

Theoretical and practical aspects on the conditions for imposing precautionary measures according to the Code of Criminal Procedure of the Republic of Albania

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Abstract

Precautionary measures are procedural actions that deprive or restrict the freedom and rights of the person against whom criminal proceedings are conducted. They are intended to prevent further criminal activity of the perpetrator of a criminal offense, to prevent his avoidance of prosecution, efforts he may make to jeopardize the taking of evidence or its veracity, as well as to guarantee the settlement of obligations arising from the criminal offense. However, in imposing precautionary measures by the court, care must be taken not to infringe on the rights of the persons against whom precautionary measures are imposed, as this would have consequences for all the various procedural actions. Therefore, the court, as a body for guaranteeing the rights of the individual in the criminal process, raises the suspicion that the person may have committed the criminal offense only if on the basis of its internal conviction, then a precautionary measure can be imposed on him, both of a personal and property character. Therefore, the court according to the Albanian criminal procedural law, before imposing the precautionary measure requested by the prosecutor, must take into consideration the conditions and criteria that must exist according to the Code of Criminal Procedure. Only after the court has ascertained the existence of requirements and criteria can it then determine or not the measure requested by the prosecutor or a less severe precautionary measure.

Keywords: precautionary measure, measure revocation, criminal process, prosecutor, defendant.

I. Introduction

According to the current code of criminal procedure in Albania, precautionary measures can be imposed only on the basis of a court decision which approves the request of the prosecutor. This is a great achievement if we refer to the code of criminal procedure of 1979, or in other words the code of the communist dictatorship system, where precautionary measures were set by the prosecutor. In this respect, with the democratic changes of the early 90's in our country in the framework of the democratization of the political system, the codes had to be democratized, as is the case of the criminal procedure code, which was adopted in 1995.

This code over the years, to date has undergone many changes in terms of the chapter of precautionary measures and especially the definition of conditions and criteria that must exist on their appointment. In fact, in practice all these years, we have faced the most bizarre situations where the Albanian courts often prejudiced tended to impose the most extreme precautionary measure, such as the measure of imprisonment. In fact, the legislator, occurring in these conditions, has intervened especially with the changes made in the Code with Law no. 35/2017, by imposing

some other criteria on the court, the fulfillment of which justifies the imposition of the most severe precautionary measure, ie imprisonment. In this paper will be studied exactly the analysis of conditions and criteria on the imposition of precautionary measures illustrated and with domestic case law but also of the European Court of Human Rights.

II. General conditions for imposing precautionary measures

According to the Albanian criminal procedural law, in order for precautionary measures to be imposed, there must be three general conditions which must exist simultaneously or cumulatively. These conditions can be identified in reasonable suspicion based on evidence, the existence of the criminal offense and the conviction of the person.

Pursuant to paragraph 1 of article 228 of the Criminal Code, it is provided that no one can be subject to personal precautionary measures if there is no reasonable doubt based on evidence against him. In other words, the precautionary measure can be imposed only against a person who is suspected of having committed a criminal offense.

With regard to the first condition, that of reasonable suspicion, the doctrine argues that we will doubtfully understand the creation of the judge's internal conviction that on the basis of the evidence presented by the prosecution the person under investigation may have committed the offense. It is understood that this does not mean that the guilt for committing the criminal offense is proven, but it is enough to create a reasonable suspicion (Islami, Hoxha, & Panda, 2017).

In other words, it is now accepted both by the theory and the Albanian judicial practice that reasonable doubt implies the conviction created by the evidence obtained and examined in accordance with the requirements of the law, which in their unity show that the criminal offense occurred and that it may have been committed by the accused. The existence of a criminal offense and the responsibility of the accused are required for the imposition of personal precautionary measures.

According to point 1 of article 228 of the Code of Criminal Procedure is understood the existence of reasonable suspicion based on evidence, ie the existence of those sufficient legal elements and circumstances of the fact that create conviction to the court in terms of the possibility that the person under investigation and the defendant has committed the criminal offense. Consequently, in order to impose a precautionary measure, it is necessary that the evidence, direct or indirect, be such as to make the responsibility of the investigator and the judge in relation to the charge against him seem possible.

Evidence-based suspicion does not require it to be exhausting, necessarily in terms of guilt.. Despite this reasonable suspicion based on evidence that the defendant has committed the criminal offense, at the end of the merits trial may result and prove both the guilt and innocence of the defendant.

In this respect, practice justifies that: "reasonable suspicion, the evidence on which it is based to justify the imposition and continuation of the application of the precautionary measure, does not need to have the same degree of certainty and

probative value to conclude as the evidence that is necessary to grant or not the sentencing decision against the defendant. It is sufficient for them to be such that, in the situation where the acts of the proceedings are, it can be concluded from them that there is a reasonable degree of possibility of guilt against the investigated and tried person for the commission of the criminal offense against him." (Joint Panels of the Supreme Court, 2011)

Based on this orientation, we can say that the provision of point 1 of article 228 shows the difference between the special nature of the trial and the manner and criteria on which the court is convinced whether or not to impose a precautionary measure compared to that of granting or not of the sentencing decision. In the first case, the trial is based on reasonable suspicions, based on evidence, which show the possibility of committing the criminal offense under trial and the possibility of attribution, ie the existence of guilt, namely in terms of the reasoning that the defendant has committed the offense (*fumus commissi delicti*); while in the second case, the trial relies only on evidence that proves, beyond any doubt, and convinces the court whether or not the offense was committed by him. Recall that with Law no. 35/2017 by the legislator has intervened in Article 390 of the Code of Criminal Procedure which deals with the conviction of the defendant and with the new wording it is determined that when the guilt of the defendant is proven beyond any reasonable doubt, the court issues a sentence, determine the type and extent of the sentence.

Meanwhile, in addition to the first condition, ie reasonable suspicion based on evidence, pursuant to Article 228 of the Code of Criminal Procedure, the existence of two other conditions is required, such as the existence of a criminal offense and the punishment of the person.

Regarding the existence of a criminal offense, we can say that precautionary measures are imposed only if a criminal proceeding is registered because a criminal offense has been committed, so the commission of a criminal offense must have been ascertained and then a criminal proceeding must have been registered. In other words, if there is no criminal offense, there can be no registration of criminal proceedings, and moreover, no precautionary measure can be alluded to. This is due to the fact that precautionary measures are imposed against a specific person who is suspected of having committed a criminal offense.

While, regarding the third condition, that of the conviction of the person for whom the imposition of the precautionary measure is requested, we can say that this person must be criminally punishable. This means that if the person is in one of the circumstances that exclude him from criminal liability, then there can be no precautionary measure imposed on him. Circumstances that exclude from criminal responsibility can be the age of the person, his mental state, or the performance of actions due to duty. In these conditions, according to the Albanian criminal procedural law, we can not impose any precautionary measure against a person who can not be criminally punished (Skenderaj & Hoxha, 2019).

In synthesis of the analysis of the relevant provisions of the Code of Criminal Procedure, in the case of imposing precautionary measures, the court can not analyze the evidence, but must strictly respect the requirement of Article 228 of the Code of Criminal Procedure, according to which no one may be subject to personal

precautionary measures unless there is a reasonable suspicion based on evidence against him. It is understandable that within the deadline to be submitted by the prosecutor to the court the request for imposing a personal precautionary measure on a person, the evidence obtained is in the initial stage, but it is necessary that, in order to impose the precautionary measure, they be sufficient to have a reasonable suspicion of the commission of the criminal offense by him. In this aspect, the main basis is the existence of the criminal offense with all its elements, ie the existence of a criminal fact without which a precautionary measure cannot be discussed (Criminal College of the Supreme Court, 2005).

Meanwhile, in addition to the general requirements that must exist, in the third paragraph of Article 228 of the Code of Criminal Procedure, the existence of at least one of the special conditions for determining the precautionary measure is provided. These special requirements are: when important reasons exist that put in danger the obtainment or the authenticity of evidence, based on factual circumstances that must be expressly set out in the reasoning of the decision. This means that if a precautionary measure is not imposed on a person there is a risk that the latter will affect the evidence, in terms of their destruction or disappearance. Therefore, precisely because of this risk, the imposition of a precautionary measure is legitimized. *Second*, when the defendant has fled or there is a risk that he might do so. It should be understood that precautionary measures are imposed against a citizen who is suspected of having committed the criminal offense and if there is a risk that he will leave then a precautionary measure may be imposed on him. This is precisely to make available the person under investigation for the purpose of investigative actions. In addition, if the suspect has left, it is again justified to impose a precautionary measure in absentia, precisely to make it possible to apprehend him and make him available to the judiciary. *Third*, when, by reason of the particular circumstances of the fact and of the defendant's character, there exists the risk that he would commit serious criminal offences similar to the one he is being prosecuted for. This means that the precautionary measure is set precisely to prevent the commission of other crimes of the same type or even more serious in relation to the crime being prosecuted. So, if a precautionary measure is not assigned to him, then there is a risk that this citizen will commit other criminal offenses again.

From the correct interpretation of the meaning that should be given to the term "risk" in Article 228 as a whole, we can say that at every stage of the proceedings, the request submitted by the prosecutor and the court decision to impose a precautionary measure must be motivated and argue (concretely) the need for security, the existence of important causes, the "risk", ie the probability, the real possibility that it will happen, the jeopardization of the probation process by the defendant.

This "risk" situation can be verified, ie it can arise, change or end, case by case, in dynamics, both during the preliminary investigation phase and during the trial phase. The conclusion of the court regarding the situation of danger is reached based on the totality of the circumstances of the fact and of the law that bring that court to the conclusion on the existence of this situation, which impedes, slows down or irregularly deviates the process of proving and establishing the circumstances of the fact related to the respective criminal proceedings, in the framework of guaranteeing

the process of administration of justice as a whole provided by the Constitution, and which precisely justifies the provision in law of the imposition and implementation of the precautionary measure.

III. Criteria for imposing personal precautionary measures

Article 229 of the Code of Criminal Procedure also stipulates the criteria that the court must take into account in determining precautionary measures. Thus it is accepted that In imposing any precautionary measures, the court shall consider the suitability of each of them with the level of precautionary needs in the actual case.

This means that precautionary measures, from the lightest to the most serious, are imposed depending on the criminal offense suspected of having been committed by the person against whom the precautionary measure is sought. This means that for serious criminal offenses the imposition of more severe measures is justified, such as house arrest or imprisonment. Meanwhile, for minor offenses, the imposition of lighter precautionary measures is justified, such as the ban on going abroad or the obligation to report to the judicial police.

This means that the most extreme precautionary measures, house arrest and imprisonment, can be imposed on the juvenile only when any other precautionary measure is incompatible with the dangerousness of the offense and the personality of the juvenile.

In other words, precautionary measures should be in direct proportion to the security needs, in the sense that the more severe the security needs, the more severe the precautionary measures should be and vice versa.

We also recall that precautionary measures can be imposed not only during the preliminary investigation but also during the trial phase. Thus, the precautionary measure can be determined at any stage of the criminal proceedings, whenever it appears from the trial that the requirements and risk criteria provided by Articles 228 et seq. of the Code of Criminal Procedure have arisen, changed or are missing. This "risk" situation can be verified, ie it can arise, change or end, case by case, both during the preliminary investigation phase and during the trial phase. The decision regarding the imposition of the precautionary measure or for its replacement, revocation and termination is given for the situation in which the proceeding is, for the situation in which the acts are, for the circumstances of the fact and of the law at the moment of submitting the request and its review by the court.

Although due to the nature and manner of conducting a criminal proceeding, precautionary measures are normally and usually imposed at the preliminary investigation stage, there is no legal logic or legal impediment to these measures not being imposed for the first time at the trial stage. If there are security needs, which, as well as respect for the freedom of the individual, are guarantees and obligations arising from the Constitution, that is, if the requirements are met and the risk circumstances provided by law are verified, not only is it not an obstacle, but on the contrary, it is an obligation for the court to accept the prosecutor's request and impose a precautionary measure. The purpose and effects provided by the criminal procedural law for the precautionary measure, the legal concept of "risk" and the

principle of “appropriateness” for its determination and implementation, remain and serve the same, both the preliminary investigation and the trial phase.

Whereas in the case of juveniles, it is provided that when the defendant is a juvenile, the court takes into account his highest interest and the request not to interrupt the educational process. This means that the court must be very careful in imposing the precautionary measure requested by the prosecutor and that the measure given by the court must be compatible with the juvenile’s interest in attending school.

Based on the Code of Criminal Justice for Children, which entered into force on January 1, 2018, there is a spirit that goes towards the protection of children’s rights at all stages of the proceedings. According to this Code, there is an approach of children justice in conflict with the law and that deprivation of liberty for the latter is considered as a last resort that can be taken against the children. This is because all possibilities for the implementation of other precautionary measures that do not deprive the juvenile of liberty must be exhausted and if the intended purpose cannot be achieved through a more lenient measure (Merkaj, 2020).

Therefore, in cases when due to the importance of the criminal fact and the dangerousness of the perpetrator, when the needs of insurance dictate necessarily for the protection of the public interest, the prosecuting authority must first assess the possibility of applying other lighter personal precautionary measures to the children, and only if none of them guarantees the security needs can the measure of arrest in prison be imposed..

Meanwhile, Article 230 of the Code of Criminal Procedure provides for special criteria for determining the precautionary measure of arrest in prison. Thus, it is provided that arrest in prison can be imposed only when any other measure is inappropriate due to the particular danger of the offense and the defendant.

It is also provided that a woman who is pregnant or with children under the age of 3 and who lives with her, a person who is in a particularly serious state of health, or who is over the age of seventy or a drug addict or alcoholic person, for whom a therapeutic program is implemented in a special institution. Thus, the rule is that, in the case of a pregnant woman or child under the age of 3, the prosecuting authority should not request or impose a precautionary measure in prison. The same rule applies to the cases of persons who are over the age of seventy, where precisely, due to age, it is incompatible to be kept under the effect of the measure of arrest in prison. However, this rule also has exceptions which are related to the criterion of dangerousness of the offense for which it is suspected to have been committed. Even if we are in front of a pregnant woman or child under the age of 3 and living with her, imprisonment can be imposed for crimes punishable by a maximum of ten years. Thus, the legislator, by placing on a scale the special qualities of the person against whom the measure is imposed, in relation to the public interest affected by the commission of the criminal offense, has legitimized the imposition of the precautionary measure arrest in prison and in the above cases.

In practice, for these cases it is justified that *“The health situation of the individual against whom the personal precautionary measure is imposed, is certified in a procedural way by the relevant health expertise, which must conclude in clear terms regarding the risk to health from the application of the personal precautionary measure. Citizen S.Gj. is being treated at the*

Prison Health Center and it does not appear that in the relevant information the doctors of this institution have ascertained the danger of life due to the implementation of the precautionary measure determined by a court decision. If, in the following, the health situation of this citizen is such that makes it necessary to review this decision, pursuant to Article 260 of the Code of Criminal Procedure, at the request of the subject, it can be reconsidered in a court session revocation or replacement. of personal precautionary measure..." (Criminal Panel of the Supreme Court, 2008)

As noted above in this paper, precautionary measures are imposed by the court on the basis of the prosecutor's request. While one of the rules provided in the Code of Criminal Procedure on precautionary measures is that the court can not impose a more severe precautionary measure than that required by the prosecutor. This rule is justified by the fact that it is the prosecutor who follows the preliminary investigations, conducts the preliminary investigations, collects evidence, so it is this procedural subject who knows better the security needs.

In the meantime, we may be in certain situations, when the precautionary measure is imposed by the court, as the latter has assessed that there are conditions and criteria, but in the meantime it turns out that one of the requirements or criteria is missing. How to proceed in these cases! In the sense of the provisions of the Code of Criminal Procedure, the institutes of revocation, replacement or termination of the precautionary measure are also foreseen.

Thus, it is accepted that the precautionary measures are revoked immediately when it turns out that the requirements and criteria for their implementation are missing. In these cases, the court, faced with the fact that one of the requirements is missing, must revoke or lift the precautionary measure. This is because, as noted earlier in this paper, precautionary measures are imposed only if the three general requirements are met simultaneously, namely: reasonable suspicion based on evidence, the existence of the criminal offense and the conviction. If, for example, it turns out that the person who was assigned a precautionary measure was arrested in prison because he was suspected of having committed the criminal offense of production and sale of narcotics, but then it turns out that he acted as a police agent infiltrated, then the requirement of conviction of the person is missing. This is because a police agent infiltrated and authorized by the prosecutor to commit a criminal offense, can not bear criminal responsibility and thus the precautionary measure against him should be revoked.

Again, when the security needs are mitigated or when the measure implemented no longer responds to the importance of the fact or the sentence that may be imposed, the court replaces the measure with another easier one. So, in these cases, we have a mitigation of insurance needs which means that the given measure does not respond to the insurance needs which may be the dangerousness of the person against whom the measure is imposed or the criminal offense attributed.

Meanwhile, in cases when the security needs are aggravated or when the person violates the obligations related to the precautionary measure, the court at the request of the prosecutor may decide to replace it with a more severe measure or to impose an additional coercive or prohibitive precautionary measure. For the violation of the obligations related to a restrictive measure, the court may decide to impose an

additional restrictive measure or to replace it with a restrictive measure.

Procedurally, the request of the prosecutor or the defendant for revocation, replacement or joining of precautionary measures is reviewed by the court where the acts are located, within five days from its filing. However, it is provided for that when it is the case, the court also decides mainly on the revocation or replacement of the precautionary measure.

In practice, there are many cases where courts find requests to replace precautionary measures based. Thus, in a practical case it is justified that *“Article 260, paragraph 2 of the Code of Criminal Procedure on replacing a precautionary measure with a less severe one, requires clearly defined criteria as to what are the circumstances that mitigate the security needs or that the precautionary measure does not respond to the significance of the fact by analyzing the health condition of the suspect based solely on his claims without investigating whether they stand or not”* (Criminal Panel of the Supreme Court, Judgment no. 323, dated 05.12.2012).

Thus, our criminal legislation provides for the replacement of precautionary measures to ensure their adequacy to the requirements and criteria of implementation, which must be assessed on a case-by-case basis and when it is found that it does not comply with those requirements and criteria that were set or changed circumstances. fact of law, they may change. The jurisprudence has accepted that the needs of insurance can be mitigated also due to family circumstances or health condition which should be particularly serious, but it should not always be accepted to change the precautionary measure as, the suspect in this case may be under the constant control of the prison hospital, qđ which is the body charged by law for medical treatment of persons who are in detention or imprisonment. Only in those cases when the state supervising authority of detention cannot provide qualified medical treatment of the disease and the absence endangers life or health, the health condition can serve as a reason for changing the precautionary measure *“imprisonment”* if there are general and specific criteria for the implementation of this measure.

In this regard, regarding the requests for replacement of precautionary measures of arrest in prison due to the health condition of the defendant, we recall that the ECHR, in some decisions (GJEDNJ, 2002) has defined three reference criteria that must be met in order for requests to replace a measure to be accepted (Melnik vs Ukraine, 2006). First, the medical condition of the prisoner; secondly, the adequacy of the medical assistance and care provided in the prison and thirdly, the guarantee of detention measures in accordance with the health condition of the applicant.

Meanwhile, in addition to the cases of revocation and replacement of precautionary measures in our code of criminal procedure are also provided the cases of extinction of precautionary measures. Extinction of precautionary measures happens when measures cease their effect. It is argued that there are some cases when the precautionary measure is extinguished. Thus, the precautionary measures cease their effect when, for the same act and against the same person, the case has been dismissed or a decision of acquittal has been issued (when the verdict of innocence is given). It is understood that in these cases it does not make sense for the precautionary measure to remain in force, as ultimately the measure is determined in function of the case and if there are no more criminal cases then there can be no precautionary measure.

Another case when precautionary measures cease their effect is when the sentence is declared extinct or suspended on condition. This means that if the sentence is declared extinguished, after the deadline provided in the criminal code has passed, then the precautionary measure will be extinguished. In addition, the precautionary measures cease their effect when the period served in precautionary detention in prison is longer than the sentence issued. So in this case if the detention served is greater than the sentence given then the precautionary measure cease its effect.

IV. Conclusions

Precautionary measures as procedural actions have as their object the restriction of the freedom of the person against whom they are assigned. In this sense, precisely that these procedural actions affect the freedom of the person, the prosecution and the court should have a certain attention in imposing precautionary measures. This is because in many times in practice we have encountered situations where precautionary measures are imposed not in accordance with the needs of security, where for minor offenses severe measures are imposed and while for serious criminal offenses light precautionary measures are imposed. In practice, these situations have led to ambiguity and confusion in terms of law enforcement by prosecutors and courts. Therefore, we think that with the establishment of the Criminal College of the Supreme Court, many judgments should be issued in terms of determining the criteria that the courts should have in terms of imposing precautionary measures, whether light or more severe.

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