

UNIVERSAL WARRANTIES OF THE SUSPECT OR ACCUSED IN CRIMINAL PROCEEDINGS IN BOSNIA AND HERZEGOVINA

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Abstract: The paper analyses the universal guarantees that are applicable to the criminal procedure laws applied in Bosnia and Herzegovina in relation to a suspect or a defendant. These guarantees oblige the court, the prosecution and other authorities that act directly in criminal proceedings and determine the criminal process aspect of treatment, as is the position of the suspect or the defendant in the criminal procedure. The aim of this paper is to identify, systematize, define, describe and explain universal guarantees of the suspect or accused in criminal proceedings, and to clarify certain dilemmas referring to direct practical application. Based on the conclusions of the Paper several questions are opened, answers to which should be sought in some future research in Bosnia and Herzegovina.

Keywords: universal guarantees, suspect, accused, criminal proceedings, Bosnia and Herzegovina.

INTRODUCTORY REMARKS

The Constitution, as the highest political and legal act in the country, but also all other accepted and ratified international legal documents, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms, with its Protocols (Mowbray, 2005: 57 and 58), provide for

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the consistent application and realization of the catalog of rights of the suspect or accused in criminal proceedings. From the constitutional point of view, the only obligation of the legislator is to take into account the requirements set before him by the Constitution of Bosnia and Herzegovina, especially those arising from the principle of the rule of law, when regulating certain institutes of these proceedings. More precisely, their regulation must always be such as to ensure the achievement of legitimate objectives of criminal proceedings, distinctness, accessibility, predictability and legal certainty of norms, as well as procedural equality of the parties.³

In addition to the substantial requirement necessary to undertake certain evidentiary and special investigative actions in the course of investigation, in terms of collecting the necessary evidence in relation to a specific criminal offense and perpetrator, it is necessary to meet the formal requirements in each individual case, and that is an order obtained from the judge, more precisely from pre-trial judges. Namely, any restriction of fundamental human rights and freedoms of any citizen in the field of criminal prosecution requires the approval of the court, so that in each case the court autonomously assesses whether the legal requirements for the application or performance of certain evidentiary or special investigative actions are met. Special sensitivity is shown when it comes to the application of special investigative actions with regard to the sensitivity and nature of the aforementioned actions. This means that all repressive activities that restrict certain human rights and freedoms of the suspect or accused (right to privacy, right to property, etc.) by law enforcement entities are limited by the law, and thus prevent or unable arbitrariness in law enforcement or other forms of possible abuse by individuals (Marochini, 2014: 63-84).

The initial existence of grounds for suspicion that a certain criminal offense was committed, in itself, is not sufficient to restrict fundamental human rights and freedoms, given that the legislator has prescribed another cumulative requirement, which is a formal requirement - a court order. In this regard, the control function and the role of the court are directly focused on the control of legality in each individual case in terms of meeting the legally prescribed requirements. In addition, the legal axiom of criminal procedure, which directly affirms and determines modern criminal procedural law, is that a court decision cannot be based on illegally obtained evidence. The indictment, efficient conduct of criminal proceedings, position of the prosecutor in the evidentiary proceedings, resolution and clarification of the criminal matter and ultimately decision-making in relation to the specific criminal matter and the accused depend on the legally collected evidence in the investigation,

It follows from the above stated that the entire conduct of law enforcement entities (prosecutors, police and other law enforcement agencies) relating to any encroachment in or restriction of human rights and freedoms, and the application or conduct of various criminal procedure actions depends on the nature and specifics of a particular criminal offense and is limited exclusively by the law. Criminal procedure laws applied in Bosnia and Herzegovina at all levels of government⁴, respecting the complex constitutional structure and organization of the state, contain essentially identical provisions with cer-

³ See: Constitutional Court of Bosnia and Herzegovina, case No. U-5/16, Partial Decision on Admissibility and Mertis of 1 June, 2017, paragraph 37.

⁴ Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/5, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 and 65/18); Criminal Procedure Code of the Federation of Bosnia and Herzegovina Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13 and 59/14); Criminal Procedure Code of the Republika Srpska (Official Gazette of the Republika Srpska, Nos. 53/12, 91/17 and 66//18), and Criminal Procedure Code of Brčko District of Bosnia and Herzegovina (Official Gazette of Brčko District of Bosnia and Herzegovina Nos. 10/03, 48/04, 06/05, 12/07, 14/07, 21/07, 27/14 and 3/19).



tain (minor) differences and represent the basic criminal procedure framework for actions of all law enforcement entities or agencies in the field of effective and vigorous fight against crime. These laws prescribe certain criminal procedural actions of criminal procedural entities and other participants in various stages of criminal proceedings aimed at solving criminal procedure tasks, which means the clarification and resolution of certain criminal matters.

CONCEPTUAL DETERMINATION AND DEFINITION OF THE STATUS OF A SUSPECT OR AN ACCUSED IN CRIMINAL PROCEEDINGS

In order to properly understand the criminal procedure status of a suspect or an accused, it is necessary to conceptually determine and define the two mentioned criminal procedure statuses. In the scientific and professional public, the difference between the criminal procedure status of a suspect and an accused person is quite clear, but there are also certain dilemmas on the part of the public, sometimes including the media. In Article 20 of the Criminal Procedure Code of BiH, the legislator defined the meaning of the mentioned terms in the catalog of basic terms. A suspect is a person for whom there are grounds for suspicion that he has committed a criminal offense [Article 20, item a)]. An accused is a person against whom one or more counts in the indictment have been confirmed [Article 20, item b)]. In the system of criminal procedural law in Bosnia and Herzegovina, natural persons, as well as legal entities, can appear as suspects or the accused (Halilović, 2019: 101).

When it comes to the criminal procedure status of a suspect, it is necessary to satisfy the standard of proof that there are grounds for suspicion that a certain criminal offense has been committed. Also, the grounds for suspicion as the lower/est degree of probability or suspicion that a certain person has committed a particular criminal offense must be satisfied for the initiation and conduct of an investigation by the prosecutor, as the only legally authorized authority (issues an order to conduct an investigation). The acting prosecutor, on the basis of autonomous and independent assessment in each criminal case, evaluates and decides on initiating and conducting an investigation, depending on whether the substantive requirement is met - the grounds for suspicion.

However, if we look at the practical aspect of initiating and conducting an investigation, it can be stated that - in the investigation phase - a certain person, for whom there are grounds for suspicion that he committed a certain criminal offense, does not know that an investigation has been initiated against him at all. It is evident that there is no prescribed legal obligation to inform the suspect about initiation and conduct of investigation. The suspect practically learns that he has the capacity of a suspect only during the application of repressive activities and particular evidentiary actions by entities or law enforcement agencies (police, prosecutor's office) restricting certain rights and freedoms (deprivation of liberty, interrogation of the suspect). On the other hand, the situation is identical when it comes to the court, given that the acting prosecutor autonomously and independently, on the basis of his own or personal assessment, decides to initiate and conduct an investigation without any obligation to previously notify, obtain the consent or approval by the court. This means that the pre-trial judge was not informed that the acting prosecutor had initiated an investigation against a particular person, and that the investigation has been conducted for a certain period of time. The pre-trial judge learns about the investigation, i.e. that there are grounds for suspicion that a particular person has committed a certain criminal offense only after receiving a reasoned request for the application of certain evidentiary or special investigative actions by the acting prosecutor.



On the other hand, when it comes to the criminal procedure status of the accused, the legal definition of this term and its meaning implies that it is necessary to satisfy a higher degree of suspicion, i.e. the probability that a certain crime was committed - reasonable doubt. Namely, for the existence of a reasonable doubt standard, it is necessary to obtain, i.e. collect during the investigation the necessary evidence relating to the existence of objective - subjective characteristics of a particular or specific criminal offense. The entire investigative and evidentiary actions taken in the investigation by the acting prosecutor and the police, and possibly of other law enforcement agencies (tax administration, inspection services, customs service, etc.) are aimed at reviewing the validity of initial information related to the existing grounds for suspicion that a certain person has committed a particular criminal offense and collection of necessary evidence. The fact that an investigation has been initiated against a certain person due to the existence of grounds for suspicion that he has committed a particular criminal offense does not necessarily mean that this person will automatically have the criminal procedure status of an accused after the investigation is completed. His further criminal procedure status and treatment directly depend on the evidence collected during the investigation, based on which the acting prosecutor autonomously and independently assesses and decides on a possible raising of an indictment, if collected evidence shows that the evidentiary standard - reasonable doubt, is met.

There is often a wrong and ill-founded opinion in the general public that the investigation is led by the police, given that the criminal procedure laws at all levels entrust the prosecutor with the managerial role in the investigation. Authorized officials have an extremely proactive role in the investigation in terms of collecting necessary evidence under the managerial role of the acting prosecutor, so that the police or authorized officials should be viewed and understood as an executive or operational service of the prosecutor's office, although they are two different and independent law enforcement entities in an organizational sense. The police, i.e. authorized officials directly implement all the requests and orders of the prosecutor, but also of the court, in terms of collecting the necessary evidence and information in relation to the particular criminal offense and the perpetrator, but this does not mean that the police or authorized officials lead the investigation. However, following the nature of their work and tasks, authorized officials are able to make proposals to the acting prosecutor or to initiate the application of certain criminal procedural actions (evidentiary actions, special investigative actions, etc.).

GUARANTEES TO THE SUSPECT OR THE ACCUSED IN THE CRIMINAL PROCEEDINGS

A key issue relating to the protection of human rights and freedoms of the suspect, i.e. the accused are their guarantees, as well as a catalog of legally prescribed rights in criminal proceedings which restrict the use of repressive means and prevent arbitrariness in actions, i.e. various forms of abuse by persons being entrusted with public powers in the field of law enforcement. On the other hand, the state of Bosnia and Herzegovina, by signing and ratifying numerous international legal documents (conventions, etc.), has undertaken the obligation to coordinate and harmonize criminal legislation regarding the adoption of appropriate internationally recognized standards that guarantee or protect human rights and freedoms to each individual (Materljan, 2019: 503-528). The analysis of the provisions of the Criminal Procedure Code of Bosnia and Herzegovina, at all the levels of government (state level, Entity level, Brčko District), recognizes clearly prescribed guarantees of universal character to the suspect / the accused in criminal proceedings (Ivičević Karas, 2015: 355-382).



FAIRNESS OF THE PROCEEDINGS

The European Court of Human Rights often spoke about “prominent place held in a democratic society by the right to a fair trial”⁵. This guarantee is directly prescribed in the provision of Article 2 of the Criminal Procedure Code of Bosnia and Herzegovina. The rules established under this law should ensure that no innocent person is convicted and that a criminal sanction is imposed on the perpetrator under the conditions stipulated in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina prescribing criminal offenses and by a procedure prescribed by the law (Article 2 of the Criminal Procedure Code of BiH). Criminal proceedings must be organized in such a way as to ensure (as characteristics of a criminal proceedings) a fair trial. The right to a fair trial is an important determinant of the quality of the concept of the rule of law and, therefore, it is of special importance that this right is protected in practice as much as possible. The proceedings must be fair, i.e. must be conducted within a “reasonable time” and have to meet certain requirements regarding the consideration of the dispute and the pronouncement of the judgment.

JURISDICTION OF THE COURT

A fair trial has to be conducted before “independent and impartial tribunal established by the law”. As the European Court of Human Rights explained, “it is essential in a democratic society that the courts instil confidence in the public and, above all, in criminal proceedings, in the accused”⁶. Consequently, to that end, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms requires that the court falling within its jurisdiction be impartial⁷.

With this guarantee, citizens have a universal right to a trial before a court. For criminal offenses within the jurisdiction of the court, only that court may impose a criminal sanction in the proceedings initiated and conducted under this law, unless otherwise prescribed by this law (Article 2 paragraph 3 of the Criminal Procedure Code of BiH).

Jurisdiction is the right and duty of a single court to shed light upon and resolve a particular criminal matter in accordance with the law. This is the scope of the court’s conduct, prescribed in advance by legal regulations. It follows from such character of court jurisdiction that it cannot be changed by the agreement of the parties or by a court decision, that the jurisdiction of the courts can be established and changed only by the law, and that all acting bodies are obliged, *ex officio*, to take care of their jurisdiction, even when the matter has been previously considered by some other body deciding on that matter.

RESTRICTIONS ON THE USE OF REPRESSIVE MEANS AND LEGALITY OF RESTRICTING THE RIGHTS AND FREEDOMS

Given that fundamental human rights and freedoms are guaranteed to each individual regardless of his or her national, ethnic, religious or racial affiliation or any other personal characteristic, the re-

⁵ *Andrejeva v. Latvia* [GC], no. 55707/00, § 98, ECHR 2009 and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII.

⁶ *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII and *Padovani v. Italy*, 26 February 1993, § 27, Series A no. 257-B

⁷ *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII.



striction of rights and freedoms is possible only if the conditions prescribed by the law are met. Prior to the issuance of a final verdict, the suspect or the accused may be restricted in his freedom and other rights only under the conditions prescribed by the law (Article 2 paragraph 2 of the Criminal Procedure Code of BiH).

PRESUMPTION OF INNOCENCE

Everyone is presumed innocent of a criminal offense until his guilt is established by a final judgment (Article 3 paragraph 1 of the Criminal Procedure Code of BiH). An identical provision is prescribed under Article 6 paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is the so-called temporary presumption (*praesumptio iuris tantum*), which is valid until proven otherwise.

It follows that: (1) the suspect or the accused is not obliged to defend himself, provided that he is obliged to respond to the summons of the body conducting the criminal proceedings; (2) the suspect or the accused is not obliged to prove his innocence and the burden of proof lies on the opposite party, i.e. the prosecutor; (3) the court must render an acquittal, not only when it is convinced of the innocence of the accused but also in a situation where it is not convinced of his guilt.

Any form of prejudice of guilt before a final judgment constitutes a violation or threat to legally prescribed rights. At the moment of the final termination of the criminal matter, this presumption can be refuted (Bejatović, 2019: 211).

IN DUBIO PRO REO

Doubt regarding the existence of facts that constitute the characteristics of a criminal offense or on which the application of provisions of criminal law depends, the court resolves by a verdict in a way that is more favorable for the accused (Article 3 paragraph 2 of the Criminal Procedure Code of BiH). In this way, the rights of the accused person are directly secured from any arbitrariness or improvisation in the application of the law, as well as possible issuance of an illegal court decision. In order to reach a verdict finding the accused guilty certainty is required regarding the existence of decisive facts, so that the court must resolve any doubt in a positive ("fact stands") or negative sense ("fact does not stand") equally for all the facts, both those being in favor and those that are to the detriment of the accused (Vasiljević & Grubač, 2002: 623).

NE BIS IN IDEM (NOT TWICE ON THE SAME MATTER)

No one may be tried again for an offense for which he has already been tried and for which a final court decision has been rendered (Article 4 paragraph 2 of the Criminal Procedure Code of BiH). The law prohibits a retrial for the same offense for which the person was tried and for which a final court decision was rendered. In connection with the above, the case law of the European Court of Human Rights is very interesting with regard to establishing a violation of the *ne bis in idem* principle, and establishing a violation in the sense of determining criteria. One of the problems of a practical nature is timely recognition and differentiation of criminal behavior into misdemeanors and criminal offenses.



Persons who commit a certain criminal offense practically have the opportunity to avoid individual criminal responsibility due to punishment for misdemeanor.

It follows from the above stated that, when defining punishable behaviors, the legislator must pay special attention to the similarity between the misdemeanor and the criminal offense according to their important characteristics and decide whether a certain punishable behavior, i.e. a certain action is a misdemeanor or a criminal offense, thus removing dilemmas and doubts regarding clear differentiation and consistent application of the universal guarantee *ne bis in idem*. In practice, it is necessary to be very cautious whenever a certain behavior (doing or not doing, i.e. punishable behavior) can be both a misdemeanor and a criminal offense, and should assess at the beginning or at least during the proceedings (either misdemeanor or criminal, and, logically, when it is rather a misdemeanor procedure) which has not been legally terminated, whether it is one or the other delict or even whether a misdemeanor or criminal offense may arise from the same life event, which can also sometimes be the case (Stojanović, Škulić & Delibašić, 2018: 66).

LEGALITY OF EVIDENCE

One of the central issues of adequacy and proper application of the law incorporates the legality of evidence, which the correct court decision directly depends on. In this sense, the legislator has prescribed very restrictive legal requirements to be applied in each specific criminal case, so that all evidence is obtained in the legally prescribed manner. It is prohibited to extort a confession or any other statement from a suspect, accused or any other person participating in the proceedings (Article 10 paragraph 1 of the Criminal Procedure Code of BiH). The Court cannot base its decision on evidence obtained in violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained in substantive violations of this Law (Article 10 paragraph 2 of the Criminal Procedure Code of BiH). In this regard, it should be emphasized that the European Convention for the Protection of Human Rights and Fundamental Freedoms with its Protocols has supremacy over domestic (national) law, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Universal Declaration on Human Rights which strictly prohibit any form of torture or cruel, inhuman or degrading treatment or punishment.

The rules of international human rights law stipulate that no one may be subjected to torture or cruel, inhuman or degrading treatment or punishment. Illegal evidence - due to the violation of the procedural form, which at the same time represents a violation of fundamental human rights - must not be used for passing a verdict in criminal proceedings (Grubač, 2004: 279). According to the legal regulation of illegal evidence, we can classify it into three basic types: a) evidence obtained in violation of human rights and freedoms prescribed by the constitution and international treaties ratified by Bosnia and Herzegovina, b) evidence obtained in significant violations of criminal procedure provisions, and c) evidence that has been established from illegal evidence (the so-called “doctrine of the fruit of poisonous tree”).

INSTRUCTION ON RIGHTS

The court, prosecutor and other bodies participating in the proceedings shall instruct the suspect / the accused or another person participating in the procedure, who could, out of ignorance, fail to carry



out an action in the proceeding or fail to exercise their rights, on the rights granted to them under this Code and the consequences of failing to act (Article 12 of the Criminal Procedure Code of BiH). Therefore, the legislator has prescribed to the court, prosecutor's office or other bodies participating in the proceedings the obligation to give instruction on rights, so that the suspect, accused or other persons would not omit an action or fail to use the rights prescribed by the law, out of ignorance, including the consequences of possible failure to act, i.e. omission of a certain action.

TRIAL WITHOUT DELAY

Conducting the proceedings within reasonable time is of a crucial importance for the entire legal system, because any unnecessary stalling often leads to *de facto* deprivation of an individual's rights, loss of efficiency and trust into that system (Moules, 2004: 265-268). The suspect or accused has the right to be brought before a court within the shortest reasonable time and to be tried without delay (Article 13 paragraph 2 of the Criminal Code of BiH). The court is obliged to conduct the procedure without delay and to prevent any abuse of the rights of persons participating in the proceedings (Article 13 paragraph 2 of the Criminal Code of BiH). Considering that certain rights are limited to the suspect / the accused, in the criminal proceedings, there is a prescribed obligation to take all legal actions within the shortest reasonable time in order to reach a lawful court decision. Any delay or unjustified and unnecessary delay in undertaking certain procedural actions and activities directly results in the unfavorable criminal procedure position and the status of the suspect / the accused.

The right to a trial within a reasonable time is also enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which stipulates in Article 6 paragraph 1 that everyone has the right to a fair and public hearing when deciding on his civil rights and obligations or criminal charges against him - within a reasonable time before an independent and impartial tribunal constituted by the law. Pursuant to the above provision, the right to a trial within a reasonable time is one of the fundamental rights of citizens that enjoy protection before the European Court of Human Rights, so the case law of this court is the most valuable source of rights in this field (Carić, 2018: 14).

EQUALITY OF TREATMENT

One of the legal axioms in law is the equality of parties in proceedings. The court is obliged to treat the parties and the defense counsel equally and to provide each party with equal possibilities in terms of access to evidence and its presentation at the main trial (Article 14 paragraph 1 of the Criminal Code of BiH). The court, the prosecutor and other bodies participating in the proceedings are obliged to examine and establish with equal care both the facts that incriminate the suspect or the accused and those that are in their favor (Article 14 paragraph 2 of the Criminal Code of BiH).

CONCLUSION

Throughout history, the Criminal Procedure Code of Bosnia and Herzegovina has gone through various stages of development with very intensive and dynamic reform processes and a clear intention to find the most adequate solutions and answers to crucial criminal procedure questions. The adequacy



of the state reaction to crime, in terms of efficient and energetic fight, can be observed through the prism of the adequacy of the criminal procedure norm and consistent application of universal guarantees to the suspect or accused, in order to clarify and resolve certain criminal matters and make a final court decision.

The criminal procedure position of the suspect or accused, by its nature, significance and importance, occupies a first-class and central place in all reform processes, given the tendency to affirm the protection of fundamental human rights and freedoms, which directly affected the position, status and treatment of the suspect or accused. The humanization of modern criminal procedural law has directly reflected on the criminal justice position and status of the suspect / the accused, and the exercise of the right to defense in the broadest sense. The universal guarantees that are the subject matter of this paper relate to the criminal procedural aspects of the specific position of the suspect or accused, and they prevent arbitrariness and various forms of abuse by persons entrusted with public authority, and directly express and affirm the legal security of each individual in terms of consistent application of the law.

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