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THE ROLE OF THE BAIL AS A MEASURE TO PROVIDE PRESENCE OF PERSONS AND UNKNOWLEDGE OF CRIMINAL PROCEDURE - FROM LEGAL POSSIBILITIES TO REAL NEEDS

Nikola Tuntevski
Faculty of Law Kicevo, University "St. Kliment Ohridski "- Bitola, Republic of Macedonia
niktun@t.mk

Abstract: One of the basic preconditions for the successful conduct and completion of the criminal procedure is how to ensure the unhindered presence of persons in it, but with a minimal limitation of their freedoms and rights. In this regard, the Law on Criminal Procedure of the Republic of Macedonia, besides the other measures, foresees the bail. The opportunities it provides in terms of human rights, with simultaneous financial benefits for the community, make this measure a similar alternative to detention.
This is the main goal of this paper - by analyzing the legal possibilities provided by this measure, to highlight its advantages and disadvantages in relation to other measures that ensure the necessary presence of the defendants in the criminal procedure, but which derogate the fundamental freedoms and rights of citizens. In this regard, special attention will be given to the advantages of the bail in relation to the measure of detention and its representation in the criminal procedure in the Republic of Macedonia.
Keywords:bail, criminal proceedings, detention.

1. INTRODUCTION

In order to be able to carry out the criminal procedure, it is necessary to ensure the presence of certain persons. For this purpose, in Article 144 paragraph 1 of the Law on Criminal Procedure, measures are provided for the presence of not only the accused, but also witnesses, expert witnesses and other persons for the smooth running of the procedure.[194] Of all of them, in the judicial practice in the Republic of Macedonia, the most frequently used measure for securing the defendant's presence is detention, which is justified by his alleged "security" in relation to the other measures. However, in a number of criminal procedures, this measure has proved counterproductive, especially if during the later stages it was concluded that the person was unjustly accused and detained. In such situations, detention leads to two key consequences:

• Creates material costs for the community, both for the exercise of the detention itself, as well as compensation for unjustly detained persons and

• The injustice that is inflicted on someone and which no one can compensate. Most who were in custody, carry psychological traumas, especially if they were not guilty. Not to mention their families, lost reputation in the middle, lost earnings, etc., etc.

How to overcome these contraindications and achieve a balance between the goals of the community for the smooth conduct of the criminal procedure and the individual rights of the defendant ?! The answer to these questions is provided by Art. 144 paragraph 2 of the Law on Criminal Procedure. In deciding which of the measures to be applied, the competent authority must take care not to apply a more severe measure if the same objective can be achieved with a more lenient measure. In this respect, the measure bail offers a good basis for providing the defendant in the criminal procedure, while at the same time minimizing its freedoms and rights.

2. CIRCUMSTANCES OF THE IMPLEMENTATION OF THE BAIL IN CRIMINAL PROCEDURES

The historical development of the bail is associated with Anglo-Saxon law. In England and Wales in the Middle Ages, the sheriff had the opportunity to release the suspect if he paid the bail. The Westminster statute of 1275 limited such discretion only to certain acts. With the Habeas Corpus Act of 1679, judges were given the opportunity to release prisoners by bail, in an amount determined by the judge. Due to abuses, the Bill of Rights of 1689 prohibits judges from imposing excessive bail. [195]

[194] *Law on Criminal Procedure*, published in the Official Gazette of the Republic of Macedonia No. 150/2010, as amended - Official Gazette No. 51/11, 100/12 and 142/2016

[195] Schnacke R. Timothy, Jones R. Michael and Brooker M. Claire, *The History of Bail and Pretrial Release*, Pretrial Justice Institute, September 2010

The use of bail was also transferred by English colonists to the New World. In 1789, after proclaiming independence, the Law on the Judiciary of the United States specified the crimes for which bail was permitted and restricted the court's discretion on the amount of the bail. Over time, a "profit-causing industry" has been created, many of whom have enriched themselves, giving loans to those to whom it has been designated. In order to avoid discrimination against defendants, in the United States in 1966 and in 1984, reforms were made on the amount of the bail and on the possibilities given to the defendants for its collection.[196]

3. THE ROLE OF THE BAIL FOR UNKNOWNED MANAGEMENT OF CRIMINAL PROCEDURE AND ITS COMPONENTS

The bail is an independent and original measure for securing the presence of the defendant, which is determined by a competent judge or court by a decision, in a procedure prescribed by law and against a person for whom there is a suspicion that he has committed a crime. With this measure, the accused himself or another person is obligated to deposit money or other movable objects on the account of the court or, exceptionally, to mortgage immovable property, such as securing the presence of the defendant and for the smooth running of the procedure.

If we analyze the given definition, we could distinguish several constituent elements that are a prerequisite for its pronouncement:

• The bail is determined by a judge or court with a decision;
• It is pronounced in a procedure and under conditions determined by law;
• It is determined only against a person for whom an order for conducting an investigative procedure has been issued, if the competent court assesses that there is a reasonable suspicion that a person has committed a criminal offense;
• It is in order to avoid pronouncing another measure (usually detention) and in order to ensure the presence of the defendant in the criminal procedure, he or another person is obligated to deposit money in a separate court account or to pledge movable or immovable objects;
• Thus, the defendant or another person guarantees that the accused will be available to the competent court during the proceedings;
• Thus should enable the smooth conduct of the criminal procedure, until its completion with a final court decision;

Thus, two goals are simultaneously achieved:

• The legal purpose of the criminal procedure - to ensure the presence of defendants in all its stages, as a general and common goal of the legal order of each society and
• The individual aims of the defendant to enable him to prove his innocence, without being detained, thereby maximizing respect for his freedoms and rights.

4. THE BAIL IN THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF MACEDONIA

The bail as a measure for securing the presence of persons and for the smooth conduct of the criminal procedure was foreseen in the general provision of Article 175, paragraph 2 in fine of the 1997 Law on Criminal Procedure. But in practice it almost did not apply at all. The reason for this was Article 179, under which she could only be ordered for an accused who should be placed or detained, for fear of fleeing, which allowed him to remain in detention or release. It clearly shows that the bail was pronounced only as a substitute for the detention, which was to be imposed only when there was a danger of the defendant's escape; and not when there were other grounds for detention (obstruction of the investigation, repetition or completion of the crime, etc.). This, to a large extent, limited the ability of the courts to impose a measure of bail.

In order to overcome this, the new Law on Criminal Procedure of 2010 advises measures that avoided pre-trial detention and set it as an independent measure that no longer relates to the grounds for detention. With this, he extracted the bail from the shadow of the detention and in Article 150, paragraph 1, except for the danger of the defendant's escape, as the reason for the determination of the bail, the circumstances justifying the fear that the defendant would repeat or complete the crime or would do something new the crime it threatens.[197] With such a wider formulation of "justified fear" in relation to the perpetrator and his superiors in the future, the courts are given a wider opportunity to determine this measure. In fact, these are the same grounds from Article 165 paragraph 1 item

[196] Justice Policy Institute, *Bail – Fail - Why the U.S. should end the practice of using money for bail*, Washington DC, September 2012

[197] *Law on Criminal Procedure*, published in the Official Gazette of the Republic of Macedonia No. 150/2010, as amended - Official Gazette No. 51/11, 100/12 and 142/2016

3, as well as the determination of the detention measure, whereby the bail, instead of the replacement measure, became an alternative measure of detention, i.e. the independence of these two measures was confirmed. In this way, its wider use is legally allowed, with the possibility of combining it with some of the precautionary measures.

Unlike before, when the investigating judge carried out a decision to determine a bail during the investigation, in the new investigation procedure, this was done by a preliminary procedure judge (in some countries, also called a judge of rights), but only on the proposal of the parties and only against the defendant, for whom previously, the competent public prosecutor (as the holder of the investigative procedure) issued an order for conducting an investigative procedure. This means that the determination of a bail is not a discretion to the court, but is imposed on the parties' proposal.[198] This provision of Article 150, paragraph 1, needs to undergo changes because it limits the possibility for it to be determined even in the shortened procedure, where such an order is not passed. This intention of the legislator stems from Article 154 paragraph 1, which states that for the determination of a bail in the shortened procedure after the submission of an indictment proposal, the council is competent to decide the Article 25 paragraph 5. This is the result of the interpretation that what is allowed for the regular procedure, so much more is allowed for the shortened procedure, although this is not always explicitly stated. Avoidance of detention is a constant, regardless of the type and form of procedural conduct regulated in the Law on Criminal Procedure.

After the confirmation of an indictment or after the submission of an indictment proposal in a regular procedure, the Chamber shall rule on the guarantee from Article 25 paragraph 5 of the Law on Criminal Procedure. Here, Article 154 should be interpreted that the said extra-judicial council is competent also after the submission of an indictment, and not only after its approval, since there would be a legal vacuum for that - who will decide in the procedure for assessment of the indictment. Such a decision shall enable the Chamber referred to in Article 25, paragraph 5, to be responsible for determining the bail from the completion of the investigative procedure until the beginning of the main hearing.

The amount of the bail shall be determined in a monetary amount. According to the type, the bail can be in the deposit of cash in a special account in the court, securities, valuables or other movable objects, which can easily be converted into money. In addition, unlike the previous Law on Criminal Procedure, where in Article 180, paragraph 2, the placement of a mortgage on real estate was on the same level as other types of bail, with Article 150 paragraph 4 of the new law it is provided only as an exception for real estate, which can easily be converted into money. It can also be defined as a bank guarantee, bonds, shares, etc., although this is not explicitly stated in the law. Earlier and now, besides the defendant, a third party (in the law referred to as "one or more citizens") may also be a guarantee, such as his relative or friend, who with his own property guarantees the presence of the defendant.

When determining the amount of the bail, the judge must appreciate the gravity of the criminal offense, the personal and family circumstances and the property status of the defendants. In this regard, the new Law on Criminal Procedure in determining the amount of the bail assesses the assets of the defendants only, and in Article 150, paragraph 2, it determines that another person may also provide a bail. In that sense, the previous law may have offered a better opportunity that, in addition to the defendants, the property status of each person who gives the bail should be appreciated. The stated assessment of the personal and family circumstances and the property status of the defendants (and third parties) is aimed at overcoming the discrimination of the defendants, that is, not to establish a practice, a bail that only the rich citizens can provide. In the United States, "point scales" are provided for, with which, apart from the personal, family and property status, the "degree of risk" of the defendant for the community is measured, depending on whether he will be allowed to be released on bail or he will be set a high bail. For these reasons, in addition to the stated criteria, we can add assessment of the personality of the defendant, whether it is a repeat of criminal acts, etc.[199]

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[198] Dorset Police Report, *Bail Condition*, 2008. There are three types of bail in England: 1. Police - which guarantees that the suspect will appear at a police station at a given time; 2. Investigative - to ensure the presence of the suspect at the first trial and 3. The court - which approves the court pending further investigations.

Carambot Kirby, Bail Agent, *What are Bail Bonds - Avoid Jail Bail Bonds*, 2009. In the United States, a bail is pronounced by a judge at the first appearance of the defendant, if he has a permanent job, stable family ties and a history of living in the community. The eighth amendment to the US Constitution prohibits "excessive bail", greater than that necessary to secure the defendant to the trial. In addition, they are provided to detained persons, appreciating the danger to the community; to be allowed to demand release on bail.

[199] Buzarovska Gordana, Nikolovska C. Margarita, Miftari Agim and Nicha Jani, *Handbook for the application of detention*, Association of Judges of the Republic of Macedonia, 2009. When deciding on a bail, the judge should ask the defendant the following questions: Do you own movable or immovable property or motor vehicles in the

On the other hand, the new Law on Criminal Procedure provides an opportunity for the judge to change the amount of the bail with a new decision, if during the procedure there is an extension of the investigative procedure, or if new circumstances are discovered for the assets of the defendant. The law does not specify whether the court acts ex officio or at the request of the parties. But if the bail is determined on the proposal of the parties, it would be logical that its change be determined on the proposal of the parties themselves. In addition, consideration should also be given to what will happen if the indictment is amended or expanded during the main hearing because there is no explicit correlation between the charge and the amount of the bail. Therefore, it should be possible to change the bail during the main hearing, depending on the modification or extension of the indictment.

In determining the bail, the court may simultaneously determine precautionary measures, or combine it with some of them. For example, to determine a bail and temporary seizure of a road or other document for crossing the state border, i.e. ban on its issuance. For a more successful implementation of the bail, the Law on Criminal Procedure may insert an attitude that combines it with electronic surveillance, i.e. by placing an electronic device on the body of the defendant, by which the bodies for its control will be notified in a timely manner where the defendant is located.

There is a dilemma whether house arrest can be combined with the bail. This dilemma can be answered by exporting two groups of arguments. On the one hand are the legal arguments. Although the Law on Criminal Procedure does not prohibit this, house detention is a detention, from which it differs only in that it is carried out at home. Pursuant to Article 144 paragraph 2 of this law, the court may simultaneously determine several measures for securing the presence of persons and for the smooth running of the procedure against the defendant, except when it determines the detention measure. Accordingly, if the detention cannot be combined with the other measures, then it is logical that the house arrest cannot be combined with the bail. But on the other hand must take into account the arguments from the reality, according to which the house arrest is more difficult to enforce and control over the detention, i.e. there is a greater danger of flight. In that case, we can accept the benefits of simultaneously determining house arrest and bail.

The bail is canceled and returned to the person who passed it, if the procedure is stopped, if an acquittal has been passed or if the charge is denied. If a final sentence is pronounced a prison sentence, the bail is abolished, when the convicted person begins to support her. The court, which abolishes the bail, does not make the decision ex officio, but on the proposal of the parties. In this regard, the possibility of the deposited bail is to be charged for any property claim filed in the court verdict as it was under the old law. This is justified given the fact that the funds for the bail are given in order to enable the defendant to be present during the procedure and its smooth conduct, not to meet the requirements of the injured party. The purpose of the bail was fulfilled with the completion of the procedure that was going smoothly.

The bail fails and the detainee will be detained if he / she unjustifiably does not come to a duly submitted invitation, escapes or repeats, finishes or does the offense he threatens. In that case, the court shall issue a decision by which the funds from the bail shall be entered in the budget of the Republic of Macedonia. Thus the law in Article 153 paragraph 1 again and unnecessarily "binds" the bail of detention. If the bail is an independent measure, which is the intention of the new law, then the legal solution of this provision should also indicate that the bail fails, without even mentioning the detention.

Against all of the aforementioned decisions defining, abolishing or failing the bail, an appeal is allowed to the immediately higher court. Although not stated in the Law on Criminal Procedure, an appeal against the decision changing the amount of the bail is allowed. In cases when an appeal against the decision for detention, containing a proposal for a bail, is filed, the court, which is competent for deciding on the appeal, decides upon such a proposal. This way, the different interpretations in the practice have been overcome, when the decision for determining the pre-trial detention is not appealed, it cannot offer a bail at the same time as it is contrary to the provisions for the competent body to decide on the bail. In addition, Article 155 requires further clarification, as it is not clear in which cases the complaint is allowed. Namely, it should be allowed in the case when the proposal for determining or cancellation of the bail is rejected, but also in the case when a decision is made for determination, revocation or failure of the bail, whereupon both parties may file an appeal. The same is the logic in relation to the competent body that decides, because it is not always the advice of the immediate higher court. Namely, if the bail was

Republic of Macedonia or abroad? Are you employed? Do you have a family? Do you support someone? Are you convicted? Is your property loaded and how? Do you have a savings account, shares and bonds? If the defendant owns property, he is in regular employment, with permanent monthly income, has a family, etc. this suggests that he would not have decided to escape.

determined by the judge of the preliminary procedure (in accordance with Article 154, paragraph 1), there is no logic for the appeal to be decided by the criminal court of the Court of Appeal, instead of the criminal court of the Basic Court. For these reasons it is necessary to apply the general provision for the determined competence for an appeal under Article 25 of the Law on Criminal Procedure, that is, the decisions of the preliminary procedure judge to decide the criminal court of the Basic Court, and for the decisions of the criminal court of the basic court, competent to decide is the criminal court of the Court of Appeal.

Despite such legal solutions, the entities in the procedure rarely determine the bail as a measure, so that when proposed, they are guided by the established practice of the old Criminal Procedure Code, that is, they determine it only as a substitute measure in cases when detention is determined.

5. CONCLUSION - ADVANTAGES AND DISADVANTAGES OF THE BAIL RELATED TO THE DETENTION

It is indisputable that the bail offers wide opportunities for its application. She is more humane than detention, in terms of human freedoms and rights. Moreover, the mere knowledge that it will lose money or property, motivates the defendant to respect the conditions determined by the court decision and makes this measure more secure. Its security is even more gaining momentum, if it is combined with other measures. And finally, as its positive side is its "economy" in terms of detention. The state does not have the costs of placing persons in detention, nor would it pay compensation for unlawfully rendered detention.

Contrary to such benefits provided by the bail, there is the possibility of discrimination against defendants. The one who can pay, can also redeem his freedom easier than the rest. This is even more bizarre if in the court procedure it is determined that the money or property, with which the bail was paid, originates from criminal acts. Knowing this, the defendant can easily give up the deposited bail and escape. This reduces the degree of security of this measure.

Therefore mechanisms must be found to eliminate such shortcomings and the courts would receive more information about the personality of the defendant. For example, the creation of a separate service (similar to the pretrial service in Anglo-Saxon law), which would present to the court all the information about the defendant's personality and would have forecasted the danger of his escape. Or to create a linked system for data exchange and database, which will compile data from the courts (penal records), the Ministry of Interior (operational knowledge of previous criminal activities, which did not end with criminal charges), the Central Registry, the Catastre and from the Credit Bureau or from the banks (regarding its financial position), as well as data from the registry books. Through them, the court could have all the data for a full and reliable profile of the defendant, which would facilitate the selection of the most appropriate measures to ensure his presence.

But always and above all, when deciding on what - what measure will it determine, the judge or council, before which the procedure is being conducted, must individually evaluate each criminal justice event and in its decisions to provide sound arguments about the reasons for applying that measure.

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