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Professional paper

THE APPLICATION OF PRE-TRIAL DETENTION AS A MEASURE TO ENSURE THE PRESENCE OF THE ACCUSED IN CRIMINAL PROCEEDINGS ACCORDING TO THE CODE OF CRIMINAL PROCEURE OF KOSOVO

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Abstract

One of the fundamental prerequisites for the progression of criminal proceedings is the participation of procedural subjects in the criminal procedure. Based on this fact, the primary responsibility falls on the justice authorities, who are obliged to ensure the presence of the accused in the procedure.
Pre-trial detention is considered one of the most severe measures to secure the presence of the accused in the criminal procedure because it significantly restricts the freedom of the accused, a measure that can only be determined in accordance with the conditions specified by the Code of Criminal Procedure.
Within the scope of this work, we will elaborate on the general concepts of pre-trial detention, the conditions for its imposition, its duration, the continuation of pre-trial detention, and the rights of pre-trial detainees.
The Code of Criminal Procedure has envisaged the implementation of pre-trial detention in accordance with international standards. The rationale for applying measures to ensure the presence of the accused in the criminal procedure lies in achieving the goal of preventing the delay of the criminal procedure and ensuring access to justice.

Keywords: pre-trial detention, the accused, rights, Code of Criminal Procedure

Introduction

The right to freedom and security is guaranteed to all citizens by the Constitution of the Republic of Kosovo as one of the fundamental rights. No one can be deprived of their freedom except in cases prescribed by law and by a competent court decision. (Constitution of the Republic of Kosovo, 2008). The right to personal freedom and security is also provided in Article 5 of the European Convention on Human Rights as an inviolable and fundamental right. Ensuring and respecting this right is a prerequisite for the proper and democratic functioning of a state. There are several measures to ensure the presence of the accused in criminal proceedings, such as summons, arrest warrants, the promise by the accused not to leave the place of residence, prohibition to approach a certain place or person, presentation at the police station, surrender, house arrest, diversion, and pretrial detention. These measures assist in the development and successful implementation of the criminal procedure. (Code of Criminal Procedure of Kosovo, 2012).
As the least restrictive measures to ensure the presence of the accused based on the Code of Criminal Procedure of Kosovo, it includes summons, the promise by the accused not to leave the place of residence, prohibition to approach a certain place or person, presentation at the police station, surrender, house arrest, and diversion. (Code of Criminal Procedure of Kosovo, 2012).
The measures to ensure the presence of the accused are not criminal sanctions. These measures are taken in an effort to successfully develop the criminal procedure, as well as achieve other objectives such as: preventing perpetrators of criminal acts and bringing them to

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justice, unhindered progress of the criminal procedure, undertaking procedural actions, executing imposed criminal-legal sanctions, preventing new criminal acts, securing evidence, and ensuring the safety of individuals. (Hajdari, A 2013). Article 185, paragraph 1 of the Code of Criminal Procedure stipulates that pretrial detention may be ordered in accordance with the conditions prescribed by this Code. (Code of Criminal Procedure of Kosovo, 2012). Paragraph 1 of this article expresses the principle of legality in relation to the decision to impose pretrial detention. The conditions for pretrial detention and the procedure for its imposition are determined by the procedural provisions within the framework of the pretrial unit. The legality of holding the accused in pre-trial detention is assessed from the perspective of the existence of conditions for pre-trial detention, not by the manner in which the criminal procedure is concluded (Sahiti E, Murati R, Elshani Xh 2014). Pre-trial detention should be minimized as much as possible (Code of Criminal Procedure of Kosovo, 2012, Article 185). "As short as possible" for the reduction of pre-trial detention from this paragraph is the time that enables the successful fulfillment of the purpose of the criminal procedure. The judge who decides on pre-trial detention evaluates this matter. Hasty action implies prioritizing activity in criminal matters where pre-trial detention is determined (Sahiti E, Murati R, Elshani Xh 2014). Pre-trial detention is lifted, and the detained person is released at any stage of the procedure as soon as the reasons for its imposition cease (Code of Criminal Procedure of Kosovo, Article 185, Paragraph 3). The court, at every stage of the procedure, examines, as an official duty, whether the conditions for pre-trial detention exist. Whenever it finds that the conditions for pre-trial detention no longer exist, it removes the pre-trial detention by decision (Sahiti E, Murati R, Elshani Xh 2014, p. 484). Unnecessary pre-trial detention before trial not only results in unnecessary costs but also deprives the accused of freedom and risks undermining the principle of the presumption of innocence. Decisions on the arrest or release of the accused must be balanced between the benefits of release and the risk of flight or the threat to public safety. (Kosovo Center for the Rehabilitation of Torture Survivors, Pre-trial Detention as a Service: Responsibilities and Implementation, 2015).

General conditions for the imposition of pre-trial detention

The court may impose pre-trial detention on a person only if some of these circumstances exist:

1. There is a reasonable suspicion that such a person has committed a criminal offense when he is in hiding, when his identity cannot be verified, or when other circumstances indicate a risk of his escape.
2. There is reason to believe that he will destroy, conceal, alter, or falsify evidence of the criminal offense, or when special circumstances indicate that he will obstruct the course of criminal proceedings by influencing witnesses, the injured party, or accomplices.
3. The seriousness of the criminal offense, the manner or circumstances in which the criminal offense was committed, his personal characteristics, past behavior, environment, and conditions under which he lives, or any other personal circumstance indicates the risk that he may repeat the criminal offense, complete the attempted criminal offense, or commit the criminal offense for which he has been incited to commit (Code of Criminal Procedure of Kosovo, 2012).

The concept of "reasonable suspicion" from the Code of Criminal Procedure of Kosovo can be considered equivalent to the local law to the concept of "reasonable suspicion" from the European Convention on Human Rights as a requirement for the legality of pre-trial detention. The condition that the suspicion be based on reasonable grounds constitutes an essential part of defense against arbitrary arrests and detentions. The European Court of Human Rights has

also emphasized that "in the absence of reasonable suspicion," the arrest or pre-trial detention of an individual should never be imposed in order to force him to admit guilt or to testify against others or to extract facts or information that could serve as a basis for reasonable suspicion against him. The risk of flight - It is understandable that law enforcement authorities may be concerned that a suspect may attempt to escape to avoid criminal punishment. The ECOHR has ruled that for this reason to be credible, local courts must explain why the risk of flight exists and not just order pre-trial detention in identical terms, let's say stereotypically, without explaining in any way why the risk of flight exists or why this risk cannot be prevented through alternative measures to pre-trial detention. Therefore, the judge must carefully assess factors such as the personal situation and personality of the accused, and their connections with the territory, through family or employment. One of the other conditions for imposing pre-trial detention is the risk of tampering with evidence. Almost every criminal investigation involves the questioning of witnesses and the collection of other evidence. Therefore, in every case, there is a theoretical possibility that the accused may obstruct the investigations; however, it cannot be assumed that the accused will do so in each case. The risk of tampering with evidence, like all other grounds for pre-trial detention, must be well justified in relation to the specific facts that support it. Prosecutors and judges, in fact, may be concerned that there is a real risk that the accused, if left free, will obstruct the normal course of investigations by attempting to influence witnesses. However, to base pre-trial detention on this ground, authorities cannot rely solely on such concerns in the abstract; they must demonstrate that there are specific factual circumstances highlighting the risk of tampering with evidence or corrupting witnesses. Additionally, it should be considered that pre-trial detention based on such grounds, in principle, should be concluded as quickly as possible so that the evidence for which detention was ordered is obtained or secured. The risk of repeating the criminal offense, meaning the risk that an accused person may repeat the criminal act, commit an attempted offense, or carry out a criminal act that they have threatened to commit, is another basis upon which pre-trial detention can be anticipated. Regarding the risk of repeating the criminal offense, the European Court of Human Rights has found that the risk must be convincing, and the measure must be appropriate, taking into account the circumstances of the case and, in particular, the individual's past history and personality. At the same time, the risk of repeating the criminal offense cannot simply be established based on unspecified precedents or previous convictions for offenses that are not comparable in nature or degree of severity (OSCE, Department for Human Rights and Communities, Legal System Monitoring Sector, 2010). The person subjected to pre-trial detention is informed: a) orally and in writing about the rights under Article 167 of this Code (information in a language the person understands about the right to remain silent, free translation, the right to professional defense, etc.); and b) in writing about other rights enjoyed under this Code.
(Code of Criminal Procedure of Kosovo, 2012). Also, Article 29, Paragraph 2 of the Constitution of the Republic of Kosovo envisages that anyone deprived of their liberty must be informed immediately, of the reasons for the deprivation, in a language they understand. Written notification of the reasons for deprivation must be made as soon as possible. (Constitution of the Republic of Kosovo, 2008, Article 29, Paragraph 2). The imposition of pre-trial detention is determined by the pre-trial judge of the competent court based on a written request from the state prosecutor after the hearing session.

The pre-trial judge conducts a hearing on pre-trial detention, where the State Prosecutor and the defense are present. (Code of Criminal Procedure of Kosovo, 2012). Professional defense in the case of pre-trial detention is mandatory. (Sahiti E, Murati R, Elshani Xh 2014). With regard to the imposition of pre-trial detention, each party has the right to appeal within twenty-four (24) hours from the time of delivery of the decision. The appeal does not suspend the execution of the decision. A decision on the appeal is made within forty-eight (48) hours

of its submission. (Code of Criminal Procedure of Kosovo, 2012). The right to appeal is also provided by the European Convention on Human Rights, where, according to this international standard, any person deprived of liberty by arrest or detention has the right to initiate proceedings in which the court must, within a short period, examine the legality of detention and order release if the detention is unlawful. (European Convention on Human Rights, 2010, Article 5, Paragraph 4).

Duration of pre-trial detention

In the Code of Criminal Procedure of Kosovo, it is specified that the detained person can be held in pre-trial detention for a maximum of one (1) month from the day of arrest based on an order according to Article 188 of this Code. After this period, the person can only be held in pre-trial detention by a decision of the pre-trial judge, the single adjudicating judge, or the presiding judge of the judicial panel that orders the continuation of pre-trial detention. Prior to the filing of the indictment, pre-trial detention cannot exceed four (4) months when the procedure is applied for a criminal offense punishable by less than five (5) years of imprisonment, and eight (8) months when the procedure is applied for a criminal offense punishable by more than five (5) years of imprisonment. (Code of Criminal Procedure of Kosovo, 2012).

The limitation of pre-trial detention to eight months does not constitute the minimum or maximum point of pre-trial detention before the filing of the indictment. Undoubtedly, setting the timeframe in this paragraph aims to express and manifest the legislator's requirement for an investigative process without undue delay, so that within this period, the indictment is raised. For the reasons presented in paragraphs 3 and 4 of Article 190, pre-trial detention can last a maximum of 12 or 18 months, respectively.When during the pre-trial procedure there is a reasonable cause to believe that there is a general risk or a risk of violence if the accused is released, the provision of paragraph 4 of Article 190 allows for the continuation of pre-trial detention beyond twelve months for an additional six months, thus the overall maximum pre-trial detention before the filing of the indictment is eighteen months. (Sahiti E, Murati R, Elshani Xh 2014).

Prosecutors are obliged to conduct investigations with particular care in cases where the accused is in pre-trial detention. It should be considered that some of the grounds justifying the imposition of pre-trial detention, such as the risk of influencing witnesses or any obstruction of justice, are likely to diminish as prosecutors complete their investigations.

Therefore, as the duration of pre-trial detention increases, the courts must be more vigilant in supervising these detentions. As such, during the review of the request for the continuation of pre-trial detention, the courts must carefully observe the need for the extension of pre-trial detention with greater precision, and the decisions regarding the continuation of pre-trial detention should meet the same or even higher standard of reasoning as the initial decision for pre-trial detention. (OSCE, Department for Human Rights and Communities, Legal System Monitoring Sector, 2010). Pre-trial detention can only be extended by the pre-trial judge, the single adjudicating judge, or the presiding judge of the judicial panel based on the request of the state prosecutor, who demonstrates that there is a basis for pre-trial detention under Article 187 of this Code, that an investigation has commenced, and that all reasonable measures have been taken to expedite the investigation. The injured party or the victims' advocate may formally or informally request the state prosecutor to seek the extension of pre-trial detention. (Code of Criminal Procedure of Kosovo, 2012). Judges must always start from the perspective that deprivation of liberty is a last resort, and not only should they demand prosecutors to present sufficient reasons for pre-trial detention, but they must also conduct an independent and critical review of the reasons presented. (OSCE, Department for Human Rights and

Communities, Legal System Monitoring Sector, 2010). Given that pre-trial detention is a much more restrictive measure than the actual punishment, Kosovo has incorporated the time spent in pre-trial detention into the days of imprisonment in its legislation. (Sopjani N. 2019). Due to the intrusive nature of pre-trial detention and considering the principle of the presumption of innocence, the fundamental principle is that pre-trial detention should only be used as a last measure. According to the perspective of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the principle that pre-trial detention should be imposed only as a last resort implies, first and foremost, that measures other than custody (i.e., measures other than pre-trial detention) should be applied as much as possible. Additionally, this Committee emphasizes that for the individual, pre-trial detention can have severe psychological effects. The suicide rate among detainees in pre-trial detention may be several times higher than among convicted prisoners, and they may also suffer other serious consequences, such as the breakdown of family ties, loss of employment, or accommodation. (Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2017). The issue of pre-trial detention, as one of the most sensitive issues in criminal proceedings, has been the subject of efforts to establish clear standards and criteria to be followed by specific states. Particularly noteworthy are the early activities of the Council of Europe, specifically the Committee of Ministers, which on April 9, 1965, approved Resolution (65) 11, outlining clear principles that obligated states to adopt them into their domestic legislation and report on the measures and progress made in their implementation. The principles outlined in this resolution are as follows: pre-trial detention should never be of a punitive nature; judicial authorities should base their decisions on the facts and circumstances of the specific case; pre-trial detention should be determined as an exceptional measure and should only be imposed when necessary, never for punitive purposes; every decision on pre-trial detention must be clearly defined, analyzing the subject of the accusation and the reasons for pre-trial detention; immediate communication of the decision to the arrested person is required, and effective guarantees must be provided to prevent the continuation of pre-trial detention beyond what is necessary. (Judges' Manual for Criminal Procedure, Judicial Institute of Kosovo, Republic of Kosovo, 2015). The provisions of Articles 191-200 of the Code of Criminal Procedure of Kosovo regulate the treatment of persons deprived of liberty before and during the criminal procedure, and the provisions of the Law on the Execution of Criminal Sanctions apply for the control, supervision, and discipline of pre-trial detainees. The position of a pre-trial detainee differs from that of an accused person who is not in pre-trial detention, although both are protected by the presumption of innocence. (Sahiti E, &Murati R, & Elshani Xh 2014).

Pre-trial detention measures, according to the orders of competent courts, are implemented in the respective correctional institutions. The person for whom the competent court has issued a pre-trial detention order may be placed in the corresponding correctional institution. The relevant correctional institution issues a written confirmation of the admission of the pre-trial detainee, indicating, among other things, the date and time of admission, as well as the name and surname of the person who brought in the pre-trial detainee. Immediately after admission to the respective correctional institution, a medical examination of the pre-trial detainee is conducted, and the findings and the doctor's opinion are recorded in the pre-trial detainee's medical record. After admission to the respective correctional institution, the pre-trial detainee is informed of the sub-legal act on the internal regime of the institution, the execution of pre-trial detention, and other rights and obligations during the implementation of pre-trial detention. (Law on the Execution of Criminal Sanctions, 2013). Therefore, a person under house arrest is obligated to fulfill his duties during his stay in the correctional facility, but at the same time, he also possesses rights that must be respected by authorized individuals within the respective institution. Pre-trial detention is held in specialized detention facilities or in

separate sections of the prison institution. Individuals of different genders cannot be held in the same room. In principle, individuals who have participated in the commission of the same criminal act are not placed in the same room, and individuals serving a sentence are not placed in the same room as those under house arrest. During house arrest, the person can carry and use personal items for hygiene, devices for listening to public media, publications, professional literature, and other literature, money, and other items that, in terms of size and quantity, allow a normal life in the residence area and do not hinder other individuals under house arrest. Within the rights of individuals under house arrest, there is also the right to visitation and communication. With the permission of the pre-trial judge, the sole judge, or the head of the judicial body and under their supervision or under the supervision of a person designated by such a judge, the person under house arrest may be visited by family members, as defined in the Penal Code, and upon his request, may be visited by a doctor or other individuals, respecting the rules of the house arrest institution. The person under house arrest also has the right to eight (8) uninterrupted hours of rest within twenty-four (24) hours. Additionally, they are guaranteed at least two (2) hours of movement in an open space each day. (Criminal Procedure Code, Article 194, paragraphs 1, 2, Article 195, Article 196, paragraph 1, Article 197).

OSCE has conducted an assessment report on the conditions of detention facilities throughout Kosovo, focusing on compliance with human rights. Based on this assessment, OSCE has concluded that the conditions of the detention facilities are satisfactory.

However, the lack of space and overcrowding are issues that need to be addressed in some detention facilities. Other concerning issues may include inadequate natural lighting and air circulation in certain cells, weak conditions of toilets and showers, as well as outdoor exercise spaces in some detention centers. (Organization for Security and Co-operation in Europe, MISSION IN KOSOVO, Conditions in Detention Centers in Kosovo, Initial Assessment, 2010). International standards have precisely defined material conditions in cells, food and water, hygiene, medical services, and the proper regime of activities, discipline, punishments, as well as complaints. Regarding material conditions, the Committee for the Prevention of Torture has outlined a summary of acceptable standards in cells: cells should provide sufficient living space for detainees to accommodate themselves, have access to natural light and ventilation, be equipped with adequate artificial lighting, and heating. Sanitary facilities should enable detainees to meet personal needs in clean and appropriate conditions, and the cells should be well-furnished (bed, table, chair/stool, and dresser). Regarding food, detainees should be provided with three meals a day, and drinking water should be available at all times. Detainees must take showers at least twice a week, preferably once a day, and all hygiene products must be provided by the prison authorities. Another important issue is the provision of medical services for detainees. It is the responsibility of prison authorities to ensure healthcare for detainees under their care. As mentioned above, detainees, in addition to their rights, are subject to discipline and punishments for violating rules within the penal institution. Discipline in detention centers should be maintained at an appropriate level. A disciplinary procedure must be established in detention facilities that ensures the detainees' right to be well-informed about possible disciplinary violations, to defend themselves, and to appeal to a higher authority against imposed punishmentsParagraph 31 of the United Nations Minimum Rules and paragraph 60.3 of the European Rules for Prisons prohibit corporal punishment, punishment by placing the detainee in a windowless cell, and all cruel, inhuman, or degrading punishments due to disciplinary violations. In case of the violation of the rights of detainees, they have the right to submit requests or complaints to the prison authorities. (Organization for Security and Co-operation in Europe, MISSION IN KOSOVO, Conditions in Detention Centers in Kosovo, Initial Assessment, 2010). Article 198 of the Code of Criminal Procedure establishes provisions regarding the discipline of detainees. The

competent person who can apply the disciplinary procedure and impose disciplinary measures in case of disciplinary violations by detainees is the Director of the correctional institution, who can impose disciplinary measures such as suspension or restriction of visits or correspondence to the detainee. Disciplinary violations under paragraph 1 of Article 198 of the Code of Criminal Procedure include: physical assault against other detainees, against the staff of the detention institution, or other official persons, the production, acceptance, or introduction of items for attack or escape, the production or introduction of alcoholic beverages and narcotics, and their distribution, violation of rules for occupational safety, fire protection, and prevention of consequences from natural disasters, repetition of the breach of the internal order of the detention institution, intentional causing of significant material damage or through gross negligence or harmful and inappropriate behavior. Against the decision to impose disciplinary measures, detainees may file a complaint with the judge of the preliminary procedure, the sole judge, or the chairman of the judicial panel within twenty-four (24) hours of receiving the decision, and they must decide on this complaint within a 48-hour period. (Code of Criminal Procedure, Article 198, paragraphs 1, 2, 4).

Research Methodology

The methods used in the study of this work are based on: research methods, comparative methods, and descriptive methods. The study relies on the collection and analysis of data regarding the significance of pretrial detention in criminal procedure according to the Code of Criminal Procedure of Kosovo, based on local and foreign literature.

Results and Discussion

The Organization for Security and Cooperation in Europe (OSCE) in Kosovo has published its latest report on monitoring pre-trial detention decisions in institutions in Kosovo. The report analyzed 70 pre-trial detention hearings across Kosovo for compliance with international human rights standards and fair trial practices, with a focus on court practices in ordering pre-trial detention. Statistics show that the proportion of individuals in pre-trial detention as a percentage of the overall prison population has indeed increased in recent years. In December 2020, 27 percent of prisoners were in pre-trial detention, while in December 2022, this figure increased to 38 percent, which is a significant and concerning rise, indicating a high percentage and highlighting a worrisome trend. (OSCE: Pre-trial detention measures are not sufficiently justified in Kosovo). The main issues for the future, addressed as part of a National Strategy for Detention Reduction should be: Effective case management of custody procedures for those courts that today result in long delays, use of new technologies to increase the quality of custody case management / supervision of released defendants, the most effective decision-making structure of the detention process, to intervene in the process of formal and mechanical process, developing a current base of useful knowledge about key issues using research and data analysis at national and local levels, developing a full range of education and training programs for law enforcement, criminal court judges and policy makers. (Kosovo Center for the Rehabilitation of Torture Survivors, Pre-trial Detention as a Service: Responsibilities and Implementation, 2015).

Conclusions

In the context of pre-trial detention addressed in this work, it is worth emphasizing that the accused, during pre-trial detention, is not considered guilty, and the presumption of innocence applies until the court, through a final decision, proves the person's guilt.
Pre-trial detention, as a more severe measure to ensure the presence of the accused in the legal proceedings, should be imposed only in necessary circumstances, as a last resort, precisely when the circumstances of the case require it, and when other measures to secure the presence of the accused are insufficient. In case of detention, the rights and freedoms of the accused must always be taken into account and respected, and also when detention is imposed, it must be terminated at the moment when the existing legal conditions cease. Additionally, any judicial decision regarding pre-trial detention must be justified by the judiciary. Time limits for pre-trial detention are strictly defined, so detention cannot exceed the legal deadline prescribed for pre-trial detention. The Penal legislation of Kosovo provides for the application and implementation of rules for pre-trial detention in accordance with international standards. In general, without measures to ensure the presence of the accused, a proper legal procedure cannot be conducted, contributing to the prevention and combatting of crime in society.

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