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**Pregledni članak**  
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**LEGAL MECHANISMS FOR THE PROTECTION  
OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS  
OF THE SUSPECT OR THE ACCUSED DURING  
THE INVESTIGATION**

*The human rights can be said that these are the standards without which people can not live in dignity as human beings. Human rights are the foundation of freedom, justice and peace. Their respect for the individual and to the community to fully develop. Human rights are only those individual rights that are owed to the state and no other will, but they are human being has the virtue of being a human being, or acquire them by birth and not by the will and grace of the state. These are the basic political and socio-economic demands of citizens in relation to state power and society in general, which is a prerequisite for the realization of biological, political, and cultural livelihood of individuals, or in conditions of life worthy of man and his dignity. Human rights and the values that are contained in them, have a very important social and political function in determining the legitimacy of the government, because only the government that respects human rights is legitimate and can function normally. This paper tries to point out what legal mechanisms available to the suspect or the accused in a criminal proceeding, specifically in the investigation and to ensure protection of his fundamental human rights and freedoms guaranteed by the*

*Constitution of the Republic not only Serbian (or BH), but also other international legal acts signed and ratified by our country.*

**Keywords: human rights and freedoms, protection of human rights and freedoms, prosecution, investigation, suspects, defendants, legal mechanisms.**

## **1. Introduction**

In the new position of the investigation<sup>1</sup> the suspect in the investigation may be viewed in two ways: from the one side of the suspect given all the procedural guarantees in terms of respect for all of his rights and freedoms guaranteed by the Constitution and ratified international documents, and have been since his first appearance before the investigating authorities, and on the other hand the position of the suspect and his defense significantly passivated than the men who were under the previous law on criminal procedure.<sup>2</sup>

The right to counsel is a fundamental right of the suspect in the investigation, and the rights of defense are not original but to the right of the suspect, so that there is no one right in the range of rights that belong to counsel and not to the suspect. The novelty of this investigation is the concept of the right to counsel of the suspect from the first knowledge of the suspect to run the investigation against him, and from his first appearance before the test or the authority conducting the investigation, whether it be the plaintiff or the authorized officials. In the new investigation, the suspect has no mechanism to challenge the basis for conducting a criminal investigation against him, as it had under the previous Act (appeal against the decision to conduct an investigation).<sup>3</sup> In addition, the suspect may not even know they are being investigated against him, not because of the law are constituted obligations prosecutor to inform, that there is no obligation of the prosecutor to submit suspect the initial act of investigation (the order for investigation), in which stated that the crime the suspect is charged, which are grounds for suspicion against him and others. The exception to this is a situation where the prosecutor at the very beginning of the investiga-

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1 Under the “new investigative procedure” by the investigation involves a changed concept introduced by the reform of the criminal justice system that has befallen the Republic of Serbian 2003 rd was expressed through the adoption of a new Code of Criminal Procedure, which entered into force on 01 July 2003. years and that previous judicial investigation model replace the new “public prosecutorial model of investigation.”

2 Simović - Nišević, 246.

3 Simović - Nišević, 247.

tion, the suspect decides to investigate, and he has at this stage must be reported to all grounds for suspicion against him.<sup>4</sup> Only suspect in this case can actually know what the subject of the plaintiff or authorized persons, and only in this case he may establish his defense. However, if the suspect and the previously described knowledge that the investigations against him, he does not in this case be achieved some particularly strong role.<sup>5</sup> The presence of the suspect or his counsel in the investigation when conducting certain investigations provided is very restrictive, and that those actions that restrict individual rights and freedoms of citizens, although even then it is not an active role of the suspect or his counsel, but a kind of control laws perform a specific investigation.

## **2. The role of a suspect accused under investigation**

The role of the suspect and his special counsel - in the investigation, mainly down to the right and not the authority, with the aim of realization and protection of constitutional rights and liberties of the suspect, and would therefore be said that they have a role in the investigation of the passive subject of a criminal procedure. The scope of the rights of the suspect and his defense counsel in the investigation, were defined in the Act with respect to the scope of restrictions on the rights of the suspect in the investigation. The scope of these rights is very narrow and applies only to inform the suspect of the crime of which he is accused of and the grounds for suspicion against him, and to provide procedural safeguards and guidelines suspect at the first examination of the plaintiff or any authorized persons, when the suspect and his counsel can see all of the evidence in favor of the suspect, and with the increasing scope and degree of restriction of rights and liberties of the suspect in the investigation, and the growing quantum of rights of the suspect or his counsel in the investigation.

The rights of a suspect in the investigation could be divided into the basic rights and the rights that depend on the nature of investigative measures and actions to be taken in the investigation which may lead to restrictions on certain rights of the suspect that he is entitled as a citizen.

Fundamental rights of the suspect are determined in Article 6 of the Code of Criminal Procedure of the Republic of Serbian (identical articles of the

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4 Ibidem, 247.

5 When it comes to the conduct of investigations and measures, the suspect and his defense in such actions and measures have no active participation or even their presence is not anticipated implementation of certain investigative activities (eg, examination of witnesses), not to mention that the suspect or his counsel in these stages of the proceeding to examine witnesses.

Criminal Procedure Code and the Criminal Procedure Code of the Federation and the Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina), which reads<sup>6</sup>: The suspect in the first test shall be informed of the offense charged and the grounds for suspicion against him, the accused, must be able to explain all the facts and evidence against him and to present all the facts and evidence in his favor, the suspect or the accused not to present evidence or answer questions.

Also, in the fundamental rights including the right to choose his counsel, that is, *ex officio*, and the right to an interpreter.

Depending on the degree of restriction of the rights of the suspect, which are the result of the implementation of certain investigative measures and actions in the investigation, we can talk about three different degrees of the suspect, including<sup>7</sup>: the position of the suspect and his defense counsel that have not been applied to the measures and actions that require court approval; position suspect and his counsel to which they are applied measures and actions that require court approval and the position of the suspect and his defense counsel when the suspect in custody (including persons deprived of their liberty).

In the first case, when the suspect did not take any measure or action that requires court approval, it means that the investigation in any of its segments has not penetrated to the constitutional rights of the suspect and that he is entitled as a citizen. The rights of the suspect, in the above case, limited to the rights granted him by the time of his first examination before any prosecutor or authorized officials, which consist of information, namely: that the offense charged; grounds for suspicion against him and the rights that include: the suspect is not required to present evidence or answer questions, to retain counsel of his choice who may present during questioning and the right to counsel without compensation as provided in the law: that is to comment on the work that he has been charged, and to present all the facts and evidence in his favor, and if he does so in the presence of counsel that is, the statement shall be admissible as evidence at trial and that, without his consent, be read and used at trial, to have the right during the investigation, examine the records and collected items in his favor, unless the files cases and that their disclosure would endanger the purpose of the investigation, to have the right to free interpreter if he can not understand or speak the language used in the test.

Here is a very complex legal issue. Specifically, Article 55 of the Criminal Procedure Code of the Republic of Serbian envisaged that during the investigation, defense counsel has the right to review records and obtained items

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6 Module 1 Criminal area-criminal investigation, 45.

7 *Ibidem*, 45.

that are in favor of the suspect.<sup>8</sup> This right to counsel may be denied if the files and objects that their disclosure would undermine the goal of the investigation. This right to counsel arises from the demands for equality of means (equality of arms) in a criminal proceeding, which is basically the right to a fair trial protected by Article 6 paragraph 1 of the Convention. However, the legislature has narrowed down the type of evidence that provides insight into the suspect or his counsel only the evidence in favor of the suspect, and even when the evidence is in favor of the suspect, he allowed deviation from the law in the case of danger to the purpose of the investigation.<sup>9</sup> When it comes to a suspect who has not applied any investigative activity which requires court approval, in a situation where the prosecutor will address the suspect or his lawyer. The prosecutor in this case estimated two things: whether the evidence in favor of the suspect and that the evidence, and whether their consideration and sightseeing undermine the goal of the investigation?<sup>10</sup>

From the prosecutor's decision depends on the realization of the rights of the suspect or his counsel. When these estimates can happen given the fact that the prosecutor in which the suspect does not give such importance and evaluate a fact as that is to the detriment of the suspect. This entails the question of whether the suspect or his counsel an effective legal mechanism in this situation make access to such evidence? When you consider all the relevant provisions of the Act, we can not draw such a conclusion. The first reason for this is that the suspect and his lawyer did not know the contents of the Prosecution's case file. Another reason is that the pre-trial judge in any way is not involved in the investigation, and can not see how the suspect or his counsel, even if they knew the contents of the file, obtained a court ruling in a case where neither formed court file. The third reason is that the investigation is fully inserted in the prosecutor's jurisdiction, and particularly in this case does not see the basis on which the court can do to get into something that is within the exclusive jurisdiction of the prosecutor who led the investigation as their own activities based on their own assessment the grounds for an investigation. The answer to why the legislature authorized the plaintiff put in evidence evaluation of the nature of the investigation is the fact that the prosecution state body, independent in their work, and that the prosecutor has a duty to properly and fairly gradual relevantly determine all the facts and circumstances related to offense and the offender. Also, to answer the original question, the prosecutor needs to know and what is meant by "objective investigation".

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8 Ibidem, 46

9 Ibidem, 46

10 Ibidem, 47

Also, Article 142 of the Act provides that the suspect, when you first call in for questioning, informed of their rights in accordance with the said member. From the receipt of the suspect is given the knowledge that the investigations against him, that he has in that investigation as a suspect, and he is giving lessons on their rights in the same way that you give lessons during the first test, with the exception of when referring to the suspect not mention that there are grounds for suspicion against him, nor factual description of the crime, but only the title of the work or his legal qualifications.<sup>11</sup>

The momenta call is received is considered the moment when the suspect with certainty to know that the investigation against him, and from that moment on can establish a defense.

When it comes to the openness of the investigation to the suspect, the suspect in this case does not have the right to attend the performance of investigative actions and measures to be carried out on the initiative of the prosecutor or the authorized officials, and therefore it is his role in the execution of these investigations is very passive and focused solely on protection of the rights of the suspect, although during the investigation the suspect and his lawyer can present facts and propose evidence.<sup>12</sup>

In the case of the suspect taken some measures and actions which requires court approval, it should be noted that such a suspect enjoys the same rights as the suspect who has not been applied, none of these measures or actions, and that the suspect, in addition to these basic rights, and still enjoys certain rights depending on the investigation, which was undertaken by him. For example, in the case of undertaking a search of the apartment the suspect would have the following rights: 1) *the right to counsel notification* (article 122 of The Code of Criminal Procedure of the Republic of Serbia envisages "a lesson that the suspect has the right to notify counsel and that the search can be carried out without counsel present if required by exceptional circumstances."<sup>13</sup> Specified statutory provision

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11 Ibidem, 47

12 Although the prosecutor has no obligation to accept such a proposal the suspect and his defense counsel, such proposals are in any case must be considered seriously for two reasons: the first is contained in the prosecutor's duty during the investigation, collect all the evidence, both those that are detrimental and those who in favor of the suspect, with the aim of establishing the truth, and the second is that the suggestions posed by the suspect during the investigation may indicate a defensive strategy of the suspect or his counsel which will guide and after an indictment is confirmed.

13 From this suspect's rights can draw several conclusions: 1) providing information that will be searched, and that he is entitled to give notice to counsel, a suspect in an indirect way of informing you that the investigation against him, 2) the content of a search warrant suspect acquire knowledge about the crime he is charged with in terms of his legal qualifications, and often in terms of the content of the facts, evidence and searched for it enables him to design a strategy for your defense a lot in

entitles a suspect to notify counsel of the search to be undertaken, but it gives the lesson to the suspect prior to the search, because otherwise this provision has lost its meaning. However, the same statutory provision requires the legislature putting lessons suspect that the search was to take place without the presence of counsel where there are exceptional circumstances. The question that arises from such defined legislation is whether to join the search if the suspect after these lessons informed counsel and requested that he stops being shaken by the arrival of counsel in the face of the search? In answering this question must proceed from the fact that the lesson that the suspect has the right to inform counsel on the search only makes sense if you suspect such a right can be realized, and if such a right can produce a certain legal consequence.

On the other hand, at the same time informing the suspects and the possibility conducts a search without the presence of counsel in the case that there are exceptional circumstances which should be evaluated in each case, and although for these “exceptional” circumstances does not set any criteria, however, the existence of such exceptional circumstances can be assumed in any case, that their existence should be the exception to the rule. Taking into account all the above, if a suspect defense information on the search and requested not to begin with the search until the arrival of counsel, and unless there are “exceptional” circumstances, counsel must be a reasonable time limit for the arrival (which is assessed in each case ) to begin the search. If counsel have agreed to comply with the deadline, then we could talk about the abuse of this right, you are here, but it might work in exceptional circumstances due to which the search can begin without counsel.<sup>14</sup>), 2) *the right to a public investigative proceedings* (Article 124, paragraph 4 of the Code of Criminal Procedure of the Republic of Serbian provides that “*the search of the premises or other persons are present as two adult witnesses. Attend witnesses that persons of the same sex. Witnesses before the the search to be alerted to watch how the search is conducted, and that they are entitled to before signing a record on the search their complaints, if they feel that the content of the record is not accurate.*”

In fact, this is the rights suspect is specific because it is not directly linked to the person of the suspect, but the suspect which ensures against possible abuses during the search by ensuring that the search results match the actual state found things which could be classified in the oeuvre of his rights during the investi-

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this early stage of the investigation which is still searching for physical evidence; 3) from this time, but may require a suspect of his right to review related documents and sightseeing objects obtained in the investigation.

14 Module 1 Criminal area-criminal investigation, 58

gation).<sup>15</sup> With regard to persons deprived of their liberty or the suspect taken into custody at their site-specific investigation.<sup>16</sup> Because of the high degree of restrictions on the freedoms and rights of persons deprived of their liberty, in these situations, the legislator introduced a stronger quantum and quality of the suspect in the investigation. These persons have a legitimate need for knowing why they are detained or why they are in custody, which is assumed to have a need for knowledge of facts on which the established reasonable suspicion of having committed a criminal offense and the evidence pointing to the existence of the matter of the grounds for the determination of custody, which means not only the evidence favorable to its benefit, but also those who are detrimental to them, to be able to do such facts and evidence before the court effectively challenged.<sup>17</sup>

### 3. Concluding remarks

The right to a fair trial is a basic human right that is proclaimed by many international documents. There certainly should be *pointed International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms*. Guarantees of a fair trial are varied and cover a wide range of institutions, such as for example, the right to inspect the records of court cases, a party's right to be heard in court, the right to a public hearing, the equality of the parties, the court is to give public notice of the decision and his reason, the presumption of innocence, the right of the accused to a speedy trial, the right to legal assistance, the right to free assistance of an interpreter, a person's right not to incriminate oneself. One of the basic criminal law standards which are particularly difficult at the present time, and why most countries have reformed their criminal procedural law, is a requirement for effective criminal proceedings, but it does not affect the legality of solving specific criminal matters and the protection of basic human rights and sloboda. One of the key arguments that highlights the negative side of the concept of prosecutorial investigation is designed so that the concept means an attack on the investigation - international instruments and national legislation that guarantees the rights and freedoms of citizens, enactment of legislative bodies of internal affairs investigations as active subjects, thereby increasing the chances of more more repressive police. In support of this view, and highlights

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15 Ibidem, 62.

16 These are individuals whose freedom of movement was limited prior to the imposition of a final judgment and which thus limited rights and freedoms that belong to every citizen, and as one of their fundamental rights.

17 Module 1 Criminal area-criminal investigation, 58.



the fact that in countries in transition is always dangerous to entrust the investigation to the public prosecutor and the police, because of their lack of objectivity, and the relationship with the executive too. This objection has no justification, primarily due to the fact that in such an organized investigation judge (in Serbian Republic's pre-trial judge) appears as the main guarantor of human rights and freedoms in a way that all matters relating to the restriction of human rights and freedom of decision exclusively on. Also, in the present day human rights and freedoms are so internationalized, that no one government body is not threatening or uncontrolled irremovable risk of their possible violation.

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**PRAVNI MEHANIZMI ZA ZAŠTITU FUNDAMENTALNIH  
LJUDSKIH PRAVA I SLOBODA OSUMNJIČENIH ILI  
OPTUŽENIH U TOKU ISTRAGE**

*Za ljudska prava može se reći da su standardi bez kojih ljudi ne mogu da žive dostojanstveno kao ljudska bića. Ljudska prava su osnova slobode, pravde i mira. Njihovo poštovanje doprinosi pojedincima ali i čitavoj zajednici da se u potpunosti razvije. Ljudska prava su samo ona individualna prava koja poseduje država, ali ljudska bića ih dobijaju po rođenju a ne prema volji i milosti države. Ona su osnovne političke i društveno-ekonomske potrebe građana u vezi sa državnim moći i društva uopšte, što je uslov za realizaciju biološku, političku i kulturnu egzistenciju pojedinaca, ili uslove života koji dostojan čoveka i njegovog dostojanstva. Ljudska prava i vrednosti koje su u njima sadržane imaju veoma važnu društvenu i političku funkciju u određivanju legitimiteta vlade, jer jedino vlada koja poštuje ljudska prava jeste legitimna i funkcionira normalno. Ovaj rad pokušava da pokaže kako pravni mehanizmi koji su ponudeni osumnjičenima ili optuženima u toku istrage obezbeđuju zaštitu njihovih fundamentalnih ljudskih prava i sloboda zagarantovanih Ustavom Republike Srbije (ili BiH), ali i drugim međunarodnim zakonskim aktima potpisanih i ratifikovanih od strane naše države.*

**Ključne reči:** *ljudska prava i slobode, zaštita ljudskih prava i sloboda, krivično gonjenje, istraga, osumnjičeni, optuženi, pravni mehanizmi*