and the evidence on which his request is based and prove to the court that the conditions and criteria exist for determining the amount of insurance requested by him. The court must individually justify the conditions and criteria for determining the amount of insurance. The court's decision on determining the amount of insurance must be based on the analysis of the concrete actions or inactions of the person as well as his individual attitude, therefore it is necessary that the circumstances of the fact and the evidence on which the decision is based be presented and examined separately for each defendant.

Failure to comply with this rule in cases where the judgment of the request for the determination of the amount of personal insurance is made simultaneously for all the persons under investigation or the defendants makes the court's decisions wrong as the obligations arising from the article are violated:

- Article 380 of the Penal Code, because the decisions were made on unverified evidence during the judicial review for each of the persons under investigation
- Article 383 of the Criminal Code since it has not been possible to present the factual circumstances and the evidence on which the decision is based (as well as the reasons for which the court considers inadmissible the contrary evidence for each defendant), to concluded whether or not the prosecutor's request for setting the security measure should be accepted or not.

Only on the basis of the analysis of the factual circumstances and the evidence examined during the trial of the request for each person separately, the court analyzes and reasons for each person individually the existence of the conditions and criteria provided for in articles 228[66], 229[67], 230[68] of criminal code .

The personal character of the insurance measures and the necessity of submitting requests, examining and setting the insurance measure for each person separately is also related to some further actions that follow the receipt of the personal insurance measure. Such are, for example: execution actions, when the person was absent (Article 246 of the

65 Vendim i Kolegjit Penal të Gjykatës së Lartë nr. 80, datë 02.10.2007.
66 "Kushtet për caktimin e masave të sigurimit personal".
67 "Kriteret për caktimin e masave të sigurimit personal".
68 "Kriteret e veçanta për caktimin e masës së arrestit në burg".

Penal Code) then left, avoiding the investigation (Article 247 of the Penal Code), the questioning (Article 248 of the Penal Code), the determination by the executing body of the location of the detention rooms where he will be held the arrested person (in the case of arrest in prison), etc., which necessarily require to be accompanied by the corresponding court decision for each arrested person, separately.[69]

In the analysis and further actions that follow the taking of the personal insurance measure (appeal, execution, revocation or replacement of the insurance measure), assigning the personal insurance measure to many people in a single decision would bring difficulties of significantly in the formulation of the dispositive of an eventual subsequent decision by the court, which would be invested in the judgment of requests, which would be related only to one, or some of the subjects against whom the measure was taken.[70]

Even when, after reviewing the requests for revocation or replacement of the security measure (Article 260 of the Penal Code), it is concluded that they should be accepted, unnecessary (artificial) difficulty will be created for the court regarding the wording of the provision of decision if there were more than one person, while the request is made by one of them. This in the event that the first decision would be changed, it would be given to more than one person.[71]

In cases where the court of first instance, in violation of the law, has examined the request for determining the amount of personal insurance simultaneously for two or more people, the court of appeal has the obligation to repair this violation of the law, request the division for each person or I proceed for this division myself, separating the issues of each one from each other, and opening separate fascicles, as well as coming up with separate decisions for each of them.

2.2.3 Presumption of innocence and presumption in favor of freedom

The principle of presumption of innocence is an important principle that is sanctioned in Article 6 (2) of the Convention, Article 30 of the Constitution and Article 4 of the Criminal Code, which stipulates that: "Everyone is considered innocent until proven guilty with a final court decision. Any doubt about the accusation is evaluated in favor of the defendant".
This principle also extends its effects to the person to whom an insurance measure is requested to be assigned or is being implemented, and therefore the presumption in this case is for the non-assignment of the measure or the non-continuation of its implementation.

In any case when there is a request from the prosecutor for the determination of the security measure, the court that examines the request must start from the "presumption" that the person should not be assigned a security measure. Based on this "presumption", the burden of proof to prove that the security measure should be assigned to the person belongs to the prosecution body that submitted the request for the assignment of the measure. The court has the obligation to ask the prosecutor the reasons on which his request is based. It must examine in detail the facts and evidence presented by the prosecutor to conclude whether in the specific case the conditions and criteria required by the law for determining the measure exist. Only in cases where the court, after examining the facts and evidence presented by the prosecutor and the person against whom the measure is requested, considers that the prosecutor's request is based on facts and evidence that show that a security measure should be imposed on the person, it accepts it , otherwise it must reject the request. The court can also decide to partially accept the request and assign a lighter security measure when it considers that the security needs are not at the level claimed by the prosecutor or the criteria for setting the measure were not taken into account in the request.

The presumption of innocence and the presumption in favor of freedom must be taken into account by the court not only in cases of consideration of the request for the determination of the measure, but also in the review of the appeal or the request for revocation or replacement of the security measure. In cases where the security measure is being implemented, the prosecutor must constantly present to the court strong and convincing reasons that legitimize the continuation of the implementation of the measure. Although the measure initially had a legal basis over time, at a certain point, the implemented measure ceases to be reasonable due to the lack of a continuing legal basis, and as such it must be replaced or revoked with an easier insurance measure.

3. "Reformatio in Peius" in Relation to the Request of the Prosecutor

In Article 244 of the Penal Code entitled "Request for the appointment of security measures", the legislator has

69 Vendim i Kolegjit Penal të Gjykatës së Lartë nr.06, datë 19.01.2009.
70 Vendim i Kolegjit Penal të Gjykatës së Lartë nr. 30, datë 13.02.2008.
71 Vendim i Kolegjit Penal të Gjykatës së Lartë nr. 80, datë 02.10.2007.

determined that "Security measures are established at the request of the prosecutor, who presents to the competent court the reasons on which the request is based". Through this article, the legislator has clearly determined that the only entity that can set a security measure is the court, and this only in cases where there is a request from the prosecutor. The prosecutor has the "initiating" power to impose a security measure, but he is not obliged to ask the court in every case that a security measure be set against the person under investigation or the defendant. If the prosecutor considers it unnecessary or inappropriate to set a security measure, he "has the power" not to ask the court to set a security measure for the person under investigation or the defendant. On the other hand, the court cannot and should not accept the prosecutor's request for the determination of the security measure if he does not present the reasons on which the request is based.

The court rejects the prosecutor's request for the determination of the security measure if, after its examination, it considers it unfounded as the conditions for the determination of the security measure are missing, or partially accepts it and assigns another lighter measure if it considers that in his request, the prosecutor did not take into account the criteria for determining the measure or did not correctly assess the security needs. However, the court must justify its decision in every case. She is obliged to justify in an exhaustive and real way the reasons for accepting or rejecting, in whole or in part, the request of the prosecutor. With the law no. 8813, dated 13.06.2002, the legislator added point 3 to article 244 of the Penal Code, in which it is determined that "the Court cannot set a security measure more severe than the one requested by the prosecutor". Since it is the prosecutor who carries out the criminal prosecution, controls and conducts the preliminary investigations, he is the person who "knows the inside" of the circumstances of the case and ascertains the needs of the insurance that must be guaranteed. This prohibition of aggravating the position/reformatio in peus is evaluated in relation to the measure requested by the prosecutor and obliges the court not to assign a more severe measure than the one requested by the prosecutor, but does not prevent the court, on the contrary, to assign a measure easier than the one requested by the prosecutor if, after examining the facts and evidence, he considers that the security needs can be guaranteed with an easier measure.

4. The Right to Complain and Review Within a Quick and Reasonable Time.

One of the most important rights enjoyed by any individual against whom criminal proceedings are conducted is the right to appeal. In Article 2 of the International Covenant on Civil and Political Rights, states have the obligation to guarantee, through competent judicial, administrative or legislative bodies, the individual's right to appeal, as well as the creation of opportunities for his trial. The right of effective appeal against the court's decision is provided for in Article 8 of the Universal Declaration of Human Rights, Article 6 (3/c) and 13 of the European Convention on Human Rights, as well as in the Constitution in Article 43 which provides that: "Anyone has the right to complain against a judicial decision in a higher court, except when the Constitution provides otherwise".

Since the security measure is an exception and not a rule that removes or limits the freedom and rights of the individual, the right to appeal in this case occupies an extraordinary place. The judgment and decision taken in relation to an insurance measure is different both for the nature and the procedures it follows and for the conclusions reached. The trial on the merits decides about the guilt or innocence of the defendant, while the trial on the security measure decides whether or not a security measure should be taken against the person and, if so, which of them. It is necessary that this change is also reflected in the appeal procedures.

In addition to the above provisions in the Convention, Article 5(4)[72] the Constitution, article 28/3[73] the right to appeal against security measures that take away a person's freedom is defined. Based on the above sanctions in the Code of Criminal Procedure in article 249, the legislator has defined a special system of appeal which aims to respond to the need to react as quickly as possible to the court's decision regarding the security measure.

Article 249 of the Criminal Code entitled "Complaint against security measures" defines that:

1.According to Article 244 of this Code, an appeal is allowed against the court's decision on the determination of the security measure within five days of the notification of the court's decision. 1/1. According to Article 248 of this Code, the prosecutor, the defendant and his defense can file an appeal within five days against the court's decision on the continuation, revocation or replacement of the security measure.

The prosecutor's interest in filing an appeal against the court's decision that refuses to take the insurance measure

72 Article 5(4) of the ECHR. "Any person who has been deprived of his freedom by arrest or imprisonment has the right to appeal to the court in order for the latter to decide, within a short period, on the legality of his imprisonment and to order his release, if the imprisonment is unlawful".

73Article 28/3 of the Constitution "The detainee has the right to appeal against the judge's decision".

requested by him is related to the goal of guaranteeing the insurance needs. While the interest of the person against whom the measure was taken or his defenders is related to the "restoration" of the violated right or freedom as soon as possible. The right to appeal against the security measure provided for in Article 249 of the Penal Code takes full meaning not only in cases of enforcement but also with the notification of the court's decision. In cases where it is not possible to execute the measure for the person against whom it was taken, because he is not found, a record is kept by the judicial police officer or agent, in which the actions that are done with the purpose of finding the person and executing the court decision. This report is sent to the court that issued the decision, which verifies whether or not the searches were complete and when it deems that the searches have been complete, it declares the person's escape. With the act that declares the escape, the court has the obligation to assign a defender to the person who has fled and to order that the copy of the decision by which the implemented measure is determined be deposited in the secretary. From this moment on, the decision of the court that has determined the measure of security without the presence of the person and his defender is no longer a "secret decision"

For the defendant who has passed, the deadline begins to run from the date of the notification made according to Article 141 of the Penal Code [74]. The procedural consequences of flight operate only within the proceedings for which it is declared. The state of escape is maintained until the security measure is executed, revoked, loses its power, or the criminal offense or punishment for which the measure was imposed is saved. For every effect, the person who has left the place where he is kept is equated with the fugitive.

In relation to the right of appeal of the person against whom the insurance measure has not yet been executed, the United Colleges of the Supreme Court have stated that: *"The decision to assign the personal insurance measure is an appealable decision even if it is not implemented, with the condition that the person to whom the decision was given was notified after his escape was declared by a court decision. If it were proven that the interested person has become aware of the act, especially when he himself accepts such a fact, the notification of the act is considered accomplished. It is the obligation of the person himself or his defender to prove the moment of receiving knowledge, related to the 5-day deadline to appeal the court's decision. Acceptance of the opposite would result in the denial of the right to complain. The right to appeal the decision to assign the measure of insurance by the person, to whom this measure was assigned in absentia, arises within 5 days from the notification or learning of the decision by him or the defender"* [75].

The 5-day period within which an appeal against the court's decision on the basis of which a security measure was taken or refused is a period that cannot be extended, and as such failure to comply in time, the violation of this period brings as a consequence, it is a reason for "not accepting the appeal". Point 6 of Article 249 of the Penal Code, determines that: "The court decides, as the case may be, the annulment, amendment or approval of the decision, even for reasons different from those presented or from those shown in the reasoning part of the decision. The court submits the reasoned decision within 10 days", while point 8 stipulates that: "against the decision of the court of appeal, an appeal can be made for violation of the law in the Supreme Court". The right of appeal provided for in Article 249 of the Penal Code is exercised through two avenues: Appeal (of the decision of the Court of First Instance to the Court of Appeal) and recourse to the Supreme Court (of the decision of the Court of Appeal).

The appellate court examines the case as a whole, regardless of the reasons presented in the appeal or those shown in the reasoning part of the appealed decision and in function of this right recognized by law, if it deems it necessary, it can decide on the repetition wholly or partially of the judicial review, recovered evidence administered in the first instance judicial review or new evidence. Requests are reviewed within 10 days from receipt of documents[76].

In contrast to the Court of Appeal which is a court of fact, the Supreme Court is a court of law and as such its review is limited only to violations of the law raised on appeal. The Supreme Court cannot repeat the judicial review in whole or in part, nor can it retake or ask for evidence. But for the legal issues that should be seen primarily by the court in

74Neni 141 – "Njoftimi i të pandehurit kur nuk gjendet"
1. Kur personi ndaj të cilit është marrë masa nuk gjendet, oficeriose agjenti i policisë gjyqësore mban procesverbal, në të cilin tregonkërkimet e bëra dhe ia dërgon atë gjykatës që ka dhënë vendimin.2. Kur gjykata çmon se kërkimet janë bërë të plota, deklaronikjen e personit.3. Me aktin që deklaron ikjen, gjykata i cakton personit që kaikur një mbrojtës dhe urdhëron që të depozitohet në sekretari kopja evendimit me të cilin është caktuar masa e zbatuar.3/1. I ikur konsiderohet personi që megjithëse ka dijeni, i shmanget me vullnet zbatimit të masave të sigurimit, të parashikuaranga nenet 233, 235, 237 dhe 238 të këtij Kodi, ose dënimit me burgim.3/2. Pasojat procedurale të ikjes veprojnë vetëm brendaprocedimit për të cilin ajo është deklaruar. Gjendja e ikjes ruhet derisamasa e sigurimit ekzekutohet, revokohet, humbet fuqinë, ose kurshuhet vepra penale apo dënimi për të cilin është vendosur masa.4. Me të ikurin barazohet, për çdo efekt, i larguari nga vendi kuruhet.5. Për të lehtësuar kërkimin e personit të ikur, gjykata mund tëurdhërojë përgjimin e bisedave telefonike dhe të formave të tjera të komunikimit.
75Vendim Unifikues i Kolegjeve të Bashkuara të Gjykatës së Lartë nr. 04, datë 24.06.2009.
76 Pika 5 e nenit 249 të K.Pr.Penale.

any state and degree of the process, which have not been seen, the Supreme Court has the right to decide[77].

The Supreme Court must also state when the existence or non-existence of reasonable suspicion based on evidence is claimed, i.e. they must analyze the evidence received by the court that determined the security measure [78]. The Supreme Court decides within fifteen days of receiving the documents.

Keeping in mind the exceptional nature of the security measures and the presumption of innocence, the review and decision regarding the complaint should be made within a quick and predictable time frame. Article 249 of the Criminal Code is not only intended to guarantee the right to appeal, but also to review the appeal quickly and within a short period of time. For this purpose, the legislator has defined strictly defined deadlines in this article. The request is submitted to the secretariat of the court that issued the appealed decision, which is obliged to submit the documents to the court that will consider the appeal within 3 days[79].

The date set for the session is announced to the prosecutor, the defendant and his defense attorney at least three days in advance. This is in order to give the defendant and the defense the necessary time to review the acts of the prosecutor and the decision of the court to prepare their defense. Starting from the construction method of point 4 of Article 249, it is concluded that the defendant must be notified first and then his defense counsel. The legislator in this case has used the conjunction "and" and not "or", which would allow the court to announce one of theme[80].

When the decision is not announced or implemented within the specified period, the act based on which the coercive measure was taken loses its force. If the decision of the appellate court is not announced or implemented within 10 days from the consideration of the cases, the coercive insurance measure that was taken on the basis of the appealed decision loses its force. With the passage of six months from the implementation of the arrest decision, the defendant and his defense can appeal to the court of appeal for the duration of detention. The Court of Appeal decides within fifteen days to receive the documents.[81]

In the above provision, it is not a question of recourse, but of an appeal, which is not made in the Supreme Court, but in the court of appeal. This is the interpretation made by the Criminal College of the Supreme Court in two of its decisions.[82] n in which it is stated that: "As the highest court in the sense of Article 249/9 of the Penal Code, the court of appeal should be understood, not the Supreme Court, which also emerges from the comparison that can be made of this point with point 1 where it is stated that within 5 days from the implementation or notification of the court decision, the prosecutor, the defendant or his defense can appeal to the highest court. Pursuant to Article 249/9 of the Penal Code, after six months have passed from the execution of the arrest decision, the prosecutor, the defendant, or his defense counsel can file and appeal only to the appeals court as the highest court. high, like all other appeals and not in the Supreme Court".

5. Conclusions and Recommendations

Since "prison arrest" is the most severe measure with psychological, social and economic consequences, it should be applied only in exceptional cases, when any other measure is inappropriate. In any case, when it is requested to assign the measure "arrest in prison", the court must start the examination from the "presumption in favor of freedom", that this measure should not be assigned to the person. Based on this presupposition, the court must request from the prosecution the evidence on which the request is based and examine "in detail" if the evidence presented creates the conviction that due to the concrete circumstances of the case and the evidence presented, the assignment of arrest in prison is absolutely justified and in accordance with the criminal procedural law. House arrest is the measure with the greatest coercive power after that of prison arrest and as such it is assigned when security needs can be met even without the necessity of detaining the person as well as in cases where the request for the appointment of prison arrest it is done for one of the subjects of point 2 of article 230 of the Penal Code, for whom the legislator has defined a certain "immunity" against arrest in prison. In contrast to the measure of arrest in prison for which the legislator has defined special criteria for its assignment, for house arrest the legislator requires that the court in its assignment adhere to the general criteria for determining the security measure, suitability, fair ratio, as well as to take into account continuity, repetition and mitigating or aggravating circumstances provided for in the Criminal Code.

77Neni 434 i K.Pr.Penale.
78 Islami, H ; Hoxha, A; Panda, I. (2011). "Procedura Penale". fq.336.
79Pika 3 e nenit 249 të K.Pr.Penale.
80 Vendim i Kolegjit Penal të Gjykatës së Lartë nr. 179, datë 26.02.2002.
81Pika 9 e nenit 249 të K.Pr.Penale.
82Shih vendimet e Kolegjit Penal të Gjykatës së Lartë nr.17, datë 26.02.2007 dhe nr. 18, datë 13.03.2007.

Changing the general basic condition required for the imposition of security measures from "reasonable suspicion based on evidence" to "significant indications of guilt", I think is "constitutionally wrong" and therefore would pose a serious risk to violation of individual freedoms and rights. The Convention and the Constitution sanction that the freedom of the individual can be removed or limited only when there is "reasonable suspicion" and not "significant indications". Even the jurisprudence of the ECtHR, in relation to "reasonable suspicion" has determined that "indications" cannot constitute a sufficient basis to accept that there is "reasonable suspicion".[83]

The use of the phrase "relevant indications" leaves a path and creates great opportunities for arbitrariness and violation of the freedoms and rights of the individual, therefore I am against such changes as the draft law provides. In the case when the prosecutor makes a request to the court for the replacement of the security measure from "prison arrest" to "house arrest" because he finds that the security needs have been mitigated, I think that the court should accept the prosecutor's request for the replacement of the measure . The court must accept the replacement of "prison arrest" with "house arrest" and in cases where the request is made by the defendant and the prosecutor in the session agrees. Regarding the "property guarantee", since it is an alternative measure to arrest in prison, which aims to ensure the appearance of the defendant in the procedural body whenever requested by him, without it being necessary for the defendant to subject to the measure of security arrest in prison, I think it should be applied more in practice. Based on the high risk of some criminal offenses, I think that the legislator should sanction the ban on the application of property guarantee.[84]

In order for the standards defined in international legal acts to be applied in Albanian legislation as well, in terms of setting security measures, it is necessary that in any case the procedural bodies respect and apply "specific/strict" criteria for the appointment of security measures with arrest, especially for arrest in prison, which can and should be imposed only for a certain category of criminal offenses with high social risk.

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83 Për më tepër shih vedimet: Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, Series A no. 182 dhe Labita v. Italy [GC], no. 26772/95, ECHR 2000-IV

84 Ndalimi për pranimi e garancisë pasurore mund të vendoset për krimet që përfshihet në:
Kreun I "Krime kundër njerzimit"
Kreun V "Krime kundër pavarësisë dhe rendit kushtetues"
Kreun VII "Akte terroriste"
Kreun XI "Vepra penale të kryera nga banda e armatosur dhe organizata kriminale"