# THE ARREST OF THE ACCUSED PARTY BY THE PROSECUTOR UNDER THE BULGARIAN CRIMINAL PROCEDURE CODE

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**Abstract**

*This publication is based on one of the traditionally important scientific issues in criminal procedure, namely the relationship between personal and public interest in criminal proceedings. It is affected by a constructive analysis of the procedure for detaining the accused party by the prosecutor about taking the measure of remand in custody in pre-trial proceedings of the Republic of Bulgaria. For this purpose, the following were critically examined: the legal nature, the order, the legal grounds, the purpose and the possibilities for control of the prosecutor's arrest. The report is also valuable in that it specifies the degree of synchronization between the provisions of art. 64, para 2 of the Criminal Procedure Code and the provisions of art. 5 of the ECHR on the basis of which it can serve as a concrete solution to the problem of unsatisfactory optimization of the right to personal liberty with the requirement of public security in the legal order of the Republic of Bulgaria.*

**Keywords:** *accused party, prosecutor's arrest, public security, right to liberty, remand in custody, court control.*

## 1. Introduction

The issue of prosecutorial detention is always relevant in Bulgarian legal theory, as its legislation implicitly contains more. Namely, the legislator's view of the relationship between the two interests in the criminal process - personal and public. Therefore, the publication is above all an open invitation to all tempted theorists and practitioners to think more. Here the emphasis is not so much on the defects of the procedure itself of restricting the free movement of the accused party in space, but on the possibility of the ideological justification of her specific *de lege lata* state. The critical emphasis, which is also an insight into the essence of the institute of prosecutorial arrest, is in line with the maxim: "it is better to acquit ten guilty than to convict one innocent person."[1] In other words, it is better to acquit ten guilty than to arrest one innocent person! Under no circumstances is it permissible for the criminal process to abandon its legitimate tasks and become an instrument of unnecessary violence and arbitrariness against citizens. The protection of the public interest in criminal proceedings should be achieved by taking into account and not by devaluing and neglecting the personal interest.

## 2. Content

There is no legal definition of the term prosecutorial arrest in the Criminal Procedure Code of the Republic of Bulgaria. It is a product of the theory, which is formulated through logical and systematic interpretation of many texts of the Code (art. 46, 63, 64, etc.) and the ECHR (art. 3, 5, 6, etc.). Guided by the understanding that any definition is dangerous[2], as well as the absence of claims to completeness, I can assume that detention is a state of loss of liberty due to forced restriction of free positioning in space (for autonomous location and residence in space). The Strasbourg Court is also not specific, not even concise in its practice in outlining the features of the concept in question. His guidelines are very general and diverse. However, it explicitly states that the measure restricting free movement requires compliance with "a whole set of criteria, such as the type, duration, consequences and manner of implementation of the measure".[3] Thus, for the application of art. 5 of the ECHR, various criteria are relevant, the manifestation of which should be judged from the general context of each case. These can be: the use of physical coercion by a non-judicial body[4], the inconvenience suffered[5], the presence of isolation[6], the inability of the detainee to return home[7], etc. The

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[1] L. Vladimirov, *The evidence in the criminal proceedings – common part. Sofia*, Pechatnitsa „Gutenberg, 1920, p. 125.

[2] *„Omnis definitio periculosa est".*

[3] Harris, O' Boyle, Warbrick, Bates, Buckley, *Law of the European Convention on Human Rights*, Sofia, Ciela", 2015, p. 339.

[4] HUDOC, „*Gillan v. UK*", „MA v. Cyprus".

[5] HUDOC, „*Austin v. UK*".

[6] HUDOC, „*Novotka v. Slovakia*".

[7] HUDOC, „*Nikolova v. Bulgaria*".

legality and justification of the forced restriction of the detainee's liberty are presumed[8] but rebuttable.

According to art. 64, para. 2 of the Criminal Procedure Code: " The prosecutor shall immediately ensure for the accused party to appear before court and, if needed, he/she may rule the detention of the accused party for up to 72 hours until the latter is brought before court". The cited provision is subject to strict interpretation, because it restricts the constitutionally established rights and freedoms of citizens. In this sense, from the literal understanding of the text below, several more important conclusions will be presented.

Firstly, detention within the meaning of art. 64, para. 2 of the Criminal Procedure Code can be carried out only by a prosecutor. Hence, detention is subject to a non-judicial body - a person who does not administer justice, but represents the state prosecution as a *conservator legis.* This denies the possibility of other bodies of pre-trial proceedings, such as investigators and investigative police officers, being valid subjects of detention. The systematic place of the mentioned norm is in Section II of Chapter Seven, where the remand measures are regulated, and in particular it is included in the content of the institute, taking a measure remand in custody in pre-trial phase. Prosecutorial arrest, therefore, is conceivable only in the course of pre-trial proceedings, and only in so far as it serves the legal purposes of some of the remand measures. The Bulgarian Criminal Procedure Code does not allow extra-procedural detention of a person by a prosecutor. In this regard, administrative detention is possible on the basis of a special law, such as detention under art. 72, para. 1 of the Ministry of Interior Act for a period of 24 hours.

Secondly, subject to grammatical interpretation, used in art. 64, para. 2 of the Criminal Procedure Code, the phrase " immediately ensure for the accused party to appear before court" requires the view that in the course of pre-trial proceedings a request must be made by the prosecutor for detention, namely in connection with which the appearance of the accused in court is necessary. Therefore, the opinion of Margarita Chinova can be shared that "it is not admissible for the accused to be detained for a day, two or three, waiting for the expiration of the statutory period of 72 hours and only then to make the request for detention or the person to get free".[9] It is correct to assume that a request for detention may be made at the latest at the same time as the detention itself, and in no case after the expiry of the detention period. The latter is an illegal and repressive practice!

Thirdly, the subject of prosecutorial arrest may be a person who has been constituted as a accused party. According to M. Chinova, in order for the prosecutor's detention to be valid, in addition to a proper act for constituting an accused, it is also necessary to have the general preconditions for remand in custody.[10] The author accepts that this "follows from art. 64, para. 2 of the Criminal Procedure Code, which tacitly refers to the prerequisites under art. 63, para. 1 of the Criminal Procedure Code for remand in custody".[11] This view can be supported in principle. It is true both that the legislator requires that the figure of the accused has arisen at the time of detention, and that the preconditions for remand in custody should also be present. Namely, a reasonable assumption can be made that the accused party has committed a criminal offence punishable by deprivation of liberty or another, severer punishment, and evidence case materials indicate that he/she poses a real risk of absconding or committing another criminal offence. However, it is not true that the preconditions for remand in custody are taken out by way of tacit referral. On the contrary, they are derived directly from art. 64, para. 2 of the Criminal Procedure Code, in which the legislator requires a filed request for taking remand in custody. It is obvious that in this way the personality of the accused is connected by the general preconditions for taking the measure of remand in custody, *i.e.* the arrest concerns a person for whom there are objectively grounds for taking remand of custody. One such conclusion follows directly from the overall reading of art. 64 of the Criminal Procedure Code. Moreover, the view that only a person can be detained for whom there is a reasonable suspicion of a crime or a recognized need to prevent a crime or abscond after the commission of a crime is specifically enshrined in art. 5, para. 1, letter "c" of the ECHR, which is part of the current law of the Republic of Bulgaria and has direct effect, according to art. 5, para. 4 of the Constitution of the Republic of Bulgaria. From what has been said in this paragraph, it should be summarized that on the grounds of art. 64, para. 2 of the Criminal Procedure Code, not every accused can be arrested, but only an accused for whom there are prerequisites for remand in custody.

Fourthly, from the first reading of the provision of art. 64, para. 2 of the Criminal Procedure Code, the impression remains that the arrest of the prosecutor has the legal purpose only of bringing the accused to court for consideration of the request for imposition of remand measure (remand in custody / house arrest). It is in this connection that the detention itself is understood, when it is not possible for the accused to

[8] Harris, O' Boyle, Warbrick, Bates, Buckley, *Law of the European Convention on Human Rights*, Sofia, Ciela", 2015, p. 352.
[9] M. Chinova, *Pre-trial proceedings on CPC – theory and practice*, Sofia, „Ciela", 2013, p. 255.
[10] *Idem*, p. 250.
[11] *Idem*, p. 251.

appear in court immediately for some reason, he is detained for up to 72 hours in order not to deviate from the court proceedings for consideration of the remand measure. Detention for any other purpose is unjustified and illegal.

Fifthly, prosecutorial arrest is explicit as a subjective right. The Criminal Procedure Code deliberately states that the prosecutor "if needed, he/she may rule the detention of the accused party for up to 72 hours until the latter is brought before court." Therefore, detention is not mandatory, it should be resorted to only when in a high-probability case there is a danger that the accused will abscond or commit another crime and his immediate appearance in court is not objectively possible.[12]

Sixthly, the arrest of the accused is for up to 72 hours, not necessarily 72 hours. Thus, it is suggested that the arrest itself must in practice be proportionate to the aim pursued, that is to say, that it does not restrict freedom more than is necessary in the present case. Another issue is that the provision of detention for such a maximum period by a non-judicial body contradicts art. 30, para. 3 of the Constitution of RB, where a ban on restricting the right to free movement for more than 24 hours (without judicial control) is regulated. It is time to mention that the ECtHR in „McKay v. The United Kingdom“ has held that a four-day detention without judicial review is the maximum, not an acceptable period, it must be justified only by some specific circumstances.[13] In the theory of human rights, it is unequivocally accepted that going to court after detention must take place within 48 hours, and after this period only if it is justified by exceptional circumstances.[14] It is in this sense that in the „Kandzhov v. Bulgaria“ case, where the administrative detention was continued with a prosecutor's arrest, the Court held as follows: “the applicant was facing trial three days and twenty-three hours after his arrest. In view of the circumstances, this does not seem timely”.[15] It can be summarized that the ECtHR is inclined to treat detention by a non-judicial body for a period of 72 hours as a violation of art. 5 of the Convention and as undermining the very essence of the guarantee of timely judicial review of the lawfulness and appropriateness of detention.

Seventhly, the arrest is imposed by the prosecutor with a decree - arg. art. 199, para. 1 of the Criminal Procedure Code. As can be seen from art. 64 et seq. of the Criminal Procedure Code, the decree is from the category of non-appealable before a court. This means that under Bulgarian law there is no possibility for the legality and justification of the arrest to be verified by a court. While the accused is arrested, he may enjoy only the general protection against the decrees of the prosecutor under art. 200 of the Criminal Procedure Code, but not from protection before an independent and separate body from the prosecution. This legislative omission does not correspond to art. 5, para. 4 of the ECHR, which reads: "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court..." The idea is to enable the court, as an independent and impartial body, to order the immediate release of the detainee if the detention is unlawful! Therefore, it is necessary *de lege ferenda* in Bulgarian law to explicitly provide for both the appeal of the arrest order before a court and the shortest possible time for a court ruling. At present, this gap in our country cannot be qualitatively overcome by direct reference and application of the Convention by the interested parties, because it is difficult to specify by analogy: the competent tribunal, the competent court, the powers of the court and the appealability of the act. There is no doubt that if the prosecutor who ordered the detention (or the superior prosecutor) *ex officio* ascertains the illegality of the same, he must immediately release the accused - art. 17, para. 5 of the Criminal Procedure Code.

From all the above it can be summarized that the arrest under art. 64, para. 2 of the Criminal Procedure Code is a coercive measure affecting the right to free movement in the space of an accused person for whom there are prerequisites for remand in custody. The detention is carried out for a period of up to 72 hours by a decree of a prosecutor, which is not subject to judicial review. It is undertaken upon request for taking remand measure (remand in custody / house arrest) and aims to bring the accused before court.

## 3. Conclusions

The existing legislation on prosecutorial arrest is not fully synchronized with art. 5 of the ECHR. In art. 64, para. 2 of the Criminal Procedure Code does not contain a sufficiently convincing objective guarantee against arbitrary (repressive) treatment of the personality of the accused. The lack of judicial control over the detention order hypothetically allows for hasty, ill-intentioned, unscrupulous, selfish, etc.,

[12] The accused's immediate appearance in court can be thwarted by a variety of difficulties. For example, delays in the administration of the request for imposition of a measure of restraint, the establishment of the court panel in the case for taking a measure of restraint, the summoning of the accused, the physical transportation of the accused, etc.

[13] HUDOC, *McKay v. UK*.

[14] Harris, O' Boyle, Warbrick, Bates, Buckley, *Law of the European Convention on Human Rights*, Sofia, Ciela”, 2015, p. 400.

[15] HUDOC, *Kandzhov v. Bulgaria*.

restriction of personal liberty. Joining the prosecutor's arrest to administrative detention for a total of 96 hours is undesirable within the meaning of the Convention. It aggravates the situation of the accused by delaying his trial excessively, thus impairing the possibility of his timely release. In view of the above, it is good *de lege ferenda* to think about: the implementation of judicial control over arrest, the duration (term) of detention, the cumulation of administrative and prosecutorial detention.

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