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THE CONCEPT OF CRIMINAL CHARGE (CRIMINAL CASE)

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Abstract

The two concepts of "criminal charge" and "criminal case" differ from one another, so they should be elaborated separately. Both are part of the meaning of the right to due process of law and represent different expressions of the phrase used in Article 6 of the European Convention for Human Rights and Fundamental Freedoms (the Convention); "the credibility of any charge of a criminal nature that is directed to him", or Article 42/2 of the Albanian Constitution; "accusations brought against him". The criminal charge has to do with the moment when the right to due process of law starts, namely the determination of the moment when we are dealing with a criminal charge, which forces the body that has filed this charge to provide procedural guarantees arising from a due legal process. Meanwhile, the criminal case has to do with the essence of the charges brought against the persons, which means that it is necessary to determine whether it is criminal or not, and depending on this fact, whether or not it should be adjudicated through a due legal process.

Key words: criminal charge, criminal accusation, criminal case, charge, accusation, criminal.

1. INTRODUCTION

Meaning of criminal charge

The concept of the criminal charge has been defined by the European Court of Human Rights (the ECHR)several times and has been considered together with other concepts that are part of a regular, autonomous vis à vis the domestic law and with a substantial material meaning. In Deweer v. Belgium (27 February 1980), the court declared:

"…the prominent place held in a democratic society by the right to a fair trial (see especially the above-mentioned Airey judgment, pp. 12-13, par. 24) prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Article 6 par. 1 (art. 6-1). The Court is compelled to look behind the appearances and investigate the realities of the procedure in question."

The court also gave the meaning of the criminal charge:
"The "charge" could, for the purposes of Article 6 par. 1 (art. 6-1), be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."
Yet, not every official notification fulfills the requirements of the Court's reasoning, but only those notices that:
"... that substantially affect the person's situation ... **"**
For the Court, it was very important to specify the moment when the accusations were brought, because from this moment, the person is entitled to claim his right to a due legal process and the *"reasonable time"* referred to in Article 6 of the Conventionand Article 42/2 of the Albanian Constitution starts precisely at this moment.
In Albanian law, the concept of *"accusation"* is closely related to the concept of *"prosecution"*, both being powers of the prosecution office, under Article 148 of the Constitution:
"The prosecution exercises criminal prosecution, and it represents the accusations in court on behalf of the state."
Also, under Article 24 of the Code of Criminal Procedure (the CPC):
"The prosecutor exercises criminal prosecution and *represents the accusations in court on behalf of the state."*
The wording of the Constitution is complete and leaves no room for misinterpretation as it reflects the fact that the indictment exists from the moment when the person suspected of committing a criminal offense receives notice by an official written act and eventually receives the quality of the defendant. It is a legal obligation for the prosecutor to make such a notification, in accordance with article 34 of the CPC:
"The status of the defendant shall be acquired by the person, to whom the criminal offense is attributed with the act of the notification of charges, which indicates sufficient information for taking him as defendant. Notice of this act is served to the defendant and his defense counsel."

2. MATERIALS AND METHODS

Moreover, based on the ECHR case law (Brozicek v. Italy, 19 January 1989), not only should the accusation be notified, but that notification should be effective and achieve the purpose for which it is made, so that the person becomes aware of the fact that he is charged with the commission of a criminal offense, understands the exact crime he is charged with and what evidence exists against him. Moreover, the person must be aware of these facts in a language that he understands. These obligations derive naturally from the meaning of the first paragraph of Article 6 of the Convention (Article 42/2 of the Constitution), but they are also provided for in a special way as a guarantee to the accused:

Article 6/3 of the Convention:
"Everyone charged with a criminal offence has the following minimum rights:
a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."

Article 31 of the Constitution:
"During a criminal proceeding, everyone has the right:
a) to be notified immediately and in detail of the accusation made against him, of his rights, as well as to have the possibility created to notify his family or those close to him."

There seem to be differences, between the Constitution and the criminal procedural law, and between the Constitution and the Convention. The CPC allows a time limit between the registrations, i.e.: the knowledge of the name of the person to whom the offense is attributed to (Article 287 of the CPC) and the notification of the indictment by an official act. The code does not specify how long this time can be, but logically it must be reasonable and short, because the deadlines for the completion of investigations start to run from the moment of the registration of the name (Article 323).
The Convention itself speaks of the notification of charges within a short deadline, which means that it allows a deadline, but this should be the shortest possible, while the Constitution has extended the minimum safeguard of the Convention, requiring instant notification of the charges. It is clear that the Constitution, being self-applicable, should direct the prosecution's decision-making in these cases and the notice of the charges should be made as soon as it becomes known that there is evidence for the attribution of the criminal offense to a particular person and a decision is made to register the name of that person.
This regulation comes as a result of the ECHR established principle that we can talk about charges when the person's situation has changed substantially, because it is a premise for the fact that investigative actions will be undertaken against him and he will become subject to a decision, whether it is only for the dismissal of the case. Therefore, from the moment of the registration of the name, there is a charge against him and all the guarantees provided by the Constitution and the Convention on due process of law must be ensured.
Meanwhile, effective notification has also to do with the fact that the person should be notified *"in a detailed manner."*This phrase shows that all circumstances and all the evidence against him must be made known to him. But the CPC has made a regulation that in general does not match its spirit. Article 279 provides:
"Investigation documents are secret until the defendant has not received any information about them. When it is necessary for the continuation of the investigations, the prosecutor may order that particular documents be kept secret until the conclusion of the investigation."

3. RESULTS

In its entirety, the CPC secures the defendant's ability to be represented by the defense attorney in conducting investigative actions and creates the prosecution's obligation to submit the file at its disposal, so it remains to be seen from judicial practice what purpose this article embodies. Another element of effective notification is the use of a language that is understood by the defendant. The ECHR in several decisions (Brozicek, or Kamasinski v. Austria, 19 December 1989) emphasized the need for the translation, whether verbally or in writing, of the act of notification of the indictment, so that the person and his defense counsel become effectively aware of the fact and its legal base, and can build their defense without being placed in an unfavorable position. The CPC has established in Article 123 that obligation for the proceeding authority:
"A defendant who does not know Albanian language, is entitled to be assisted by an interpreter, free of charge, to understand the charge and follow actions where he takes part."

However, the expression used by the Convention is *"in a language that he understands and in detail",* which must be understood as also imposing the obligation that the notification of the indictment be made clear and comprehensible, at least for an average intellect.
It is interesting to see some special ways of bringing criminal charges, as provided by the CPC:

1) Article 59 of this Code recognizes the right of victims of a numberof criminal offenses file a direct request with the court for the criminal prosecution of the perpetrator and seek punishment for him. In this case, the notice of the charge is made by the court, through notification of the claim, according to the general rules on the notices.

2) Article 284 recognizes the right of the victim of a number of criminal offenses to file a criminal claim with the prosecutor or the judicial police. This claim is not a referral, as it is not mandatory and essentially represents the complainant's wish to prosecute the perpetrator. A claim must be notified promptly to the person to whom it is attributed, but the complainant may withdraw it at any time and automatically the charges are dropped. This means that the charge exists from the moment the claim is filed.

3) Article 375 provides for the power of the court that is examining the merits of a criminal charge, to give the facts a different legal definition from the one that the prosecutor has provided. The Constitutional Court, by Decision no. 50, dated 30 July 1999, found that this legal arrangement does not give the court powers of prosecution and does not place it in the position of the prosecutor. Rather, it gives them the opportunity to apply the law correctly, by making the qualification that is appropriate and by giving the defendant the opportunity to defend himself in regard to this new qualification. These considerations are not very important because it is clear that the notification of the different qualification is made when the court announces that it has come to a different conclusion. From this moment, all the guarantees of the regular process must be re-established.

4. DISCUSSIONS

Understanding the criminal case.

Let's go back to the concept of *"criminal case",* which has to do with the nature of the charge that has been filed. The ECHR has repeatedly emphasized the autonomy of this concept. In Engel and Others v. Netherlands (8 June 1976) it makes the following summary:
"The Convention without any doubt allows the States… to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects… Such a choice, which has the effect of rendering applicable Articles 6 and 7 (art. 6, art. 7), in principle escapes supervision by the Court.
The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.

In short, the "autonomy" of the concept of "criminal" operates, as it were, one way only."
In this judgment, but especially in the judgment Weber v. Switzerland (22 March1990), the ECHR has emphasized the criteria to be used in qualifying a criminal offense:

1. The classification of the offense according to the legal system of the respective country, but only as a relative criterion and serves only as a starting point;
2. The nature of the act itself;
3. The type of punishment, the amount, and the purpose for which it is given.

The last two criteria are decisive and, as a rule, when the sentence for a violation is deprivation of liberty, then the court believes it is in front of criminal matters. On the other hand, punishment with fine has not always been considered sufficient to determine the nature of the offense.

In Lauko v. Slovakia (2 September 1988), the ECHR found that *"the fine imposed on the unjust appeal of the applicant was intended to penalize and prevent the repetition of the offense ..., so the offense in question had, within the scope of Article 6, a criminal nature."*

CONCLUSIONS

There may be a discussion here about various Albanian laws that envisage different sanctions for contraventions, such as, for example, the Customs Code, which does not make a clear distinction between customs violations and the criminal offense of smuggling. Although this discussion can be closed with the consideration that any decision of the customs administration that imposes a fine on the offender may be appealed in an administrative way and ultimately with the courtroom. For this reason, the due legal process is guaranteed. Problems may arise if the person is fined for an administrative contravention and, at the same time, prosecution is started for the same fact. I think that these cases should be avoided, especially for customs offenses, as the high value of fines and their punitive goals give offenses a pure criminal character. This is followed by the outcome of two decisions on the same criminal case, which contradicts the important constitutional principle of *"ne bis in idem (Article 34)"*.

In the case of Dybeku v. Albania (18 December 2007), the ECHR further argued that:

"The Court reiterates the settled case-law of the Convention institutions to the effect that proceedings concerning the execution of a sentence imposed by a competent court, including proceedings on the granting of conditional release, do not fall within the scope of Article 6 § 1 of the Convention. They concern neither the determination of "a criminal charge" nor the determination of "civil rights and obligations" within the meaning of this provision (see, for example, Aldrian v. Austria, no. 16266/90, Commission decision of 7 May 1990, Decisions and Reports (DR) 65, p. 337; A. B. v. Switzerland, no. 20872/92, Commission decision of 22 February 1995, DR 80, pp. 66 and 72; Grava v. Italy (dec.), no. 43522/98, 5 December 2002; Husain v. Italy (dec.), no. 18913/03, 24 February 2005; and Sannino v. Italy (dec.), no. 30961/03, 24 February 2005).
It observes that the applicant's conviction and sentence were upheld by the domestic courts at three levels of jurisdiction. The applicant has been serving the prison sentence imposed on him ever since. The Court is not persuaded that the decision taken by the domestic courts regarding the applicant's request to serve his sentence in a specialist institution appropriate to his state of health or to be released involved the determination of a "criminal charge" or of "civil rights and obligations" within the meaning of Article 6 § 1. The applicant's request in practice related to the manner of implementing his sentence."

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