

THE STAGE OF FILING THE INDICTMENT AND OF THE STATEMENT

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ABSTRACT

Filing an indictment against an accused and his/her statement about the guilt presents one of the most important stages of criminal procedure. It is an important criminal procedure, due to the fact as of this procedural phase the criminal procedure in adjudicating the accused about the criminal offence charged shall commence. The state prosecutor, at the moment the investigation is completed, or if he/she considers the information he possesses about the criminal offence and the perpetrator, files an indictment, and only on the basis of the filed indictment, he/she can initiate criminal proceedings before the court. The act of charging or the indictment determines the court where the main trial shall be held, personal data of the accused, time and place where the criminal offence was committed as well as its legal qualification, proposal on the evidence that has to be proceeded during the court hearing, reasoning for filing the indictment, and the fact that the accused is either free or detained. After filing of the indictment, the prosecutor submits the indictment in sufficient copies together the case file supplementing the indictment, whereas at this moment, despite its submission to the court, the prosecutor provides the entire evidence based on which the indictment was filed, for the accused and his/her attorney, so that the latest get prepared for defence before the court.

Keywords: Indictment, initial, disclosure, disposal, review.

INTRODUCTION

During the initial hearing before the court, the following shall be present: the state prosecutor, the accused or the accused persons and the attorney or the attorneys. In the initial court hearing, the accused after consulting with his/her attorney can declare whether he/she confesses the guilt about the offence he/she is accused. If, in the initial hearing, the accused does not confess the guilt, he/she can, before the second court hearing, submit a challenge together with his/her attorney against the evidence based on with the prosecutor filed the indictment, as well as the request to dismiss the indictment.

During the second court hearing, the parties being the same as in the initial court hearing take part, wherein the parties present their evidence as well as the reasoning on challenging the evidence, whereas the court schedules the main trial at this procedural stage.

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Indictment

The indictment is a formal legal-procedural act of charging³, by which the state prosecutor brings the accused before the court, whereas he/she is shown up after the investigation is completed, or the state prosecutor may file an indictment without conducting investigation in the cases when he/she assesses or considers that the information available to him about the criminal offence or the perpetrator⁴ or its committer⁵ comprise a sufficient ground to file the indictment.

However, the question is raised whether there can be any sentence without an indictment, the answer is no; that's why the title of the topic was given the indictment and the sentence. Therefore, the aim of the indictment is that the court declares the accused guilty and sentences him/her according to the Law.

The purpose of sentence is a social and citizen protection from dangerous offences by which important individual and society values are damaged and endangered⁶.

The main primary purpose of a criminal sentence is the punishment of a guilty person who committed a criminal offence, to stop his/her further criminal activity, as well as his re-education to become helpful for the society in the future, or as it is called in our legal terminology a special prevention. The other main purpose of a criminal sentence is education of citizens about the feeling of complying with the state laws, otherwise called as general prevention⁷.

The Criminal Code of the Republic of Albania was developed or drafted on the grounds of democratic principles, which entered into force on 01.06.1995 that underwent a range of legal reforms in 2001, 2003, 2004, 2007 and 2008, is a powerful weapon in the fight against criminality, especially against organized crime⁸.

Nevertheless, the Criminal Code of the Republic of Albania, despite its development and drafting on the basis of international advanced standards and laws, as well as despite the legal reforms occurring meanwhile, it has not expressly foreseen or it has not provided the purpose of the criminal sentence⁹, but this does not mean that criminal sentence, in our criminal law, does not pursue certain purposes of punishing a guilty person.

According to the legal definition of the Criminal Code of Kosovo (CCK), the purpose of punishment¹⁰ is: to prevent the perpetrator from committing criminal offenses in the future and to rehabilitate the perpetrator, to prevent other persons from committing criminal offenses, to

³ Hajdari, A. (2006) *E Drejta e Procedurës Penale*, page 277, Prishtina, Universiteti Mbretëror ILIRIA.

⁴ Criminal Legislation of the Republic of Kosovo identifies the person that committed a criminal offence as “Kryes” (Perpetrator).

⁵ Criminal legislation of the Republic of Albania identifies the person who committed a criminal offence as “Autor” (Perpetrator).

⁶ Salihu, I (1995) *E Drejta Penale*, page 332, Prishtina, Faculty of Law.

⁷ Kaçupi, S. Haxhia, M, (2012) *Komentar Kodit Penal të Republikës së Shqipërisë*, page 218, Tirana, Botimet KUMI.

⁸ Elezi, I. (2009) *E Drejta Penale (Pjesa e Posaçme)*, page 5, Tirana, Botimet ERIK.

⁹ Kaçupi, S. Haxhia, M, (2012) *Komentar Kodit Penal të Republikës së Shqipërisë*, faqe 218, Tiranë, Botimet KUMI.

¹⁰ Article 41 CCK, No 04/L-082 dated 20 04.2012, applicable as of 01.01.2013

provide compensation to victims or the community for losses or damages caused by the criminal conduct as well as to express the judgment of society for criminal offenses, increase morality and strengthen the obligation to respect the law.

The indictment contains¹¹: an indication of the court before which the main trial is to be held, personal data of the accused, the data whether the accused is detained or shall remain at liberty on bail, or the duration of detention, or the proposal to determine the detention, the time and place of commission of criminal offence and the way the criminal offence was committed, the legal definition of the criminal offence, the proposal or recommendation about the evidence that is to be administered during the main trial, the fact whether there was a special investigation stating the names of judges that were members of the trial panel as well as the reasoning.

After filing of the indictment, the state prosecutor presents the indictment to the competent court in sufficient copies to the accused, the attorney, to the injured party, and the court is submitted the entire file of investigation.

First initial hearing

The Court assigns the single Judge (if it is about a criminal offence that is adjudicated by a single judge) or the Presiding Judge of the Trial Panel, whereas the Judge of the Presiding Judge of the Trial Panel checks the jurisdiction *ex officio*, and schedules the initial hearing immediately, which is to be held within 30 days from filing of the indictment, but if the accused is in detention on remand, the initial court hearing is held no later than 15 days from filing of the indictment, the litigants are notified about the initial hearing.

On the occasion of submitting the indictment to the court, the state prosecutor, with the aim of providing the accused during the criminal offence, is entitled to request the court to order the detention of the accused¹² if the same is at liberty, or provide the presence of the accused in the court hearing by lesser measures such as: the 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, diversion¹³, whereas, the same materials and evidence that the state prosecutor submits to the court, submits to all parties on the criminal proceedings¹⁴.

During the first initial hearing, there are present the following: the state prosecutor, the accused or the accused persons as well as the attorney or the attorneys. At this stage of hearing, the Judge or the Presiding Judge of the Trial Panel decides about the measures in ensuring the presence of the accused during the criminal proceedings, ensures the fact that the accused persons and the attorneys have been given all materials and evidence on basis of which the indictment was filed, schedules the second initial hearing no earlier than 30 days neither 40 days from the date of the first initial hearing, informs that the parties that prior to the second initial hearing, they are

¹¹ Article 241 of the Criminal Procedure Code of Kosovo No 04/L-123.

¹² Article 193 of the Criminal Procedure Code of Kosovo No 04/L-123.

¹³ Article 173 of the Criminal Procedure Code of Kosovo No 04/L-123.

¹⁴ Parties in the proceedings shall be: the prosecutor, the injured party, the defendant and his/her defense council (the attorney).

entitled to challenge the evidence based on which the indictment was filed, to request dismissal of the indictment if it is inadmissible, as well as request the dismissal of the indictment, due to the lack of description of criminal offence pursuant to the law¹⁵.

Statement of the accused about the guilt

At the beginning of the initial hearing, the Judge or the Presiding Judge of the Trial Panel shall instruct the defendant of the rights not to plead his or her case or to answer any questions and, if he or she pleads his or her case, not to incriminate himself or herself or his or her close relative, nor to confess guilt; to defend himself or herself in person or through legal assistance by a defence counsel of his or her own choice; to object to the indictment; and to challenge the admissibility of evidence and the indictment.

After reading the indictment by the State Prosecutor, the single Judge or Presiding Judge of Trial Judge shall satisfy himself or herself that the defendant understands the indictment and afford the defendant the opportunity to plead guilty or not guilty, whereas, if the defendant does not want to make any statement regarding his or her guilt, he or she shall be considered to have pleaded not guilty.

The state prosecutor and the attorney may negotiate the terms of a written plea agreement under which the defendant and state prosecutor agree to the charges of an indictment and the defendant agrees to plead guilty¹⁶, provided that the state prosecutor's agreement to recommend a more lenient punishment to the court, but not under one below the minimum provided for by law, except for the stage of proceedings in which the defendant confesses the guilt, the recommendation for punishment of at least 40% of the legal minimum when the defendant confesses the guilt as a cooperative witness. The other requirement for confession of guilt consists of the considerations in the interest of justice, such as the waiver of the punishment when the perpetrator of the criminal offence cooperates voluntarily in disclosing the crime or when his cooperation prevents the commitment of other criminal offences.

In cases when the guilt is confessed prior to the first initial hearing, the indictment to the court is thus submitted together with the confession of guilt, the Judge or the Presiding Judge of the Trial Panel assesses the pleas of agreement, by approving the pleas of agreement or rejects it and schedules a main trial.

In case when the defendant has confessed his/her guilt according to the points of the indictment, the Judge or the Presiding Judge of the Trial Panel¹⁷ shall determine or to get sure or get convinced that the defendant understands the nature and consequences of the guilty plea, he guilty plea is voluntarily made by the defendant after sufficient consultation with defence counsel, if the defendant has a defence counsel, as well as the guilty plea is supported by the facts and other materials based on which the indictment was filed, and the fact that the indictment does not comprise of any legal violations.

¹⁵ Article 245 of the Criminal Procedure Code of Kosovo No 04/L-123.

¹⁶ Article 233 of the Criminal Procedure Code of Kosovo No 04/L-123.

¹⁷ Article 248 of the Criminal Procedure Code of Kosovo No 04/L-123.

In case the single trial judge or presiding trial judge is not convinced about the confession of guilt by the defendant, that it was made pursuant to the above, he shall reject the guilt confession by the defendant and schedules the court hearing as if there was no guilt plea, on the other hand, the defendant is entitled to confess the guilt during the entire court hearing.

In case the single trial judge or presiding trial judge is convinced that the confession of guilt was made according to the law, he or she shall render a ruling on the minutes of the court hearing to accept the guilty plea made by the defendant and shall proceed with sentencing, or shall suspend sentencing pending the completion of the cooperation by the defendant with the state prosecutor.

Dismissal of the indictment

After the first initial hearing, whereas after the second initial hearing, the defendant is entitled to challenge the evidence based on which the indictment was filed, with the reasoning that the evidence was not taken legally by the police, the state prosecutor or other government body, that the evidence was taken through ill-treatment of the defendant, induced fatigue, physical interference, administration of drugs, torture, coercion or hypnosis, threaten with measures not permitted under the law, hold out the prospect of an advantage not envisaged by law and impairment of the defendant's memory or his or her ability to understand, as well as it is likely that the court assesses ungrounded evidence.

With regard to challenging the evidence, the single judge or the presiding judge of the trial panel renders a written decision permitting or excluding the evidence, whereas parties have 5 days to appeal the decision. The inadmissible or excluded evidence shall be sealed and separated from the case file and they may not be examined or used in the criminal proceedings.

Prior to the second hearing, the defendant may submit a request to dismiss the indictment, on the basis that the criminal offence he/she is charged does not comprise of a criminal offence, there are circumstances excluding criminal liability, the period of statutory limitation has expired, a pardon covers the act, or other circumstances exist which bar prosecution, here is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence.

The single judge or the presiding judge of the trial panel, after the challenge of evidence, gives a week to the state prosecutor to submit a written response. The state prosecutor, during this period, after checking the case file and assessing the challenge of evidence, if he/she finds arguments that he/she can file the amended indictment, the defendant is again entitled to challenge the evidence; but if the defendant does not challenge again the evidence of the amended indictment, the single judge or the presiding judge decides whether such challenge or the request are not relevant for the amended indictment and does not examine them any further.

Following the request of the defendant for dismissing the indictment and after checking the case file as well as assessing the entire collected evidence, the single judge or the presiding judge of the trial panel renders a decision for dismissal of the indictment and termination of investigation proceedings, when he/she assesses that the criminal offence by which the defendant is charged does not comprise a criminal offence, there are circumstances excluding criminal liability, the

period of statutory limitation has expired, a pardon or amnesty covers the act, or other circumstances exist which bar prosecution, here is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence for which he/she is charged¹⁸.

Second hearing and scheduling of the main trial

At the second hearing, the state prosecutor, defendant or defendants, and defence counsel or defence counsels shall be present¹⁹.

At the beginning of the second hearing or in the proceeding of the hearing, the single judge, respectively the presiding judge of the trial panel shall ensure that the defence counsel has fulfilled the obligation relating to the disclosure of evidence.

During the second hearing, the single judge or the presiding judge of the trial panel assesses the challenge of the entire evidence submitted by the defendant or his/her attorney, the state prosecutor, also during the second hearing, may either verbally or in writing respond to the challenge of the evidence within a week; the single judge or the presiding judge of the trial panel also schedules hearings if he/she assesses that such hearings are necessary.

If the single judge or presiding judge of the trial panel finds that it is necessary to schedule a hearing to assess the challenge of evidence presented during the second hearing by the defendant or his attorney, he shall set and perform such a hearing as soon as possible, but no later than three weeks after the date of the second hearing. The single judge or the presiding judge of the trial panel, after holding the hearing regarding the challenge of evidence, shall render a written and reasoned ruling as soon as possible, but no later than three weeks from the date of holding the hearing.

In the second court hearing, the defendant or the attorney shall provide to the state prosecutor, notice of the intent to present an alibi²⁰, specifying the place or places at which the defendant claims to have been present at the time of the alleged criminal offence and the names of witnesses and any other evidence supporting the alibi, notice of the intent to present a ground for excluding criminal liability by attaching supporting evidence, as well as the names of witnesses the defence is planning to invite to testify. The attorney may supplement all the evidence prior to commencing with the main trial.

In case the single judge or the presiding judge of the trial panel has not decided yet about the challenge of the evidence submitted by the defendant or his attorney, he/she shall render a written ruling with its reasoning on all proposals submitted after the second hearing, and by the same decision issues an order and schedules the main trial.

¹⁸ Article 253 of the Criminal Procedure Code of Kosovo No 04/L-123.

¹⁹ Article 254 of the Criminal Procedure Code of Kosovo No 04/L-123.

²⁰ Article 256 of the Criminal Procedure Code of Kosovo No 04/L-123.

CONCLUSION

1. In comparison to the old code of criminal procedure²¹ that was in force until 31.12.2012, the new code of criminal procedure is more practical with regard to the criminal procedural stage after filing of the indictment, due to the fact that the same judge or the presiding judge of the trial panel that examines the legality of indictment shall also proceed with the main trial.
2. In view of all procedural stages until scheduling the main trial, I consider that this procedural code provided such solutions that prolong and overload the criminal procedure unreasonably, which means unnecessary prolongation of the criminal procedure until the initiation of the main trial.
3. I consider that a hearing would be sufficient for the parties to present to evidence and challenges against the evidence based on which the indictment was filed as well as the request for dismissing the indictment.

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