

THE RIGHTS OF SUSPECTS AND ACCUSED IN CRIMINAL PROCEEDINGS IN BOSNIA AND HERZEGOVINA: TO WHAT EXTENT ARE THEY IN COMPLIANCE WITH EUROPEAN UNION AGENDA ON PROCEDURAL SAFEGUARDS?

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Abstract

Paper discusses the rights of suspects and accused in Bosnia and Herzegovina (BiH) criminal proceedings in comparison to the efforts of the European Union (EU) when it comes to strengthening the foundation of the European area criminal justice. BiH is on the road toward the EU integrations and is faced with the requests to harmonize national legislation, including specific areas of criminal justice with EU standards and legislation. Research primarily comprises normative analysis of the criminal proceeding laws that are in force in BiH including other related regulations. Due attention is paid to special safeguards for juvenile suspects and accused in criminal proceedings as well. As EU *acquis* implies not only harmonization of national legislation but also its effective implementation, paper provides analytical insight to number of decisions of the Constitutional Court and of other high courts in BiH comprising important opinions regarding procedural safeguards for suspects and accused.

Keywords

suspects, accused, criminal proceeding, procedural safeguards, EU integrations

1. INTRODUCTION

In 2009, European Council adopted Convention on Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ C 295, 2009). The above-mentioned document will become fundamental step in improvement the rights of suspects and accused persons in criminal proceedings of EU countries and will mark the beginning of the development of the EU agenda on procedural safeguards. In 2010, the Roadmap became an integral part of the Stockholm Program – An open and secure Europe serving and protecting citizens (OJ C 11, 2010), and in the next few years this Agenda will generate a series of legislative acts aimed to improve procedural safeguards. Philosophy behind was that the EU recognizes the importance of the European Convention on Human Rights (ECHR) (1950) 213 UNTS 222 as a common basis for the protection of the rights of suspects and accused in criminal proceedings, furthermore that interpretations of its provisions by the European Court of Human Rights (ECtHR) represent the foundation of developing mutual trust of Member States in each other's criminal justice system, but that there is still room for improvement of that protection in terms of implementation and respect of Convention standards, consistent application of the applicable standards and where it is possible to raise existing standards (Roadmap, Point 1, 2). This advancement by various EU directives from this Agenda was made in several areas, namely: rights to interpretation, translation, and information in criminal proceedings, improvements to various aspects of the presumption of innocence, rights to legal advice and legal aid, communication with relatives, rights of juvenile suspects and accused, as well as in some other aspects of legal protection of citizens in criminal proceedings.

On the other side, the beginning of the 2000s for the legislation of BiH marked the entry into a period of radical criminal justice reform, which began with the adoption of new criminal laws and laws on criminal procedure and was supposed to bring BiH closer to the Western, European values, to the rule of law, especially regarding protection of human rights and freedoms, and to provide more effective fight against crime as well. The reform is still ongoing and was reflected through the process of constant improvement of existing laws as well as the adoption of new ones. Thus, in the meantime, among others, completely new legislation will be developed, such as the one in area related to protection and treatment of children and juveniles in criminal proceedings, in area related to forfeiture of property acquired through criminal activities as well, and in other areas of criminal justice. No less important are the regulations governing the issues of the institutional functioning of the criminal justice system, which were also the subject of reform through all these years and are in the constant focus of the international factor in BiH, especially the EU, and which should ensure its efficiency and integrity.

Approaching European values meant adopting more adequate protection of rights and freedoms in criminal proceedings in relation to suspects and accused persons, in accordance with international documents, in particular the ECHR, which is ultimately a constitutional obligation of all legislators in BiH, as well as institutions and individuals who enforce the laws. Paper examines the achieved level of reform from the point of view of protecting the rights and freedoms of suspects and accused persons in BiH as one of the most obvious indicators of the rule of law in a legal system. In this regard, besides the review of the procedural safeguard in contemporary criminal procedure law legislation, main attention is paid to the review of the compliance of BiH criminal justice with EU directives from the Agenda on procedural safeguards.

In 2022, the European Council granted candidate status to BiH, which means that at some point in the future, BiH is obliged to harmonize its legislation with EU requests, including the area related to the Agenda on procedural safeguards. In the end, regardless of whether and when BiH will become part of the EU family, the acceptance of the minimum standards of rights for suspects and accused persons in criminal proceedings as laid down in EU legislation will certainly represent a civilizational step forward in achieving the rule of law.

2. EU DIRECTIVES WITHIN THE FRAMEWORK OF AGENDA ON PROCEDURAL SAFEGURADS

Following the Roadmap adopted in 2009. European Parliament and Council of the EU adopted 6 legislative acts aiming the further strengthening and protection of human rights and freedoms of suspects and the accused in the EU area.

- *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (OJ L 280, 2010)* was adopted in 2010. To achieve fairness of the proceedings, the Directive aimed to improve the right to interpretation and right to translation of essential documents. In that context Member States are obliged to provide suspects or accused persons who do not speak or understand the language of the criminal proceedings without delay with interpretation before investigative and judicial authorities (Art. 2. para. 1.). Furthermore, the obligation was established, where necessary for the purpose of safeguarding the fairness of the proceedings, that interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications (Art. 2. para. 2.). The right to interpretation includes appropriate assistance for persons with hearing or speech impediments as well (Art. 2. para. 3.). Related to right to translation of essential documents Directive lays down that Member States are obliged to ensure that suspects or accused persons who do not understand the language of the criminal proceedings are provided within a reasonable period of time with a written translation of all documents which are essential to ensure that they are able to exercise their right of defense and to safeguard the fairness of the proceedings (Art. 3. para 1.). According to the Directive essential documents include any decision depriving a person of his liberty, any charge or indictment, and any judgment (Art. 3. para. 2.). Effective implementation of both rights is guaranteed by the right of suspect or the accused to challenge decisions that there is no need for the interpretation or translation and with possibility to complain on the quality of interpretation or translation (Art. 2. para. 5. and Art. 3. para. 5. of the Directive).
- *Directive 2012/13/EU on the right to information in criminal proceedings, (OJ L 142, 2012)* followed in 2012 aimed to strengthen suspects and accused right to information on procedural rights. Directive defines aspects of: Right to information about rights (Art. 3.); Letter of Rights to arrest (Art. 4.); Letter of Rights in European Arrest Warrant proceedings (Art. 5.); Right to information about accusation (Art. 6.); Right of access to the materials of the case (Art. 7.). Art. 8. para. 1. and 2. of the Directive specifically requests verification of the process of suspects and accused information about their rights by recording procedure and guarantees a remedy in the case of possible failure or refusal of the competent authorities to provide information in accordance with

the Directive. Of particular importance is the Letter of Right to arrest, which obliges Member States to promptly provide suspects or accused persons who are arrested or detained with a written Letter of Rights. Accordingly suspects or accused would be in position to read the Letter of Rights and allowed to keep it in their possession throughout the time that they are deprived of liberty. Letter of Rights should contain further information: (a) the right of access to a lawyer; (b) any entitlement to free legal advice and the conditions for obtaining such advice; (c) the right to be informed of the accusation, in accordance with Article 6; (d) the right to interpretation and translation; (e) the right to remain silent; (f) the right of access to the materials of the case; (g) the right to have consular authorities and one person informed; (h) the right of access to urgent medical assistance; and (i) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority (Art. 3. para. 1. and Art. 4. para. 2. of the Directive).

- *Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 2013)* was adopted in 2013. Directive in its text lays down minimum rules related to: The right of access to a lawyer in criminal proceedings (Art. 3.); Confidentiality of communication between suspects or accused persons and their lawyer (Art. 4.); The right to have a third person informed of the deprivation of liberty (Art. 5.); The right to communicate, while deprived of liberty, with third persons (Art. 6.); The right to communicate with consular authorities (Art. 7.); General conditions for applying temporary derogations (Art. 8.); Waiver (Art. 9.); The right of access to a lawyer in European arrest warrant proceedings (Art. 10.); Legal aid (Art. 11.); Remedies (Art. 12.) and Vulnerable persons (Art. 13.).
- *Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 2016)* from 2016 was the next in the series of European Parliament and Council of EU directives in the framework of Agenda on strengthening procedural safeguards. It focuses on setting minimal standards related to certain aspects of the presumption of innocence as are: Public references to guilt (Art. 4.); Presentation of suspects and accused persons (Art. 5.); Burden of proof (Art. 6.); and right to remain silent as well as right not to incriminate oneself (Art. 7.). Directive lays down minimal standards regarding the right to be present at the trial in criminal proceedings (Art. 8-9.) as well. When it comes to the right to be present at the trial, intention of the Directive is to promote this right, but it recognises that there are circumstances where it is possible to hold trial in absence of a suspect or the accused. In these circumstances Directive lays down very specific and strict conditions for the trial to be held and decision on the innocence or the guilt of the suspect or the accused to be passed in their absence.
- *Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 2016.)*. This EU Directive laid down obligation for Member States to ensure that the child's best interests are always a primary consideration and that children who are suspects or accused in criminal proceedings need to be given particular attention in order to preserve their potential

for development and reintegration into society (Point 8. and 9.). It needs to be mentioned that Directive applies to children who are suspects or accused in criminal proceedings and children who are subjects to European arrest warrant. Minimum rules laid down by Directive are related to strengthening the rights of suspected or accused children in criminal proceedings and to implementation of a specific procedural measures when children are subject of the proceedings. These are: Right to information (Art. 4.); Right of the child to have the holder of parental responsibility informed (Art. 5.); Assistance by a lawyer (Art. 6.); Right to an individual assessment (Art. 7.); Right to a medical examination (Art. 8.); Audiovisual recording of questioning (Art. 9.); Limitation of deprivation of liberty (Art. 10.); Alternative measures (Art. 11.); Specific treatment in the case of deprivation of liberty (Art. 12.); Timely and diligent treatment of cases (Art. 13.); Right to protection of privacy (Art. 14.); Right of the child to be accompanied by the holder of parental responsibility during the proceedings (Art. 15.); Right of children to appear in person at, and participate in, their trial (Art. 16.) and other as well.

- *Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 2016)* is the sixth legislative act from the framework of the EU Agenda on procedural safeguards. The Directive complements the right to access to the lawyer defining the minimum rules for obtaining legal aid to suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer. It lays down the possibility for the Member States to apply different tests whether legal aid is to be granted in accordance with the Directive provisions and requests where conditions for the legal aid in criminal proceedings are met to be granted without delay (Art. 4.).

3. RIGHTS OF SUSPECTS AND ACCUSED PERSONS IN CONTEMPORARY CRIMINAL PROCEEDINGS IN BIH

The importance of respect for human rights and freedoms in BiH, especially in the context of the aggression and unfortunate events that occurred in the first half of the 1990s, is particularly emphasized in the provisions of the Constitution of BiH. According to the Constitution of BiH the provisions of the ECHR, as well as its Protocols are directly applied in BiH and have priority over all other laws (Art. II/2 of the BiH Constitution). Conforming to constitutional organization and system, criminal jurisdiction in BiH is divided between the state, the entities of the Federation of BiH (FBiH) and Republika Srpska (RS) followed by Brčko District of BiH (BD BiH). As a result, there are four separate criminal jurisdictions with accompanying legislation and institutional framework in BiH today. In principle, legislation in all jurisdictions is quite compatible, although there are also certain differences. Unfortunately, as time passes, new amendments often bring more, non-harmonized, provisions, which ultimately contribute to the (non)equality of the citizens before the law and legal insecurity. Due to the reason of complexity for the paper of this nature to encompass analyses for all four criminal procedure codes, for the purposes of our subject we will pay attention only to the provisions of state law on criminal proceedings, considering the high degree of compatibility between state and entity laws, as well as those of BD BiH.

Regarding the rights of juvenile offenders, given that there is no *lex specialis* regulations at the state level that would lay down the rules related to legal status and protection of juvenile

offenders, we will refer to the provisions of special laws that exist at the entity level of FBiH and RS, as well as BD BiH.

In BiH criminal justice system according to the provisions of Art. 20 a) and b) of the Criminal Procedure Code of BiH (CPC BiH, 2018), a suspect is defined as a person against whom there are grounds for suspicion that he has committed a criminal offense, while the accused is a person against whom one or more counts of the indictment are confirmed. The suspect as well as the accused are one of the main subjects of the criminal proceedings and at the same time parties to the proceedings. Considering the nature of certain stages of criminal proceedings, it is clear that the person in the legal status of a suspect will be exposed to a more significant limitation of individual rights and freedoms (deprivation of liberty, custody, prohibition measures, various evidence-gathering measures, etc.) than in the status of the accused who comes out before the court and in the further proceedings according to the principles of equality in treatment and adversary, undertakes his defense. Of course, this does not mean that legally based coercive measures cannot be applied to the accused, depending on the specific circumstances, such as, for example, detention after confirmation of the indictment, etc.

The following is an overview of the rights of suspects and accused persons in accordance with the provisions of the CPC BiH which are under EU Agenda scope:

a) Fair trial (due process of law)

The right to a fair trial, which is one of the fundamental rights of suspects and accused persons derives from Art. 6. of the ECHR. In BiH, this right has been raised to the level of one of the most important principles of criminal procedure law and criminal law in general if not the most important one. The CPC BiH, through several of its provisions, expresses the requirements from Art. 6. Main provision of the CPC BiH related to a fair trial is the provision of Art. 2. para. 1. which lays down that: *"The rules established by law should ensure that no innocent person is convicted, and that the perpetrator of a criminal offense is sentenced under the conditions prescribed in the Criminal Code of BiH and in other laws of BiH in which criminal offenses are prescribed and, in the procedure, prescribed by law"*. This provision is further strengthened by Art. 2. para. 2. of the CPC BiH which lays down that: *"Before the final judgment is passed, the suspect or the accused may be restricted in his freedom or rights only under the conditions prescribed by this law."* Finally, according to the Art. 2. para. 3. of the CPC BiH *"For criminal acts that fall under the jurisdiction of the Court of BiH only that court can impose a criminal sanction in a procedure initiated and carried out according to the law, unless otherwise is prescribed by the law itself."* It is considered that Art. 2. of the CPC BiH and similar provisions of related criminal proceeding codes of entities FBiH and RS including BD BiH encompasses following rights: presumption of innocence; *in dubio pro reo* rule; right to material and formal defense; request that competent court decides on criminal charges; public nature of trial; right to trial without delay; right to be present at trial; prohibition of double jeopardy; right to use its own language during the proceeding; prohibition of illegally obtained evidence; explanation of court decisions (Sijerčić-Čolić, 2007).

b) Presumption of innocence

CPC BiH guarantees the presumption of innocence in Art. 3. para. 1. according to which: *"Every person is considered innocent until a final judgment establishes otherwise."* Furthermore, Art. 3.

para. 2. of the CPC BiH obligates the court to resolve doubts regarding the existence of facts that constitutes the characteristics of a criminal offense or on which the application of a provision depends, in a manner to reach decision favourable for the accused. It is known as an *in dubio pro reo* principle. Following the above mentioned provisions, a suspect or accused in criminal proceedings in BiH: 1. is not obliged to defend himself except for the obligation to respond to the summons of the criminal proceedings body; 2. is not obliged to prove his innocence because the burden of proof is on the prosecutor; 3. the court must issue an acquittal not only when it is convinced of the innocence of the accused, but also in a situation where it is not convinced of his guilt (Simović et al., 2021). In support of the *in dubio pro reo* principle Constitutional Court of BiH asserts in one of its decisions that: "... facts against the accused must be established with certainty, in contrast to facts in favour of the accused, which are taken as established even when they are only probable." (AP-1603/05, 2006). Supreme Court of FBiH discussing the judicial announcements regarding presumption of innocence in one of its decisions concludes: "There is a violation of the presumption of innocence from Art. 3. para. 1. of the Criminal procedure code of FBiH (CPC FBiH, 2020) and Art. 6. para. 2. of the ECHR when decision on extending suspects custody contains statements which in their content, present a clear judicial announcement that the suspects committed criminal offenses for which they are being investigated." (09 0 K 0035796 20 KZ 2, 2020).

c) Right to be informed about rights and of the nature and cause of accusation

According to Art. 5. para. 1. CPC BiH a person deprived of liberty must be immediately informed: 1. of the reasons for the deprivation in his native language or a language he understands; 2. about right that he is not obliged to give a statement, nor to answer the questions, 3. about right to take defense counsel whom he can choose by himself, 4. about right to notify his family, a consular officer of a foreign country whose citizen he is or another person designated by him of his deprivation of liberty. Art. 5. para. 2. stipulates the obligation that a defense counsel will be appointed to a person who is deprived of liberty at his request if cannot afford to pay defense costs due to financial situation.

Further, at the first interrogation the suspect must be informed about the crime for which he is charged and about the grounds of suspicion against him and that his testimony can be used as evidence in the further course of the proceedings (Art. 6. para. 1. CPC BiH). Following the provision of Art. 6. para. 2. to suspect or the accused, must be given the opportunity to state all the facts and evidence against him and to present all the facts and evidence in his favour.

In BiH criminal proceedings, the suspect or the accused is not obliged to present his defense or answer the questions and must be informed about that right (Art. 6. para. 3. CPC BiH) which is a provision in favour of the presumption of innocence and one of the suspects or accused rights which will be discussed latter.

Finally, Art. 12. CPC BiH lays down general obligation for judicial authority, prosecutor as well as other bodies which participate in proceeding to inform the suspect, the accused or another person participating in the procedure, who, out of ignorance, could miss a legal motion in the procedure, or out of ignorance, would not use their rights, about the rights that belong to them according to the provisions of the CPC BiH, and about the legal consequences of missed procedural motion. CC BiH in one of its decisions concludes that: „The fact that Art. 6. of the ECHR requires that the appellant must be informed as soon as possible about the charge

against him does not mean that he must be informed about it in the arrest warrant, but rather in the shortest possible time” (AP-86/05, 2005).

d) Right to interpretation and translation

According to Art. 8. para. 2. of the CPC BiH participants in the proceedings have the right to use their native language or a language they understand. If a proceeding participant does not understand one of the official languages of BiH (which are in official use equally), CPC BiH guarantees an oral translation of participants or other persons statements during the proceedings, as well as translation of documents and other written evidence used during the proceedings (Art. 8. para. 3.). Additionally, procedural bodies are obliged to inform proceeding participants, including suspect and the accused, about rights to use their native language or language they understand, before the first examination (Art. 3. para. 3. CPC BiH). Translation is provided with the assistance of court interpreter. Furthermore, CPC BiH guarantees translation of summons, decisions, and other written documents in the proceedings to a person who has been deprived of liberty or is in custody, serving a sentence or is put to compulsory psychiatric treatment, or compulsory treatment related to addiction (Art. 9. para. 3. CPC BiH). Finally, CPC BiH explicitly prescribes for the interrogation of suspect during the investigation if he is deaf or mute to be performed with the assistance of interpreter (Art. 80.). In one of its decisions CC BiH, regarding the issue where the party who does not speak the official language of the court was interrogated during the pretrial procedure with the assistance of the elected interpreter that: *“There is no violation of the right to a fair trial from Article II/3.e) of the Constitution of BiH and Art. 6, para. 3, item e. of the ECHR...in the case when during the appellants hearing...at his explicit request was present elected not permanent court interpreter for a foreign language.”* (AP 1030/04, 2005).

e) Right to remain silent and privilege against self-incrimination

CPC BiH explicitly lays down this right in a few of its provisions, as a right about which the person deprived of liberty must be informed (Art. 5. para. 1) and as a right of the suspect or the accused during the first interrogation (Art. 6. para. 3). This right is again indicated by Art. 78. para. 2. a) as a part of instruction on the suspect's rights during interrogation. It is widely considered that suspect or the accused during the criminal proceedings has a complete freedom to decide whether to use this right, and if he uses it, no conclusions should be drawn from that fact even indirectly from his behaviour during the proceedings. (Krapac, 2014).

f) Right of defense and right to legal aid

On the right to take assistance of defense counsel whom he can choose, and that defense counsel will be appointed to a person who is deprived of liberty on request if cannot afford to pay defense costs due to financial situation, every person must be informed in the moment of deprivation of liberty – arrest (Art. 5. para. 1. CPC BiH). The CPC BiH guarantees the right to defense in such a way that it gives the suspect or the accused the opportunity to defend himself alone or to defend himself using the professional assistance of a defense counsel (Art. 7. para. 1). The possibility that the suspect or the accused defend himself alone in BiH theory and practice is called substantial defense, while defense with the assistance of a defense attorney is called formal defense.

In circumstances where the suspect or the accused does not hire a defense counsel, a defense counsel will be appointed in cases prescribed by law (Art. 7. para. 1. CPC BiH). These are cases

of mandatory defense, i.e., circumstances that require the professional assistance of a defense counsel regardless of the will of the suspect or the accused. These circumstances are as follows: 1. if the suspect is mute or deaf, he must have a defense counsel during the first interrogation; 2. if the suspect is charged with a criminal offense for which a long-term prison sentence can be imposed, in which case he must also have a defense counsel during the first interrogation; 3. in the circumstances when the suspect or the accused is ordered to be detained, he must have a defense counsel at the time of the statement on the motion for detention as well as for the entire duration of the detention; 4. if an indictment has been brought for a criminal offense for which a prison sentence of 10 years or a severe sentence can be imposed, the suspect must have a defense counsel from the moment the indictment is raised; 5. if the court determines that it is due to the complexity of the case or the mental state of the suspect or the accused or other circumstances in the interest of justice; and 6. if in the indictment there is a motion for the court to determine that the suspect committed the criminal offense while in a state of insanity, the suspect or the accused must hire a defense counsel after submitting that motion (Art. 45. CPC BiH). CPC BiH in Art. 171. Para. 3. lays down additional circumstance for the mandatory formal defense. This is the case when an accused who does not have a defense counsel and needs to be provided with decision imposing prison sentence, but delivery cannot be made to the accused's current address. In these circumstances the court will appoint an *ex officio* defense counsel for the accused, who will perform this duty until the accused's new address is known. In cases of mandatory defense, if the suspect or the accused does not hire a defense counsel himself, or the defense lawyer is not hired by persons to whom that right belongs according to the law, the defense counsel will be appointed by the judicial authority. In the above-mentioned case, the suspect or the accused has the right to a defense counsel until the verdict becomes final, and if a long-term prison sentence is imposed, then also in the legal remedy procedure (Art. 45. para. 4. CPC BiH).

According to the provisions of the law on the protection and treatment of children and juveniles in criminal proceedings, which are in force in the entities and the BD BiH, defense is always mandatory in the case of a juvenile is perpetrator of a criminal offense. The juvenile must have a defense counsel from the moment of the first hearing by the prosecutor or an authorized official, as well as during the entire procedure.

Furthermore, according to the provisions of CPC the suspect or the accused must be given enough time to prepare his defense (Art. 7. para. 3. CPC BiH).

Finally, BiH criminal procedure laws recognise defense with the assistance of lawyer of persons who have no sufficient financial resources to acquire one. According to Art. 46. para. 1. of the CPC BiH in the absence of conditions for mandatory defense, and if the proceedings are conducted for a criminal offense for which a prison sentence of 3 years or more severe sentence may be imposed, or when the interests of fairness require it, regardless of the prescribed sentence, to the suspect or the accused shall be appointed a lawyer at their request, if they cannot bear the costs of the defense due to their financial situation. A request to exercise this right can be made during the entire proceeding.

Constitutional Court BiH, in its consideration of the right to defense, concludes in one of its decisions that: *"There is no violation of the right to defense as an element of the right to a fair trial when the Supreme Court, in accordance with the law, made a decision at a panel session attended only by the appellant, who agreed that the Supreme Court panel session be*

held without the presence of his defense counsel.” (AP-2050/05, 2007). Regarding the issue of “sufficient time for preparing the defense”, in decision AP-639/03, 2004 Constitutional Court BiH expressed that: *“There is no violation of the right from Article 6.3.b) of the European Convention in view of the established facts, and especially bearing in mind the fact that both the appellant and his newly appointed defense counsel stated that they do not need additional time for preparation.”* Furthermore, in decision AP-877/07 2009 Constitutional Court BiH concludes that: *“The appellant's right to a defense counsel from Art. 6, para. 3, point c) was not violated when the appellant was instructed about this right, so he did not demand that the court appoint him an ex officio defense counsel, and the court assessed that, considering the nature of the accusation against the appellant, the potential sentence that can be imposed, the complexity of the case and the financial resources of the appellant, it is not necessary.”*

g) Right to access material of the case

According to the Art. 47. para. 1. of the CPC BiH during the pre-trial stage of investigation, defense counsel has the right to examine the files and observe acquired material evidence that are beneficial for the suspect, unless it is about files and material evidence whose disclosure could endanger the purpose of the investigation. Art. 78. para. 2. d) of the CPC BiH prescribes the similar right for the suspect. Given the possibility that an examination of the file could call into question the objectives of the investigation, this right during the investigative stage of the procedure seems very limited, even though we speak about evidence in favour of the suspect which could contribute to a more appropriate preparation of his defense (Halilović, 2019). Our disagreement with the existing legal provisions and judicial practice is confirmed even more by decision 070-O-Kz-09-000449 2009, of the Supreme Court of FBiH in which court asserts that: *“By submitting to the suspect's defense counsel motion for custody extension, which contained a notice that the court received evidence essential for the decision on the validity of the motion it can be concluded that court notified the defense counsel about the evidence in the meaning of Art. 61. para. 2, of the CPC FBiH.”* After submitting the indictment for confirmation, this right can no longer be denied (Art. 226. para 2. CPC BiH).

h) Right to attend trial and prohibition of trial *in absentia*.

In BiH system of criminal justice accused has the right to attend trial. In the case accused would not be allowed to participate in the trial that was initiated based on the confirmed indictment against him, then the very meaning of the rule of law would be called into question (Halilović, 2019). Art. 247. CPC BiH explicitly prohibits trial *in absentia*. Constitutional Court BiH its opinion regarding the right of the accused to attend trial expressed in several decisions. In its decision AP-557/04, 2004 Constitutional Court BiH concluded that: *“The appellant must have the opportunity to attend the court session in person. This refers, primarily, to the trial before the court of first instance. However, the right to a fair trial also includes the right to be present before the courts of higher instance that decide on appeals, except when the consideration before those courts is limited to procedural or purely legal issues, when the personal presence of the accused is not important.”* In one of its other decisions Constitutional Court BiH stresses that: *“If the hearing related to the factual and legal aspects of the appeal was held in the absence of the appellant and his legal representative, and in the presence of the deputy public prosecutor, even if it was based on the current law, it still represents a violation of the right to a fair trial, and especially a violation of the principle equality.”* (U-28/01, 2001).

i) Other important rights of the suspect and the accused in BiH criminal proceedings

Additional rights prescribed by BiH criminal proceeding legislation(s) which were not part of the analysis since they are not in a direct scope of the EU agenda on procedural safeguards are: Right to be tried by independent, objective and court established by law; Double jeopardy clause (*non bis in idem* principle); Right to a public trial; Equality of Arms; Right to a speedy trial; Right to introduce evidence at trial; Right to a closing argument at trial; and Right to appeal. Although they are not part of our discussion, it should be emphasized that these rights are essential for legal status of suspects and accused in criminal proceedings, without which the fairness of the proceedings and minimum rights from the EU Agenda on procedural safeguards certainly could not be realized in full capacity.

4. REVIEW ON THE RIGHTS OF JUVENILE SUSPECTS AND ACCUSED IN BIH CRIMINAL PROCEEDINGS

The area of protection of children and juvenile offenders in BiH was separated from the criminal procedure codes first in the entity RS in 2010 by the adoption of a special law on the protection and treatment of children and juveniles in criminal proceedings of the RS. In 2011, the BD BiH and in 2014 the entity FBiH adopted their own laws on the protection and treatment of children and juveniles in criminal proceedings. These laws encompassed the protection and treatment of both, children's victims, and juvenile offenders. At the state level, until this moment, there is still no special law, and the provisions on the procedure for juvenile offenders are part of the CPC BiH. These provisions unfortunately do not meet the contemporary legal trends of humanization and best interest of the children and juveniles related to their protection in criminal proceedings.

Given the significant overlap of the aforementioned laws in the entities and BD BiH, for the purposes of our analysis, we will present some of the most significant provisions of the Law on protection and treatment of children and juveniles in criminal proceedings of FBiH (No. 7/2014, 74/2020).

Thus, according to the Art. 2. para. 1. of this Law, a child is defined as a person who has not reached the age of 18. Furthermore, according to Art. 2. para. 2. it is not possible for criminal sanctions or any other measures this Law lays down to be applied against child who was under 14 years of age at the time the criminal offense was committed. However, children who, due to their age, cannot be subjects to criminal liability and criminal sanctions, are treated in another way, primarily through certain activities prescribed by family legislation, where the social protection services (guardianship authorities) have the first-class role and importance, which directly apply certain activities arising from their legal powers (Karović et al., 2020).

On the other side, juvenile is defined as a child who has reached the age of 16 at the time of the commission of the criminal act but has not reached the age of 18 and against whom criminal sanctions and other measures provided in this Law can be applied (Art. 2. para. 3.).

Further, this Law provides distinction between: 1. a younger juvenile who has reached the age of 14 at the time of the commission of the criminal offense and has not yet reached the age of 16; 2. an older juvenile who, at the time of the commission of the criminal act, turned 16 and did not turn 18 years of age; and 3. younger adult who has reached the age of 18 at the time of the commission of the criminal offense but has not reached the age of 21 (Art. 3. para. 1, 2. and 3).

The Law on protection and treatment of children and juveniles in criminal proceedings of FBiH prohibits any form of discrimination of children, juveniles, and younger adult offenders during all stages of proceedings (Art. 4).

Furthermore, it guarantees minimal rights for the juvenile offenders during every stage of criminal proceedings. These rights are: (a) right to be informed about the accusations; (b) presumption of innocence; (c) to defend himself by remaining silent; (d) not to have his confession coerced by force; (e) the right to the legal assistance of a lawyer; (f) the right to the presence of parents or guardians; (g) the right to conduct proceedings "without delay"; (h) the right to cross-examine the witnesses of the opposing party and to call and hear one's own witnesses under equal conditions; and the right to an effective legal remedy (Art. 5.).

Other rights and appropriate procedures laid down by this Law are: right to translation (Art. 6.); right to privacy (Art. 7.); diversion from a regular criminal proceedings by giving the possibility for the prosecutor and the judge to decide they will not conduct formal criminal proceedings, but they will the case of a juvenile offender acts solve by applying educational recommendations when they are in the best interest of juvenile (Art. 8.); the proportionality or the possibility to choose and apply the sanctions and measures provided by Law that are adapted to the personal characteristics, environment and circumstances in which the juvenile lives and in proportion to the circumstances and severity of the criminal offense committed with respect of the rights of the injured person (Art. 9.).

5. FINDINGS

Right to interpretation and translation in criminal proceedings as we already discussed in the text above is clearly expressed in CPC BiH as well as in other criminal proceeding laws which are in force in BiH. Regarding the Directive 2010/64/EU, it can be observed that there are still certain aspects related to which the legal provisions in BiH could be improved. This primarily refers to prescribing the exercise of this right "without delay", and in the matter of written translation of all essential documents "within reasonable period of time". Further, legal provisions, should clearly define what procedural documents are considered "essential documents" and establish that the suspect or accused has the right to challenge decisions that there is no need for the interpretation or translation with possibility to complain on the quality of interpretation or translation.

Right to information in criminal proceedings in the form prescribed by the provisions of the CPC BiH and other laws on criminal proceeding in BiH could be assessed as not fully satisfactory. One of the objections that could be raised is that these provisions are inconsistent and unsystematic (Filipović, 2022). Consequently, despite provisions prescribe the obligation of procedural bodies to inform suspects and accused persons about their rights, some of these rights are not clearly defined in the context of their interpretation and appropriately placed in legal texts. Thus, much of the improvements regarding this right which are laid down in Directive 2012/13/EU would certainly be welcomed to BiH laws. This particularly refers to the Letter of rights to arrest, which would not only greatly improve the position of suspects and accused persons in terms of familiarizing them with their rights but would also eliminate possible doubts regarding the potential violation of their rights and freedoms that could appear later in procedure through complaints that the suspect or the accused were not informed about their rights. In addition, the legal provisions should be strengthened by the verification of the process of suspects and accused infor-

mation about their rights by recording procedure. Introduction of a remedy in the case of possible failure or refusal of the competent authorities to provide information would be also step forward for the BiH legislation(s). Regarding *the right of access to the materials of the case*, in this moment BiH legislation(s) significantly diverge from what is laid down in the Directive. The provisions of the CPC BiH and other laws on criminal procedure that are in force nowhere clearly prescribe the right of access to the materials of the case which are essential to challenging the lawfulness of the arrest or detention. It is clearly prescribed by the Directive. In addition, the Directive clearly prescribes the reasons for which access to certain materials may be refused, such as: serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest (Art. 7 para. 4.). At this moment, the only justified reason for denying access to the materials of the case in BiH legislation(s) is the endangerment of the purpose of the investigation, which is a quite broad term and subject to voluntary interpretation of the proceeding body. In case of BiH this proceeding body is the prosecutor while the Directive asks that a decision to refuse access to certain materials would be taken by a judicial authority or at least to be subject of judicial review (Art. 7. para. 4).

Right of access to a lawyer as one of the fundamental rights of suspects and accused in criminal proceedings, as we had the opportunity to discuss earlier in this text, is recognized in BiH legislation(s). However, it is quite certain that further steps need to be taken to align this right with the minimum rights required by Directive 2013/48/EU. This particularly refers to the implementation of the term "access to a lawyer without undue delay" in laws texts as well as to ensure clear legal guarantees according to which suspects or accused persons can exercise their right to defense "practically and effectively". Further, the legal provisions should ensure in an appropriate manner not only that suspects or accused persons have the right for their lawyer to be present but to participate effectively during the interrogation as well. Likewise, it is necessary to clearly determine by law that the lawyer can attend all investigative and evidence gathering acts that are provided by law and in respect of which the presence of the suspect or the accused is either required or he is allowed to attend those actions. In this context, the directive specifically states a) identity parade; b) confrontations and c) reconstruction of a crime scene (See Art. 3. para. 3. of the Directive). Regarding *the right to have a third person informed of the deprivation of liberty* it should be noted that this right is recognized in BiH criminal proceedings laws but without any reference of *the right to communicate with a third person while deprived of liberty* what we see as an additional insufficiency. Finally, in the area of communication with consular authorities, despite BiH legislation(s) recognize this right of the suspect or the accused it should be strengthened following the Directive provisions to include formulations as are: "the right to be visited by their consular authorities ", "the right to converse and correspond with them" and "the right to have legal representation arranged for by their consular authorities" (See. Art. 7. para. 2. of the Directive).

Presumption of innocence as it was already discussed in the text above is one of the main pillars of the contemporary criminal justice system in BiH. However, when we discuss about strengthening certain aspects of the presumption of innocence as they are formulated in the Directive (EU) 2016/343, we will only partially meet this type of provision in BiH legislation. This primarily refers to issues of public references to guilt and in relation to presentation of suspects and accused persons while burden of proof and right to remain silent are already part of the BiH legislation(s) in a very acceptable form. Regarding the right of the accused to

be present at trial which is also subject of this Directive according to BiH criminal proceedings legislation *trial in absentia* is explicitly prohibited so we can conclude in this part there is a high level of compatibility with Directive provisions.

Procedural safeguards for children who are suspects or accused persons in criminal proceedings in the manner they are laid down in BiH laws represent probably the most compatible part of BiH legislation(s) with the EU Agenda and requirements settled down in Directive (EU) 2016/800. This can be concluded for the most of requirements established in the Directive, both the ones related to the rights of children and juveniles and the ones related to specific measures in the case of juvenile offenders as are limitations of deprivation of liberty and specific treatment, timely and diligent exercise of juvenile cases, alternative measures and others. However, certain aspects of the juvenile offenders procedural protection should be improved. This in particular can be observed regarding the juvenile right to information in criminal proceeding including the right of a holder of parental responsibility to be informed as well.

Regarding minimum rules for obtaining *legal aid for suspects and accused persons in criminal proceedings* laid down in the Directive (EU) 2016/1919 it can be concluded that BiH legislation(s) in a quite acceptable manner guarantees this right. The conditions for exercising this right in BiH correspond to those from the Directive to the high extent. However, the existing provisions could be improved by emphasizing that this right, if the conditions for its realization are met, should be ensured "without delay" and in any case before the examination or the undertaking of some other evidence-gathering acts. It should also be noted that the Directive's insists on expanding the circle of persons who can exercise right to legal aid. In this context besides initial suspects and accused Directive recognises this right for persons who become suspects or accused while questioning by the police or by another law enforcement authority (See. Art. 2. para 3. of the Directive). This provision should be added in BiH laws as well.

Furthermore, it needs to be emphasized as a general observation that every EU directive within the EU Agenda on procedural safeguards encompasses right to remedy in relation to the decisions about right(s) it strengthens. Additionally, every directive obliges Member states to pay special attention to the specific needs of vulnerable suspects or the accused. Both should be more explicitly implemented and guaranteed in BiH criminal proceedings legislation(s) even though these rights in many instances are already part of the legislation(s).

Finally, it should be emphasized that different projects aimed to improve criminal justice in BiH already exist and contain recommendations to the BiH legislators toward harmonization for the most part with the minimum rights laid down in the EU Agenda. In this sense, recommendations have already been proposed to improve the criminal proceeding legislation(s) in BiH in area of presumption of innocence and right to information, which would include the Letter of Rights, as well as some other improvements, including those in the area of translation and interpretation and protection of vulnerable suspects and accused persons (Sijerčić-Čolić & Halilović, 2022).

6. CONCLUSION

Criminal proceeding legislation(s) in BiH, undoubtedly provides acceptable level of protection of suspects and accused rights in criminal proceedings. In that context, we are prone to state that the existing framework of procedural rights of suspects and accused in criminal proceedings to the greatest extent follows the requirements established by the ECHR as well as the

requirements from ECtHR jurisprudence. It can be confirmed not only on the observation and analysis of legal provisions but also following the BiH high courts practice. However, compared to the minimum rights and standards established by the EU Agenda, there are lot to do for BiH legislators to achieve a full level of harmonization. This is especially the case regarding the right to information in criminal proceedings and the right to access materials of the case, even though in every other area of minimum rights prescribed by directives there are certain parts that BiH needs to implement or improve.

It should be mentioned however, that some areas of protection and promotion of the rights of suspects and accused persons are of satisfactory scope already. This, in particular, applies to the rights of juvenile suspects and accused. Furthermore, BiH judicial practice is already in line to some of the minimum rights laid down in directives. This mostly applies to EU Agenda on minimum rights related to presumption of innocence. Finally, it is worth pointing out that the need for harmonization is not unknown to judicial professionals, members of the academic community, civil society and international organizations. This can be confirmed by number of published texts as well as recommendations which have been sent to competent authorities. However, it remains to be seen how long it will take the BiH authorities to harmonize the legislation with the EU agenda. This would be a step forward towards a more humane criminal justice and certainly significant improvement in achieving the rule of law.

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PRAVA OSUMNJIČENIH I OPTUŽENIH OSOBA U KRIVIČNIM POSTUPCIMA U BOSNI I HERCEGOVINI: U KOJOJ SU MJERI OVA PRAVA U SKLADU SA AGENDOM EUROPSKE UNIJE O PROCESNIM MJERAMA ZAŠTITE OSUMNJIČENIH ODNOSNO OPTUŽENIH?

Professional Paper

Abstract

Rad razmatra prava osumnjičenih i optuženih osoba u krivičnim postupcima u Bosni i Hercegovini (BiH) u poređenju sa naporima Evropske unije (EU) kada je u pitanju jačanje temelja evropskog područja krivičnog pravosuđa. BiH je na putu ka EU integracijama i suočava se sa zahtjevima za usklađivanje nacionalnog zakonodavstva, uključujući specifična područja krivičnog pravosuđa sa standardima i zakonodavstvom EU. Istraživanje najvećim dijelom obuhvata normativnu analizu zakona o krivičnom postupku koji su na snazi u BiH uključujući i druge povezane propise. Specifična pažnja posvećena je i posebnim garancijama za maloljetne osumnjičene i optužene u krivičnim postupcima. Kako *acquis* EU podrazumijeva ne samo harmonizaciju nacionalnog zakonodavstva već i njegovu učinkovitu primjenu, rad pruža analitički uvid u niz odluka Ustavnog suda i drugih visokih sudova u BiH koje sadrže važne stavove u vezi sa procesnim zaštitama osumnjičenih i optuženih u krivičnom postupku.

Keywords: osumnjičeni, optuženi, krivični postupak, procesne mjere zaštite, EU integracije

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