

**DETENTION ON REMAND, MEASURE FOR SECURING THE
PRESENCE OF THE DEFENDANT IN COURT PROCEEDINGS OR
VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE**

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Abstract: Detention is the most severe measure for securing the presence of the defendant in criminal proceedings. It is so because with this is restricted the freedom of a person under the conditions specified by law. The right to liberty of person is a fundamental human right. Everyone has the right to personal freedom which is a standard provided in international acts on human rights. This right, in this way, is enshrined in the Constitution of the Republic of Kosovo. The Constitution of the Republic of Kosovo as well as procedural laws have determined that everyone charged with a criminal offense is presumed to be innocent until proven guilty in accordance with the law. Constitutional and legal regulations in Kosovo, have also determined that the person deprived of liberty shall have the right to court rule on the legality of restricting his freedom. Criminal Procedure Code has determined that in cases when the defendant is sentenced by five or more years in prison, the accused be ordered detention if he is not in custody, or it continues it when the accused is in custody. The paper seeks to elaborate whether this way of detention, violates the principle of presumption of innocence and the need for this detention on remand in the future not be ordered by default, but to find first the hearing before the court is necessary or not in order to be assigned to each particular case.

Key words: security measure, procedure, detention, violation, presumption of innocence.

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I n t r o d u c t i o n

The right to liberty of person is a fundamental human right. Everyone has the right to personal freedom which is a standard provided in international acts on human rights. Everyone has the right to life, liberty and security of person stated in Article 3 of the UN Universal Declaration. Whereas Article 9 (1) of the ICCPR this right strengthens further adding that not only that "Everyone has the right to liberty and security of person, no one shall be subjected to arbitrary arrest or detention, no one shall be deprived of liberty except in cases and under the procedures established by law"². It is so because by this is done the restriction of freedom of person under the conditions specified by law. The right to liberty of person is a fundamental human right. Everyone has the right to personal freedom which is a standard provided in international acts on human rights. This right, in this way, is enshrined in the Constitution of the Republic of Kosovo. The Constitution of the Republic of Kosovo as well as procedural laws have determined that everyone charged with a criminal offense is presumed to be innocent until proven guilty in accordance with law.

Detention is the most severe measure for securing the presence of the defendant in criminal proceedings. It is the measure which to the greatest extent restricts the freedom of the person. Criminal Procedure Code has determined that in some cases the measure becomes mandatory sentence. To understand better the issue of detention on remand and application of this measure in criminal proceedings in Kosovo, we believe that it is necessary to obtain appropriate responses which are measures to ensure the presence of the defendant in the proceedings, what represents the principle of presumption of innocence, does the obligatory detention violate the presumption of innocence, as well as what is needed to be changed in Kosovo legislation that such a measure be closer to humanity.

² Amnesty International Publications. (1998), pg. 32.

1. Detention as the most severe measure for securing the presence of the defendant in the proceedings

Measures to ensure the presence of the defendant in the proceedings are aimed to ensure his presence in the criminal proceedings. They are not sanctions against the defendant. Besides ensuring the presence of the defendant in criminal proceedings, they are given in order also to prevent redoing of the offense, the continuation of commenced offense or the successful implementation of the criminal proceedings. According to Kosovo legislation, measures to ensure the presence of the defendant in criminal proceedings are: summons, order for arrest, promise of the defendant not to leave his or her place of current residence, prohibition on approaching a specific place or person, attendance at a police station, bail, house detention, diversion and detention on remand.³

In deciding which of the measures will be applied to ensure the presence of the defendant, the court shall take into consideration the conditions setting out concrete measures to ensure that a more severe measure is not imposed when less severe measure would suffice. As "lesser measures to ensure presence of the defendant in the proceedings" under the law of Kosovo are: summons, order for arrest, promise of the defendant not to leave his or her place of current residence, prohibition on approaching a specific place or person, attendance at a police station, bail, house detention, diversion. Criminal Procedure Code of Kosovo has determined that these measures shall be terminated when the reasons that necessitated them cease to exist or shall be replaced by more lenient measures if the conditions are met for this⁴.

As noted above, detention represents the most severe measure for securing the presence of the defendant in the proceedings. The application of this measure restricts the freedom of a person therefore the legislator has foreseen that the court may determine the detention of a person only if clearly found that:

³ Criminal Procedure Code - Article 173.

⁴ Criminal Procedure Code- Article 173, item 3.

- there is a grounded suspicion that such person has committed a criminal offence;
- he or she is in hiding, his or her identity cannot be established or other circumstances indicate that there is a danger of flight;
- there are grounds to believe that he or she will destroy, hide, change or forge evidence of a criminal offence or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, injured parties or accomplices;
- the seriousness of the criminal offence, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted criminal offence or commit a criminal offence which he or she has threatened to commit; and
- the lesser measures to ensure the presence of defendant would be insufficient to ensure the presence of such person, to prevent re-offending and to ensure the successful conduct of the criminal proceedings⁵.

Because of the weight that this measure presents on limiting a person's freedom, the Constitution of the Republic of Kosovo has determined that "Anyone who is deprived of liberty shall be informed immediately, for reasons of deprivation, in the language he/she understands. The written notice on the reasons of deprivation should be done as soon as possible. Anyone who is deprived of liberty without a court order, within forty-eight (48) hours must be sent before a judge, who decides on the detention or his/her release, not later than forty-eight (48) hours from the moment a person deprived is brought before the court. Anyone who is arrested has the right to be taken to trial within a reasonable time or to be released pending trial, unless the judge determines that the person is a flight risk before his/her pre-trial"⁶. The Constitution also stipulates that "Everyone who is deprived of liberty shall be promptly informed of their right not

⁵ Criminal Procedure Code- Article 187.

⁶ The Constitution of the Republic of Kosovo -Article 29.2.

to make any statements, right to counsel of his/her choice and has the right to promptly inform the person of his choice”⁷.

Criminal Procedure Code also provides the timelines of detention under which the person may be detained the longest to one month from the initial order of detention and after that time period he or she may be held in detention on remand only under a court ruling ordering an extension of detention on remand.

Prior to the filing of an indictment, detention on remand shall not exceed:

- four months, when proceedings are conducted for a criminal offence punishable by imprisonment of less than five years;
- eight months, if proceedings are conducted for a criminal offence punishable by imprisonment of at least five years;
- in exceptional cases where proceedings are conducted for a criminal offence punishable by imprisonment of at least five years, when the case is complex and the delay is not attributable to the state prosecutor, in addition to the prescribed periods of time provided, detention on remand prior to the filing of an indictment may be extended by up to four months for a maximum of twelve months in total;
- upon a convincing and grounded cause to believe that public danger or a threat of violence exists upon the pre-trial release of a defendant, an extension of the detention on remand can be extended for another six months for a maximum of eighteen months in total⁸.

When it comes to the definition of "complex issue" Code has determined that this represents "any offense that includes but is not limited to more than ten defendants, organized criminal activity, corruption, or investigation of which requires ample evidence forensic accounting analysis or international cooperation. A complex case would be a criminal proceeding in which a complex case is investigated and prosecuted. If the indictment is not filed before the timeline outlined above, the detainee must be released.

⁷ The Constitution of the Republic of Kosovo -Article 29.2.

⁸ Criminal Procedure Code- Article 190.

The continuation of detention may be made only by court order. Court supervises detention hearing and decides on the immediate release of the detainees when the legal conditions are met, the reasons for detention have ceased because of changing circumstances, detention ordered by the court has expired, or detention is unlawful for some other reason.

2. The principle of the presumption of innocence

The principle of the presumption of innocence is also a key element of the right to fair trial. The right to be presumed innocent means that everyone charged with a penal offense has the right to be presumed innocent and should be treated as innocent until, and only when, according to law in a fair trial, proved that he or she is guilty.⁹ The presumption of innocence constitutes the right of every person to be considered innocent of suspicion from the moment of the indictment and until proven guilty by a final judgment. Legal principle derived from the Latin "*qui dicit, non qui negat*" (*burden of proof rests with the accuser and not the defendant*).¹⁰ The principle of the presumption of innocence is enshrined in Article 11 of the Universal Declaration, Article 14 (2) of the ICCPR, Article 6.2 of the ECHR and it was enshrined in the Constitution of the Republic of Kosovo in Article 31 (5), according to which "*Everyone charged with a criminal offense is presumed to be innocent until proven guilty in accordance with law.*"

The right to be presumed innocent must be applied not only to treatment in court and the evaluation of evidence, but also in treatment before trial. Suspects must be accompanied by this right and the stage prior to the filing of the indictment is brought, during the trial and guilty finding phase but also after the final appeal. The presumption of innocence is of great importance for those who are in the early stages after raising accusatory act as stages of interrogation by

⁹ *Understanding Human Rights - Human Rights Education Handbook*, the European Centre for Training and Research for Human Rights and Democracy (ETC), Graz, Austria, 2003 - published in Albanian by the Finnish Council for Human Rights, Prishtina, pg. 169.

¹⁰ Hila, F. (2010), p. 65.

investigators and the prosecution, pending the release phase of raising accusatory act or termination of the investigation, the stage of release from custody etc. awaiting trial. The right not to be compelled to testify against oneself or to admit guilt and the right to silence are rooted in the presumption of innocence. International acts for human rights have determined that no criminal offender charged can testify against himself or confess guilt.¹¹ The right to silence, too, requires the prosecutor that before any investigation by the prosecutor, silence not be taken into consideration in the determination of guilt or innocence, whereas the right not to be compelled to testify against oneself means stopping of any form of pressure.

The right of presumption of innocence requires that judges or juries do not prejudice in any case. It is important to respect the other public authorities and the media. Public officials, particularly prosecutors and police should not make statements about the guilt or innocence of an accused before the trial. It is the obligation of authorities to discipline the media or other powerful groups of society that do not affect the outcome of an issue that is emerging in proceedings.¹² However, the Court in *Kraus v Switzerland* has estimated that the presumption of innocence is not assessed to be violated if the authorities inform the public about criminal investigations and in doing so, designate a suspect or say a suspect is arrested or has pleaded guilty, as long as they do not declare that the person is guilty.¹³

The presumption of innocence consists of three essential elements: the burden of proof, the level of proof should be on reasonable grounds, means of proof should be taken in accordance with the law. The burden of proof is on the accuser who has the obligation to prove with clear and convincing evidence the defendant's guilt. If after assessment of the evidence by the court there are still doubts about the guilt of the accused, the court is obliged to declare him/her an innocent person. Presumption of innocence also means the right of the accused to defence and allowing him/her to oppose. The presumption of innocence is also important for people who are

¹¹ Amnesty International Publications. (1998) pg. 90.

¹² Idem, pg. 87

¹³ Amnesty International Publications, (1998), pg. 87.

released for lack of evidence. If a person is released from the court with a final decision of the court for lack of evidence, the decision is binding on all state authorities.

3. Detention on remand, violation of the principle of presumption of innocence

Kosovo Constitution and Criminal Procedure Code have determined the need to act with urgency in cases dealing regarding the detention. These acts have set deadlines within which the authorities must abide by and highlight the reduced application of this measure, only if lesser measures prove insufficient. Despite this, the practice of the courts has been a high applicability of imposition of detention. Ordered detention, as the most severe measure that ensures the presence of the defendant in the proceedings, was not justified with reasons for not ordering other alternative measures as house detention, attendance at the police station, bail and other measures foreseen by the Criminal Procedure Code. Such excuses almost patterned are also used on the occasion of extending the detention measure¹⁴.

During research conducted with representatives of law, there is a prevailing opinion that detention by local judges is ordered in almost all cases where this is required by the state prosecutor. Prosecutor's requirements for setting measures of detention are of stereotyped character and are only a description of legal provisions requiring the ordering of such a measure. Legal professionals have the opinion that detention hearings in most cases are of formal character. The decisions of the judges in these cases, too, do not exceed paraphrasing and citing legal provisions regarding the circumstances for detention... (From the research done with Lawyers of Prishtina -Kosovo).

¹⁴ In a case before the District Court in Pristina regarding the extension of the detention, the court had paraphrased sections of the law without giving any specific reason which is the reason that makes the court be satisfied that the defendants will evade the court summons and flee, or what were the opportunities to effect on the witnesses, or the repetition of the offense. The court had only stated in its decision that "all these circumstances present legal reasons set out in Article 281, paragraph 1, sub-paragraph 1 and 2 (i), (ii) and (iii) of the PCCK, to continue detention. - See the decision of this court GJPP.nr. 45/2010, dated. 17.11.2010.

In addition, an issue, which is worth to be discussed is the issue of the so-called *detention on remand*. This type of detention is set after the ruling, and granted in cases when the court imposes a sentence of *five or more years*¹⁵. Detention is obligatory in proceedings against minors, when sentenced to juvenile prison for five or more years¹⁶. Cause for this detention setting deals with the amount of punishment. When the accused is sentenced to five years imprisonment or more, the amount of punishment causes potential danger to the possibility of his/her flight if left at liberty¹⁷. Provisions of the new Criminal Procedure Code which entered into force in 2013, concerning provisions for the setting of this kind of detention, can be regarded as a step back because the previous code of procedure, which had entered into force in 2004, had not provided the detention on remand. From the cases that have been tried when legal provisions of the Code of 2004 were in force, there are cases where the accused is punished with imprisonment of eight (8) years and the accused was found at liberty and so was not ordered detention on remand measure.¹⁸ Previous code has also left the court to assess whether the legal conditions have been met for detention and the court was obliged to assess the circumstances and require a high level of reasoning of the decision whether or not setting the most severe measure for securing the presence of the defendant in the proceedings could have been avoided.

In the recently announced verdict against several defendants in the case called "Drenica II", detention on remand measure was imposed against the three defendants, although before the announcement of the verdict the defendants had previously been free pending trial. Viewed in terms of time, we estimate that in this case the possibility of repetition of the offense or the continuation of the offense started was impossible because the defendants are accused of having committed the offense 17-18 years ago. In the present case also, there may be discussed about the possibility of influencing the witnesses, since they were protected witnesses and their testimony had already been exhausted during the proceedings. If it can be discussed about the possibility of flight, we also asses that this issue may not present the fact of fear for detention, as

¹⁵ Criminal Procedure Code- Article 367.2.

¹⁶ Sahiti, E. (2014), pg. 857.

¹⁷ Idem.

¹⁸ www.eulex-kosovo.eu – from EULEX Press Release, 29 April 2013, taken from the internet on 15.06.2015.

the defendants were shown as cooperative with the court and had never shown unwillingness to every appearance requested.

If the presumption of innocence constitutes the right of every person to be considered innocent of suspicion from the moment the indictment and until proven guilty by a final judgment, then the detention setting automatically hides itself as a kind of "invisible danger", which is not proved but only remains within the limits of the assumptions and in this case the default setting leads to the negation of the principle of presumption of innocence. This can be justified by the fact that under the law, detention constitutes a measure to ensure the presence of the defendant in the proceedings and does not constitute punishment. Setting of detention measure only because the sentence is over five years appears unconvincing and also leads to loss of public confidence in the courts, unless proven otherwise. The legal framework in Kosovo gives no other reason than that the defendant may flee, as the length of the sentence of over five years is considered as a sentence which has considerable duration, it may affect the convicted person who flee and thereby evade the criminal proceedings. In the case of legislation imposing this measure, there are not provided full reasons and so the existence of this norm, does not the defendant space to oppose such a move, to give his explanations and reasons why this measure should not be set in this case. Lack of means of opposition to the detention on remand, we think, narrows and prejudices the defendant's right to effective use of this procedure and the right of the accused to a fair trial.

4. Conclusions

Measures to ensure the presence of the defendant in the proceedings are aimed to ensure his/her presence in the criminal proceedings. They are not sanctions against the defendant. Besides ensuring the presence of the defendant in criminal proceedings, they are set also in order

to prevent new criminal offense, the continuation of offense or to have successful implementation of the criminal procedure.

Detention is the most severe measure for securing the presence of the defendant in criminal proceedings. It is so because with this is restricted the freedom of a person under the conditions specified by law. The right to liberty of person is a fundamental human right. Everyone has the right to personal freedom which is a standard provided in international acts on human rights. This right, in this way, is enshrined in the Constitution of the Republic of Kosovo. The Constitution of the Republic of Kosovo as well as procedural laws have determined that everyone charged with a criminal offense is presumed to be innocent until proven guilty in accordance with the law. If the presumption of innocence principle constitutes the right of every person to be considered innocent of suspicion from the moment the indictment and until proven guilty by a final judgment, then the detention setting automatically hides itself as a kind of "invisible danger", which is not proved but only remains within the limits of the assumptions and in this case the default setting leads to the negation of the principle of presumption of innocence. According to law, detention constitutes a measure to ensure the presence of the defendant in the proceedings and does not constitute punishment. Setting of detention measure only because the sentence is over five years appears unconvincing and also leads to loss of public confidence in the courts, unless proven otherwise. Presumption that the length of the sentence of over five years is considered as a sentence that has considerable duration and may affect the convicted person to flee and thereby avoid the criminal proceedings and detention, appears biased and greatly hurts the person who considers to feels not guilty and wants to take part to the end in conclusions by appeals and later by means of extraordinary high levels of judiciary.

We think that detention after the verdict should not be imposed automatically but should be left to the court to assess the necessity of imposing a measure of detention or if there is no need and this should be evaluated in each concrete case for each of the accused.

In this way, we believe that the assignment by default under section 367.2 of the Criminal Procedure Code constitutes a much more serious measure than provisions of the previous Criminal Procedure Code which was in force in Kosovo since April 2004 and at which time in

the post-war circumstances the overall security situation was much more grave than now when Kosovo has already done a lot building the rule of law and the consolidated institutions. This way of setting detention on remand, without leaving the court to assess alternative concrete circumstances in each particular case, does not lead to the advancement of respect for human rights and freedoms since in democratic states, these freedoms have to go towards the promotion of respect for them and not towards the levies and no advance of the position of persons participating in criminal proceedings.

Finally, removal or amendment of this legal provision would strengthen even more the principle of the presumption of innocence as one of the most important principles of due process and advancing respect for human rights in general.

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