

## Acts against the freedom of the person in terms of criminal, constitutional and international instruments

**Av. Asllan Dogjani**

*Deputy in Albanian Parliament*

**Av. Arben V. Prifti**

*Mediterranean University of Tirana*

### Abstract

This paper was treated by two co – authors and is divided in two parts. *First part* was prepared by Av. Asllan Dogjani, which addresses the removal of freedom of person under the special provisions of the Criminal Code of the Republic of Albania. *Second part* of this work is handled by the lecturer Av. Arben V. Prifti, related to defense, restrictions and guarantees of freedom of the person in view of the Constitution and international acts and instruments.

The paper aims the analysis and presentation of the offense against a person's freedom, under special provisions of the Criminal Code, but also the treatment of freedom of person under the provisions of the Constitutional Law and international acts and instruments.

The target group of criminal offenses is common, the legal relationship established in the sphere of security of a person's freedom, specially defended by the Criminal Law of criminal acts or omissions is socially dangerous.

We hope that this paper will serve readers and lawyers in the field of Criminal Law, in particular students of the Faculties of Law. On the other hand, we are open to understand any comments, suggestions and valuable qualitative opinion from all colleagues and professors of Criminal Law, friends and colleagues who will read this scientific work.

**Keywords:** Criminal Code, Constitution, Conventions, Offense, Abduction of a Person, deprivation of freedom.

### Introduction

In the Albanian criminal doctrine is given the meaning that the offense against a person's freedom means those works (actions or inactions) socially dangerous that are directed towards the freedom of the person. Types of offenses against the freedom of the person provided for in our criminal code are as follows:

Article 109 of the Criminal Code – Kidnapping or hostage – taking;

Article 109 / a of the Penal Code – Kidnapping or hostage – taking in mitigation circumstances;

Article 109 / b of the Criminal Code – Tightening by threat or violence;

Article 110 of the Criminal Code – Unlawful deprivation of freedom;

Article 110 / a of the Criminal Code – Trafficking of Persons;

Article 111 of the Criminal Code – Hijacking of planes, ships and other vehicles;

Article 112 of the Criminal Code – Violation of property.

By addressing the specific provisions of the special section of the Criminal Code, relating to the deprivation of liberty of a person, we see that “the kidnapping of

a person or holding him/her as hostage" and "illegal deprivation of liberty of the person" includes offenses that have common features, but also differences between them, which we will analyze in the following of this paper.

Article 109 of the Albanian penal Code provides the meaning of the offense of "Kidnapping", which explicitly defines:

"Kidnapping or hostage – taking in order to gain wealth or any other benefit, to prepare the establishment of mitigation circumstances for committing a crime, to help hide or escape of perpetrators or accomplices in committing a crime to avoid punishment, to force the implementation of certain requests or conditions for political purposes or any other purpose, shall be punished by imprisonment from ten to twenty years. The same offense committed against a minor under the age of 14 is punishable by imprisonment no less than fifteen years. Kidnapping or hostage – taking of a person or a minor under the age of 14 years old, preceded or accompanied by physical torture or when committed against several persons, or more than once, shall be punished with imprisonment of not less than twenty years, and when death is caused it will be punished to life imprisonment."

According to Albanian Criminal Code the offense of deprivation of liberty, namely the illegal detention of a person constitutes a criminal offense and is punishable by a fine or imprisonment of up to one year. When this offense is accompanied with severe physical suffering, carried out in cooperation against several persons, or more than once, it is punished with imprisonment from three to seven years.

The Joint Colleges of the Supreme Court with their decision no. 1 dated 25-th of March 2005, interpreted the two offenses, provided by Articles 109 and 110 of the Penal Code.

In this sense, the differences observed between these two offences are as follows:

Firstly, the difference lies in the object of figure of the crime of kidnapping or holding hostage, which is broader because it affects or endangers the legal relationship established to ensure the inviolability of the freedom of the person, of the property or its other rights. While the object of unlawful deprivation of liberty is only the inviolability of a person's freedom to move according to its will.

Secondly, the difference lies in the objective side of the kidnapping or holding hostage, performed by active actions, with violence, or omissions, but under the threat of the use of physical or psychological violence. These acts or omissions are committed not only to gain wealth or any other benefit, but also to perform or failure to perform other unlawful actions.

On the objective side of unlawful deprivation of liberty are provided qualifying circumstances that distinguish this institution from kidnapping or hostage, which are as follows:

- Acts of unlawful deprivation of liberty is associated with severe physical or psychological suffering, e.g. holding a person locked in a basement without food or water, or threatening the person hour by hour with a gun on the head to kill him/her or his/her family in search of performing a service. In every moment it is required reaching a consequence that is the physical suffering of the victim.
- Another qualifying circumstance is where the offense of unlawful deprivation of liberty is carried out in cooperation between two or more persons, with or

without prior agreement.

- Third qualifying circumstance is where the offense of unlawful deprivation of liberty is committed against several persons at the same time, for example depriving of freedom of some persons locking them in a room and not allowing to move from it according to their will.
- The fourth qualifying circumstance of this offence is when it is performed more than once, i.e. at different times, with repetition, provided that it is not prescribed, pardoned or amnestied the first offense.

Thirdly, the main difference lies undoubtedly in the subjective side of crime of kidnapping or holding hostage by illegal deprivation of liberty. In the decision of United Colleges, it is analyzed mainly the purpose of acquiring wealth, but it is not analyzed also the purpose for any other benefit and it is not taken into account at all “or any other purpose” contained in Article 109 of the Criminal Code.

### **Protection and guarantees of freedom of the person in view of the Constitution and acts and international instruments**

In addition to legal – criminal treatment of offenses related to illegal deprivation of liberty of a person, different definitions and treatments from the Constitution of the Republic of Albania are included in the doctrine since 1998, but also international conventions, acts and instruments.

The direct reference on the fundamental documenting in this field, the European Convention for the Protection of Human Rights and Freedoms, coincides with the consideration that the rights are treated not only as subjective rights, but also as an objective element of legal order, which oblige political power to be confirmed with the contents, the defense and their realization (Article 15/2 of the Constitution).

Human rights and fundamental freedoms are provided for in the second part of the Constitution.

This part is divided in four chapters, which are:

Chapter I: General principles;

Chapter II: Freedoms and personal rights;

Chapter III: The freedoms and political rights;

Chapter IV: The freedoms and economic, social and cultural rights.

Albania's Constitution guarantees the freedom of person by Article 27 (and following), contained in Chapter II and the freedoms and personal Rights. From the content of this constitutional provision, in its two paragraphs are defined:

1. “No one can be deprived of freedom, except in cases and under procedures provided by law.
2. Freedom of the person cannot be limited, except in the following cases:
  - a) *“When is punished with imprisonment by a competent court.*
  - b) *Because of failure to comply with the lawful orders of the court or for failure to comply with an obligation set by law.*
  - c) *When there is reasonable suspicion of having committed an offense, or to prevent him/ her committing an offense or fleeing after committing a crime.*
  - d) *For the supervision of a minor for purposes of education or for escorting it to a competent*

organ.

e) *When the person is a carrier of a contagious disease, mentally incompetent and dangerous to society”.*

f) *For illegal entry at state borders or in cases of deportation or extradition.*

3. *No person shall be deprived of liberty just because he/she is not able to fulfill a contractual obligation.*

As it turns out from the meaning and content of this provision, the cases of restriction of liberty are mandatory and any other case of deprivation of freedom would be a violation of this article of the Constitution. Also, paragraph 3 of Article 27 excludes explicitly, the possibility of deprivation of liberty of a person just because he/she has not been able to fulfill a contractual obligation.

Albania's Constitution, under the protection of a person's freedom, is not limited to the provision of cases in which the person may be restricted from freedom. It provides these individuals a set of rights. Some of these are: the right to be informed immediately in a language which he/she understands of the reasons for this measure and charges, the right to communicate immediately with a lawyer, the right to be tried within a reasonable time, the right of humane treatment and respect his/her dignity, etc. (Article 28 onwards).

A particular aspect of a person's freedom has to do with his/her right to choose their residence and the right to move freely. Our Constitution guarantees these rights in Article 38 thereof.

According to this provision, it is determined:

1. *“Everyone has the right to choose their residence and to move freely to any part of the territory of the state.*
2. *No one may be prevented from leaving the state freely.”*

A person's right to choose his/her residence, moves in parallel with the right to guarantee the inviolability of the property. The latter is guaranteed by Article 37, paragraph 1 and 2 of the Constitution, with the following content:

1. *“The inviolability of the residence is guaranteed.*
2. *Searches of a residence and premises involved in it, can be made only in cases and manner provided by law”.*

By addressing the meaning of constitutional provisions, on the one hand we note that our Constitution guarantees freedom of the individual, its freedom of movement, inviolability of the property, but on the other hand, it provides rightly also restrictions on them (restrictions which have a general character, which means that these restrictions have a space for all of the rights and freedoms of the individual).

In this sense, the restrictions relating to freedom of the person are defined in Article 17 of the Constitution with the contents as follows:

1. *“Limitations of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. The restriction must be proportionate to the situation that has dictated it.*
2. *These limitations may not infringe the essence of freedoms and rights and in no case may not exceed the limitations provided for in the European Convention on Human Rights”.*

As noted, by the meaning and content of this provision, it appears that these limitations

that can be imposed only by law, are dictated by a public interest and the need to protect the rights of others, and that the reference to the European Convention determines the fact that the criteria implemented by the Council of Europe bodies are analysis means that will be used by our judicial system and that of the Constitutional Court.

In conclusion, the Constitution of the Republic of Albania contains one of the essential elements of a constitutional democracy such as limiting the powers of the state against the rights and fundamental freedoms of the individual. Freedom of the person, his/her freedom of movement, inviolability of residence (which constitute also the object of this study), are aligned and defended as the most important personal freedoms.

### **Protection of freedom of the person in view of the acts and international instruments**

As outlined above, freedom of a person is protected and guaranteed by a series of acts, conventions and instruments of international law. Such fundamental documents of this right are as follows:

- **Great Charter of Liberties (Magna Charta Libertatum) of 1215**

This document was first intended to protect *inter alia* the freedom of the person. Amendment XLV provided that *“no free man cannot be arrested or go to jail, or be deprived of inheritance, or to be excluded out of law or prosecuted, or in any way damaged, and we cannot do anything against him/her, except in accordance with the law”*.

What is noted from the above – mentioned amendment is the fact that this card, although very early in time, in general lines provides the already known principle that no one shall be deprived of freedom, except in cases provided by law.

- **Bill of Rights of 1628**

The amendment of this law provided:

*“No one with any situation and position cannot be put in jail, or be deprived of inheritance, or die without being questioned, according to the procedure, which is set by law.”* This amendment gives to the person a procedural known mean very important to protect its freedom, namely the right to be heard (for questioning) before being judged.

- **Declaration on Human Rights and of the Citizen of 1789**

Freedom of the person in this statement is guaranteed by Article 7 that states:

*“No man can be accused, imprisoned, except in cases defined by law and according to the procedure that it provides”*.

Compared with the above two legal acts, this statement brings something new and positive. So it should be provided by law not only the cases when a person can be deprived of liberty, but also the procedures that would apply to the deprivation of liberty. Obviously this is another guarantee for the freedom of the person.

- **Declaration on Human Rights and of the Citizen of 1793**

Also this declaration pays a special attention to the protection of freedom of a person's freedom. Article 12 thereof provides:

*“No one shall be accused, imprisoned or detained except in cases provided by law and in the manner prescribed by the law”.*

This legal provision has an almost identical wording to Article 7 of the Declaration of Human Rights and of the Citizen of 1789.

After World War II with the establishment of the United Nations Organization (UNO) the protection of freedoms and fundamental human rights entered into a new, very progressive phase. Already these rights and freedoms began to be recognized and protected also by legal acts of international character.

### **The jurisprudence of the European Court of Human Rights concerning the freedom of the person**

European Convention of Human Rights has been ratified by Republic of Albania, and as such it constitutes a normative act in force throughout the country, according to Article 122 of the Constitution.

The Convention itself is an international treaty by which the member states of the Council of Europe have undertaken to guarantee the basic human rights of all those persons who are under their jurisdiction. Convention with its mechanisms implements the protection that it provides, such as the inclusion of its norms in domestic law, preventing conflict between it and this law, and the improvement of procedures to guarantee the rights and fundamental freedoms. Exactly this had into account the legislator that made such a provision in Article 122 of the Constitution of the Republic of Albania.

In application of Article 5 of the Convention, the right to liberty and security, the Strasbourg Court has drawn specific conclusions. To illustrate the relationship between the Convention and domestic law, we are presenting some conclusions that have emerged from specific judgments of this Court (certainly not going out of objection of this study).

In the case of *Guzzardi Vs Italy*, the Court has given solution to some problems.

Firstly, it has set some criteria by which to determine whether someone is deprived of liberty. It is expressed that in addition to the concrete situation, it should be taken into account also a set of criteria such as: the type of used instrument, the duration of deprivation of liberty, its consequences, etc.

Secondly, in this case, the Court has distinguished between deprivation and restriction of liberty of a person. This change is observed only on the extent and intensity of violation of the freedom and not to its essence or content.

Thirdly, the Court is expressed about the fact what does the law to personal liberty includes under Article 5 of the Convention. According to it, this article relates to the physical human freedom, namely the freedom to move.

In the case *Winterwerp Vs Netherlands*, the Court has interpreted the term “psychic” provided for by point e) of the first paragraph of Article 5 of the Convention, as a case of deprivation of liberty. It identified three criteria for the accuracy of this notion, which are:

1. The State shall apply objective medical norms to determine the individual as a psychic.

2. Mental illness should have sufficient premises and character to justify isolation.
3. The state should not isolate the individual, for as long as he has mental turbulence.

In the case of *De Wilde, Ooms, Versypy Vs Belgium*, the Court held a very important position. Based on the importance, the personal freedom has in a democratic society, it is expressed that if a person surrenders his personal freedom, this does not preclude the court (court of the state that gives the decision) from the obligation not to violate the Convention, going beyond the cases provided for in its Article 5/1.

### Conclusions

This paper showed a very important and key role that Albania's Criminal Law, Constitution, Acts and Norms of International Law have in the definition, treatment and interpretation of works related to deprivation, restriction and the guarantee of freedom of person.

The conclusions of this manuscript contain the main findings regarding the illegal deprivation of liberty of a person, restriction of this freedom and the criteria to be taken into account such as the type of used instrument, the duration of deprivation of liberty and the consequences coming from it.

Also, it should be stated the difference between deprivation and restriction of liberty, that is only to the extent and intensity of violation of the freedom and not to its essence or content.

Finally, this paper shows the crucial role that law enforcement institutions in the country should have in dealing with measures taken in cases of deprivation and restriction of liberty of a person.

### References

- Elezi, I. (1997). Criminal legal defense of a person's freedom. Tirane.
- Flowers, V. (1994). Education and human rights.
- Analysis of the criminal justice system in Albania.
- Universal Declaration of Human Rights (1946).
- Law no. 8417, (1998), as amended, the Constitution of the Republic of Albania.
- Law no. 7995 (1995), amended the Criminal Code of the Republic of Albania.
- Law no. 8137 (1996), European Convention of Human Rights.
- Unifying Decision of the Albanian Supreme Court, Unlawful Deprivation of Freedom under Article 110 of Criminal Code.