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The change in the legal classification of the criminal offense and the right to defense in the trial

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Abstract

Due process of law is not just a right. As a constitutional principle, it extends to some basic human rights and freedoms, with which legal procedures are carried out. It is a guarantee of vital importance in any democratic society, the responsibility for ensuring which falls on the justice system.

The right to due legal process is characterized by duality. On the one hand, it is presented as a guarantee for every citizen against the unjust actions of state authorities and on the other hand it constitutes an obligation not to violate the rights of citizens without a regular legal procedure. In order to make the protection of basic human rights and freedoms as efficient as possible, the constitutional legislator has provided legal means of constitutional control. The control exercised by the Constitutional Court, when the individual claims the violation of this principle, also appears in the form of a fundamental right in itself and becomes possible through an individual constitutional appeal. Respect for due legal process according to the Constitution is sanctioned by article 42 of the Constitution of Albania where *“freedom, property and rights recognized by the Constitution and by law cannot be violated without due process of law.”* This provision obliges all public authorities to respect freedom and other human rights.

As a guarantee for a due legal process, every person has the right **for his case to be heard in a due, public, legal process and within a reasonable time by an independent and impartial tribunal, established by law, which shall decide both disputes concerning his rights and obligations of a civil nature, as well as for the validity of any criminal charges against him.**

Article 15 of the Constitution of the Republic of Albania provides that basic human rights and freedoms are indivisible, inviolable and underlie the entire legal order. Based on the constitution, during the criminal process, everyone has the right to be informed immediately and in detail about the accusation against him, about his rights, as well as to be given the opportunity to notify his family or relatives. Everyone has the right to defend himself or with the help of a legal defense lawyer of his choice, to communicate freely and privately with him and to be provided with free defense when he/she does not have sufficient means.

The right of defense must be real and its exercise must not be hindered, but the courts must take all legal measures in function of the fair process in order to give the individual the

opportunity to defend himself in compliance with the principle of equality of arms, creating the opportunity for the accused to familiarize himself with the materials, evidence and results of the investigation in advance, to prepare and to exercise an effective defense with arguments in his favor in order to oppose the charge brought. Each party must be given a reasonable opportunity to present its case, under conditions, which do not place it in a less favorable position vis-à-vis the opponent.

Main objective of this manuscript is the right of defense of the individual during the change of the legal qualification of the criminal offense, analyzing the criteria for its realization in the ordinary trial and further specifically in the trial.

Keywords: law, defense of the defendant, due process of law, special trial, jurisprudence.

1. Introduction

In relation to the trial, as a special trial provided by the Code of Criminal Procedure, the conscious choice of the accused to be tried based on the original state of the court file documentation, benefiting from the reduction of one third of the sentence, which would be formulated in charge of the defendant, does not come into conflict with the guarantees provided by Article 6§1 and 3 of the Convention. This principle is defined, in the ECHR's decision *Kwiatkowska vs. Italy*, dated November 30, 2000. In any case, it is up to the court, from studying the documents, to evaluate and decide whether or not the criminal case can be resolved based on those documents brought by the prosecution body, a right derived from article 404 of the Criminal Procedure Code, where regardless of the type of special trial and the procedure followed under this procedural rite, the defendant does not waive the right provided for by Article 6 § 3 d of the ECHR and there is no violation of Article 6 of the Convention in the framework of the due legal process, based on the argument of the general justice of the criminal procedure.

2. The right of defense during the change of the legal qualification of the criminal offense in the practice of the Albanian Constitutional Court

The right to due process of law is related to judicial proceedings.¹ Violation of fundamental rights can be claimed at any stage of the ordinary trial, in the conditions where the courts are obliged to implement and respect human rights.² If within the ordinary judicial system, it is not possible to remedy the violation of the right, another effective option remains to the individual, to appeal to another institution, specifically the Constitutional Court, with a special means of appeal. Exercising its powers recognized by the Constitution, the Constitutional Court will examine whether it is faced with any violation of fundamental rights and freedoms (Miha, 2024).

¹ Article 131f of the Albanian Constitution.

² Article 15/2 of the Albanian Constitution.

The Code of Criminal Procedure has sanctioned³ that with the final decision, the court can give the fact a different definition than the one made by the prosecutor or the accused victim, lighter or more serious, provided that the offense is within its competence. For the court to change the legal classification of the criminal offense, the judgment of the criminal offense on the basis of the legal qualification given by the court's decision must be within its competence, the same fact presented by the prosecutor should exist and the legal qualification of the offense must be changed with a final decision.

The issue of the right of defense is related to how the parties will become aware of the change in the legal qualification, implying that the court is forced to make a decision and this type of decision-making is intermediate by nature, as it aims to decide to inform the parties, so that they can take measures to defend themselves in this special trial, emphasizing that these decisions are part of the decision-making of the judicial body for the administration of the court case (Nela, 2024).

In the spirit of the Constitutional Court, changing the legal qualification of the criminal offense, in special trials, such as the summary trial, must be done in accordance with the features of this trial, in particular with the fact that in order to proceed with this type of trial, in addition to the request of the defendant, the judge's approval is also required (Miha, 2024). The court must give the applicant the opportunity to exercise the right of defense and not accept the summary trial, when it doubts a legal qualification for a more serious criminal offense, implying that this type of trial can be accepted, only by changing the legal qualification of the criminal offense to a lighter criminal offense, where such a line of reasoning has also been followed by judicial practice (Miha, 2024).

3. The case law of the Strasbourg Court (ECHR), in function of guaranteeing the due legal process

The principle of due process goes beyond Albania's internal law, becoming a European right and value enshrined in Article 6 of the European Convention on Human Rights. The European Convention on Human Rights is a reflection of democracy and the First Convention of the Council of Europe that protects human rights. In the content of this provision, legality (Bajri, 2016) can be defined in two ways, in the narrow sense, "legality" where each of the parties in the process can defend their case under equal conditions in relation to the opposing party, as well as in the broad sense where the synonym of justice also includes the right to be tried within a reasonable time. Through several decisions, the European Court of Human Rights has approved⁴ this concept when it says that the first paragraph of Article 6 of the ECHR is the basic norm and that paragraphs 2 and 3 are its special applications or when it emphasizes⁵ that the requirements of paragraph 3 are analyzed as special aspects of the right for

³ Article 375 of the Albanian Code of Criminal Procedure.

⁴ ECHR Decision in *Lutz v. Spain*, dated 25 August 1987, series A no.123-B.

⁵ ECHR Decision in *Isgro v. Italy*, dated 19 February 1991 series A no.34-B.

a due legal process, which is guaranteed by the first paragraph of this article. *Every person has the right to a fair trial, publicly and within a reasonable time by an independent and impartial tribunal established by law, which will decide both disputes concerning his rights and obligations of a civil nature, as well as for the validity of any criminal charge against him. The judgment must be given in public, but the presence of the press and the public in the courtroom may be prohibited during all or part of the proceedings, in the interests of morality, public order or national security in a democratic society, when required by the interests of minors or the protection of privacy of the parties in the process or to the extent deemed necessary by the court, when in special circumstances publicity would harm the interests of justice. Anyone accused of a criminal offense has the minimum rights to be informed within the shortest possible time, in a language he understands and in detail, of the nature and cause of the charge against him; to be given adequate time and facilities for the preparation of the defense; to defend himself or to be assisted by a defender of his choice, or if he does not have sufficient means to pay the defender, to be provided with free legal aid when the interests of justice so require; to ask or request that to question the witnesses of the accusation and to have the right to call and question the witnesses in his favor, under the same conditions as the witnesses of the accusation; to be assisted free of charge by an interpreter if he does not understand or speak the language used in court.*

The European Court of Human Rights has emphasized in its jurisprudence that the conscious choice of the accused to be tried based on the original state of the court file documents, benefiting from the reduction of one third of the sentence that would be imposed, would not constitute incompatibility and violation of the guarantees provided by Article 6§1 and 3 of the Convention. We find this principle defined, among others, in the inadmissibility decision, in the case of Kwiatkowska vs. Italy, case no. 52868/99, dated November 30, 2000.

The European Court of Human Rights has also emphasized the importance of making the defendant aware of the waiver of certain procedural guarantees such as public hearings, requests for new evidence, calling witnesses, finally considering that this waiver, if it is clear, would not conflict with any important public interest. The request for summary proceedings must be presented directly by the defendant or by the defense attorney with a special power of attorney, precisely to ensure that the choice is made with full awareness.⁶

4. Change of legal qualification and the right of defense according to ECHR

The ECHR has analyzed changing the legal qualification of the criminal offense, in terms of its compliance with the Convention,⁷ in relation to the right of defense enjoyed by the defendant in the criminal process.

The very provision of Article 6§3 letter a) of the ECHR does not impose any special

⁶ ECHR Decision in *Hermi v. Italy* no. 18114/02, dated 18 October 2006 – preceded slightly by *Kwiatkowska* - and in the inadmissibility decision *Vitale etc. v. Italy*, case no. 37166/97, dated 02.11.1999, the ECHR has kept the same assessments.

⁷ ECHR Decision in *Drassich v. Italy*, case no. 25575/04.

form on how the accused must be informed about the nature and reason of the accusation against him, therefore the ECHR emphasizes that it is the duty of the trial judges, that domestic law recognizes the right to change the legal qualification of the criminal fact/criminal offense, for the facts which they regularly refer to, to ensure that the accused have had the opportunity to exercise their rights of defense in a concrete and effective way.

The ECHR essentially judges how the “modus operandi” of national courts should not infringe the right of the accused to be informed in detail of the nature and reasons of the charge against him and to have the necessary time to prepare his defense and to argue against the new charge or different profiles of the charge.

According to the ECHR, the right to be informed about the nature and motives of the accusation should be considered in the perspective of the defendant’s right to prepare his defense. If the trial judges have, when this right is recognized in domestic law, the possibility to change the legal qualification of the facts, they must ensure that the defendants have had the opportunity to exercise their right of defense correctly and effectively. This means that the defendants must be informed in a timely manner not only about the motives of the accusation, that is, with the material facts attributed to them and on which the accusation is based, but also, in detail, about the legal qualification given to these facts.

The European Convention of Human Rights has sanctioned⁸ that everyone, accused of a criminal offense, has the minimum rights to be given adequate time and facilities for the preparation of a defense, to defend himself or to be assisted by a counsel of his choice, or to pay the defense lawyer when not having sufficient means.

ECHR in function of guaranteeing the right of defense has expressed⁹ that “*the provisions of paragraph 3 of Article 6 of ECHR sanction the need to devote special care to the notification of the charge to the interested party. Given that the indictment has an important role in criminal proceedings, Article 6/3 recognizes the defendant’s right to be informed not only of the motive of the accusation, that is, of the material facts attributed to him and on which the accusation is based, and in detail, with the legal qualification given to these facts.*”¹⁰

In the standards of the ECHR, it is required that the defendant be informed *in detail, about the legal qualification given to these facts*. In the Drassich case,¹¹ the Strasbourg Court focused its attention on the circumstance that the accused should have been informed of the nature of the accusation against him and there is no doubt that the

⁸ Refer to Article 6/3 of the ECHR, which stipulates that: “Anyone accused of a criminal offense has the following minimum rights: a. to be informed as soon as possible, in a language that he understands and in detail, about the nature and cause of the accusation against him; b. to be given adequate time and facilities for the preparation of the defense; c. to defend himself or to be assisted by a defender chosen by him, or if he does not have sufficient means to pay the defender, to be provided with free legal aid when the interests of justice require it; d. to question or request that the witnesses of the prosecution be questioned and have the right to call and question the witnesses in his favor, under the same conditions as the witnesses of the prosecution; e. to be assisted free of charge by an interpreter if he does not understand or speak the language used in court.”

⁹ ECHR Decision in Drassich v. Italy, no. 25575/04.

¹⁰ ECHR Decision in Pélissier and Sassi v. France, no. 25444/04.

¹¹ ECHR Decision in Drassich v. Italy, no. 25575/04.

indictment must play a fundamental role in accordance with Article 6 §3, letter a) of the ECHR, where the accused must be informed not only about the grounds of the charge and the material facts based on it, but also, in detail, with the legal designation given to them.

This reasoning of the Strasbourg Court is included in the essence of the general principle for a fair trial, that of the correlation between the accusation and the sentence that should not be the same, affirming the need for contradiction between the parties, and setting a limit to the judge's competence to make the legal qualification, including the change in the most fair way, since the change of the legal qualification must be carried out carefully, in order not to violate the right of defense and to allow the defendant to have perfect knowledge of the offense, which is attributed to him, evaluating and placing supervision of the defendant on this type of predictability criterion of the evolution of the charge against him.

*The right to be informed for the nature and motives of the accusation should be considered in the perspective of the defendant's right to prepare his defense. If the trial judges have, when this right has been recognized in domestic law, the possibility to requalify the facts, they must ensure that the defendants have had the opportunity to exercise their right of defense correctly and effectively. This means that the defendants must be informed in a timely manner not only about the motives of the accusation, that is, about the material facts attributed to them and on which the accusation is based, but also, and in detail, about the legal qualification given to these facts.*¹²

*".....it is not the duty of the European Court of Human Rights to assess the validity of the means of defense that the defendant could have invoked or used if he had had the opportunity to debate the new charge raised in his trial..., but the ECHR points out that it is admissible to say that such defenses would have been different from those chosen to contest the original charge".*¹³

5. Conclusion

The defendants should be informed in a timely manner, not only about the motives of the accusation, that is, with the material facts attributed to them and on which the accusation is based, but also, in detail, about the legal qualification given to these facts..."., which includes specifically the right to be informed in detail of the nature and reasons of the charge against him and to have the necessary time to prepare his defense and to argue in opposition to the new charge or different profiles of the charge. Every accused person¹⁴ for a criminal offense has the minimum rights to be given

¹² Drassich claimed that the criminal offense he was accused of, was time-barred. The first two levels of the trial did not accept his claims, so he initiated the process in the Supreme Court of Italy, which at the end of the trial, changed the legal qualification of the offense, convicting him for another criminal offense, the statute of limitations which were longer.

¹³ ECHR Decision in Pélissier and Sassi v. France, no. 25444/94.

¹⁴ Refer to Article 6/3 of the ECHR, which stipulates that: "Every person accused of a criminal offense has the following minimum rights: a. to be informed as soon as possible, in a language that he understands and in detail, about the nature and cause of the accusation against him; b. to be

adequate time and facilities for the preparation of the defense, to defend himself or to be assisted by a defender of his choice, or when he does not have sufficient means to pay the defender. The provisions of paragraph 3 of article 6 of the ECHR sanction the need to give special care to the notification of the charge to the interested party. The court has the obligation to make a preliminary assessment of the accusation and the evidence on which it is based, analyzing the conditions imposed by the Code of Criminal Procedure on the meaning of the evidence, the object of the evidence and the methods of obtaining the evidence.

Changing the legal qualification in the ordinary trial is not considered unconstitutional, and in the following, the question of the constitutionality of this institute is not raised in the summary trial, except for the standard that the legal qualification of the criminal offense cannot be changed to a more serious one, for the defendant in terms of summary trial. On the other hand, the case can be tried in a summary trial, if there is a change of the legal qualification of the criminal offense, with the consequence of easing the defendant's position.¹⁵ In any case, the standards set by the ECHR on notifying the defendant of the new definition of the criminal offense must be respected, bearing in mind the above-mentioned "Drassich" case. This notification would give the defendant the opportunity to rebuild his defense strategy in function of the new qualification of the criminal offense, where in any case there should be no violation of the defendant's right to be informed in detail about the nature and the grounds of the charge against him and he should have the necessary time to prepare his defense and argue against the new charge or different profiles of the charge.

These above-mentioned standards have been materialized in the best way in the decision of the Constitutional Court¹⁶ in the Republic of Albania and are equally applicable in both ordinary and summary trials.

Having the objective of guaranteeing the realization of the right of defense of the parties in trial against the new formulation of the criminal offense, this constitutes a guarantee and puts the court in its role of providing justice, in order not to violate the right to an effective defense for the defendant, respecting the due process of law and the standards of a democratic society.

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given adequate time and facilities for the preparation of the defense; c. to defend himself or to be assisted by a defender chosen by him, or if he does not have sufficient means to pay the defender, to be provided with free legal aid when the interests of justice require it; d. to question or request that the witnesses of the prosecution be questioned and have the right to summon and question the witnesses in his favor, under the same conditions as the witnesses of the prosecution; e. to be assisted free of charge by an interpreter if he does not understand or speak the language used in court."

¹⁵ Positions confirmed by the decisions of the Criminal Panel of the Albanian Supreme Court no. 514 (12), dated 12.07.2021 and no. 739, dated 04.11.2021.

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