

some aspects of the legal fair proceedings in criminal cases according to domestic law in albania and according to international law

Turkish Online Journal of Qualitative Inquiry (TOJQI)

Volume 12, Issue 9, August 2021: 5875-5891

## **Some Aspects Of The Legal Fair Proceedings In Criminal Cases According To Domestic Law In Albania And According To International Law**

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### **Abstract**

In a state of law, the effective recognition and guarantee of fundamental human rights and freedoms is the basis of its existence. The domestic legal order of any democratic state, as well as the international acts provide even the mechanisms that guarantee the real existence and effective exercise of human rights. One of the most important mechanisms that serves in this regard is to ensure the implementation of the principle of fair legal process, which is provided for by both domestic and international law.

According to national and international legal acts, fundamental human rights and freedoms cannot be violated without guaranteeing the individual a fair legal process for the protection of these rights. Fair legal process finds its application both in the criminal field, which means the investigation and adjudication of criminal charges that may be brought against an individual, and in the civil field, which includes the adjudication of civil disputes, for example, ownership, contracts, inheritance, causing damage, etc., between the parties in the process. It is a fact accepted by all lawyers that the implementation of a fair legal process is of a high importance in the criminal cases. This is due to the fact that in the case of criminal charges the most important rights of the individual are more endangered or violated than in the case of civil disputes.

In this scientific work we will address the problems that appear in the implementation of fair legal process only in the criminal cases. This approach will be made in two main issues. The first issues will address the elements of a fair legal process according to the domestic law in Albania. In the second issue we will talk about the definition of this principle according to the most important international acts, where a special place will have the European Convention on Human Rights and the practice of the Strasbourg Court. The determination of the principle of a fair legal process in the criminal field will be done by us, seeing the application of this principle in the critical aspect, as well as confronting it with the domestic and international judicial practice. At the end of the scientific work will be given the conclusions and recommendations regarding the issues addressed, as well as the bibliography on which this work is based.

**Keywords: human rights, independent court, fair legal process, the state of law, legal certainty**

### **Introduction**

The legal protection of the rights of the individual and society from criminal law has a feature as it constitutes the most serious violation of the rights of the person who is accused of committing a criminal offense. For this reason, in some criminal legislations of different states, it is provided that legal-criminal protection is done by the state only when the rights of the individual or society can not be protected by other means or any other means of protection is inappropriate. Thus, if we refer to the

Criminal Code of Kosovo, which is one of the newest Codes adopted in Europe, this Code provides that criminal law protection is applied to the protection of the rights of the individual and society, only when this protection does not can be realized by other legal means (see also Article 1, point 1 of the Criminal Code of the Republic of Kosovo)<sup>1</sup>.

In cases of criminal charges against an individual, the criminal legislation provides a solution to establish a fair balance between the freedoms and interests of the accused individual and the interests of society as a whole. Finding or establishing the right balance in these cases is a difficult issue. This is due to the fact that we are facing two opposite interests. On one hand, we have the rights and interests of the accused, on the other hand we have the interests of society, which demands that every individual accused of committing a criminal offense, if proven guilty and receive the sentence he deserves and if not proven guilty of the charge will be declared innocent (see for more Sahiti, E; Murati, R; "The Right to Criminal Procedure", Prishtina 2013<sup>2</sup>.

The application of a fair legal process in the case of criminal charges against an individual is a principle that is in favor of the rights and interests of the accused individual as well as in the interest of society as a whole. This is due to the fact that through the implementation of a fair legal process, to the accused individual are guaranteed all his rights and interests in relation to the charges against him, being recognized the right of defense, the right to be tried within a reasonable time by an independent and impartial court established by law, etc.

The protection of the interests of the society is ensured through the implementation of a fair legal process, by providing to the accused individual with all the rights in the criminal process and guaranteeing him a fair criminal investigation and trial, it becomes possible that only persons who are proven guilty in committing a criminal offense be criminally convicted, while the accused individuals that are not found guilty, will be declared innocent. In this way, the application of this principle guarantees not only justice for the accused individual, but also social justice in the criminal field, which is one of the conditions for the full development of the personality of each individual and for the development of normal relations between different individuals of society.

The fair legal process constitutes one of the basic guarantees for the accused individual who have committed an offence, to receive justice at the end of the criminal process, but also as a guarantee for the interests of society, because in this way it ensures the normal development of society, as a whole, has acquired the status of a fundamental right and freedom. Thus in the legal order of any democratic state, the right to a fair legal process is provided in addition to the classical fundamental rights and freedoms such as the right to life, the right to personal liberty, the right to property<sup>3</sup>.

Given the importance of the right to a fair trial, it is explicitly provided by the most important international acts that guarantee fundamental human rights and freedoms, where a special application of this principle is found in the European Convention of Human Rights. We can also mention here the fact that the most detailed and authoritative definition of the principle of a fair trial has been made by the Strasbourg Court, with its consolidated practice, whose decisions serve as a guiding practice for all states of Europe and beyond. The practical implementation of the fair legal process in Albania has

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<sup>1</sup> Point 1 of Article 1 of the Criminal Code of the Republic of Kosovo provides:

*"Criminal offenses and criminal sanctions are provided only for those behaviors which violate or damage to that extent the freedoms and human rights as well as other rights and social values guaranteed and protected by the Constitution of the Republic of Kosovo and international law. , whose protection could not be realized without criminal legal violence".*

<sup>2</sup> See also: Sahiti, E; Murati, R; "Law of Criminal Procedure", Prishtina, 2013, page 31

<sup>3</sup> See also: Islam, H; Hoxha, A and Panda, I; "Criminal procedure", Tirana 2007, pages 38-39.

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shown that it consists of several elements, the definition of which will be the first issue of this scientific work.

## 1. The main elements of a fair legal process according to domestic law in Albania

The principle of a fair legal process in general, as well as in criminal law in particular, occupies an important place in the legal order of Albania. This principle is recognized by this legal order, not only as a legal principle, but also as one of the most important constitutional principles. The Constitution of the Republic of Albania, an explicit sanction, that the fundamental rights and freedoms of the individual, as well as any other right recognized by the Constitution and the law, cannot be violated without a fair legal process. Furthermore, the Constitution has provided in an indicative and not exhaustive way, some of the most important elements of a fair legal process, such as the right to a fair and public trial, the right to a trial within a reasonable time, the right to be tried by an independent and impartial court, the right to be tried by a court established by law, etc. (see also Article 42 of the Constitution of the Republic of Albania)<sup>4</sup>.

In the criminal field or in the case of criminal charges brought against an individual, the more detailed elements of a fair legal process are provided in the Code of Criminal Procedure, and these elements are addressed in several Decisions of the Constitutional Court of Albania, some of which will be mentioned in this scientific work. What should be emphasized is that at this moment the legal system in Albania provides in full and in accordance with international standards the principle of a fair legal process, despite the fact that, as we will see in the following issue, the practical implementation of this the principle by law enforcement agencies has presented significant problems.

One of the most important elements of a fair legal process under domestic law in Albania **is the recognition and guarantee of the right to defence for the accused person**. Due to the importance of this element is explicitly provided in the Constitution of Albania which stipulates that every accused person has the right to have sufficient time and facilities to prepare the defense, and has the right to defend himself or with the help of a defense counsel of his choice, as well as to be provided with free defence when he does not have sufficient financial means to carry out his defense with an elected defense counsel (see also letters "b" and "ç" of Article 31 of the Constitution of Albania.<sup>5</sup>)

The right to defence of the accused person throughout the criminal process is guaranteed in more detail in some provisions of the Code of Criminal Procedure, which provide the principles, rules and procedures for the investigation and trial of an accused person. Thus, in this Code in the part of "General Provisions", which provides the principles of criminal procedural law, in one of these provisions is provided the right to defence of the accused person as one of the principles of criminal proceedings. According to this provision, any person suspected of committing a criminal offense has

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<sup>4</sup> Article 42 of the Constitution of the Republic of Albania provides:

*"1. Freedom, property and rights recognized by the Constitution and by law cannot be violated without due process of law.*

*2. Everyone has the right to a fair and public hearing within a reasonable time by the protection of his rights and freedoms, interests and constitutional and legal interests, and by an independent and impartial court established by law".*

<sup>5</sup> Letters "b" and "ç" of Article 31 of the Constitution of the Republic of Albania provide:

*"During the criminal process, everyone has the right:*

*...b) have sufficient time and facilities to prepare their defense;*

*...ç) to defend himself or with the assistance of a legal counsel of his choice; to communicate freely and privately with him, as well as to provide him with free assistance when he does not have sufficient means;"*

the right to defend himself or with the assistance of a lawyer chosen by him. When the suspect does not have the financial means to provide defence, he is provided with free defence in accordance with the requirements of the law. This provision also provides the general obligations of the defense counsel against the suspect, person, stating that he is obliged to assist the defendant in securing his procedural rights during the criminal proceedings, as well as to protect his legitimate interests (see also Article 6 of the Criminal Procedure Code of the Republic of Albania<sup>6</sup>.)

With the new amendments made to the Criminal Procedure Code of Albania, with law no. 35, dated 30.3.2017, the right to protection during the criminal process, as one of the important elements of a fair legal process, was guaranteed at a more complete level, through this law, for the first time, *the cases of compulsory defence for the individual suspected of committing a criminal offense*. Mandatory protection of the accused person means that any procedural action and any act that requires the presence of the accused must be made in the presence of the defense counsel, otherwise the action or act is absolutely invalid with serious and irreparable consequences for the whole process.

The Criminal Procedure Code, in force, provides that defence is mandatory in the following cases:

- i. when the person is a minor aged 14-18 years;
- ii. when the person has physical defects as a result of which he does not hear or speak;
- iii. when the person is mentally disabled which makes him unable to exercise his defence;
- iv. when the person is charged with a criminal offense for which the law provides for a maximum sentence not less than 15 years imprisonment;
- v. when the person is charged with one of the criminal offenses related to corruption and organized crime, which are within the competence of the Special Court for Corruption and Organized Crime;
- vi. when the person has been declared fugitive or absent by a decision of the competent court;
- vii. when the arrested or detained person is questioned;
- viii. when the control of places or items is performed and their owner or possessor is not present;
- ix. when by the judicial police officer are obtained information about the person under investigation;
- x. in any other case provided by law ”(see further point 1 of article 49 of the Criminal Procedure Code of the Republic of Albania)<sup>7</sup>.

Another important aspect of the right to defense of the accused person is the realization by the defense counsel of an effective and informal defense. This issue has been addressed in several decisions of the Constitutional Court of the Republic of Albania, which in some of its decisions has found that the defense counsel of the accused person has not made an effective defense, violating the principle of a fair legal process, and consequently turning the whole criminal process into an absolutely invalid process. Thus, in its *Decision no. 222, dated 4.11.2002 The Constitutional Court*, inter alia, explained that:

“...According to the important constitutional and procedural principles and jurisprudence of the Constitutional Court, in a judicial process, the defense attorney must act in accordance with the law, standards and professional ethics to protect the rights of his client. When the lawyer acts contrary to

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<sup>6</sup> Article 6 of the Criminal Procedure Code of the Republic of Albania provides:

“1. *The defendant has the right to defend himself or with the assistance of lawyer. When he does not have sufficient means, he is provided with free defence by a lawyer in the cases provided by this Code.*

2. *“The defense counsel assists the defendant in guaranteeing his procedural rights and the protection of his legal interests”.*

<sup>7</sup> See also: Point 1 of article 49 of the Criminal Procedure Code of the Republic of Albania.

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the regular fulfillment of his obligations in defense of the client's rights, he also violates the individual's right to be defended by a lawyer.

Given the attitudes held by the defense counsel, which conflict with the function of defense in a criminal process, as well as given that such allegations have been taken into account by the court in the reasoning of the decision, The Constitutional Court concludes that the applicant A.Ç was not given the opportunity for a legal defense in the judicial process, thus violating his right to an adequate and effective defense, which constitutes a violation of the right and fair process according to the Article 42 of the Constitution of the Republic of Albania, Article 6 of the European Convention on Human Rights. ... ”(see further the decision of the Constitutional Court of the Republic of Albania, no. 222, dated 4.11.2002)<sup>8</sup>.

From the interpretation of this decision of the Constitutional Court, it results that it is the duty of the procedural body that according to the procedural rules related to the trial to create all possibilities for the accused person to be effectively represented, and ensure that the lawyer is performing his duties in accordance with the law, otherwise he should be replaced. According to the constitutional and procedural principles and the jurisprudence of the Constitutional Court of Albania, in a judicial process the defense lawyer must act in accordance with the law, standards and professional ethics to protect the rights of his client. When the lawyer acts contrary to the regular fulfillment of his obligations in defense of the client's rights, he also violates the individual's right to be defended by a lawyer<sup>9</sup>.

***Another element of a fair legal process is the application of the principle of adversarial proceedings and equality of arms at trial.*** Contradictory means that the parties should be given the opportunity to get acquainted with each other's evidence in advance in order to prepare the defense strategy and realize an effective defense. This principle also includes the right of each party to present evidence at trial, to challenge the evidence of the other party, to make comments and factual and legal assessments on the case, which is known in the science of criminal procedural law as "cross examination" or the development of judicial process on evidence. This is due to the fact that only by being physically present at the hearing or through the defense counsel chosen by him, the defendant has the opportunity to present his evidence and prepare an effective defense, as well as to debate and challenge the evidence of the other party. (see also Sprack, J; Engelhardt “A practical approach to Criminal Procedure”, 16th Edition, Oxford 2019)<sup>10</sup>.

The principle of equality of arms is closely linked to the principle of adversarial proceedings, as these two principles apply at the same time and cannot be applied separately. Equality of arms in criminal proceedings means that both parties to the proceedings, both the defendant and the prosecutor, have equal rights and opportunities to present evidence, to argue the defense of their case, to oppose and debate in the same way. evidence of the opposing party, as well as to make any legal and factual assessment on the matter.

The contractility and equality of arms as part of a fair legal process are recognized and enforced by domestic law in Albania, despite the fact that in some cases the courts notice that these elements of a fair legal process have not been properly implemented. Thus, if we refer to the provisions of the Constitution of Albania, we find that these principles are explicitly provided. According to these provisions, during the criminal process, every suspect has the right to be immediately informed about

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<sup>8</sup> See also: Decision of the Constitutional Court of the Republic of Albania, no. 222, dated 4.11.2002.

<sup>9</sup> See also: Zaganjori, Xh; Vorpsi, A; Biba, D; "Constitutional principles and fundamental rights in the jurisprudence of the Constitutional Court", Tirana 2012, page 458.

<sup>10</sup> See also: Sprack, J; Engelhardt “A practical approach to Criminal Procedure”, 16-th Edition, Oxford 2019, page 32.

the accusation made against him, about his rights, as well as the right to question the witnesses present, to request the appearance of witnesses,

experts and to request the taking of any evidence which may serve to clarify the criminal fact (see also letters "a" and "d", of Article 31 of the Constitution of Albania<sup>11</sup>).

These elements of a fair legal process have also been addressed by the Constitutional Court of the Republic of Albania. This court has consistently found that in any criminal proceedings, the court has the obligation to apply the principles of equality of arms and adversarial proceedings, treating the parties equally, without prejudice to the case in favor of one or the other party. , as well as giving equal opportunities to the parties to realize their defense, to present evidence, to oppose the evidence of the other party, as well as to give any legal determination that has to do with the fair settlement of the case. For the principle of equality of arms and adversarial proceedings in criminal proceedings, **the Constitutional Court of Albania, in its decision no. 50**, dated 1.11.2012, stated that:

“...The Court has consistently addressed the importance of respecting the principle of equality of arms and adversarial proceedings, especially in criminal proceedings, these principles are related with the defence of the defendant, expressly guaranteed in Article 31 of the Constitution and Article 6 of the The European Convention on Human Rights , constitute the most essential elements of due process in the constitutional sense. The Court reiterates that the principle of adversarial proceedings and equality of arms in criminal proceedings requires that the arguments of the defense must be presented and be heard in the same way as those of the prosecutor. This principle presupposes that each party should be offered a reasonable opportunity to present claims on the case, in order not to be at a disadvantage with the other party ... ”(see further the decision of the Constitutional Court of Albania, no. 50, dated 1.11.2012.<sup>12</sup>)

***Another element of a fair trial is the principle of presumption of innocence of the defendant.*** This principle is one of the most important principles of the criminal process according to which the defendant is presumed innocent until is not proven guilty, by a final court decision. An important part of this principle is the fact that any suspicion of the charge is valued in favor of the defendant, known in Latin as “in dubio pro reo”.

The presumption of innocence means that not only the court, but any state body including political power such as the Prime Minister, ministers, members of Parliament should not take positions or make public statements, according to which the accused person is guilty of committing a criminal offense, no matter how serious the criminal offense is, and no matter how negative impact it has caused on the public opinion, before the person has been found guilty of committing this criminal offense by a final court decision.

In Albania, it has unfortunately happened that in some cases the high bodies of political power such as the Prime Minister, ministers or other senior state officials, have violated the principle of presumption of innocence by making public statements that directly attributed the commission of the criminal offense of the accused, who was suspected of having committed serious crimes, such as murder for blood feud, terrorist acts, etc. and had fled abroad. This violation of the principle of

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<sup>11</sup> Article 31 of the Constitution of the Republic of Albania, its letters "a" and "d" provide:

“During the criminal process everyone has a right:

a) to be informed immediately and in detail about the accusation made against him, about his rights, as well as to be given the opportunity to inform his family or relatives;

...d) To question witnesses and obtain the appearance of witnesses, experts and other persons who can clarify the facts”.

<sup>12</sup> See also: Decision of the Constitutional Court of the Republic of Albania, no. 50, dated 1.11.2012..

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presumption of innocence by the highest officials of the political power, has brought serious negative consequences for the investigation and trial of these persons, because not only has violated fair legal process, but has also resulted in their non-extradition in Albania by the state where they were located, with the argument given by the foreign state that criminal prosecution and punishment should be done for political reasons.

Also, according to this principle, the court should not initiate the criminal process with the conviction that the defendant has committed the crime for which he is accused. Any suspicion of the charge must be made in favor of the defendant. In criminal proceedings based on this principle, the burden of proof to prove the charge against the accused person is borne by the state and the charge against the accused must be proved beyond any reasonable doubt. (See also: Murphy, P; “Murphy on Evidence”, Oxford Univerisity, 2005<sup>13</sup>).

The principle of presumption of innocence is expressly provided in the Constitution of Albania, as one of the fundamental personal or civil rights and freedoms, as well as as one of the important guarantees of the accused person during the criminal process. According to the Constitution, every person is presumed innocent until is not proven guilty, by a final court decision (see also Article 30 of the Constitution of the Republic of Albania<sup>14</sup>).

The presumption of innocence as part of a fair legal process is expressly provided in the Code of Criminal Procedure, as one of the basic principles of criminal proceedings. According to the provisions of this Code, the defendant is is presumed innocent until is not proven guilty by a final decision and any suspicion of the charge is assessed by the court in favor of the defendant. Also, this Code, in order to emphasize the importance of the application of this principle in practice, stipulates that the court can give a guilty verdict for the accused only when it is proven beyond any reasonable doubt that he has committed the criminal offense for which he is accused ( see also Article 4 of the Criminal Procedure Code of the Republic of Albania)<sup>15</sup>.

The principle of presumption of innocence in criminal proceedings has been analyzed in several decisions of the Constitutional Court of Albania. In these Decisions this Court has emphasized that this principle constitutes one of the most important guarantees that every accused person has during the criminal process, this principle imposes general obligations, not only on the court, but on every public body to respect it, and that the accused has no obligation to prove his innocence, but it is the obligation of the state, and the prosecutor must prove that the accused is guilty and that any suspicion of the charge is assessed in favor of the accused.

*Thus, for this principle of procedural law, the Constitutional Court with its decision no. 57, dated 21.12.2012, states that:*

“...In its jurisprudence, the Court has emphasized that the presumption of innocence is one of the constituent elements of due process. According to Article 30 of the Constitution, anyone is presumed innocent until is not proven guilty by a final court decision. The presumption of innocence consists of several aspects, one of which is *in dubio pro reo*, so any doubt goes in favor of the defendant and the

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<sup>13</sup> See also: Murphy, P; “Murphy on Evidence”, Oxford Univerisity, 2005, Page 124.

<sup>14</sup> See also: Article 30 of the Constitution of the Republic of Albania.

<sup>15</sup> Article 4 of the Criminal Procedure Code of the Republic of Albania provides:

“1. According to the provisions of this Code, the defendant is is presumed innocent until is not proven guilty by a final decision and any suspicion of the charge is assessed by the court in favor of the defendant.

2. The court gives the verdict of guilt when the defendant is found guilty of the criminal offense attributed to him beyond any reasonable doubt.”.

burden of proof falls primarily on the prosecuting authority. The court has interpreted the presumption of innocence and that ordinary courts should not initiate proceedings with the conviction that the defendant committed the crime for which he is accused, that the burden of proof lies with the accusing party, that any doubt should go in favor of the defendant, that the court should base the decision on direct and indirect evidence to be proved by the prosecution. This principle is considered violated if a judicial decision against a person who is charged for a criminal offense, It reflects an opinion that he is guilty before being proven guilty according to law. Even if there is no formal conclusion, it is enough to have a reasoning which suggests that the court finds the accused guilty. ...” (see also decision no. 57, dated 21.12.2012 of the Constitutional Court of Albania)<sup>16</sup>.

Another aspect of a fair trial *is the non-trial and non-sentencing of the accused for a criminal offence, which at the time of its commission was not provided by law as a criminal offense and no criminal punishment was provided for it*. This element is one of the oldest and most important principles of criminal law, known as the principle of legality and known in Roman law with the term "*nullum crimen, nulla poena sine lege*". The principle of legality consists of some special elements, which will not be addressed in this scientific work. In this article we will focus only on defining the most essential elements of this principle, as part of a fair legal process. According to this principle, no one can be investigated or tried for committing an action or inaction, which at the time of its commission was not provided by law as a criminal offense. This principle is closely related to the principle of legal certainty, which is one of the basic principles of the state of law, according to which every citizen in a democratic society, must know in advance what are the actions or omissions that are considered prohibited by criminal law, in order to adjust their behavior in accordance with these legal prohibitions.

A special element of this principle is the non-punishment of the person with a measure and type of punishment, which was not provided by law at the time of the commission of the criminal offense. This element of the principle of legality, in addition to the principle of legal certainty is related to another important principle of criminal law, which is the principle of justice in sentencing, according to which the punishment for the criminal offense committed must be fair. , in accordance with the dangerousness of the criminal offense and its perpetrator and the circumstances of the commission of the offense.

*Another aspect of applying the principle of legality is the lack of retroactive effect of criminal law, except when it is favorable to the accused*. According to the principle of legality, if the law at the time of the commission of the criminal offense and the law of the trial are different, will be applied the law that is most favorable to the accused. This aspect of the principle of legality is also related to the principle of legal certainty, because the rights and interests of the accused cannot be violated due to legal changes made by the legislator.

The principle of legality is provided in the Constitution of Albania as one of the fundamental human rights and freedoms, as well as as one of the guarantees of the accused in the criminal process. According to the Constitution, no person can be charged or found guilty of committing a criminal offense which was not provided for at the time of its commission as such, except when the act constitutes war crimes or crimes against humanity under international law. The Constitution provides that to the accused person can not be given a punishment which was not envisaged by the law at the

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<sup>16</sup> See also: Decision no. 57, dated 21.12.2012 of the Constitutional Court of the Republic of Albania.

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time of the offense, and the favorable criminal law has retroactive effect (see also Article 29 of the Constitution of Albania.<sup>17</sup>).

This principle is also expressed in the Criminal Code of Albania in its two provisions, according to which no person can be criminally sentenced for an act that was not previously expressly provided in the law as a crime or criminal offense, and no one can to be sentenced with a type and measure of sentence not provided by law. These legal provisions also provide that no one may be sentenced of an offense which, under the law of the time it was committed, did not constitute a criminal offense, and the new law which does not convict the offense has retroactive effect. In this case, the person who has been convicted on the basis of the old law, which has been repealed by the new law, cannot serve the sentence and if he has started serving his sentence, the further serving of this sentence ceases immediately. As an integral part of this principle, this Code stipulates that when the law of the time when the criminal offense was committed and the subsequent law are different, the law that is most favorable to the accused shall apply (see also Articles 2 and 3 of the Criminal Code of the Republic of Albania)<sup>18</sup>.

The principle of legality has also been addressed by *the Supreme Court in its Unifying Decision no. 4, dated 27.3.2003*, as well as by some decisions of the Constitutional Court of #Albania. These decisions point out the fact that there can be no criminal conviction without law, no one can be convicted with a measure or type of sentence not provided by law, and criminal law has retroactive effect.

The High Court in the above Unifying Decision, regarding this matter, among other things states that: "...From the content of paragraph 2 of article 3 of the Criminal Code, according to which, when the law of the time when the criminal offense was committed and the subsequent law are different, the law whose provisions are more favorable to the person applies who has committed the criminal offense, it is concluded that, in cases when the law that was in force at the time that the criminal offense was committed, is more unfavorable than the law that is in force at the time of the trial of the criminal case against the person who has committed it, the courts are obliged to apply the latter, namely, the subsequent law, which is in force at the time of the trial of the case... (see also Unifying Decision No. 4, dated 27.3.2003, of the High Court)<sup>19</sup>.

Also, the Constitutional Court of Albania, regarding the meaning of the principle of legality in criminal law in its Decision no. 16, dated 15.6.2009, among others explains that:

"...The right of citizens not to be sentenced without law, sanctioned in Article 29 of the Constitution and Article 7 of the European Convention on Human Rights, is an essential element of the State of law. This principle must be interpreted and applied in order to provide an effective safeguard against prosecution, guilty plea and arbitrary sentencing.

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<sup>17</sup> Article 29 of the Constitution of the Republic of Albania provides:

*"1. No person can be charged or found guilty of committing a criminal offense which was not provided for at the time of its commission as such, except when the act constitutes war crimes or crimes against humanity under international law.*

*2. It can not be given a severe punishment than the one that was provided by law at the time of the commission of the criminal offense.*

*3. Favorable criminal law has retroactive effect".*

<sup>18</sup> See also: Articles 2 and 3 of the Criminal Code of the Republic of Albania.

<sup>19</sup> See also: Unifying Decision no. 4, dated 27.3.2003, of the High Court.

The guarantee of Article 7 of the Convention embodies a general principle according to which every criminal offense must be provided for by law and the person must be objectively able to understand the content of the criminal offense and, if necessary, with the help of her court interpretations, what actions or omissions will make the person criminally responsible. When it comes to the ability of the individual / person to predict the consequences of his actions, it is not necessary to imply an absolute clarity. The law must be able to follow different circumstances and, therefore, a standard of reasonable predictability is sufficient..." (See also Decision No. 16, dated 15.6.2009, of the Constitutional Court of Albania)<sup>20</sup>.

## **2. Fair legal process according to the acts of international law and the standards set by the Strasbourg Court in relation to it**

As discussed above, the application of due process to a person accused of committing a criminal offense is a matter of paramount importance for the effective recognition and guarantee of fundamental human rights and freedoms, as well as for the existence of the State of law as a whole. For this reason, the elements of this process are provided not only by the domestic law of any democratic state, but also by the most important international acts in the field of rights and freedoms of the individual.

The recognition of a fair legal process, as part of fundamental rights and freedoms has been done since the first contemporary act of protection of human rights which is *Universal Declaration of Human Rights, approved by the General Assembly of the United Nations on December 10, 1948*. According to this Declaration, everyone has the right, in full equality, to a fair and public hearing by an independent and impartial tribunal, which has the right to decide on his rights and obligations, as well as for the justice of any accusation in the criminal field filed against him (see also "Human Rights; Summary of International Acts", published by the Albanian Helsinki Committee, Tirana 1994)<sup>21</sup>.

Another important act of international law that recognizes and guarantees a fair legal process is *International Covenant on Civil and Political Rights, approved by the General Assembly of the United Nations on December 16, 1966 and entered into force on March 23, 1976*. This international act provides that every person has the right to have his or her case handled impartially and publicly by a competent, independent and impartial tribunal established by law, which must decide on the justice of any criminal charge brought against him.

It is worth mentioning that this is the first international act in the field of human rights of global character, which has binding force for all member states that have ratified it, including Albania, which has ratified this act, just like all the democratic states of the world. This legal act explicitly provides for the most important elements of a fair legal process in the criminal field, according to international law, such as an impartial and public trial, a trial by an independent and impartial Court and a trial by a competent court established by law (See also Article 14 of the International Covenant on Civil and Political Rights)<sup>22</sup>.

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<sup>20</sup> See also: Decision no. 16, dated 15.6.2009, of the Constitutional Court of the Republic of Albania.

<sup>21</sup> see also "*Human Rights; Summary of International Acts*", published by the Albanian Helsinki Committee, Tirana 1994.

<sup>22</sup> The second sentence of Article 14 of the International Covenant on Civil and Political Rights, approved by the General Assembly of the United Nations on December 16, 1966 and entered into force on March 23, 1976, provides that:

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In the framework of international regional acts, regarding the European continent, the most important act that provides and grants the right to a fair legal process is *European Convention on Human Rights*, approved by the General Assembly of the Council of Europe on November 4, 1950 and entered into force on September 3, 1953. This act of international law has been ratified by Albania, with law no. 8137, dated 31.7.1996 and since then, is part of the domestic law of our country.

Regarding Albania, this legal act of international law, occupies a special place in the hierarchy of legal norms, having an equal position with the Constitution of the country. Such a fact is foreseen, expressly in the Constitution of the country itself, which stipulates that the restrictions that may be imposed on human rights under the domestic legal system, can never exceed the restrictions provided by the European Convention on Human Rights (see also Article 17 of the Constitution of the Republic of Albania)<sup>23</sup>.

Based on the content of point 1 of Article 6 of the European Convention on Human Rights (hereinafter ECHR), it is concluded that the right to a fair trial consists of several elements. One of the important elements of a fair trial under this Convention is *the right of a person to have access to a court*, expressed as the right that his case in relation to any criminal charge brought may be heard fairly. A fair hearing of the accused's case means his right to be summoned by the court and to be notified of the charge made against him in accordance with the principle that no one can be judged without being duly notified, unless it is proven that the person is evading justice.

The right of the accused to have access to the court does not mean that the accused is forcibly escorted to court by the police, in order to participate in the examination of the accusation against him. This element of the judicial process, by its very designation "right of access to court", means a right of the accused and not an obligation of him and this right is in the free will of the accused to be exercised by him or no.

The right of access of the accused to the court is closely related to his exercise of other rights, which guarantee the right to a fair legal process, such as the right to be informed as soon as possible of the charge against him, the right to prepare a defense, the right to defend oneself or to choose a defense counsel, and the right to benefit from free defense if there are not enough means to carry out the defense. This right also gives the accused the opportunity to apply during the criminal proceedings the principle of equality of arms and adversarial proceedings, which include his right to have equal opportunities with the prosecutor to seek evidence, to challenge the evidence of the charge, as well as to present evidence itself and to make any legal assessment of the case (see also Nowicki, A, M; "On the European Convention on Human Rights", published by the Albanian Center for Human Rights ", Tirana 2003)<sup>24</sup>.

***Another element of the right to a fair trial under the European Convention on Human Rights is the right of the accused person to have his case publicly heard.*** The main reason why this international act stipulates that the case of the accused should be considered publicly, has to do with the fact that, in

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*"Every person has the right to have his case judged impartially and publicly by a competent, independent and impartial Court, instituted in accordance with the law and which will decide on the merits of any criminal charge against him, whether for conflicts related to his rights and obligations in the civil field".*

<sup>23</sup> Point 2 of Article 17 of the Constitution of the Republic of Albania provides that:

*"2. These restrictions may not violate the essence of freedoms and rights and in no case may they exceed the restrictions provided for in the European Convention on Human Rights".*

<sup>24</sup> See also: Nowicki, A, M; "On the European Convention on Human Rights", published by the Albanian Center for Human Rights ", Tirana 2003, page 162.

this way, a greater guarantee is created for the accused person that his case will be tried by the court with justice.

The trial of the case of the publicly accused person puts public pressure on the court to properly assess the case, as well as to correctly implement the legal obligations, as otherwise the public and especially the media will react negatively to a court that violates the rights of the accused or violates the legal obligations for a fair legal process. This element of due process also has its historical origins and is intended to prevent secret or closed trials, which took place in the Middle Ages and Antiquity, against various accused persons and especially political opponents.

The adjudication of the case of the accused person as part of a fair legal process also has its exceptions, which are expressly provided for in the Convention. According to the Convention, the accused may be tried behind closed doors, in whole or in part, when necessary for the protection of social morals, the protection of public order or national security, the protection of the interests of minors or the private interests of the parties in the process, or when there are special circumstances, whose existence could harm the interests of justice. When there are such circumstances mentioned above, the Court may decide that the trial should not be held in public, but in any case, the final decision of the court against the accused person should be given publicly, as one of the guarantees of a fair legal process.

***Another aspect of the right to a fair trial under the Convention, is the right of the accused person to be tried within a reasonable time.*** A trial within a reasonable time means that the case of the accused person is investigated and tried as soon as possible, understood without compromising the quality of decision-making and the interests of justice. This element of due process takes on great importance in cases where the accused is a minor, or in cases where the accused is detained, awaiting a final decision from the court.

In assessing whether the accused person has been tried within a reasonable time, several criteria must be considered. One of these criteria is the difficulty and complexity of the case. The complexity of the case, in the case of criminal charges, is related to the high risk of charges against the accused person, the large number of charges against him, the fact whether the accused is suspected of acting alone or in collaboration, with the fact whether the acts were committed in simple cooperation or in the form of organized crime, etc. It is logical that if the accused person is being tried on charges that present great danger, he is being tried on several charges committed in the form of organized crime, the complexity and difficulty of the case is great, hence the time limit of investigation and trial of the charges against him will be longer.

Another criterion for assessing whether the case has been tried within a reasonable time is the conduct of the accused person during the trial of the case. Thus, if the accused person, as has happened in some cases in court proceedings in Albania, submits continuous requests for adjournment of court hearings or does not appear in court, neither he nor his lawyer, or if he repeatedly changes lawyers without justifiable reasons, or his lawyers postpone the trial by not appearing at the hearing, repeatedly without reasonable cause, etc., the whole period will not be counted as time in favor of the defendant that he to claim that he has not been tried within a reasonable time.

Another criterion that must be taken into account in determining the reasonable time is the conduct of the court and other public authorities. If in a certain trial it is noticed that its court hearings have been postponed several times, due to the lack of formation of the trial panel, ie due to the absence of the judge at work for unreasonable reasons or it has been postponed because the competent bodies have not implemented their legal obligations to notify and present witnesses in court or have not presented certain scientific evidence without justified reasons, in this case it will be assessed that the trial of the

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accused person has not been done within a reasonable time (see more: Biancu, L; "Jurisprudence of the Strasbourg Court", publication of the European Center of the Council of Europe, Tirana 2007, pages 340-341)<sup>25</sup>.

***Another element of due process according to the ECHR is the right of the accused to be tried by an independent court.*** The independence of the judiciary is one of the main conditions for guaranteeing fundamental human rights and freedoms, as well as for the existence of the rule of law. This independence, seen from several dimensions such as external independence or independence from other state bodies, such as the legislative body and the executive body, internal or functional independence, according to which a judge of a higher court, can not give extra-procedural orders or instructions to a judge of a lower court, the financial independence, etc. The detailed treatment of the elements of the independence of the judiciary goes beyond the scope of this scientific paper, what is worth noting here is the fact that pursuant to this element of a fair legal process, every accused person has the right to be tried by a panel that enjoys all the elements to qualify as an impartial court.

In addition to what was discussed above, for a judge to meet the conditions to be an impartial judge, several other factors are important. One of these factors is that his appointment be made solely on the basis of merit, based on professional ability and moral integrity. Another important factor that shows the independence of the judge is the duration of his appointment, where the judge should be guaranteed his safety in duty and he should be dismissed only for serious violations of the law or for professional incompetence. Another factor related to the independence of the judge in the exercise of his duties is that he can be removed from office only by an independent body, composed in at least half of it of judges elected by the general panel of judges and guaranteed the right to a fair trial.

***Another element of a fair legal process according to the ECHR relates to the right of the accused to be tried by an impartial tribunal.*** The impartiality of the judge is assessed on the basis of two tests: the objective test and the subjective test. According to the objective test, the court is not impartial when it has legal impediments to adjudicating the case, because it has previously adjudicated the case or previously investigated it or has close family or social ties with the accused person or has an enmity relations with him etc.

According to the subjective test, in order to determine the impartiality of the court in the trial of the case, its behavior must be taken into account, before and during the trial of the case. In connection with this, it will be deemed that the court has been biased if it has prejudiced the cases with the decisions, it has taken or the actions it has taken or has given advice or opinions on the case, or has unfairly favored the other party or received gifts and benefits of any kind from the other party, etc. With regard to the impartiality of the court as part of a fair legal process, it is important that it not only be in fact impartial, but also in appearance or appearance should behave in such a way that impartiality not only to exist but also to be visible that it exists.

***The final element of a fair trial according to the ECHR is the right of the accused person to be tried by a court established by law.*** This aspect of due process relates primarily to the jurisdiction of the court to adjudicate the case, as if the case is adjudicated by an incompetent court, it is deemed to have been adjudicated by a court not established by law.

Another aspect of the right to be tried by a court established by law has to do with the manner in which judges are appointed to adjudicate the case. According to generally accepted international standards,

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<sup>25</sup>See more: Biancu, L; "Jurisprudence of the Strasbourg Court", publication of the European Center of the Council of Europe, Tirana 2007.

the judge is appointed by lot to resolve the case, because if he is appointed by order of the president of the court or another public body, we will be before a trial by a court not established by law. Another aspect of this element refers to the manner of appointment of judges who adjudicate the case against the accused, who must be appointed, in any case in accordance with the criteria and legal procedures, because otherwise if their appointment was made in violation of the law, we will again be faced with a court not established by law (see also "For a European public order", Selected Decisions of the European Court of Human Rights, Volume 1, publication of the Albanian Center for Human Rights ", Tirana 2001<sup>26</sup>).

In order to have a fair legal process, the Strasbourg Court has set some minimum standards, which are mandatory for implementation by all member states that have ratified the Convention on Human Rights and have accepted the jurisdiction of this Court. Thus, concerning the right of the accused to be tried by an independent and impartial tribunal, the Strasbourg Court its *Decision dated 6 May 2003, the Grand Chamber, in Kleyn and Others v. The Netherlands*, among other things, it was stated that the subjective impartiality of the public body can be ascertained from its behavior during the proceedings or from the content of the decision given by it (See also Strasbourg Court decision, Grand Chamber decision, in *Kleyn and Others v. the Netherlands*)<sup>27</sup>.

In another decision of the Strasbourg Court, specifically in *the Decision of 9.1.2013, in the case Volkov v. Ukraine*, for this element of the principle of impartiality of the public body, among other reasons, reasons:

"...The Court further notes that the members of the High Council of Justice who conducted preliminary investigations into the applicant's case and filed for his dismissal (R.K. and V.K.) subsequently participated in the removal of the applicant from duty. Furthermore, one of the members (V.K.) was appointed chairman of the High Council of Justice and chaired the hearing on the applicant's case. The role of these members in raising disciplinary charges against the applicant, on the basis of their own preliminary investigations, cast's objective doubts on their impartiality in establishing the merits of the applicant's case (See also: The decision of the Strasbourg Court, dated 9.1.2013, in the case *Volkov v. Ukraine*)<sup>28</sup>".

On the right of the accused person to be tried by a court established by law, the Strasbourg Court in its decision, *Decision of the Grand Chamber, dated 1 December 2020, in the case of Astradsson v. Iceland*, inter alia, justifies that:

..."This connection between the procedure of appointing a judge and the "legality" of the trial panel in which this judge then belongs, also finds support in the purpose of applying the criterion of a "court established by law", as explained in paragraph 214 above. This requirement reflects the principle of the State of law and seeks to protect the judiciary against unlawful external interference, by the executive in particular (see paragraph 211 above), it is also not excluded that such unlawful

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<sup>26</sup> See also: "For a European public order", *Selected decisions of the European Court of Human Rights*", Volume 1, publication of the Albanian Center for Human Rights, Tirana 2001, page 623.

<sup>27</sup> See also: Judgment of the Strasbourg Court of 6 May 2003 in the Grand Chamber in *Kleyn and Others v. The Netherlands*.

<sup>28</sup> See also: The decision of the Strasbourg Court, dated 9.1.2013, in the case *Volkov v. Ukraine*.

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interference may also arise by the legislature or even by the judiciary itself. Furthermore, this includes any provision of domestic law, including in particular the provisions relating to the independence of the judiciary, which, if violated, could lead to the participation of one or more judges in the examination of an "irregular" case (see paragraph 212 above). The Court is aware that the process of appointing judges may be open to irregular interference and finds that calls for the appointment of judges should be subject to careful scrutiny, and it is clear that violations of the law governing the process of appointing judges may lead to the participation of judges in the consideration of a case in an "irregular" manner... (see also: Decision of the Strasbourg Court, decision of the Grand Chamber, dated 1 December 2020, in the case of *Astradsson v. Iceland*)<sup>29</sup>.

Regarding this right of the accused person during the criminal process, the Strasbourg Court, in another decision, *in the Decision of 9 February 2021, in the case Xhoxhaj v. Albania*, this Court has once again emphasized that the right to be tried by "a court established by law", due to the participation in its trial of a judge, whose appointment procedure has been violated by serious irregularities, which affect the essence of this right, constitutes a violation of Article 6 , paragraph 1 of the European Convention on Human Rights (see further the Decision of the Strasbourg Court of 9 February 2021, in the case *Xhoxhaj v. Albania*)<sup>30</sup>.

## **Conclusions and Recommendations**

For the treatment made in relation to the issues that are the subject of this scientific paper, we can draw these conclusions and recommendations. The first conclusion that can be mentioned is that the right to a fair trial in criminal matters is recognized not only by the domestic law of any democratic state, but also by the most important international acts in the field of human rights. This right, for its importance, constitutes at the same time a procedural guarantee and one of the fundamental human rights and freedoms, being provided as such by the Constitutions of every democratic state.

According to the domestic law in Albania, one of the elements of the due process of law is the right of the accused person to defend himself with a lawyer. This right is provided not as a formal right, but as a right of the accused person to realize an effective defense, having the right for a reasonable time to prepare the defense, to be acquainted with the evidence of the accusation. and to make legal assessments on the matter.

Another aspect of the right to a fair legal process according to the legal order in Albania, is the application during the criminal process of the principle of adversarial proceedings and equality of arms in the process, which means the right of the accused person to be treated equally by the prosecuting authority, and to give them the same opportunity to present evidence, to challenge the evidence against the prosecution, to question witnesses and experts, and so on. The presumption of innocence constitutes one of the important elements of the right of the accused person to a fair legal process, according to which anyone is presumed innocent until proven guilty by a final decision and any suspicion of the charge goes in favor of the defendants.

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<sup>29</sup> See also: Judgment of the Strasbourg Court, decision of the Grand Chamber, dated 1 December 2020, in the case of *Astradsson v. Iceland*.

<sup>30</sup> See also: The decision of the Strasbourg Court dated 9 February 2021, in the case *Xhoxhaj v. Albania*.

Another element of the right to a fair trial under domestic law in Albania, consists of the principle of legality, according to which no one can be investigated or tried for an act or omission, which at the time of the commission is not defined by law as a criminal offense, and no one can be punished with a sentence unforeseen in law. This principle is closely related to the principle of legal certainty, according to which the law should be clear and complete, and should not change without reason or continuously, thus creating insecurity among citizens.

Based on international law and especially according to the European Convention on Human Rights, an important element of a fair legal process in the criminal field is the right of access to court. This right includes the right of the accused person to have his case heard fairly by the court, and to have it heard before it is tried, except when it is hidden from justice.

Another element of a fair legal process, according to the ECHR, relates to the right of the accused to be tried in public, in addition to the restrictions provided by law in the interests of minors or private parties or in the protection of justice. The right of the accused to be tried by an independent and impartial court is one of the most important elements of a fair legal process, which has been expressed by the Strasbourg Court in several of its decisions. The last element of the accused's right to a fair trial is his right to be tried by a court established by law. This right means the right of the accused to be tried by a competent court, as well as his right to be tried by judges appointed for the trial of this case, in accordance with the procedure provided by law, as well as the right to be tried by a judge who has been appointed in accordance with the legal procedure and the legal criteria provided by law.

Regarding the recommendations, we would say that, in the conditions when the domestic law in Albania is complete and in accordance with the international standards regarding the right of the accused for a fair legal process, recommendations can be given only for the problems that have encountered the implementation of this right in Albania. Thus, from the organisational point of view, it may be recommended that the competent bodies (the High Judicial Council and the High Prosecution Council) conduct a more detailed and complete control over the implementation of the right of the accused for a fair trial in Albania by judges and prosecutors.

The fact that in post-communist Albania, even though 30 years have passed since the establishment of the state of law in Albania, no judge has been dismissed although they have violated the rights of the accused person in the criminal process, convicting him unjustly, these violations of law have been ascertained by the highest courts, and even by the Strasbourg Court. Another recommendation we can give is that concrete measures should be taken for the recognition of the right of the accused, for a fair legal process by the judicial police officers, as this right applies not only in the trial but also in preliminary investigations.

Another recommendation would be for the competent authorities to conduct a more comprehensive training for judges and prosecutors, in relation to the jurisprudence of the Strasbourg Court regarding the right of the accused to a fair trial, there are few references in the jurisprudence of this Court. Another recommendation is the fact that the right of the accused for a fair trial should be notified by appropriate means and to the accused themselves, especially to pre-trial detainees.

For various researchers who want to expand their knowledge, I would suggest to read is the book "Murphy on Evidence" by P. Murphy, Oxford University Press, 2005. Another book I would suggest is, "The Right to Criminal Procedure", Sahiti, E; Murati, R; Prishtina, 2013.

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Also, to further expand the knowledge I would suggest the book of some authors in Albania, Islami, H; Hoxha, A and Panda, I; "*Criminal Procedure*", Tirana 2007. Another book I would suggest is Sprack, J; Engelhardt "A practical approach to Criminal Procedure", 16th Edition, Oxford 2019, as well as the book by Zaganjori, Xh; Vorpsi, A; Biba, D; "Constitutional principles and fundamental rights in the jurisprudence of the Constitutional Court", Tirana 2012. I would also recommend, "*For a European public order*", Selected Decisions of the European Court of Human Rights ", Volume 1, publication of the Albanian Center for Human Rights, Tirana 2001 and "*Human Rights*"; *Summary of international acts*", publication of the Albanian Helsinki Committee, Tirana 1994, as well as all the decisions of the Constitutional Court of the Republic of Albania and the Strasbourg Court cited in the scientific work

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