Msc. Arjan NDOJA

CRIMINAL LAW: ITS EFFICIENCY AND INEFFICIENCY OF A REASONABLE TRIAL TIME

Abstract

Criminal law[1] constitutes of set of legal principles, determining criminal acts, when is considered a person criminally responsible and criminal sanctions attributed to who committed the offense.

The main task of the criminal law is the study, progression and implementation of criminal legislation in the territory of the Republic of Albania. The essential feature of the criminal law relates to the efficiency that it transmits. According criminal principles point of view and the continuous study it can be understand whether further reformation is necessary or not. The effectiveness of criminal law appears as a feature enabling the proper recognition and understanding of the institutions, notions and in general, criminal law principles in force. Respectively, in practice, the science of criminal law helps to adequately interpret and apply criminal law principles.

In a wider sense, criminal law's task is to study criminality and take necessary measures to prevent it, as well as to study the fundamental issues and effects of criminal and punitive policy. In this regard, this science studies the actual institutions and meanwhile proposes to apply new measures and new institutions to improve crime prevention. ***Crime prevention means any act or tool used by natural persons or government bodies and agencies intended to minimize the damages that may cause the criminal offense[2].***

One of the of criminal justice' element considered in this paper is the reasonable trial time, also supported by the Constitutional Court and the ECHR's practice, the role of the defense lawyer appointed by the court/ prosecution office, who can indicate a series of problems and evidences of the inefficiency of criminal justice in Albania.

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[1] Salihu.I, "E drejta penale",(Criminal Law) General Part, Pristine 2003

[2] Hughes, G.: Crime prevention, edit."The sage Dictionary of Criminology", Sage, 2001

The democratic standards of the defendant rights were accepted in all procedural criminal principles. The entire procedural principles are a guarantee to achieve the full effectiveness of criminal justice in fight against crime, for regular implementation of the Criminal Code articles. Respecting and enforcing the principle of legitimacy by the court develops a due lawful process. Using and verifying evidences, ensuring the participants' equality in the judicial process, the defense rights of the defendant, a court decision based on law and fairness ensures punishment of the offense and of its author.

The effectiveness of the Criminal Procedure Code is clearly stated at all stages of the criminal process in order to achieve justice, the practical implementation of the Criminal Code that punishes the perpetrator, the imposition of punishment individualization against him or the acquittal when the charge is not proven.

The efficiency of a judicial system depends on the manner of courts' organization, the available budget, the number of judges and laws applied by them. This system is often reformed in Albanian law; however, its shortcomings will be thoroughly analyzed in the second part of this article regarding the inefficiency of criminal justice for a correct legal process within reasonable time, the role of the lawyer appointed by court / prosecution.

According to the European Convention on Human Rights and the Constitution of the Republic of Albania, everyone has the right to have the case adjudicated within a reasonable time[3].

"The Constitution of the Republic of Albania, respectively Article 42/2 provides the right to a correct legal process: "*Whoever, for the protection of his constitutional and legal rights, freedoms and interests, or in the case of an accusation raised against him, has the right to a fair and public trial,* ***within a reasonable time,*** *by an independent and impartial court specified by law. "*

The principle's purpose of a trial within a reasonable time has to do with the fact that, a trial process within a reasonable time and through a final decision, terminates the legal uncertainty in which can anyone be found in terms of his legal position, improving the justice system and guaranteeing constitutional rights.

One of the instruments of international human rights protection is the right to a fair legal process stated both in the International Convention on Civil and Political Rights[4], also incorporated in Article 6/1 of the European Convention on Human Rights[5]. Even though Article 6/1 of the ECHR protects the individual's

[3] ECHR, Article 6 and the Constitution of the Republic of Albania article 42, paragraph 2.

[4] Article 14 of the Convention.

[5] Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law *that will decide on disputes regarding the rights and*

right to a judicial trial within a reasonable time, it does not provide a solution as to who will be the consequences of discrepancy of this principle. However, this Article should be seen in conjunction with Article 13 of the ECHR where it is provided that, state authorities should enable the parties' effective remedies (through national legislation, criminal law) if a right / freedom provided in the Convention is violated.

Determination of a reasonable continuance, takes in consideration the complexity of the case, the conduct and interests of the defendant and the behavior of the judicial and administrative state authorities. The courts' task is to ensure avoidance of unnecessary delays in trials through all participants in the process. Extended process beyond reasonable time limits is a request applied both to civil and criminal cases. The evaluation if the trial time limits have been respected or not, takes in consideration: - The complexity of the case (the nature of the indictment / charge, the number of the accused persons, the time needed to collect the evidence and the compilation of the charges, respect of the notification procedure, complaints at different levels of the judiciary, etc); - The applicant's conduct (absence of advocate, provision of evidence and proper presentation, etc.); - The conduct of the relevant authorities (lack of judge, prosecutor, dispatch of letters, etc.).

Parts of the objective factors are the nature or the character of the case, because it cannot be change from the subjects or actors that give or speed the verdict up. So, unlike other factors, it cannot be assessed by the court that has completed the criminal or civil case, but by a higher court instance, such as the Court of Appeals or the High Court, who will ultimately make their case by case assessment. Comparison between the objective and the subjective nature of the reasonableness assessment relates to the terms of termination.

Decision no. 12[6], dated March 05, 2012 of the Constitutional Court, emphasizes that as far as the conduct of the authorities is concerned, although civil proceedings have provided for the principle that the procedural initiatives belong to the parties (Article 2 of the CPC), it does not dismiss the obligation to ensure a prompt adjudication, as required by both Article 42 of the Constitution of the Republic of Albania and Article 6/1 of the ECHR. In this regard, the ECHR has maintained the same position (see the Decision of June 08, 2006, Surmeli v. Germany, Application No. 75592 / 01, par. 129).

Since 2000, the jurisprudence of the European Court of Human Rights ("ECHR") and European States are obliged, in front of a local authority, to

obligations of both of its civil nature and of the criminal charges brought against it.

[6] Decision No. 12, dated 05.03.2012 of the Constitutional Court

create effective means over the delay of the proceedings[7].

The European Court of Human Rights has noted mostly that the increasing cases of violation of the Article 6/1 of the Convention has led the tribunal itself to pay attention to the risk that exists for the "power of law" within the internal legal system of the states. In this context, Article 13 of the Convention provides for an additional warranty for the protection of the individual's fundamental rights (Further within the internal legal system).

Article 6/1 of the European Court of Human Rights imposes on states parties the obligation to organize their judicial system in such a manner that national courts respect all the requirements of this article, including the development of the process within a reasonable time period. In cases if there are deficiencies in the judicial system, the best solution is the prediction of an internal legal remedy to speed up the process in order to prevent a very long process. Such a legal remedy is more efficient than anticipating a measure of compensation, since it prevents the state from being considered responsible for subsequent convention violations, and unlike compensation, it does not repair *a posterior* consequences.

For the first time, the European Court of Human Rights has decided in the "Kudla" case against Poland [8] (decision of October 26, 2000), that due to the length of the trial, Article 13 of the ECHR is violated, except for Article 6 (examination within a reasonable time). This the decision was followed by others such as Hartman vs. the Czech Republic[9], Decision of July 10, 2003, or Mifsud vs. France, the decision of September 11, 2002[10].

According to these decisions, the internal appeal instrument must be effective and it becomes such only if it enables the courts to give in as soon as possible the decision, or at least to provide indemnification for the prolonged adjudication terms.

In support of this principle, our Constitution, in its article 131 / f has defined as one of the competences of the Constitutional Court, the final judgment of individuals' complaints of violation of constitutional rights for a due legal process after they have been exhausted all legal means for their protection. More specifically and detailed for trial within a reasonable time, is Article 42 of the Constitution, according to which: "... everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ".

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[7] Kudła v. Poland, October 26, 2000, §152.

[8] Kudła v. Poland, October 26, 2000, §152.

[9] Hartman v. Czech Republic, July 10, 2002

[10] Mifsud v. France, September 11, 2002

Decision No. 12[11], dated March 05, 2012 of the Constitutional Court states that: *according to the Article 42 of the Constitution anyone has the right to protect his constitutional and legal rights, freedoms and interests or in the case of charges brought against him a fair and public trial within a reasonable time by an independent and impartial tribunal established by law. This provision establishes the obligation to organize the legal system in such a way that the courts meet the requirements of the standards for a due process, including that of the trial within a reasonable time.* ***In this regard, courts have a duty to ensure that all participating parties in the proceedings are brought in order to avoid any unnecessary delay*** *(see Decisions no.42, dated 25.05.2017, No.12, dated 05.03.2012 of the Constitutional Court).*

Decision no. 76[12] dated December 04,2017 of the Constitutional Court, regarding the requirements to ascertain a violation of constitutional law for a due legal process within a reasonable time, emphasizes that the reason for the extension of the process should be assessed on ***the basis of the criteria set out in the legitimacy of the ECHR, according to which the reason for the length of the trial must be assessed in the light of the particular circumstances of the case, having regard in particular to the complexity of the case, the applicant's conduct, the conduct of the authorities, the risk that passes the applicant for this length of time for the trial*** (see *Decision No. 59, dated 16.09.2016 of the Constitutional Court*). Consequently, in order to conclude whether, in the present case, we are before the violation of the right to a fair hearing, the Court considers that ***each of the above mentioned elements must be taken into account.***

In the Code of Civil Procedure with the latest amendments to the law no. 38/2017[13], OB 98, dated May 05,2017, in Chapter X, the legislator for the first time has provided clear rules regarding the violation of terms, the measures that are imposed to speed up the trial proceedings and the damage reward in case of terms violation. All the rules that we will outline below are in coherence with the definition of Article 6/1 of the European Convention "On the Protection of Human Rights and Fundamental Freedoms".

The need for change in this direction was indispensable. Up today, court proceedings have been abusively postponed for years, and no one was held responsible, while with the new amendments the court is faced with greater responsibility towards the process of a case within a reasonable time frame set by law and if this term is violated unreasonably then these judge's unfavorable

[11] Decision No. 12, dated 05.03.2012 of the Constitutional Court

[12] Decision no. 76 dated 04.12.2017 of the Constitutional Court

[13] Law no. 38/2017, Official Journal 98, date 5.5.2017, Chapter x, page 162, of the Civil Procedure Code

decisions are forwarded to the High Inspectorate of Justice for the imposition of disciplinary measures against him. Also, the citizen has the right after the final verdict to file a claim for compensation of damage if terms violations are found.

The matter is which are these reasonable terms within which an issue from its inception to its termination at each stage for the adjudication of a criminal case: (at the Court of First Instance up to 2 years for crimes; for offenses 1 year; At the Court of Appeal for criminal trial 1 year; 6 months for criminal offenses;at the High Court for criminal offenses 1 year; 6 months for the offenses;)

Regarding to these changes, it is worth to mention the fact that the Constitutional Court on all the reviewed requests has consistently contained new provisions identifying new cases of reasonable time limits violation.

Thus, the Decision of the Constitutional Court No. 76 dated December 04, 2017 *emphasizes in advance that the Law No. 38 /2017 "On Amendments to the Code of Civil Procedure" entered into force on November 05 2017, the law which added Chapter X "On the adjudication of applications for ascertaining the violation of the reasonable terms, anticipation of the proceedings and damage recovery".* ***The provisions of this chapter determine the evaluation of the reasonable period of the proceedings as well as the fair remuneration when it is found unreasonable time extension in the investigation procedures, trials and as well as in the execution procedures of the decisions. According to recent legal amendments, there will be a legal remedy that is effectively presumed, which will guarantee an acceleration of the criminal, civil or administrative judicial process, as well as compensation, so a concrete result against the violation of right for a judicial proceeding within reasonable legal time limits.*** *The Civil Procedure Code did not foresee retroactive effects on matters that were fundamentally concluded by ordinary courts and for which reasonable deadlines have passed under the relevant legal provisions but has regulated and specified rules and procedures for matters that are or will be be considered after November 5th at ordinary courts regarding allegations of unreasonable litigation. Since in the present case we are not before a case which is still under consideration in court but the appellant complains of decisions of the courts that have already passed all the levels of the judicial appeal and for which the legislation does not provide for other effective remedies for the protection of this constitutional right, the claimant is legitimated to consider this claim.*

The Criminal Procedure Code of the Republic of Albania provides that courts should come to a decision at a single hearing and if this is not possible, then the court decides to be continued the next working day and only for special

reasons, postponed to fifteen days[14].

This is in accordance with the principle of "uninterrupted trial", which aims to present completed and coherent facts to the judicial panel, thereby facilitating their assessment. In the judicial practice the concept of uninterrupted trial has been deformed since it has been abandoned or rather has never been accepted as recommended by law. Today we can say that it does not really exist. The duration of the trial, in addition to the consequences in terms of human rights, there are also considerable economic consequences.

On one hand, increasing efforts to ensure the participation of all involved persons may be expensive, but on the other hand, shorter and more efficient judicial processes would significantly reduce costs for all involved parties. In this way it would be possible to judge more issues by using these resources. However, it seems that the Criminal Proceedings Code does not facilitate the uninterrupted trials. Parties are required to file a list of witnesses and experts, at least five days prior to the date set for trial[15]

This is an insufficient time to notify witnesses and to be presented at the court, especially taking in consideration the register of civil status directorate, as well as the ineffective Albanian postal system. Moreover, it appears that the parties may "officially" request the evidence, which is determined by the court whether they are accepted or not, only after the court hearing opened[16].

On this subject, the Constitutional Court[17] emphasizes that, regarding the conduct of the authorities, does not relieve the courts of responsibility to provide a prompt adjudication, as required by Article 42 of the Constitution of the Republic of Albania and Article 6/1 of the ECHR . Although the civil procedural framework has provided that procedural initiatives fall within the parties (Article 2 of the CPC). In this regard, the ECHR has maintained the same position.

Thus, it is impossible to come to a decision within the same working day or the next one especially where the hearing of witnesses and experts is required. Consequently, in spite of the principle of uninterrupted trial, in Albania the main hearings often continue for long periods and there are cases that it took years to end. It is very rare that a trial terminates within one session and instead of continuing on the following working day, the trial is postponed for the maximum allowed period, i.e. fifteen days, and this is not an exception but a rule. Moreover,

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[14] Article 342 of the Code of Criminal Procedure of the Republic of Albania.

[15] Article 337, paragraph 1, of the Code of Criminal Procedure of the Republic of Albania.

[16] Article 357 of the Code of Criminal Procedure of the Republic of Albania

[17] Decision of ECHR, dated 08.06.2006 "Surmeli v. Germany", App. No .75592 / 01, para. 129

sometimes sessions are only made to inform that someone or something misses and judicial review is postponed for another two weeks.

One of the most common causes of postponing the court proceedings is the non-appearance of defense lawyers without legitimate reasons. There are indications that they use postponement as a defense technique. This is still an unsolved problem because this is related to the fact that detention is counted as a day and a half in calculating the time of imprisonment[18] or to meet the maximum length of detention on remand or for other purposes.

The impression is that court-appointed defense attorneys often play a passive and formal role. In general, court-appointed lawyers tend to meet less often with their clients and simply appear in sessions without being consulted previously. Based on the principle that **"Justice should not only be given but should also appear to be given"**, the courts must make efforts to ensure that the charge and defense are treated in the same and respectful manner. Judges should avoid informal contacts in court or elsewhere with each of the parties. The same goes for prosecutors and defense lawyers. This would reduce opportunities for corrupted deals.

The Constitutional Court[19], in its consolidated practice, has stated that the right of defense must be realistic and effective and not just theoretical, courts of ordinary jurisdiction must take all legal measures that in the function of a fair trial give to the individual the opportunity to make real defense respecting the principle of equality of arms. The Code of Criminal Procedure, contains no another provision regarding disciplinary measures for defense attorneys, except a provision regarding the conduct of the session,Article 341. On the contrary, but it seems not to be used for the situations outlined above, the CPC creates the opportunity to suspend the deadlines for the defendant for acts committed by the lawyer of the hearing.

Although this provision is intended to prevent defendants and defense lawyers from using postponement as a tactic for the purposes outlined above, this situation may lead to the "punishment" of the defendant for an action that only belongs to the defense lawyer. It is regularly abused with this provision , by suspending the deadlines for all defendants when only one of the defense lawyers is absent, thus "punishing" the defendants that are not related to them.

In order to limit these types of practice from the defense lawyers, disciplinary measures should be enacted in the Criminal Procedure Code. The measures that may be imposed are, for example, the obligation to pay a part or all of the

[18] Article 238, paragraph 2, of the Code of Criminal Procedure of the Republic of Albania.

[19] Decision of the Constitutional Court no. 30/2010

procedural costs, fines, to be prevented from attending as a defense lawyer on the current issue or in general before the court in question. However, the first and foremost measure is for the court to make it very clear to all parties that disciplinary measures will be taken against objectively unjustified the .

It should be clear to the lawyers the fact that taking on more issues than they can bear is not a reason to delay court hearings. If an unjustified delay can be punished with a fine, such delays should lead on the obligation to pay the procedural costs. Regular and repeated abuses must ban the lawyers from the case in question and if the defense lawyer has a history of postponed proceedings, then he should be prevented from appearing before the court in question. In order to encourage the Chamber of Advocates to fulfill its responsibilities as a disciplinary body, the measures to be provided in the CPC should be made subject to the appropriateness of the measures taken by the Chamber of Advocates. Another possibility is to make it clear to the Chamber of Advocates that if it does not fulfill its disciplinary responsibilities, then the power to impose disciplinary measures is passed to the court.

Of course, the effectiveness of the criminal justice system and criminal legislation in combating criminality depends on the outcome of criminal cases trials. The effectiveness of criminal legislation against crime is significantly reduced if the number of innocent cases increases, the return for completion of investigations or decision to dismiss the case or if the court imposes penalties on the minimum provided by the Criminal Code. The number of appeals against court decisions is another indication of a due legal process, lack of trust in justice[20].

The fundamentals for the independence of the judiciary have also been identified by the Organization for Security and Co-operation in Europe[21] such as: Judicial Administration; Judicial Selection and Responsibility towards Independence in Trial. The effectiveness of the criminal justice system for investigating and adjudicating criminal cases is also indicative of the effectiveness of criminal and criminal procedural legislation.

Recommendations of the Committee of Ministers of the Council of Europe and the European Union, have played an important role in aligning legal reforms in the criminal justice system with European standards. Understandably, the achievements so far are only part of the reform process that is expected to be taken. One of the main conditions for integration into the European Union is precisely the reform in the criminal justice system as a whole and in the

[20] Hysi, V. The Role of the Criminal Justice System in Crime Prevention, Legal Life, N.4 / 2010,

[21] Law no. 8811, 2001 "On the Organization and Functioning of the High Council of Justice"

judicial system in particular as well as the fight against corruption within and out of this system.

The Sectoral Strategy of Justice defines this vision for the justice system: "... transforming the justice system to be open to anyone, to inspire confidence in everyone and to provide justice for everyone[22]". This strategy states that: "... an effective justice system does not only contribute to the economic well-being of a country, but aims to develop its society by ensuring that the power of law functions properly."

In this process, the current challenges of the justice system, in the service of increasing public confidence, remain:

- The functioning of the judicial system, not only for the aligning with legislation with the acquis communitaire and good practices, but above all to the effective implementation of the adopted legislation, transforming judicial practices into rapid efficiency, avoiding trial delays and reducing overdue issues.
- Respect for human rights, especially the rights of vulnerable categories such as prisoners and pre-detainees, humanitarianism, legal security for them, access to justice in the function of due process of law.

Conclusions

At the end of representing these data, I would like to emphasize that the identification of causes and the determination of the measures to be taken is a great first step in the way of solving the problem, which should be followed by others.

According the principle that "justice delayed is justice denied," I would like to stress strongly that unjustified delays and further delays in criminal proceedings can not only be tolerated but they are jeopardizing the justice, both in terms of guaranteeing the legality of the criminal proceedings and the rights of the parties involved, as well as in putting the perpetrators of the law offenders responsible, so should be an immediate common reaction to the situation.

The delays in verdicts to some high-risk criminal cases warns of a truncated justice that risks the failure of criminal proceedings, the elimination of evidence, the weakening of judicial review, the lack of interest of witnesses and in some cases the release of defendants due to the expiry of detention periods.

With all the undeniable and visible achievements, we are aware that justice as well as the entire politics, economy or Albanian society as a whole, still has

[22] In this sectoral justice strategy, etc. (Official Journal No.116 of August 15, 2011, p. 4580-4595)

problems, shortcomings and other challenges to face.

The road to consolidating positive values and building on contemporary standards of an independent, professional, and high moral integrity is still long and difficult.

There are some functional judiciary mechanisms that we need to change and reform.

Further reforming of the Albanian judiciary, achieving western standards, and gaining public confidence in criminal justice are a constant goal for which we are all ready and determined to contribute more in the future to successfully deal with it.

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