



Due Process, the Constitutional Right of the Defendant in the Trial: Overview According to the European Convention on Human Rights

Mirseda Shehdula¹

Prof.As.Dr. Joniada Musaraj²

Msc. Ismail Thaçi³

¹Doctorate Candidate, As, Lecturer, Faculty of Political and Law,
Aleksander Moisiu University Durrës,
Durrës, Albania

²Professor, Faculty of Political and Law,
Aleksander Moisiu University Durrës,
Durrës, Albania

³Specialist, Career and Alumni Sector, Directorate of Administration and Academic Services,
Aleksander Moisiu University Durrës,
Durrës, Albania

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Abstract

The right to a regular legal process is one of the basic rights recognized by the person, and more precisely a positive right, since its realization requires the intervention of the state. The care that must be shown in respecting the due process of law must be great. This requires not only the vigilance of the administrative bodies and the courts towards their legal obligations, but also the interest of the person himself to claim his right. The paper focuses on the approach that has the right to a regular legal process towards the defendant as well as on the jurisprudence of the Constitutional Court in Albania and the European Court of Human Rights. Answers are given to questions such as: what is the status of the right to a regular legal process in the Constitution of the Republic of Albania and how is it harmonized with the European Convention of Human Rights? What are some of the elements of this right? How is the defendant positioned in front of this right?

Keywords: defendant, due process, presumption of innocence, SPAK

1. Introduction

Human rights are defined as rights that are inherent in our nature and without which we cannot live as human beings. Basic human rights and freedoms enable us to fully develop and use our human qualities, our intelligence, our talents and our consciousness, as well as to satisfy our spiritual and other needs.¹

The right to a regular legal process is one of the basic rights recognized by the person, and more precisely a

¹ UN General Assembly Resolution 49/184 of 23 December 1994, Declaration of the UN Decade for Human Rights Education (1995-2004), of the United Nations General Assembly.

positive right, since its realization requires the intervention of the state. The care that must be shown in respecting the due process of law must be great. This requires not only the vigilance of the administrative bodies and the courts towards their legal obligations, but also the interest of the person himself to claim his right. The lack of such an interest ensures that no one will do it in your place, without you showing that you want to enjoy your right stripped of the infringement that falls on it.

The Magna Carta, in its content, affirms four principles of justice (within the right to due process) that are vital to us:

1. we must have honest judges and law-abiding sheriffs and do not violate it;
2. we have the right to habeas corpus-no person can be arrested and detained indefinitely without being charged and tried according to the law of the land;
3. if charged, we have the right to a jury trial, in public, with credible witnesses; and
4. if convicted, the punishment must fit, not exceed, the crime. The Magna Carta Libertatum served as the foundation for other documents that followed, including the Constitution of England and the UDHR.²

The right to a due process of law consists of two important parts formulated as paragraphs of Article 42 of the Constitution: in the first place, freedom, property and rights recognized in the Constitution are limited; secondly, this restriction cannot be enforced without due process of law.³ What is missing in the above article is the provision of the concept of due process, even though it emerges not only from the formulation of this right in the ECHR, but even more detailed in the practice of the CJC and that of Strasbourg.

It is necessary that article 42 of the Constitution or article 6 of the Convention, not only be understood correctly, but be applied precisely in such a way as to achieve the goal set by them. Since the right to property is one of the most sensitive rights for the person, it is justified the fact that in the Albanian practice and that of the ECtHR, there are many cases of complaints about the non-implementation of a regular legal process, fair, within a deadline reasonable and by an independent and impartial court, with the object of the property.

2. The Right to a Regular Legal Process, Harmonized in the Constitution of the Republic of Slovenia and the ECHR

The constitutional wording gives wide scope to the due process of law for any legal violation. It identifies due process as a guarantor not only of arbitrary actions that state authorities may perform on the individual's freedom, property and constitutional and legal rights, but also of fair and fair judicial procedures. From the content of Article 42 of the Constitution, it follows that constitutional protection will be present and necessary in any intervention in the event that two basic conditions related to the violation of rights are met: the first, where it is required that freedom, property and constitutional or legal rights have been violated and secondly, this violation of rights has been carried out without having a regular and fair legal process.⁴

If we refer to Article 6 of the ECHR, we will find a broader formulation having these elements as follows:

- a) Public process
- b) The process must be completed within a reasonable time frame;
- c) The process should be carried out by an independent and impartial court;
- d) The process must be carried out by a court designated by law;
- e) The decision at the end of the process must be made public;
- f) The defendant should be informed about the procedures being followed;
- g) p. The defendant has the opportunity and facilities to prepare for his case;
- h) The right to have self-selected counsel or free legal aid;
- i) Interaction in the process between the parties with each other as well as between the parties and witnesses, experts, etc.

It should be clarified that these are the basic elements that we find in the above provisions, but from the jurisprudence of the CJK and the ECHR, other supplementary and very essential elements have emerged, such as

² The right to a due process of law is provided for in Article 10 of the UDHR: "Everyone has the same right to an objective and public judicial process before an independent and impartial court, in the determination of their rights and obligations and for the decision on any kind of criminal charge".

³ Omari, L., Anastasi, A., "Constitutional Right" Tirana, 2008, pg 158.

⁴ See further <http://www.avokatipopullit.gov.al/sq/te-drejtat-deontologjia-e-sigurise>

adversarial nature, reasoning of the decision, execution of the decision, etc.⁵

3. The Defendant and the Principle of Presumption of Innocence

The development of a regular legal process is treated as an essential element for the defendant. This condition becomes very sensitive especially in criminal cases. The time limit varies depending on whether we are dealing with a civil or criminal case. Here, the complexity of the case, the interest of the parties, etc. are taken into account.

In Decision no. 8, dated 26.02.2015⁶, The GJK of Albania has emphasized that the principle of presumption of innocence consists of several aspects, one of which is *in dubio pro reo*, so any doubt goes in favor of the defendant and the burden of proof falls mainly on the prosecution body. The court has interpreted the presumption of innocence in the sense that ordinary courts should not begin the process with the conviction that the defendant has committed the crime of which he is accused, that the burden of proof rests with the accusing party, that every doubt should be in favor of the defendant and that the court must support the decision in direct and indirect evidence that must be proven by the prosecution. It is the prosecutor's duty to inform the accused about the case against him, so that he can prepare and present his defense and refute the evidence that is sufficient to convict him. The principle of presumption of innocence can be violated even in the absence of a formal declaration, it is enough to have a justification which suggests that the court considers the accused as guilty, as well as when the burden of proof passes from the prosecutor to the defense.⁷

On the principle of presumption of innocence, ECtHR, in *Kuzmin v. Russia*⁸, emphasizes that it is particularly important, at an early stage, especially before an indictment in the context of criminal proceedings, not to make public accusations that could be interpreted as confirmation by high officials that they consider the individual in question guilty.⁹

The presumption of innocence is recognized as an element of due process from the point of view of Article 6/2 of the ECHR. This principle means that the defendant is considered innocent until proven guilty by a competent court. The proof of guilt is said to have been completed at the moment when the final decision is given. The ECtHR has repeatedly accepted that the guarantee provided by Article 6/2 of the ECHR is intended to compel the prosecutor during a criminal proceeding to convincingly prove the charges against the defendant "without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused".¹⁰

From the issues discussed above, it can be concluded that in recent years, trust is growing in SPAK. SPAK is seen as one of the most fruitful models of justice bodies. This institution has been taken as an experience from other countries such as Romania, Bulgaria, etc., where clear results have been seen in the fight against organized crime or crimes committed by leaders of high state institutions. In his work, SPAK, it is said that the number of cases investigated by SPAK has increased and this has brought difficulties, due to the limited number of prosecutors, judicial police officers and according to the head of SPAK Mr. Dumani, the budget is also problematic. insufficient and for this reason he requested a doubling of the budget for 2024. However, also from the evaluation reports, it was found that SPAK is required to increase cooperation with the police body, the use of human resources, advertising the work of SPAK and productivity growth.

Nešťák v. Slovakia, no. 65559/01, February 27, 200714

The suspect was arrested and interrogated regarding the crime of robbery. During the reception during questioning, the suspect confessed to planning and preparing the robbery, but denied taking part in the robbery. The court ordered detention based on strong suspicion that if released, the accused could commit any other offense with the intention of securing the money to pay a financial debt, which had prompted him to plan the theft in the first place. The accused did appeal against the decision. The regional court rejected the appeal and found that the applicant there was a tendency to commit an offense and the risk that he would commit further offenses was justified. He had a debt that he could not re-pay and according to the available evidence, this was the reason why he had decided to commit the robbery.

5 Musaraj, J. 2017, "Issues of access to justice and trial within a reasonable time in the framework of the right to a due process of law. The Albanian experience in a comparative view", Tirana, page 25.

6 One of the appellant's claims was the violation of the principle of presumption of innocence. According to him, the courts started the case with the prejudice of his guilt. They administered as evidence, an act that was not part of the review and verification in the court session, specifically the final decision declaring the other three defendants guilty, which was also referred to in the reasoning of the court decisions.

7 Decision of the CJK, no. 49, date 29.09.2014, point 26 of the decision.

8 Case *Kuzmin v. Russia*, ECtHR decision, March 18, 2010.

9 ECtHR, "Annual Report" 2010, page 86.

10 See also the case of *Saunders v. United Kingdom*, 17 December 1996 and *Allenet de Ribemont v. France*, February 10, 1995

The ECHR considered that this statement of the Regional Court was taken as evidence that the applicant has performed the deed assigned to him, that his motive was the need for money and the manner in which he is committed crime has shown the level of corruption of the applicant. Therefore, the ECHR concluded that these the statements constitute a violation of the presumption of innocence of the accused because they clearly implied

that the individual had committed the crime. In the absence of a final sentence, the applicant's guilt was not proved according to the law and therefore the courts had to refrain from referring to the suspect in a manner suggesting that he committed the crime in question.

Sekanina v. Austria, 25 August 1993, Series A no. 266-A

Sekanina was tried and acquitted of the murder of his wife and then initiated proceedings for the reimbursement of costs and compensation for more than one year spent in custody. The request for compensation u rejected on the basis that his release did not remove the suspicion that he committed the murder. The state of the respondent argued that the indications given by the national court merely referred to him the continued existence of doubt, that in the wake of the Lutz v. Germany case, are in accordance with the presumption of innocence insofar as they do not present the opinion that the person in question is guilty.

The ECtHR unanimously distinguished between the earlier case of Lutz, which dealt with the termination of the proceedings before the final determination of guilt, while the current case had

deal with the procedures after acquittal. The ECtHR determined that "the expression of doubts regarding the innocence of the accused is possible as long as the criminal procedure has not been completed a decision on the merits of the charge. However, it is not acceptable to rely on such doubts after the decision becomes final. Consequently, the reasoning [of the Austrian courts] does not it is in accordance with the presumption of innocence".²² The ECtHR found a violation of Article 6(2) of the ECHR.

Borovský v. Slovakia, no. 24528/02, June 2, 2009.

In this case, the ECHR found a violation of Article 6(2) of the ECHR as a result of the distribution of details specifics of the police file in the media, which described the accused as guilty. The claims of the applicant referred to the publication of statements by the deputy director of the Financial Police Office in a daily newspaper. In particular, the police officer emphasized that "the action of the accused, if considered as a whole, it was "premeditated fraudulent action" that had the purpose of transferring the property of the company in question to different companies." According to the ECHR's view, this statement is not limited to the description of pending status procedures or "state of suspicion" against the applicant, but gave an assessment of the attitude as if this were a proven fact, qualifying the action of the accused person as "fraudulent" and as if "premeditated", without any reservation. This statement meant that the accused e had committed the crime, and therefore it was found to be a violation of Article 6(2) of the ECHR.

4. Conclusions

When we deal with the elements of due process in this chapter, they are compared to the ECHR. The Constitution of RSH and the Convention do not exclude each other when it comes to the determining factors of the right to a due process of law.

At the end of the first chapter, it is also concluded that the system of the ECHR and, especially, the jurisprudence of the ECtHR have made a significant contribution to the strengthening of the Albanian constitutional order, making available to the Albanian state authorities a system of effective guarantees for the protection of fundamental rights and freedoms. The complementary function of the Convention system to the local system has served as an incentive for the inclusion in the Albanian legal system of the best European values and principles, as the only way to move towards a consolidated democracy, especially based on the respect of fundamental rights and freedoms.

The right to a due process of law is inseparable from the defendant. The defendant enjoys rights during the new process, rights such as the presumption of innocence, access to justice, bond between the defendant and the prosecutor, etc. Jurisprudence has shown that there are many cases where we have appealed to a higher court or we have gone all the way to the Strasbourg Court. The defendant is very sensitive to his right to due process as it concerns the deprivation of his liberty. Freedom is the fundamental right, without which other rights have no meaning.

The Albanian courts, due to the overturning of some decisions by the Strasbourg Court, are trying to be more careful when they make decisions, but it seems that the reform in Justice and the establishment of special institutions, such as SPAK, GJKO, etc., have had a greater impact.

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