

The right to Defense Counsel and its implementation according to the Criminal Procedure Code of Kosovo

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Abstract

This paper aims to address the normative aspect of determining the right to defense counsel and the importance of this right in practice as a guarantee for a fair trial under the Criminal Procedure Code of Kosovo.

This paper will address two dimensions. In the first dimension, the researcher will address the meaning and importance of the right to defense counsel, including the analysis of the right to mandatory defense and the right to defense counsel at public expense, and the reflection that this right has in the implementation of criminal procedural principles regarding with the position of the defendant as an equal party. The second dimension will address the implementation of the right to defense counsel by judicial bodies by analyzing the powers of the defense counsel at each stage of criminal proceedings, in order to guarantee a fair criminal trial.

Keywords: defense counsel, fair trial, defendant, Criminal Procedure Code of Kosovo (CPCCK).

Introduction

The discussion of the right to defense counsel in criminal proceedings is a very crucial issue which is directly related to the position of the defendant in criminal proceedings. The separation of criminal procedure functions and the treatment of the defendant as a subject of criminal proceedings represents an improvement of the defendant's position in criminal proceedings (Sahiti & Murati, 2016). The implementation of modern criminal procedure is based on principles which aim to ensure a fair criminal trial. Within the preconditions for ensuring a fair trial, the right to defense counsel, as a basic right for the defendant in criminal proceedings, undoubtedly has a very crucial role.

The importance of enforcing the right to defense counsel lies in the fact that through this right, the defendant, is provided with professional protection by lawyers who have the appropriate professional training to provide legal aid. Otherwise, regarding the importance of defense counsel, it is estimated that in addition to being in the interest of the individual against whom the procedure is conducted, it is also in the interest of society not to judge innocent people (Sahiti, Murati & Elshani, 2014).

The right to defense counsel is guaranteed by international documents such as the ECHR (Article 6, parag.c) and the PNDPCP (Article 14), and at the same time, it is a right which is guaranteed by the Kosovo Constitution. In the Constitution of Kosovo, Article 30 defines the minimum rights of the accused, while paragraph 5 defines the right of the accused to: *"have the assistance of a defence counsel of his choice, to communicate freely with him and, if he has no means sufficient, to be provided with free*

protection" (Constitution of Kosovo, p.9). The definition of this right as a constitutional category best reflects the importance that the defense counsel has for the defendant. The guarantee of the defendant to defend himself is expressed in two ways, so in the procedural rights that are recognized to him throughout the criminal process and that give him the opportunity to defend himself personally and his right to have a defense counsel (Gjoleka & Gjoleka, 2006).

Since the defendant in most cases is a person who lacks legal knowledge and is in a special emotional state because the criminal process is conducted against him, then these circumstances justify the need for professional protection in order to perform the function of defense counsel in criminal proceedings (Sahiti, Murati, & Elshani, 2014). Even in modern criminal procedure, the right to have a defense counsel is a necessity for a fair trial. According to Skenderaj and Mengjesi (2014), "*Nowadays, the criminal process does not make sense without the presence of one of its important subjects like the legal defendant's lawyer.*" (p. 189).

This paper aims at explaining the importance of the right to defense counsel for the defendant as a subject against whom criminal proceedings are conducted. Of course, through an analytical approach, this paper discusses the provisions of the CPCK, which guarantee the right to defense counsel.

1. Defense counsel according to the CPCK

Undoubtedly, the CPCK, based on democratic principles, aims to make criminal proceedings efficient and at the same time respect the freedoms and rights of the defendant in criminal proceedings, thus guaranteeing the right to defense counsel in several forms.

The right to counsel under the CPCK is defined in Article 11, paragraph 2 which stipulates that: "*The defendant shall have the right to defend himself or herself in person or through legal assistance by a member of the Kosovo Chamber of Advocates of his or her own choice*" (CPCK, 2012, p.3). It is clear from the paragraph that the right to have a defense counsel is left to the choice of the defendant, except in cases where the conditions for mandatory defense are met. Related to Article 11 of the CPCK, is Article 53 of the CPCK, which sets out the obligation of the competent body to notify the defendant of his right to defense since the first interrogation. (CPCK, 2012). The guarantee of this right from the moment of interrogation for the first time reflects the importance of defense counsel in the implementation of criminal proceedings. The non-implementation of this right violates the right to a fair trial.

The CPCK guarantees the right to defense counsel by defining the cases where mandatory defense should be applied, when defense counsel is optional and when defense counsel should be provided at public expense. Optional defense counsel exists in cases when the conditions for mandatory defense are not met, and it is up to the defendant to assess whether to engage a defense counsel or not. Whereas, according to the CPCK, the conditions for mandatory defense exist in the following cases:

"from the first examination, when the defendant is mute, deaf, or displays signs of mental disorder or disability and is therefore incapable of effectively defending himself or herself; at hearings on detention on remand and throughout the time when he or she is in detention

on remand; from the filing of an indictment, if the indictment has been brought against him or her for a criminal offence punishable by imprisonment of at least ten (10) years; and for proceedings under extraordinary legal remedies when the defendant is mute, deaf, or displays signs of mental disorder or disability or a punishment of life long imprisonment has been imposed, in all cases when a defendant seeks to enter an agreement to plead guilty to a crime that carries a punishment of one (1) year or more of long period imprisonment or life long imprisonment, the defendant must be represented by counsel.”(CPCCK, 2012,p.24)

If we analyze cases when the CPCCK provides mandatory defense, we see that this protection is conditioned by several types of reasons starting from: a) causes which deal with certain qualities of the defendant or the person against whom the procedure is applied; b) causes which have to do with the gravity of the criminal offence which is the subject of the proceedings; c) causes which have to do with a special procedural situation; d) causes which have to do with features of the procedure (Sahiti, Murati & Elshani, 2014, p.206). Regarding this, all cases show that the position of the defendant is delicate, either in terms of his physical condition or the punishment provided for the criminal offence for which he is charged.

Also, in cases when the defendant seeks to use the alternative procedure, namely to enter into a plea agreement for criminal offences for which imprisonment of more than one year is provided, mandatory defense is provided precisely for the specifics of this agreement regarding with the privileges enjoyed by the defendant from this agreement, and for the rights from which he must waive. In such a situation, the importance of providing professional counselling by the defense is imperative. Based on cases, when mandatory defense should be assigned, it turns out that the CPCCK aims to ensure an efficient criminal procedure and at the same time create opportunities for the defendant to have an equal position with the state prosecutor through proper professional protection.

A question that arises in cases of the right to defense counsel is whether the defendant can waive this right? The CPCCK, in Article 53 paragraph 3, has determined that the defendant has the right to waive the right to have a defense counsel if he does so voluntarily and in writing and after being notified by the competent body that implements the procedure. However, given the importance of defense counsel in cases of mandatory defense, the CPCCK, in Article 53 para. 4, has determined that the defendant may waive this right only after a lawyer has been appointed on standby who must advise the defendant throughout the proceedings. (CPCCK, 2012). Undoubtedly, this possibility of having a lawyer on standby to provide professional advice goes in favour of the defendant and enables a fair trial for him.

In addition to mandatory defense, the CPCCK, in Article 58, has defined the defense counsel at public expense which the defendant enjoys in cases when there are no conditions for mandatory defense, but the defendant requests to have a defense counsel in the following cases: *“there exists no conditions for mandatory defence and the criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight (8) or more years; or when in the interest of justice, independently from the punishment foreseen, a defence counsel is appointed to the suspect or defendant upon his or her request, if he or she is financially unable to pay the cost of his or her defence.”* (KCCP, 2012, p.25) From the determination of the circumstances to benefit from defense counsel at public

expense, it is clear that the CPCK, in addition to the gravity of the criminal offence, has also taken into account the interest of society to have a fair trial.

Assessing the importance of providing defense counsel at public expense, in the Constitution of Kosovo, Article 31 para. 6 defines that: *"Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice"* (Constitution of the Republic of Kosovo, 2008, p. 9).

According to the CPCK, only a lawyer who is a member of the Kosovo Chamber of Advocates can be hired as a defense counsel, but who in certain cases can be replaced by a lawyer. (CPCK, 2012, Article 54). While the conditions for registration and practice of the profession of lawyer consist of both the conditions of professional training and the conditions about the ethical side and dignity of the lawyer (Law No. 04/L-193 On The Bar, Article 10).

2. Enforcement of the right to protection in criminal proceedings under the KCCP

Referring to the importance of the defense counsel in criminal proceedings and the fact that the defendant enjoys this right since the first interrogation, then it is clear that the adequate implementation of this right plays an important role in protecting the rights of defendants in criminal proceedings, which are guaranteed by the CPCK. Following the logic of the CPCK, respectively according to Article 68, the CPCK determines these stages of criminal proceeding: *"A criminal proceeding under this Criminal Procedure Code shall have four distinct stages: the investigation stage, the indictment and plea stage, the main trial stage and the legal remedy stage."* (p. 28)

Since the defendant enjoys the right to defense since the first interrogation, then this right is important in each of these stages of the criminal proceedings, and even the absence of a defense counsel in any of these stages may cause the violation of other rights guaranteed to the defendant.

The investigation phase is a phase which begins with a ruling to initiate an investigation and identifies the criminal offence and the defendant against whom the investigation will take place and which aims to gather the necessary material to decide whether there is room for indictment or termination of the investigation. According to Article 152, paragraphs 3 and 4, either the state prosecutor, who interrogates the defendant in the preliminary procedure or the police, who may be authorized by the state prosecutor to interrogate the defendant, must inform the defendant for the following rights:

"the criminal offence with which he or she has been charged; and the fact that he or she may request evidence to be taken in his or her defense. If the defendant is in detention on remand, he or she shall also be informed before any examination of his or her right to have defense counsel provided if he or she cannot afford to pay for legal assistance; the right to remain silent and not to answer any questions, except to give information about his or her identity; the right to consult with his or her defense counsel prior to as well as during the examination." (CPCK, 2012, pp.74-75).

Undoubtedly, during the interrogation of the defendant in the investigation phase, the role of the defense counsel is very important for the defendant regarding the

entirety of the guarantees that the CPCK recognizes to the defendant. The role of the defense counsel is to present evidence that argues the allegations of the defense, to submit procedural actions related to detention, where in fact we are dealing with cases of mandatory defense, to advise the defendant on the possibility of entering into an agreement for admission of guilt.

Regarding the defense counsel's access to the materials of the criminal case, the CPCK has determined that at the latest until the filing of the indictment, the prosecutor must provide the defense counsel with the materials or copies of the criminal case if these have not been provided during the investigation. (CPCK, 2012, Article 244, 120). It is clear that the CPCK intends, through the provision of criminal case materials, to provide the defendant with a professional defense by constructing evidence-based arguments.

Also, the role of the defense counsel is extremely important in the procedure for controlling the indictment, respectively in the initial hearing and the second hearing. CPCK explicitly specifies that the defendant and the defense counsel before the second hearing must present objections to the evidence mentioned in the indictment, requests to dismiss the indictment if prohibited by law and requests to dismiss the indictment due to non-description of the criminal offence under the law (CPCK, Article 245, paragraph 6- 6.1-6.3). Of course, taking these procedural actions at this stage depends a lot on the professionalism of the defense counsel, which may result in dismissal of the indictment due to the argumentation of these circumstances determined by the CPCK.

Undoubtedly, the main trial phase is one of the most important phases of the criminal procedure, which consists in confronting the subjects of the criminal proceedings before the court. Defense counsel must be active in the evidentiary proceedings of the main trial, and his task is to challenge the witnesses which harm the defense and also to strengthen the testimony of the defense witnesses in order to convince the court (Gavrila, 2018). The role of the defense counsel at this stage of the criminal proceedings consists in protecting the interests of the defendant whom he has in defense through undertaking the procedural actions provided by law. Leka (2018) states that *"the lawyer has no obligation to prove the truth, he has a different mission, to make it impossible to help his client"* (p.47).

By giving the defendant the status of a subject in criminal proceedings, the CPCK (Article 9), allows him to undertake procedural actions as much as he allows the state prosecutor. By giving the defendant the status of a subject in criminal proceedings, the CPCK (Article 9) allows him to undertake procedural actions as much as it gives to the state prosecutor. Consequently, the quality of the subject in criminal proceedings has the defendant, but not his defense counsel, whose role consists in providing professional legal assistance in finding the material truth (Sahiti & Murati, 2016, p.159).

Therefore, the right to defense counsel is an opportunity for the defendant to equate with the state prosecutor in the context of taking procedural actions regarding the verification of defense claims, either in presenting and arguing evidence or in presenting objections. Also, according to the legal remedies, the defense counsel plays an important role in the exhaustion of the legal remedies in the protection of

the interests of the defendant which are determined by law.

Regarding the legal infrastructure, it is clear that the CPCK, through the guarantee of the right to defense and the authorizations given to the defense counsel in criminal proceedings, intends to provide the defendant with a fair trial. Of course, based on the above analysis, it is clear that with the provisions of the CPCK, the right to defense and its types represents an advanced model for the protection of the rights of the defendant in criminal proceedings. However, despite these obligations arising from the CPCK, the practical implementation of the right to defense counsel remains a concern because the enforcement bodies of criminal proceedings have in many cases failed to implement the right to defense, even in cases where defense counsel is mandatory (Podvorica& Rakaj, 2020).

Of course, the inadequate implementation of the right to defense counsel represents a weakness of the case law in the Republic of Kosovo. In this case, actions should be taken in order to apply this right and ensure a fair criminal trial because it is not enough to guarantee the right to defense counsel by the CPCK if it is not applied in practice. This could violate one of the fundamental rights that belong to the defendants in criminal proceedings.

Conclusions

From the above analysis, it is clear that in terms of normative infrastructure regarding the guarantee of the right to defense counsel, the Republic of Kosovo presents a very advanced model where the defendant is guaranteed this right from the moment of arrest for the first time and further at all stages of criminal proceedings.

Through mandatory defense and defense counsel at public expense, the CPCK aims to cover all categories of defendants in order to provide them with adequate legal protection. Undoubtedly, the right to defense counsel in the Constitution of Kosovo and the CPCK, represents a further guarantee for the implementation of the principle of equality of arms and a regular criminal process, thus enabling the defendant professional legal assistance.

Although with a rich normative infrastructure, the implementation of this right by the bodies that implement the criminal procedure remains a concern. Therefore, to reduce this discrepancy between the normative definition and the practical implementation of the right to defense counsel, work should be done to ensure the adequate implementation of this right by the bodies conducting criminal proceedings. This should be done to materialize the provisions of the CPCK and to provide professional defense both in cases of mandatory defense and in cases of defense counsel at public expense.

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