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# THE RIGHT TO INFORMATION ON THE NATURE AND CAUSE OF THE ACCUSATION AND THE DEFENDANT'S RIGHT TO PREPARE ITS DEFENSE UNDER ARTICLE 6 OF THE ECHR



*Abstract*

This article analyses the minimum procedural guarantees for the defense in criminal proceedings under Article 6 of the European Convention of the Human Rights (ECHR). The rights are called "minimal" because they represent a lower limit, minimum guarantees for the protection of the defendant in the dispute with the state, which rights must not be reduced. After all, otherwise, there would be no approximate balance between the defendant and the state repressive apparatus in criminal proceedings. The author reviews the right to information on the nature and cause of the accusation and its correlation with the defendant's right to have adequate time and facilities for the preparation of its defense as an integral right of the right to a fair trial. More specifically, the article makes a critical analysis about the right to information about the charges in the investigation phase of the criminal procedure and the reclassification of the charges - the amendment and extension of the indictment in the phase of the main hearing in the criminal justice system of the Republic of North Macedonia *vis-à-vis* the defendant's right to prepare its defense through an overview of domestic case-law and the judicial practice of the European Court of the Human Rights (ECtHR).

*Keywords: right to information of the charges, defense's rights, criminal proceedings, Article 6 of the ECHR, Law on Criminal Procedure*

## I. THE CONCEPT OF FAIR TRIAL UNDER ARTICLE 6 OF THE ECHR

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR)[1] guarantees the right to a fair trial. The provisions contained in Article 6 of the Convention enshrine the principle of the rule of law, upon which a democratic society is built, and the paramount role of the judiciary in the

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[1] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed: 26.6.2020].

administration of justice, reflecting the common heritage of the Contracting States.[2] The 'rule of law', which is also set out in the Preamble to the Convention and which is central to its vision, cannot exist if there is no fair trial. Article 6 in its content guarantees the procedural rights of the parties in civil proceedings[3] and the rights of the defendant (accused) in the criminal proceedings[4]. Besides guaranteeing the general right to a fair trial, Article 6 protects specific rights, such as the right to a public hearing and the right to be tried within a reasonable time, as well as more particular rights, such as the right to be presumed innocent, the right to be informed of the accusation, the right to have adequate time and facilities for the preparation of the defense, the right to defend oneself and to have the assistance of counsel, the right to test witness evidence and the right to have the free assistance of an interpreter. Article 6 also encompasses the privilege against self-incrimination.[5] Although the other participants in the procedure (victims, witnesses, etc.) cannot file an appeal in accordance with Article 6, their rights are often taken into account by the European Court of Human Rights (ECtHR).[6]

The particular elements of the term *fair trial* that the ECHR explicitly requires are: independence and impartiality, reasonable time, and publicity; presumption of innocence; and the specific (minimum) procedural guarantees for the defense in criminal proceedings. Article 6 of the ECHR does not explicitly provide the right to be informed of one's rights. However, ECtHR case law provides some guidance on what national authorities need to tell suspects or accused persons about their procedural rights. For example, the ECtHR has held that authorities have a positive obligation to inform the accused of their right to legal representation. A passive approach – where law enforcement waits for the accused to claim their right – is insufficient, and they must actively ensure that the accused understand their right to legal assistance and legal aid, as well as their right to remain silent.[7]

The provision of Article 6 § 3 of the ECHR enumerates the following minimum rights for each accused: as soon as possible, in the language he understands, to be informed in detail about the nature and cause of the accusation against him; to have adequate time and facilities to prepare its defense; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and to have the free assistance of an interpreter if he cannot understand or speak the language used in court. The set of guarantees, which Article 6 § 3 specifically grants to the person charged with criminal offences also appears to be both an expression of the fair trial principle and a specification of the individual's right of defense. As the wording in the Convention implies, Article 6 § 3 refers to 'minimum guarantees', indicating clearly that there is no intention to exclude other protections of an accused person.

In the following subtitles a detailed analysis of the rights of the defense will be given, respectively, the right to information on the nature and cause of the accusation and the defendant's right to prepare its defense under Article 6 § 3 (a), (b) from the Convention through the ECtHR's

[2] Vitkauskas, Dovydas, Dikov, Grigoriy, *"Protecting the right to a fair trial under the European Convention on Human Rights Council of Europe: Human Rights Handbooks"*, Strasburg, Council of Europe, 2012, p.7.
[3] ECHR, Article 6, § 1.
[4] ECHR, Article 6, § 1, § 2, § 3.
[5] See Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005.
[6] *Mihova v. Italy*, App No 25000/07 Council of Europe: European Court of Human Rights, 30 December 2010.
[7] *Panovits v. Cyprus*, No. 4268/04, § 72, ECtHR*; Padalov v. Bulgaria*, No. 54784/00, § 54–56, ECtHR.

jurisprudence, but also taking into consideration the current national provisions regarding the criminal procedure of the Republic of North Macedonia and the domestic practice.

## II. THE RIGHT TO BE INFORMED OF THE CHARGES

Article 6 § 3 (a) of the Convention guarantees the right that everyone charged with criminal offence 'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'. Numerous other relevant international documents guarantee this right. For example, Article 14 § 3 (a) of the ICCPR[8] stipulates that "in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him…" A similar provision is encompassed in Article 8 § 2 (b) of the ACHR[9], using a somewhat simplified formula: it guarantees the right to 'prior notification in detail to the accused of the charges against him.'

The scope of Article 6 § 3 (a) of the European Convention must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters, the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.[10] The purpose of this clause seems clear: the right to defend oneself can only be exercised effectively, i.e. with a minimum of chances of success, if the accused knows what he or she is accused of. [11] The Strasbourg Court's case law is also consistent in holding that the information must include both the cause of the accusation, i.e. the material facts alleged against the accused and the nature of the accusation, namely the legal qualification of these material facts.[12] Sub-paragraphs (a) and (b) of Article 6 § 3 are related in that the right of the person to be informed about the nature and the causes of the accusation against him must be considered in light of the right of the accused person to prepare his defense.[13] While the extent of the "detailed" information varies depending on the particular circumstances of each case, the accused must at least be provided with sufficient information to understand fully the extent of the charges against him, in order to prepare an adequate defense. For instance, detailed information will exist when the offences of which the defendant is accused are sufficiently listed; the place and the date of the offence stated; there is a reference to the relevant Articles of the Criminal Code, and the name of the victim is mentioned.[14] The information must be submitted to the accused in good time for the preparation of his defense, which is the principal underlying purpose of Article

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[8] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx , [accessed 19 September 2020].

[9] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: https://cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm , [accessed 19 September 2020].

[10] *Pélissier and Sassi v. France* [GC], No.25444/94, §54, § 52, ECtHR,; *Sejdovic v. Italy* [GC] No.56581/00, § 90 ECHR; *Varela Geis v. Spain*, No.61005/09, § 42 ECtHR.

[11] Trechsel, *Human Rights in Criminal Proceedings,* p. 193.

[12] *Mattoccia v. Italy*, No. 23969/94, §59 ECtHR.

[13] *Pélissier and Sassi v. France*, [GC], No.25444/94, §54, ECHR, 1999.; *Dallos v. Hungary*, No.29082/95, §47, ECHR, 2001.

[14] *Mattoccia v. Italy*, No. 23969/94, § 60, ECtHR; *Brozicek v. Italy*, No. 10964/84, § 42, ECtHR.

6 § 3 (a).[15] Whilst the provision does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, a defendant not familiar with the language used by the court may be at a practical disadvantage if he is not also provided with a written translation of the indictment into a language which he understands.[16] However, the Court in its jurisprudence also states that sufficient information on the charges may also be provided through an oral translation of the indictment if this allows the accused to prepare his defense. Furthermore, the cost incurred by the interpretation of the accusation must be borne by the State in accordance with Article 6 § 3 (e), which guarantees the right to the free assistance of an interpreter.

The ECHR neither imposes that the prosecution remains static during the course of the proceedings nor prevents the judge from giving a new legal characterization to the acts on which the accusation is based. However, the accused must be duly and fully informed of any changes in the accusation, including reclassification of facts, and must be provided with adequate time and facilities to react to them and organize his defense based on any new information or allegations.[17] In the case of reclassification of facts during the course of the proceedings, the accused must be afforded the possibility of exercising his defense rights in a practical and effective manner, and in good time.[18]

In EU law, the right of the information on the charges has been the object of harmonization by Directive 2012/13/EU on the 'right to information in criminal proceedings'.[19] The Directive gives the right to information a triple function: informing the suspects or accused persons about their procedural rights, informing them on the accusation and allowing their access to the materials of the case.[20] Concerning the second function, Article 6 of the Directive provides for the Member States' obligation to ensure that the suspects or accused persons be provided with information about the accusation. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defense.[21] Furthermore, Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed. At the latest on submission of the merits of the accusation to a court, detailed information must be provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person. At last, Member

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[15] See *C. v. Italy*, Commission decision, where the notification of charges to the applicant four months before his trial was deemed acceptable, by contrast, *Borisova v. Bulgaria*, §§ 43-45, where the applicant had only a couple of hours to prepare her defense without a lawyer.

[16] *Hermi v. Italy* [GC], No.18114/02, § 68, ECtHR; *Kamasinski v. Austria*, No.9783/82, § 79, ECtHR.

[17] *Mattoccia v. Italy*, No. 23969/94, § 61, ECtHR; *Varela Geis v. Spain*, No. 61005/09; § 54 ECtHR.

[18] *Pélissier and Sassi v. France* [GC] No. 25444/94, § 62, ECtHR; *Block v. Hungary*, No. 56282/09, § 24 ECtHR; *Haxhia v. Albania*, No. 29861/03, §§ 137-138, ECtHR; *Pereira Cruz and Others v. Portugal*, No. 56396/12, § 198, ECtHR.

[19] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings OJ L 142, 1.6.2012, p. 1–10, available at: https://eur-lex.europa.eu/eli/dir/2012/13/oj , [accessed 19 September 2020].

[20] For more on this subject see:, Divna Ilikj Dimovski, Boban Misoski, "Impact on the EU Directives on Defendant's Right on the Macedonian Criminal Procedure: Directive on the Right to Information in Criminal Proceedings and Directive on the Right to Interpretation and Translation in Criminal Proceeding*"*, *Proceedings from the Annual International Conference – 30 years after the fall of the Berlin Wall*, Skopje, Iustinanus Primus Law Review, 2019.

[21] Directive 2012/13/EU, Article 6.

States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.[22]

## III. THE RIGHT TO PREPARE ITS DEFENSE

Article 6 § 3 (b) of the ECHR stipulates that everyone charged with a criminal offence has the following minimum rights: …'to have adequate time and facilities for the preparation of his defense'. Other international documents, as the ICCPR[23] and the ACHR[24] guarantee this right using largely identical texts. The ACHR uses the term 'means' rather than 'facilities', but this cannot be interpreted as representing an intention to give the guarantee a different meaning. The Covenant adds a reference to the right to contact with counsel, which is certainly a valuable 'facility'.[25] The right to prepare its defense gives a non-exhaustive list and has been instituted above all to establish equality, as far as possible, between the prosecution and the defense. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defense.[26] When analyzing the minimum guaranteed rights in Article 6 § 3 comes to the conclusion that 'the right to have adequate time and facilities for the preparation of the defense' has a subsidiary role and can be interpreted as a general guarantee which will only be invoked to the extent that none of the other specific guarantees applies. Furthermore, the phrasing and the purpose of Article 6 § 3 (b) indicates that if an accused has been acquitted, there can be no violation, thus making it a relative guarantee.[27] The guarantee has a relation to the other rights of the defense, as the right to trial within a reasonable time; the principle of the equality of the arms; and the right of the accused to be informed about the charge. Cases as *Pélissier and Sassi v. France* and *Sadak v. Turkey* are examples where violation of Article 6 § 3 (b) were found with regard to the element of time in accordance with Article 6 § 3 (a).

This part of the Article of the European Convention concerns two elements of a proper defense, namely the question of facilities and that of time. This provision implies that the substantive defense activity on the accused's behalf may comprise everything which is "necessary" to prepare the trial. The accused must have the opportunity to organize his defense in an appropriate way and without restriction as to the ability to put all relevant defense arguments before the trial court and thus to influence the outcome of the proceedings. When assessing whether the accused had adequate time for the preparation of his defense, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and stage of the proceedings.[28] A balance must be achieved between ensuring that proceedings are conducted within a reasonable time. In the Court's jurisprudence, the issues arising regard to the requirement of adequate time under Article 6 § 3 (b) are manifested as: limited time for the inspection of a file; the short period between the notification of the charges and the holding of the hearing; insufficient time in certain occurrences (as changes in the indictment or introduction of new evidence by the prosecution) in the proceedings in order to adjust its position, prepare a request, lodge an appeal, etc.

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[22] Ibid.
[23] ICCPR, Art. 14 § 3(b).
[24] ACHR, Art. 8 §2 (b).
[25] Trechsel, *Human Rights in Criminal Proceedings,* p. 208.
[26] *Mayzit v. Russia*, No. 63378/00, § 79, ECtHR.
[27] *X v. Austria* No. 2291/64, ECtHR; *S v. United Kingdom* No. 12370/86, ECtHR.
[28] *Gregačević v. Croatia*, No. 58331/09, § 51, ECtHR.

According to the Commission, 'facilities' within the meaning of Article 6 § 3 (b) 'include the opportunity for the accused to acquaint himself, for the purposes of preparing his defense, with the results of investigations carried out throughout the proceedings'.[29] This aspect of the right is in tight connection with the principle of the equality of arms. The ECHR's case law recognizes the following adequate facilities for preparation of the defendant's defense: access to the case files; investigation by the defense; access to legal materials in cases where a defendant is representing himself on appeal; access to medical examination; and the right to a hearing.
Under EU law several directives impose an obligation to the Member States regarding the defendant's right to prepare its defense. For example, Article 3 (1) of the Directive on the right of access to a lawyer[30] requires that access to a lawyer is provided in such time and manner so as to allow the persons concerned to exercise their rights of defense practically and effectively. Article 3 (3) gives suspects or accused persons the right to meet in private and communicate with the lawyer representing them. Article 3 (4) requires the Member States to make available general information to facilitate the obtaining of a lawyer by suspects or accused persons. Additionally, the Directive on the right to information in criminal proceedings imposes obligations to inform suspects and accused persons on their rights in criminal proceedings, including, for example, their right to access case materials to prepare their defense.[31]

## IV. THE RIGHT TO BE INFORMED OF THE CHARGES VS. THE RIGHT TO PREPARE ITS DEFENSE IN THE MACEDONIAN CRIMINAL PROCEDURE LAW

The Law on Criminal Procedure (hereinafter LCP) [32] specifically elaborates and regulates the special guarantees for the accused's defense – to be informed of the case and the reasons for the accusation; the right to timely preparation of the defense; the right to the professional assistance of a defense counsel; mandatory defense; defense of the poor etc. Article 70 of the LCP which stipulates fundamental rights of the accused includes that "accused shall be immediately informed, in a language they understand and in detail, about the criminal offences they are charged with and the evidence against them". The guarantees in Article 70 are practically identical to the guarantees from the international human rights treaties - Article 6 of the ECHR and Article 14 of the ICCPR. Obviously, the rights of the defendant listed in Article 70 of the LCP, as those deemed essential for a fair trial, are further elaborated and specified through a number of provisions.

### 1. The Investigation Phase

Regarding the investigation phase of the criminal procedure, the LCP provisions stipulate that suspects should not necessarily be notified of investigation orders and that the public prosecutor is not obliged to interrogate them before adopting this order. First obligation for notification of

[29] *Jespers v. Belgium* No 8404/78, § 56, ECtHR.
[30] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 20143 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, 6.11.2013, p. 1–12, available at: http://data.europa.eu/eli/dir/2013/48/oj [accessed 22 September 2020].
[31] Directive 2012/13/EU Article 7.
[32] Law on Criminal Procedure, ("Official Gazette of the RNM" No.150/10, 100/12, 142/16 198/18) Decision of the Constitutional Court of the RNM No. 2/16 dated: 28 September 2016, published in the "Official Gazette of the RNM" No. 193/16.

suspects is in effect upon investigation's completion, as the public prosecutor is obliged to notify suspects and their defense attorney about the completed investigation.[33] In these cases the suspects find out that there was an investigation conducted against them at its very end, thus making it difficult to challenge the prosecutor's actions and eventually, to prepare a substantive defense. This notification includes a brief description of the criminal offence for which investigation activities have been taken, the legal grounds, including an indication that all investigation-related records have been deposited to the archive at the public prosecution's office and suspects and their defense attorney are entitled to make insight and take notes of these records and evidence. The notification also includes a legal notice that the suspect, within a deadline of 15 days, is entitled to submit documents or other evidence, records of defense activities or to request the public prosecutor to collect particular evidence.[34] The deadline of 15 days for the defense is way shorter than the public prosecutor's deadline for completion of the investigation procedure which is up to 15 months, i.e. 21 months in cases of organized crime. Having no regulation about the deadline in which the prosecutor can inform the suspect about the ongoing investigation against him, gives space for the public prosecution to strategically plan when to inform the suspect. This puts the public prosecutor's office in a much superior position *vis-à-vis* the defense, as it will gather evidence immediately after the event, when everyone's memories are fresh, unlike the defense, which will exercise its right to its own investigation much later.

### 2. The Trial

In the subsequent phase of the criminal procedure, if the public prosecution does not stop the investigation he is obliged to lodge a bill of indictment against the suspect with the court. The court of first instance shall deliver the indictment to the suspect without delay, and if he is in custody, within 24 hours from the receipt of the indictment. The suspect has a right to object to the indictment.[35] This provision is in accordance with Article 6 § 3 (a) of the European Convention. Sub-paragraphs (a) and (b) are related in that the right of the person to be informed of the nature and the cause of the charge against him must be considered in view of the right of the accused to prepare his defense.[36] It would be a misinterpretation to say that the provisions of Article 6 § 3 (a) refer only to the initial, preliminary stage of the procedure, i.e. the investigation phase. Furthermore, the provisions of subparagraph (b) lead to the conclusion that in case of re-qualification of the facts during the procedure, the accused person must be given the opportunity to exercise his right of defense in a practical, effective and in timely manner.[37] Given the fact that the collected evidence from the initial procedure is presented for the first time at the main hearing, it is not excluded that there may be changes in the factual situation from the one presented in the indictment. Analyzing the elements of the principle of a fair trial and the principle of the equality of arms, it would be correct to say that the application of these two provisions together with Article 6 § 1 would probably be the most accurate approach to this issue. In the national criminal procedure law, the amendment and the extension of the indictment are regulated by Article 393 para.1 of the LCP: "If the prosecutor assesses that the presented evidence indicates that the factual situation

[33] LCP Article 302.
[34] Ibid.
[35] LCP, Article 325.
[36] *Pélissier and Sassi v. France*, [GC], No.25444/94, §54, ECHR, 1999.; *Dallos v. Hungary*, No.29082/95, §47, ECHR, 2001.
[37] *Pélissier and Sassi v. France*, [GC], No.25444/94, §62, ECHR, 1999.; *Block v. Hungary*, No.56282/09, §24, ECHR, 2011.

presented in the indictment has changed, he can change the indictment at the main hearing. For the preparation of the defense, the main hearing may be postponed. In this case, the indictment is not confirmed." From the evidence presented during the main hearing, if a different factual situation arises from the one contained in the field indictment, the public prosecutor may amend the field indictment. The change of the indictment can refer to both the change of the description of the indictment and the change of the legal qualification of the crime. In that case, at the request of the defendant and his counsel, and for the purpose for the preparation of the defense, the court may postpone the main hearing. In this case, the court would be even more obliged to give the defendant the opportunity to plea the new charges.[38] Analyzing the provision through an extensive interpretation of the Article 393 para. 1 it comes to the conclusion that the public prosecutor has the authority to amend and extend the indictment at any stage of the main hearing. The common practice of the public prosecution to amend and extend the indictment in its closing arguments is in the wrong direction with the right of the accused, or in this part of the proceeding, the defendant, to be duly and completely informed of any changes in the indictment and must be given adequate time and facilities to respond to such changes and to organize its defense in accordance with any new information or allegations. An amended or extended indictment, and often a change in the legal qualification, may lead the defense to propose new evidence relating to the amended or extended indictment because the theory of the case constructed by the defense and the concept of its presentation before the court referred to the initial indictment even more so the evidence was in the direction of refuting such an indictment.[39] When the public prosecutor makes amendments and extensions of the indictment in closing arguments, especially if the changes are substantial, not technical, the defendant does not have the opportunity to adequately respond to the new allegations of the indictment, given the fact that the stage of the procedure for presenting evidence has already been completed.

The next phase and final of the main hearing is the defense's closing argument. Although the defendant and its defense attorney may request a postponement of the main hearing to prepare the defense, in essence, they do not have the opportunity to adequately oppose the changes in the indictment. Namely, in the phase of closing arguments, all key analyzes regarding the previously presented evidence are presented, conclusions are drawn and points are made. With the completion of the evidentiary procedure, the parties no longer have the opportunity to propose new evidence to the court, nor to present it. According to such provisions of the LCP, it is obvious that the law intends to allow adequate time for the preparation of the defense in case the indictment makes substantial, not technical corrections, and therefore any change in the indictment that relates to the verdict with the indictment in the sense of Article 398 of the LCP[40] should not be made by giving the closing arguments, but during the evidentiary procedure, as it would be given an opportunity for the defense to refute the amended indictment in the supplement to the evidentiary procedure.

In the second instance procedure, the procedure for regular legal remedies, as a rule, there is inclusion or inability to propose new facts and evidence with the submitted appeal. There is an exception to this rule only for evidence that could not be presented until the end of the evidentiary

[38]Kalajdziev, Gordan et al. *„Коментар на Законот за кривичната постапка* [Komentar na Zakonot za krivicnata postapka]*",* Skopje, OSCE, 2018, p.806.

[39] Ibid.

[40] According to Article 398 of the LCP, the verdict can refer only to the person who is accused and only to the crime that is the subject of the indictment. According to the Article the court is not bound by the legal qualification of the crime (the principle of *iuria novit curia*), but is bound by the factual description of the charge in terms of the manner and time of committing the crime.

procedure at the main hearing because they were unknown or unavailable.[41] In the Macedonian case law, the appellate courts, acting on the field complaint of the defendant that the first instance court made substantial violations of the provisions of the criminal procedure on the circumstances that following the amendment of the indictment in closing arguments by the public prosecution, the defense was not allowed to present new evidence, does not accept it, and assessed it as unfounded with the explanation that evident from the case file the court allowed the adjournment of the main hearing.[42] However, the mere postponement of the main hearing to prepare the defense is not sufficient for the defendant to be able to effectively prepare his defense, as his possibilities to propose evidence, as well as evidence of new circumstances that arose during the main hearing that may be performed in the supplement to the evidentiary procedure, are already exhausted.
Similar dilemmas arise when a change in the legal qualification of the indictment is made by the court so that the material description of the event, given by the public prosecutor is summed up contrary to the position of the public prosecutor under another legal qualification.[43] The problem with the new legal qualification is the fact that in such cases the defense will have the opportunity to make its assertion up until in the appellate procedure, thereby losing the right to argue the case in a two-instance procedure regarding an extremely important subject. When passing a verdict, the court must be bound not only to the factual situation but also by the legal qualification of the indictment, because the defendant has the opportunity to defend only for the crime for which he is accused. With regard to the new legal qualification, the defense did not have an opening statement, closing argument, or any word, nor could it offer evidence that would possibly refute it because the procedure was conducted according to another legal qualification for which other facts were relevant.[44]

## V. THE PROPOSAL ON THE LAW ON CRIMINAL PROCEDURE - A ROAD TOWARDS STRAIGHTENING THE DEFENSE'S RIGHTS?

The current flaws or more likely said uncertainties in the provisions make an opportunity for inadequate practice from the concerned parties in the criminal procedure. In that narrative, certain weakness of some of the provisions was located in the LCP, resulting in Proposal on the Law on Criminal Procedure (hereinafter Proposal on the LCP)[45], currently in the process of its preparation. The main goal in the adoption of this law is to incorporate the contemporary relevant international documents and to eliminate the localized weaknesses that arose from the legal practitioners during the trainings for the law's application and the current court's practice. Regarding the investigation phase of the procedure, as stated above in the text, the suspect will not be served with an investigation order, meaning unless he is questioned or detained before the public prosecutor enacts the order to conduct the investigation, then he will have no way of finding out about the accusations against him, as well as about the fact that investigation has been opened against him.

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[41] LCP Article 413 para.4
[42] Decision of the Appellate Court – Skopje, КОКЖ-111/15, 4.2.2016.
[43] LCP Article 398 para. 2.
[44] See: Trpenoski, Leonid, „Дали има баланс во истрагата, при промената на правната квлификација и кај анонимните сведоци [Dali ima balans vo istragata, pri promenata na pravnata kvalifiacija i kaj anonimnite svedoci]*",* in *Macedonian Journal for Criminal Law and Criminology*, vol.22, issue 1, Macedonian Society for Criminal Law and Criminology, Skopje, 2015.
[45] Proposal on the Law on Criminal Procedure, available at: https://ener.gov.mk/Default.aspx?item=pub_regulation&subitem=view_reg_detail&itemid=49560, [accessed 10 October 2020].

The Proposal on the LPC corrects this and provides that the person shall be notified of the investigation order being made in eight days after the enacted order, although the order itself is not given to him. This notification must contain the description of the criminal offence as well as the legal qualification.[46] In particular cases, the public prosecutor can postpone the submission of the notification, if special circumstances arise, indicating that the suspect will obstruct the criminal proceedings by influencing witnesses, experts, accomplices or accessories to the crime.[47] Linking the deadline for notification of the suspect with the enactment of the investigation order, not with the investigation's competition, lives no room for the public prosecutor to tactically plan the notification of the charges against the suspect, furthermore allowing the suspect to be promptly informed on the nature and cause of the accusation, so he can prepare its defense in a timely manner and proactively participate in the investigation conducted against him.

The Proposal on the LCP regulates in detail the procedure for amendment and extension of the indictment in the stage of the main hearing. According to Article 393 para.1, "If the prosecutor assesses that the presented evidence indicates a different factual situation from the one presented in the indictment, he may change the indictment until the completion of the evidentiary procedure". Such regulated provision does not allow the public prosecutor to abuse its authorization to amend or extend the indictment in closing arguments, as it is the current practice. The proposed article is regulated meticulously so that in the case of reclassification of facts during the course of the proceedings, the accused must be afforded the possibility of exercising his defense rights in a practical and effective manner, and in good time, according to the jurisprudence of the ECtHR.[48] So to speak, the defendant will have the opportunity to present new evidence to refute the new charges in the supplement to the evidentiary procedure. At the request of the defendant, the court shall postpone the main hearing for the preparation of the defense and proposing new evidence regarding the amended indictment.[49] The Proposal on the LCP goes even further in regulating the defendant's rights to prepare its defense stating that when the change of the indictment is made putting the defendant in a worse situation than the original indictment (*reformation in peius*), the court is compelled to postpone the main hearing and to oblige the public prosecutor to file the amended bill of indictment to the court within 15 days deadline. Upon receipt of the amended indictment, the court shall submit it to the Council for evaluation of the indictment, and after its confirmation, the main hearing will start again before the same or expanded council.[50] Furthermore, paragraph 2 from the same Article states that in a case where a change in the indictment is made the court must first ask the defendant to plea the new charges and then proceed with the main hearing.[51] This is a logical approach, because if there is reclassification to the charges, i.e. the charges are amended or extended on new facts or different legal qualification, the defendant has to have the opportunity to plea whether or not he is guilty to the new charges.

Another novelty in the Proposal on the LCP that goes in favour of the defendant's rights is with regard to the subjective and objective identity of the judgment and the indictment. The governing premise is that the court is bound by the factual grounds specified in the indictment, but it is not bound by anything that falls within the scope of legal qualification. Notwithstanding, the proposed

[46] Proposal on the LCP Article 292 para.4.

[47] Proposal on the LCP Article 292 para. 5.

[48] *Pélissier and Sassi v. France* [GC] No. 25444/94, § 62, ECtHR; *Block v. Hungary*, No. 56282/09, § 24 ECtHR; *Haxhia v. Albania*, No. 29861/03, §§ 137-138, ECtHR; *Pereira Cruz and Others v. Portugal*, No. 56396/12, § 198, ECtHR.

[49] Proposal on the LCP Article 393 para.3.

[50] Proposal on the LCP Article 393 para.4.

[51] Proposal on the LCP Article 393 para.2.

Article 398 para.2 states that the court is bound by the public prosecutor's legal classification of the crime. This means that, if a new factual situation arises on the main hearing indicating that the criminal act should be substituted under another legal norm from the Criminal Code, the court does not have the authority to make such requalification *ex officio*.[52] If the public prosecutor does not amend the indictment on the legal qualification in the stage of the main hearing, where evidence suggests that a change on legal grounds is needed, the court will have to acquit the defendant. This is in accordance with the principle of the adversarial system in criminal proceedings, where the court is impartial in ensuring the fair play in due process: the *onus probandi* is on the plaintiff and if the public prosecutor cannot prove beyond a reasonable doubt that the defendant is guilty of the crime he is being charged with, the court must acquit him – *actore non probante, reus apsolvitur*.

## VI. CONCLUSION

To conclude, the Macedonian criminal procedure law is in compliance with the provision of the European Convention of Human Rights regarding the minimal guaranteed rights of the defendant provided in Article 6 § 3 (a), (b) and is making a significant effort to enforce this provisions through the national jurisprudence. Nevertheless, certain weaknesses of some of the provisions are located in the LCP resulting in violation of the defendant's rights in the criminal procedure, more specifically the right to information of the nature and cause of the accusation and the defendant's right to prepare its defense mostly manifested in the investigation phase of the procedure, and at the amendment and extension of the indictment bill at the phase of the main hearing. In that narrative, the Proposal of the LCP is making an effort to eliminate these weaknesses by meticulous regulation of the provision in question and to deter the possibility of the public prosecution to exercise its powers *mala fide*. By analyzing the proposed provision it is safe to say that the specified provisions of the Proposal of the LCP guarantee the defendant's rights to information on the nature and cause of the accusation and the defendant's right to prepare its defense on a much higher level than the present ones. However, it's early to ascertain whether and when these provisions will enter into force, or how their interpretation will result into practice. In the meantime, the domestic courts and the other parties in the criminal justice system should govern the procedure in accordance with the ECtHR's jurisprudence and the basic principle of a fair trial under Article 6 of the ECHR ensuring the protection of the defense's rights in the criminal proceedings.

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[52]For a detailed analysis concerning the relative nature of the distinction between factual and legal issues see: *Hermi v. Italy*, No. 18114/02, annexed to the judgment (b) dissenting opinion of Judge Zupančič, ECtHR.

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